No. 20 – 2388

In The Supreme Court of the United States

SAMANTHA GOLD, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Brief for Petitioner

Team 21-P
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 precludes the admission at trial of confidential communications made in the course of a criminal defendant's psychotherapy treatment, where the defendant threatened harm to a third party and the psychotherapist had a duty to report threats to law enforcement.

II. Whether the government violates the Fourth Amendment by seizing and offering into evidence information which was obtained from a personal laptop computer without a warrant and which was not revealed by a private party's earlier search of that laptop.

III. Whether the government flouts this Court's holding in *Brady v. Maryland* by withholding potentially exculpatory evidence from the defense solely on the grounds that the information may be inadmissible at trial.

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STATEMENT OF THE CASE

Samantha Gold is a young woman who suffers from mental health issues, including Intermittent Explosive Disorder. R. at 17. In 2015, Ms. Gold began to seek treatment for her condition with psychotherapist, Dr. Chelsea Pollack. R. at 17. During weekly treatment sessions with Dr. Pollack, Ms. Gold began to show signs of improvement. R. at 17.

On May 25, 2017 at 12:00 PM, Ms. Gold met with Dr. Pollack for a regularly scheduled appointment and vented feelings of resentment toward Tiffany Driscoll, a fellow Joralemon University ("JU") student. R. at 3-4. Ms. Gold explained that Ms. Driscoll had recruited her to sell supplements for the multilevel marketing company, HerbImmunity, and that after a year of hard work, Ms. Gold was still about $2,000 in debt. R. at 4. During this session, Ms. Gold also made a statement that Dr. Pollack perceived to be a threat of harm against Ms. Driscoll. R. at 4.

Based on Dr. Pollack's duty to report threats of harm to a patient or an identifiable other under Boerum Health and Safety Code § 711, Dr. Pollack contacted the Joralemon Police Department ("JPD") on May 25, 2017 at 1:15 PM. R. at 5. That afternoon, JPD conducted a safety and wellness check at JU. R. at 5. After speaking with Ms. Gold for fifteen minutes, JPD concluded that she posed no threat of harm to herself or others. R. at 5. JPD also spoke with Ms. Driscoll directly and warned her that a threat against her had been reported. R. at 5. Ms. Driscoll expressed no concern and returned to class. R. at 5.

Later that day, around 4:40 PM, Ms. Gold's roommate, Jennifer Wildaughter entered the Livingston Police Department ("LPD") with a flash drive containing Ms. Gold's entire hard drive. R. at 6. Ms. Wildaughter explained that Ms. Gold had been upset earlier that afternoon and had left her laptop open in her bedroom when she stepped out of the apartment for a period of time. R. at 6. Then, Ms. Wildaughter entered Ms. Gold's bedroom and accessed her laptop

without Ms. Gold's permission. R. at 27. While clicking around on Ms. Gold's laptop, Ms. Wildaughter viewed a few of Ms. Gold's files. R. at 28. Ms. Wildaughter proceeded to copy Ms. Gold's entire hard drive onto a flash drive, which she later presented to the LPD for inspection. R. at 6, 28. After Ms. Wildaughter had given a brief and vague description of the few files she had opened, and left the station, the LPD searched the entire flash drive. R. at 6.

On the evening of May 25, 2017, Ms. Driscoll was found dead at the bottom of the stairs leading to her basement. R. at 13. It was initially reported that Ms. Driscoll suffered blunt force trauma to the head. R. at 13. Medical examiners noted that there was no sign of a struggle and no indication of foul play. R. at 13. The LPD similarly reported that there was no forensic evidence such as footprints, fingerprints or weapons at the scene. R. at 13.

Despite this lack of physical evidence, Ms. Gold was arrested and charged in connection with the death of Ms. Driscoll. R. at 14. Ms. Gold sought an order precluding the government from calling Dr. Pollack to testify against her and from introducing Dr. Pollack's notes into evidence at trial. R. at 16. Ms. Gold also asked the court to suppress information illegally obtained from her personal laptop computer. R. at 16. Both motions were denied. R. at 40.

On February 1, 2018, Ms. Gold was convicted of causing the death of Ms. Driscoll under 18 U.S.C. § 1716 *et seq.* in the U.S. District Court for the Eastern District of Boerum and was sentenced to life in prison. R. at 51. After trial, Ms. Gold learned that the government withheld two potentially exculpatory reports. R. at 43. Ms. Gold filed a motion for post-conviction relief on the basis of the *Brady v. Maryland* violation, which the court denied on August 22, 2018. R. at 43. On February 24, 2020, the U.S. Court of Appeals for the Fourteenth Circuit affirmed Ms. Gold's conviction. R. at 51. This Court granted Ms. Gold's petition for a writ of certiorari on November 16, 2020. R. at 60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

SUMMARY OF ARGUMENT

This is a case that cuts to the heart of due process. During its investigation and at trial, the government cut corners; exploiting Ms. Gold's mental health issues; relying upon illegally obtained information; and withholding material and exculpatory evidence from the defense to secure the conviction of an innocent woman.

As an initial matter, this Court should find that Dr. Pollack's testimony against Ms. Gold at trial was improper because their communications were confidential, and the dangerous-patient exception did not apply. In *Jaffee v. Redmond*, this Court held that reason and experience dictate the recognition of a psychotherapist-patient testimonial privilege. 518 U.S. 1, 8 (1996). Thus, "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure[.]" *Id*. at 9-11, 16.

The dangerous-patient exception to the psychotherapist-patient testimonial privilege, adopted by the Tenth and Fourteenth Circuits, was judicially-created from obiter dictum in a *Jaffee* footnote and should be eliminated. This Court should join the Sixth, Eighth and Ninth Circuits in rejecting the proposed exception because it is at odds with Court's holding in *Jaffee*. But even if this Court adopts a dangerous-patient exception, the Tenth Circuit's test announced in *Glass* was not met in the case at bar. The waiver analysis, adopted by the Fifth and Fourteenth Circuits, also does not apply in this case because waiver of the psychotherapist-patient testimonial privilege following disclosure of a threat to law enforcement is not a logical necessity, and even if it were, Ms. Gold did not knowingly and voluntarily waive the privilege.

Secondly, this Court should find that the Fourth Amendment is violated when the government exceeds the scope of an earlier private search of a computer without a warrant because computers contain the privacies of life, as this Court recognized in *Riley v California*.

573 U.S. 373, 401-03 (2014). This Court should find that *Riley* requires law enforcement officers to obtain a warrant before replicating a private search on a personal laptop computer because of the depth and breadth of private information found on these devices.

Alternatively, this Court should adopt the Sixth and Eleventh Circuit's particularity approach in the private search context because it properly balances citizens' Fourth Amendment rights with the interest of public safety and is also a better fit in light of this Court's holding in *Riley*. The Fifth and Seventh Circuits' container approach is woefully inadequate when applied to modern technology because of the significant privacy interests involved. Under either approach, however, the evidence LPD illegally obtained from Ms. Gold's hard drive should have been suppressed at trial.

Finally, this Court should find that the government violated this Court's holding in *Brady v. Maryland* when it withheld two material and exculpatory investigative reports from Ms. Gold solely on the basis that they may be inadmissible at trial. There is a reasonable probability that the outcome of Ms. Gold's trial would have been different if the government had disclosed these reports because Ms. Gold could have conducted additional discovery, presented alternative theories of the case, and challenged the government's investigation at trial. Excluding all inadmissible evidence from *Brady* disclosure, regardless of its potential to lead to admissible evidence is a misinterpretation of this Court's holding in *Wood* and would lead to injustice.

Ultimately, Ms. Gold was convicted of a crime she did not commit with the assistance of highly prejudicial testimony, illegally obtained information, and improper suppression of material and exculpatory evidence from the defense. The government's misconduct was rampant in this case, and Ms. Gold did not receive a fair trial. Accordingly, this Court should reverse and remand the Fourteenth Circuit's decision.

ARGUMENT

I. DR. POLLACK'S TESTIMONY AGAINST MS. GOLD AT TRIAL WAS IMPROPER BECAUSE THEIR COMMUNICATIONS WERE CONFIDENTIAL AND THE DANGEROUS-PATIENT EXCEPTION DID NOT APPLY.

This Court should find that the admission of Dr. Pollack's testimony against Ms. Gold at trial constitutes reversible error because their communications were confidential and the dangerous-patient exception to the psychotherapist-patient testimonial privilege under Federal Rule of Evidence ("F.R.E.") 501 did not apply. The standard of review on a lower court's analysis of the contours of federal testimonial privileges is *de novo*. *United States v. Hayes*, 227 F.3d 578, 581 (6th Cir. 2000) Under F.R.E. 501, federal courts are authorized to apply testimonial privileges derived from the common law, as interpreted in light of reason and experience, unless barred by the United States Constitution, a federal statute or the rules prescribed by the United States Supreme Court. *Jaffee*, 518 U.S. at 8.

The proposed dangerous-patient exception to the psychotherapist-patient testimonial privilege, adopted by the Tenth and Fourteenth Circuits, does not meet with reason and experience and should be eliminated. But even if this Court adopts a dangerous-patient exception, it did not apply in the case at bar. The Fifth Circuit's waiver analysis, supported by the Fourteenth Circuit below, is also flawed and should be rejected. Therefore, this Court should reverse and remand the Fourteenth Circuit's decision.

A. The dangerous-patient exception to the psychotherapist-patient testimonial privilege, adopted by the Tenth and Fourteenth Circuits, was judicially-created from obiter dictum in a *Jaffee* footnote and should be eliminated.

Reason and experience dictate the recognition of a psychotherapist-patient testimonial privilege under F.R.E. 501, and a dangerous-patient exception would undermine this Court's holding to that effect. In *Jaffee*, a police officer who had shot and killed a civilian sought to

protect her mental health records from compelled disclosure in a § 1983 action brought by the deceased's family. *Id*. at 3-5. This Court analogized the psychotherapist-patient privilege to the attorney-client and spousal privileges, finding that psychotherapists and their patients share a unique relationship which depends upon the development of trust through the promise of confidentiality. *Id*. at 9-10 ("[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.")

In fact, patient confidentiality has been hailed as the "*sine qua non* for successful psychiatric treatment" which serves compelling private interests. *Id*. at 11, 16. Similarly, the public at large is served when individuals with mental and emotional problems are able to receive effective therapy. *Id*. at 11 ("[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.") Therefore, this Court concluded that the psychotherapist-patient privilege "promotes sufficiently important [public and private] interests to outweigh the need for probative evidence" in a given case, such that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under [F.R.E. 501]." *Id*. at 9-11, 16.

However, obiter dictum in a *Jaffee* footnote reads, "[w]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of disclosure by the therapist." *Id*. at 18 n.19. There is currently a circuit split regarding whether this footnote creates a dangerous-patient exception to the psychotherapist-patient privilege. The Tenth and Fourteenth Circuits have recognized a dangerous-patient exception to the psychotherapist-patient privilege, while the Sixth, Eighth and Ninth Circuits reject it. *Gold v. United States*, No. 19-142 (14th Cir. 2020);

United States v. Ghane, 673 F.3d 771, 785 (8th Cir. 2012); *United States v. Chase*, 340 F.3d 978, 992 (9th Cir. 2003); *Hayes*, 227 F.3d at 579; *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998). The Fifth Circuit has opted for a waiver analysis, which was also cited favorably by the Fourteenth Circuit below. *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008).

This Court should reject the reasoning of the Fifth, Tenth and Fourteenth Circuits, and adopt the Sixth, Eighth and Ninth Circuits' reasoning because it more closely aligns with this Court's holding in *Jaffee* and comports with prevailing reason and experience found in state statutes and the proposed federal testimonial privileges. Even if this Court adopts a dangerous-patient exception or waiver of the psychotherapist-patient privilege, they do not apply to the case at bar because the tests for those departures from the general rule were not met.

1. This Court should adopt the reasoning of the Sixth, Eighth and Ninth Circuits because it more closely aligns with this Court's logic in *Jaffee*.

The Sixth, Eighth and Ninth Circuits have correctly refused to recognize the dangerous-patient exception because it is directly at odds with this Court's holding in *Jaffee*. These circuits have reasoned that the dangerous-patient exception would undermine effective psychotherapy treatment, run counter to psychotherapists' ethical obligations to protect their patients, and depart from the reason and experience found in current state statutes and the proposed federal testimonial privileges. *Ghane*, 673 F.3d at 785; *Chase*, 340 F.3d at 992*; Hayes*, 227 F.3d at 585.

The first court to recognize a psychotherapist-patient privilege was the Circuit Court of Cook County, Illinois. *Binder v. Ruvell*, No. 52-C-2535 (Ill. Cir. Ct. June 24, 1952). In that opinion, Judge Fisher held that "if the courts compel disclosure and thus the abuse of [the patient's] confidence, that much of the knowledge gained in [psychotherapy] would become abstract and useless as a healing means." *Id*. Since then, all fifty states and the District of Columbia have adopted some form of the psychotherapist-patient privilege. *Jaffee*, 518 U.S. at

6. This overwhelming consensus among the states informed this Court's reasoning in *Jaffee* and remains in effect today.[1] *Id*. at 12 n. 11.

As in *Binder*, this Court has emphasized that denial of the psychotherapist-patient privilege would not result in a significant benefit from an evidentiary perspective. *Id*. at 11-12. A warning that information disclosed in a psychotherapy session could be introduced by the psychotherapist in a criminal trial is very likely to chill the dialogue and prevent successful treatment. *Id*. ("[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.")

In *United States v. Hayes*, the Sixth Circuit echoed much of this Court's reasoning in *Jaffee* when it affirmed the defendant's right to exclude his psychotherapist's testimony at trial. 227 F.3d at 579. In that case, the defendant had made threats against his supervisor at the United States Postal Service during several psychotherapy sessions. *Id*. The district court granted the defendant's motion to suppress his medical records and to exclude his psychotherapist's testimony on the grounds that they were privileged and dismissed the indictment against him under 18 U.S.C. § 115. *Id*.

On appeal, the Sixth Circuit concluded that the dangerous-patient exception would negatively impact the psychotherapist-patient relationship, which this Court highly prioritized in *Jaffee*. *Id*. at 585. The court also recognized that unlike testifying at a patient's civil commitment hearing, which may be in the patient's best interests in receiving protection and treatment, a psychotherapist's assistance in securing a patient's criminal conviction would

[1] Christopher B. Mueller, Laird C. Kirkpatrick, and Liesa Richter, *Evidence §5.35*, (6th ed. Wolters Kluwer), GWU Law School Public Law Research Paper No. 2018-68 (2018).

stigmatize and endanger the patient. *Id*. Finally, the court reasoned that since only one state statute and none of the proposed federal testimonial privileges included a dangerous-patient exception, the exception did not meet with reason and experience and should not become part of federal common law.[2] *Id*. at 585-86.

Three years later in *United States v. Chase*, the Ninth Circuit also refused to adopt a dangerous-patient exception to the psychotherapist-patient privilege. 340 F.3d at 992. In that case, the defendant's psychotherapist testified against him at trial, which helped to secure his conviction for threatening federal officials in violation of 18 U.S.C. § 115. *Id*. at 979. On appeal, the Ninth Circuit broke its analysis down into three parts; first, whether the defendant's statements were made in confidence; second, whether the psychotherapist's disclosure of defendant's threat to law enforcement was proper; and third, whether that disclosure destroyed the psychotherapist-patient testimonial privilege recognized in *Jaffee*. *Id*. at 981.

The court found that the defendant's statements made in the course and scope of psychotherapy treatment were confidential, and therefore, privileged. *Id*. at 980. While the psychotherapist's disclosure of the defendant's threat to law enforcement was proper under state law, the court held that it did not waive the defendant's right to invoke the testimonial privilege at trial. *Id*. at 978 (finding that disclosure of a threat for protective purposes does not compel disclosure for punitive purposes, which would go against patients' logical expectations, and the reason and experience found in state statutes and the proposed federal testimonial privileges).

Ultimately, the Ninth Circuit concluded that the proposed dangerous-patient exception "would significantly injure the interests justifying the existence of the privilege; would have little practical advantage; would encroach significantly on the policy prerogatives of the states; and

[2] Only California has codified a dangerous-patient exception which arguably allows psychotherapists to testify against their patients at criminal trials. *Hayes*, 227 F.3d at 585.

would go against the experience of all but one [state] . . . as well as the persuasive [proposed federal testimonial privileges.]" [3] *Id*. at 992. Because the defendant's communications with his psychotherapist were confidential and shielded by the psychotherapist-patient privilege, the Ninth Circuit held that the district court erred in admitting the psychotherapist's testimony against the defendant at trial.[4] *Id*.

Similarly, in *United States v. Ghane*, the Eighth Circuit rejected the proposed dangerous-patient exception to the psychotherapist-patient testimonial privilege. 673 F.3d at 785. In that decision, the court distinguished between communications which were made during a hospital intake procedure and communications which were made in the course and scope of psychotherapy treatment; finding that only the latter were protected by the privilege. *Id*. at 783-84, 786. In rejecting the proposed dangerous-patient exception, the Court went on to hold that it would apply inconsistently based on the underlying state law and would negatively impact the psychotherapist-patient relationship, contrary to this Court's priorities in *Jaffee*. *Id*. at 784-86.

Here, Ms. Gold's communications with Dr. Pollack, made in the course and scope of psychotherapy treatment, were confidential and privileged under Boerum Health and Safety Code ("BHSC") § 711(1). R. at 17. The record reflects that Ms. Gold was a stable college student who simply needed to vent her frustrations to her trusted confidante. R. at 38. As this Court recognized in *Jaffee* and the Sixth Circuit reiterated in *Hayes*, it is very unlikely that Ms. Gold would have made the statements in question if she had known that Dr. Pollack would testify against her at a criminal trial. *Jaffee*, 518 U.S. at 11-12; *Hayes*, 227 F.3d at 585 ("an

[3] This Court's proposed federal psychotherapist-patient testimonial privilege, although ultimately rejected by Congress, noticeably did not include a dangerous-patient exception. *Hayes*, 227 F.3d at 989.

[4] Chase was ultimately acquitted of the charge relating to his psychotherapist's testimony, so although it was erroneous to allow his psychotherapist to testify, it did not cause him any prejudice and his conviction was affirmed. 340 F.3d at 993.

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.")

Dr. Pollack's testimony at trial was also unfairly prejudicial to Ms. Gold because of the stigma surrounding mental health issues. Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver And The Evisceration Of The Psychotherapist-Patient Privilege In The Federal Courts*, 58 DePaul L. Rev. 79, 88 n.42 (2008). The jury likely assumed that Ms. Gold committed the offense because they learned that she had mental health issues directly from her psychotherapist. *Id*. It would have been impossible for Dr. Pollack to separate out what she learned on just one occasion with Ms. Gold from their several-year psychotherapist-patient relationship, even if the prosecution attempted to avoid a "fishing expedition." R. at 17, 39. Moreover, Ms. Gold was likely unable to engage in effective cross examination of Dr. Pollack because that would have required delving deeper into communications that Ms. Gold intended to preserve as private.

Securing Ms. Gold's conviction was not in Ms. Gold's best interests, as she is now confined in a potentially dangerous environment where she is unlikely to receive adequate mental health treatment. R. at 51; *Hayes*, 227 F.3d at 585. Therefore, Dr. Pollack's testimony against Ms. Gold at trial violated Ms. Gold's trust and ran counter to Dr. Pollack's obligations to protect Ms. Gold. *Chase*, 340 F.3d at 990; *Hayes*, 227 F.3d at 585. Although Ms. Gold should be praised for seeking mental health treatment, she is now incarcerated due to the betrayal of her confidences by a trusted medical provider. *Hayes*, 227 F.3d at 584. This unfortunate yet predictable outcome exemplifies why the dangerous-patient exception cannot square with this Court's holding in *Jaffee* and why this Court should join the Sixth, Eighth and Ninth Circuits in rejecting the proposed exception.

2. Even if this Court adopts a dangerous-patient exception, the Tenth Circuit's test announced in *Glass* was not met in the case at bar.

Even if this Court adopts a dangerous-patient exception, it did not apply to the case at bar. In *United States v. Glass*, the defendant's psychotherapist testified against him at trial, disclosing threats which were made confidentially and in the course of treatment. 133 F.3d at 1357. Ultimately, the defendant was convicted of threatening the President of the United States in violation of 18 U.S.C. § 871(a). *Id*.

On appeal, the Tenth Circuit adopted the dangerous-patient exception and held that psychotherapists could testify against their patients at a criminal trial if "the threat was serious when it was uttered and . . . disclosure was the only means of averting harm." *Id*. at 1360. Applying this test to the facts in *Glass*, the court concluded that the defendant's threat was not taken seriously by his psychotherapist when it was uttered and that there were other means of preventing the potential harm. *Id*. at 1359. Thus, the court reversed and remanded for reconsideration of the defendant's conviction. *Id*. at 1360.

Here, although Dr. Pollack construed Ms. Gold's statements as a serious threat, Dr. Pollack's testimony at trial was not the only means of averting a theoretical harm. R. at 18-19, 53. In fact, there were other witnesses, including Ms. Wildaughter, who could have testified from her personal knowledge that Ms. Gold was frustrated with Ms. Driscoll and that Ms. Gold was about $2,000 in debt to HerbImmunity. R. at 6, 14, 24-26, 41. The prejudicial effect of Dr. Pollack's testimony, as mentioned above, is particularly insupportable given that other witnesses were present at trial and competent to testify to Ms. Gold's relationship with Ms. Driscoll and involvement with HerbImmunity. R. at 6, 24-26, 41, 53.

More significantly, there was also no harm to be averted at the time of trial. R. at 51. Ms. Driscoll, Ms. Gold's allegedly "identifiable victim," was already deceased at the time of

trial. R. at 51. Therefore, Dr. Pollack's testimony focused entirely on establishing past actions rather than on preventing any future threat of harm.[5] *Chase*, 340 F.3d at 987; *Hayes*, 227 F.3d at 584. Although the Fourteenth Circuit expressed its concern that criminal defendants could "regain" the psychotherapist-patient testimonial privilege by killing their victims, this Court has rejected that line of logic. R. at 53; *Giles v. California*, 554 U.S. 353, 366-68, 377 (2008) (holding that criminal defendants do not lose their right to exclude improper testimony simply because they are accused of murder). Accordingly, the Tenth Circuit's dangerous-patient exception is poorly conceived and should be rejected in light of this Court's precedent.

B. The waiver analysis, adopted by the Fifth and Fourteenth Circuits, is also flawed and should be rejected.

The Fifth and Fourteenth Circuits' waiver analysis is logically flawed because it conflates psychotherapists' duty to warn with their later testimony against a patient at a criminal trial. As the Sixth, Eighth and Ninth Circuits have recognized, there is a fundamental difference between a psychotherapist's duty to report a potential threat of harm and a psychotherapist's subsequent testimony against a patient at a criminal trial. *Ghane*, 673 F.3d at 786-87; *Chase*, 340 F.3d at 988; *Hayes*, 227 F.3d at 583.

Psychotherapists' duty to warn arose out of the California Supreme Court's holding in *Tarasoff v. Regents of University of California*. 551 P.2d 334, 340, 345 (Cal. 1976). In that case, a patient informed his psychotherapist that he intended to kill a readily identifiable victim, and the psychotherapist believed that the patient would do so. *Id*. The court determined that at that point in time, the psychotherapist incurred a duty to warn the identifiable victim or law enforcement of the threat so that protective measures could be taken. *Id*. at 340 ("once a therapist does in fact determine, or under applicable professional standards reasonably should

[5] This concept will be explored more fully in section I(B)(1) below.

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.")

Since the *Tarasoff* decision in 1976, most states have adopted an analogous duty to warn either by legislative action or judicial decision. Paul B. Herbert & Kathryn A. Young, *Tarasoff at Twenty-Five*, J. Am. Acad, Psychiatry Law 30:275-81 (2002). However, *Tarasoff*-inspired duties to warn differ in several significant respects from the psychotherapist-patient testimonial privilege that this Court recognized in *Jaffee*. *Ghane*, 673 F.3d at 786; *Chase*, 340 F.3d at 987; *Hayes*, 227 F.3d at 583-84. Accordingly, this Court should adopt the Sixth, Eighth and Ninth Circuits' reasoning and reject the waiver analysis advanced by the Fifth and Fourteenth Circuits.

1. Waiver of the psychotherapist-patient testimonial privilege is not a logical necessity.

The waiver analysis adopted by the Fifth and Fourteenth Circuits is at odds with this Court's holding in *Jaffee* and does not meet with reason and experience. In *United States v. Auster*, the Fifth Circuit held that because the defendant's psychotherapist warned him repeatedly that his threatening statements against identifiable victims would be disclosed, the defendant had no reasonable expectation of confidentiality and had automatically waived his right to assert the psychotherapist-patient testimonial privilege at trial. 517 F.3d at 315-16.

Conversely, the Sixth, Eighth and Ninth Circuits have found that there is little correlation between the duty to warn and a psychotherapist's subsequent testimony against their own patient at a criminal trial. *Ghane*, 673 F.3d at 786; *Hayes*, 227 F.3d at 583; *Chase*, 340 F.3d at 987 ("there is not necessarily a connection between the goals of protection and proof.") While a *Tarasoff* warning focuses on preventing a future harm, testimony against a criminal defendant at trial focuses entirely on past acts. *Chase*, 340 F.3d at 987 ("[i]f a patient was dangerous at the time of the *Tarasoff* disclosure, but by the time of trial the patient is stable and harmless, the

protection rationale that animates the exception to the states' confidentiality laws no longer applies."); *Hayes*, 227 F.3d at 584 ("Unlike the situation . . . in *Tarasoff*, the threat articulated [in psychotherapy]. . . is rather unlikely to be carried out once court proceedings have begun[.]")

Moreover, federal evidentiary rules are intended to promote "uniform disposition of criminal matters in the federal system." *United States v. DeWater*, 846 F.2d 528, 530 (9th Cir. 1988); *see Lippay v. Christos*, 996 F.2d 1490, 1497 (3d Cir. 1993) (addressing "Congress' intent that the [F.R.E.] have uniform nationwide application"); *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989) (stating that "the [F.R.E.] are intended to have uniform nationwide application").

A waiver analysis would directly contradict this aim for uniformity by creating widely varying results based on each state's standard of care. *See Jaffee*, 518 U.S. at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."); *Chase*, 340 F.3d at 987 ("[i]f the federal evidentiary privilege were tied to the states' disclosure laws, then similarly situated patients would face different rules of evidence in federal criminal trials."); *Hayes*, 227 F.3d at 584 ("it cannot be the case that the scope of a federal testimonial privilege should vary depending upon state determinations of what constitutes 'reasonable' professional conduct.")

Here, Dr. Pollack's duty to warn under BHSC § 711 was fundamentally different from her later testimony against Ms. Gold at trial. Dr. Pollack fulfilled her duty to warn under BHSC § 711 by promptly contacting the Joralemon Police Department ("JPD"). R. at 5. The JPD carried out a health and safety check at Joralemon University ("JU") and determined that Ms. Gold did not pose any immediate harm to Ms. Driscoll. R. at 5. JPD also warned Ms. Driscoll

directly. R. at 5. Therefore, Dr. Pollack and the JPD took several tangible steps to protect Ms. Driscoll. R. at 5. Conversely, Dr. Pollack's testimony against Ms. Gold at trial went entirely to establishing past statements rather than to preventing any future harm, which exceeded the scope of permissible disclosure of client confidences under BHSC § 711. R. at 19, 51.

BHSC § 711 also differs in several material respects from other states' disclosure laws in that it imposes a mandatory duty to warn. Griffin Sims Edwards, *Database of State Tarasoff Laws*, University of Alabama at Birmingham (2010). While about half of the United States jurisdictions mirror Boerum's mandatory duty to warn, another half allow discretionary disclosure, have no definitive rule, or entirely reject the duty to warn. *Id*. Under the Fifth and Fourteenth Circuit's waiver rule, the availability of Ms. Gold's federal testimonial privilege would hinge on whether Dr. Pollack's disclosure was proper under Boerum law; an analysis which would look entirely differ if this trial had taken place in a neighboring state. *See Jaffee*, 518 U.S. at 18; *DeWater*, 846 F.2d at 530; *Lippay*, 996 F.2d at 1497; *Boren*, 887 F.2d at 1038. Accordingly, the Fifth and Fourteenth Circuits' waiver analysis does not meet with reason and experience and should be rejected by this Court.

2. Ms. Gold did not knowingly and voluntarily waive her psychotherapist-patient testimonial privilege.

Even if this Court finds that the Fifth and Fourteenth Circuits' waiver analysis meets with reason and experience as a general matter, Ms. Gold did not knowingly and voluntarily waive her privilege in the case at bar. R. at 21. Psychotherapists have an ethical obligation to inform their patients when their confidences may be betrayed. American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, Standard 5.01 (Dec. 1992).

In *Hayes*, the Sixth Circuit held that the patient could not have made a knowing and voluntary waiver when he was not informed that his statements made in the course of

psychotherapy could be used against him in a subsequent criminal prosecution. 227 F.3d at 587 ("it must be the law that, in order to secure a valid waiver of the protections of the psychotherapist-patient privilege from a patient, a psychotherapist must provide that patient with an explanation of the consequences of that waiver suited to the unique needs of that patient.")

Conversely, and prior to this Court's holding in *Jaffee*, the Seventh Circuit held that the defendant had waived his privilege by signing a consent form which specifically stated that information about child sexual abuse would be reported to the authorities and nonprivileged at trial. *United States v. Wimberly*, 60 F.3d 281, 285 n.2 (7th Cir. 1995); *but see Ghane*, 673 F.3d at 786-87 (finding defendant's written and oral consent to disclose his mental health records to "anyone" was legally insufficient).

Unlike the psychotherapist in *Wimberly*, Dr. Pollack did not warn Ms. Gold verbally or otherwise that her statements, which were made confidentially and in the course of treatment, could be used against her in a subsequent criminal prosecution. R. at 21. Dr. Pollack testified that while she informed Ms. Gold of her obligations under BHSC § 711, she "did not believe" that she had advised Ms. Gold that the prosecution could compel her to testify against Ms. Gold at a criminal trial. R. at 21.

Dr. Pollack is a duly qualified psychotherapist and is aware of her ethical obligations to protect her patients' confidences under federal and state law. R. at 20. Dr. Pollack's failure to inform Ms. Gold that her statements could be used against her at a criminal trial demonstrates that Dr. Pollack never contemplated testifying against Ms. Gold and that Ms. Gold could not have waived her testimonial privilege. R. at 20-21. Accordingly, even if this Court adopts the waiver analysis as a general matter, Ms. Gold did not knowingly and voluntarily waive her psychotherapist-patient testimonial privilege in the case at bar.

II. THE FOURTH AMENDMENT IS VIOLATED WHEN THE GOVERNMENT EXCEEDS THE SCOPE OF A PRIVATE SEARCH OF A COMPUTER WITHOUT A WARRANT BECAUSE COMPUTERS CONTAIN THE PRIVACIES OF LIFE.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. A search "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed" and a seizure "occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The standard of review on the lower court's application of the Fourth Amendment is *de novo*. *United States v. Hardin*, 539 F.3d 404, 416 (6th Cir. 2008).

The founding fathers drafted and adopted the Fourth Amendment to combat arbitrary intrusions into personal affairs and property. *Steagald v. United States*, 451 U.S. 204, 220 (1981). While this Court initially implemented a trespass-based analysis in its Fourth Amendment jurisprudence, this Court has recently segued to a two-pronged reasonableness approach, recognizing that advancements in technology have significantly expanded law enforcement's ability to search without committing a physical trespass. *United States v. Jones*, 132 S. Ct. 945, 949-50 (2012); *Katz v. United States*, 389 U.S. 347, 353 (1967) (stating that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.") Accordingly, because the Fourth Amendment "protects people, not places[,]" the defendant must show that the government's conduct "violate[d] a subjective expectation of privacy that society [was prepared to] recognize as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001); *Katz*, 389 U.S. at 351, 360.

However, the Fourth Amendment generally does not apply to searches conducted by private parties; a concept known as the private search doctrine. *Jacobsen*, 466 U.S. at 112, 115

(citing *Walter v. United States*, 447 U.S. 649, 662 (1980) (finding that the Fourth Amendment "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.")) Thus, when the government obtains and relies upon evidence that was revealed by a private search, the relevant inquiry for Fourth Amendment purposes is whether the government exceeded the scope of the private search. *Id*.

If the government *has* exceeded the scope of the private search without obtaining a warrant, and has violated an individual's reasonable expectation of privacy, that evidence generally must be excluded at trial. *Walter*, 447 U.S. at 659-60; *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) ("Because [the Fourth Amendment] is enforceable in the same manner . . . as other basic rights secured by the Due Process Clause, we can no longer permit [the exclusionary rule] to be revocable at the whim of any police officer who . . . chooses to suspend its enjoyment.")

There is currently a circuit split regarding the private search doctrine's application to electronic devices. The Sixth and Eleventh Circuits have adopted the particularity approach, which holds that a warrantless search of an electronic device is unreasonable unless it perfectly corresponds with the private party's earlier search. *United States v. Lichtenberger*, 786 F.3d 478, 486, 488 (6th Cir. 2015); *United States v. Sparks*, 806 F.3d 1323, 1336-37 (11th Cir. 2015). The Fifth and Fourteenth Circuits have alternatively adopted a container approach, which holds that an individual's expectation of privacy in an electronic device is frustrated once that device has been opened by a private party, and that the government need not limit its search to the exact corners of the earlier private search. *Rann v. Atchison*, 689 F.3d 832, 836-37 (7th Cir. 2012); *United States v. Runyan*, 275 F.3d 449, 463-64 (5th Cir. 2001).

This Court should find that under the landmark decision of *Riley v. California*, law enforcement officers are required to obtain a warrant before replicating a private search on a private laptop computer. 573 U.S. at 401-03. Alternatively, this Court should adopt the Sixth and Eleventh Circuit's particularity approach because the Fifth, Seventh and Fourteenth Circuits' container approach is woefully inadequate in the electronic device context. Accordingly, this Court should reverse and remand the Fourteenth Circuit's decision.

A. <u>This Court should find that *Riley* requires law enforcement officers to obtain a warrant before replicating a private search on a personal laptop computer.</u>

Justice Harlan established the modern two-prong "reasonableness" test for whether the government conducts a "search" for the purposes of the Fourth Amendment in *Katz v. United States*. 389 U.S. at 360 (finding that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as [objectively reasonable.]") To determine the reasonableness of a particular search or seizure, this Court considers "on the one hand, the degree to which [that search or seizure] intrudes upon an individual's privacy [interests] and, on the other, the degree to which [that search or seizure] is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

In *Coolidge v. New Hampshire*, this Court emphasized that "the warrant requirement is an important working part of our machinery of government" and not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." 403 U.S. 433, 455 (1971). Accordingly, warrantless searches are presumptively unreasonable and can only be sustained in exigent circumstances, including the need to render emergency aid, to detain a fleeing suspect, or to prevent the destruction of evidence. *Riley*, 573 U.S. at 382; *Kentucky v. King*, 563 U. S. 452, 459-60 (2011).

This Court has expressed concern about the "power of technology to shrink the realm of guaranteed privacy" in its recent Fourth Amendment cases. *Carpenter v. United States*, 136 S. Ct. 2206, 2221 (2018) (holding a warrantless subpoena of cell site location information was an unreasonable search given that individuals have a reasonable expectation of privacy in the whole of their public movements); *Jones*, 132 S. Ct. at 949 (holding that the warrantless attachment of a GPS tracking device onto the defendant's vehicle was an unreasonable search because it constituted a physical occupation of his personal effect for the purposes of obtaining information); *Kyllo*, 533 U.S. at 34 (holding that the search of the defendant's home with a thermal imaging device was an unreasonable search, especially because the home has always been entitled to additional protections under the Fourth Amendment). Accordingly, this Court has attempted to assess and maintain "the degree of privacy against government [intrusion] that existed when the Fourth Amendment was adopted[.]" *Kyllo*, 533 U.S. at 34.

In *Riley*, this Court prioritized citizens' privacy rights in their digital data over the convenience of law enforcement officers; finding that law enforcement officers must obtain a warrant prior to searching an arrestee's cell phone. 573 U.S. at 401-03. This Court reasoned that electronic devices "differ in both a quantitative and qualitative sense" from other personal effects. *Id*. at 393. The storage capacity of cell phones and other electronic devices would have been incomprehensible to our founding fathers. *Id*. at 395, 400 (finding that "[p]rior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day" and that it was "implausible that [the defendant] would have strolled around with video tapes, photo albums, and an address book all crammed into his pockets.")

Additionally, more than 75% of Americans owned a cell phone and personal computer in 2016. Camille Ryan, *Computer and Internet Use in the United States: 2016*, American

Community Survey Reports, ACS-39, U.S. Census Bureau (2017). Indeed, Chief Justice Roberts noted that electronic devices have become the functional equivalent of human anatomy, and that in most cases, it would be more intrusive to search an individual's cell phone than his home. *Riley*, 573 U.S. at 385, 396-97 ("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.")

Homes have always received additional protections under the Fourth Amendment. *Kyllo*, 533 U.S. at 31 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.")) Similarly, "[v]irtually any intrusio[n] into the human body," will invade "cherished personal security" that must be scrutinized under the Fourth Amendment. *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968)); *Schmerber v. California*, 384 U.S. 757, 770 (1966).

In *United States v. Allen*, the Sixth Circuit refused to extend the private search doctrine to private residences because of the significant privacy interests involved and historical protections afforded to those spaces. 106 F.3d 695, 699 (6th Cir. 1997) ("[u]nlike the package in *Jacobsen* . . . which 'contained nothing but contraband,' [defendant's] motel room was a temporary abode containing personal possessions" and his "legitimate and significant privacy interest [in that abode] . . . was not breached in its entirety merely because the motel manager viewed some of those contents.") A similar argument can be made under *Carpenter* and *Riley* that the private search doctrine should not apply to genetic information and other searches of an individual's person. *Carpenter*, 136 S. Ct. at 2217; *Riley*, 573 U.S. at 395-96, 403; Katelyn N. Ringrose, *A*

Cautionary Note: Genealogy Companies Need to Stop Giving Warrantless DNA Clues to Law Enforcement, 124 Penn St. L. Rev. Penn Statim 302, 308-322 (2019).

As an initial matter, Livingston Police Department's ("LPD") search of Ms. Gold's personal laptop hard drive was more akin to a search of Ms. Gold's body or home than of one of her simple personal effects. *Riley*, 573 U.S. at 385, 396-97. It is important to note that the flash drive Ms. Wildaughter turned over to the LPD contained Ms. Gold's entire hard drive, which included sensitive information about Ms. Gold's budget, health information, and location data, in addition to private communications between Ms. Gold and her family and friends. R. at 6, 32. Like the defendant in *Allen*, Ms. Gold did not surrender her privacy interests in her entire personal laptop and all the sensitive information it contained simply because Ms. Wildaughter surreptitiously viewed a few of her files. R. at 6, 32; 106 F.3d at 699.

Moreover, there was no risk of destruction of evidence in this case because the flash drive was already in LPD's custody where it could have been guarded until a warrant was obtained. R. at 6; *Riley*, 573 U.S. at 402. There was also no risk of imminent harm to LPD officers, and no risk that Ms. Gold would flee, because she was unaware that her data had been stolen at that time. R. at 6; *Id*. As this Court recognized in *Riley*, it has become easier to obtain a warrant in the digital age, so LPD had no excuse for failing to obtain one. R. at 6, 34-35; *Id*.

In a matter of minutes, Ms. Wildaughter was able to copy the equivalent of millions of pages of information from Ms. Gold's private laptop computer and to transport that information to the LPD in the palm of her hand. *Id*. at 394; Lexis Nexis, *How Many Pages in a Gigabyte?*, Discovery Services Fact Sheet (2007). Prior to the digital age, Ms. Wildaughter simply would not have been able to rifle through this many of Ms. Gold's private documents, nor could she have singlehandedly transported those documents to the LPD.

As this Court has emphasized, Ms. Gold should not lose the amount of privacy that would have been available to her at the time of the founding simply because modern technology has made Ms. Wildaughter's and the LPD's extensive intrusion into her personal property and affairs possible. Accordingly, this Court should find that under *Riley* and other recent Fourth Amendment cases involving modern technology, the government was required to obtain a warrant to search Ms. Gold's personal laptop computer, even though a few of her files were previously inspected by Ms. Wildaughter. *Riley*, 573 U.S. at 401-03; *Kyllo*, 533 U.S. at 34.

B. Alternatively, this Court should adopt the Sixth and Eleventh Circuits' particularity approach because it is more in line with *Riley* than the Fifth and Seventh Circuits' container approach.

In the alternative, this Court should adopt the particularity approach for warrantless searches of electronic devices in the private search context because it is a better fit with this Court's holding in *Riley* than the Fifth and Seventh Circuits' container approach. In *Walter v. United States*, a private party accidentally received obscene films in the mail. 447 U.S. at 651-52. The recipient did not view the films, but after reading the suggestive labels, contacted the Federal Bureau of Investigation ("FBI"). *Id*. The FBI subsequently viewed the films, and after confirming that they contained contraband, charged the sender under 18 U.S.C.S. §§ 371, 1462, and 1465. *Id*. at 652.

On appeal, this Court held that a private party's opening of the package before its delivery to the intended recipient did not strip the unseen portions of the package of all Fourth Amendment protection. *Id*. at 658-59. Because the private party did not actually view the obscene films, the FBI exceeded the scope of the earlier private search, which "was necessary in order to obtain the evidence which was to be used at trial." *Id*. at 654. Accordingly, the FBI's conduct constituted a warrantless search, which was unreasonable and prohibited by the Fourth

Amendment. *Id*. at 657 (finding that the "projection of the films was a significant expansion of the search that had been conducted previously by a private party . . . . [constituting a] separate search . . . [which] was not supported by any exigency, or by a warrant even though one could have easily been obtained.")

Conversely, in *United States v. Jacobsen*, private postal carriers opened a box which contained suspicious white powder and contacted the Drug Enforcement Agency ("DEA") to investigate. 466 U.S. at 111-12. Upon arrival, the DEA tested the powder without obtaining a warrant, and determined that it was cocaine. *Id*. The defendant was charged and convicted of drug trafficking at trial, and on appeal, this Court concluded that testing the powder was not a search because it could only confirm whether or not the powder was cocaine. *Id*. at 112, 122. ("[t]he field test at issue could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine.") Because the Fourth Amendment is only at issue if authorities obtain information for which the "expectation of privacy has not already been frustrated[,]" the "critical measures of whether a governmental search exceeds the scope of the private search . . . are how much information the government stands to gain [in] re-examin[ing] the evidence and, relatedly, how certain it is regarding what it will find." *Id*. at 117, 119-20.

The Sixth and Eleventh Circuits have interpreted *Walter* and *Jacobsen* to mean that "the private-search doctrine requires a private actor's search to create a 'virtual certainty' that a government search will disclose nothing more than what the private party has already discovered." *Lichtenberger*, 786 F.3d at 488; *Sparks*, 806 F.3d at 1336-37. Alternatively, the Fifth and Seventh Circuits have construed those decisions to mean that when a private party has opened and viewed some data on an electronic device, the expectation of privacy in that device has been entirely frustrated. *Rann*, 689 F.3d at 836-37; *Runyan*, 275 F.3d at 463.

This Court should find that private searches of electronic devices implicate privacy interests closer to those in *Walter* than in *Jacobsen* because digital media and electronic devices can reveal much more about an individual than a simple box or container. *Jacobsen*, 466 U.S. at 122; *Walter*, 447 U.S. at 657. Accordingly, this Court should adopt the Sixth and Eleventh Circuits' particularity approach and find that the LPD violated Ms. Gold's Fourth Amendment rights by greatly exceeding the scope of Ms. Wildaughter's earlier search.

1. The particularity approach tracks with this Court's holding in *Riley*.

In *Riley*, this Court found that "[t]reating [an electronic device] as a container . . . is a bit strained" as a practical matter. 573 U.S. at 397 (citing *New York v. Belton*, 453 U. S. 454, 460 n.4 (1981) (describing a "container" as "any object capable of holding another object")). The Sixth and Eleventh Circuits have agreed, holding that electronic devices are entitled to greater protections than other personal effects because of the privacy interests involved. *Lichtenberger*, 786 F.3d at 485 (finding that because laptop computers have "even greater [storage] capacity than the cell phones at issue in *Riley*[,]" officers may view only the exact images already seen by a private party); *Sparks*, 806 F.3d at 1336 (finding that the private search of defendant's cell phone which revealed certain images did not expose his entire phone to warrantless scrutiny).

Although the defendant's girlfriend in *Lichtenberger* showed a few illicit images to law enforcement, the officer who conducted the search admitted on the stand that she "could not recall if these were among the same photographs she had seen earlier because there were hundreds of photographs in the folders she had accessed." *Id*. at 488. Thus, the Sixth Circuit held that the government lacked a "virtual certainty" that the "inspection of the [laptop] and its contents would not [reveal] anything more than [had] already [been revealed by the private search][,]" violating this Court's holdings in *Walter* and *Jacobsen*. 786 F.3d at 488.

Here, Ms. Wildaughter viewed only a few files, gave vague descriptions of those files, and was absent as LPD freely roamed through Ms. Gold's entire hard drive. R. at 6. Because Ms. Gold's personal laptop computer contained substantially more private information than a simple container, the government did not have license to aimlessly search Ms. Gold's entire hard drive after Ms. Wildaughter saw only a few of her files. Holding otherwise would permit the government to make exploratory rather than confirmatory warrantless searches unsupported by exigent circumstances. Accordingly, the government must confine its search of electronic devices to the exact images viewed by a private party.

2. The container approach is constitutionally inadequate in the context of electronic devices.

The Fifth and Seventh Circuits apply the container approach to searches of electronic devices and look to whether law enforcement officers are "substantially certain of what is inside [the device] based on the statements of the private searchers, their replication of the private search, and their expertise." *Rann*, 689 F.3d at 836-37; *Runyan*, 275 F.3d at 463. This test is ill-advised because it incorporates circular reasoning and near total deference to law enforcement where privacy interests are paramount. Unlike a search of a cardboard box, an earlier search of an electronic device will never render the contents of unopened digital files obvious. Thus, the container approach essentially authorizes officers to open thousands of sealed boxes after a private party opens one.

But, even if this Court adopts the Fifth and Seventh Circuits' container approach as a general matter, it did not apply in this case because the LPD was not substantially certain of what it would find on Ms. Gold's hard drive. R. at 6. Accordingly, this Court should find that the LPD's search of Ms. Gold's entire laptop hard drive significantly exceeded the scope of Ms. Wildaughter's earlier search, such that the files LPD uncovered should have been suppressed.

III. THE GOVERNMENT VIOLATED THIS COURT'S HOLDING IN *BRADY V. MARYLAND* BY WITHHOLDING TWO EXCULPATORY INVESTIGATIVE REPORTS ON THE BASIS THAT THEY MAY BE INADMISSIBLE AT TRIAL.

Under *Brady v. Maryland*, a new trial is required if the prosecution fails to disclose evidence which is favorable to the defendant and material to his guilt or punishment, regardless of the prosecutor's mental state in withholding the evidence. 373 U.S. 83, 87 (1963). In *Brady*, this Court explained that the suppression of material exculpatory evidence amounts to a violation of the due process clause of the Fourteenth Amendment. *Id*. Thus, the standard of review on a lower court's denial of a criminal defendant's *Brady* claim is *de novo*. *United States v. Beasley*, 72 F.3d 1518, 1525 (11th Cir. 1996).

In *Brady*, the defendant learned of his co-defendant's confession after trial. 373 U.S. at 84. Although that confession could not have lowered the defendant's culpability below first-degree murder, it was potentially material to his punishment. *Id*. at 87. This Court concluded that it could not place itself "in the place of the jury and assume what their views would have been as to whether [the suppressed evidence] did or did not matter." *Id*. at 88. Therefore, this Court affirmed the Fourth Circuit's finding that the defendant's due process rights under the Fourteenth Amendment had been violated and that resentencing was required. *Id*. at 85, 91.

In *Wood v. Bartholomew*, this Court applied its *Brady* analysis and found that because the suppressed evidence was inadmissible for any purpose under state law, it was "not evidence at all" and did not need to be shared with the defense. 516 U.S. 1, 6 (1995). There is currently a circuit split regarding whether this Court's holding in *Wood* precludes defendants from asserting a *Brady* violation for the prosecution's failure to disclose evidence that would have been inadmissible at trial. The majority of circuits that have considered this issue have held that inadmissible evidence can form the basis of a *Brady* violation. *See Dennis v. Sec'y Pa.*, 834 F.3d

263, 308 (3d. Cir. 2016); *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 5 (1st Cir. 2003); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000), *cert. denied*, 531 U.S. 1128 (2001); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991); *but see Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996).

The case at bar does not fall squarely under this Court's holding in *Wood* because the investigative reports were not necessarily inadmissible and were material to the ultimate outcome at trial. 516 U.S. at 8. However, if this Court finds that *Wood* is controlling, this Court should join the First, Second, Third, Sixth and Eleventh Circuits in requiring the prosecution to turn over inadmissible evidence that would lead directly to admissible evidence. The Fourth and Eighth Circuits' approach is flawed because the purpose of a *Brady* disclosure is to ensure that the defendant is "acquitted or convicted on the basis of all the evidence which exposes the truth[,]" not to adhere to rigid formalism. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

Ultimately, this Court should find that the government committed a *Brady* violation in this case by failing to disclose the two material and exculpatory investigative reports because they would have led the defense to pursue two alternative theories of the case and additional discovery. Accordingly, this Court should reverse and remand the Fourteenth Circuit's decision.

A. ***Wood* is not directly on point because there is a reasonable probability that the outcome of Ms. Gold's trial would have been different if the government had disclosed the two investigative reports.**

This Court has held that suppressed evidence must be exculpatory and materiality to form the basis of a *Brady* claim. *United States v. Bagley*, 473 U.S. 667, 677-78 (1985). Evidence is material if there is "a reasonable probability that had the evidence been disclosed to the defense before trial, the defendant would have received a different outcome." *Kyles*, 514 U.S. at 434. A

reasonable probability of a different result at trial need not be shown by a preponderance of evidence, rather the defendant must show the prosecution's "evidentiary suppression undermines confidence in the outcome of the trial[.]" *Kyles*, 514 U.S. at 434.

In *Wood*, the defendant learned after trial that a witness for the prosecution had failed a polygraph test pertaining to his whereabouts on the night of the robbery. *Wood*, 516 U.S. at 5. This Court noted that the defendant's trial strategy was not significantly impacted by the prosecution's failure to disclose, and that the defendant could have pursued his theory that the prosecution's witness was untruthful independent of the test results. *Id*. at 6-8. Moreover, there was significant physical evidence, two witness identifications, and the defendant's own statements linking him to the robbery and fatal shooting. *Id*. at 8. This Court ultimately found that there was no reasonable probability of a different result at trial, and thus, no *Brady* violation in the suppression of the polygraph results. *Id*.

This Court's holding in *Wood* is not directly on point to the case at bar because there is a reasonable probability that Ms. Gold would have been acquitted if the government had turned over the two investigative reports. R. at 45. The reports would have clued Ms. Gold in to two individuals who worked for HerbImmunity and had motives to kill Ms. Driscoll. R. 11-12. The first report indicated that Ms. Driscoll was in debt to an individual who had a reputation for violence. R. at 11. The second directly implicated another individual in Ms. Driscoll's death. R. at 12.

Therefore, unlike the defendant in *Wood*, Ms. Gold's trial strategy would have differed significantly if the prosecution had disclosed these two reports. R. at 45. Ms. Gold could have followed up on these leads by collecting additional evidence, deposing, and possibly calling these individuals to testify at trial. R. at 45.

Moreover, there is no physical evidence linking Ms. Gold to this crime, and Ms. Gold was ultimately convicted on purely circumstantial evidence. R. at 13, 45. Information that two other individuals had motives to kill Ms. Driscoll would have been instrumental to developing Ms. Gold's theory of the case and defense strategy at trial. R. at 45. Accordingly, this Court should find that the holding in *Wood* is not controlling in the case at bar, such that the government should have disclosed the two investigative reports to Ms. Gold under *Brady*.

B. Alternatively, this Court should find that *Wood* excludes immaterial evidence from mandatory disclosure under *Brady*, not inadmissible evidence.

Categorically excluding inadmissible evidence is a misapplication of this Court's holding in *Wood* and would lead to injustice. First, this Court has held that the animating purpose behind *Brady* is that the defendant will be "acquitted or convicted on the basis of all the evidence which exposes the truth." *Kyles*, 514 U.S. at 439 (finding that the prosecution's goal is not to "win a case, but [to ensure] that justice shall be done.") Second, although this Court has never held that the "Constitution demands an open file policy[,]" this Court has encouraged the government to resolve all doubts in favor of disclosure. *Id*. at 437-39. Finally, the crux of a *Brady* inquiry is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. at 437, 444-46, 453.

With these considerations in mind, the majority of circuits have held that inadmissible evidence can form the basis of a *Brady* claim if the suppressed information would have led to admissible evidence. *Dennis*, 834 F.3d at 310; *Ellsworth*, 333 F.3d at 5; *Gil*, 297 F.3d at 104; *Bradley*, 212 F.3d at 567; *Phillip*, 948 F.2d at 249. This Court should adopt this approach because *Wood* excludes immaterial evidence from *Brady* disclosures, not inadmissible evidence. Indeed, as the Third Circuit has recognized, "[i]f inadmissible evidence could never form the

basis of a Brady claim, th[is] Court's examination of the issue would have ended when it noted that the [polygraph] results were inadmissible." *Dennis*, 834 F.3d at 308. Beyond its potential to lead to admissible evidence, inadmissible evidence can be used to impeach, to cross-examine and to challenge the government's investigation. *Id*. at 310-11. Thus, inadmissible evidence has independent value and must be disclosed where, as here, it may lead to admissible evidence.

The two investigatory reports in this case were exculpatory of Ms. Gold and material to her defense strategy. R. at 48. While the reports may have been inadmissible at trial, Ms. Gold could have followed up on the two leads and gathered admissible evidence through additional discovery. R. at 44-45, 48. While the LPD's initial theory was that Ms. Driscoll had fallen and hit her head, the LPD quickly honed-in on Ms. Gold, and disregarded all other suspects. R. at 13, 45. Therefore, Ms. Gold could have used these two reports to challenge the government's paltry investigation itself. R. at 45.

Ultimately, Ms. Gold was convicted of an egregious crime and sentenced to one of the most serious punishments—life in prison. R. at 51. All of the evidence offered against Ms. Gold at trial was circumstantial in nature. R. at 51. The government withheld two pieces of information which cast serious doubt on the prosecution's theory of the case, and which would have led Ms. Gold to pursue additional discovery and two alternative theories of the case. R. at 11-12. This Court has continually broadened its holding in *Brady*, prioritizing defendants' rights to due process and fair trials over formalism and technicalities. *See Kyles*, 514 U.S. at 433-40. Accordingly, this Court should find that inadmissible evidence can form the basis of a *Brady* violation, especially where, as here, the government's failure to disclose the two investigative reports impacted Ms. Gold's defense strategy and the ultimate outcome of her trial.

CONCLUSION

First, this Court should find that Dr. Pollack's testimony against Ms. Gold at trial constitutes reversible error because their communications were confidential, and the dangerous-patient exception did not apply. Second, this Court should find that the government violated Ms. Gold's Fourth Amendment rights by conducting an extensive warrantless search of her entire hard drive after Ms. Wildaughter viewed only a handful of Ms. Gold's files. Finally, this Court should find that the government violated *Brady v. Maryland* by withholding two investigative reports from the defense because Ms. Gold should have had the opportunity to present alternative theories of the case and to challenge the government's investigation at trial.

Therefore, in light of this Court's emphasis on protecting criminal defendants' rights to a fair trial and the rampant government misconduct in this case, this Court should reverse and remand the Fourteenth Circuit's decision.

Respectfully Submitted,

Team 21-P
Team 21-P
Counsel for Petitioner

APPENDIX

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.

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.

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."

U.S. CONST. AMEND. IV.

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