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 RESPONDENT

TEAM 24

Counsel for Respondent

February 16, 2021

TEAM 24

New York, New York

Counsel for The Respondent

QUESTIONS PRESENTED

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

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

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

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STATEMENT OF THE FACTS

On May 25, 2017, at 12:00 P.M., Samantha Gold ("Petitioner") attended a weekly therapy session with Dr. Chelsea Pollack ("Dr. Pollack"). Record ("R."), at 3–5, 17. The Petitioner had been receiving ongoing treatment for "Intermittent Explosive Disorder" ("IED"), a psychiatric condition that manifests in episodes of aggression, impulsiveness, and sometimes violent behavior. R., 17. During the session, the Petitioner appeared disheveled, unkempt, and agitated. R., 3, 18. She had been complaining about a classmate, Tiffany Driscoll ("Driscoll"), for weeks before this specific therapy session. R., 4, 19.

Driscoll had recruited the Petitioner to work for HerbImmunity, a multi-level marketing scheme, in 2016. R., 18, 51. Between the time the Petitioner joined HerbImmunity and May 25, 2017, she developed substantial debt ($2,000). R., 18. The Petitioner recently learned that Driscoll was in debt, but Driscoll's father provided her with financial support. R., 18.

Although Petitioner had complained about Driscoll to her therapist before, her complaints escalated to a deadly threat during this session. R., 4, 19. Specifically, she exclaimed, "I'm so angry! I'm going to kill her. I will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again*."Id.* Because of the Petitioner's statements and agitated state, Dr. Pollack feared the Petitioner might act on that impulse. R., 5, 19–20. After the session, Dr. Pollack contacted the Joralemon Police Department to report the Petitioner as a dangerous patient, as required per Boerum Health and Safety Code § 711, and faxed her handwritten notes from the Petitioner's therapy session. R., 4–5, 19. Joralemon Police Officer Nicole Fuchs ("Officer Fuchs") received Dr. Pollack's call at about 1:15 P.M. and departed for the university to check on both the Petitioner and Driscoll. R., 5. After determining that the Petitioner appeared "calm and rational" at that time and that Driscoll was in class, Officer Fuchs determined

there did not appear to be any imminent danger. *Id*. Officer Fuchs notified Driscoll about a reported threat before concluding her investigation. *Id*.

Later that day at 4:40 P.M., Jennifer Wildaughter ("Wildaughter"), the Petitioner's roommate, independently came forward with concerns about the Petitioner and Driscoll. R., 6, 23. After the Petitioner returned home from class, she discovered a bill in the mail related to HerbImmunity. R., 24. She stormed out of the apartment but not before exclaiming, "I'd do anything to get out of this mess Tiff put me in."[1] *Id*. Wildaughter was concerned and decided to go into the Petitioner's room. *Id*. There, she found the Petitioner's desktop computer unlocked and active. *Id*. Wildaughter reviewed several folders and files on the computer, becoming more and more concerned. R., 26. While reviewing these files, Wildaughter discovered photos that appeared to show the Petitioner stalking Driscoll and a document referencing strychnine, a rat poison. *Id*. at 26–27.

Wildaughter grabbed a flash drive from her room, copied the Petitioner's desktop files and folders onto it, and delivered the flash drive to Officer Aaron Yap ("Officer Yap") of the Livingston Police Department. R., 6, 26–27. Wildaughter explained her concerns about the Petitioner to Officer Yap and told him that "everything is on there," referring to the flash drive. R., 6, 26–27. After Wildaughter left, Officer Yap reviewed the contents of the flash drive. R., 6. Outside of the documents and files reviewed by Wildaughter, Officer Yap discovered a $212 purchase titled "Tiffany's strawberries – secret strychnine stuff," that included strawberries, chocolate chips, and research on different poisons. R., 6. The document outlining the poison research included the word "USE" next to strychnine, along with a recommended dosage, the symptoms caused by ingestion, and the detail that cooks put strychnine into food. R., 6, 10. Based

[1] Wildaughter confirmed that "Tiff" is Tiffany Driscoll and that Driscoll is responsible for the Defendant's involvement with HerbImmunity. R., 24.

on these findings, Officer Yap contacted his supervisor, believing that the Petitioner intended to poison Driscoll. R., 6. Later that evening, Driscoll was found dead in her father's townhouse. R., 51. A post-mortem toxicology report determined that Driscoll ingested strychnine in strawberries anonymously mailed to Driscoll in a fruit basket. *Id*.

STATEMENT OF THE CASE

A grand jury indicted the Petitioner on June 6, 2017, for knowingly and intentionally mailing a package of poisoned strawberries with the intent to kill or injure Driscoll in violation of 18 U.S.C. §§ 1716(j)(2), (3), and 3551 *et seq*. R., 1, 51.

Before trial, the Petitioner moved to preclude the testimony of Dr. Pollack at trial and prevent the government from introducing Dr. Pollack's notes from the therapy session on May 25, 2017. R., 16. The Petitioner also moved to suppress all evidence derived from Officer Yap's search of Wildaughter's flash drive. *Id*. The District Court denied both of Petitioner's motions. R., 40.

Following a jury trial, the Petitioner was convicted and sentenced to life in prison. R., 51. She then moved for a new trial alleging that the government suppressed two FBI 302 reports in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The District Court denied this motion. The Petitioner appealed the denials of both pretrial motions and her motion for post-conviction relief. R., 51–56. The Fourteenth Circuit affirmed the District Court on all grounds. *Id*. This appeal follows.

SUMMARY OF THE ARGUMENT

The United States respectfully ask the Court to affirm the decision of the Fourteenth Circuit and uphold the Petitioner's conviction. Following the rationale of *United States v. Jacobsen*, 466 U.S. 109 (1984), this Court should hold that once a private party looks into a container, even a digital one, an owner's expectation of privacy in the contents of that container is frustrated.

Because Wildaughter frustrated the Petitioner's privacy by downloading the desktop files to her flash drive, and that flash drive was virtually certain to contain no more than what Wildaughter downloaded, Officer Yap's search was permissible under the Fourth Amendment. If Officer Yap did exceed the scope of Wildaughter's search, it was only in entering the Petitioner's folders that Wildaughter had not viewed, which did not contain any of the incriminatory files. Under this folder-based approach, any impermissible intrusion by Officer Yap was harmless; alternatively, Officer Yap's search was harmless under the inevitable discovery doctrine.

Further, the United States respectfully asks that this Court make explicit what it implied in *Jaffee v. Redmond,* 518 U.S. 1 (1996), and hold that the psychotherapist-patient gives way if, during treatment, the therapist acts on their ethical duty and legal duty to breach confidentiality to avert harm to others. Once this confidentiality is breached, society's desire for probative evidence at trial vastly outweighs a patient's desire for re-disclosure. Reason and experience as informed by the states, as well as public policy, should persuade this Court to affirmatively establish what it intended to in *Jaffee*, the dangerous patient exception. Alternatively, the United States requests that if this Court declines to establish the dangerous patient exception, it find Dr. Pollack's testimony harmless given the independent evidence establishing the Petitioner's intent in this case.

Lastly, as for the Petitioner's allegation that the government's failure to disclose two inadmissible FBI investigation reports violated her right to due process, the United States respectfully asks that this Court reject her invitation for reversal and remand for a new trial. In so doing, the United States asks this Court to hold that inadmissible evidence is per se immaterial for determining whether evidence is material under *Brady*. Alternatively, the United States requests that this Court recognize the undisclosed FBI investigative reports that were still immaterial in this case.

ARGUMENT

I. OFFICER YAP DID NOT VIOLATE THE FOURTH AMENDMENT WHEN HE SEIZED EVIDENCE THAT A PRIVATE PARTY COMPILED AND SEARCHED ITS CONTENTS.

For over a century, this Court has recognized that the Fourth Amendment only proscribes government action. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) ("origin and history [of the Fourth Amendment] clearly show that the Founders intended the amendment to be a restraint upon the activities of sovereign authority, not to be a limitation upon nongovernmental agencies . . . ."); *United States v. Di Re*, 332 U.S. 581, 595 (1948) ("the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance . . . ."). If law enforcement violates the Fourth Amendment, the evidence discovered by law enforcement is subject to exclusion at trial. *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961); *Weeks v. United States*, 232 U.S. 383, 391–92 (1914). In *Jacobsen v. United States*, this Court established the private search doctrine, which holds that if a private party, of their own volition, searches another's property, "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." 466 U.S. at 117; *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971) (where a private party shows police evidence, "it [is] not incumbent on the police to stop [them] or avert their eyes."). So long as a government search remains "within the scope of the antecedent private search[,]" the Fourth Amendment is not violated. *United States v. Rivera-Morales*, 961 F.3d 1, 4 (1st Cir. 2020); *see Jacobsen*, 466 U.S. at 115, 118–20.

This Court has not revisited the private search doctrine since *Jacobsen*. Since then, advancements in technology are forcing courts to reexamine traditional legal principles in an

increasingly digital world.[2] *Riley v. California*, 573 U.S. 373, 393–97 (2014) ("a cell phone search would typically expose to the government far more than the most exhaustive search of a house . . . ."); *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (cell phones required for participation in modern society). Although technological advancements pose issues to traditional conceptions of Fourth Amendment jurisprudence,[3] they do not require wholesale change. There are inherent differences between the closed container-like nature of flash drives and cell phones or personal computers that are "a digital record of nearly every aspect of [a person's life]—from the mundane to the intimate." *Riley*, 573 U.S. 373, 395 (2014). Therefore, as long as a government agent remains within the same container frustrated by the private searcher, they remain within the scope of the antecedent search even if "they examine more items within a closed container than did the private searchers." *United States v. Runyan*, 275 F.3d 449, 464 (2001).

A. Standard of Review.

This Court reviews lower courts' legal determinations de novo, while its factual determinations are disturbed only for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

B. Because Officer Yap's Search Was Limited to the Contents Wildaughter Downloaded Onto Her Own Flash Drive, He Did Not Frustrate the Petitioner's Expectation of Privacy Any Further Than Wildaughter Already Had.

In *Jacobsen*, federal agents were invited to a Federal Express office to search the contents of a package after employees at the office discovered what they believed to be cocaine. 466 U.S. at 110–112. This Court reasoned that the government's search of that package and subsequent field

[2] *See generally* Orin S. Kerr, *Searches and Seizures in A Digital World*, 119 HARV. L. REV. 531, 532 (2005) (discussing technological advancements and their interaction with the Fourth Amendment).

[3] 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.

test of the cocaine did not violate the Fourth Amendment because the expectation of privacy in the package was frustrated by the private searchers. *Id*. at 119, 122–23. Further, this Court held that, even if the cocaine was not in plain view within the package when the agents arrived, "there was a *virtual certainty* that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told." *Id*. at 119. Thus, the agent's search went no further than the private searcher's. *Id*. This Court reasoned that a search's scope is determined by whether the government merely avoids the risk of a flaw in the private searcher's recollection, "*rather than further infringing* [an individual's] right to privacy." *Id*. at 120 (emphasis added). Any additional invasions of privacy "must be tested by the degree to which they exceeded the scope of the private search." *Id*. at 115; *Walter v. United States*, 447 U.S. 649, 657 (1980) ("[i]f a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion . . . .").

Officer Yap did not violate the Fourth Amendment when he reviewed Wildaughter's flash drive's full contents because the Petitioner's expectation of privacy in every file within the container was frustrated. Applying *Jacobsen* to digital containers does not require a file-for-file replication, as the Petitioner, Sixth, and Eleventh Circuits claim. R., 31–33; *United States v. Lichtenberger*, 786 F.3d 478, 490 (6th Cir. 2015); *United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015), *overruled on other grounds*, 963 F.3d 1056 (11th Cir. 2020). Rather, the scope of Officer Yap's search is limited by not infringing further than Wildaughter had. Because Wildaughter had frustrated the expectation in the Petitioner's entire laptop's desktop by downloading the desktop files, Officer Yap did not infringe further than Wildaughter because the flash drive contained only what Wildaughter downloaded. Officer Yap remained within the scope

of the antecedent search. As the Fifth and Seventh Circuits reason, based on Eleventh Circuit precedent involving a non-digital container, the government does not unreasonably infringe on a Petitioner's expectation of privacy any further by searching an already frustrated container more thoroughly. *Runyan*, 275 F.3d at 464; *Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012); *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990).

1. Because a closed container like a flash drive is different from an internet-connected device like a cell phone or laptop, the Petitioner does not have a heightened expectation of privacy in the files on Wildaughter's flash drive.

The existing circuit split regarding the application of the private search doctrine in the digital age is tied to the nature of the container viewed by the private searcher and delivered to the police. In the Fifth and Seventh Circuits, the containers were floppy discs, compact discs ("CD"), a digital memory card, and a zip drive. *See Runyan*, 275 F.3d at 453; *Rann*, 689 F.3d at 834. Comparatively, the Sixth and Eleventh Circuits dealt with a laptop and a cell phone. *See Sparks*, 806 F.3d at 1330; *Lichtenberger*, 786 F.3d at 488 ("under *Riley*, the nature of the electronic device greatly increases the potential privacy interests at stake . . . ."). Although this Court did note the large storage capacity of cell phones in *Riley*, its analysis for heightening privacy expectation in a cell phone stemmed from the qualitative nature of the internet-connected device's information. *Riley*, 573 U.S. at 395–98 (focusing on information on an internet-connected device that can reconstruct the owner's thoughts and movement). Relatedly, this Court limited the scope of the third-party doctrine in the context of cell site location information precisely because of the qualitative difference between records that can accurately track an individual's movements and documents like bank records. *Carpenter*, 138 S. Ct. 2214–17 (holding that individuals relinquish their respective expectation of privacy when a party other than the individual themselves controls the records). The critical inquiry in this Court's precedent regarding electronic searches is the

qualitative nature of the device's information, not storage capacity. A flash drive and other non-internet connected devices are appropriately analogous to containers, while laptops and cell phones are akin to a home's sanctity. *California v. Acevedo*, 500 U.S. 565, 585 (1991) *(Scalia, J.* concurring) ("the search of a closed container . . . with probable cause to believe that the container contains contraband . . . is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant."); *contra Kyllo v. United States*, 533 U.S. 27, 31–32, 37, 40 (noting the sanctity of the home for Fourth Amendment purposes).

2. Wildaughter's delivery of the flash drive to Officer Yap is analogous to a party with apparent authority giving law enforcement consent to search a residence.

Unlike in *Jacobsen*, the physical container searched by Officer Yap here, did not belong to the Petitioner, but the private searcher. R., 26. Wildaughter "grabbed a flash drive from [her] room," to download the files. *Id*. Because Wildaughter downloaded the files to her own flash drive and gave Officer Yap consent to search that flash drive, the Petitioner's expectation of privacy in all of the files was frustrated. Accordingly, the scope of Officer Yap's search was within the parameters of Wildaughter's search.

A warrantless search of an individual's home is reasonable if law enforcement receives consent to search the home from an occupant freely and voluntarily. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). The party consenting to the search does not need to be the actual homeowner. *Illinois v. Rodriguez*, 497 U.S. 177, 186–87 (1990) (police can receive valid consent based on apparent authority to enter residence); *United States v. Matlock*, 415 U.S. 164, 169–72 (1974) (joint occupant of residence can give officers consent to search without the approval of the other occupant); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (joint user of duffel bag can give

officers consent to search bag); *Florida v. Jimeno*, 500 U.S. 248, 249 (1991) (if the suspect gives officer consent to search an automobile, police can search closed container in it).

In determining the permissible scope of a search where an individual gives the police consent, the objective inquiry is "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno*, 500 U.S. at 251. Wildaughter's flash drive is analogous to the residence in *Illinois v. Rodriguez*, where the defendant's girlfriend-victim aided the police in entering the defendant's home. 497 U.S. at 179–80; R., 6, 24, 27. Although the girlfriend-victim had moved out of the apartment weeks earlier, this Court validated the search because the facts available to the officers at the moment warranted a person of reasonable caution in the belief that the consenting party had authority over the premises. *Rodriguez*, 497 U.S. at 188–89. In the case at hand, the flash drive is akin to the victim-girlfriend's consent in *Rodriguez* because of Wildaughter's representation to Officer Yap that she browsed through documents and files on the Petitioner's desktop. Wildaughter browsed through documents until she discovered concerning ones, then delivered a flash drive to Officer Yap, saying, "everything is on there." R., 6, 27. Wildaughter's actions and statements would warrant a person of reasonable caution to believe that all of the files on that flash drive were reviewable. *Id.*

C. Alternatively, Officer Yap Only Exceeded the Scope of Wildaughter's Search When He Reviewed the Contents of Folders She Had Not Viewed. Because the Incriminating Files Were Not Within the Suppressible Folders, Officer Yap's Error was Harmless.

If Officer Yap's search impermissibly exceeded the scope of the private search, it did so only to the extent that he searched through folders on the flash drive Wildaughter had not viewed herself. If the flash drive, folders, and subfolders in it are the containers, Officer Yap should have restricted his review to the unorganized files on the Petitioner's desktop and the folders

Wildaughter had entered herself.[4] The same legal principles set forth in *supra* Argument § I.B apply equally here. The sole difference is the determination of what constitutes a container. Rather than focusing on the physical device, the folders and subfolders determine the search's legal scope. Because a container is an "object capable of holding another object . . ." the individual folders and subfolders could be considered the containers for private search purposes. *Riley*, 573 U.S. at 397 (citing *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981).

The record establishes that Wildaughter reviewed: (1) the individual desktop files on the Petitioner's computer; (2) the folder titled "HerbImmunity" on the desktop; (3) the subfolders titled "Confirmations," "Customers," and "Receipts" within the "HerbImmunity" folder; (4) the subfolder "Tiffany Driscoll" within the "Customers" subfolder and; (5) the subfolder "For Tiff" within the "Tiffany Driscoll" subfolder.[5] R., 24–27. Wildaughter testified that "I wanted to know what was going on so *I looked around at some of the desktop files* on her computer. *I saw a folder* called HerbImmunity so I clicked on it." (Emphasis added) R., 24. Wildaughter distinguishes files from folders when explaining her private search. Relatedly, Wildaughter told Officer Yap that she browsed "through files and documents until she saw the concerning images and text files in question." R. 6. This record establishes that she reviewed the singular files present on the Petitioner's desktop. R. 6, 7, 10, 23–27.

This sequence defines the scope of the antecedent search, and the folders Officer Yap could have permissibly searched. Any files contained within those containers are within the scope of

[4] *See* Joseph Little, *Privacy and Criminal Certainty: A New Approach to the Application of the Private Search Doctrine to Electronic Storage Devices*, 51 U.C. DAVIS L. REV. 345, 363–68 (2017).

[5] Insofar as Officer Yap reviewed folders that Wildaughter did not investigate herself, "the infringement was de minimis." *See Jacobsen*, 466 U.S. 109, 126 (1984). Admittedly, Officer Yap reviewed the folders titled "College Stuff," "Games," and "Photos," while Wildaughter did not. R., at 6–7, 23–29. Although the Petitioner can successfully move to suppress Officer Yap's findings from these containers, the fact that he reviewed them does not taint the validly discovered findings from the loose files on the Petitioner's desktop and those found within the HerbImmunity folder.

Wildaughter's private search. *Runyan*, 275 F.3d at 465 ("police do not exceed the scope of a prior private search when they examine particular items within a container that were not examined by the private searchers"). Like the CDs in *Runyan*, the containers outside of Wildaughter's search may be suppressible; however, the incriminating files found within the containers Wildaughter searched are not. *Runyan*, 275 F.3d at 464–65. When Officer Yap reviewed the loose desktop files and the folders and subfolders within "HerbImmunity," he was virtually certain not to exceed the *information* learned by Wildaughter through her private search. R., 6, 23–27. Officer Yap was not permitted to enter the "Games," "College Stuff," "Photos," or "Tax Docs," folders because Wildaughter did not personally enter them. *See* R., 6, 23–27. These are like the unsearched CDs from *Runyan*; however, the loose desktop files, the "HerbImmunity," folder, and all subfolders contained within the "HerbImmunity," folder are subject to a permissible search because Wildaughter frustrated the expectation of privacy relating to them. R., 6, 23–27.

In *United States v. Williams,* a landlord and her niece called the DEA after entering a tenant's residence after receiving a high-water bill to check for leaks. *Williams*, 354 F.3d 497, 500 (6th Cir. 2003). Although the landlord and niece only checked the kitchen before discerning a "suspicious odor," they called the DEA, and the agent checked the entire residence, including four other rooms. *Id*. at 500–01. The agent discovered marijuana plants in rooms outside of the kitchen. *Id*. The Sixth Circuit held that the DEA agent exceeded the scope of the private search when he searched "under the kitchen sink, where [the landlord] had not looked, and then navigated the rest of the house with a flashlight, including the bedrooms, washroom, and bathrooms." *Id*. at 510. Comparatively, the kitchen from *Williams* is akin to the loose desktop files and "HerbImmunity" folder along with the subfolders in it. The rooms and cabinet under the kitchen sink not searched by the landlord in *Williams* are akin to the "Games," "College Stuff," "Photos," and "Tax Docs,"

folders. This case is distinguishable from *Williams* because, in *Williams,* police discovered contraband exclusively in areas outside the kitchen. Accordingly, all fruits derived from the search in *Williams* were suppressible. In contrast, all of the incriminating documents found here were within the scope of Wildaughter's search.

Importantly, *Lichtenberger* relies on *Williams*, along with *Riley,* to justify the file-based approach. *Lichtenberger*, 786 F.3d at 487. Although *Lichtenberger* relies on *Williams* and *Riley*, *Lichtenberger* and *Sparks* were decided specifically in instances involving private searches of laptops and cellphones. *Lichtenberger*, 786 F.3d at 487–88; *Sparks*, 806 F.3d at 1336. *Lichtenberger* and *Sparks* are distinguishable from this case because laptops and cellphones are distinguishable from the flash drive's limited information. Even so, under the folder-container approach, the deterrent effect of preventing "police from going on 'fishing expeditions' by opening closed containers[,]" remains protected. *Runyan*, 275 F.3d at 464. This concern implicitly underlies both *Lichtenberger* and *Sparks*. *Lichtenberger*, 786 F.3d at 488 ("the nature of the electronic device greatly increases the potential privacy interests at stake . . . ."); *Sparks*, 806 F.3d at 1336 ("[the] private search of the cell phone might have removed certain information from the Fourth Amendment's protections, it did not expose every part of the information contained in the cell phone."). Because the folder-based approach still provides adequate prophylactic protection against government overreach but is reasonable within the private search doctrine framework, this Court should adopt the folder-based framework for private electronic searches.

D. Because Officer Yap's Search of the Flash Drive Did Not Trespass Any Further Than Wildaughter, He Did Not Exceed the Scope of the Search.

Property rights have an indisputable impact on Fourth Amendment rights. *United States v. Jones*, 565 U.S. 400, 405 (2012) ("our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."); Orin S. Kerr, *The Fourth Amendment*

and New Technologies: Constitutional Myths and the Case for Caution, 102 MICH. L.REV. 801, 816 (2004). Still, even where property rights serve as the guiding principle for Fourth Amendment analysis, suppression is only granted where the government is the trespasser. *Burdeau*, 256 U.S. at 475.

The private search doctrine is rooted in *Burdeau v. McDowell*, where this Court validated the government's use of papers stolen from a defendant by a third-party (uninfluenced by the government) against that defendant in a grand jury proceeding.[6] 256 U.S. at 470–74. This Court held that a private individual's actions do not change the government's ability to use evidence derived from them. *Id*. at 476 ("we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character"). Under *Burdeau*, the Petitioner's real contention is with Wildaughter for trespassing, not the government. *Id*. at 475 ("[w]e assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned."). The remedy is a common-law trespass action against Wildaughter, not suppressing the evidence now delivered to the government.

E. Even so, Any Error Was Harmless Because the Government Would Have Inevitably Discovered Incriminating Files on Wildaughter's Flash Drive on the Defendant's Computer.

Even if Officer Yap's search violated the Fourth Amendment, the entire contents on Wildaughter's flash drive are admissible under the inevitable discovery doctrine. Inevitable discovery applies "if the prosecution can establish by a preponderance of the evidence that the

[6] *Burdeau* was decided in 1921, seven years after the federal government had adopted the exclusionary rule for the purposes of federal prosecution in *Weeks v. United States*, 232 U.S. 383 (1914). Relatedly, *Burdeau* was decided before *Katz*, when the trespass and property-based conception of the Fourth Amendment dominated judicial interpretation of the right to be free from unreasonable searches and seizures.

information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." *Nix v. Williams*, 467 U.S. 431, 444 (1984). This is essentially a rule of harmless error. *Id.* at 443 n.4. Courts balance the application of the inevitable discovery doctrine to encourage law enforcement to follow proper protocol. *United States v. D'Andrea*, 648 F.3d 1, 12 (1st Cir. 2011) (citing *United States v. Silvestri*, 787 F.2d 736, 744 (1st Cir.1986)).[7] The inevitable discovery doctrine exists to put the police "in the same, not a worse position than they would have been in if no police error . . . had occurred." *Nix*, 467 U.S. at 443.

For evidence to be admissible under the inevitable discovery doctrine, courts must ask, "what would have happened had the unlawful search never occurred . . ." *United States v. Heath*, 455 F.3d 52, 55 (2d Cir. 2006); *United States v. Christy*, 739 F.3d 534, 540 (10th Cir. 2014) (evidence admitted where the lawful investigation would have discovered it). Likewise, the government can purge the taint by establishing that it "would have conducted a lawful search absent the challenged conduct." *United States v. Eymann*, 962 F.3d 273, 288 (7th Cir. 2020) (citing *United States v. Marrocco*, 578 F.3d 627, 637–38 (7th Cir. 2009)). Courts look at whether an independent investigation would have led to discovering the evidence and whether there are other compelling facts to establish such. *United States v. Bowden*, 240 F. App'x 56, 61 (6th Cir. 2007). Those facts must be verifiable from the record, not speculative. *United States v. Bradley*, 959 F.3d 551, 557 (3d Cir. 2020).

[7] "[A]re the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?" *United States v. D'Andrea*, 648 F.3d 1, 12 (1st Cir. 2011) (citing *United States v. Silvestri*, 787 F.2d 736, 744 (1st Cir.1986)).

Even stripping away all information learned by Officer Yap's search, probable cause existed for a search warrant of the entirety of the Petitioner's computer. The FBI did not pursue such a search because they already possessed the pertinent information needed. Here, when the FBI began their investigation of Driscoll's murder, they were made privy to various facts and circumstances that pointed directly to the Petitioner as the culprit. *See Florida v. Harris*, 568 U.S. 237, 244 (2013) (probable cause is a fluid assessment based on probabilities); *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003) (probable cause based factual and practical considerations of everyday life that cause a reasonable person to act); *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983) (probable cause determined by totality-of-the-circumstances); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (probable cause exists where facts based on reasonably trustworthy information sufficient to cause reasonable person to believe crime committed). The record establishes that through a routine investigation (*See United States Watkins*, 981 F.3d 1224, 1233 (11th Cir. 2020)), the FBI would have inevitably discovered the flash drive contents via a warrant to search the Petitioner's computer.[8]

First, the FBI would have the facts established from Officer Fuch's conversation with Dr. Pollack on May 25, 2017, before Driscoll's death. R., 3–5, 16–19, 23; *See United States v. Dyer*, 580 F.3d 386, 390 (6th Cir. 2009) (magistrate can rely on hearsay for warrant affidavit); *United States v. Ventresca*, 380 U.S. 102, 107–08 (1965) (hearsay can be the basis for issuing warrant). These facts solidify that: (1) Dr. Pollack had been treating the Petitioner weekly for a period of approximately two years before May 25, 2017; (2) the Petitioner's IED diagnosis makes her prone to "aggressive, impulsive, or violent behavior"; (3) on May 25, 2017, the Petitioner manifested those symptoms during a weekly therapy session; (5) the Petitioner's manifestation of those

[8] The FBI did not obtain a search warrant for the Petitioner's computer because they already had all of the incriminating evidence necessary from Wildaughter's flash drive.

symptoms was caused by Driscoll (6) the Petitioner explicitly threatened to kill Driscoll; (7) the Petitioner's therapist found the threat credible and reported it to law enforcement. R., 4–5, 17, 19. Dr. Pollack's reliability and the basis for her knowledge are readily apparent from those facts. *See United States v. Moore*, 661 F.3d 309, 312–14 (6th Cir. 2011) (informant needs to be reliable and establish basis of knowledge).

Second, although the information by Dr. Pollack is insufficient by itself to establish probable cause, it is sufficient when coupled with Wildaughter's disclosures. R., 6, 23–27; *See Dyer*, 580 F.3d at 390; *Ventresca*, 380 U.S. at 107–08; *United States v. Williams*, 10 F.3d 590, 593–94 (8th Cir. 1993) (officer independently confirmed apartment owner where narcotics operation suspected based on informant tip); *United States v. Howard*, 632 F. App'x 795, 802 (6th Cir. 2015) (informant participating in controlled narcotics buy lends informant credibility and corroboration); *United States v. Stearn*, 597 F.3d 540, 556 (3rd Cir. 2010) (informant participating in controlled buy and independent police observation of defendant engaging in behavior is corroboration). Wildaughter's disclosure to Officer Yap established that: (8) on May 25, 2017 between 1:15 P.M. and 4:00 PM, the Petitioner stormed out of her apartment after receiving a bill from HerbImmunity; (9) the Petitioner angrily said, "I'd do anything to get out of this mess Tiff put me in,"; (10) her college roommate then entered the Petitioner's room and reviewed files on her computer; (11) in reviewing those files, the roommate discovered photographs of the Petitioner stalking Driscoll; (12) one picture showed Driscoll eating strawberries; (13) a note addressed to Driscoll refers to giving her a gift; (14) another file titled "Market Stuff" references strychnine; (15) the roommate believed that the Petitioner may be planning to poison Driscoll and (16) the roommate provided a flash drive with documents downloaded from the Petitioner's desktop

confirming what she discovered.[9] R., 6, 24–27. Wildaughter's review of the Petitioner's files and download of them onto the flash drive is akin to an informant performing a controlled buy in a narcotics operation, with the distinction being that here, the informant performed a corroborative, investigative act without government prompting.

Lastly, (17) Driscoll was found dead on the evening of May 25, 2017, and; (18) Driscoll's autopsy results confirmed that her death was caused by ingesting strychnine injected into strawberries, further linking the Petitioner to the crime. R., 51. These toxicology results establish independent, corroborating evidence linking the Petitioner to Driscoll's death. *See Gates*, 462 U.S. at 241–42 (corroborating informant's info can establish reliability); *United States v. Clay*, 579 F.3d 919, 925 (8th Cir. 2009) (co-defendant admission linking the defendant to crime corroborated by autopsy report). Because of the toxicology report confirming "that her death was caused by ingesting strychnine found to have been injected into strawberries," (R., 51), the FBI had sufficient facts to lead a reasonably prudent person to search the contents of the Petitioner's entire computer, an even broader search than Wildaughter's flash drive.

The exclusionary rule intends to place law enforcement where they would have been absent an illegal search, not a worse position. *Nix*, 467 U.S. at 443. Because there was probable cause to search the entirety of the Petitioner's computer independent of anything Officer Yap learned when he impermissibly searched the flash drive, his error was harmless. The preponderance of the evidence shows that a routine law enforcement investigation would have inevitably discovered the incriminating evidence. *See Watkins*, 981 F.3d 1244, 1233.

[9] Numbering of facts and circumstances that would have been contained on the search warrant from Dr. Pollack's disclosure to Officer Fuchs continued here.

II. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT PRECLUDE THE ADMISSION OF CONFIDENTIAL COMMUNICATIONS THAT CONTAIN EXPLICIT THREATS TO SERIOUSLY HARM A THIRD PARTY PREVIOUSLY DISCLOSED TO LAW ENFORCEMENT.

When this Court established the psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1, (1996), it implicitly recognized that, at times, the privilege itself "must give way . . . ." *Id*. at 18 n.19. The only enumerated instance mentioned by this Court was embedded within a footnote and held that the privilege would not extend to communications where "a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id*. ("footnote 19"). Despite the Court recognizing this exception in *Jaffee*, some circuits now reject any such exception to the testimonial privilege. *E.g., United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000); *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003).

Although this Court recognized the psychotherapist-patient privilege "at the purchase price of occasional injustice," (*Jaffee*, 518 U.S. at 18) (Scalia, J., dissenting), the privilege itself was limited to protecting confidential communications. *Jaffee*, 518 U.S. at 9–10. Based on reason and experience, this Court should explicitly hold that because therapists are ethically obligated to warn law enforcement or targets of a patient's threat, the dangerous patient exception pierces the privilege because the communications between the therapist and patient are no longer confidential. With the cat already out of the bag, stuffing it back in for trial serves no good. *Chase*, 340 F.3d at 998 (Kleinfeld, J., concurring); *United States v. Auster*, 517 F.3d 312, 318 n.21 (5th Cir. 2008) ("[o]nce information is released, both client and psychologist lose control over redisclosure.").

A. Standard of Review.

The Court reviews questions of law de novo but reviews the underlying factual determinations by a district court for an abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552,

558 (1988). This Court applies an abuse of discretion standard when reviewing a district court's evidentiary rulings. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997).

B. This Court Implicitly Recognized the Dangerous Patient Exception in *Jaffee.*

When this Court recognized the psychotherapist-patient privilege in *Jaffee v. Redmond*, it also recognized that one limitation of the privilege would be "situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." 518 U.S. 1, 18 n.19 (1996). Two decades before *Jaffee*, the California Supreme Court established that therapists have an affirmative duty to warn either law enforcement or potential victims about credible threats made by a patient during a confidential therapy session. *Tarasoff v. Regents of Univ. of California*, 17 Cal. 3d 425, 441–42 (1976) ("*Tarasoff* duty"). Subsequently, states across the nation statutorily adopted either mandatory or discretionary forms of a therapist's duty to act after a patient provides a reasonably imminent threat against a third party. *See supra* Argument II.B.3. The limitation on the confidentiality between a psychotherapist and their patients influenced this Court's implicit recognition of a dangerous patient exception in *Jaffee* in three-parts.

First, the psychotherapist-patient privilege only applies to confidential communications. *Jaffee*, 518 U.S. at 9–10. No matter the specific type of privilege, a threshold requirement is that "[t]he communications must originate in a confidence that they will not be disclosed." 8 WIGMORE, EVIDENCE § 2285 (J. McNaughton rev. 1961). The priest-penitent, attorney-client, and physician-patient privileges are all limited to confidential communications, unlike spousal privilege. *Trammel v. United States*, 445 U.S. 40, 51 (1980). This Court explicitly recognized the privilege applied to "confidential communications between a licensed psychotherapist and her patients . . . ." *Jaffee*, 518 U.S. at 15. Second, this Court noted that therapists must disclose "the relevant limits

on confidentiality[,]" to their patients based on ethical obligations within their profession. *Jaffee*, 518 U.S. at 13 n.12 (referencing AMERICAN PSYCHOLOGICAL ASSOCIATION, *Ethical Principles of Psychologists and Code of Conduct*, Standard 5.01 (Dec. 1992)). This ethical duty of therapists to breach confidentiality to protect the patient's welfare or community members has existed since 1957. *Tarasoff*, 17 Cal. 3d 425, 441–42 (1976).

Third, this Court stated that "the privilege" must give way, referring to the testimonial privilege. *Jaffee*, 518 U.S. 1, 18 n.19. This Court held that the privilege must give way when a psychotherapist's disclosure occurs to protect the safety of either the party threatened by the patient or the patient when they threaten to harm herself. *Id*. This exception directly ties in with the first and second points of this argument. Because therapists ethically breach confidentiality when they believe a patient has levied a credible threat during their course of treatment, then those communications are no longer confidential.

1. The Dangerous Patient Exception Appropriately Incorporates a True Threats Analysis Based on a Mental Health Professional's Experience and Expertise.

Because the psychotherapist-patient privilege only gives way under the dangerous patient exception if "*a serious threat of harm to the patient or to others* can be averted only by means of a disclosure by the therapist." *Jaffee*, 518 U.S. at 18 n.19 (emphasis added). Dr. Pollack's expertise as a trained mental health professional and lead treatment provider to the Petitioner for two years led her to believe the Petitioner made a true threat. R., 4–5, 17, 19.

The two prongs of Boerum Health and Safety Code § 711(1) statutorily build in a "true threat" analysis under the First Amendment and take the Petitioner's statements out of the realm of agitated hyperbole. R., 2. To establish what constitutes a true threat of harm, this Court should

adopt the standard enumerate in Boerum Health and Safety Code § 711(1), requiring that a patient make an *actual threat* based on the psychotherapist's *clinical judgment*.

Circuits are split on the precise test to be applied in determining a true threat. The objective standard asks whether a reasonable person would find that a threat existed based on a fact-specific inquiry, the language, and the context of the statements. *E.g. United States v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015); *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) (whether an ordinary, reasonable recipient familiar with context would interpret speech as a threat). The subjective standard asks whether "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence . . . ." *Virginia v. Black*, 538 U.S. 343, 359 (2003); *United States v. Parr*, 545 F.3d 491, 499–500 (7th Cir. 2008). Because a dangerous patient exception should incorporate both the objective and subjective standards of a true threat, and Dr. Pollack did so here, the Petitioner's privilege must give way. The Petitioner claims that "I'm going to kill her" was not a true threat (R., 38); however, Dr. Pollack used her experience, including two years of treating the Petitioner and experience treating other patients with IED, to determine that this was a credible threat. R., 22 ("[i]n my professional judgment [Petitioner] was displaying the signs of a dangerous patient and thus I had the legal duty to warn her intended victim").

2. Logic Requires That the Dangerous Patient Exception Still Applies Even if the Threat Was Not Averted.

Although the second prong of *Jaffee*'s footnote 19 requires that the threat "*can be averted only by means of a disclosure by the therapist*[,]" this must necessarily include instances in which a patient successfully carries out the threat. 518 U.S. at 18 n.19 (emphasis added). It would defy logic if "a dangerous patient could regain protection of the privilege by simply killing the victim." R., 39. The circuits that reject the dangerous patient exception distinguish between disclosure to protect a potential victim and testifying after the fact at trial. *See Chase*, 340 F.3d at 987 ("[t]here

is not necessarily a connection between the goals of protection and proof."). But, this Court can rely on common sense when setting boundaries of legal rules. *Cf. Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (using common-sense for reasonable and articulable suspicion); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 653 (1995) (using common-sense for ERISA interpretation); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 598–99 (1837) ("[t]he books are full of cases to this effect . . . if indeed, so plain a principle of common sense and common justice stood in any need of authority to support it."). Although not explicitly mentioned in footnote 19, this Court understood that the details of creating an exception to the privilege on a case-by-case basis. *Jaffee*, 518 U.S. at 18. This Court should rely on common-sense and logic that once a psychotherapist breaches confidentiality to try to avert harm, thereby causing the privilege to give way, a patient does not regain the privilege for successfully carrying out their threat.

3. Reason and experience persuasively urge this Court to hold that the dangerous patient exception is a limitation to the psychotherapist-patient privilege.

Fed. R. Evid. 501 explicitly guides courts to rely on "reason and experience" for the governance of common-law privileges. This rule is a byproduct of long-standing tradition predating the adoption of the Federal Rules of Evidence.[10] *See Wolfle v. United States*, 291 U.S. 7, 12 (1934) (reason and experience prevented extending privilege to communication from husband to wife recorded by a stenographer). *See also Funk v. United States*, 290 U.S. 371, 383 (1933). The states' policy decisions are a significant factor in this Court's consideration of reason and experience. *Jaffee*, 518 U.S. at 12–13. This Court not only relied upon the consensus among the states when recognizing the psychotherapist-patient privilege, (*Jaffee*, 518 U.S. at 13), but also

[10] The Federal Rules of Evidence were adopted in 1972. Fed. R. Evid. Refs & Annos.

when amending the scope of spousal privilege. *Trammel v. United States*, 445 U.S. 40, 47–50 (1980); *Funk*, 290 U.S. at 380 (this Court looks to "the trend of congressional opinion and of legislation . . ." generally for "sound reason."). Although there may be a circuit split on the dangerous patient exception, the states are nearly unanimous in recognizing a therapist's ethical obligation to warn from *Tarasoff*.

Here, the state of Boerum is among the majority of states nationwide that recognize a *Tarasoff* duty either statutorily or at common law. R., 2, 19, 52. A 2014 survey on the status of *Tarasoff* duties nationwide reveal that twenty-three states have codified a mandatory *Tarasoff* duty, ten states have adopted a mandatory *Tarasoff* duty through their common law, and eleven states permissively allow a therapist to breach confidentiality if a threat is present per *Tarasoff*.[11] In all, forty-four states (not including Boerum) have recognized some form of limitation to confidentiality between a therapist and a patient, and thirty-three of those states *require* therapists to breach confidentiality where their professional judgment leads them to believe a patient levies a credible threat against themselves or another person. *Id*. Comparatively, when this Court amended the limits of spousal privilege in *Trammel v. United States* and held that the witness-spouse rather than the accused-spouse exercises the discretion of invoking the privilege, twenty-four states still allowed an accused-spouse to exercise the privilege. 445 U.S. at 48–50. If this Court intends to stay true to the principle espoused in its precedents and the Federal Rules of Evidence to rely on reason and experience, then it should adopt the dangerous patient exception.

4. Because the public's right to every person's evidence outweighs an individual's desire to protect communications already disclosed to law enforcement, the dangerous patient exception is an appropriate exception to the privilege.

[11] Rebecca Johnson et. al, *The Tarasoff Rule: The Implications of Interstate Variation and Gaps in Professional Training*, 42 J. AM. ACAD. PSYCHIATRY L. 469, 470 (2014).

When this Court established the psychotherapist-patient privilege, it weighed the centuries-old presumption that "the public . . . has a right to every man's evidence," against whether a psychotherapist-patient privilege is a public good, "transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee*, 518 U.S. at 9. This Court concluded that society's interest in a psychotherapist-patient privilege outweighed the need for probative evidence. *Id*. at 15. Employing this same balancing test to communications that originate in a confidential psychotherapist-patient relationship but are later breached under the ethical and legal obligation to warn potential victims of a credible threat, leads to a different conclusion.

Here, the Fourteenth Circuit concluded that "once the confidentiality of Dr. Pollack's and [the Petitioner's] conversations was breached, there simply was no other compelling interest to keep such probative evidence from the jury." R. 53. Similarly, the Fifth Circuit reasons that "[i]f the therapist's professional duty to thwart the patient's plans has not already chilled the patient's willingness to speak candidly, it is doubtful that the possibility that the therapist might also testify in federal court will do so." *Auster*, 517 F.3d at 318. Although the Ninth Circuit rejects the dangerous patient exception, Judge Kleinfeld's concurring opinion (in judgment only) in *United States v. Chase* aptly summarizes why this balancing supports the dangerous patient exception: "[w]here disclosure [is] necessary, the social interest in assuring that the judge and jury know the whole truth greatly exceeds the value of preserving any remaining shreds of the confidential therapeutic relationship." 340 F.3d at 998.

On the other hand, the Petitioner and circuits that reject the dangerous patient exception hypothesize that allowing a psychotherapist to testify against a patient will create an adverse chilling effect on individuals seeking mental health help. R., 57; *Ghane*, 673 F.3d at 785; *Chase*, 340 F.3d at 990–91; *Hayes*, 227 F.3d at 585. Despite this enumerated limitation outlined in *Jaffee*,

the Sixth, Eighth, and Ninth Circuits disregard the dangerous patient exception set forth in footnote 19 as dictum. *Ghane*, 673 F.3d at 784; *Chase*, 340 F.3d at 995 (Kleinfeld, J., concurring) ("[t]he only reason we have any room to opine to the contrary, as the majority does, is that the Court spoke in dicta."); *Hayes*, 227 F.3d at 584. Rather than adopt this Court's guidance on the issue, these circuits have extended the psychotherapist-patient privilege beyond the parameters established in *Jaffee* by distinguishing between a therapist's duty to protect and trial testimony. *Hayes*, 227 F.3d at 586; *Ghane*, 673 F.3d at 785; *Chase*, 340 F.3d at 987. These circuits advance policy reasons to preclude a psychotherapist's testimony despite lacking empirical evidence to support this claim. Although this anecdotal assertion seemingly has facial validity, empirical data contradicts such a conclusion.[12] Without an overriding policy justification, the presumption that society is entitled to every person's evidence prevails. *See Jaffee*, 518 U.S. at 15. Once a therapist reveals confidential communication to the outside world, "[t]he marginal increase . . . in effective therapy achieved by privileging psychotherapist-patient communications at trial, but still allowing the therapist to warn threatened third parties, is *de minimis*." *Auster*, 517 F.3d at 319 (emphasis in original).

C. Even If This Court Rejects the Dangerous Patient Exception, Dr. Pollack's Testimony Was Harmless.

Even if this Court rejects the dangerous patient exception, the Court should affirm Petitioner's conviction because the Court should only reverse a jury's verdict when improperly admitted evidence is harmful in light of the full trial record. Fed. R. Crim. P. 52; *Viramontes v. City of Chicago*, 840 F.3d 423, 430 (7th Cir. 2016) ("[w]e will not reverse if the error is harmless in light of the trial record as a whole."); *United States v. Sanabria*, 645 F.3d 505, 516 (1st Cir.

[12] *See* Elisia Klinka, *It's Been A Privilege: Advising Patients of the Tarasoff Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 FORDHAM L. REV. 863, 895–97 (2009). Commentators shared the same fears of a chilling effect post-*Tarasoff*, but the data rejects such a chilling effect because "patients seem to accept that there are limits of confidentiality in psychotherapy when they are informed of a *Tarasoff* duty." *Id*. at 896.

2011) (conviction only vacated where the effect of the error is harmful); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005) (to reverse, or vacate, the court must find an error that caused a substantial injurious effect on the jury in light of full record) (citing *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). The United States bears the burden of establishing the improperly admitted testimony did not materially affect the verdict. *United States v. Kilpatrick*, 798 F.3d 365, 378–79 (6th Cir. 2015). Even absent Dr. Pollack's testimony, there is a firm and definite belief that the jury would have convicted the Petitioner, making her testimony harmless.

Dr. Pollack's testimony was limited to establishing the Petitioner's intent to kill or injure Driscoll. R. 16–23, 52–53. Dr. Pollack's testimony regarding the Petitioner's underlying IED diagnosis and specific statements during the therapy session undoubtedly had *some* impact on the jury; however, this testimony was not substantially injurious in light of the record. The record establishes independent evidence of the Petitioner's behavior on May 25, 2017, threatening comments towards Driscoll, as well as significant premeditation and planning.

First, evidence of the Petitioner's plan overwhelmingly establishes her intent to kill or injure Driscoll. Wildaughter discovered photos that showed the Petitioner had been stalking Driscoll for some time before May 25, 2017. R., 25. Wildaughter discovered the Petitioner's extensive researched on different poisons, meticulously noting the type that would work best if injected into strawberries, the desired dosage, and the symptoms ingesting the poison would cause. R., 6, 10, 26–27. These files also revealed a recipe to make chocolate covered strawberries with the "secret stuff," a reference made clear by the "budget" document's $212 expense for "Tiff Strawberries – Secret Strychnine Stuff." R., 10. Lastly, these documents revealed that the Petitioner urgently shipped Driscoll an item on May 24, 2017, (R., 7) *before* the Petitioner disclosed to Dr. Pollack that, "[a]fter today, I'll never have to see her again," referring to Driscoll

during their session on May 25, 2017. R., 4, 19. Although probative, the jury did not need Dr. Pollack to reach their verdict. The evidence of Petitioner's meticulous plan and premeditation, such as identifying a favorite snack of Driscoll, researching poison, and the eventual toxicology confirmation that the poison the Petitioner settled on caused Driscoll's death, independently establishes intent to kill or injure. R., 6, 8–10, 25, 51.

Second, although Wildaughter is not a trained psychotherapist or the Petitioner's treatment provider, she can establish the Petitioner's state of mind. Wildaughter, the Petitioner's college roommate for eight months, was frightened on May 25, 2017, because of the Petitioner's anger after receiving a bill from HerbImmunity. R., 24, 27. Wildaughter testified that the Petitioner angrily said, "I'd do anything to get out of this mess Tiff put me in," before storming out of their shared apartment. *Id*. Although this threat is not directly analogous to the one the Petitioner made during her session with Dr. Pollack, it impacted Wildaughter enough to go to the police.

Because of the independent evidence establishing the Petitioner's intent to kill or injure Driscoll based on premeditation and planning of a unique crime, there was overwhelming evidence linking the Petitioner to Driscoll's death even absent Dr. Pollack's testimony. R., 6, 8–10, 24–27, 49, 56. Thus, any error in admitting Dr. Pollack's testimony was harmless in light of the full record.

III. THE GOVERNMENT DOES NOT VIOLATE AN INDIVIDUAL'S RIGHT TO DUE PROCESS WHEN IT DOES NOT DISCLOSE IMMATERIAL EVIDENCE.

Although the government violates an individual's right to due process when the prosecution suppresses evidence favorable to an accused, the evidence must also be material to guilt or punishment. *Brady*, 373 U.S. 83, 87 (1963). Evidence is material only if there is a reasonable probability that the trial's result would have been different if the parties disclosed the evidence. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The Petitioner claims that her right to due process was violated here because the government did not disclose two FBI 302 Investigative Reports ("FBI reports"). R., 12–13, 43–48, 55–56. This Court has held that inadmissible evidence is not material because it "is not 'evidence' at all." *Wood v. Bartholomew*, 516 U.S. 1, 6, (1995). If the jury would not have heard the evidence, either directly or for impeachment purposes, it necessarily follows that it cannot be material. Because the Petitioner could not use either of these reports at trial and the Petitioner failed to establish more than speculation that these reports could have led to material evidence, her claim must fail.

A. Standard of Review.

Whether the government violated the requirements of *Brady* is a mixed question of law and fact. This Court reviews questions of law de novo, and factual determinations for an abuse of discretion. *See Pierce,* 487 U.S. at 557–58. *See also United States v. Morales*, 746 F.3d 310, 316 (7th Cir. 2014); *United States v. Spencer*, 873 F.3d 1, 6 (1st Cir. 2017).

B. Inadmissible Hearsay Reports are Per Se Immaterial under *Brady* Because They Cannot Be Used as Either Direct Evidence or for Impeachment Purposes.

Although evidence broadly refers to "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." (EVIDENCE, Black's Law Dictionary (11th ed. 2019)), it is only material "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. Simply, if the jury would not have heard the evidence, either directly or for impeachment purposes, there is no basis to believe it would have altered their verdict. This Court implicitly recognized that inadmissible evidence is per se immaterial where it cannot be used at trial because inadmissible evidence "is not 'evidence' at all." *Wood*, 516 U.S. at 6.

Brady is, at its core, a trial right. *Brady*, 373 U.S. at 87 (due process violation is in the fairness of the trial); *United States v. Mathur*, 624 F.3d 498, 506–07 (1st Cir. 2010) ("[i]t is, therefore, universally acknowledged that the right memorialized in *Brady* is a trial right."); *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010) ("the *Brady* right...is a *trial* right… [that] exists to preserve the fairness of a trial verdict . . ."). *Brady* seeks to prevent prosecutors from becoming "an architect of a proceeding that does not comport with standards of justice . . ." *Brady*, 373 U.S. at 88.

The Petitioner does not contest that both FBI reports were inadmissible for trial purposes. R., 43. This concession necessarily makes the evidence immaterial for *Brady* purposes; if the Petitioner could not use the FBI reports at trial for *some* purpose, there is no basis to believe it could have altered the jury's guilty verdict. *See Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) ("these statements may well have been inadmissible at trial . . . and therefore, as a matter of law, 'immaterial' for *Brady* purposes."); *United States v. Salem*, 578 F.3d 682, 686 (7th Cir. 2009) (only admissible evidence can be material, for only admissible evidence can lead to a different verdict).

In *Wood v. Bartholomew*, this Court held that polygraph results were immaterial precisely because the defendant "could have made no mention of them either during argument or while questioning witnesses." 516 U.S. at 6. In *Hoke v. Netherland*, statements that the court would have precluded from evidence under Virginia's Rape Shield Statute were held immaterial for identical reasons. 92 F.3d at 1356 n.3. In both *Wood* and *Hoke*, inadmissible evidence was held immaterial because of the exact scope of *Brady*.

Here, the FBI 302 reports are akin to *Wood's* inadmissible polygraphs and *Hoke's* inadmissible witness statements. Because the FBI 302 reports could not serve as direct evidence

because they contained hearsay and could not be used to impeach any of the witnesses put forward by the prosecution at trial, the jury would not have heard them even if they were provided to the defense counsel. R., 56. This Court should stand with its precedent from *Wood*, reflected in *Hoke*, and explicitly adopt a bright-line rule that inadmissible evidence is per se immaterial under *Brady*. Adopting this rule would disallow evidence which the parties could not use during an argument, nor for impeachment purposes, to serve as a sound basis for a *Brady* claim.

It is also not the government's duty to build the defense's case for them. *Boss v. Pierce*, 263 F.3d 734, 747 (7th Cir. 2001) ("*Brady* . . . does not require the prosecution to assist in presenting the defense's case . . .") (Flaum, J., dissenting); *United States v. Ruiz*, 536 U.S. 622, 629 (2002) ("[T]he Constitution does not require the prosecution to share all useful information with the defendant."); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("[T]here is no general constitutional right to discovery in a criminal case,"). Although this is not the Government's responsibility, the Petitioner seeks such an outcome. R., 43–48. The Petitioner claims that had this evidence been disclosed, she could have discovered other evidence to support a third-party culpability defense. R.at 46, 48. Third-party culpability evidence is "routinely excluded unless evidence connects the third-party to the crime." *Scrimo v. Lee*, 935 F.3d 103, 116 (2d Cir. 2019). This Court has affirmed rules related to third-party culpability that exclude such evidence when they are "remote and lack such connection with the crime . . ." *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006) (citing 41 C.J.S., HOMICIDE § 216, pp. 56–58 (1991)). Here, the Petitioner seeks to shift the burden of building a defense onto the prosecution, a troubling post-hoc assertion because she was aware that Driscoll was in debt herself and that Driscoll's father was covering those debts. R., 4, 18; *contra* R., 11. Despite knowing this, the Petitioner claims that not knowing the upstream distributor's name was significant enough to not pursue a third-party culpability

defense. R., 4, 18; *contra* R., 11. In any event, neither of these FBI reports could be used to establish such a defense *at trial* and are "not 'evidence' at all." *See Wood*, 516 U.S. at 6.

C. Alternatively, Even If This Court Finds That Inadmissible Evidence Can Be Material, the Petitioner Must Establish More Than Mere Speculation That the Non-Disclosed, Inadmissible Evidence Could Have Led to Direct Evidence.

Even if inadmissible evidence can be material under *Brady*, the FBI 302 reports here are immaterial because they do not undermine the confidence in the verdict. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995). The district court did not abuse its discretion or commit clear error when it denied the Petitioner's motion for a new trial. Several circuits that allow inadmissible evidence to be material requires that it "must lead to admissible evidence." *Coleman v. Calderon*, 150 F.3d 1105, 1116–17, *rev'd other grounds*, 525 U.S. 141 (9th Cir. 1998); *Wright v. Hopper*, 169 F.3d 695, 703–04 (11th Cir. 1999) (substituting "must" for "would" have produced admissible evidence). In other words, a party arguing that evidence is admissible must base such argument on more than speculation. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) ("[a] court cannot speculate as to what evidence the defense might have found if the information had been disclosed.").

In *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998), the Eighth Circuit held that, even if inadmissible evidence could be material, defendants must assert more than "mere speculation" to establish inadmissible evidence as material. There, the jury convicted the defendant of rape. *Id*. at 603. The government did not disclose to the defendant that the forensic analyst who performed a serology test on a bathroom towel at the scene, showing different blood than the victim on the towel, would be incompetent to testify. *Id*. at 603–04. The court noted the defendant had a chance to test the towel independently but did not. *Id*. at 604–05. Additionally, the government's expert serology witness established that the incompetent analyst performed improper and inadequate testing on the towels from the outset. *Id*. at 604–05. Similarly, the Petitioner claims that she would

have pursued a third-party culpability claim if she knew the FBI reports existed. As in *Madsen*, the Petitioner was aware of the basic underlying facts for a third-party culpability defense but did not pursue it. *See* R., 4, 18. Further, the overwhelming evidence linking the Petitioner to Driscoll's murder (*see supra* Argument II.C) is akin to the government's expert serology witness.

This overwhelming evidence linking the Petitioner to Driscoll's murder is why, no matter what standard this Court adopts, there is no reasonable probability that the evidence at issue would have undermined the verdict.[13] Assessing the cumulative effect of the evidence for materiality purposes requires laying them out "in the context of the specific elements of the charged offense." *United States v. Sipe*, 388 F.3d 471, 479 (5th Cir. 2004). Here, 18 U.S.C. §§ 1716(j)(2) & (3) requires establishing that (1) the defendant knowingly and intentionally (2) deposited for mailing or delivery by mail (3) a package containing poisoned food (4) with the intent to kill or injure another (5) resulting in the death of another. R., 2. Although the Petitioner contends that she was convicted based on "wildly circumstantial evidence" and the FBI investigative reports provide two alternative suspects' names, she ignores the other overwhelming evidence linking her to the murder. R., 48. The circumstances of Driscoll's death, ingesting strychnine from strawberries she received in a fruit basket, combined with the evidence from the Petitioner's computer outlining the premeditated plan to poison Driscoll in that fashion, is too specific for the Petitioner to undermine confidence in the jury's verdict. R., 49, 51, 56.

CONCLUSION

For the foregoing reasons, the United States of America respectfully asks that this Court affirm the decision(s) of the Fourteenth Circuit Court of Appeals.

[13] Neither the Fifth nor Seventh Circuit distinguish inadmissible and admissible evidence for the purpose of materiality. *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999); *United States v. Martin*, 248 F.3d 1161, 5 (7th Cir. 2000) *as corrected* (Feb 7, 2001).