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 18P
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether psychotherapist-patient testimonial privilege under Rule 501 of the Federal Rules of Evidence ceases to exist when a therapist perceives a dangerous patient and discloses otherwise confidential patient communications to law enforcement.

II. Whether law enforcement's investigation of every file in a personal computer, subsequent to a private party's initial cursory view of just a single folder in that computer, violates the Fourth Amendment.

III. Whether the Government violates the requirements of *Brady v. Maryland* by intentionally withholding exculpatory evidence on the sole basis that such evidence might be inadmissible at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of the United States **Page(s)**

United States Courts of Appeals

United States District Courts

State Courts

Constitutional Provisions

Statutes

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Boerum (No. 17-cr-651) are unreported. The opinion of the United States Court of Appeals for the Fourteenth Circuit (No. 19-142) is unreported.

PERTINENT PROVISIONS

U.S. CONST. AMEND. IV.
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.

18 U.S.C. § 1716(j)
(2) Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by this section, whether or not transmitted in accordance with the rules and regulations authorized to be prescribed by the Postal Service, with intent to kill or injure another, or injure the mails or other property, shall be fined under this title or imprisoned not more than twenty years, or both.
(3) Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life.

BOERUM HEALTH & SAFETY CODE § 711
1. Communications between a patient and a mental health professional are confidential except where:
    a. The patient has made an actual threat to physically harm either themselves or an identifiable victim(s); and
    b. The mental health professional makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat.
2. Under such circumstances, mental health professionals must make a reasonable effort to communicate, in a timely manner, the threat to the victim and notify the law enforcement agency closest to the patient's or victim's residence and supply a requesting law enforcement agency with any information concerning the threat.
3. This section imposes a mandatory duty to report on mental health professionals while protecting mental health professionals who discharge the duty in good faith from both civil and criminal liability.

FED. R. EVID. 501.
The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

STATEMENT OF THE CASE

I. Statement of Facts

On May 26, 2017, Tiffany Driscoll, a sophomore at Joralemon University, was found dead in her home. R. at 13. From the start, the Federal Bureau of Investigation ("FBI") and Joralemon Police Department wanted to believe that they had found the perfect suspect in Samantha Gold ("Petitioner"), one of Ms. Driscoll's classmates who they knew was seeking treatment for a mental health condition. R. at 4. They based this belief entirely on two sources of dubious circumstantial evidence: statements made by Ms. Gold's therapist and a warrantless search of Ms. Gold's computer.

On May 25, 2017, Ms. Gold attended a regularly scheduled session with her psychiatrist, Dr. Chelsea Pollak, and discussed her frustrations with HerbImmunity, a multi-level marketing organization that sells vitamins and is commonly described as "nothing more than a pyramid scheme." R. at 4, 13. Ms. Gold had been diagnosed with Intermittent Explosive Disorder, or "IED," and Dr. Pollak noted that "[Ms. Gold's] involvement with HerbImmunity has caused a setback in the treatment/management of her IED." R. at 4. Ms. Driscoll was a sales representative for HerbImmunity and had recruited Ms. Gold to join and to invest $2,000, though Ms. Gold had made only one sale and was now in debt. R. at 4, 13. In the session, Ms. Gold told Dr. Pollak that "she was going to kill 'her,'" specifying that she "will take care of her and her precious HerbImmunity." R. at 4, 21–22. Dr. Pollak never asked Ms. Gold what she meant—in fact, she now acknowledges that it is possible Ms. Gold was actually referring to finishing off the debt she owed Driscoll. R. at 21–22.

Boerum Health and Safety Code § 711 imposes a mandatory reporting duty upon therapists who believe that their patients pose an actual threat to an identifiable victim. BOERUM HEALTH & SAFETY CODE § 711; R. at 2. Though Dr. Pollack informed Ms. Gold of her legal duty to report

serious threats at the very beginning of treatment, Ms. Pollack never informed Ms. Gold statements made during therapy could be used as evidence in a criminal prosecution. R. at 21. Dr. Pollak did not definitively conclude that Ms. Gold had voiced an actual threat, but instead erred on the side of caution. R. at 22 (Q: "You did not know for certain if this was a serious threat, or if it was simply an expression of frustration?" A: "True, but in that moment, I had to make a decision."). After the therapy session ended, Dr. Pollak called the Police Department, disclosed the contents of her discussion with Ms. Gold and, upon request, scanned and emailed her therapy notes to an officer. R. at 19–20. Responding to the supposed threat, police officers contacted Ms. Gold, noted that "[s]he appeared calm and rational," and "determined that she posed no threat to herself or to others." R. at 5.

A few hours later, Officer Aaron Yap met with Ms. Gold's roommate, Jennifer Wildaughter, to discuss the contents of Ms. Gold's computer. R. at 6. Earlier that day, Ms. Gold had left the apartment without closing her computer. *Id.* Ms. Gold's computer was on her desk in her room—Ms. Gold and Ms. Wildaughter lived in separate rooms, had only been roommates for eight months, and did not share a computer. *Id.*; R. at 27. Nonetheless, Ms. Wildaughter claimed to have been worried about Ms. Gold and so viewed some of Ms. Gold's unopened computer files without permission. R. at 27. Ms. Wildaughter initially opened a single folder, labeled "HerbImmunity." R. at 6. It was only after she opened eight nested folders within "HerbImmunity" that she saw pictures of Ms. Driscoll, Ms. Driscoll's father, and other documents. R. at 24–25. In one of these documents, titled "Market Stuff," Ms. Wildaughter saw a reference to rat poison. R. at 26, 28. Despite her awareness of the apartment's recent rodent problem and her later admission that there was nothing "specific about harming Ms. Driscoll[,]" Ms. Wildaughter copied the *entire* computer onto a flash drive and reported to the police that the flash drive "demonstrated that Ms.

Samantha Gold was planning to poison Ms. Driscoll." R. at 28–29, 6. Ms. Wildaughter told Officer Yap about the photos, a short, unsigned note directed to Ms. Driscoll, and a text file with passwords and codes "she did not understand" with a one-off reference to rat poison. R. at 6, 9. Officer Yap did not ask Ms. Wildaughter where the photos were located on the drive or how many files were on the drive—in fact, he did not ask "any questions at all" about the files Ms. Wildaughter reviewed. R. at 29. Instead, Officer Yap conducted "an examination of *all* the drive's contents," and "was able to confirm that Ms. Gold was planning to poison Ms. Driscoll." R. at 6 (emphasis added). Officer Yap conveyed this information to his supervisor, but took no other actions to warn Ms. Driscoll or to investigate further. *Id.*

The next day, when Ms. Driscoll was found dead, investigating officers believed the cause to be blunt force trauma to the head, and reported "no physical evidence at the scene." R. at 13, 14. This conclusion was revised a few days later when officers discovered an empty box and a short note from Ms. Gold. R. at 14. That note "convey[ed] a positive message praising Ms. Driscoll," and officers conjectured that the box contained chocolate covered strawberries that "may have been tampered with." *Id.* Connecting this information to Dr. Pollack's statements and Officer Yap's computer search, the FBI arrested Ms. Gold and charged her with Delivery By Mail of An Item With Intent to Kill or Injure, 18 U.S.C. § 1716(j)(2), (3). R. at 1, 14. The Joralemon Police Department and FBI described the arrest as a "huge relief" because of the lack of "any physical evidence at the scene pointing to either the cause of death or a suspect." R. at 14.

Six days after Ms. Gold's arrest, on June 2, 2017, FBI Special Agent Mary Baer interviewed Chase Caplow. R. at 11. Mr. Caplow recounted that Ms. Driscoll had called him just two weeks before her death saying that she owed money to Martin Brodie, another HerbImmunity seller. *Id.* Mr. Caplow specifically told Agent Baer that Mr. Brodie could be violent with Ms.

Driscoll. *Id.* In her investigative report, Agent Baer noted that she planned to interview Mr. Brodie and determine where further investigation was warranted. *Id.* It is unclear whether Agent Baer did in fact conduct a subsequent interview with Mr. Brodie.

Nearly a month later, the FBI received an anonymous tip that Belinda Stevens, another HerbImmunity distributor, was responsible for Ms. Driscoll's murder. R. at 12. Based on the call, Special Agent Mark St. Peters conducted a short "preliminary investigation" that lasted no more than 24 hours, but nonetheless concluded that the lead "[did] not require further follow-up." *Id.*

II. Procedural History

Ms. Gold moved to suppress and raised two issues before the United States District Court for the Eastern District of Boerum: (1) that Dr. Pollack's testimony should be suppressed because it violated her therapist-patient privilege and (2) that the digital evidence obtained by Officer Yap was seized illegally and therefore should be suppressed. R. at 30. The District Court denied the motion. *United States v. Gold*, No. 17-cr-651-FN (E.D. Boerum, Jan. 9, 2018)).

The Government introduced both pieces of evidence at trial and Ms. Gold was subsequently convicted of mailing items with the intent to kill or injure Ms. Driscoll, a crime punishable by life imprisonment or execution. R. at 51; 18 U.S.C. § 1716(j)(2), (3). On August 22, 2018, Ms. Gold moved for post-conviction relief on grounds that the Government's failure to disclose the two FBI reports constituted a *Brady* violation. R. at 43. The District Court again denied the motion. *United States v. Gold*, No. 17-cr-651-FN (E.D. Boerum, Aug. 22, 2018).

The United States Court of Appeals for the Fourteenth Circuit affirmed the district court's rulings on February 24, 2020. *Gold v. United States*, No. 19-142 (14th Cir., Feb. 24, 2020). The Court granted certiorari on November 16, 2020. R. at 60.

SUMMARY OF ARGUMENT

The Fourteenth Circuit violated established Supreme Court precedent when it affirmed the District Court's denial of Petitioner's motion to suppress and motion for post-conviction relief. Accordingly, its holding should be reversed.

The Fourteenth Circuit erred when it ruled that the therapist-patient testimonial privilege under Rule 501 of the Federal Rules of Evidence does not apply to Ms. Gold's confidential communications to her psychiatrist. Instead, this Court's precedent has been clear: federal privilege extends to communications between patients and their therapists because of the privilege's (1) public health benefits, (2) negligible evidentiary impact, and (3) respect for state policy-making. Reaffirming the therapist-patient privilege promotes well-recognized public health benefits by encouraging patients to seek effective mental health treatment while the Fourteenth Circuit's carve out excepting "dangerous patients" serves only to undercut this positive outcome. Moreover, the Fourteenth Circuit's creation of a "dangerous patient" exception has only negligible evidentiary benefits for the same reason that therapist-patient privilege has negligible evidentiary drawbacks: if the privilege is not granted, patients will not be as candid, and inculpatory evidence will not be created in the first place. Recognizing a federal therapist-patient privilege and rejecting the "dangerous patient" exception would also respect the states' consensus and ensure predictability and consistency between state and federal proceedings. Although the Fourteenth Circuit relies on a single footnote in Supreme Court dicta as support for its holding, such an interpretation rebuts the holding's plain language and intent. Finally, the Fourteenth Circuit's reasoning that Ms. Gold waived her right to therapist-patient privilege is inapposite: there was no actual nor constructive notice by Dr. Pollak that Ms. Gold's statements could be used against her

in a criminal proceeding, and to hold that Dr. Pollak's breach of confidentiality creates a waiver of privilege improperly vests the ability to waive privilege in the therapist instead of the patient.

The Fourteenth Circuit also erred when it held that Officer Yap's thorough investigation of Ms. Gold's entire computer did not violate her protection from unreasonable searches and seizures under the Fourth Amendment. Government searches subsequent to private searches do not constitute Fourth Amendment "searches" under the "private search doctrine," but this Court has ruled that if an officer searches beyond the prior search and cannot be substantially certain he will avoid intruding upon any remaining untouched privacy interests, he has conducted an unreasonable search. The Fourteenth Circuit's reliance on a supposed circuit split regarding the application of this doctrine to digital devices is misguided and unfounded: all circuits focus on substantial certainty, which necessarily is absent for computers. In this case, Ms. Wildaughter copied Ms. Gold's entire computer onto a flash drive and only made a cursory examination of one folder, but Officer Yap searched the entire computer without asking what files Ms. Wildaughter had viewed—the Fourteenth Circuit stretched beyond reason to conclude that Officer Yap was within the private search doctrine. Finally, Officer Yap's search is presumptively unreasonable and cannot be excused under either (a) a claim of exigency, because his lack of follow-up indicates no threat of immediate harm, nor (b) the "plain view doctrine," because any "incriminating" features of the folders were not immediately apparent without a further search.

Finally, by failing to disclose exculpatory evidence solely on the grounds that it might be inadmissible, the Government violated this Court's decisive rule promulgated in *Brady v. Maryland*, 373 U.S. 83 (1963). It is a basic tenet of criminal law that a defendant has a right to all favorable evidence that might affect the outcome of their trial. In this case, the FBI had two written reports that other suspects might have murdered Ms. Driscoll, but the FBI failed to fully investigate

these leads, and instead willfully suppressed the reports. While the Fourteenth Circuit emphasized that the reports might not have been admissible in court, they are still material because they likely would have led to admissible exculpatory evidence and undermined confidence in the Government's case. Moreover, as has been recognized by the Government itself, justice is achieved when courts err on the side of greater disclosure, not less. Ms. Gold is asking for justice.

ARGUMENT

I. The Circuit Court's Creation of a "Dangerous Patient" Exception to Therapist-Patient Privilege Improperly Ignored the Letter, Logic, and Intent of *Jaffee*.

Samantha Gold sought confidential treatment for a diagnosed emotional disorder and instead unwittingly created evidence for a criminal trial that may result in her execution. To permit this outcome, the Fourteenth Circuit began with an artificially blank slate, noting that "we start with the primary assumption 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 [ ]." *Gold*, No. 19-142; R at 52 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). This assumption is unwarranted because the Circuit Court had not been asked to create a new exception but rather to simply follow this Court's holding in *Jaffee v. Redmond*, 518 U.S. 1 (1996). In *Jaffee*, this Court recognized with "no hesitation" that "federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy." *Id.* at 15. The Court reached this decision after determining that the federal therapist-patient privilege "serves the public interest" and respects the overwhelming support shown by state legislatures while representing little actual impact on the availability of reliable evidence. *Id.* at 11–13.

Instead of following *Jaffee's* guidance, the Circuit Court improperly assessed the public benefits of the privilege, misconstrued a footnote, and incorrectly interpreted a breach of confidentiality to constitute complete waiver of evidentiary privilege. These errors culminated in

a decision that contravenes this Court's logic in *Jaffee* and chips away at the protections that the Supreme Court created for patients seeking mental health treatment. A thorough evaluation of (a) the public benefits of recognizing the therapist-patient privilege, (b) the Court's intended meaning in the *Jaffee* footnote, and (c) the dire implications of notice as a form of waiver reveals that the Fourteenth Circuit must be reversed because no "dangerous patient" exception exists and Dr. Pollak's testimony must therefore be suppressed.

A. Permitting a "Dangerous Patient" Exception Would Undermine the Therapist-Patient Privilege's Recognized Public Benefits.

In *Jaffee*, the Supreme Court held that a federal therapist-patient privilege was warranted because it would "serv[e] public ends[.]" *Id.* at 11 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). In *Clark v. United States*, this Court established a weighing mechanism, noting that "the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy." 289 U.S. 1, 13 (1933). The same task of weighing benefits and detractors is before the Court now: "to mediate between [public ends], assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process." *Id.* The Court initially approved the federal therapist-patient privilege because it (1) incentivizes effective mental health treatment, (2) comprises a negligible threat to the court's truth-seeking function, and (3) reflects the policy decisions of state legislatures. *Jaffee*, 518 U.S. at 11–12. Reviewing the very same factors that led the Court to recognize a federal therapist-patient privilege in *Jaffee*, it is clear that the privilege's benefits would be undermined by a "dangerous patient" exception and so none should be created.

1. The Therapist-Patient Privilege Encourages Mental Health Treatment, Which a "Dangerous Patient" Exception Would Discourage.

It is in the interests of peaceable society that those in need of mental health treatment are encouraged to seek it out. *See id.* at 11 ("The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."). Even Justice Scalia's dissent in *Jaffee* recognized that "[e]ffective psychotherapy undoubtedly is beneficial to individuals with mental problems, and surely serves some larger social interest in maintaining a mentally stable society." *Id.* at 22 (Scalia, J., dissenting). For treatment to be effective, it is not enough for patients to visit a therapist—they must feel comfortable disclosing issues and receiving advice. *See United States v. Hayes*, 227 F.3d 578, 582 (6th Cir. 2000) (finding that the Supreme Court recognized the therapist-patient privilege specifically to "facilitate an atmosphere of confidence and trust conducive to meaningful treatment.") (internal quotations omitted) (quoting *Jaffee*, 518 U.S. at 10). Dr. Pollack herself testified that "patients may be more reluctant to share certain thoughts or urges with me if they know that I may be required to testify about the content of our therapy sessions." R. at 21.

Indeed, the Ninth Circuit declined to create a "dangerous patient" exception because it recognized that "[a] criminal conviction with the help of a psychotherapist's testimony is almost sure to spell the end of any patient's willingness to undergo further treatment for mental health problems." *United States v. Chase*, 340 F.3d 978, 991 (9th Cir. 2003). The Sixth Circuit similarly understood that "recognition of a 'dangerous patient' exception surely would have a deleterious effect on the 'atmosphere of confidence and trust' in the psychotherapist/patient relationship" because it would "chill and very likely terminate open dialogue." *Hayes*, 227 F.3d at 584–85. "Thus, if our Nation's mental health is indeed as valuable as the Supreme Court has indicated, and

we think it is, the chilling effect that would result from the recognition of a 'dangerous patient' exception and its logical consequences is the first reason to reject it." *Id.* at 585.

It is thus perplexing that the Circuit Court held that "[t]he public good that the psychotherapist-patient privilege promotes – successful psychiatric treatment reliant on confidentiality – no longer outweighs the need for probative evidence once confidentiality has been breached by a therapist reporting a dangerous patient to the authorities." *Gold*, No. 19-142; R. at 53. This position represents a focus on punishing individual wrongdoing after the fact rather than preventing widespread harm before it occurs. Such a punitive approach is deleterious to public welfare. The crime at issue cannot be undone and "[o]nce in prison, even partly as a consequence of the testimony of a therapist to whom the patient came for help, the probability of the patient's mental health improving diminishes significantly and a stigma certainly attaches after the patient's sentence is served." *Hayes*, 227 F.3d at 585. The Sixth Circuit resultingly found that the benefits of neutralization are outweighed by the costs to the patient's potential recovery. *Id.*

The Supreme Court recognized a federal therapist-patient privilege to encourage individuals in need of mental health counseling to seek it out and be candid with their therapists. The Fourteenth Circuit's reasoning undermines this public health benefit.

2. The Therapist-Patient Privilege Has a Negligible Impact on Courts' Truth-Seeking Ability, So a "Dangerous Patient" Exception Would Result in Negligible Evidentiary Benefits.

Opponents of a robust therapist-patient privilege complain that the *Jaffee* Court "discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling" but discounted "the purchase price: occasional injustice." *Jaffee*, 518 U.S. at 18 (Scalia, J., dissenting). Yet, this Court and several circuit courts have held that the resulting injustice is not *occasional* but rather *nearly nonexistent*.

Justice Scalia's criticism rests on the premise that there is an untapped reserve of therapists' testimony and the privilege is allowing guilty individuals to go free. However, if any such cache exists, it would vanish as soon as the privilege is removed. *See Chase*, 340 F.3d at 990 ("Any exception necessarily has some adverse effect on the candor that the psychotherapist-patient privilege is meant to encourage, because patients will be more reluctant to divulge unsavory thoughts or urges if they know that the therapist may be required to testify about the content of therapeutic sessions."). Far from ignoring the privilege's evidentiary losses, as Justice Scalia alleged, the majority in *Jaffee* acknowledged that the evidence would be unavailable regardless: "Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Jaffe*, 518 U.S. at 12.

Moreover, this Court has made clear that "the privilege is not rooted in any constitutional right of privacy but in a public good which overrides the quest for relevant evidence[.]" *United States v. Glass*, 133 F.3d 1356, 1358 (10th Cir. 1998) (citing *Jaffee*, 518 U.S. at 17–18). While the public good of encouraging mental health and preventative care is an immense one, it is aided by the fact that the quest for relevant evidence would be fruitless just the same.

3. The Therapist-Patient Privilege Would Respect States' Rejection of the "Dangerous Patient" Exception.

The third element to be weighed is perhaps less obvious: respect for state policy-setting. This Court has taken state evidence rules into consideration for two reasons: (1) states' superior policy-making ability, and (2) the benefits of procedural consistency across state and federal courts. Both support the extension of the federal therapist-patient privilege without a "dangerous patient" exception.

First, states have the greatest insight into how their criminal courts operate and thus are expected to enact evidentiary policies that best promote justice and efficacy. "Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee*, 518 U.S. at 13. It is beyond question that the states' "reason and experience" supported *Jaffee*'s creation of the federal therapist-patient privilege because "[a]ll 50 states and the District of Columbia have enacted laws protecting psychotherapist-patient confidentiality." *Chase*, 340 F.3d at 982. The states buttress more than just the basic privilege. The Sixth Circuit held that "adoption of a 'dangerous patient' exception as part of the federal common law is ill-advised" because "[t]he majority of states have no such exception as part of their evidence jurisprudence." *Hayes*, 227 F.3d at 585. Only California's evidence code contains a 'dangerous patient' exception. *Id.* at 585–86; *see also* CAL. EVID. CODE § 1024 (West 1967). States' "reason and experience" rejects the creation of a "dangerous patient" exception.

Second, consistency in privilege application is important because "a state's promise of confidentiality has less value if the patient knows that an exception to the privilege applies in federal court." *Chase*, 340 F.3d at 986. Because individuals have poor predictive powers as to whether they will be tried in state or federal court, disagreement over a privilege would require individuals "play it safe" and act as if there is no privilege. The *Jaffee* Court held that "given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed . . . [d]enial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Jaffee*, 518 U.S. at 13. Failing to recognize a privilege that the states affirmatively enacted would essentially act as a judicial overrule of otherwise-constitutional state action.

If states wished to create a dangerous patient exception, they could do so statutorily. The fact that they have not and have instead enshrined a more straightforward version of the therapist-patient privilege indicates that federal courts should follow suit. Both out of deference to the states' "reason and experience" and to promote the privilege's predictability, this Court should decline to create a "dangerous patient" exception.

B. The *Jaffee* Footnote Did Not Create a "Dangerous Patient" Exception.

Courts that have recognized a "dangerous patient" exception claim they do so under the auspices of this Court's own ruling in *Jaffee*. *See Glass*, 133 F.3d at 1359–60; R at 52. However, this is an incorrect interpretation of a single footnote which appeared in dicta and was intended to highlight future questions, not to undermine a landmark decision. In *Jaffee*, the Court noted that "[b]ecause this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'" *Jaffee*, 518 U.S. at 18 (quoting *Upjohn*, 449 U.S. at 386). The Court appended the footnote in question to this notice of impossibility:

> "Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that 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."

Jaffee, 518 U.S. at 18 n.19.

Before delving into how circuit courts have reimagined this footnote, it is important to recognize that the plain language does not support the admission of Dr. Pollak's testimony. Permitting prosecutors to call Dr. Pollak as a witness and compel her to discuss Ms. Gold's diagnosis and confidential conversations in no way averted serious harm, let alone presented the only way to avert serious harm. At that point, Ms. Driscoll was deceased and no party has alleged that Ms. Gold represented an ongoing serious threat to any individual, herself, or society at large.

This interpretation comports with the Sixth, Eighth and Ninth Circuit's understanding of the footnote: "We believe [ ] that the *Jaffee* footnote is no more than an aside by Justice Stevens to the effect that the federal psychotherapist/patient privilege will not operate to impede a psychotherapist's compliance with the professional duty to protect identifiable third parties from serious threats of harm." *Hayes*, 227 F.3d at 525; *United States v. Ghane*, 673 F.3d 771, 785 (8th Cir. 2012) ("We agree with our sister circuits that have rejected this exception and decline to interpret the dictum in *Jaffee* as establishing a precedentially binding "dangerous patient" exception to the federal psychotherapist-patient testimonial privilege."); *Chase*, 340 F.3d at 984 ("We read that footnote as endorsing—albeit elliptically—a duty to disclose threats to the intended victim and to the authorities[.]"). The concurrence in *Chase* protested that "the words 'the privilege must give way' do not mean that 'the right to out-of-court confidentiality must give way,' or that 'the right to confidentiality is superseded by the duty of out-of-court disclosure to the prospective victim.'" *Id.* at 995 (Kleinfeld, J., concurring). But the Ninth Circuit majority countered with a list of scenarios in which the privilege itself would "give way," outside of the context of a criminal trial, noting that, for example, "psychotherapists will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient[.]" *Id.*

Simply looking at the facts of *Jaffe*, it is implausible that Justice Stevens would undermine the overall ruling with a footnote in dicta. In *Jaffee*, the Court was faced with a mother seeking justice on behalf of her son—fatally shot by Mary Lu Redmond. 518 U.S. at 4–6. Though Redmond's discussions with her therapist promised a trove of evidence that would support the requested relief, the Court denied it, holding that the benefits of encouraging confidential communications between patients and therapists override the minimal evidentiary loss. *See generally*, *id.* The instant case represents no departure from the facts that prompted the Court's

determination in *Jaffee*. Ms. Driscoll is dead and her parents seek justice, but the "important interests" of encouraging mental health treatment still outweigh the comparably lesser "need for probative evidence." R. at 57. Though the *Jaffee* footnote may create an exception to privilege for the initial disclosure to police or noncriminal contexts, none such applies to Ms. Gold's situation.

C. The Circuit Court Incorrectly Found that Ms. Gold Waived Her Claim to Therapist-Patient Privilege Despite Her Lack of Informed or Affirmative Consent.

The Circuit Court relied heavily on the notion that the therapist-patient privilege was waived by the time of trial. *See Gold*, No. 19-142; R. at 53. This argument manifests in two forms: (1) that Ms. Gold should have been on notice that her communications would not be confidential, and thus waived the privilege, and (2) that the initial breach of confidentiality voided all subsequent claims to invoke the therapist-patient privilege. Neither is persuasive.

1. Ms. Gold Was Not Given Constructive Notice That Would Indicate Waiver of Privilege.

It is undisputed that Dr. Pollack did not warn Ms. Gold that her statements could be used against her in a subsequent criminal prosecution. R. at 21. However, in this absence of actual notice, the Government has previously tried to claim "constructive notice." In *Hayes*, the government argued that because Hayes' therapists advised him of their "duties to protect," by reporting threats to law enforcement, "when Hayes chose to continue discussions with the therapists after receiving such advice, he constructively waived the protections of the psychotherapist/patient evidentiary privilege." 227 F.3d at 586. Correctly, the Sixth Circuit rejected this argument, holding that the privilege can only be waived "knowingly" or "voluntarily" and because "[n]one of Hayes's psychotherapists ever informed him of the possibility that they might testify against him . . . government's constructive waiver argument is meritless." *Id.*

Even if Dr. Pollack had provided notice—which she admits she did not—the notice would have to be tailored to Ms. Gold's understanding. The Sixth Circuit noted that when dealing with patients who "suffer from serious mental and/or emotional disorders[,] . . . it must be the law that, in order to secure a valid waiver of the protections of the psychotherapist/patient privilege from a patient, a psychotherapist must provide that patient with an explanation of the consequences of that waiver suited to the unique needs of that patient." *Id.* at 587. *See also Ghane*, 673 F.3d at 787 (holding that the plaintiff did not waive therapist-patient privilege because he was not specifically informed that his statements could be used against him in a subsequent criminal prosecution).

Because Ms. Gold was not warned in any form, let alone one that conformed to her unique needs, no constructive notice should be found here.

2. A Therapist's Breach of Confidentiality Cannot Indicate Waiver of Privilege.

The Circuit Court seems to have adopted the New York Court of Appeals' long-ago observation that "when a secret is out it is out for all time and cannot be caught again like a bird and put back in its cage." *People v. Bloom*, 193 N.Y. 1, 10 (1908). The Circuit Court found that "once the confidentiality of Dr. Pollak's and Gold's conversations was breached, there simply was no other compelling interest to keep such probative evidence from the jury." *Gold*, No. 19-142; R. at 53. This reasoning flips therapist-patient privilege on its head and renders it meaningless.

This Court has held that "it is the patient, alone, who has the authority to waive that evidentiary privilege." *Hayes*, 227 F.3d at 587 (citing *Jaffee*, 518 U.S. at 15 & n. 14). However, the Circuit Court's formulation incorrectly vests the ability to waive privilege in the therapist, not the patient. If Boerum Health and Safety Code § 711 empowers the therapist to decide that a patient has made an actual threat, shields the therapist from both civil and criminal liability, and then subsequently waives the patient's testimonial privilege, the therapist would have total control over

the process. BOERUM HEALTH & SAFETY CODE § 711. Consequently, it could not be argued that the patient "knowingly" or "voluntarily" agreed to the waiver in any form. *Hayes*, 227 F.3d at 586. As the Sixth Circuit noted, "it would be rather perverse and unjust to condition the freedom of individuals on the competency of a treating psychotherapist." *Id.* at 584.

II. Officer Yap Violated Ms. Gold's Fourth Amendment Protection Against Warrantless Searches and Seizures Because He Conducted a Broader Search than the Prior Search Conducted by a Private Party.

Officer Yap's investigation into Ms. Gold's computer constituted a "search" under the Fourth Amendment and was *per se* unreasonable. The Fourth Amendment's "reasonableness clause" provides that citizens have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV, cl. 1. "To determine whether a Fourth Amendment violation has occurred, courts ask two primary questions: (1) whether the alleged government conduct constitutes a search within the meaning of the Fourth Amendment, and (2) whether the search was reasonable." *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019).

As to the first question, a search implicates the Fourth Amendment if it frustrates an individual's "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967). But the constitutional protection against unreasonable searches does not apply to non-government searches, (*Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)) and if a private party does commence an unlawful search, the police are under no obligation to "avert their eyes." *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971) (plurality opinion). Therefore, under the "private search doctrine," a government intrusion subsequent to a private party's intrusion is not a "search" under the meaning of the Fourth Amendment if there is "virtual certainty" that the search will expose no more than what the private party's earlier intrusion had revealed. *United States v. Jacobsen*, 466

U.S. 109, 119 (1984). As to the second question, a warrantless search is presumptively unreasonable unless an exception applies. *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).

In this case, Ms. Gold had a reasonable expectation of privacy in the contents of her computer. Officer Yap's investigation into Ms. Gold's computer exceeded Ms. Wildaughter's previous search, and since there was no way for him to be virtually certain that his search would expose no more than the earlier search—in fact, it did—he implicated the Fourth Amendment. Moreover, Officer Yap did not have a warrant, and because he cannot rely on exigency nor plain view as exceptions to obtaining a warrant, Ms. Gold's constitutional rights were violated and the Fourteenth Circuit must be reversed.

A. Officer Yap's Investigation Constituted a Search Because it Violated Ms. Gold's Reasonable Expectation of Privacy and Exceeded the Initial Private Search.

Under *Katz*, a reasonable expectation of privacy means that a person "exhibited an actual (subjective) expectation of privacy and, second, that the expectation is one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring). Ms. Gold's expectations satisfy both prongs of this inquiry, so Ms. Wildaughter's view of a folder in Ms. Gold's computer frustrated her privacy interests. Still, a private search does not implicate the Fourth Amendment, so a subsequent government intrusion is not considered a "search" if there was an initial search by a private party. *Jacobsen*, 466 U.S. at 117. Here, Officer Yap's subsequent investigation constituted a "search" because it exceeded Ms. Wildaughter's initial cursory view, thus frustrating Ms. Gold's previously untouched privacy interests.

1. Ms. Gold Had a Reasonable Expectation of Privacy in the Contents of Her Computer.

First, Ms. Gold had a subjective expectation that the contents of her computer would remain private. Although Ms. Gold "ran out of the apartment, leaving her computer open on her desk," she could not have anticipated that Ms. Wildaughter would seize an opportunity to snoop:

they were short-term suitemates who did not share a room or computer. R. at 27. Moreover, the content was not readily viewable—Ms. Wildaughter had to dig through folders hidden within folders in order to find what she deemed "suspicious." R. at 27–28.

Second, it is widely acknowledged that an expectation of privacy over a personal computer is reasonable. *See, e.g.*, *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers."); *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) ("The government does not dispute that [the defendant] had a subjective expectation of privacy in his computer and his dormitory room, and there is no doubt that [the defendant]'s subjective expectation as to the latter was legitimate and objectively reasonable."); *United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007) (recognizing a reasonable expectation of privacy in computer files).

Because Ms. Gold satisfies both prongs of the *Katz* inquiry, she undoubtedly had a reasonable expectation of privacy in her computer and the contents therein.

2. Officer Yap Violated the Private Search Doctrine by Exceeding the Initial Private Search.

Officer Yap's subsequent investigation constituted a "search" under the Fourth Amendment because it did not stay within the confines of the "private search doctrine." "The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated," and there must be "virtual" or "substantial" certainty that the search will expose no more than what the private party's earlier intrusion had revealed. *Jacobsen*, 466 U.S. at 117, 119. Officer Yap's investigation is not protected by the private search doctrine because he (a) exceeded Ms. Wildaughter's prior search and (b) lacked substantially certainty that he would avoid any preserved privacy interests.

a. Officer Yap Went Beyond the Scope of Ms. Wildaughter's Prior Investigation.

The underpinnings of the private search doctrine make clear why Officer Yap conducted a "search" within the meaning of the Fourth Amendment: it is critical that officers stay within the confines of the privacy interest that has already been frustrated by the initial search. *Jacobsen*, 466 U.S. at 115 (the government's subsequent search "must be tested by the degree to which they exceeded the scope of the private search."). The private search doctrine is grounded in the "plain view doctrine," whereby a person has no reasonable expectation of privacy over that which is exposed to the public. *Id.* at 130 (White, J., concurring) ("The private search doctrine thus has much in common with the plain-view doctrine, which is 'grounded in the proposition that once police are lawfully in a position *to observe an item first-hand,* its owner's private interest in that item is lost.'") (emphasis in original) (quoting *Illinois v. Andreas*, 463 U.S. 765, 772 (1983)). Accordingly, if a private search "merely frustrate[s] that expectation in part," then a "partial invasion cannot automatically justify a total invasion." *Walter v. United States*, 447 U.S. 649, 659 n.13 (1980). Without these limitations, the doctrine could lead to an arbitrary double standard—that is, a warrant requires particularity, but a warrantless search initiated by a private person is limitless. *See* U.S. Const. amend. IV, cl. 2 ("No warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized."); *Walter*, 447 U.S. at 657; ("If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy.") (plurality opinion). In this case, Officer Yap "conducted an examination of *all* of the drive's contents." R. at 6 (emphasis added)). Ms. Wildaughter, however, had only viewed photographs, a short note, and a text file of passwords

and codes within the computer. R. at 6. Indeed, she had only explored one folder. R. at 24. Officer Yap clearly exceeded the prior search.

b. Officer Yap Could Not be Substantially Certain That He Would Expose No More than What Ms. Wildaughter Had Already Revealed.

Officer Yap could have exceeded what was literally viewed during a prior private search only if "there was virtual certainty that [further inspection] . . . would not tell [the officer] anything more than he had already been told." *Jacobsen*, 466 U.S. at 119. However, because of the nature of the flash drive and his lack of clarifying questions, Officer Yap was in no way "virtually certain" that he would merely confirm what Ms. Wildaughter had told him. Although this Court has not yet directly ruled on how the private search doctrine applies to digital devices, several circuits have done so, noting that "the critical measures of whether a governmental search exceeds the scope of the private search that preceded it are how much information the government stands to gain when it re-examines the evidence and, relatedly, how certain it is regarding what it will find." *United States v. Lichtenberger*, 786 F.3d 478, 485–86 (6th Cir. 2015). The flash drive Officer Yap searched held Ms. Gold's *entire* computer. R. at 6, 26 (Ms. Wildaughter stated that "I grabbed a flash drive from my room and copied the whole desktop onto it")). Since the flash drive was in effect Ms. Gold's computer, it was not "a small, defined, handpicked pool of offline documents." *Gold*, No. 19-142; R. at 54. Rather, it was "simultaneously [a] file cabinet[] (with millions of files) and [a] locked desk drawer[]; [it] can be repositories of innocent and deeply personal information." *United States v. Comprehensive Drug Testing, Inc*., 513 F.3d 1085, 1108 (9th Cir. 2008) (quotations omitted); *see also United States v. Crist*, 627 F. Supp. 2d 575, 585 (M.D. Penn. 2008) ("Computers are composed of many compartments, among them a 'hard drive,' which in turn is composed of many 'platters,' or disks."). Computers have become more personal as they have

become a staple in our lives. *Cf. Riley v. California*, 573 U.S. 373, 395 (2014) (discussing the pervasiveness of phones).

Focusing on the nature of the flash drive comports with *Riley* and *Jacobsen*. In *Riley*, this Court emphasized that devices present heightened privacy concerns under the Fourth Amendment. *See id.* at 394 ("[T]he possibility of intrusion on privacy is not physically limited in the same way when it comes to cell phones."). Even the Fourteenth Circuit acknowledged this heightened concern. *Gold*, No. 19-142; R. 54 ("[T]he advancement of digital technology presents a new set of challenges."). It is true that "an electronic device does not change the fundamentals of this inquiry. But under *Riley*, the nature of the electronic device greatly increases the potential privacy interests at stake, adding weight to one side of the scale while the other remains the same." *Lichtenberger*, 786 F.3d at 488.[1] By adopting an approach that recognizes the expanded privacy interests inhered in computers, this Court can be consistent with the basic tenet of *Jacobsen*: officers staying within the confines of the previous search such that there is virtually no concern a new privacy interest will be frustrated. 466 U.S. at 119.

Moreover, Officer Yap could not have been substantially certain about what he would find because he asked no questions about the files Ms. Wildaughter reviewed, where the photos were located on the drive, or how many files were on the drive, but was instead explicitly aware that the flash drive contained Ms. Gold's entire desktop. R. at 29, 6. Officer Yap's lack of questions, coupled with the nature of the flash-drive, meant "there was a very real possibility [the officer] exceeded the scope of [the private] search and that he could have discovered something else on

[1] The Government's and Fourteenth Circuit Court's emphasis on the fact that the copy of Ms. Gold's computer meant it was not connected to the Internet is inapposite. (R. 34; R. 54). This fact only matters in degree, not in kind. Indeed, in *Riley*, the Court emphasized that electronic devices like computers increase the privacy interests at stake because of their storage capacity—separate and apart from whether they are connected to the Internet. "[M]any [modern cell phones] are in fact *minicomputers* . . . . One of the most notable distinguishing features of modern cell phones is their immense *storage* capacity." *Riley*, 573 U.S. at 393 (emphasis added).

[the] laptop that was private, legal, and unrelated to the allegations prompting the search—precisely the sort of discovery the *Jacobsen* Court sought to avoid in articulating its beyond-the-scope test." *Lichtenberger*, 786 F.3d at 488–89. *See also United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015), *overruled on other grounds by United States v. Ross*, 963 F.3d 1056 (11th Cir. 2020).

The Fourteenth Circuit mischaracterized the circuit split when it claimed that the aforementioned approach (a so-called "narrow approach" adopted by the Sixth and Eleventh Circuits, as opposed to a "broad approach" adopted by the Fifth and Seventh Circuits) requires "know[ing] with exact certainty what is contained in a digital file." *Gold*, No. 19-142; R. at 55. But the narrow approach demands the same "substantial certainty" standard promulgated by this Court in *Jacobsen* and adopted by the Fifth and Seventh Circuits, while recognizing the reality that such certainty is difficult in the context of personal computers. "The rule the court adopted must 'take account of more sophisticated systems that are already in use or development.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2218–19 (2018) (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001)). It is for this reason that courts across both the Sixth and Fifth Circuits have found stringent searches satisfy the substantial certainty requirement. *United States v. Miller*, 982 F.3d 412, 418 (6th Cir. 2020) ("Critically, [the defendant] does not dispute . . . a hash-value match's near-perfect accuracy: It created a 'virtual certainty' that the files in the Gmail account were the known child-pornography files that a Google employee had viewed."); *United States v. Reddick*, 900 F.3d 636, 639 (5th Cir. 2018) (noting the "almost absolute certainty of the hash-value in assigning images for review.").

In fact, the Fourteenth Circuit's interpretation of the Fifth Circuit case *United States v. Runyan* is at odds with this Court's precedent in *Jacobsen* and *Riley*. In *Runyan*, private parties

had viewed a few files in a couple of CDs and floppy disks, but in none of the ZIP disks. Analogizing these digital media devices to "containers," the Fifth Circuit held that a subsequent government examination of the ZIP disks was a search, but an examination of the entire contents of the CDs and floppy disks was not. 275 F.3d 449, 464 (5th Cir. 2001) ("[T]he police do not exceed the private search when they examine more items *within* [that] closed container than did private searchers."). According to the Fourteenth Circuit, *Runyan* stands for the proposition that a computer is a container, so if Ms. Wildaughter viewed a single file, the computer's entire contents would be accessible to Officer Yap without constituting a search. *Gold*, No. 19-142; R. at 55.

This approach to Officer Yap's investigation is not only intuitively wrong; it is inconsistent with Supreme Court precedent. For instance, in *Jacobsen*, even though FedEx employees had only seen white powder in a bag after they opened a box, the officers went further by analyzing the white powder. Yet, the Court found that because the test only verified whether the powder was a drug, "the *likelihood* that official conduct of the kind disclosed by the record will actually *compromise any legitimate interest* in privacy seems much too remote to characterize the testing a search subject to the Fourth Amendment." *Jacobsen*, 466 U.S. at 123–24 (emphasis added). To reach this determination, the Court cited *United States v. Place*, wherein the use of a canine to sniff for narcotics in luggage at an airport was found to not be a "search" in part because "[i]t d[id] not expose noncontraband items that otherwise would remain hidden from public view." 462 U.S. 696, 707 (1983). *See also Walter*, 447 U.S. at 675 (finding it insufficient that "[p]rior to the Government screening one could only draw inferences about what was on the films."). Officer Yap thus had anything but substantial certainty that he would not frustrate a preserved expectancy interest. Indeed, two folders had highly sensitive information including tax documents and insurance information, neither of which were previously viewed by Ms. Wildaughter. R. at 7.

With this understanding, it is clear that *Runyan* does not stand for the proposition that Ms. Gold's computer is an already-opened container. Rather, the critical point is substantial certainty: since the private parties had not examined any of the contents of the ZIP disks, the officers could not be substantially certain what they would uncover. 275 F.3d at 464; *see also Lichtenberger*, 786 F.3d at 489. The officer in *Runyan* could be substantially certain as to the contents of the CDs and floppy disks because these were "limited to a small, defined, handpicked pool of offline documents." *Gold*, No. 19-142; R. at 54. *See also Crist*, 627 F. Supp. 2d at 586 ("[A] hard drive is comprised of many platters, or magnetic data storage units, mounted together. Each platter, as opposed to the hard drive in its entirety, is analogous to a single disk as discussed in *Runyan*."). The Seventh Circuit, which adopted *Runyan*, confirmed this understanding when it highlighted that "[t]he Illinois Appellate Court specifically found that [t]his is not a case where multiple pieces of potential evidence were turned over to the police, who then had to sift through the potential evidence to discover if any factual evidence existed." *Rann v. Atchison*, 689 F.3d 832, 837–38 (7th Cir. 2012) (internal quotations omitted). In direct contrast, multiple pieces of potential evidence were turned over on a device with virtually limitless storage for Officer Yap to sift through.

It may very well be true, as the Fourteenth Circuit posits, that a rule allowing officers to search entire computers as long as a previous search opened just one file is "easy to understand." *Gold*, No. 19-142; R. at 55. Further, the Fourteenth Circuit complains that the narrow approach as applied to digital information "imposes stringent and frankly unrealistic guidelines on government agents." *Id.* But that reasoning undercuts the purpose of the Fourth Amendment. *Camara v. Mun. Court of City & Cty. of S.F.*, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of [the Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (internal quotations

omitted)). This Court must refuse the resigned submission that requiring an officer to receive a warrant before conducting a search is "unrealistic." *Katz*, 389 U.S. at 357 ("Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, and that searches conducted . . . without [a warrant] are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (internal quotations and citations omitted) (alterations in original).

B. Neither Exigency nor Plain View Excuse Officer Yap's Unlawful Search.

An officer can conduct a warrantless search with probable cause under exigent circumstances: ones that "would cause a reasonable person to believe that entry [or search] . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. Camou*, 773 F.3d 932, 940 (9th Cir. 2014) (quotations omitted) (alterations in original). Regardless of whether there was probable cause, Officer Yap clearly did not believe there was an immediate threat to other persons that required him to search the *entire* computer—after the search, he ceased the investigation and contacted his supervisor, who also took no discernible action. R. at 6. The computer also presented no threat to Officer Yap, no risk of aiding an escape, and no danger of erasure given that it was a digital copy already in his possession. *Lichtenberger*, 786 F.3d at 491; *Riley*, 573 U.S. at 387 ("Digital data . . . cannot itself be used as a weapon to harm an . . . officer or to effectuate . . . escape.").

Moreover, Officer Yap's investigation into every folder is not excepted under the plain view doctrine. For this doctrine to apply, an officer must have a lawful right of access to an object whose incriminating character is "immediately apparent." *Horton v. California*, 496 U.S. 128, 137 (1990) (quoting *Coolidge*, 403 U.S. at 466). Officer Yap had no lawful access to the contents of the flash drive because he exceeded the private search doctrine. Assuming *arguendo* he did have

lawful access, the incriminating contents of the folders were not apparent: the only labels visible upon uploading the flash drive were, "College Stuff," "Games," "HerbImmunity," "Photos," "Tax Docs," "Budget," "Exam4," "Health Insurance ID Card," and "To-Do List." R. at 7. These folders are sufficiently innocuous that Officer Yap "lack[ed] probable cause . . . without conducting some further search of the object." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

Since the search was not conducted under the auspices of an exigent circumstance or plain view, and since the search exceeded the confines of the private search doctrine, Officer Yap's warrantless investigation was unconstitutional. *Coolidge*, 403 U.S. at 454–55 (quoting *Katz*, 389 U.S. at 357). The Fourteenth Circuit's holding thus must be reversed.

III. The Government Violated *Brady* by Failing to Disclose Inadmissible But Exculpatory FBI Reports.

The prosecution committed a *Brady* violation when it withheld exculpatory information from Ms. Gold's counsel in order to pursue a conviction at the expense of justice. This Court's monumental decision in *Brady* recognized that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. To this end, the core principle "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)). It is this principle which the Court is being asked to affirm once more.

Ms. Gold and her counsel had a right to favorable evidence that "might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 104 (1976). To demonstrate that the prosecution's omission constituted a Brady violation, Ms. Gold must satisfy three tests: "1) that the evidence was favorable to [her] because it was exculpatory or impeaching; 2) that the evidence was suppressed by the State, either willfully or inadvertently; and 3) that the evidence was material

and, therefore, that the failure to disclose it was prejudicial." *Bradley v. Nagle*, 212 F.3d 566 (11th Cir. 2000) (citing *Strickler v. Greene*, 527 U.S. 263 (1999)).

The two FBI agents' reports constituted "[n]ew evidence suggesting an alternate perpetrator" and was therefore highly exculpatory and "classic Brady material." *Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (quoting *Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001)). The Government has not pled accident or oversight in failing to disclose, but rather eschewed any responsibility to inform Ms. Gold. *See Gold*, No. 19-142; R. at 55 ("In explaining why the reports had not been previously disclosed, the government took the position that the reports did not constitute Brady material."). The Government is wrong in both its interpretation of law and in its reasoning. The suppressed evidence should have been disclosed because (A) the evidence was in fact material as it could have led to admissible evidence or else, when viewed cumulatively, could have put the case in a different light, and (B) this Court has instructed prosecutors to err on the side of disclosure to ensure that defendants receive a fair trial.

A. The Definition of "Materiality" in a *Brady* Claim Includes Inadmissible Material That May Nonetheless Undermine Confidence in a Trial's Outcome.

In *United States v. Bagley*, the Court constructed the materiality requirement that "favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 684 (1985)). The Court clarified that this is not an insurmountable hurdle: "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. Instead, the *Bagley* Court defined this "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." 473 U.S. at 682.

Circuit courts have split on the question of whether evidence that is itself inadmissible at trial might still sufficiently undermine confidence in the outcome. "Most circuits addressing the issue have said yes if the withheld evidence would have led directly to material admissible evidence." *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc); *see also United States v. Phillip*, 948 F.2d 241, 256 (6th Cir. 1991) (Merritt, C.J., dissenting) (noting that "State supreme courts have adopted similar reasoning" and "rejected admissibility as a prerequisite for disclosure under *Brady*" in Alaska, California, Delaware, and Iowa).[2]

There are two manners in which inadmissible evidence might undermine confidence in the outcome. First, as the First Circuit found, "given the policy underlying *Brady*, we think it plain that evidence itself inadmissible could be so promising a *lead to strong exculpatory evidence* that there could be no justification for withholding it." *Ellsworth*, 333 F.3d at 5 (emphasis added) (citing *Wood v. Bartholomew*, 516 U.S. 1, 6–8 (1995)). Second, as this Court has found, a defendant may claim a *Brady* violation "by showing that the favorable evidence could reasonably be taken *to put the whole case in such a different light* as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435 (emphasis added). The suppressed evidence in this case satisfies both: disclosure of the reports could have (1) led to admissible evidence and (2) cast the case in a different light. As such, the reports are material and their suppression constitutes a *Brady* violation.

[2] In sum, the First, Second, Third, Fifth, Ninth, and Eleventh Circuits have joined ranks in supporting the notion that the Government's suppression of inadmissible evidence may give rise to a *Brady* violation. *See Ellsworth*, 333 F.3d at 5; *United States v. Gil*, 297 F.3d 93, 104-05 (2d Cir. 2002); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016); *Spence v. Johnson*, 80 F.3d 989, 1005 n.14 (5th Cir. 1996); *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011); *Paradis v. Arave*, 240 F.3d 1169 (9th Cir. 2001); *Bradley*, 212 F.3d at 567. Only the Fourth, Seventh, and Eighth Circuits have issued rulings to the contrary. *See Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996); *United States v. Wigoda*, 521 F.2d 1221, 1228 (7th Cir. 1975); *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998).

1. The Reports Were Material Because They Could Have Led to Admissible Evidence That Would Have Undermined Confidence in the Trial's Outcome.

In *Wood*, this Court heard the question of whether *Brady* compels the disclosure of inadmissible polygraph reports. *Wood*, 516 U.S. at 5–9. The Court encountered the Ninth Circuit's reasoning "that the information, had it been disclosed to the defense, might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized." *Id* at 6. The Court did not criticize or overrule this reasoning, instead only taking fault with the Circuit's application of the standard. *See id.* at 8 ("In short, it is not 'reasonably likely' that disclosure of the polygraph results—inadmissible under state law—would have resulted in a different outcome at trial."). The Court remanded the case and no protest was voiced when the Ninth Circuit found there was no *Brady* violation because "it was not reasonably likely that [the reports'] disclosure would have led to other evidence that would have affected the result." *Bartholomew v. Wood*, 96 F.3d 1451, 2 (9th Cir. 1996). The other circuits picked up on this tacit endorsement. *See, e.g.*, *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013) ("[W]e believe, as do the majority of our sister courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of admissible evidence.").

Even the Fourteenth Circuit did not deny this path to materiality, instead following in the Supreme Court's footsteps by finding that "[Petitioner] failed to present anything beyond mere speculation that she could have found additional admissible evidence if these reports had been disclosed prior to trial." *Gold*, No. 19-142; R. at 56. However, this is far from true. The evidence at issue consists of two potential leads that indicated someone other than Ms. Gold was responsible for Ms. Driscoll's death. R. at 11, 12. One report indicated that Agent St. Peters performed a "preliminary investigation." R. at 12. The other merely noted a plan to follow up but no actual indication that the agent ever did so. R. at 11. Ms. Gold's counsel noted that at "the very least, had

the defense been provided with this information, we could have done our own investigation into these leads." R. at 45. A host of Circuit decisions signal that permitting such an investigation merits disclosure. In *Bradley*, the Eleventh Circuit found that potential leads were immaterial only because law enforcement fully "investigated each lead" and definitively found that "none of the three suspects was involved in [the decedent]'s murder." 212 F.3d at 567. Just because law enforcement declined to pursue any leads other than Petitioner does not mean Ms. Gold should be precluded from hiring a private investigator or otherwise conducting a more thorough investigation. This issue is particularly concerning given the strength of the potential leads—both named alternative suspects with a motive to harm Ms. Driscoll. R. at 46.

Furthermore, the strength and potential of suppressed exculpatory evidence must be weighed against the strength of the admitted inculpatory evidence. *See Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir. 2010) ("The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state."). *See also Wood*, 516 U.S. at 8 (finding it not reasonably likely that disclosure of the suppressed materials "would have resulted in a different outcome" because "[e]ven without [the excluded] testimony, the case against respondent was overwhelming"). The case against Ms. Gold is much weaker: it rests only on circumstantial evidence, including Dr. Pollack's testimony and the overbroad computer search, both of which should have been excluded. R. at 51, 6. It is thus all the more condemnable that the Government chose to hide leads rather than conduct complete investigations or properly disclose leads so that Ms. Gold could do it herself.

2. The Withheld Reports Were Material Because Disclosure of the Perfunctory Nature of the Police Investigation Could Have Put the Case in a Different Light.

Disclosing the suppressed material would have also allowed Ms. Gold to attack law enforcement's investigative failure. A *Brady* violation arises when the suppressed "evidence could

reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Valenzuela v. Small*, 2020 WL 6948788, at *2 (9th Cir. Nov. 25, 2020) (quoting *Kyles*, 514 U.S. at 435).

Evidence that the FBI conducted a lackadaisical investigation—latching on to Ms. Gold based on circumstantial evidence and ignoring subsequent alternative suspect—clearly reframes the case and undermines confidence in the verdict. There is a host of case law indicating that a defendant—and the jury—has the right to know about deficiencies in a police investigation, and failure to disclose is a *Brady* violation. *See Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation . . . and we may consider such use in assessing a possible *Brady* violation"); *Kyles*, 514 U.S. at 446 (finding a *Brady* violation where suppressed evidence might have allowed the defendant to "attack[] the reliability of the investigation"); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (finding a *Brady* violation where the suppressed evidence had the potential to discredit "the police methods employed in assembling the case against [the defendant]").

Had Ms. Gold been aware of the FBI's failure to follow leads or conduct a proper investigation, her attorneys could have alerted the jury to that fact. Though it is uncontested that the reports are hearsay inadmissible for their truth, the existence of unfollowed leads could have been brought to the jury's attention. "A statement that is not offered to prove the truth of the matter asserted but to show its effect on the listener is not hearsay." *United States v. Churn*, 800 F.3d 768, 776 (6th Cir. 2015). Had Ms. Gold been able to inform the jury that the FBI failed to fully investigate alternative leads, she may have achieved a different trial outcome.

B. Justice is Achieved Through Greater Disclosure, Not Less.

It is strange to transition from the arena of evidentiary privilege where "[f]or more than

three centuries it has now been recognized as a fundamental maxim that the public has a right to every man's evidence" to the world of *Brady*, where the Government advocates for its right to hide evidence, hoping it will never come to light. *Jaffee*, 518 U.S. at 9 (internal punctuation and citations omitted). Instead, the Court should do what is has done before: urge prosecutors to err on the side of more disclosure than less. In *Agurs*, the Court extended the *Brady* duty to not only require that prosecutors respond to requests for evidence, but also volunteer exculpatory evidence. *Agurs*, 427 U.S. at 104–07. When the Government asked for a "certain amount of leeway in making a judgement call" and petitioned the *Kyles* Court "to raise the threshold of materiality[,]" the Court responded with a resounding rebuff, because "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be." *Kyles*, 514 U.S. at 439 (internal citation omitted). The Court noted approvingly that its holding "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Id*. at 440. There is a stark imbalance between the prosecution and defendant's access to information. The latter relies on the former to erect a competent defense. An inscription enshrined on the walls of the Department of Justice and in the pages of *Brady* states, "The United States wins its point whenever justice is done its citizens in the courts." 373 U.S. at 87 (quotations omitted). The Government wins not by jealously guarding its information imbalance, but by enabling defendants to construct effective defenses and to push back on poorly conducted investigations.

CONCLUSION

For the foregoing reasons, the Fourteenth Circuit's holding must be reversed.

Respectfully submitted,

Team 18P
Counsel for Petitioner