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Docket 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 THE PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether the admission of a psychiatrist's testimony and notes in a criminal trial violate the patient's testimonial privilege even when the psychiatrist has exercised a *Tarasoff* duty to protect.

II. Whether the Government's warrantless search of every folder and file on a flash drive violated the Fourth Amendment when a private party viewed only a single folder on the defendant's desktop, before copying the entirety of the desktop's contents onto the flash drive.

III. Whether the Government commits a *Brady* violation when it fails to disclose exculpatory information only because the specific form of the evidence would be inadmissible at trial.

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CONSTITUTIONAL PROVISIONS

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. IV.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Samantha Gold was a student at Joralemon University (JU) in Livingston, Boerum. R. at 5. At that time, she had been seeing psychiatrist Dr. Chelsea Pollak for two years, undergoing effective treatment for anger issues in weekly therapy sessions. R. at 17.

In keeping with her standard practice, Dr. Pollak, was "pretty sure" she had advised Ms. Gold that therapists had a duty to warn a third-party of any serious threat made by a patient. R. at 21. Dr. Pollak did not think she had warned Ms. Gold that her statements could be used against her in a subsequent criminal prosecution, as she felt the threat of a patient's own words being used against them would impede effective treatment. R. at 21.

In 2016, Tiffany Driscoll, another student at JU, recruited Ms. Gold to a multi-level marketing scheme, HerbImmunity. R. at 14. Driscoll struggled to make sales and relied on her father to inject funds to help keep it going. R. at 14. Nonetheless, she still recruited a number of people to join the scheme, including Ms. Gold. R. at 14.

On May 25, 2017, during their weekly session, Ms. Gold confided to Dr. Pollak that she was two-thousand dollars in debt because of her involvement in HerbImmunity. R. at 18. Ms. Gold blamed Driscoll for duping her into participating. R. at 18. Dr. Pollak found Ms. Gold to be more agitated than usual and feared her patient might actually try to harm herself or Driscoll. R. at 19. Dr. Pollak was unsure whether Ms. Gold was making a serious threat, or merely expressing frustration. R. at 22. Nonetheless, Dr. Pollak felt she had to make an immediate decision and notified police as required under the Boerum Health and Safety Code. R. at 19, 22.

Dr. Pollak called the Joralemon Police Department at 1:15 pm, after the noon session ended. R. at 5. Dr. Pollak spoke to Officer Nicole Fuchs, disclosing Ms. Gold's address, and immediately emailing a scan of her notes upon the officer's request. R. at 5, 20. Officers then

visited Ms. Gold, finding her calm and rational, concluding she posed no threat to herself or to others. R. at 5. They also determined Driscoll was in no imminent danger as she was in class. R. at 5. They informed her of a threat reported against her and she expressed no concern. R. at 5.

On May 25, 2017, Jennifer Wildaughter, Ms. Gold's suitemate, entered Ms. Gold's room while she was away and accessed her laptop without permission. R. at 25, 27. Wildaughter opened a single desktop folder, titled "HerbImmunity." R. at 24. Wildaughter only viewed ten photos, one Word document, and one text file within that folder. R. at 25. Several of the photos were of Driscoll. R. at 25–26. The Word document titled "Message to Tiffany - draft" was a nice note addressed to Driscoll. R. at 25, 28. The text file titled "Market Stuff" contained a reference to strychnine, a common rat poison. R. at 26, 28. Wildaughter had a gut feeling Driscoll was in danger, even though she and Ms. Gold had a rat problem in their apartment the previous month. R. at 26, 29. Despite only viewing those 12 files, Wildaughter copied everything from Ms. Gold's desktop onto a flash drive. R. at 26.

Later that day, Wildaughter brought the flash drive to Livingston Police Officer Aaron Yap. This occurred about three hours after Dr. Pollak contacted the police. R. at 5–6. When delivering the drive, and after explaining her concern over the mention of rat poison on Ms. Gold's laptop, Wildaughter told Officer Yap that "everything is on there." R. at 27. Officer Yap proceeded to search the entirety of the drive's contents. R. at 6.

At no point did Officer Yap ask Wildaughter about what files and folders she viewed, where they were located on the flash drive, or the total amount of files on the drive. R. at 29. In files that Wildaughter had never opened, Officer Yap found a chocolate-covered strawberry recipe for Driscoll and research on strychnine. R. at 6. Officer Yap reported his theory that Ms. Gold was planning to poison Driscoll to his supervisor. R. at 6.

That night, Driscoll was found dead at the bottom of the basement stairs of her father's townhouse in Livingston. R. at 13. Investigators determined she died from blunt force trauma to the head, with no indication of foul play. R. at 13. Two days later, FBI agents arrested Ms. Gold in connection with Driscoll's death. R. at 14. The arrest came as "a huge relief" to investigators who had begun to suspect foul play, but were unable to find any physical evidence pointing to a cause of death or a suspect until the FBI executed a search warrant. R. at 14.

Just prior to Ms. Gold's arrest, the FBI obtained a warrant to search the Driscoll home where they found an empty box accompanied by a note in her trash can. R. at 14. Investigators suspected the box had contained chocolate covered strawberries that had been poisoned with strychnine—which a toxicology report showed was in Driscoll's system—and was delivered to Driscoll by mail the morning of the day she died. R. at 14. The discovery of the empty box two days after Driscoll's death convinced investigators the death was not an accident and that they "finally may be onto something." R. at 14.

Six days after Ms. Gold's arrest, FBI Special Agent Mary Baer interviewed Chase Caplow, Driscoll's schoolmate who was also involved in the HerbImmunity scheme. R. at 11. Caplow revealed that just two weeks before Driscoll died, Driscoll confided that she was in debt to Martin Brodie, another HerbImmunity distributor. R. at 11. Brodie was rumored to be violent. R. at 11. Special Agent Baer planned to interview Brodie, R. at 11, but there is no record of any interview or further investigation.

Then, more than a month later on July 7, 2017, the FBI received an anonymous phone tip that alleged another HerbImmunity participant, Belinda Stevens, was responsible for Driscoll's murder. R. at 12. That day, Special Agent Mark St. Peters opened and closed a preliminary investigation into Stevens. R. at 12. There is no record of what that preliminary investigation

entailed or how Special Agent St. Peters was able to determine so quickly that no follow up was warranted. R. at 12. The government failed to disclose either of these two reports to the defense.

II. PROCEDURAL HISTORY

Ms. Gold was charged with intentionally mailing an injurious article and causing the death of another, in violation of 18 U.S.C. § 1716 (j)(2), (3). R. at 1. During the criminal trial, Ms. Gold moved to suppress two pieces of evidence: (1) Dr. Pollak's testimony and notes from their therapy session, and (2) the contents of the flash drive that contained Ms. Gold's entire desktop. R. at 16. The motion to suppress was denied. R. at 41. On February 1, 2018, Ms. Gold was convicted and sentenced to life in prison. R. at 51.

After Ms. Gold's conviction, she moved for post-conviction relief, arguing that the prosecution's failure to disclose material information constituted a *Brady* violation. R. at 43. This motion was also denied. R. at 49. On appeal, the Fourteenth Circuit affirmed the district court's denials of both (1) the motion to suppress and (2) the motion for post-conviction relief. R. at 57. The defense subsequently petitioned this Court for a writ of certiorari which was granted on November, 16, 2020. R. at 60.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision for three reasons. First, the psychotherapist-patient privilege—belonging to Ms. Gold—should have prevented her psychiatrist from testifying against her. Second, Officer Yap's warrantless search of the flash drive violated Ms. Gold's Fourth Amendment rights. Third, the prosecution failed to discharge its duty to disclose information helpful to the defense under *Brady*.

This Court has long recognized the confidentiality of communications between psychotherapists and their patients during diagnosis or therapy. *See Jaffee v. Redmond*, 518 U.S.

1, 15 (1996). These confidences are protected against any disclosure and a trial judge may not balance them against the need for evidence. *Id.* at 17. This Court has found the mental health of the citizenry to be of "transcendent importance," and a guarantee of confidentiality essential to effective treatment. *Id.* at 10–11. The psychotherapist-patient privilege against compelled testimony is separate and distinct from any duty to disclose in order to protect the patient or a third-party from harm. *See United States v. Hayes*, 227 F.3d 578, 583–84 (6th Cir. 2000). The duty to protect gives priority to the safety of a potential victim. *Id.* at 586. The privilege against compelled testimony gives priority to the patient's expectation of privacy. *Id.* at 586. The Fourteenth Circuit impermissibly stripped away Ms. Gold's privilege by both recognizing a dangerous patient exception and tethering the testimonial privilege to a therapist's duty to protect.

Officer Yap's warrantless search of the flash drive violated Ms. Gold's Fourth Amendment right to be free from unreasonable searches. Flash drives are vast, complex digital storage devices and demand a strict application of the private search doctrine to properly preserve Fourth Amendment protections. This particular flash drive contained every folder and file on Ms. Gold's desktop. To allow a search of the entire drive simply because Wildaughter opened one desktop folder invites officers down the line to search entire laptops by invoking the private search doctrine. This would defeat the Fourth Amendment's purpose by making warrants the exception, rather than the rule. Even if this Court applies a broader, more lenient approach to the private doctrine, Officer Yap's search impermissibly exceeded the scope of the search.

Due process requires the prosecution to disclose material evidence that is favorable to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Materiality of evidence is not dismissed simply because it may be inadmissible. *See Wood v. Bartholomew*, 516 U.S. 1, 8

(1995). In addition, precluding materiality of evidence based only on its inadmissibility would result in an unfair trial, contrary to the service of justice. Here, the two reports identifying alternate suspects with motive were material. Had they been disclosed, the reports would have led directly to admissible evidence that first, identified alternative perpetrators with motive, and second, negated the government's credibility. These legitimate deficiencies should undermine the Court's confidence in the outcome of the trial. Thus, Ms. Gold's conviction should be overturned.

ARGUMENT

I. THE TRIAL COURT VIOLATED MS. GOLD'S PSYCHOTHERAPIST-PATIENT PRIVILEGE BY ADMITTING HER CONFIDENTIAL COMMUNICATIONS INTO EVIDENCE.

The law recognizing a privilege of confidentiality between a psychotherapist and patient is well established. Communications in the course of treatment or diagnosis are privileged and protected from compelled disclosure. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). This Court was explicit, holding the privilege is "certain," finding a tenuous privilege is "little better than no privilege at all." *Id.* at 18. Here, the Fourteenth Circuit impermissibly stripped away Ms. Gold's privilege in two ways: first, by recognizing a dangerous patient exception, and second, by tying the testimonial privilege to a therapist's duty to protect.

A. The Use Of A Dangerous Patient Exception To Admit Her Psychiatrist's Testimony And Notes Violated Ms. Gold's Privilege.

As this Court has made clear, the psychotherapist-patient privilege does not bend to support evidentiary need. *See Jaffee v. Redmond*, 518 U.S. 1, 17 (1996). The trial court wrongfully stripped away Ms. Gold's testimonial privilege by balancing it against a need for evidence, in direct contradiction of *Jaffee*'s holding. In addition to this impermissible balancing, the Fourteenth Circuit inferred a dangerous patient exception from a singular ambiguous footnote

to rationalize turning *Jaffee*'s holding upside down. *See* R. at 53. By applying the exception, the court denied Ms. Gold's testimonial privilege the same deference granted to the other privileges rooted in trust and confidence, such as the spousal and attorney-client privileges. *See Jaffee*, 518 U.S. at 10. The Fourteenth Circuit's decision belied this Court's recognition of the "transcendent importance" of mental health as a public good.

1. The psychotherapist-patient privilege does not give way to a need for evidence due to balancing or to a dangerous patient exception.

The Fourteenth Circuit erred in affirming the trial court's admission of Dr. Pollak's testimony and handwritten notes detailing Ms. Gold's therapy session. This Court has said a privilege without some degree of certainty is no privilege at all, rejecting any balancing of the privilege against a need for evidence. *See Jaffee*, 518 U.S. at 17. Before denying the motion to suppress, the trial judge conducted a hearing to consider Ms. Gold's expectation of privacy and confidentiality against the prosecution's need for additional evidence. R. at 16–23. This is typical of the balancing forbidden by the Supreme Court in *Jaffee*. The Fourteenth Circuit should have reversed the trial court for abuse of discretion in eviscerating Ms. Gold's privilege.

There is no dangerous patient exception to the testimonial privilege. The only hint of any exception comes in dicta in a single footnote ("The Footnote"). *See Jaffee,* 518 at 15 n.19. The Footnote speculates that sometimes the privilege must give way if disclosure is the only means to avert a threat of harm to the patient or to a third-party. *Id.* The "disclosure" is mentioned only in the context of averting harm, and says nothing about testimony in a criminal prosecution to put a patient in prison. Yet, that is exactly what happened here. Dr. Pollak's testimony and notes were used to help convict Ms. Gold. Neither *Jaffee's* holding nor The Footnote provides direct support for an exception permitting this use.

Many circuit courts have correctly found no justification for a dangerous patient exception to compel testimony in a criminal trial. *See United States v. Hayes*, 227 F.3d 578, 585 (6th Cir. 2000); *United States v. Chase*, 340 F.3d 978, 992 (9th Cir. 2003); *United State v. Ghane*, 673 F.3d 771, 786 (8th Cir. 2012). The Sixth Circuit interpreted The Footnote to mean a therapist might have to disclose confidential information to (1) comply with a duty to warn or (2) testify in civil commitment proceedings. *See Hayes*, 227 F.3d at 585. Neither of these situations applied to Ms. Gold's criminal trial. Ms. Gold was looking at life in prison for punishment, not at civil commitment for therapy. *See* R. at 51. The psychiatrist was weaponized against the very person she was supposed to help and protect. The Fourteenth Circuit treated Ms. Gold's privilege as a sword rather than a shield.

Even if a dangerous patient exception to the testimonial privilege can be inferred from *Jaffee*'s footnote, an exception does not apply here. The Tenth Circuit recognized a limited dangerous patient exception allowing for disclosure dependent on two criteria: (1) a threat that is serious when made and (2) when disclosure is the only means of averting harm. *United States v. Glass,* 133 F.3d 1356, 1360 (10th Cir. 1998). The Fourteenth Circuit erred in finding the circumstances of the present case satisfied the Tenth Circuit's criteria. In the Tenth Circuit case, Glass was making serious threats to kill a sitting president, who unquestionably was still a living target. *Id.* at 1356. Here, the threat may not have been serious when made; Dr. Pollack was unsure whether there was an actual threat or a mere expression of frustration. R. at 22. This issue, however, is moot because the second prong fails. Dr. Pollak's disclosure vis-a-vis compelled testimony could not have possibly averted any harm at the time of disclosure, as Driscoll had already died. Thus, a dangerous patient exception was inapplicable here and the

privileged communications then served only as prosecutorial tools to enhance the government's case against Ms. Gold.

The trial court should not have admitted Dr. Pollak's testimony and notes as they were unnecessary and highly prejudicial, adding little more than to predispose the jury to conviction. A court may exclude even relevant evidence if it is needlessly cumulative or substantially more prejudicial than probative. *See* Fed. R. Evid. 403. A court should favor alternative evidence of similar or greater probative value but having a lower danger of unfair prejudice. *See Old Chief v. United States*, 519 U.S. 172, 182–83 (1997). Here, the prosecution had many other pieces of evidence of similar probative value but that were far less prejudicial. First, investigators discovered the strawberry box and note at Driscoll's house. R. at 14. Second, prosecutors had the testimony of Ms. Gold's suitemate. *See* R. at 23–29. Third, they had the toxicology report and the reports of Officers Yap and Fuchs. R. at 5, 6, 14. Fourth, the prosecution had Dr. Pollak's call telling the police of her concerns. R. at 5, 57. On the other hand, the psychiatrist's testimony and notes put the prosecution's thumb on the scale for jurors likely to take a doctor's opinion at face value. Thus, the trial court should have excluded the testimony and notes as unnecessarily cumulative and substantially more prejudicial than probative.

2. The psychotherapist-patient privilege belongs to a well-recognized category of common law privileges rooted in trust.

The Fourteenth Circuit unfairly deprived Ms. Gold of the psychotherapist-patient privilege, arbitrarily determining it to be less worthy than other long-standing common law privileges "rooted in the same imperative need for confidence and trust." *See Jaffee,* 518 U.S. at 10. Spouses need not worry about the frankness of their communications with each other, *See Wolfe v. United States*, 291 U.S. 7, 14 (1951), and neither do attorneys and their clients. *See Fisher v. United States*, 425 U.S. 391, 403 (1976). Ms. Gold had reached out to Dr. Pollak for

help. They spoke frankly and candidly to each other in confidence for two years. *See* R. at 15. Had Ms. Gold been talking to her spouse or to her attorney, the prosecution could not have usurped her confidential communications. *See Wolfe*, 291 U.S. at 14. Even if there is a dangerous patient exception, Ms. Gold's privilege is no less deserving of protection and should not be subject to the vagaries of the prosecution's wish list.

3. Mental health is of critical importance to the public good.

The Fourteenth Circuit's admission of Dr. Pollak's testimony and notes disregarded the public policy concerns animating the establishment of the psychotherapist-patient privilege. Even without an unprecedented global pandemic, one in five Americans will have a mental health problem in a given year.[1] That is roughly sixty-six million people in the best of times.[2] For psychotherapy to be effective, patients must feel free to bare their souls without fear of embarrassment or disgrace. *See Jaffee*, 518 U.S. at 10. Here, Dr. Pollak echoed this exact sentiment, noting that patients may be more reluctant to share certain thoughts or urges if they knew she would betray their confidences through compelled testimony. R. at 21. The Court stripped away Ms. Gold's privilege of confidentiality for the benefit of the prosecution. A dangerous patient exception establishes an undesirable and problematic precedent that impedes effective and necessary mental health treatment, a critical component of a broader public good. *See Jaffee*, 518 U.S. at 11.

[1] CENTERS FOR DISEASE CONTROL AND PREVENTION, Learn About Mental Health, https://www.cdc.gov/mentalhealth/learn/index.htm (last visited Feb. 15, 2021).

[2] UNITED STATES CENSUS BUREAU, Population and Housing Unit Estimates, https://www.census.gov/programs-surveys/popest.html (last visited Feb. 15, 2021) (The figure of sixty-six million is based on a calculation of roughly one in five of a total population of three-hundred thirty million).

B. Dr. Pollak's Exercise Of Her Duty to Protect Did Not Waive Ms. Gold's Testimonial Privilege.

The exercise of the duty does not waive the protection of the privilege as they operate independently of one another and serve different objectives. Tethering the duty to the privilege jeopardizes the existence of the privilege and the fairness of the judicial process to the patient.

1. The duty and the privilege are separate and distinct.

Duty and privilege should not be confused as one and the same thing or interdependent. First, exercise of the duty to protect does not sanction compelled testimony at trial as the duty to protect serves a more immediate function. *See United States v. Hayes*, 227 F.3d 578, 583–84 (6th Cir. 2000). The duty to disclose is intended to prevent someone from imminent harm while the privilege is meant to protect the privacy of the patient against compelled testimony in a later trial. *Id.* Second, the limited and necessary disclosure inherent in required reporting does not and should not justify an automatic breach of the testimonial privilege. *See id.* at 586; *United States v. Chase*, 340 F.3d 978, 987 (9th Cir. 2003); *United States v. Ghane*, 673 F.3d 771, 785 (8th Cir. 2012). The psychotherapist-patient privilege belonged to Ms. Gold exclusively and only she had the right to waive it.

The Fourteenth Circuit failed to separate Dr. Pollak's duty to protect and Ms. Gold's federal testimonial privilege. The California Supreme Court articulated the duty to protect potential victims in its landmark *Tarasoff* decision, holding that psychotherapist-patient privilege must yield, "to the extent to which disclosure is essential to avert danger to others." *See Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d. 425, 442 (1976).[3] Today, most states have implemented some version of the "*Tarasoff* duty" to require therapists to protect third-parties

[3] *Tarasoff* established a therapist's affirmative duty to protect a patient's foreseeable victims. It followed the murder of a coed by another student who had made threats in therapy.

from harm caused by their patients.[4] Here, the Fourteenth Circuit tied the *Tarasoff* duty to the testimonial privilege. *See* R. at 53. It erroneously read the *Jaffee* footnote to mean a psychotherapist's right to refuse to testify, or her patient's privilege to bar that testimony, ceases to exist after a serious threat requires disclosure. *Id.* The Fourteenth Circuit ignored the two different objectives served by the *Tarasoff* duty and the privilege against compelled testimony: the former to avert serious harm threatened by a patient and the latter to protect the psychotherapist-patient relationship. *See Hayes*, 227 F.3d at 583–84. The duty gives legal priority to the safety of a potential victim, while the privilege gives legal priority to the confidentiality of the patient. *Id.* Disclosure for one purpose does not sanction disclosure for another. *See id.* at 586; *Chase*, 340 F.3d at 987; *Ghane*, 673 F.3d at 785. The Fourteenth Circuit should have recognized the duty and the privilege as separate and distinct in law and in their objectives and reversed the trial court's decision.

Limited disclosure does not authorize allowing other disclosures. A limited disclosure does not imply a duty to testify. *See Hayes*, 227 F.3d at 586; *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981). Nonetheless, the Fourteenth Circuit ruled once confidentiality was breached by calling police, there was no other compelling reason to keep the evidence from the jury. R. at 53. The court mischaracterized the issue as one of putting the bird back in the cage, when the concern should be who saw the bird when the door was opened. R. at 41. Dr. Pollak only divulged confidential information to Officer Fuchs, who informed Driscoll. R. at 5, 57. Only Driscoll and police officers saw the bird, not the public at large. Limited disclosures such as this should not authorize the more expansive disclosure of public testimony.

[4] NAT. CONF. OF STATE LEGISLATURES, *Mental Health Professionals' Duty to Warn* (Oct. 12, 2018), https://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx.

The Fourteenth Circuit deprived Ms. Gold of her exclusive right to exercise control over her testimonial privilege. The patient holds the testimonial privilege and alone has the authority to waive it. *See Jaffee*, 518 U.S. at 15 n.14; *Hayes*, 227 F.3d at 587. A patient may do so constructively by disclosing the substance of a therapy session to an unrelated third-party. *See Hayes*, 227 F.3d at 586. There is nothing in the record to indicate Ms. Gold explicitly or constructively waived her privilege. Without explicit or constructive waiver, Ms. Gold retained the protection of the testimonial privilege, making her confidential information inadmissible.

Additionally, Ms. Gold did not receive adequate warning that losing her testimonial privilege was a possibility. Merely advising a patient of the duty to protect is not enough for informed consent to waive the testimonial privilege. See *Hayes*, 227 F.3d at 586. The patient must be made fully aware of the right at risk and the consequences of surrendering it, with an explanation "suited to the unique needs of the patient." *Id.* at 587. Here Dr. Pollak testified she believed she had advised Ms. Gold that therapists have a duty to protect third-parties if a patient makes any serious threat against them. R. at 21. The psychiatrist could not recall ever warning Ms. Gold about the possibility of testifying about their privileged communications in a criminal trial. *Id.* Dr. Pollak believed such a warning would make patients more reluctant to share highly personal thoughts or urges. *Id.* Here Ms. Gold may have been put on notice about the duty but not about the privilege. Because Dr. Pollak failed to provide Ms. Gold with information sufficient to obtain the necessary informed consent, the trial court should have excluded the psychiatrist's testimony and notes.

2. Tying the duty to the privilege threatens the existence of the privilege and subverts fairness in the judicial process.

First, the federal privilege against compelled testimony should not be held hostage to inconsistent state reporting statutes. *See Hayes*, 227 F.3d at 584. Second, binding the testimonial

privilege to the duty creates unnecessary trial delay and jury confusion by raising questions over the reasonableness of a therapist's decision to report.

Tying the federal evidentiary privilege to the standard of care in state disclosure laws would risk different results for similarly situated patients in different states in federal criminal trials. *See Chase*, 340 F.3d at 988. Duty to protect statutes enacted in the individual states do not have uniform criteria for a therapist's exercise of reasonable judgement to report.[5] Currently, Colorado has a mandatory "duty to protect/warn," while in Texas the duty is permissive, and in North Carolina there is no duty at all. *Id.* If Ms. Gold had been in a different state, for example North Carolina, her psychotherapist's duty would not have been triggered and thus her privilege unaffected. Tying the federal privilege to a state's duty deprives defendants of the judicial consistency necessary to ensure justice is served.

Binding the evidentiary privilege to the duty brings into question whether a therapist acted reasonably in exercising a duty to report, and creates an unnecessary issue at trial. This could precipitate a battle of the experts over what is reasonable and lead to unpredictable results. *See Hayes*, 227 F.3d at 584. The Sixth Circuit found this to be "unsound in theory and in practice." *Id.* Here the record shows that using her clinical judgment, Dr. Pollak was still uncertain whether Ms. Gold was making serious threats or merely expressing frustration but called police anyway. *See* R. at 5, 22, 57. Though Dr. Pollak's reasonableness in making the call was not an issue in the present case, the Fourteenth Circuit's rationale sets a dangerous precedent: a battle of the experts, requiring juries to second guess therapists and therapists to second guess themselves.

[5] *See supra* note 4.

II. OFFICER YAP'S EXAMINATION OF THE FLASH DRIVE VIOLATED MS. GOLD'S FOURTH AMENDMENT RIGHTS BY EXCEEDING THE SCOPE OF THE PRIVATE SEARCH.

Government agents may replicate a prior private search where that private search has already breached an individual's expectation of privacy. *Walter v. United States,* 447 U.S. 649, 658–59 (1980). The government may make alterations to the scope of the search only in limited instances where it is "virtually certain" as to what it will find. *United States v. Jacobsen* 466 U.S. 109, 125 (1984). Such alterations are confirmatory in nature. *Id.* at 120.

The government violated Ms. Gold's Fourth Amendment right against unreasonable searches by viewing files on Ms. Gold's desktop that Wildaughter did not open. U.S. Const. amend. IV. First, a strict application of the private search doctrine best protects the privacy rights of individuals given the context of modern, complex digital devices. Second, even if this Court applies a broader approach to the private search doctrine, Officer Yap nevertheless exceeded the scope of the search when he viewed files outside the "HerbImmunity" folder.

A. A Strict Application Of The Private Search Doctrine Protects Defendants From Overbroad Government Searches Of The Libraries Of Information On Their Digital Devices.

A strict application of the private search doctrine places a reasonable limitation on government officials: it stops the search at the exact items viewed by the private party. First, several circuits correctly extend *Jacobsen*'s virtual certainty test to digital devices. Second, the size and variety of content in digital devices, particularly computers and flash drives, combined with their ubiquitous nature, demands a strict application of the doctrine. Third, the strict application of the doctrine strikes a fair balance between the right against unreasonable searches and investigatory needs. Fourth, Officer Yap violated Ms. Gold's Fourth Amendment right—he should never have opened, let alone searched, any files beyond those Wildaughter viewed.

Under a strict application of the private search doctrine, Officer Yap's search of many files and folders unseen by Wildaughter impermissibly exceeded the scope of the private search. Namely, the ten photos, "Message to Tiffany," and "Market Stuff" are the only files Wildaughter opened, R. at 24–25, and therefore they are the only files admissible from Officer Yap's warrantless search.

1. Several Circuits Correctly Extend Jacobsen to Digital Devices.

Circuit courts have correctly extended *Jacobsen* to digital devices. In *Jacobsen*, this Court held that government agents may exceed the scope of a private search in very limited scenarios: only when they are virtually certain they will "learn nothing that had not previously been learned during the private search." 466 U.S. at 120. Circuit courts have correctly invoked *Jacobsen* when imposing strict limits on warrantless government searches, finding that the private search doctrine must exclude evidence that the private searcher did not view. *See United States v. Lichtenberger*, 786 F.3d 478, 484–85, 487; *United States v. Sparks*, 806 F.3d 1323, 1334–36 (11th Cir. 2015). In *Lichtenberger*, the Sixth Circuit held that a police officer's warrantless search of a laptop was limited to only the files opened and viewed in a private search. *See* 786 F.3d at 488–89. The flash drive in this case is analogous to the laptop unlawfully searched in *Lichtenberger*. The fact that the device itself is a flash drive is unimportant; it is a complete copy of Ms. Gold's desktop.

The Fifth, Seventh, and Fourteenth Circuits use phrases like "substantial certainty" to creatively reinterpret the *Jacobsen* "virtual certainty" standard. *See United States v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001); *Rann v. Atchison*, 689 F.3d 832, 836 (7th Cir. 2012); R. at 55. The virtual certainty standard only allows government agents to alter the scope of a prior private search—exceeding that which the private searcher saw—where they are doing so to merely

confirm what is already understood. *Jacobsen*, 466 U.S. at 119. However, circuit courts have cited *Jacobsen* in finding that searching unopened containers is "not necessarily [] problematic" where police are "substantially certain" of the contents. *Runyan,* 275 F.3d at 463; *see also Rann*, 689 F.3d at 836–37. The private search doctrine is meant to be a narrow exception to Fourth Amendment protections for the sake of re-examining materials found in private searches. *See Walter v. United States*, 447 U.S. 649, 657–59 (1980). These circuits disregard *Jacobsen* by lowering the bar from virtual certainty to substantial certainty. The Fourteenth Circuit mistakenly interpreted the Fifth and Seventh Circuits' misstatement of the *Jacobsen* rule as an entirely new standard that somehow displaces the rule set by this Court.

Circuits that reach a different conclusion have done so because their decisions concerned strikingly different digital devices. The Fifth and Seventh Circuits broadly applied the private search doctrine to CDs, floppy disks, a camera memory card, and zip drives full of photos. *See Rann*, 689 F.3d at 833–34; *Runyan*, 275 F.3d at 453. In their broad application of the doctrine, these courts have found that a defendant's privacy interest in containers remains intact unless the contents are "rendered obvious by the private search." *Runyan*, 275 F.3d at 464; *see also Rann*, 689 F.3d at 836–38. Unlike laptops and cell phones, individuals rarely, if ever, keep logs of daily activities and various media on CDs and camera memory cards. Camera cards only contain photos and videos. CDs have far lower storage capacity than nearly any laptop or flash drive. Searching Ms. Gold's flash drive is the functional equivalent of opening her laptop and viewing each file and folder accessible from the desktop screen. As the Sixth and Eleventh Circuits correctly observe, achieving the policy goals stated in *Riley* requires treating complex electronic devices differently than more dated media like CDs.

2. Digital devices have immense storage capabilities and are ubiquitous in nature.

This Court's concerns about the vast storage capabilities of other digital devices apply with equal force to Wildaughter's flash drive, which contained the entirety of Ms. Gold's desktop. Physical containers house curated objects and information, whereas digital devices contain far more. Cell phones document "nearly every aspect" of their users' lives. *Riley v. California*, 573 U.S. 373, 395 (2014). Similarly, laptops store "vast warehouses" of information. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 533 (2005). Here, Ms. Gold's desktop contained a wide range of documents, in large quantities, corresponding to the duration she held the laptop. *See Lichtenberger*, 786 F.3d at 488. She stored information concerning her budget, health insurance, taxes, schoolwork, and employment. R. at 7–10. In a single, portable—seemingly secure—place, Ms. Gold stored details of her personal, academic, and professional life. In the physical world, Ms. Gold's desktop was the functional equivalent of her diary, multiple file cabinets, and desk drawers. Her desktop could hardly be analogized to a single container. Thus, in the context of complex digital devices, a strict application of the private search doctrine is especially necessary to prevent overbroad searches.

In an era in which 89 percent of American households own computers, giving government agents too much leeway under the private search doctrine would be disastrous for Americans' expectation of privacy.[6] In light of the recent pandemic, these concerns are drastically exacerbated as even more Americans are required to use laptops as an integral part of their daily lives. If this Court fails to strictly apply the *Jacobsen* virtual certainty standard to

[6] CAMILLE RYAN, *Computer and Internet Use in the United States: 2016*, American Community Survey Reports, ACS-39, U.S. CENSUS BUREAU, Aug. 2018, 5 tbl.1.

searches of complex digital devices, it risks allowing law enforcement officers to search full laptops and cell phones without warrants to comb through sensitive data entirely unrelated to the initial search.

3. A Strict Application Appropriately Balances The Fourth Amendment Rights of Defendants With The Needs of Investigators.

A strict application of the private search doctrine to digital devices properly balances a defendant's Fourth Amendment rights against the government's interest in securing evidence. In any case where a private search yields evidence of a crime, law enforcement can seek a warrant. *See Walter*, 447 U.S. at 658. In this case, Officer Yap could have sought a warrant, but he made no effort to do so. The strict application is not the untenable standard that the Fourteenth Circuit purported it to be.

The Fourteenth Circuit mischaracterized the strict application as overly restrictive. R. at 55. A strict application does afford flexibility to officers in the field. A police officer may modify the search if the officer has "virtual certainty" such steps will not uncover significant evidence that the private search did not. *Jacobsen*, 466 U.S. 109, 119 (1984). The Fourteenth Circuit rejected the strict application of the private search doctrine—in favor of a broader approach—too hastily. It misinterpreted such an approach as requiring officers "know with exact certainty what is contained in a digital file." R. at 55. This description is simply incorrect. By misstating the degree of certainty required by a government agent following up on a private search, the court mischaracterized the strict application as unfairly restrictive.

Failing to strictly apply *Jacobsen* to digital devices would sanction fishing expeditions by improperly prioritizing the ease of police investigations over a reasonable expectation of privacy. This Court has become increasingly concerned with how invasive searches of digital devices can be. *See Riley v. California*, 573 U.S. 373, 394 (2014); *Carpenter v. United States* 128 S.Ct. 2206,

2217, 2220 (2018). Many Americans rely on computers for school, work, and personal use. Allowing for warrantless searches of private information because of the prying eyes of private citizens would be a long leap from this Court's analysis in *Jacobsen*, which merely allowed a government agent to open clear bags to confirm that a powder suspected to be cocaine was indeed cocaine. *See Jacobsen*, 466 U.S. at 122–24. To allow the search of entire laptops, cell phones, or even flash drives in cases like this, would defeat the purpose of search warrants altogether, by giving police officers a carte blanche to go "fishing" for evidence simply by invoking the private search doctrine.

That is precisely what happened here. Wildaughter saw nothing in her search that referenced causing harm to Driscoll. R. at 28. Officer Yap made no inquiry into the scope of the private search. R. at 6. He searched each file on the drive, which contained Ms. Gold's entire desktop. R. at 6. This is a prime example of a police officer avoiding proper judicial process to ferret out crime.

4. Officer Yap impermissibly exceeded the scope of Wildaughter's private search.

Officer Yap's search violated Ms. Gold's Fourth Amendment rights when he viewed files that Wildaughter had not viewed. To properly exceed the scope of the private search, he would have to be virtually certain that he would not find information that was not already known to Wildaughter. *See Jacobsen*, 466 U.S. at 119. Here, Wildaughter only viewed the contents of one desktop folder, titled "HerbImmunity." R. at 24. The folder names alone suggest that the contents vary greatly from folder to folder, with names like "College Stuff," "Games," "HerbImmunity," "Photos," and "Tax Docs." R. at 7. It was nearly impossible for Officer Yap to be virtually certain that his search would not uncover new information. Regardless, Officer Yap went on to look at every single folder and file on the flash drive, R. at 6, far exceeding the

scope of Wildaughter's search. To claim that opening and searching any one folder on a desktop would inform a searching party to the contents of the other folders is to claim that viewing even a single photo on a desktop screen subjects the entire desktop to a warrantless government search. This would be an incredibly generous legal fiction for the government. Because the contents in the unsearched folders on the flash drive were not revealed by Wildaughter's search, Officer Yap did not have the virtual certainty required to exceed the scope of the private search. Thus, the only admissible files on the flash drive are the ten photos Wildaughter viewed, "Message to Tiffany – draft," and "Market Stuff."

B. Even If This Court Adopts A Broad Approach To The Private Search Doctrine, Officer Yap Exceeded The Scope Of The Search By Viewing Folders Outside The "HerbImmunity" Folder.

Even if this Court adopts the broad approach applied by the Fourteenth Circuit, Officer Yap lacked a basis for substantial certainty about the contents of each unsearched folder. This approach affords government agents more leeway to exceed the scope of a private search if they are substantially certain of the contents of the previously unsearched containers. *See Rann v. Atchison*, 689 F.3d 832, 836–37 (7th Cir. 2012) (quoting *United States v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001). Circuits determine whether officers have a basis for substantial certainty by weighing "statements of the private searchers, their replication of the private search, and their expertise," though no one of these is dispositive. *See id.* Here, if any of them had been sufficiently satisfied, officers may have had the substantial certainty to search the entirety of the desktop. In this case, however, none of them are satisfied. Thus, Officer Yap violated Ms. Gold's Fourth Amendment rights—he could only establish substantial certainty for searching all of the files in the "HerbImmunity" folder because it is the only desktop folder Wildaughter searched.

First, Wildaughter's search of one desktop folder did not enable her to make statements that provided Officer Yap with substantial certainty of the contents of other folders. Officers cannot have substantial certainty about the contents of a container not searched by the private party based only on comments by the private party that they searched other containers in the same location. *Runyan*, 275 F.3d at 464. In *Runyan*, each CD was treated as a container. *See* 275 F.3d at 458. Here, given the fact that modern digital storage devices contain the equivalent of a library of CDs, it is appropriate to characterize folders on the flash drive as individual containers. Wildaughter stated that she opened just one of five desktop folders. R. at. 27–29. It is irrelevant to a determination of substantial certainty that all of these containers were in the same location, on Ms. Gold's desktop—as Wildaughter's statements about her search of one folder could not have possibly informed Officer Yap of the contents of other folders. Wildaughter herself admits she copied the files and took them to the police based on no more than a "gut" feeling. R. at 28. If private citizens' gut feelings alone were enough to justify a police search of previously unsearched containers, the Fourth Amendment would be rendered virtually meaningless.

Second, because Wildaughter's flash drive was not limited to the images and text files she viewed, and instead contained many more files and folders she did not view, Officer Yap did not replicate the private search. Where a private searcher compiles only the relevant files from her search onto a portable memory drive and delivers it to police officers, a search of that drive is a replication of the private search. *See Rann*, 689 F.3d at 837–38. Instead of only selecting the files that she viewed during the private search and transferring them onto the flash drive, Wildaughter decided to transfer the contents of Ms. Gold's entire desktop. R. at 28. Officer Yap did not replicate the private search. He went far beyond the scope of the search when he

searched each and every folder and file on the drive, despite being told that Wildaughter only viewed the contents of one desktop folder.

Third, without experience in searching desktops for evidence, Officer Yap lacked the applicable expertise. Expertise in this context is gained as an officer accumulates experience in the field. *Runyan,* 275 F.3d at 462–63 (citing *United States v. Bowman,* 907 F.2d 63 (8th Cir.1990). In *Jacobsen*, the "trained eye" of a police officer allowed him to determine that a package leaking a white powder contained cocaine. *Id.* at 462–63 (quoting *Jacobsen,* 466 U.S. at 121). Officer Yap is trained in digital forensics. That expertise does not enable him to divine the contents of unopened folders on a desktop. Therefore, Officer Yap lacked the applicable expertise to give him substantial certainty as to what all of the previously unsearched folders contained, and his position as a digital forensic expert had no bearing in this context.

Even if this Court applies the broad approach, Officer Yap impermissibly exceeded the scope of Wildaughter's search to the extent he searched any folder outside of the "HerbImmunity" folder.

III. THE PROSECUTION VIOLATED *BRADY* BY FAILING TO DISCLOSE MATERIAL REPORTS OF ALTERNATE SUSPECTS BECAUSE DISCLOSURE WOULD HAVE CREATED A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME AT TRIAL.

Justice and due process impose an affirmative duty on the prosecution to disclose all material evidence that is favorable to the defense. U.S. Const. amend. V; *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Fourteenth Circuit erred in holding that two reports identifying alternate suspects with motive ("Reports") were not material. Even though they were inadmissible, they were still material because their disclosure would have created a reasonable probability of a different outcome at trial. In addition, precluding materiality of evidence based only on its inadmissibility would result in an unfair trial, contrary to the service of justice. This should

undermine the Court's confidence in the outcome of the trial, and thus Ms. Gold's conviction should be overturned.

A. Reports Identifying Two Alternative Perpetrators Are Material Under *Brady* Because Had They Been Disclosed, There Is A Reasonable Probability The Outcome Would Have Been Different.

Brady violations require three elements: first, that the prosecution suppressed evidence, second, that the evidence is favorable to the defense, and third, that the evidence was material. *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009); *see also Strickler v. Greene,* 527 U.S. 263, 281–82 (1999). It is undisputed that the government withheld the Reports, and that the Reports are favorable to the defense. R. at 45. The central question is whether the Reports are material. Indeed, they are.

1. Evidence is material when there is a reasonable probability of a different outcome had it been disclosed.

The Reports are material under *Brady*. They disclose the existence of alternate suspects and raise concerns about the robustness of the investigation, either of which could lead to a different outcome at trial. Evidence is material if its disclosure creates a reasonable probability that the trial would have turned out differently. *United States v. Bagley*, 473 U.S. 667, 682 (1985). A reasonable probability of a different outcome exists if the government's suppression of evidence "undermines confidence" in the trial's outcome. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *Bagley*, 473 U.S. at 678). Here, if the government had given the defense the Reports, then Ms. Gold would have been able to raise a stronger defense for two reasons.

First, the detailed tips named two other murder suspects. Their disclosure would have directly led to admissible evidence that Driscoll owed Brodie money and that Brodie could be violent. R. at 11. It also would have directly led to evidence connecting Belinda Stevens to Driscoll through their involvement with HerbImmunity. R. at 12.

Second, the information in the Reports would have led to admissible evidence that any FBI investigations into these leads were cursory at best. Special Agent Baer's report indicates she planned to follow up with Brodie directly, but there is no indication that ever happened. In addition, Special Agent St. Peters commenced a preliminary investigation into Stevens and somehow concluded it did not warrant further investigation, all on the day the tip was received. These inquiries could cause a jury to doubt the credibility of the government's investigation. The Reports are material because Ms. Gold's defense would have been different, creating a reasonable probability of a different outcome.

2. Reasonable probability does not require certainty

It is not necessary for the Reports to exonerate Ms. Gold. Reasonable probability does not mean it is more likely than not that the defendant would have been acquitted had the information been disclosed. *See Kyles*, 514 U.S. at 434. Instead, it asks if, in the absence of the evidence, whether the defendant received "a verdict worthy of confidence," i.e. a fair trial. *Id*. The government concludes the Reports are not material because the verdict would have been the same even if they were disclosed. R. at 44, 46. However, this concrete conclusion about the outcome is not consistent with the standard. Instead the focus should be whether the verdict is worthy of confidence in the absence of the disclosure. *See Kyles*, 514 U.S. at 434. Evidence that not only leads directly to two alternative perpetrators, but also raises questions about the fairness of the investigation, creates a reasonable probability of a different outcome because it prevents Ms. Gold from raising legitimate defenses at trial. That is enough to undermine confidence in the verdict.

When considered in the context of all of the facts of the case, the Reports raise negative inferences about the thoroughness of the police investigation into the alternative suspects.

Suppressed evidence must be considered in context to assess if it places the whole case "in such a different light" that it undermines confidence in the outcome. *Kyles*, 514 U.S. at 435. Reports of tips naming alternative perpetrators could have been used not only to pursue the substance of those tips, but also to provide direct probative value into the "thoroughness" and "good faith of the investigation" which are legitimate bases for *Brady* violations. *Id.* at 445–46. The June 2nd interview with Chase Caplow provided investigators with an alternative suspect, Brodie, with motive. R. at 11. In that report, Special Agent Baer stated her intention to interview Brodie in order to determine if this lead warranted further investigation. R. at 11. However, there is nothing in the record to indicate Special Agent Baer made any contact with Brodie at all, let alone an investigatory interview. Even though the Caplow testimony was inadmissible in its current form, it would have led the defense directly to evidence concerning one of two possible scenarios: one, that there was no interview with Brodie to determine if he warranted further investigation after all, or two, if there was an interview, what that interview revealed, and why there is no record of it. Either result has probative value that questions the legitimacy of the investigation. That information would certainly be admissible and tend to exculpate Ms. Gold because it would undermine the confidence in the prosecution's case.

The July 7th report also indicates any investigations into alternate perpetrators were insufficient and ineffective. Special Agent St. Peters stated he received a tip alleging Ms. Stevens was responsible for Driscoll's death and that he conducted a preliminary investigation but determined the lead was unreliable. R. at 12. However, there is no indication anywhere in the record what that preliminary investigation included and how Special Agent St. Peters arrived at his conclusion. The disclosure of that report would have led directly to the defense finding out what the preliminary investigation entailed.

In context, the Reports not only tended to exculpate Ms. Gold, but also further impeached the government's investigation. Ms. Gold was forced to defend herself against circumstantial evidence that was improperly obtained because of earlier investigator error. First, police were unable to protect the victim even though they were warned she was in danger. R. at 5. Then the police conducted an illegal search of the contents of Ms. Gold's desktop. R. at 6–10. The suppressed Reports not only identify two alternative perpetrators, but also indicate law enforcement's failure to adequately investigate the leads. In the context of a case that heavily relies on improperly admitted circumstantial evidence and privileged testimony, this substantially undermines the confidence in the verdict.

B. Inadmissible Evidence Can Be Material Under *Brady.*

Evidence is not dismissed as immaterial simply because it may be inadmissible. *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995). Instead the analysis remains whether there is a reasonable probability that the result would have been different had the information been disclosed. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Disclosure of the Reports would have led to admissible evidence of alternative perpetrators and raised doubt concerning the thoroughness of the investigation, creating a reasonable probability of a different outcome.

1. Inadmissible evidence is considered under the reasonable probability standard.

Reasonable probability is the appropriate standard to assess materiality even when the evidence itself would be inadmissible. In *Wood v. Bartholomew*, this Court applied the reasonable probability standard to assess the materiality of inadmissible evidence. 516 U.S. 1, 5 (1995). It examined the suppressed inadmissible evidence in the context of the entire case to determine whether it was reasonably likely that the verdict would have been different. *Id.* at 6.

Ultimately, there was nothing to "undermine [the] court's confidence in the outcome," as is required to satisfy the reasonable probability standard. *Id*. at 8.

In Ms. Gold's case, however, the failure to disclose the Reports does undermine confidence in the outcome and so it is material. Only circumstantial evidence, mostly improperly obtained, connects Ms. Gold to Driscoll's death. This strengthens the materiality of the Reports. These facts hardly rise to the same level of confidence as physical evidence of a single action revolver firing twice at a victim's head along with an admission that the defendant held the gun when it fired the shots, as was the case in *Wood*. 516 U.S. at 8. In addition, the attorney in *Wood* admitted the suppressed evidence would not have changed the defense he raised at trial, and so there was no reasonable probability that the outcome would have been different. *Id.* at 7. However, Ms. Gold's defense counsel maintained the suppressed evidence would have directly affected the evidence the defense would have presented at trial. R. at 45.

2. Disclosure of the Reports Would Have Created a Reasonable Probability of a Different Outcome.

Though the Fourteenth Circuit rightly applied the reasonable probability standard, it erred in its conclusion that disclosure of the Reports did not create a reasonable probability of a different outcome. R. at 56. The inadmissible evidence in *Wood* was immaterial in part because it would not have led to other admissible evidence. 516 U.S. at 6. However, in Ms. Gold's case it is clear the Reports would have led directly to evidence that implicates alternative suspects with motive and negates the credibility of the investigation. Therefore, using the Court's same analysis from *Wood*, it is reasonably likely the outcome would have been different for Ms. Gold because the inadmissible evidence would have led directly to admissible evidence that could have affected the result of the trial.

All of the circuits that follow *Wood* require more than mere speculation that inadmissible evidence would lead to admissible evidence. The Fifth and Sixth Circuits inquire generally into whether the disclosure of the inadmissible evidence would have created a reasonable probability that the outcome would have been different. *See Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999); *Trevino v. Thaler*, 449 F. App'x 415, 424 (5th Cir. 2011), vacated and remanded on other grounds, *Trevino v. Thaler*, 569 U.S. 413 (2013); *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011). The First, Second, Third, and Eleventh Circuits also apply a reasonable probability standard by considering whether the inadmissible evidence would lead to admissible evidence. *See Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). Under either approach, it is practically necessary that the disclosure lead to admissible evidence—the existence of which must be more than "merely speculative"—in order to establish a reasonable probability of a different outcome. *Wood*, 516 U.S. at 6.

In Ms. Gold's case, disclosure of the inadmissible evidence would have led directly to admissible evidence that showed Driscoll was in debt to someone who may be violent and raise negative inferences about the tenacity of the government's investigation into those other leads. R. at 11–12. The existence of this additional admissible evidence is hardly speculative.

The Fourteenth Circuit incorrectly held it was "mere speculation" that the Reports would have led to additional admissible evidence. R. at 56. However, this conclusion was incorrect. The connection between the Reports and the resulting admissible evidence is direct and not speculative. First, Chase Caplow's testimony would have led to admissible evidence that Driscoll was in significant debt to Martin Brodie. Therefore, "it is clear" that the Reports would

have led directly to admissible evidence of "another potential perpetrator—the clearest example of the type of exculpatory evidence covered by *Brady*." R. at 59, (Cahill, J., dissenting). Second, disclosure of the Reports would have allowed the defense to investigate the lack of any record of a substantive preliminary investigation into either of the two identified alternative perpetrators. That evidence would have allowed the defense to raise legitimate questions about how seriously the FBI considered investigating other potential identified suspects motivated to harm Driscoll. Ultimately, consistent with this Court's methodology, and that of the majority of circuits, had the Reports been disclosed, it would have led directly to admissible evidence. Thus, there is a reasonable probability that the outcome of the trial would have been different.

C. The Government's Failure To Disclose The Exculpatory Information Regarding The Existence Of Two Additional Suspects Denied Ms. Gold A Fair Trial.

Brady and its progeny exist to protect the due process rights of defendants like Ms. Gold in order to ensure fair trials in our justice system. A trial is fair when the defendant has all of the relevant and available information so that she can defend herself. The *Brady* doctrine plays a critical role in facilitating that necessary access. Ms. Gold was denied that opportunity here.

The prosecution, acting as the sovereign, has a duty to govern impartially, a duty mandated by due process and professional and ethical standards. Here, the government breached this duty by failing to disclose the Reports, resulting in a failure of justice.

1. *By withholding material evidence, the prosecution fails to act impartially, which violates the defendant's due process rights.*

The prosecution's failure to disclose the Reports also violated the prosecution's duty to serve justice. *Brady* disclosures are critical for justice to be served. The source of the duty to disclose favorable evidence to the defense is that the public prosecutor—acting as the government in criminal cases—has an obligation to govern impartially. *See*, *Berger v. United*

States, 295 U.S. 78, 88 (1935); *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Therefore, the prosecutor's task is not just to obtain convictions, but to seek justice. *See Berger*, 295 U.S. at 88. Justice is achieved when defendants receive fair trials. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair."). Justice failed in Ms. Gold's case. She was treated unfairly from the start of the government's investigation and the government's failure to disclose the Reports is just the latest instance of the government failing to govern impartially by prioritizing convictions over justice.

Ultimately, if this Court determines inadmissible evidence is per se immaterial for *Brady* purposes, it would empower prosecutors to make evidentiary decisions in direct violation of the Constitution. When a prosecutor withholds evidence that would tend to exculpate a defendant, the prosecutor assumes "the role of an architect of a proceeding" that conflicts with what justice requires. *Brady*, 373 U.S. at 87–88. This problem becomes worse when, deciding what to disclose to the defense, the prosecution is given the de facto power to decide what is and is not admissible. *See* R. at 59 (Cahill, J., dissenting). The court, not the prosecution, decides evidentiary questions of admissibility. *See* Fed. R. Evid. 104.

2. The prosecution also violates its professional and ethical duties.

In addition to violating Ms. Gold's due process rights by failing to disclose exculpatory information, the prosecution also violated its professional and ethical duties. The underlying principles of fairness and justice also guide the prosecutor's professional and ethical duties of disclosure. *See Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009). The ABA Model Rule of Professional Conduct 3.8(d) (2008) requires prosecutors to "make timely disclosure . . . of all evidence or information . . . that tends to negate guilt . . . or mitigates the offense." Model Rules of Prof'l Conduct R. 3.8(d). These principles of fairness and justice are codified in the

prosecution's ethical duty to disclose not just admissible evidence, but any information favorable to the defendant. Given these professional and ethical obligations, the government should have disclosed the investigators' Reports. That information itself, including its revelation of inadequate investigations into the leads, tends to negate the guilt of Ms. Gold. Had it been disclosed, Ms. Gold would have been able to present a defense to that effect. The same principles of fairness and justice that propel the *Brady* doctrine are also the basis for these professional and ethical obligations to disclose material evidence.

Ms. Gold's situation is a primary example of why inadmissible evidence may be material and therefore constitute a *Brady* violation. Evidence may itself be inadmissible yet lead to strong exculpatory evidence. In such a case—given the policy supporting *Brady* and its progeny—there could be "no justification for withholding it." *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003). Two reports that identify alternative perpetrators with motive to harm Driscoll, but were not subject to adequate investigation, leads to very strong exculpatory evidence. There is no justification for withholding that information and doing so only suppressed Ms. Gold's due process rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourteenth Circuit and overturn Ms. Gold's conviction. It should grant Ms. Gold's motion to suppress (1) Dr. Pollak's testimony and notes from their therapy session, and (2) the contents of the flash drive that contained Ms. Gold's entire desktop, other than the files Wildaughter opened. It should also grant the motion for post-conviction relief.

Respectfully submitted,

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