NO. 20-2388

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

Samantha GOLD,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

TEAM 19

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Does the psychotherapist-patient privilege preclude testimony about statements made in therapy sessions when the disclosure occurs in a criminal prosecution long after the statements were made and any potential harm has been averted?

II. Does the Government violate the Fourth Amendment when, after an unauthorized private search of computer files, it conducts a warrantless search of files that were not previously opened during the private search?

III. Is inadmissible evidence regarding alternative potential suspects material under *Brady v. Maryland* so as to obligate the Government to disclose the exculpatory evidence to the defense before trial?

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The opinion of the United States District Court for the Eastern District of Boerum is unreported. The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but appears on the record at pages 50–59.

STATEMENT OF JURISDICTION

Samantha Gold appeals the Fourteenth Circuit Court of Appeals' affirming of the United States District Court for the Eastern District of Boerum decision denying Samantha's motion to suppress and convicting Samantha of a crime under 18 U.S.C. § 1716(j)(2), (3). The court of appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291 and entered a final judgment on February 24, 2020. Samantha timely filed a petition for a writ of certiorari. The petition for writ of certiorari was granted by this Court on November 16, 2020. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides:

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

U.S. Const. amend. IV. This case also involves Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

> nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

This case also involves 18 U.S.C. § 1716 and Boerum Health and Safety Code § 711, both of which are reproduced on page 3 of the record.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

This appeal challenges a murder conviction. The Government relied on evidence it gained from a confidential therapy session and a warrantless search. At the same time, the Government failed to disclose evidence of alternative suspects to the defense.

Samantha's Therapy Session. Samantha was a student at Joralemon University. R. at 14. She began seeing Dr. Chelsea Pollak, a board-certified psychiatrist, in 2015 to manage her anger. R. at 17. Over time, Dr. Pollak diagnosed Samantha with Intermittent Explosive Disorder and treated her through weekly therapy sessions. R. at 17.

In the therapy sessions, Dr. Pollak learned that Samantha was becoming frustrated with a multi-level marketing group, HerbImmunity, due to debt she had incurred. R. at 18. During a May 25, 2017 therapy session, Samantha told her psychiatrist she was extremely upset with Tiffany Driscoll, the person who got her involved with HerbImmunity. R. at 18. Samantha told Dr. Pollak that she blamed Tiffany for the debt she had incurred. R. at 18. Dr. Pollak's notes indicate that Samantha made confidential statements of "I'm going to kill her," and "[a]fter today, I'll never have to see or think about her again." R. at 19. Dr. Pollak took no action to hospitalize Samantha or try any other therapeutic treatment to address the anger. R. at 19. Instead, Dr. Pollak notified the Joralemon Police Department of what Samantha had said in therapy. R. at 19.

Jennifer Wildaughter's Private Search. On the same day, May 25, 2017, Samantha had an encounter with her roommate, Jennifer Wildaughter. R. at 24. Samantha arrived home upset because she had received a bill in the mail from HerbImmunity, and stated "I'd do anything to get out of this mess Tiff put me in." R. at 24. Wildaughter assumed she was talking about Tiffany Driscoll. R. at 24. After Samantha stormed out of the apartment, Wildaughter went into her room and accessed her computer. R. at 24.

Wildaughter initially opened a folder called HerbImmunity, and then opened various subfolders, including the "Tiffany Driscoll" subfolder. R. at 24–25. She saw several pictures of Tiffany and noticed a "For Tiff" subfolder that she clicked on. R. at 25. Inside this subfolder, she saw four documents, but only opened two of them: the "Message to Tiffany" and the "Market Stuff." R. at 25–26. In the "Market Stuff" document, she saw a reference to rat poison. R. at 26. After seeing this, she copied the contents of Samantha's entire computer onto a flash drive and took it to the Livingston Police Department. R. at 26. She told the police she had only viewed some of the documents. R. at 6.

Officer Yap's Subsequent Search. After receiving the flash drive, Officer Aaron Yap immediately examined all of the drive's contents without obtaining a warrant. R. at 6. He first looked through Samantha's personal photos, and then clicked on the HerbImmunity folder that Wildaughter had previously opened. R. at 6. But Officer Yap examined far more than Wildaughter had, stating in his report that he looked "into the contents of every subfolder." R. at 6. He found a document in a subfolder Wildaughter had not viewed labeled "Shipping Confirmation," he opened the "recipe" document, where one of the ingredients was labeled "secret stuff," and continued examining "every document on the drive in the order they were

listed." R. at 6. After viewing the entire contents of the drive Officer Yap concluded that Samantha was planning to poison Tiffany Driscoll. R. at 6.

Potential Suspects. After Tiffany Driscoll was murdered on May 25, 2017, the FBI received two tips which gave information of two potential suspects. R. at 44. On June 2, 2017, in an interview with Chase Caplow, the FBI was told that Driscoll was in debt to Martin Brodie, an upstream distributor for HerbImmunity. R. at 11, 44. A month later, on July 7, the FBI received an anonymous phone call identifying Belinda Stevens as the person committing the murder. R. at 12, 44. The FBI only conducted a preliminary investigation, thinking they already had the right person. R. at 12, 45. Moreover, the Government withheld this information from Samantha's counsel. R. at 44.

II. PROCEDURAL HISTORY

Samantha was charged with delivering by mail an item with the intent to kill another, in violation of 18 U.S.C. § 1716. R. at 51. Before trial, Samantha moved to suppress the testimony of her confidential therapy sessions with Dr. Pollak and the evidence obtained Officer Yap obtained without a warrant. R. at 51. The United States District Court for the Eastern District of Boerum denied this motion on both grounds after an evidentiary hearing. R. at 41. After the trial, Samantha's counsel moved for a new trial or directed verdict after learning that the government had failed to disclose the information about two other potential suspects, alleging this was a violation of its obligation under *Brady v. Maryland*. R. at 52. The district court denied this motion as well. R. at 48. On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's holdings. R. at 51.

SUMMARY OF THE ARGUMENT

I.

The court of appeals erred in suppressing evidence of confidential therapy sessions between Samantha and her psychiatrist. The communications made in this setting were protected from disclosure by the psychotherapist-patient patient this Court recognized in *Jaffee v. Redmond*.

The appellate court's primary error related to its adoption of the so-called dangerous-patient exception. The exception is fundamentally inconsistent with the language of the *Jaffee* holding. It also improperly ties the statutory duty to protect third parties to the testimonial privilege, when the two have little in common. The most devastating aspect of the exception, however, is the chilling effect it will necessarily have on confidential communications in therapeutic settings. Patients will not share the information for treatment if they fear their confidences will be divulged in criminal proceedings.

Even if such an exception were adopted, it could not apply here. When Dr. Pollak testified at trial, there was no harm to avert so it certainly could not meet the narrow circumstance under which disclosure would be permissible. The Government also could not justify the disclosure under a waiver theory because Dr. Pollak never told Samantha she could or would testify against her in a criminal proceeding. Without proper notice to Samantha of the consequences of continuing to confide in her therapist, there could never be a knowing, intelligent waiver of her rights.

II.

The court of appeals erred in suppressing the computer files Officer Yap obtained without a warrant. The search of Samantha's computer files were unreasonable and violated the Fourth Amendment.

The search cannot be justified on the basis of the private search doctrine. While private searches of digital files extinguish privacy interests in what a private individual searches, they are limited to the specific files that individuals actually examines. The Government has no right to expand the scope of the private search. Even though Samantha's roommate did not search certain files, Officer Yap examined each of the digital files on the flash drive. Each previously unopened file he opened was a warrantless search. And when he did so, the officer had no idea what he would find. He was looking for items of significance, rather than making any attempt to avoid them.

III.

The court of appeals erred in not granting post-conviction relief. The Government denied Samantha of due process by withholding from her *Brady* material about alternative suspects.

The appellate court created a categorical rule that inadmissible evidence is automatically immaterial under *Brady* and, as a result, falls outside the scope of what prosecutors must disclose. This narrow conception of the disclosure requirements is necessarily at odds with the broad protections contemplated by the *Brady* opinion and it is fundamentally unfair. The Government knew of two possible suspects that could have been involved in Driscoll's murder but took no steps to investigate their involvement. Had the Government made the proper *Brady* disclosures, Samantha's counsel could have conducted the investigation or at least challenged the Government's investigation. The suspects were named. Samantha's counsel could have easily

compelled their testimony or located other evidence to support what had been shared with the Government. Additionally, apart from the additional evidence that would be available with knowledge of the additional suspects, notice to Samantha's counsel could have caused a change in general strategy. This goes beyond mere speculation that evidence might be available. It is a reasonable probability that the outcome would be different. As a result, Samantha is entitled to post-conviction relief.

This Court should reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit.

ARGUMENT AND AUTHORITIES

Standard of Review. This appeal involves review of an order denying a motion to suppress and denying a motion for a directed verdict or new trial. In cases regarding a district court's order on a motion to suppress evidence, this Court reviews facts and reasonable inferences de novo. *United States v. Gil*, 204 F.3d 1347, 1350 (11th Cir. 2000). Although a reviewing court typically reviews a motion for a new trial for an abuse of discretion, the standard of review is de novo "if the reason for the motion is an alleged *Brady* violation." *United States v. Martin*, 431 F.3d 846, 850 (5th Cir. 2005).

I. DR. POLLAK VIOLATED THE PSYCHOTHERAPIST-PATIENT PRIVILEGE BY DISCLOSING CONFIDENTIAL STATEMENTS MADE TO HER BY SAMANTHA GOLD DURING THERAPY.

The first issue addresses the denial of Samantha's motion to suppress statements she made to Dr. Chelsea Pollak while undergoing psychiatric treatment. Before trial, Samantha's counsel moved to suppress the psychiatrist's testimony as protected by the federal common law psychotherapist-patient privilege this Court recognized in *Jaffee v. Redmond*, 518 U.S. 1 (1996). R. at 35. The Government urged the district court to adopt a "dangerous patient" exception to the

privilege and thereby permit it to call Dr. Pollak as a witness and introduce notes of her confidential therapy session. After the district court did so, the psychiatrist recounted the confidential therapy sessions at trial, and Samantha was convicted of violating the federal murder by mail statute. R. at 41, 53.

Ironically, the Government does not dispute that Samantha's statements in therapy are otherwise protected by the federal common law psychotherapist-patient privilege. Nor can it. In *Jaffee v. Redmond*, this Court recognized the evidentiary privilege because "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." 518 U.S. at 18 (citing Fed. R. Evid. 501). The promise of confidentiality to Samantha and other patients facilitates the "atmosphere of confidence and trust" necessary for effective treatment. *Id.* at 10. This Court explained that "reason and experience dictate" that the need for confidential communication to be greater and more important than the general rule that the public has a right to the evidence. *Id.*

The lower courts erred by recognizing the "dangerous patient" exception and allowing the testimony. The exception is ill-advised and, in any event, the facts do not justify its application. Samantha came to Dr. Pollak for professional help to address difficulties she was encountering. She now stands convicted for a crime because the psychiatrist she confided in testified against her.

A. This Court Should Not Create a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege.

The Government's argument for a "dangerous-patient" exception to the psychotherapist-patient privilege flows from a footnote in the *Jaffee* opinion. In footnote 19, Justice Stevens writing for the Court stated:

> 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.

Id. at 18 n.19. This language is clearly dictum as it suggests a rule not necessary to the judgment and addresses a situation not present in that case. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013). To be sure, *Jaffee* involved a wrongful death claim under Section 1983 where the victim's family sought to compel the production of a therapist's notes after the shooting incident to be used as proof in the case against the office. 518 U.S. at 5. There was no issue regarding any attempt to "avert" a "threat of harm." The case was simply about whether to recognize the psychotherapist-patient privilege. Nonetheless, the Government relies on this language to contend that Dr. Pollak should be permitted to divulge the confidences Samantha shared with her.

This Court should reject the "dangerous-person" exception. It is fundamentally at odds with what this Court said and did in *Jaffee*. Nor can it be justified based on the statutory duty to protect third persons. More fundamentally, it threatens to chill patient disclosures in therapy, which was the primary justification for recognizing the psychotherapist-patient privilege in the first place.

1. A dangerous-patient exception is inconsistent with *Jaffee*.

The court of appeals' interpretation of footnote 19 cannot be squared with several critical aspects of the *Jaffee* opinion.

First, the condition contemplated by footnote 19's language—that the psychotherapist-patient privilege must "give way" when "a serious threat of harm to the patient or to others can be averted only by means of a disclosure"—cannot ever occur in a criminal trial. Footnote 19's language contemplates a future threat. A criminal trial is by design retrospective, determining

guilt and punishment based on the defendant's past behavior. *See Robinson v. California*, 370 U.S. 660, 667 (1962) (finding that conviction for being addicted to narcotics violated the Eighth Amendment). It does not address future conduct. Dr. Pollak's testimony in the criminal trial was offered to establish that Samantha had killed Driscoll, not to avert a future threat.

Second, the exception frustrates *Jaffee*'s underlying premise regarding the importance of confidentiality in therapeutic settings. The Court grounded the privilege in the notion that "effective psychotherapy . . . depends upon an atmosphere of trust in which the patient is willing to make frank and complete disclosure of facts, emotions, memories, and fears." *Jaffe*, 518 U.S. at 10. The Court recognized that this privilege serves the public interest of enabling mental health treatment by allowing patients to disclose their "innermost thoughts without fear of disclosure." *Id.* at 11. The Government's exception sacrifices the sanctity of those confidential therapeutic sessions in a manner that contradicts each of these foundational statements.

Third, the exception undermines the majority's specific agreement with the Judicial Conference Advisory Committee's Proposed Rule 504 that specifically rejected the exception. Deborah Paruch, *From Trusted Confidant to Witness for the Prosecution: The Case Against the Recognition of a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege*, 9 U.N.H. L. Rev. 327, 368 (2011); *see also United States v. Gillock*, 445 U.S. 360, 367–68 (1980) (recognizing the proposed rules as instructive). The Proposed Rule establishing that privilege also created three exceptions: proceedings to hospitalize a patient for mental illness, proceedings to examine the mental or emotional condition of the patient, and proceedings in which the patient's mental or emotional condition is relevant to a claim or defense. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 241 (1972). But the list did not include a dangerous-patient exception. And the Court noted that the Senate Judiciary Committee, in

rejecting Proposed Rule 504 in favor of the more open-ended Rule of Evidence 501, explicitly stated that its action "'should not be understood as disapproving any recognition of a psychiatrist-patient . . . privileg[e] contained in the [proposed] rules.'" *Jaffee*, 518 U.S. at 15 (quoting S. Rep. No. 93-1277, at 13 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7059).

Fourth, the exception is inconsistent with *Jaffee*'s statements regarding the need for predictability of the privilege. The Court declared, "if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Jaffee*, 518 U.S. at 18 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981)). That is precisely why the Court rejected a suggested balancing test for the privilege, as it would "eviscerate the effectiveness of the privilege by making it impossible for participants to predict whether their confidential conversations will be protected." *Id.* at 3.

The only reasonable interpretation of footnote 19 comes from the Sixth Circuit in *Hayes*: "We think the *Jaffee* footnote was referring to the fact that psychotherapists will sometimes need to testify in court proceedings, such as those for involuntary commitment of a patient, to comply with their duty to protect the patient or identifiable third parties." *United States v. Hayes*, 227 F.3d 578, 585 (6th Cir. 2000). It certainly did not signal a dangerous-person exception to the psychotherapist-patient privilege.

2. A dangerous-patient exception cannot be justified on the limited connection, if any, between the duty to report serious threats and the testimonial privilege.

The Government claims that the exception is a function of the statutory duty to protect third parties embodied in Boerum Health and Safety Code § 711. In its view, any right to

confidentiality ended when Dr. Pollak notified the Livingston Police Department of the potential threat that Samantha posed to Driscoll. R. at 19. But the standard of care the psychiatrist exercised in complying with the state's duty to protect requirement has no bearing on the applicability of the psychotherapist-patient privilege in criminal proceedings. The two inquiries are entirely distinct.

The duty to protect arose from the case of *Tarasoff v. Regents of University of California*, 551 P.2d 334, 347 (Cal. 1976). That case involved a psychologist employed by the University of California at Berkeley. *Id.* at 339. During a confidential session, a patient declared his intent to murder Tatiana Tarasoff. *Id.* Although the psychologist told campus police of the statements and campus police briefly detained the patient, no one warned Tatiana or her family of the danger. *Id.* at 340. Two months later, the patient murdered Tatiana. *Id.* at 339.

The California Supreme Court held that "the therapist owes a legal duty not only to his patient, but also to his patient's would-be victim and is subject in both respects to scrutiny by judge and jury." *Id.* at 345–46. At the same time, however, the court recognized the limited nature of the duty and the importance in "open and confidential" communication for treatment:

> The therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then, that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.

Id. at 347. Since *Tarasoff*, most states, including Boerum, have codified the psychotherapist's duty to protect third parties from serious threats. *See Hayes*, 227 F.3d at 583; R. at 2.

The testimonial privilege is entirely different when, as here, the testimony is not the disclosure to avert harm. As the Ninth Circuit explained,

> The *Tarasoff* duty is justified on the ground of protection; the societal benefit from disclosing the existence of a dangerous patient out-weighs the private and public cost of the deleterious effect on the psychotherapist-patient relationship. By contrast,

> ordinarily testimony at a later criminal trial focuses on establishing a past act. There is not necessarily a connection between the goals of protection and proof. If a patient was dangerous at the time of the *Tarasoff* disclosure, but by the time of trial the patient is stable and harmless, the protection rationale that animates the exception to the states' confidentiality laws no longer applies.

United States v. Chase, 340 F.3d 978, 988 (9th Cir. 2003); *see also United States v. Ghane*, 673 F.3d 771, 785 (8th Cir. 2012) ("The 'dangerous patient' exception to the federal testimonial privilege is quite different from a therapist's 'duty to protect.'").

The timing component of the policy interest also makes each inquiry different. For example, "[s]tate law requirements that psychotherapists take action to prevent serious and credible threats from being carried out serve a far more immediate function than the proposed 'dangerous patient' exception." *Hayes*, 227 F.3d at 584. The duty to protect requires immediate action. In normal circumstances, the testimonial privilege does not. As a matter of fact, the public interest to be served by notifying the police, in most cases, could be achieved by divulging only that information needed to show why a clear and immediate danger is believed to exist. It would rarely justify the full disclosure of the patient's confidences to the police, and never justify a full disclosure in open court, long after any possible danger has passed. *State v. Miller*, 709 P.2d 225, 236 (Or. 1985).

The interest in protecting an intended victim from harm that triggers the duty to protect, and the interest in promoting "an atmosphere of confidence and trust" to ensure effective psychological treatment are two separate and distinct interests. The Fourteenth Circuit erred in holding that they are one in the same and in concluding that once Dr. Pollak fulfilled her duty to warn, the confidence between her and Samantha ceased to exist.

3. A dangerous-patient exception would have a chilling effect on the candor that the psychotherapist-patient privilege is meant to encourage, because patients will be more reluctant to participate if they know that the therapist may be required to testify about the content of therapeutic sessions.

Confidentiality is of critical importance in any therapeutic relationship, including the one between Samantha and Dr. Pollak. *See Jaffee*, 518 U.S. at 10 ("[T]here is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.") (quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)). "The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure." *In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983). Thus, allowing for a dangerous-patient exception would produce fear of disclosure, and hinder the candor that the privilege is meant to encourage.

An exception to the privilege would chill the candid conversations critical to effective therapy. The "mere possibility" of disclosure may impede development of the confidential relationship necessary for successful treatment. *Id.* Dr. Pollak acknowledged this fact when she described the "negative impact" of being required to testify about the content of therapy sessions. R. at 21. After all, a psychiatrist's ability to help her patients fully depends on the patients' willingness and ability to talk openly. *Jaffee*, 518 U.S. at 10. Thus, this exception effectively cuts against the reason for the privilege, would prevent individuals from getting the psychological help that they need. This Court should reject it.

B. Alternatively, Dr. Pollak's Testimony Would Not Fall Within the Dangerous-Patient Exception Because Disclosing Samantha Gold's Confidential Statements Was Not the Only Way to Avert Harm.

Even if a dangerous-patient exception were adopted, Dr. Pollak's testimony would qualify under that standard.

The Tenth Circuit adopted the dangerous-patient exception in *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998). There, a mental health patient told his psychotherapist that he intended to "get in the history books" and "wanted to shoot Bill Clinton and Hilary." *Id.* at 1357. After he was released from a mental health facility, he disappeared and the psychotherapist reported his statements to Secret Service agents. *Id.* When the patient was subsequently charged with threatening to kill the President, the psychiatrist was called as the star witness against the patient. *Id.* (citing 18 U.S.C. § 871(a)). Although the court of appeals adopted the dangerous-person exception to the psychotherapist-patient privilege, it narrowed the ruling to the following inquiry: "[O]n remand, the district court must proceed . . . to determine whether, in the context of the case, the threat was serious when it was uttered and whether its disclosure was the only means of averting harm to the President when the disclosure was made." *Id.* at 1360.

The Government cannot meet this standard. Dr. Pollak's disclosure of Samantha's confidential statements was not the only way to avert harm. The decision to allow Samantha to leave the therapy session necessarily establishes this point. Similar to the therapist in *Glass*, Dr. Pollak elected not to admit her to hospital supervision, which was certainly another means of averting any potential harm to Driscoll. And Glass requires that disclosure is the "only means" of averting harm.

Additionally, the Joralemon Police Department necessarily decided that Driscoll was not in the danger contemplated by the *Glass* standard. The police obviously did not believe the threat to Driscoll was imminent or serious because they released Samantha after interrogating her. Without imminent or serious harm, it could not satisfy the requirements of the dangerous-patient exception under *Glass* and would instead fall within the general protection of the psychotherapist-patient privilege.

C. Samantha Did Not Constructively Waive the Protections of the Psychotherapist-Patient Privilege by Continuing to Confide in Dr. Pollak After Being Advised of the Therapist's Duty to Protect.

Any suggestion that Samantha waived a privilege by continuing to confide in Dr. Pollak after allegedly being told of the therapist's duty to protect is simply misplaced. Nothing in the record could support a voluntary, intelligent waiver of Samantha's rights.

Constructive waiver is not enough. A therapist has a professional obligation to specifically "disclose to a patient 'the limitations on confidentiality.'" *Hayes*, 227 F.3d at 586 (citing Am. Psych. Ass'n, Ethical Principles of Psychologists and Code of Conduct, Standard 5.01 (Dec. 1992)). Nothing in the record definitively establishes that Dr. Pollak gave this required notice. And the Government bears the burden of establishing that the warning has been given. *Fish v. Superior Court*, 255 Cal. Rptr. 3d 786, 792 (Ct. App. 2019) ("'Once the claimant establishes the preliminary facts of a psychotherapist-patient relationship, the burden of proof shifts to the opponent of the privilege' to . . . 'show that the privilege has been waived.'"). Dr. Pollak merely describes her "standard practice" at the outset of the representation. R. at 21. She started treating Samantha in 2015—two years before the fateful session. R. at 17. And when asked if she told Samantha that a breach of confidentiality could include using statements in a criminal proceeding against her, Dr. Pollak admitted she had not. R. at 21; *see also Hayes*, 227 F.3d at 586 ("None of Hayes's psychotherapists ever informed him of the possibility that they might testify against him [and, for this reason,] . . . Hayes cannot be said to have "knowingly" or "voluntarily" waived his right to assert the . . . privilege."). As the Eighth Circuit noted, "[w]hile early advice to the patient that, in the event of the disclosure of a serious threat of harm to an identifiable victim, the therapist will have a duty to protect the intended victim, may have a marginal effect on a patient's candor in therapy sessions, an additional warning that the patient's

statements may be used against him in a subsequent criminal prosecution would certainly chill and very likely terminate open dialogue." *Hayes*, 227 F.3d at 584–85.

II. OFFICER YAP'S WARRANTLESS SEARCH OF SAMANTHA'S COMPUTER FILES VIOLATED THE FOURTH AMENDMENT.

The second issue addresses the denial of Samantha's motion to suppress certain computer files the Government obtained without a warrant. The files were on Samantha's personal computer that her roommate, Jennifer Wildaughter, accessed without permission. R. at 51. After viewing some of the files, Wildaughter downloaded the entire contents of the computer to a flash drive, which she gave to the Livingston Police Department. R. at 23. Officer Aaron Yap examined every file on the flash drive. R. at 38. Before trial, Samantha's counsel moved to suppress the specific digital files Wildaughter had not opened. R. at 35. The Government argued that Wildaughter's viewing of some files and copying of the computer's contents extinguished any expectation of privacy Samantha could have had in any of the documents on the flash drive. R. at 33. After the district court accepted the argument, the Government introduced electronic files Wildaughter had not "clicked on, opened, or viewed," R. at 59, and used them to convict her of violating the federal murder by mail statute, R. at 51.

The Fourth Amendment protects the security of citizens' "persons, houses, papers, and effects against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. Such protections, however, do not apply to searches conducted by private parties. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Thus, once an individual's expectation of privacy is frustrated by a private person, a subsequent government search without a warrant is lawful to the extent the individual's expectation has already been frustrated. *Id.* But a private party search "[does] not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection." *Walter v. United States*, 447 U.S. 649, 659 (1980). Rather, when a

government search "follows on the heels" of a private party, it "must be tested by the degree to which [the government] exceeds the scope of the private search." *Jacobsen*, 466 U.S. at 115.

The Government's search here fails that test. Officer Yap violated the Fourth Amendment by exceeding the scope of the private search and not obtaining a warrant.

A. Samantha Retained a Reasonable Expectation of Privacy in the Computer Files.

Samantha maintained a reasonable expectation of privacy in the computer files not viewed by Wildaughter. This expectation stems initially from the Fourth Amendment's language, which protects "papers . . . against unreasonable searches and seizures." U.S. Const. amend. IV. But it also stems from the long-standing principle that "[t]he constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, *wherever they may be*." *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (emphasis added).

Like most others, Samantha secured her "papers" on her desktop computer. R. at 6. She had a reasonable expectation in the files stored there. *See, e.g.*, *United States v. Horton*, 863 F.3d 1041, 1047 (8th Cir. 2017) ("[An individual] has a reasonable expectation of privacy in the contents of his personal computer."); *United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009) ("[T]he hard drive of a computer . . . is the digital equivalent of its owner's home, capable of holding a universe of private information."). Her expectation of privacy in the computer files comports with this Court's recognition in *Riley v. California*—"[w]ith all they contain and all they may reveal," computers "hold for many Americans the privacies of life." 573 U.S. 373, 402 (2014). The fact that Samantha kept these files on her computer "does not make them any less worthy of the protection for which the Founders fought." *Id.* at 403.

B. Officer Yap Violated Samantha's Expectation of Privacy by Exceeding the Scope of Wildaughter's Initial Search and Opening the Desktop Files That Wildaughter Had Not Opened Because Each Folder Contained on the Flash Drive Is Separate and Distinct.

Officer Yap violated Samantha's expectation of privacy by opening computer files Wildaughter had not. Certainly, Wildaughter's unauthorized review of Samantha's computer extinguished any expectation of privacy in the specific files the roommate opened. *See Jacobsen*, 466 U.S. at 117. But Officer Yap went beyond what Wildaughter had seen and now attempts to justify his warrantless search of the specific unopened files with the roommate's private search of the general contents of Samantha's computer. It cannot be done.

In the context of searches of physical objects, courts generally allow the Government to "exceed the scope of a prior private search when it examines a closed container that was not opened by the private searchers" only when the police are already "virtually certain" of what is inside that container. *United States v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001). Known as the "closed container doctrine," this rule is justified by 1) the decreased expectation of privacy that individual has in the closed container; and 2) the increased legitimate government interests in the safety of a police officer and preserving evidence. *United States v. Lichtenberger*, 786 F.3d 478, 487 (6th Cir. 2015).

In the context of searches of digital data storage devices, however, the Government's interest in a warrantless search is significantly diminished, and the individual's privacy interest is dramatically expanded. *See Riley*, 573 U.S. at 394; *see also Lopez v. United States*, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring) (recognizing the importance of considering technological implications in the Fourth and Fifth Amendment analysis). Thus, such government searches under the private-search doctrine should be limited to only the specific digital files the private party viewed. *See Lichtenberger*, 786 F.3d at 481–82 (citing *Jacobsen*, 466 U.S. at 115). In other

words, the closed container doctrine should not apply to searches of electronic data storage devices.

Here, the court of appeals disagreed and relied on the private search doctrine to justify Officer Yap's search of Samantha's computer. In doing so it misapplied the doctrine and held that once Wildaughter opened one file on the computer, the entire computer is fair game for police officers to search without a warrant. R. at 55. This approach equates a computer to a single container, an analogy that makes no sense. In *Riley*, this Court stressed that "the sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions" which a hard drive has the likelihood and capability of containing. 573 U.S. at 394.

Worse still, neither the Government nor the court of appeals articulate any limiting principle to this closed container justification for searching computer storage devices. If all someone had to do was view one file on a computer to give law enforcement officers unlimited access to "the sum of an individual's private life," Fourth Amendment protections would be fundamentally diminished. *See id.* The Government cannot use "the power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

Although this Court has not revisited the private search doctrine since its application in *Jacobsen*, various circuit courts have. For example, in *United States v. Sparks*, a customer left a cell phone at a Walmart. 806 F.3d 1323, 1336 (11th Cir. 2015). A Walmart employee viewed one videos on the phone, determined it was child pornography, and turned the phone over to police. *Id.* 1330. The police officer then viewed another video on the phone, which exceeded the scope of the private search. *Id.* at 1332. The court specifically held that the private search "did not expose every part of the information contained in the cell phone." *Id.* The Eleventh Circuit

found similar limits in *Lichtenberger*, 786 F.3d at 485–86. There, the defendant's girlfriend hacked the defendant's computer and found images of child pornography. *Id.* at 479–80. After calling the authorities, she showed the responding police officer images, but could not recall if the images had been the same ones she had viewed before. *Id.* at 480–81. The court held "the government's ability to conduct a warrantless follow-up search of this kind is expressly limited by the scope of the initial private search." *Id.* at 482 (citations omitted). Because the defendant's girlfriend could not remember, "there was a very real possibility" that the officer "could have discovered something else" outside the scope of the private search. *Id.* at 488.

Officer Yap made the same mistake the officers in *Sparks* and *Lichtenberger* did. By "viewing every document in the flash drive," R. at 6, he exceeded the scope of Wildaughter's private search.

C. Officer Yap Could Not Have Been Virtually Certain as to the Contents of the Files Before He Opened Them Because the Titles of the Folders Offered Little Insight into What They Contained.

Even under the closed container doctrine, Officer Yap's subsequent search beyond that of Wildaughter was limited to the extent that he was certain of what he might find. When an officer searches privately searched items without a warrant, the officer has the duty to be "virtually certain" the object of the search "contains nothing but contraband." *Jacobsen*, 466 U.S. at 120 n.17. But Officer Yap had no idea what his expanded search would turn up. Thus, should this Court choose to treat Samantha's computer as a closed container and allow a limited expansion of the Government's subsequent search, the search was still unlawful.

This Court explained the "virtual certainty" concept in *United States v. Jacobsen*, the case first recognizing the private-search doctrine. 466 U.S. at 111. There, the Court held a government agent's search of a package following a search by a Federal Express employee was

lawful. *Id.* at 118. The employee had opened the package, found multiple, transparent, zip-lock containers of a "white, powdery substance," and informed the police. *Id.* at 111. In response, a Drug Enforcement Administration agent subsequently opened each container and removed a small amount of the powder. *Id.* In upholding the agent's actions, the Court recognized that it had exceeded the scope of the initial search by the employee, but reasoned that it was permissible because "there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of [the containers] would not tell him anything more than he had already been told." *Id.* at 119.

Contrary to the reasoning of the court of appeals, the *Jacobsen* Court did not create a bright-line rule allowing an officer to search anything and everything within a container simply because a private actor had previously opened it. Rather, it held that an officer's search can only proceed beyond an initial private party search if the officer is substantially certain he will find nothing new.

Even the cases relied on by the lower court recognize this important limiting principle. In *United States v. Runyan*, the Fifth Circuit held that the government had unlawfully searched computer disks that had been turned over to them by a private actor but which the private actor had not viewed. 275 F.3d at 464. In so holding, it reasoned that the police were not "substantially certain of what was inside that container . . . ." *Id.* Conversely, in *Rann v. Atchison*, the Seventh Circuit held that a government search of a memory card turned over to the police by a private actor was lawful because "the police were substantially certain" of the contents of the digital storage device. 689 F.3d 832, 834 (7th Cir. 2012).

What these cases indicate is that even when electronic storage devices are analogized to physical containers, a police officer cannot simply peruse their contents without being certain

that they will not discover anything new. The private-search doctrine is based on the idea that once a private individual frustrates the privacy interests of another, a subsequent search by a government agent does not violate that person's expectation of privacy to the extent it has already been frustrated. *Jacobsen*, 466 U.S. at 117–18. But a private search "does not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection." *Walter*, 447 U.S. at 659. In this case, the court of appeals ignored this premise, holding that once a private actor frustrates a person's privacy interests in one computer file, the entire computer hard drive is stripped of Fourth Amendment protection without properly examining if the officer was substantially or virtually certain of what might be found.

Officer Yap could not have been substantially certain of what any of the files contained. He had not asked Wildaughter which files she examined. R. at 20. She had just told him "they were all on there." R. at 29.

Nor could Officer Yap have been substantially certain from the names on the particular files. They ranged from innocuous labels such as "confirmations" to "recipe," and "budget." R. at 6. He even opened files entitled "Health Insurance ID Card," and "research." R. at 6. None of these file names gave any indication that could or would meet the virtual certainty standard articulated in *Jacobsen*.

D. Officer Yap's Warrantless Search of the Computer Files Does Not Fall into Any of the Exceptions to the Warrant Requirement and Was Thus Per Se Unreasonable.

Officer Yap conducted his search of the computer files outside the judicial process. He did not get a warrant and offers no possible exception to the requirement that could arguably apply.

Warrantless searches are per se unreasonable under the Fourth Amendment and are subject only to a few "specifically established and well-delineated exceptions." *Arizona v. Gant*, 556

U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Warrants are presumptively required because they "provide[] the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). Thus, the warrant requirement is "not an inconvenience to be somehow 'weighed' against the claims of police efficiency," but rather "an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous, executive officers who are a part of any system of law enforcement." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (citation omitted).

The Fourth Amendment required Officer Yap to obtain a warrant before exceeding the private search of Samantha's computer files. He did not so the search was unconstitutional.

III. SAMANTHA GOLD WAS DENIED DUE PROCESS WHEN THE GOVERNMENT WITHHELD EXCULPATORY INFORMATION ABOUT POTENTIAL SUSPECTS ON THE BASIS THAT IT WAS INADMISSIBLE.

The third issue addresses the denial of Samantha's motion for post-conviction relief on the basis of two *Brady* violations. Specifically, the Government withheld information from Chase Caplow, who had revealed the victim was in debt with another HerbImmunity distributor, Martin Brodie, rumored to be violent. R. at 11, 44. The Government also withheld information from an anonymous tip, naming Belinda Stevens as the person responsible for Driscoll's death. R. at 12, 44. Neither lead was shared with the defense. R. at 44. After the trial and sentencing, the defense first learned of the existence of the statements and filed a request for a directed verdict or new trial based on the *Brady* violations. R. at 55. In explaining its failure to disclose the information, the Government maintains that it could withhold these statements suggesting other suspects. R.at 55. The sole basis for its position is that, in its view, inadmissible evidence is never material

under *Brady*. R. at 45. In other words, the Government contends that "information that is inadmissible at trial is not evidence at all and cannot form the basis of a *Brady* claim." R. at 43. The district court accepted that argument and denied the post-conviction relief. R. at 48–49.

This Court in *Brady v. Maryland* established constitutional obligations for the prosecution to disclose all evidence that is favorable and material to the defendant. 373 U.S. 83, 87 (1963) (citing U.S. Const. amends. V, XIV). *Brady* held that the Government violates due process by suppressing evidence that is material and favorable either to guilt or punishment, irrespective of the motivation behind the suppression. *Id.* The prosecutor at trial withheld extrajudicial statements made by Brady's accomplice in which the accomplice admitted to committing the homicide. *Id.* at 84. Brady learned of favorable evidence after his conviction was final. *Id.* Thus, to prevent this type of unjust treatment of defendants, this Court imposed an obligation on the prosecution to disclose "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." *Id.* The constitutional obligation this Court created was a "limited departure" from the "adversary model." *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."). The Due Process principle underlying the *Brady* obligation is "the careful balance between maintaining an adversarial system of justice and enforcing the prosecution's obligation to seek justice before victory." *Boss v. Pierce*, 263 F.3d 734, 743 (7th Cir. 2001).

To demonstrate a *Brady* violation, Samantha had to prove 1) that the evidence was favorable to her because it was exculpatory or impeaching; 2) that the evidence was suppressed by the Government, either willfully or inadvertently; and 3) that the evidence was material and, therefore, that the failure to disclose it was prejudicial. *See Strickler v. Greene*, 527 U.S. 263,

271 (1999). Under *Brady*, excluded evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

The issue in this case focuses on the third, materiality element. The court of appeals mistakenly transformed *Brady*'s obligation from affirmative and mandatory to non-existent by focusing on the form of the information, rather than the effect it had. This Court should reverse the erroneous ruling to preserve *Brady*'s due process protections. *Brady* requires disclosure of material, exculpatory information in the Government's possession before trial. By withholding statements implicating alternative suspects, the Government committed an error of constitutional magnitude that undoubtedly affected the trial and sentence. Thus, Samantha is entitled to post-conviction relief.

A. Inadmissible Exculpatory Evidence Can Be Material Under *Brady* if It Can Lead to the Discovery of Admissible Exculpatory Evidence.

The court of appeals categorically excluded all inadmissible evidence from a prosecutor's *Brady* obligations. It did so based on the mistaken notion that *Brady* violations do not occur even when undisclosed inadmissible information in the Government's hands has the potential of leading to admissible exculpatory evidence for the defense.

Although this Court has never explicitly stated that inadmissible evidence can form the basis of a *Brady* violation, it has alluded to this fact. For example, in *Wood v. Bartholomew*, the court ruled that polygraphs did not establish material evidence necessary for a *Brady* violation because they were not likely to change the outcome of the case, not because they were inadmissible evidence. 516 U.S. 1, 8 (1995). The materiality standard that the court relied on in *Wood* was adopted in *United States v. Bagley*, stating that the question is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different." 473 U.S. at 682. The resolution in *Wood* focused on the effect the evidence had, not what form it took. To be sure, the Court did not categorically reject the suggestion that inadmissible evidence can be material, if it could have led to the discovery of admissible evidence. Instead, this Court found, polygraph results, to be "mere speculation," because it was consistent with the witnesses' testimony at trial and with the petitioner's guilt. *Wood*, 516 U.S. at 8. The Court also rejected the suggestion that the polygraph results might have affected the petitioner's trial counsel's preparation, because counsel had himself testified to the contrary at the evidentiary hearing. *Id.* at 7. But other than its disapproval of such "mere speculation," the Court did not rule out the possibility of basing a *Brady* claim on inadmissible evidence that could have led to the discovery of admissible evidence.

Since *Wood*, a circuit split has emerged. A minority of circuit courts took the court of appeals' approach and have held that inadmissible evidence is never material under *Brady*. *United States v. Morales*, 746 F.3d 310, 314 (7th Cir. 2014) ("[S]uppressed evidence must be more than material to guilt or punishment—it must actually be admissible in order to trigger *Brady* analysis."); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (holding that inadmissible statements are, "as a matter of law, 'immaterial'"). But a majority of circuits hold that inadmissible evidence can be material under *Brady*. *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 307 (3d Cir. 2016) (en banc) (holding that to add an admissibility requirement to Fourteenth Amendment *Brady* inquiry constituted "an unreasonable application of" and was "contrary to" clearly established federal law); *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."); *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc) ("[W]e 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."); *Spence v. Johnson*, 80 F.3d 989, 1005 (5th Cir. 1996) ("[I]nadmissible evidence may be material under *Brady*."); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (same).

Categorically excluding evidence that happens to be inadmissible would undermine the *Brady*'s due process goals. *Brady* promoted trust and fairness in the criminal judicial system. This Court in explained 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. Due to this rule, "[t]he prudent prosecutor will resolve doubtful questions in favor of disclosure" as they should. *United States v. Agurs*, 427 U.S. 97, 108 (1976). "Such disclosure will serve to justify trust in the prosecutor . . . [a]nd it 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." *Kyles v. Whitley*, 514 U.S. 419, 439–40 (1995).

Adopting a rule that, without consideration, excludes *Brady* claims on the sole basis that the evidence is inadmissible cuts to the heart of *Brady*'s foundational principles discussed above. This would allow the prosecutor to hide material evidence that could significantly affect the verdict of a case, leaving it solely up to the defense counsel to discover the evidence on its own, no matter the degree of difficulty. And a prosecutor's *Brady* obligations could be manipulated by not calling a witness.

This Court has expressly rejected this type of practice in *Banks v. Dretke*, declaring that "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material." 540 U.S. 668, 695 (2004). After *Banks*, circuit courts have used

this language to hold that the approach taken by the court of appeals here directly conflicts with the fundamental principles in *Brady*. *See Dennis*, 834 F.3d at 293 ("[I]t is clear there is no . . . 'hide and seek' exception depending on defense counsel's knowledge or diligence."); *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) ("[T]he clear holding in *Banks* should have ended . . . favoring the prosecution with a defendant-due-diligence rule.").

Samantha's counsel would not have reasonably been able to find either piece of information regarding additional potential suspects after the government decided to play 'hide and seek' with it. Each piece of evidence—the interview with Chase Caplow that revealed Driscoll was in debt trouble with someone, and the anonymous phone call naming another suspect—were intentionally hid from Samantha, and should have been disclosed pre-trial.

B. The Possibility That the Disclosure of the Two Potential Suspects Would Have Led to Admissible Evidence Is More Than Mere Speculation.

The inadmissible information is material under *Brady* because it would have led Samantha's counsel to discover admissible evidence. The FBI reports that were withheld from Samantha would have directly led to admissible evidence, and it is not speculative to conclude this. She need only show "[a] reasonable probability of a different result is possible only if the suppressed information is itself admissible or would have led to admissible evidence." *Spaziano v. Singletary*, 36 F.3d 1028, 1033 (11th Cir. 1994).

Samantha is not speculating that the disclosure of two other potential suspects would have led to admissible evidence. Had she been given this information, her counsel would have been able to thoroughly investigate these suspects, something that the FBI failed to do. *See Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000) (finding defendant had only presented speculation because had conducted thorough investigations to rule out undisclosed suspects). Each lead provided a specific name and, at a minimum, Samantha's counsel could have issued subpoenas

to compel witness testimony. And her counsel could have conducted other discovery to determine precisely what other evidentiary support was available. Because there was a "reasonable probability" of a different result had the inadmissible information been disclosed, then a *Brady* violation has occurred regardless of whether the information initially withheld was admissible or inadmissible. *United States v. Phillip*, 948 F.2d 241, 245 (6th Cir. 1991).

C. Samantha Can Show a Reasonable Probability That, Had the Exculpatory Evidence Been Disclosed Before Trial, the Result Would Have Been Different.

Samantha can also show a "reasonable probability" that, had the exculpatory evidence been disclosed at trial, the result would have been different. *Banks*, 540 U.S. at 698–99. But this different result standard does not require that the suppressed evidence would have automatically led to an acquittal. *Kyles v. Whitley*, 514 U.S. at 434. Rather, a reasonable probability of a different result is shown when the failure to disclose evidence "undermines confidence in the outcome of the trial." *Id.* at 434 (quoting *United States v. Bagley*, 473 U.S. at 678).

Information not otherwise admissible would have formed the basis for cross-examining police witnesses about the adequacy of their investigation. In *Kyles*, for example, the prosecution failed to disclose multiple inconsistent statements of a non-testifying informant, "Beanie," that suggested his own culpability for the murder and his desire to see the defendant arrested. 514 U.S. at 445–46. Recognizing that, had the statements been disclosed, the defense might have elected not to call Beanie as an adverse witness, this Court described in detail how the statements nevertheless could have been used to "attack[] the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted." *Id.* at 446; *see also Dennis*, 834 F.3d at 302 (recognizing police activity sheet indicating State's eyewitness gave inconsistent statement to

third party could have been used not only to impeach eyewitness, but to cross-examine detectives about failure to further investigate). The same was certainly true here.

The suppressed evidence was clearly favorable to Samantha's defense. It directly contradicted the State's theory that she was the actual killer. But it would have also have had an effect on the defense's preparation and strategy. And that is enough for a *Brady* violation claim, and enough to conclude that the trial she received was unfair. Withholding information may "throw existing strategies and preparation into disarray . . . when a trial already has been prepared on the basis of the best opportunities and choices then available." *Leka v. Portunondo*, 257 F.3d 89, 100–01 (2d Cir. 2001). Samantha's counsel was not given an opportunity to investigate either of the two suspects that the FBI knew of and was not given the opportunity to alter its trial strategy in any way.

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER