Team R15

No. 20-2388

IN THE

Supreme Court of the United States

SAMANTHA GOLD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 precludes the admission at trial of confidential communications that occurred during the course of a criminal defendant's psychotherapy treatment, where the defendant threatened serious harm to a third party and the threats were previously disclosed to law enforcement.

II. Whether the Fourth Amendment is violated when the government, relying on a private search, seizes and offers into evidence at trial files discovered on a defendant's computer without first obtaining a warrant and after conducting a broader search than the one conducted by the private party.

III. Whether the requirements of *Brady v. Maryland* are violated when the government fails to disclose potentially exculpatory information solely on the grounds that the information would be inadmissible at trial.

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The District Court's Bench Opinion appears in the record on pages 15-49. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 50-59.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions are provided below:

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XVI.

STATEMENT OF THE CASE

I. Factual History

In 2016, the petitioner, Samantha Gold, was recruited by the victim, Tiffany Driscoll, to join HerbImmunity. R. at 14. HerbImmunity is a multi-level marketing organization. Sources tell us that she was persuaded by Driscoll to invest $2,000 in the product but was only able to make one sale. *Id.* Angered by her increasing debt and her struggle to keep up with her classes, Ms. Gold had been heard on numerous occasions making threats against Ms. Driscoll. *Id.*

During the early afternoon on May 25, 2017, Gold attended a counseling session with Dr. Chelsea Pollock. *Id.* at 3. The session was arranged due to Gold's diagnosis of Intermittent Explosive Disorder (IED). *Id.* at 4. In her report of the session, Pollock noted that Gold was suffering a setback in the management of her IED. *Id.* Dr. Pollack reasoned that the setback was caused by her involvement with HerbImmunity. *Id.* Although Gold had been complaining for weeks, on the day of the session she was disheveled and agitated. *Id.* During the session Gold explained that she felt that she was tricked and taken advantage of by Driscoll. *Id.* Gold was $2,000 in debt from buying HerbImmunity products and had recently learned that Driscoll would also be in debt had it not been for "her daddy's money". *Id.*

Throughout the session Gold's tension escalated, and she eventually stormed out. *Id.* In her report, Dr. Pollock noted that Gold said "I'm so angry! I'm going to kill her. I will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again." *Id.* Dr. Pollock also made note that Gold has a volatile history with IED. *Id*. Due to this history, and Gold's comments, Dr. Pollock was concerned that Gold was going to harm Driscoll. *Id.* at 4-5.

On May 25, 2017, Officer Fuchs of the Joralemon Police Department (JPD) received a phone call from Dr. Pollock. *Id.* at 5. Dr. Pollock reported that she feared her patient, Gold, intended to harm Driscoll. She stated that she was calling pursuant to her duty to report under Boerum Health and Safety Code § 711. *Id.* During the call, Dr. Pollack explained to the officer

that Gold had been diagnosed with (IED). *Id.* Dr. Pollock called directly after concluding the therapy session with Gold, where Gold made the threatening statements about Driscoll. *Id.*

After concluding the call with Dr. Pollock, JPD units were dispatched to Joralemon University to conduct a safety and wellness check. *Id.* at 5. Officers spoke to Gold, at her dorm room and she appeared to be calm and rational, at the time. *Id.* The officers determined that she posed no threat to herself or others. *Id.* Officers then located Driscoll and informed her of the reported threat, but Driscoll expressed no concern and officers left. *Id.*

During the late afternoon of May 25th, Gold's roommate, Jennifer Wildaughter, brought evidence to the Livingston Police Department. *Id.* at 6. Wilddaughter claimed that earlier that day, Gold came to their apartment and appeared angry and agitated. *Id.* Wilddaughter explained to Officer Yap, that Gold was angry and agitated while at their apartment. *Id.* at 24. Gold then stormed out of the apartment, while leaving her laptop on and open on her desk. *Id.* Concerned, Wilddaughter looked on Gold's laptop and searched some of the desktop files. *Id.*

While searching Gold's laptop, Wilddaughter found three folders labeled: receipts, confirmations, and customers. *Id.* In the files, Wilddaughter found pictures of Driscoll, references to rat poison, and other documents. *Id.* at 25. Willdaughter copied the entire desktop to a flash drive and brought it to the police station, where she explained what she saw to Officer Yap. *Id.* at 26. Officer Yap conducted a search of the entire flash drive. *Id.* at 6. After concluding his search, he determined that Gold was planning to poison Driscoll. *Id.* Officer Yap then contacted his supervisor with his findings and gave the supervisor the flash drive. *Id.*

On May 25, 2017, Tiffany Driscoll was found dead. *Id.* at 13. Her body was discovered at the bottom of the basement stairs, in her father's townhouse. *Id.* The toxicology report revealed

that Driscoll had traces of strychnine in her system *Id.* at 14. Strychnine is a highly toxic poison that is often used as a pesticide.

On May 27, 2017, the FBI obtained a warrant to search the Driscoll family home. During the search authorities discovered an empty box along with a short note, lying in Ms. Driscoll's bedroom trash can. *Id.* The authorities believed that the empty box contained chocolate covered strawberries that were poisoned with the strychnine. *Id.* On June 6, 2017, Gold was indicted under 18 U.S.C. 1716 (J)(2), (3) and 3551 et seq., for committing delivery by mail of an item with intent to kill or injure. *Id. at 1.*

II. Procedural History

Samantha Gold was charged with murder by mail in violation of 18 U.S.C. § 1716 (j)(2), (3). Following the indictment, the defendant brought a motion to suppress both the testimony of her psychiatrist, Dr. Chelsea Pollak, and digital evidence obtained by Officer Aaron Yap. Following an evidentiary hearing, the motion to suppress was denied on all grounds, by the District Court. A jury trial was held, and Gold was convicted. Following her conviction, Gold was sentenced to life in prison. After the conviction, the defense's counsel filed a motion for a directed verdict or new trial, claiming that the government failed to disclose certain information to the United States Court of Appeals for the Fourteenth Circuit. The court denied the motion and the defense filed the current appeal.

SUMMARY OF ARGUMENT

Dr. Pollak's testimony at trial is not precluded by the psychotherapist-patient privilege. The psychotherapist privilege creates an environment where patients may disclose their issues to their therapists without fear of use of that information in litigation. However, the psychotherapist-patient privilege is not and should not be an unlimited bar on the discovery of evidence. The psychotherapist-patient privilege has the same requirements and limitations as other privileges.

The communications at issue must be confidential, and their disclosure to third parties waives the privilege in its entirety, regardless of whether the disclosure was required under statute. The public policy also protected by the psychotherapist-patient privilege is outweighed by the need for probative evidence in the administration of justice in a criminal murder trial. With the need for probative evidence outweighing the benefit of the privilege, the privilege must give way and the evidence must be disclosed, and Dr. Pollak's testimony at trial must be admitted.

The Livingston Police Department did not violate the Petitioner's Fourth Amendment rights when they conducted the search of the flash drive. Under the private search doctrine, Petitioner's expectation of privacy had already been frustrated by her roommate, Jennifer Wildaughter's private search. Under the broad approach, law enforcement did not exceed the scope of the private search conducted by Wildaughter. Officer Yap has been the head of the forensics department for eight years, making him an expert in this field. He met with Wildaughter to discuss the results of her private search before conducting his own search. Thus, under the broad approach, Officer Yap did not exceed the scope of the private search since he was substantially certain about what the contents of the flash drive contained. It should be noted that if the Court were to adopt the narrow approach, it would be forcing law enforcement to meet an unreasonable standard. Therefore, the Respondent asks this Court to adopt the broad approach and affirm the holding of the Court of Appeals in denying the motion to suppress.

The government did not create a *Brady* violation, under *Brady v. Maryland*, when it did not disclose potentially exculpatory information. Prior to the trial, the government possessed statements, that identified other potential murder suspects. However, the reports were inadmissible at trial because the information was hearsay. As a requirement of a *Brady* violation, the evidence in question must be material evidence. Being that inadmissible evidence is not

material evidence, inadmissible evidence cannot form the basis of a *Brady* violation. Therefore, the requirements of a *Brady* violation were not met when the government failed to disclose the potentially exculpatory information found in its reports.

ARGUMENT

There are three issues being presented in this appeal. The first is regarding the admissibility of Dr. Pollak's testimony, and whether it is precluded under the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501. The second issue concerns the Petitioner's Fourth Amendment rights, and whether they were violated when law enforcement conducted a warrantless search of the flash drive. The third issue involves the requirements of *Brady v. Maryland*, and whether they were violated. Both the district court and the Fourteenth Circuit Court of Appeals properly found that the Petitioner's motions to suppress should be denied, and that the Petitioner's motion for post-conviction relief should be denied.

I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT BAR DR. POLLAK'S TESTIMONY SINCE THE CONFIDENTIALITY REQUIREMENT WAS VIOLATED WHEN DR. POLLAK DISCLOSED THAT DRISCOLL WAS AT RISK OF HARM BY GOLD, AND, BECAUSE PUBLIC POLICY FAVORS PERMITTING THE DISCLOSURE.

1. The importance of the psychotherapist-patient privilege and its role in this case.

When Congress enacted the Federal Rules of Evidence, Congress provided flexibility to the courts to develop evidentiary privileges "in the light of reason and experience". *Trammel v. United States*, 445 U.S 40, 47 (1980). In the landmark case *Jaffee v. Redmond*, the Supreme Court used the authority of Rule 501 of the Federal Rules of Evidence to create the patient-psychotherapist privilege. In *Jaffee*, Redmond was a police officer who fatally shot Ricky Allen on a police call. *Jaffee v. Redmond*, 518 U.S. 1 (1996). At trial, Jaffee; representing Allen's estate, sought to discover and admit communications between Redmond and her licensed clinical social

worker. The Supreme Court recognized a federal psychotherapist privilege, holding that the mere possibility of disclosure can impede the confidential relationship necessary for successful treatment. *Id.* at 10. Within Footnote 19 of the opinion, the majority highlighted that the privilege may be forced to give way if a serious threat of harm to the patient or others can be averted only through disclosure by the therapist. This possibility stems from the duty to warn articulated in *Tarasoff*, which held that psychotherapists have a protective duty to individuals they reasonably believe to be at risk of injury based on a patient's confidential statements. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (1976). This duty may be discharged in different ways, such as notifying the appropriate authorities or warning the intended victim. *Id.* at 431.

Circuit courts are split on the issue of whether a psychotherapist's duty to warn forces the psychotherapist-patient privilege to give way. For the following reasons, we ask this Court to adopt the approach that a psychotherapist's duty to warn automatically breaches the confidentiality requirement of the psychotherapist-patient privilege, and so that privilege must give way.

2. Dr. Pollak's disclosure to law enforcement broke the confidentiality of the communications between Gold and Dr. Pollak, and thus the psychotherapist-patient privilege was waived.

Samantha Gold consulted Dr. Pollak for treatment with her mental issues. During their sessions, Samantha disclosed information that triggered Dr. Pollak's duty to warn under Boerum Health and Safety Code §711. If the psychotherapist-patient privilege functions similarly to other privileges, then when Dr. Pollak informed the police that Gold posed a threat to Driscoll, the communications between Gold and Dr. Pollak lost their confidentiality. The issue that must be resolved is whether the psychotherapist-patient privilege is subject to the confines of other privileges. Careful analysis of *Jaffee* shows that the psychotherapist-patient privilege is subject to the same confidentiality restrictions as the other privileges.

Returning to *Jaffee*, this Court continually analogized the psychotherapist-patient privilege with the attorney-client and spousal privileges. An asserted privilege must serve public ends, *Jaffee* 518 U.S at 11; quoting *Upjohn Co v. United States*, 449 U.S 383. The attorney-client privilege encouraged clear communication between attorneys and their clients to promote broad public interests, and the spousal privilege is justified to further the public interest in marital harmony. *Id.*. The psychotherapist privilege serves to facilitate in treating individuals suffering the effects of mental or emotional problems, and mental health, like physical health, is a public good of transcendent importance. *Id*. The rhetoric this Court used in *Jaffee* demonstrates that the psychotherapist privilege is functions similarly to the attorney-client and spousal privileges. By that logic, the psychotherapist privilege must be subject to the same waiver conditions as the attorney-client and spousal privileges.

The attorney-client privilege requires that the communications must be confidential, and that the communication be done without the presence of strangers. *United States v. United Shoe Machinery Corp.*, 89 F. Supp 357, 358 (D. Mass. 1950). Additionally, where one part of a confidential conversation, the waiver extends to the rest of the conversation. *United States v. Tellier*, 255 F.2d 441, 447 (2d Cir. 1958). The boundaries of the attorney-client privilege are clear, the conversation must be kept confidential, and once that confidence is lost the entire disclosure may be subject to compelled discovery. The same confidentiality requirement also applies to the spousal privileges. In *Wolfle v. United States*, this Court held that the written communication by a husband to his wife was not privileged when the letter was prepared by his stenographer despite the communication being made in confidence. *Wolfle v. United States*, 291 U.S. 7 (1934); *see also Grulkey v. United States*, 394 F.2d 244; *Pereira v. United States*, 347 U.S. 1, 6, 7 (1954). The same confines should apply to the psychotherapist privilege. When Dr. Pollak disclosed that Gold posed

a threat to Driscoll to the police, the confidentiality of the communications between Gold and Dr. Pollak was severed. Once severed, the communications should be subject to discovery in their entirety, as attorney-client communications would be.

Adoption of the *Tarasoff* duty in Boerum Health and Safety Code §711 reflects this public policy exception. §711(2) creates a duty to report the threat to a third party and that the professional must supply information concerning the threat. *Boerum Health and Safety Code §711: Reporting Requirements for Mental Health Professionals*. The duty to report requires breaking the confidentiality requirement within the psychotherapist-patient privilege. If the psychotherapist-patient privilege is to be treated as every other privilege, the 14th circuit court interpreted the *Jaffee* footnote correctly. When a serious threat requires disclosure, Gold's privilege to bar that Dr. Driscoll's testimony ceases to exist.

3. Public policy forces the privilege to give way.

Public policy considerations frustrate the purpose of the privilege and therefore the privilege must give way. The public policy behind the psychotherapist-patient testimonial privilege is to allow for the best patient treatment possible. This privilege functions by allowing a patient to feel secure in openly disclosing their issues to their therapist without the fear that their statements will be used against them. If a patient were to withhold information due to the fear of litigation, that restriction would cause the patient to receive ineffective treatment. As a result, the privilege protects the communications between a patient and their therapist from discovery during trial, and patients can disclose their issues with their therapists. The interest the psychotherapist privilege serves is the mental health of the patient. This interest however is outweighed by the safety of those in danger. The existence of the duty to warn demonstrates that the therapeutic relationship is not the only value at stake. So is the prospective victims' safety. *People v. Kailey*, 333 P.3d 89, 97 (Colo. 2014).

The lives of those who are in danger out prioritize the requirement for confidentiality. The protective privilege ends where the public peril begins. *Tarasoff*, 551 P.2d 334 at 347. Following *Tarasoff*, the California Supreme court logically approached the "dangerous patient exception" with regards to the privilege. In *People v. Wharton*, the court held "where a psychotherapist warns a potential victim… the statute permits the psychotherapist to reveal, in a later trial or proceeding, both the substance of the warning and the patient's statements made in therapy, which caused or triggered the warning". *People v. Wharton*, 809 P.2d 290, 314 (Cal. 1991). The reasons for this are clear, criminal issues raised by cases involving the duty to warn are more serious. *Kailey*, 333 P.3d at 98. These cases are most serious so any increase in the admissibility of probative evidence in criminal proceedings is especially valuable. *Id*. The codification of the duty to warn in the Boerum Health and Safety Code demonstrates the Fourteenth Circuit Court's adoption that Driscoll's safety was more important than the confidentiality of the communications between Dr. Pollak and Gold. Dr. Pollak's testimony is increasingly valuable as probative evidence at trial.

An argument has been made that the mandatory disclosure under a statutory duty is excepted from the psychotherapist-patient privilege's requirement. While this proposition runs contrary to logic and law, it is an issue that has split the circuit courts. Waiver of the psychotherapist-patient privilege is connected to the public interest served by the therapist's reporting a dangerous patient. In holding that the psychotherapist's duties of confidentiality, and duties to warn potential victims of patients, are separate and distinct from the federal evidentiary privilege, circuit courts overlook key language within *Jaffee*. *Hayes*, one of the primary cases in support of this separation, states that while merely informing a patient of the duty to warn will not affect the patient's disclosure, a warning that the patient's statements may be used in a criminal

prosecution would terminate open dialogue and destroy the purpose of the psychotherapist-patient privilege. *United States v. Hayes*, 227 F.3d 578, 585 (6th Cir 2000). While the circuit court is likely correct that the patient's disclosure will be slightly limited, the limitations should also have a "marginal effect on the patient's candor". It is only when the therapist reasonably believes that a third party is in danger that the privilege gives way.

This Court in *Jaffee* stated, "the mental health of our citizenry, *no less than its physical health*, is a public good of *transcendent importance*". *Jaffee*, 518 U.S at 11 (emphasis added). *Hayes* and the Fourteenth Circuit's dissent fail to account for the language equating the mental and physical health of our citizens. A psychotherapist's state-imposed duty to report and the psychotherapist-patient privilege are connected in their interests: they create a safe environment for peoples' health's; physical and mental. When both these interests are taken into account, Driscoll's physical health and Gold's communications should be viewed equivalently in the eyes of the law. Despite this equivalency, the introduction of a final public policy trumps the argument that the psychotherapist privilege should remain despite the duty to disclose: the policy that the public has a right to the evidence of all.

A general duty exists that one must give whatever testimony they can barring the intervention of any exception, and because of this policy, privileges are construed strictly. *United States v. Bryan,* 339 U.S. 331 (1950). All testimonial exclusionary rules and privileges run against the principle that the public has a right to every man's evidence. *Trammel v. United States*, 445 U.S. 40, 50 (1980). The fundamental tenet of evidence at trial is that barring an exclusionary rule or privilege, all relevant evidence is to be presented. As a general rule, testimonial privileges may be justified by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth. *Trammel*, 445 U.S. at 50. However, when the judicial

process's need for the evidence outweighs a privilege, occasionally the privilege has given way. *See Nixon v. United States* (holding that the need for the evidence outweighed President Nixon's executive privilege, and the privilege was forced aside). When analyzing the spousal-testimonial privileges, this Court in Trammel determined that if the privilege against adverse spousal testimony promotes sufficiently important interests outweighing the need for probative evidence in the administration of criminal justice, the privilege would hold. *Trammel*, 445 U.S 40 (1980).

The Federal Rules of Evidence were created for uniformity, and this Court should standardize the exception to the psychotherapist-patient privilege throughout federal courts. Multiple federal courts have recognized this principle when utilizing other state holdings to interpret the Federal Rules of Evidence. *See United States v. DeWater*, 846 F.2d 528, 530 (9th Cir. 1988); *See also Lippay v. Christos*, 996 F.2d 1490, 1497 (3d. Cir. 1993); *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989). Unfortunately, the dangerous-patient exception to the psychotherapist privilege was never codified. Rather, the exception was briefly mentioned within Footnote 19 of *Jaffee*. To support the public policies protecting individual's physical health and the public's right to evidence, we request that this Court immortalize the dangerous-patient exception within *Jaffee*.

II. LAW ENFORCEMENT'S SEARCH DID NOT VIOLATE THE PETITIONER'S FOURTH AMENDMENT RIGHTS SINCE THE PETITIONER'S EXPECTATION OF PRIVACY WAS ALREADY FRUSTRATED UNDER THE PRIVATE SEARCH DOCTRINE.

The Fourth Amendment provides individuals with constitutional protection against unreasonable searches and seizures conducted by the Government. U.S. Const. amend. IV. Government searches and seizures typically require a warrant to be constitutionally permissible. *Id*. In *Katz v. United States*, the Supreme Court held that a violation of the Fourth Amendment

depends upon whether an individual's expectation of privacy has been breached [by a Government search]. *See Katz v. United States*, 389 U.S. 347 (1967). In his concurring opinion, Justice Harlan provides a test for determining if an individual's reasonable expectation of privacy under the Fourth Amendment has been violated. *Id*. The test has two parts: (1) an individual has an actual, subjective expectation of privacy, and (2) this expectation of privacy is one that society deems reasonable. *Id*. While an individual may satisfy this test and thus have a reasonable expectation of privacy, there are several exceptions. Once one of these exceptions exists, Government searches are considered reasonable and constitutionally permissible.

1. The Private Search Doctrine articulated in *United States v. Jacobsen* provides law enforcement with an exception to Fourth Amendment protections.

One of the exceptions to the Fourth Amendment, the private search doctrine, was discussed in *United States v. Jacobsen* by the Supreme Court. *See United States v. Jacobsen*, 466 U.S. 109 (1984). Under the private search doctrine, an individual's Fourth Amendment rights are not violated when the Government repeats a search first conducted by a private party. *Id*. In *Jacobsen*, the Court held that "additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." *Id*. The Court found that the Government actor "learned nothing that had not previously been learned during the private search. *Id*. The Government's actions did not constitute a search under the Fourth Amendment since it "infringed no legitimate expectation of privacy". *Id*. The case here is distinguishable from *Jacobsen*, in which case a physical container was searched. *Id*. In the case here before the Court, a flash drive was searched, which constitutes a digital storage device. Deciding this case will require the Court to address a new, unanswered question as to when the scope of a private search is exceeded by Government agents.

In previous cases, the Supreme Court has held that an individual's expectation of privacy in a physical container is frustrated once a private party has viewed or opened that container. *Id*. However, the Court has also been careful to note that Government agents must replicate the search conducted by the private party. *See Walter v. United States*, 447 U.S. 649 (1980); 466 U.S. 109. This means that if the private party has not actually viewed or opened the physical container, Government agents must typically get a warrant to look at those containers and exceed the scope of the private search. *See* 447 U.S. 649; 466 U.S. 109. Therefore, under both *Jacobsen* and *Walter*, "the fourth amendment is only implicated if the Government uses evidence to which the expectation of privacy has not already been frustrated." 466 U.S. 109. Therefore, the Government can exceed the scope of the private search in some circumstances, provided there is an exception for violating the individual's Fourth Amendment rights.

Under *Jacobsen* and *Walter*, a violation of the Fourth Amendment would only apply to the items that the Government searched which were not previously searched by the private party. Any items first searched by a private party and subsequently searched by the Government would be admissible evidence. Items not searched by the private party first would not be admissible in evidence unless the Government can prove that those items were searched lawfully. For example, in *Jacobsen*, the private party merely opened a package and viewed it contents before notifying law enforcement. *Id*. Subsequently, law enforcement opened the contents of the package and took a sample of the contents for testing. *Id*. While the private individual never actually opened the contents of the package, the Supreme Court still permitted the results of the test to be admitted into evidence. *Id*. Therefore, in *Jacobsen*, the Court found that there are exceptions under which Government agents may permissibly exceed the scope of a private search. *Id*.

A. The Petitioner's roommate frustrated the Petitioner's expectation of privacy when she conducted her private search; therefore, law enforcement's subsequent search was constitutionally permissible.

The case here is distinguishable from the case in *Walter*, as that case did not invoke any exigent circumstances as a basis for the warrantless search. 447 U.S. 649. In the case at hand, the Petitioner's roommate, Jennifer Wildaughter, searched the Petitioner's laptop after she grew increasingly worried about the Petitioner. In conducting this private search, Wildaugther viewed and opened a number of files on the Petitioner's computer which caused Wildaughter to become even more concerned. Wildaughter was specifically worried about the Petitioner hurting herself or someone else. Wildaughter decided to go to police with the results of her search, but instead of giving law enforcement copies of the items she opened, Wildaughter copied the entire contents of the laptop onto the flash drive that she gave to police. When Wildaughter gave the flash drive over to Officer Aaron Yap, she notified him that "everything is on the drive". Officer Yap then conducted a search of the device, looking at its' entire contents.

In support of the motion to suppress, the Petitioner alleges that Officer Yap's warrantless search of the flash drive exceeded the scope of Wildaughter's private search. However, the Respondent argues that the Petitioner's reasonable expectation of privacy in the entire contents of the flash drive had already been frustrated by Wildaughter's private search. The Court, in *Segura v. United States*, held that "the exclusionary rule had no application where the government learned of the evidence from an independent source…". *Segura v. United States*, 468 U.S. 796 (1984). Thus, a motion to suppress evidence should not be granted when the government had grounds to conduct a search after a private citizen first conducted one [under the private search doctrine].

According to the Fourteenth Circuit Court, the Court of Appeals for the Fifth Circuit in *United States v. Runyan*, held that "when a private party opens a container, the Defendant's

expectation of privacy is frustrated for the entire contents of the container. *See United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001). Wildaughter browsed through the laptop's contents during her private search before copying the laptop's contents for police onto the flash drive. Thus, Wildaughter's private search frustrated the Petitioner's expectation of privacy before law enforcement conducted their own search of the flash drive, which was limited in storage capacity.

B. Unlike other digital storage devices, such as laptops and cellphones, a flash drive has a limited storage capacity and does not implicate the same privacy concerns as other digital devices.

In *Riley v. California*, the Court discusses the privacy concerns related to law enforcements' search of digital devices. *See Riley v. California*, 573 U.S. 373 (2014). In this case, the Court emphasizes "the immense storage capacity" that devices such as laptops and cellphones have. *Id*. *Riley* is distinguishable from this case because, in *Riley*, the only grounds for the warrantless governmental search were that it was incident to arrest. However, in the case at hand, the private search doctrine provided law enforcement with an exception to the warrant requirement. When analyzing a warrantless governmental search, the Court has noted that it must balance "the degree to which it intrudes upon an individual's privacy, and…the degree to which it is needed for the promotion of legitimate governmental interests." 573 U.S. 373; *See also Wyoming v. Houghton*, 526 U.S. 295 (1999).

Here, the specific government interest of preventing crime and saving lives must be weighed against the Petitioner's expectation of privacy. It must be emphasized that the Petitioner's expectation of privacy had already been frustrated by the time Officer Yap conducted his warrantless search of the flash drive. Wildaughter searched the Petitioner's laptop herself, finding evidence of the crime in question. Only after she found this evidence and notified police did Officer Yap conduct his own search of the flash drive. Unlike the laptop itself, the flash drive had limited

storage capacity and Officer Yap was confined to only examining its' contents. Wildaughter told Officer Yap that everything of concern was on that flash drive, which is what prompted Officer Yap to conduct his own search. Thus, the Respondent argues that this private search frustrated the Petitioner's expectation of privacy in the entire laptop. The Respondent asks this Court to affirm the Fourteenth Circuit Court's decision, holding that law enforcement did not violate the Petitioner's Fourth Amendment rights.

2. Under the broad approach, law enforcement's search of the flash drive did not exceed the scope of the private search, and thus was constitutionally permissible.

There are two approaches to the private search doctrine in the context of digital storage devices: the broad approach and the narrow approach. Under the narrow approach, law enforcement exceeds the scope of a private search when they view or open any evidence outside of what was viewed during the private search. In contrast, under the broad approach, law enforcement does not exceed the scope of a private search if they examine a closed container not opened by the private individual, so long as the officer is already substantially certain of what is inside that contained based on the statements of the private searches their replication of the private search, and their expertise. The narrow approach has been adopted by the Sixth and Eleventh Circuit Courts, while the broad approach has been adopted by the Fifth, Seventh, and now the Fourteenth Circuit Courts.

A. The broad approach should be adopted by this Court, as it allows law enforcement to investigate suspected crimes more quickly and efficiently, and it balances the interests of private citizens with the interests of the Government.

The Respondent asks this Court to adopt the broad approach as applied to the private search doctrine in the context of digital storage devices. Under the broad approach, some of the Circuit Courts have held that "the critical inquiry under the Fourth Amendment was whether the

authorities obtained information with respect to which the defendant's expectation of privacy has not already been frustrated." 275 F.3d 449. This case is distinguishable from *Runyan*, because in that case the court found law enforcement exceeded the scope of the private search when they examined disks not previously examined by the private searchers. *Id*. In the case at hand, they were not multiple containers being examined, such as the disks in *Runyan*. Here, Officer Yap only examined the contents of the flash drive, much of which had been previously examined during the private search.

This case is analogous to *United States v. Guindi*, in which the court found that "a defendant's expectation of privacy with respect to a container unopened by private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search." *See United States v. Guindi*, 554 F. Supp. 2d 1018 (N.D. Cal. 2008). In *Guindi*, the court held that law enforcement did not exceed the scope of the private search because "the Government did not learn something from the evidence that it could not have learned from the private searcher's testimony." *Id*. The case here is similar to *Guindi*, because Officer Yap learned everything about the evidence from Wildaughter's interview, which he conducted before completing his own search of the flash drive. The Fifth and Seventh Circuit Courts have both held that the "police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searches unless the police are already substantially certain of what is inside that container…" *See Rann v. Atchison,* 689 F.3d 832 (7th Cir., 2012); 275 F.3d 449.

Here, Officer Yap examined a closed container (the flash drive) which contained the same evidence observed during the private search, in addition to some other files from the Petitioner's laptop. Officer Yap was already substantially certain of the contents of the flash drive prior to

conducting his search. Under the broad approach, Officer Yap would be able to conduct his investigation into Wildaughter's concerns in a timely fashion, which could lead to preventing the alleged crime. Adopting the broad approach could potentially save lives and prevent crimes. It is imperative that law enforcement be equipped with the tools to conduct their investigations in this manner, as the individual's expectation of privacy is already frustrated by the private search. The broad approach is an ideal method for balancing these competing interests between individual rights and law enforcements' investigations.

i. Because of Officer Yap's expertise and his meeting with Wildaughter, he was substantially certain of the flash drive's contents; thus, the scope of the private search was not exceeded.

Officer Yap worked as the head of the Livingston Police Department's Forensics unit for eight years, making him more knowledgeable in this area compared to others. He made sure to meet with Wildaughter prior to conducting his own search of the flash drive to interview her. During this interview, Wildaughter told Officer Yap about the things that she discovered during her private search which had caused her to grow increasingly concerned. Both Officer Yap's expertise and Wildaughter's statements about her private search findings together gave Officer Yap substantial certainty that he knew what the contents of the flash drive would contain. Under the broad approach, this would be sufficient to prove that Officer Yap did not exceed the scope of the private search conducted by Wildaughter. Therefore, the Petitioner's Fourth Amendment rights would not be violated.

B. If the Court were to adopt the narrow approach it would be going against public policy, as it would be excessively burdening law enforcement.

There is a public policy argument implicated in this case. As the Fourteenth Circuit noted in their opinion, adopting the broad approach "strikes an appropriate balance between the

defendant's remaining expectation of privacy after the private search and the additional invasion of that privacy by the Government." To determine the reasonableness of law enforcement's conduct, the Court has held that it "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the Governmental interested alleged to justify the intrusion." *See United States v. Place*, 462 U.S. 696 (1983). This balance is imperative, considering both the Government and individuals have interests at stake in this issue.

According to the Constitution, individuals are entitled to reasonable privacy against the Government. U.S. Const. amend. IV. However, the Government also has an interest in protecting the public. Both the Government's interests and the individual's rights must be balanced properly, so that neither interest outweighs the other. The broad approach accurately balances these interests since the Government is only permitted to exceed the scope of the private search when they are substantially certain of the container's contents. Furthermore, the individual's expectation of privacy in the container has already been frustrated by the private search doctrine. As the court in *United States v. Sparks* points out, the person whose item was seized no longer possesses an interest in that item, so their Fourth Amendment rights would not be violated by waiting for a search warrant. *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015). Nonetheless, the Petitioner could have hurt herself or someone else in the time it would take Officer Yap to obtain a search warrant for the flash drive.

If the Court were to adopt the narrow approach, it would be unreasonably burdening law enforcement, and it likely would hamper future investigations. Consider the case of *United States v. Lichtenberger*, in which Defendant was reported by his girlfriend for having child pornography on his laptop. *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir., 2015). The girlfriend was not certain that the same files had been opened during law enforcement's search which were

opened during her private search. *Id*. Thus, the court suppressed the evidence, finding that "the officer had to proceed with virtual certainty that the inspection of the laptop and its contents would not tell him anything more than he had already been told by the girlfriend." *Id*. The court in *Lichtenberger* erroneously found that the narrow approach should be adopted. In doing so, they hampered the investigation and allowed the defendant's individual interests to outweigh protecting children and the rest of the public.

i. The narrow approach unreasonably burdens law enforcement and puts the risk at public, while the broad approach allows for law enforcement to act quickly, and thus would likely prevent more crime.

In the case here, Wildaughter was reporting an immediate threat of concern. If the Court were to adopt the narrow approach, Livingston Police would not have been able to follow up and continue this investigation until receiving a search warrant. By the time the warrant had been issued, it is possible that the crime would already have been committed. Thus, it is in the public's interest and for their safety that law enforcement be able to investigate a possible crime within the bounds of the private search doctrine. Once law enforcement can prove that the private search doctrine has frustrated an individual's expectation of privacy in a closed digital container, the entire container should be permitted to be searched. This involves taking into consideration the law enforcement officer's expertise, as well as their interview with the private party who conducted the initial search. Therefore, the Respondent asks this Court to adopt the broad approach in the context of the private searches of digital storage devices, under which law enforcement did not exceed the scope of the private search here.

III. A VIOLATION UNDER *BRADY V. MARYLAND* DID NOT OCCUR WHEN INADMISSIBLE EVIDENCE, THAT WAS NOT MATERIAL, WAS SUPPRESSED BY THE PROSECUTION.

1. The suppressed reports do not create a *Brady* violation because the three requirements that are needed were not met.

In *Brady v. Maryland*, the prosecution suppressed a confession for a murder, and the case resulted in the defendant receiving the death penalty. *Brady v. Maryland*, 373 U.S. 83, (1963). Under *Brady*, the Supreme Court ruled that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. Therefore, it is a due process violation for the prosecution to withhold exculpatory evidence. A violation is established, under *Brady,* when a defendant proves that (1) "the prosecution suppressed evidence," (2) "the evidence was favorable to the defense," and (3) "the evidence was material." *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). All three requirements must be met in order for a violation to have occurred.

A. The reports were suppressed by the prosecution.

The first requirement under *Brady*, is that the prosecution must have suppressed the evidence in question. For evidence to have been suppressed, the prosecution must have failed to disclose the evidence, leading to prejudice. 373 U.S. 83. The suppression of evidence may occur regardless of whether the prosecution was aware that the evidence was in their possession. *Id*. It is also irrelevant whether or not the evidence was "intentionally or inadvertently withheld" from the defense. *Id*. In *Brady*, the prosecution suppressed the confession by the defendant's robbery partner, claiming that the partner committed the murder. Being that the defense was not given the confession, and it was neither presented to the jury nor used by the defense. This suppression of the evidence caused the first requirement to be met in *Brady*.

In the case at hand, the prosecution suppressed the reports concerning other potential suspects. The government did not disclose the reports prior to the trial and the defense was

unable to use the reports in their defense. However, it must be noted that both reports would have been inadmissible at trial. Being that the reports contained out of court statements that were used to prove the truth of the matter they asserted, hearsay is clearly present. Fed. R. Evid. 801. Although the evidence was clearly hearsay, its suppression by the government meets the first requirement of *Brady*.

B. The reports are favorable to the defense's case.

The second requirement under *Brady*, is that the evidence in question must be favorable to the defense. The evidence must have the potential to aid a defendant's case or exonerate the defendant. In *Brady* the evidence provided by the partner's confession would have exonerated the defendant of guilt for that charge. The exculpatory nature of the confession made it favorable to the defendant. An evidence's ability to free a defendant from guilt causes it to be favorable to the defense.

When considering whether evidence is favorable, it is irrelevant whether or not the defense requested the information. In *Kyles*, the Supreme Court ruled that it is not a requirement that the evidence be requested by the defense. *Kyles v. Whitley* 514 U.S. 419, 434 (1955). The court reasoned that the prosecution has a constitutional duty to disclose evidence that is potentially favorable. 514 U.S. 419, 434; *United States. v. Bagley*, 473 U.S. 667 (1985). Therefore, only the evidence's favorability towards the defense need be considered to determine the meeting of the second requirement.

In the case at hand, the defense argues that the reports were favorable to their position. The defense argues that reports provided exculpatory evidence that would help to clear Gold's name. One report named a potential suspect, based off of an interview with Chase Caplow. The report, which was authored by a FBI special agent, states that Ms. Driscoll indicated to Caplow that she owed a large amount of money to Martin Brodie. The report explains that Brodie was an upstream

distributor that was also involved in HerbImmunity. Also, in the report, Caplow claims that Brodie has a reputation for being violent and having a temper. However, Caplow admitted that he had never witnessed Brodie being violent, himself. Due to Driscoll's debt and Brodie's reputation, it was assumed that Brodie had a possible motive for killing Driscoll.

The second report lists another potential suspect that was discovered through an anonymous phone call. The phone caller claimed that Belinda Stevens, who was also involved in HerbImmunity, was responsible for Driscoll's murder. The FBI agent responsible for the report followed up on the lead with a preliminary investigation. After the investigation, the agent concluded that the lead was unreliable.

The defense believes that if they were supplied with the information in the reports, they could have conducted their own investigation. By conducting their own investigation, they argue that they could have determined for themselves whether to raise the potential suspects as a possible defense. Being that the evidence is favorable to the defense, it meets the second requirement of a *Brady* violation.

C. The reports are not material evidence.

The third requirement under *Brady*, is that the evidence in question must be material evidence. Under *Brady*, evidence is considered to be "material" when there is a "'reasonable probability' that had the evidence been disclosed, the result at trial would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (internal citations and quotations omitted) (record). The materiality of evidence correlates to its relevance in the case. In both *Bagley* and *Kyles*, the courts addressed what constitutes materiality. The courts reasoned that an evidence's materiality is determined by its "reasonable probability". Courts analyze the "reasonable probability" that the suppression of evidence would undermine the outcome of the trial. The courts also consider

whether the defendant would have been more likely to have received a different verdict, if the evidence had not been suppressed.

In the past, the Supreme Court has held that evidence qualifies as material when there is any reasonable likelihood it could have affected the judgement of the jury. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Due to this holding, the opposition may attempt to argue that inadmissible evidence has the ability to form the basis of a *Brady* claim if the evidence may lead directly to admissible evidence. In cases, such as this, where there is no materiality, the court must decide whether the inadmissible evidence can form the basis of a *Brady* violation.

In *United States v. Bagley*, the petitioner argued that the government's failure to disclose evidence violated his right to due process under the Fourteenth Amendment. The court agreed that the evidence was favorable to the petitioner. However, the court also concluded that the disclosure of the evidence would not have had an impact on the verdict. Under the ruling in *Bagley*, the disclosure of evidence is only necessary, as a matter of due process, when the evidence in question is both favorable to the accused and material. However, courts are not required to consider the favorability of the evidence, to the defense. *See United States v. Bagley*, 473 U.S. 667 (1985).

In the case at hand, the evidence is not considered to be "material" because there is no "reasonable probability" that the suppression of the evidence undermined the trial. The evidence was inadmissible because the statements within the reports were hearsay. By rightfully excluding hearsay, the trial was not undermined. The trial would have been undermined, however, if the evidence were disclosed, due to its inadmissibility. Because the evidence is inadmissible hearsay, it does not create a "reasonable probability" of undermining the trial and is not material.

Currently, there is no consensus for determining whether inadmissible evidence can form the basis for a *Brady* claim. In the past, some circuit courts have followed *Wood*, and ruled that

inadmissible evidence cannot form a *Brady* violation." *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996); see also *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998). On other occasions, circuit courts have argued that *Wood* allows for inadmissible evidence to be the basis for a *Brady* violation if the evidence would lead directly to the disclosure of admissible evidence. *Dennis v. Sec'y, Pa. Dep't of Corr*., 834 F.3d 263, 310 (3d Cir. 2016); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). Some circuit courts have chosen to focus solely on "whether the disclosure of evidence would have created a reasonable probability that the result of the proceeding would have been different." *Trevino v. Thaler*, 449 Fed. App'x 415, 424 n.7 (5th Cir. 2011). As addressed previously, the evidence in the current case does not create a reasonable probability of a different outcome.

In *Kyles*, the court ruled that "the failure to disclose material Brady evidence justifies setting aside a conviction where there exists a "reasonable probability" that had the evidence been disclosed, the trial result would have been different". *Kyles v. Whitley*, 514 U.S. 419, 433-35 (1995). There must be more than mere speculation that the disclosure of the inadmissible evidence would have led to admissible evidence. *Bradley*, 212 F.3d at 567. The opposition has only provided speculation that admissible evidence would have directly resulted from the disclosure of the reports. The suspect provided by the interview was investigated by the FBI. After investigating, the FBI determined that Brodie was not the culprit. The suspect provided by the anonymous phone call was also determined to be a weak lead. Therefore, the opposition is only speculating that admissible evidence would have been discovered through the reports.

Here, the disclosure of the interview and the anonymous phone call would not have directly led to admissible evidence that would substantially alter the outcome of this case. There was other evidence that implicated Gold in the murder and that evidence clearly establishes Gold's guilt.

Although the reports would have created two additional suspects for the jury, the substantial amount of evidence against Gold is key. The other potential suspects, presented by the reports, do not negate the presence of considerable evidence against Gold. It should also be noted that the authorities did take the proper steps in investigating the other potential suspects, and the investigation did not lead to convictions, unlike with Gold. Therefore, there is a reasonable probability that a different verdict would not have been reached, had the reports been disclosed to the defense prior to trial. *U.S. v. Lee*, 88 F. App'x 682, 685 (5th Cir. 2004).

The disclosure of the reports would not have directly led to admissible evidence, that would have been material to this case. Also, there is no indication that there is a reasonable probability that disclosure of the reports would have changed the outcome of the trial. Therefore, the reports are not "material" evidence and do not meet the last requirement. For these reasons, there is no reasonable probability that disclosure of the evidence would have altered Gold's verdict and the reports would not be considered the basis of a Brady violation.

2. Inadmissible evidence cannot form the basis of a *Brady* violation as a matter of public policy

Also, as a matter of public policy, inadmissible evidence should not be able to form a basis for a *Brady* violation. Allowing inadmissible evidence to be disclosed during a trial poses a dangerous threat to the justice system. It causes a deviation from the proper legal procedure and is harmful to the justice system. Inadmissible evidence is deemed inadmissible for a variety of reasons and is prohibited from trials to ensure fairness. Fed. R. Evid. 103. Allowing inadmissible evidence to form the basis for a *Brady* violation, and therefore become admissible, would create unfairness. This would set a dangerous precedent for future cases and jeopardize justice.

The purpose of *Brady* violations is to ensure the fairness of trials. "Society wins not only when the guilty are convicted but when criminal trials are fair" *Brady*. The court created the

standard for *Brady* violations to ensure that defendants have access to potentially exculpatory evidence. The courts also created a set of requirements that must be for a violation to occur, to ensure that the standard also respects the prosecution's rights. Although *Brady* works to ensure fairness, allowing inadmissible evidence to be a basis for a violation would undo this fairness. If the inadmissible evidence provided in the reports is made to set a basis for a *Brady* violation, the entire purpose of the *Brady* standard would be defeated.

For a violation to occur under *Brady*, the satisfaction of all three elements is required. Due to the fact that all three requirements are not met, in this case, a *Brady* violation did not occur. Also, as a matter of public policy, inadmissible evidence should not be able to form the basis of a Brady violation. It is for these reasons that we respectfully request that the court affirm the decision of the Circuit court.

CONCLUSION

For the foregoing reasons, the Respondent, the United States, respectfully requests that this Court affirm the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

Team 15R
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