Team 22R – ORIGINAL BRIEF

Docket 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 THE RESPONDENT

Attorneys for Respondent

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iv

Questions Presented vii

Opinions Below 1

Constitutional Provisions 1

Statement of the Case 1

Summary of the Argument 5

Argument 7

I. This Court should recognize and apply the Dangerous Patient Exception to the Psychotherapist-Patient Privilege.. 7

A. After Petitioner's psychotherapist, abiding by the *Boerum* statute, reported her in-session statements to law enforcement, psychoterapist-patient confidentiality ceased. 9

1. The Dangerous Patient exception is invoked when a patient, in the course of treatment, makes a serious threat in the presence of a mental health professional, who then timely reports the threat. 9

2. When state law mandates the reporting of a threat made by a patient to a mental health professional, this mandated reporting breaches confidentiality between that professional and patient. 12

3. Petitioner's statements regarding Tiffany Driscoll, made in the presence of Dr. Pollak, constituted a threat such that Dr. Pollak was legally required to report them, thus breaching confidentiality. 14

B. After the confidentiality between the psychotherapist and patient is breached, no compelling reason exists to keep probative evidence from the jury.. 16

II. Law enforcement did not violate Petitioner's Fourth Amendment right against unreasonable searches when conducting the search of the contents on the flash drive provided by a private party. 18

A. This Court should recognize the application of the Private Search Doctrine to the digital medium. 18

B. This Court should apply the broader interpretation of the Private Search Doctrine to the digital medium.. 19

1. Narrower application of the Private Search Doctrine to the digital sphere unduly deters law enforcement from conducting lawful investigations. 20

2. The police officer did not exceed the scope of the private party's search of a closed container because Petitioner's reasonable expectation of privacy was already frustrated. 22

C. The police officer that conducted the search of the flash drive conformed with the Private Search Doctrine. 23

1. The search of Petitioner's computer by her roommate constituted a private search *and* seizure, but not for Fourth Amendment purposes. 24

2. Petitioner's roommate did not assume the role of a governmental actor when searching through Petitioner's unattended and unlocked computer. 25

III. As a matter of law, the government's decision not to disclose the two FBI reports does not constitute a *Brady* violation. 26

A. Petitioner fails to prove all elements of the three-pronged test established in *Brady*. 26

1. Neither FBI report is favorable to Petitioner's defense. 27

2. Neither FBI report is material to Petitioner's defense. 28

3. In respect to both FBI reports, the government's nondisclosure does not constitute suppression of evidence. 30

B. Neither FBI report qualifies as admissible evidence, making *Brady* inapplicable to the case at bar... 31

1. The hearsay statements contained within both FBI reports render them inadmissible in a court of law. 32

2. It is highly unlikely that a direct link exists between either FBI report and admissible evidence. 33

Conclusion 33

TABLE OF AUTHORITIES

PAGE(S)

UNITED STATES SUPREME COURT

Brady v. Maryland, 373 U.S. 83 (1963) 26-29, 32

Chandler v. Miller, 520 U.S. 305 (1997) 21

Chimel v. California, 395 U.S. 752 (1969) 19

Davis v. United States, 564 U.S. 229 (2011).......... 20, 21

Elkins v. United States, 364 U.S. 206 (1960).......... 8

Florida v. Riley, 488 U.S. 445 (1989).......... 24

Jaffee v. Redmond, 518 U.S. 1 (1996).......... 7, 8, 9, 11, 14, 17, 18

Katz v. United States, 389 U.S. 347 (1967).......... 18, 24

Kyles v. Whitley, 514 U.S. 419 (1995).......... 28-29

Riley v. California, 573 U.S. 373 (2014).......... 19

Strickler v. Greene, 527 U.S. 263 (1999).......... 28, 29

Texas v. Brown, 460 U.S. 730 (1983).......... 23

Trammel v. United States, 445 U.S. 40 (1980) 7

United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).......... 31

United States v. Bryan, 339 U.S. 323 (1950).......... 7

United States v. Jacobsen, 466 U.S. 109 (1984).......... 4, 18, 20, 22, 23, 24, 26

United States v. Leon, 468 U.S. 897 (1984).......... 20

United States v. Nixon, 418 U.S. 683 (1974).......... 8

United States v. Robinson, 414 U.S. 218 (1973).......... 19

Walter v. United States, 477 U.S. 649 (1980).......... 18

Wood v. Bartholomew, 516 U.S. 1 (1995)... 32

Youngblood v. West Virginia, 547 U.S. 867 (2006) (per curiam). 28

United States Courts of Appeals:

Carman v. McDonnell Douglas Corporation, 114 F.3d 790 (8th Cir. 1997). 7

Carvajal v. Dominguez, 542 F.3d 561 (7th Cir. 2008). 30

Rann v. Atchinson, 689 F.3d 832 (7th Cir. 2012). 6, 22

United States v. Auster, 517 F.3d 312 (5th Cir. 2008). 12, 13, 14, 17

United States v. Chase, 340 F.3d 978 (9th Cir. 2003). 12, 13, 14, 17, 18

United States v. Glass, 133 F.3d 1356 (10th Cir. 1998). 9, 10

United States v. Grimes, 244 F.3d 375 (5th Cir. 2001). 25

United States v. Hayes, 227 F.3d 578 (6th Cir. 2000). 12, 13

United States v. Jarrett, 338 F.3d 339 (4th Cir. 2003). 25

United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926). 19

United States v. Navarro, 737 F.2d 625 (7th Cir.), cert. denied, 469 U.S. 1020 (1984). 33

United States v. Jarrett, 338 F.3d 339 (4th Cir. 2003). 25

United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926). 19

United States v. Navarro, 737 F.2d 625 (7th Cir.), cert. denied, 469 U.S. 1020 (1984). 33

United States v. Runyan, 275 F.3d 449 (5th Cir. 2001). 6, 22-24

United States v. Scarpa, 897 F.2d 63 (2d Cir.), cert. denied, 498 U.S. 916 (1990) 27-28

United States v. Simpson, 904 F.2d 607 (11th Cir. 1990). 24

United States v. Soderstrand, 412 F.3d 1146 (10th Cir. 2005). 25

United States v. Steiger, 318 F.3d 1039 (11th Cir. 2003). 25

United States District Courts:

Miller v. Mehltretter, 478 F. Supp. 2d 415 (W.D. N.Y. 2007)............ 31

United States v. Borda, 941 F. Supp. 2d 16 (D. D.C. 2013)............ 27

United States v. Hardy, 640 F. Supp. 2d 75 (D. Me. 2009)............ 10, 11

United States v. Highsmith, No. 07-80093-CR, WL 2406990 (S.D. Fla. 2007)............ 12

State Courts:

Tarasoff v. Regents of University of California, 17 Cal. 3d 425 (Cal. 1976)............ 14, 15, 17

Federal Statutes and Constitutional Provisions:

18 U.S.C. § 1716(j)(2), (3)............ 4

18 U.S.C. § 3731............ 4

U.S. Const. amend. IV............ 1, 18

U.S. Const. amend. V............ 1

State Statutes:

Boerum Health and Safety Code § 711............ 2, 5, 9, 16

Rules:

Fed. R. Evid. 501............ 7, 13

Fed. R. Evid. 801(c)(1), (2)............ 32

Other Authorities:

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

Blake R. Hills, *The Cat is Already Out of the Bag: Resolving the Circuit Split over the Dangerous Patient Exception to the Psychotherapist-Patient Privilege,* 49 U. Balt. L. Rev. 177 (2020)............ 13

Wigmore, Evidence § 2192 (3d ed. 1940)............ 7

QUESTIONS PRESENTED

I. Whether the Dangerous Patient exception to the Psychotherapist-Patient testimonial privilege recognized under Rule 501 of the Federal Rules of Evidence precludes the admission of confidential conversations between the psychiatrist and the Petitioner, when the psychiatrist reported to law enforcement that the Petitioner threatened to harm a known third party.

II. Whether a search of computer files by law enforcement violates the Fourth Amendment when the files belonged to the Petitioner and were supplied to law enforcement by a private party.

III. Whether the Petitioner's Fifth Amendment right to due process of law was violated when the United States Government did not disclose information under the rationale that such information is inadmissible and thus immaterial to guilt or punishment.

OPINIONS BELOW

The District Court's Bench Opinion appears in the record at pages 40-41 and pages 48-49. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 50-57.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions is provided below:

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

I. Factual History

On May 25, 2017, Tiffany Driscoll, a twenty-one-year-old college student, was found dead at her father's townhouse. R. at 13. Lying at the foot of a flight of stairs leading to the basement of the townhouse, the victim appeared to have suffered blunt force trauma to the head. R. at 13. Medical examiners found no signs of a struggle, nor did they suspect foul play. R. at 13. To add to this perplexity was the absence of footprints, fingerprints, weapons, and other forensic

evidence within the townhouse. R. at 13. Two days later, after obtaining a search warrant, the Federal Bureau of Investigation conducted a more thorough search of Tiffany's home. R. at 14.

The Bureau's search produced two leads: (1) an empty box; and (2) a short note found in Tiffany's bedroom trashcan. R. at 14. Investigators determined that the box contained chocolate-covered strawberries, accompanied by the note that outwardly complimented Tiffany. R. at 14. Shortly after, toxicologists found strychnine in Tiffany's system and concluded that she died of both respiratory failure and brain death after eating the strawberries. R. at 51. Strychnine, a colorless toxin commonly used to kill rodents, was injected into the strawberries, which were mailed to Tiffany in a fruit basket. R. at 51.

The day of Tiffany's death, the Joralemon Police Department received a phone call from Dr. Chelsea Pollak, a psychiatrist and licensed psychotherapist providing services at Joralemon Psychotherapy and Counseling Center. R. at 5. In compliance with § 711 of the Boerum Health and Safety Code, Dr. Pollak filed a police report concerning a threat made by her patient to kill Tiffany. R. at 5. The patient, Petitioner Samantha Gold, arrived at Dr. Pollak's office in an anxious, agitated state. R. at 3. Appearing unkempt and disheveled, she expressed what Dr. Pollak described as "grossly inadequate" judgment. R. at 3.

Petitioner knew Tiffany through HerbImmunity, a company dependent on large networks of distributors and recruits who sell vitamins. R. at 4. Several months prior, Tiffany recruited Petitioner as a HerbImmunity representative. R. at 4. In purchasing products deemed essential to selling the company's vitamins, Petitioner incurred $2,000 in debt. R. at 4. In her session with Dr. Pollak, Petitioner blamed Tiffany for this financial hardship, and explicitly uttered the following threat:

> "I'm going to kill her [Tiffany Driscoll]. I will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again."

R. at 4. Given Petitioner's diagnosis of Intermittent Explosive Disorder (IED) and her difficulties managing her impulsive, volatile behavior, Dr. Pollak believed she posed a threat to Tiffany Driscoll and thus alerted local law enforcement. R. at 5.

On the very same day, Jennifer Wildaughter arrived at the Livingston Police Department with a flash drive. R. at 6. Jennifer, the Petitioner's roommate, corroborated Dr. Pollak's account of Petitioner's rage towards Tiffany Driscoll. R. at 6. Jennifer, concerned about Petitioner's extreme agitation, browsed through Petitioner's open computer after she stormed out of their apartment. R. at 6. This search produced several unsettling pieces of evidence, including: (1) ten photos of Tiffany taken from a stalker's perspective; (2) a draft of the note found in Tiffany's trashcan; (3) a recipe for chocolate-covered strawberries; and (4) a reference to strychnine, the substance that caused Tiffany's death. R. at 25-26. Reasonably disturbed, Jennifer copied the contents of Petitioner's entire desktop onto a flash drive, which she handed to Officer Aaron Yap for further investigation. R. at 6.

As Dr. Pollak's police report and the contents supplied by Jennifer Wildaughter substantially linked Petitioner to Tiffany Driscoll's death, police arrested Petitioner on May 27, 2017. R. at 14. The FBI's investigation of Tiffany's death continued through July of that year. R. 12. On June 2, 2017, Special Agent Mary Baer interviewed Tiffany's acquaintance, Chase Caplow. R. at 11. Chase recalled that two weeks before her death, Tiffany told him that she owed money to a Martin Brodie, a distributor within HerbImmunity. R. at 11. While Chase mentioned rumors of Martin's violent nature, the FBI ruled Martin out as a suspect, citing insufficient evidence. R. at 56. On July 7, 2017, Special Agent Mark St. Peters received an anonymous tip alleging that Belinda Stevens (also a HerbImmunity associate) murdered Tiffany Driscoll. R. at

12. Like Martin, Belinda was deemed an unlikely suspect, bringing a close to the FBI's investigation. R. at 56.

Law enforcement gathered no new evidence and failed to find additional suspects connected to Tiffany Driscoll's death. R. at 56. On February 1, 2018, the United States District Court for the Eastern District of Boerum convicted Petitioner of delivery by mail of an item with intent to kill or injure another, which resulted in the death of another. R. at 51. To date, Petitioner serves a sentence of life in prison, in line with 18 U.S.C. § 1716(j)(3). R. at 51.

II. Procedural History

Samantha Gold ("Petitioner") was indicted with delivery by mail of an item with intent to kill or injure, in violation of 18 U.S.C. § 1716(j)(2). (3), and 3551. R. at 1. Petitioner filed a motion to suppress to exclude: (1) the testimony of Petitioner's psychiatrist, Dr. Chelsea Pollak; and (2) evidence obtained from Petitioner's computer. R. at 16. The United States District Court for the Eastern District of Boerum ("District Court") denied Petitioner's motion to suppress on both pieces of evidence. R. at 40. On February 1, 2018, the District Court convicted Petitioner of the aforementioned offense and sentenced her to life in prison. R. at 51. Petitioner filed a motion for post-conviction relief on the basis of two alleged Brady violations. R. at 43. The District Court denied this motion. R. at 49.

Subsequently, Petitioner filed an interlocutory appeal pursuant to 18 U.S.C. § 3731 with the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit"). R. at 50. On appeal, Petitioner argued that: (1) the psychotherapist-patient privilege precludes Dr. Pollak's testimony; (2) the application of the private search doctrine established in *Jacobsen* precludes the collection of digital files absent a warrant; and (3) the withholding of two FBI reports constitutes a *Brady* violation. R. at 53-55.

In affirming the District Court, the Fourteenth Circuit adhered to testimonial privilege in federal courts, constitutional standards set by the Fourth Amendment, and the materiality requirements of a *Brady* claim. Consequently, Petitioner's appeal follows. R. at 60.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's holding because: (1) the evidentiary psychotherapist-patient privilege does not apply when a dangerous patient, like Petitioner, expresses her intentions of harming another to her psychotherapist; (2) a search warrant is not required when a private party supplies law enforcement with digital files that indicate wrongdoing; and (3) the government does not engage in misconduct when undisclosed information, including investigative reports, are not favorable nor material to the Petitioner's defense under the three components established in *Brady*.

In regard to Dr. Pollak's testimony, this Court should affirm the Fourteenth Circuit's holding that the dangerous-patient exception to the evidentiary psychotherapist-patient privilege precludes confidentiality between psychotherapists and their clients in both state and federal courts. This holding prioritizes the public interest of others' safety over Petitioner's private interests so waived by her threats against Tiffany Driscoll communicated to Dr. Pollak. While Dr. Pollak is legally bound to maintain strict patient confidentiality, she is also legally bound under § 711 of the Boerum Health and Safety Code to disclose actual threats made by patients to law enforcement and potential victims when it is more likely than not that the patient will carry out the threat in the near future. As a mental health professional and witness to Petitioner's credible threat, Dr. Pollak became a mandatory reporter, thus waiving her right to refuse to testify, which the psychotherapist-patient privilege ordinarily protects. Likewise, Petitioner's threat to kill Tiffany Driscoll—a crime in itself—cancels Petitioner's privilege to bar admission

of Dr. Pollak's testimony against her at trial. Accordingly, Dr. Pollak's testimony was properly and lawfully admitted into evidence.

Concerning the flash drive given to law enforcement by Petitioner's roommate, this Court should affirm the Fourteenth Circuit's holding that Officer Aaron Yap's examination of Petitioner's digital files did not violate her Fourth Amendment rights. The Fourteenth Circuit correctly applied *United States v. Runyan* and *Rann v. Atchinson* in determining that Petitioner did not maintain a reasonable expectation of privacy. While this Court has yet to rule on the application of the private search doctrine to private searches of digital devices like the flash drive in question, the Fourteenth Circuit's reasoning warrants binding adaptation in that the Fourth Amendment does not protect Petitioner from private actors. Petitioner's roommate perused her desktop files out of alarm raised by Petitioner's agitated behavior. The course of this perusal, unbeknownst to law enforcement, remained private in nature and motivation until the Petitioner's roommate voluntarily handed the content on the flash drive to Officer Yap. To grant Petitioner's motion to suppress this digital evidence only obstructs law enforcement's lawful investigation of dangerous, criminal activity when notified by concerned individuals. It follows that the files on the flash drive were properly and lawfully admitted into evidence.

On the matter of Petitioner's motion for post-conviction relief, this Court should affirm the Fourteenth Circuit's holding that the government's decision not to share two FBI reports does not constitute any *Brady* violation. For *Brady* to apply, evidence not disclosed by the government must be favorable and material to Petitioner's defense. Favorable evidence manifests itself in information properly used to exculpate criminal defendants and impeach the credibility of other evidence presented at trial. Material evidence likely changes the outcome of a criminal proceeding absent its nondisclosure. Neither FBI report, containing unreliable leads to additional

suspects, qualifies as favorable or material evidence. Additionally, the government's actions do not constitute suppression as these reports remained available to Petitioner's defense counsel through a formal request, including a subpoena. Because these FBI reports were not suppressed, and neither favorable nor material to the Petitioner, this Court should not deem them *Brady* material as a basis for any post-conviction relief Petitioner seeks.

ARGUMENT

I. This Court should recognize and apply the Dangerous Patient Exception to the Psychotherapist-Patient Privilege.

The District Court did not abuse its discretion in recognizing the Dangerous Patient exception to the Psychotherapist-Patient Privilege under Rule 501 of the Federal Rules of Evidence that was recognized in *Jaffee*. Ultimately, the District Court did not abuse its discretion by denying Petitioner's motion. When analyzing an evidentiary privilege, those privileges should be analyzed "in the light of reason and experience." *Carman v. McDonnell Douglas Corporation.*, 114 F.3d 790, 793 (8th Cir. 1997). The beginning of this analysis of the psychotherapist-patient privilege starts with the notion that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public…has a right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (ellipses in original) (citing Wigmore, Evidence § 2192 (3d ed. 1940)). When recognizing new testimonial privileges, federal courts "start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S. Ct. 1923, 135 L Ed. 2d 337 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (internal quotations omitted). These testimonial privileges "are not lightly created nor expansively construed, for they are in

derogation of the search for truth." *See generally*, *United States v. Nixon*, 418 U. S. 683, 710 (1974). Privileges of this nature must be recognized "only to the very limited extend that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *See Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting). This Court has already identified the valid need for a general testimonial privilege between mental health professionals and the benefit that the privilege provides. The general testimonial privilege between a psychotherapist and a patient is one that promotes successful treatment.

The relationship and the privilege between mental health professional and patient are based in the mutual need for confidence and trust. *Jaffee v. Redmond*, 518 U.S. at 10. The privilege, called the Psychotherapist-Patient Privilege, applies to communications between the parties in the course of treatment of a mental illness. *See id*. at 15. When communications between a psychotherapist and patient are protected by the privilege, both public and private interests are protected. *Id.* at 10–11. The public interests are protected because the Psychotherapist-Patient Privilege facilitates the treatment of an individual's mental health. *Id*. at 11. Private interests are served so that the participants in the conversation can share requisite information for successful treatment. *Id*. at 10. In recognizing the Psychotherapist-Patient Privilege, the Court included that "it is neither necessary nor feasible to delineate [the privilege's] full contours in a way that would 'govern all conceivable future questions.'" *Id*. at 18. The Court "[did not] doubt that there are situations in which the privilege *must give way*... if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id*. at 18 n.19.

A. After Petitioner's psychotherapist, abiding by the *Boerum* statute, reported her in-session statements to law enforcement, psychotherapist-patient confidentiality ceased.

In footnote 19 of *Jaffee*, the Court correctly identified a potential conflict between the Psychotherapist-Patient Privilege and an individual's safety. *Jaffee v. Redmond*, 518 U.S. at 18 n.19. Boerum has passed § 711 of its Health and Safety Code, which covers confidential communications between a mental health professional and a patient, the exception to such confidentiality, and the mandatory steps that a mental health professional must take when a sufficient threat is made by dangerous patient. Boerum Health and Safety Code § 711. This provision states that all communications between a mental health professional and a patient are confidential except when "the patient has made an actual threat to physically harm either themselves or an identifiable victim(s), and "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." Boerum Health and Safety Code § 711(1)(a), (b).

1. The Dangerous Patient Exception is invoked when a patient, in the course of treatment, makes a serious threat in the presence of a mental health professional who then timely reports the threat.

The Tenth Circuit Court of Appeals and numerous other federal courts have recognized the Dangerous Patient Exception to the Psychotherapist-Patient Privilege. The Tenth Circuit, in *Glass*, recognized the Dangerous Patient Exception and determined whether or not the patient's threat was sufficient to trigger it. *See United States v. Glass*, 133 F.3d 1356, 1360 (Tenth Cir. 1998). In *Glass*, the patient was under voluntary hospitalization to treat his mental illness, during which he made statements to his psychotherapist that he wanted to be known like [John Hinkley Jr.] and shoot President Clinton and the First Lady. *Id. at* 1357. Evidence showed that after

spending several more days in the mental health unit, Glass was released voluntarily after he agreed to participate in outpatient treatment while residing with his father. *Id*. Days later, an outpatient nurse discovered that Glass had left his father's home. The outpatient nurse notified local law enforcement. *Id*. Secret Service agents contacted Glass's psychotherapist, who relayed Glass's statement to them. Between the time of Glass's statement and the notification of local law enforcement, ten days had passed. *Id*.

After evaluating the record, the Tenth Circuit Court of Appeals recognized that there were gaps in the record that required answers. The *Glass* court recognized the beneficial knowledge of the context in which the threat was made, and if the psychotherapist's reporting the threat was the only way to avert the harm. *Id*. at 1360. The court noted the importance of the psychotherapist's opinion of the seriousness of the threat and the opinion of relevant law enforcement authority. *Id*. By inquiring into this information, which held great importance, the Tenth Circuit Court of Appeals held that Glass had the privilege available to him and recognized the existence of the Dangerous Patient Exception to the Psychotherapist-Patient Privilege. *Id*. at 1360. The Tenth Circuit recognized that the degree of severity of the threat and the mental health professional's reaction to the threat plays an important role in the determination of whether the exception to the Psychotherapist-Patient Privilege is applicable, and concluded that these gaps in time did not provide enough information on the exigency of the situation. The Court of Appeals centered the issue on whether or not disclosure by the psychotherapist was the *only* means by which the harm could have been averted. *Id*. at 1360.

The District Court in Maine correctly recognized the existence of the Dangerous-Patient Exception to the privilege. *United States v. Hardy*, 640 F. Supp. 2d 75 (D. Me. 2009). In *Hardy*, the Defendant checked into an emergency room in Maine complaining of an issue not related to

his mental health. *Id*. at 77. *While* being admitted, the Defendant threatened to cut an individual's head off. *Id*. During the initial medical assessment, the Defendant threatened to cut off and shoot President George W. Bush, and a hospital staff member contacted Secret Service to alert them of the threat. *Id*. After being transferred to a different hospital for further psychiatric evaluation, the Defendant threatened President Bush, Pope Benedict XVI, and numerous hospital staff. *Id*. at 78. After an agent was dispatched to investigate, the Defendant's psychiatrist confirmed the threats to the agent. *Id*. The Defendant's psychiatrist at the second location successfully initiated proceedings to commit the Defendant involuntarily on the basis that he was a threat to others. *Id*. After ten days, the staff believed that the defendant was stable enough to be released; however, the Defendant began threatening hospital staff and contacted a gun store to inquire into purchasing a bullet proof vest. *Id*. The Defendant was not arrested until five months later. *Id*. at 80.

The District Court in Maine identified the difference between the circumstances in *Jaffee* and those in *Hardy*. The District Court in *Hardy* seemed to apply a balancing test to determine if the Dangerous Patient Exception should apply to the circumstances. *See Id*. The District Court concluded that the exception should apply because an individual seeming to be involved in the defendant's treatment contacted the Secret Service almost immediately after the threat which shows that the defendant's threat was taken seriously by the medical professionals, as Hardy's team of medical professionals concluded that his mental state required that he be committed involuntarily. *Id*. The District Court realized that there are legitimate interests in protecting third parties from identifiable and serious threats made by dangerous patients in the context of treatment for mental health-related issues.

This issue also arose in *United States v. Highsmith*, No. 07- 80093-CR, 2007 WL 2406990 (S.D. Fla. Aug. 20, 2007). In *Highsmith*, The District Court applied the Tenth Circuit's approach. The District Court evaluated whether the disclosure of Highsmith's statements was the only way to avert harm from happening to the third party. *Id*. at 2. The District Court concluded that the disclosure was not the only means of averting harm because Highsmith was confined to a psychiatric unit when the threat was made, the weapon he alleged to use was in his home, and he never sought to leave the unit while experiencing homicidal and suicidal thoughts. *Id*. at 3. Numerous courts have recognized that the applicable question for the exception is whether or not the disclosure by the psychotherapist is the *only* means of averting the harm that could be caused by the dangerous patient. These courts have recognized that this question does not always favor the application of the exception.

2. When state law mandates the reporting of a threat made by a patient to a mental health professional, this mandated reporting breaches confidentiality between that professional and patient.

The psychotherapist's duties of preserving confidentiality and warning potential victims of harm are intertwined with the federal evidentiary privilege. In *Auster*, the Fifth Circuit responded to the arguments set forth by the Sixth Circuit Court of Appeals in *Chase* and the Ninth Circuit Court of Appeals in *Hayes* that stated that there would be conflicting outcomes for federal criminal trials because of a state's individual disclosure laws. *United States v. Auster*, 517 F.3d 312, 317 (5th Cir. 2008) (citing *United States v. Chase*, 340 F.3d 978, 987 (9th Cir. 2003) and *United States v. Hayes*, 227 F.3d 578, 584 (6th Cir. 2000)). The Fifth Circuit Court of Appeals responded to its courts' argument by differentiating between the cause of the confidentiality breach. In *Chase*, the Ninth Circuit contended that similarly situated patients would experience different outcomes in federal criminal trials if the federal evidentiary privilege

was tied to a state's application of disclosure laws. *United States v. Chase*, 340 F.3d 978, 987 (9th Cir. 2003). Similarly, the Sixth Circuit Court of Appeals in *Hayes* contended that the federal testimonial Psychotherapist-Patient Privilege cannot rely upon state determinations of reasonable professional conduct. *United States v. Hayes*, 227 F.3d 578, 584 (6th Cir. 2000). The Fifth Circuit Court of Appeals responded by stating that "the test is a federal one: whether there was a 'reasonable expectation of confidentiality' when the statement was made." *Auster*, 227 F.3d 578, 317. State law plays a role in negating confidentiality. *Id*. In *Auster*, the Defendant saw two mental health professionals for treatment of his anger issues, paranoia, and depression. *Id*. at 313. Auster often made threats about an identifiable third party during his sessions with the two professionals, and the professionals relayed these threats to the third party pursuant to their duty to warn. *Id*. Eventually, Auster sent a threatening letter to the third party, and the third party contacted the Federal Bureau of Investigation. *Id*. at 314. Although the Fifth Circuit did not ultimately recognize the Dangerous Patient Exception to the privilege, the Fifth Circuit correctly concluded that while applicable state law does not control the application of federal privileges, it may play a role in negating confidentiality. *Id.* at 321.

The Ninth Circuit Court of Appeals in *Chase* discusses the Judicial Conference Advisory Committee on the Rules of Evidence, Proposed Rule 504, which covers the Psychotherapist-Patient Privilege, and the three exceptions to the privilege. *Chase*, 340 F.3d 978, 989. Ultimately, Congress chose not to adopt Proposed Rule 504, and instead adopted Rule 501, which states that "the common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege." Hills, Blake R., *The Cat is Already Out of the Bag: Resolving the Circuit Split over the Dangerous Patient Exception to the Psychotherapist-Patient Privilege*, 49 U. Baltimore L. Rev. 156, 157 (2020) (quoting Fed. R. Evid. 501). The *Chase* Court heavily

emphasized that the Dangerous-Patient Privilege is absent from the Advisory Committee's exceptions. *Id*. The Court of Appeals added that "[the] committee deliberately chose not to write a [dangerous patient exception] … patients willing to express their intention to commit crime are not *ordinarily likely* to carry out that intention." *Chase*, 340 F.3d 978, 989 (quoting Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute,* 36 Conn. B.J. 175, 182 (1962) (emphasis added). Even if this is the case, and the Advisory Committee chose not to include the Dangerous Patient Exception in the proposed rules, this Court, in *Jaffee,* included footnote 19 and language to support the possibility of the Dangerous Patient Exception. *See Jaffee*, 518 U.S. at 18 n.19.

3. Petitioner's statements regarding Tiffany Driscoll, made in the presence of Dr. Pollak, constituted a threat such that Dr. Pollak was legally required to report them, thus breaching confidentiality.

This Court concluded that psychotherapist-patient privilege applies to psychotherapists and "should also extend to *confidential* communications made to licensed social workers." *Jaffee*, 518 U.S. at 15. In *Auster*, the Fifth Circuit applied a reasonable expectation of confidentiality test. *Auster*, 517 U.S. at 317. The Fifth Circuit emphasized that the Court held that "the patient's statement was made in *confidence*... the privilege covers *confidential* communications made to licensed psychiatrists and psychologists." *Id*. at 316 (quoting *Jaffee*, 518 U.S. at 15, (emphasis added)). The Fifth Circuit concluded that Auster's statements could not be protected by the privilege because Auster had actual knowledge that the threats would be conveyed to the third party and were not confidential. *Id.* at 321.

Dr. Pollak reported the Petitioner's actions pursuant to her "*Tarasoff*" duty. The Boerum statute codified the duty, similar to the one created in *Tarasoff*, that mental health professionals have to report serious threats to third parties. *See generally Tarasoff v. Regents of Univ. Of*

California, 17 Cal. 3d 425, 551 P.2d 334 (1976). Prosenjit Poddar killed Tatiana Tarasoff after disclosing his intent to kill her to his psychologist at the University of California at Berkley. *Id*. at 432. Poddar was a voluntary outpatient receiving treatment from Moore. *Id*. Poddar informed Moore that he intended to murder an unnamed girl; however, this girl was readily identifiable as Tarasoff. *Id*. Moore, along with the doctor that had initially examined Poddar and doctor who was the Assistant to the director of the department of psychiatry, decided that Poddar should be committed to a mental hospital, but Poddar was not committed because the police officers who took Poddar into custody believed him to be rational. *Id*. Poddar promised to stay away from Tarasoff. *Id*. Neither the police nor the medical professionals who treated Poddar warned Tarasoff of the danger, and Poddar killed Tarasoff two months later. *Id*. at 433. The California Supreme Court concluded that "professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened individual." *Id*. at 439. The California Supreme Court recognized that the potential for the mental health professional to incorrectly conclude that a patient may harm a third party is not a valid reason to refuse to perform their duty to warn a third party. Furthermore, the California Supreme Court concluded that "the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins." *Id*. at 442 (emphasis added). The California Supreme Court correctly recognized that the individual's interest in confidential communications between the individual and psychotherapist ends when the individual has threatened a third party. After the California Supreme Court announced its decisions in *Tarasoff*, states across the country followed suit and legislators enacted statutes to cover this situation, Boerum included.

When a psychotherapist, under a duty, reports a communication that the psychotherapist has deemed to be sufficiently dangerous to law enforcement pursuant to a state law requirement and the reporting of the threat is the *only* way to avert harm, the psychotherapist-patient confidentiality is breached. In the course of Petitioner's treatment on May 25, 2017, the Petitioner exclaimed to Dr. Pollak the following: "I'm so angry! I'm going to kill her! I'm going to take care of her and her precious HerbImmunity! After today, I'll never have to see or think about her again!" R. at 4. Dr. Pollak included the exact quote in the "Therapy Progress Notes" that are completed after a session. R. at 4. Dr. Pollak concluded that the Petitioner made an actual threat to physically harm the victim. R. at 5. Fifteen minutes after finishing the session, Dr. Pollak followed Boerum state law and reported Petitioner's statements to the appropriate law enforcement agency. R. at 5. The law enforcement officers then acted upon Dr. Pollak's required reporting and checked on both the victim and the Petitioner. R. at 5.

Petitioner had no reasonable expectation of confidentiality when she made the threats to Dr. Pollak, as Dr. Pollak previously disclosed to the Petitioner her duty, as required by § 711 of the Boerum Health and Safety Code. Petitioner had knowledge of Dr. Pollak's duty prior to making the threat about Tiffany Driscoll. Petitioner's knowledge of this duty and Dr. Pollak's required reporting of the threat breaks Petitioner's reasonable expectation of confidentiality. In following Boerum law and making the required report, Dr. Pollak breached psychotherapist-patient confidentiality. After the legally required confidentiality breach by the mental health professional, the confidentiality which the privilege protects no longer holds value.

B. After the confidentiality between the psychotherapist and patient has been breached, no compelling reason is left to keep probative evidence from the jury.

The compelling reason for the psychotherapist-patient privilege to exist in the first place is to protect the confidentiality so that honesty and openness are promoted. Confidentiality is a legitimate private interest because it facilitates effective treatment by psychotherapists for their patients. Many states, like Boerum, have created statutes that cover required reporting of serious threats made by patients of psychotherapists during the course of treatment. When a psychotherapist under a duty to warn acts in accordance with that duty, confidentiality breaks because parties that were not included in the privilege have become privy to knowledge that was previously confidential. *See, e.g.*, *Auster*, 517 F.3d. 312, 317. After the confidentiality between psychotherapist and patient has been breached by a required reporting, interests can no longer be served.

Furthermore, this Court's inclusion of footnote 19 in *Jaffee* did not reference the earlier mentioned *Tarasoff* duty to warn. *Jaffee*, 518 U.S. 1, 18 n.19, S. Ct. 1923, 1932. This Court's statement that "the privilege must give way" in footnote 19 of *Jaffee* implies that this Court was referring to the psychotherapist-patient privilege giving way so that testimony from the psychotherapist can be given. *Id*. Circuit Judge Kleinfeld in *Chase* agreed with this. *Chase*, 340 F.3d 978, 995 (9th Cir. 2003) (Kleinfeld, Circ. J., concurring). The Circuit Judge correctly stated in his concurrence that "the privilege must give way [does] not mean that the right to out-of-court confidentiality must give way ... [The Supreme Court means] what they say, that what must give way is the privilege." *Id*. The Circuit Judge then further explains that the privilege referenced in footnote 19 of *Jaffee* is "the privilege of a psychotherapist to refuse to testify in federal court, or her patient's privilege to bar her testimony," and that "[the psychotherapist-patient privilege] does not exist if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id*. Although the Ninth Circuit in *Chase*

incorrectly concludes that there is no dangerous patient privilege, the concurring judge's commentary correctly identifies that the privileged referenced in footnote 19 of *Jaffee* is the testimonial privilege. Once the confidentiality of the psychotherapist-patient privilege has been breached, there is no compelling reason to prevent the jury from hearing the testimony that was previously barred by the privilege.

II. Law enforcement did not violate Petitioner's Fourth Amendment right against unreasonable searches when conducting the search of the contents on a flash drive provided by a private party.

While the Fourth Amendment protects individuals from "unreasonable searches and seizures," this Court only readily applies this protection in scenarios concerning government-initiated activity. U.S. Const. Amend. IV; *Katz v. United States,* 389 U.S. 347, 360 (1967). In respect to searches initiated by private parties, including family members and roommates, Fourth Amendment protections are not applicable. *See Walter v. United States,* 477 U.S. 649, 662 (1980). It follows that this Court should find that the evidence found on the flash drive, copied from the desktop of Petitioner's home computer, is admissible, even if law enforcement's search does not precisely replicate that of Petitioner's roommate.

A. This Court should recognize the application of the Private Search Doctrine to the digital medium.

Under the Private Search Doctrine, when a private party conducts an initial search unprompted by governmental authorities, these authorities may repeat the search regardless of whether it violates the Fourth Amendment. *United States v. Jacobsen,* 466 U.S. 109 (1984). In the context of today's highly digitalized society, where cell phones and computers are indispensable to everyday communication and information storage, the Private Search Doctrine still holds relevance. Ostensibly, electronic devices are capable of storing much more information than the Fourth Amendment's drafters foresaw, but this increase in storage capacity

should not preclude the Private Search Doctrine's application in regard to incriminating evidence.

Within the past decade, this Court has recognized that as electronic devices abound in their advancements and capabilities, the scope of searches by law enforcement continues to broaden. *See Riley v. California*, 134 S. Ct. 2473, 2490-91 (2014) (negating Justice Learned Hand's statement that "it is a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything that may incriminate him" in *United States v. Kirschenblatt,* 16 F.2d 202, 203 (2d Cir. 1926)).While *Riley v. California* concerned law enforcement's warrantless search and seizure of the digital contents of a cell phone incident to arrest, the case at bar is distinguishable in that it involves a search initiated by a private party. *Id.* The fact that this initial search produced digital, rather than physical incriminating evidence, should not render the Private Search doctrine obsolete in respect to the digital medium.

A literal, mechanical application of the Fourth Amendment suggests that electronic devices, including cell phones, computers, and flash drives, stand outside the purview of constitutional protection. This Court, while acknowledging this line of reasoning in *Riley v. California*, staunchly rejected it on the ground that these devices were nonexistent and unforeseen at the time of more restrictive rulings that support their exclusion. *See Chimel v. California,* 395 U.S. 752 (1969); *see also United States v. Robinson,* 414 U.S. 218 (1973). Thus, it is the view of this Court that "personal papers and effects" mentioned in the Fourth Amendment's original language no longer applies to literal papers and personal belongings, such that application of the Fourth Amendment to *all* personal belongings warrants recognition.

B. This Court should adopt the broader interpretation of the Private Search Doctrine to the digital medium.

In best serving public interests of safety and efficacy among law enforcement, this Court should rule against Petitioner's suggestion that a narrow approach to the Private Search Doctrine be applied to digital information, including the files originally found on her desktop. Applying the narrower approach to the case at bar not only burdens law enforcement with unreasonable restrictions, but also neglects an analysis of the reasonable expectation of privacy required to invoke the Fourth Amendment. *United States v. Jacobsen,* 466 U.S. at 117. Adhering to the Private Search Doctrine, this Court should consider Petitioner's reasonable expectation of privacy *after* the private party's search. *Id.* at 126. Given the nature of the contents actually viewed by the roommate, including ten photos that mostly featured an unsuspecting Tiffany and four documents related to the ingredients and note contained in the package mailed to her, Petitioner lacks any remaining reasonable privacy expectation. R. at 25; *Id.* at 121. This Court, as it did in *Jacobsen,* should broadly interpret the Private Search Doctrine in holding that Officer Yap of the Livingston Police Department "did not infringe any [of Petitioner's] constitutionally protected privacy interest that had not *already* been frustrated as a result of private conduct." *Id.* at 126 (emphasis added).

1. Narrower application of the Private Search Doctrine to the digital sphere unduly deters law enforcement from conducting lawful investigations.

To narrowly apply the Private Search Doctrine to digital content hampers law enforcement's efforts to proactively investigate crimes that, in this age, are likely commissioned or facilitated through electronic mediums. In *Davis v. United States*, this Court held that "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Davis v. United States*, 564 U.S. 229, 241 (2011) (quoting *Leon*, 468 U.S. 897, 919 (1984)). The record indicates that Officer Yap reviewed the files on the flash drive after

Petitioner's roommate, voluntarily arriving at the police station, communicated her concerns about Petitioner's agitated behavior and the disturbing material she accessed on Petitioner's unattended computer. Given that Petitioner's roommate described photos taken of Tiffany that suggest criminal stalking, and a list of ingredients for chocolate-covered strawberries that included strychnine, Officer Yap's actions undoubtedly fall within the scope of "objectively reasonable law enforcement activity" that *Davis* aimed to protect.

Importantly, this Court held in *Chandler v. Miller* that for a search to be reasonable under the Fourth Amendment, it "ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller,* 520 U.S. 305 (1997). An exception to this rule exists when circumstances present a "special need" exceeding that of law enforcement's investigatory interests. *Id.* at 313. This need, sufficiently important so as to supersede Petitioner's privacy interest in her desktop files, is determined by a context-specific analysis that involves the "private and public interests advanced by the parties." *Id.*

Petitioner's counsel argued before the District Court that narrower application of the Private Search Doctrine ensures continued protection of private citizens' digital privacy rights. R. at 35. However, Petitioner's prolonged, alarming behavior rose to a level that justified the search of her desktop, which led to her roommate's discovery of digital files that demonstrated Petitioner's harmful intentions toward Tiffany Driscoll. R. at 24-27. For Petitioner to profess her concern for others' privacy interests while arguing for narrower application so as to exclude evidence of her own guilt is as misplaced as it is offensive. What the roommate heard of Petitioner's anger toward Tiffany, that she would "do anything to get out of this mess Tiff put me in," raised a suspicion of wrongdoing not applicable to law-abiding private citizens. R. at 24. While Petitioner advocates for her own privacy rights, she conveniently overlooks that the

"pictures of Tiffany all over town, in different places" and "all taken from a distance," as if Petitioner "was stalking her," are arguably invasive in both their content and procurement. R. at 25.

2. The police officer did not exceed the scope of the Private Party search of a closed container because Petitioner's reasonable expectation of privacy was already frustrated.

This Court and numerous circuit courts agree that in the examination of the contents of a closed container, law enforcement does not exceed the scope of a private party's search when the private search has already compromised the defendant's reasonable expectation of privacy. *See, e.g., United States v. Jacobsen,* 466 U.S. at 121; *United States v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001); *Rann v. Atchison,* 689 F.3d 832 (7th Cir. 2012). *Atchison* is a case nearly analagous to that of Petitioner. In *Atchison*, along with downloading images depicting defendant's sexual assault of his daughter, law enforcement searched through pornographic images of both the defendant's daughter and stepdaughter saved onto a computer ZIP drive brought to the police station by the victim's mother. *Rann v. Atchison*, 689 F.3d at 834. Like the victim's mother, Petitioner's roommate downloaded the desktop files to a flash drive herself. R. at 26; *Rann v. Atchison,* 689 F.3d at 837. Citing the holding in *Runyan*, the *Atchison* Court agreed that a defendant's expectation of privacy is already frustrated when the results of a private search indicate that there is no question as to the nature of the contents within a container. *Id.,* quoting *United States v. Runyan*, 275 F.3d at 463-464.

While the roommate did not view all the files searched by Officer Yap, what she *did* see was material that obviously indicated Petitioner's intention of wrongdoing so as to leave Officer Yap "substantially certain" of the flash drive's overall contents. R. at 33. The very nature of the files viewed by Petitoner's roommate satisfies the "virtual certainty" requirement outlined in

Jacobsen. *United States v. Jacobsen,* 466 U.S. at 119. Based on the the concerns voiced by Petitioner's roommate, that she "had discovered some concerning photographs and text documents" on Petitioner's computer, and that "Ms. Samantha Gold was planning to poison Ms. Driscoll," Officer Yap's more exhaustive search of the flash drive did not violate Petitioner's Fourth Amendment rights because the private search gave law enforcement "virtual certainty that a subsequent search will not reveal anything more than [they] alread ha[ve] been told." *Id.* The roommate's statements describing the outward appearance of the files she perused allowed Officer Yap to search the flash drive without a warrant, as her descriptions led him to infer with certainty that further evidence of criminal activity existed on the flash drive, as if the evidence was out in the open (like Petitioner's unattended, lit computer). *See, e.g., Texas v. Brown*, 460 U.S. 730, 750-51 (1983) (Stevens, J., concurring).

C. The police officer that conducted the search of the flash drive conformed with the Private Search Doctrine.

Officer Yap's search of Petitioner's files copied onto the flash drive provided by her roommate conformed with the Private Search Doctrine, and did not result in a Fourth Amendment violation. In weighing the viability of the broader application of the doctrine, this Court faces the question of whether Officer Yap's search involved a prohibited examination of more items than what the roommate actually accessed. While the roommate only viewed some of the files on Petitioner's desktop, copying all of them onto a flash drive, Officer Yap's subsequent examination of all these computer files is not problematic. R. at 27; *United States v. Runyan*, 275 F.3d at 449. In *Runyan,* the Fifth Circuit compared law enforcement's examination of disks containing child pornography to a closed container, of which a private actor only persues its contents to a limited degree. *Id.* at 463. The *Runyan* Court, identifying each disk as a unitary container, determined that law enforcement's more thorough search of the files contained therein

did not violate defendant's Fourth Amendment rights, as law enforcement did not examine more disks than what was accessed and perused by the private actor. *Id.* The evidence copied onto the flash drive is analagous to the evidence addressed in *Runyan* in that it was originally found within one, standalone storage device (Petitioner's computer). R. at 26. Because Officer Yap's search, though extending to files "including sensitive budget, tax and health information," was confined to the contents the roommate extracted from Petitioner's one computer, his conduct was lawfully restricted so as not to implicate Petitioner's Fourth Amendment rights. R. at 32; *Runyan,* 275 F.3d at 465 (citing *United States v. Simpson,* 904 F.2d 607, 610 (11th Cir. 1990)).

1. The search of Petitioner's computer by her roommate constituted a private search *and* seizure, but not for Fourth Amendment purposes.

For Petitioner's Fourth Amendment rights to be implicated, actions must occur that constitute a search and seizure, after which the government seeks to use the searched and seized material as incriminating evidence against Petitioner. This Court recognizes a "search" as the deprivation of an individual's reasonable expectation of privacy. *See Florida v. Riley,* 488 U.S. 445 (1989) (because a criminal suspect lacked an objectively reasonable expectation of privacy, law enforcement did not conduct a search under the Fourth Amendment by monitoring his conduct in a helicopter 400 feet above his house). Specifically, that reasonable expectation of privacy must be constitutionally protected for a violation to occur under the Fourth Amendment. *Katz v. United States,* 389 U.S. at 360 (1967). Petitioner's roommate, a fellow college student, searched through the files on Petitioner's desktop independently of any law enforcement inquiry or investigation, and performed the initial search as a private party. *United States v. Jacobsen,* 466 U.S. at 117. This Court has long held that a private party's search renders subsequent

searches by law enforcement as a "non-search," immune to scrutiny under the Fourth Amendment. *Id.* at 115.

2. Petitioner's roommate did not assume the role of a governmental actor when searching the Petitioner's unattended and unlocked computer.

This Court should give weight to Petitioner's roommate's role as a private actor who conducted the initial search of Petitioner's desktop files. Key factors considered by courts in determining whether an individual acts as a government agent or private actor include: (1) whether the government knew of and acquiesced in the intrusive conduct; (2) whether the private actor's purpose was to assist law enforcement rather than fulfill his own, personal objectives; and (3) whether the government requested the individual's action or offered the private actor a reward. *See, e.g., United States v. Soderstrand,* 412 F.3d 1146, 1153 (10th Cir. 2005); *United States v. Steiger,* 318 F.3d 1039, 1045 (11th Cir. 2003); *United States v. Jarrett,* 338 F.3d 339, 345 (4th Cir. 2003); *United States v. Grimes,* 244 F.3d 375, 383 (5th Cir. 2001).

None of the aforementioned factors characterize Petitioner's roommate's conduct when she sat in front of Petitioner's computer and looked through the files later admitted as evidence. R. at 24-27. The roommate, aware of Petitioner's issues with intense anger and a money-centered conflict with Tiffany Driscoll, saw that Petitioner "was pretty upset when she came home from class." R. at 24. Because she was "pretty concerned about [Petitioner]," the roommate "wanted to know what was going on," and "looked around at some of the desktop files" on Petitioner's computer. R. at 24. Neither the Livingston Police Department nor any other government agency was aware that the roommate rummaged through these desktop files as the conduct transpired, nor did they communicate any approval of the roommate's actions. R. at 6. The roommate, searching through the files to address her own concerns, copied them onto a flash drive and

spoke with Officer Yap on her own initiative, receiving no reward from law enforcement for the files she supplied. R. at 26-27. It is obvious that the independent nature of the roommate's actions negates Petitioner's claim of entitlement to the District Court's suppression of the incriminating files. *United States v. Jacobsen,* 466 U.S. at 117.

III. As a matter of law, the government's decision not to disclose the two FBI reports does not constitute a *Brady* violation.

The District Court did not abuse its discretion in concluding that the government did not commit any Brady violation by not sharing two reports with Petitioner after trial that resulted from a fruitless FBI investigation of alternative suspects and were neither material nor favorable to Petitioner's defense. Named after *Brady v. Maryland,* 373 U.S. 83 (1963), the Brady Rule requires prosecutors to disclose material, favorable, exculpatory evidence in the government's possession to the defense. The rule applies to any evidence that mitigates or refutes a defendant's guilt, reduces the terms of a sentence, or casts doubt on the credibility of witnesses and other evidence actually presented at trial. *Id.* Not only must the government withhold this evidence for a Brady violation to ensue. *Id.* The absence of such evidence must also levy a prejudicial effect on the trial's outcome. *Id.* Because neither FBI report acts materially nor favorably to the Petitioner's defense, and would unlikely change the verdict and sentencing, the District Court did not abuse its discretion by denying Petitioner's motion for post-conviction relief.

A. Petitioner fails to prove all elements of the three-pronged test established in *Brady*.

For Petitioner's third argument to succeed, she must prove that (1) the undisclosed evidence is favorable to Petitioner's defense; (2) this evidence, not disclosed by the government to Petitioner, is in fact material to an issue at trial; and (3) the prosecution suppressed the evidence in question. Under *Brady*, Petitioner must successfully

demonstrate *all* three points to secure this Court's reversal of the lower courts' judgment. Even if this Court finds that Petitioner satisfies one or two of these points, it should nonetheless rule in the government's favor, consistent with past decisions. Plainly, Petitioner's claim fails tri-fold in that the government transparently attested to not sharing the FBI reports with Petitioner's counsel, and that lack of disclosure of both reports was not prejudicial as to yield a different outcome if they were available to Petitioner and thus admitted into evidence.

1. Neither FBI report is favorable to Petitioner's defense.

For evidence to be favorable, it must be either exculpatory, or applicable to the impeachment of witnesses. As defined by *Brady*, favorable evidence is any evidence that, if disclosed and used effectively, *may* make the difference between conviction and acquittal. Petitioner argues that the FBI reports which document their continued investigation are favorable to her defense because they both concern potential suspects in connection to Tiffany Driscoll's death. R. at 44-45. The government defers to prior case law in asserting that the District Court properly rejected Petitioner's argument. As the statements contained within both FBI reports fail to exculpate Petitioner, they are not favorable and fall outside of *Brady*'s purview.

Petitioner's insistence that the reports are favorable rests on the fact that they only name Martin Brodie and Belinda Stevens as potential suspects. R. at 11-12. The June report describes Brodie as someone who "could be violent," while the July report mentions an anonymous tip alleging that "a Belinda Stevens was responsible for the murder of Driscoll." R. at 11-12. As determined by multiple circuit courts, a report's lack of information which incriminates a defendant does not constitute its favorability under *Brady. United States v. Borda*, 941 F. Supp. 2d 16, 24 (D.D.C. 2013); *see United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir.), cert. denied, 498 U.S. 916 (1990). In a case involving the government's nondisclosure of audio tapes that lacked

incriminating statements, the *Scarpa* Court denied the defendant relief on the ground that proof of the absence of criminality on particular occasions could not establish his innocence. *Id.* at 70. Similarly, FBI reports that do not establish any association between Petitioner and two potential suspects are not necessarily proof that Petitioner was not involved in the events leading to Tiffany Driscoll's death. To decide otherwise relies on the same faulty reasoning of allowing Petitioner to call witnesses—including Dr. Pollak—to testify about all the times she expressed anger toward Tiffany but never uttered a death threat. Because neither FBI report exculpates Petitioner, they cannot qualify as favorable evidence.

2. Neither FBI report is material to Petitioner's defense.

Under *Brady*, evidence qualifies as material "if there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood v. West Va.,* 547 U.S. 867, 870 (2006) (per curium) (quoting *Strickler v. Greene,* 527 U.S. 263, 280 (1999)). This "reasonable probability" exists when, upon due comparison to all evidence actually presented at trial, the undisclosed evidence challenges the credibility of testifying witnesses and the weight of other evidence that supports the conviction. *See Strickler*, 527 U.S. at 289-295 (when withheld evidence fails to undercut the weight of other evidence that points to a defendant's role in the commission of a crime, that evidence is *not* material). The evidence lawfully admitted at trial strongly demonstrates Petitioner's guilt. Thus, there is no reasonable probability that either FBI report's impact on the outcome is greater than negligible.

Carrying the burden of proof, the Petitioner falters in that disclosure of both FBI reports would not change the outcome at trial, nor do they cumulatively shift perspective on the case to undermine confidence in the District Court's verdict. *Kyles v. Whitley,* 514 U.S. 419, 434 (1995).

This Court previously expanded upon *Brady* by outlining the materiality of evidence in four aspects:

1. Rather than indicating that the defendant would more likely than not receive a different verdict, the "reasonable probability" of a different result addresses whether the government's nondisclosure undermines confidence in the trial's outcome.

2. In proving materiality, the defendant must show that reasonable fact finders could consider favorable evidence to the extent that the whole case is cast in a different light.

3. Upon the defendant's successful demonstration that the government's nondisclosure supports a finding of constitutional error, further review for harmless error is not required of the Court.

4. The government's duty to disclose is determined by the cumulative effect of any favorable, non-disclosed evidence, rather than the impact of evidence analyzed in separate parts.

Id. at 433-438. Since both FBI reports are not favorable evidence in that they do not exculpate Petitioner, we narrow our argument within the scope of the first aspect.

The District Court correctly found that the two FBI reports containing information on potential suspects was not material because there was no reasonable probability that the result of the proceeding would have differed had the government disclosed these reports to Petitioner's counsel prior to trial. R. at 49. In determining the likelihood that disclosing these reports would result in a different outcome, this Court should consider the totality of the existing record, as it did in *Strickler v. Greene*. *Strickler,* 527 U.S. at 289-295. In *Strickler,* the defendant contended that a prosecutor violated *Brady* by not disclosing interview notes by police that cast doubt on a witness's testimony. *Id.* at 273. This Court, while agreeing that this evidence was favorable if used for impeachment, held that even without the notes, the record contained independent evidence sufficient to prove the defendant's guilt, including a 69-pound bloodstained rock used to crush the victim's skull, hairs torn from the defendant's scalp, and hairs on the victim's

clothing that belonged to the defendant. *Id.* at 290-293. The evidence admitted against Petitioner, including the box that contained chocolate-covered strawberries, the deceptively kind note, the toxicologist's finding that Tiffany Driscoll consumed strychnine, and the files traced to Petitioner's desktop listing the ingredients for a treat meant "For Tiff" are comparably salient. R. at 6. Together, the two FBI reports cannot logically challenge the weight of the uncontroverted evidence that supports Petitioner's conviction. Moreover, the fact that statements contained within these reports were taken *after* the collection of all other evidence suggests that not only are these reports immaterial for *Brady* purposes. Together, they are irrelevant.

3. In respect to both FBI reports, the government's nondisclosure does not constitute suppresion of evidence.

The Brady Rule stipulates that the government suppresses evidence only when prosecutors (1) fail to timely share evidence (intentionally or not) with the defendant as she prepares her case, and (2) the defendant is unable to practice reasonable diligence in procuring the evidence through other channels. *Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008). The record shows that the District Court did not directly address the issue of government suppression. R. at 42-49. Rather, the District Court accepted the government's justification for nondisclosure, that because both FBI reports contained hearsay statements, they were inadmissible and thus exempt from any legal disclosure requirement. R. at 45. Importantly, through both the Privacy Act and the Freedom of Information Act, the FBI reports were available to Petitioner's counsel upon formal request. Given Petitioner's opportunity to practice reasonable diligence in gathering these reports, this Court should not find that the government suppressed evidence.

Given that FBI detectives worked with Joralemon law enforcement in the investigation of Tiffany Driscoll's death, yielding the box that contained the chocolate-covered strawberries and

the note drafted on Petitioner's home computer, Petitioner had actual notice of the FBI's involvement and possession of information related to her case. R. at 14. The fact that the FBI's investigation was publicized in *The Joralemon Journal* on May 29, 2017, further points to actual notice that the FBI had access to this information. Thus, it was incumbent upon Petitioner's counsel, after examining all discovery evidence, to send a written request to the U.S. Attorney's Office for any additional reports that pertained to the FBI investigation. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In the exercise of reasonable diligence, defense counsel sends these requests accompanied by a subpoena. *Id.* In the event that the FBI denies this request, the subpoena provides a basis for a defendant's motion to compel. *Id.* While Petitioner's access to the FBI reports was never guaranteed, a longstanding process allowed her an opportunity to procure information not disclosed by prosecutors.

Petitioner may argue that the process to obtain these reports is obsolete, that under 28 C.F.R. § 16.26, the FBI may cite the investigatory privilege to deny counsel's written request. This presumption ignores the fact that the investigatory privilege is qualified, and that Petitioner may overcome a denial by sufficiently demonstrating a need for the reports. *Miller v. Mehltretter,* 478 F. Supp. 2d 415, 424 (W.D.N.Y. 2007). The *Miller* Court held that "When the information sought is both relevant and essential to the presentation of the case on the merits and the need for disclosure outweighs the need for secrecy, the privilege is overcome." *Id.* While both reports are not material, nor favorable in respect to the trial's outcome, they were prepared during the investigation of a death for which Petitioner was alleged responsible. Given this relationship to Petitioner's case, Petitioner cannot complain of unfairness or an undue burden due to an irrebuttable privilege.

B. Neither FBI report qualifies as admissible evidence, making *Brady* inapplicable to the case at bar.

Under Rule 801(c)(1) and (2) of the Federal Rules of Evidence, the statements within the two FBI reports constitute inadmissible hearsay because the special agents offered these statements for the purpose of asserting the truth therein, but did not do so under oath. Fed. R. Evid. 801(c)(1-2). Arguably, because hearsay statements are inadmissible at trial, they cannot constitute evidence. *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). While the circuit courts do not agree on a standard application of the Brady Rule to inadmissible evidence, this Court's holding in *Wood* logically disqualifies inadmissible evidence from *Brady* claims. *Id.* Like the results of a polygraph test inadmissible at trial, the FBI reports "could have no direct effect on the outcome of the trial, because the respondent could have made no mention of them either during argument or while questioning witnesses." *Id.*

1. The hearsay statements contained within both FBI reports render them inadmissible in a court of law.

Petitioner's argument alleging government misconduct suggests that the hearsay statements contained in both FBI reports were outcome-determinative at trial. However, it logically follows that for this Court to make such a finding, it must conceptualize the outcome had both reports been lawfully admitted. Special Agents Mary Baer and Mark St. Peters did not make statements contained within the reports while testifying under oath at a trial or hearing. Therefore, under Rule 801(c)(1) of the Federal Rules of Evidence, both reports contain hearsay and are inadmissible. The government demonstrated that the FBI determined that Chase Caplow and the anonymous tipster provided unreliable leads. Thus, no exception to the rule against hearsay enumerated in Rule 803 applies to the FBI reports. We reiterate that these hearsay statements aside, the evidence presented at trial overwhelmingly demonstrated Petitioner's guilt, leaving no reasonable doubt that her actions resulted in Tiffany Driscoll's death. The FBI reports' preclusion from lawful admission prevents this Court from comparing their weight to

that of otherwise admissible evidence, and so they could not affect the outcome at trial to any quantifiable degree.

2. It is highly unlikely that a direct link exists between either FBI report and admissible evidence.

There is scant probability that pre-trial disclosure of the FBI reports would have led to the discovery of otherwise admissible evidence sufficient to change the outcome at trial. Petitioner, conceding that the FBI reports are inadmissible, and not bona fide evidence for *Brady* purposes, argues that they warranted disclosure in that the information contained therein could facilitate defense counsel's investigation yielding admissible evidence that is favorable and material. R. at 45. The Seventh Circuit, in *United States v. Navarro*, held that defendants' mere speculation that government files may contain *Brady* material cannot sufficiently support reversals or remands. *United States v. Navarro,* 737 F.2d 625, 631 (7th Cir.) cert. denied, 469 U.S. 1020 (1984). Petitioner's argument rings of speculation, and erroneously construes *Brady* to require the government to rummage through all its records for evidence that is only potentially exculpatory. A clear, logical relationship between the FBI reports and potentially admissible, exculpatory evidence that Petitioner has yet to discover remains unlikely in light of the unreliability of leads and the strength of existing evidence readily traceable to the Petitioner alone.

CONCLUSION

For the foregoing reasons, Respondent, United States of America, respectfully requests that this Court affirm the holding of the Fourteenth Court of Appeals.

Respectfully submitted,

Team 22
Counsel for Respondent