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 2
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Federal Rule of Evidence 501 doctor-patient evidentiary privilege protects confidential communications made during a therapy session after the doctor previously breached confidentiality by notifying police of a potential threat.

2. Whether the Fourth Amendment requires the government to obtain a warrant prior to viewing files on a USB drive, beyond what a private party previously viewed.

3. Whether the requirements of *Brady v. Maryland* obligate the government to disclose exculpatory information that can affect the judgment of the jury.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. THE DOCTOR-PATIENT EVIDENTIARY PRIVILEGE PROTECTS COMMUNICATIONS MADE BY MS. GOLD TO DR. POLLAK. 10

- A. Ms. Gold's Statements to Dr. Pollak During Therapy Did Not Fall Within the Scope of Section 711 of the Boerum Health and Safety Code; Thus, Dr. Pollak Violated the Doctor-Patient Privilege. 10
- B. A Doctor May Warn the Police and Intended Victim After a Patient Communicates a Threat, but the Doctor May Not Testify at a Criminal Proceeding Thereafter. 12
- C. Trust and Confidentiality are Essential to the Patient's Reliance on Professional Therapy. 13

II. THE GOVERNMENT'S WARRANTLESS SEARCH OF THE USB DRIVE VIOLATED THE FOURTH AMENDMENT. 15

- A. Officer Yap's Digital Search Exceeded the Scope of the Search Conducted by Ms. Wildaughter, the Private Party. 15
- B. Broadening the Scope of the Private Search Doctrine Will Destroy Any Reasonable Expectation of Privacy in Digital Data. 20

III. THE GOVERNMENT'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE VIOLATED THE REQUIREMENTS OF *BRADY V. MARYLAND*. 21

- A. *Brady's* Due Process Protections Required the Government to Disclose the FBI Reports to the Defense. 21
  1. The Government Suppressed the FBI Reports from Ms. Gold's Defense. 22
  2. The FBI Reports Were Favorable to Ms. Gold's Defense. 23
  3. Disclosure of the FBI Reports Would Have Created a Reasonable Probability that the Result of the Trial Would Have Been Different. 23
- B. When Prosecutors Turn a Blind Eye to Their Disclosure Obligations, Justice Can No Longer Be Achieved. 27
  1. A Broad Approach to the Government's Disclosure Requirements is the Best Avenue to Guarantee the Pursuit of Justice and Due Process for all Defendants. 27
  2. It Would Be Unfair to Determine a Prosecutor's Duty to Disclose Based on Admissibility. 29

CONCLUSION 30

APPENDIX..a

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Brady v. Maryland, 373 U.S. 83 (1963). 6, 9, 23

Carroll v. United States, 267 U.S. 132 (1925).. 18

Cone v. Bell, 543 U.S. 447 (2005). 28

Kentucky v. King, 563 U.S. 452 (2011). 18

Kyles v. Whitley, 514 U.S. 419 (1995)... 26, 28, 31, 32

Riley v. California, 573 U.S. 373 (2014). 16, 17

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).. 18

Smith v. Cain, 565 U.S. 73 (2012). 31

Strickler v. Greene, 527 U.S. 263 (1999). 23, 26, 30

Terry v. Ohio, 392 U.S. 1 (1968). 17

United States v. Agurs, 427 U.S. 97 (1976). 30

United States v. *Bagley*, 473 U.S. 667 (1985). 23

United States v. Jacobsen, 466 U.S. 109 (1984).. 16, 19, 22

Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995). 16

Virginia v. Moore, 553 U.S. 164 (2008). 17

Walter v. United States, 447 U.S. 649 (1980)... 18

Warden v. Hayden, 387 U.S. 294 (1967). 18

Wood v. Bartholomew, 516 U.S. 1 (1995). 26, 27

Wyoming v. Houghton, 526 U.S. 295 (1999). 22

UNITED STATES COURTS OF APPEALS CASES

Barton v. Warden, 786 F.3d 450 (6th Cir. 2015)... 31

Bradley v. Nagle, 212 F.3d 559 (11th Cir. 2000). 27

Carvajal v. Dominguez, 542 F.3d 561 (7th Cir. 2008). 25

Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263 (3d Cir. 2016). 27

Ienco v. Angarone, 429 F.3d 680 (7th Cir. 2005). 24

Johnson v. Folino, 705 F.3d 117 (3d Cir. 2013).. 27, 29

Rann v. Atchison, 689 F.3d 832 (7th Cir. 2012). 18, 19

United States v. Bland, 517 F.3d 930 (7th Cir. 2008)... 23
United States v. Chase, 340 F.3d 978 (9th Cir. 2003). 11, 12, 14
United States v. Glass, 133 F.3d 1356 (10th Cir. 1998). 15
United States v. Hayes, 227 F.3d 578 (6th Cir. 2000). 12, 14
United States v. Morales, 746 F.3d. 310 (7th Cir. 2014). 32
United States v. Price, 566 F.3d 900 (9th Cir. 2009)... 31
United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007). 33
United States v. Runyan, 275 F.3d 449 (5th Cir. 2001). 18
United States v. Sparks, 806 F.3d 1323 (11th Cir. 2015). 19, 22
United States v. Wilson, 481 F.3d 475 (7th Cir. 2007). 23

STATE SUPREME COURT CASES

People v. Bloom, 193 N.Y. 1 (1908).. 11
State v. Miller, 300 Or. 203 (1985)... 13
State v. Wilkins, 125 Idaho 215 (1994). 13
Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425 (1976)... 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend IV ....8, a

STATUTES

18 U.S.C. § 1716 (2018). 4, 5
18 U.S.C. § 3551 (2018). 5
Boerum, Health and Safety Code § 711 (2020)... 7, 8, 11, 13

RULES

Fed. R. Evid. 501 ....7, a

OTHER AUTHORITIES

Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175 (1962). 14

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit affirming the district court's judgment is unpublished but available in the Record on pages 50–59. The United States District Court for the Eastern District of Boerum's oral ruling on Petitioner's motion to suppress is reproduced in the Record on pages 40–41. The district court's oral ruling on Petitioner's motion for post-conviction relief is reproduced in the Record on pages 48–49.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves questions under Rule 501 of the Federal Rules of Evidence, Section 711 of the Boerum Health and Safety Code, and the Fourth Amendment to the United States Constitution. The appendix contains the text of Rule 501, Section 711, and the Fourth Amendment. Pet'r's App., *infra*, a.

STATEMENT OF CASE

I. STATEMENT OF FACTS

A. Samantha Gold and Her Struggles at Joralemon University

Petitioner Samantha Gold is a student at Joralemon University. R. at 5, 14, 38. Like many college students, Ms. Gold worked to help pay bills while she attended school. R. at 18. In 2016, Tiffany Driscoll, a Joralemon student, recruited Ms. Gold to work for HerbImmunity, a multi-level marketing group. R. at 5, 14, 18, 51. Unfortunately, Ms. Gold had little success in selling HerbImmunity's products and found herself going deeper and deeper into debt as she continued to invest in a wide variety of HerbImmunity's products. R. at 6, 14, 18, 51. To cope with her frustrations, Ms. Gold sought treatment for "anger issues" at the Joralemon Counseling Center. R. at 17. There, Ms. Gold met with Dr. Chelsea Pollak, a therapist, whom she had regular therapy sessions with. R. at 17-18, 20, 22, 52. On the afternoon of May 25, 2017, Ms. Gold attended a therapy session with Dr. Pollak where she disclosed certain intimate and personal information. R.

at 3, 17-18. According to Dr. Pollak, Ms. Gold "appeared disheveled and agitated" at her appointment. R. at 4, 18.

B. Violations of Ms. Gold's Confidences and Personal Intimacies

Following their session, Dr. Pollak phoned the Joralemon University Police Department (JUPD) and disclosed information she learned in confidence from Ms. Gold, violating doctor-patient evidentiary privilege. R. at 5, 19, 52. In particular, Dr. Pollak informed an officer that Ms. Gold stated she was "so angry" and "going to kill her." R. at 4, 5, 19-20, 52. Ms. Gold further stated, "I will take care of her and her precious HerbImmunity"; however, during cross examination Dr. Pollak admitted that it was possible Ms. Gold meant that she would pay off her debt and never think about Ms. Driscoll or HerbImmunity again. R. at 22. Dr. Pollak scanned and sent the therapy session records to the officer, despite knowing records are confidential. R. at 5, 20. Based on the information Dr. Pollak disclosed to the JUPD, Officer Nicole Fuchs warned Ms. Driscoll that there had been a threat reported against her, but Ms. Driscoll expressed little to no concern. R. at 5. Officer Fuchs and her team then paid a visit to Ms. Gold. R. at 5. Upon arriving at Ms. Gold's dorm room, Officer Fuchs stated that Ms. Gold answered the door, appeared calm and rational, and after speaking with her for 15 minutes, determined that she posed no threat to herself or to others. R. at 5. Based on these events, Officer Fuchs concluded her investigation. R. at 5.

Shortly after her interaction with the JUPD, Ms. Gold left her dorm room. R. at 6. At that time, and without permission, Jennifer Wildaughter, Ms. Gold's roommate, proceeded to enter Ms. Gold's personal room and view her desktop, alleging that she was "concerned about Samantha." R. at 6, 24, 26. Ms. Wildaughter proceeded to browse through Ms. Gold's personal documents and files until she saw certain "concerning images and text files." R. at 6, 24-26. Thereafter, Ms.

Wildaughter copied Ms. Gold's entire desktop onto a USB drive, and brought it to Officer Aaron Yap, head of the digital forensics department at the Livingston Police Department (LPD). R. at 6, 26, 51. At the precinct, Ms. Wildaughter informed Officer Yap of the information copied to the USB drive, namely, that the drive contained files demonstrating that Ms. Gold was planning to poison Ms. Driscoll. R. at 6, 26-27. She told Officer Yap that "everything of concern was on the drive" and described the particular images and text files that she saw on the desktop. R. at 6, 26-27, 29. Ms. Wildaughter described photographs "depicting [Ms. Driscoll] unlocking her door and entering the house, at a café where Ms. Driscoll was eating chocolate covered strawberries, and of her father exiting the subway." R. at 6, 25. Ms. Wildaughter also "viewed a short, unsigned note directed to Ms. Driscoll, telling her how kind she was and offering her some sort of gift[.]" R. at 6, 26, 28. Ms. Wildaughter told Officer Yap about "a text file containing passwords and codes she did not understand, along with a mention of strychnine, a common rat poison." R. at 6, 26-27. Ms. Wildaughter said during cross examination that she and Ms. Driscoll had a rodent problem in their apartment in April 2017. R. at 29.

Based on the information relayed by Ms. Wildaughter, Officer Yap conducted a warrantless search of the drive's contents. R. at 6, 32-34. Officer Yap first clicked on the "photos" folder but only saw personal photos unrelated to the photographs Ms. Wildaughter mentioned. R. at 6. Officer Yap then examined the contents of every folder, subfolder, and document on the drive, including unrelated documents labeled "Exam4" and "Health Insurance ID Card," as well as budget information and a to-do list. R. at 6, 32, 51. After viewing every document on Ms. Gold's desktop, Officer Yap concluded that Ms. Gold was planning to poison Ms. Driscoll and ended his investigation. R. at 6.

C. FBI Investigation into the Death of Tiffany Driscoll

On the evening of May 25, 2017, Ms. Driscoll was found dead in her father's townhouse. R. at 13-14, 51-52. She appeared to have suffered blunt force trauma to the head, but medical examiners on the scene noted that there was nothing to suggest that foul play may have been involved. R. at 13-14. On May 27, 2017, the FBI conducted a search of the Driscoll home that revealed evidence suggesting Ms. Driscoll had been poisoned. R. at 14. Toxicology reports confirmed that Ms. Driscoll's death was caused by ingesting strychnine found to have been injected into strawberries that were mailed to Driscoll's apartment in a fruit basket. R. at 14, 51. As part of the FBI's investigation, agents obtained information that in 2016 Ms. Driscoll recruited Ms. Gold to join HerbImmunity. R. at 5, 14, 18, 51. Further, the FBI reported that sources told them Ms. Driscoll persuaded Ms. Gold to invest $2,000 in the product but was only able to make one sale. R. at 14, 18. These sources also stated that, angered by her increasing debt and her struggle to keep up with her classes, Ms. Gold had been heard on numerous occasions making threats against Ms. Driscoll. R. at 14. Based on the allegations made by these sources, the FBI subsequently arrested Ms. Gold in connection with Ms. Driscoll's death and charged her with murder by mail, in violation of 18 U.S.C. § 1716 (j)(2), (3). R. at 14, 51; *see* Pet'r's App., *infra*, a.

In the months following Ms. Gold's arrest, the FBI continued to investigate the death of Ms. Driscoll. R. at 11-12, 44. On June 2, 2017, an FBI agent interviewed a Chase Caplow during the Bureau's investigation. R. at 11, 44. Mr. Caplow attended Joralemon University with Ms. Driscoll and was also involved in the multi-level marketing company HerbImmunity. R. at 11, 55. During the interview, Mr. Caplow indicated that Ms. Driscoll called him two weeks prior to her death and said she owed money to Martin Brodie, an upstream distributor within the company. R. at 11, 55. Mr. Caplow was unaware of how much money Ms. Driscoll owed to Mr. Brodie but

indicated Mr. Brodie was rumored to be violent. R. at 11, 55. On July 7, 2017, the FBI received an anonymous phone call in connection with the death of Ms. Driscoll. R. at 12, 44, 55. The anonymous tipster alleged that a Belinda Stevens was responsible for the murder of Ms. Driscoll and indicated that both Ms. Stevens and Ms. Driscoll were involved in the multi-level marketing operation HerbImmunity. R. at 12, 55. An FBI agent conducted a preliminary investigation into the veracity of the anonymous tip, eventually concluding that the lead was not reliable, nor did it require further follow-up. R. at 12.

II. NATURE OF THE PROCEEDINGS

In February 2017, the United States Attorney for the Eastern District of Boerum brought charges against Ms. Gold for knowingly and intentionally depositing for mail or delivery by mail, a package containing items declared unmailable by the United States Postal Service, with the intent to kill or injure another, and which resulted in the death of another, in violation of Title 18, United States Code, Sections 1716(j)(2), (3), and 3551 et seq. R. at 1, 14, 51. The Government offered the testimony and notes of Dr. Pollak, Ms. Gold's therapist, as well as certain information seized illegally from Ms. Gold's computer, as evidence of Ms. Gold's connection to the charged crime. R. at 6, 16, 20, 23-26. Ms. Gold filed a pre-trial motion to suppress with the district court, seeking to preclude (1) the government from calling Dr. Pollak to testify against her and from introducing Dr. Pollak's notes into evidence and (2) certain information seized illegally from Ms. Gold's computer. R. at 16, 31, 51. Ms. Gold argued that the compelled testimony violated her doctor-patient evidentiary privilege protecting confidential communications and the warrantless search of her entire desktop violated her Fourth Amendment rights. R. at 35. The district court denied Ms. Gold's motion in its entirety, agreeing with the Government that (1) a "dangerous patient" exception should be carved out to the doctor-patient evidentiary privilege, and (2) a broad approach

to the private search doctrine allows for reasonable flexibility on the part of government actors, while still allowing individuals to retain reasonable expectations of privacy. R. at 35-36, 40-41. The district court admitted that the defense made important policy concerns regarding the recognition of the "dangerous patient" exception but still revoked Ms. Gold's doctor-patient evidentiary privilege simply because Dr. Pollak had already breached the privilege. R. at 41.

In her trial testimony, Dr. Pollak stated she was "pretty sure" she told Ms. Gold about her duty to protect a potential victim upon a patient's threatening statement but did not inform Ms. Gold that statements made in therapy sessions may be used against a patient in a criminal proceeding. R. at 21. Dr. Pollak admitted that alerting patients to the possibility of his or her therapist testifying against him or her in a criminal proceeding could harm the therapist-patient relationship. R. at 21. Dr. Pollak further indicated that confidentiality "encourage[s] patients to feel comfortable enough to tell [therapists] any and all relevant information necessary for . . . diagnos[is] and treat[ment.]" R. at 20.

After the trial and sentencing, Ms. Gold learned that the Government possessed statements provided to the FBI prior to trial that identified other potential suspects in the murder of Ms. Driscoll. R. at 43, 47, 48, 55. Ms. Gold argued that the Government's failure to disclose these two pieces of evidence is a violation of its obligations under *Brady v. Maryland*, and sufficiently prejudicial to warrant a directed verdict or a new trial. R. at 43, 48, 52, 55. Agreeing with the Government, the district court set aside the prejudices against Ms. Gold, finding that information that is inadmissible at trial is not evidence at all and cannot form the basis of a *Brady* claim. R. at 43, 49, 51, 56. After the trial, the grand jury convicted Ms. Gold. R. at 48. On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed the district court, on both the pre-trial motion to suppress and the motion for post-conviction relief. R. at 57.

Despite JUPD determining that Ms. Gold posed no threat to Ms. Driscoll, the court concluded there was a serious threat of harm that could only have been averted by Dr. Pollak's disclosure. R. at 5, 52-53. According to the court, doctor-patient evidentiary privilege had previously been breached and any privilege that would bar Dr. Pollak's testimony ceased to exist. R. at 41, 53. The court also refused to adopt an approach that would impose stringent guidelines on government agents, instead applying a broad approach to the private search doctrine as applied to digital information. R. at 51, 55. The court reasoned that a broad approach allows for "a more consistent application that is easy to understand." R. at 55. Finally, the majority agreed with the trial court that, "the government's failure to disclose these [FBI] reports did not constitute a [*Brady*] violation," as the Government's failure to disclose would not create a reasonable probability that the outcome of the trial would have been different. R. at 48, 55-56.

SUMMARY OF ARGUMENT

This Court should reverse the Fourteenth Circuit's decision because (1) the doctor-patient evidentiary privilege protects confidential communications made during a therapy session; (2) the Government must obtain a search warrant under the Fourth Amendment prior to viewing digital files, beyond what a private party previously viewed; and (3) the Government must disclose evidence favorable to the defense of a defendant.

I. The Federal Rule of Evidence 501 doctor-patient evidentiary privilege protects communications between a patient and his or her doctor during a therapy session. Under Section 711 of the Boerum Health and Safety Code, a doctor may disclose confidential communications pertaining to "an actual threat to physically harm . . . an identifiable victim" if there exists "a clinical judgment that the patient has the apparent capability to commit such an act and . . . it is more likely than not that in the near future the patient will carry out the threat." During Ms. Gold's therapy session, she expressed frustration and vaguely stated she wanted to "kill her" and "take

care of her and her precious HerbImmunity." The record fails to establish who Ms. Gold was referring to. Under Section 711, Dr. Pollak should not have disclosed her confidential communications with Ms. Gold to the police because there was no identifiable victim; however, Dr. Pollak's duty under Section 711 ends with the notification to the police. Section 711 does not permit a doctor to testify against a patient in a criminal proceeding. Permitting the Government to compel doctors to testify against patients will certainly result in a chilling effect in which patients will no longer communicate openly with their therapists.

II. The Fourth Amendment allows for the police to conduct warrantless searches within the scope a search previously conducted by a private party. Ms. Wildaughter searched through certain documents and files on Ms. Gold's computer without permission. Suspecting Ms. Gold planned to harm Ms. Driscoll, Ms. Wildaughter copied the entire desktop of Ms. Gold on a USB drive and delivered it to Officer Yap. Once Ms. Wildaughter handed the USB drive to Officer Yap, she walked him through the files she searched and highlighted some concerns she had, including there being pictures of Ms. Driscoll and her father, a friendly note, and a file containing passwords and the mentioning of rat poison. The record does not reflect whether Ms. Wildaughter told Officer Yap that she and Ms. Gold recently had a rodent problem, a valid reason for Ms. Gold to have references to rat poison on her computer. Officer Yap proceeded to search the entire USB drive, containing all the contents of Ms. Gold's computer, despite knowing the limited scope of Ms. Wildaughter's search. In the process, Officer Yap came across several personal files including an exam, health insurance identification card, budget information, and a to-do list. Expanding the private search doctrine to cover USB drives and other storage devices would destroy an individual's reasonable expectation of privacy in digital data. It would incentivize police departments to ask questions limited in scope and solicit vague details from a private party who

previously conducted a private search. In doing so, police could sidestep and render null the Fourth Amendment's warrant requirement.

III. The Government violated *Brady v. Maryland* by failing to produce before trial the two FBI reports concerning other potential suspects in the alleged murder of Ms. Driscoll. The reports that resulted from the FBI's ongoing investigation were favorable and material to Ms. Gold's defense, and thus disclosure was required under *Brady*. These reports and their content were material to Ms. Gold's defense, as they suggested there are other suspects in the murder of Ms. Driscoll, one of whom had motive. The district court abused its discretion in rejecting this argument and denying Ms. Gold's motion for post-conviction relief based on the *Brady* violation. To receive a new trial based upon a *Brady* violation, Ms. Gold must prove that (1) the prosecution suppressed evidence, either willfully or inadvertently that was (2) favorable to her as the accused, and (3) material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Ms. Gold can make each of these showings.

First, the Government suppressed two FBI reports containing statements identifying two suspects connected to the death of Ms. Driscoll, from the defense. In the transcript from the hearing on the motion for post-conviction relief, the Government expressly stated that it did not disclose the reports to the defense prior to trial. The defense had no other means of obtaining these reports, and thus, were suppressed from seeing that information. Second, the FBI reports are favorable to Ms. Gold because the period during which the FBI received the identities of two additional suspects overlapped with the period the FBI conducted its investigation into Ms. Gold and her alleged connection to Ms. Driscoll's murder. Thus, the Government should have understood the importance of these reports to Ms. Gold's defense and the need to investigate their veracity. Lastly, the evidence is material because there is a reasonable probability that the result of the proceeding

would have been different had the Government disclosed the evidence before trial. The Government presented insufficient testimony by Dr. Pollak and an unsubstantiated investigation into Ms. Gold. The FBI reports named two additional suspects in Ms. Driscoll's death. Had the Government disclosed these two pieces of evidence to the defense, the jury would have been unable to conclude beyond a reasonable doubt that Ms. Gold was the murderer when there were other individuals with the motive and means to commit the murder, thus placing the outcome of the case into question.

ARGUMENT

I. THE DOCTOR-PATIENT EVIDENTIARY PRIVILEGE PROTECTS COMMUNICATIONS MADE BY MS. GOLD TO DR. POLLAK.

The doctor-patient evidentiary privilege protects the communications made by Ms. Gold to Dr. Pollak because (A) Ms. Gold's statements during her therapy session on May 25, 2017 did not fall within the Section 711 exception that permits disclosure; however, given the confidential statements were disclosed (B) a doctor may notify the police and warn a potential victim but cannot testify at a criminal proceeding because (C) trust and confidentiality are essential to successful treatment.

A. Ms. Gold's Statements to Dr. Pollak During Therapy Did Not Fall Within the Scope of Section 711 of the Boerum Health and Safety Code; Thus, Dr. Pollak Violated the Doctor-Patient Privilege.

When a patient makes statements during treatment, the statements are confidential under the doctor-patient privilege. *See United States v. Chase*, 340 F.3d 978, 981-82 (9th Cir. 2003). Additionally, where a patient discloses confidential information protected by the doctor-patient privilege to a third party, the patient waives the privilege. *See People v. Bloom*, 193 N.Y. 1, 7, 10 (1908) ("There can be no disclosure of that which is already known, for 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.").

Section 711 of the Boerum Health and Safety Code requires "an actual threat to physically harm . . . an identifiable victim" and "a clinical judgment that the patient has the apparent capability to commit such an act and . . . it is more likely than not that in the near future the patient will carry out the threat." R. at 2. Ms. Gold has been a patient of Dr. Pollak since 2015. R. at 17, 20. Ms. Gold sought treatment for "anger issues." R. at 17. The record is silent on any history of Ms. Gold committing violence or harming herself or others; therefore, there was no "actual threat to physically harm" because Ms. Gold simply is not a violent person.

While Ms. Gold may have "appeared disheveled and agitated" at her appointment with Dr. Pollak on May 25, 2017, it does not follow that she harmed Ms. Driscoll. R. at 4, 18. Despite Ms. Gold's frustration and concerning communications that she was "so angry" and "going to kill her[,]" during the therapy session, officers went to Ms. Gold's dorm room and noted that she "appeared calm and rational." R. at 4, 5, 18-19, 21-22. Officers concluded that Ms. Gold did not pose a threat to anyone, including herself. R. at 5. Though Ms. Gold made what can potentially be perceived as a threatening statement, she did not identify Ms. Driscoll or anyone else when making the statement. R. at 22. Ms. Gold further stated, "I will take care of her and her precious HerbImmunity." R. at 22. Even if the government's position held true that Ms. Gold had Ms. Driscoll in mind when making those statements, during cross examination Dr. Pollak admitted that it was possible Ms. Gold meant that she would pay off her debt and never think about Ms. Driscoll or HerbImmunity again. R. at 22.

In sum, the record lacks evidence showing Ms. Gold's violent tendencies and it is pure speculation as to what she meant when making the statements to Dr. Pollak during the therapy session on May 25, 2017. This Court should find that the statements did not fall within Section

711's scope, and thus, Dr. Pollak mistakenly disclosed confidential communications protected by the doctor-patient privilege.

B. A Doctor May Warn the Police and Intended Victim After a Patient Communicates a Threat, but the Doctor May Not Testify at a Criminal Proceeding Thereafter.

Some states recognize a dangerous patient exception to the doctor-patient privilege, whereby the doctor may warn the potential victim or notify police; however, the doctor may not testify at trial. *See Chase*, 340 F.3d at 984-85, 987 ("[T]he societal benefit from disclosing the existence of a dangerous patient outweighs the private and public cost of the deleterious effect on the psychotherapist-patient relationship. By contrast, ordinarily testimony . . . focuses on establishing a past act. There is not necessarily a connection between the goals of protection and proof."); *United States v. Hayes*, 227 F.3d 578, 585 (6th Cir. 2000) ("We think the *Jaffee* footnote was referring to the fact that [therapists] will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient, to comply with their "duty to protect" the patient or identifiable third parties."); *State v. Wilkins*, 125 Idaho 215, 220 (1994) ("[I]t was improper for the trial court to have compelled [Defendant's] personal [doctor] to testify at the sentencing hearing."); *State v. Miller*, 300 Or. 203, 216 (1985) ("[The public interest] 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.") (citation omitted); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 439 (1976) ("[O]nce a [doctor] does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.").

Boerum's Health and Safety Code Section 711 imposes a duty on mental health professionals to warn a potential victim and notify the police of a threat made by a patient. R. at 2.

Under this provision, the doctor can disclose confidential communications with the patient; however, Section 711 does not include language that would permit a doctor to testify at a subsequent criminal proceeding. R. at 2. After Ms. Gold's therapy session on May 25, 2017, Dr. Pollak believed Ms. Gold could harm herself or Ms. Driscoll, and she called the police to report the incident under Section 711. R. at 5, 19, 22. Dr. Pollak believed Ms. Gold's medical history made her capable of carrying out the vague threat made during the therapy session. R. at 5, 19, 22. The officer Dr. Pollak spoke with asked for the therapy session records, which Dr. Pollak scanned and sent over immediately. R. at 5, 20.

Dr. Pollak fulfilled her duty to warn the potential victim and notify the police under Section 711. Given this is a criminal proceeding involving the death of Ms. Driscoll, this Court should not permit Dr. Pollak to testify against Ms. Gold, a patient.

C. Trust and Confidentiality are Essential to the Patient's Reliance on Professional Therapy.

Successful treatment of a patient "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a doctor] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication." *Jaffee v. Redmond*, 518 U.S. 1, 10-11 (1996) (internal quotation marks omitted) (quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)); *see Hayes*, 227 F.3d at 585 ("[A] 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."). Unlike treatment by physicians for physical injuries and illnesses, therapy requires "frank and complete disclosure of facts, emotions, memories, and fears." *Jaffee*, 518 U.S. at 10-11 ("The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.").

An important aspect affecting the success of psychotherapy is a patient's certainty in knowing discussions had during treatment will be protected. *See id.* at 10-18. Courts should balance the competing interests of the need for patient confidentiality and the health and safety of the potential victim. *See Chase*, 340 F.3d at 990 ("[W]e think that a patient will retain significantly greater residual trust when the therapist can disclose only for protective, rather than punitive, purposes. In other words, the marginal additional harm to the relationship is significant."); *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998) (holding the doctor-patient privilege protected statements under Rule 501 where the therapist implemented a course of treatment instead of notifying the victim or police). Generally, a patient who communicates his or her intention to commit a crime in the future is simply "making a plea for help[,]" and he or she is unlikely to commit the crime itself. Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175, 188 (1962).

While Dr. Pollak indicated she was "pretty sure" she told Ms. Gold about her duty to protect a potential victim upon a patient's threatening statement, Dr. Pollak conceded that she did not tell Ms. Gold that statements made in therapy sessions may be used against a patient in a criminal proceeding. R. at 21. Dr. Pollak further indicated that alerting patients to the possibility of his or her therapist testifying against him or her in a criminal proceeding would likely have a chilling effect on the therapist-patient relationship. R. at 21. During cross examination, Dr. Pollak admitted that confidentiality is important because it "encourage[s] patients to feel comfortable enough to tell [therapists] any and all relevant information necessary for . . . diagnos[is] and treat[ment.]" R. at 20. Further, Dr. Pollak stated that patient records and session notes are confidential. R. at 20.

This Court must recognize the importance of protecting the doctor-patient privilege, as ensuring the confidentiality of communications made by patients to their doctors is essential to successful therapeutic treatment.

II. THE GOVERNMENT'S WARRANTLESS SEARCH OF THE USB DRIVE VIOLATED THE FOURTH AMENDMENT.

Under the Fourth Amendment, "a 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Further, "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). The Government's search of Ms. Gold's documents constituted an unreasonable search because (A) it exceeded the scope of the private search; therefore, (B) broadening the private search doctrine in the manner that the Government suggests will severely reduce privacy expectations in digital data.

A. Officer Yap's Digital Search Exceeded the Scope of the Search Conducted by Ms. Wildaughter, the Private Party.

This Court previously held "that officers must generally secure a warrant before conducting [a digital data search]." *Riley v. California*, 573 U.S. 373, 386 (2014) ("Cell phones . . . place vast quantities of personal information literally in the hands of individuals."). Devices typically store large amounts of digital data; therefore, digital searches "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 393. This Court should treat digital data stored on one's computer desktop the same way as digital data stored on one's smartphone. After all, cell phones are frequently backed up to the user's desktop. *See id.* at 396 ("[A] cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records

previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.”).

Digital data is quantitatively and qualitatively different than physical records. *See id.* at 395. Digital data can include “internet search and browsing history, . . . [reveal[ing] an individual’s private interests or concerns[,] . . . [h]istoric location information[,]” or even financial records. *Id.* at 396. As is the case with cell phones, computers run application software, which “offer a range of tools for managing detailed information about all aspects of a person’s life.” *Id.* (“There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible . . . indefinitely.”).

Under certain circumstances, there are exceptions to the Fourth Amendment prohibition against unreasonable searches. *See generally Virginia v. Moore*, 553 U.S. 164 (2008) (incident to lawful arrest); *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (voluntary consent); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Carroll v. United States*, 267 U.S. 132 (1925) (automobiles). Additionally, an exception to the warrant requirement applies where “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 563 U.S. 452, 460 (2011) (internal quotation marks omitted) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

“When a private party provides police with evidence obtained in the course of a private search, the police need not ‘stop her or avert their eyes.’” *Rann v. Atchison*, 689 F.3d 832, 836 (7th

Cir. 2012) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971)). However, this Court previously stated, "the Government may not exceed the scope of the private search unless it has the right to make an independent search." *Walter v. United States*, 447 U.S. 649, 657 (1980). "[P]olice exceed the scope of a prior private search when they examine a closed container that was not opened by the private searches unless the police are already substantially certain of what is inside that container based on the statements of the private searches, their replication of the private search, and their expertise." *United States v. Runyan*, 275 F.3d 449, 463-64 (5th Cir. 2001) ("A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search.").

Additionally, this Court previously explained, "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant." *Jacobsen*, 466 U.S. at 117-20 (finding no privacy interest existed in a package initially opened by Federal Express employees). Thus, this Court's analysis should focus on whether the government's search "exceed[ed] the scope of the private search." *Atchison*, 689 F.3d at 836 (citing *Jacobsen*, 466 U.S. at 115); *see United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015) (finding the police exceeded the scope of the private search when officers viewed a video on a cell phone that the private party had not previously viewed).

The record indicates that Officer Yap, head of the digital forensics department, met with Ms. Wildaughter, the roommate of Ms. Gold, on May 25, 2017. R. at 6, 23, 29. Without permission, Ms. Wildaughter searched through documents and files on Ms. Gold's computer when Ms. Gold

left the apartment. R. at 6, 23-24, 27. There were images and text files that Ms. Wildaughter thought were suspicious in a folder called "HerbImmunity," but nothing in the files specifically indicated Ms. Gold intended to harm Ms. Driscoll. R. at 6, 23-24, 27-28. Ms. Wildaughter subsequently copied all documents and files from the desktop to a USB drive and brought it to Officer Yap. R. at 6, 26, 28. She told Officer Yap that "everything of concern was on the drive[,]" but described the particular images and text files that she saw on the desktop. R. at 6, 26-27, 29. Officer Yap's report states that Ms. Wildaughter described photographs "depicting [Ms. Driscoll] unlocking her door and entering the house, at a café where Ms. Driscoll was eating chocolate covered strawberries, and of her father exiting the subway." R. at 6, 25.

Further, the report indicates that Ms. Wildaughter "viewed a short, unsigned note directed to Ms. Driscoll, telling her how kind she was and offering her some sort of gift[.]" R. at 6, 26, 28. Lastly, Ms. Wildaughter told Officer Yap about "a text file containing passwords and codes she did not understand, along with a mention of strychnine, a common rat poison." R. at 6, 26-27. Ms. Wildaughter said during cross examination that she and Ms. Driscoll had a rodent problem in their apartment in April 2017. R. at 29. The record does not indicate that Officer Yap asked about or was told by Ms. Wildaughter about a rodent problem. Officer Yap discussed his subsequent search of the drive in his report, saying,

> I first clicked on the "photos" folder, but only saw personal photos unrelated to the photographs Ms. Wildaughter had mentioned. I then examined the contents of the "HerbImmunity" folder, looking into the contents of every subfolder. When examining the "confirmations" subfolder, I found a document titled "Shipping Confirmation" which was a confirmation for a package sent via NationalExpress to Ms. Tiffany Driscoll on May 24, 2017 at 3:45 pm. I then clicked into the "customers" subfolder where I found a subfolder titled "Tiffany Driscoll." After clicking into this folder, I saw the timestamped photographs Ms. Wildaughter had described during our meeting. I then saw and opened the subfolder "For Tiff" and encountered three text documents: "Market Stuff," "recipe," and "Message to Tiffany." I first examined "Message to Tiffany," which was the note Ms. Wildaughter had described during our meeting. I then opened the "recipe"

> document, which was a recipe for chocolate covered strawberries, including an ingredient titled "secret stuff." Next, I opened the "Market stuff" document and noticed the usernames, passwords, and other information Ms. Wildaughter had told me about, along with the reference to strychnine. R. at 6.

Despite knowing the limited scope of Ms. Wildaughter's search, Officer Yap stated that he continued searching "every document on the drive in the order they were listed, including the other subfolders[.]" R. at 6. These documents included file names "Exam4" and "Health Insurance ID Card," as well as budget information and a to-do list. R. at 6. Officer Yap's examination of every file on the USB drive led him to believe Ms. Gold would harm Ms. Driscoll. R. at 6.

The Government exceeded the scope of the private search conducted by Ms. Wildaughter. Like cell phones, computers store large amounts of personal and private data. Officer Yap was aware that Ms. Wildaughter limited her search to certain documents and files on the desktop but still viewed every file on the USB drive, including Ms. Gold's exam, health insurance identification card, personal budget, and to-do list. Further, based on the record the Government cannot establish any exceptions discussed above apply here. The search was not incident to lawful arrest. The search did not result of a stop and frisk. Ms. Gold did not voluntarily consent. Officer Yap was not in hot pursuit. This was not a search of an automobile. There were no exigent circumstances that would permit Officer Yap to sidestep the warrant requirement under the Fourth Amendment. The record does not show Ms. Wildaughter was certain that Ms. Gold intended to harm Ms. Driscoll. Ms. Wildaughter's concern stemmed from photographs, a friendly note, and a file containing passwords and mentioning of rat poison. The possession of photographs, a friendly note, passwords, and rat poison to address a rodent problem should not lead anyone to believe another individual is in immediate danger. If Officer Yap believed it to be necessary to conduct a full search of the USB drive, which contained all contents on Ms. Gold's desktop, he should have obtained a warrant.

Due to Officer Yap's blatant disregard for constitutional due process under the Fourth Amendment, this Court should find that the Government exceeded the scope of the initial private search conducted by Ms. Wildaughter.

B. Broadening the Scope of the Private Search Doctrine Will Destroy Any Reasonable Expectation of Privacy in Digital Data.

This Court should analyze searches of digital data storage devices "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). Broadening the scope of the private search doctrine to include situations involving a private party who snoops into another's possessions without permission will destroy any reasonable expectation of privacy. *See Jacobsen*, 466 U.S. at 117 ("It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information."); *see also Sparks*, 806 F.3d at 1341 ("Fourth Amendment claims do not lie when the defendant has abandoned the property.").

The record confirms that Ms. Wildaughter searched some and copied all of Ms. Gold's documents and files without permission. R. at 6, 23-24, 27. Should this Court allow the Government to exceed the scope of a private search of digital data, it would reduce any reasonable expectation of privacy to zero. Essentially, the Government could refrain from asking specific details about the scope of a private search and proceed to search through large amounts of data provided by private parties on storage devices. Scenarios like this are the reason the Fourth Amendment warrant requirement exists – to protect an individual's right to privacy from excessive government intrusion. Therefore, the degree to which expanding the private search doctrine

intrudes upon an individual's privacy is far greater than the degree to which the expansion is needed to promote legitimate interests of the Government.

III. THE GOVERNMENT'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE VIOLATED THE REQUIREMENTS OF *BRADY V. MARYLAND*.

In *Brady v. Maryland*, the Supreme Court held that the "suppression of evidence favorable to an accused upon [their] request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The Government's duty to disclose such information "is applicable even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States* v. *Agurs*, 427 U.S. 97, 107, (1976)). The duty to disclose encompasses impeachment evidence as well as exculpatory evidence. *See United States* v. *Bagley*, 473 U.S. 667, 676 (1985).

A defendant who seeks a new trial based upon a *Brady* violation must satisfy three elements: (1) the prosecution suppressed evidence, either willfully or inadvertently that was (2) favorable to the accused, and (3) material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *See, e.g.*, *United States v. Bland*, 517 F.3d 930, 934 (7th Cir. 2008); *United States v. Wilson*, 481 F.3d 475, 480 (7th Cir. 2007). The Government's failure to disclose the FBI reports to Ms. Gold violated the requirements of *Brady* because (A) *Brady's* due process protections required disclosure to the defense and (B) when prosecutors turn a blind eye to their disclosure obligations, justice can no longer be achieved.

A. *Brady's* Due Process Protections Required the Government to Disclose the FBI Reports to the Defense.

The Government violated *Brady* by failing to disclose until after trial the FBI reports detailing the names and motives of two additional suspects tied to Ms. Driscoll's death. First, the Government suppressed the evidence at issue because Ms. Gold could not have discovered the evidence through the exercise of reasonable diligence. Second, the evidence is favorable because

the reports showed someone Ms. Driscoll owed a large sum of money to – who purportedly has a reputation for violence and a quick temper – had motive for murder. Finally, given the FBI's woefully inadequate investigation into the veracity of the reports, and the Government's subsequent failure to explore the reports any further, the evidence is material. There is a reasonable probability that pre-trial disclosure of these reports would have led to a different outcome, as well as doubt in the jurors' minds as to the true nature behind Ms. Driscoll's death. Accordingly, the district court abused its discretion in denying Ms. Gold's motion for post-conviction relief based on an alleged *Brady* violation.

1. The Government Suppressed the FBI Reports from Ms. Gold's Defense.

Evidence is "suppressed" when (1) the prosecution fails to disclose the evidence, either willfully or inadvertently, in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence. *See Ienco v. Angarone,* 429 F.3d 680, 683 (7th Cir. 2005). Here, the Government does not refute that it failed to disclose the evidence in time for Ms. Gold to make use of it. Nor does the Government refute that the evidence was not otherwise available to Ms. Gold through the exercise of reasonable diligence. In fact, when the district court questioned the Government's rationale for not disclosing the FBI reports to the defense prior to trial, the Government simply replied, "the statements [defense counsel] is referring to are inadmissible hearsay, so even if we had disclosed the reports, they could not have been used by the defense at trial." R. at 45. The issue of admissibility should be of no consequence to the Government's disclosure obligations, let alone the issue of suppression. Because the Government failed to disclose the FBI reports in time for Ms. Gold to make use of them, and because she had no other means of obtaining the reports, the reports (and the information contained therein) were clearly suppressed.

2. The FBI Reports Were Favorable to Ms. Gold's Defense.

To be "favorable" to the defendant, the undisclosed evidence must be either exculpatory or impeaching. *See Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008). Here, the FBI reports are favorable to the defense, because they contain statements identifying two suspects connected to the death of Ms. Driscoll. Ms. Driscoll owed a large sum of money to a Mr. Brodie, who had a reputation for violence and a quick temper, clearly establishing motive for murder. R. at 11. Further, an anonymous phone call identified Ms. Stevens as another potential suspect. R. at 12. In this case, the period during which the FBI received the identities of these two suspects overlapped with the period the FBI conducted its investigation into Ms. Gold, and her alleged connection to Ms. Driscoll's murder. The FBI did not definitively rule out Mr. Brodie or Ms. Stevens as suspects. Rather, the FBI merely concluded after "preliminary investigation" the leads were not reliable. R. at 12. The Government should have seen the importance in investigating these suspects further to prevent convicting an innocent person. At the very least, had the Government provided the defense with the FBI reports, it could have done its own investigation into the leads and determined for itself whether to raise the statements as a possible defense. Thus, the reports were favorable to Ms. Gold's defense.

3. Disclosure of the FBI Reports Would Have Created a Reasonable Probability that the Result of the Trial Would Have Been Different.

Perhaps most important to the *Brady* discussion, is the issue of materiality. This Court can award a new trial solely on finding the withheld evidence as material. Evidence is material for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280 (quoting *Bagley*, 473 U.S. at 682). Importantly, materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the

defendant's acquittal…[Rather], [a] 'reasonable probability' of a different result is…shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

In this case, the Government should have immediately recognized that someone Ms. Driscoll owed a large sum of money to, who purportedly has a reputation for violence and a quick temper, had motive for murder. Further, the anonymous phone call identified another potential suspect. Although the report states that the FBI conducted a "preliminary investigation into the veracity of the lead," any follow-up investigation was woefully inadequate. R. at 11-12.

The Government argued that the statements in the FBI reports were inadmissible hearsay, so even if it had disclosed the reports, the defense could not have used the reports at trial, and thus, the reports were immaterial. R. at 45. Relying on the holding in *Wood v. Bartholomew*, 516 U.S. 1 (1995), the Government noted that results from a polygraph test were inadmissible at trial, even for impeachment purposes; therefore, the results were "not evidence at all," and disclosure under *Brady* was not required. R. at 45. The First, Second, Sixth, and Eleventh Circuits interpret *Wood* differently, ruling that inadmissible evidence can form the basis for a *Brady* violation if the evidence would have led directly to admissible evidence. *See, e.g., Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016); *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). After acknowledging the inadmissibility of the reports in *Wood*, this Court proceeded to examine whether, if disclosed, the results would have led to the discovery of evidence influencing the course of trial, including pre-trial preparations. *See Wood*, 516 U.S. at 7 (considering whether trial counsel would have prepared differently given the results, though ultimately concluding that disclosure would not have resulted in a different outcome).

As the Third Circuit noted, "[this Court's] decision to continue its inquiry in light of inadmissible alleged *Brady* material is telling…[i]f inadmissible evidence could never form the basis of a *Brady* claim, this Court's examination of the issue would have ended when it noted that the test results were inadmissible." *Dennis*, 834 F.3d at 308. This Court's choice in *Wood* to consider the way in which suppression of the polygraph results affected trial counsel's preparation, and the trial itself, aligns with the way in which materiality is discussed in *Kyles.* Evidence is material under *Brady* when the defense could have used it to "attack the reliability of the investigation." *Kyles*, 514 U.S. at 446. Defense counsel could have used the information at issue "to throw the reliability of the investigation into doubt and to sully the credibility" of the lead detective. *Id.* at 447. The proper inquiry for the lower courts in this case was to consider whether disclosure of the FBI reports would have impacted the course of trial, which includes investigative activities. Here, disclosure of the FBI reports would have empowered defense counsel to pursue strategies and preparations they were otherwise unequipped to pursue.

This Court should note its longstanding focus on disclosure regardless of admissibility at trial. *See, e.g.*, *Cone v. Bell*, 543 U.S. 447 (2005). This Court considered impeachment evidence including police bulletins, statements contained in official reports, and FBI reports to be *Brady* material. *See Cone*, 556 U.S. at 470-71, 472 (The lower courts failed to "thoroughly review the suppressed evidence or consider what its cumulative effect on the jury would have been" regarding Cone's sentence."). In its remand for full consideration of the *Brady* claim even though the suppressed evidence was not necessarily admissible, this Court indicated that the admissibility of suppressed evidence ought not to change the materiality inquiry itself, which is understood as "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* at 470, 476.

The Third Circuit affirmed the view that inadmissible evidence is often material, stating

> [I]nadmissible evidence may be material if it could have led to the discovery of admissible evidence. Furthermore…we think that inadmissible evidence may be material if it could have been used effectively to impeach or corral witnesses during cross-examination. Thus, the admissibility of the evidence itself is not dispositive for *Brady* purposes. Rather, the inquiry is whether the undisclosed evidence is admissible itself or could have led to the discovery of admissible evidence that could have made a difference in the outcome of the trial sufficient to establish a "reasonable probability" of a different result. *Johnson,* 705 F.3d at 130.

Here, the district court and court of appeals ignored how this Court has evaluated materiality and instead, made inadmissibility the determinative factor. The Fourteenth Circuit's characterization of admissibility as a separate, independent prong of *Brady* effectively added to the existing requirements. This runs afoul of this Court's precedent. The lower courts effectively required evidence sought under *Brady* be both material and admissible. This Court has never added a fourth "admissibility" prong to *Brady* analysis.

The FBI reports were material under *Brady*. Ms. Gold's counsel could have used the information contained in the FBI reports to challenge the Government and the FBI agents at trial regarding their inadequate investigation of leads into Ms. Driscoll's death. Further, had the Government not suppressed the FBI reports, Ms. Gold could have presented an "other person" defense at trial, which she was otherwise not able to do. The FBI reports bring to light that the Government had the names of two other potential suspects with a connection to Ms. Driscoll. R. at 11-12. The FBI did not definitively rule out Mr. Brodie or Ms. Stevens as suspects. Rather, the FBI merely concluded after "preliminary investigation" that the leads were not reliable. R. at 12. Thus, the reports support an alternative suspect defense, which the defense could have been prepared to raise had the FBI reports been disclosed. Consequently, it was unreasonable for the lower courts to conclude that the FBI reports were not material. There is a reasonable probability

that the result of the proceeding would have been different had the jury heard an "other person" defense.

B. When Prosecutors Turn a Blind Eye to Their Disclosure Obligations, Justice Can No Longer Be Achieved.

Brady establishes the Government's "broad duty of disclosure." *Strickler*, 527 U.S. at 281. Acceptance of the expansive responsibilities and discretion of the prosecutor carries with it the attendant duty to ensure that "justice shall be done" by taking a broad view of their *Brady* disclosure obligations that extends beyond merely evidence admissible at trial. The Government's goal is not only to strive for a fair trial but also to protect individual liberties and the pursuit of justice by ensuring that innocent persons are not convicted while the guilty remain free.

1. A Broad Approach to the Government's Disclosure Requirements is the Best Avenue to Guarantee the Pursuit of Justice and Due Process for all Defendants.

Although this Court has made clear that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict," it can be difficult for prosecutors to determine pre-trial what information may meet this standard post-trial. *Strickler*, 527 U.S. at 281. Precisely for this reason, prosecutors contribute to the fairness of the criminal justice system by taking a broad view of their pretrial disclosure obligations. *See Agurs*, 427 U.S. at 108 ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."). This broad view of *Brady* is essential to guarantee that the prosecutor – even when acting in good faith – does not view the potential materiality of exculpatory or impeaching information too narrowly, thereby suppressing information that "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.

As multiple decisions of this Court applying *Brady* establish, prosecutors should be particularly careful about disclosing information that could be used to impeach certain testimony or eyewitnesses. *See, e.g.*, *Smith v. Cain*, 565 U.S. 73, 75-77 (2012) (reversing where undisclosed statements of sole eyewitness to five murders that conflicted with eyewitness's identification of defendant at trial undermined confidence in verdict); *Kyles*, 514 U.S. at 441-42, 445 (reversing based on cumulative impact of suppressed information, including prior conflicting statements of eyewitnesses, and noting that "effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others").

It should make no difference whether certain proffered evidence and testimony is inadmissible for other purposes. The fact that information which itself may be inadmissible could nevertheless be the basis for other admissible evidence, or effective cross-examination, thus providing sufficient reason for prosecutors to reject disclosure determinations based on admissibility. *See, e.g., Barton v. Warden*, 786 F.3d 450, 466 (6th Cir. 2015) (reversing where prosecution failed to disclose substance of unrecorded statement of third party that, although inadmissible hearsay, could have been used to cross-examine the government's only witness or to call another witness for impeachment), cert. denied, 136 S. Ct. 1449 (2016); *United States v. Price*, 566 F.3d 900, 912 (9th Cir. 2009) (reversing where prosecution failed to disclose police reports documenting eyewitness's prior fraudulent acts because such evidence was admissible to impeach witness's testimony). Even the Seventh Circuit, which adheres to the minority position that evidence "must actually be admissible to trigger *Brady* analysis," recently has critiqued that position, acknowledging, "[i]t is hard to find a principled basis for distinguishing inadmissible

impeachment evidence and other inadmissible evidence that, if disclosed, would lead to the discovery of evidence reasonably likely to affect a trial's outcome." *United States v. Morales*, 746 F.3d. 310, 314-15 (7th Cir. 2014).

2. It Would Be Unfair to Determine a Prosecutor's Duty to Disclose Based on Admissibility.

Information not otherwise admissible might form the basis for cross-examining FBI agents to challenge the adequacy of their investigation or for the defense to present an additional argument at trial. In *Kyles*, among other suppressed information, 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 serious possibilities that incriminating evidence had been planted." *Id.* at 446.

The potential unfairness of determining a prosecutor's duty to disclose based on admissibility becomes clear when taken to its extreme, as this Second Circuit hypothetical illustrates:

> Assuming, for example, that the prosecution's investigations revealed a reliable informant's inadmissible hearsay statement to the effect that the defendant was innocent and had been framed by a rival gang, and that the true perpetrator was in fact X, who had thrown the murder weapon into the abandoned mine shaft outside of town, it would seriously undermine reliability of the judgment and the fairness of the proceeding to negate the defense's entitlement to be informed of this on the ground that the hearsay statement was inadmissible. *United States v. Rodriguez*, 496 F.3d 221, 226 n.4 (2d Cir. 2007).

When making disclosure decisions, prosecutors surely must consider countervailing concerns such as witness security and privacy, protecting the integrity of ongoing investigations,

and national security interests, among others, but these concerns must be weighed against the due process rights of the defendant.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Fourteenth Circuit and remand the case for further proceedings.

February 16, 2021

Respectfully submitted,

/s/

Team 2
Counsel for Petitioner

APPENDIX

1. Federal Rule of Evidence 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.

2. Boerum Health and Safety Code § 711: Reporting Requirements for Mental Health Professionals

   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.

3. Fourth Amendment to the United States Constitution

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.

4. 18 U.S.C. § 1716 – Injurious Articles as Nonmailable

(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.