No. 20 – 2833

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

No. 20 – 2388

Brief for Petitioner

Team 29
Attorneys for Petitioner

Original brief

QUESTIONS PRESENTED

I. Whether the psychotherapist-patient privilege created through Rule 501 of the Federal Rules of Evidence protects statements made by a patient when the statements were made during the treatment of Intermittent Explosive Disorder, where impulsive anger is one symptom of the disorder, and the therapist did not provide warning that the statements could be used in criminal adversarial proceedings?

II. Under the Fourth Amendment, does an officer exceed the scope of a private search when he views files the private searcher did not search, the names of the files reveal they contain information outside the original search, and the item searched is a flash drive containing the entire hard drive of a computer?

III. Under *Brady v. Maryland*, can inadmissible evidence form a Brady violation when the evidence is two alternative leads from the FBI, and one of the leads is provided by a close friend of the victim, and one of the suspects is known for violence who the victim owed money to?

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CONSTITUTIONAL PROVISIONS, FEDERAL RULES, AND STATUTES

The Fourth Amendment Provides:

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

U.S. Const. amend. VI.

Rule 501 of the Federal Rules of Evidence Provides: "The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege..." Fed. R. Evid. 501.

18 U.S.C. § 1716 – Injurious Articles as Nonmailable provides:

> (j) (2) Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by this section, whether or not transmitted in accordance with the rules and regulations authorized to be prescribed by the Postal Service, with intent to kill or injure another, or injure the mails or other property, shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (3) Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life.

BOERUM HEALTH AND SAFETY CODE § 711: REPORTING REQUIREMENTS FOR MENTAL HEALTH PROFESSIONALS

1. Communications between a patient and a mental health professional are confidential except where:

a. The patient has made an actual threat to physically harm either themselves or an identifiable victim(s); and

b. The mental health professional makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat.

2. Under such circumstances, mental health professionals must make a reasonable effort to communicate, in a timely manner, the threat to the victim and notify the law enforcement agency closest to the patient's or victim's residence and supply a requesting law enforcement agency with any information concerning the threat.

3. This section imposes a mandatory duty to report on mental health professionals while protecting mental health professionals who discharge the duty in good faith from both civil and criminal liability.

R. at 2.

STATEMENT OF THE CASE

Statement of the Facts

On May 25th, 2017, Tiffany Driscoll was found dead in her father's townhouse with what appeared to be blunt force trauma to the head. R. at 13. Ms. Driscoll was a sales representative of HerbImmunity, a multilevel sales company that multiple students participated in, though many of them labelled it as a "pyramid scheme." R. at 13. Samantha Gold was one of the many students involved in HerbImmunity. R. at 14. She was arrested for Ms. Driscoll's death in 2016, despite no physical evidence at the scene pointing to Ms. Gold or the cause of death. *Id*. Ms. Gold was later convicted based on two pieces of evidence: her therapist's notes about statements said during the course of therapy and the files on her computer the police searched without a warrant. R. at 51. Also, prior to trial, the prosecution did not disclose two FBI alternative leads to the defense. R. at 43, 52.

Therapist's Notes and Statements During Therapy

For two years, to combat her anger issues, Ms. Gold met with Dr. Pollak for weekly therapy sessions. R. at 17. Dr. Pollak diagnosed Ms. Gold with Intermittent Explosive Disorder, or "IED", characterized by aggressive, impulsive, or violent behavior. *Id*. Dr. Pollak reported that once she discovered the root cause of Ms. Gold's anger, the episodes were effectively treated through the weekly sessions. *Id*. During the session on May 25th, 2017, Ms. Gold appeared agitated, and as her anger reached a peak, expressed a desire to kill Ms. Driscoll. *Id*. Fearing Ms. Gold may harm Ms. Driscoll, Dr. Pollak informed the police, who performed a wellness check on Ms. Gold. R. at 5. The officers noticed "she appeared calm and rational." *Id*. After a fifteen-minute conversation, they determined she posed no threat to herself or others, and warned Ms. Driscoll, who expressed no concern over the threat. *Id*.

Dr. Pollak is required to keep all notes and information regarding her patients confidential. R. at 20. Although she alerted Ms. Gold that if Ms. Gold appeared to be a danger to herself or someone else, she had a duty to report it to the police, Dr. Pollak never warned of the possibility that the statements said during treatment may be used in a criminal prosecution. R. at 21. Additionally, Dr. Pollak noted in her professional opinion that if patients knew their therapist would be required to testify against them, patients may be more reluctant to "share certain thoughts and urges." *Id*.

Warrantless Search of the Flash Drive

After Ms. Gold returned home from class on May 25th, Ms. Wildaughter, her roommate, noticed she was agitated. R. at 24. Without permission, Ms. Wildaughter searched through Ms. Gold's personal computer, located in her bedroom. R. at 24, 27. She opened three "HerbImmunity" subfolders located on the desktop and did not search any other files. R. at 27. The three folders she searched were called "receipts," "confirmations" and "customers." R. at 25. Within the folders, she saw pictures of Ms. Driscoll, an unsigned letter to Ms. Driscoll, and a file called "Market Stuff" with passwords and codes. R. at 26. Instead of copying the folders and files she opened, she copied the entire hard drive of the computer to a flash drive and delivered it to the police. *Id*. She relayed to Officer Yap that she browsed a few files on the computer and noted she copied the entire computer to the flash drive. R. at 6. Ms. Wildaughter told him the exact content of the photographs she witnessed, the note she viewed, and the text file containing the passcodes. *Id*. Officer Yap did not ask where the information was located. R. at 29. When she left, Officer Yap proceeded to search through the entire drive's contents without a warrant. R. at 6. He viewed personal photographs, then other subdocuments that Ms. Wildaughter did not mention viewing, including documents called "Shipping Confirmation," "Recipe," "Exam4,"

"budget," and "Health Insurance ID Card" pdf. *Id*. The "budget" document included personal finance information related to her budget for the month. R. at 10.

Alternative Leads Not Disclosed to Defense

On June 2nd, 2017, Special Agent Mary Baer interviewed Mr. Caplow regarding Ms. Driscoll's death. He both attended Joralemon University with Ms. Driscoll and was also involved in HerbImmunity. R. at 11. He told her Ms. Driscoll called him two weeks prior to her death and noted she owed money to an upstream distributor to the company. *Id*. Mr. Caplow reported she did not disclose how much money she owed to the distributor. *Id*. Although he never witnessed the suspect being violent himself, it was known to Mr. Caplow that the suspect had a reputation for being violent. *Id*. Special Agent Baer planned to interview the suspect, but never reported any findings to clear his name. *Id*. The prosecution did not disclose the possible lead to the defense prior to trial. R. at 43.

On July 7th, 2017, Special Agent Mark St. Peters received an anonymous phone call related to Ms. Driscoll's death and alleged Belinda Stevens was responsible and that both were involved in HerbImmunity together. R. at 12. On the assumption it was unreliable, he did not investigate it further. *Id*. This lead was also not disclosed to the defense prior to trial. R. at 43.

Procedural History

On June 6th, 2017, Ms. Gold was indicted by grand jury for "knowingly and intentionally" depositing by delivery of mail a package "containing poisoned food items, with the intent to kill or injure another, and which resulted in the death of another." R. at 1. The defense filed two motions to suppress evidence: one to suppress the notes and testimony of Ms. Gold's therapist and another to suppress files Officer Yap searched that Ms. Wildaughter did not. R. at 51. The hearing occurred on January 8th, 2018, and on January 9th, after oral argument,

both motions were denied. R. at 41. She was convicted and sentenced to life in prison. R. at 51. The defense then filed a motion for post-conviction relief based on the prosecution's failure to disclose the FBI's two alternative leads. R. at 43. The hearing occurred on August 22nd, 2018, and the judge denied the motion. R. at 42, 49. Ms. Gold appealed to the Court of Appeals for the Fourteenth Circuit, which affirmed the verdict. R. at 50, 57. On November 16th, 2020, Ms. Gold petitioned to the Supreme Court of the United States, which granted cert. R. at 60.

SUMMARY OF THE ARGUMENTS

The Fourteenth Circuit's decision should be overturned because (1) there is no dangerous-patient exception to the psychotherapist-patient privilege, (2) an officer exceeds the scope of a private search when he views files the private searcher did not view on a digital data device, and (3) inadmissible evidence can form a *Brady* violation if the inadmissible evidence leads to admissible evidence.

First, because this Court in *Jaffee v. Redmond*, 518 U.S. 1, 11-13 (1996) stressed the need to promote mental health when creating the psychotherapist-patient privilege, there is value in protecting statements even after confidentiality is breached. A patient's fear of a psychotherapist's possible testimony during treatment would create tension, impeding open communications needed to aid the patient's mental health. Also, some patients seek help for the very conditions and symptoms that trigger a duty to report. Additionally, the privilege is not conditioned on confidentiality, and a breach in confidentiality does not open the statements to the jury.

Second, when searching digital storage devices, the scope of the private search doctrine must be confined to the narrow interpretation, where an officer can only search the exact files searched by the private party. Due to the bottomlessness of a digital device as opposed to a

physical container, the quantity of data contained on a digital device, and the quality of data stored, an officer cannot be virtually certain any unsearched files will yield the same information as the previously searched files. Because Officer Yap searched files Ms. Wildaughter did not view on a flash drive that contained the entirety of Ms. Gold's hard drive, he exceeded the scope of the private search and violated Ms. Gold's Fourth Amendment rights.

Finally, inadmissible evidence can form the basis of a *Brady* claim if the inadmissible evidence leads to admissible evidence. Materiality does not require admissibility. *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995) outlawed polygraph tests, which are inadmissible even for impeachment, but other inadmissible evidence such as hearsay can be used for impeachment purposes. Also, polygraph tests cannot lead to admissible evidence, but other inadmissible evidence can. In this case, the two undisclosed FBI leads could have led to admissible evidence because the leads were not fully investigated, one lead was produced by someone close to the victim, and the person described had both a motive and a history of violent behavior. Additionally, with little physical evidence at the crime scene and no documented alibis for either suspect, there was a reasonable probability that the evidence would have undermined the confidence in the verdict.

ARGUMENT

Standard of Review

When assessing a matter of law, the standard of review is de novo, meaning the court reviews the case anew with no deference to the lower court's decision. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). A court reviews the contours of a federal privilege de novo. *United States v. Hayes*, 227 F.3d 578, 581 (6th Cir. 2000). Whether the state exceeds the scope of a private search is also reviewed de novo. *See United States v. Jacobsen*, 466 U.S. 109, 112, 126 (1984). Additionally, whether a *Brady* violation has occurred is also a

matter of law and reviewed de novo. *See United States v. Bagley*, 473 U.S. 667, 676-77 (1985). Therefore, the standard of review for all three issues is de novo.

I. THERE IS NO DANGEROUS PATIENT EXCEPTION BECAUSE A BREACH IN CONFIDENTIALITY DOES NOT WAIVE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

Rule 501 of the Federal Rules of Evidence allows for courts to delineate new privileges through the "light of reason and experience" of "common law principles." Fed. R. Evid. 501. Although there is a general duty to provide testimony, exceptions to this duty can arise out of a "public good." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). In *Jaffee*, this Court delineated the "psychotherapist privilege" in a desire to protect the conversations between therapist and patient, stressing a need for confidentiality to promote public mental health. *Id*. at 11-12.

First, there is value in protecting confidentiality under the psychotherapist-patient privilege even after confidentiality has been breached by a therapist's duty to report. Second, if a therapist breaches confidentiality, a jury should not be allowed to consider that evidence at trial. Therefore, this Court should reverse the Fourteenth Circuit's decision.

A. Because the Psychotherapist-Patient Privilege is Rooted in Promotion of Mental Health, There Is Value in Protecting Statements Even When Confidentiality Is Breached.

Evidentiary privileges stem from the "need for confidence and trust." *Trammel v. United States*, 445 U.S. 40, 51 (1980). The psychotherapist-patient privilege protects statements made during therapy because of the need for patients to speak freely during treatment. *Jaffee*, 518 U.S. at 11. The fear of testimony would chill the conversations between therapist and patient and negatively impact the ability for a psychotherapist to aid the patient's mental health. *Id*.

The psychotherapist-patient privilege exists to protect the atmosphere of confidence and trust between therapist and patient. *Id*. In *Jaffe*, after an off-duty police officer shot a civilian,

she sought counseling from a clinical social worker. *Id*. at 4. The administrator of the decedent's estate brought wrongful death charges against the officer and sought access to the conversations between the officer and the social worker. *Id*. This Court held the statements were privileged because "reason and experience" provides that confidential communications promote "sufficiently important interests that outweigh the need for probative evidence." *Id*. at 9 (*quoting Trammel*, 445 U.S. at 50). It reasoned that the privilege serves private interests because the relationship between a therapist and patient requires an atmosphere of trust protected by confidentiality. *Jaffee*, 518 U.S. at 9. Also, it provides a public good by allowing for proper treatment to those suffering with mental health issues. *Id*. at 11. The fear of public disclosure and testimony in court would create tensions between patients and therapists, greatly impeding the work therapists try to accomplish. *Id*. at 12. This Court also noted that all the states have created a form of the privilege, and creating separate outcomes for whether a person is in state or federal court defeats the purpose of the state's legislature to protect those conversations. *Id*. at 13. Although in a footnote, it left open the possibility of disclosure to avert serious threat or harm, it did not state disclosure equates to criminal testimony. *See id*. at 18 n.19.

The need for patients to speak freely during therapy sessions created the psychotherapist-patient privilege. *Id*. at 11. In *Hayes*, the defendant suffered from depression and sought help from medical professionals. 227 F.3d at 580. After a death in the family, a termination of the prescriptions he was taking, and increased anxiety, he admitted the desire to kill his boss during one of his treatments. *Id*. After attempting to suppress the statements, the Sixth Circuit held there was not a dangerous-patient exception because the exception would destroy the confidence and trust patients have with their therapists. *Id*. at 586. It reasoned that mental health was a public interest protected in *Jaffee*, and allowing a therapist to testify in any capacity will deteriorate the

mental health of a patient who is incarcerated due to those testimonies, especially if the patient sought help for the exact symptoms triggering a duty to report. *Id*. at 585. It also interpreted the footnote in *Jaffee* to open a possibility to testify regarding involuntary confinement, but not to extend the use of testimony in criminal cases. *Id*. at 585.

Knowing a therapist could testify in court about statements made during a session could stifle the open conversations necessary for therapists to treat their patients. *Jaffee*, 518 U.S. at 11. In *United States v. Glass*, 133 F.3d 1356, 1357 (10th. Cir. 1998), the defendant was voluntarily admitted to a hospital where he told the psychotherapist assessing him that he wanted to kill the president. He was charged with knowingly and willfully threatening the President of the United States and attempted to suppress the statements made through the psychotherapist-patient privilege. *Id*. at 1357. The Tenth Circuit held that he may be entitled to the privilege depending upon whether the threat was serious and disclosure was the only means of averting the harm at the time disclosure was made. *Id*. at 1360. It interpreted the footnote in *Jaffee* to create a dangerous-patient exception but limited it to the seriousness of the threat and the aversion of harm disclosure created. *Id*. It noted that there was insufficient evidence on the record to show that the threat given by the defendant could have only been averted through disclosure and saw no difference between the facts in the case and the facts in *Jaffee*. *Id*. at 1359.

There should not be a dangerous-patient exception to the psychotherapist privilege because there is value in protecting all conversations between a psychiatrist and a patient. This Court in *Jaffee* emphasized the need to preserve an atmosphere of trust between patient and therapist that could shatter if a therapist is compelled to testify against the patient. 581 U.S. at 11. In *Hayes*, the Sixth Circuit stated that regardless of the content of the conversation, the fear of a therapist being compelled to testify against a patient would chill the atmosphere in the same way

Jaffee feared. 227 F.3d at 586. In contrast, the Tenth Circuit's decision in *Glass* strained the patient-therapist relation further by creating an exception to the psychotherapist privilege but conditioning it on whether the threat was actual and the disclosure was the only way to avert the threat. 133 F.3d at 1360. This exception not only causes patients to be concerned about the possibility of their therapist testifying against them, but also places the therapist's decisions in the spotlight. If a therapist is compelled to testify against his or her patient, the patient can counter that the threat was not assessed properly or that the actions of the therapist were incorrect. The possibility of either outcome would create a cold and more censored relationship, detrimentally affecting the ability for mental health professionals to counsel their patients. By not protecting all conversations between patients and psychotherapists, the purpose of protecting open conversations in *Jaffee* is defeated.

Also, the dangerous-patient exception runs counter to the public good of promoting the treatment of mental health. In *Jaffee*, this court recognized the privilege based on the public good of supporting mental health, 581 U.S. at 11, yet the dangerous-patient exception threatens that same public good. A side effect of a patient's mental condition could be homicidal thoughts. Any treatment to counteract those feelings would be at risk for disclosure in adversarial proceedings in court. The Sixth Circuit in *Hayes* noted the paradoxical nature of the exception where a person seeking help for their mental health is at risk for those statements being used against him or her in court simply for seeking help. 227 F.3d at 585. By choosing to confide the dangerous thoughts to a mental health professional, the exception forces the patient to face those thoughts in court rather than allowing the professional to properly uncover the underlying cause. This Court in *Jaffee* stressed the public good need for mental health protection over testimonial evidence, but the exception disregards the former to favor the latter.

In this case, Ms. Gold was diagnosed with IED, characterized by violent bouts of aggressive and impulsive behavior. R. at 17. She approached Dr. Pollak to help her with her anger issues related to IED. *Id*. The threats Ms. Gold made against Ms. Driscoll during therapy fit within the symptoms of IED. She sought help for her IED but instead, the very symptoms she attempted to control with Dr. Pollak are the same that can be used against her in court based upon the exception. Additionally, Dr. Pollak reported they were able to discover the root of her anger problems, and she showed improvement. *Id*. Forcing Dr. Pollak to testify against her in court chooses evidence over mental health: the opposite of what this Court attempted to protect in *Jaffee*.

B. Confidentiality Is Not a Requirement of the Psychotherapist-Patient Privilege and Therefore, a Breach in Confidentiality Does Not Mean a Therapist Can Testify About Those Statements Before a Jury.

Although disclosure may be required to avert serious threat of harm, testimony in criminal court was not listed as an explicit effect of disclosure. *See Jaffee*, 581 U.S. at 18 n.19. Disclosure of confidential statements is not enough to dispel a federal privilege. *Trammel*, 445 U.S. at 50. Additionally, when creating the privilege, it recognized the power of the states. *Jaffee*, 581 U.S. at 13. Yet, despite recognizing the value and need for confidential statements, confidentiality was not listed as a condition for the privilege. *See Id*. at 11-13.

A breach in confidentiality alone is not sufficient to waive federal privilege protections. *See Trammel*, 445 U.S. at 50. In *Trammel*, the defendant was charged with importing heroin to the United States. *Id*. at 42. His wife was indicted as a co-conspirator, but offered immunity if she testified against him. *Id*. This Court held that the privilege did not bar her testimony because she voluntarily agreed to testify, and her testimony related to "criminal acts and of communications made in the presence of third persons." *Id*. at 51. This Court distinguished it

from the physician-patient privilege because "barriers to full disclosure" would impede a physician's diagnosis or treatment, whereas the relationship between spouses need not be protected when one voluntarily wishes to disclose information related to criminal acts. *Id*. It also delineated that marital communications were still privileged, despite the voluntary decision to testify about criminal acts in the presence of a third party. *Id*. at 50. Additionally, the spousal privilege prevents testimony in court, even when the government enlists one spouse to provide information to aid the apprehension of the other. *Id*. at 52 n.12.

The psychotherapist-patient privilege was created in part by the need to ensure similar results in state and federal court. *Jaffee*, 518 U.S. at 13; *see also United States v. Chase*, 340 F.3d 978, 986. In *Chase*, the defendant made threats to kill or injure FBI agents. 340 F.3d at 979. The defendant challenged the admissibility of the statements made during the therapy sessions. *Id*. at 981. The Ninth Circuit held there is not a dangerous-patient exception because the duty-to-disclose break in confidentiality does not automatically mean the therapist can testify in court. *Id*. The Circuit Court reasoned that the duty to disclose is meant to protect the victim and has little relation to the protection of confidentiality that underlies the reasoning in *Jaffee*. *Id*. at 984. Additionally, it noted that almost all the states recognize a difference between duty to disclose and the federal testimonial privilege, which *Jaffee* cited as a reason for creating the privilege in the first place. *Id*. at 986. It also reasoned that a patient knowing a therapist must disclose threats to victims does not necessarily mean he or she expects that disclosure to cover incriminating testimony in court. *Id*. at 988. "Not confidential" does not immediately mean it is not "privileged" under federal law. *Id*.

Although confidentiality between therapist and patient is stressed, the privilege was not conditioned upon it. *See Jaffee*, 581 U.S at 11-13. In *United States v. Auster*, 517 F.3d 312, 313

(5th Cir. 2008), the defendant informed his psychiatrist he intended to harm the managers of his worker's compensation if they did not continue to pay his benefits. After being charged with extortion, he argued the communications between him and his therapist were privileged. *Id*. at 314. The Fifth Circuit held a dangerous-patient exception exists because once confidentiality is broken, the privilege no longer applies. *Id*. at 317. It suggested that confidentiality is the cornerstone basis of the privilege and once it is broken, the purpose of the privilege is moot. *Id*. Additionally, it reasoned that a breach of confidentiality risks widespread embarrassment and detrimentally effects the patient, therefore the privilege of excluding the testimony in court is "*de minimis*." *Id*. at 318-19. It also noted areas where a patient has "no reasonable expectation of confidentiality" opens doors to disclosure in court. *Id*. at 319. Also, it based the "reasonable expectation" rule on the assumption that the patient's knowledge that statements can be used in court will not deter a person from making them more than knowledge they will be disclosed to a third party. *Id*. at 320.

First, a breach in confidentiality does not equate to a waiver of federal privilege because federal privileges do not require confidentiality. A duty to disclose may break confidentiality, but it does not cause the privilege to cease to exist. In *Trammel*, this Court recognized that no privilege prevents government officials from asking one spouse for information about the other during a criminal investigation, but the privilege does prevent those statements from reaching a jury in court. 445 U.S. at 52 n.12. If the spousal privilege was dependent upon confidentiality, any statement made to the police about a spouse would be unprivileged. Yet, despite the disclosure, the spouse is barred from testimony in court unless voluntarily offering to testify. *Id*. at 51. It follows that a breach in confidentiality to protect another person does not waive the protections of the psychotherapist-patient privilege. Additionally, the spousal privilege allowed

for voluntary testimony of statements made in the presence of third parties. *Id*. If a third party is hearing the information, confidentiality is already breached, though the spouse cannot be compelled to testify unless voluntarily agreeing to testify.

Also, almost all state legislatures have recognized a difference between a duty to disclose and the federal psychotherapist privilege. One of the primary reasons for creating the psychotherapist-privilege this Court articulated in *Jaffee* was that all fifty states already privileged statements between mental health professionals and their patients. 581 U.S. at 13. It stressed the need for similar outcomes, regardless of whether a case was in federal or state court. *Id*. If the dangerous-patient exception is allowed in federal court, different outcomes would occur depending on which court the case is filed in. The Ninth Circuit in *Chase* noted that almost every state recognizes a difference between duty to disclose and the federal privilege. 340 F.3d at 986. By allowing a break in confidentiality to mean a jury can hear those statements creates starkly different outcomes between state and federal law: the exact problem this Court in *Jaffee* attempted to remedy.

The psychotherapist-patient privilege is not conditioned upon confidentiality. *See Jaffee*, 581 U.S. at 11-13. Even so, the Fifth Circuit in *Auster* contended that the privilege is reliant on confidentiality and likened the embarrassment of third parties knowing about the threat to possible criminal charges. 133 F.3d at 318-19. Yet, the knowledge of embarrassment or the possible loss of job due to the threat is different than the risk of testimony in court. Embarrassment and job loss is fleeting. A criminal conviction can mean months to years in prison and a criminal record that could further impede employment opportunities. The Fifth Circuit further reasoned that knowledge disclosure could lead to testimony in court would not deter patients from speaking more than the duty to report does. *Id*. at 319. Yet, the stakes are far

higher in a criminal proceeding. Hearing a therapist may have to inform the police of a possible threat does not hold the same ramifications as testimony in court. Even if the therapist does alert the police, there is no guarantee charges will be brought, but testimony in court could mean conviction.

In this case, Dr. Pollak did not warn Ms. Gold the statements said during therapy could be used in an adversarial proceeding against her. R. at 21. Although she did tell Ms. Gold she had a duty to report any threats made to a possible victim or the patient herself, the statute requiring reporting does not state those threats can be used as testimony in court. *Id*. It merely requires Dr. Pollak to communicate the threat "to the victim and notify the law enforcement agency closest to the patient's or victim's residence" as well as "any information concerning the threat." R. at 2. The statute does not create a link between duty to report and a waiver of the federal privilege. Therefore, the threats made during the May 25th session are protected by the psychotherapist-patient privilege.

II. THE STATE VIOLATES FOURTH AMENDMENT RIGHTS WHEN IT SEARCHES DIGITAL FILES THE PRIVATE SEARCHER DID NOT SEARCH.

The Fourth Amendment protects against unreasonable searches and seizures by the state. U.S. Const. amend. IV. To search, the government must procure a warrant or demonstrate that an exception to the warrant requirement exists. *Riley v. California*, 573 U.S. 373, 382 (2015). The private search doctrine states that when a private actor performs a search and frustrates the expectation of privacy, officers can search without a warrant only if they do not exceed the scope of the private search. *United States v. Jacobsen*, 446 U.S. 109, 115 (1984).

First, due to the rising complexities with technology, a narrower approach to the scope of the private search doctrine is the correct scope. Second, Officer Yap exceeded the scope of Ms.

Wildaughter's private search when he viewed files she did not view. Therefore, the Fourteenth Circuit's decision should be reversed.

A. Because of The Expansiveness of Digital Data, The Scope of the Private Search Doctrine Should Be Confined to The Digital Files Physically Opened by the Private Searcher.

The private search doctrine allows officers to conduct a warrantless search of what has already been searched by a private party but the search is confined to the scope of the initial search. *Id*. at 115. Beyond the scope, officers need a warrant to search unless they have virtual certainty the unsearched containers will not produce previously unknown information. *Id*. at 119. Yet, digital storage units compile large amounts of data into files and contain a higher quality of information than a physical search. *Riley*, 573 U.S. at 393.

When performing a search after a private party, the state is bound to the scope of the original party's search. *Jacobsen*, 466 U.S. at 115. In *Jacobsen*, employees of a private freight company examined a damaged package and found a white powdery substance. *Id*. at 111. The employees opened the package to reveal a brown box with a silver duct taped tube. *Id*. Upon cutting open the tube, they discovered four plastic bags of white powder. *Id*. DEA agents opened the tube where it was sliced open and opened all four plastic bags. *Id*. The white substance was removed and a field test revealed it was cocaine. *Id*. at 112. This Court held the search did not violate the Fourth Amendment because the search was initiated by a non-state actor, and the search performed by the DEA was not beyond the scope of the original search. *Id*. at 115. It reasoned that there was a "virtual certainty" the tube did not contain anything else of significance beyond what the private party discovered. *Id*. at 119. Although the following field test was beyond what the private actors could readily discover, this Court likened it to a "canine sniff,"

where it would only reveal the illegality of the substance rather than any other personal information, and therefore, it did not infringe upon privacy interests. *Id*. at 124.

If the state searches beyond the scope of the initial search, it must have a warrant or virtual certainty of the contents of the further search. *Id*. at 119. In *Walter v. United States*, 447 U.S. 649, 651 (1980), a package of films was mistakenly delivered to a third-party. Upon inspection of the package and the description of the tapes, the private party determined the tapes contained "obscene" materials. *Id*. at 652. After turning them over to the FBI, the FBI viewed the videos without a warrant and charged the defendants with obscenity. *Id*. This Court held the FBI violated the defendant's Fourth Amendment rights when it viewed the contents of the tapes. *Id*. at 658. Although the packages were opened by a private party and not a state actor, and the FBI legally obtained the packages, they violated the defendant's expectation of privacy when they viewed the tapes the third party did not view. *Id*. 654.

Because digital storage units contain vast amounts of data, they invoke higher privacy interests than the search of physical property. *Riley*, 573 U.S. at 401. In *Riley*, an officer stopped the defendant for driving with expired registration tags and, during the stop, learned he drove with a suspended license. *Id*. at 378. The officer arrested the defendant and, incident to the arrest, seized the defendant's cellphone. *Id*. at 379. This Court held that a warrantless search of a cellphone incident to arrest violates the Fourth Amendment because technology like modern cellphones "implicate privacy concerns far beyond those implicated by the search" of other physical property items. *Id*. at 393, 401. This Court noted that a cellphone compiles distinct pieces of personal information into an easily accessible space. *Id*. at 394. Digital gigabytes can equate to thousands of pages of text. *Id*. at 396. Additionally, the type of information compiled is far more detailed than could be found physically carried by a person. *Id*. Photographs a person

has taken can reconstruct where that person has been and when. *Id*. A browsing history can reveal private interests and concerns as well as underlying medical issues related to symptom searches. *Id*. at 395. This Court compared the search of a cellphone to a home, but noted that even a phone contains more sensitive data than a typical house. *Id*. at 396-97.

With the expansiveness of what digital property can hold, the broad interpretation of the private search doctrine's scope implicates privacy concerns that searches of physical property do not. *Id*. at 401. First, because digital storage units contain a large amount of data, an officer exceeds the scope of a search by opening digital files the original searcher did not. Items stored in a physical container, such as the pipe and plastic bags in *Jacobsen*, is limited to the confines of the container. 446 U.S. at 111. A small plastic bag can only yield what it can hold. Yet a digital file contains endless amounts of data. Similar to the cellphone in *Riley*, where digital gigabytes can equate to thousands of pages of text, 573 U.S. at 396, a digital computer file can contain thousands of photographs, documents, or videos. A flash drive with a computer hard drive worth of information cannot be equated to a plastic bag. Compare to *Walter*, where state actors exceeded the scope of a search by viewing the videos. 447 U.S. at 658. Even though the searchers viewed the physical container, watching the videos exceeded the scope of the private search. *Id*. In the same way, viewing a file not viewed previously on a flash drive exceeds the scope. The bottomlessness of digital data requires the scope of a state actor's search to remain confined to the physical search of each individual data file.

Further, technology makes it impossible for an officer to be "virtually certain" the unsearched items contain the same information as the searched items. In *Jacobsen*, the private actors did not open all the bags but could see the white powder through the plastic. 466 U.S. at 111. The officers could be virtually certain all four bags contained the same substance through

what the initial searchers reported and through the visibility of the white powder through the plastic. *Id*. at 119. With technology, there is no ability to view the contents before opening a file. This Court in *Riley* noted the quantity of data a cellphone can hold and noted even a house holds less data. 573 U.S. at 396-97. Because an officer does not have virtual certainty that every file on a computer, cellphone, or flash drive is limited to the information discovered in the initial search, searching files not searched by the private party exceeds the scope of the private search doctrine.

Also, because of the quality of data stored on digital storage devices, searches of files not searched by private parties are more likely to discover personal information that physical searches are less likely to yield. In *Jacobsen*, this Court emphasized that the field test performed by the officers revealed only the illegality of the substance and no personal information. 466 U.S. at 119. Unlike the field test or a canine sniff, a search of digital storage devices can reveal large amounts of personal data that normally would require a warrant. This Court in *Riley* emphasized the intimate details of life captured through the photographs, text messages, and search history of our browsers. 573 U.S. at 394. A previously unsearched file on a computer, cellphone, or flash drive is more likely to produce personal information than a search of a physical object. In *Walters*, this Court recognized the invasion of privacy the police committed through viewing the videos not watched by the private parties, 447 U.S. at 658, and that same invasion of privacy occurs when an officer opens a file the private party did not. In both cases, the information contained within the "containers" would produce personal information that the search of the physical cocaine bags in *Jacobsen* did not. Therefore, because of the capacity and types of information contained on digital technology, this Court should adopt the narrower scope of the private search doctrine.

B. When Officer Yap Opened and Viewed Files on the Flash Drive That Ms. Wildaughter Did Not, He Exceeded the Scope of the Search and Violated Ms. Gold's Fourth Amendment Rights.

When assessing whether an officer exceeded the scope of a private search, a court must compare what was searched by the private party and what was searched by the state. *Jacobsen*, 446 U.S. at 115. If the state searches or views contents the original searcher did not, it has exceeded the scope of the search unless it had virtual certainty the containers not searched by the private party did not contain any previously unknown information. *Id*. at 116.

To assess whether a state actor exceeded the scope of a search, the files searched by a state actor must be compared to what was searched by the private party. *Id*. at 115; *see also United States v. Sparks*, 806 F.3d 1323, 1336 (11th. Cir. 2015). In *Sparks*, employees of Walmart located a cellphone left by a customer. 806 F.3d at 1330. The phone was not password protected, and when one of the employees searched through the photos to identify the owner, she noticed pornographic images on the thumbnails. *Id*. at 1330-31. After taking the cellphone to the police, the officer searched through every photograph seen by the employee but viewed one video the employee did not view. *Id*. at 1332-33. The Eleventh Circuit held that the viewing of the video exceeded the scope of the original private search. *Id*. at 1336. The circuit reasoned that because of the expansive amount of information held on a cell phone, the employees' search of the photographs did not "expose every part of the information" collected on the cell phone. *Id*. The officer needed a warrant to view the video. *Id*.

If a state actor searches items the private actor did not search, the state actor must have virtual certainty of the contents. *Jacobsen*, 446 U.S. at 116; *see also United States v. Lichtenberger*, 786 F.3d 478, 488. In *Lichtenberger,* the defendant's girlfriend searched through his laptop computer and the thumbnail files on the computer revealed sexually explicit images.

786 F.3d at 480. She clicked through several others involving what appeared minors, and after calling the police, she clicked through several images with an officer, but could not say if the photographs shown to the officer were the same as the ones she saw during the initial search. *Id*. 480-81. The Sixth Circuit held that the officer's search exceeded the scope of the private search because of the privacy concerns implicated with the large amount of information stored on a laptop and the inability for the officer to be "virtually certain" the inspection would not reveal information beyond the initial search. *Id*. at 488. Although all photographs shown to the officer contained child pornography, the files could have contained information unrelated to the crime. *Id*. at 489.

If a search by a state actor exceeds the scope of the initial search, the officer must be certain the previously unsearched containers will not reveal information previously unknown to the state actor. *Jacobsen*, 466 U.S. at 116; *see also United States v. Ackerman*, 831 F.3d 1292, 1306. (10th Cir. 2016). In *Ackerman*, the defendant attempted to send child pornography through email, but the email server he used had an automatic filter designed to detect child pornography. 831 F.3d at 1294. His emails with the pornographic attachments were sent to a CyberTipline, which viewed the attachments and the emails before alerting local law enforcement. *Id*. The Tenth Circuit found that the CyberTipline was a government entity and by opening the emails with the attachments, exceeded the scope of the private search. *Id*. at 1306 The Circuit reasoned that the opening of the emails risked "exposing private, noncontraband information" the email server had not examined. *Id*. at 1307.

In the present case, Officer Yap's search of Ms. Gold's computer exceeded the scope of Ms. Wildaughter's search. First, Officer Yap opened files that Ms. Wildaughter did not in her search of her roommate's computer. R. at 6. He opened files called "recipe," "Exam 4," "Health

Insurance ID Card Documents," "Budget," and "Research." R. at 6. These files were not viewed by Ms. Wildaughter, similar to the video viewed by the officer in *Sparks*, 806 F.3d at 1332, and the photographs viewed by the officer in *Lichtenberger*. 786 F.3d at 480. In both those cases, the officer exceeded the scope of the initial private search by viewing images or videos the private searcher did not. In this case, Yap viewed photographs, health insurance documents, budget information, and compiled research that Ms. Wildaughter did not view, R. at 6: a more extensive search than the officers performed in *Lictenberger* or *Sparks*. Although Yap searched a flash drive and not a cellphone or a laptop computer, the flash drive contained the entire hard drive from Ms. Gold's computer, equating to the capacity of a computer. Also, the information discovered in *Sparks* or *Lichtenberger* was stored on the phone and not in the "cloud". 806 F.3d at 1332; 786 F.3d at 480. The outcome of those cases would not change if the item searched was a flash drive rather than an object connected to the internet. Because Yap viewed files not viewed by Ms. Wildaughter, his search exceeded the scope of the private search.

Moreover, Officer Yap exceeded the scope of the private search because he did not have virtual certainty the files contained the same information that Ms. Wildaughter searched. First, several of the files had names that did not correspond to the information Ms. Wildaughter provided. R. at 6. The file called "Health Insurance ID Card Documents" would likely provide information outside the scope of the search for information on the alleged crime. Unlike the officer's search in *Sparks*, where all the photographs and videos were related to child pornography, 806 F.3d at 480-81, the "Health Insurance ID Card Documents" clearly contained information outside the search. Because the title of the file revealed the file contained information separate from the search, Officer Yap had little certainty it would contain the same information already known. Additionally, Officer Yap had no virtual certainty the files with less

descriptive names such as "Recipe," "Exam 4," and "Budget" would contain the information previously known. Ms. Wildaughter stated which files she opened, but Officer Yap failed to ask where those files were found. R. at 6. The first file he opened revealed personal images which were not the ones Ms. Wildaughter described. *Id*. At that point, instead of asking for clarification, he continued to open other files. In *Lichtenberger*, the Sixth Circuit found no virtual certainty when both the officer and private searcher viewed images of child pornography but they could not be certain they viewed the same ones. 786 F.3d at 480-81. In this case, Officer Yap knew he viewed photographs Ms. Wildaughter did not describe. R. at 6. He then proceeded to open files he knew she had not viewed. *Id*. Because he had no virtual certainty the other files on the flash drive would not contain previously unknown information, he exceeded the scope of the initial private search.

Lastly, the search Officer Yap performed on the flash drive exceeded the scope of the private search because of the large chance of discovering personal information previously unknown. The flash drive contained Ms. Gold's entire hard drive, including personal photographs unrelated to the alleged crime, personal health documents, and private monetary information. R. at 6. Similar to the search in *Ackerman,* where the Tenth Circuit found the opening of emails by the government entity to exceed the scope of the search because of the possibility of private and personal information contained in the emails, 831 F.3d at 1306, the files Officer Yap opened had a large chance of containing private personal information. Emails can reveal intimate correspondence, but the files held on the flash drive revealed protected information about Ms. Gold's health and financial personal life. R. at 6. The high risk of personal information revealed in opening many of the files Officer Yap opened exceeded the scope of Ms.

Wildaughter's private search. Therefore, Officer Yap exceeded the scope of Ms. Wildaughter's search when he viewed the files she did not.

III. INADMISSIBLE EVIDENCE CAN FORM A *BRADY* CLAIM IF IT LEADS TO ADMISSIBLE EVIDENCE.

In *Brady v. Maryland*, 373 U.S. 83, 88 (1963), this Court held that the prosecution's failure to disclose evidence favorable to the accused and material to guilt or punishment violates due process. Evidence is material when there is a "reasonable probability" that the result of the proceeding may have been different if the information had been disclosed. *Bagley*, 473 U.S. at 682. Yet, the question is not whether the accused may have been given a different verdict, but whether without the information, the accused received a fair trial. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

First, inadmissible evidence can form a *Brady* violation if it leads to admissible evidence. Second, Ms. Gold failed to receive a fair trial because the prosecution withheld the two leads investigated by the FBI. Therefore, the Fourteenth Circuit's decision should be reversed.

A. Inadmissible Evidence Can Form a *Brady* Claim Because *Brady v. Maryland* Does Not Require Admissibility.

Brady v. Maryland requires favorability to the accused and materiality to the verdict, but not admissibility. 373 U.S. at 88. Impeachment is a powerful tool of the defense and undisclosed evidence that could have been used for impeachment fits within the materiality component of *Brady*. *Bagley*, 473 U.S. at 676. Although some inadmissible evidence has been held to not support a *Brady* violation, such as a polygraph test, it only foreclosed evidence that would not have led to any admissible information. *See Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995).

Admissibility is not a requirement to the materiality of a *Brady* violation. *See Brady*, 373 U.S. at 88. In *Kyles*, the defendant was convicted of first-degree murder and sentenced to death.

514 U.S. at 422. A large portion of the prosecution relied upon eye-witness descriptions that the defense later discovered were inconsistent and supported that a different person, who gave tips against the defendant, was the killer. *Id*. at 430. The Court held the defendant was denied due process rights under *Brady* because the evidence withheld was favorable to the defense and raised a "reasonable probability" the disclosure could have resulted in a different outcome. *Id*. at 454. This Court reasoned that "reasonable probability" aspect of materiality does not mean the defendant would have received a different verdict, but questions whether he received a fair trial due to the failure to disclose. *Id*. at 434. It also stressed that a *Brady* violation depends on whether the favorable evidence could place the case in "a different light" and undermine "the confidence in the verdict." *Id*. at 435.

Impeachment evidence is an effective tool included within the materiality requirement of *Brady*. *Bagley*, 473 U.S. at 676. In *Bagley*, twenty-four days before trial for narcotics and firearms charges, the defense requestioned the names of all witnesses the prosecution planned to use, criminal records of all witnesses, and whether there were any promises and inducements made to any of them in order to testify. *Id*. 669-70. After conviction, the defendant found through a FOIA request that the prosecution paid $300 each for witness testimony, and alleged that failure to disclose the contracts for the money could have been used for impeachment. *Id*. at 671-72. This Court held that evidence is material if there is a "reasonable probability" the proceeding could have resulted in a different outcome. *Id*. at 682. "Reasonable probability" means the evidence could "undermine the confidence" of the verdict. *Id*. at 682, (*quoting Strickland v. Washington*, 466 U.S. 688, 694 (1984)). It reasoned that impeachment evidence falls within *Brady* protections and disclosure of evidence used for impeachment can alter the outcome of a conviction. *Id*. at 676.

Inadmissible information that leads to admissible information can form a *Brady* violation. *See Wood*, 516 U.S. at 5-6. In *Wood*, the defendant was charged with murder for killing a laundromat attendant during a robbery. *Id*. at 2. He admitted to robbing the laundromat and firing the shots, but claimed the two shots fired discharged accidentally. *Id*. at 3 The prosecution subjected two of its witnesses to a polygraph test, but one witness, when asked about his testimony, appeared to be lying. *Id*. at 4. This Court held the failure to disclose the polygraph test was not material. *Id*. at 5. It noted polygraph tests are inadmissible under state law for even impeachment purposes. *Id*. Because the information could not be used to impeach witnesses, the possibility for the defense to use it to pursue possible admissible evidence could not reach the *Brady* materiality threshold. *Id*. The defense argued they might have chosen to depose the witness, but admitted that it would have not affected the cross-examination at trial, and therefore it was not "reasonably likely" that the polygraph results would have created a different outcome. *Id*. at 8.

First, inadmissible evidence can form the basis of a *Brady* claim because admissibility is not a requirement. *See Brady*, 373 U.S. at 88. To form a *Brady* claim, evidence need only be withheld by the prosecution, favorable to the accused, and material to the outcome. *Id*. The rule itself does not define the form of the evidence it can take. *See id*. Although materiality requires a "reasonable probability" of altering the confidence of an outcome, as stated in *Bagley*, inadmissible evidence has the possibility of calling into question the verdict. 473 U.S. at 682. Although the underlying assumption is that evidence that cannot be heard in court has no way of affecting the jury, inadmissible evidence can be used by the defense to investigate admissible evidence or impeach a witness. So long as the withheld evidence can undermine the confidence in the verdict, or calls into question the fairness of the trail, inadmissibility is not precluded.

Inadmissible evidence can form the basis of a *Brady* claim because of its use for impeachment. As reasoned in *Bagley*, impeachment is an important tool that can mean a conviction or acquittal based on how it is used. *Id*. at 676. The polygraph test in *Wood*, 516 U.S. at 5, could not be used for impeachment, yet evidence such as hearsay can be used to impeach. Therefore, due to the impeachment value of evidence inadmissible for one purpose, *Wood* does not bar all inadmissible evidence from forming a *Brady* claim.

Finally, *Wood* left open the possibility that inadmissible evidence that leads to admissible evidence can form a *Brady* claim. The polygraph test at the center of *Wood* was inadmissible and could not lead to admissible information. 516 U.S. at 5. A polygraph test only gives data on whether the person undergoing the test is being truthful. If that person has already been called as a witness and the test is not admissible for impeachment purpose, it cannot lead to admissible information. The defense even admitted the disclosure of the polygraph test would not have affected cross-examination. *Id*. at 8. Therefore, the holding in *Wood* is limited to inadmissible evidence that cannot lead to admissible evidence.

In this case, the two FBI leads would have led to admissible information. Mr. Caplow, who provided one of the leads, was close to the victim and supplied a suspect with both a motive and a violent history. R. at 11. The report stated a need for a follow-up interview, but the FBI provided no information as to why the lead was dismissed. *Id*. Additionally, although the FBI concluded the second lead did not require a follow up investigation, that alone is not conclusive. R. at 12. The report did not include why the lead was considered unreliable, or why investigation ceased. *Id*. In both cases, the defense could have located admissible information by further investigating the two leads.

B. The FBI Leads That the Prosecution Failed to Disclose Are Material to Ms. Gold's Case Because They Call into Question the Investigation Performed By the FBI.

Evidence is material if there is a "reasonable probability" the disclosure of evidence may have altered the outcome. *Bagley*, 473 U.S. at 682. For a "reasonable probability" the evidence need only "undermine the confidence of the outcome." *Id*. To undermine the outcome does not mean that the defense has to prove the verdict would have changed, but whether the new evidence places the case in a "different light." *Kyles*, 514 U.S. at 435.

Materiality is measured by whether disclosure of the evidence had a "reasonable probability to alter the outcome of the case. *Bagley*, 473 U.S. at 682. In *Dennis v. Sec'y, pa. Dep't of Corr.*, 834 F.3d 263, 269 (3d. Cir. 2016), the defendant was sentenced to death for first degree murder. He challenged his sentence because the prosecution failed to turn over several pieces of exculpatory evidence, one of which was a lead that another person may have killed the victim. *Id*. at 269, 305. The person who supplied the lead heard a confession during a three-way call with his aunt and the confessor matched the description of the shooter. *Id*. 305. Although police interviewed the suspect, they did not investigate the alibi given. *Id*. at 305-06. The Third Circuit held the failure to disclose the lead was material because it had a strong likelihood of leading the defense to admissible evidence. *Id*. at 311. It reasoned that the lead was not rigorously pursued because of the police's failure to interview the aunt who also heard the confession and other important people related to the lead. *Id*. at 307. Also, the victim noted the shooter attended her high school, which the suspect did. *Id*. at 312. The information could have been pursued by the defense and created an "other person" defense to present at trial. *Id*. at 307. Additionally, the defense could have used it to cast doubt upon the police's abandonment of the lead and failure to fully investigate it. *Id*. at 311.

For evidence to meet the "reasonable probability" threshold, it need only undermine the confidence in the verdict. *Bagley*, 473 U.S. at 682. In *Ellsworth v. Warden*, *N.H. State Prison*, 333 F.3d 1, 2 (1st Cir. 2003), the defendant, an employee of a youth treatment facility for children with emotional impairments, was convicted of sexually assaulting one of the children who lived there. Next to no circumstantial evidence corroborated either story. *Id*. at 3 He challenged his conviction and claimed the prosecution violated his *Brady* rights when they did not disclose an intake note claiming the victim falsely accused employees of sexual assault at the prior hospital he stayed at. *Id*. at 4 The court held the intake note had the possibility of leading to admissible information. *Id*. at 5-6. It reasoned defense could have located the employees previously accused and found others that could testify to whether the allegations were true or false. *Id*. at 5. It also noted that both allegations were similar in setting and type, which could have created reasonable doubt in the verdict. *Id*. at 5.

Material evidence does not need to ensure a different verdict, but merely place the case in a different light. *Kyles*, 514 U.S. at 435. In *Bradley v. Nagle*, 212 F.3d 559, 561, 563, (11th. Cir. 2000), the defendant was convicted of raping and murdering his stepdaughter. Despite the large amount of forensic evidence that suggested he was the killer, he challenged his sentence in part because the prosecution failed to disclose three alternative hearsay leads. *Id*. at 563, 566. The Eleventh Circuit held that the failure to disclose the leads was not a *Brady* violation because they would not have led to any admissible evidence. *Id*. at 568 The prosecution presented at the post-conviction hearing evidence that concluded all three possible alternative suspects either had alibis or could not have physically produced the DNA evidence found at the scene. *Id*. at 567 The circuit reasoned that even if the jury had considered the information, the fruitless leads

would not have altered their perception in the wake of the substantial weight of forensic evidence that incriminated the defendant. *Id*. at 568.

In this case, the prosecution violated Ms. Gold's *Brady* rights by not disclosing two possible leads the prosecution failed to investigate. First, the evidence undermines the thoroughness of the FBI's investigation. Both leads involved suspects close to the victim. R. at 11-12. The victim even owed money to one suspect, who was reported to having a history of violence. R. at 12. Similar to the lead given in *Dennis*, where the police failed to fully investigate the lead given, 834 F.3d at 311, the police in this case dismissed both leads without offering why. A follow up interview was given to the first lead, but no evidence of an alibi was presented. R. at 11. The second lead was dismissed without a follow up investigation. R. at 12. Unlike the tip given in *Bradley*, where the three alternative suspects either had strong alibis or the inability to produce the forensic data left, 212 F.3d at 567, the tips here were dismissed by the investigation without alibi or forensic evidence to rule out any of the previous suspects. R. at 11-12. The alternative leads undermined the FBI's investigation and created a rational probability of an alternate outcome had the leads been disclosed.

Also, with the information, the defense could have created an "other man" defense. Both alternative suspects knew the victim and were equally invested in HerbImmunity, like Ms. Gold. R. at 11-12. One of the suspects was an upstream distributor to whom the victim owed money. R. at 11. Similar to the suspect in *Dennis*, who matched the description of the killer and attended high school with the victim, 834 F.3d at 312, the suspects in this case both knew the victim, were a part of her HerbImmunity scheme, and one the victim owed money to. R. at 11-12. If the prosecution disclosed the leads to the defense, the defense could have investigated the leads

further and presented a strong "other man" defense: information which may have put the case in a different light to the jury.

Finally, the when weighing the evidence against Ms. Gold, the addition of the undisclosed information places the case in a different light. No direct evidence led to Ms. Gold as the killer, R. at 14, unlike the defendant in *Bradley*, where forensic examinations of the house and the victim directly implicated him as the murderer. 212 F.3d at 563. Rather, the evidence against Ms. Gold is similar to the defendant in *Ellsworth*, where evidence did not directly support the allegations against him and the undisclosed information had the possibility of casting doubt upon the verdict. 333 F.3d at 3. The other suspects, like Ms. Gold, were lured in by the victim, and one of the suspects was both prone to violence and had a motive. R. at 11-12. Without strong direct evidence implicating Ms. Gold, the undisclosed leads had the power to cast doubt upon the conviction.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the decision of the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

Dates: February 16, 2021

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Team 29
Attorneys for Respondent