Docket 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 PETITIONER

Team 16

Attorneys for Petitioner

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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STATEMENT OF THE CASE

I. Factual History

On May 27, 2017, the Federal Bureau of Investigation (FBI) arrested Ms. Samantha Gold, claiming she was responsible for the death of Tiffany Driscoll just two days earlier. R. at 14. The investigation into Ms. Gold began when Jennifer Wildaughter, Ms. Gold's roommate, snooped through the "HerbImmunity" folder on Ms. Gold's laptop and became "afraid" Ms. Gold might poison Driscoll after seeing a vague reference to rat poison and a "short note" to Driscoll thanking her for all her efforts. R. at 24–27. Wildaughter downloaded Ms. Gold's entire laptop hard drive onto a flash drive and gave it to the Livingston Police Department. R. at 26. Wildaughter explained her concern to Officer Yap and informed him that she looked "into some of the folders" but offered no specifics about the location of any information – merely telling them that "everything is on there." R. at 26–27. Yap did not ask a single question in response to Wildaughter's wild tale and simply told her that he would "get back to" her. R. at 29. Yap then looked through every file and folder on the flash drive. R. at 6. Yap opened new, previously unopened files that revealed Ms. Gold's health insurance, budget, and tax information. *Id.* Some of the newly opened files revealed that Ms. Gold had researched other rat poisons, had shipped a package to Driscoll's address, and had made a recipe including "[s]ecret stuff." *Id.*

To deal with the stresses of college and financial hardship, Ms. Gold sought therapy treatment from Dr. Pollak. Ms. Gold currently sees Dr. Chelsea Pollak, for treatment of Intermittent Explosive Disorder, an anger disorder that Dr. Pollak diagnosed her with a few years into Ms. Gold's treatment. R. at 17. Ms. Gold's diagnosis was a breakthrough in her treatment, as it allowed Dr. Pollak to provide the appropriate mental health treatment. During a session on May 25, 2017, Ms. Gold explained her annoyance with Driscoll, who convinced a vulnerable Ms. Gold to invest in Driscoll's multilevel marketing scheme. Driscoll pressured Ms. Gold to put even more

money into HerbImmunity, despite Ms. Gold struggling to make sales and being nearly $2000 in debt to Driscoll. R. at 18. During her therapy session, Ms. Gold used a colloquial phrase "I'm going to kill her" to express her frustration with HerbImmunity. R. at 17–19. Dr. Pollak took this phrase, which never once mentioned so much as a name, and reported it to the Joralemon police without Ms. Gold's knowledge. Officer Fuchs requested notes from the therapy session and Dr. Pollak sent them immediately, exercising her discretion under Boerum Health and Safety Code 711. Dr. Pollak has no memory of whether or not she informed Ms. Gold of her duty to report. The Joralemon police found the statement to be inauspicious when checking in on Ms. Gold. She was "calm and rational" as she spoke to the officers. After only fifteen minutes, the police easily recognized that Ms. Gold was no threat to herself or her community.

Throughout the fleeting investigation, two FBI reports were written. The first report, written by Special Agent ("SA") Mary Baer, details an interview with Chase Caplow. R. at 11. Caplow knew both Ms. Gold and Driscoll through his involvement with HerbImmunity. *Id.* He detailed to SA Baer his suspicion that Martin Brodie was responsible for Driscoll's death. *Id.* Caplow described in detail Brodie's violent tendencies. *Id.* Caplow also provided SA Baer with a motive—Brodie was Driscoll's upstream distributor in HerbImmunity, and Driscoll owed Brodie a substantial amount of money. *Id.* SA Baer wrote in her report that she would interview Brodie, but no further inquiry was made. *Id.* Another FBI report, written by SA Mark St. Peters, details a second suspect. R. at 12. SA St. Peters received an anonymous phone call that alleged Belinda Stevens was responsible for the death of Driscoll. *Id.* Stevens knew Driscoll through HerbImmunity. *Id.* While SA St. Peters followed protocol by conducting a preliminary investigation, he made no indication as to the steps taken or what was found in the investigation. *Id.* Neither report was disclosed to Ms. Gold prior to trial.

II. Procedural History

The Federal Government indicted Ms. Gold for Delivery by Mail of An Item With Intent to Kill or Injure in violation of 18 U.S.C. §§ 1716(j)(2),(3) and 3551 *et seq*. R. at 1. Before trial Ms. Gold moved the District Court to suppress the following evidence at her criminal trial: (1) testimonial evidence of confidential communications with her psychotherapist; (2) evidence obtained through the government's search of the flash drive. *Id.* The District Court denied both motions. At trial, Ms. Gold also argued that failure of the prosecution to turn over specific pieced of evidence constituted a *Brady* violation. The District Court denied Ms. Gold's objection. Ms. Gold appealed to the United States Court of Appeals for the Fourteenth Circuit.

The Fourteenth Circuit affirmed the District Court's findings and held that the testimonial evidence was admissible, and introduction of evidence obtained through the government's search of the flash drive did not violate Ms. Gold's right against unreasonable search and seizure. The Fourteenth Circuit also affirmed the District Court's ruling that failure of the prosecution to turnover evidence does not meet a *Brady* violation. Ms. Gold appeals these rulings and upon grant of *writ of certiorari* this Court reviews the decision of the Fourteenth Circuit *de novo*.

SUMMARY OF THE ARGUMENT

Ms. Gold's communications during therapy treatment are privileged and confidential. The communications are inadmissible under the psychotherapist-patient privilege and no dangerous patient exception exists in federal criminal proceedings. *Jaffee* recognized the federal evidentiary psychotherapist-patient privilege to prevent the compulsion of a psychotherapist to testify against her clients. Further, *Jaffee*'s amorphous footnote does not carve out a dangerous patient exception. Adoption of the Fourteenth Circuit's rule that compels testimony by a psychotherapist, would destroy the "confidence and trust" necessary for effective therapy treatment and "chill" vital

conversations for adequate treatment. Even if this Court chooses to adopt the exception, Ms. Gold's statements are still inadmissible because they are outside the scope of the exception and Ms. Gold did not waive her privilege by only speaking to her therapist.

The government's warrantless search of Ms. Gold's unopened files was an unreasonable search. Ms. Gold's roommate conducted a limited search of a few files; however, the government conducted an unlimited search of all Ms. Gold's files and thus exceeded the scope of the private search. *Jacobsen* requires the government to have "virtual certainty" about what they find, but the officer ransacked every unopened file because he totally uncertain about the file's contents. The Fourteenth Circuit's decision is inconsistent with this Court's decision in *Riley*, mandating the government obtain a warrant to search an entire digital device. Here, the privacy concerns of Ms. Gold's files far outweigh the government's legitimate interests.

The prosecution's suppression of two separate FBI reports, both naming potential suspects with motive and connection to Driscoll, were material to Ms. Gold's trial and therefore constitute a *Brady* violation. When exculpatory evidence is suppressed by the prosecution, a *Brady* violation occurs. Even when evidence is inadmissible, it can still be the basis for a *Brady* violation. The two FBI reports went directly to the heart of the case, offering new suspects with the same motives and connections that the government found damming to Ms. Gold. Ms. Gold was denied her basic right to a fair trial and was hastily convicted without all the evidence.

Therefore, this Court should reverse the Fourteenth Circuit's order.

ARGUMENT

I. MS. GOLD'S COMMUNICATIONS DURING THERAPY TREATMENT ARE PRIVILEGED AND CONFIDENTIAL AND THUS, SHOULD NOT HAVE BEEN ADMITTED AT TRIAL.

Federal Rule of Evidence 501 establishes that federal evidentiary privileges are governed by the "principles of common law as . . . interpreted . . . in the light of reason and experience." Fed. R. Evid. 501. Pursuant to Rule 501, this Court in *Jaffee v. Redmond*, established the psychotherapist-patient testimonial privilege in federal common law. *Jaffee v. Redmond*, 518 U.S. 1, 1 (1996). Accordingly, the Court held "that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Id.* at 18. The privilege effectively precludes a therapist from being compelled to testify against her patient in federal criminal proceedings.

However, as an afterthought in the last footnote in the opinion, the *Jaffee* Court stated: "We do not doubt that there are situations in which the privilege must give way, for example, if a serious threat to the patient or to others can be averted only by means of a disclosure by the therapist." *Jaffee*, U.S. at 18 n.19. The minority of circuits have pulled from this dictum, some form of a "dangerous-patient" exception. The majority of circuits, however, do not recognize a dangerous patient exception and uphold the right of a patient to confidential communications in seeking mental health treatment. *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000); *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003); *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012).

This Court should find that Ms. Gold's statements to her psychotherapist are inadmissible. Compelling a psychotherapist to testify against her client in criminal proceedings undermines the "confidence and trust" necessary for effective treatment. The Fourteenth Circuit reasoning leaves patients uncertain in their disclosures and creates an exception that swallows the rule. Accordingly,

this Court should find the evidence inadmissible under the psychotherapist-patient privilege because (1) a dangerous patient exception does not exist in federal criminal proceedings and (2) even if this Court chooses to adopt the exception, Ms. Gold's statements are still privileged.

A. *In light of reason and experience, carving out a testimonial "dangerous patient" exception to psychotherapist-patient privilege does not transcend the public good.*

Testimonial privileges, unlike the majority of evidentiary rules of exclusion, do not exclude relevant evidence because it is likely unreliable or prejudicial. Rather, testimonial privileges exclude evidence, *despite* its potential value, to advance a policy goal more important than that of fact-finding. Thus, when courts "consider . . . adopting a new exception" to a privilege, the appropriate inquiry is whether the protection of a "particular class of confidential communications promotes" an interest that "outweighs the need for probative evidence." *Trammel v. United States*, 445 U.S. 40, 51 (1980). In short, the scope of a testimonial privilege often hinges on its respective policy justifications. *Id.*

As mandated by Federal Rule of Evidence 501, policy judgments must be made "in light of reason and experience." Fed. R. Evid. 501. With respect to the psychotherapist-patient privilege, "reason," balances the public's interest in mental health and the private interests of confidentiality against the public's interest in safety. *Jaffee*, 518 U.S. at 6. "Experience" refers to the interaction of the federal testimonial privilege with state confidentiality law. *Id.* Accordingly, the *Jaffee* Court agreed with the state legislatures and the Advisory committee that a psychotherapist-patient privilege transcends the normally "predominant" goal of fact-finding. *Jaffee*, 518 U.S. at 8.

An exception to a privilege must align with the policy foundation of the privilege an in "light of reason and experience," the dangerous-patient exception does not. Accordingly, this Court should decline to recognize the exception in federal criminal proceedings to (1)

appropriately balance public and private interests in accordance with the (2) intent of the privilege as established by *Jaffee* and the Federal Rules of Evidence.

1. *A dangerous patient exception to the psychotherapist-patient privilege does not transcend a public good.*

"[T]he chilling effect that would result from the recognition of a dangerous patient exception and its logical consequences is the first reason to reject it." *Hayes*, 227 F.3d at 585. Evidentiary privileges are an exception to the rule that "the public has a right to every man's evidence" and thus, are "not lightly created nor expansively construed." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Accordingly, evidentiary privileges are only narrowed when doing so serves "a public good of transcendent importance." *Jaffee*, 518 U.S. at 11 (citing the population's "mental health" as a "public good" outweighing the need for potentially relevant evidence).

The scope of a privilege must also serve private ends. *Id.* (finding that like the attorney-client privilege, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." *Id.* at 10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment.").

Further, an exception must be justified by an *ex ante* policy analysis. *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71 (1st Cir. 1999). In other words, an exception may be appropriate where the lack of an exception *furthers* injustice, not simply where evidence might be probative to the interest of justice. The First Circuit, in *In Re Grand Jury Proceedings (Gregory P. Violette)*, applied the narrow "crime-fraud" exception to the psychotherapist patient-privilege. *Id.* When deciding to nick the psychotherapist-patient privilege with an exception, the Court balanced the competing interests of crime prevention and mental health but clarified that the

ultimate rationale behind the justification of the exception was that it represented an *ex ante* policy judgment. *Id.* In other words, the exception was not justified simply because it was relevant to a crime. Rather, the exception applies only to the narrow classification of statements that *further* a crime—a result the privilege was not intended to promote. Thus, the crime-fraud exception permits testimony of statements made for the *purpose* of furthering a crime, whereas a dangerous-patient exception would permit testimony of patient's statements made in the furtherance of proper diagnosis and treatment. Moreover, the lack of a dangerous-patient exception does not promote crime or other injustices. If a patient has made threats, a psychotherapist may properly disclose the threats to protect a third party.

Additionally, the Proposed Rules of Evidence demonstrate that the drafters did not intend to carve out a dangerous-patient exception. Although Congress opted instead for Rule 501's common law approach to evaluating the scope of privileges, courts "look to the proposed rules for guidance."[1] *In re Grand Jury Proceedings*, 183 F.3d at 76–77; *see also Jaffee*, 518 U.S. at 14–15. In 1972 the Proposed rules of Evidence recognized three exceptions to the psychotherapist-patient privilege, including (1) proceedings for hospitalization, (2) examination by order of a judge, and in cases where (3) mental state is an element of a claim or defense. 56 F.R.D. 183. None of the three proposed exceptions are comparable to the dangerous-patient exception. Unif. R. Evid. 504. Courts have construed the omission as deliberate. *Chase*, 340 F.3d at 989–990. In creating the Proposed Rules, the drafters cited an article by the authors of a Connecticut statute which noted the purposeful omission of particular exceptions. *Id.*

[1] "[T]he Supreme Court has officially recognized the psychotherapist-patient privilege, and cited favorably to [Proposed Rule 504] as initially proposed, the contents of the [Proposed Rule] have considerable force and should be consulted when the psychotherapist-patient privilege is invoked." 3 Weinstein's Federal Evidence § 504.02, at 504–507 (footnote omitted).

Further, courts have construed the language of *Jaffee's* footnote regarding circumstances where the privilege "must give way" to refer to the exceptions of the Proposed Rules. *Ghane*, 673 F.3d at 784. For example, proceedings for hospitalization where a therapist may need to testify to the patient's mental state for treatment purposes "will not have . . . the deleterious effect on the confidence the therapist shares with his patient" in the same way that allowing testimony from the therapist to prosecute the patient would. *Chase*, 340 F.3d at 992. Proceedings for hospitalization are used to treat the patient whereas criminal proceedings are used to prosecute the patient. *Ghane*, F.3d at 785.

The proposed rules indicate that the drafters did not intend to carve out an exception that would compel a patient's "most trusted confidant" testify against them in criminal proceedings. *Hayes*, 227 F.3d at 587.

2. The duty to warn is separate and distinct from the federal evidentiary privilege.

At the heart of the psychotherapist-patient privilege is "the imperative need for confidence and trust." *Jaffee*, 518 U.S. at 9. This air of confidentiality is only polluted with disclosure in the most severe circumstances, where a patient has threated serious harm during the course of treatment. *Tarasoff v. Regents of Univ. of Cali.*, 551 P.2d 334 (1976). In these cases, state laws impose psychotherapists a "duty to warn" potential victims of threats made against them by the patient. *Id.* at 345. However, state law often limits a psychotherapist's disclosure obligation to designated persons and specific content "likely to apprise the victim of the danger" in the presence of an imminent threat. *Id.* at 340. Any further disclosure would be a violation of state confidentiality law. Accordingly, the majority of circuits have found that psychotherapist's duty to warn exhibits only a "marginal connection, if any" to the federal testimonial privilege. *Hayes*, 227 F.3d at 583. Further, the Eighth Circuit has found that "advancing any connection" between a therapist's duty to warn and the application of the dangerous patient exception is "unsound in

theory and in practice." *Id.* Courts have cited two reasons for refusing to advance a connection between the duty to warn and the testimonial privilege.

a. Protection does not warrant prosecution.

First, state duty to warn laws are "justified on the grounds of protection." *Chase*, 340 F.3d at 987. Duty to warn laws ensure that a psychotherapist takes action to prevent a threat from materializing. *Tarasoff*, 551 P.2d at 340. Thus, a psychotherapist's ethical duty to warn serves a "far more immediate function" than the federal evidentiary privilege. *Hayes*, 227 F.3d at 583. In contrast, "testimony at a later criminal trial focuses on establishing a past act." *Chase*, 340 F.3d 978 at 987. Accordingly, a therapist's ethical obligation to prevent harm is not hindered by the lack of a dangerous patient exception. The interest of safety may still be advanced by warning a potential third party and allowing the therapist to testify at involuntary commitment hearings that aid appropriate treatment. To the contrary, the public's interest in mental health will surely be "chilled." Dr. Pollak confessed that a patient may be less willing to "share certain thoughts or urges with her if they know that she would be required to testify about the content of the therapy sessions," rather than if the statements were only communicated to the identifiable third party.

b. The exception undermines certainty.

Second, tying the federal evidentiary privilege to state disclosure laws results in uncertain application of the federal privilege in criminal trials. *Id.* This Court stated nearly sixty years ago, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Duty to warn laws are governed by the states and each impose varying standards for disclosure. Additionally, therapists maintain discretionary authority over whether or not they deem a threat severe enough to report. *Chase*, 340 F.3d at 986. Thus, one therapist

may find a threat to meet the standard of the state duty to warn law for reporting while another, may not. Accordingly, one patient may then have their therapist compelled to testify against them in federal court while another is still pursing effective psychotherapy treatment.

In addition, the duty to warn requires a therapist to inform patients of this duty at the outset of treatment. However, the laws do not mandate that a therapist inform patients that the therapist would then have to testify in federal criminal proceedings. *Hayes*, 227 F.3d at 586 (finding duty to warn distinct from the federal privilege where a defendant was not informed that his therapist may testify against him despite being informed of the therapist's duty to report because failure to "advise a patient that his 'trusted' confidant may one day assist in procuring his conviction is "quite another" thing).

Admission of Ms. Gold's confidential statements at trial undermines the certainty of the privilege. The Boerum Health and Safety Code's Reporting Requirement allows a therapist to exercise their discretion to make a "clinical judgment" that a patient has the "apparent capacity" and it is "more likely than not" that the patient will carry out the threat in the "near future." Using discretionary language as guidance, Dr. Pollak determined that Ms. Gold posed an "immediate threat" to a third party. However, the officers called to investigate, just moments after the therapy session, found Ms. Gold "calm and rational," indicating that "dangerousness" judgments vary and Dr. Pollak could have made an unsound judgement call. Incorrect determinations of dangerousness only exert harm to the extent that a victim may now be aware of a potential threat. However, if the law is so situated that a duty to warn gives rise to federal prosecution Ms. Gold and similarly situated defendants, face uncertainty in whether their statements will be used for their prosecution. Further, Dr. Pollak does not remember informing Ms. Gold of her duty to warn and *did not* advise Ms. Gold that her statements could be used

against her in a subsequent prosecution. Like the defendant in *Hayes*, Ms. Gold had no indication that her "most trusted confidant" would be compelled to aid in her prosecution.

Given that the policy interests promoted by the privilege outweigh those promoted by the exception and the clear difference between the duty to warn and the federal privilege, this Court should find that a dangerous-patient exception to the psychotherapist-patient privilege does not exist in federal criminal proceedings.

B. *The testimony by Ms. Gold's therapist is barred by the psychotherapist-patient privilege because it falls outside the scope of the Tenth Circuit exception and statements made in the course of treatment do not constitute a waiver.*

Of the five circuits that have addressed the scope of the federal testimonial privilege, in regard to state duty to warn laws, only two circuits have found that a therapist's duty to warn may void the privilege. Of these circuits, the Fifth Circuit did not directly create an exception and instead found that disclosure under state duty to warn laws undermines the confidentiality element of the privilege. The Tenth Circuit, on the other hand, created a narrow dangerous-patient exception. Even if this Court accepts the reasoning in either of these circuits, Ms. Gold's statements are precluded from admission at trial under the psychotherapist-patient privilege.

1. Ms. Gold did not "waive" her psychotherapist patient privilege.

Ms. Gold maintained a reasonable expectation of confidentiality when communicating statements only to her therapist and thus, did not waive the privilege. A party may waive a privilege when they do not have a reasonable expectation of privacy. *Dorato v. Smith*, 163 F. Supp. 3d 837, 852 (D. N.M. 2015). However, a waiver in one regard does not constitute "a blanket waiver" of the privilege in all regards. *Id.*; *see also Chase*, 340 F.3d at 988 (finding no waiver where the therapist did not inform the patient she might testify against him in criminal proceedings).

However, the Fifth Circuit went so far as to find that a therapist's duty to warn prevents the formation of the privilege by undermining the privilege's first element of confidentiality.

In *United States v. Auster*, the Fifth Circuit found it unnecessary to answer directly whether a dangerous patient exception to the psychotherapist-patient privilege existed. *United States v. Auster*, 517 F.3d 312, 317 (5th 2008). Instead, the Court determined that the circumstances in which the privilege "must give way" are those where a patient has been informed of their therapist's ethical obligation to warn but the patient still proceeds to make threats. The defendant in *Auster* sought treatment for an anger disorder and had threatened "various individuals over the years" with the defendant's therapist consistently informing his patient of his duty to warn third parties. *Id.* at 313. Under the Fifth Circuit's reasoning, a patient that has been informed of their therapist's ethical duty to warn but proceeds to make threatening statements, has no reasonable expectation of confidentiality and the privilege never materializes.

However, the Fifth Circuit's reasoning is flawed. A patient does not undermine confidentiality by making statements for the purpose of diagnosis or treatment. *Jaffee*, 518 U.S. at 11. Ms. Gold suffers from Intermittent Explosive Disorder which makes her prone to excited outbursts and moments of intense anger that quickly fade. Unlike *Auster* where the defendant's therapist informed him several times of his duty to warn, Ms. Gold's therapist does not remember informing her of any duty to warn. Further, nothing indicates Ms. Gold had a history of threatening third parties where she may have been put on notice of her therapist's reporting obligation like in *Auster*. Ms. Gold appropriately sought treatment for her anger disorder and her statements made in an emotional outburst are nothing more than a patient seeking treatment for their mental illness. If a patient's psychotherapy treatment leads to the compulsion of their therapist testifying against them in criminal proceedings, the privilege is effectively useless.

2. Ms. Gold's statements during therapy are outside the scope of the dangerous patient exception.

Even if this Court adopts the Tenth Circuit's reasoning, Ms. Gold's statements are still privileged because they do not fall within the scope of the dangerous-patient exception outlined by *Glass*. The exception delineated in *Glass* requires the privilege to yield in situations where a patient discloses a threat that is (1) serious when uttered and (2) harm can only "be averted . . . by means of a disclosure by the therapist." *United States v. Glass*, 133 F.3d 1356, 1360 (10th 1998).

Ms. Gold's "threat" was not serious when uttered. A threat is considered serious when it constitutes "pure, unqualified statements." *United States v. Hardy*, 640 F. Supp. 2d 75 (D. Me. 2009) (defendant stated he "wanted to get in the history books like Hinkley [sic] and wanted to shoot Bill Clinton and Hilary [sic]."). Further, a statement constitutes a serious threat when the defendant's demeanor indicates seriousness. *United States v. Medina*, No. 04-1566, WL 8164228, at *1 (D. N.M. 2005) (finding serious threat where the "[d]efendant's demeanor was calm and even a little flat" when he threatened to cause an explosion at the VA office).

Additionally, in *United States v. Highsmith*, the Court found that other means could have prevented harm because at the time of the threat the patient was in a psychiatric hospital, under the authority of the treating therapist and the therapist admitted that the patient did not pose a threat to the third party. *United States v. Highsmith*, No. 07-80093-CR, WL 2406990, at *3 (S.D. Fl 2007). The patient's "continued presence in the locked psychiatric unit, which at the time of disclosure was within the control of the treating psychiatrist's averted harm and the need for disclosure." *Id.*

In the present case, Ms. Gold's statements were neither serious when uttered nor was disclosure the only means of averting harm. During her therapy session, Ms. Gold vented about her frustration with HerbImmunity and Ms. Driscoll's faulty scheme. In her frustration, Ms. Gold uttered a common and general expression of frustration with another person, stating she would

"kill her." Factually distinguishable from *Hardy*, where the patient had made specific claims identifying a specific target of his actions and how he planned to carry out those actions. The case at hand does not rise to the level of specificity as that in *Hardy* as Ms. Gold did not identify a specific victim or the means of carrying out the so-called "threat."

Additionally, disclosure to law enforcement was not the only means of averting harm. At the time of the threats, Ms. Gold was in a therapy session with Dr. Pollak. Angry at being tricked into falling nearly two-thousand dollars in debt as an already struggling college student, Ms. Gold expressed her frustration during therapy from Driscoll's marketing scheme. Immediately after the meeting Dr. Pollak felt that Ms. Gold might be a danger and decided to inform law enforcement as soon as Ms. Gold left the therapy session. However, Dr. Pollak could have pursued alternative means of treatment. As a psychiatrist, Dr. Pollak has the power to have Ms. Gold involuntary committed or checked into other in-patient treatment programs. Instead, Dr. Pollak let Ms. Gold leave the therapy session. If Dr. Pollak truly felt that Ms. Gold's statements constituted a "serious threat" and that Ms. Gold imposed an immediate threat to Driscoll, Dr. Pollak could have sought other treatment options that would not have required disclosure to parties not involved in mental health treatment. Therefore, disclosure could not have been the only means of averting harm, nor could Dr. Pollak have considered Ms. Gold's statements to constitute a serious threat if she let Ms. Gold leave the therapy session.

Given that the facts of the present case do not fall within the scope of the dangerous patient exception nor constitute a waiver, Ms. Gold's statements are not admissible.

II. THE GOVERNMENT'S WARRANTLESS SEARCH OF THE ENTIRE FLASH DRIVE'S FILES EXCEEDED THE SCOPE OF THE ROOMMATE'S PRIVATE SEARCH, AND THUS VIOLATED MS. GOLD'S FOURTH AMENDMENT RIGHTS.

The Fourth Amendment provides for the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV.

Fourth Amendment protections apply when an individual intends to keep something private, and society recognizes their expectation as reasonable. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment's "ultimate touchstone" is an individual's reasonable expectation of privacy. *Riley v. California*, 573 U.S. 373, 381–82 (2014). This expectation "generally requires the obtaining of a judicial warrant" to ensure that the police's inferences to support a search are "'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime.'" *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

However, under the private search doctrine exception, a government agent may conduct a warrantless follow-up search of a container that was previously searched by a private party because the Fourth Amendment's protections do not apply to searches by private parties. *Jacobsen*, 466 U.S. at 113–15. Yet the government agent must not exceed the scope of the initial private search. The agent exceeds that scope where he searches without "virtual certainty" about what he will find and "further infringe[s] on the [defendant]'s privacy." *Id.* at 119–20. The circuits are split on how the private search doctrine applies to searches of digital containers with the circuit's divided between a broad or narrow approach.

After this Court's decision in *Riley v. California*, most circuits have adopted the narrow approach and find a digital container only constitutes individual files within a larger device. Thus, under the narrow approach, a warrantless search is confined to the exact files opened during the private search. *See United States v. Lichtenberger*, 786 F.3d 478, 486 (6th Cir. 2015). However, the Fourteenth Circuit instead adopted the broad approach, resulting in entire device's files being ransacked when the private party only opens a single file.

Consistent with this Court's precedent in *Riley* and following the trend amongst most circuits, this Court should adopt the narrow approach. Ms. Gold maintained a reasonable expectation of privacy in her unopened files. The officer did not meet the requisite level of "virtual certainty" to conduct his follow-up search. Moreover, the legitimate government interests of preserving evidence and cutting costs are dwarfed by the immense privacy interests at stake. Accordingly, the officer exceeded the scope of the roommate's private search and violated Ms. Gold's Fourth Amendment rights. To protect people's privacy rights in the digital age, this Court should reverse the Fourteenth Circuit's order and grant the motion to suppress.

A. *Ms. Gold maintained a reasonable expectation of privacy in all files previously unopened by her roommate because they were closed digital containers.*

A container is "an object (such as a box or can) that can hold something." *Container*, MERRIAM-WEBSTER DICTIONARY (2015). The "something" held within an individual's containers are often the most intimate "privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). To protect these "privacies of life," this Court has long recognized that closed, opaque containers are protected by an individual's Fourth Amendment right to a reasonable expectation of privacy. *See Smith v. Ohio*, 494 U.S. 541, 542 (1990) (per curiam) (brown paper grocery bag); *United States v. Place*, 462 U.S. 696, 705–706 (1983) (luggage); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (letters and packages). Thus, under the private search doctrine, a government agent exceeds the scope of the private search when he searches new, discrete containers unsearched by the private party. *Walter v. United States*, 447 U.S. 649, 657 (1980) (finding FBI agent exceeded the scope of the private search by watching an obscene film where the private searcher had only opened a package to find a film case with obscene labels).

This Court has not yet defined what constitutes "a container" in the digital age. However, in response to the digital age's privacy concerns, this Court necessitates a judicial warrant for the

government's search of an entire cell phone. *Riley*, 573 U.S. at 382. Accordingly, *Riley* impliedly demands that an entire digital device also cannot be the "container" for purposes of the private search doctrine. Rather, individual files on a device are the constitutionally protected "containers" in the digital age. Thus, the government agent exceeds the scope of the private search by opening new, previously unopened files. *See Lichtenberger*, 786 F.3d at 486 (government agent was randomly shown image files of child pornography on the defendant's laptop when the private party viewed entirely different image files); *see also United States v. Sparks*, 806 F.3d 1335, 1335 (11th 2015) (government agent opened a second video of child pornography that was unopened but scrolled over in a thumbnail view by the private party).

Ms. Gold's individual files constituted discrete, digital containers under this Court's decision in *Riley*, and thus the officer violated Ms. Gold's reasonable expectation of privacy each time he opened a file that was not previously opened by her roommate. This Court has protected the privacy interests in everything from brown paper bags, luggage, and packages, and now must protect the vast "privacies of life" contained with an individual's files. *Boyd*, 116 U.S. at 630. The officer opened every individual file on the flash drive even though the roommate only opened two documents and some image files during her search. Ms. Gold housed the intimate "privacies of life" in her files such as her health insurance, budgetary, and tax information. *Id.* Moreover, similar to *Walter*, *Lichtenberger*, and *Sparks*, Ms. Gold did not lose her reasonable expectation of privacy in unopened files simply because some files contained potentially incriminating evidence. The Fourth Amendment articulates a constitutional process for obtaining incriminating evidence, and the officer, here, chose to forgo this process and violated Ms. Gold's Fourth Amendment rights.

B. *The government agent did not have "virtual certainty" about what he would find and further infringed on Ms. Gold's privacy during his search.*

"The reasonableness of an official invasion of the citizen's privacy must be appraised on

the basis of the facts as they existed at the time that invasion occurred." *Jacobsen*, 466 U.S. at 115. Thus, when conducting a warrantless, follow-up search after an earlier private search, a government agent must be "virtual[ly] certain[]" that he will find "nothing else of significance" and that his search "w[ill] not tell him anything more than he already ha[s] been told" by the private searcher. *Jacobson*, 466 U.S. at 119 (finding government agent's follow-up search of clear plastic bags filled with white powder housed within a plastic tube and cardboard box permissible because the private searcher made the agent "virtually certain" that the package only contained those exact contents). Moreover, when conducting a warrantless follow-up search, "[t]he advantage the Government gain[s] . . . [is] merely avoiding the risk of a flaw in the [private searcher's] recollection, rather than in further infringing [the defendant's] privacy." *Id.* at 117; *see also United States v. Tosti*, 733 F.3d 816, 816 (9th Cir. 2013) (finding that clicking on a thumbnail and seeing the larger image did not exceed the scope of the private search where "the police learned nothing new through their actions.").

A minority of circuit courts have allowed government agents to open new containers unopened during the private search when the container's contents are rendered obvious. *United States v. Bowman*, 215 F.3d 951, 956 (9th Cir. 2000) (finding "virtual certainty" where the government agent opened the last bundle of clothes containing cocaine because the private searcher opened the first four bundles of clothes that all contained cocaine). However, this Court has stated a government agent cannot open a container unopened by the private searcher simply because the government is able to "draw inferences" about the container's contents. *Walter*, 447 U.S. at 657 (finding FBI agent exceeded the scope of the private search by viewing an obscene film when the private searcher had only seen obscene images labeled on the outside of the film role). Moreover, virtual certainty does not exist where a file's contents cannot be made obvious.

See Sparks, 806 F.3d at 1335 (officer exceeded the scope of a private search where he could not view the details of the file's contents from the thumbnail view and proceeded to open the video file).

Unlike the physical searches in *Jacobsen*, where the government agent had "virtual certainty" that he would uncover "nothing else of significance" but plastic bags filled with white powder, here, the police officer blindly opened every folder and file on the flash drive, despite being specifically told by the private searcher that she only "looked into some of the folders." In the physical world, its reasonable a government agent could achieve "virtual certainty" about the contents of a box or other container. *Jacobsen*, 466 U.S. at 119. However, the digital world requires specificity because digital devices like flash drives contain potentially thousands of folders, sub-folders, and files. Here, Ms. Gold's roommate only informed the officer that she was "afraid" Ms. Gold might poison Driscoll after seeing a vague reference to rat poison and a "short note" to Driscoll thanking her for all her efforts. However, Ms. Gold's roommate never informed the officer in what folder, sub-folder, or file that information could be located on the flash drive, merely stating that "everything is on there." The officer failed to ask a single question or even clarify what "there" meant, rather he just said he would "get back to her." As a result of the officer's failure to inquire further, the officer had no instructions and no "certainty" where this information was located "at the time the invasion occurred." *Id.* at 115. Without clear instructions and direct guidance from Ms. Gold's roommate, the officer opened every single file and folder. This fishing expedition permitted the government to obtain vast amounts of new information and violate Ms. Gold's Fourth Amendment rights.

Furthermore, the officer's search of Ms. Gold's unopened files cannot be brushed aside by claiming that the file's contents were made obvious to the officer. Unlike *Bowman*, where the last

bundle of clothes containing cocaine was rendered obvious to the government agent searching the suitcase, the officer, here, could not see the volume, shape, or content of Ms. Gold's unopened files. Moreover, similar to *Walter*, the officer could only draw "mere inferences" from Ms. Gold's folder and file names on the flash drive. Similar to *Lichtenberger* and *Sparks*, where the private searchers scrolled through folders but left the files unopened, the officer exceeded the scope of the private search by opening new, previously unopened files, despite Ms. Gold's roommate scrolling through a single folder and sub-folder.

Moreover, the officer did not conduct his search to gain "[t]he advantage . . . [of] merely avoiding the risk of a flaw" in Ms. Gold's roommate's recollection. *Jacobsen*, 466 U.S. at 119. In fact, the police officer must have known that his search would "further infringe on [Ms. Gold's] privacy" and tell him "more than he already had been told" by Ms. Gold's roommate when he indiscriminately opened every single file on the flash drive. *Id.* Ms. Gold's roommate never told the officer about Ms. Gold's research on rat poisons, shipment of a package to Driscoll's address, and her recipe including "[s]ecret stuff." Similar to *Sparks* and *Lichtenberger*, where the government obtained new incriminating information by opening previously unopened files, here, the police garnered a haul of unknown facts by not replicating the roommate's private search. The government would not have been able to support a conviction at trial without the incriminating evidence uncovered through this illegal search.

C. *Ms. Gold's privacy interests in her unopened files outweigh the government's legitimate interests in preserving evidence and avoiding unnecessary costs.*

This Court has found that a government agent cannot search an entire cellphone without a judicial warrant because an individual's privacy concerns outweigh the legitimate government interests, despite a proper exception to the warrant requirement. *Riley*, 573 U.S. at 382 (warrantless search incident to a lawful arrest of an individual's cell phone violated the defendant's Fourth

Amendment rights). This Court "determine(s) whether to exempt a given type of search from the warrant requirement by assessing on the one hand the degree to which it intrudes upon an individual's privacy and on the other hand the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295 (1999). When evaluating privacy concerns on a digital device, the Court looks to the storage capacity of the digital device and the variety of personal data stored on the device. *Riley*, 573 U.S. at 382 (a cell phone holds a large quantity and depth of a person's "privacies of life"). Moreover, when evaluating the legitimate government interests, the Court looks to the preservation of evidence and the avoidance of unnecessary judicial and law enforcement costs. *Id.*; *see also Missouri v. McNeely*, 569 U.S. 141, 154 (2013).

1. *The storage capacity of the flash drive and the variety of Ms. Gold's personal data stored within her files present even greater privacy concerns than a person's constitutionally protected home.*

Responding primarily to warrantless searches of homes in Colonial America by the British, the Founding Generation ratified the Fourth Amendment to protect Americans by placing "the right against unreasonable search and seizure on a constitutional footing." *See* William J. Cuddihy, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 603 (Oxford University Press, 2009). Furthermore, this Court has found that a "cell phone search would typically expose to the government far more than the most exhaustive search of a house" because a phone has all the sensitive information found in a house but also contains an "array of private information never found in a home in any form—unless the phone is." *Riley,* 573 U.S. at 396–97. Moreover, when it comes to homes, the Fourth Amendment provides a unique protection that "has never been tied to measurement of the quality or quantity of information obtained." *Kyllo v. United States*, 533 U.S. 27, 37 (2001). However, instead of forbidding the application of the private search doctrine to

digital devices entirely, the Sixth, Ninth, and Eleventh Circuits have narrowly limited the government to searching the exact files opened by the private searcher to protect those great individual privacy interests. *See Lichtenberger*, 786 F.3d at 486; *see also Sparks*, 806 F.3d at 1335; *Tosti*, 733 F.3d at 816.

Here, Ms. Gold's privacy interests in her individual files far exceed that of a person's home, the great area of concern by the ratifiers of the Fourth Amendment. Ms. Gold's privacy interests are indistinguishable to those in *Riley*, where the smartphone's storage capacity and variety of personal data created immense privacy interests. The flash drive held enough storage capacity to download Ms. Gold's entire laptop hard drive including numerous image files and a variety of her personal data such as her health insurance, budget, and tax information. The flash drive has the same privacy interests as Ms. Gold's laptop because the flash drive was an exact copy of the computer's hard drive. As recognized in *Lichtenberger*, a laptop has more privacy interests at stake than a smartphone due to the laptop's larger storage capacity. Therefore, Ms. Gold's privacy interests are weightier than those of the smartphone in *Riley.* The officer, here, exceeded the scope of the private search and violated Ms. Gold's Fourth Amendment rights by opening previously unopened files and revealing intimate information "never found in a home in any form." *Riley*, 573 U.S. at 397.

2. The government's interests are unimpaired by the scope of the private search being narrowly confined to the exact files opened by Ms. Gold's roommate.

The government has a legitimate interest in the preservation of evidence on digital devices before they can obtain a judicial warrant. *Riley*, 573 U.S. at 391. Moreover, the government has a legitimate interest in conserving judicial and law enforcement costs. *United States v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001) (government has interest in preventing the "waste [of] valuable time and resources obtaining warrants based on intentionally false or mistaken testimony of private

searchers"). When searching a digital device that is lawfully in the possession of the police, the legitimate interest of preserving evidence does not have "much force" because there is no risk of the defendant deleting the data that has been downloaded on the device. *Riley*, 573 U.S. at 386. Technological and legal advancements in the warrant application process have made obtaining warrants faster and much less costly. *McNeely*, 569 U.S. at 154–55 (finding that the Federal Rules of Criminal Procedure's new rules allowing warrants to be issued by telephone or other electronic means like e-mail or video conferencing greatly expedite the speed and reduce the cost of the warrant application process).

Here, similar to *Riley*, the officer legally possessed the flash drive and there was no risk that the flash drive would return into Ms. Gold's possession and for the evidence to be destroyed. Further, the officer had probable cause of criminal activity based on the roommate's testimony, and thus met the basic requirements to apply for a judicial warrant. As this Court recognized in *McNeely*, the officer cannot fault the unnecessary costs of obtaining a judicial warrant because the Federal Rules of Criminal Procedure have greatly expedited the speed and reduced the cost of obtaining a judicial warrant. The officer, here, neglected this expedited process of obtaining a warrant by failing to even send an email or pick up the phone for a warrant. In a time where following the constitutional requirement of obtaining a warrant has never been easier, the officer lazily bypassed the law and violated Ms. Gold's Fourth Amendment rights.

III. THE PROSECUTION'S SUPPRESSION OF TWO SEPARATE FBI REPORTS, BOTH NAMING POTENTIAL SUSPECTS WITH MOTIVE AND CONNECTION TO DRISCOLL, WERE MATERIAL TO MS. GOLD'S TRIAL AND THEREFORE CONSTITUTE A *BRADY* VIOLATION.

Deeply rooted in the United States justice system is the notion of a fair trial. The Supreme Court actively and tenaciously protects this right by recognizing *Brady* violations. A *Brady* violation occurs when the prosecution commits the ultimate miscarriage of justice—by failing to disclose favorable evidence. *United States v. Bagley*, 473 U.S. 667, 675 (1985); *see also Brady v.*

Maryland, 373 U.S. 83, 87 (1963). As a result of this deprivation of justice, a defendant is robbed of their constitutional right to a fair trial. *Id.*

A. *The two FBI reports were exculpatory evidence, as they went directly against the prosecution's weak case and were favorable to Ms. Gold.*

A *Brady* violation occurs when exculpatory evidence is suppressed by the prosecution. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). In evaluating a *Brady* violation, a court must examine the cumulative impact of all the evidence. *Kyles v. Whitley*, 514 U.S. 419, 421–22 (1995); *Strickler*, 527 U.S. at 280. The overriding concern of a *Brady* violation is that the interest of justice is served. *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (quoting *Kyles*, 514 U.S. at 421; *Berger v. United States*, 295 U.S. 78, 88 (1935)).

The failure by both the prosecution and the FBI to provide Ms. Gold with crucial evidence negating her culpability, stripped Ms. Gold of her right to a fair trial. Ms. Gold's relief for such an egregious error comes through this Court's recognition of a *Brady* violation.

1. The prosecution's failure to share the two FBI reports was suppression of evidence.

It is irrelevant whether the suppression was willful or inadvertent. *Strickler*, 527 U.S. at 282; *see also United States v. Agurs*, 427 U.S. 97, 1077 (1976); *Bagley*, 473 U.S. at 676. As the gatekeeper of evidence, the prosecution bears the responsibility to gauge the net effect of evidence. *Kyles*, 514 U.S. at 421 (the prosecution must turn over evidence even when it makes their case weaker). The prosecution maintains the obligation to turn over all evidence with any exculpatory value. *Bagley*, 473 U.S. at 676 (holding all favorable and exculpatory evidence must be delivered to the defendant to ensure a fair trial).

It is not the job of the prosecution to act as the judge, jury, and executioner. Yet, by failing to turn over favorable evidence, the prosecution did just that. In *Kyles*, this Court recognized that the prosecution's failure to disclose key eyewitness statements, calls, and tapes in a murder case,

amounted to suppression of evidence. Ms. Gold's case is factually indistinguishable from *Kyles*, where blatantly withholding multiple pieces of favorable evidence would have weakened the case. If Caplow's interview and the anonymous phone call had been turned over, the prosecution's case would have weakened further. However, a weakened case is no excuse for withholding evidence.

Further, the prosecution knew the evidence's exculpatory value. If the prosecution provided details of the FBI reports, reports that named two suspects with motive and connections to Driscoll, a fair trial might have occurred. As this Court recognized in *Bagley*, suppression evidence can impact the outcome at trial and strip a defendant of their constitutional rights. Similar to *Bagley*, where the government failed to turn over payments made to material witnesses, the prosecution, here, failed to turn over any piece of evidence that could have remotely led to Ms. Gold to Brodie and Stevens. Just as this Court has recognized in both *Bagley* and *Kyles*, the failure to provide this evidence was suppression. The prosecution did not meet this basic obligation.

2. The two FBI reports were favorable to Ms. Gold.

Evidence is favorable to a defendant when it provides exculpatory or impeachment value. *Turner*, 137 S. Ct. at 1893 (quoting *Strickler*, 527 U.S. at 281–82) (withholding a minor detail does not rise to the level of exculpatory for *Brady* purposes). To recognize evidence as favorable, the evidence need only possess *some* tendency to help the defense. *Kyles*, 514 U.S. at 437. If disclosed and used appropriately, favorable evidence would "in any reasonabl[e] likelihood affect[] the judgement of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)) (evidence is favorable if it might impact the case as a whole).

Any evidence that provides other named suspects, with motives and connections to Driscoll, is favorable to Ms. Gold. Not only did Caplow name Brodie as a suspect, he spoke to Brodie's known violent tendencies. While Respondent contends that the anonymous phone call

about Stevens was investigated by the FBI, only a preliminary investigation occurred. Both pieces of evidence could have gone to the heart of the case—who killed Driscoll.

In *Turner*, the defense contended a *Brady* violation occurred when the identity of a single witness to a violent, group crime was unknown. However, the withheld evidence was so minor—as there were various other witnesses and participants who confessed to the crime—that it did not rise to the level of favorability needed for *Brady*. Unlike *Turner*, here, the prosecution's case does not rely on multiple eyewitnesses or substantial evidence. Rather, the prosecution grounded their case on Ms. Gold's grievances with HerbImmunity—the exact same grievances shared by Brodie and Stevens. The exculpatory value not found in *Turner* is overwhelmingly present here.

Just as this Court recognized in *Giglio*, the identities of Stevens and Brodie would have likely affected the judgement of the jury. In *Giglio*, the sole means of prosecuting a defendant was a key government witness who was provided a deal for testifying. If the defense knew of the deal in *Giglio*, it could have been used to impeach the witness, leading to a different outcome at trial. Similarly, here, the prosecution had to prove beyond a reasonable doubt that Ms. Gold was the perpetrator. The jury found Ms. Gold guilty, beyond a reasonable doubt, because no other suspects were presented. Ms. Gold sat through a trial in the dark, unaware of multiple other suspects. Ms. Gold lacked vital information, necessary to cast doubt. Therefore, the withheld evidence impacted the jury in accordance with the favorability requirement set by this Court.

3. There is a reasonable probability the outcome at trial would have been different.

Evidence is material when it has a reasonable probability the proceedings would have been different. *Bagley*, 473 U.S. at 682 (finding outcome at trial implicit in requirement of materiality where government did not disclose that law enforcement officers received monetary payments for their testimony). A reasonable probability is "a probability sufficient to undermine confidence in

the outcome." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)) (finding reasonable probability occurred when undisclosed evidence undermined the essence of the State's case). To determine the impact of evidence, courts look at whether admission of the evidence would have troubled the jury and thus, cast the trial in a completely different light. *Kyles*, 514 U.S. at 442, 435.

Any jury would be troubled to convict Ms. Gold beyond a reasonable doubt had they known of Brodie and Stevens. As this Court recognized in *Kyles*, when evidence undermines the prosecution's case, it creates reasonable probability and is, therefore, material. Here, knowledge that two alternate suspects existed would have undermined the prosecution's contention that Ms. Gold was the only person capable of killing Driscoll.

Recognition of the government's inability to succeed without suppressing the evidence in *Bagley* aligns directly with the injustice in the present case. In *Bagley*, the defendant would have been able to present a stronger case had he known about payments to key witnesses. Ms. Gold could have presented a case questioning who the real killer of Driscoll was if she had the knowledge that there were other known suspects. At the heart of a murder case is the question—who did it? The evidence withheld by the prosecution goes directly to this question.

This Court in *Kyles* and *Bagley* did not ask prosecutors to hand over every minuscule piece of evidence. Rather, prosecutors are simply asked to share exculpatory evidence that will allow justice to take its course. Had Ms. Gold been given this evidence prior to trial, there would be no appeal on a *Brady* violation. However, a *Brady* violation has occurred as a result of the prosecution's failure to provide two constitutionally mandated pieces of evidence. It is the job of this Court to recognize such a miscarriage of justice and uphold Ms. Gold's right to a fair trial.

B. *The Fourteenth Circuit erred in its determination that the two FBI reports could not serve as the basis of a Brady violation because they were inadmissible evidence.*

Courts are split on how to approach inadmissible evidence as the basis for a *Brady*

violation. The Fourteenth Circuit incorrectly applied the "key" question approach by not recognizing the overwhelming materiality of suppressed evidence. This Court has the opportunity now to ensure justice takes its course by recognizing the materiality of the FBI reports in applying the "key" question approach. This Court also has the option of applying two other approaches: (1) that *Wood* left the door open for inadmissible evidence or (2) that inadmissible evidence cannot be the basis for a *Brady* violation. If this Court chooses to apply one of the other approaches, both the interview and the anonymous phone call are still bases for a *Brady* claim.

1. The lower court's application of the "key" question was flawed.

Inadmissible evidence may stand as the basis for a *Brady* violation if the evidence could have created a probability for a different result at trial. Courts find suppressed, inadmissible evidence likely to create an alternate outcome at trial when the evidence would have led to the discovery of favorable admissible evidence. *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011). Evidence discovered as a result of inadmissible evidence is favorable if it goes to guilt, punishment or undermines the prosecution's theory of a crime. *United States v. Lee*, 88 Fed. Appx. 682, 684 (5th Cir. 2004) (quoting *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999)) (inadmissible evidence is insufficient if there is sufficient corroborating evidence because that evidence supports a jury's verdict); *Jamison v. Collins*, 291 F.3d 380, 390 (6th Cir. 2002). Favorable evidence is looked at cumulatively to determine if the outcome at trial would have been different. *United States v. Freeman*, 164 F.3d 243, 248 (5th Cir. 1999); *see also Kyles*, 514 U.S. at 421–22. If the cumulative impact of the suppressed evidence would have cast a different light on the trial, it undermines the confidence of a verdict. *Kyles*, 514 U.S. at 434; *see also Spirko v. Mitchell*, 368 F.3d 603, 608 (6th Cir. 2004) (no *Brady* violation when evidence does not impact the trial);

Freeman, 164 F.3d. at 248; *Henness*, 644 F.3d at 325 (inadmissible hearsay is not the basis for a *Brady* violation if it does not lead to any admissible evidence); *Lee*, 88 Fed. Appx. at 685.

The Fourteenth Circuit's application of the "key" question failed to recognize the gravity of the withheld evidence. The prosecution lacked any real corroborating evidence. In *Lee*, the Fifth Circuit acknowledged that if no significant corroborating evidence exists, there is no reasonable probability. Dissimilar to *Lee*, the prosecution here presented no corroborating evidence. The prosecution's contention was that Ms. Gold had a motive to kill Driscoll—the same motive as both Stevens and Brodie. If disclosed, the evidence would have undercut the prosecution's theory and created the requisite doubt to change the outcome at trial.

The Fourteenth Circuit based their decision on the fact that there was only speculation of admissible evidence. While Ms. Gold may only be able to estimate what evidence could have been found, this speculation is a direct result of the prosecution. Without knowledge of the evidence, Ms. Gold was unable to thoroughly investigate Brodie and Stevens.

The Sixth Circuit reasoned in *Henness* that when no other evidence can be found, a *Brady* violation does not occur. Under this reasoning, Ms. Gold has a *Brady* claim as she could have found other persons with information or suspects. Ms. Gold should not be burdened with providing direct details about two suspects she was unaware of. Further, Ms. Gold should not be penalized for the FBI's failure to fully investigate two other suspects with motives and ties to Driscoll.

The relevant standard is "reasonable probability," not "definitive evidence." Two motivated and connected suspects far surpass the requirement of a reasonable probability of a different outcome and therefore, the Fourteenth Circuit erred in their decision.

2. Under the open-door approach, Ms. Gold can establish the basis for a Brady claim.

While the Fourteenth Circuit applied a variation of the "key" question approach, the

majority approach is that *Wood* left the door open, as admissibility is not a prerequisite for a *Brady* claim. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 306 (3rd Cir. 2016). Inadmissible evidence may be material if it leads to the discovery of admissible evidence. *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000) (inadmissible evidence is unusable when other significant pieces of evidence would not change the outcome); *Johnson v. Folino*, 705 F.3d 117, 130 (3rd Cir. 2013); *see also Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 4–5 (1st Cir. 2003) (finding no justification for prosecution to withhold relevant evidence); *United States v. Gil*, 297 F.3d 93, 102–103 (2nd Cir. 2002). A *Brady* claim is established when admissible evidence, discovered as a result of inadmissible evidence, holds the ability to sway the outcome at trial. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) (no *Brady* violation when the defense cannot show how the outcome at trial would be different); *see also Bradley*, 212 F.3d at 567.

With knowledge of both Brodie and Stevens, Ms. Gold would have been able to provide sufficient exculpatory evidence to directly negate the prosecution's feeble case. The Eleventh Circuit, in *Wright*, recognized that admissible evidence under the *Wood* approach need only *possibly* change the outcome at trial. In *Wright*, the affidavit in question was not useful to the defendant and therefore no benefit existed from the inadmissible evidence whereas, here, the evidence would have benefitted Ms. Gold. Ms. Gold would have pursued the investigation, resulting in the finding of material evidence. The benefit to Ms. Gold is exponential. Ms. Gold could have mounted a defense, broken down the prosecution's case, and cast reasonable doubt.

Further, the prosecution's case was so weak at trial that any admissible evidence found as a result would drastically change the outcome. Unlike *Bradley*, where significant serology evidence clearly connected the defendant to a rape and murder, here, there is no significant, convincing evidence the prosecution presented. In *Bradley*, the Court determined that due to the

strength of the serology evidence, there was no possible way for a small amount of admissible evidence to change the outcome. Here, the prosecution's case against Ms. Gold is considerably weaker compared to *Bradley*. There is no DNA evidence. The only evidence the prosecution presented was from an illegal search and privileged testimony. As a result, any admissible evidence Ms. Gold might find from the knowledge of the FBI reports would have an impact on the outcome.

The "leaving the door open" approach in *Wood* provides this Court the opportunity to evaluate the facts as a whole and acknowledge the weight of the withheld evidence. The approach provides Ms. Gold with the rights afforded to her by constitutional guarantee—the same rights the prosecution stripped away.

3. Under the inadmissibility approach, Ms. Gold has a Brady claim.

Inadmissible evidence may be the basis of a *Brady* claim if the evidence can alter the impact at trial. *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995). If inadmissible evidence is readily available to a defendant or a defendant can pursue a reasonable and diligent investigation themselves, no *Brady* claim can be made. *Hoke v. Netherland*, 92 F.3d 1350, 1355–56 (4th Cir. 1996) (a defendant who is aware of essential facts can investigate properly). If the purpose of the inadmissible evidence is to protect victims in accordance with state statutes, it cannot be used for a *Brady* violation. *Jardine v. Dittmann*, 658 F.3d. 772, 776–77 (7th Cir. 2011) (inadmissible evidence is not the basis of a *Brady* claim when a rape shield statute is the reason for inadmissibility).

Few circuits follow the approach that inadmissible evidence is not grounds for a *Brady* violation. As seen in *Jardine* and *Hoke,* the circuits that follow this approach have noted specific reasons for disallowing the *Brady* claim. None of those reasons are applicable to Ms. Gold. Therefore, if this Court follows the inadmissible approach, Ms. Gold has a *Brady* claim.

Without any access to FBI reports, Ms. Gold could not have found any information about Brodie and Stevens on her own. In *Hoke*, the identities of a victim's other sexual partners could have been easily found, but the attorney did not take any steps to locate the information. As the Fourth Circuit noted in *Hoke*, failure to complete an investigation into other possible evidence cannot be grounds for a *Brady* violation. Unlike *Hoke*, Ms. Gold does not have open access to FBI reports, nor does she have resources readily available to FBI agents. Under no circumstance, other than the reports being disclosed, could Ms. Gold have learned about the two other suspects. Therefore, under the Fourth Circuit's reasoning for inadmissibility, Ms. Gold has a *Brady* claim.

The Seventh Circuit also used the inadmissibility approach, but regarding legitimate reasons for inadmissibility. In *Jardine*, the withheld evidence was inadmissible under a Wisconsin rape shield statute. The FBI reports, here, would not have negatively impacted Driscoll the way revealing a rape victim's past sexual history would, like in *Jardine*. If properly investigated, the FBI could have found who killed Driscoll and brought justice to the victim.

Ms. Gold is a reasonably diligent defendant who under no circumstance could have accessed the FBI reports. The courts who have followed the inadmissibility approach combined their determination with other legitimate reasons for disallowing a *Brady* claim. Here, the only possible determination this Court could make under this approach is to grant Ms. Gold access to a fair trial, one with all the evidence and the opportunity to mount a zealous defense.

CONCLUSION

For the foregoing reasons, Petitioner, Ms. Samantha Gold, respectfully requests that this Court reverse the decision of the Fourteenth Circuit Court of Appeals.

Respectfully Submitted,

Team 16
Counsel for Petitioner