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 PETITIONER

Team 26
Counsel for Petitioner

Oral Argument Requested

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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CONSTITUTIONAL PROVISIONS

Adjudication of this case involves the Fourth Amendment to the United States Constitution, the text of which is reprinted in Appendix A.

STATEMENT OF THE CASE

A. Factual History

Petitioner Samantha Gold ("Ms. Gold") is an aspirational student at Joralemon University. In 2016, Ms. Gold was recruited into a multi-level marketing group, HerbImmunity, by Tiffany Driscoll ("Driscoll"). (R. 18). Despite her efforts, Ms. Gold had difficulty selling the HerbImmunity vitamins. (R. 18). When Ms. Gold explained this to Driscoll, Driscoll induced her to "increase her investment," which ultimately caused Ms. Gold to fall $2,000 in debt. (R. 18). Around May of 2017, Ms. Gold learned that Driscoll, too, was unsuccessful at selling the products and that Driscoll's father had been keeping her afloat by "funding her business." (R. 18).

Since 2015, Ms. Gold sought treatment for anger management from Dr. Chelsea Pollak, a Board-Certified Psychiatrist working from the Joralemon Psychotherapy and Counseling Center. (R. 17). Once Dr. Pollak diagnosed Ms. Gold with Intermittent Explosive Disorder ("IED") she "began to effectively treat [Ms. Gold] through weekly psychotherapy sessions." (R. 17). Ms. Gold's unsuccessful HerbImmunity endeavor was the topic of her psychotherapy appointments "for weeks," and during her May 25, 2017 appointment, Dr. Pollak noted that Ms. Gold "seemed more agitated than usual." (R. 4, 18). Dr. Pollak noted that Ms. Gold felt "tricked and taken advantage of by Driscoll." (R. 4). Ms. Gold then allegedly declared "I'm so angry! I'm going to kill her," and "stormed out" of the session. (R. 4, 19). Ms. Gold did not specify who she was referring to. (R. 21–22). Dr. Pollak, allegedly fearing Ms. Gold "might actually try to harm herself" or Driscoll, reported Ms. Gold as "a dangerous patient as required under Boerum Health and Safety Code Section 711" to the Joralemon Police Department at around 1:00 PM. (R. 5, 19). Upon request by Officer Fuchs, Dr. Pollak then emailed the entirety of Ms. Gold's session records as well as the address of her on-campus residence to the police. (R. 20). When Officer Fuchs arrived at Ms. Gold's residence to conduct a safety and wellness check, Ms. Gold answered the door and

"appeared calm and rational." (R. 5). Officer Fuchs reported that. "[a]fter speaking with her for 15 minutes," he "determined that she posed no threat to herself or to others." (R. 5).

Later that day, Jennifer Wildaughter ("Wildaughter"), Ms. Gold's roommate, observed Ms. Gold open a bill from "that pyramid scheme she's been sucked into." (R. 24). Ms. Gold allegedly stated, "I'd do anything to get out of this mess Tiff put me in" and left their shared suite. (R. 24). Wildaughter then, without permission, entered Ms. Gold's room and "looked around at some of the desktop files on her computer," one of which was titled "HerbImmunity." (R. 24, 27). Wildaughter began opening several folders and subfolders, and eventually "grabbed a flash drive … and copied the whole desktop onto it." (R. 26). She then gave the flash drive to Officer Aaron Yap and told him "everything is on there." (R. 26–27). Officer Yap did not ask Wildaughter any questions about the contents of the flash drive or what she had specifically viewed. (R. 29). Yet, he examined "every document on the drive," determined that "Ms. Gold was planning to poison Ms. Driscoll," and alerted his supervisor. (R. 6). Driscoll was later "found dead at the bottom of the stairs in her father's townhouse." (R. 51). Toxicology reports determined that Driscoll died from "ingesting strychnine found to have been injected into strawberries that were mailed to Driscoll's apartment in a fruit basket." (R. 51). Ms. Gold was subsequently arrested. (R. 51).

B. Procedural History

On June 6, 2017, Ms. Gold was indicted with delivery by mail of an item with intent to kill or injure, in violation of 18 U.S.C. §1716(j)(2), (3) and 18 U.S.C. §3551, in the United States District Court for the Eastern District of Boerum ("district court"). (R. 1). On January 8, 2018, Ms. Gold motioned to suppress "the Government from calling Ms. Gold's psychiatrist, Dr. Chelsea Pollak, to testify against her and from introducing Dr. Pollak's notes into evidence," as well as "certain information seized illegally from [her] computer." (R. 16). The district court denied the

motion to suppress in all respects on January 9, 2018. (R. 40). In doing so, it found that the "dangerous patient" exception to the evidentiary privilege "allows for Dr. Pollak's testimony to be admitted at trial," and that the narrow approach to the private search doctrine "would unduly hamper law enforcement." (R. 40–41). On February 1, 2018, Ms. Gold was convicted and sentenced to life in prison. (R. 51).

On August 22, 2018, Ms. Gold filed a motion for post-conviction relief on the grounds that the government withheld two material FBI investigative reports (R. 11, 12) in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (R. 42). The government argued that the withheld reports could not amount to a *Brady* violation because they would not be admissible at trial and thus were not material. (R. 45). The district court agreed and denied Ms. Gold's motion. (R. 48). Relying on *Wood v. Bartholomew*, 516 U.S. 1 (1995), the district court reasoned that, because the reports were hearsay, they "cannot be considered evidence at all and, thus, cannot form the basis of a *Brady* violation." (R. 48–49). Ms. Gold timely appealed and, on February 24, 2020, the United States Court of Appeals for the Fourteenth Circuit affirmed her conviction and sentence. (R. 50).

On November 16, 2020, this Court granted certiorari to address three issues: (1) "whether the psychotherapist-patient testimonial privilege under Fed. R. 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;" (2) "whether the Fourth Amendment is violated when the Government, relying on a private search, seized 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;" and (3) whether the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), "are violated when the government

fails to disclose potentially exculpatory information solely on the grounds that the information would be inadmissible at trial." (R. 60).

SUMMARY OF THE ARGUMENT

There are three issues before the Court, each of which warrants the reversal of the decision below. First, as a psychotherapist, Dr. Pollak's professional duties of confidentiality and to warn potential victims of a patient's threat are separate and distinct from the federal evidentiary privilege granted by Rule 501 of the Federal Rules of Evidence. Dr. Pollak's professional duty and decision to notify a third-party of Ms. Gold's threats does not compel Dr. Pollak to testify about confidential conversations made in the course of therapy and treatment. Rather, the communications between Dr. Pollak and Ms. Gold are confidential and privileged under Rule 501 and not subject to the dangerous-patient exception, which has been frequently rejected by the circuit courts.

Second, the government inherently violated the Fourth Amendment under the private search doctrine when it conducted a search of Ms. Gold's computer files that exceeded the scope of the initial private search performed by her roommate. This is especially true with regard to technological devices because the narrow approach, or the one-to-one approach, aligns with the purpose of *United States v. Jacobsen*, 466 U.S. 109 (1984), whereas the broad approach, or the container approach, is inapplicable to digital files.

Finally, by withholding two FBI investigative reports, each naming an alternate suspect in the murder of Tiffany Driscoll, the government violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), which sufficiently prejudiced Ms. Gold to warrant a directed verdict or a new trial. Although inadmissible hearsay, the reports are nonetheless material for Brady purposes because their disclosure would have undermined confidence in the outcome at trial by directly leading to admissible evidence and undercutting the jury's reliance on the police investigation.

ARGUMENT

I. PSYCHOTHERAPISTS' DUTIES OF CONFIDENTIALITY AND DUTIES TO WARN POTENTIAL VICTIMS OF PATIENTS ARE SEPARATE AND DISTINCT FROM THE FEDERAL EVIDENTIARY PRIVILEGE UNDER RULE 501

Petitioner Samantha Gold ("Ms. Gold") respectfully asks this Court to reverse the decision of the Fourteenth Circuit below on the grounds that the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 ("Rule 501") precludes the admission at trial of confidential communications that occurred during the course of a defendant's psychotherapy treatment, even where the defendant threatened harm to a third party. Rule 501 provides that federal privileges are determined by "the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. With regard to testimonial privileges, courts "start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). One established exception to Rule 501 is the psychotherapist-patient privilege. *See Jaffee*, 518 U.S. at 15 ("confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501."). By ignoring this exception to Rule 501, the Fourteenth Circuit below erred in its recognition of the dangerous patient exception to the psychotherapist-patient privilege and thus its decision warrants reversal.

This Court should instead follow the well-reasoned holdings of the Sixth, Eighth, and Ninth Circuits, which properly reject the "dangerous patient" exception in cases with defendants similarly situated to Ms. Gold. *See United States v. Ghane*, 673 F.3d 771, 785 (8th Cir. 2012) (declining "to interpret the dictum in *Jaffee* as establishing a precedentially binding 'dangerous

patient' exception to the federal psychotherapist-patient testimonial privilege."); *United States v. Chase*, 340 F.3d 978, 979 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578, 579 (6th Cir. 2000). This Court recognized a psychotherapist-patient testimonial privilege under Rule 501 in *Jaffee* by asserting that "a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence….'" *Jaffee*, 518 U.S. at 9–10 (citing *Tramel v. United States*, 445 U.S. 40, 51 (1980)). Understanding the notable public and private interests closely connected to the psychotherapist-patient privilege, the Court highlighted that the confidential communications were as significant as the attorney-client or spousal privileges. *Id.* at 11.

Below, the Fourteenth Circuit erroneously relied on *Jaffee*'s nineteenth footnote and conclusively accepted the dangerous patient exception it implies. (R. 53). *See Jaffee*, 518 U.S. at 18 n.19 ("we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only be means of a disclosure by the therapist."). In doing so, the court agreed with Respondents' misplaced reliance on the Tenth Circuit's decision in *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998). In *Glass*, the defendant was taken to a mental health hospital after making statements that he wanted to shoot then-President Clinton and first lady, Hillary Clinton. *Glass*, 133 F.3d at 1357. The defendant proclaimed to the hospital's psychotherapist that he wanted "to get in the history books." *Id.* Upon his release just ten days after his admission, and after agreeing to outpatient treatment at his father's house, the defendant left the house and the outpatient nurse notified law enforcement. *Id.* Before trial, the defendant moved to exclude his statements made to the psychotherapist on the grounds that "the confidential communication to his treating psychotherapist was protected by the psychotherapist-patient privilege announced in *Jaffee*." *Id.* The *Glass* court ultimately found that

a psychotherapist may testify in court about a threat made by a patient if the threat was "serious when it was uttered and whether its disclosure was the only means of averting harm" to the intended subject of the threat. *Id.* at 1360.

In contrast to the defendant in *Glass*, Ms. Gold is a "stable college student" who was undergoing continued psychotherapy treatment. (R. 38). The statements at issue made to Dr. Pollak came as the result of Ms. Gold's prolonged frustration regarding Tiffany Driscoll ("Driscoll") and the massive debt Ms. Gold was on the hook for from her involvement with HerbImmunity. (R. 21–22). As Dr. Pollak admitted, Ms. Gold never explicitly threatened to kill Driscoll, nor any other identifiable person, under the defendant in *Glass*. (R. 21). Rather, her words were "I'm going to kill *her*," thus lacking *Glass*'s requisite seriousness and specificity. (R. 21, 38) (emphasis added). Moreover, after Dr. Pollak notified the Joralemon Police Department of Ms. Gold's perceived threat, Officer Fuchs interviewed Ms. Gold for 15 minutes, noting that she was "calm and rational" and determining that "Driscoll was not in any imminent danger." (R. 5).

By formulating the crux of its decision on *Jaffee*'s nineteenth footnote, the Fourteenth Circuit critically ignored *Jaffee*'s true holding and erred in its conclusion that the dangerous patient exception applies to the psychotherapist-patient evidentiary privilege afforded under Rule 501. (R. 52). Accordingly, the Court should follow its true precedent of *Jaffee*, whereby confidential communications between a licensed psychotherapist and a patient are protected from compelled disclosure under Rule 501. *Jaffee*, 518 U.S. at 18. The decision below thus warrants reversal for two reasons: (1) the dangerous patient exception is only marginally connected to the use of a psychotherapist's testimony against a patient, and (2) the psychotherapist-patient privilege is a separate and distinct public interest.

A. The Dangerous Patient Exception and Duty to Warn is Only Marginally Connected to the Use of a Psychotherapist's Testimony to Prosecute and Incarcerate a Patient

Now imposed on psychotherapists throughout the country, the duty to protect was conceptualized in 1976. *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 439 (Cal. 1976) (superseded by statute in *Regents of University of California v. Superior Court*, 29 Cal. App. 5th 890 (Cal. Ct. App. 2018)) ("once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."). It is thus well established that the open and confidential nature of "psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed." *Id.* at 441. Importantly, psychotherapists should not be compelled or "encouraged routinely to reveal such threats." *Id.* On the contrary, psychotherapists should report threats made in confidence only when "such disclosure is necessary to avert dangers to others," and should be done in a discreet fashion, so as to "preserve the privacy of [her] patient to the fullest extent compatible with the prevention of the threatened danger." *Id.* This duty to protect must end when a psychotherapist has a duty to warn an endangered person of threats made by the patient. *Id.* at 442 ("The protective privilege ends where the public peril begins."). Critically, it does not encompass nor require such disclosure to carry on to testimony at trial as contemplated by the dangerous patient exception. These are separate and distinct issues. *See Hayes*, 227 F.3d at 583 (rejecting the dangerous patient exception and finding that there was "a marginal connection, if any at all" between a psychotherapist's duty to warn a potential victim of a threat and a court mandating that psychotherapists testify about the threat at a later prosecution, long after the threat ceased to exist); *see also Ghane*, 673 F.3d at 785 ("The 'dangerous patient' exception to the federal testimonial privilege is quite different from a therapist's 'duty to protect,' which is already in

place."). This is because Rule 501 deals with the privilege of a witness not to testify, meaning that the Rule grants an evidentiary privilege to prevent a psychotherapist from testifying against her patient at trial. This is especially true here, where the Joralemon Police "determined that she posed no threat to herself or others." (R. 52). As such, Dr. Pollak fulfilled her duty to warn under both federal and state law, but now has no duty to testify against Ms. Gold. (R. 2). *See Ghane*, 673 F.3d at 786 ("compliance with the professional duty to protect does not imply a duty to testify against a patient in criminal proceedings or in civil proceedings other than directly related to the patient's involuntary hospitalization, and such testimony is privileged and inadmissible if a patient properly asserts the psychotherapist/patient privilege.").

The Sixth Circuit offers useful guidance in *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000). In *Hayes*, the defendant was a United States Postal Service employee, who suffered from major depression with "severe psychotic features." *Id.* at 579. During treatment at a veterans' hospital, the defendant informed a staff psychiatrist of his desire to kill the postmaster at his post office branch. *Id.* Over the course of two months, Hayes found a social worker and outlined his homicidal plans and his intent to kill the postmaster. *Id.* The social worker recognized the threats were becoming serious and disclosed Hayes' plans to local authorities, who in turn warned the postmaster. *Id.* at 580–81. The district court granted Hayes' motion to exclude testimony from his psychotherapist and the Sixth Circuit affirmed, recognizing that the dangerous patient exception proposed by the *Jaffee* footnote is "unsound in theory and in practice.' *Id.* at 578, 584. If courts are to allow the dangerous patient exception to determine the "standard of care exercised by a treating psychotherapist," cases such as *Hayes* and the one before the Court would lead to drawn-out expert testimony regarding whether the psychotherapist in question behaved reasonably before disclosing a perceived threat. *Id.* This should not happen, just as the "scope of a federal testimonial

privilege should [not] vary upon state determinations of what constitutes reasonable professional conduct." *Id.* (internal punctuation omitted). The dangerous patient exception to the psychotherapist's standard of care should not be conflated. *Id.* Based on its sound reasoning and practical applications, this Court should adopt the same line of analysis as the Sixth Circuit and thus reverse the Fourteenth Circuit below.

B. The Privilege Protecting Communications Between a Psychotherapist and Patient is a Separate and Distinct Public Interest

As this Court held in *Jaffee*, the psychotherapist-patient privilege serves "the public interest, since the mental health of the Nation's citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee*, 518 U.S. at 2. Importantly, the "likely evidentiary benefit that would result from the denial of [such] privilege is modest." *Id.* It is therefore paramount that the Court considers how allowing Dr. Pollak to testify against Ms. Gold in a criminal prosecution regarding vague statements Ms. Gold made during the course of her confidential and ongoing treatment would serve a public end justified by those means. The answer is that it would not; that end is not justified by the means of compelling Dr. Pollak to take the stand and disclose confidential, privileged communications about a perceived threat which has long since passed. It is undeniable that, to improve the mental health of individuals like Ms. Gold and encourage open and honest communication in the course of mental health treatment and psychotherapy, a patient cannot fear that what they say in confidence will be used against them in a court of law. *See Ghane*, 673 F.3d at 785 ("adopting a 'dangerous patient' exception to the psychotherapist-patient privilege would necessarily have a deleterious effect on the 'confidence and trust' the Supreme Court held is implicit in the confidential relationship between the therapist and patient").

As the Sixth Circuit set forth in *Hayes*, if the mental health of citizens is "indeed as valuable as the Supreme Court has indicated … the chilling effect that would result from the recognition of

the 'dangerous patient' exception … is the first reason to reject it." *Hayes*, 227 F.3d at 585. To be sure, "there *are* times when a therapist can testify at a hearing" without devastating effects upon the confidence shared between a psychotherapist and a patient, such as "[h]aving a therapist testify at his patient's own involuntary commitment proceedings." *Ghane*, 673 F.3d at 785. That is certainly not the case here, however. In fact, the Joralemon Police determined that Ms. Gold was "calm and rational," and "posed no threat to herself or others." (R. 52). To utilize the testimony of a psychotherapist to prosecute and incarcerate a former patient would result in detrimental mental health effects, which are unlikely to resolve upon incarceration, in addition to individuals declining to seek proper help for fear of their statements being used against them. *Ghane*, 673 F.3d at 786. Accordingly, the Court should recognize the pernicious effect the dangerous patient exception would have and reverse the decision below by denouncing the dangerous patient exception.

II. THE FOURTH AMENDMENT IS INHERENTLY VIOLATED UNDER THE PRIVATE SEARCH DOCTRINE WHEN THE GOVERNMENT CONDUCTS A WARRANTLESS SEARCH THAT EXCEEDS THE SCOPE OF AN INITIAL PRIVATE SEARCH

Ms. Gold asks this Court to reverse the decision of the Fourteenth Circuit on the grounds that the government violated her Fourth Amendment rights in conjunction with the private search doctrine when it conducted a more expansive search of digital files stored on her computer than allowed for by the scope of the initial private search. The private search doctrine provides that, "if a private actor … searches evidence in which an individual has a reasonable expectation of privacy, and then provides that evidence to law enforcement," the constitutionality of the subsequent intrusions upon the individual's privacy by the government "must be tested by the degree to which they exceeded the scope of the private search." *United States v. Powell*, 925 F.3d 1, 5 (1st Cir. 2018) (citing *United States v. Jacobsen*, 466 U.S. 109, 115 (1984)) (internal punctuation omitted).

The private search doctrine has been construed both broadly and narrowly. Ms. Gold asks this Court to adopt the narrow approach (the one-to-one approach), which provides that a government search conducted on the heels of a private search must maintain a one-to-one ratio in order to remain constitutional. *See United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015) (finding that an officer's search exceeded the scope of the private search where the private actor watched one of the two videos found on the cell phone, but the officer watched both videos on the cellphone without obtaining a warrant). Under this standard, the admission of Ms. Gold's digital files into evidence by the government cannot stand as the fruit of an unreasonable search. *See Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (holding that evidence obtained by unreasonable searches and seizures is inadmissible in federal and state courts). In the same vein, the Court should reject the broad approach (the container approach) applied by the Fourteenth Circuit below because its improper application to technological devices erodes the purpose of *Jacobsen* and eviscerates the safeguards established by the Fourth Amendment in the context of digital files.

The two approaches are delineated by the characterization of the item to be searched. Under the broad container approach, a digital file is not considered its own container, but rather, is a part of the physical device it is contained on. Therefore, in the context of the private search doctrine, the unit of measurement for the scope of governmental intrusion extends to the whole container that was initially searched by the private actor, regardless of whether that individual viewed the entirety of its contents. Michael Mestitz, *Unpacking Digital Containers: Extending Riley's Reasoning to Digital Files and Subfolders*, 69 STAN. L. REV. 321, 329–30 (2017). Conversely, under the narrow one-to-one approach, each digital file is considered its own container, therefore, under the private search doctrine, the government exceeds the scope of the initial private search if it views individual files that have not already been reviewed. Matthew Lupo, *Privacy in the Digital*

Age: Preserving the Fourth Amendment by Resolving the Circuit Split Over the Private-Search Doctrine, 10 ALB. GOV'T L. REV. 414, 428 (2017); *see United States v. Fall*, 955 F.3d 363, 371 (4th Cir. 2020) (explaining that the narrow approach uses each individual file as a unit of measurement to determine scope and has been interpreted to require a "one-to-one match between electronic files viewed by a private party and files later examined by police."). Considering the unique nature of technology and digital files, a one-to-one ratio draws an easily distinguishable line for the government actor that the broad approach blatantly obliterates.

In ensuring the "right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" performed at the hands of the government, U.S. Const. amend. IV, the Fourth Amendment serves as a necessary line of defense between unwarranted government intrusion and an individual's privacy. *See Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967) (explaining that the central purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."). The government betrays the Fourth Amendment when it violates an individual's "reasonable expectation of privacy." *See Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that the Fourth Amendment's "reasonable expectation of privacy" is implicated in situations where a person exhibits an expectation of privacy in something that society recognizes as reasonable). Importantly, "reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.* at 362 (Harland, J., concurring). However, the Fourth Amendment does not provide that same level of protection against searches and seizures performed by private citizens. *See Jacobsen,* 466 U.S. at 115 (observing that private searches do not violate the Fourth Amendment, regardless of whether they were "accidental or deliberate, [or] whether they were reasonable or unreasonable … because of their private character."). Of critical

importance here is "the fact that a repository of personal property previously was searched by a private party has never been used to legitimize *governmental conduct* that otherwise would be subject to a challenge under the Fourth Amendment." *Id.* at 130–31 (White, J., concurring) (emphasis in original).

Below, the Fourteenth Circuit improperly applied the broad container approach to the private search doctrine and determined that the Joralemon Police Department's search of Ms. Gold's digital files did not violate the Fourth Amendment, despite the fact that its search was significantly more expansive than the private search previously conducted by Jennifer Wildaughter ("Wildaughter"), Ms. Gold's roommate. (R. 55). This Court should therefore adopt the narrow one-to-one approach to the private search doctrine and reverse the decision below for two reasons: (1) the government's search exceeded the parameters of the private search, and (2) the container approach to the private search doctrine is wholly inapplicable to digital files.

A. The Government Impermissibly Performed a Broader Search than Allowed for by the Scope of the Prior Private Search

First, the decision below warrants reversal because the government's more expansive search than the one previously performed by a private individual fundamentally exceeds the permissible scope of that search, whereas a one-to-one ratio ensures that the police are only accessing information that the private individual had already reviewed. Specifically, the government here unconstitutionally infringed upon Ms. Gold's Fourth Amendment rights when the Joralemon Police conducted a search of her digital files that exceeded the scope of the search previously performed by Wildaughter, a private actor. (R. 27–29).

In 1984, the *Jacobsen* Court established the proper Fourth Amendment analysis for situations where the initial search is performed by a private citizen before the evidence is reviewed by a government actor. *Jacobsen*, 466 U.S. at 130 (White, J., concurring). In *Jacobsen,* a Federal

Express employee examined a package that was damaged during shipping and discovered a powdery substance concealed within an inner container. *Id.* at 111. After the initial inspection, the employee reassembled the package as he found it and reported the discovery to the Drug Enforcement Administration ("DEA"). *Id.* A DEA agent arrived, removed the inner package from the damaged shipping container, and tested the substance without a warrant. *Id.* at 111–12. While reviewing the constitutionality of the search and seizure, this Court explained that when a "governmental search … follows on the heels of a private one," the permissibility of the search should be analyzed by the degree to which the government's additional invasion of privacy "exceeded the scope of the private search." *Id.* at 115. In other words, "the government's ability to conduct a warrantless follow-up search … is expressly limited by the scope of the initial private search." *United States v. Lichtenberger*, 786 F.3d 478, 482 (6th Cir. 2015) (citing *Jacobsen*, 466 U.S. at 115).

A key consideration regarding a subsequent government search is whether the government learned something new "that had not previously been learned during the private search." *Jacobsen*, 466 U.S. at 120. For instance, in *Jacobsen*, when the police searched the contents of a package that had previously been searched by a private individual, the police did not learn anything new from their search that had not already been discovered during the private search. *Id.* The crucial distinction here is that the police did not frustrate an expectation of privacy that was not already frustrated by the private search. Because the agents' removal of the inner package from the damaged shipping container mirrored the scope and discovery of the employee's private search, it therefore did not offend the Fourth Amendment. *Jacobsen*, 466 U.S. at 126 ("In sum, the federal agents did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct."). However, where the government exceeds the scope

of that initial private search and accesses information where the expectation of privacy still exists, the government actor "presumptively violate[s] the Fourth Amendment if they act[ed] without a warrant." *Id.* at 118. That is the case here.

The Fourteenth Circuit below erroneously relied on the framework for the broad approach established by *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), which establishes a substantial certainty exception to the private search doctrine. (R. 55). *Id.* at 463. Essentially, *Runyan* allows the police to conduct a more expansive search than that initially performed by the private individual—and discover information not discovered during the private search—without a warrant if the police can be "substantially certain" of what they will uncover. *Id.* Under this approach, the physical piece of technology becomes the container, rather than the individual digital files. Adam Bereston, *The Private Search Doctrine and the Evolution of Fourth Amendment Jurisprudence in the Face of New Technology: A Broad or Narrow Exception?*, 66 CATH. U. L. REV. 445, 466 (2016). The implications of this unit of measurement in the digital context completely deviates from the purpose of the private search doctrine, which is to limit the government's intrusion by the scope of the private search, similar to the limits prescribed by a search warrant. *Jacobsen*, 466 U.S. at 119; *see Walter v. United States*, 447 U.S. 649, 657 (1980) ("If 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 of another person's privacy."). This limitation serves to ensure that the police only confirm what has already been reviewed during the private search. *Jacobsen*, 466 U.S. at 119. "Substantial certainty" has yet to be defined, however. *Runyan*, 275 F.3d at 463.

With regard to digital files, the scope of the broad approach is not easily determined by the physical container, as would be the case in traditional search contexts. *See State v. Terrell*, 372

N.C. 657, 669 (N.C. 2019) ("Unlike rifling through the contents of a cardboard box, a foray into one folder of a digital storage device will often expose nothing about the nature or the amount of digital information that is, or may be, stored elsewhere in the device."). When the unit of measurement is interpreted as the physical device rather than the digital file, law enforcement is given unfettered access to unfathomable amounts of sensitive information, otherwise entirely off-limits without a warrant. For instance, the private search of one picture file contained on a 128-gigabyte cell phone, estimated to take up about 0.000076 percent of the phone's storage data, would give the police "warrantless access to potentially thousands of photos after a private searcher found just one incriminating photo." Lupo, *supra,* at 446. Similarly, if the container at issue is a computer server, the private search of a single file on the server could allow the police to search and analyze "everything on the server, perhaps belonging to thousands of different people, without any restriction[.]" Orin Kerr, *Searches and Seizures in a Digital World,* 119 HARV. L. REV. 531, 556 (2005). Under *Jacobsen*, these hypotheticals should not become reality.

In *Walter v. United States,* 447 U.S. 649 (1980), this Court held that the frustration of privacy for part of a container does not frustrate the entire container and, therefore, government inferences regarding what may be discovered from the un-frustrated parts do not justify an expansion of the private search. *Id.* at 657. In *Walter*, private citizens searched packages that were mistakenly delivered to them and found individual films with provocative pictures and descriptions but did not view the films inside the packages. *Id.* at 651–52. When the police arrived to search the packages, they went beyond the cursory search performed by the private individuals and viewed the actual films to determine if they were obscene material. *Id.* at 652. This Court held that, based on the initial private search, the government could only infer what was actually on the films and thus "[t]he projection of the films was a significant expansion" of the private search and

"therefore must be characterized as a separate search" unsupported "by any exigency." *Id.* at 657. In response to the government's argument that the private search of the packages that exposed the labels completely frustrated the reasonable expectation of privacy in the films, this Court explained that "[t]he private search merely frustrated that expectation in part" and did not "strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection." *Id.* at 659.

The core findings in *Walter* should be extended to Ms. Gold's case to show that the broad approach to the private search doctrine cannot apply in a technological context. Wildaughter's private viewing of singular digital files located on Ms. Gold's personal computer should not provide the Joralemon Police warrantless and limitless access to the entire device. Moreover, the police should not be able to expand a private search of a technological device based on a mere inference, especially when "[t]he hard drive of an electronic-storage device 'is the digital equivalent of its owner's home, capable of holding a universe of private information.'" Lupo, *supra*, at 437 (internal citation omitted). Simply put, inference cannot reasonably be made for devices where information "may be concealed among an unpredictable number of closed digital file folders, which may be further concealed within unpredictable layers." *State v. Terrell*, 257 N.C. App. 884, 895 (N.C. Ct. App. 2018). The broad container approach should thus be rejected as it impermissibly opens the door to unbridled police discretion on the basis of mere inferences.

The facts of the case at hand easily demonstrate that the Joralemon Police exceeded the scope of the search performed by Ms. Gold's roommate, Wildaughter, thereby infringing upon Ms. Gold's Fourth Amendment protections. Ms. Gold and Wildaughter shared a suite with separate rooms. (R. 27). On May 27, 2017, Wildaughter entered Ms. Gold's room without consent and "looked around at some of the desktop files" on Ms. Gold's personal computer. (R. 24). Wildaughter opened one folder on the desktop, three subfolders within, and two additional

documents within a subfolder. (R. 24–27). Wildaughter then "grabbed a flash drive from [her] room and copied the whole desktop onto it," although she "didn't open all the files" that she copied onto the flash drive. (R. 26–27). This was not a situation "limited to a small, defined, handpicked pool of offline documents," as the court below asserted. (R. 54). She then gave the flash drive to Joralemon Police Officer Aaron Yap, telling him that she "had seen the photographs on [Ms. Gold]'s desktop and looked into some of the folders." (R. 26). Officer Yap did not ask "any questions at all" about the specific files Wildaughter viewed but still examined every single file contained on the flash drive—Ms. Gold's entire desktop. (R. 6, 29). Undoubtedly, Officer Yap's warrantless search of the whole flash drive violated Ms. Gold's Fourth Amendment protections because he viewed "materials beyond the scope of the private search" initially conducted by Wildaughter. *Sparks*, 806 F.3d at 1336.

Allowing the government to search the entire contents of a device based solely on the private search of a singular file, as the Fourteenth Circuit did below, will become more problematic as electronic storage capabilities advance. Indeed, in the future, "[t]he one searched file will be more than just a drop poisoning the well; it will become a drop poisoning the ocean." Mestitz, *supra*, at 341. Therefore, as a means of preventing this evil, the Court should reverse the decision below and adopt the narrow approach to the private search doctrine.

B. The Broad Approach to the Private Search Doctrine is Wholly Inapplicable to Digital Files Due to the Fundamental Differences Between Traditional Containers and Technological Devices

Second, considering the unique nature of technology and digital files, there is no way for police to predict with "substantial certainty" what will be uncovered on a technological device compared to traditional searches of non-technological containers. *Runyan*, 275 F.3d at 463. To be sure, the Court has not had the opportunity to decide how the private search doctrine applies to

digital files specifically, but its Fourth Amendment jurisprudence regarding searches of technology ultimately provides thoughtful guidance on the present issue.

In *Riley v. California*, 573 U.S. 373 (2014), this Court held that, generally, the government must obtain a warrant before it searches the contents of a cell phone. *Id.* at 403 ("Our answer to the question of what police must do before searching a cell phone seized incident to arrest is accordingly simple—get a warrant."). The Court took careful consideration to explain the fundamental differences between cell phones (a technological device) and non-technological items typically found on a person incident to arrest. *Id.* at 393–95. Importantly, the capabilities of technological devices fundamentally change the reality of searches, especially in light of cell phones' "immense storage capacity." *Id.* at 393 ("Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy."). For example, the storage capabilities of a standard smartphone in 2014 with 16 gigabytes of storage could "translates to millions of pages of text, thousands of pictures, or hundreds of videos." *Id.* at 394. Thus, unlike physical containers, "the possible intrusion on privacy is not physically limited in the same way" for technological containers. *Id.* The Court cautioned that, because a cell phone has the capability to maintain various types of extraordinarily detailed and sensitive information in one uniquely portable place, the attached privacy implications are much greater and mandate a different form of protection than regular items found on an individual. *Id.* at 394–95. Accordingly, searches of technology should not be measured under the same standards as traditional objects. *See Id.* at 407 ("we should not mechanically apply the rule[s] used in the predigital era" to searches in a post-digital era) (Alito, J., concurring). Just as this Court limited the government's search abilities incident to arrest for the technological context in *Riley*, those same limitations should be provided in the context of the private search doctrine on the

grounds that there is no way to predict with "substantial certainty" what is contained within technological devices. *Runyan*, 275 F.3d at 463.

The broad approach to the private search doctrine is wholly inapplicable here due to the fundamental nature of technology and digital files. In reality, the *Runyan* framework allows the government to perform warrantless searches at their unbridled discretion and then justify its unconstitutional search with the fruits of its unreasonable fishing expeditions. Given the immense storage capabilities inherent in modern technological devices, as well as the unique nature of digital files, there is no practical way to be substantially certain that the contents of one digital file is indicative of the contents of another. *See Lichtenberger*, 786 F.3d at 489 ("the reality of modern data storage is that the possibilities are expansive."). This means that the Joralemon Police had no way to predict—with any amount certainty, let alone substantial certainty—what the files unsearched by Wildaughter could have contained. This Court should not permit the government to violate the Fourth Amendment unscathed by accepting its after-the-fact justification that was created with information obtained from the violation itself.

The Sixth Circuit offers well-reasoned analysis for the Court's consideration. In *Lichtenberger*, the private actor testified that she only reviewed a select number of files before alerting the police and she was unsure if she showed the police the same files that she reviewed initially, thus indicating to the court that the officer involved may likely exceeded the scope of the private search. *Lichtenberger*, 786 F.3d at 488. Regardless of the fact that both searches uncovered child pornography, the court pointed out that "there was no virtual certainty that would be the case." *Id.* at 489. In fact, the Sixth Circuit recognized the very real possibility that the police "could have discovered something else on [the] laptop that was private, legal, and unrelated to the allegations prompting the search—precisely the sort of discovery the *Jacobsen* Court sought to

avoid in articulating its beyond-the-scope test." *Id.* at 488–89 (explaining that the folders where the initial private search of the digital files occurred could have contained legal and sensitive information unrelated to the allegations).

In effect, the broad container approach to the private search doctrine affords the police unlimited discretion to parse through the contents of digital containers with previously unfathomable storage capacity. As the Court has acknowledged, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 51 (2001). Technology will inevitably continue to advance, as will its storage capabilities, and larger quantities of information will be able to be maintained on smaller physical devices. While the police may be able to predict with substantial certainty the undiscovered contents of a paper bag, for example, the task's complexity increases when the container can hold millions, if not billions, of digital files. The private discovery of one singular file that alludes to criminal conduct cannot be the substantial certainty key that opens the floodgates, allowing the police unfettered access to countless other files that have yet to be discovered. Accordingly, the Court should reverse the decision below by rejecting the broad approach to the private search doctrine on the grounds that it is inherently inapplicable to digital files.

III. THE GOVERNMENT VIOLATED BRADY BY WITHHOLDING MATERIAL EVIDENCE THAT, IF DISCLOSED, WOULD HAVE UNDERMINED CONFIDENCE IN THE OUTCOME OF MS. GOLD'S TRIAL

Ms. Gold additionally asks this Court to reverse the decision of the Fourteenth Circuit below on the grounds that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by intentionally withholding two FBI reports that were material to her case. A viable *Brady* claim exists where the government suppresses material evidence that is favorable to the accused.

Strickler v. Greene, 527 U.S. 263, 281–82 (1999); *Brady*, 373 U.S. at 87 (1963). The question here is one of admissibility: whether inadmissible evidence—specifically, two FBI investigative reports—may still be considered material for *Brady* purposes.

Under *Brady*, "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Importantly, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence," but rather, "whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Thus, although the suppressed evidence must be material to make out a *Brady* claim, *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995), "inadmissible evidence might nonetheless be considered material under *Brady* if it would lead directly to admissible evidence." *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 465 (6th Cir. 2015) (internal citation omitted); *see* Brian D. Ginsberg, *Always Be Disclosing: The Prosecutor's Constitutional Duty to Divulge Inadmissible Evidence*, 110 W. VA. L. REV. 611, 626–34 (2008) (reviewing Supreme Court *Brady* jurisprudence and determining that "the Court's opinions in its *Brady* line of cases contemplate that constitutional criminal discovery encompasses inadmissible evidence.").

The Fourteenth Circuit below erred in its conclusion that the government's suppression "could not form the basis for a *Brady* violation" and that inadmissible evidence has "no 'reasonable probability' of creating a different result at trial." (R. 56). By so holding, the court misinterpreted *Wood v. Bartholomew*, 516 U.S. 1 (1995). (R. 56); *see Paradis v. Arave*, 240 F.3d 1169, 1178 (9th Cir. 2001) (explaining that *Wood* "did not categorically reject the suggestion that inadmissible

evidence can be material under *Brady*, if it could have led to the discovery of admissible evidence."). In *Wood*, this Court declined to find a *Brady* violation where the results of a polygraph test had been withheld. *Wood*, 516 U.S. at 6. Contrary to the Fourteenth Circuit's assertion, however, the Court's reasoning was not solely based on the inadmissibility of the test results. Rather, the Court determined that, in light of the weight of the vast physical evidence against Mr. Bartholomew, the polygraph results would have had no bearing on the verdict, regardless of admissibility. *Id.* at 8. As the Third Circuit correctly points out, "the Court's examination of the issue would have ended when it noted the test results were inadmissible" had it meant that "inadmissible evidence could never form the basis of a *Brady* claim." *Dennis v. Secretary of Pennsylvania*, 834 F.3d 263, 308 (3d Cir. 2016) (internal citation omitted). Therefore, *Wood* does not stand for the assertion that *Brady* evidence must necessarily be admissible, but instead is focused solely on "the impact that the absence of evidence had on the trial." *Id.* at 295.

In fact, "[m]ost circuits addressing the issue" have agreed that a viable *Brady* claim exists "if the withheld evidence would have led directly to material admissible evidence" resulting in undermined confidence in the outcome. *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 4 (1st Cir. 2003); *Dennis*, 834 F.3d at 310; *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004); *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). The Supreme Court itself has even clarified that "the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,'" not whether it is admissible. *Strickler*, 527 U.S. at 290 (citing *Kyles*, 514 U.S. at 435). This makes sense, considering the purpose of *Brady*, "to ensure that a miscarriage of justice does not occur," would be defeated by bright-line rules regarding the admissibility of withheld evidence. *Bagley*, 473 U.S. at 675.

Here, the two FBI reports in question each identified another suspect in the murder of Tiffany Driscoll ("Driscoll"). The first report (the "Brodie Report") revealed that Driscoll owed money to an HerbImmunity distributor known for his violent reputation, Martin Brodie. (R. 11, 44). The second report (the "Stevens Report") suggested that Belinda Stevens was responsible for Driscoll's murder. (R. 12, 44). Although the Reports constitute inadmissible hearsay, they are nonetheless material because the information contained within them would have undermined confidence in the outcome of the trial. This is true for two reasons: (1) the information contained in the reports, had they been disclosed, would have directly led to admissible evidence, and (2) the information would have undercut the jury's confidence in the police investigation into Driscoll's murder. Either way, the disclosure of the reports would have changed the trial entirely.

A. The Suppressed Reports Would Have Led Directly to Admissible Evidence

For *Brady* purposes, "inadmissible evidence may be material if it could have led to the discovery of admissible evidence." *Dennis*, 834 F.3d at 310 (internal citation omitted); *see Nagle*, 212 F.3d at 567 (stating that the withheld evidence, "although inadmissible, would have led the defense to some admissible exculpatory evidence."). Both of the withheld FBI reports explicitly name an alternate suspect and, had the reports been disclosed, defense counsel would have undertaken independent investigations into each of them, undoubtedly leading to admissible and exculpatory evidence that would have altered the outcome at trial.

First, the Brodie Report details an interview of Chase Caplow, a classmate of Driscoll's who "was also involved in the multi-level marketing company HerbImmunity." (R. 11). During the interview, Caplow divulged that, two weeks before her death, Driscoll called Caplow to tell him "she owed money to an upstream distributor within the company, Martin Brodie." (R. 11). Caplow stated "that there were rumors that Brodie could be violent." (R. 11). As Judge Cahill

underscored in his dissent below ("the Dissent"), "[t]hough inadmissible hearsay, the disclosure that the victim owed a substantial amount of money to another HerbImmunity distributor would have led to another potential perpetrator—the clearest example of exculpatory evidence covered by *Brady*." (R. 59). Brodie's multiple connections to Driscoll and his violent reputation establish a viable motive for murder, making the information in the Brodie Report vital to Ms. Gold's defense. This information would have led to admissible evidence because defense counsel could have deposed both Brodie and Caplow, and they both could have been called to testify. Most importantly, defense counsel could have used this evidence "to mount an 'other suspect' defense at trial." *Dennis*, 834 F.3d at 302. It is inevitable that the potential to craft an alternate defense would result in an entirely different trial. The Brodie Report provides an obvious link to an alternate suspect and Ms. Gold should have been afforded the opportunity to pursue that link which would have uncovered admissible and exculpatory evidence.

Second, the Stevens Report describes an "anonymous phone call" the FBI received "in connection with the death of Tiffany Driscoll." (R. 12). Special Agent Mark St. Peters explained that "[t]he anonymous tipster alleged that a Belinda Stevens was responsible for the murder of Driscoll." (R. 12). Stevens was also "involved in the multi-level marketing operation HerbImmunity." (R. 12). Had any of this information been disclosed, not only could defense counsel have undertaken their own investigation to determine the veracity of the tip, but Stevens also could have been deposed and called to testify. To be sure, "[p]rosecutors are not necessarily required to disclose every stray lead and anonymous tip," but their disclosure of legitimate suspects is critical. *Gumm v. Mitchell*, 775 F.3d 345, 364 (6th Cir. 2014) (internal citation omitted). As highlighted by the Dissent, "[w]hether this phone call was considered credible by the officer is not determinative of whether the call should have been disclosed to the defendant." (R. 59). The very

fact that two potential suspects were explicitly identified by name is sufficient for the defense to have undertaken independent investigation and uncovered admissible evidence in the form of testimony or physical evidence. The "potential for that evidence to have affected the outcome of petitioner's trial is inescapable." *Gumm*, 775 F.3d at 370.

As the Dissent observed, "it is clear that the interview with Chase Caplow and the anonymous 911 call would have led directly to admissible evidence." (R. 59). As such, "the nondisclosure of the identities of these suspects … is an egregious breach of the [government's] *Brady* obligations." *Gumm*, 775 F.3d at 364. In fact, "[w]ithholding knowledge of a second suspect conflicts with the Supreme Court's directive that 'the criminal trial, as distinct from the prosecutor's private deliberations, [be preserved] as the chosen forum for ascertaining the truth about criminal accusations.'" *United States v. Jernigan*, 492 F.3d 1050, 1056–57 (9th Cir. 2007) (en banc) (quoting *Kyles*, 514 U.S. at 440). This is not a case of mere speculation, as the government asserts. (R. 47). Instead, the defense was wrongly kept in the dark with regard to "lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Bagley*, 473 U.S. at 682; *see Dennis*, 834 F.3d at 311 ("Alterations in defense preparation and cross-examination at trial are precisely the types of qualities that make evidence material under *Brady*."). The disclosure of the Brodie and Stevens Reports would have changed almost every aspect of Ms. Gold's trial, thereby constituting material evidence that must be turned over pursuant to *Brady*. *See United States v. Agurs*, 427 U.S. 97, 112 (1976) ("if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."). In fact, the government's suppression ultimately prevented the defense from conducting the "reasonable and diligent investigation" Ms. Gold was entitled to. *Strickler*, 527 U.S. at 287–88 (citing

McCleskey v. Zant, 499 U.S. 467, 498–99 (1991)). Had this opportunity been made available, the outcome of the trial would undoubtedly have been different.

B. The Suppressed Reports Would Have Undermined the Jury's Confidence in the Police Investigation

Additionally, had the FBI reports been disclosed, the outcome of the trial would have been different as the defense would have been able to significantly undermine the jury's confidence in the police investigation performed into Driscoll's murder. *See Kyles*, 514 U.S. at 446 (withheld evidence, if disclosed, could have allowed the defense to "attack[] the reliability of the investigation in failing even to consider" another suspect's possible guilt). Accordingly, the reports are material under *Brady*.

First, in the Brodie Report, Special Agent Baer stated under oath that she would follow up on Caplow's information and investigate Brodie. (R. 11). There is no evidence that Special Agent Baer ever did follow up, thus reflecting the impermissible attitude that the government was willing to pin the case on Ms. Gold without considering other potential suspects. *See Dennis*, 834 F.3d at 302 (police may not "arbitrarily put blinders on as to the possibility that someone else committed the crime and pursued the easy lead."). These facts would have allowed the defense to undermine the sufficiency of the police investigation by planting substantial doubt in the jury's mind regarding its thoroughness, reliability, and completeness. *See Gumm*, 775 F.3d at 360 ("These facts, had they been disclosed, would have provided a compelling counter-narrative to the state's theory of the case and would have called into question the thoroughness of the police investigation."). The non-disclosure of the Brodie Report is therefore an unconstitutional infringement upon Ms. Gold's right to a fair trial.

Second, disclosure of the Stevens Report would also have further dissolved the jury's confidence in the police investigation. The anonymous caller described in the Stevens Report

explicitly stated that Belinda Stevens, another person involved in HerbImmunity, "was responsible for the murder of Driscoll." (R. 12). This is a heavy accusation that should have been thoroughly explored, especially considering Stevens' link to HerbImmunity. Despite Special Agent St. Peters claiming that he "conducted a preliminary investigation into the veracity of the lead," such investigation was undoubtedly inadequate, if it were performed at all. (R. 12). In fact, there is no evidence that Special Agent St. Peters conducted any investigation into the tip at all. By explaining to the jury that, even though another member of HerbImmunity was indicated to be responsible, the FBI provided no proof of a subsequent investigation, the defense would once again be able to undercut the jury's reliance on the police work involved. *See Agurs*, 427 U.S. at 119 (Marshall, J., dissenting) ("If there is a significant chance that the withheld evidence … would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside."). The FBI and the government alike failed Ms. Gold by disregarding her right to a fair trial, and the jury should have been made aware of this failure.

Moreover, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113. That is the case here. As the Dissent points out, "the evidence of the defendant's guilt is less than compelling." (R. 59). The jury found Ms. Gold guilty based on speculation and "wildly circumstantial evidence" without any physical evidence or compelling proof tying Ms. Gold to Driscoll's murder, meaning that the government's suppression of two additional suspects could certainly create a reasonable doubt in the jury's mind. (R. 48). The quality and quantity of evidence presented by the government at trial is not strong enough to withstand the introduction of the withheld reports, and the disclosure of the Brodie and Stevens Reports would have rocked the already unsteady foundation upon which Ms. Gold was convicted. Ms. Gold therefore did not

receive a fair trial on the grounds that the jury was not given the opportunity to hear the entire story. In fact, Ms. Gold herself was denied the full story by not being made aware of two material reports. Neither courts nor the prosecution may "usurp[] the function of the jury as the trier of fact in a criminal case," *Agurs*, 427 U.S. at 117 (Marshall, J., dissenting), but that is exactly what the government and the Fourteenth Circuit did when deciding that the suppressed reports were not material. On the contrary, the reports could have exonerated Ms. Gold by uncovering compelling evidence of alternate suspects, modifying her defense strategy, and undermining the police investigation. *See Dennis*, 834 F.3d at 287 (that the evidence "does not wholly undermine the prosecution's theory of guilt does not sap its exculpatory value."). There can be no doubt that the reports were material.

In sum, the Brodie and Stevens Reports, both intentionally withheld by the government, satisfy *Brady*'s materiality standard because, despite their inadmissibility, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433 (citing *Bagley*, 473 U.S. at 682). Accordingly, the Court should reverse the decision below on the grounds that the government committed an inexcusable *Brady* violation by withholding material evidence from Ms. Gold.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Samantha Gold asks this Court to reverse the decision of the Fourteenth Circuit below and remand for further proceedings.

Respectfully submitted,

Team 26
Counsel for Petitioner

APPENDIX A

U.S. Const. amend. IV:

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