Team R27

No. 20-2388

In the Supreme Court of the United States

SAMANTHA GOLD,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

BRIEF FOR RESPONDENT

Team 27
Attorneys for Respondent

ORIGINAL BRIEF

QUESTIONS PRESENTED

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

II. Whether the Fourth Amendment allows the government, relying on a private search, to seize and offer into evidence at trial files discovered on a defendant's computer without a warrant when the officer was substantially certain of the computer's contents before conducting a more thorough search than the one conducted by the private party.

III. Whether *Brady v. Maryland* requires the government to disclose potentially exculpatory information even though the information would be inadmissible at trial.

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The decision of the Court of Appeals for the Fourteenth Circuit has not been published at the time of filing this Brief, but the decision is reproduced in the record on pages 50-59. *Gold v. United States*, No. 19-142 (14th Cir. 2020). The oral ruling of the United States District Court for the Eastern District of Boerum on Petitioner's motion to suppress has not been published at the time of filing this Brief, but the decision is reproduced in the record on pages 40-41. *United States v. Gold*, No. 17 CR 651 (E.D. Boerum 2018).

CONSTITUTIONAL PROVISIONS AND RULES

The Fourth Amendment of the United States Constitution guarantees:

> 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.

Federal Rule of Evidence 501 provides that:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Fed. R. Evid. 501.

Federal Rule of Evidence 801 provides that:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay**.** "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

> (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 801.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

The facts predating the May 27, 2017 arrest of Samantha Gold in connection with the death of Tiffany Driscoll are anything but a mystery. *See* R. at 14. Ms. Driscoll and Ms. Gold attended Joralemon University together. *Id.* In 2016, Ms. Driscoll recruited Ms. Gold to join a multilevel marketing organization HerbImmunity. *Id.* Upon persuasion, Ms. Gold decided to join and invested an unsettling $2,000.00 into the organization. *Id.* Unfortunately, Ms. Gold was only able to make one sale and it further indebted her to the organization. *Id.* Angered and frustrated by this, Ms. Gold began to make threats concerning the wellbeing of Ms. Driscoll to her therapist, Doctor Chelsea Pollak. R. at 4. Ms. Gold became a patient of Dr. Pollak's in 2015 to manage her anger issues. R. at 17. Dr. Pollak's standard practice is to warn patients, such as Ms. Gold, that she has a legal duty to break the psychotherapist-patient privilege if the patient threatens to harm themselves or others. R. at 21. During Ms. Gold's May 25th counseling session, Ms. Gold complained about her involvement with HerbImmunity, and in reference to Ms. Driscoll yelled, "I'm so Angry! I'm going to kill her. I will take care of her and her precious HerbImmunity. After today, I will never have to see or think about her again." R. at 4. Due to Ms. Gold being diagnosed with Intermittent Explosive Disorder (IED), Ms. Pollak had a sincere fear that Ms. Gold would actually harm Ms. Driscoll and decided to report the threat to Officer Nicole Fuchs at the Livingston Police Department (LPD). R. at 5.

About three hours later, the LPD was once again contacted concerning threats to the wellbeing of Ms. Driscoll; only this time, it was by Ms. Gold's former roommate, Jennifer

Wildaughter. R. at 6. Ms. Wildaughter arrived at the LPD precinct and informed the detective that she found texts and documents on Ms. Gold's computer that appeared to be a concern to Ms. Driscoll. *Id.* Ms. Wildaughter indicated to the officer that she was aware that Ms. Gold owed debt to a vitamin company and blamed Ms. Driscoll because she was the one who recruited her involvement. *Id.* Ms. Wildaughter explained that when Ms. Gold returned to the apartment on the evening of May 25, 2017 she was agitated. *Id.* Later, she stormed out, leaving her computer open on her desk. *Id.* Out of concern, Ms. Wildaughter decided to look through it, and upon viewing several folders labeled "Photos," "HerbImmunity," "Confirmations," and "For Tiff," Ms. Wildaughter saw personal photos of the victim and her father, a note to the victim offering her a gift, research on several poisons, as well as a confirmation receipt for a shipment of chocolate-covered strawberries to the recipient Ms. Tiffany Driscoll. *Id.* The discovery of these files led Ms. Wildaughter to believe that Samantha Gold was planning to poison Ms. Driscoll. *Id.* Due to this belief, Ms. Wildaughter created a flash drive compiling all of the documents on Ms. Gold's computer, and turned it into Officer Aaron Yap, telling him "everything of concern was on this drive." *Id.* Ms. Wildaughter had the intention of turning the flash drive over to the LPD with hopes of preventing Ms. Gold from hurting herself, or others. R. at 26. Officer Yap has been in charge of the LPD's digital forensics unit for eight years and based upon his proficiency, the conversation he had with Ms. Wildaughter triggered concern that Ms. Gold did in fact have a motive to harm Ms. Driscoll. R. at 34. After Ms. Wildaughter left, Officer Yap then conducted a subsequent review of the flash drive, reviewing all content, including the documents not seen by Ms. Wildaughter. R. at 6. After viewing every document on the flash drive, Officer Yap confirmed the suspicion that Ms. Gold was going to poison Ms. Driscoll and presented this evidence to his supervisor. *Id.*

During this same evening, Tiffany Driscoll was found at the bottom of the stairs leading to her basement. R. at 13. Medical examiners expressed that Ms. Driscoll suffered blunt force trauma to the head but there were no indications that foul play may have been involved. *Id.* Toxicology reports later revealed that Ms. Driscoll's system contained traces of strychnine, a poison often used as a pesticide. R. at 14. On May 27, the Federal Bureau of Investigation (FBI) obtained a search warrant for Driscoll's family home and upon execution, discovered an empty box and a note lying in Ms. Driscoll's trash can. *Id.* The box, which was delivered by mail to Ms. Driscoll on the morning of May 25, 2017, was believed to contain the chocolate covered strawberries that Ms. Gold tampered with. *Id.* At this point, Ms. Gold became the viable suspect; however, special agents with the Federal Bureau of Investigation (FBI) continued to conduct a thorough investigation after her arrest. *Id.* On June 2, 2017, Chase Caplow, a classmate of Ms. Driscoll, reported to Special Agent Mary Baer that he knew Ms. Driscoll owed money to Martin Brodie, an upstream distributor within the company. R. at 11. It was also revealed that Mr. Brodie could become violent, however, a follow-up interview with Mr. Brodie would be needed to determine the accuracy of this information. *Id.* Additionally, on July 7, 2017, Special Agent Mark St. Peters received an anonymous phone call declaring that Belinda Stevens, another HerbImmunity marketer was responsible for murdering Ms. Driscoll. R. at 12. This information was never shared with the defense before trial, and in the end, the continued investigation never led officers to believe that anyone besides Ms. Gold was responsible for the death of Ms. Driscoll. R. at 43; *see* R. at 12.

II. PROCEDURAL HISTORY

Ms. Gold was indicted for Delivery By Mail of An Item with Intent to Kill or Injure (Murder by Mail) in violation of 18 U.S.C. §§ 1716(j)(2), (3), and 3551. R. at 1. Following her indictment, Ms. Gold filed a pretrial motion before the District Court, seeking to suppress two

pieces of evidence. R. at 16. First, Ms. Gold attempted to preclude the Government from calling Ms. Gold's psychiatrist, Dr. Pollak, to testify against her and from introducing her notes into evidence. *Id.* Dr. Pollak's testimony was limited to the disclosure she already made to the LPD. R. at 39. Second, Ms. Gold attempted to suppress evidence obtained from her computer. R. at 16. The District Court denied Ms. Gold's motion to dismiss on both issues. R. at 40. Ms. Gold was subsequently convicted of Murder by Mail and sentenced to life in prison. R. at 51.

Following her conviction, Ms. Gold filed a post-conviction motion before the District Court, requesting a direct verdict or a new trial based on two alleged *Brady* violations. R. at 43, 52; *see Brady v. Maryland*, 373 U.S. 83, 87 (1963). The two alleged *Brady* violations regarded two reports that the Government did not disclose before Ms. Gold's trial. R. at 43. The District Court denied Ms. Gold post-conviction relief. R. at 48. Ms. Gold appealed her conviction and sentence to the United States Court of Appeals for the Fourteenth Circuit. R. at 51. The Fourteenth Circuit affirmed the rulings of the District Court. *Id.* Ms. Gold then petitioned this Court for a writ of certiorari which was granted on November 16, 2020. R. at 60.

SUMMARY OF THE ARGUMENT

First, this Court should affirm the District Court's holding that there is a dangerous patient exception to the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501; therefore, qualifying the testimony of Ms. Gold's psychiatrist admissible at trial. The District Court was correct in recognizing this exception because this Court in *Jaffee v. Redmond* recognized, when establishing this testimonial privilege, that there are situations where applying this privilege would be inappropriate, including when a serious threat of harm to the patient or others can be averted only by a disclosure by the psychiatrist (i.e. this Court suggests there is a dangerous patient exception). This case presents just the situation the *Jaffee* Court had in mind when suggesting the

existence of a dangerous patient exception because the only way harm could have been prevented to Ms. Gold's victim was through Dr. Pollak's required disclosure to the LPD. This dangerous patient exception should also be recognized by this Court because Ms. Gold had no confidentiality left to protect at trial since all the contents of Dr. Pollak's testimony were required to be and were already disclosed to the LPD before trial.

Second, this Court should affirm the District Court's holding that the LPD did not exceed the scope of the private search conducted by Ms. Gold's roommate. The court was correct in applying the broader approach to the private search doctrine as applied to digital information because as held in *Rann v. Atchison*, a government actor does not exceed the scope of a private search so long as the actor is "already substantially certain of what is inside that container based on the statements of the private searches, their replication of the private search, and their expertise." Additionally, courts such as *United States v. Guindi* have recognized that a violation of the Fourth Amendment does not occur when a government actor examines the same content that the private searchers had viewed, but more thoroughly. In the case at hand, Officer Yap was substantially certain as to what the flash drive contained before conducting a subsequent search of the drive. Furthermore, Officer Yap's conduct was nothing more than the re-examination of the content that Ms. Wildaughter previously viewed, only more thoroughly. Thus, the private search of Officer Yap should be constituted as a valid search.

Third, this Court should affirm the District Court's holding that there was no *Brady* violation by the Government and deny the defendant's request for a directed verdict or new trial. The court was correct in finding that the Government's failure to disclose two FBI reports mentioning potential suspects in the murder of Ms. Driscoll would be inadmissible at trial as hearsay and therefore did not constitute material that could form the basis for a *Brady* violation.

As held in the Supreme Court case *Brady v. Maryland*, the defendant must prove that the evidence was favorable to the defense and the evidence was material. Under *Brady*, "material" evidence is found when there exists a reasonable probability that if the evidence had been disclosed, the result of the trial would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). In the case at hand, the evidence is not material because it is inadmissible as hearsay. Inadmissible evidence can never be material, and is in fact, "not evidence at all." *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). The FBI dismissed these reports as without merit and concluded there were no viable suspects aside from Ms. Gold. These reports would not have led to admissible evidence for the defense. Additionally, there was overwhelming evidence linking Ms. Gold to the victim which makes it highly unlikely the trial would have had a different outcome if the defense had had access to this information prior to trial.

ARGUMENT

I. THE DANGEROUS PATIENT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT TESTIMONIAL PRIVELGE UNDER RULE 501 SHOULD APPLY.

Federal Rule of Evidence 501 (Rule 501) provides that privileges "shall be governed by the principles of the 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. Witnesses have a general duty to provide any evidence that they can provide. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). Because of this general duty, privileges are generally disfavored but can be justified when "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). In *Jaffee v. Redmond*, this Court held that there is a psychotherapist-patient testimonial privilege under Rule 501. *Id.* at 15. The purpose of this privilege is to protect confidential communications between patients and their psychotherapists to facilitate effective mental health treatment. *See Id.* at 10. There is now a

circuit split as to whether there is a dangerous patient exception to the psychotherapist-patient testimonial privilege under Rule 501.

The Tenth Circuit has adopted this exception, while the Sixth, Eighth, and Ninth have not. *See United States v. Ghane*, 673 F.3d 771, 786 (8th Cir. 2012); *United States v. Hayes*, 227 F.3d 578, 586 (6th Cir. 2000); *United States v. Chase*, 340 F.3d 978, 992 (9th Cir. 2003); *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998). But within the other eight circuit courts that have not decided this issue (which is two-thirds of the circuit courts, not including the Fourteenth Circuit), there have been several district courts to adopt this exception. *See United States v. Hardy*, 640 F. Supp. 2d 75, 80 (D. Me. 2009); *United States v. Highsmith*, No. 07-80093-CR, 2007 WL 2406990, at *7 (S.D. Fla. Aug. 20, 2017). To resolve this circuit split, this Court should hold that there is a dangerous patient exception to the psychotherapist-patient testimonial privilege.

A. <u>This Court in *Jaffee* recognizes that the psychotherapist-patient testimonial privilege is not absolute.</u>

Regarding the *Jaffee* decision that established the psychotherapist-patient testimonial privilege, this Court noted that the details of this privilege (such as exceptions) should be determined on a case-by-case basis and that like any other privilege, protection can be waived. *Jaffee*, 518 U.S. at 15 n.14, 18. This Court also suggests that 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" (i.e. this Court suggests there is a "dangerous patient exception"). *Id.* at 18 n.19. These statements in *Jaffee* reveal that this Court views this privilege as limited in scope. *United States v. Auster*, 517 F.3d 312, 315 n.5 (5th Cir. 2008). In other words, this Court recognized that there could be situations where it is appropriate for a therapist to testify against their client at trial. *See Id.*

The situation with Ms. Gold is just the situation the *Jaffee* Court was talking about when making these statements. The dangerous patient exception should be adopted and the psychotherapist-patient testimonial privilege should give way in situations like Ms. Gold's because the only way for harm to be avoided in these situations is through disclosure of the threat by a psychotherapist.

B. Ms. Gold lost protection of the psychotherapist-patient testimonial privilege when she lost protection of the psychotherapist-patient privilege.

As previously stated, the purpose of the psychotherapist-patient privilege is to protect confidential communications to facilitate effective mental health treatment. *See Jaffee*, 518 U.S. at 10. Since Ms. Gold does not have any confidentiality to protect at trial, she should not get the protection of this privilege.

Boerum Health and Safety Code § 711 makes communications between a patient and a mental health professional confidential except when a patient makes an "actual threat to physically harm either themselves or an identifiable victim(s)" (the psychotherapist-patient privilege). R. at 2. For a mandatory duty to report to exist under this statute, three requirements must be met according to the mental health professional's good faith clinical judgment: (1) The patient makes an actual threat to themselves or a third party; (2) the patient has the "apparent capability" to carry out the threat; and, (3) it is more likely than not that the patient will carry out the threat in the near future. *Id.* When these three requirements are met, the patient loses the psychotherapist-patient privilege and the mental health professional has a mandatory duty to warn the victim and notify law enforcement of the threat. *See Id.* This duty is often referred to as the *Tarasoff* duty and recognizes that protecting a patient or a third party from danger outweighs the interests served in applying the psychotherapist-patient privilege. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976). Since Dr. Pollak had a sincere fear that Ms. Gold had the means and would

actually carry out her true threat to kill her victim, Ms. Gold lost the confidentiality she had under the psychotherapist-patient privilege and Dr. Pollak had no choice but to report the threat to the victim and the LPD.

This Court should adopt the dangerous patient exception to the psychotherapist-patient testimonial privilege because once a mental health professional carries out their mandatory duty of breaching the psychotherapist-patient privilege, there is no confidentiality left to protect at trial. Simply put by the highest court in New York in *People v. Bloom*, "[t]here can be no disclosure of that which is already known, for when a secret is out it is out for all time and cannot be caught again like a bird and put back in its cage." *People v. Bloom*, 193 N.Y. 1, 10 (1908). Here, at trial, Dr. Pollak was not going to testify to anything not already disclosed to the LPD when she was required to breach the psychotherapist-patient testimonial privilege. Because Dr. Pollak will not be testifying to anything not already disclosed, Ms. Gold does not have any confidentiality left to protect at trial.

Ms. Gold has argued that this exception should not apply because the harm Dr. Pollak attempted to prevent by disclosing Dr. Gold's threat, the harm of Ms. Driscoll, has since passed. R. at 39. However, it is important to remember that the harm Dr. Pollak tried to prevent has only passed because Ms. Driscoll was murdered. Ms. Gold's argument is bad logic. Not adopting the dangerous patient exception to the psychotherapist-patient testimonial privilege sets bad precedent that patients, including Ms. Gold here, can regain lost confidentiality by killing their victim. *People v. Wharton*, 809 P.2d 290, 308 (Cal. 1991).

Like with the *Tarasoff* duty, in that the interest in protecting a patient or a third party from danger outweighs the interests served by applying the psychotherapist-patient privilege, the same is true regarding the testimonial privilege. Ms. Gold cannot reap the benefits from the

psychotherapist-patient testimonial privilege because she has no confidentiality left to protect since her threat has already been disclosed to the LPD. However, future victims can actually be protected by adopting the dangerous patient exception since this reliable testimony by the psychiatrist will make it more likely that the dangerous patients will be convicted and "[i]f convicted, the patient[s] may be incarcerated, and incarceration is one way to ensure protection of [] intended victims." *United States v. Chase*, 340 F.3d 978, 99 (9th Cir. 2003). Therefore, this Court should hold that the dangerous patient exception to the psychotherapist-patient privilege applies because this Court suggested this exception exists in *Jaffee* and Ms. Gold has no confidentiality to protect.

II. THE FOURTH AMENDMENT WAS NOT VIOLATED BECAUSE THE CONTENTS OF THE COMPUTER DID NOT EXCEED THE SCOPE OF THE PRIVATE SEARCH.

This Court should also affirm the District Court's decision to admit evidence obtained from Ms. Gold's computer because the search conducted by the government was not broader than the search conducted by the private search, thus, not requiring a warrant to be obtained.

The Fourth Amendment of the United States Constitution guarantees all citizens the right "to be secure in their persons, houses, papers, and effects," affording them protection from unreasonable search and seizures. U.S. Const. amend. IV. A "search" occurs when one's expectation of privacy is infringed upon, whereas, a "seizure" occurs when one's possessory interest of property is interfered with. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). However, as created in *United States v. Jacobsen*, the Private Search Doctrine implements the rule as to when an unreasonable search or seizure is conducted by a private party versus a government actor. *Id.*

The United States District Court was correct in holding that Officer Yap's examination did not violate Ms. Gold's Fourth Amendment rights. The United States Supreme Court has yet to

decide how the private search doctrine applies to searches of digital devices that were conducted privately. However, courts have been influenced by the broader approach taken by *Rann v. Atchiso*n, 689 F.3d 832 (7th Cir. 2012).

Although the Fourth Amendment does not apply to private searches, the private search doctrine has established "[i]f a private actor searches evidence in which an individual has a reasonable expectation of privacy, and then provides that evidence to law enforcement or its agent, the additional invasions of the individual's privacy by the government agent 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). It is only in circumstances in which the government's subsequent search exceeds the scope of the private search that the Fourth Amendment is implicated and thus requires the government to have the legal right to conduct an independent search. *Id*.

A. Officer Yap was substantially certain of what content the flash drive contained.

This Court should affirm the District Court's holding because the officer was substantially certain of what the flash drive contained before re-examining it. Consistent with the broader approach to the private search doctrine, the *Rann* court held that to determine whether an officer exceeded the scope of the search courts must look to whether the officer is "already substantially certain of what is inside that container based on the statements of the private searches, their replication of the private search, and their expertise." *Rann v. Atchiso*n, 689 F.3d 832, 836–37 (quoting *United States v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001)). Additionally, as held under *Jacobsen*, "confirmation of prior knowledge does not constitute exceeding the scope of a private search." *Runyan*, 275 F.3d at 463.

In *United States v. Runyan*, the defendant's ex-wife and friends gathered a collection of digital storage devices and turned it over to the police, soon after, the defendant was convicted of

child pornography *Id.* at 453. Before providing it to the police, the ex-wife and friend had only viewed several sections of the disks at random. *Id*. Once turned over, the police conducted a subsequent search of the digital media and found an additional amount of pornography. *Id.* The court upheld the search upon applying the rationale of *Jacobsen* for two reasons. *Id.* One, the court stated, "[a] search of any material on a computer disk is valid if the private party who conducted the initial search had viewed at least one file on the disk." *Id.* And two, the police had conversations with the defendant's ex-wife regarding the evidence before conducting a subsequent search which in return allowed them to gain substantial certainty as to what the private disks contained. *Id.* at 463.

This is analogical to the case at hand because Ms. Wildaughter too conducted a private search of Ms. Gold's computer, and then transferred the disturbing images and content onto a flash drive. Ms. Wildaughter had the intention of turning the flash drive over to the LPD with hopes of preventing Ms. Gold from hurting herself, or others. Although Ms. Wildaughter did not search each and every bit of content on Ms. Gold's computer, she did view several of the folders, and the subfolders in which she found several concerning documents, thus, meeting the *Jacobsen* standard of viewing at least one file. After having a conversation with Ms. Wildaughter concerning the content of these folders such as the photographs, usernames, note to Tiffany, etc., the officer then conducted a reexamination of the flash drive, in which he was likely to confirm what he previously learned from Ms. Wildaughter. Officer Yap has been in charge of the LPD's digital forensics unit for eight years and based upon his proficiency, the conversation he had with Ms. Wildaughter triggered concern that Ms. Gold did in fact have a motive to harm Ms. Driscoll. Ms. Wildaughter was very specific as to the information that she came across on Ms. Gold's computer which would

allow any officer with the level of expertise of Officer Yap to believe there is substantial certainty as to what the flash drive contained.

Likewise, as determined in *Rann,* based upon the suppression of information contained on a memory card, the court recognized that in the absence of multiple pieces of evidence to sift through, that there is a greater likelihood of the individual knowing what information is being handed over. *Rann v. Atchiso*n, 689 F.3d 832, 838 (7th Cir. 2012). With respect to that case, the mother and daughter provided police with one zip drive that allegedly contained criminalizing information regarding the defendant. *Id.* Upon determining substantial certainty, the court urged that turning over one zip drive clearly concludes that the mother and daughter knew what information it contained, allowing the officer to gain substantial certainty as to what would be revealed in a subsequent search. *Id.* Therefore, in this similar situation, it should too be determined that Ms. Wildaughter knew exactly what she was turning into the LPD when providing Officer Yap with one flash drive.

Lastly, in accordance with *Runyan*, the court in *Rann* also held that a defendant's expectation of privacy "has already been frustrated [when] the contents were rendered obvious by the private search." *Rann*, 689 F.3d at 837. As previously mentioned, before visiting Officer Yap, Ms. Wildaughter went into the bedroom of Ms. Gold and looked around at some of the files of her lit up desktop. Upon this examination she then reported the contents to Officer Yap, which would deem the contents as being previously frustrated, diminishing Ms. Gold's expectation of privacy. Taking the other route and holding that Officer Yap exceeded the scope of Ms. Wildaughter's search would in turn create a narrower reading of the private search doctrine, thus, imposing demanding guidelines on government agents. These demanding guidelines would implement hardship on officers, requiring them to obtain a search warrant, although an individual's

expectation of privacy has already been diminished. This in return can cause vital resources to plenish at a quicker rate when instead, if the broader approach is followed officers can do their jobs all while allowing citizens to retain some expectation of privacy. Therefore, it should be held that the subsequent search was valid because Officer Yap was substantially certain as to what was on the flash drive.

B. The "search" conducted by Officer Yap was the same search conducted by Ms. Wildaughter, but just more thorough.

This Court should affirm the District Court's holdings because searching content in a more thorough manner does not constitute an independent search. As held in *United States v. Guindi*, a violation of the Fourth Amendment does not occur when a government actor examines the same content that the private searchers had viewed, but more thoroughly. *United States v. Guindi*, 554 F. Supp. 2d 1018, 1024 (N.D. Ca. 2008). The court conceded that "the police do not exceed the scope of a prior private search when they examine particular items within a container that were not examined by the private searchers." *Id.*

In *Guindi*, there was a civil lawsuit that created the necessity for access to the computers of the Netcap offices and records. *Id.* at 1020. A computer forensic expert was hired to image all of the hard drives and contents of the Netcap offices. *Id.* at 1021. At this time, the expert was provided with 11 CDs, containing the computer's human-readable information. *Id.* at 1021. At trial, the expert testified that he attempted to systematically open every file but did not read every document within any given file. *Id.* at 1020. After Guindi was indicted for several counts of wire fraud based upon this information, the FBI then received copies of the imaged hard drives, however, there were only five DVDs. *Id.* at 1022. The government then reviewed these files, and Guidi filed a motion to suppress the evidence based on this unconsented search. *Id.* at 1021. The court here emphasized, "Although the imaged hard drives had been copied on to five DVDs for

the Government, rather than the 11 CDs that Schwartz reviewed, this case does not present a situation where the government reviewed more disks than the private searchers, as was the case in *Runyan*. Moreover, Schwartz testified that with one or two exceptions, he opened every file on the eleven CDs and also scrolled through the materials contained on those files." *Id.* at 1025.

Similarly, to the case at hand, although Ms. Wildaughter did not view each and every document that was compiled into the HerbImmunity folder, she did browse through several of the files and subfolders before creating the flash drive that she provided to Officer Yap. Based upon the conversation that she had with Officer Yap about the files she did see, he then conducted a more thorough search of the information that was turned over to him. Being that the facts of the two cases are analogous to one another, this court too should hold that Officer Yap's subsequent search did not further frustrate Ms. Gold's expectation of privacy by examining the content more thoroughly.

Equally, in *United States v. Simpson*, the defendant was convicted for receiving materials that contained minors engaged in sexually explicit activity. *United States v. Simpson*, 904 F.2d 607 (11th Cir. 1990). These materials were first exposed by Federal Express employees. *Id.* at 609. The employee merely opened the box and saw magazines and a loose-leaf folder that had pictures of nude children. *Id.* The employee immediately taped the box shut and then turned the material over to a Federal Express Security Officer. *Id.* This officer viewed four of the tapes with a company videocassette recorder. *Id.* These tapes and magazines were then turned over to federal law enforcement agents, which resulted in a subsequent search. *Id.* Simpson argued that this evidence should be suppressed based upon the private search doctrine. *Id.* at 611. Here, the court also held that the content of the box's material had already been determined by the private party and then reviewed when the US attorney and FBI agent arrived. *Id.* at 610. Being that the

government agents "took more time and were more thorough than the Federal Express agents," did not constitute as exceeding the scope of the search that was priorly conducted by the private party. *Id.*

Here, the contents of the flash drive had already been examined by Ms. Wildaughter before being re-examined by Officer Yap. The contents of the folders and subfolders had been determined to be worrisome, and Officer Yap simply took his time and sifted through the content to decide whether this content was anything to be worried about. *Id.*

If courts were to declare this type of re-examination to be a violation of the Fourth Amendment, then it would only sabotage a civilian attempting to assist the government in solving a crime. Government agents encourage those with information about a crime to come forward with said information in hopes of expediting the crime-solving process. However, if courts then declare this information as inadmissible it not only allows perpetrators to get away with the illegal act they have committed, it also undermines the attempted help of the individual, discouraging them from becoming involved next time. Therefore, it should be held that searching content more thoroughly does not constitute an independent search.

III. THERE WAS NO *BRADY* VIOLATION BECAUSE INADMISSIBLE EVIDENCE IS NOT "MATERIAL" AND THEREFORE CANNOT FORM THE BASIS OF THE VIOLATION.

This Court should affirm the District Court's decision to deny Ms. Gold, the petitioner's, post-trial motion for a directed verdict or new trial because there is no reasonable basis to believe the inadmissible evidence in this case, hearsay, can form the basis of a *Brady* violation.

The Supreme Court in *Brady v. Maryland* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373

U.S. 83, 87 (1963). To establish a *Brady* violation, the defendant must prove that (1) "the prosecution suppressed evidence," (2) "the evidence was favorable to the defense," and (3) "the evidence was material." *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). Under *Brady*, evidence is considered material only where there exists a "reasonable probability" that if the evidence had been disclosed the outcome at trial would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). The defendant has the burden of proof to show that the favorable evidence could reasonably put the case "in such a different light as to undermine the confidence in the verdict." *Id.* at 453. Only the second and third elements from *Brady* are at issue in this case because there is no dispute over whether the Government suppressed evidence from the defense.

A. The FBI reports were not evidence that was favorable to the defense.

As held in *U.S. v. Bagley*, the *Brady* rule is founded in the requirement of due process. *United States v. Bagley*, 473 U.S. 667, 676 (1985). The purpose of the rule is to ensure a miscarriage of justice does not occur, and only requiring the prosecution to deliver to the defense favorable evidence to the accused that "if suppressed, would deprive the defendant of a fair trial." *Id.* at 675. In *U.S. v. Bagley,* the prosecutor failed to disclose evidence that the defense may have used to impeach the State's witnesses with bias or interest. *Id.* The Supreme Court held in that case that impeachment evidence is exculpatory and therefore falls within the *Brady* rule because it is favorable to the accused. *Id.*

However, in Ms. Gold's case, the FBI reports were not being offered as hearsay for the purpose of impeachment but instead as part of their defense to cast doubt on Ms. Gold's involvement and suggest other suspects were culpable for the crime. The evidence may be exculpatory, but only to a small extent. The FBI vetted the two reports and found both were unsubstantiated claims and dismissed. Additionally, there was such a close connection and strong

evidence pointing to Ms. Gold's involvement in the murder that these suspects would have been of little value to the defense's argument. Unlike in *Bagley,* there was no risk of misjustice to Ms. Gold because the prosecutor withheld the evidence of the FBI reports. They resulted in no viable suspects that would have been valuable to the defense. The most important reason for *Brady*, the protection of Ms. Gold's due process was not violated by withholding the evidence in this case.

B. <u>There was no "reasonable probability" that if the hearsay was allowed as admissible evidence it would have changed the outcome of the trial.</u>

In *Bradley v. Nagle,* the Eleventh Circuit of United State Court of Appeals determined there was no *Brady* violation when the prosecution withheld the following pieces of evidence: (1) identity of the person to whom a Rickey McBrayer allegedly said he had killed the victim in the case; (2) notes taken by the police concerning an anonymous caller who said a Keith Sanford killed the victim; and (3) the fact that the police had received a note stating a Ricky Maxwell was the murderer. *Bradley v. Nagle,* 212 F.3d 559, 566 (11th Cir. 2000). The district court found that none of the evidence in question was material because (1) hearsay rules would prohibit its introduction at trial; (2) the items of evidence did not undermine the reliability of the evidence on which Bradley was convicted; (3) Bradley's counsel expressed doubts as to the usefulness of the evidence; and (4) the State investigated each of the three leads and found no connections to the murder. *Id.* at 567.

In the case at hand, there are similar facts. The Government withheld evidence of two FBI investigations. The first was from an anonymous caller who accused an additional suspect in the murder of Ms. Driscoll. The second was a report detailing the interview of another HerbImmunity seller, Chase Caplow, who claimed Ms. Driscoll was in debt to a higher up distributor with a potential for violence. These claims were deemed to be unreliable leads that lacked merit by the FBI. As in *Bradley,* the rules of hearsay under the Federal Rules of Evidence 801 would prohibit

the introduction of these other suspects at trial. Fed. R. Evid. 801. These are out of court statements being offered for the truth of the matter asserted because they were made outside the presence of the court and are being offered as truthful statements by the anonymous caller and Chase Caplow. Hearsay was inadmissible evidence in both Ms. Gold's case and *Bradley* and therefore would not have been allowed to be introduced during trial. Evidence that is inadmissible at trial cannot be material because it would not have been included and therefore could not have changed the outcome of the trial.

CONCLUSION

For the foregoing reasons the Government of the United States of America respectfully requests that this Court affirm the decision of the United States Eastern District of Boerum, and hold: (1) the dangerous patient exception applies, qualifying the testimony of Ms. Gold's psychiatrist admissible at trial; (2) the Livingston Police Department did not exceed the scope of the private search conducted by Ms. Gold's roommate; and, (3) inadmissible evidence is not "material," and thus, cannot form the basis of a *Brady* violation.

Respectfully submitted,

Team 27R
Counsel for Respondent