Team P20 – Original

No. 20 – 2388

Supreme Court of the United States

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 THE PETITIONER

QUESTIONS PRESENTED

I. Whether the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 precludes the admission at trial of confidential communications that occurred during the course of a criminal defendant's psychotherapy treatment, where the defendant threatened serious harm to a third party and the threats were previously disclosed to law enforcement.

II. Whether the Fourth Amendment is violated when the government, relying on a private search, seizes and offers into evidence at trial files discovered on a defendant's computer without first obtaining a warrant and after conducting a broader search than the one conducted by the private party.

III. Whether the requirements of *Brady v. Maryland* are violated when the government fails to disclose potentially exculpatory information solely on the grounds that the information would be inadmissible at trial.

BRIEF ANSWERS

I. Yes. The psychotherapist-patient privilege under Federal Rules of Evidence 501 precludes the admission of Dr. Pollak's testimony at trial, even where Gold threatened serious harm to a third party and the threats were previously disclosed to law enforcement, because there is no dangerous-patient exception to the privilege.

II. Yes. The government violated the Fourth Amendment when it searched Gold's desktop without a warrant because its search exceeded the scope of a previously conducted private search.

III. Yes. The government's failure to disclose this potentially exculpatory information solely because of its inadmissibility violated *Brady v. Maryland* because inadmissibility does not prevent evidence from being covered by *Brady*, and the government's suppression of material evidence that is favorable to Samantha Gold further violated the requirements.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

United States Supreme Court

United States Courts of Appeals

State Courts

Other Authorities

STATEMENT OF THE CASE

I. Statement of Facts

Petitioner Samantha Gold ("Gold") is a college student at Joralemon University. R. at 14. Faced with the high costs of a contemporary college degree, she worked for HerbImmunity, a multi-level vitamin marketing company, since 2016. *Id.* at 18. Like many college students, Gold regularly sees a psychotherapist to work through mental health challenges associated with being a working college student. *Id.* at 17.

The events giving rise to Gold's May 27, 2017 arrest began two days earlier on May 25, 2017, when she met with her psychotherapist Dr. Chelsea Pollak ("Dr. Pollak") for a confidential therapy session. *Id.* at 18. Gold expressed frustration about her work with HerbImmunity. *Id.* She explained that she was $2,000 in debt after Tiffany Driscoll ("victim"), who recruited Gold to HerbImmunity, encouraged her to invest in a wide variety of HerbImmunity products, while promising "lucrative . . . business." *Id.* But the promises to Gold did not materialize. *See id.* In a moment of anger during the hourlong session, Gold stated, without naming anyone in particular, "I'm so angry! I am going to kill her. I will take care of her and her precious HerbImmunity." *Id.* at 19.

Boerum Health and Safety Code § 711 requires mental health professionals to communicate to law enforcement when a patient makes a threat to physically harm themselves or a third party. *Id.* at 2. Pursuant to her duty under Boerum law, Dr. Pollak called the Joralemon Police Department following her session with Gold and expressed her concern for the safety of both Gold and the victim. *Id.* at 5. Based on Dr. Pollak's report, officers with the Joralemon Police Department went to the university campus to check on Gold and the victim. *Id.* Upon

arrival, the officers reported that Gold was "calm and rational" and determined that she posed no threat to herself or others. *Id.* They also concluded that the victim was not in danger, and subsequently wrapped up their investigation. *Id.*

A few hours after the therapy session, Gold returned to her apartment, which she shared with her roommate Jennifer Wildaughter ("Wildaugher"). *Id.* at 6. Wildaughter noticed that Gold was angry. *Id.* When Gold left the apartment again, Wildaughter, without permission, entered Gold's room and accessed Gold's computer. *Id.* Wildaughter opened several folders on Gold's desktop, including a "Tiffany Driscoll" subfolder, which contained several photos of the victim and a nice note addressed to her. *Id.* Wildaughter also opened a "Market Stuff" document, which included codes and passwords that she did not recognize and a reference to the rat poison strychnine. *Id.* Even though Gold and Wildaughter had a recent rodent problem, the mention of strychnine caused Wildaughter concern. *Id.* at 26, 29. Wildaughter copied the entire desktop onto a flash drive and brought the flash drive to Officer Yap at the Livingston Police Department. *Id.* at 6. Without asking what specific files Wildaughter viewed and without obtaining a warrant, Office Yap took the flash drive from Wildaughter and proceeded to open every folder and document on the drive. *Id.*

The victim was found dead at the bottom of her home staircase the night of May 25, 2017 with traces of strychnine in her system. *Id.* at 13. The Federal Bureau of Investigation ("FBI"), proceeding on a theory that Gold mailed the victim poisoned chocolate covered strawberries, arrested Gold less than two days later on May 27, 2017. *Id.* at 14. However, on June 2, 2017, the FBI interviewed one of Driscoll's classmates, Chase Caplow ("Caplow"), who indicated that the victim owed money to an upstream HerbImmunity distributor named Martin Brodie ("Brodie") who was rumored to be violent. *Id.* at 11. The FBI also received an anonymous tip a month later

suggesting that Belinda Stevens ("Stevens") was responsible for the victim's death. *Id.* at 12. Despite the FBI reports suggesting two new suspects, the government did not disclose the reports to Gold prior to trial. *Id.* at 43.

II. Procedural History

Petitioner Gold was charged with knowingly and intentionally mailing a package with the intent to kill or injure another, and which resulted in the death of another, in violation of 18 U.S.C. § 1716. *Id.* at 1. Gold moved for the district court to suppress two pieces of evidence. First, she argued that the admission of Dr. Pollak's testimony and notes violated the psychotherapist-patient privilege under Federal Rules of Evidence 501. Second, she sought to suppress the information on the flash drive on the grounds that Officer Yap's warrantless search violated her Fourth Amendment right against unreasonable search and seizure. *Id.* at 16. The district court denied both motions. *Id.* at 41. Gold was convicted at trial and moved for post-conviction relief, arguing the government's failure to turn over the two FBI reports constituted a *Brady* violation. *Id.* at 43. The district court denied the motion. *Id.* at 49.

Gold appealed the district court's rulings on the motion to suppress and the motion for post-conviction relief to the United States Court of Appeals for the Fourteenth Circuit. *Id.* at 50. The Fourteenth Circuit affirmed the district court on all three issue, holding that 1) a dangerous-patient exception applies to the psychotherapist-patient privilege under Federal Rules of Evidence 501, and therefore Dr. Pollak's testimony is admissible, 2) under a broad approach to the private search doctrine, Officer Yap's search of Gold's desktop did not violate her Fourth Amendment rights, and 3) the FBI reports were inadmissible and not "material" and, thus, cannot form the basis of a *Brady* violation. *Id.* at 51. Gold appeals these rulings and upon grant of writ of certiorari this Court reviews the decision of the Fourteenth Circuit de novo.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Fourteenth Circuit because 1) the psychotherapist-patient privilege under Federal Rules of Evidence 501 precludes the admission of Dr. Pollak's testimony at trial, 2) the government's warrantless search of Gold's desktop exceeded the scope of Wildaughter's private search in violation of the Fourth Amendment, and 3) the government committed a *Brady* violation when it failed to disclose potentially exculpatory information solely because of its inadmissibility.

First, this Court should decline to recognize a dangerous-patient exception to the psychotherapist-patient evidentiary privilege. The duty to warn of dangerous patients under Boerum state law is separate and distinct from the psychotherapist-patient privilege, so it does not follow that a psychotherapist acting pursuant to her duty to warn should automatically create an exception to the privilege. Recognizing a dangerous-patient exception would undercut society's interest in individual and collective mental health that this Court has recognized as "transcendent." Further, the dangerous-patient exception provides little practical value in this case, where the danger to the victim has already passed.

Second, this Court should adopt a narrow approach to the private search doctrine for digital information and hold that the government's warrantless search of Gold's desktop exceeded the scope of Wildaughter's private search in violation of the Fourth Amendment. A narrow approach is most consistent with this Court's decision in *Riley v. California*, 573 U.S. 373 (2014) recognizing a heightened privacy interest for digital information. Under a narrow approach, Officer Yap exceeded the scope of Wildaughter's search because he viewed files that Wildaughter did not view. Further, pursuant to either a narrow or broad approach to the private

search doctrine, Officer Yap exceeded the scope of Wildaughter's search because he did not have virtual certainty about what he would find on the desktop.

Third, consistent with *Brady v. Maryland*, the Fourteenth Circuit was correct to consider the materiality of the inadmissible reports that the government failed to disclose. Following the proper standard, as advocated by Gold, this evidence was material to Gold's trial because the defense would have discovered admissible evidence of two other potential suspects as a direct result of their disclosure. Assuming that the Fourteenth Circuit was permitted to consider the standard advocated by the government, the evidence was still material due to the reasonable probability that their disclosure would have affected the outcome of Gold's trial because the discovered evidence would have undermined the government's trial arguments. The materiality of the evidence proves that the government violated what *Brady* required of them, and as such, Gold is entitled to post-conviction relief.

ARGUMENT

I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER FEDERAL RULES OF EVIDENCE 501 PRECLUDES THE ADMISSION OF DR. POLLAK'S TESTIMONY AT TRIAL, EVEN WHERE GOLD THREATENED SERIOUS HARM TO A THIRD PARTY AND THE THREATS WERE PREVIOUSLY DISCLOSED TO LAW ENFORCEMENT, BECAUSE THERE IS NO DANGEROUS-PATIENT EXCEPTION TO THE PRIVILEGE.

Society recognizes certain public goods as being so important—so essential to the functioning of a healthy and productive populace—that it is prepared to offer them extra protection. This Court has held that mental health is one such good. *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) ("[T]he mental health of our citizenry . . . is a public good of *transcendent importance.*"). To further the goals of individual and societal mental health, this Court in *Jaffee* established a federal evidentiary privilege that bars psychotherapists from disclosing confidential communications with patients in court proceedings. *Id.* at 10.

This Court should follow the approach of the Sixth, Eighth, and Ninth Circuits and decline to recognize a dangerous-patient exception to the psychotherapist-patient evidentiary privilege. *See United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012); *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000). As such, Dr. Pollak should not be permitted to testify against Gold. This Court should not adopt a dangerous-patient exception—which would allow a psychotherapist to break privilege and testify at trial if she has already revealed patient confidences pursuant to a state law duty to warn authorities of dangerous patients—for three reasons. First, the duty to warn of dangerous patients under Boerum state law is separate and distinct from the psychotherapist-patient privilege because they serve different purposes. Second, the dangerous-patient exception undermines the public interest in mental health that this Court has recognized as "transcendent." *Jaffe*, 518 U.S. at 11. Third,

the dangerous-patient exception provides little practical value in this case, where the danger to the victim has already passed.

Finally, even if this Court adopts the dangerous-patient exception to the psychotherapist-patient privilege, the Court should preclude Dr. Pollak's testimony because Gold's threat was not serious when it was uttered, and the government has not shown that disclosure was the only means of averting harm.

A. The duty to warn of dangerous patients under Boerum state law is separate and distinct from the psychotherapist-patient privilege because they serve different purposes.

The duty to warn of dangerous patients and the psychotherapist-patient evidentiary privilege serve different purposes. The former protects third parties from serious danger, *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976), while the later facilitates effective mental health treatment, *Jaffee*, 518 U.S. at 11. A dangerous-patient exception to the privilege, however, would bind together a psychotherapist's duty to warn under state law with the applicability of the federal psychotherapist-patient privilege in court proceedings, allowing a psychotherapist to testify about a dangerous patient once they have complied with their duty to warn. *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998). Put differently, a dangerous-patient exception would undermine the mental-health function of the evidentiary privilege even though the protection function of the duty to warn has already been fulfilled. This Court should recognize that there is "only a marginal connection, if any at all" between the duty to warn and the psychotherapist-patient privilege, *Hayes*, 227 F.3d at 583, and avoid creating a dangerous-patient exception that conflates the two.

Although communications between a psychotherapist and her patients are generally confidential, many states—including Boerum—impose a mandatory duty on psychotherapists to

warn third parties and law enforcement when a patient makes a threat to physically harm themselves or an identifiable victim. R. at 2. *See generally* Rebecca Johnson et al., *The Tarasoff Rule: The Implications of Interstate Variation and Gaps in Professional Training*, 42 J. Am. Acad. Psychiatry & L. 469, 470 (2014) (noting 23 states have a statutory duty to warn, 10 states have a common law duty, and 11 states have permissive disclosure laws for dangerous patients). The California Supreme Court first recognized such a duty in *Tarasoff*, where a graduate student confided in his psychologist an intent to kill his love interest. 551 P.2d at 340. The *Tarasoff* Court reasoned that the public interest in ensuring safety and protecting potential victims from violent assault outweighed a patient's interest in confidential psychotherapeutic communication, triggering a duty to take reasonable precautions, including warning the potential victim, when a therapist learns from her patient about their intent to harm a third party. *Id.* at 347. In the present case, when Dr. Pollak faced a situation similar to that of the psychologist in *Tarasoff*, in which a patient expressed a desire to harm a third party, she reported her concern for both Gold and the victim to the Joralemon Police Department pursuant to her duty under Boerum Health and Safety Code § 711. R. at 5. In doing so, she furthered the public safety and protection purposes identified by the *Tarasoff* Court.

The psychotherapist-patient evidentiary privilege, however, serves a separate and distinct purpose from public safety and protection functions of the duty to warn. As this Court reasoned in *Jaffee*, effective mental health treatment relies heavily on a relationship of trust between a patient and her psychotherapist, which can be hampered by the possibility of disclosure of confidential information in a courtroom. 518 U.S. at 10. An evidentiary privilege precluding psychotherapists from testifying about confidential communications with patients, this Court held, would assure patients that sensitive information would not be disclosed, thereby facilitating

better mental health treatment. *Id.* In the present case, Dr. Pollak echoed the *Jaffee* Court's reasoning, explaining that she did not tell Gold that her statements could be used against her in a subsequent criminal prosecution because, in her opinion, patients would be reluctant to share certain information with her if they knew she could be required to testify about the contents of therapy sessions. R. at 21.

Dr. Pollak's actions illustrate the detachment between the duty to warn and the psychotherapist-patient privilege. She reported Gold's threatening behavior to police, pursuant to state law, to protect both Gold and the victim. R. at 5. Permitting Dr. Pollak to testify, however, would undermine the separate interest in an effective psychotherapist-patient relationship. The Sixth Circuit has called the connection between the duty to warn and the evidentiary privilege "marginal." *Hayes*, 227 F.3d at 583. The Eight Circuit has identified any linkage as "highly speculative." *Ghane*, 673 F.3d at 785. The Ninth Circuit has likewise pointed out the "disconnect." *Chase*, 340 F.3d at 986. In fact, forty-nine of fifty states have declined to link the duty to warn with the psychotherapist-patient privilege. *See Hayes*, 227 F.3d at 585 (explaining that only California has enacted a dangerous-patient exception as part of its evidence code). Because of the distinct purposes of the duty to warn of dangerous patients and the psychotherapist-patient evidentiary privilege, this Court should avoid tying the two together and decline to adopt a dangerous-patient exception to the privilege.

B. A dangerous-patient exception to the psychotherapist-patient privilege undermines the public interest in mental health because the exception impedes effective treatment.

This Court need not look far to understand the widespread public consequences of poor mental health—suicides, domestic violence, and even mass shootings. Yet, instead of

encouraging those who need it most to seek help, a dangerous-patient exception threatens to further exacerbate these public consequences.

The dangerous-patient exception would allow a psychotherapist to testify about confidential communications with her patients in certain circumstances, threatening to undermine the atmosphere of confidence and trust that forms the foundation of effective mental-health treatment. In *Hayes*, the Sixth Circuit considered the negative impact that allowing psychotherapist testimony would have on a defendant who threatened to murder his supervisor over the course of several therapy sessions. 227 F.3d at 580. In declining to adopt a dangerous-patient exception, the court reasoned that the possibility a patient's statements could be used against her in a subsequent prosecution would have a chilling effect on the patient's candor. *Id.* at 585. Further, the court noted that a patient who is incarcerated even partially as a result of the testimony of a psychotherapist to whom she came for help would be unlikely to improve their condition or to seek further mental-health treatment. *Id.* The same reasoning applies here. Like the defendant in *Hayes* who expressed homicidal thoughts while seeking mental-health help, Gold made statements about wanting to kill someone during the course of her mental-health treatment. R. at 4. In discussing her work with Gold, Dr. Pollak echoed the *Hayes* Court's concern that "patients may be more reluctant to share certain thoughts or urges with me if they know that I may be required to testify about the content of our therapy sessions." R. at 21. Adopting a dangerous-patient exception will trigger this reluctance, undermining our nation's critical work to improve mental health.

The government argues that there is minimal additional harm in allowing Dr. Pollak to testify since the scope of the testimony would be limited to the disclosure already made under Boerum's duty to warn law. R. at 39. Experts say otherwise. As the *Hayes* court explains, a

psychotherapist's disclosure of the duty to warn may have a marginal effect on a patient's candor during a therapy session, but "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." 227 F.3d at 584–85 (citing Gregory B. Leong, *et al.*, *The Psychotherapist as Witness for the Prosecution: The Criminalization of Tarasoff*, 149 Am. J. Psychiatry 1011, 1115 (1992)). The present case illustrates this dichotomy. Dr. Pollak has effectively treated Gold since 2015 even after the standard disclosure of her duty to warn under Boerum law. R. at 17, 21. However, Dr. Pollak did not tell Gold that she may be required to testify about their confidential communications and stated that she thought such a requirement would chill the candid psychotherapist-patient relationship. R. at 21. Because of the barriers the dangerous-patient exception would erect to effective mental health treatment, this Court should decline to adopt the exception and preclude Dr. Pollak from testifying.

C. A dangerous-patient exception to the psychotherapist-patient privilege has little practical value because the danger to the victim has already passed.

The victim is dead. While tragic, the danger to her has already passed. This Court should recognize the exception has little practical value in the present case.

The justification for a proposed dangerous-patient exception—public safety and the protection of patients and third parties—no longer exists in this case. Among the circuit courts, only the Tenth Circuit has applied the dangerous patient exception. *Glass*, 133 F.3d at 1360; *see also United States v. Auster*, 517 F.3d 312 (5th Cir. 2008) (recognizing an exception to the psychotherapist-patient privilege exists but declining to apply it). In *Glass,* the Tenth Circuit relied exclusively on this Court's footnote in *Jaffee*, which acknowledged that there may be situations in which the psychotherapist-patient privilege must give way "if a serious threat of harm to the patient or others can be averted only be means of a disclosure by the therapist."

Glass, 133 F.3d at 1359 (citing *Jaffee*, 518 U.S. at 36 n.19). Thus, the proposed dangerous-patient exception is justified by a need to protect patients and third parties. Once that need for protection has passed, so too has the justification for a dangerous patient exception. *See Chase*, 340 F.3d at 986 ("The public interest to be served by notifying the police [would] . . . never justify a full disclosure in open court, long after any possible danger has passed."). In the present case, Dr. Pollak initially contacted the Joralemon Police Department and disclosed confidential information about her session with Gold to protect a potential victim from harm. R. at 19–20. However, because the victim is now dead and the need to avert danger to her has passed, an exception to the psychotherapist-patient privilege is not justified.

D. Even if this Court recognizes a dangerous-patient exception to the psychotherapist-patient privilege, Dr. Pollak's testimony should not be admitted because Gold's threat was not serious when it was uttered, and the government has not shown disclosure was the only means of averting harm.

While this Court should decline to adopt the dangerous-patient exception to the psychotherapist-patient privilege, the Court should preclude Dr. Pollak from testifying even if it does recognize an exception. The Tenth Circuit, the only circuit court to apply a dangerous patient exception, established a two-part test to determine whether the exception should apply. *Glass*, 133 F.3d at 1360. Because 1) Gold's threat was not serious when it was uttered, and 2) the government has not shown disclosure was the only means of averting harm, her actions do not justify the inclusion of Dr. Pollak's testimony under the dangerous-patient exception.

Gold's threats were not serious when she made them. In *Glass*, the Tenth Circuit held that a psychotherapist's testimony about the defendant, who during a therapy session threatened to shoot President Clinton, could be admitted into evidence only if the threat was serious when uttered and its disclosure was the only means of averting harm when the disclosure was made. 133 F.3d at 1360. Given the fact that the psychotherapist released the defendant from an

inpatient mental facility even after he threatened the President, the court concluded the threats could not be classified as serious. *Id.* at 1359. Unlike the defendant in *Glass*, who had ongoing mental illness and was being treated at an inpatient facility, Gold is a stable college student who voluntarily met with a psychotherapist once a week. R. at 17. If the Tenth Circuit did not consider the threats of a seriously mentally ill defendant as serious when uttered, Gold's venting to her therapist about frustration with her job does not rise to the level of seriousness that would justify application of the dangerous-patient exception.

Finally, the government has not shown that Dr. Pollak's disclosure of Gold's statements was the only means of averting harm. In *Glass*, the court found that the government failed to demonstrate that disclosure of the psychotherapist's statement was the only way to prevent harm to President Clinton. 133 F.3d at 1359. Similar to *Glass*, there has been no evidentiary hearing or other fact-finding in the present case to determine that Dr. Pollak's disclosure of Gold's statement was the only way to avoid Gold's threatened harm to the victim. Because the government has not shown that disclosure of confidential communications between Dr. Pollak and Gold was the only means of preventing harm to the victim, this Court should not breach the psychotherapist-patient privilege by applying the dangerous-patient exception.

II. THE GOVERNMENT VIOLATED THE FOURTH AMENDMENT WHEN IT SEARCHED GOLD'S DESKTOP WITHOUT A WARRANT BECAUSE ITS SEARCH EXCEEDED THE SCOPE OF A PREVIOUSLY CONDUCTED PRIVATE SEARCH.

In an increasingly digital world, a computer is more than a piece of hardware and an internet connection. A computer is, in essence, a gateway into the most personal reaches of an individual's life. This Court should exclude the files from Gold's desktop from evidence because Officer Yap's search exceeded the scope of Wildaughter's private search in violation of the

Fourth Amendment, penetrating the vast trove of personal information stored on a private computer.

The Fourth Amendment of the U.S. Constitution protects the right of people to be secure from unreasonable searches and seizures. U.S. Const. amend. IV. This protection only applies to searches conducted by the government and does not extend to those effected by private parties. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Walter v. United States*, 447 U.S. 649, 655 (1980). When a government search follows a private search, as in the present case, this Court has examined the degree to which the government search exceeded the scope of the private search to determine whether the subsequent search falls within the Fourth Amendment's protection. *Jacobsen*, 466 U.S. at 115. Officer Yap's search of Gold's desktop exceeded the scope of Wildaughter's search in violation of the Fourth Amendment for two reasons. First, under a narrow approach to the private search doctrine for digital information, which is most consistent with this Court's decision in *Riley v. California*, 573 U.S. 373 (2014), Officer Yap exceeded the scope of Wildaughter's search because he viewed files that Wildaughter did not view. Second, under either a narrow or broad approach to the private search doctrine, Officer Yap exceeded the scope of Wildaughter's search because he did not have virtual certainty about what he would find on the desktop. Because the government's search exceeded the scope of the private search in violation of the Fourth Amendment, the files from Gold's desktop should be excluded from evidence.

A. Under a narrow approach to the private search doctrine for digital information, which is most consistent with this Court's decision in *Riley v. California*, Officer Yap exceeded the scope of Wildaughter's search because he viewed files that Wildaughter did not view.

This Court has recognized that digital information is deserving of unique privacy protections. *Riley*, 573 U.S. 373. Consistent with that recognition, this Court should follow the

approach of the Sixth, Eighth, and Eleventh Circuits and adopt a narrow approach to the private search doctrine for digital information, which requires police to limit a warrantless search following a private search to the specific items a private individual saw. *See United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015); *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015); *see also United States v. Suellentrop*, 953 F.3d 1047 (8th Cir. 2020) (affirming district court decision to endorse narrow approach to private search doctrine). Under a narrow approach, Officer Yap's warrantless search of Gold's desktop violated the Fourth Amendment because he opened folders and files that Wildaughter did not open during the course of her private search.

1. A narrow approach to the private search doctrine for digital information is most consistent with this Court's decision in *Riley v. California* recognizing a heightened privacy interest in digital information.

A narrow approach to the private search doctrine for digital information best comports with this Court's concern for privacy in the age of rapidly expanding technology. In *Riley*, this Court held that police cannot conduct a warrantless search incident to arrest of a cell phone because of the vast amount of information contained on a phone. *Riley*, 573 U.S. at 403. In observing the difference between the search of a cell phone and, for instance, a brief physical search of a person, this Court noted "an individual's private life can be reconstructed through [information on a cell phone]." *Id.* at 394. A narrow approach to the private search doctrine, which requires that the government only view files that corresponded one-to-one with those viewed by a private party, *Sparks*, 806 F.3d at 1356, is most consistent with *Riley*'s heightened privacy interest for digital information.

The Fourteenth Circuit provides two justifications for applying a broader approach to the private search doctrine, which would allow the government to search the entire container—here, the flash drive—opened by a private party. Both are inconsistent with *Riley*. First, the Fourteenth

Circuit claims our case is distinct from *Riley* because a flash drive is not connected to the internet and lacks the automatically updated location data of a laptop or cell phone. R. at 54. However, the *Riley* Court was not primarily concerned with the fact that a cell phone was connected to the internet. 573 U.S. at 394–95. Rather, *Riley* emphasized the vast amount of personal information, the immense storage capacity, and temporal range of data on a cell phone. *Id.* A flash drive has all of these characteristics, especially in the present case where Wildaughter copied the entirety of Gold's desktop onto the flash drive. R. at 6. Second, the Fourteenth Circuit relies on two circuit court decisions that analogize a digital storage device to a container, holding that a private individual's opening of the container frustrates the expectation of privacy for the entire container. R. at 55 (citing *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012) and *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001)). Both *Rann* and *Runyan*, however, were decided before this Court's recognition in *Riley* of the heightened privacy interest in digital devices. Because "[a] computer is like a container that stores thousands of individual containers," Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 555 (2005), this Court should not adopt the container analogy for Gold's desktop.

2. Under the narrow approach to the private search doctrine for digital information, Officer Yap exceeded the scope of Wildaughter's search because his search went beyond the specific files viewed by the private party.

Under this narrow approach to the private search doctrine for digital information, Officer Yap exceeded the scope of Wildaughter's search. In *Lichtenberger*, the Sixth Circuit used a narrow approach and held that an officer who conducted a warrantless search of hundreds of pornographic photographs on the defendant's laptop—some of which had been previously viewed by a private party and some of which had not—exceeded the scope of a prior private search. 786 F.3d at 488. The heightened privacy interests in a laptop, the court reasoned, favored

a narrow approach that strictly limits the scope of the government search to the particular items the private party viewed or those items with which the government had virtual certainty about the contents. *Id.* at 485. The same reasoning applies here. Like the private party who conducted a limited search of a laptop in *Lichtenberger*, Wildaughter searched Gold's laptop and limited her search to opening the "Customers" folder, the "Tiffany Driscoll" subfolder, and the "For Tiff" subfolder. R. at 23–26. When Wildaughter copied Gold's desktop on to a flash drive and turned it over to Livingston Police Department, she told Officer Yap it contained photographs and a short note. *Id.* at 6. However, as in *Lichtentenberger,* the officer proceeded to open files not initially viewed during the private search. *Id.* Instead, Officer Yap clicked on every folder, subfolder, and document on the computer, viewing not only the photos and note Wildaughter described but also wide-ranging information about Gold's employment, finances, and health insurance. *Id.* Because Officer Yap went beyond the specific folders and items viewed during the private search, his warrantless search of Gold's desktop exceeded the scope of the private search in violation of the Fourth Amendment.

B. Under either approach to the private search doctrine, Officer Yap exceeded the scope of the private search because he was not virtually certain about what he would find on the flash drive.

Whether this Court adopts a narrow or broad approach to the private search doctrine, Officer Yap's warrantless search of Gold's desktop exceeded the scope of Wildaughter's search because he lacked virtual certainty about what he would find. In developing the private search doctrine, this Court has emphasized the degree to which a government search caused a greater invasion of privacy than the initial private search. *Jacobsen*, 566 U.S. at 115; *Walter*, 447 U.S. at 657. This Court has used a "virtual certainty" test to help with the inquiry—a government search is permissible if officers, based on what they know about the private search, have virtual

certainty about what they will find and that they will learn no new information in a subsequent search. *Jacobsen*, 566 U.S. at 118–19. In the present case, Officer Yap's search constituted a greater invasion of Gold's privacy than Wildaughter's search because he did not have virtual certainty about the information he would find on the flash drive.

Officer Yap could not have surmised the wide-ranging swath of personal information—from financial records to academic files—that his warrantless search of Gold's laptop would reveal. In applying the private search doctrine to a digital context, the circuit courts have continued to use *Jacobsen*'s virtual certainty inquiry. For instance, in *Rann*, the Seventh Circuit considered whether police had violated the defendant's Fourth Amendment rights when they searched a zip drive containing pornographic images turned over by a private party. 689 F.3d at 837. Because the private individual who turned over the zip file told the police that she knew it contained only pornographic images, the court held that the police were virtually certain about the contents of the zip file and the subsequent search did not further invade the defendant's privacy in violation the Fourth Amendment. *Id.* at 839. That reasoning does not apply here. Unlike the private party in *Rann* who told the police the zip file specifically contained pornographic images, Wildaughter told Officer Yap that she copied Gold's entire desktop on to the flash drive. R. at 6. While Wildaughter did report some concerning photographs and a note, Officer Yap did not ask any follow up questions about what specific files she did and did not view or whether she knew what other information was on the flash drive. *Id.* at 28–29. Unlike the officer in *Rann* who was virtually certain he would only find pornographic images in his search of the zip file, Officer Yap could not have known what vast trove of information he would gain from Gold's desktop. This information included Gold's monthly budget, health insurance plan, a mailing label, and academic files—all information that Wildaughter had not viewed or reported

to Officer Yap. R. at 6. Because Officer Yap was not virtually certain about what he would find on Gold's desktop, his search was a greater infringement on Gold's privacy than the private search conducted by Wildaughter. This Court should hold that the government search exceeded the scope of the private search in violation of the Fourth Amendment.

III. THIS COURT SHOULD GRANT GOLD'S REQUESTED POST-CONVICTION RELIEF, A DIRECTED VERDICT OR A NEW TRIAL, BECAUSE THE GOVERNMENT VIOLATED GOLD'S TRIAL PROTECTIONS WHEN IT CONCEALED THE POTENTIALLY EXCULPATORY EVIDENCE OBTAINED BY THE FBI.

The government's concealment of the FBI's knowledge of two other potential suspects—obtained in the interview identifying Martin Brodie and the phone call identifying Belinda Stevens— violated the due process protections owed to Gold under this Court's decision in *Brady v. Maryland*. *See* 373 U.S. 83 (1963); *see also Kyles v. Whitley*, 514 U.S. 419, 433–55 (1995). The government committed a *Brady* violation because 1) it "suppressed" the reports of the FBI's knowledge of two other potential suspects (hereinafter, the "FBI Reports"); 2) the FBI Reports were "favorable" to Gold at trial; 3) the FBI Reports were "material" to Gold's trial. *See United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009).

The government suppressed the FBI Reports because they possessed the reports and refused to disclose them before and after trial. *See* R. at 45 (explaining the government's argument for concealing the FBI Reports in its possession); *see also* R. at 55 ("[T]he defense learned that the government was in possession of certain statements provided to the FBI prior to trial that identified other potential suspects . . . ."). The FBI Reports were favorable to Gold because they would have undermined the government's argument at trial: the FBI Reports would have introduced at least one additional individual that had the same motive and alleged temperament that made up the government's argument against Gold. *See* R. at 44 ("[The victim]

owed a large sum of money to [Martin Brodie], who purportedly has a reputation for violence and a quick temper, clearly had motive for murder.").

The FBI Reports were material to Gold's trial. As a direct result of their disclosure, the defense would have discovered admissible evidence for Gold's trial. Otherwise, the FBI Reports were material because their disclosure "would have created a reasonable probability" that the outcome of Gold's trial would have been different. The Fourteenth Circuit was correct to consider the FBI Reports, regardless of their admissibility, to protect the principle of fairness in our criminal justice system that *Brady* is meant to uphold. Therefore, the government committed a *Brady* violation that warrants post-conviction relief for Gold.

A. The Fourteenth Circuit was correct to consider the materiality of the FBI Reports despite their inadmissibility at trial, but the court should have followed the position of the First, Third, and Eleventh Circuits to determine under *Brady*.

The Fourteenth Circuit was correct that it should consider the materiality of the FBI Reports and decline to adopt the government's argument that the court should not on the sole grounds that the reports are inadmissible. *See* R. at 56 (determining the materiality of the FBI Reports by whether they "would have led directly to admissible evidence" or "create "a reasonable probability that the outcome of the trial would have been different.'" (first citing *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000); then quoting *United States v. Lee*, 88 F. App'x 682, 685 (5th Cir. 2004))).The Fourteenth Circuit's consideration of the FBI Reports was consistent with *Brady* because the decisions regarding this evidence was properly retained by the court, rather than left to the unilateral decisions of one of the parties. *See* R. at 59 (Cahill, J., dissenting) ("Whether this [evidence] was considered credible by the [government] is not determinative . . . ."); *see also id.* ("[T]he purpose of the *Brady* rule was to protect defendants' rights and ensure fairness in our criminal justice system." (citing *Brady*, 373 U.S. at 87)).

The Fourteenth Circuit should have only followed the position of the First, Third, and Eleventh Circuits to determine the materiality of the FBI Reports. As Judge Cahill noted in the Fourteenth Circuit's dissenting opinion, evidence of additional potential suspects is "the clearest example of the type of exculpatory evidence covered by *Brady*." *Id.* It would be consistent with *Brady* to find that evidence, which itself would lead to exculpatory evidence in the form of additional potential suspects, would be considered material to the trial at hand, regardless of admissibility. *See id.* ("[I]nadmissible evidence may form the basis of a *Brady* claim if that inadmissible evidence could lead to other evidence. To hold otherwise undermines the *Brady* rule itself."). Although the Supreme Court held in *Wood v. Bartholomew* that an inadmissible polygraph test was not material, there is no indication that the test would have led to the disclosure of other evidence and was held to be not material despite that fact. *See* 516 U.S. 1 (1995). The Court in *Wood* did not foreclose the possibility that inadmissible evidence could be material through the indirect effect of introducing other admissible evidence at trial. Therefore, the Fourteenth Circuit should have solely followed the position of the First, Third, and Eleventh Circuits because the position is consistent with *Brady*.

B. The FBI Reports were material to Gold's trial because the defense would have discovered admissible evidence of two other potential suspects if the reports were disclosed rather than concealed by the government.

Following the position of the First, Third, and Eleventh Circuits, the FBI Reports were material to Gold's trial, under *Brady*, if they would have led directly to admissible evidence if they were disclosed. *See, e.g.*, *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); *Bradley*, 212 F.3d at 567.

The defense would have discovered admissible evidence about two other potential suspects as a direct result of the government disclosing the FBI Reports. The FBI Reports detail

an interview that the FBI conducted with Chase Caplow, in which he told authorities about Martin Brodie, who was a creditor to the victim though HerbImmunity and is alleged to "be violent." R. at 11. Although the victim's statements to Caplow in that interview would be inadmissible hearsay, the defense would still have obtained admissible evidence if the government did not conceal the FBI Reports. The defense would have been made aware of another individual with a debt relationship with the victim through HerbImmunity and who is alleged to be violent; by being aware of Brodie, the defense would have been able to call him to testify as to his debt relationship to the victim and alleged violent temperament. *See* R. at 44–45 ("[H]ad the defense been provided with this information, we could have . . . determined for ourselves whether to raise this as a possible defense."). The government introduced such evidence about Gold at trial in the district court. *See* R. at 51 (detailing the government introducing evidence to argue that "[Gold] was in serious debt to [the victim]" and Dr. Pollak's testimony to allege that Gold has "threatening" attitude toward the victim.); *see also* R. at 16–18 (hearing held on government's plan to introduce Dr. Pollak's testimony and notes regarding Gold's temperament and HerbImmunity connection with the victim). If the government had not concealed the FBI Reports, the defense would have obtained admissible evidence in the form of calling Brodie to testify about both his HerbImmunity relationship with the victim and his alleged violent temperament, just as the government did with Gold at trial.

Further, the defense would have been able to introduce evidence about Belinda Stevens. If the government did not conceal the FBI Reports, the defense would have been made aware of Stevens and that she was connected to the victim through HerbImmunity. *See* R. at 12. Similar to the government's evidence at trial, the defense would have been able to introduce evidence of Stevens's HerbImmunity connection to the victim in the form of calling her to testify on the

matter. *See* R. at 51. If the government disclosed the FBI Reports, the defense would have been made aware of Brodie and Stevens and their connections to the victim through HerbImmunity, and would have been able to find these other potential suspects and decide for themselves whether to call each of them to testify. *See* R. at 44–45.

The chances that the defense would have been able to obtain admissible evidence at trial is more likely than mere speculation. Although the FBI looked into Brodie and Stevens after being made aware of the other potential suspects themselves, they did not conduct a complete investigation of these leads. The FBI only conducted a "preliminary investigation" of Brodie and Stevens; they did not reach a finding that rules any of these two out as potential suspects in the murder of the victim. *See* R. at 47; *see also id.* at 12 ("I conducted a preliminary investigation into the veracity of the [phone call]."). The authorities did not conduct a thorough follow-up of the interview with Caplow or the anonymous phone call that identified Stevens; if they did, they may have actually uncovered more information on the two potential suspects' HerbImmunity connection to the victim, or of Brodie's alleged violent temperament. Therefore, the lack of a thorough investigation by the authorities into the two potential suspects does not mean that the defense would similarly not bring any new admissible evidence to trial.

Despite the inadmissibility of the FBI Reports, if the government had properly disclosed them instead of concealing them the defense would have been made aware of two other potential suspects in the murder of the victim: Martin Brodie and Belinda Stevens. The disclosure of the FBI Reports would have led directly to admissible evidence in the form of the defense calling each of the other potential suspects to testify at trial. Therefore, following the position of First, Third, and Eleventh Circuits, the FBI Reports were material to Gold's trial. As such, the

government committed a *Brady* violation when it concealed the FBI Reports, which warrants a directed verdict or new trial for Gold.

C. Even if the Fourteenth Circuit was correct to consider the position of the Fifth Circuit, under *Brady*, the FBI Reports would still have been material to Gold's trial because their disclosure would likely have affected the outcome of the trial.

Assuming the Fourteenth Circuit was correct to consider the position of the Fifth Circuit, the FBI Reports were material to Gold's trial because their disclosure would have created "a reasonable probability that the outcome of the trial would have been different." *Lee*, 88 F. App'x at 685 (internal citations and quotations omitted); *see Trevino v. Thaler*, 449 F. App'x 415, 424 n.7 (5th Cir. 2011), *vacated and remanded on other grounds by* 569 U.S. 413 (2013). It is reasonably probable that the outcome at trial would be different if the FBI Reports could have likely affected the judgment of the jury. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *see also* R. at 59 (Cahill, J., dissenting) (citing *Giglio*, 405 U.S. at 154) ("[T]he Supreme Court held that evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury.").

The FBI Reports would have affected the judgment of the jury at Gold's trial because disclosure of the reports would have led to the discovery of additional evidence that would have undermined the evidence the government presented at trial. The government's evidence at trial included information about Gold's debtor connection to the victim through HerbImmunity (used to argue motive for the murder) and of Dr. Pollak's testimony about her opinions of Gold's temperament (used to argue ability for the murder). *See* R. at 51. At trial this appeared to be "substantial evidence" in favor of the government. *Id.* at 56. As explained in Section III.B., the defense would have been able to discover admissible evidence in the form of the testimonies of Brodie and Stevens; these testimonies would expose the jury to two other potential suspects who

are connected to the victim through HerbImmunity, and at least one potential suspect who is similarly alleged to have a violent temperament. *See* R. at 44, 47. If the jury had been allowed to consider these two other potential suspects, the evidence that the government presented at trial would have been undermined because the jury would have been introduced to the possibilities that either Martin Brodie or Belinda Stevens murdered the victim. *See id.* at 47. From the jury's perspective, the government's evidence at trial would no longer have been substantial enough to lead to same, previous result. There is a reasonable probability that the outcome at Gold's trial would have been different because the judgment of the jury would have been affected by the disclosure of the FBI Reports. Therefore, even if the position of the Fifth Circuit is considered, the FBI Reports were material to Gold's trial.

The government has breached every prong from *Erickson*. It suppressed the FBI Reports, which would have been favorable to Gold at trial. The FBI Reports were material to her trial under the materiality position of the First, Third, and Eleventh Circuits, and even under the Fifth Circuit's approach for which the government advocated. Therefore, the government committed a *Brady* violation in Gold's trial. As such, we ask this Court to grant Gold's request for post-conviction relief of a directed verdict or a new trial.

CONCLUSION

For the foregoing reasons, Petitioner Samantha Gold respectfully asks for this Court to reverse the decision of the Fourteenth Circuit Court of Appeals and hold: 1) the psychotherapist-patient privilege under Federal Rules of Evidence 501 precludes the admission of Dr. Pollak's testimony at trial; 2) the government's warrantless search of Gold's desktop exceeded the scope of Wildaughter's private search in violation of the Fourth Amendment; and 3) the government

committed a *Brady* violation when it failed to disclose potentially exculpatory information solely because of its admissibility.