Team #31 - Original

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 COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

1) The Federal Rules of Evidence 501 precludes evidence of privileged communications at trial. Samantha Gold had a privileged conversation with her psychotherapist where she used a common phrase to express her frustration, however, the psychotherapist perceived the comment as a threat and alerted the police. The police investigated the statement and determined Petitioner was not a threat. Is the confidential statement during Samantha's psychotherapy treatment session admissible at trial where the threats were previously investigated and dismissed by law enforcement?
2) The Fourth Amendment protects individuals from unreasonable searches. Ms. Gold's roommate viewed some of the files but copied the entirety of Ms. Gold's desktop without her permission and handed the information over to the police. The police officers exceeded the scope of the search conducted by Ms. Gold's roommate and searched her entire desktop without a warrant. Was Ms. Gold's Constitutional Right violated when the police conducted a broader search than the one conducted by the private party?
3) The FBI received two reports from individuals claiming they had information about who killed Tiffany Driscoll. The FBI never followed up on those hearsay reports. Accordingly, the Government did not disclose those reports to Samantha Gold. Were the requirements of *Brady v. Maryland*, which protect a Defendant's trial rights and ensure fairness in the criminal justice system, violated when the Government failed to disclose potentially exculpatory evidence, that it argues was inadmissible at trial?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

FEDERAL RULES OF EVIDENCE

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This appeal is from the judgment of the United States District Court of Appeals for the Fourteenth District. This Court has subject matter jurisdiction pursuant to Title 18 U.S.C. § 1716(j)(2), 18 U.S.C. § 1716(j)(3), and 18 U.S. Code § 3551 et seq. for Petitioner's conviction of mailing injurious nonmailable articles.

STANDARD OF REVIEW

When reviewing a district court's denial of a motion to suppress, we review the court's legal conclusions *de novo* and defer to the district court's factual findings unless those findings are clearly erroneous. *United States v. Scott,* 731 F.3d 659, 663 (7th Cir. 2013).

"In ruling on [a motion to suppress,] the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. Finally, its ruling on the third, which is a mixed facts-law question that is however predominantly one of law, *viz*., the reasonableness of the challenged police conduct, is also subject to independent review. The reason is plain: 'it is "the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.'" *People v. Michael E.*, 178 Cal. Rptr. 3d 467, 471–72 (2014).

STATEMENT OF THE CASE

I. Procedural History

On June 6, 2017, Samantha Gold ("Ms. Gold") was indicted by a grand jury and was charged with Title 18 U.S.C. § 1716(j)(2), 18 U.S.C. § 1716(j)(3), and 18 U.S. Code § 3551 et seq. – Delivery By Mail of An Item With Intent to Kill or Injure. *R*. at 1. Ms. Gold was accused of killing and poisoning Tiffany Driscoll ("Ms. Driscoll"). Ms. Driscoll was found dead on May 25, 2017, after she ingested strychnine, which was in the strawberries that were mailed to her. *R*. at 14. Prior to Ms. Gold's jury trial, the defense brought a motion to suppress the testimony of digital evidence that Ms. Gold's roommate, Jennifer Wildaughter ("Ms. Wildaughter"), obtained from Ms. Gold's laptop, without her permission, and presented it to Officer Aaron Yap ("Officer Yap") of the Livingston Police Department. *R*. at 31-32. Officer Yap exceeded the scope of the private search when he examined files not inspected by Wildaughter. *R*. at 32. The defense further moved to suppress the testimony of Gold's psychiatrist, Dr. Chelsea Pollak ("Dr. Pollak"), since her testimony would be based on a confidential therapy session between the two. *R*. at 35-36. The defense argued that permitting Dr. Pollak to testify would violate Federal Rules of Evidence Rule 501. *R*. at 35-36.

After an evidentiary hearing, the Honorable Frank Nicholas denied the motion to suppress on all grounds. *R*. at 41. At trial, the Government called Dr. Pollak to testify against Ms. Gold, presented the testimony of Ms. Wildaughter, and offered the evidence that Officer Yap obtained from the flash drive that Ms. Wildaughter presented him. *R*. at 51. Additionally, the Government argued that Ms. Gold blamed her financial debt on Ms. Driscoll for recruiting her to join the vitamin company, HerbImmunity. *R*. at 51. Following her conviction, Ms. Gold was convicted and sentenced to life in prison. After Ms. Gold's conviction, the defense moved for post-

conviction relief based on the Government's failure to disclose two FBI reports that contained leads on two other individuals that could be responsible for Ms. Driscoll's death. *R*. at 43.

Ms. Gold contended that the Government's failure to disclose these FBI reports violated the requirements set forth in *Brady v. Maryland. R*. at 43. The Honorable Frank Nicholas denied the motion for post-conviction relief. *R*. at 48-49. On December 2, 2019, Gold appealed to the Fourteenth Circuit Court in order to obtain post-conviction relief based on the District Court's error in permitting Dr. Pollak's testimony, allowing the USB flash drive examined by Officer Yap to be admitted at trial, and for the failure to turn over the FBI reports pursuant to *Brady*. *R*. at 51. The Fourteenth Circuit denied the motion for post-conviction relief. *R*. at 52-56.

The Supreme Court granted certiorari.

II. Factual Background

On May 25, 2017, at 12:00 p.m., Ms. Gold had an appointment with her psychotherapist, Dr. Pollak, who she had been seeing since 2015. Specifically, Dr. Pollak was treating Ms. Gold for Intermittent Explosive Disorder, or "IED," which is characterized by repeated episodes of aggressive, impulsive, or violent behavior. Dr. Pollak managed to have a breakthrough with Ms. Gold after diagnosing her with IED, and begin effectively treating her through weekly psychotherapy. *R*. at 17.

Ms. Gold had never presented any dangerous episodes, yet on May 25, 2017, Dr. Pollak noticed that Ms. Gold seemed a bit more disheveled than usual. Ms. Gold was behaving erratically and stated to Dr. Pollak that she was upset with Ms. Driscoll. Ms. Driscoll had recruited Ms. Gold to join the multi-level marketing group she had begun working for in 2016, HerbImmunity. Ms. Gold invested $2,000 in having to buy HerbImmunity products. *R*. at 18. Ms. Gold was in debt as she was unsuccessful in recruiting others to buy HerbImmunity's

products. During the session, Ms. Gold illustrated to Dr. Pollak, "I'm so angry! I'm going to kill her. I will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again." *R*. at 19. Ms. Gold wound up leaving the psychotherapy appointment early.

At 1:15 p.m. that same day, Officer Nicole Fuchs ("Officer Fuchs") received a call at the Joralemon Police Department Station from Dr. Pollak to report that she feared for the safety of her patient, Ms. Gold, and Ms. Driscoll. Officer Fuchs went to check on Ms. Gold at Joralemon University women's residence after receiving Dr. Pollak's report. Once there, Ms. Gold appeared calm and rational. After speaking with Ms. Gold for 15 minutes, Officer Fuchs determined she posed no threat to herself or to others. As a precautionary measure, Officer Fuchs then contacted the University's administration to determine the location of Ms. Driscoll; Ms. Driscoll was in class. Officer Fuchs warned Ms. Driscoll that there had been a threat reported against her, but she returned to class, not concerned. Officer Fuchs concluded that Ms. Driscoll was not in danger. *R*. at 5.

Later that same day at approximately 4:40 p.m., Ms. Wildaughter appeared at the Livingston Police Department precinct and gave Officer Yap a flash drive with certain files she pulled from Ms. Gold's computer. Ms. Wildaughter mentioned to Officer Yap that she believed that Ms. Gold may be planning to poison Ms. Driscoll. Ms. Wildaughter had gone through Ms. Gold's laptop without her permission and viewed only one folder on Ms. Gold's computer. Ms. Wildaughter further informed Officer Yap that she had viewed a short, unsigned note directed to Ms. Driscoll, telling her how kind she was and offering her some sort of gift, and a text file containing passwords and codes she did not understand, and that she saw a file with the word

"strychnine" in it, which is a common rat poison. *R*. at. 6. Ms. Wildaughter omitted mentioning their apartment previously had a rat infestation problem. *R*. at 29.

After Ms. Wildaughter left the precinct, Officer Yap inspected all files that Ms. Wildaughter had informed him about and continued to look at all the subfolders that Ms. Wildaughter had not seen.

On Friday, May 26, 2017, an edition of the Joralemon Journal reported that Ms. Driscoll had been found dead at her father's house on the evening of May 25, 2017. The article also reported that Ms. Driscoll was a sales representative at Herb Immunity and that many disgruntled students called HerbImmunity nothing more than a pyramid scheme. The Journal further stated that there was no forensic evidence, no footprints, no fingerprints, and no weapons present in Ms. Driscoll's home. *R*. at 13.

On Monday, May 29, 2017, the Joralemon Journal followed up the story reporting that Ms. Gold was arrested for being a suspect in Ms. Driscoll's murder. The Journal concluded its reporting that law enforcement officers were happy because they were unable to find any physical evidence at the scene pointing to the cause of death or a suspect before arresting Gold. *R*. at 14.

On June 2, 2017, FBI Agent Mary Baer interviewed Chase Caplow ("Caplow"). Caplow attended Joralemon University with Ms. Driscoll and was also involved in HerbImmunity. Caplow indicated that Driscoll called him to notify him that she owed money to an upstream distributor within the company, Martin Brodie ("Brodie"). Additionally, Caplow indicated that there were rumors that Brodie could be violent. *R*. at. 11.

Nevertheless, on June 6, 2017, Ms. Gold was formally indicted by a grand jury and was charged with Title 18 U.S.C. § 1716(j)(2), 18 U.S.C. § 1716(j)(3), and 18 U.S. Code § 3551 et

seq. – Delivery By Mail of an Item With Intent to Kill or Injure. *R*. at 1. However, the FBI continued to receive leads about other possible suspects related to Ms. Driscoll's murder. On July 7, 2017, FBI Agent Mark St. Peters received an anonymous phone call in connection with the death of Ms. Driscoll. The anonymous tipster alleged that Belinda Stevens ("Stevens") was responsible for the murder of Ms. Driscoll and indicated that both Stevens and Driscoll were involved in HerbImmunity. *R*. at 12.

Ms. Gold was convicted and sentenced to life in prison. *R*. at 41.

SUMMARY OF THE ARGUMENT

Ms. Gold suffers from a mentally diagnosable disorder, which results in sudden outbursts of rage. Ms. Gold experienced one of these episodes while at her therapy session with Dr. Pollak, which Dr. Pollak perceived as a threat, directed towards Ms. Driscoll. Dr. Pollak reported the comment to the police, who investigated and dismissed the tip. Since the tip did not result in any action and in order to promote a healthy environment of a trusting psychotherapist-patient confidentiality, Dr. Pollak should not have been able to testify against Ms. Gold at trial.

The Government's warrantless search of Ms. Gold's computer was an unreasonable search which led to Ms. Gold being prosecuted and convicted. Ms. Wildaughter did not have authority to look through Ms. Gold's computer. Even if this Court were to find that the private party search doctrine applies, Officer Yap violated the doctrine by exceeding the scope of the search that was initially done by Ms. Wildaughter.

Brady v. Maryland set forth requirements and guidelines for disclosing evidence to the defense before trial. The court in *Erickson* went on to state three factors that must be met in order to form a valid *Brady* claim. Here, Ms. Gold meets all three requirements of a *Brady* claim. First, the prosecution suppressed two FBI reports from the defense prior to trial. The FBI received two

separate reports alleging someone else was the true killer of Ms. Driscoll. The prosecution, believing the reports were inadmissible hearsay, failed to disclose the reports to the defense. Second, the FBI reports were favorable to Ms. Gold's case because they were exculpatory evidence. They would have allowed Ms. Gold to present a stronger defense at trial. Any evidence that points to someone else as the killer is favorable in a criminal case. Third, the FBI reports were material in that, had they been disclosed, there is a reasonable probability they would have undermined the confidence of the outcome at trial. The jury would not have been able to conclude, beyond a reasonable doubt, that Ms. Gold was the killer when there was evidence of another suspect with a motive and history of violence also in play. Thus, all three elements of Ms. Gold's *Brady* claim have been satisfied, meaning the Government violated her constitutional rights.

ARGUMENT

I. Once the Police Investigated the Tip from Ms. Gold's Psychotherapist and Found That Ms. Driscoll Was Not in Imminent Danger, Dr. Pollak's Duty to Inform Law Enforcement of the Perceived Emergency had Abated. Dr. Pollak Was Not Entitled to Breach the Patient-Psychotherapist Privilege by Testifying Against Ms. Gold at Trial.

In the United States alone, there are 328.2 million people. Of those 328.2 million people, one in four adults suffers from a diagnosable mental disorder. JOHN HOPKINS MEDICINE. *Mental Health Disorder Statistics.* https://www.hopkinsmedicine.org/health/wellness-and-prevention/mental-health-disorder-statistics, (last visited Feb. 14. 21.) This fact alone shows the importance of therapy and psychotherapist-patient confidentiality, which explains why the Federal Rules of Evidence 501 precludes evidence of privileged communications at trial. FRE 501 left the law of privileges in its present state and further provided that privileges shall continue to be developed by the United States courts under a uniform standard applicable both in civil and criminal cases. It is appropriate for federal courts to recognize a psychotherapist

privilege under FRE 501, and "this is confirmed by the fact that all fifty states and the District of Columbia have enacted into law some form of psychotherapist privilege." *Jaffee v. Redmond*, 518 U.S. 1, 3 (1996).

Boerum Health and Safety Code § 711 is applicable in relation to disclosing confidential communications:

> Communications between a patient and a mental health professional are confidential except where: a) The patient has made an actual threat to physically harm either themselves or an identifiable victim(s); and b) The mental health professional makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat.

Ibid. This Court should reverse the lower court's holding because the Fourteenth Circuit, improperly, did not preclude confidential testimony at trial. Holding that there is a dangerous exception to the patient-psychotherapist privilege will undermine the rationale for FRE 501 as it will discourage individuals with severe mental illnesses from fully disclosing their paranoia, psychosis, or other dangerous thoughts they may be entertaining.

a. The Confidential Communication That Occurred During Ms. Gold's Psychotherapy Treatment is Inadmissible at Trial Because the Federal Rules of Evidence 501 Precludes Privileged Communication.

A psychotherapist-patient relationship is a special relationship that requires confidentiality, as "confidentiality is the essential ingredient for successful psychotherapy." *Scull v. Superior Court*, 254 Cal. Rptr. 24, 26 (1988). Under *Tarasoff,* the only circumstance in which this privilege will give way is once a therapist determines (either by their judgment or under applicable professional standards) that a patient poses a danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger by warning them. *Tarasoff v. Regents of Univ. of Cal.*, 131 Cal. Rptr. 14 (1976). The discharge of such duty varies

with the facts of each case. *Ibid.* The Sixth Circuit interpreted the rationale behind this rule is, "the preservation and protection of the health and safety of innocent third parties outweigh the good achieved by maintaining the confidentiality of life-threatening communications." *United States v. Hayes*, 227 F.3d 578, 583 (2000).

In *Jaffee v. Redmond*, this Court recognized a psychotherapist-patient testimonial privilege under FRE 501. *Jaffee,* 518 U.S. at 116. Reason and experience persuade that a privilege protecting confidential communications between a psychotherapist and her patient promotes sufficiently important interests to outweigh the need for probative evidence. *Id.* at 3. This Court, however, made an infamous footnote, which read, "[A]lthough 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*. at 18 n.19.

The Fourteenth Circuit, in deciding this present matter, stated "The only way to read the *Jaffee* footnote is that when a serious threat requires disclosure, the psychotherapist's right to refuse to testify, or her patient's privilege to bar that testimony, ceases to exist." *R.* at 53. The Fourteenth Circuit adopted the reasoning of the Fifth and Tenth Circuits that recognize the exception to the psychotherapist-patient privilege. *Ibid.* This Court should reverse this holding because the Fourteenth Circuit erred in deciding this present matter in that they disregarded the entirety of the *Jaffee* holding, and merely focused on a footnote.

i. Dr. Pollak Properly Followed Protocol When She Suspected Ms. Driscoll Might be in Danger. When the Police Investigated Her Tip, They Found That Ms. Gold Appeared Calm and Rational. Since the Police Investigated the Tip and Determined She Posed No Threat to Herself or Others, the Psychotherapist-Patient Privilege Should be Preserved.

Confidential communications between a licensed psychotherapist and a patient in the course of treatment are protected from compelled disclosure under FRE 501. *Jaffee,* 518 U.S. at 3. This includes notes taken during their counseling sessions. *Ibid.*

When the right to disclosure clashes with a privilege, the court is required to "indulge in a careful balancing" of the need for disclosure against the fundamental right of privacy. *Scull v. Superior Court*, 254 Cal. Rptr. 24, 27 (1988). The privilege scope is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure. *Ibid.* When the balance swings in favor of disclosure, the court is required to limit the scope of discovery "to the extent necessary for a fair resolution of the lawsuit." *Ibid.*

In *People v. Wharton*, the court upheld a ruling where a psychotherapist can testify at trial about the statement which triggered the warning because the defendant decided to waive his privilege by placing his mental state in issue as a tactical decision in response to an evidentiary ruling by the trial court. 280 Cal. Rptr. 631, 655 (1991). The psychotherapist in *Wharton* gave the warning directly to the victim, instead of the police officers, and the victim admitted to the psychotherapist she has been in situations where she had feared he would kill her. *Id.* at 522. In our present case, the warning was given to police officers to investigate the tip. The police did so, and found Ms. Gold to be "calm and rational." *R*. at 5. The police even warned Ms. Driscoll, "who expressed no concern." *Ibid.* Most importantly, Ms. Gold did not waive the privilege, Dr. Pollak testified against Ms. Gold's wishes. As such, waiving the constitutional right to privacy at a psychotherapist session cannot be made in reliance on *People v. Wharton*. The Fourteenth Circuit cited *Wharton* by noting the court there stated, "if the dangerous patient-exception became inapplicable after the death of a potential victim, a dangerous patient could regain

protection of the privilege by simply killing the victim." *Ibid.* That concern is not of issue in our present case. The facts are simply, too different.

Ms. Gold is diagnosed with intermittent explosive disorder. Intermittent explosive disorder involves repeated, sudden episodes of impulsive, aggressive, violent behavior or angry verbal outbursts in which you react grossly out of proportion to the situation. Mayo Clinic Staff, *Intermittent Explosive Disorder*, MAYO CLINIC, Sept. 19, 2018. https://www.mayoclinic.org/diseases-conditions/intermittent-explosive-disorder/symptoms-causes/syc-2037392. Ms. Gold expressed valid concern because of the financial hardship imposed upon her by her belief in Ms. Driscoll's statements. The Record does not give rise to an inference that Ms. Gold is a danger to society. The Record doesn't even show valid concern that Ms. Gold had the intent to kill Ms. Driscoll. Ms. Gold stated "I'm so angry! I'm going to kill her. I'll take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again." R. at 4. Judging off the objective meaning of her words, it makes sense why someone would infer that harm will be caused on Ms. Driscoll. Some people, however, even without IED, have similar outbursts and say the phrase "I'm going to kill X." Additionally, in our present matter, it's not black and white, this Court cannot rely merely on the objective meaning of the words. Dr. Pollak is a licensed professional who should understand that on the road to recovery, a patient might have outbursts. Further, her behavior was consistent with her diagnosis. Therefore, the Fourteenth's Circuit's concern is not relevant here.

In *United States v. Glass*, the defendant was voluntarily admitted to a mental health facility to treat an ongoing mental illness. 133 F.3d 1356, 1356 (10th Cir. 1998). The defendant told their psychotherapist they wanted to shoot the president; the psychotherapist warned the secret service, and the defendant was later arrest. *Ibid.* In *Glass*, the statement arose in the course

of his treatment, presumably in "an atmosphere of confidence and trust" where Mr. Glass was "willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Ibid.* at 1356. After the statement was made, the psychotherapist did not feel the need to disclose the statement. *Ibid.* The psychotherapist only revealed the statement when the defendant was released from the hospital after agreeing to participate in an outpatient program. *Ibid.* The Tenth Circuit, relying on *Jaffee's* opinion which stated that the contours of the privilege would be fleshed out on a case-by-case basis, held that the psychotherapist-patient privilege announced in *Jaffee* is available to protect Mr. Glass under FRE 501; further stating that footnote 19 of *Jaffee* is applicable only where the threat was serious when made and disclosure was the only way of averting harm. *Ibid.* The Tenth Circuit further guided on remand that the district court should determine whether in the context of this case, whether the threat was serious when it was uttered and whether its disclosure was the only means of averting harm when the disclosure was made.

ii. Under *United States v. Hayes*, the "Dangerous Patient" Exception Would Have a Deleterious Effect on the "Atmosphere of Confidence and Trust" in the Psychotherapist-Patient Relationship; the Testimony Serves a Public End, But it is an End That Does Not Justify its Means; and the Adoption of the Exception is Ill-Advised.

In *United States v. Hayes*, the Sixth Circuit concluded that there should be no "dangerous patient" exception to the privilege as stated in *Jaffee.* 227 F.3d 578 (6th Cir. 2000). The Sixth Circuit noticed merely a marginal connection between a psychotherapist's action in notifying a third party and a court's refusal to permit the therapist to testify about the threat. *Id.* at 583-584. The Sixth Circuit correctly noted that the footnote in *Jaffee* is just dictum and debated whether the dictum establishes a precedentially binding "dangerous patient" exception to the federal psychotherapist-patient testimonial privilege applicable under FRE 501. *Ibid.* The Sixth Circuit rejected the "exception" for three reasons.

First, the recognition would have a deleterious effect on the "atmosphere of confidence and trust" in the psychotherapist-patient relationship. *Ibid.* The Sixth Circuit stated that early advice regarding the requirement to disclose would have a marginal effect on whether or not a patient engages in open and honest conversation during therapy. *Ibid.* However, "an additional warning that the patient's statement may be used against him in a subsequent criminal prosecution would certainly chill and very likely terminate open dialogue." *Ibid;* (citing Gregory B. Leong, et al., *The Psychotherapist as Witness for the Prosecution*: *The Criminalization of Tarasoff*, AM. J. PSYCHIATRY 1011, 1014 (Aug. 1992). Since this Court recognized the importance of mental health when ruling in *Jaffee*, if the dangerous patient exception was recognized, its logical consequence such as preventing open conversation, is the first reason to reject it. *Ibid.*

Second, the Sixth Circuit stated that allowing a psychotherapist to testify against his or her patient in a criminal prosecution "serves a public end" but it is an end that does not justify its means. *Ibid.* The Court referenced *Jaffee*, where the footnote recognized there are two interests at stake: first, the improvement of our citizens' mental health achieved (in part, by open dialogue) and second, the protection of innocent third parties. The Sixth Circuit stated, "We believe, therefore, that the *Jaffee* footnote is no more than an aside by Justice Stevens to the effect that the federal psychotherapist-patient privilege will not operate to impede a psychotherapist's compliance with the professional duty to protect identifiable third parties from serious threats of harm." *Ibid.* A psychotherapists testimony used to prosecute and incarcerate a patient who came to them for professional help cannot be justified. *Ibid.* The court, additionally, feared the stigma that is attached to the patient after their sentence is served after being incarcerated after a psychotherapist testifies against their own client. The court concluded that

the proposed "dangerous patient" exception is unnecessary to allow a psychotherapist to comply with his or her professional responsibilities and would seriously disserve the "public end" of improving the mental health of our Nation's citizens. *Ibid.*

Third, the Sixth Circuit opined the adoption of "dangerous patient" exception is ill-advised. *Ibid.* The court concluded by stating that "reason and experience" teach us that the dangerous patient exception should not be part of the federal common law. *Ibid.* Therefore, the Sixth Circuit concluded the psychotherapist-patient privilege does not impede a psychotherapist's compliance with his professional and ethical duty to protect innocent third parties. *Ibid.*

In our present case, Dr. Pollak, pursuant to Boerum Health and Safety Code § 711, called the Police to report the comments Ms. Gold made during their session. The Fourteenth Circuit in deciding our present matter stated it is "recognizing the exception to the privilege for two interconnected reasons: (1) there is no value in preserving confidentiality under the psychotherapist-patient testimonial privilege once that confidentiality has already been breached by a therapist's required reporting, and (2) once such confidentiality has been breached, the jury should be allowed to consider that evidence at trial." *R*. at 52.

Assuming the privilege has already been breached, the Fourteenth Circuit's reasoning may be applicable to some cases, but it is not applicable given our set of facts. The Police investigated the tip from Dr. Pollack and found that "[s]he appeared calm and rational. After speaking with her for 15 minutes, we determined she posed no threat to herself or to others […] we determined that Driscoll was not in any imminent danger." *R*. at 5. The district court stated, "[w]hen a secret is out, it is out for all time, and cannot be caught again like a bird and put back in its cage." *R*. at 41. After the tip was investigated, Ms. Gold was awarded psychotherapist-

patient privilege yet again, because the psychotherapist was wrong about the severity of Ms. Gold's comments. Thus, although the confidentiality was breached, as a matter of public policy in preserving whatever privacy is left of individuals, this Court should disagree with the reasoning of the lower court.

The Fourteenth Circuit's second reason for allowing the jury to consider the evidence at trial once confidentiality has been breached is also not relevant given the facts of our present case. "[…] [T]he societal benefit of a mentally healthy populace outweighs the occasional loss of evidence in federal proceedings." *Dangerous Patients: An Exception to the Federal Psychotherapist-Patient Privilege,"* 91 KENTUCKY LAW JOURNAL 457, 458 (2002). The Court in *Jaffee* compared the psychotherapist-patient privilege to the spousal and attorney-client privilege by noting that all are "rooted in the imperative need for confidence and trust." *Ibid.*

Furthermore, unless this Court salvages whatever is left for Ms. Gold to utilize this privilege, it will be setting a precedent in which the environment of the psychotherapist-patient session is limited. If this Court does not reverse this holding, then this Court will deter one in four of the 328.2 million Americans who suffer from a mentally diagnosable disorder from being open and honest with their psychotherapist.

For the foregoing reasons, this Court should **REVERSE** the Fourteenth Circuit's holding and find that there is no exception to the psychotherapist-patient privilege.

II. Ms. Gold's Fourth Amendment Constitutional Rights Were Violated When the Police Conducted a Broader Search Than the One Conducted by the Private Party. This Court Should Uphold the Privacy Required for Digital Media. The Disclosure of the Contents on Ms. Gold's Laptop Constituted a Violation of Ms. Gold's Reasonable Expectation of Privacy.

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, […]" U.S. CONST. AMEND. IV. A "search" within the meaning of the Fourth Amendment occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109, 111 (1984). Unfortunately, the law notoriously lags behind advancements in technology. Jennifer L. Moore, et al., *The Cost Of Privacy: Riley v. California's Impact On Cell Phone Searches*. DESALES UNIVERSITY, 7 (2014). The slow response time of the legislature "perpetuates a legal system constantly trying to 'catch up' with innovation." *Ibid.* This Court should reverse the lower court's holding and find that evidence that is provided to law enforcement as a result of a private search should not exceed the scope of the search done by the private party.

In our present matter, the Fourteenth Circuit distinguished this case from *Riley v. California* by stating that "a flash drive is not a laptop or a cell phone; it lacks the automatically updated location data involved in *Riley." R*. at 54. The Fourteenth Circuit further reasoned that by accessing a flash drive, "Officer Yap was limited to a small, defined, handpicked pool of offline documents." *Ibid.* This Court should disagree with this reasoning. This Court should reverse the lower court's holding because Ms. Gold did not consent to Ms. Wildaughter viewing the contents of her computer. Even if the private search doctrine applies, Officer Yap violated the private search doctrine by going beyond the scope of the search done by the private party.

a. Ms. Wildaughter Searched Ms. Gold's Computer Without Consent, and Disclosed the Findings to Officer Yap. When Officer Yap Was Given the USB Drive with Ms. Gold's Desktop on it, He Exceeded the Scope of the Search Done by Ms. Wildaughter in Violation of Ms. Gold's Reasonable Expectation of Privacy.

The private search doctrine stems from the distinction between private and government action. Alexandra Gioseffi, *Lichtenberger, Sparks, and Wicks: The Future of the Private Search Doctrine*, 66 Emory L. J. 395 (2017). "The Fourth Amendment proscribes government action, and does not apply to search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Walter v. United States*, 447 U.S. 649, 662 (1980). In *Walter,* this Court described the scope of the private search doctrine by stating "even though some circumstances, [...], may justify the Government's re-examination of the materials, the Government may not exceed the scope of the private search unless it has the right to make an independent search". *Id.* at 651.

In *United States v. Sparks,* the defendant left their phone at Walmart, where it was found and examined by an employee. 806 F.3d 1323 (11th Cir. 2015). The phone was not password protected, so when the third party went to look at images to see who she will be meeting with to return the phone, she saw "questionable" images. The third party searched through all of the photos on the phone to make some sense of it. The third party then took the phone to the police station to file a report, he went through and showed the officers the photos which caused him concern, searching through the photos in thumbnail form, pausing occasionally. When the police handed the phone over to the detective, the detective viewed a video that the private party did not view. The Petitioner in *Sparks* argued that the Government failed to establish that the images observed by the police officers and detective formed the basis that led to the issuance of the

search warrant because they were not within the scope of the prior search. The Eleventh Circuit found that the video the detective watched that the private party did not watch, exceeded the breadth of the private search. *Id.* at 1336.

In our present case, Ms. Wildaughter admitted to going into Ms. Gold's room and looking through her computer after Ms. Gold had left the house. *R.* at 24. Ms. Wildaughter clicked on the "HerbImmunity" folder, and testified that she saw three subfolders labeled "receipts," "confirmations," and "customers." Ms. Wildaughter testified to opening only the "customers" folder, where she saw a folder named "Tiffany Driscoll," which Ms. Wildaughter states contained photos of Tiffany. After viewing the photos, Ms. Wildaughter found a subfolder labeled "For Tiff" with four documents, three text files which were titled "Message to Tiffany – draft," "market stuff," and "recipe." The fourth document was a screenshot of a photo of a "receipt." Of the four documents Ms. Wildaughter saw, she only clicked on two of them. The "market stuff" document contained codes and passwords, which scared Ms. Wildaughter because she did not want to view something of Ms. Gold's which she thought was a secret and did not want to cross that line. Ms. Wildaughter ended her search when she saw the reference to rat poison. At that point, Ms. Wildaughter copied the entire desktop and took it to the police station where she was greeted by Officer Yap. Ms. Wildaughter briefly explained what she saw, and she warned Officer Yap that everything on Ms. Gold's desktop was there.

Ms. Wildaughter stated under oath that she did not have permission to go through Ms. Gold's laptop, so she did feel "weird, like it was an invasion of privacy," which resulted in her stating that she "didn't open all the files." *R.* at 27. Ms. Wildaughter did not even "think of looking into any other documents or folders on Ms. Gold's laptop." *Id.* at 28. The facts here are clear. Ms. Wildaughter only clicked on one of the folders but copied the entire desktop. As a

result of turning in the USB to the police, the police violated Ms. Gold's Fourth Amendment right against illegal searches.

The Respondent is relying on *Rann v. Atchison*, where the court held that even if the private party did not open the container, the police were permitted to open it if they were "substantially certain" of their contents. 689 F.3d 832 (2012). The question now turns to whether there was a reasonable basis for Officer Yap's search. The Respondent's argument, if followed here today, will set a precedent that in this digital world, the police do not have to exercise caution while viewing digital devices.

In *People v. Michael*, the First District held a warrantless police search cannot be undertaken under the Fourth Amendment when the private searcher had not determined the illicit character [...] on a USB flash drive. 178 Cal. Rptr. 3d 467, 468 (2014). The court in *Michael* applied a "substantially certain" test where the police needed to be substantially certain of what is inside the container based on the statements of the private searchers, their replication of the private search, and their expertise. *Id.* at 271. There, the appellant had taken his computer to a shop for servicing, and in the course of the work, the repairman "viewed images on the computer of what appeared to him 'to be underage girls engaged in sexual activity,'" *Id*. at 264. After viewing these images, the repairman called the police, when the officer who responded to the call arrived at the scene, together they continued to look through the computer until they came across videos that the repairman was unable to open. *Ibid.* The repairman, however, was able to put the video files on a USB flash drive which he then gave to the officer to take with him to the police station. *Ibid.*

In our present case, there was a similar course of events with a few key differences. Ms. Wildaughter took a flash drive she compiled from documents on Ms. Gold's computer to the

Livingston Police Department, where she met with Officer Yap. *Ibid.* Ms. Wildaughter explained what she saw and where she saw it to Officer Yap, and then she left. *Ibid.* After Ms. Wildaughter left, Officer Yap conducted his own search, without a warrant, of *all* the contents of the flash drive. *Ibid.*

Officer Yap examined the "confirmations" subfolder, where he found a document titled "Shipping Confirmation" which was a confirmation for a package sent via NationalExpress to Ms. Driscoll on May 24, 2017, at 3:45 p.m. He then opened the subfolder "For Tiff" and encountered three text documents: "Market Stuff," "recipe," and "Message to Tiffany." The "recipe" document, contained a recipe for chocolate covered strawberries, including an ingredient titled "secret stuff." Officer Yap correspondingly went through every document on the drive in the order they were listed, including the other subfolders, the "Exam4" and "Health Insurance ID Card" documents, and the budget, which confirmed a two hundred and twelve dollar purchase for "Tiffany's strawberries – secret strychnine stuff," along with purchases for strawberries and chocolate chips. Lastly, Officer Yap went through Gold's to-do list and saw a list of several poisons under a bullet titled "research," which included strychnine, with text explaining what dosage of the poison would lead to respiratory failure and brain death. R. at 6. This search exceeded the scope of Ms. Wildaughters search.

This Court in *Walter v. United States* stated government officials may recreate the private search without obtaining a warrant, however, the warrantless government search cannot exceed the limits of the initial private search. 447 U.S. 649, 649 (1980). If this Court does not reverse this holding, they will be ruling against their own holding.

b. There is a Heightened Level of Privacy Concerns Implicated by the Digital Age. A Narrow Approach is Consistent with the Purpose of the Constitutional Rights Awarded by the Fourth Amendment.

In *Riley v. California*, this Court, in a unanimous decision, held that a warrant is required before a search of a cell phone. 573 U.S. 373, 373 (2014). In *Riley,* Riley's cell phone was removed from the pocket of his pants and searched by the police officer on the scene; he reviewed the text messages on the phone, and a few hours after that initial search by the police officer, a detective further analyzed the contents of his cell phone at the police station. *Ibid.*

This Court in *Riley* recognized that cell phones are different "in both a quantitative and qualitative sense." *Riley* at 375. Before the modern cell phone with immense storage capacity, a search of a person was limited by physical realities and generally constituted only a narrow intrusion of privacy. *Ibid.* This Court recognized three features of a cell phone that are similar to a computer. First, the collection of distinct types of information into one place; second, the capacity allows even just one type of information to convey far more than previously possible; and third, data on the phone can date back years. *Ibid.* All these characteristics are similar to that of a computer. Afterall, "'cell phone' is misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as telephones." *Id.* at 393.

In *Walter v. United States,* the recipients of a wrongly delivered package opened the package and found "suggestive drawings" and "explicit descriptions." This Court stated that even though the FBI agents were lawfully in possession of the boxes, and even though some of the boxes were opened by a private party, the FBI agents still needed to have a warrant. 447 U.S. at 656.

The Respondent urges this court to follow the Fifth and Seventh Circuit, however the cases the Respondent is relying on are distinguishable from ours. In *Rann v. Atchison*, the

Seventh Circuit held the Police did not exceed the scope of the private searches performed by the inmate's victim and the victim's mother when they subsequently viewed the images contained on the digital media devices brought to them by the victim. 689 F.3d 832, 833 (7th Cir. 2012). In *Rann,* the Seventh Circuit dismissed the defendant's argument that his Fourth Amendment rights were violated by the police for exceeding the scope of the search that was done by the private party. *Ibid* at 836. In *Rann*, the testimonies from the private party also were certain about what the contents of the digital media device meant and were. *Id.* at 838.

In *United States v. Runyan*, the Fifth Circuit held again that the police did not violate the defendant's Fourth Amendment rights when they exceeded the scope of the private search. 275 F.3d 449 (5th Cir. 2001). In *Runyan*, however, the facts are distinguishable from our present case. *Ibid.* There, Runyan's ex-wife and her friends only viewed a "randomly selected assortment." *Id.* at 460. The Fifth Circuit compared digital media storage to containers and stated that unless police can be "substantially certain of what is inside that container based on the statements of the private searches," they exceed the scope of the prior private search. *Id.* at 463. The police in *Runyan* had multiple conversations, with Runyan's ex-wife and her friends, so it makes sense why the Fifth Circuit concluded the police could be reasonably certain.

In our present case, reliance on either *Runyan* or *Rann* is improper since the facts of our current case do not allow us to infer that the police were reasonably certain about the contents in the USB drive. Ms. Wildaughter specifically stated she did not know what she was looking at, and it "felt like an invasion of privacy." *R.* at 27.

A broad approach to the search doctrine for reasonable certainty may work in some scenarios, but it needs to be established by a case-by-case basis, and in our present case, a broad search results in a constitutional violation. This Court should apply a narrow approach to the

private search doctrine, and rule that there needs to be a one-to-one search, where the police will exceed the scope if they were to view even one more document than the private party searched.

This Court should follow *United States v. Lichtenberger*, where the Sixth Circuit held the officer violated the defendant's Fourth Amendment right when the officer did not stay within the scope of the initial private search. 786 F.3d 478, 479 (2015). "[T]he government's ability to conduct a warrantless follow-up search of this kind is expressly limited by the scope of the initial private search." *Ibid.* In *Lichtenberger*, the defendant's girlfriend searched his laptop, and turned it over to the police. The defendant successfully argued that because the laptop was in his home and because the laptops may contain private information similar to that in a home, then the private search doctrine does not apply in his case. *Id,* at 483. The Sixth Circuit went on to state that "the likelihood that an electronic device will contain 1) many kinds of data, 2) in vast amounts, and 3) corresponding to a long swath of time, convinced the *Riley* Court that officers must obtain a warrant before searching such a device […]." *Id,* at 488.

In order to maintain use of the private search doctrine, this Court should ensure that police do not go beyond what is shown to them and uphold the Fourth Amendment rights of individuals. As a police officer who is informed of the law, Officer Yap should have respected the reasonable expectation of privacy that Ms. Gold had for her digital device. For the foregoing reasons, this Court should **REVERSE** the lower courts holding.

III. The Government Violated Ms. Gold's Due Process Rights When They Failed to Divulge Two FBI Reports to the Defense That Could've Potentially Exonerated Ms. Gold, Done so in Violation of the Procedural Safeguards Established in *Brady vs. Maryland*.

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

373 U.S. 83, 88 (1963). The Government has deprived Ms. Gold of her due process rights by withholding exculpatory evidence from her before trial and that evidence was material to her case.

Justice William O. Douglas wrote, "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." *Ibid*. In this case, society has not won, and the accused has not been treated fairly. The court in *Erickson* opined, "To establish a *Brady* violation, the defendant must prove," (1) "that the prosecution suppressed the evidence," (2) "the evidence was favorable to the defense," and (3) "the evidence was material." *United States v. Erickson*, 561 F.3d 1150, 1164 (2009). Here, the Government withheld evidence that, had it been disclosed, would have undermined the confidence of the outcome at trial; leaving this Court with no other option than to conclude Ms. Gold's due process rights, according to *Brady*, have been violated.

a. The Government Suppressed Two FBI Reports.

"The prosecutor in a criminal case shall [. . .] make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." ABA Model Rules of Professional Conduct 3.8(d). Before this court today lies a criminal case, one that bound the prosecutor, and by extension, the Government, to disclose all evidence to defense before trial. This Court recognized this obligation in *Kyles*, noting, "whether the prosecutor succeeds or fails in meeting this obligation [. . .] the prosecutor's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). In every criminal case, the prosecutor, acting as the spearhead for the Government, must give all evidence to the defense. In the present case, the prosecution failed to do so by withholding two FBI reports

which pointed at two individuals as the killer of Ms. Driscoll, two individuals other than Ms. Gold.

The court in *Dennis* understood, "Prosecutors have an affirmative duty to 'disclose [*Brady*] evidence [. . .] even though there has been no request [for the evidence] by the accused,' which may include evidence known only to police." *Dennis v. Sec'y, Pa. Dept. of Corr.*, 834 F.3d 263, 285 (2016); quoting *Strickler v. Greene*, 527 U.S. 263, 280 (1999). In *Dennis*, the court found the prosecutors had a duty to disclose three pieces of evidence to the defense, even when defense had not requested them in the first place. Applying that standard here, the prosecutors had a duty to disclose the FBI reports to defense prior to trial. Even if the prosecution claims they had no knowledge of the reports, the duty to disclose pursuant to *Brady* is not overcome. This Court affirmed this principle in *Kyles*, stating, "To comply with *Brady*, prosecutors must learn of any favorable evidence known to the others acting on the government's behalf [. . .] including the police." *Kyles*, 514 U.S. at 437. Given these requirements from this Court, it would not matter whether or not the Government knew the FBI reports existed, as the FBI is an extension of the police as both are law enforcement entities.

In the present case, however, the Government had knowledge of these two reports and actually had them in their possession prior to trial. In the Fourteenth Circuit's holding it clearly states the Government was in possession of the statements provided to the FBI prior to trial. *R.* at 55. The Government even admitted to having these reports before trial because it tried to justify its reasoning for not disclosing the reports. The Government argued that it did not disclose the information based on their own reasoning that the records were hearsay. *Ibid.* The Government's justification for not disclosing the reports, solidifies that it possessed the reports and suppressed them from the defense prior to trial, in clear violation of the requirements set forth in *Brady*.

Further, there can be no argument that Ms. Gold could have learned of the FBI reports by her own diligence and investigation. The court in *Spears v. Mullin* noted, "there can be no suppression by the state of evidence already known by and available to the defendant prior to trial." 343 F.3d 1215, 1256 (2003). Nothing in the record in the present case suggests defense had any knowledge of these FBI reports prior to trial. Some courts have held there is "no *Brady* violation . . . when [the] defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information' or when the evidence is available to him from another source, such as a witness 'to whom he had as much access as the police.'" *Erickson*, 561 F.3d at 1164; quoting *Coe v. Bell*, 161 F.3d 320, 344 (1998). Like the aforementioned notion in *Spears*, the same analysis applies here. Nothing in the record suggests defense should have known about the essential facts of the reports, particularly regarding Special Agent Mary Baer's report discussing Caplow's interview. There is nothing to suggest Ms. Gold knew or should have known of Caplow's knowledge or involvement with the case, especially Caplow's statement that Ms. Driscoll owed money to Martin Brodie. With nothing suggesting defense had any knowledge of these facts, there is nothing to defeat Ms. Gold's *Brady* claim.

In conclusion, this Court has held that prosecutors have an affirmative duty to disclose evidence that is in their possession to the defense before trial. The record clearly states that the government was in possession of two FBI reports prior to trial, and they failed to disclose those reports to the defense. *R.* at 55. Thus, the first prong of Ms. Gold's *Brady* claim, that the Government suppressed the evidence, has been satisfied.

b. The Two FBI Reports in the Government's Possession are Favorable to Ms. Gold's Defense.

This Court stated the suppressed evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching." *Kyles*, 514 U.S. at 437. The two FBI

reports in question today present exculpatory evidence that the defense could have used to bolster her stance at trial. Evidence that put forth names of possible other murder suspects will always be exculpatory to the defense, even if the FBI found the leads to be fruitless. In *Dennis*, the defendant was tried and convicted of murder. At trial, witnesses could not corroborate his story that he had nothing to do with the crime in the first place. It was discovered that three pieces of evidence were suppressed by the prosecution: a welfare benefits receipt, inconsistent statements, and documents regarding a tip from an inmate. *Dennis*, 834 F.3d 263. All three of these pieces of evidence were favorable to the defendant because they corroborated his defense.

The case and reasoning behind the favorability of evidence in *Dennis* can directly be applied to the two pieces of evidence in this case. The two FBI reports in the present case would have offered Ms. Gold an avenue to prove she was not the murderer. They would have allowed her to mount a stronger defense in front of the jury and prove her innocence. The Third Circuit went on to state, "The United States Supreme Court has made plain that the . . . evidence may be considered favorable under *Brady* even if the jury might not afford it significant weight." *Dennis*, 834 F.3d at 287, see *Kyles*, 514 U.S. at 450-51. Assuming the jury would not have paid much attention to the FBI reports in trial, that does not take away their favorability towards Ms. Gold's case.

Finally, this Court in *Kyles* states "the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Kyles*, 514 U.S. at 440. After looking at the record and the evidence that was presented against Ms. Gold at trial, there is no question these FBI reports are favorable to her. In a news article released by the school, it plainly states "no forensic evidence was found anywhere in the house [. . .] no footprints, no fingerprints, and no weapons." *R* at 13. In a second news article released, after

finding a random box of strawberries in Ms. Driscoll's room, Lead Detective Barry Apple stated "We feel like we finally may be on to something, which is a huge relief." *R* at 14. It was a huge relief because there was no other evidence to go off of. The detectives had no evidence linking Ms. Gold to the murder and once they found even the slightest piece of evidence, they assumed it was case closed. The FBI reports would have proven there was another aspect and avenue for the defense to follow. Importantly, the reports would have provided the jury with another suspect to consider. Thus, since the FBI reports are favorable to Ms. Gold, the second prong of Ms. Gold's *Brady* claim, that the evidence was favorable, has been satisfied.

c. The Suppressed Favorable FBI Reports are Material to the Defense's Case.

The third, and arguably most important, prong of *Brady* requires that the favorable evidence suppressed by the government must be material. Evidence is considered "material" under *Brady* "only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." *Kyles*, 514 U.S. at 433-34. This Court went on to clarify, "a 'reasonable probability,' [is] one that is 'sufficient to undermine the confidence in the outcome' of trial." *Ellsworth v. Warden*, 333 F.3d 1, 5 (2003); quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 (1985). The two FBI reports in question are sufficient to undermine the confidence of the outcome at trial because they provided at least one, legitimate suspect, other than the Ms. Gold, who could have committed this heinous crime. This information could have caused a reasonable doubt in the jury when entering its verdict.

This Court has seen its fair share of *Brady* claims, so it is fully aware that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 435. Ms. Gold, "need not prove that it is more likely than not that [she] would have received a

different verdict with the evidence, 'but whether in the absence [of the evidence she] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Bradley v. Nagle*, 212 F.3d 559, 568 (2000); quoting *Kyles*, 514 U.S. at 434. Utilizing these two holdings, it stands that Ms. Gold need only show that, had these FBI reports been disclosed, the jury would have had reasonable doubt to find a verdict against her.

The real crux of the materiality element before this Court today stems from whether or not "inadmissible" evidence can form the basis of a *Brady* claim. This is the crux of the argument because, currently, there remains a circuit split on this issue. The Fourteenth Circuit noted this distinction, stating "There is currently no uniform circuit approach to the treatment of inadmissible evidence as the basis for a *Brady* claim." *R* at 56. The FBI reports are material to the case. This Court in *Bagley* answered the issue of inadmissibility, stating, "given the policy underlying *Brady* . . . evidence itself inadmissible could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it." *Bagley,* 437 U.S. at 6. The evidence in question here, one, an anonymous tip alleging Belinda Stevens was the true murderer of Tiffany Driscoll; and the second, a tip from Caplow suggesting Martin Brodie was the true murderer. The two reports fall identical with the issue and holding from *Dennis* where the court opined, "withholding impeachment material that is germane to a critical aspect of the case – as here, the identity of the perpetrator – violates *Brady*." *Dennis,* 834 F.3d at 302. Like *Dennis,* the critical aspect in the present case is the culprit of Ms. Driscoll's tragic death.

In *Wood v. Bartholomew,* a defendant was tried and convicted of first-degree murder committed in the course of a robbery. 516 U.S. 1 (1995). After trial, defense asserted a *Brady* violation claiming the Government suppressed two polygraph tests of the defendant's brother and girlfriend. *Ibid.* This Court reasoned that the polygraph tests were inadmissible and defense

could not have made a mention of them during trial. *Ibid*. The polygraph results would also not have changed the outcome at trial because they would have only proved the defendant had an accomplice in the killing and robbery, it would not exonerated him. *Ibid*. *Wood* now sets the foundation for debate in the Circuit Courts as to whether or not inadmissible evidence can form the basis of a *Brady* claim.

The Fourteenth Circuit seemed to think that the name of a potential suspect, that suspect's potential motive for murder, and the potential suspects known history of violence was not enough to undermine the confidence of the outcome at trial. The court sided with Respondent's theory that inadmissible evidence cannot form the basis of a *Brady* claim. They rely on two cases that interpret *Wood* in a way that does not provide justice for the accused. First, in *Madsen,* the eighth circuit held inadmissible evidence cannot form the basis for a *Brady* violation. *Madsen v. Dormire*, 137 F. 3d 602 (1998). In *Madsen,* the defendant was tried and convicted of forcible rape and sodomy. After trial, the defense learned the prosecution suppressed the testimony of a forensic chemist, whose blood work tests came back inconclusive as to whether the victim was ever in the defendant's house. The prosecution suppressed this evidence because they deemed the chemist incompetent. The eighth circuit denied defenses *Brady* claim because it deemed the evidence inadmissible that would not have changed the outcome at trial. *Madsen* is distinguishable from the present case.

In *Madsen,* the testimony of the victim who was raped was backed by concrete evidence found at the scene (a knife used to subdue the victim, the rope used to control the victim, and a bloody towel the victim used to wipe her hand) which the State presented at trial. Consequently, the inadmissible evidence would not have done anything to undermine the confidence of the outcome of trial, thus no *Brady* claim was formed. Here, the evidence presented to convict Ms.

Gold was circumstantial. The only tangible evidence found at the scene was the box of strawberries laced with strychnine, which cannot be proven to be sent from Ms. Gold, beyond a reasonable doubt. The two FBI reports in the present case are distinguishable from the chemist's testimony in *Madsen* in that the FBI reports undermine the confidence in the outcome of this trial, where the testimony in *Madsen* did not.

Next, Respondent cites to the third circuit's decision in *Hoke v. Netherland*, 92 F. 3d 1350 (1996). In that case, the defendant was tried and convicted of capital murder in the commission of robbery, rape, and abduction. Hoke filed a *Brady* claim asserting his due process rights were violated when the government failed to disclose three police interviews with men who had sexual relations with the victim in the past. The court there opined that the interviews were inadmissible hearsay and could not form the basis of a *Brady* claim. The facts and reasoning the court used there is distinguishable from our present matter. The interviews Hoke referred to only proved that the woman had sex with the men in her past. Even if the court there accepted the evidence, it would have had no bearing on the outcome, the outcome that the defendant killed the woman. In the present case, if the FBI reports were disclosed, defense could have introduced a real, legitimate suspect that could have committed the murder. The present case is distinguishable from *Hoke* because here, the evidence would have absolved Ms. Gold of the crime, not just taken an added offense away. The inadmissible evidence here is much different because it points at two people who may have committed the murder, and at least one of those had a motive to kill Ms. Driscoll.

Assuming this Court deems that the FBI reports were inadmissible hearsay for trial, this does not absolve the prosecution of its duty to disclose because it does not take away the materiality of the evidence. The Third Circuit opined, "There is no requirement that leads be

fruitful to trigger disclosure under *Brady*, and it cannot be that if the [Government] fails to pursue a lead, or deems it fruitless, that it is absolved of its responsibility to turn over to the defense counsel any *Brady* material." *Dennis*, 834 F.3d at 307. It is not for the prosecutor to decide what is fruitful and what is not, they need only disclose what they have in their possession and leave it for the court to believe the defense as to whether or not the evidence is material.

The only question that needs answering comes from this Court's decision in *Giglio v. United States*. 405 U.S. 150, 155 (1972). This Court opined that evidence is material when there is, "any reasonable likelihood [the evidence could] have affected the judgement of the jury." *Ibid.* The two FBI reports would have affected the jury because they would not have been able to say, beyond a reasonable doubt, Ms. Gold was the killer; leaving this Court with no other decision than to deem the reports as material thus providing the basis of a valid *Brady* claim. Thus, the third prong of Ms. Gold's *Brady* claim, the evidence was material, has been satisfied.

In conclusion, the Government suppressed two FBI reports from the defense, in violation of their duties in this case. The two FBI reports were favorable to the defense because they were exculpatory pieces of information that would have allowed the defense to present its best case. Finally, the FBI reports were material in that there is a reasonable likelihood, had they been admitted, they would have undermined the confidence of the outcome at trial.

CONCLUSION

For the foregoing reasons, Petitioner, Ms. Samantha Gold, respectfully requests this court to **REVERSE** the decision of the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

Team 31
Brief for Petitioner