Team 23P

No. 20-2388

IN THE

SUPREME COURT OF THE UNITED STATES

SAMANTHA GOLD,

Petitioner,

-- against --

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR

THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Attorneys for Petitioner

ORIGINAL BRIEF

QUESTIONS PRESENTED

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

II. Whether the Fourth Amendment is violated when the government, relying on a private search, seizes and offers into evidence at trial files discovered on a defendant's computer conducted by the private party.

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

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JURISDICTION STATEMENT

A formal statement of jurisdiction has been waived according to Rule 5.2 of the 2021 Thirty-sixth Annual Dean Jerome Prince Memorial Evidence Competition.

OPINIONS BELOW

The Fourteenth Circuit's decision is unpublished but is reproduced in the Record on pages 50-59. The order number of the opinion is No. 20-2388. The transcript of the Motion Hearing is unpublished but reproduced in the Record on pages 15-29. The District Court's oral ruling on the Petitioner's Motion to Suppress is unpublished but is reproduced in the Record on pages 30-41. The transcript of the Hearing on Petitioner's Motion for Post-Conviction Relief is unpublished but reproduced in the Record on pages 42-49. The exhibits are unpublished but reproduced in the Record on pages 3-14. The docket number is 17 CR 651 (FN)

CONSTITUTIONAL PROVISIONS

U.S. Constitution amend. IV 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.

STATEMENT OF THE CASE

I. Statement of Facts

Ms. Gold seeks psychiatric help from Dr. Pollak who reports her to the police.

In 2015, a 20-year-old student at Joralemon University, Samantha Gold, came to the office of Dr. Pollak, seeking diagnosis and treatment for her anger issues. R. at 16-17. Dr. Pollak is a licensed psychiatrist, Board Certified by the American Board of Psychiatry and Neurology. *Id.* In compliance with Boerum's laws, Dr. Pollak informed Ms. Gold that if, in the course of her treatment, she made any serious threats to harm of an "identifiable victim," Dr. Pollak would have a legal duty to protect the victim and go to the legal authorities. R. at 2, 21. Dr. Pollak believed that her legal duty went beyond the duty to protect a potential victim. She never warned Ms. Gold that her statements could be used in a possible criminal prosecution, because she feared that such disclosure would make the patient "more reluctant to share certain thoughts or urges." *Id.*

In the course of their weekly therapeutic sessions, Dr. Pollak diagnosed and treated Ms. Gold for Intermittent Explosive Disorder (IED), a condition that in Ms. Gold's case manifested itself in her anger management issues. R. at 17.

On May 25, 2017, during her afternoon session with Dr. Pollak, Ms. Gold was "dramatic," "aggressive" and "agitated" because of a $2,000 debt to HerbImmunity, a multi-level marketing group to participate in which she was recruited by another student, Tiffany Driscoll. R. at. 3-4, 18. During the course of the session, Ms. Gold said things like "I'm so angry," "I'm going to kill her," "I will take care of her and her precious HerbImmunity," and "After today, I'll never have to see or think about her again." R. at 4. Ms. Gold never mentioned Ms. Driscoll's name, but Dr. Pollak concluded that these were specific threats against Ms. Driscoll and, in compliance with her mandatory duty under Boerum Health and Safety Code § 711, she contacted

the police. Dr. Pollak reported that Ms. Gold to Officer Fuchs because she had made "an actual threat to physically harm either [herself] or an identifiable victim" and was "more likely than not" to carry out her threats. R. at 3, 5, 20. Dr. Pollak believed Ms. Gold was a "dangerous patient" and described her diagnosis, treatment, the content of their sessions, and sent Officer Fuchs a scan of the session notes via email when requested. R. at 5, 20.

Officer Fuchs conducted a wellness check on Ms. Gold and concluded that she was "calm and rational" and "posed no threat to herself or others." R. at 5. She also warned Ms. Driscoll about threats, who "expressed no concern and returned to class." *Id.*

Later that night, Ms. Driscoll was found dead in her father's house. R. at 13. She died after ingesting chocolate covered strawberries, injected with poison, that were delivered by mail to the Driscoll residence in the morning of May 25, 2017. R. at 14.

Ms. Wildaughter viewed a few specific files before copying Ms. Gold's computer.

Out of concern for her roommate, Ms. Wildaughter looked at Ms. Gold's computer "to know what was going on." R. at 24. Before copying the contents of computer desktop onto a flash drive, she looked at very specific folders and files: the "HerbImmunity" folder, which contained three sub folders—" receipts," "confirmations," and "customers"— opened the "customers" folder, saw two subfolders— "Randolph Jackson," and "Tiffany Driscoll"—and, after opening the "Tiffany Driscoll" subfolder, she viewed ten pictures: "mostly of Tiffany." R. at 24-25. Also, within the "Tiffany Driscoll" subfolder there was another subfolder— "For Tiff"—which contained four documents and she opened two: "Message to Tiffany" and "Market Stuff." R. at 25-26. The small size of the folder and file computer icons for each of these files revealed nothing about their content. R. at 7-8. She did not search other documents and folders on Ms. Gold's computer. R. at 28.

Ms. Wildaughter brought the flash drive to Officer Yap (R. at 26.), Head of Digital Forensics at the Livingston Police Department. R. at 6. Ms. Wildaughter described the photographs, a friendly note to Ms. Driscoll and files that worried her. R. at 26-27. Officer Yap "examin[ed]..all of the drive's contents … every document on the drive in the order they were listed," R. at 6. At no point did Officer Yap ask Ms. Wildaughter where the files were located on the drive, how many files in total, or any questions about the files she found or reviewed on Ms. Gold's computer. R. at 29. Officer Yap did not obtain a warrant. R. at 35. Ms. Wildaughter had no knowledge of the "budget," "confirmation," "shipping confirmation," "to-do list" and "recipe" that Officer Yap discovered during his search of the entire flash drive. *Id.*

Ms. Wildaughter and Ms. Gold had been roommates for eight months. R. at 27. During her search of the computer, Ms. Wildaughter noticed a reference to strychnine: a pesticide commonly used for killing rodents. R. at 28-29. However, the roommates had a rodent problem the previous month. *Id.*

The prosecution did not disclose two FBI 302 investigative reports to defense.

On June 2, 2017, Special Agent Mary Baer with the Federal Bureau of Investigations (FBI) wrote a 302 Investigative Report outlining her interview with Chase Caplow, a Joralemon University student who was involved in HerbImmunity with Ms. Driscoll. R. at 11. Mr. Caplow stated that two weeks prior to her death, Ms. Driscoll called him to lament that she owed an unknown amount of money to Martin Brodie, an upstream distributor in HerbImmunity. *Id.* Mr. Caplow pointed out that Mr. Brodie was rumored to be violent, although he did not witness this first-hand. *Id.* SA Baer indicated that she planned to follow up after this interview and investigate Mr. Brodie further as an alternative suspect. *Id.*

On July 7, 2017, the FBI received an anonymous telephone tip stated that Belinda Stevens, also involved in HerbImunnity, murdered Ms. Driscoll, which Special Agent Mark St. Peters memorialized in his report. R. at 12. Although SA St. Peters stated that he followed protocol, he did not outline his preliminary investigation into Ms. Stevens as an alternative suspect, only briefly mentioning the tip was unreliable and no further follow-up was needed. *Id.* The prosecution did not disclose both FBI reports. R. at 43.

II. Procedural History

Ms. Gold was charged with Murder by Mail in violation of 18 U.S.C. §1716 (j)(2) and (3). Ms. Gold moved for the District Court to suppress two pieces of evidence: (1) the testimony by Dr. Chelsea Pollak and any of her notes; and (2) the information that was illegally seized from Ms. Gold's computer. R. at 1, 15. The District Court denied both motions. R. at 30, 40.

Ms. Gold moved for post-conviction relief after discovering that the prosecution did not disclose two FBI reports. R. at 42-43. The District Court denied the motion. R. at 48-49. Ms. Gold appealed these decisions to the United States Court of Appeals for the Fourteenth Circuit on December 2, 2019. R. at 50. The Fourteenth Circuit affirmed the District Court's rulings on all three motions. R. at 51-56. Ms. Gold filed a petition for writ of certiorari, which this Court granted on November 16, 2020. R. at 60.

STANDARD OF REVIEW

Because the case includes a possible deviation in a federal testimonial privilege of whether or not to adopt a "dangerous patient" exception to the psychotherapist-patient privilege, it is reviewed *de novo*. *United States v. Ghane*, 673 F.3d 771, 779-80 (8th Cir. 2012). A district court's decision not to suppress evidence is a mixed question of law and fact and reviewed *de*

novo. *United States v. Bowers*, 594 F.3d 522, 525 (6th Cir. 2010). A *Brady* violation is reviewed *de novo*, applying a *Bagley* standard. *United States v. Green*, 46 F.3d 461, 464 (5th Cir. 1995).

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Court of Appeals for the Fourteenth Circuit that the District Court did not err in denying Ms. Gold's motions to suppress evidence because (1) psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 did not seize after Dr. Pollak fulfilled her duty and reported her concerns about "dangerous patient" to law enforcement; (2) Officer Yap's search was an unreasonable infringement of Ms. Gold's privacy and was not exempt from a warrant requirement due to a government interest; and (3) the prosecution violated *Brady* when it failed to disclose the two FBI reports, even when inadmissible at trial, because the disclosure could have led to the investigation of admissible, material evidence and there was a reasonably probability the result of the trial would have been different.

First, the psychotherapist-patient privilege protects and advances crucial public interests of confidentiality between a mental health worker and patient, guaranteeing full disclosure of all fears, thoughts and emotions in the course of therapy, which is crucial for correct diagnosis and treatment. The ethical duty of the therapists - their *Tarasoff* duty - to report patient's threats to the potential victims or law enforcement advances a different important public interest of protecting innocent third parties and does not negate the need for testimonial privilege. The public policy, the experiences of the states and the reasoning behind *Jaffee*'s recognition of the psychotherapist-patient privilege go against the "dangerous patient" exception to it. And even if there would be a "dangerous patient" exception, Ms. Gold would not satisfy it because (1) her threats were not serious when they were made, and (2) there were "other means available" to

avert the harm. This Court should hold that there is no "dangerous patient" exception to the psychotherapist-patient privilege under the Federal Rule of Evidence 501.

Second, the officer's warrantless search exceeded the scope of the private search and violated petitioner's unfrustrated privacy interests in violation of the Fourth Amendment. The government went beyond the scope of the initial search and was required to obtain a warrant because Officer Yap's search was (1) not coextensive with the initial search, (2) conducted without virtual certainty such that he did not learn anything new, and (3) the evidence found was not in plain view. The officer's warrantless search of the flash drive did not further any legitimate government interest. The Fourteenth Circuit's mechanical application of pre-digital, container doctrine was anachronistic and failed to recognize the differences between digital devices and their analog antecedents.

Third, the accused's right to defend herself is inextricably linked to the bedrock of American jurisprudence. That foundation is reflected in this Court's decision in *Brady v. Maryland*, which laid the requirements for the prosecution to disclose evidence favorable to the defense for impeachment and exculpatory purposes. As the ultimate goal for a prosecutor is to seek justice, disclosing inadmissible evidence, which might lead to admissible material evidence, is paramount in prosecutorial duties in the American legal system. Accordingly, this Court should reverse the lower court's decision denying the motion for post-conviction relief and either grant Ms. Gold a directed verdict or at least remand it for a new trial.

ARGUMENT

I. MS. GOLD'S MOTION TO SUPPRESS DR. POLLAK'S TESTIMONY SHOULD HAVE BEEN GRANTED BECAUSE IT DISCLOSED PRIVILEGED INFORMATION THAT WAS PROTECTED BY THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

The district court erred in denying Ms. Gold's motion to suppress Dr. Pollak's testimony because (A) fulfilling a *Tarasoff* duty to report does not negate the testimonial psychotherapist-

patient privilege; (B) the so-called "dangerous patient" exception does not exist in the federal criminal cases; and (C) even if the "dangerous patient" exception exists, it would not apply to the statements that Ms. Gold made to Dr. Pollak.

In *Jaffee v. Redmond*, this Court recognized the psychotherapist-patient privilege under the Federal Rule of Evidence 501. 518 U.S. 1, 18 (1996). The privilege applies equally to licensed, psychologists, psychiatrists, and clinical social workers. *Id.* at 15-17. This privilege advances private and public interests by guaranteeing that therapy is conducted in "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." *Id.* at 10. Even before *Jaffee* was decided, the therapists had a recognized ethical duty to maintain confidentiality with an exception known as the "*Tarasoff* duty" to protect innocent third parties by notifying them of their patients' threats or reporting these threats to the authorities. *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334, 343-47 (Cal. 1976). *Jaffee* did not change it, acknowledging in the Footnote 19 of the opinion that in some cases the privilege "must give way" when "a serious threat of harm to the patient or others can be averted only by means of a disclosure by the therapist." *Id.* at 18 n.19. The majority of the circuits interpreted this footnote as dicta and did not read it as an expansion of the *Tarasoff* duty to protect and refused to create an exception to the testimonial privilege. *See, e.g., United States v. Chase*, 340 F3d. 978 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000); *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012); *but cf. United States v. Auster*, 517 F3d 312 (5th Cir. 2008); *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998).

A. *Tarasoff* Duty to Report Does Not Negate Testimonial Privilege.

The psychotherapists' *Tarasoff* duty to protect third parties is distinct from the evidentiary privilege preventing therapist's testimony about patient's threats in future

prosecutions. *Hayes*, 227 F.3d at 583-84. The Sixth Circuit held that testimonial privilege does not interfere with the psychotherapist's compliance with their ethical duty to protect. *Id.* at 585. The *Tarasoff* duty furthers important public policy interests – the protection of innocent third parties. *Tarasoff*, 551 P.2d at 343-47. Testimonial privilege advances other crucial public policy interest – the guarantee of confidentiality to patients seeking treatment from a psychotherapist. *See Jaffee*, at 518 U.S. at 10-11. A successful therapy requires full confidentiality, trust and openness between the parties, a guarantee that patient's words during the sessions will not be used against them later in court. *Id.* Although psychotherapists are required to break their ethical duty of confidentiality under a narrow exception – to protect a third party from harm – testimonial privilege must remain intact to preserve greater public policy interests. *Id.*; *see also Tarasoff*, 551 P.2d at 343-47.

Most states recognize an exception to the ethical duty of confidentiality. But only California adopted the "dangerous patient" exception in their evidentiary standards. The *Tarasoff* duty exception permits a therapist to breach their duty to protect potential victims where a patient has made a serious threat to an identified individual. This exception only calls for disclosure, not a trial testimony, and there are states that refuse to mandate even the disclosure. *See, e.g., Thapar v. Zezulka*, 994 S.W.2d 365, 369 (Tex. 1999) (declining to impose a common law duty on mental -health professionals to warn third parties of their patients' threats as it goes against the state confidentiality statute). With no agreement among the states about psychotherapist's duty to protect potential victims, its scope and mandate, with very limited recognition of a "dangerous patient" exemption to the testimonial privilege, the "reason and experience" of an overwhelming majority of states tilts against the "dangerous patient" exception to the testimonial privilege, and therefore it should not be imposed on the federal level as it would lead to much confusion and

uncertainty for mental-health and legal officials nationwide. *Chase*, 340 F3d. 978 at 986 (refusing to recognize "dangerous" patient exception where the therapist fulfilled his duty to report in accordance with the state laws); *see also Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) ("A 'no harm in one more exception' rationale could contribute to the general erosion of the privilege, without reference to . . . 'reason and experience'").

Boerum has their own legal provision that mandates a psychotherapist to report their communication with patients to law enforcement under certain circumstances. A report is required when (1) a patient has made an actual threat to physically harm either themselves or an identifiable victim, and (2) the psychotherapist makes a clinical judgment that the patient is serious. R. at 2. This statute is similar to reporting requirements in other jurisdictions and does not impose a testimonial waiver. There is only a *Tarasoff* duty to report.

Here, Dr. Pollak transformed from a trusted confidante into the prosecution's star witness. Her testimony was against Ms. Gold's interests, this Court's holding in *Jaffee*, multiple circuits and public policy. There are two significant risks if this type of testimony is permitted. First, the public will lose trust in therapy knowing that therapists are permitted to disclose the confidential information conveyed to them for the purpose of diagnosis and treatment. Using such information against patients violates the principles under which they entered into a professional relationship. Second, the efficacy of treatment will be jeopardized if patients withhold information from their psychotherapists leading to consequences for both the individual patient, psychotherapist, and the community writ large.

Like the therapist in *Chase*, Dr. Pollak met her professional obligation when she disclosed to Officer Fuchs her communication with Ms. Gold as well as her concern for Ms. Driscoll's wellbeing. This was consistent with Boerum Health and Safety Code § 711. She

fulfilled her *Tarasoff* duty to report. Dr. Pollak violated her professional duty by testifying and providing supporting documentation under the mistaken belief that it was mandated to her.

Dr. Pollak's duty to report ended when she made her report to Officer Fuchs. Her testimony at trial should have been suppressed because a psychotherapist's *Tarasoff* duty does not negate testimonial psychotherapist-patient privilege and failure to recognize this would lead to much confusion and harm in the mental-health community.

B. "Dangerous Patient" Exception to the Psychotherapist-Patient Privilege Does Not Exist.

This Court should adopt the reasoning from the majority of circuits that considered the issue and hold that there is no "dangerous patient" exception to the psychotherapist-patient privilege in federal criminal cases.

Basing a "dangerous patient" exception to the psychotherapist-patient privilege on one *Jaffee's* footnote 19 is an error. Deborah Paruch, *From Trusted Confidant to Witness for the Prosecution: The Case against the Recognition of a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege*, 9 U. N. H. L. REV. 327, 366 (2011). This gives a footnote that is dicta significant persuasive value despite it being a "side comment." *Id. Jaffee* was a civil case about an officer violating suspect's constitutional rights by use of excessive force, and the disputed evidentiary matter was the disclosure of statements made by the involved police officer to a licensed social worker when in counseling after the incident. 518 U.S. 1 at 5. Footnote 19 appeared at the end of the opinion, was not part of the holding, and did not address the case in front of the court. *Id.* at 18, n.19. For these reasons, the footnote is merely dicta. Thus, it is not a mandatory authority for circuits and should not govern decisions about the admissibility of privileged information at trial.

The "dangerous patient" exception contradicts the holding in *Jaffee*. In *Jaffee,* this Court held that Federal Rule 501 includes a psychotherapist-patient privilege. 518 U.S. 1 at 5. In finding so, *Jaffee* relied in part on the proposed Rule 504 that would have codified this privilege even though it was ultimately rejected by the Congress. *See* Rules of Evidence for United States and Magistrates, 56 F.R.D. 183, 240-41 (1972). The proposed rule included explicit exceptions to the privilege, yet it notably excluded the "dangerous patient" one. *Id.* One of the exceptions that was recognized is in civil cases of involuntary hospitalization. *Id.* The jurisdictions that since recognized this exception, speak about the need to isolate patients who are "dangerous to self and others." *Cf. United States v. Gillock,* 445 U.S. 360, 367-368 (1980) Such phrasing is remarkably similar to Justice Stevens' "serious threat of harm to the patient or to others" in Footnote 19. *Jaffee,* 518 U.S. at 18 n.19. *Jaffee*'s footnote was likely pointing out that the testimony might be appropriate in the already recognized matters such as involuntary hospitalization hearings without creating a "dangerous patient" exception.

Finally, a therapist who is required to testify against their own patients is forced to undermine the crucial public interest upon which the privilege was founded: "frank and complete disclosure of facts, emotions, memories, and fears" in the interest of obtaining correct diagnosis and prescribing an effective treatment. *Hayes,* 227 F.3d at 586-87. As this Court stressed in *Jaffee,* successful therapy hinges on the patient feeling that they are safe to disclose everything, and the "mere possibility" of the disclosure of confidential communication could obstruct the treatment. *Jaffee,* 518 U.S. at 10. Moreover, because the prosecution aims at incarceration, it reduces the likelihood of improved mental health outcomes for the patient. *Hayes,* 227 F.3d 585. After all, "the mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee,* 518 U.S. at 11. The prosecution of patients for the statements

that they make in therapy does not install public trust in the necessity and power of therapy. *See Hayes*, 227 F.3d at 586-87. Seeking therapy in times of distress for the purpose of diagnosis and treatment is commendable and should be encouraged. *Id.* More so, without the confidentiality, the probative value of any statements disclosed in the therapy sessions would be greatly diminished because patients would be hesitant to disclose honest fears and thoughts, risking potential prosecution. *Jaffee*, 518 U.S at 11-12. Allowing "dangerous patient" exceptions would fail to bring in probative evidence while simultaneously inflicting harm upon mental health professionals and patients seeking help.

In the present case, the dicta from *Jaffee* is inapplicable. There are significant and fundamental factual differences between Ms. Gold and *Jaffee*. In *Jaffee*, the court permitted privileged testimony in a civil matter, but Ms. Gold was on trial in a criminal case. The privileged conversations in *Jaffee* occurred after the incident that gave rise to the case, here, Ms. Gold's privileged communication with Dr. Pollak was prior to the events surrounding Ms. Driscoll's death.

Boerum modelled its evidentiary rules on the Federal Rules of Evidence. This indicates that the statute would have never considered a recognition of the "dangerous patient" exception to the psychotherapist-patient privilege because it was never recognized by *Jaffee* under Rule 501. Fed. R. Evid. 501.

Dr. Pollak's testimony here contradicts the very reason for the psychotherapist-patient privilege – to advance the interests of the patient's mental health. If Ms. Gold were aware that she could be prosecuted for her statements, she likely would not have made them (or other disclosures of her angers and fears) in the first place. Knowing that it would be unsafe to disclose such information, she would have been "reluctant to share," as Dr. Pollak herself testified. But

because Ms. Gold was honest and open with Dr. Pollak and genuinely sought her professional help with her "anger issues," disclosing her fears, deepest thoughts and urges, Dr. Pollak was able to use the sessions to diagnose and treat Ms. Gold's Intermittent Explosive Disorder (IED), then only to turn around and help convict Ms. Gold because of what she said during therapy. Allowing Dr. Pollak's testimony at Ms. Gold's trial negated years of progress and sent a chilling message to the mental-health community that the words uttered in the moments of great vulnerability and, as patients think, complete confidence, will come to haunt them later and cost them their freedom.

This Court should recognize that there is no "dangerous patient" exception to the psychotherapist-patient privilege.

C. Ms. Gold's Statement to Dr. Pollak Does Not Satisfy the "Dangerous Patient" Exception.

Even if this Court adopts the "dangerous patient" exception, it will find that it is not satisfied in this case because Ms. Gold's statements were (1) not "serious threats" and (2) Dr. Pollak's disclosure was not "the only means of averting harm" to Ms. Driscoll.

In limited circumstances, the Fifth and Tenth Circuits permit testimony by a therapist that would be otherwise covered by the privilege: where the patient's threat to the safety of others was (1) serious when made and (2) the disclosure is the only means of everting the harm. *Glass*, 133 F.3d. at 1359; *see also Auster*, 517 F3d 312.

If a threat cannot be considered serious at the time it is being made, the "dangerous patient" exception cannot be satisfied. In *Glass*, the Tenth Circuit found that the patient's statements to a psychotherapist, after having voluntarily committed himself to a hospital, did not fall under the "dangerous patient" exception and precluded the therapist from testifying at a criminal trial against the patient after he made death threats against President Clinton. 133 F.3d.

at 1357. The court found that because the psychotherapist did not disclose the patient's statement until he realized that he could have been under legal obligation to disclose, he knew that the threats were not serious. *Id.* at 1360. In *Auster*, the patient's confidentiality was waived because his threats were routinely made to his therapist, and the patient was aware that his targets knew of his threats, which made them "unserious." 517 F.3d at 313-315. These facts negated any patient expectation of confidentiality and no exception was needed. *Id.*; *see also Hayes*, 227 F.3d at 586 ("A patient may waive the psychotherapist-patient privilege by knowingly and voluntarily relinquishing it, such as by disclosing the substance of therapy sessions to unrelated third parties"); *United States v. Kokoski*, 435 F. App'x 472, 477 (6th Cir. 2011) (finding that no privilege applied where the patient attached the copy of his psychotherapist notes to his motion the court).

Next, the "dangerous patient" exception is not satisfied even if the threats are considered serious in the moment they are made, but there are objective means of preventing harm other than disclosure. In *United States v. Highsmith*, a patient made homicidal threats against an Administrative Law Judge while locked up in a psychiatric unit. No. 07-80093CR, 2007 WL 2406990 (S.D. Fla. Aug. 20, 2007). The court found that the disclosure of these statements was not the "the only means" to prevent harm noting that the patient's continued presence at the psychiatric unit was "other means" to avert harm, and his statements to the psychotherapists should not be disclosed at trial under the "dangerous patient" exception. *Id.*; *see also Glass*, 133 F.3d at 1360 (holding that the delay in notification contradicted the idea that the threats made by the patient against the President were the "only means" to avert harm).

Here, the threats that Ms. Gold made during her May 25 session were not necessarily serious, which Dr. Pollak admitted was "possible" when cross examined. Like in *Glass*, where the

disclosure was motivated by legal considerations, it is possible that Dr. Pollak's disclosure was not necessarily rooted in the genuine worry for Ms. Driscoll's safety but in her "legal duty" to warn. Just like the patient in *Glass* appeared not to present any serious danger to the President, Ms. Gold here appeared not to present any serious danger to Ms. Driscoll, as was evident to Officer Fuchs and Ms. Driscoll herself.

Unlike in *Auster*, there was no reason for Ms. Gold to believe that her therapy sessions were not confidential. Although she received a pre-therapy notice that in the event of "a disclosure of a serious threat of harm to an identifiable victim" Dr. Pollak will have the duty to protect the intended victim, Ms. Gold never identified Ms. Driscoll at the May 25 session. Dr. Pollak decided that the threats were against Ms. Driscoll due to a vague reference to "her" by Ms. Gold. Unlike the patient in *Kokoski*, Ms. Gold never attached the copy of the therapy records to any motions or filings, and she never disclosed the contents of her therapy to the third parties, therefore she never waved the privilege.

Next, the disclosure by Dr. Pollak was not the "only means" to avert harm because, as Officer Fuchs noted in her report, Ms. Driscoll was in no imminent danger. Just like the aggressive patient in *Highsmith* recovered later and was deemed not dangerous after leaving the psychiatric facility, Ms. Gold might have been agitated during her session with Dr. Pollak, but she was "calm and rational," when Officer Fuchs checked on her. Moreover, as the record states, the package that contained poison was delivered to Ms. Driscoll in the morning of May 25, whereas the therapy session occurred at noon that same day. If the crime of mailing of the box with the intent to harm already occurred, there is no logic in the argument that the disclosure of something that already happened could have been averted by a later occurrence.

Therefore, even if the Court follows the Fifth and Tenth Circuit, the facts of Ms. Gold's case do not satisfy the requirements set out by the circuits, and this Court should hold that Ms. Gold's statements to Dr. Pollak were privileged, and the District Court erred in denying her motion to suppress.

For the foregoing reasons, the Court should hold that there is no "dangerous patient" exception to the psychotherapist-patient privilege, and the privilege is not waived by the mandated disclosure of threats to the authorities.

II. THE OFFICER'S WARRANTLESS SEARCH EXCEEDED THE SCOPE OF THE PRIVATE SEARCH AND VIOLATED MS. GOLD'S UNFRUSTRATED PRIVACY INTERESTS IN VIOLATION OF THE FOURTH AMENDMENT.

"The ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 573 U.S. 373, 381 (2014). During the colonial era, general warrants permitted British officers to search indiscriminately for evidence of criminal activity, unrestrained by a neutral magistrate. *Id.* at 403. The founders considered general warrants evil and drafted the Fourth Amendment to protect individual's personal privacy. *Walter v. United States*, 447 U.S. 649, 656-57 (1980).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Yet, the amendment only restrains government actors. *Walter*, 447 U.S. at 662. Under the private search exception, an individual's Fourth Amendment protections are partially frustrated when a search is made by a private party acting independent of government officials. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). But, privacy interests are only frustrated up to a point. *United States v. Runyan*, 275 F.3d 449, 464 (5th Cir. 2001). Oversight by a neutral

magistrate, through a particularized warrant, is required when an independent, governmental search exceeds the scope of the initial private search. *Katz v. United States*, 389 U.S. 347, 355 (1967); *Jacobsen*, 466 U.S. at 115; *Walter*, 447 U.S. at 659, n.13 ("A partial invasion of privacy cannot automatically justify a total invasion").

To assess the reasonableness of a governmental search of a digital device, following a private search, "we must balance the nature and quality of the intrusion on an individual's privacy interests against the importance of the governmental interests alleged to justify the intrusion." *Jacobsen*, 466 U.S. at 125. In addition, digital devices have quantitative differences with their analog equivalents that implicate the reasonableness of searches.

In the context of a search of a digital device, the circuits have split on where to draw the line when an individual's expectation of privacy has only been partially frustrated by a private search. The Sixth and Ninth Circuits, sensitive to these privacy issues, permit law enforcement to replicate a private search of a digital device: a line beyond which a broader search is independent and requires a warrant. *United States v. Lichtenberger*, 786 F.3d 478, 482 (6th Cir. 2015). The Fifth, Seventh, and Fourteenth Circuits are excessively permissive and deferential to law enforcement: a private search and general warrant are nearly indistinguishable. In the private search context, these circuits apply anachronistic container doctrine as a loophole through which law enforcement can use the "partial invasion of privacy" of a digital device to justify a "total invasion." *See Walter*, 447 U.S. at 659, n.13.

A. The Scope of the Officer's Search was an Unreasonable Infringement of Ms. Gold's Privacy.

Ms. Gold's expectation of privacy was not fully frustrated because the initial invasion of

her privacy was the result of her roommate's search. See *Jacobsen*, 466 U.S. at 115. The government went beyond the scope of the initial search and required a warrant because Officer Yap's search was (1) not coextensive with the initial search, (2) conducted without virtual certainty that he did not learn anything new, and (3) the evidence found was not in plain view.

First, a coextensive search by law enforcement that replicates a private search does not implicate the Fourth Amendment. *Runyan*, 275 F.3d at 458. In *Sparks*, the Eleventh Circuit held that law enforcement's search of a cell phone's photo application did not exceed the private search when the phone was left at a store because the private search conducted by retail staff included all of the images in one digital album. 806 F.3d at 1335. But, viewing a video within the same album, not watched by the private searcher, went beyond the scope of the private search. *Id.* at 1335. But, in *Runyan*, the Fifth Circuit held that the police were permitted to examine items on computer disks ("closed containers") beyond those randomly selected by the defendant's wife because it was not a new search. Law enforcement examined an already compromised container and looked at additional items. 275 F.3d at 460, 463.

Here, Officer Yap did not recreate the search performed by Ms. Wildaughter; it was not coextensive. Ms. Wildaughter's private search of Ms. Gold's computer was limited to opening the "HerbImmunity" folder, which contained three subfolders— "receipts," "confirmations," and "customers"— opened the "customers" folder, saw two subfolders— "Randolph Jackson," and "Tiffany Driscoll"—and, only opened the "Tiffany Driscoll" subfolder, where she viewed ten pictures that were "mostly of Tiffany." Within the "Tiffany Driscoll" subfolder there was another subfolder— "For Tiff"—which contained four documents, and Ms. Wildaughter opened two: "Message to Tiffany" and "Market Stuff." Similar to *Sparks*, where law enforcement went beyond the scope of the private search and violated the constitution by viewing a video inside the

same digital photo album that had not been viewed by the private searcher, here, Officer Yap went beyond the scope of Ms. Wildaughter's search by viewing "all" of the drive's contents. His search included many files that Ms. Wildaughter did not open. This type of complete search is similar to the type of search the court in *Runyan* found privacy issues. Like the court in *Runyan*, where the search should have been limited to the scope of items found by the private searcher and suppressed admission of the video, the District Court should have suppressed the evidence Officer Yap found that had not been previously viewed by Ms. Wildaughter: budget, receipts, shipping confirmations, and recipe.

Police officers are permitted to exceed the scope of a private search with a "confirmatory examination" if they have virtual certainty of what they will find. *Jacobsen*, 466 U.S. at 119; *see United States v. Tosti*, 733 F.3d 816, 822 (9th Cir. 2013) (enlarging thumbnail images on a computer did not result in officers learning anything new because they could tell that the thumbnails contained illicit content); *Lichtenberger*, 786 F.3d at 480 (finding that a police officer could not have been virtually certain of the search results of the computer because the defendant's girlfriend was unable to recall which files she had initially opened). When police learn something new from their search, that could not be learned through a private searcher's testimony, it implicates the Fourth Amendment's reasonableness requirement. *See Runyan*, 275 F.3d at 461. In *Jacobsen*, this Court held that the use of a chemical test did not exceed the scope of a private search when FedEx employees damaged a package and exposed a white powder because the test confirmed the contents as cocaine: what a manual inspection had suspected. *Jacobsen*, 466 U.S. at 119. And, in *Rann v. Atchison*, the Seventh Circuit permitted an expansive search of digital devices, beyond the scope of the private search, because law enforcement was

substantially certain the devices contained child pornography based on the wife and daughter's statements about what they found during their private search. 689 F.3d 832, 838 (7th Cir. 2012).

In the present case, Officer Yap did not have virtual certainty of what he would find when he went outside the scope of Ms. Wildaughter's search. Unlike in *Tosti*, where enlarging thumbnail images did not exceed the scope of the private search because the officers could see that the images contained illicit content, Officer Yap could not do a "confirmatory examination" of files on Ms. Gold's computer because the visible computer folders and file icons revealed nothing about the content. His exam of the flash drive was exploratory, not confirmatory. At no point did Officer Yap ask Ms. Wildaughter to tell him the location on the drive the concerned files were located, how many files there were in total, or questioned her about the files she found. Similar to *Lichtenberger*, where the private searcher could not precisely recall which files she had viewed such that the officer could not have been virtually certain of the search results, Officer Yap could not have been virtually certain of what he would find because Ms. Wildaughter only vaguely described some of the images and files to him. In addition, Officer Yap's search uncovered facts previously unknown by Ms. Wildaughter (e.g. budget, receipts, shipping confirmations, and recipe). Like in *Runyan*, where the court suppressed evidence where the police learned something new that would not have been learned through the testimony of a private searcher, Officer Yap's search of the entire flash drive led to the evidence and facts that Ms. Wildaughter could not have testified to knowing.

Third, the evidence resulting from a private search, in plain view, in a container that is clearly labeled and then shown to law enforcement does not infringe individual privacy interests. *Jacobsen*, 466 U.S. at 132-33 (White, J., concurring). In *Walter*, this Court would have permitted

the re-examination of the materials provided to the government by private searchers if the results were in plain view. 447 U.S. at 650. But, law enforcement's projection of films was "a significant expansion" of the search because the private searchers could not discern the content visually and were left to infer the subject matter based on the outer boxes. *Id.*

In the present case, the content of the files Officer Yap explored were not in plain view. Similar to *Walter,* where the private searchers were left to infer the subject matter of the films based on the labels on the exterior of the boxes, the content of files on Ms. Gold's computer could only be inferred. Ms. Wildaughter's search was motivated by a gut feeling that Ms. Gold might hurt someone. Yet, she only read a nice note, looked at photos, and saw research on pesticides that may have been inspired by the rodent problem the roommates had experienced at their apartment the previous month. Also, the contents of Ms. Gold's computer were not in plain view. Like in *Walter*, where the private searcher could not discern the subject matter of the film stills, it would have been impossible for Ms. Wildaughter to discern the content of these files by seeing the file names, folder names, or from their computer icons.

Officer Yap's experience, expertise, and training may have helped ensure that the digital search of items not in plain view was consistent with what a neutral magistrate would have ordered to protect Ms. Gold's reasonable expectations of privacy. However, affirming conduct retroactively cannot be done. This Court has historically provided categorical rules and bright-line guidance for law enforcement without depending on police officers to voluntarily confine their activities to the least intrusive means on a case-by-case basis. *Riley*, 573 U.S. at 398. Neutral judges have an important role and provide safeguards with particularized warrants that prevent police from going on "fishing expeditions." *Runyan,* 275 F.3d at 464.

Therefore, Officer Yap performed an independent, warrantless search. This was unreasonable and infringed Ms. Gold's unfrustrated privacy interests because his search exceeded the scope of Ms. Wildaughter's private search, it could not have proceeded with virtual certainty, the government learned new information from the expanded search, and the evidence found was not in plain view.

B. Officer's Warrantless Search of the Flash Drive Does Not Further Any Legitimate Government Interest.

Officer Yap's search of the flash drive would be exempt from the reasonableness requirement of the Fourth Amendment if justified by a legitimate government interest. *Riley*, 573 U.S. at 387. "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Id.* at 382.

Exigencies may make a warrantless search reasonable when there is no time to secure a warrant, but a compelling need must exist. *Missouri v. McNeeley*, 569 U.S. 141, 149 (2013). *See, e.g.*, *Lichtenberger*, 786 F.3d at 487 (preserving evidence weighs against protecting privacy interests); *Riley*, 573 U.S. at 388 (rejecting government exigency arguments because a "smartphone" does not endanger police officer lives and remote wiping of the phone can be prevented by removing the battery). In addition, "effects" that have no "justifiable expectation of privacy can be seized without a warrant." *See, e.g.*, *Jacobsen*, 466 U.S. at 125 ("Congress has decided that…privately possessing cocaine is illegitimate).

In the present case, there was no compelling need for Officer Yap's warrantless search without authorization from a neutral judge. There was no imminent danger to Officer Yap because he explored the flash drive within the confines of the Livingston Police Department.

There was no legitimate fear that the evidence could be destroyed because the flash drive was in his possession. And, unlike in *Jacobsen*, where there was no "justifiable expectation of privacy" because Congress decided that privately possessing cocaine was illegitimate, Ms. Gold's computer contained nothing the government would find illegitimate or contraband.

Officer Yap's investigation of the flash drive would not have been unduly impeded by seeking a warrant. *Riley*, 573 U.S. at 401 (citation omitted) ("[T]he warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency"). Warrants can be received efficiently and approved within minutes based on sworn testimony via telephone, radio, email, iPad, and video conferencing. *McNeeley*, 569 U.S. at 154-155 (applying for search warrants remotely is permitted for police officers and prosecutors in a majority of states).

Therefore, there is no legitimate governmental interest, compelling need, or exigency that would make reasonable, without obtaining a warrant, Officer Yap's search of the digital device beyond the scope performed by Ms. Wildaughter.

C. The Fourteenth Circuit's Application of Container Doctrine is Anachronistic and Fails to Recognize the Differences Between Digital Devices and Their Analog Antecedents.

The Fourth Amendment and technology are in tension. Technology is capable of overriding legal constraints during criminal investigations. *Jacobsen*, 466 U.S. at 137-38 (Brennan, J., dissenting); *see also Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) ("[I]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology"). This Court has repeatedly emphasized the contours of privacy interests in relation to technology-aided law enforcement investigations

that are novel yet encroaching. *See, e.g.*, *Katz*, 389 U.S. at 352; *Jacobsen*, 466 U.S. at 119; *Riley*, 573 U.S. at 373-374.

Predigital rules should not be "mechanically appl[ied]." *Riley*, 573 U.S. at 406-07. Digital devices are distinct from the containers on which private search doctrine has rested since the early 1980s. They have capacities that were inconceivable at the time physical containers became a limitation on the scope of a search. Digital devices raise privacy concerns "far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 393. In *Riley*, this Court expounded on why cell phones are minicomputers with "immense storage capacity" and collect, in a single place, different types of information that "reveal much more in combination than any isolated record." *Id.*; *see also United States v. Adjani*, 452 F.3d 1140, 1152 (9th Cir. 2006) ("Digital devices are simultaneously file cabinets (with millions of files) and locked desk drawers; they can be repositories of innocent information, but also of evidence of crimes"). In *Runyan*, the Fifth Circuit intimated that a different standard might be required for searches of computer disks where rules governing closed container searches might be inapplicable, but the issue was sidestepped when neither party expressed concern about the context of the search. 275 F.3d at 458; *cf. United States v. Guindi*, 554 F. Supp. 2d 1018, 1021 (N.D. Cal. 2008) (noting the difficult privacy issues presented when digital searches are at issue).

In the present case, none of the files searched said anything specific about harming Ms. Driscoll. Ms. Gold and Ms. Wildaughter were experiencing a rodent problem at the time of Ms. Driscoll's death, and similar to the concerns expressed by this Court in *Riley*, evidence of Ms. Gold's research on how to mitigate their rodent problem, and the nature of the information found by Officer Yap, "revealed much more in combination than any isolated record." In addition,

searching the internet for chocolate covered strawberry recipes that include "secret stuff" will yield endless recipes with permutations for interior and exterior flavorings. Similar to *Runyan*, the government wants this Court to focus on the information found, rather than the inconvenient privacy context of the digital search. Unlike *Runyan*, where evidence of child pornography was found, the contents of Ms. Gold's computer did not contain any evidence of contraband or anything illegal.

Therefore, the Fourteenth Circuit's application of container doctrine is anachronistic. The mechanical application of predigital container doctrine permitted the admission of this evidence, which, in the context of a physical search, would have required a warrant. Private search doctrine must be updated to ensure that Fourth Amendment protections cannot be sidestepped when an individual's privacy interests have only been partially frustrated.

Therefore, the district court improperly denied Ms. Gold's motion to suppress. This Court should reverse the Fourteenth Circuit and remand the case for retrial.

III. MS. GOLD IS ENTITLED TO A NEW TRIAL BECAUSE THE PROSECUTION VIOLATED *BRADY* BY NOT DISCLOSING TWO FBI REPORTS, WHICH MAY HAVE LED TO MATERIAL, ADMISSIBLE EVIDENCE AND CHANGED THE OUTCOME OF THE TRIAL.

This Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit on two grounds, (1) the underlying information could have led to material, admissible evidence resulting in a different outcome of the trial, and (2) the Government violated public policy when the prosecution failed to disclose exculpatory evidence. The prosecution violated the requirements of *Brady v. Maryland* by failing to disclose two FBI 302 reports, regardless of admissibility. 373 U.S. 83 (1963). Under *Brady*, withholding material evidence

where there is a reasonable probability that the result of the trial would be different, justifies the invalidation of the conviction. *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995).

A. The Prosecutor Has an Affirmative Duty Under *Brady* To Produce Exculpatory Evidence Regardless of its Admissibility at Trial Because it Could Have Led to Material, Admissible Evidence, and Changed the Outcome of the Trial.

The prosecution must disclose evidence that is useful to the defense for impeachment purposes as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In order to mount a successful *Brady* claim, one must show that (1) the prosecution did indeed suppress evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material. *Kyles v. Whitley*, 5 F.3d 806, 811 (5th Cir. 1993) (*citing United States v. Sink*, 586 F.2d 1041, 1051 (5th Cir. 1978)). This Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "The question 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." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

In *Wood*, this Court held that since it was not reasonably likely that the failed disclosure of the inadmissible polygraph tests would have resulted in a different outcome at trial, it did not deprive the defendant of material evidence under the *Brady* rule. 516 U.S. at 8. The circuits are divided in their interpretation of *Wood's* holding and the majority of the circuits interpreted it to mean that inadmissible evidence may be considered material under *Brady* if it leads to the discovery of material, admissible evidence. *See Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (holding that if the inadmissible evidence were so promising that it might lead to strong exculpatory evidence, it must be disclosed); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002)

(finding that a withheld hearsay memo might have led to material admissible evidence); *Johnson v. Folino*, 705 F3d 117, 130 (3d Cir. 2013) (holding that although the report was hearsay and inadmissible, since the appellant had not shown how its disclosure would have led to admissible evidence there was no *Brady* violation); *Spence v. Johnson*, 80 F.3d 989, 1005 n. 14 (5th Cir. 1996) (agreeing that the district court erred in concluding that the undisclosed police reports were immaterial because they would not have been admissible at defendant's trial); *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011) (finding that inadmissible hearsay evidence is proper when determining if a *Brady* violation occurred but in the instant case, the petitioner was not prejudiced because he failed to establish that the inadmissible evidence could have led to discovery of admissible material evidence); *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998) (finding that alleged impeachment evidence was immaterial because it would not have changed the trial's outcome); *Bradley v. Nagle*, 212 F3d 559, 567 (II) (11th Cir. 2000) (reasoning that there was no reasonable probability that had certain evidence been disclosed, the trial result would have been different); *but see Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (ruling that inadmissible evidence is "immaterial" for *Brady* purposes as a matter of law). Therefore, when evaluating whether certain inadmissible evidence qualifies under *Brady*, the Court must consider the underlying goals of the *Brady* decision itself and determine whether the inadmissible evidence would have led to material, admissible evidence. Abigail B. Scott, *Comment: No Secrets Allowed: A Prosecutor's Obligation to Disclose Inadmissible Evidence*, 61 CATH. U. L. REV. 867, 890 (2012).

Here, there is a clear *Brady* violation because (1) the government suppressed two FBI reports naming two alternative suspects, (2) the existence of alternative suspects is a fact favorable to Ms. Gold, and (3) the evidence, although inadmissible at trial, is material because

not only would its disclosure have led to new material, admissible evidence through investigation, but also there is a reasonable probability that had it been disclosed, the outcome of the trial would have been different. While a *Brady* violation does not occur every time the government fails to disclose an alternative suspect (*Crawford v. Cain*, Civ. Action No. 04-0748, 2006 U.S. Dist. LEXIS 51060 at *18 (E.D. La. July 11, 2006)), impeachment and alternative suspect evidence fall well within *Brady's* scope. *Carillo v. County of L.A.*, 798 F.3d 1210, 1224-25 (9th Cir. 2015). The FBI reports may have been inadmissible at trial, but the knowledge of the existence of two alternative suspects before the trial was important for three reasons (1) it cast doubt on the strength of the government's case against Ms. Gold, (2) it led the investigation towards material, admissible evidence, and most importantly, (3) it discredited the thoroughness of the investigation into the murder of Ms. Driscoll. *E.g., Smith v. Secretary of New Mexico Dep't of Corrections*, 50 F.3d 801, 830 (10th Cir. 1995) (in considering whether a *Brady* violation occurred, the court acknowledged the fact that police investigating an alternative suspect would have arguably carried significant weight with the jury and would also have been useful in "discrediting the caliber of the investigation or the decision to charge the defendant").

The FBI had two alternative suspects, both of whom worked at HerbImmunity and presumably had contact with Ms. Driscoll. The first suspect, Martin Brodie, was rumored to be violent and Ms. Driscoll owed him money; a powerful motive for murder. Disclosure of this FBI report to Ms. Gold's defense would have initiated a full investigation interviews of potential witnesses or victims of Brodie's violent behavior, and whether he had access to Ms. Gold's computer, like her roommate. There is no indication in the record that the FBI actually interviewed Brodie or made a determination whether this information required further investigation. This shoddy investigation is indicative that the government had "tunnel vision" in

their pursuit of Ms. Gold as a suspect and casts doubt that Ms. Gold received a fair trial with a verdict worthy of confidence.

The record also shows that the FBI dismissed the second alternative suspect. They concluded that an anonymous call was an "unreliable lead," but did not explain why. There would have been no other way to have discovered this anonymous tip that came through the FBI without the prosecution's disclosure.

Both Special Agents Mary Baer and Mark St. Peters, the authors of the 302 reports, could have been questioned about the fact that they dismissed both alternative suspects and critiqued the way in which they conducted their investigation. The effect that the existence of two alternative suspects would have had on the outcome of the trial is not "mere speculation" but rooted in the fact that one of the suspects, Brodie, had a motive for killing Ms. Driscoll as well: greater than the motive alleged for Ms. Gold. *See Wood*, 516 U.S. at 6 (holding that a *Brady* claim may not be based on "mere speculation" of that exculpatory evidence would be found.)

B. Failure To Disclose Exculpatory Evidence Subverts Public Policy.

There were explicit protections in many colonial-era state Constitutions protecting the right of the accused to call witnesses, present evidence, and "to call for evidence in their favor." 1 Garland & Imwinkelried, Exculpatory Evidence § 1-1 (Matthew Bender) (2020). In the United States Constitution, the Fifth and Fourteenth Amendments require the Government to disclose specific types of evidence to the defendant. Discovery and Access to Evidence, 39 GEO. L. J. (ANN. REV. CRIM. PROC.) 356, 356-57 (2010). However, there is no general Constitutional right to discovery in a criminal case and the Due Process Clause does not specify the amount of discovery to which the defendant is entitled. *Weatherford v. Bursey,* 429 U.S. 545, 559 (1977) (citation omitted). Yet, this Court's decision in *Brady* reflected the importance of gathering

evidence in order to defend oneself. *Brady*, 373 U.S. at 87 (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

The American Bar Association's Center for Professional Responsibility requires a specific, higher duty for prosecutors requiring them to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Model Rules of Pro. Conduct r. 3.8(d) (Am. Bar Ass'n 2020). This Court went further to state that the prosecution has an affirmative duty to produce exculpatory evidence even if the defense does not make a specific request. *United States v. Agurs*, 427 U.S. 97, 106-07 (1976). Moreover, although the prosecution is ultimately responsible for the information that gets turned over to the defense, "police officers and other state actors may be liable under § 1983 for failing to disclose exculpatory information to the prosecutor." *Gibson v. Superintendent of N.J. Dep't of Law and Public Safety*, 411 F.3d 427, 443 (3d Cir. 2005). This duty stems from society's ultimate goal of securing justice, not prosecutorial victory. *Brady*, 373 U.S. at 87. Otherwise, the criminal justice system would incentivize prosecutors to withhold favorable evidence, risking an increased likelihood of convicting the innocent. Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN. ST. L. REV. 1133, 1149-50 (2005).

A broad view of materiality would reduce prosecutorial burden to determine what evidence constitutes *Brady* material before disclosure. *See* Stephanos Bibas, Brady v. Maryland: *From Adversarial Gamesmanship Towards the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES, 129, 143-44 (Carol S. Steiker ed., 2006). The broad view reflects *Brady's* goals and

helps to ensure that the defendant receives a fair trial. *Scott*, 61 CATH. U. L. REV. at 885. Moreover, by erring on the side of disclosure, the prosecutor will avert allegations of prosecutorial misconduct. The broad view is also consistent with American jurisprudence: the right to defend oneself. Brian D. Ginsberg, *Article: Always Be Disclosing: The Prosecutor's Constitutional Duty to Divulge Inadmissible Evidence*, 110 W. VA. L. REV. 611, 645 (2008).

Here, the disclosure of the two, one-page FBI 302 reports created no undue burden to the prosecution. Disclosure of the reports would have had no impact on the government's case since they considered the other suspects unreliable. In addition, disclosing this information to Ms. Gold's defense team was consistent with their professional responsibility and duty to affirmatively disclose exculpatory evidence. The government had no insight into Ms. Gold's defense strategy and the role this evidence may have played through thorough investigation. If the prosecution believed there was a sufficient basis that the FBI reports could have led to admissible exculpatory or impeachment evidence, the prosecutors must disclose it. *See Strickler v. Green*, 527 U.S. 263, 280 (1999). As representatives of the state, prosecutors have tremendous power to control evidence. Disclosure must not be left to prosecutorial discretion because of these types of evidentiary omissions. Clear guidance from this Court will ensure that evidentiary omissions will not constrain defendants from putting up their best defense to allegations.

In conclusion, in the interest of justice and keeping in line with the goals underlined in *Brady*, the prosecution should take a broader approach to material, exculpatory evidence, regardless of admissibility. Although Article VIII of the Federal Rule of Evidence defines hearsay and its exceptions, without knowing the defense's strategy, the prosecution could not foresee what type of evidence might come into play, for impeachment or exculpatory purposes. *See* Fed. R. Evid., Art. VIII. Had these FBI reports been made available, Ms. Gold could have

investigated the leads on her own. Here, the prosecution is guilty of two *Brady* violations, and Ms. Gold was sufficiently prejudiced for this Court to warrant a directed verdict or at least a new trial, therefore, this Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

CONCLUSION

For the foregoing reasons, Ms. Gold respectfully requests this Court reverse the ruling of the United States Court of Appeals for the Fourteenth Circuit and hold that (1) a psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 did not seize after Dr. Pollak fulfilled her duty and reported her concerns about "dangerous patient" to law enforcement, and Dr. Pollak should not have testified because Ms. Gold never waived the privilege, (2) Officer Yap's warrantless search exceeded the scope of the private search and violated Ms. Gold's unfrustrated privacy interests in violation of the Fourth Amendment, and (3) the failure to disclose inadmissible evidence that leads to admissible, material evidence would constitute a *Brady* violation if there is a reasonable probability that had it been disclosed, the outcome of the trial would have been different.

Respectfully submitted,

Team 23P
Counsel for Petitioner