No. 20-2388

IN THE

Supreme Court of the United States

SAMANTHA GOLD, *Petitioner,*

v.

UNITED STATES OF AMERICA., *Respondent.*

On Writ of Certiorari to
the United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the psychotherapist-patient testimonial privilege, governed by the Federal Rules of Evidence, prevent the admission of confidential communications from psychotherapy treatment into trial, even if the defendant threatened serious harm to a third party and those threats had already been disclosed to law enforcement.

2. Whether the government violate the Fourth Amendment by relying on a private search to seize and offer into evidence files discovered on a computer without a warrant, when the government searched was broader than the private party's search.

3. Whether *Brady v. Maryland* is violated when the government fails to disclose information that is potentially exculpatory just because it is inadmissible at trial.

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Statement of the Case

Petitioner, Samantha Gold, has been convicted of the charge of delivery by mail of an item with intent to kill or injury another, which resulted in the death of another, Tiffany Driscoll. R. at 1. Ms. Driscoll was found dead at the bottom of the stairs in her father's townhouse on May 25, 2017. R. at 13. She was observed to have suffered blunt force trauma to the head. *Id*. However, the police later came up with the theory that she died of the poison strychnine before falling down the stairs, as traces of the substance were found in her system. R. at 14.

Dr. Chelsea Pollak has been Ms. Gold's psychiatrist since 2015. R. at 17. Dr. Pollak met with Ms. Gold on May 25, 2017 and was concerned about her behavior and demeanor. R. at 17-18. Dr. Pollak was already aware of Ms. Gold's frustration with her participation in the multi-level marketing group, HerbImmunity, which was causing her to go into debt, and Ms. Driscoll, who had gotten Ms. Gold involved in the scheme despite the fact that her father had to fund her continuance in the scheme. R. at 18. Dr. Pollak feared that Ms. Gold might harm herself or Tiffany, and therefore called the police after their psychotherapy situation to alert them of her concerns. R. at 19. Ms. Gold was found by the police in her dorm and appeared calm and rational. R. at. 5. Ms. Driscoll was informed as well, but she expressed no concern and returned to class. Dr. Pollak's handwritten notes were used as evidence in Ms. Gold's trial and she testified. *Id.*

That same day, Ms. Gold's roommate, Jennifer Wildaughter, went into Ms. Gold's computer and clicked on a folder entitled "HerbImmunity." R. at 24. She did not have permission to open this folder or to access Ms. Gold's laptop at all. She opened a subfolder, "Customers," and then a subsequent folder, "Tiffany Driscoll." R. at. 27. There she found ten pictures of Tiffany Driscoll, and a fourth folder "For Tiff." R. at 25. This folder contained a brief message to

Ms. Driscoll, and another document with passwords, codes, and a reference to rat poison. R. at 26. These were the only folders and documents opened by Ms. Wildaughter. R. at 27-28. She then copied Ms. Gold's entire desktop onto a flash drive and took it to the police. R. at 29. Officer Yap asked no questions about the flash drive and proceeded to look through Ms. Gold's entire desktop. *Id.*

One June 2, 2017, the FBI learned that Ms. Driscoll was in debt to Martin Brodie, another HerbImmunity distributor. R. at 44. Five days later, the FBI received an anonymous call naming another possible suspect, Belinda Stevens, for Ms. Driscoll's death. R at 44-45. The prosecution failed to inform Ms. Gold that there were other possible suspects in the investigation. R. at 45.

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Summary of the Argument

The "dangerous patient" exception to the psychotherapist-patient privilege is a judge-made doctrine first developed in *Jaffee v. Redmond,* 518 U.S. 1 (1996). However, there is currently a circuit split as to whether this exception exists at all. The Circuits who believe it exists use the *Tarasoft* duty, which is the duty to reveal information about a potentially dangerous patient, to undermine the psychotherapist-patient privilege. This is improper because the dangerous patient exception was intended to be used solely for preventing harm when no other recourse was available and the *Tarasoft* duty does not undermine the confidentiality of statements made to a psychotherapist.

The private search doctrine re-establishes Fourth Amendment protections for a search if an official exceeds the scope of the private search. There are currently two approaches to the private search doctrine among the Courts of Appeals, one narrower, which is stricter on how much the police officer or other official can exceed the scope of the search, and one broader, which is less strict in limiting the police officer. This Court should adopt the narrow approach to

the private search doctrine because of its constitutional benefits and its adaptability to the digital age. However, under either definition of the private search doctrine, Officer Yap exceeded the scope of the private search of Ms. Gold's laptop desktop that was initially performed by her roommate.

A *Brady* violation occurs when the prosecution fails to disclose potentially exonerating evidence to the defendant, thus violating their due process rights under the Fourteenth Amendment. Ms. Gold has suffered a *Brady* violation through the prosecution in this case failing to reveal that there were two other potential suspects in this case and suppressing their own investigative reports. This suppression substantially affected the outcome of the trial because the reports could have contributed to Ms. Gold's defense, could have been used as an alternate theory of the crime, and reflect how the police stopped following up on credible leads. The relevant test for a *Brady* violation is the likelihood of a different outcome of trial, not admissibility.

ARGUMENT

I. THERE IS NO "DANGEROUS PATIENT" EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE FOR THE PURPOSE OF CRIMINAL PROSECUTION.

The psychotherapist-patient privilege is judge-made doctrine developed by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The privilege was created pursuant to the Court's authority under the Federal Rule of Evidence 501, that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege." Fed. R.

Evid. 501 (2021).[1] However, "[a]n exception from the general rule disfavoring testimonial privileges is justified when the proposed privilege "promotes sufficiently important interests to outweigh the need for probative evidence...." *Jaffee*, 518 U.S. at 2 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). In *Jaffee*, this Court formally recognized the psychotherapist-patient privilege as falling among the limited number of federally recognized privileges.[2] Also included in *Jaffee* was Footnote 19, which acknowledged that the privilege should not be absolute:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist. *Id*.

Interpretation of Footnote 19 has given rise to a split among the circuits regarding exactly what circumstances would give rise to the necessity of the privilege "giv[ing] way." The Sixth, Eighth, and Ninth Circuits have held that there is no "dangerous patient exception" to the psychotherapist patient privilege. The Fifth and Tenth Circuits have held that there is. Almost always, the dangerous patient exception is invoked in situations where the psychotherapist reveals information about a potentially dangerous patient pursuant to the psychotherapist's "duty to warn," or *Tarasoff* duty.[3] The split has reflected the desire of courts and law enforcement to

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[1] The rule, further, demonstrates commitment to federalism by providing that state law will govern rules of privilege in civil cases. Fed. R. Evid. 501 (2021).[1]

[2] In creating federal recognition of the psychotherapist-patient privilege, this court in part took cue from the fact that all fifty states had already enacted such a privilege legislatively. *Jaffee* at 13. ("[A]ny State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court [and] would frustrate the purposes of the state legislation." *Id.*)

[3] "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. . . . Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 431 (1976).

use evidence made available by the psychotherapist's duty to warn *to prevent future harm* for a different purpose, for the purpose of achieving criminal justice *after* a crime has been committed.

Because the objectives of Tarasoff and the so-called "dangerous patient exception" derive from different duties and are grounded in different public policy objectives, the two doctrines operate distinctly from one another and *Tarasoff* duty should not be used to undermine the psychotherapist-patient privilege. This Court should resolve the circuit split in favor of protecting the psychotherapist-patient privilege, and clearly defining the outer limits of the dangerous patient exception to ensure that the public policy goals of the psychotherapist patient privilege are not severely undermined by the exception. Petitioner asks this Court to recognize that (A) the "dangerous patient" exception contemplated by Footnote 19 was intended strictly as a narrow exception for the sole purpose of preventing harm when no other recourse is available, and public policy is undermined when it is construed to include broadly the pursuit of criminal justice and (B) that the *Tarasoff* duty to warn does not undermine the confidentiality of statements made to a psychotherapist for and during the course of treatment for the purpose of recognizing confidentiality for the psychotherapist-patient privilege.

A. The "dangerous patient" exception that has been construed within the psychotherapist-patient privilege is a narrow exception created for the purpose of preventing harm when no other recourse is available, and public policy is undermined when it is expanded to pursue criminal justice objectives.

Privileges are fashioned and construed narrowly, based upon the belief that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . . To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974). It has become axiomatic that in the pursuit of justice "the public has a right

to every man's evidence." *Carman v. McDonnell Douglas Corporation,* 114 F.3d 790, 793 (8th Cir. 1997) (quoting Hardwicke, L.C.J., quoted in 12 *Cobbett's Parliamentary History,* 675, 693 (1742)). Privileges are not constitutionally based. *United States v. Highsmith*, No. 07-80093CR, 2007 WL 2406990, at *4 (S.D. Fla. Aug. 20, 2007). Rather, "[t]he Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials." *Trammel v. United States*, 445 U.S. 40, 47 (1980). *United States v. Ghane*, 673 F.3d 771, 780 (8th Cir. 2012).

In spite of the judicial preference for disclosure and narrow interpretations of privilege, the law has long recognized that certain public policy interests are sufficiently important to merit the recognition of a privileged relationship. "Certain exemptions from attending or, having attended, giving testimony are recognized by all courts. But every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth." *United States v. Bryan*, 339 U.S. 323, 331 (1950). "Every exemption from testifying or producing records thus presupposes a very real interest to be protected." *Id.* at 332.

The psychotherapist-patient privilege was established to facilitate treatment for psychological disorders, out of a recognition that such treatment would be functionally impossible without ensuring the confidentiality of sensitive or embarrassing information for the purpose of treatment. In explaining why it thought the psychotherapist-patient privilege was necessary, this Court stated that:

> Significant private interests support recognition of a psychotherapist privilege. Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment. The privilege also serves the public interest, since the mental health of the Nation's citizenry, no less than its physical health, is a public good of transcendent

> importance. In contrast, the likely evidentiary benefit that would result from the denial of the privilege is modest.

Jaffee, 518 U.S. at 2 (1996). In so stating, the Court acknowledged that the cost-benefit analysis weighed in favor of treatment. Not only the patient, but society at large, benefits from the improved mental health of its citizenry. The *Jaffee* court also emphasized the importance of predictability and certainty in the privilege, stating that:

> [I]f the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Jaffee*, 518 U.S. at 17–18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

The social cost of undermining the psychotherapist patient exception is particularly stark when considering patients with mental illnesses that might lead to dangerous propensities. A patient who voluntarily seeks out psychological treatment when experiencing dangerous thoughts is a patient who is *actively* attempting to *prevent harm* by seeking help. A patient who pursues this course of action is trying to do the right thing. And a therapist who is able to anticipate out potentially dangerous behavior and warn about it before the behavior occurs is able to produce a net social good by preventing the harm. Those circuits that have supported using the dangerous patient exception risk undermining these valuable social goods. For example, in *United States v. Hayes,* 227 F.3d 578 (6th Cir. 2000), the defendant voluntarily admitted himself to a psychiatric hospital for help for depression. During his commitment he made threats to kill his supervisor, and the threats were properly communicated to the relevant parties pursuant to the duty to warn. As a result

of these threats made while in confinement, the defendant was indicted for threatening to kill a federal official. The court said:

> [W]e note the paradoxical nature of this case. On the one hand, [the defendant] should be applauded for seeking professional help for the mental and emotional difficulties he was suffering. Yet, because the psychotic delusions for which he sought treatment took the form of homicidal intentions toward an employee of the federal government, [the defendant] now finds himself facing a felony conviction and incarceration because his professional care givers are prepared to testify against him. *Id. at* 584.

This situation clearly reflects what would have been a perverse result. The court declined to recognize the dangerous patient exception on public policy grounds. In explaining why, the Sixth Circuit stated that such an exception would "surely would have a deleterious effect on the 'atmosphere of confidence and trust' in the psychotherapist/patient relationship" *Id*. at 584–85. The court acknowledged that the dangerous patient exception served an end but "an end that does not justify the means." *Id.* In fact, the means threaten to inflict much greater cumulative social harm in analyzing the potential costs and benefits of recognizing such an exception, the Sixth Circuit held that:

> While early advice to the patient that, in the event of the disclosure of a serious threat of harm to an identifiable victim, the therapist will have a duty to protect the intended victim, may have a marginal effect on a patient's candor in therapy sessions, an additional warning that the patient's statements may be used against him in a subsequent criminal prosecution would certainly chill and very likely terminate open dialogue. *United States v. Hayes*, 227 F.3d 578, 584–85 (6th Cir. 2000).

The Ninth Circuit distinguished the duty to warn from the dangerous patient exception in terms of the prevention function of the former, versus the criminal justice function of the later, stating that: "[E]ven though the threats that Defendant communicated arguably constituted a crime [o]nce Defendant finished uttering the threats, the charged crime was completed, and the

psychiatrist was in the same position she would have occupied had her patient described a bank robbery in which he had participated a week earlier." *United States v. Chase*, 340 F.3d 978, 982 (9th Cir. 2003). In a situation where the crime had already occurred, the reasons for upholding the privilege were more important than the criminal justice considerations.

In this case, Petitioner voluntarily sought treatment from her psychotherapist, Chelsea Pollak, for Intermittent Explosive Disorder. R. at 5. Ms. Pollak acted correctly in reporting Petitioner's statements to law enforcement, pursuant to her duty to warn. Law enforcement took reasonable precautions on the basis of those statements, and conveyed the warning to Ms. Driscoll, giving her the opportunity to take precautionary measures. R. at 5. However, Petitioner is entitled to claim the psychotherapist-patient privilege to prevent Ms. Pollak from testifying against her in this matter, and the dangerous patient exception should not be allowed to undermine her right to claim this privilege. Petitioner was right to seek out treatment for her condition. Her expressions of anger were consistent with her diagnosis, and perhaps even understandable given the financial predicament that she was caught in. Ms. Driscoll had advance warning about Petitioner's angry feelings towards her in part *because* Petitioner was doing the right thing by seeking treatment for her psychiatric condition. Her pursuit of treatment was a positive thing, and it is in the best interests of all of society that therapeutic relationships are supported through strong public policy measures and strong assurances to patients that they will not end up being penalized for their efforts to heal. It would be contrary to public policy, and to the legitimate expectations of the Petitioner when she engaged in psychotherapy, for Ms. Driscoll to testify against her.

The public policy goals of the psychotherapist-patient privilege would be seriously undermined if the dangerous patient exception permitted statements made in therapy to be used against the patient in later criminal proceedings.

B. The *Tarasoff* "duty to warn" does not undermine the confidentiality of statements made to a psychotherapist for and during the course of treatment for the purpose of recognizing confidentiality for the psychotherapist-patient privilege.

Those circuits that have recognized the dangerous patient exception have, in part, justified the exception on the grounds that statements subject to disclosure under the *Tarasoff* duty never fall within the psychotherapist-patient privilege to begin with because the patient had no reasonable expectation of confidentiality in statements subject to disclosure under the duty to warn. Thus, any statement triggering a duty to warn automatically falls within an exception to the privilege, thereby threatening to gut any meaningful application of the privilege for judicial purposes. This construction ignores the different origins, workings, and public policy goals of the *Tarasoff* duty and the psychotherapist-patient privilege. Although the two types of disclosure are similar in that they may be triggered by the same kinds of statements or behaviors, their similarity in terms of legal implications quickly diverge.

The Colorado Supreme Court articulated this doctrine best when it held that "communications implicating the duty to warn are never confidential as a matter of law—and because confidentiality is required for the psychologist-patient privilege to attach in the first place—we conclude that the trial court erred in excluding [the psychotherapist's] testimony." *People v. Kailey*, 333 P.3d 89, 94 (Colo. 2014). In *Kailey*, the court explained that "confidentiality is inextricably tied to the policy rationale underlying the psychologist-patient privilege" 333 P.3d at 95. It held that because this Court "unambiguously limited the privilege to circumstances in which the patient's statements were made in confidence" statements made

without reasonable expectation of that confidence fell outside the privilege. *Id*. Because psychologists are legally required to notify their patients of their duty to warn before commencing treatment, courts following this rationale have argued that no psychologist-patient privilege ever attaches to such statements. *United States v. Auster*, 517 F.3d 312 (5th Cir. 2008). *United States v. Hardy*, 640 F. Supp. 2d 75 (D. Me. 2009).

In *Kailey*, the court justified its approach by recognizing that the competing interests may, at times, be unreconcilable. Using the rationale behind Tarasoff, it reasoned that:

> [t]he duty to warn constitutes a legislative recognition . . . that mental health treatment providers must simultaneously serve another—sometimes conflicting—societal duty besides that of strictly maintaining patient confidentiality. Specifically, these providers have a duty to larger society to affirmatively violate patient confidentiality when an identified individual is at imminent risk of physical violence. *Kailey*, 333 P.3d at 94.

However, in conflating the duty to disclose under *Tarasoff* with testimony for criminal justice purposes, the court failed to recognize the distinction between Tarasoff's forward-looking objectives of preventing harm and the backward-looking objectives of criminal justice. *Jaffee's* Footnote 19, like *Tarasoff*, is forward-looking: in both instances, the court held that confidentiality may *only* be breached to prevent future harm. A breach of confidentiality for criminal justice purposes simply does not fit the criteria.

Similarly, the circuits have acknowledged the problem with the loophole as described in Kailey. "It is one thing to inform a patient of the 'duty to protect;' [but] it is quite another to advise a patient that his 'trusted' confidant may one day assist in procuring his conviction and incarceration." *Hayes,* 227 F.3d at 586. In *United States v. Ghane,* the Eighth Circuit held that there was no exception to the psychotherapist patient privilege even where the patient had consented to allow his psychotherapist share information about his threats with law enforcement,

holding that providing consent under the duty to warn was substantively different in scope than providing consent that would result in a psychotherapist testifying for the prosecution in a criminal proceeding. 673 F.3d 771, 785–86 (8th Cir. 2012). The court provided an interpretation of *Jaffee's* Footnote 19 that offers a clear and reasonable framework for understanding the exception loosely laid out in the footnote:

> We likewise recognize . . . that there *are* times when a therapist can testify at a hearing and it will not have the above-mentioned deleterious effect on the confidence the therapist shares with his patient. Having a therapist testify at his patient's own involuntary commitment proceedings is a different matter altogether. Testimony such as this comports with the already-existent "duty to protect" the patient or identifiable third parties placed on therapists generally. And, once committed, the patient's mental health care continues, quite possibly with the very same mental health professional that recommended the involuntary commitment. This furthers the public interest . . . . The same cannot be said for testimony at a patient's later criminal trial, for example. . . . Once incarcerated as the result of a criminal prosecution, "the probability of the patient's mental health improving diminishes significantly." *Id. (*quoting *Hayes,* 227 F.3d at 585) (internal citations omitted).

The connection between a psychotherapist engaging in a prospective duty to warn about a threat is distinct from assisting in prosecution against the defendant for making the threat. *United States v. Hayes*, 227 F.3d 578, 583–84 (6th Cir. 2000). "State law requirements that psychotherapists take action to prevent serious and credible threats from being carried out serve a far more immediate function than the proposed 'dangerous patient' exception." *Id.*

This Court should reject an interpretation of the dangerous patient exception that holds no confidentiality attaches to statements that would be subject to the duty to disclose. Such an interpretation would effectively gut the psychotherapist-patient privilege. It would significantly harm the relationship between psychotherapist and patient and would dissuade those who would seek help from doing so. In so doing, society would lose the benefit of avoiding the harm that

may be prevented through psychotherapy. It would also lose the benefit of the warnings that might be obtained through the *Tarasoff* duty to warn. Even if the prosecution is occasionally deprived of testimony it would like to use, the benefit of the privilege far outweighs its cost.

II. PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN HER PERSONAL COMPUTER WAS SEIZED AND SERACHED WITHOUT A WARRANT BECAUSE OFFICER YAP GREATLY EXCEEDED THE PRIVATE PARTY'S SEARCH

The Fourth Amendment states that "unreasonable searches and seizures" are violative of one's constitutional rights. U.S. CONST. AMEND. IV. A "search" occurs when an individual's reasonable expectation of privacy is infringed. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The constitutionality of the search is then determined by its reasonableness. The private search doctrine under the 4th Amendment removes the typical Fourth Amendment protections against unreasonable searches if the private party conducted the search, because the Fourth Amendment does not apply to private searches. *See United States v. Jacobsen*, 466 U.S. 109 (1984); *Rann v. Atchison*, 689 F.3d 832, 836 (7th Cir. 2012). If a private entity searches in a manner that would be impermissible for a government agent, it does not necessarily render subsequent, proper official conduct unreasonable under the Fourth Amendment.

However, if the official conduct exceeds the scope of the private search, there may still be a Fourth Amendment violation for an unreasonable search. The Supreme Court has held that "additional invasion of privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen*, 466 U.S at 115. The privates search doctrine only allows an official party "to verify the illegality of evidence discovered during a private search provided the agent stays within the scope of the private search." *United States v. Kemp*, 18020043, 2018 U.S. Dist. LEXIS 184341, at *12 (E.D. Mich. Oct. 29, 2018).

Courts of Appeals have utilized both a narrow and broader approach to the so-called "private search doctrine." This Court should officially adopt that narrow approach to the private search doctrine because it is the necessary interpretation to deal with issues of the digital age. This Court should hold that under both the broad and narrow approach to the doctrine, Officer Yap's actions in searching Ms. Gold's entire desktop on a flash drive, seizes it and offering into evidence at trial files were unconstitutional because although he was relying on a private search, to search defendant's computer without first obtaining a warrant, he conducted a broader search than the one conducted by the private party and was therefore outside the scope of the private search doctrine.

A. This Court should adopt the narrow approach to the private search doctrine because it is better suited to protecting constitutional rights in the digital age.

The narrow approach to the private search doctrine essentially states that an official exceeds the scope of a private search if they look at any materials that were not specifically viewed by the private party. *See United States v. Sparks*, 806 F.3d 1323, 1329 (11th Cir. 2015) (abrogated on other grounds); *United States v. Lichtenberger*, 786 F.3d 478, 480-81 (6th Cir. 2015). In terms of electronic filing, both the Eleven and Sixth Circuits have held that "there must be an exact one-to-one match between electronic files viewed by a private party and files later examined by police*." United States v. Fall*, 955 F.3d 363, 370-371 (4th Cir. 2020). This approach can be described as requiring that "a private actor's search create a 'virtual certainty' that a government search will disclose nothing more than what the private party has already discovered." *United States v. Miller*, 982 F.3d 412, 428 (6th Cir. 2020). A court using this test will look to the information the government stands to gain from re-examining the evidence, and the government's certainty of what it will find in the evidence. *Kemp,* 2018 U.S. Dist. LEXIS 184341, at *13.

The narrow approach is even hinted at by the Supreme Court in *Walter v. United States*, stating that "[if] a properly authorized official search is limited by the particular terms of its authorization, *at least* the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy." 447 U.S. 649, 657 (1980) (emphasis added). The 8th Circuit has similarly hinted that it would follow a more narrow approach to the private search doctrine. The Minnesota District Court finds that since there is no evidence that the private party saw the particular image that the police offer was using, the court would assume that the police searched exceeded the scope of the private search. *United States v. Walsh*, 19-CR-0193 (PJS/LIB), 2020 U.S. Dist. LEXIS 7960, at *5, n. 4 (D. Minn., Jan. 17, 2020).

This approach should be adopted because it better upholds the important constitutional values at stake and better deals with the realities of new technology. The Supreme Court has found that the nature of electronic devices greatly increases the privacy interests of an individual that are stake when one is searched. *Lichtenberger*, 786 F.3d at 830. It is well-settled that under the Fourth Amendment, the home is considered that of the upmost sanctity and therefore gets the highest protection, However, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house." *Riley v. California*, 134 S.Ct. 2472, 2491, 189 L. Ed. 2d 430 (2014) (emphasis in original). Further, this case is directly on point with a *United States v. Crist*, where the police went through every file on a hard drive, although the private party had only opened "two or more" files. 627 F. Supp. 2d 575, 585 (M.D. Pa. 2008). The court found that this was unreasonable under the Fourth Amendment because the search exceeded the scope of the private search. *Id.*

The constantly evolving realities of an increasingly digital world brings important privacy and Fourth Amendment considerations. Although a cell phone and computer hold the

same sanctity of a home, they are different in a way that should afford them different privacy considerations. Opening one folder among money on a desktop, and only viewing that folder, does not breach the entire privacy of the computer in the same way that breaching the privacy of one room of a house breaches the privacy of the entire house. The retrospective quality of digital data gives the police access to information that would otherwise be unknowable and the information might be of completely different character. *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018). Further, the owner's expectation of privacy in that separate information had not yet been frustrated. *Id.* This approach is also based on the concept of plain view, because if the officer does not have a warrant, the scope of his search should be limited to solely the information on the screen. Sarah A. Mezera, *Carpenter's Legacy: Limiting The Scope of the Electronic Private Search Doctrine*, 117 MICH. L. REV. 1487, 1499 (2019).

On the other hand, the broad approach, taken by the Fifth and Seventh Circuits, holds that a private search is not exceeded if the private search leads the official party to be "substantially certain" of what they will find outside that search. *Rann v. Atchison*, 689 F.3d 832, 836-837 (7th Cir. 2012); *United States v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001). The 5th Circuit in *Runyan* applied this rule to find that searching any material on a computer disk was permissible if at least one file had been viewed during the private party's search. 275 F.3d 449 at 465.

This approach should not be adopted because it is violative of 4th Amendment rights and draws a blurry and uncertain line for officials regarding what is and is not illegal. Analyzing whether the information viewed by the private party allowed them to be substantially certain of what else was on a computer is much less clear than simply stating that officials can only look at the files that the private party looked at first.

Additionally, this approach misinterprets the guiding Supreme Court case on the private search doctrine, *U.S. v. Jacobsen*. In *Jacobsen,* the private party found white powder in a package. *Jacobsen*, 466 U.S at 111. The DEA agent did not violate the Fourth Amendment from visually inspecting that powder and subjecting them to a field test. *Id.* at 121-22. The additional field test was not a Fourth Amendment violation specifically the private party has seen the white powder and removed it from the package, and because the only new information the test could reveal to the agent was whether or not it was cocaine. *Id.* at 122. Nowhere does this case state that the agent could have gone outside the realm of the package the cocaine came from, or even further within the package, even if he was substantially certain about what it would contain. Therefore, the more important question is whether the private party looked at the specific item at issue, not whether they were substantially certain about what would be present in items outside what the private party saw.

B. The police search was outside the scope of the private search doctrine because his search does not meet the "one-to-one" test prescribed in the narrow approach.

This Court should apply the narrow approach to the private search doctrine to find that each folder on a desktop is its own unit of measurement for determining the scope of a private search. Under this standard, Officer Yap went outside the scope of the private search, violating Ms. Gold's Fourth Amendment rights, because he viewed multiple folders that the private party did not view or even open.

In *Sparks*, the Eleventh Circuit found the police officer to have exceeded the scope of the private search just by viewing a second video that was stored in the album that the private party had scrolled through, but was not viewed by, the private party. 806 F.3d at 1335. In *Lichtenberger,* the Sixth Circuit found the private search to have been exceeded when the private

party, who searched her partner's laptop then called the police, then re-opened the laptop and navigated its contents at the police officer's request. 786 F.3d at 484. This case is opposite to *Kemp,* where the court found that the private search doctrine did protect the officer's actions. In that case, the private party had reviewed the *entire* contents of the defendant's phone, and the police officer then did the same. *Kemp,* 2018 U.S. Dist. LEXIS 184341 at *6-7.

Ms. Gold clearly had a subjective expectation of privacy in her laptop. Her roommate did not have permission to access the computer, let alone to copy its entire contents onto a flash drive and take it elsewhere. R. at 27. Ms. Gold left her laptop in her own room, and the laptop clearly belonged to Ms. Gold and was not shared between the two roommates. *Id.* This set of facts clearly shows that she did not give up her general privacy interest in her laptop to Ms. Wildaughter.

Ms. Wildaughter only accessed a single folder on the laptop and stated that her only cause for concern were the pictures and the message located in that folder. R. at 25-26. Officer Yap systematically went through Ms. Gold's entire desktop, looking and reading all the folders that the private party, Ms. Wildaughter, had not even opened. R. at 6. This included her health insurance documents, financial information, and school information. R. at 7. Ms. Wildaughter, her roommate, specifically did not open all of the files because she felt like it was an invasion of privacy. R. at 27. When the Court can rely on testimony from the private party that they did not look at the files or images on a device, and then the official party admits that they looked at everything, the private search is exceeded. *United States v. Suellentrop* 4:17 CR 435 CDP (JMB), 2018 U.S. Dist. LEXIS 137190, at *26 (E.D. Mo., July 23, 2018) (the private search extended "only to those images that the government proved Donnelly actually could see).

C. Even under the broadest understanding of the private search doctrine, Officer Yap exceeded the private search.

The broadest understanding of the private search doctrine still requires that the official party be "substantially certain" of what will be in the materials that exceed the scope of the private search. Even under this broad understanding of the doctrine, evidence obtained outside the private search will be suppressed *unless* the official entity can show they were substantially certain of what they found in the search when exceeding. substantially certain that the rest of the disks would contain child pornography. This is not the case here.

In *Walter v. United States*, the Supreme Court found that the private search at issue, which entailed looking at the covers of films and suspecting them to be pornagraphy, was exceeded when the agents screened the films, specifically because "the private party had not actually viewed the films." 447 U.S. 649, 657 (1980). In *Runyan*, the exceedance of the private search was only found acceptable because several disks had been found and contained child pornography, and the court found that the police must have been substantially certain that the rest of the disks would contain child pornography. 275 F.3d at 464. *See also Rann*, 689 F.3d at 838 (it was acceptable for the police to search a zip drive and flash drive brought to the police by a private party, because although they hadn't looked at it, it was reasonable to conclude they knew the devices contained the evidence of pornography); *United States v. Rosenschein*, 16-4571 JCH, 2020 U.S. Dist. LEXIS 211433, at *40 (N.M.D.C. Nov. 12, 2020) (search was not exceeded because several employees has asserted the images being sent qualified as images of child exploitation based on a highly reliable software).

In *United States v. Reddick,* the only reason that the entire set of computer files were allowed to be searched by the official party because a program has already run the "hash values" of the values and compared them to child pornography. 900 F.3d 636, 639 (5th Cir. 2018); *see United States v. Ackerman,* 831 F.3d 1292, 1305-06 (10th Cir. 2016) (The private search was

exceeded when police opened an email containing child pornography because although a software flagged an email as containing child pornography, no employee had actually opened it). The knowledge of a computer program comparing data affords an incredibly high level of certainty that is difficult to attain through human judgment.

The case at hand is also distinguishable from *Runyan*'s holding that police are not exceeding a private search by examining items within a closed container that were not examined by the private searchers. 275 F.3d at 464. Despite the holding in *Runyan*, the main test underneath the conclusion was whether the police could not have known with substantial certainty what was on separate disks. *Id.* at 465. It was nowhere near substantially certain what Officer Yap would find on the rest of the desktop based on the message and pictures that Ms. Wildaughter had observed. The privacy of the other files on the computer had not yet been frustrated by the private search. *United States v. Oliver*, 630 F.3d 397, 406 (5th Cir. 2011) ("A defendant's expectation of privacy…is preserved…unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search.").

The private party, Ms. Wildaughter, had only searched a chain of files within the main file entitled "HerbImmunity." R. at 24-25. There were four other folders on the desktop, as well as a "budget" document, health insurance, and Exam4, a school program. R. at 7. Officer Yap searched through every single one of these folders. The cited basis for Ms. Wildaughter's search was concern for Ms. Gold's thoughts about the HerbImmunity company and Tiffany Driscoll. R. at 24. The reasons she went to the police was to report pictures and a message to Tiffany in the "Tiffany Driscoll" subfolder. R. at 25. This information in no way could provide Officer Yap with substantial certainty as to what would be in the other folders on the desktop.

III. THE GOVERNMENT VIOLATES DUE PROCESS WHEN IT WITHHOLDS EXCULPATORY EVIDENCE FROM THE DEFENDANT, REGARDLESS OF WHETHER THE EVIDENCE IS IN ITSELF ADMISSIBLE AT TRIAL IF THE EVIDENCE WITHHELD CASTS DOUBT ON THE INTEGRITY OF THE TRIAL OUTCOME.

Likelihood of a different outcome at trial, not admissibility, is the relevant test to determine whether exculpatory evidence withheld by the government constitutes a *Brady* violation. Whether the evidence would have been admissible in itself is irrelevant.

When the prosecution fails to disclose potentially exonerating evidence to the defendant, it commits a violation of due process under the Fourteenth Amendment. *Brady v. Maryland*, 373 U.S. 83, 86 (1963). This Court held in *Mooney v. Holohan* that:

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. " 294 U.S. 103, 112–13 (1935).

The importance of this dual prosecutorial role is encapsulated in *Brady*, wherein this Court stated that "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). However, the state's interest in finality and cost-effective administration of justice cabins the application of Brady claims to situations where the defendant can show a reasonable likelihood that the suppressed evidence would have produced a different outcome at trial. *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995). To prevail in a prosecutorial misconduct claim under

Brady, the three elements required are that "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281–282 (1999). *Banks v. Dretke*, 540 U.S. 668, 691 (2004). The accused need not request the evidence for the prosecution to have an affirmative duty to disclose it under *Brady*. *United States v. Agurs,* 427 U.S. 97, 107 (1976). Such 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." *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999) (quoting *United States v. Bagley,* 473 U.S. 667, 682, (1985)).

The prosecutor has an affirmative duty to seek out and disclose exculpatory evidence. "[T]he government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995). Exculpatory evidence need only cast doubt on the outcome of the trial. "Exculpatory evidence need not show defendant's innocence conclusively." *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 287 (3d Cir. 2016). "[I]mpeachment evidence may be considered favorable under *Brady* even if the jury might not afford it significant weight. " *Id.* at 286. Crucially, in assessing whether or not a Brady violation occurred, a court must consider the *cumulative* effect of the evidence, not the significance of individual pieces of evidence. *Kyles*, 514 U.S. at 440.

For example, in *Dennis v. Pennsylvania*, a high school student was shot and killed in a botched robbery of her earrings. 834 F.3d 263 (3d Cir. 2016). There, the Third Circuit held that exculpatory evidence that, by itself, was hearsay was nevertheless exculpatory and constituted a

Brady violation. In that case, among the evidence suppressed by the prosecution was a police activity sheet with notes about inconsistent shooter identification statements made by the primary witness, and documents related to credible tips received from alternate sources regarding the identity of the shooter. Although the trial court initially discounted the value of the activity sheet as hearsay, the Third Circuit recognized that it was valuable impeachment evidence that materially undercut the testimony of the witness. *Id.* at 298. "There is a reasonable probability that had the activity sheet been disclosed, the result of the proceeding would have been different." *Id.*, at 301. Thus, at the crux of the issue is whether the evidence was likely to affect the outcome of the trial. The nature of the evidence only influences a court's analysis of *how* the evidence might have played out in trial in an effort to determine, as a primary matter, the likelihood that the evidence would have changed the outcome of the trial.

Also similar to the instant case is the fact that in *Dennis v. Pennsylvania* the police had other leads that they never thoroughly investigated. There, the police received a tip from an inmate at a local penitentiary claiming to have spoken with the real killer. *Id.* at 276. Despite "internal markers of credibility" the police never followed up on their investigation of the lead. *Id.* at 789.

Here, the prosecution suppressed two separate investigative reports prepared by the FBI. R. at 11, 12. On June 2, 2017, Special Agent Mary Baer reported that she conducted an interview of Chase Caplow, a student who attended university with Ms. Driscoll. R. at 11. During the course of the interview, he identified Martin Brodie as a person to whom Ms. Driscoll owed money, who might have both motive and propensity to kill Ms. Driscoll. R. at 11. Although the report indicates an intention to follow up on the lead, the lead was dropped. R. at 11. The second investigative report was prepared by Special Agent Mark St. Peters on July 7, 2017. R. at 12. The

record states that an anonymous tipster alleged that Belinda Stevens (another person involved with the HerbImmunity pyramid scheme) was responsible for killing Ms. Driscoll. R. at 12. Although Special Agent Peters stated that he conducted a preliminary investigation and determined that the lead required no follow-up, no further information is provided.

Despite the paucity of these two investigative reports, the prosecution's failure to provide them substantially affected the outcome of the trial for three reasons. First, Petitioner could have used this information to pursue these leads as part of her defense. Second, Petitioner could have used this information to set forth an alternate theory of the crime to the jury. Third, taken within the context of the whole investigation, these reports reflect how the police stopped following up on credible leads once they felt they had a suspect. It is of no moment that the suppressed evidence is not fully exonerating, nor does it matter that it does not prove Petitioner's innocence: it is sufficient to cast reasonable suspicion upon the trial's result. That is all *Brady* requires.

Although the Respondent has asserted that it has examples of evidence that would have been inadmissible as hearsay considered insufficient as for purposes of establishing a Brady violation, hearsay has never been the sole determining factor. For example, in *Bradley v. Nagle*, the Eleventh Circuit held that there was no Brady violation related to the prosecution withholding statements from three men who had had sex with his victim. 212 F.3d 559 (11th Cir. 2000). Although the fact that the evidence was inadmissible hearsay was one of the factors supporting the Court's decision, in fact the Court also based its decision on the fact that the evidence simply did not suggest any reasonable probability that the evidence would have undermined confidence in the outcome of the trial. *Id.* at 567. Nor does it matter that it does not appear as though the prosecution deliberately suppressed these reports. The prosecution had an

affirmative duty to pursue and disclose potentially exonerating evidence. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

Accordingly, the fact that the suppressed documents are, in themselves, hearsay is not relevant to determining the existence of prosecutorial misconduct under *Brady*.

CONCLUSION

This Court should overturn the conviction of Ms. Gold for three reasons. First, the Court should find that the "dangerous patient" exception to the to the psychotherapist-patient testimonial privilege does not exist because the dangerous patient exception was intended to be used solely for preventing harm when no other recourse was available and the *Tarasoft* duty does not undermine the confidentiality of statements made to a psychotherapist. Therefore, the testimony of Ms. Gold's psychotherapist should not have been admitted at trial. Second, the Court should adopt the narrow approach to the private search doctrine because it is more protective of Fourth Amendment rights in the digital age. Regardless, the evidence from Ms. Gold's computer is inadmissible because under either approach Officer Yap exceeded the private search. He could not be substantially certain of what was in the folders based on the information provided to him by the private party, and he looked at multiple folders that the private party had not viewed. Finally, Ms. Gold suffered a *Brady* violation when the government failed to disclose the investigatory reports of two other potential suspects in the case. The proper test for a *Brady* violation is the likelihood of a different outcome at trial, not the admissibility of the evidence at trial.

CERTIFICATE OF SERVICE

The Petitioner, by and through its Counsel, hereby certifies that a true and accurate copy of this document was served on Opposing Counsel on this 16th day of February, 2021.