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 THE RESPONDENT

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether Federal Rule of Evidence 501 applies to testimony from a psychotherapist regarding her patient's serious threats of harm to an identifiable victim when the therapist previously disclosed the statements to law enforcement under a mandatory duty to report.

II. Whether the Government violates a criminal defendant's Fourth Amendment rights when it searches a small, handpicked pool of offline documents on a flash drive that a private party previously searched, while the officer is substantially certain of the device's contents.

III. Whether the Government violates *Brady v. Maryland* when it does not disclose inadmissible hearsay evidence when that information would not have directly led to admissible evidence or altered the result at trial.

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The district court's bench opinion denying Petitioner's motion to suppress is in the record on pages 40 to 41. The district court's decision to deny Petitioner's motion for post-conviction relief is in the record on pages 48 through 49. The United States Court of Appeals for the Fourteenth Circuit affirmed the district court, on all issues, on pages 50–59 of the record.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provision is provided below:

The Fourth Amendment to the Constitution reads:

> 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.

STATEMENT OF THE CASE

I. Factual History

Dr. Pollak is a board-certified psychotherapist who begins each session with a new patient by telling them that she must disclose any serious threats of harm to a known victim. (R. 21.) Dr. Pollak treated Samantha Gold ("Petitioner") since 2015 and diagnosed Petitioner with Intermittent Explosive Disorder ("IED"), which is characterized by repeated episodes of aggressive, impulsive, or violent behavior. (R. 3–4, 17.)

On May 25, 2017 at 12:00 PM, Petitioner appeared unkempt, disheveled, and aggressive when she arrived at her therapy appointment with Dr. Pollak. (R. 3.) During this hour-long session, Petitioner paced all around the room and became exceedingly agitated to a level unseen by Dr. Pollak. (R. 4, 18.) Petitioner was enraged about her involvement in HerbImmunity, a multi-level marketing company that Tiffany Driscoll ("Driscoll") recruited her to join. (R. 4.) Upset that she

was in $2,000 worth of debt to the company and feeling that Driscoll took advantage of her, Petitioner reached a breaking point. (R. 4.) She bolted out of Dr. Pollak's office hollering, "I'm so angry. I'm going to kill her. . . . After today, I'll never have to see or think about her again." (R. 4, 19.)

Believing that Petitioner seriously threatened Driscoll's life, Dr. Pollak made a professional judgement that Petitioner was a dangerous patient. (R. 22.) Under Boerum Health and Safety Code §711, Dr. Pollak is required to inform law enforcement. (R. 2, 19.) As such, she alerted the Boerum Police Department by calling them a mere 15 minutes after Petitioner stormed out of her office. (R. 3–5, 19.) Investigating the threat, Officer Fuchs discovered Petitioner at her dorm where she appeared calm. (R. 5.) After finding Driscoll, Officer Fuchs cautioned Driscoll about the threats made to her wellbeing. (R. 5.) However, he determined Driscoll was not in any imminent danger as she sat attentive in class. (R. 5.)

A little more than three hours after Petitioner's session with Dr. Pollak, her roommate Jennifer Wildaughter ("Wildaughter") went to the Livingston Police Department and spoke with Officer Yap. (R. 6.) Wildaughter illustrated to Officer Yap how Petitioner came home extremely agitated and exceptionally upset with Driscoll and her involvement with HerbImmunity. (R. 6, 24.) She described how Petitioner rushed out of the apartment, leaving her computer wide open on her desk. (R. 6, 24.) Concerned about Petitioner, Wildaughter browsed Petitioner's computer. (R. 6, 24.) Wildaughter spotted a folder called "HerbImmunity," which had three sub-folders: "receipts," "confirmations," and "customers." (R. 6, 24.) In the "confirmations" sub-folder, Wildaughter discovered a shipping confirmation for a package sent to Driscoll the day before. (R. 6.) Inside the "customers" folder contained another sub-folder titled "Tiffany Driscoll." (R. 6.) Wildaughter was immediately disturbed as she found alarming photographs taken of Driscoll all over town. (R. 6,

25.) Notably, these photos were taken from a distance, like a stalker. (R. 25.) This led Wildaughter to open the "For Tiff" sub-folder. (R. 6, 26.) Inside was a message to Driscoll, a recipe for chocolate-covered strawberries, and a reference to strychnine—rat poison. (R. 6, 26.) Sufficiently disturbed, Wildaughter came to the conclusion that Petitioner was going to poison Driscoll. (R. 6, 26.)

Out of fear for Driscoll's safety, Wildaughter copied Petitioner's desktop onto a flash drive and turned it over to the police. (R. 6, 26.) Wildaughter told Officer Yap that the drive contained files demonstrating that Petitioner planned to poison Driscoll. (R. 6, 26–27.) Wildaughter explained the note that was addressed to Driscoll as well as the photographs and text documents which again referenced strychnine. (R. 6, 26–27.) She informed Officer Yap that everything of concern was on the flash drive. (R. 6, 27.) After Wildaughter left, Officer Yap viewed everything on the drive. (R. 6.) He confirmed Wildaughter's fear: Petitioner planned to poison Driscoll. (R. 6.)

Later that evening, Driscoll's father returned home late from work. (R. 13.) He discovered his 20-year-old daughter lifeless at the bottom of the stairs. (R. 13.) Initially investigators believed Driscoll died from accidentally slipping down the stairs and smashing her head. (R. 14.) However, two days later, the FBI arrested Petitioner in connection with Driscoll's death. (R. 14.) The toxicology report revealed strychnine in Driscoll's system. (R. 14.) A search of the Driscoll residence revealed a box of chocolate-covered strawberries, delivered that day, with the same note found on Petitioner's computer. (R. 14.) The authorities suspected Petitioner poisoned the strawberries and sent them to Driscoll to retaliate against her for recruiting Petitioner to join HerbImmunity. (R. 14.)

On June 2, 2017, Mary Baer, a special agent with the FBI interviewed Chase Caplow in the course of Driscoll's murder investigation. (R. 11, 44.) Caplow, a fellow student at Joralemon University and participant in HerbImmunity, claimed that Driscoll owed money to Martin Brodie, an upstream distributor within the company. (R. 11.) Caplow alleged that Brodie could be violent, but he could not support this accusation. (R. 11.) Special Agent Baer planned to interview Brodie to determine if the information required further investigation. (R. 11.)

One month later, Mark St. Peters, a special agent with the FBI, received an anonymous phone call concerning Driscoll's death. (R. 12, 44.) The anonymous tip speculated that Belinda Stevens killed Driscoll, as both were involved in HerbImmunity. (R. 12.) Strictly following FBI protocol, St. Peters pursued the tip. (R. 12.) He determined the lead was unreliable and did not require more attention. (R. 12.) Thus, the FBI concluded that only one person could have killed Driscoll: Petitioner Samantha Gold. (R. 1, 51.)

II. Procedural History

A grand jury, in the Eastern District of Boerum, indicted Petitioner with knowingly and intentionally depositing for mailing or delivery by mail, a package containing poisoned food items, with the intent to kill or injure another, and which resulted in the death of another, in violation of 18 U.S.C. § 1716(j)(2), (3), and 3551 et seq. (R. 2, 51.) After the indictment, Petitioner filed a motion to suppress. (R. 51.) On January 8, 2018, the district court held an evidentiary hearing. (R. 15–29.) The next day, the district court denied Petitioner's motion. (R. 30–41.) Less than a month later, the district court sentenced Petitioner to life in prison. (R. 51.) Seven months later, on August 22, 2018, Petitioner filed a motion for post-conviction release. (R. 42, 52.) After a hearing, the district court denied Petitioner's motion. (R. 42–49.) Five months after the district court denied Petitioner's motion for post-conviction relief, she appealed her conviction and sentence. (R. 51.)

On February 24, 2020, the Fourteenth Circuit affirmed the district court on all issues. (R. 57.) Almost a year later, this Court granted Petitioner's petition for certiorari. (R. 60.)

SUMMARY OF THE ARGUMENT

This is a case about Government officials acting consistently with the Federal Rules of Evidence, the Fourth Amendment, and *Brady v. Maryland*. Federal Rule of Evidence 501 protects confidential communications between a patient and their psychotherapist. But this Court emphasized that in certain situations the privilege "must give way." This case is one of those instances this Court predicted. During a session with Dr. Pollak, Petitioner, enraged and upset, declared that she was going to kill Driscoll. Having never seen the Petitioner as agitated and irate, Dr. Pollak—under a mandatory duty to report—immediately notified law enforcement of the threat to Driscoll's life. Once Dr. Pollak disclosed the threats, they became immune from confidentiality—a requirement for the privilege's protection. Thus, the psychotherapist patient privilege does not shield Petitioner's serious threats of killing Driscoll, and Dr. Pollak's testimony is admissible.

The Fourth Amendment protects against unreasonable searches and seizures. However, these protections only extend to government actors. A private party does not violate the Fourth Amendment when it conducts a search. Under the private search doctrine, once a private party frustrates an individual's expectation of privacy, the Fourth Amendment does not prohibit the government's subsequent use of that information. Wildaughter frustrated Petitioner's expectation of privacy by searching her computer. Further, Officer Yap did not exceed the scope of Wildaughter's search because he searched within the same closed container and was substantially certain of its contents. Because Officer Yap's search did not exceed the scope of the Wildaughter's search, the Government did not violate Petitioner's Fourth Amendment.

Brady v. Maryland requires the prosecution to disclose evidence favorable to an accused when the evidence is material either to guilt or to punishment. However, evidence is material only when there exists a reasonable probability that the result at trial would have been different had the government disclosed the evidence. The FBI reports here are not material nor are they evidence at all. The reports are inadmissible hearsay. Petitioner offers nothing more than speculation to show that the reports would have led directly to admissible evidence, and the independent corroborating evidence sufficiently supports Petitioner's conviction. Thus, disclosure of the reports would not have changed the result at trial. For these reasons, this Court should affirm the Fourteenth Circuit on all issues.

ARGUMENT

I. DR. POLLAK'S TESTIMONY IS ADMISSIBLE BECAUSE THE PSYCHOTHERAPIST PRIVILEGE DOES NOT APPLY AND PETITIONER'S SERIOUS THREATS OF HARM TO DRISCOLL FALL UNDER THE DANGEROUS PATIENT EXCEPTION.

This Court should affirm the circuit court's decision to admit Dr. Pollak's testimony for three reasons. First, the psychotherapist patient privilege does not apply to Petitioner's threats because this Court noted that the privilege "must give way" when a patient seriously threatens to kill another. Second, given that the psychotherapist privilege protects confidential communications, Boerum's mandatory reporting laws prohibits Petitioner's threats from confidentiality—a prerequisite for the privilege. Finally, if the psychotherapist privilege applies to Petitioner's threats, Dr. Pollak's testimony is admissible under the privilege's dangerous patient exception as Petitioner seriously uttered her threats and disclosure was the only means of averting harm.

A. Courts recognize privileges to a very limited extent because excluding relevant evidence must have a public good surpassing the need to ascertain the truth.

The common law, as interpreted by United States courts in the light of reason and experience, governs a claim of privilege unless the United States Constitution, a federal statute, or a Supreme Court rule provides otherwise. Fed. R. Evid. 501. The primary assumption is that there is "a general duty to give what testimony one is capable of giving" and that any exemptions which may exist are distinctly exceptional. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

Such privileges must be strictly construed and recognized only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for "ascertaining the truth." *Elkins v. United States*, 364 U.S. 206, 234 (1960). Therefore, testimonial privileges are not lightly created nor expansively construed, for they are in "derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Moreover, testimonial exclusionary rules and privileges contrive the "fundamental principle that the public . . . has a right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50 (1980).

B. This Court announced that in certain circumstances the psychotherapist-patient privilege "must give way" when a patient seriously threatens to harm another.

This Court emphasized that in certain situations the psychotherapist privilege cannot protect a defendant's serious threats of physical violence to another. *See Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996). This is one of the situations that the Court predicted. This Court in *Jaffee* unequivocally questioned the privilege's application to future cases. *Id.* at 18. The Court explained that "it is neither necessary nor feasible" to delineate its full contour in a way that would "govern all conceivable future questions in this area." *Id.* And, the rule that authorizes the recognition of new privileges on a "case-by-case" basis makes it appropriate to define the details of a new

privilege. *Id.* Further, there are situations in which the privilege "must give way," for example, if a "serious threat of harm to the patient or to others" can be averted "only by means of a disclosure by the therapist." *Id.* at n.19 (emphasis added). As such, the privilege does not shield Petitioner's threats to kill Driscoll, and Dr. Pollak's testimony is admissible.

1. Petitioner's serious threats of harm to kill Driscoll exemplifies this Court's belief that the psychotherapist privilege "must give way" in appropriate circumstances.

When a patient makes a serious threat of harm to another, the psychotherapist privilege "must give way." *Id.* (emphasis added). In *Jaffee*, Redmond, a police officer, arrived at an apartment complex after receiving a call about a fight in progress. *See id.* at 4. As several men left the building, one waiving a pipe, Redmond drew her weapon. *Id.* One man, Ricky Allen, chased the others with a butcher knife. *Id*. Allen ignored Redmond's commands to drop the knife, and Redmon eventually shot Allen—killing him. *Id.* During discovery, Allen's estate learned that after the shooting, Redmond participated in numerous counseling sessions with a licensed social worker, Karen Beyer. *Id.* at 5. Allen's estate wanted to use Beyer's notes from the session during cross examination. *Id.* Redmond and Beyer refused to turn over the notes, claiming a psychotherapist-patient privilege. *Id.*

The Court recognized the psychotherapist privilege. *Id.* at 15. The Court reasoned it is appropriate for the federal courts to recognize a psychotherapist privilege because all states, and the District of Columbia, enacted some form of psychotherapist privilege. *Id.* at 12. Furthermore, the Court noted denying the privilege would "frustrate the purposes of the state legislation" that enacted the laws. *Id.* at 13. Therefore, 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. *Id.* (emphasis added). But applying the privilege to future cases is an open question. *See id.* at 18.

The psychotherapist privilege must give way as Petitioner seriously uttered threats to kill Driscoll. First, unlike the civil action in *Jaffee*, this case is a criminal prosecution. (R. 1.) Second, unlike Redmond in *Jaffee*, here, Petitioner threated to kill another person. (R. 4, 18–19.) *Jaffee*, 518 U.S. at 5. Here, Petitioner's counseling sessions are distinct from the sessions in *Jaffee* because Petitioner's session occurred before Driscoll's death. (R. 3–4, 17–19, 51.) *Jaffee*, 518 U.S. at 3 (explaining that after accidentally killing a man, Redmond received extensive counseling from a licensed clinical social worker) (emphasis added).

At its core, the Court resolved *Jaffee* because "all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege." *Jaffee*, 518 U.S. at 12. In divergence from the states in *Jaffee*, Boerum did not enact any psychotherapist privilege laws. In fact, Boerum enacted a mandatory reporting law for mental health professionals. (R. 2, 19, 21–22.) Unlike *Jaffee* where the "likely evidentiary benefit that would result from the denial of the privilege is modest," here, the "likely evidentiary benefit" would be monumental—allowing essential testimony to discover the truth. *Jaffee*, 518 U.S. at 11; *see also United States v. Mazzola*, 217 F.R.D. 84, 88 (D. Mass. 2003) (reasoning that there is a great evidentiary benefit of denying the psychotherapist privilege and allowing defense counsel to access medical records to effectively prepare and cross examine). Hence, the psychotherapist privilege does not shield Petitioner's threats, and Dr. Pollak's testimony is admissible.

2. The psychotherapist privilege does not apply because Boerum's mandatory reporting law prohibits Petitioner's threats from confidentiality.

When a patient has no reasonable expectation of privacy in their threats, they cannot satisfy *Jaffee*'s confidentiality requirement. *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008). Auster, a retired police officer received treatment for paranoia, anger, and depression. *Id.* at 313. Over the years, Auster threatened numerous people, and made these threats during session with his two therapists, Davis and Dr. Ginzburg. *Id.* In 2006, Cochran Management Services Inc., "CCMSI," who managed Auster's compensation benefits, stopped paying a portion of Auster's benefits. *Id.* at 313–14. During a session with Davis, Auster threatened CCMSI personnel, city authorities and police officials. *Id.* at 314.

Under a duty to report, Davis sent a CCMSI employee, who was responsible for Auster's claim, a letter warning him that if CCMSI did not pay Auster's compensation, Auster would "carry out his plan of violent retribution against a list of persons." *Id.* Davis also alerted CCMSI that Auster stated that he had "stockpiles of weapons and supplies to provide the basis for his actions." *Id.* Auster marked October 2 as the date of violent retribution. *Id.* When the CCMSI employee received Davis' letter, he bought a gun, contacted the police, who notified the FBI. *Id.* Before trial, the district court suppressed Auster's statements made to Davis under the psychotherapist privilege. *Id.*

The Fifth Circuit ruled that the psychotherapist privilege did not protect Auster's threats. *Id.* at 320. The court articulated that without a reasonable expectation of confidentiality, there is no privilege. *Id.* The Fifth Circuit reasoned that the Supreme Court "unambiguously limited" the privilege to instances in which it covers "*confidential* communications" made to licensed psychiatrists and psychologists, and "*confidential* communications" made to licensed social

workers. *Id.* at 315 (emphasis original). The court elaborated that Auster knew—when he made his threats—that his therapist would convey the threats to CCMSI. *Id.* Furthermore, Auster's therapists repeatedly informed him that his violent threats would be communicated to the potential victims. *Id.* at 315–316. Because Auster knew his therapists would relay his threats, Auster had "no reasonable expectation of confidentiality." *Id.* at 316.

The Fifth Circuit expressed policy reasons for denying Auster's privilege claim. The court explained that if the therapist's duty to warn the victims has not already "chilled the patient's willingness to speak candidly," it is doubtful that the therapist's testimony will also do so. *Id.* at 318. Once the therapist warns the target, he or she is under no obligation to keep the warning confidential. *Id.* Further, "it is unrealistic" to believe that he or she will keep the warning confidential; there are many people who the target would tell. *See id.* In criminal cases, "any marginal increase in the admissibility of probative evidence" is "especially valuable." *Id.* at 319. As such, the Fifth Circuit held that the psychotherapist privilege did not apply because Auster conceded actual knowledge that his therapists would convey his threats, and thus, the threats were not "confidential." *See id.* at 320.

Petitioner had no reasonable expectation of privacy in her threats and thus cannot satisfy *Jaffee's* confidentiality requirement. Similar to the therapist in *Auster*, Dr. Pollak was under a duty to warn potential victims. (R. 2, 19, 21–22, 51.) *Auster*, 517 F.3d at 313. Not only did Dr. Pollak have a duty to warn Driscoll, but identical to the therapist in *Auster*, Boerum's mandatory reporting law required Dr. Pollak to convey Petitioner's threats to the police. (R. 19–20, 52.) *Auster*, 517 F.3d at 314.

In essence, the Fifth Circuit decided *Auster* because the defendant had "actual knowledge" that his therapists would recount the threats—defective of the privilege's confidentiality

requirement. *See Auster*, 517 F.3d at 320. Here, Petitioner had more knowledge of Dr. Pollak's duty to warn than the defendant in *Auster* because Dr. Pollak explained to Petitioner that "in the event of the disclosure of a serious threat of harm to an identifiable victim, I will have a duty to protect the intended victim."[1] (R. 21.) *Auster*, 517 F.3d at 315, 320. Like the Fifth Circuit reasoned in *Auster*, Petitioner had no "reasonable expectation of confidentiality" because Boerum enacted a mandatory reporting law, Dr. Pollak informed Petitioner of her duty to warn, Dr. Pollak called the police after Petitioner's threats, and the police quickly warned Driscoll. (R. 2, 5, 19, 21, 52.) *Auster*, 517 F.3d at 316; *see also United States v. Martinez*, No. 8-43, 2009 WL 10675091 at *5 (M.D. Fla. Oct. 2, 2009) (finding that the psychotherapist privilege was inapplicable when the defendant had no reasonable basis to conclude his statements were confidential because his therapists informed him that his statement would be disclosed to third parties); *People v. Kailey*, 333 P.3d 89, 98 (Colo. 2014) (holding that the psychotherapist privilege did not apply because the threats were not confidential as the therapist was under a mandatory duty to report).

Once Dr. Pollak alerted the police, Petitioner's threats, or secrets, became public. (R. 5, 19, 52.) After Dr. Pollak learned about Petitioner's vicious threats, two more people knew about the threats: Officer Fuchs and Driscoll. (R. at 5.) Nothing prevented Driscoll from telling the school, her friends, or her parents. Unfortunately, we do not know if Driscoll told anyone else because her father found her lifeless body sprawled out on the bottom of his stairs, just hours after Petitioner threated to kill Driscoll. (R. 51.) Thus, once Petitioner divulged her secret threats to Dr. Pollak, the "secret [was] out it [was] out for all time and cannot be caught again like a bird and put back

[1] Q: At any time during this period, did you tell [Petitioner] that you had the legal duty to break your psychotherapist-patient privilege if she made a threat to harm herself or to harm others?
A: Yes, I'm pretty sure that I did. My standard practice is that whenever I start seeing a new patient, I advise them immediately that in the event of the disclosure of a serious threat of harm to an identifiable victim, I will have a duty to protect the intended victim. (R. 21 lines 1–9.)

in its cage." *People v. Bloom*, 193 N.Y. 1, 10 (N.Y. 1908). Therefore, the psychotherapist privilege does not protect Petitioner's threats to kill Driscoll as the statements were not confidential.

C. The dangerous patient exception admits Dr. Pollak's testimony because Petitioner seriously uttered her threats and disclosure was the only means of averting harm.

The dangerous patient exception to the psychotherapist privilege applies when the threat was serious when uttered and disclosure was the only means of averting harm. *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998). There, Glass suffered from mental illness and admitted himself for treatment. *Id.* at 1357. Dr. Darbe, a psychotherapist, examined Glass as he threatened that "he wanted to get in the history books like Hinkley [sic] and wanted to shoot Bill Clinton and Hilary [sic]." *Id.* Later, Dr. Darbe released Glass as he agreed to outpatient treatment in his dad's home. *Id.* Ten days after his release, Glass left his father's home. *Id.* A nurse notified law enforcement, and the Secret Service subsequently contacted Dr. Darbe—who relayed Glass' threats. *Id.*

The Tenth Circuit extended the psychotherapist privilege to Glass' threats and recognized the dangerous patient exception. *Id.* at 1360. The Tenth Circuit noted that when Glass made his threats, Dr. Darbe did not contact the authorities. *Id.* at 1359. Thus, the record did not give the court a basis of how Glass' threats were "a serious threat of a harm which could only be averted by disclosure." *See id.* The court also acknowledged that there was no evidence of an affirmative effort by Dr. Darbe to avert the threat of harm or how the Secret Service only averted the threat through disclosure. *Id.* The Tenth Circuit ultimately ruled that the psychotherapist privilege protected Glass' statements. *Id.* at 1360. However, the Tenth Circuit acknowledged the dangerous patient exception. *Id.*

The dangerous patient exception applies when a medical professional immediately divulges a patient's threats to law enforcement. *United States v. Hardy*, 640 F. Supp. 2d 75, 80 (D.

Me. 2009). In *Hardy*, while at the hospital, the defendant suffering from mental illness threatened to kill President Bush. *See id.* at 77. One of the hospital's employees called the Secreted Service to report the threat. *Id.* The District of Maine found that the medical professional "immediately informed" the Secret Service of the threat. *Id.* at 80. Therefore, the court ruled that the dangerous patient exception applied to the defendant's threat. *See id.*

The dangerous patient exception to the psychotherapist privilege applies because Petitioner seriously uttered her threats and disclosure was the only means of averting harm. Dr. Pollak is unlike the psychotherapist in *Glass* because Dr. Pollak immediately informed the police. (R. 5.) *Glass*, 133 F.3d at 1357. She called the police department 15 minutes after Petitioner's session because she believed Petitioner was capable of killing Driscoll. (R. 5, 19.) Moreover, in *Glass* the defendant was discharged and confined to father's home, and a nurse did not notify the Secret Service until 10 days after the initial threats. *Glass*, 133 F.3d at 1359. Here, Petitioner had no travel restrictions and could carry out her threats; making Dr. Pollak's disclosure the only means of averting harm to Driscoll. (R. 4.) *Glass*, 133 F.3d at 1357. The Tenth Circuit ruled that the privilege applied even though there was "hardly an indication of a threat which can only be averted by means of disclosure." *Glass*, 133 F.3d at 1369.

Here, the indications—from the record—are far greater than the indication in *Glass* because this record demonstrates that Petitioner's threats were "serious when it was uttered" and "its disclosure was the only means of averting harm." (R. 4–5, 18–19, 22, 52.) *Glass*, 133 F.3d at 1360. Notably, Dr. Pollak's session is distinct from the session in *Glass* because Dr. Pollak made a "professional judgment" that Petitioner "was displaying the signs of a dangerous patient . . . ." (R. 22.) *Glass*, 133 F.3d at 1359. Further, unlike the defendant in *Glass*, Dr. Pollak observed that Petitioner "was disheveled and unkempt" and that she "never saw [Petitioner] as agitated." (R. 18.)

Glass, 133 F.3d at 1357. Dr. Pollak also "believed that [Petitioner] was capable of harming Tiffany Driscoll . . . ." (R. 19.)

Dr. Pollak made an affirmative effort to avert the threat to Driscoll's life, unlike the therapist in *Glass*. There, the Tenth Circuit explained that there was no "evidence of an affirmative effort by the psychotherapist to avert the threat of harm . . . ." *Glass*, 133 F.3d at 1359. Here, the record demonstrates a "an affirmative effort by the psychotherapist to avert the threat of harm": Dr. Pollak "feared that Samantha, [Petitioner] might actually try to harm herself or Tiffany. So after the session ended, I called the Police Department to report a dangerous patient as required under Boerum Health and Safety Code Section 711." (R. 19.) *Glass*, 133 F.3d at 1359. Therefore, the dangerous patient exception to the privilege should apply to Petitioner's threats.

The dangerous patient exception applies because Dr. Pollak immediately contacted law enforcement. Dr. Pollak is similar to the medical professional in *Hardy* because Dr. Pollak immediately called the police after Petitioner's session. (R. 3–5.) *Hardy*, 640 F. Supp. 2d at 80. The *Hardy* court ruled that the dangerous patient exception applied because of the seriousness of the defendant's threats. *See Hardy*, 640 F. Supp. 2d at 80. Here, there is more evidence of the serious nature of Petitioner's threats: Dr. Pollak warned the police 15 minutes after Petitioner stormed out of her session, Dr. Pollak believed Petitioner was capable of hurting Driscoll, the police arrived at Petitioner's dorm within hours after Petitioner's session, and the police searched for Driscoll's location and warned her about the threats to her life. (R. 4–5, 19.)

This Court in *Jaffee* emphasized that in certain situations, the psychotherapist privilege "must give way." *Jaffee*, 518 U.S. at 18 n.19. This is one of those situations. Dr. Pollak's testimony is admissible because Petitioner's threats were not confidential and the dangerous patient exception to the privilege applies. Extending the privilege would contradict this Court's concern

that privileges are "in derogation of the search of truth." *Nixon*, 418 U.S. at 710. Therefore, the Government respectfully requests that this Court affirms the circuit court's decision.

II. THE GOVERNMENT DID NOT VIOLATE PETITIONER'S FOURTH AMENDMENT RIGHTS BECAUSE OFFICER YAP LIMITED HIS SEARCH TO A SMALL, DEFINED POOL OF OFFLINE DOCUMENTS AND HE WAS SUBSTANTIALLY CERTAIN OF WHAT WAS ON THE FLASH DRIVE.

The Government did not violate Petitioner's Fourth Amendment rights when Officer Yap searched the flash drive that Wildaughter, a private party, gave to him and searched. Officer Yap was substantially certain of the flash drive's contents because of his expertise, training, and Wildaughter's warnings. Further, Wildaughter frustrated Petitioner's expectation of privacy when she searched Petitioner's computer. Thus, this Court should affirm the circuit court's decision that the Government did not violate Petitioner's Fourth Amendment.

A. The protections of the Fourth Amendment extend only to government action and are wholly inapplicable to searches by a private individual.

The Fourth Amendment protects 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. However, Fourth Amendment protections extend only to government action. The Fourth Amendment is "wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Thus, when a private party provides police with evidence obtained in the course of a private search, the police need not to "stop her or avert their eyes." *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971). Once a private party frustrates an individual's expectation of privacy in particular information, the Fourth Amendment does not prohibit the government's subsequent use of that information, even if obtained without a warrant. *Jacobsen*, 466 U.S. at 116.

As such, a warrantless law-enforcement search conducted after a private search "must be tested by the degree to which [it] exceeded the scope of the private search." *Id.* at 115.

B. A warrantless law-enforcement search conducted after a private search does not violate the Fourth Amendment if the officer is substantially certain of what is inside the container.

Following *Jacobsen*, this Court has not ruled on how the private search doctrine applies to digital devices. With digital devices, "the unit of measurement could be as narrow as the specific images and videos enlarged and viewed by the private citizen, or as broad as the entire [digital device], or somewhere in the middle, such as a photo folder/directory or all thumbnail images scrolled through." *United States v. Suellentrop*, No. 17-435, 2018 WL 4693082, at *9 (E.D. Mo. July 23, 2018), *report and recommendation adopted sub nom. United States v. Suellentrop*, No. 17-435, 2018 WL 3829798 (E.D. Mo. Aug. 13, 2018).

Courts following the broad approach to the private search doctrine held that officers do not exceed the scope of a private search if they examine a closed container not opened by the private individual. *Rann v. Atchison*, 689 F.3d 832, 836–37 (7th Cir. 2012). Further, officers do not exceed a private search when an officer is "already substantially certain of what is inside that container based on the statements of the private searches, their replication of the private search and their expertise." *Id.* This broad standard applies to containers left unopened by the private search because the defendant's expectation of privacy in the unopened container was "already frustrated because the contents were rendered obvious by the private search." *Id.* at 837.

1. Officer Yap did not exceed the scope of Wildaughter's search because it was within the same container.

"A search of any material on a computer disk is valid if the private party who conducted the initial search viewed at least one file on the disk." *Runyan*, 275 F.3d at 465. In *Runyan*, the defendant's ex-wife gave the police 22 CDs, 10 ZIP disks, and 11 floppy disks that she took from the defendant's ranch after discovering they contained child pornography. *Id.* at 453. The police subsequently examined more files on the disks than the ex-wife, and the Fifth Circuit held the police did not exceed the scope of the private search. *Id.* at 465. The Fifth Circuit reasoned that police would be disinclined to examine containers previously opened by private parties for fear of coming across important evidence that private searchers did not happen to see if doing so would subject that evidence to suppression. *Id.* Further, a private party frustrates an individual's expectation of privacy in the contents of the container when the private party opens it. *Id. See Jacobsen*, 466 U.S. at 119.

A more detailed examination of a digital device does not exceed the scope of the private search. *United States v. Jeremias*, No. 10-62, 2011 WL 2414209, at *28 (W.D.N.C. April 29, 2011). In *Jeremias*, the defendant's ex-wife discovered computer disks containing child pornography while looking for the defendant's financial records. *Id.* at *5. She subsequently copied the disks onto her computer, in order to make copies, and turned over both the originals and the copies to the police. *Id.* The police viewed all the disks and conducted a more detailed examination. *Id.* at *6. The Western District of North Carolina ruled that a more thorough examination of the computer disks did not exceed the scope of the private search because the ex-wife testified that she examined all of the computer disks, both the originals and the copies. *Id.* at *26.

The government does not exceed the scope of a private search when the information it learns aligns with the private party's testimony. *See United States v. Guindi*, 554 F. Supp. 2d 1018, 1025 (N.D. Ca. 2008). In *Guindi*, the government searched five DVDs after the private searcher only opened each file but did not reach each document contained in a given file. *Id.* at 1020. The Northern District of California held that the government search did not exceed the scope of the private search. *Id.* at 1025. The court reasoned that this was not a situation where the government reviewed more disks than the private searchers, and the subsequent search enabled the government to learn something that it only learned from the private searcher's testimony. *Id.*

Once Wildaughter searched Petitioner's computer, Wildaughter frustrated Petitioner's expectation of privacy in the contents of her desktop. Similar to the police in *Runyan*, who viewed more files on the disks than the private searcher, Officer Yap viewed more files on the flash drive than Wildaughter. (R. 6.) *Runyan*, 275 F.3d at 465. However, the fact that Officer Yap viewed more files than Wildaughter is not constitutionally problematic because *Runyan* noted that police do not exceed the private search when they examine more items within a closed container than the private searchers did. (R. 6.) *See Runyan*, 275 F.3d at 464. The closed containers in *Runyan* included CDs, ZIP disks, and floppy disks. Here, a single offline flash drive limited Officer Yap's search. (R. 6.) Because Wildaughter viewed at least one file on the flash drive, Officer Yap's search did not exceed the scope of the private search.

Officer Yap's more detailed inspection of the flash drive did not exceed the scope of Wildaughter's search. Like the police in *Jeremias*, who conducted a more detailed examination of the computer disks, Officer Yap's search of the flash drive was more detailed than Wildaughter's. (R. 6.) Officer Yap viewed a handful of additional files on the flash drive that Wildaughter did not view, while the officer in *Jeremias* viewed thousands of additional images. (R. 6.) *Jeremias*, 2011

WL 2414209, at *6. Further, while the government search in *Jeremias* took months, Officer Yap's search was done on the same day he received the flash drive. (R. 6.) Just as the Western District of North Carolina held that the more detailed government search did not exceed the scope of the private search, this Court should hold the same.

Officer Yap discovered evidence on the flash drive only from Wildaughter's vivid description of its contents. When Wildaughter brought the flash drive to Officer Yap, she informed him of the concerning photographs and text documents she uncovered on Petitioner's computer. (R. 6, 24–25.) Wildaughter told Officer Yap that she browsed through the documents and files on the computer, leading her to fear that Petitioner was going to poison Driscoll. (R. 6, 26.) After conducting his own search of the flash drive, Officer Yap corroborated Wildaughter's biggest fear: Petitioner was planning to poison Driscoll. (R. 6.) Similar to *Guindi*, where the private searcher did not review each document on the DVD's, Wildaughter did not view each document on the flash drive. (R. 6.) *Guindi*, 554 F. Supp. 2d at 1020. However, because this is not a case where Officer Yap viewed more digital devices than Wildaughter and the information he learned aligned with Wildaughter's statements, his search did not exceed the scope of the private search.

2. Officer Yap was substantially certain of what was on the flash drive because of Wildaughter's statements, his corroboration of Wildaughter's search, and his expertise.

Police do not exceed the scope of a prior private search when they are substantially certain of what is inside the container. *Runyan*, 275 F.3d at 463. While the Fifth Circuit in *Runyan* was presented with a situation where officers examined more files on a previously searched disk, the police in that case also viewed extra disks that the private searcher did not view. *Id.* With regard to the disks that the private searcher did not examine, the Fifth Circuit held that the police do not exceed the scope of the private search when they are substantially certain of the container's

contents. *Id.* Applying that guideline, the court determined that the police were not substantially certain of the disks' contents because there was nothing on the outside of any of the disks indicating its contents and the private searcher did not know what was on the disks. *Id.* at 464.

The government is "substantially certain" when the private searcher knows what is on the device. *Rann*, 689 F.3d at 838. In *Rann*, the defendant's daughter, S.R., turned over a memory card containing pornographic images of her to the police after reporting that the defendant sexually assaulted her. *Id.* at 834. Subsequently S.R.'s mother gave the police a zip drive that contained additional pornographic images of S.R. and K.G., the defendant's stepdaughter. *Id.* The Seventh Circuit held that the police were substantially certain the devices contained child pornography, and the officers did not exceed the scope of the private search because S.R. and her mother knew what was on the digital devices when they delivered them to the police. *Id.* at 838.

Even if the files that Wildaughter did not examine are considered unopened containers, Officer Yap's search does not violate the Fourth Amendment because he was substantially certain of what was on the flash drive. The standard set forth in *Runyan* notes that substantially certain is based on the statements of the private searchers, the officer's replication of the private search, and the officer's expertise. *Runyan*, 275 F.3d at 463. Here, based on Wildaughter's statements, his replication of Wildaughter's search, and his expertise, Officer Yap was substantially certain of what was on the flash drive. (R. 6.)

When Wildaughter gave the flash drive to Officer Yap, she told him that she feared Petitioner was planning to poison Driscoll. (R. 6, 27.) Wildaughter specifically highlighted how she accessed the disturbing images and text documents. (R. 6, 25–26.) A single flash drive that contained a small, offline pool of documents limited Officer Yap's search as he replicated it. (R. 6.) He viewed a few extra files which Wildaughter did not view, but as noted in *Runyan*, viewing

other files on a privately searched disk is not constitutionally problematic. *Runyan*, 275 F.3d at 464. For eight years, Officer Yap served as the head of the Livingston Police Department's digital forensics unit. (R. 34.) Officer Yap relied on his experience and expertise to conclude what the drive contained. In *Runyan*, there was nothing on the outside of any of the disks indicating their contents and the private searcher did not know what the disks contained. *Runyan*, 275 F.3d at 464. Here, the opposite occurred. The files on the flash drive were labeled, and Wildaughter knew what flash drive contained because she downloaded it herself. (R. 6, 24–26.)

Officer Yap's search of the flash drive did not exceed Wildaughter's search because he was substantially certain of its contents. When Wildaughter brought Officer Yap the flash drive she told him that she found photographs and text messages that led her to believe Petitioner was planning on poisoning Driscoll. (R. 6, 26.) Wildaughter explained how the photographs were taken and informed Officer Yap that Petitioner mentioned poison, strychnine to be exact. (R. 6, 26–27.) Just as the Seventh Circuit in *Rann* found that the police were substantially certain when S.R. and her mother knew of the digital device's contents, the same result should control here because Wildaughter knew what Officer Yap would find on the flash drive. *Rann*, 689 F.3d at 838.

C. A narrow application of the private search doctrine imposes stringent and unrealistic guidelines on government agents.

Circuit courts choosing to apply a narrow approach to the private search doctrine in the context of digital storage devices hold that officers exceed the scope of the private search if they view or open anything beyond the exact items searched by the private individual. *See United States v. Sparks*, 806 F.3d 1323, 1329 (11th Cir. 2015); *United States v. Lichtenberger*, 786 F.3d 478, 480–81 (6th Cir. 2015). In *Sparks*, a Walmart employee turned the defendant's cellphone over to police after discovering images of child pornography. *Sparks*, 806 F.3d at 1331. The Eleventh Circuit held the government search exceeded the scope of the private search because the officers

watched a video that the private searcher did not view. *Id.* at 1336. *See Lichtenberger*, 786 F.3d at 488 (holding that an officer must proceed with "virtual certainty" that his search will not tell him anything more than he was already told by the private searcher).

This Court expressed concern about the ability for digital devices, like cell phones and computers, to collect and store "many distinct types of information" that "reveal much more in combination than any isolated record." *Riley v. California*, 573 U.S. 373, 395 (2014). *Riley* involved the police examining a cellphone pursuant to a search incident to arrest. The Court emphasized the private information and amount of data stored on cellphones, which can reveal information about all aspects of a person's life. *Id.* at 396.

A broad application of the private search doctrine strikes an appropriate balance between a defendant's remaining expectation of privacy after the private search and "the additional invasion of privacy by the government." *See Jacobsen*, 466 U.S. at 115. Meanwhile, the narrow approach taken by the Sixth and Eleventh Circuits unduly burdens law enforcement. Under the narrow approach, officers will hesitate before opening a container that a private party already searched. If this Court were to adopt *Lichtenberger*'s "virtual certainty" standard, officers would hardly ever open containers that a private party already opened—eviscerating the private search doctrine and rendering it virtually non-existent. Further, the "virtual certainty" standard creates a major problem in situations where officers must act quickly. Presented with a dangerous and potentially life-threatening situation, where Wildaughter, and Dr. Pollak, told police that Petitioner was going to poison Driscoll, Officer Yap needed to react. If officers need to be virtually certain of a container's contents, the threat to an identifiable victim becomes more imminent and real.

Storage devices, such as flash drives, which contain select offline documents are distinguishable from cell phones and computers. Simply put, the *Riley* Court's concern about

digital devices is not applicable to the facts of this case. While *Riley* involved an officer's warrantless search of a defendant's cellphone pursuant to a search incident to arrest, Officer Yap searched a flash drive that a private party, Wildaughter, already viewed. (R. 6.) *Riley*, 573 U.S. at 395. The officer in *Riley* was able to access automatically updated information, through the defendant's cellphone, but Officer Yap was limited to the offline documents that Wildaughter chose to put on the flash drive. (R. 6, 26.) The flash drive is more analogous to a storage container than a digital device like a phone or computer because it was not connected to the internet and only contained a select number of documents. Further, Officer Yap could not access any more information—on the flash drive—than what was available to Wildaughter.

The Government did not violate Petitioner's Fourth Amendment when Officer Yap searched the flash drive that Wildaughter already searched. Petitioner's expectation of privacy was frustrated once Wildaughter searched her computer. Officer Yap's expertise and Wildaughter's statements made him substantially certain of the flash drive's contents. Further, the broad approach to the private search doctrine appropriately balances the needs of law enforcement with individuals' expectation of privacy. The narrow approach imposes unworkable guidelines on government agents. Thus, this Court should affirm the circuit court's decision.

III. THE GOVERNMENT DID NOT VIOLATE *BRADY V. MARYLAND* BECAUSE THE FBI REPORTS ARE INADMISSIBLE HEARSAY THAT WOULD NOT HAVE LED DIRECTLY TO ADMISSIBLE EVIDENCE AND THERE IS NO REASONABLE PROBABILITY THAT THE RESULT AT TRIAL WOULD HAVE BEEN DIFFERENT.

The Government does not violate *Brady v. Maryland* when it does not disclose information that would have been inadmissible at trial. Inadmissible evidence, such as the FBI reports here, do not meet *Brady*'s "material" requirement because it cannot impact the result at trial. It is speculative whether

the reports would have directly led to admissible evidence. Further, there is no reasonable probability the result at trial would have been different. Thus, this Court should affirm the circuit court's decision that there is no *Brady* violation.

A. A *Brady* violation can only exist where the suppressed evidence is material.

This Court in *Brady v. Maryland* established the pretrial discovery rule 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." 373 U.S. 83, 87 (1963). A defendant cannot establish a *Brady* violation, unless they prove: (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). Evidence is "material" for *Brady* purposes "only where there exists 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).

B. Inadmissible evidence is not evidence at all and cannot form the basis of a *Brady* violation.

Inadmissible evidence is not evidence at all. *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). In *Wood*, two witnesses were subject to polygraph examinations, which the prosecution did not turn over to the defense. *Id.* at 4. The polygraph examinations were inadmissible evidence, even for impeachment purposes, and as such, not "evidence" at all. *Id.* at 6. The Court determined the disclosure of the polygraph results could not impact the outcome of trial because the defendant could have made "no mention of them either during argument or while questioning witnesses." *Id.* Similarly, in *Hoke v. Netherland*, the defendant was convicted of capital murder in the robbery, rape, and abduction of a woman. 92 F.3d 1350, 1357 (4th Cir. 1996). The government interviewed three men who previously had sex with the victim and did not disclose the interviews to the

defense. *Id.* at 1354. Defense counsel acknowledged that the statements by the men may have been inadmissible at trial and were, therefore, immaterial for *Brady* purposes. *Id.* at 1356 n.3. The Fourth Circuit held that, even if admissible, the statements were not material because there was "no chance at all" that the outcome of trial would have been different. *Id.* at 1357. *See Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998) (holding that information about a witness' competency is not evidence at all when the information could not be used to impeach witnesses).

Because the FBI reports are inadmissible hearsay, they are not evidence at all and do not meet *Brady*'s "material" requirement. Here, like the polygraph examinations in *Wood*, the FBI reports were inadmissible at trial and Petitioner could have made no mention of the reports or used them for impeachment purposes. (R. 43.) *Wood*, 516 U.S. at 4. As such, the reports had no chance of impacting Petitioner's trial. This Court in *Wood* stated that inadmissible evidence is not evidence at all. *Wood*, 516 U.S. at 6. Therefore, because the FBI reports are inadmissible hearsay, they are not evidence at all for *Brady* purposes. (R. 43.) Further, as the Fourth Circuit noted, inadmissible evidence is immaterial for *Brady* purposes. *Hoke*, 92 F.3d at 1356 n.3. The FBI reports here fail to meet *Brady*'s "material" requirement, and as such, there is no *Brady* violation.

C. Even if inadmissible evidence can form the basis of a *Brady* violation, it must directly lead to admissible evidence.

In the event this Court determines that inadmissible evidence may form the basis of a *Brady* violation, the question that follows is whether the disclosure of the FBI reports would have led directly to admissible evidence. *See 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). Here, because the FBI reports would not lead directly to admissible evidence, there is no *Brady* violation.

1. Whether the FBI reports would have led directly to admissible evidence is speculative.

There is no *Brady* violation when it is speculative that inadmissible evidence would lead to admissible evidence. *See Henness v. Bagley,* 644 F.3d 308, 325 (6th Cir. 2011). In *Henness*, the government withheld several police informational summaries which were hearsay and inadmissible at trial. *Id.* The Sixth Circuit specifically noted "it should take more than supposition on the weak premises offered by [the defendant] to undermine a court's confidence in the outcome." *Id.* As a result, the court held that the defense failed to demonstrate that the withheld statements would have led to the discovery of additional admissible evidence. *Id. See also Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000) (ruling that there was no *Brady* violation when the defendant presented only speculation that he would have uncovered admissible evidence from undisclosed hearsay evidence).

Because it is pure speculation whether the FBI reports would have led to admissible evidence, Petitioner's *Brady* claim fails. Petitioner offered nothing more than speculation to show that she would have uncovered admissible evidence from the reports. At the hearing for post-conviction relief, Petitioner claimed that had the Government disclosed the reports, defense counsel could have done their own investigation. (R. 47.) However, the FBI conducted their own preliminary investigations into the anonymous tip, and leads, and determined the information was not reliable. (R. 11, 12.) Just as the Sixth and Eleventh Circuits held there is no *Brady* violation when the defense offers only speculation to show that inadmissible evidence would lead to admissible evidence, the same should control here. *See Henness*, 644 F.3d at 325; *Bradley*, 212 F.3d at 567. Petitioner simply guesses that if the Government disclosed the reports, she would have uncovered admissible material evidence. This is not enough to sustain a *Brady* violation.

2. There is no reasonable probability that the outcome at trial would have been different.

The Fifth Circuit takes a slightly different approach and focuses its *Brady* analysis on whether the inadmissible evidence, if disclosed, could create a reasonable probability of a different trial result. *United States v. Lee*, 88 F. App'x 682, 685 (5th Cir. 2004). In *Lee*, the government did not disclose that one witness had an outstanding arrest warrant. *Id.* at 684. This information was inadmissible at trial. *Id.* Because the defendant could not show a reasonable probability that the outcome of trial would have been different, the Fifth Circuit held that there was no *Brady* violation. *Id.* at 685. *See also Trevino v. Thaler,* 449 F. App'x 415, 425 (5th Cir. 2011) (*vacated and remanded on other grounds by Trevino v. Thaler*, 569 U.S. 413 (2013)) (holding that undisclosed inadmissible hearsay cannot be considered material for *Brady* purposes when there is not a "reasonable probability" that the outcome at trial would have been different.)

There is no reasonable probability of a different trial result because there is sufficient independent evidence to support Petitioner's conviction. Even if the Government disclosed the FBI reports, Petitioner cannot show a reasonable probability of a different trial outcome. *See Lee*, 88 F. App'x at 685. The testimony from Dr. Pollak and Wildaughter shows Petitioner's threats to seriously harm or kill Driscoll. (R. 18, 24.) Wildaughter and Officer Yap's searches confirm Petitioner's plan to poison Driscoll. (R. 6.) The fact that Driscoll died from eating strawberries laced with strychnine—the exact way Petitioner planned to kill her—further proves that Petitioner is guilty of poisoning Driscoll. (R. 14.) Like the arrest warrant in *Lee*, the FBI reports here do not create a reasonable probability that the result at trial would have been different. Thus, this Court should affirm the circuit court's decision.

CONCLUSION

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

Respectfully submitted,

Team 17R
Counsel for Respondent

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