Team #28

---

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

## QUESTIONS PRESENTED

I. Whether the dangerous patient exception to Federal Rule of Evidence 501 allows a psychotherapist to testify at a patient's criminal trial after the psychotherapist has breached confidentiality with their patient under the duty to protect.

**Suggested Answer: YES**

II. Whether, under the Fourth Amendment, the private search doctrine allows law enforcement to view more files on a digital storage device than the private searcher originally viewed.

**Suggested Answer: YES**

III. Whether evidence that is undisputedly inadmissible and could have no reasonably likely effect on the outcome of trial is *per se* immaterial for purposes of *Brady v. Maryland.*

**Suggested Answer: YES**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Supreme Court of the United States**



**Federal Circuit Court of Appeals**



**Federal District Courts**



**State Supreme Courts**



**Constitutional Provisions**



**Statutes**



**Rules**

## STATEMENT OF FACTS

On the Evening of May 25, 2017, Tiffany Driscoll, a 20-yeaR.old student at Joralemon University, was found dead at her father's townhouse. (R.13). Toxicology reports confirmed that her death was caused by ingesting strychnine found in strawberries that were mailed to Driscoll's apartment in a fruit basket. (R.14). Driscoll worked as a sales representative for HerbImmunity, a multi-level marketing organization that some students have described as a pyramid scheme. (R.14). One of Driscoll's recruits, Samantha Gold, became a key suspect in her murder because Driscoll persuaded Gold to invest $2,000 in the product, and Gold was only able to make one sale. *Id*. Gold's increasing debt became a focal point of her anger, and her struggle to keep up with classes. *Id.* More than once, Gold had been heard making threats against Driscoll. *Id.*

Gold first communicated to her psychiatrist, Dr. Pollack, that she was enraged because of Driscoll. (R.18). Dr. Pollack testified that Gold told her she "was so angry, she wanted to kill Tiffany Driscoll." (R.19). Dr. Pollack indicated she "feared [Gold] would actually harm herself or Driscoll." *Id.* Dr. Pollack made a clinical judgment and contacted the authorities, because Gold was diagnosed with Intermittent Explosive Disorder (IED) and was considered dangerous. (R.17, 19). Dr. Pollack felt the only way to avert harm against Driscoll was to contact the police. (R.19). Dr. Pollack had informed Gold, at their relationship's inception, that Dr. Pollack had a duty to protect an intended victim if Gold made a serious threat of harm to an identifiable victim. (R.21). Immediately after hearing Gold's threat against Driscoll, Dr. Pollack scanned and provided Gold's session records, in compliance with § 711, to police to aid their investigation. (R.2). The district court allowed Dr. Pollack to testify, over defense's objection, and reasoned that "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." (R.41).

Jennifer Wildaughter, Gold's roommate, also met with police out of concern for Driscoll's safety. (R.8). Wildaughter privately searched Gold's laptop after Gold seemed upset and stormed out of their apartment. (R.24). After Wildaughter searched the HerbImmunity folder and various subfolders on Gold's laptop, she found suspicious photos of Driscoll, and a reference to rat poison. (R. 24-26). Wildaughter copied Gold's entire laptop onto a flash drive and provided it to Officer Yap. (R.26). Although Officer Yap examined every document on the flash drive, including those not viewed by Wildaughter, Wildaughter informed him that she found a short note to Tiffany, and a reference to strychnine, the same poison used to kill Driscoll (R.16, 26,27). Wildaughter testified that before she asked Officer Yap to take a look, she informed him that she was afraid Gold was going to poison Driscoll. (R.26).

Gold was convicted and sentenced to life in prison. (R.51). After the conviction, Gold filed a motion for a directed verdict or a new trial and claimed that the government failed to disclose information in violation of *Brady v. Maryland.* (R.52). After the trial and sentencing, the defense learned that the FBI provided the government statements prior to the trial that identified other potential suspects in Driscoll's murder. (R.55) One report discussed an interview with Chase Caplow, another HerbImmunity distributor who claimed that Driscoll was in debt to an upstream, potentially violent, HerbImmunity distributor. Id. The second FBI report described an anonymous voice message that accused Belinda Stevens of being responsible for Driscoll's death. Id. The FBI further investigated the reports, but found no further evidence. (R. 56). The circuit court affirmed the district court's decision to convict Gold and she now moves for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit.

## SUMMARY OF THE ARGUMENT

This case involves a college student, Samantha Gold, who told her therapist, Dr. Pollack, that she wished to kill a fellow colleague, Ms. Tiffany Driscoll. (R.19). And then acted on her intentions by poising Driscoll with strychnine. (R.14). Under Federal Rule of Evidence 501, a psychotherapist cannot be compelled to reveal confidential communications a patient revealed during treatment. FED. R. EVID. 501; *Tarasoff v. Regents of Univ of. Cal.*, 17 Cal. 3d 425, 441-42 (1976). However, therapists also have a "duty to protect" third parties from physical harm. *United States v. Hayes*, 227 F.3d 578, 583 (6th Cir. 2000). The dangerous-patient exception entitles Dr. Pollack to testify against Gold under Dr. Pollack's "duty to protect." *See Jaffee v. Redmond*, 518 U.S. 18, 18 n.19 (1996). The dangerous-patient exception applies when a therapist's disclosure is "the only means of averting harm to the [third party] when the disclosure was made." *United States v. Glass*, 133 F.3d at 1356, 1360 (10th Cir. 1998).

Dr. Pollack should be allowed to testify at trial because she already breached confidentiality when she notified the police about Gold's threatening statements. *See United States v. Auster*, 517 F.3d 312, 319 (5th Cir. 2008). Because Driscoll ultimately died at Gold's hands, the harm was not averted. (R. 13). However, the dangerous-patient exception still controls this case because if courts allowed a defendant to regain a privilege after a victim has died, patients would then kill their intended victims to regain the psychotherapist-patient privilege. *See People v. Wharton*, 53 Cal. 3d 552, 555 (1991).

Further, Officer Yap provided the government with an abundance of evidence against Gold after he examined Gold's laptop that Wildaughter privately searched and provided him. (R. 27). Under the private search doctrine, police do not need a warrant to access information obtained through a search by a private entity if the private search frustrated the subject's

expectation of privacy, and police do not exceed the scope of the private search. *United States v. Jacobsen*, 466 U.S. 109, 120-26 (1984). Wildaughter searched Gold's laptop and provided Officer Yap with a copy. (R.27). Wildaughter told Officer Yap that she found suspicious photos of Driscoll, and a reference to rat poison on Gold's laptop. Officer Yap did not exceed Wildaughter's search because he was substantially certain he would find the information Wildaughter described. *Id*.

Gold did not have a reasonable expectation of privacy in her laptop because a reasonable expectation of privacy does not exist after a private search occurs if the risk of private intrusion is reasonably foreseeable. *United States v. Oliver*, 630 F.3d 397, 407 (5th Cir. 2011). Wildaughter's search of Gold's laptop was reasonably foreseeable because Gold left her laptop opened and illuminated in their shared apartment. (R.27). The flash drive Wildaughter gave to Officer Yap should be considered a single container because under the Fifth and Seventh Circuits, digital storage devices are considered a single container. *United States v. Runyan*, 275 F.3d 449, 464-65 (5th Cir. 2001)*; United States v. Rann,* 689 F.3d 832, 836-37 (7th Cir. 2012). Officer Yap was permitted to examine the flash drive more thoroughly than Wildaughter because Wildaughter had already frustrated Gold's expectation of privacy in that container.

The Court should not limit Officer Yap's examination of the flash drive only to the files that Wildaughter explicitly reviewed. Circuit courts that have adopted this approach have mistakenly overextended the narrow holding from *Riley v. California*. Lastly, this approach would over deter law enforcement and result in judicial waste.

Gold appealed the circuit court's decision and requested a directed verdict or a new trial, claiming that the government violated *Brady v. Maryland*. (R.51). However, *Brady* was not violated for two reasons. First, where evidence is undeniably inadmissible, it cannot form the

basis of a *Brady* violation because, as a matter of law, it could not have had any reasonably likely effect on the trial's outcome. *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). The prosecution's suppression of evidence favorable to an accused upon request violates due process only where the evidence is material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Second, even if the Court finds that the inadmissible evidence here can lead to material evidence, it still does not amount to a violation because it is not exculpatory. Despite a split among the circuit courts regarding materiality of inadmissible evidence, the majority and minority have both held that a *Brady* claim will fail where evidence is unlikely to affect the trial's outcome. *United States v. Morales*, 746 F.3d 310, 314-15 (7th Cir. 2014). Therefore, even if the Court chooses the majority approach, there must be more than mere speculation that the inadmissible evidence would have led directly to admissible evidence for a *Brady* violation. *Wood*, 516 U.S. at 6. Here, the evidence shows that two additional individuals have been identified to have the same motive as Gold. (R.11, 12). The Circuit Court affirmed the district court's decision to convict Gold, and she has now filed a writ of certiorari. (R.51, 60).

## LEGAL ARGUMENT

### I. The Court should affirm the circuit court's decision and hold that the dangerous-patient exception applies to this case.

Under Federal Rule of Evidence 501, a psychotherapist cannot be compelled to reveal confidential communications a patient revealed during treatment. FED. R. EVID. 501; *Tarasoff*, 17 Cal. 3d at 441-42. However, a therapist can share statements a patient made throughout

treatment if "she is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community." *Tarasoff,* 17 Cal. 3d at 42. For example, therapists have a duty to protect third parties that their patient threatens to cause serious bodily harm to. *United States v. Hayes*, 227 F.3d 578, 583 (6th Cir. 2000). The court noted the "duty to protect" is designed to protect the health and safety of innocent third parties. *Id*. at 583. However, the "duty to protect" should not be limited to only allow a therapist to inform a third party of harm but should also allow the therapist to testify in a patient's criminal trial when the patient is considered a dangerous patient.

In *Jaffee*, the Supreme Court established the federal psychotherapist privilege that covers communications made to licensed psychiatrists and psychologists. 518 U.S. at 18. However, the Court noted that it was "neither necessary nor feasible to delineate [the privilege's] full contours in a way that would govern all conceivable future questions in this area." 518 U.S. at 18; *Glass*, 133 F.3d at 1360. Therefore, the Court acknowledged that there are circumstances where the privilege must "give way." *Jaffee*, 518 U.S. at 18 n.19. For example, the privilege should "give way" when "a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id*. The Court's lack of guidance as to what circumstances alleviate the psychotherapist privilege created a circuit split on whether the dangerous-patient exception should be recognized. This Court should adopt the 10th Circuit's decision in *Glass* and hold that Dr. Pollack's testimony at Samantha Gold's criminal trial can be admitted through the dangerous-patient exception. *Glass*, 133 F.3d at 1357.

### A. The Court should affirm the circuit court's decision because Dr. Pollak's "duty to protect" is inextricably intertwined to her testimony at trial under the dangerous-patient exception.

Therapists have the duty to inform a third party of potential harm, which therefore breaches the doctor-patient confidentiality. *Hayes*, 227 F.3d at 583. At the beginning of a therapist-patient relationship, the therapist has a "professional responsibility" to inform the patient that the "duty to protect" places limits on their confidential relationship." *Id*. at 586. The court noted that the "duty to protect" is designed to protect the health and safety of innocent third parties. *Id*. at 583. However, the "duty to protect" should not be limited to only allow a therapist to inform a third party of harm, but should also allow the therapist to testify at the patient's trial based on the threatened harm.

The Court in *Trammel v. United States* held that when Congress enacted Rule 501, "Congress manifested an affirmative intention not to freeze the law of privilege." 445 U.S. 40, 47 (1980). The true purpose of Rule 501 was to allow courts to be flexible when determining the rules of privilege, and Congress purposefully left the door open to change said rules. *Id*. The fundamental principle that "the public has a right to every man's evidence" stands unless there is a testimonial privilege that is "distinctly exceptional." *United States v. Bryan*, 339 U.S. 323, 331(1950); *Trammel*, 445 U.S. at 49. Testimonial privileges are not created lightly and are considered a relaxation of the general principle of "the right to every man's evidence." *United States v. Nixon*, 418 U.S. 683, 710 (1974). However, there are exceptions to privileges when the privilege fails to protect the public's interests.

The Supreme Court in *Jaffee* held that the psychotherapist-privilege exists because it is in the public's interest to protect confidential communications between a therapist and patient from

being disclosed at trial. 518 U.S. at 11. However, the Court noted that there would be an exception in the future if there is a serious threat of harm to another that could only be "averted" by the physician's disclosure. 518 U.S. 18 n.19; *Glass*, 133 F.3d at 1357. The *Glass* court interpreted footnote 19 in the *Jaffee* decision to mean that the "contours" of the psycho-therapist privilege would be defined on a case-by-case basis. *Id*. at 1359.

The therapist in *Glass* did not contact the authorities when his patient told his therapist that he wanted to kill the President of the United States. *Id*. Instead, the therapist recommended a course of treatment, and allowed Mr. Glass to be discharged from the hospital, believing that Mr. Glass was not a serious threat. *Id*. The court in *Glass* recognized the dangerous-patient exception and held that disclosure must be "the only means of averting harm to the [the third party] when the disclosure was made." *Id*. at 1360. Following the *Glass* court, the court in *United States v. Hardy*, held that the dangerous-patient exception applies when there is a threat of serious harm. 640 F. Supp 2d 75, 80 (D. Me. 2009). The therapist in *Hardy,* unlike the therapist in *Glass,* believed the patients threat to kill the President was serious, which resulted in the therapist contacting the Secret Service. *Id*. The court noted that "the evidence of the threat need not be excluded based on the psychotherapist-patient privilege." *Id*. Therefore, if a therapist believes that a threat is serious enough to contact the authorities, the evidence should be admitted at trial because the evidence had already been turned over to the authorities.

Similarly, in *Auster*, the court held that the patient's statements made to his therapist were no longer confidential because the patient knew that the therapist had a duty to inform third parties of threatening statements. 517 F.3d at 313. The court noted that criminal cases that involve the "duty to protect" are taken seriously to protect public interest, and because of the seriousness of these cases, any increase in the "admissibility of probative evidence is valuable."

*Id*. at 319. Thus, the "duty to protect" eliminates a patient's expectation of privacy in their threatening statements. *Id*. Therefore, the psychotherapist-patient privilege does not apply to threatening statements because there has already been a breach to the confidentiality requirement. *Id*. at 315.

Here, the dangerous-patient exception applies because Gold told Dr. Pollack that she "was so angry, she wanted to kill Tiffany Driscoll," a serious threat of physical harm. (R.19). Dr. Pollack contacted the authorities, like the therapist in *Hardy*, because she believed that Gold had the capability to harm Driscoll. 640 F. Supp 2d at 80; (R.19). Dr. Pollack testified that she "feared [Gold] would actually harm herself or [Driscoll]." (R.19). Dr. Pollack notified the police that she had a dangerous patient immediately after her session with Gold because, under Boerum Health and Safety Code §711, communications between a patient and therapist are confidential except where: (a) the patient has made an actual threat to physically harm themselves or another; and (b) the therapist makes a clinical judgement that the patient has the capability to commit such an act. (R.2). Dr. Pollack made a clinical judgement and contacted the authorities, because Gold was diagnosed with Intermittent Explosive Disorder, and was considered dangerous. (R.17, 19). The only way for Dr. Pollack to avert the harm towards Driscoll was to contact police. *See Glass*, 133 F.3d at. 1360; (R.19).

Here, as in, *Auster*, Dr. Pollack, under the Boerum Health and Safety Code, had to notify the authorities of Gold's threatening statement, therefore the psychotherapist-patient confidentiality had been breached. 517 F.3d at 313; (R.2). Dr. Pollack warned Gold of the "duty to protect," therefore, Gold no longer had an expectation of privacy in her threatening statements towards Driscoll and the psychotherapist-patient privilege no longer applied. *See Auster*, 517 F.3d at 313. Therefore, Dr. Pollack's testimony should be admissible in court because Dr. Pollack had already

notified the authorities about Gold's threatening statements, and the public has "the right to every man's evidence." *Trammel*, 445 U.S. at 49. The district court below stated, "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." (R.41). Accordingly, this Court should hold that Gold's statements to Dr. Pollak should be presented to the jury because her statements are probative evidence, and the confidentiality requirement between the two had already been breached. (R.53).

### B. The circuits that do recognize the dangerous-patient exception fail to consider the public's interest to be free from violence.

The Sixth, Eighth, and Ninth Circuits do not recognize the dangerous-patient exception but acknowledge that therapists have a "duty to protect." These circuits contend that the "duty to protect" is unrelated to allowing a therapist to testify about confidential conversations. *Hayes*, 227 F.3d at 583. The "duty to protect" an innocent third party outweighs the psychotherapist-patient confidentiality because of the "life-threatening communications." *Id*. These circuits hold that complying with the "duty to protect" does not allow a therapist to testify about his patient in a criminal proceeding. *Id*. at 586. However, the circuits fail to acknowledge the public interest of keeping individuals free from "violent assault." *People v. Wharton*, 53 Cal. 3d at 555. (1991).

The patient in *Hayes* told his therapist, more than once, that he planned to harm a third party. 227 F.3d at 580. The therapist notified the patient that serious threats towards a third party would not be kept confidential. *Id*. After the patient made threatening statements, the therapist turned over all of the patient's documents that showed the patient's homicidal statements made throughout his treatment. *Id*. Although the court acknowledged that the therapist had the duty to notify the third party, the court rejected the dangerous-patient exception to hold that the exception is "unnecessary to allow a psychotherapist to comply with her professional

responsibilities." *Id*. At 585 The court further held that a therapist notifying a patient of the "duty to protect" only has a "marginal effect on the patient's candor." but a therapist's warning that a patient's statements could be used against him in a criminal prosecution would "certainly chill and very likely terminate open dialogue." *Id*. The court, therefore, rejected the argument that the "duty to protect" allows a therapist to testify at a patient's trial. *Id.*

Similarly, the court in *United States v. Chase* held that disclosure for the purpose of warning a potential victim is separate and distinct from disclosure for the purpose of conviction. 340 F.3d 978, 990 (9th Cir. 2003). The court noted that the dangerous-patient exception would harm the patient-therapist relationship and terminate the patient's willingness to participate in any open dialogue. *Id*. In *United States v. Ghane,* the Eighth Circuit held that the psychotherapist-patient privilege does not disrupt a therapist's "duty to protect," which often leads to disclosure to a third party. 673 F.3d 771, 786 (8th Cir. 2012). However, the Court also held that the "duty to protect" does not allow a therapist to testify against her patient in a criminal or civil trial unless the testimony is "directly related to the patient's involuntary hospitalization." *Id*.

Conversely, the court in *Wharton*, held that the dangerous-patient exception is not limited only when a threat of harm exists. 53 Cal. 3d at 555. The patient in *Wharton* claimed that when the threat of harm no longer exists, the exception no longer applies and "the interest favoring confidentiality again becomes paramount." *Id*. If the court allowed the dangerous-patient exception to apply only for the longevity of the threat of harm, defendants could kill victims to regain the psychotherapist-patient privilege. *Id*. The court held that this rule would not serve the public and would increase violent assault. *Id*. The legislature has found that protecting the public from violent assault outweighs the importance of therapists keeping dangerous communications

confidential. *Id*. Therefore, a therapist's testimony against a patient is favored over confidentiality when there is a threat of serious harm.

Here, Dr. Pollack had the "duty to protect" Driscoll under Boerum Health and Safety Code §711 (R.2). Gold made a threat against Driscoll. Like the therapist in *Hayes*, Dr. Pollack notified the authorities about the threats Gold made against Driscoll, believing Gold could harm Driscoll. 227 F.3d at 580; (R.20). Dr. Pollack immediately scanned and provided Gold's session records to police to aid their investigation because, under §711, Dr. Pollack had to make reasonable efforts to communicate the threat to law enforcement and send any and all documents that would aid in their investigation. (R.2).

Gold's case is similar to *Hayes* in that Dr. Pollack did have a "duty to protect" Driscoll. 227 F.3d at 585; (R.2). However, the decision that the dangerous-patient exception is "unnecessary to allow a psychotherapist to comply with her professional responsibilities" is misguided. 227 F.3d at 585. Public interest is not served by allowing Gold to regain the psychotherapist-patient privilege simply because Driscoll is dead. Such a holding would set the precedent that patients can kill their intended victims to regain the psychotherapist-patient privilege.

The Court should reject the reasoning in *Chase* that held that disclosure for the purpose of warning a potential victim is separate and distinct from disclosure for the purpose of conviction. 340 F.3d at 990. The court believed that a therapist should not be allowed to testify about confidential communications just because the confidentiality was broken from the "duty to protect." *Id*. Alternatively, the Court should follow the reasoning from the district court that stated, "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." (R.41). Therefore, because Dr. Pollack already notified the police about Gold's threat and provided them with Gold's session notes, Dr. Pollack should be allowed to testify.

Therefore, the Court should rule that Dr. Pollack can testify at Gold's criminal trial because the confidentiality between Dr. Pollack and Gold had been breached, and the dangerous-patient exception applied to this case.

## II. The circuit court should be affirmed because Officer Yap did not violate Gold's Fourth Amendment Rights when he examined the flash drive copy of Gold's laptop more thoroughly than Wildaughter.

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. It is well-settled that the Fourth Amendment proscribes only government action, with private actors outside its scope. *Jacobsen*, 466 U.S. 109, 113 (1984). Evidence obtained through a constitutional violation may be suppressed to deter police from acting outside of their constitutional restraints. *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961). A search without a warrant is *per se* unreasonable. *Katz v. United States*, 389 U.S. 347, 356-57 (1967). A search occurs when the government intrudes upon an area where an individual has a subjective expectation of privacy that society would recognize as reasonable. *Id.* at 361 (Harlan, J., concurring). However, the exclusionary rule does not apply to evidence that was obtained through a constitutional violation if the government can prove by the preponderance of the evidence that the illegally obtained evidence would have inevitably been discovered had the constitutional violation not occurred. *See Nix v. Williams*, 467 U.S. 431, 449-50 (1984).

The private search doctrine allows police to access information obtained through a search by a private entity without a warrant if the private search frustrated the subject's expectation of privacy, and police do not exceed the scope of the private search. *Jacobsen*, 466 U.S. at 120-26. Here, Officer Yap examined a flash drive copy of Gold's laptop that Wildaughter provided him

after Wildaughter privately searched the laptop. The circuit courts are split as to how the private search doctrine applies to private searches of digital storage devices such as cell phones, laptops, or hard drives, compared to physical containers. The Fifth and Seventh Circuit's approach (hereinafter "Broad Approach") properly treats a digital storage device as single physical container and allows police to access all of the files found on the device if the private searcher has frustrated the container owner's expectation of privacy in at least one file. *Rann v. Atchison*, 689 F.3d at 836-37 (citing *Runyan*, 275 F.3d at 463-64). The Sixth and Eleventh Circuit's approach (hereinafter "Narrow Approach") unduly burdens law enforcement by requiring police to obtain a warrant to view any file that the private searcher did not view. *See United States v. Lichtenberger*, 786 F.3d 478, 488-89 (6th Cir. 2015)*; United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015).

This Court should adopt the Broad Approach and hold that Officer Yap did not exceed the scope of Wildaughter's private search because the Broad Approach is more consistent with established law surrounding expectations of privacy. Further, this court should reject the Narrow Approach because it unduly burdens law enforcement, and the Sixth and Eleventh Circuits improperly extended the narrow holding of *Riley v. California* to reach their decision.

### A. The Court should adopt the "Broad Approach" to hold Officer Yap did not exceed the scope of Wildaughter's Private Search.

The Broad Approach to the private search doctrine and digital storage devices is more consistent with established expectations of privacy. The Broad Approach would more consistently apply *Katz* to hold that Gold's expectation of privacy in her laptop cannot be objectively reasonable after Wildaughter's private search frustrated Gold's expectation of privacy. The Broad Approach recognizes that Officer Yap was permitted, under the Fourth

Amendment, to examine the contents of a container more thoroughly than Wildaughter did. Further, the Narrow Approach should be rejected because it impermissibly extends the Supreme Court's narrow holding in *Riley v. California*, unduly burdens law enforcement, and contributes to judicial waste.

**i. Gold did not retain an objectively reasonable expectation of privacy in her laptop, and the Broad Approach holds more fidelity towards well-settled expectations of privacy.**

The circuit court properly concluded Officer Yap did not violate Gold's Fourth Amendment rights. Gold could not retain an objectively reasonable expectation of privacy in her laptop after Wildaughter privately searched it. Because Gold did not have an objectively reasonable expectation of privacy in her laptop, Officer Yap did not perform a search when he more thoroughly examined the flash drive copy of Gold's laptop that Wildaughter previously searched and provided him.

This Court should adopt the Broad Approach and find that Officer Yap did not violate Gold's Fourth Amendment rights when he examined the flash drive copy of Gold's laptop more thoroughly than Wildaughter did. Police do not need a warrant to view the contents of a container that a private actor searched and provided to them, provided that they do not exceed the scope of the private search. *Jacobsen,* 466 at 120-26. Police do not need a warrant to examine an area where an individual does not have an objectively reasonable expectation of privacy. *Katz*, 389 U.S. at 356-57; 389 U.S. at 61 (Harlan, J., concurring). A reasonable expectation of privacy does not exist after a private search if there is a reasonably foreseeable risk of private intrusion. *Oliver*, 630 F.3d at 407. Under the private search doctrine, the Fifth and Seventh Circuits

correctly treat a digital storage device as a single container. *Runyan*, 275 F.3d at 464-65*; Rann,* 689 F.3d at 836-37.

The private search doctrine allows police to view the contents of a container that was searched and provided to them by a private actor, provided they do not exceed the scope of the private search. *See e.g., Jacobsen*, 466 U.S. at 120-26. In *Jacobsen*, the Court held that DEA agents were permitted to examine a package searched by the FedEx employees if they did not exceed the scope of the FedEx employee's search. *Id.* at 117-20. The DEA agents did not exceed the scope of the FedEx employee's search because the DEA agents were substantially certain the box contained drugs based on the FedEx employee's description of their search. *Id.* at 119-21. In *Runyan*, the police were permitted to examine CD's and floppy disks that private searchers viewed and provided them but exceeded the scope of the private search when they searched the ZIP drives that the private searchers did not view. 275 F.3d at 464-65.

Police are required to obtain a warrant when they intrude upon an area where an individual has a subjective expectation of privacy that society would deem objectively reasonable. *See e.g., Katz*, 389 U.S. at 356-57; 389 U.S. at 61 (Harlan, J., concurring). In *Katz*, police were required to obtain a warrant to wiretap the defendant's phone conversation made inside a closed telephone booth. *Katz*, 389 U.S. at 356-57. The defendant exhibited a subjective expectation of privacy when he closed to the door to the booth, and society would recognize his expectation as reasonable because a reasonable person would not expect the government to eavesdrop on private conversations in a closed phone booth. *Id.* at 561 (Harlan, J., concurring).

A reasonable expectation of privacy does not exist after a private search if the risk of private intrusion is reasonably foreseeable. *See e.g., Oliver*, 630 F.3d at 407. In *Oliver,* the defendant was arrested for mail fraud, and his girlfriend searched a box he left at her apartment,

which she subsequently gave to police. 630 F.3d at 403. The defendant's decision to leave the box unsecured in his girlfriend's home created a reasonably foreseeable risk of intrusion that eliminated his expectation of privacy in the box's contents. *Id.* at 407.

The Fifth and Seventh Circuit correctly treat a digital storage device as a single container and allow police to view every file on the device if the private searcher viewed at least one file. *See e.g., Runyan*, 275 F.3d at 464-65; *Rann,* 689 F.3d at 836-37. In *Runyan,* the Fifth Circuit treated each CD and floppy disk as an individual container and found police could view the entire CD or floppy disk if the defendant's estranged wife and companions viewed a single file on the device. 275 F.3d at 465. Police did exceed the scope of the private search when they searched the ZIP disks that the private searchers did not view. *Id.* at 464. The court properly reasoned that the defendant's expectation of privacy was no longer objectively reasonably once a single file had been privately searched and allowed police to view the rest of the files without a warrant. *Id.* at 464-65. In *Rann*, the Seventh Circuit treated a digital camera memory card and ZIP drive that the private searchers provided police as individual containers. 689 F.3d at 837. Police were permitted to view every file on both devices because the private searchers knew what the devices contained, and police were substantially certain they would find what the private searchers described. *Id.* at 838.

Here, Gold and Wildaughter were roommates. (R.24). Wildaughter privately searched Gold's laptop after Gold was upset and stormed out of their apartment. (R.24). The laptop was left opened and illuminated. (R.24). Wildaughter searched the HerbImmunity folder and various subfolders. (R.24-26). After Wildaughter found suspicious photos of Driscoll and a reference to rat poison, Wildaughter copied Gold's entire laptop onto a flash drive and provided the flash

drive to Officer Yap. (R.26). Officer Yap examined every document on the flash drive, including those not viewed by Wildaughter.

Officer Yap did not violate Gold's Fourth Amendment rights because he did not exceed the scope of Wildaughter's private search. Similar to *Jacobsen*, where the DEA agents did not exceed the scope of the FedEx employee's search of the package because the DEA agents were substantially certain the box contained drugs, Officer Yap did not exceed the scope of Wildaughter's search because he was substantially certain he would find the suspicious photos of Driscoll, and references to rat poison Wildaughter described. *See* 466 U.S 119-21; (R.24-26). Similar to *Runyan*, where police did not exceed the scope of the private search when they viewed CD's and floppy disks that the private searchers viewed and provided, Officer Yap was permitted to examine the flash drive copy of Gold's laptop that Wildaughter viewed and provided him. *See* 275 F.3d at 465; (R.26). However, unlike in *Runyan*, where police exceeded the scope of the private search when they examined the ZIP drives that were not searched by the private party, Wildaughter did not provide Officer Yap with any containers that she did not view herself. *See id.* at 464; (R.26).

Gold did not retain a reasonable expectation of privacy in her laptop after Wildaughter searched it because the risk of Wildaughter's intrusion was reasonably foreseeable. Similar to *Oliver*, where the defendant created a reasonably foreseeable risk of intrusion that eliminated his expectation of privacy when he left his personal box unsecured in his girlfriend's home, Gold created a reasonably foreseeable risk of intrusion in her laptop when she left it unsecured and illuminated in her shared apartment. *See* 630 F.3d at 407; (R.24). Officer Yap was permitted to examine the contents of the flash drive copy of Gold's laptop without a warrant because Gold did

not retain an objectively reasonable expectation of privacy in her laptop. *See Katz*, 389 U.S. at 356-57; 389 U.S. at 61 (Harlan, J., concurring).

Officer Yap was permitted to examine the flash drive copy of Gold's laptop more thoroughly than Wildaughter did without offending the Fourth Amendment because the flash drive copy of Gold's laptop was a single container. Similar to *Runyan*, where police could more thoroughly examine the CDs and floppy disks than the private searchers because the private search of a single file on the devices frustrated the defendant's expectation of privacy, Officer Yap was permitted to examine the flash drive copy of Gold's laptop more thoroughly because Wildaughter's private search frustrated Gold's expectation of privacy in her laptop. *See* 275 F.3d at 464-65; (R.24-26). Similar to *Rann*, where police were permitted to view more files on each digital storage device than the private searchers viewed because the private searchers were aware of what content they provided police, and police were substantially certain of the storage devices' contents, Officer Yap was permitted to view more files than Wildaughter because Wildaughter knew what she provided to Officer Yap, and Officer Yap was substantially certain he would find what Wildaughter described. *See* 689 F.3d at 838; (R.24-26). It would be wholly incompatible with well-established Fourth Amendment principles to hold that police cannot more thoroughly examine a container that Gold did not have an objectively reasonable expectation of privacy in.

This court should adopt the Broad Approach to hold that Officer Yap did violate Gold's Fourth Amendment rights when he viewed more files than Wildaughter on the flash drive copy of Gold's laptop. The Broad Approach better reconciles the private search doctrine and digital storage devices with well-established expectations of privacy. Officer Yap did not exceed the

scope of Wildaughter's private search because Wildaughter had already frustrated Gold's expectation of privacy in Gold's laptop as a single container.

**ii. The "Narrow Approach" improperly extends Riley's narrow holding, unduly burdens law enforcement, and contributes to judicial waste.**

The circuit court correctly rejected the Narrow Approach. The Narrow Approach would overextend *Riley*'s narrow holding to the private search doctrine, despite *Riley*'s silence on the matter, and over-deter law enforcement from pursing legitimate investigations.

This Court should reject adopting the Narrow Approach to find that Officer Yap violated Gold's Fourth Amendment rights when he viewed more files than Wildaughter on the flash drive copy of Gold's laptop. The Narrow Approach limits police to view only the files that the private searcher explicitly viewed. *Lichtenberger*, 786 F.3d at 488-89*; United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015). *Riley*'s concerns with data privacy were only discussed to require police to obtain a warrant to search a cellphone seized incident to a lawful arrest. *Riley v. California*, 573 U.S. 373, 386 (2014). The Narrow Approach would over-deter law enforcement from conducting any digital private searches, and contribute further to judicial waste.

The Narrow Approach restricts police to view only the exact files the private searcher viewed. *See e.g., Lichtenberger*, 786 F.3d at 488-89*; Sparks*, 806 F.3d at 1336. In *Lichtenberger*, the defendant's girlfriend privately searched the defendant's laptop, and scrolled through a folder that contained child pornography thumbnails. 786 F.3d at 480. Police exceeded the scope of the private search because the defendant's girlfriend enlarged different photos to full screen for police than she initially did. 786 F.3d at 488-49; *See also Sparks*, 806 F.3d at 1336 (holding police exceeded the scope of a private search when they viewed a video on the defendant's phone that the private searcher had not viewed). The courts in both *Lichtenberger* and *Sparks*

considered the Supreme Court's concern with cell phone privacy in *Riley* to hold that each file on a digital storage device is a separate container. 786 F.3d at 487; 806 F.3d at 1336.

The Supreme Court's concern with data privacy in *Riley* only affected searches of cell phones seized incident to a lawful arrest. 573 U.S. at 386. The Supreme Court found that the quantity and quality of data stored on modern cellphones entitles cellphones to more privacy rights and because of this, police are required to obtain a warrant to search a cell phone seized incident to lawful arrest. *Id.* at 393-401. The Court's concern about data privacy did not disturb other well-settled areas of law, such as the private search doctrine.

The Narrow Approach unduly burdens law enforcement's ability to investigate and solve crime and contributes to judicial waste. *Runyan,* 275 F.3d at 465. As noted by the Fifth Circuit, police would be over-deterred from relying on private searches if they could only view the exact files viewed by the private searcher. *Id*. Police would be hesitant to examine a digital device that has already had its expectation of privacy frustrated by a private search because they would risk invalidating valuable evidence the private searcher overlooked. *Id.* Rather than risk invalidating valuable incriminating evidence, police would be forced to waste time and judicial resources to secure a warrant just confirm what the private searcher already told them. *Id.*

The Sixth and Eleventh Circuit's reliance on *Riley* to hold that each file on a digital storage device is a separate container is misplaced and extends *Riley*'s narrow holding outside its intended scope. *See Lichtenberger*, 786 F.3d at 487; *Sparks*, 806 F.3d at 1336. Although the Supreme Court was concerned with the vast amount and intimate types of data that can be digitally stored, *Riley* narrowly holds police are required to obtain a warrant to search a cell phone seized incident to lawful arrest. 573 U.S. 393-401. The Court's concerns with cell phones seized incident to lawful arrest should not be used to further constrain the private search doctrine

that *Riley* failed to mention. Further, the privacy concerns discussed in *Riley* do not analogously apply to the private search doctrine because a person retains an expectation of privacy in his phone after it has been seized but *does not* retain an expectation of privacy after a private search. *Compare*, *Riley*, 573 U.S. 393-401 *with, Runyan*, 275 F.3d 449. This Court should not rely on the misconstrued reasoning from *Lichtenberger* and *Sparks* with respect to *Riley*'s narrow holding to unreasonably constrain private searches, and further burden law enforcement.

The Narrow Approach would unduly hinder Officer Yap and other law enforcement's ability to investigate dangerous criminals. Similar to the discussion from *Runyan*, where the Fifth Circuit noted police would be over-deterred from relying on private searches if they could only view the exact files the private searcher viewed, Officer Yap would have been hesitant to examine the flash drive copy of Gold's laptop *at all* because he would risk invalidating valuable evidence that Wildaughter did not view. *See* 275 F.3d at 465. Officer Yap would then be forced to waste valuable time to obtain a warrant after Wildaughter informed him Driscoll's life was in danger, further bogging the judiciary just to simply confirm what Wildaughter had already told him. *See id.*

This Court should reject the Narrow Approach because it improperly extends irrelevant precedent, unduly burdens law enforcement, and contributes to judicial waste.

### B. Alternatively, if this Court should adopt the Narrow Approach and find Officer Yap violated Gold's Fourth Amendment rights, the district court's error was harmless.

Alternatively, if the district court improperly found that Officer Yap did not violate Gold's Fourth Amendment rights, the district court's error was harmless. If the government can establish that the outcome of a trial would have been the same had the error not occurred, the

error is harmless. *Weaver v. Massachusetts*, 127 S. Ct. 1899, 1907 (2017). Evidence obtained through a constitutional violation does not warrant exclusion if the evidence would have inevitably been discovered absent the constitutional violation. *See Nix*, 467 U.S. at 449-50. Probable cause for a search warrant exists where a neutral and impartial magistrate would determine, based on the totality of the circumstances, a fair probability exists that evidence of a crime will be found at the described location. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

Here, the district court's error was harmless because the evidence obtained through Officer Yap's constitutional violation would inevitably been discovered, and the outcome of the trial would not have changed. The surreptitious photos of Driscoll and the references to rat poison that Wildaughter found on Gold's laptop, combined with Dr. Pollack's report that Gold threatened to kill Driscoll, establishes probable cause for Officer Yap to obtain a search warrant for Gold's laptop. *See Gates,*462 U.S. at 238-39. Because Officer Yap would have been able obtain a search warrant for Gold's laptop, all the evidence he found beyond Wildaughter's search would have been inevitably discovered, and therefore was admissible. *See Nix*, 467 U.S. at 449-50. Because the evidence Officer Yap found beyond Wildaughter's private search would have been admissible, the outcome of the trial would have been the same, and the district court's error was harmless. *See Weaver*, 127 S. Ct. at 1907.

## III. The circuit court should be affirmed because the government did not violate the requirements of *Brady v. Maryland* when it suppressed inadmissible hearsay reports.

The Sixth Amendment guarantees people the right to a fair trial. U.S. CONST. AMEND. VI. Under the Supreme Court's caselaw, the government must disclose material exculpatory and impeachment evidence to the defense prior to trial. *See Brady v. Maryland,* 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). In *Brady*, the Supreme Court 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 punishment." *Id.* at 87. To show a *Brady* violation, a defendant must show the evidence at issue meets three critical elements: (1) the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) it must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material such that prejudice resulted from its suppression. *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). Under *Brady*, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Moreover, the materiality inquiry should be applied to the "suppressed evidence considered collectively, not item-by-item." *Kyles v. Whitely,* 514 U.S. 419, 435 (1995). Over the years, the Court has pushed the issue of whether the federal government must disclose exculpatory evidence to the defense if it is inadmissible at trial. *Wood*, 516 U.S. at 6. The Court ultimately held in *Wood*, that polygraph results, inadmissible under state law, did not satisfy *Brady*'s materiality prong, and therefore, did not trigger a prosecutor's duty to disclose evidence to the defense. *Id.* Although the Court did not opine other types of inadmissible evidence in its holding, it has yet to use inadmissible evidence as the basis of a *Brady* violation. *Wood*, 516 U.S. at 6. Despite Department of Justice guidelines to the contrary, failure to disclose exculpatory evidence which is immaterial under *Brady* does not violate a defendant's due process guarantees.

### A. The Court should hold inadmissible evidence is *per se* immaterial for *Brady* purposes.

Although the circuits are split about whether inadmissible evidence that leads directly to admissible evidence can be the basis of a *Brady* violation, evidence that is undeniably

inadmissible cannot amount to a *Brady* violation because, as a matter of law, it could not have had any reasonably likely effect on the outcome of the trial. *Wood,* 516 U.S. at 6. The Court has found that evidence that is inadmissible at trial is "not 'evidence' at all." *Id.* The Supreme Court has reasoned that because inadmissible evidence could have no direct effect on the outcome of the trial, it does not meet the materiality requirement of *Brady* to form the basis of such violation. *Id.* The prosecution's suppression of evidence favorable to an accused that defense requested violates due process only where the evidence is material either to guilt or punishment. *Brady*, 373 U.S. at 87. Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). For inadmissible evidence to form the basis of *Brady* violation, there must be more than mere speculation that the inadmissible evidence would have led directly to admissible evidence. *Wood*, 516 U.S. at 6.

A *Brady* violation requires more than mere speculation that the inadmissible evidence would have led directly to admissible evidence. *Wood*, 516 U.S. at 6. In *Wood*, the defense argued that the prosecution's disclosure of polygraph examination results, inadmissible under state law, would have led the defense to conduct additional discovery that might have led to some additional useful evidence. *Id*. at 8. The defendant's mere speculation that he would have discovered additional useful evidence did not make it "reasonably likely" that the trial would have resulted in a different outcome because the case against the defendant was overwhelming. *Id.* at 8. The Court held that the state's failure to disclose that the witness had failed a polygraph test did not deprive the defendant of material evidence under *Brady*, because the polygraph results were inadmissible and defense counsel merely speculated that knowledge of polygraph results *might* have affected trial preparation. *Wood*, 516 U.S. at 1; *See United States v. Bagley*,

473 U.S. 667, 678, (1985) (finding that suppression of evidence only amounts to a constitutional violation if it deprives the defendant of a fair trial).

Evidence that is potentially useful the defense, but unlikely to change the verdict will not require a new trial. *Giglio v. United States*, 405 U.S. 150, 154 (1972). In *Giglio*, the petitioner motioned for a new trial based on newly discovered evidence and contended that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. *Id.* at 150. The court held that because the Government's case depended almost entirely on the testimony of this witness, the witness's credibility was an important issue in the case. *Id* at 154-55. Evidence of any understanding or agreement as to future prosecution would be relevant to his credibility, and the jury was entitled to know of it. *Id*. This established materiality required under *Brady* and was enough to require a new trial. *Id.* at 155.

Here, as in *Wood*, the defense concedes that the evidence in question would not have been admissible at trial. Because the evidence was inadmissible at trial, it could not possibly have affected the outcome, and is therefore immaterial. *See Wood*, 516 U.S. at 6, (R.43). Also, similar *Wood*, here defense argues that although the evidence is inadmissible, it would have led defense to conduct additional discovery that might have led to evidence that could have been utilized in its favor. *Id.* However, defense does not specify which evidence the inadmissible FBI reports could lead to, meaning its claim is based, as in *Wood*, on mere speculation. *Id.* at 8, (R.44). Here, the reports merely identified two individuals who were in debt as a result of the victim, just as Gold was, which defense claims presents "a motive for murder." (R.44). Further, the Circuit Court has already acknowledged that the FBI reports were investigated by the FBI further, and no sufficient evidence to tie the suspects to the murder of Driscoll was found. (R. 56).

For the inadmissible evidence to be considered material for *Brady* purposes, the case's outcome would have to depend on it almost entirely. *Giglio v. United States*, 405 U.S. 150, 154 (1972). In *Giglio*, the Court held that because the Government's case depended almost entirely on the testimony of a key witness to which an undisclosed promise was made, the witness's credibility was a crucial issue in the case, and evidence of any understanding or agreement as to future prosecution would be relevant to his credibility. Id. at 154-155. Conversely, here, even if the FBI reports had been disclosed to the defense, it would do little to discredit, or even challenge the evidence leading to Gold's motive or role in the murder of Driscoll. (R. 49). The evidence in question merely presents two additional individuals who share Gold's motive but lacks any additional corroborating evidence. (R. 11, 12).

The inadmissible hearsay, pursuant to the rulings of the Supreme Court, cannot be viewed as "material" for purposes of *Brady*.

### B. Alternatively, if the Court finds inadmissible evidence can be material under *Brady*, here, it still does not amount to a violation because it is not exculpatory.

Despite the split among the circuit courts regarding the materiality of inadmissible evidence, both the minority and majority approaches have held that a *Brady* claim will fail where evidence is unlikely to affect the trial's outcome. *Morales*, 746 F.3d at 314-15. Under *Brady*, withheld evidence warrants undoing a conviction only where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.* A *Brady* violation presents itself only if the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id.* The Fourth, Seventh, and Eighth

Circuits have consistently held that inadmissible evidence is "as a matter of law, inadmissible for *Brady* purposes." *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996); *see also Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998). Conversely, the First, Second, Third, Sixth and Eleventh Circuits have held that the holding in *Wood* would allow inadmissible evidence to be the basis for a *Brady* violation only if the evidence would lead directly to the disclosure of admissible evidence. *See, e.g., Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000).

The approach of the Fourth and Seventh Circuits holds that due process is only violated when the government suppresses *exculpatory* evidence that is material to the outcome of trial. *Hoke*, 92 F.3d at 1356. In *Hoke*, where the prosecution withheld inadmissible evidence of interview with three men who claimed they had previous had sex with the victim of defendant's alleged rape and murder, it was held that no *Brady* violation had occurred. *Id.* The Fourth Circuit reasoned that, even in assuming the statements were admissible, the evidence could not be considered material because the overwhelming evidence against the defendant made it so there was "no chance at all" that the outcome of the trial would have been different. *Id.* at 1357. However, the holding acknowledged the reasoning of *Wood*, and held that because the statements were inadmissible at trial, they were, as a matter of law, "immaterial" for *Brady* purposes. *Id.* at 1356.

When considering materiality under *Brady*, the majority approach assesses whether the favorable evidence, taken as a whole, would put the case "in such a different light as to undermine confidence in the verdict." *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). In *Bradley*, the Eleventh Circuit considered inadmissible hearsay evidence that alleged three other suspects in the defendant's rape and murder case. *Id.* The defense argued that had the

government disclosed the three inadmissible leads, it may have been able to uncover evidence that the other men were involved in the rape and/or murder of the victim. *Id.* at 566. The Eleventh Circuit reasoned that because the evidence was inadmissible, in order to find that confidence in the outcome of the trial could be undermined, it must be determined whether the inadmissible evidence would lead to material exculpatory evidence. *Id.* at 567. Based on the record, the court concluded there was not a lack of confidence in the outcome because the defendant only speculated that he would have uncovered admissible evidence from the three hearsay leads. *Id.* The court further concluded that the inadmissible hearsay evidence constituted tenuous and ultimately fruitless police suspicions, which, weighed against all the evidence existing against the defendant, would not cause a jury to likely reach a different conclusion. *Id.*

Here, under the correct minority approach, the evidence in question is not in violation of *Brady* because it is not material, nor is it exculpatory. Like *Hoke*, where the Fourth Circuit, acknowledged *Wood's* reasoning, and held that inadmissible evidence was not evidence at all, and therefore could have no effect on the outcome of the trial, here, the evidence is, as conceded by defense, inadmissible and could not have affected the outcome of Gold's trial. *Hoke*, 92 F.3d at 1356. However, in *Hoke*, the court reasoned that even if it assumed the evidence would have been admissible at the defendant's trial, the evidence could not be considered material because based on the overwhelming evidence against the defendant, there was "no chance at all" that the outcome of the trial would be different given the already. *Id.* at 1357 Similarly, here the exculpatory value of the FBI reports is diminished by the strength of the evidence against Gold. *Id*. Here, the government has already presented evidence to the lower courts that shows Driscoll recruited Gold to invest in HerbImmunity products that Gold was unable to sell. (R.51). Gold was in debt of over $2,000 to the Driscoll, and according to several witnesses, was extremely

angry with Driscoll for having knowingly induced her to participate in a losing venture. *Id.* Dr. Pollack, Gold's psychiatrist, had already testified at trial to threatening statements Gold made against Driscoll. (R.18, 51). Additionally, Gold's former roommate, Wildaughter, testified that she examined Gold's laptop because she was worried about Gold's behavior, and discovered photographs of the victim and references to rat poison, the confirmed cause of Driscoll's death. (R. 51). It is reasonably concluded then, that based on *Hoke*, had the FBI reports been disclosed, the evidence would do little to dispute the strong evidence that already stands against Gold.

Even under the majority approach, the Court should find that that the requirements of *Brady v. Maryland* were not violated here because as in *Bradley*, the inadmissible hearsay in question, taken as whole, would not put the case "in such a different light as to undermine the confidence in the verdict." *Bradley*, 212 F.3d at 567. Here, as in *Bradley*, the evidence favorable to the defense is inadmissible hearsay which is presents additional suspects. (R.44, 45), *Id.* at 566. As in *Bradley*, where the court held that inadmissible hearsay evidence leading to three alleged additional suspects constituted tenuous, and ultimately fruitless police suspicions, here the FBI reports are also tenuous, and ultimately fruitless police suspicions. (R.11, 12), *Id.* at 567. In weighing the inadmissible evidence against the evidence already brought against Gold, as in *Bradley*, it is unlikely a jury would reach a different conclusion. (R.48), *Id.* As the Supreme Court has repeatedly held, and as the majority approach has emphasized, mere speculation that inadmissible evidence would lead to exculpatory, material evidence, is not enough for it to constitute a *Brady* violation. *Id.* Here, as in *Bradley*, defense has only presented speculation that the inadmissible evidence would lead to admissible evidence. *Id.*

For these reasons, the inadmissible hearsay evidence is not material, nor is it exculpatory, and therefore cannot form the basis of a *Brady* violation under either the majority, or the minority approach.

### C. Although the minority approach does not align with DOJ guidelines, it properly interprets *Brady* under the Due Process Clause of the Fourteenth Amendment.

While the majority approach has used the policy underlying *Brady*, that each defendant deserves a fair trial, to support its conclusion that inadmissible evidence may lead to a viable *Brady* claim, this approach fails to acknowledge the slippery slope inadmissible evidence creates. *Ellsworth*, 333 F.3d at 5. The DOJ has expressed that although evidence which would not be admissible ordinarily need not be disclosed, policy encourages prosecutors to err on the side of disclosure if admissibility is a close question. JM 9-5.0001 at B.1. However, the ultimate question in *Brady* is whether petitioner is denied a federal right when the court violates the Due Process Clause of the Fourteenth Amendment it allows the suppression of a confession that could have been used in the defendant's favor. *Brady*, 373 U.S. at 86. The infamous holding concluded that prosecution's suppression of evidence favorable to an accused violates due process only where the evidence is material to either guilt or to punishment. *Id.* at 87. The Court answered the question of whether this standard may apply to inadmissible evidence in *Wood*, when it held that evidence which is inadmissible at trial is not "evidence" at all. *Wood,* 516 U.S. at 6. *Wood* further recognized that acknowledging admissible evidence as a basis for *Brady* violations will likely result in great costs to the State's legitimate interest in finality. *Id.* at 11. In *Wood*, a retrial would not have occurred for 13 years, and the costs and burdens of trial would have been compounded many times over. *Id.* Of course, *Wood* also recognized that the costs may be justified where there are serious doubts about the reliability of a trial infested with constitutional

error. *Id.* However, where habeas relief is granted based on little more than speculation with slight support, the proper delicate balance between federal courts and the states is upset to a degree that requires correction. *Id.* at 8. *See Ellsworth*, 333 F.3d at 8 (acknowledging that evidence about lies not directly relevant to the episode at hand could carry courts into an "endless parade of distracting, time-consuming inquires" despite remanding to the district court based on inadmissible hearsay evidence).

Although a defendant is entitled to a fair trial pursuant to the Sixth Amendment, here entertaining a *Brady* violation would only lead to an "endless parade of distracting, time-consuming inquires." *See Ellsworth*, 333 F.3d at 8. In *Wood*, the Court recognized that allowing a violation to occur based on little more than speculation with slight support would upset the delicate balance between federal courts and the states, and the compound costs and burdens of trial many times. Similarly, here, it is evident that the inadmissible FBI reports can only provide mere speculation of leads to admissible evidence as they constitute inadmissible hearsay. (R.43). If admitting such evidence would truly provide Defendant with a more just trial pursuant to the Sixth Amendment, the government would concede this argument. However, we strongly assert that no *Brady* violation has occurred here, as the reliability of a trial infested with Constitutional error cannot exist on the mere speculation this case presents. *Wood*, 516 U.S. at 11.

## CONCLUSION

For the aforementioned reasons, the government respectfully requests the circuit court be affirmed on all matters before this Honorable Court.