Team #25 P

Docket No. 20 – 2388

IN THE

SUPREME COURT OF THE UNITED STATES

SAMANTHA GOLD,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER

COUNSEL FOR THE 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 without first obtaining a warrant and after conducting a broader search than the one conducted by the private party.

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

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The District Court's Bench Opinion appears in the record at pages 16-49. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 51-59.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provision is provided below

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Standards of Review

The analysis of a lower court's decision on the contours of the psychotherapist-patient testimonial privilege is de novo. *U.S. v. Hayes*, 227 F.3d 578, 581 (6th Cir. 2000). For review of a fourth amendment seizure, most courts found the appropriate standard as de novo; while the facts are reviewed deferentially. *U.S. v. Chaidez*, 919 F.2d 1193, 1197-8 (7th Cir. 1990). Review of a *Brady* holding presents a mixed question of law and fact, where application of the facts to the law is reviewed de novo. *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 460 (6th Cir. 2015). Similarly, a court will review the holding on a motion for a directed verdict de novo. *X Techs., Inc. v. Marvin Test Sys., Inc.*, 719 F.3d 406, 411 (5th Cir. 2013).

B. Statement of the Facts

In or about and between June 6, 2017, Ms. Gold was indicted by a grand jury for mailing or delivery by mail a package containing poisoned food. R. at 1. On May 25, 2017, Ms. Gold had

a session with her psychiatrist, Dr. Chelsea Pollak ("Dr. Pollak"), where she expressed anger that her friend Tiffany Driscoll ("Ms. Driscoll") had gotten her into debt from buying "HerbImmunity" products. R. at 4. Statements made by Ms. Gold, during the session caused Dr. Pollak to fear Ms. Gold may take action to harm Ms. Driscoll. R. at 4. Dr. Pollack feared Ms. Golds diagnosis of Intermittent Explosive disorder ("IED"), characterized by episodes of impulsive, agitated, and possibly violent behavior, may present itself as violence towards Ms. Driscoll. R. at 5. Dr. Pollak reported Ms. Gold's behavior to Joralemon Police Officer Nicole Fuchs ("Officer Fuchs") who, upon going to Ms. Gold's home, observed that Ms. Gold appeared calm, rational, and not at all a danger to herself or others. R. at 5.

A few hours later, Gold's roommate Jennifer Wildaughter ("Ms. Wildaughter") met with Livingston Police Officer Aaron Yap ("Officer Yap") to inform him that she had searched files on Ms. Gold's laptop and found evidence that led her to believe Ms. Gold was planning to poison Ms. Driscoll. R. At. 6. Ms. Wildaughter said Ms. Gold had come home agitated earlier that afternoon and had left her laptop open upon exiting their apartment. R. at 6. Upon searching Ms. Gold's laptop Ms. Wildaughter specifically identified timestamped photographs of Ms. Driscoll unlocking her door and eating chocolate covered strawberries in addition to viewing a text file mentioning strychnine as evidence of Ms. Gold's plot against Ms. Driscoll. R. at 6.

Although that was the extent of her personal search of Ms. Gold's computer, Ms. Wildaughter copied the entirety of Ms. Gold's desktop files onto a flash drive and brought it to Officer Yap. R. at 6. Officer Yap conducted an excessively far reaching and thorough search of all Ms. Gold's files on the flash drive, continuing to search additional files even after he found the information related to Ms. Wildaughter's accusation. R. at 6. Officer Yap's thorough examination of the flash drive resulted in him confirming that Ms. Gold planned to poison Ms.

Driscoll and was instrumental in bringing charges against Ms. Gold. R. at 6.

On June 2nd, 2017, the FBI interviewed Chase Caplow in the course of her investigation of Ms. Driscoll's death. R. at 11. During the course of the interview, Caplow told Ms. Driscoll told Caplow two weeks before her death about a debt she owed to Martin Brodie. R. at 11. Caplow could not provide specifics on the amount of money but did indicate that Mr. Brodie had a reputation for being violent. R. at 11. The interviewing agent planned to interview Mr. Brodie and determine if there is information that would warrant further investigation. R. at 11.

Additionally, on July 7th, 2017, the FBI received an anonymous phone call alleging that Belinda Stevens was responsible for Ms. Driscoll's murder and indicated that both Belinda Stevens and Ms. Driscoll were involved with HerbImmunity. R. at 12. A preliminary investigation was conducted but did not go further to determine the veracity of the tip. R. at 12.

Ms. Gold has a credible *Brady* claim on the grounds that these possible replacement offenders were not disclosed to her, regardless of evidentiary admissibility.

C. Procedural History

Samantha Gold ("Ms. Gold") was indicted for sending a box containing poisoned food items, with the intent to kill or injure another, and which resulted in the death of another, in violation of Title 18, United States Code, Sections 1716(j)(2), (3), and 3551 et seq. R. at 1. Ms. Gold filed a motion to suppress to exclude: (1) the testimony and notes of her psychiatrist and (2) information seized from her computer. R. at 15-41. The United States District Court for the Eastern District of Boerum ("District Court") denied Ms. Gold's motion to suppress both pieces of evidence. R. at 41. Subsequently, Ms. Gold filed a motion for post-conviction relief on the basis of two alleged *Brady* violations in the District Court. R. at 42-49. The District Court denied Ms. Gold's motion for post-conviction relief. R. at 49. Subsequently, Ms. Gold filed an

interlocutory appeal pursuant to 18 U.S.C. § 3731 with the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit"). R. at 54. On appeal, Ms. Gold argued: (1) the dangerous-patient exception to testimonial privilege is pre-empted by federal common-law privilege; (2) the private search doctrine cannot apply to electronic devices in its current form; (3) Inadmissible evidence can still be material and can give rise to *Brady* claims. R. at 50-59. In affirming the District Court, the Fourteenth Circuit disregarded consequential constitutional standards. R. at 57. Accordingly, this appeal follows. R. at 60.

SUMMARY OF THE ARGUMENT

The psychotherapist-patient testimonial privilege precludes the admission of Dr. Pollak's testimony, despite her breach in confidence by complying with Boerum's statutory duty to warn. The breach in confidence required by the duty to warn is isolated in scope to situations in which a third party is in likely danger within the near future. Holding otherwise would contravene the intent of this Court established in *Jaffee*.

Recognizing a "dangerous person" exception to the privilege would eviscerate the benefits of effective mental health treatment by stripping the trust and confidence of patients established by the privilege. A "dangerous person" exception would also threaten to undermine state confidentiality laws and cause inconsistent use of the privilege in federal court. Duty to warn statutes change state-by-state, finding such an exception exists would severely undermine notions of federalism and result in widespread inconsistency of application of the privilege in federal court.

Officer Yap's search of the flash drive containing Ms. Gold's digital files violated the Fourth Amendment. Officer Yap's search of Ms. Gold's desktop far exceeded the scope of Ms. Wildaughter's private search; examining files well after he had identified those related to Ms.

Wildaughter's accusation. Officer Yap infringed upon digital files that had an expectation of privacy unfrustrated by the private search. Under the superior narrowly tailored particularity approach used by the Sixth and Eleventh Circuits in analyzing government recreation of private searches that pertain to electronics, Officer Yap's search clearly violated Ms. Gold's Fourth Amendment right to privacy. Therefore, the evidence gained from Officer Yap's expanded search must be suppressed.

The prosecution's failure to disclose the two material reports solely on the grounds that the information would be inadmissible at trial resulted in a violation of the requirements of *Brady* because both reports would have led to exculpatory evidence. Materiality is met where inadmissible evidence would have led to exculpatory evidence, resulting in the reasonable probability that the proceeding would have had a different outcome. The reports made to law enforcement would have led to exculpatory evidence with a reasonable probability of changing the outcome of the case. Through the informants' reports, two additional suspects were implicated, one expressing an alternate motive for the murder of Ms. Driscoll. It was in violation of the requirements of *Brady* to withhold disclosure of the two reports based solely on the ground that they were inadmissible. Although a *Brady* violation typically results in a new trial, here, where the remaining viable evidence could not have resulted in reasonable persons differing on the insufficiency of said evidence, this Court should dismiss.

ARGUMENT

I. DESPITE COMPLIANCE WITH HER DUTY TO WARN, THE PSYCHOTHERAPIST-PATIENT TESTIMONIAL PRIVILEGE PRECLUDES THE ADMISSION OF DR. POLLAK'S TESTIMONY REGARDING MS. GOLD'S COMMUNICATIONS DURING TREATMENT TO PROMOTE PUBLIC HEALTH AND RESPECT STATE CONFIDENTIALITY LAWS.

The psychotherapist-patient testimonial privilege ("the privilege") precludes the admission of Dr. Chelsea Pollak's ("Dr. Pollak") testimony and records of confidential communications that occurred during the course of Appellant Samantha Gold's ("Ms. Gold") psychotherapy treatment, despite Dr. Pollak's compliance with her duty to warn, because the interests in public health and safety served by the privilege remain wholly intact. The recognition of a "dangerous patient" exception would dispose of those very interests the privilege and this Court aim to instill, undermine state confidentiality laws, and cause inconsistency with the application of the privilege. A psychotherapist's satisfaction of a statutory duty to warn does not negate, nor weaken, the interests served by the privilege, and, as such, does not create a "dangerous patient" exception to the federal common law privilege. When Dr. Pollak exercised her statutory duty to warn, breaching her confidentiality with Gold, she did so for the isolated purpose of attempting to protect Tiffany Driscoll. The privilege's wide aim of encouraging those who need it to seek psychotherapy remains untouched by Dr. Pollak's warning to law enforcement, and finding a "dangerous patient" exception would deter those who need the help most and undermine state confidentiality laws. Thus, Dr. Pollak's testimony and records are privileged under Federal Rule of Evidence 501, precluding admissibility at trial, and this evidence should be suppressed.

A. DR. POLLAK'S COMPLIANCE WITH BOERUM'S STATUTORY DUTY TO WARN DOES NOT ABROGATE THE PSYCHOTHERAPIST-PATIENT TESTIMONIAL PRIVILEGE AND IS JUSTIFIED TO PROTECT THIRD PARTIES IN HARM'S WAY.

The psychotherapist-patient testimonial privilege precludes the admissibility of Dr. Pollak's testimony, despite her breach in confidentiality by complying with her statutory duty to warn. This is to preserve the public wellbeing that this Court has recognized as sufficiently important to overrule any benefits received from this evidence at trial. *Jaffee v. Redmond*, 518

U.S. 1, 9 (1996). A breach in the confidentiality established between psychotherapists and patients stemming from a statutory duty to warn does not negate the societal interests of the privilege. *U.S. v. Hayes*, 227 F.3d 578, 584 (6th Cir. 2000); *U.S. v. Ghane*, 673 F.3d 771, 786 (8th Cir. 2012); *U.S. v. Chase*, 340 F.3d 978, 991 (9th Cir. 2003); *State v. Expose*, 872 N.W.2d 252, 258 (Minn. 2015). A statutory duty to warn is an ethical mandate which lifts the confidentiality of psychotherapist-patient communications in response to a dangerous patient, and does nothing to abrogate the privilege of those communications in court. *Hayes*, 227 F.3d at 586. Allowing this duty to extend its temporal confidentiality-breaching scope as to permit the psychotherapist to testify on privileged communications to further an evidentiary goal already weighed against by the Court creates an exception where no exception exists. Boerum's statutory duty to warn permits a breach in confidentiality in order to protect third parties who are likely in harm's way.[1] It does not authorize the dissemination at court of these privileged communications as this would expand the purpose of the statute: to protect third parties from violence.

The confidentiality established in psychotherapy-patient communications is an intensely important construct that must be protected, and should only be breached in the most exceptional circumstances. As contemplated by a majority of states, including Boerum, one exceptional circumstance arises when a third party is in likely danger in the foreseeable future. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976); La. Stat. Ann. § 9:2800.2; Minn. Stat. Ann. § 148.975; Colo. Rev. Stat. Ann. § 13-21-117; Restatement (Second) of Torts § 315 (1965); George C. Harris, The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote, 74 Wash. L. Rev. 33 (1999). This duty to warn was discussed in the seminal case of *Tarasoff*, in which the California Supreme court found a duty to

[1] Boerum Health and Safety Code § 711(1).

warn exists where a patient's communications to a psychotherapist reveals that a third party is in likely danger from the patient. 551 P.2d at 347.

The court in *Tarasoff* opined on the benefits and value of maintaining confidentiality between patients and their respective psychotherapists; specifically, this confidentiality facilitates effective mental illness treatment and protects the privacy of patients. *Id*. at 346. However, the court found that these benefits must be weighed against the public interest in protection from violent assault. *Id*. Having weighed these countervailing concerns, the court determined that the protection of third parties threatened with foreseeable violence outweighs the value of absolute confidentiality in patient communications when presented with such a situation. *Id*.

It is important to note that the court in *Tarasoff* took great pains in weighing the competing interests, and in no way minimized the importance of confidence in mental health communications. *Id*. at 345-7. To the contrary, the great lengths the court in *Tarasoff* takes to explore every possible issue with establishing a duty to warn only bolsters the importance of maintaining psychotherapist-patient confidentiality. The court acknowledged that the open and confidential nature of psychotherapist-patient communications encourages patients to express threats of violence. *Id*. at 347. Only where there is a foreseeable, likely threat of violence against a third person does the duty arise, and psychotherapists should certainly not routinely disclose every possibly threatening communication. *Id*. Even when the duty to warn does present itself, requiring a breach in confidentiality, the court posits that a psychotherapist must do so "discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger." *Id*. Further indicating that this breach of confidentiality is limited this isolated event, the court held that "[t]he revelation of a communication under the above circumstances is not a breach of trust." *Id*. The great deal of

importance imputed to the confidentiality between psychotherapists and the respective patients demands that this confidentiality only be breached under the most necessary of circumstances. Boerum Health and Safety Code § 711 supports this conclusion in its construction and use of terms. Boerum's duty to warn contains plain language which allows the confidentiality to be lifted only where "[t[he patient has made an actual threat to physically harm [...] an identifiable victim(s); and b. [...] the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat." Boerum Health and Safety Code § 711(1). The statute makes clear that the breach of confidentiality must be confined and restricted to use in this circumstance. Once the warning has been given, whether to law enforcement or to the third party directly, the duty is discharged, along with the ability to breach psychotherapist-patient confidentiality.

California holds a duty to warn statute relatively similar to that of Boerum, yet the California statute differs slightly and allows for the testimony of psychotherapist-patient communications in state court. Cal. Evid. Code Ann. § 1024; *Chase*, 340 F.3d at 986. The critical difference in statutes between Boerum and California, which allows the testimony in state court, is that the California statute states that there "is no privilege under this article if...," whereas the Boerum statute states that communications "are confidential except where..." Cal. Evid. Code Ann. § 1024; Boerum Health and Safety Code § 711(1). This difference is critical, and if the Boerum State legislators intended to allow the use of psychotherapist-patient testimony, the statute would have stated that the communications were not "privileged." Even on a practical basis, notice to a patient of a psychotherapist's duty to warn which would breach the psychotherapist-patient confidentiality could not be said to give notice that those same communications would be used against the patient in federal court. This is far too long of a jump

to make, especially when it relates to individuals who have some form of mental illness. Ultimately, the patient holds the privilege. *See generally In re Sims*, 534 F.3d 117, (2d Cir. 2008); *Oliphant v. Dept. of Transp.*, 171 Fed. Appx. 885 (2d Cir. 2006) (unpublished). Thus, the privilege cannot be waived by a psychotherapist's compliance with a statutory duty to warn. While this Court has not weighed on confidentiality in regard to a statutory duty to warn, the Supreme Court of Minnesota found that the duty to warn statute creates a discrete duty which is discharged "once the threat is communicated to the potential victim or [...] the law enforcement agency closest to the victim." *State v. Expose*, 872 N.W.2d 252, 258 (Minn. 2015). Importantly, the court in *Expose* found that duty to warn statute stated nothing of allowing a psychotherapist to testify in court on those same privileged communications used to warn. *Id*. The inclusion of when confidentiality may be broken, and the silence on any authority to testify in court, lead the court to determine that the breach in confidentiality to comply with the duty to warn does not abrogate any privilege in court. *Id*.

Boerum Health and Safety Code § 711, like the statutory duty to warn addressed by the court in *Expose*, contains explicit language of when the confidentiality may be breached, and is silent on use of the communications in court. If the legislators of Boerum intended the confidentiality to be breached at court, the statute would have stated that no privilege would be afforded, but this is not the case. Thus, a breach in confidentiality in order to comply with the statutory duty to warn does not abrogate the privilege in federal court.

B. THE "DANGEROUS PATIENT" EXCEPTION CONTRAVENES PUBLIC HEALTH AND SAFETY ACHIEVED THROUGH PATIENT TRUST AND CONFIDENCE WITH A PSYCHOTHERAPIST AND ADDS LITTLE TO PROTECT THIRD PARTIES.

Recognizing a "dangerous patient" exception at trial to overcome the privilege of confidential communications would thwart the very benefits this Court intended and add little

protection, if any, to third parties. The privilege was established to encourage and facilitate successful psychotherapeutic treatment by instilling confidence and trust in the process for the overwhelming benefit of public health and safety; while the statutory duty to warn established in Boerum health and safety code § 711 was established to protect individuals in likely harm's way within the near future. *Jaffee*, 518 U.S. at 11; Boerum Health and Safety Code § 711(1). Widening the purpose and function of the statute to justify the breach of confidentiality in federal court to gain admissibility of otherwise privileged testimony would severely deteriorate those public health and safety goals to which the privilege is focused. Additionally, the "dangerous patient" exception adds no practical protections as it is not operable until trial, long after the danger has passed. *Hayes*, 227 F.3d at 583. Thus, this Court should not recognize a "dangerous patient" exception in order to facilitate the effective treatment of mental illness as it adds little practical protection, if any, to third parties.

In *Jaffee*, this Court expressly accepted and established the privilege after weighing the societal interests of the privilege against those of allowing the privileged testimony to ascertain the truth in court. 518 U.S. 1, 9-10. In establishing the privilege, this Court found that it "will serve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id*. at 15. At the heart of this reasoning was the desire to encourage those who need to seek mental health therapy to do so with trust and confidence that communications will be kept in confidence by the psychotherapist. *Id*. at 10. "Effective psychotherapy [...] depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id*. It is the heightened sensitivity of the disclosures made during psychotherapist-patient treatment, coupled with the societal benefits of such treatment, which gives such great weight to the

importance of the privilege. *Ghane*, 673 F.3d at 786. As contemplated by this Court, the refusal to recognize the privilege would surely chill the communications between the psychotherapist and patient, especially where there is an obvious potential for litigation. *Jaffee*, 518 U.S. at 12. This would result in far fewer individuals seeking the mental health services needed to facilitate treatment, and far less of a chance that a psychotherapist would be able to intervene when a third party is likely in harm's way. Thus, where the need for psychotherapy treatment rises due to the dangerous nature of the patient, the absolute importance of the privilege also increases to facilitate the treatment of those "dangerous" individuals.

This Court continued in *Jaffee* to include dictum leaving open the possibility that, while there are great societal interests in holding psychotherapist-patient communications privileged, there is no "doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." Id. at 18, n. 19. This is where a "dangerous patient" exception is alleged to have originated, although this Court made no reference to allow a "dangerous patient" exception to permit privileged testimony in court. Addressing worries of the "dangerous patient" who may cause harm to a third party in the near future is precisely what the statutory duty to warn is functioned to do by suspending the burden of confidentiality *only* where danger to a third party is likely and in the near future.[2]

Accordingly, the court in *Hayes* refused to recognize the "dangerous patient" exception for many of the same reasons for which this Court established the privilege in the first place. *Hayes*, 227 F.3d at 584-5. The court found that recognition of the "dangerous patient" exception would stymie meaningful psychotherapy treatment through the deterioration of trust and

[2] Boerum Health and Safety Code § 711(1)(a),(b): Reporting Requirements for Mental Health Professionals (requiring probability and a close temporal factor to activate the duty to warn).

confidence, especially when addressing more dangerous mental health issues. *Id*. at 585. Suggesting that psychotherapists give explicit notice that a "patient's statements may be used against him in a subsequent criminal prosecution would certainly chill and very likely terminate open dialogue." *Id*. Further, the court reasons that while the "dangerous patient" exception would undeniably promote a public good through permitting otherwise privileged testimony into trial, this end is unjustified by the means. *Id*. This Court's Footnote 19 in *Jaffee* contemplates two interests at stake: the public health interests achieved through promoting and encouraging psychotherapy services and the interest in protecting third parties from possible harm. *Id*. These two interests are distinct, yet similar in the broad purpose of furthering societal interests, as are the federal common law privilege and the statutory duty to warn. *Id*. In analyzing the purpose and substance of both the privilege and the duty to warn, the court in *Hayes* found that the duty to warn in no way compromises the privilege of the testimony in court. *Id*. The court determined that the only viable interpretation of Footnote 19 must refer to the situation in which a psychotherapist may need to testify in court for the involuntary commitment of the patient, not the tenuous leap to permit the testimony in every trial dealing with a "dangerous patient." *Id*. Thus, the court in *Hayes* concluded that the duty to warn does not also warrant an exception to dispense with the privilege of the testimony in court.

The eighth and ninth circuit courts also agree with the sixth circuit court's holding in *Hayes*, finding that Footnote 19 in *Jaffee* does not recognize a "dangerous patient" exception, but instead appropriately leaves open the circumstance in which such privileged testimony would be admissible at trial, such as state court commitment proceedings or where the patient engaged in a criminal act. *Ghane*, 673 F.3d at 785; *Chase*, 340 F.3d at 991. In both aforementioned cases, the courts concluded that the gain from refusing to recognize a "dangerous patient" exception to the

privilege outweighs the gain from permitting the psychotherapist to testify. *Id*. There is simply no change in the dynamic of the decision of this Court to promote psychotherapy treatment when there has been a required disclosure stemming from a duty to warn. The "dangerous patient" exception allegedly aims at protecting third parties, yet functions to admit privileged testimony at trial where no threat of danger remains. This is the exact purpose and function of a statutory duty to warn, and finding such an exception does nothing to add protections to third parties beyond gaining access to otherwise inadmissible evidence.[3] Thus, no "dangerous patient" exception exists to compel the privileged testimony of Dr. Pollak at trial.

This conclusion is supported by the very body charged with enumerating the Federal Rules of Evidence, as illustrated in Notes of the Advisory Committee on Proposed Rules, Proposed Rule 504, which contemplates that only three exceptions would have been included in the Proposed Rule 504 on Psychotherapist-Patient Privilege. 56 F.R.D. 183, 241. These included proceedings for hospitalization, examination by order of a judge, and where the condition is an element of the claim or defense. *Id*. However, absent from these proposed exceptions is a "dangerous patient" exception. While the Advisory Committee notes that some states, including California, have codified a "dangerous patient" exception, it refused to do so for fear that the exceptions would swallow the privilege. *Id*. This would certainly be the case in every duty to warn instance, eviscerating the original purpose of the privilege.

On the other hand, the fifth and tenth circuits have held that some form of the "dangerous patient" exception does exist, albeit with differing opinions on the actual operation of the

[3] Anthony Parsio, The Psychotherapist-Patient Privilege: The Perils of Recognizing A "Dangerous Patient" Exception in Criminal Trials, 41 New Eng. L. Rev. 623, 652 (2007) (A "dangerous patient" exception, which allows the prosecution to compel a patient's psychotherapist to testify, does not provide additional protection beyond the "warning" that comes from the Tarasoff duty [to warn]. In addition to having little-to-no impact on protecting the victim, a therapist's testimony against the patient will have severe drawbacks.)

exception. *U.S. v. Glass*, 133 F.3d 1356, 1359 (10th Cir. 1998); *U.S. v. Auster*, 517 F.3d 312, (5th Cir. 2008). The court in *Glass* focused heavily on the importance of disclosure to the safety of the third party but failed to make the leap to applying the same consideration of safety to disclosure at the time of a subsequent trial. *Glass*, 133 F.3d at 1360. In the case of *Auster*, the fifth circuit seemed to rely on minimizing the chilling effect the "dangerous patient" exception would have to successful psychotherapy treatment by heightening the effectual result on the patient through a notice from the psychotherapist of a duty to warn. *Auster*, 517 F.3d at 317. While the court in *Glass* acknowledges the viability of a "dangerous patient" exception, the court parts with the fifth circuit court's decision by relying on a determination of the standard of care used by the psychotherapist in assessing whether the duty to warn had arisen or not. *Glass*, 133 F.3d at 1359. The critical issue presented by the court's holding in *Glass* was contemplated, and condemned, by this Court in *Jaffee*; a test requiring the balancing of interests at court would contravene the purpose of the privilege, making it impossible to predict when the confidentiality of communications would be honored. *Jaffee*, 518 U.S. at 17-8. This Court reasoned that, in order for the privilege to function, those under the privilege must be able to predict with some degree of certainty whether those confidential communications discussions will be protected. *Id*. at 18. "An uncertain privilege [...] is little better than no privilege at all." *Id*.

What both the fifth and tenth circuits refused to consider, however, was the very reasoning and rationale this Court used in finding a psychotherapist-patient privilege existed in the first place. The public health and safety benefits attained through encouragement and facilitation of effective psychotherapy treatment outweighs the value derived from admitting confidential in-treatment communications at trial, effectively syphoning the trust needed to facilitate effective psychotherapy. The only possible value in admitting privileged testimony at

trial would be to effectuate punishment, not at all the reason the privilege or the statutory duty to warn are aimed at. Thus, these two cases are ineffective to show that a "dangerous patient" exception exists at all, in any consistent form, much less one that can be utilized by a court to admit privileged testimony at trial.

Pursuant to the previous holding of this Court, and to a majority of the circuit courts which have spoken on the issue, a "dangerous patient" exception does not exist to the extent that it may permit a court to admit privileged testimony at trial. Otherwise, the intent set out by this Court to facilitate the acceptance of effective psychotherapy treatment to the benefit of public health would be abrogated by an unjustified extension of an ethical duty to warn. Upon reaching and speaking with Ms. Gold following Dr. Pollak's duty to warn, Officer Nicole Fuchs found that Ms. Gold was calm and rational. Officer Fuchs was able to determine that Ms. Gold presented no threat of harm to herself or others. This is where the statutory allowance of a breach in Ms. Gold's psychotherapist-patient confidentiality ceased to exist, and no further breach in confidentiality could be permitted. Thus, Dr. Pollak's privileged testimony may not be compelled at trial due to the public health interests in facilitating psychotherapy treatment.

C. RECOGNIZING A "DANGEROUS PATIENT" EXCEPTION UNDERMINES STATE CONFIDENTIALITY LAW AND CAUSES INCONSISTENCY WITH THE APPLICATION OF PSYCHOTHERAPIST-PATIENT TESTIMONIAL PRIVILEGE IN FEDERAL COURT.

A "dangerous patient" exception to the privilege would not only chill the benefits established by this Court in *Jaffee*, but it would undermine state confidentiality laws protecting the trust and confidence of patients seeking psychotherapy treatment. The confidentiality associated with Boerum's health and safety code is distinct from the testimonial privilege provided to psychotherapist-patient communications during treatment. Typically, most states holding a statutory duty to warn do not permit the testimony of a psychotherapist in state court

proceedings. *Chase*, 340 F.3d at 985. However, the standards of when the duty to warn attaches can differ wildly. *Chase*, 340 F.3d at 987. Further, it was Congress's intent that the Federal Rules of Evidence have a consistent application nationwide. *Lippay v. Christos*, 996 F.2d 1490, 1497 (3d Cir. 1993); *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989). If a "dangerous patient" exception were to exist in federal court, two identical threats could result in wildly different outcomes due to differing admissibility of testimony. To recognize a "dangerous patient" exception and tie it from the duty to warn to the privilege in federal court, would frustrate Congress's intent in codifying the Federal Rules of Evidence by creating inconsistent applications of the privilege in federal courts.

While federal courts would face inconsistency, state confidentiality laws would be undermined if a "dangerous patient" exception were to be recognized. In Oregon and a majority of duty-to-warn states, unlike California, there is no "dangerous patient" exception to the privilege in state court. *Chase*, 340 F.3d at 986. Therefore, a patient in Oregon may hold confidence that psychotherapist-patient communications would be kept confidential in state court, only to have that trust and confidence stripped by the inclusion of otherwise privileged testimony in federal court. This contravenes notions of federalism and deteriorates the trust and confidence held in confidential communications by patients. Thus, a "dangerous patient" exception does not exist to compel Dr. Pollak's testimony at trial.

II. OFFICER YAP VIOLATED MS. GOLD'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES WHEN HE EXCEEDED THE SCOPE OF MS. WILDAUGHTER'S PRIVATE SEARCH.

The Fourth Amendment promises "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures." U.S. Const. amend. IV. The "basic purpose of this Amendment," the Supreme Court has recognized, "is to safeguard the

privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967). A search within the meaning of the Fourth Amendment occurs when the government acquires information by (1) physically trespassing upon private property or (2) intruding upon a sphere where an individual has a reasonable expectation of privacy. *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). But private and government action are divorced under the Fourth Amendment, as the Fourth Amendment exclusively applies to state action. *See Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., Dissenting). As such, "a private individual not acting as an agent of the Government or with the participation or knowledge of any government official" is not subject to the restrictions of the Fourth Amendment and may conduct an unreasonable search without violating the Fourth Amendment. *Walter,* 447 U.S. at 662 (Blackmun, J., Dissenting). Pursuant to that doctrine, the Supreme Court has determined that government officials may recreate a private search without violating the requirements of the Fourth Amendment. *Id.* at 656-67. That said, what is known as the "private search doctrine," does not give the government unfettered discretion to search anything that has already been searched by a private individual. *Id.* Should the government's search expand the scope of the private search to include items with an unfrustrated expectation of privacy, then the Fourth Amendment has been violated. *United States v. Jacobsen*, 466 U.S. 109, 117 (1984). Here, Officer Yap's search—beyond the scope of Ms. Wildaughter's private inquiry—did just that.

A. Officer Yap's Recreation Of Ms. Wildaughter's Private Search Expanded Into Files That Had An Unfrustrated Expectation Of Privacy.

Government officials violate the Fourth Amendment if they expand the scope of a private search to include items with an unfrustrated expectation of privacy. *United States v. Jacobsen,*

466 U.S. 109, 117 (1984) ("The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated."); *Walter v. United States,* 447 U.S. 649, 656-657 (1980) (explaining that if the Government's search surpasses the limits of the private search, it is considered a separate, independent search). To reach that determination, the Supreme Court has stated that government searches pursuant to the private search doctrine "must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115-17 (explaining that this rule stems from the rule that when "frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit government use of the now nonprivate information"). However, determining the scope of private searches in the context of modern technology has proven to be contentious. *Compare United States v. Lichtenberger*, 786 F.3d 478, 488 (6th Cir. 2015) (acknowledging that laptops are intrinsically different from standard containers), and *United States v. Wicks*, 73 M.J. 93, 102 (C.A.A.F. 2014) (differentiating cell phones from "static storage containers" because of the likelihood of "vast amount[s] of personal data" stored on cell phones), *with United States v. Runyan*, 275 F.3d 449, 462–64 (5th Cir. 2001) (treating computer disks as standard containers and using container case law to address the private search of computer disks).

Government officials may recreate a private search but cannot exceed the limits of the initial private search. *See Jacobsen*, 466 U.S. at 115-118; *See also Walter*, 447 U.S. at 656-57. An example of a successful government recreation occurred in *Jacobsen*. 466 U.S. 109 (1984). Employees for a private shipping carrier were inspecting a cardboard box for damage when they discovered a tube made of duct tape. *Id.* at 111. The employees slit open the tube and observed several plastic bags containing a white, powdery substance. *Id.* The employees placed the plastic bags and the tube back into the cardboard box and notified the Drug Enforcement Agency

("DEA"). *Id.* Upon arrival and without obtaining a warrant, a DEA agent removed the plastic bags from the previously cut-open tube, opened each of the bags, and conducted a field test to confirm that the powder was cocaine. *Id.* at 111-12.

The Supreme Court addressed the initial private search conducted by the employees and found that the Fourth Amendment's inapplicability to private action extended to the search conducted by the employees of the carrier. *Id.* at 114-115 (("Whether [the initial invasions by the employees] were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character." (footnote omitted)). Then, the Court analyzed the subsequent government search to determine whether the government search infringed upon any expectation of privacy that was not frustrated by the private search. *See Id.* at 115-118. The Court applied the standard that the government violates the Fourth Amendment if the scope of the private search is expanded to include items with expectations of privacy unfrustrated by the private search. *Id.* at 117 ("The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.").

Under that standard, the Court determined that the carrier employees frustrated the privacy interests in the contents of the box when they cut open the tube, removed the plastic bags containing the powder, and called the DEA. *Id.* at 119. As a result, the DEA agents did not infringe upon any unfrustrated privacy interest when they removed the bags from the tube and tested their contents. *Id.* at 119-20. Even further, the Court considered what information the DEA agents stood to gain from their examination and concluded that they were not poised to discover anything it did not already know. *Id.* at 120. (explaining that the agent did not learn anything from the government search that "had not previously been learned during the private search").

Taking those considerations into account, the Court concluded the DEA agents did not exceed the scope of the private search, nor did their search violate the Fourth Amendment. *Id.* ("It infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment.").

The DEA agents' recreation of the shipping carrier's employees' private search in *Jacobsen* is starkly different from Officer Yap's recreation of Ms. Wildaughter's search. Unlike the DEA agents, Officer Yap's search was not restricted to items that were already within the scope of a private search. Nor was it even exclusive to items that Ms. Wildaughter informed Officer Yap she viewed on Ms. Gold's desktop. Instead, Officer Yap continued to search the files on the flash drive well after he found the information Ms. Wildaughter informed him of. Extending well beyond the parameters of Ms. Wildaughter's private search; by his own account examining *all* of the flash drive's contents. In doing so, Officer Yap infringed on the privacy interests of those files that were not included in Ms. Wildaughter's private search. And since those files' privacy interests were not already frustrated by Ms. Wildaughter's private search, Officer Yap's recreation of the private search infringed upon Ms. Gold's unfrustrated expectations of privacy.

B. In Interpreting Whether The Government's Expanded Recreation Of A Private Search Violates The Fourth Amendment, The Narrow "Particularity Approach" Best Addresses The Complexities of Electronic Devices.

The particularity approach to interpreting a government search that exceeds a private search accommodates the unique complexities of electronic devices and addresses issues that traditional private search rules do not. *United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015); *United States v. Lichtenberger*, 786 F.3d 478, 485–89 (6th Cir. 2015); *United States v. Wicks*, 73 M.J. 93, 100–01 (C.A.A.F. 2014). Further, the narrowly tailored particularity

approach better protects data that is potentially private, legal, and unrelated to allegations prompting a search—a result the Supreme Court has stressed it has intended in its Fourth Amendment jurisprudence. *Lichtenberger,* 786 F.3d at 488-89. The unique characteristics of electronic devices and the privacy interests at stake alter the privacy analysis under *Jacobsen*, placing additional weight on preserving those privacy interests from warrantless government intrusion. *Id.*at 485-88 ("That the item in question is an electronic device does not change the fundamentals of this inquiry. But . . . the nature of the electronic device greatly increases the potential privacy interests at stake, adding weight to one side of the scale while the other remains the same. This shift manifests in Jacobsen's 'virtual certainty' requirement." (citation omitted)).

The Sixth Circuit applied the particularity approach in *United States v. Lichtenberger*. *See* 786 F.3d at 487 (stating that "searches of physical spaces and the items they contain differ in significant ways from searches of complex electronic devices under the Fourth Amendment"). In *Lichtenberger*, a private searcher accessed the defendant's private, password-protected laptop. *Id.* at 480. She opened several folders on the laptop and discovered images of child pornography. *Id.* She proceeded to call the police to report her findings. *Id.* (The searcher would later testify that she viewed about one hundred images during her private search). When an officer arrived, he instructed the private searcher to open the laptop and show him the images. *Id.* The private searcher complied, opening the laptop and clicking on "random thumbnail images to show him." *Id.* The searcher later expressed "that she could not recall if [the images she showed the police officer] were among the same photographs she had seen earlier . . . ." *Id.* at 488.

Upon his indictment, the defendant filed a motion to suppress the evidence that the officer obtained from his search. *Id.* at 481. In his motion, the defendant alleged that the private searcher was acting as an agent of the government when the officer instructed her to open the

images she found. *Id.* The district court granted the defendant's motion to suppress on agency grounds, but the government appealed the case to the Sixth Circuit of Appeals. *Id.*

The Sixth Circuit distinguished its decision from that of the lower court by declaring that the relevant issue was scope rather than agency. *Id.* at 485 (Accordingly, the correct inquiry is whether [the police officer's] search remained within the scope of [the private searcher's] earlier one."). Accordingly, the court compared the scope of the initial private search to that of the ensuing government search using two private search test criteria established by the Supreme Court in *Jacobsen*: (1) "how much information the government stands to gain when it reexamines the evidence"; and (2) whether the police officer had "virtual certainty" of what he would find during the ensuing government search. *Id.* at 485-86 (citing *United States v. Jacobsen*, 466 U.S. 109, 119-20 (1984)).

While the Sixth Circuit acknowledged that those two factors have been the bedrock of private search analysis decades and remain so even in the context of electronic devices, it also declared that the distinctive nature of electronic devices and privacy interests at stake altered the "virtual certainty" analysis, placing greater emphasis on preserving those interests. *See Id.* at 485-488. As a result, in concert with the vast storage capacities of laptop computers, the Sixth Circuit determined that "there [was] no virtual certainty that [the police officer's] review was limited to the photographs from [the private searcher's] earlier search." *Id.* at 488 ("Considering the extent of information that can be stored on a laptop computer . . . the 'virtual certainty' threshold in Jacobsen requires more than was present here."). Additionally, the court observed that not only could the police officer have accessed photos the private searcher did not, but also that the officer could have accessed other private data unrelated to the that which gave rise to the search. *Id.* at 488-89. Given the possibility the police officer viewed data outside that the private

searcher viewed and that the searcher did not know whether the officer's search was limited to the images she accessed, the Sixth Circuit held that the government search exceeded the scope of the private search and violated the defendant's Fourth Amendment rights. *Id.* at 485, 490. That holding indicates that government searches following private searches should be narrowed and specific to material actually viewed during the private search, unlike the one at issue in *Lichtenberger*. *See id.* at 488–89 (indicating that a government search following a private search must be limited to what the private searcher viewed) (The *Lichtenberger* ruling also reinforces that only the expectation of privacy in the particular images a private searcher views is frustrated. Rather than the privacy interests of all the contents of the electronic device the private searcher is investigating.). Like the Sixth Circuit's application in *Lichtenberger*, the Eleventh Circuit's application of the particularity approach in the context of electronic devices suggests the necessity of a narrow, particularized notion of scope. *See United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015).

The defendants in *Sparks* left a cell phone at a Walmart store location by mistake. *Id.* at 1330. A store employee later discovered the phone and upon inspection, noticed messages from the defendants requesting the return of the phone and providing a phone number where they could be contacted to arrange its return. *Id.* The store employee contacted the defendants and arranged to return the lost phone. *Id.* However, prior to meeting with the defendants, the employee decided to look at images stored on the cell phone in hopes of finding something to assist in identifying the phone's owner. *Id.* During the employee's examination, she discovered "questionable" images of a young girl in the phone's stored photographs. *Id.* at 1330-31. The store employee then showed the images to the private searcher. *Id.* The private searcher examined the thumbnail images of all the photographs on the phone and two full-sized images.

Id. at 1331. The private searcher subsequently took the phone to the police department. *Id.* At the police station, the private searcher showed several Community Service Aides several full-size images, scrolled through all the thumbnail pictures, and played them a video. *Id.* The Community Service Aides contacted a sergeant, who viewed the thumbnail version of all the images in the photo album and two videos. *Id.* at 1331-32 (The private searcher had only watched one of those videos) *Id.* at 1332. Following some additional policework,[4] the defendants were charged with crimes related to child pornography in federal district court. *Id.* at 1333. The defendants moved to suppress the evidence obtained from the phone, but the district court denied the motions. *Id.* The defendants appealed the district court's decision on three grounds; one of which is relevant here: that the sergeant's search of the phone exceeded the scope of the private search.[5] *Id.*

The Eleventh Circuit applied the particularity approach in its analysis of the defendant's appeal. *Sparks*, 806 F.3d at 1334-37. First, the court considered whether the sergeant's review of all the pictures in the photo album replicated or exceeded the scope of the store employee's private search. *Id.* at 1335. The Eleventh Circuit ultimately ruled in line with the district court, holding that the sergeant's search of the pictures merely replicated the scope of the private searcher's search. *Id.* The private searcher viewed the thumbnail images of every picture in the phone on more than one occasion. *Id.* (Once with the Walmart employee who found the phone, then again with the Community Service Aids). In comparison, the sergeant "specifically testified that he looked at only those images contained in a single photo album, and his description of the

[4] The police department assigned the case to a special investigatory agent. The investigatory agent was able to obtain a warrant to conduct a forensic analysis on the phone by submitting a supporting affidavit from the sergeant who examined the phone. Based on the evidence from the forensic examination of the phone, the agent obtained a search warrant for the defendants' residence. *Sparks*, 806 F.3d at 1333.

[5] The other two grounds the defendants appealed on are: the gap in time between the agent receiving the case and applying for the search warrants was an unreasonable interference with possessory interests, and that the search warrant should have been supported by more evidence than just the sergeant's affidavit. *Sparks*, 806 F.3d at 1333.

thumbnails of the photos contained in that album matched the contents of the album that [the private searcher] had viewed. *Id.*

Second, the Eleventh Circuit addressed whether the sergeant's search of the videos exceeded the scope of the private search. *Id.* On this issue, the Eleventh Circuit disagreed with the district court and determined that the sergeant's review of the video the private searcher did not view exceeded the scope of the private search. The court emphasized that the private searcher had only viewed one of the two videos that the sergeant accessed during his search. *Id* at 1336 ("But with respect to the second video, which [the private searcher] never watched, [the sergeant's] review exceeded—not replicated—the breadth of the private search."). As a result, the court found that the sergeant had exceeded the scope of the private search in viewing the video that the private searcher did not. *Id.* at 1336. And while the private search of the cell phone frustrated the expectation of privacy in some contents of the phone, it did not do so for all. *Id.*

While the Eleventh Circuit ultimately upheld the district court's ruling on other grounds, it nonetheless ruled that the private search doctrine does not permit a government searcher to conduct a search of material that the private searcher did not view. *Id.* at 1336. As such, the court utilized a narrow, particularized concept of scope for private searches of electronic devices by determining that the private search doctrine only permits government review of the particular material viewed during the private search. *Id.* at 1334-1336. In opposition to the "particularity approach" is the more traditional "container approach." Due to the lack of case law and the persistent questions relating to the scope of a private search involving electronic devices, courts adopting the container approach attempt to include technology under a broad umbrella definition of container. *United States v. Donnes*, 947 F.2d 1430, 1439 (10th Cir. 1991); *United States v. Bowman*, 907 F.2d 63, 65 (8th Cir. 1990). Courts applying the container approach draw parallels

between electronic devices and conventional closed containers at the traditional heart of historical private search jurisprudence. *United States v. Runyan*, 275 F.3d 449, 462–64 (5th Cir. 2001) (applying container case law to computer disks); *Rann v. Atchison*, 689 F.3d 832, 834 (7th Cir. 2012).

The Fifth Circuit applied the container approach in *United States v. Runyan*. *See* 275 F.3d at 463–65. In *Runyan*, the search at issue involved two private searchers and multiple media storage devices. *Id.* at 453. The initial private searcher entered the defendant's property to retrieve some of her personal property. *Id.* Instead, she removed a bag containing pornography and multiple storage floppy disks. *Id.* Hours later, she and several of her friends returned to the defendant's house and took a computer, additional floppy disks, CDs, and flash drives. *Id.* The second private searcher examined about twenty of the CDs and floppy disks but did not search any of the flash drives. *Id.* During her private search, she discovered images of child pornography and turned over more than forty CDs, floppy disks, and flash drives to the police. *Id.* Additionally, the first private searcher gave the police additional CDs, the black duffle bag, the computer, and other items found on the defendant's property at a later date. *Id.* A police officer viewed images from every CD, floppy disk, and flash drive from the two private searchers. *Id.* at 454.

At trial, the defendant moved to suppress the evidence on the grounds that the police officer violated his Fourth Amendment rights by searching every disks. *Id.* The trial court denied the motion and the defendant was convicted. *Id.* On appeal, the Fifth Circuit Court of Appeals utilized the container approach to determine whether the government search exceeded the scope of the private search. *Id.* at 462-65. In its analysis, the court utilized a traditional container rule, which provides that a more thorough government search does not exceed the scope of the private

search, likening each media disk to a closed container. *See Id.* at 464-65. As a result, the government's search of additional images on each disk was merely more thorough and did not exceed the scope of the private searches because the expectation of privacy in all the contents of the disks was frustrated when the private searchers merely opened the disks. *Id.* ("Thus, the police do not engage in a new 'search' for Fourth Amendment purposes each time they examine a particular item found within the container.").

The particularity approach is superior to the container approach because it adapts Fourth Amendment law to the unique characteristics of electronic devices and avoids many of the shortcomings presented by the traditional method of detecting privacy violations. Using the particularized approach to the private search doctrine utilized by the Sixth and Eleventh Circuits, Officer Yap's search of Ms. Gold's desktop files is a violation of the 4th Amendment. Like the police officer in *Lichtenberger* and the sergeant in *Sparks*, Officer Yap's search of files on an electronic device went beyond what the private searcher performed themselves. Where Ms. Wildaughter searched Ms. Gold's desktop until she came across the images and text files that scared her, Officer Yap searched every file on the flash drive containing Ms. Gold's digital information, continuing even after he found the specific images and text Ms. Wildaughter had informed him of. Thus, Officer Yap infringed on the unfrustrated privacy interests Ms. Gold's has in the files outside the scope of Ms. Wildaughter's private search, violating her Fourth Amendment right.

III. THE REQUIREMENTS OF BRADY V. MARYLAND WERE VIOLATED BY THE PROSECUTION'S FAILURE TO DISCLOSE TWO EXCULPATORY REPORTS BASED SOLELY ON THE GROUNDS OF INADMISSIBILITY BECAUSE THEY WERE MATERIAL.

The prosecution's failure to disclose the two material reports solely on the grounds that the information would be inadmissible at trial resulted in a violation of the requirements of

Brady because both reports would have led to exculpatory evidence. The materiality element of the *Brady* test was satisfied by both of the two reports withheld by the prosecution as they would have directly led to admissible evidence, which would have had a reasonable probability to change the outcome of the proceeding. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). After discounting the wrongful inclusion of Dr. Pollak's privileged testimony, along with most, if not all, of the evidence found on Ms. Gold's computer, the heightened materiality of the two reports would have shifted the outcome of the case with a reasonable probability, which demands a directed verdict.

In *Brady v. Maryland*, this Court found that the suppression by the prosecution of evidence favorable to the accused is a violation of a defendant's right to due process "where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). The purpose is to further the goal that every defendant has a right to a fair trial, rather than to punish the prosecution for withholding possibly exculpatory evidence. *Id*. This Court viewed such a suppression as unfair to the defendant and inconsistent with the fair administration of justice. *Id*. In order to find a *Brady* violation, three components must be proven by the defendant: 1) the prosecution suppressed evidence; 2) the evidence was favorable to the defense; and 3) the evidence was material. *U.S. v. Headman*, 594 F.3d 1179, 1183 (10th Cir. 2010) (quoting *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009) (quotations omitted)). As the first of the three elements of the *Brady* test are not in controversy in the immediate case, only the question of materiality remains to find that there was an unfair administration of justice at trial.

This Court in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (relying on four aspects of materiality established in *United States v. Bagley*, 473 U.S. 667, (1985)), reiterated that the appropriate standard by which to assess materiality is not by a preponderance of the evidence,

but when the disclosure of the suppressed evidence creates a "reasonable probability" of a different result of the proceeding. This "reasonable probability" is shown when the prosecution's suppression of the evidence undermines the confidence of the results of the proceeding. *Id*. Further, materiality does not turn on whether the remaining viable evidence following the disclosure of the suppressed evidence is enough to render a conviction. *Id*. at 434-5. Once a reviewing court has found that the evidence was material, a constitutional standard, harmless-error evaluation no longer applies. *Id*. at 435. Lastly, the determination of materiality does not occur in relation to each item of evidence individually, but collectively to assess the materiality of all evidence suppressed by the prosecution. *Id*. at 437. Thus, by the nature of assessment of materiality, some discretion on part of the prosecutor remains as to disclose or not. *Id*. at 438. However, a determination of good faith is not required here, meaning the "prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Id*.

The standard of materiality was assessed in relation to inadmissible evidence by this Court in *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). While this Court stated early in the analysis of *Wood* that the polygraph information at issue was inadmissible, and therefore "not evidence," this Court did not reject the notion that inadmissible evidence could form the basis of a Brady violation where the inadmissible evidence would directly lead to admissible evidence resulting in the reasonable probability that a different outcome would have resulted. *Id*. at 8. This Court continued in *Wood* to consider the lower court's holding that admissible evidence would have been found and would have created a reasonable probability for a different result in the proceeding. *Id*. at 6-8. This Court concluded that the inadmissible evidence could not have, with reasonable probability, rendered a different outcome of the case, and could not, therefore, form

the basis of a Brady violation. *Id*. at 8. Importantly, this Court left open the possibility that inadmissible evidence could form the basis of a Brady violation.

The circuit courts since *Wood* have carved out different standards of materiality to apply to suppressed inadmissible evidence purported to constitute a *Brady* violation; the majority of these circuit courts have not, however, claimed that inadmissible evidence can never form the basis of a Brady violation. *Barton v. Warden, S. Ohio Correctional Facility*, 786 F.3d 450, 465 (6th Cir. 2015) ("inadmissible material might nonetheless be considered material under Brady if it would 'lead directly' to admissible evidence"); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) ("we think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it"); *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013) (inadmissible evidence may be material for Brady purposes if its disclosure would lead to admissible evidence); *Spence v. Johnson*, 80 F.3d 989, 1005 n. 14 (5th Cir. 1996) ("inadmissible evidence may be material under Brady"); *U.S. v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (holding that a memo consisting of hearsay can be material if it would lead to admissible evidence); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) ("Inadmissible evidence may be material if the evidence would have led to admissible evidence"); *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998) (inadmissible evidence can be material under *Brady*, if it could have led to the discovery of admissible evidence).

Most courts now consistently view admissibility as a "critical end-product," but not dispositive of materiality where the evidence in inadmissible.[6] While there is at least one circuit which has recognized that the inadmissibility of the evidence at issue precluded its use to form a

[6] 22A C.J.S. Criminal Procedure and Rights of Accused § 384; Blaise Niosi, Architects of Justice: The Prosecutor's Role and Resolving Whether Inadmissible Evidence Is Material Under the Brady Rule, 83 Fordham L. Rev. 1499, 1522 (2014).

basis for a *Brady* violation, the majority of circuits, and even cases within the fourth circuit, disagree with the blanket prohibition on use of inadmissible evidence to support a *Brady* violation. *Hoke v. Netherland*, 92 F.3d 1350, 1356, n. 3 (4th Cir. 1996) (holding that the inadmissible statements at issue would not be material as a matter of law). In *U.S. v. Hayes*, the court applied the materiality element of *Brady* to the undisclosed identity of an informant who named three additional suspects for robbery and conspiracy. 120 F.3d 739, 742 (8th Cir. 1997). Importantly, the suspects identified by the informant were all disclosed to the defense six months before the claim of a Brady violation occurred. *Id*. Specifically, the defendant claimed that withholding the informant's identity constituted a *Brady* violation. *Id*. The court held that this was not the case because any exculpatory evidence provided by the informant had already been acquired, and that it is generally not material to the outcome of a case to disclose the identity of informants who merely convey information to the government but neither witness nor participate in the offense. *Id*. at 743. Critically, the court found that, while the identity of the informant was not material, the identity of the three suspects was material and exculpatory. *Id*.

Ms. Gold's motion for postconviction relief should have been granted because the information contained within the informants' reports on the identities of two additional possible suspects, as well as an alternate motive for her murder, was highly material and exculpatory, and the nondisclosure of which resulted in a violation of the *Brady* requirements. As the court in *Hayes* acknowledges, informants' information can absolutely meet the materiality element of *Brady*, and a lack of identity of the informant does not go to the weight of the evidence. Although Chase Caplow was a non-participant and non-witness, his information naming an additional possible suspect with a motive to murder Ms. Driscoll was certainly exculpatory and material for the purposes of *Brady*. Similarly, the anonymous tip explicitly stated that it was a

another named individual who murdered Ms. Driscoll. Although the information contained within the anonymous tip was likely not as strong as Chase Caplow's tip, the determination of materiality rides on whether the information would have led to exculpatory evidence. In this case, an additional suspect could certainly have led to the discovery of exculpatory evidence. In tandem, or individually, these reports constitute material information resulting in a *Brady* violation.

Dr. Pollak's testimony should not have been compelled, and this was a violation of Ms. Gold's privilege in confidential communication in federal court. Similarly, the evidence obtained from Ms. Gold's laptop should have been suppressed because Officer Yap's search exceeded the scope of the previous private search. Without these two pieces of inadmissible evidence, the admissible evidence directly leading from disclosure of the inadmissible reports would have met the materiality element of *Brady* and would have changed the outcome of the proceeding with reasonable probability due to the lack of remaining viable evidence. Thus, this case should be dismissed. If this Court finds dismissal unwarranted, a new trial should be granted to evaluate the efficacy of the appropriate evidence.

CONCLUSION

For the foregoing reasons, Petitioner, Ms. Samantha Gold, respectfully requests that the Court reverse the decision of the Fourteenth Circuit Court of Appeals and enter judgment for Petitioner.