Team 32 P

**No. 19–142**

# 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

Team 32
*Attorneys for Petitioner*

ORIGINAL BRIEF

## QUESTIONS PRESENTED

I. Whether the trial court violated Federal Rules of Evidence 501 by admitting a psychotherapist's testimony regarding their patient's confidential statements made during a psychotherapy session, even though the testimony was presented when there was no longer a threat of serious harm ot the potential victim.

II. Whether the Government violated the Fourth Amendment after, upon relying on a private search, it seized files discovered on a defendant's computer without first obtaining a warrant and after conducting a broader search that the private party.

III. Whether the Government violated the requirements of *Brady v. Maryland* when it failed to disclose potentially exculpatory information solely on the grounds that the information would be inadmissible at trial, even though the suppressed evidence would have likely led to admissible evidence and had it been disclosed, would have had a "reasonable probability" that a different proceeding would have occurred, undermining the confidence of the verdict.

## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

UNITED STATES SUPREME COURT CASES

U.S. COURT OF APPEALS

CONSTITUTIONAL PROVISIONS



OTHER AUTHORITIES

## OPINIONS BELOW

The Fourteenth Circuit's decision is unpublished but is reproduced in the Record on pages 50–59. The order number of the opinion is No. 19–142. The District Court's oral ruling on Petitioner's motion to suppress is unpublished but is reproduced in the Record on pages 15–53. The docket number of the opinion is 17 CR 651.

## CONSTITUTIONAL PROVISIONS

U.S. Constitution Amend. IV 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.

## STATEMENT OF THE CASE

### I. STATEMENT OF THE FACTS

Psychotherapist Patient Privilege

Ms. Gold had a history of Intermittent Explosive Disorder (IED). R. at 17. Since 2015, Ms. Gold treated her IED symptoms through weekly psychotherapy sessions with Dr. Pollak. R. at 17. During these sessions, she shared much about her life, including her involvement with HerbImmunity that began in 2016. R. at 17-18. On May 25, 2017, Ms. Gold arrived at her weekly session angry and agitated. R. at 18. She then disclosed during the session that she was $2,000 in debt from buying HerbImmunity products at the request of Tiffany Driscoll. R. at 18. During the May 25 session, Ms. Gold had shown signs of hostility towards Ms. Driscoll. R. at 19. According to Dr. Pollak's notes, during their session Ms. Gold said, "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.

Based on Ms. Gold's agitated state, history of IED, and her above statements, Dr. Pollak determined that Ms. Gold may try to harm herself or Ms. Driscoll. R. at 19. Under Boerum Health and Safety Code § 711, Dr. Pollak was required to notify law enforcement about the threats. R. at 2. After the session, Dr. Pollak contacted the Joralemon Police Department to alert them of Ms. Gold's history of IED and her threats to Ms. Driscoll. R. at 19. At the officer's request, Dr. Pollak scanned session records to assist the police in their investigation. R. at 20. Police first went to Ms. Gold's dorm room. R. at 5. Despite Dr. Pollak's warnings, the police determined within fifteen minutes that she "posed no threat to herself or to others." R. at 5. The police then located Ms. Driscoll and warned her that there had been threats against her. R. at 5. Nevertheless, the police determined that Ms. Driscoll was not in immediate danger. R. at 5. Just hours later, Ms. Driscoll was found dead in her dorm room. R. at 13.

At trial, the Government called Dr. Pollak to the stand to testify to the statements made by Ms. Gold during their May 25, 2017 session. R. at 35. Defense counsel filed a *Motion to Supress* the testimony of Dr. Pollak, citing the psychotherapist-patient privilege doctrine according to this Court's ruling in *Jaffee v. Redmond* and the decisions of the Sixth, Eighth, and Ninth Circuit. R. at 35. The trial court denied Ms. Gold's *Motion to Supress*. R. at 41. The denial was upheld by the Fourteenth Circuit. R. at 57.

Fourth Amendment Violation

On May 25, 2017 Jennifer Wildaughter delivered a personal flash drive to the Livingston Police Department containing files she pulled from her roommate, Ms. Gold's, private computer. R. at 23. Ms. Wildaughter had opened only three subfolders on Ms. Gold's desktop,

citing that she didn't open all the files on the desktop because it felt like an invasion of privacy—yet she had copied everything from Ms. Gold's desktop to turn over to the police. R. at 27–28. Ms. Wildaughter admitted nothing in the documents she viewed stated anything specific about Ms. Gold poisoning Ms. Driscoll or harming her in any way. R. at 28. Ms. Wildaughter did see the word strychnine in a folder labeled "Market Stuff" and does admit that the roommates had a rodent problem in the apartment. R. at 29.

At the *Motion to Supress* hearing, Ms. Wildaughter states that when she gave her flash drive to Officer Yap, a leader of the Digital Forensics Unit at the Livingston Police Department for the past eight years, she said "they were all on there" and he did not ask any questions to define the parameters of her private search through Ms. Gold's personal files. R. at 29, 34. Officer Yap did not ask about how many total files were on the drive or about any photos, documents, or other files Ms. Wildacre viewed. R. at 29.

<u>*Brady* Violation</u>

On June 2, 2017, Special Agent Mary Baer of the Federal Bureau of Investigation (FBI) interviewed Chase Caplow in the course of the investigation of Ms. Driscoll's murder. R. at 11. Mr. Caplow was a classmate of Driscoll's at Joralemon University was also involved in the HerbImmunity. R. at 11. During the interview, Mr. Caplow indicated Ms. Driscoll called him two weeks prior to her death, admitting to Mr. Caplow that she owed money to a HerbImmunity upstream distributor, Martin Brodie. R. at 11. Mr. Caplow also reported that Mr. Brodie had a reputation for violence and a quick temper. R. at 11, 44. Special Agent Baer made note that she intended to follow up with Mr. Brodie, but nothing more was stated about the potential follow up. R. at 11.

Over a month later, on July 7, 2017, the FBI received an anonymous phone call tip in connection with the death of Ms. Driscoll alleging that Belinda Stevens was the murderer. R. at 12. During this anonymous call, the tipper indicated that both Ms. Stevens and Ms. Driscoll were involved in HerbImmunity. R. at 12. Per protocol, Special Agent Mark St. Peters conducted a preliminary investigation into the credibility of the lead, ultimately questioning its reliability and halting further follow-up. R. at 12. Special Agent Peters did not explain how he came to his decision not to investigate further. R. at 12. Despite the government's knowledge of these FBI reports which named two additional suspects, one with a clear motive, these reports were never disclosed to the defendant. R. at 44, 48. As a result, the defendant was not able to use this information at trial. R. at 55.

## II. PROCEDURAL HISTORY

Petitioner, Samantha Gold, was charged with knowingly and intentionally depositing for mailing or delivery by mail, according to the directions thereon, a package containing items declared unmailable by the United States Postal Service which resulted in the death of another, in violation of 18 USC § 1716(j)(2), (3) and 3551 (et seq.). Gold filed a *Motion to Supress* both the testimony of Dr. Chelsea Pollak, her psychiatrist, and digital evidence obtained by Office Aaron Yap of the Livingston Police Department. The District Court denied the *Motion to Supress* on all grounds. Gold was convicted and sentenced to life in prison. After her conviction, Gold's counsel filed a *Motion for Directed Verdict or New Trial* on the basis that the government failed to disclose certain information in violation of their *Brady* requirements. The District Court denied the motion and Gold appealed to the United States Court of Appeals for the Fourteenth Circuit.

The Fourteenth Circuit fully affirmed the District Court's finding and held that the disclosure of Ms. Gold's threats to law enforcement breached confidentialy, thus eliminating any testimonial privilege; Office Yap's examination did not violate appellant's Fourth Amendment rights; and no *Brady* violation occurred because the evidence was inadmissible. Gold appeals these rulings and upon grant of *writ of certiorari* this Court reviews the decision of the Fourteenth Circuit *de novo* on all grounds.

## SUMMARY OF THE ARGUMENT

I. Based on the transcendant public importance of preserving candor and effectiveness in mental health treatment in the United States, the testimonial privilege of a psychotherapist-patient relationship does not include a "dangerous patient" exception. A psychotherapist's duty to warn law enforcement of imminent danger to a potential victim based on confidential communications within a session is separate and distinct from compelling a psychotherapist to testify at a defendant-patient's criminal proceedings after the fact because each disclosure is based on different standards. Even if the Court chooses to establish the "dangerous patient" exception, there was no danger at Ms. Gold's criminal proceedings in which Dr. Pollak's testimony would have averted.

II. Due to the strong privacy interests at stake and to the information available when the search was conducted, the warrantless review of the flash drive containing the contents of Gold's laptop exceeded the scope of the private search doctrine, therefore violating Gold's Fourth Amendment rights to be free from an unreasonable search and seizure. Under the private search doctrine, a warrantless government search is expressly limited by the scope of an initial private search. The goal of this limitation is to balance legitimate government interests and the "degree to which a search intrudes on an individual's privacy." Historically, the test of scope has focused

on physical "closed containers," but the volume of information contained on digital devices demands the Court continue to shift to a more narrow definition of "container" based on the "virtual certainty" test articulated in *Jacobsen*. This "virtual certainty" standard has been consistently applied by the circuit courts in determining proper scope in private search cases and should be affirmed in the present case.

III. The underlying policy of *Brady* provides no justification for withholding promising leads to exculpatory evidence, even if the leads on their own are considered inadmissible. Therefore, the majority of federal circuit courts of appeals have held that for the purposes of *Brady*, inadmissible evidence may be material when it could have led to the discovery of admissible exculpatory evidence. Further, this Court has found that inadmissible evidence is material when there was a "reasonable probability" that had the evidence been disclosed the result of the proceeding would have been different, thus diminishing the confidence of the verdict. Accordingly, this Court should reverse and remand on the *Brady* issue.

## ARGUMENT

### I. BECAUSE OF THE DISTINCTION BETWEEN A PSYCHIATRIST'S DUTY TO WARN UNDER BOERUM HEALTH AND SAFETY CODE § 711, TESTIMONY OF THE PETITIONER'S PRIVILEGED STATEMENTS AT TRIAL DO NOT FALL UNDER THE "DANGEROUS-PATIENT" EXCEPTION, THUS VIOLATING FEDERAL RULES OF EVIDENCE 501.

In 1996, this Court held that an effective psychotherapist-patient relationship is so significant, it holds "a public good of transcendent importance." *Jaffee v. Redmond*, 518 U.S. 1, 2 (1996); *see also Trammel v. United States*, 445 U.S. 40, 50 (1980). With the interest of encouraging the public to seek necessary mental health treatment and to ensure candor during these sessions so that treatment is effective, the Court established the psychotherapist-patient privilege under Federal Rule of Evidence 501. *Jaffee* 518 U.S. at 6. The Court held that the

probative value of a patient's confidential statements at trial does not outweigh the important public interest of effective mental health care. *Id.* at 11–12 (1996); *United States v. Ghane*, 673 F.3d 771, 786 (8th Cir. 2012). However, within the dicta in *Jaffee*, the Court stated that there are certain instances that cannot be foreseen that may require some type of disclosure by a therapist.[1]

The duty to warn, which has been established in numerous jurisdictions, imposes an obligation on mental health professionals to disclose certain confidential communications to law enforcement and potential victims if, in their opinion, a patient has the capacity to seriously harm themselves or someone else. *Tarasoff v. Regents of University of California*, 551 P.2d 334, 444 (1976). The duty to warn was established in *Tarasoff* after university psychologists were made aware of threats to a student's life and failed to alert authorities, resulting in the death of the student. *Id*. at 431. The California Supreme Court established that if a mental health professional determines during treatment that a patient poses a serious threat to an intended victim, then that professional must take reasonable steps to protect the victim. *Id.* (1976).

However, this Court has not addressed whether a psychotherapist's disclosure of confidential patient communications to law enforcement to protect a potential victim eliminates the psychotherapist-patient testimonial privilege, thus allowing those communications to be presented at the patient's criminal proceedings. *Jaffee*, 518 U.S. at 18. A few state and federal jursidictions have interpreted the above footnote in *Jaffee* as establishing a "dangerous patient" exception to the testimonial privilege of a therapist and patient when an initial disclosure of the statements was already made of the harmful threats to a potential victim. *People v. Kailey*, 333 P.3d 89, 94 (Colo. 2014); *United States v. Glass*, 133 F. 3d 1356, 1359 (10th Cir. 1998).

[1] *Jaffee*, 518 at n.19 "Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."

However, this exception has not been established in the majority state law or the federal circuits. *Ghane*, 673 F.3d at 778; *United States v. Chase*, 340 F.3d 978, 982 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578, 581 (6th Cir. 2000).

The disclosure of a patient's statements for the purpose of alerting law enforcement to a potential danger versus compelling a psychotherapist to testify to those statements at the patient's criminal proceedings are separate and distinct. *Chase*, 340 F.3d at 982. Further, even if a "dangerous patient" exception is established by this Court, the testimony of Dr. Pollak would not be admissible because her testimony would not meet the "dangerous patient" standard set forth by the Tenth Circuit. *Glass*, 133 F.3d at 1359 (holding that a dangerous-patient exception exists when the threat of harm can only be averted by disclosure). Therefore, the testimony of Dr. Pollak regarding Ms. Gold's statements on May 25, 2017 was a violation of Federal Rules of Evidence 501.

**A. This Court should not establish a testimonial "dangerous patient" exception to Federal Rules of Evidence 501 because the duty to warn is separate and distinct from the testimonial privilege established in *Jaffe,* and the probative value of a patient-defendant's statements alone does not outweigh the public interest of effective psychotherapy treatment in the United States.**

A psychotherapist's duty to warn a potential victim is separate and distinct from evidentiary testimonial privilege because both disclosures are analyzed under different standards. *Chase*, 340 F.3d at 982. Looking to federal and state jurisdictions who have chosen to establish the "dangerous patient" exception, the Tenth Circuit established that testimony from a psychotherapist is admissible when that testimony is the only means of averting harm. *Glass*, 133 F.3d at 1359. In contrast, the duty to warn a potential victim, under *Tarasoff*, only requires a therapist to believe that a threat to an individual is *reasonable* based on their clinical judgment. *Tarasoff*, 551 P.2d at 431 (emphasis added).

Instead of relying on each trial court to conduct a balancing test to compare the public interest of testimonial privilege against the probative value of those statements, this Court determined that in all cases, the public interest of establishing privilege in confidential conversations during a psychotherapy session outweighs evidentiary benefit of allowing these statements at trial. *Jaffee*, 518 U.S. at 12. The public interest of the testimonial privilege is for society as a whole, not just case by case basis. *Id*. at 7; *Ghane*, 673 F.3d at 781. The Ninth Circuit determined if a patient is aware that their statements during psychotherapy treatment may be used against them during criminal proceedings, then the candor of a patient during their psychotherapy treatment is threatened. *Chase*, 340 F.3d at 982. Therefore, the statements that would have provided any evidentiary value would not exist because the patients would likely not disclose them for fear of prosecution. *Id*.

Both federal and state level legislation regarding psychotherapist-patient privilege have chosen to exclude a "dangerous patient" exception to testimonial privilege. *Chase,* 340 F.3d at 983; *see also United States v. Hayes*, 227 F.3d 578, 581 (6th Cir. 2000). Consistent state legislation states whether these communications are of "transcendent public importance" where privilege should reside, by showing there is an important public interest "in light of reason of experience." Fed. R. Evid. 501; *see also Hawkins v. United States*, 358 U.S. 74, 79 (1958); *Trammel*, 445 U.S. at 50. If legislative trends signal when a privilege is present, then they also signal when exceptions to those privileges are present. *Chase*, 340 F.3d at 986.

All fifty states have codified some version of psychotherapist-patient privilege and confidentiality. *Jaffee*, 518 U.S. at 6; *see also Chase*, 340 F.3d at 982. Out of those fifty, some states do provide a duty to warn similar to the State of Boerum, though they range in the limitations of the disclosure. Conn. Gen. Stat. Ann. § 52-146c(c)(3) (West 1991) ("[I]f the

psychologist believes in good faith that there is risk of imminent personal injury to the person or to other individuals or risk of imminent injury to the property of other injuries."); Tenn. Code Ann. § 24-1-207 (c) (West 1998) ("[T]he patient has made an actual threat to physically harm an identifiable victim or victims and the treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act insofar as is necessary to warn or protect any potential victim."). Based on the language in the state laws, the disclosure of a patient's confidential statements is limited to law enforcement only when the therapist believes the patient has the capacity to harm themselves or others, and when disclosing the statements is necessary to protect a potential victim in imminent danger.[2]

To further prove the legislative intent concerning psychotherapist-patient privilege, Congress proposed Evidence Rule 504 to consider codifying the psychotherapist-patient privilege. 504. 56 F.R.D. 183,242 (1972) ("A patient has a privilege refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition . . . ."). Of the exceptions that were listed, Congress failed to note any exception similar to the "dangerous patient" exception established in the Tenth Circuit.[3] The legislature indicated that though it was never codified, it did not signal a legislative disapproval of the development of a psychotherapist-patient privileges. *Jaffee*, 518 U.S. at 14-15 (quoting S. Rep. No. 93-1277, at 13).

[2] *See also* R.I. Gen. Laws Ann. § 5-37.3-4 (Michie 1997); S.C. Code Ann. § 19-11-95(C)(3) (West Supp. 1997); W. Va. Code Ann. § 27-3-1(b)(4) (Michie 1997).

[3] 56 F.R.D. 183, 242 (1972) Exceptions to psychotherapist-patient privilege were limited to (1) proceedings for hospitalizations (2) Examination by Order of Judge, and (3) Condition an Element of Claim or Defense.

The only state that explicitly allows a patient-defendant's statements to be disclosed at trial is California, which greatly differs from other jurisdictions in both testimonial privilege and the disclosure of a patient's confidential statements for the purposes of duty to warn. Cal. Evid. Code § 1024 (West 1995); *People v. Wharton*, 809 P.2d 290, 312–13 (1991). Accordingly, California holds that if statements of this kind are made, then the statements are not confidential or privileged. *Wharton*, 809 P.2d at 312–13; *see also Menendez v. Superior Court*, 809 P.2d 786, 796 (Cal. 1992). When a patient makes a threat of serious harm towards another person, states have nearly uniform codified standards for disclosing a patient's confidential statements to law enforcement, and a defendant's testimonial privilege are distinct. *Chase*, 340 F.3d at 986 ("First, the states' experiences are instructive in themselves . . . especially when they are nearly uniform over a significant period of time.").

There is no question that Dr. Pollak had an obligation to warn law enforcement of Ms. Gold's statements under Boerum law. Boerum Health and Safety Code § 711. She took every necessary step to ensure the safety of Ms. Driscoll by alerting the police of their locations and of the threats. R. at 5. Dr. Pollak even sent the police copies of Ms. Gold's statements, though under *Tarasoff* standard it is not necessary since most *Tarasoff* warnings only require notice. R. at 5. Boerum Health and Safety Code § 711 models itself after the majority of most states' "duty to warn" statutes, not the California standard, thus the State of Boerum has separated the duty to disclose to law enforcement and from compelling testimony of a defendant's statements during psychotherapy. Boerum Health and Safety Code § 711.

This Court should also reject the argument that disclosure for one purpose is the disclosure for all purposes. "A communication can be 'not confidential' under state law, but still 'privileged' under the Federal Rules of Evidence." *Chase*, 340 F.3d at 988. Additionally, the

purposes of disclosure would only change if the public interest in psychotherapist-patient privilege disappears because a patient's communications were disclosed to law enforcement under a duty to warn statute. *United States v. Auster*, 517 F.3d 312, 318 (5th Cir. 2008). However, this is not the case—a privilege is no longer necessary when the public interest disappears after the first disclosure. *Id*. Unless the patient was put on specific notice their statements would be disclosed to a third party at the time of the session, then the public interest of preserving a psychotherapist-patient relationship stands. *Id*.

**B. Even if the Court establishes the "dangerous patient" exception the testimony of Dr. Pollak would not be admissible because there was no outstanding danger that her testimony would have averted.**

A psychotherapists' duty to warn potential victims is separate and distinct from the testimonial privilege under FRE 501 as they are only connected if allowing the testimony would protect a potential victim from serious harm. *Glass*, 133 F.3d at 1359; *Hayes*, 227 F.3d at 583–84. In *United States v. Hayes*, the Sixth Circuit determined that the connection was marginal at best because typically, a duty to warn under state statute or *Tarasoff* serves the more immediate function of protecting a victim than testimony at a criminal proceeding. *Id.* at 584.

If this Court adopts the "dangerous patient" exception, the testimony of a defendant-patient statements during treatment are admissible solely if that testimony at trial is the only way to avert the harm to the person who was threatened in the statements. *Glass*, 133 F.3d at 1358. However, in some instances, the need to protect potential victims from harm may rise above the public interest of protecting psychotherapist-patient communications. *Chase*, 340 F. 3d at 978; *Jaffee*, 518 at n.19.

In *United States v. Glass*, the Tenth Circuit adopted the "dangerous patient" exception after the appellant made threats against the President of the United States, relying on the footnote in *Jaffee*. *Glass,* 133 F.3d at 1357; *see also Jaffee,* 518 at n.19. Accordingly, the Tenth Circuit

stated that psychotherapist/patient communications are not subject to testimonial privilege if the testimony is the *only way* to avert the harm that was threatened during a psychotherapy session. *Glass,* 133 F.3d at 1358 (emphasis added). The jurisdictions which have accepted the "dangerous patient" exception have one factual basis in common: the type of crime that was prosecuted is limited to criminal threats, not the acts themselves. *Id.* at 1359.

Here, Ms. Gold was not charged with a crime in which the threats themselves were the only evidence that could have kept Ms. Driscoll safe, but instead she was charged with 18 USC § 1716. R. at 1. Her charge does not rely solely on her previous statements to Dr. Pollak and thus there was no harm for the Government to avert at the time of Ms. Gold's criminal proceedings. Accordingly, we ask this Court to reverse the lower court's decision and find that the testimony of Dr. Pollak violated Ms. Gold's psychotherapist-patient privilege.

## II. DUE TO THE STRONG PRIVACY INTERESTS AT STAKE AND TO THE INFORMATION AVAILABLE AT THE TIME THE SEARCH WAS CONDUCTED, THE WARRANTLESS REVIEW OF THE FLASH DRIVE CONTAINING THE CONTENTS OF GOLD'S LAPTOP EXCEEDED THE SCOPE OF THE PRIVATE SEARCH DOCTRINE, THEREFORE VIOLATING GOLD'S FOURTH AMENDMENT RIGHTS TO BE FREE FROM AN UNREASONABLE SEARCH AND SEIZURE.

The Fourth Amendment limits "unreasonable searches and seizures" to protect "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The government must have either a warrant or an exception to infringe upon that right. *Id.* But this protection does not apply when a private party conducts the search. *Id.* at 113–15 ("Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character."); *see also Walter v. United States*, 447 U.S. 649 (1980).

However, the government's subsequent search is expressly limited by the scope of the initial private search. *United States v. Lichtenberger*, 786 F.3d 478, 482 (6th Cir. 2015). The goal of this limitation is to balance legitimate government interests and the "degree to which a search intrudes on an individual's privacy." *Id.* at 486. Historically the test of scope has focused on physical "closed containers," but the volume of information contained on digital devices in the present day demands this Court continue to shift to a more narrow definition of "container" based on the "virtual certainty" test articulated in *Jacobsen*. *See Lichtenberger*, 786 F.3d at 488 ("[T]he search of a laptop is far more intrusive than the search of a container because the two objects are not alike . . . given the amount of data a laptop can hold, there was absolutely no virtual certainty" . . . .).

### A. This Court should continue to use its "virtually certain" standard explained in *Jacobsen*, which Circuit Courts also consistently apply in testing the degree in which an officer exceeds the scope of a private search.

The private search doctrine's "closed container" test was based on the principle that a container holds a limited amount of information, therefore balancing the interests of the government with the intrusion into an individual's privacy. *Lichtenberger*, 786 F.3d. at 488. "Opaque containers that conceal their contents from plain view" give an individual a reasonable expectation of privacy. *United States v. Villarreal*, 963 F.2d 770, 773 (5th Cir. 1992). But that privacy is eliminated once a container is opened by a private party. *U.S. v. Runyan*, 275 F.3d 449, 465 (2001). Therefore, to protect a person's privacy, any governmental search of the container's contents must fall within the scope of the initial private search. *Id.* at 464–65.

However, this Court in *Jacobsen* clarified the test for containers by articulating the "virtual certainty" standard, stating that police must be "virtually certain" any expanded follow up search will not uncover anything else of significance. *Jacobsen* 466 U.S. at 119. In *Jacobsen*,

FedEx employees opened a damaged package and found a tube that contained plastic bags of white powder. *Id.* at 111. The employees did not open the bags, but called the DEA; an agent arrived on scene, opened the bags and used field testing to determine the powder was cocaine. *Id.* at 111–12.

Importantly, in *Jacobsen* this Court noted that initial inspections of the package itself showed it contained only one item: a "suspicious looking tape tube" of limited size. *Id.* at 115, 121. ("[S]ince it was apparent that the tube and plastic bags contained contraband and little else, this warrantless seizure was reasonable . . . ."). Yet even with the natural limitations in volume of the physical container and the preceding private search, this Court held the employees' comments to the agent made the agent "virtually certain" of the package's contents and therefore, the agent's reexamination of the package did not violate the Fourth Amendment. *Id.* at 119. ("[T]here was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told."). This Court further explained that employee statements, the circumstances surrounding the search, and the agent's expertise combined to qualify the field testing of the white powder as reasonable. *Id.*

This is in direct contrast to the facts of this case, where Officer Yap admitted knowledge that Ms. Wildaughter copied Ms. Gold's entire desktop contents onto the flash drive, yet she had only viewed a limited number of files. R. at 6. Upon receiving Ms. Wildaughter's flash drive, Officer Yap never asked the specific location of the files she had reviewed or any information about her private search in order to establish the legal boundaries of his subsequent government search. R. at 29. Importantly, as the leader of Livingston Police Department's Digital Forensics Unit for the past eight years, Officer Yap should have known to ask these questions initially, but

certainly would have understood that follow up questioning of Ms. Wildaughter would be required after seeing the number of files on the flash drive and their labels. R. at 34. Officer Yap's expansive and complete search of the flash drive included Ms. Gold's tax documents, financial information, and health insurance information. R. at 6–7. These files were all clearly marked with no indication they were related to anything Ms. Wildaughter told Officer Yap she viewed during her private search. R. at 6–7. Finally, if there was any confusion as to the files available for review after the private search, Officer Yap could have procured a warrant before examining it. Based on conversations with Ms. Wildaughter, the circumstances surrounding the case, and Officer Yap's expertise, he was in no way virtually certain regarding the information he would find by examining the entire contents of the flash drive, therefore he inexcusably violated the scope of the private search and Ms. Gold's rights under the Fourth Amendment.

This conclusion is further supported by the holdings in the lower courts. Despite the presumed circuit split in applying the private search doctrine, the circuit's holdings hinge on the virtual or substantial certainty standard in searches involving containers. In *United States v. Lichtenberger*, the Sixth Circuit decided where the ex-wife had not viewed a computer disk, the police had no "substantial certainty" regarding the contents, and the court found that those searches violated the Fourth Amendment. 786 F.3d at 489.

The Seventh Circuit in *Rann v. Atchison* held officers do not exceed the scope of a private search if they examine a closed container not opened by the private individual, so long as the officer is "already *substantially certain* of what is inside that container based on statements of the private searches, their replication of the private search, and their expertise." *Rann v. Atchison,* 689 F.3d 832, 836–37 (7th Cir. 2012) (holding that police did not exceed the scope of a

private search by viewing additional images on a digital device provided by a private party) (emphasis added).

### B. A "virtual certainty" requirement supports the underlying principle of the private search doctrine articulated by this Court in *Jacobsen* by balancing legitimate government interests with the degree of intrusion on a person's privacy.

"The ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Riley v. California*, 573 U.S. 373, 381–82 (2014) (quoting *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). Reasonableness usually requires a judicial warrant to ensure the decision to conduct a search is "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id*. The private search doctrine does fall within a specific exception to this requirement, but in the absence of a warrant, the courts have stated meeting strict exception criteria is necessary to prevent government "fishing expeditions" through police searches. *Runyan* at 464.

However, Officer Yap's search, which exceeded the scope of Ms. Wildaughter's private search, amounted to nothing more than just that—a fishing expedition. Ms. Wildaughter admitted nothing in the documents she viewed on Ms. Gold's desktop said anything specific about Ms. Gold poisoning or harming Ms. Driscoll. R. at 28. Ms. Wildaughter did see the word strychnine in a folder labeled "Market Stuff," but also admits through further questioning that the apartment she shared with Ms. Gold had a rodent problem. R. at 29. At the time Ms. Wildaughter presented the flash drive to Officer Yap his department had no information regarding any potential outside threat to Ms. Driscoll, only the unsubstantiated conjectures of her roommate. R. at 26. Officer Yap had no knowledge of a timely concern for a legitimate government interest when he expanded his search beyond the bounds of the private search, yet his search did implicate strong privacy interests of Ms. Gold.

The courts have recognized that as the volume of information able to be transported on small digital "containers" grows, so does the list of privacy concerns. In *Lichtenberger* the court acknowledged digital folders could contain explicit photos and private images, bank statements, and personal communications that are not related to the crime being investigated. 786 F.3d at 489 ("The reality of modern data storage is that the possibilities are expansive."). That concern is reality in the present case where Officer Yap ultimately viewed files containing Ms. Gold's tax and medical data—personal information that had nothing to do with his investigation. R. at 6–7.

The lower court errs in its comparison of the present case to *Riley*, distinguishing it upon the fact that this case involves a flash drive that was not connected to the internet. R. at 54. But the decision in *Riley* hinges on the vast amount of storage space and information contained in the modern digital devices, not its internet connectivity. *Riley*, 573 U.S. at 393. ("One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy."). The Court continues by explaining how that storage capacity "has several interrelated consequences for privacy," many of which are completely analogous to the flash drive in the present case and support the argument that relying solely on a measurement of a physical container is not sufficient in the digital context.

> First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a

> record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

*Id.* This trifecta of (I) many kinds of data, (II) in vast amounts, and (III) corresponding to a long swath of time, "convinced the *Riley* Court that officers must obtain a warrant before searching such a device incident to arrest." *Lichtenberger*, 786 F.3d at 487–88. These three criteria are the exact concerns shown in this case and, as the Court held in *Riley*, the officers should have obtained a warrant before searching the device. Therefore, Officer Yap inexcusably exceeded Ms. Wildaughter's private search, violating the Fourth Amendment.

### C. Police exceeded the bounds of the private search because the flash drive in question does not qualify as a container created by Ms. Gold with an expectation of privacy; the flash drive is an aggregation of smaller containers collected by a private individual.

In *Runyan*, the Fifth Circuit emphasized the need for police officers to have substantial certainty regarding what their follow up search would find in regards to the private search doctrine, but the court also discussed the collection of containers in question. 275 F.3d at 464 In that case, after finding computer disks, the defendant's ex-wife opened some of them and found child pornography. *Id.* at 453. Then, she gathered those disks and all the nearby disks to turn over to police. *Id.* at 464. Analogizing the various disks to opened and unopened containers, the court found that "the police exceed the scope of a prior private search when they examine a closed container [disk] that was not opened by the private searchers." *Id.* Where the ex-wife had not viewed a disk, the police had no "substantial certainty" regarding their contents, and the court found that those searches violated the Fourth Amendment.[4]

[4] *Id.* The court there stated the holding "is sensible because it preserves the competing objectives underlying the Fourth Amendment's protections against warrantless police searches." The court added that a container unopened during the private search still preserves the defendant's expectation of privacy "unless the contents of the container [have] already been frustrated because the contents were rendered obvious by the private search." *Id.* at 463–64.

This aligns directly with the facts in the present case: Ms. Wildaughter opened some of Ms. Gold's files (containers) and, seeing information she thought could be suspicious, Ms. Wildaughter gathered other unopened files (containers) which happened to be in close proximity and placed them on *her* flash drive as a means to transport the files to the police. R. at 26. The contents of the flash drive were literally an aggregation of containers Ms. Wildaughter collected—some of which she had opened, some of which she had not opened, much like the ex-wife in *Runyan*. R. at 27. Therefore, Ms. Wildaughter's flash drive, which *she* used to collect Ms. Gold's files, cannot be seen as a container Ms. Gold relied on with an expectation of privacy; Ms. Gold's expectation would be in the files (containers) she created on her computer that contained the information she collected. R. at 29.

While the Seventh Circuit in *Rann* did allow a camera memory card and a zip drive submitted as evidence for child pornography, the courts holding turned not on the containers themselves, but on the investigator's "substantial certainty" of what was on the devices. *Rann* at 838 ("Because [the private individuals] knew the contents of the digital media devices when they delivered them to the police, the police were "substantially certain" the devices contained child pornography.").

This further points to how the majority opinion of the 14th Circuit Court of Appeals erred in its assessment of the facts of the present case stating, "By accessing a flash drive rather than a phone screen or actual desktop, Officer Yap was limited to a small, defined, handpicked pool of offline documents." R. at 54. The information included on the flash drive was not small, handpicked or in any way curated. R. at 26. Ms. Wildaughter dumped all the contents because she did not know what other information was on the computer for the very reason that she had not looked at the files. R. at 26 . This in itself proves the violation of the private search

doctrine—(I) the government official did not have virtual certainty regarding what was on the flash drive because (II) the individual who did the private search had not looked at the contents. Unlike with physical tubes or containers, the volume of information in digital devices cannot be accurately deducted from a cursory glance—the physical measurement of the container is not sufficient to protect individual privacy.

This further emphasizes that even if the Court were to claim the entire flash drive was one "container" for purposes of the private search doctrine, the lack of "virtual certainty" as to the entire contents of the flash drive still impermissibly exceeds the scope of the private search and therefore violates Ms. Gold's Fourth Amendment rights.

## III. THOUGH INADMISSIBLE, EVIDENCE MAY STILL BE MATERIAL FOR THE PURPOSES OF *BRADY* IF IT COULD HAVE LED TO ADMISSIBLE EVIDENCE OR WOULD HAVE CREATED A "REASONABLE PROBABILITY" THE RESULT OF TRIAL WOULD HAVE BEEN DIFFERENT; THUS, THE GOVERNMENT ERRED IN FINDING NO *BRADY* VIOLATION.

The purpose of the *Brady* rule is not only to protect defendants' rights, but also to ensure fairness among our criminal justice system. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In preserving a fair judicial system, the Supreme Court has encompassed the principal that prosecutors must seek justice by overturning all exculpatory evidence. *Id.*

To establish a *Brady* violation, the defendant must prove three factors: (I) the prosecution suppressed evidence; (II) the evidence was favorable to the defense; and (III) the evidence was material. *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). Here, there is no issue as to whether the prosecution suppressed evidence as the government was in possession of statements provided to the FBI that identified other potential suspects prior to trial, but did not even mention their existence to the defense. R. at 11–12, 44, 48. Additionally, there is no question whether the evidence was favorable to the defense, as it identified two other potential

suspects in the murder of Driscoll other than the defendant. R. at 11–12, 44, 48. However, the state contests whether the evidence was or was not material solely because it would have been inadmissible at trial. R. at 43–49.

While the circuits split on whether withheld inadmissible evidence can constitute material *Brady* evidence*,* this Court should adopt the First, Second, Third, Sixth, and Eleventh Circuits' view in finding that inadmissible evidence may still be material if it could lead to other admissible evidence, thus forming a *Brady* violation. *Dennis v. Sec'y, Pennsylvania Dep't of Corr*., 834 F.3d 263, 310 (3d Cir. 2016) (stating "Most federal courts have concluded that suppressed evidence may be material for *Brady* purposes even where it is not admissible."); *see also United States v. Morales*, 746 F.3d 310, 314 (7th Cir. 2014).

Moreover, even if this Court does not find that the inadmissible evidence is material when it may lead to additional admissible evidence, it should find that evidence is still material if there is a reasonable probability that had the evidence been disclosed, the trial result would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995). By upholding this majority held precedent that inadmissible evidence may still be material, this Court will not only maintain the integrity of the *Brady* rule, but also preserve the judicial system's duty of fairness and justice to defendants. *Id*. For these reasons, this Court should reverse the lower court's decision and find that there was a *Brady* violation.

### A. The Withheld Inadmissible Evidence May Have Led to Other Admissible Evidence, And Thus, It Is Material.

The underlying policy of *Brady* provides no justification for withholding promising leads to exculpatory evidence, even if the leads themselves are inadmissible. *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003). Following this, the majority of federal courts have ruled that for the purposes of *Brady* suppressed evidence may be material even when it is not admissible. *Dennis,*

834 F.3d at 310; *see also Morales*, 746 F.3d at 314 (finding the First, Second, Third, Sixth, and Eleventh Circuits' view *Brady* more broadly and hold inadmissible evidence may still be material if it could have led to the discovery of admissible evidence.).

Courts on both sides of this circuit split look for support in this Court's opinion in *Wood v. Bartholomew*. *See Morales*, 746 F.3d at 315 (citing *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995)). The majority circuits have interpreted *Wood* to "implicitly assume" that a *Brady* claim could be based on inadmissible evidence, when that evidence may have led to discovery of other admissible evidence. *Morales*, 746 F.3d at 315 (conceding the Court's "methodology in *Wood* to be more consistent with the majority view in the courts of appeals than with a rule that restricts *Brady* to formally admissible evidence."). In *Wood*, this Court analyzed whether the withheld information "might have led [defendant's] counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized." *Wood*, 516 U.S. at 7. This Court concluded that under the specific circumstances of *Wood* the answer to this question was no, noting two significant reasons for their decision: I) the appellate court failed to stipulate how the defense counsel would have prepared differently or what potential evidence may have been found had the withheld evidence been turned over; and II) the defendant's counsel acknowledged the scope of their cross-examination of the implicated witness would not have been affected even with this additional evidence because it was consistent with the respondent's preestablished defense. *Id.* at 8.

In contrast to *Wood*, when analyzing whether the evidence in the case at hand could have led to the discovery of other admissible evidence, this Court should recognize the appellate court admitted that the Caplow interview provides the name of a potential suspect and their clear motive—which, though inadmissible hearsay, still qualifies as exculpatory evidence. R. at 56.

Even more, the appellate court's dissent correctly identifies what potential evidence may have been found had the withheld evidence been turned over. R. at 59. The court stated with clarity that the Caplow interview and anonymous 911 call, though inadmissible hearsay, would still have led directly to admissible evidence because the disclosure that the victim was largely indebted to another HerbImmunity distributor would have led to another prospective perpetrator—the purest example of the kind of exculpatory evidence protected by *Brady*. R. at 59. Additionally, in contrast to *Wood*, where the new information merely reiterated the respondent's pre-established defense, here the defendant's counsel pleads that this information would have allowed them to conduct their own investigation into these leads. R. at 46. Even more, it may have helped the defense to determine whether or not to raise this as a newly established defense, thus, affecting the scope of the trial. R. at 46. Accordingly, because the facts of the case at hand differ from the circumstances surrounding *Wood*, we respectfully ask this Court to apply the majority circuits interpretation of *Wood* by finding this inadmissible evidence was material as it would clearly lead to other exculpatory admissible evidence.

Additionally, the appellate court erroneously treats the *Brady* rule as if there is a fourth prong of admissibility. R. at 56. However, materiality and admissibility are not mutually exclusive and thus, evidence can be both inadmissible and material at the same time, satisfying the *Brady* requirements. *Dennis*, 834 F.3d at 287 (holding this Court has never added a fourth prong of "admissibility," but instead has explicitly rejected alterations of the traditional three-prong *Brady* test.). By viewing admissibility and materiality as completely separate prongs, the lower court fails to properly conduct an accurate analysis of materiality. *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013). While the lower court was correct that admissibility is a

*consideration* pertinent to *Brady's* materiality prong, their application of it inaccurately reduces *Brady's* materiality standard to "a simple determination of admissibility." *Id*.

Here, the lower court incorrectly rejects that there was a *Brady* violation based solely on the fact that the suppressed evidence was inadmissible hearsay that could be used neither as direct evidence nor to impeach any of the witnesses, blatantly diminishing the materiality standard to a question of admissibility. R. at 56. In doing this, the lower court failed to acknowledge how this evidence could have led to other admissible evidence that may be sufficient to establish a "reasonable probability" of the trial going differently—such as creating a new defense based on new potential suspect with a motive for the murder. R. at 56. Accordingly, we ask this Court to reverse the lower court's decision and find that there was a *Brady* violation because the inadmissible evidence was still material.

### B. There Is A "Reasonable Probability" That Had the Withheld Evidence Been Disclosed, The Result At Trial Would Have Been Different, And Thus It Was Material.

Even if this Court does not find that the evidence is material when it leads to other admissible evidence, the Court should recognize that evidence is still considered material under *Brady* "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. To determine whether evidence withheld by the government satisfies the materiality prong of *Brady*, the question is not whether the defendant would have received a different verdict with the suppressed evidence, but instead whether in its absence the defendant received a "fair trial" with a verdict worthy of confidence. *Kyles*, 514 U.S. at 434; *United States. v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)) ("Nondisclosure is material if it is sufficient to 'undermine confidence in the outcome' of trial."). It follows, when a "reasonable probability"

of a different result exists then evidentiary suppression undercuts the confidence in an outcome of trial. *Kyles*, 514 U.S. at 434. To demonstrate such a *Brady* violation, one must show the favorable evidence could reasonably be taken in a way that puts the entire case in "such a different light as to undermine confidence in verdict." *Kyles*, 514 U.S. at 435; *see also Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). Thus, to prove materiality one is not required to demonstrate by a preponderance that had the suppressed evidence been disclosed it would have ultimately resulted in the defendant's acquittal, but rather there was a "reasonable probability" of a different trial. *Kyles*, 514 U.S. at 419; *see also Bradley*, 212 F.3d at 567 (finding "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.").

In *Kyles*, this Court found in a first-degree murder case that inadmissible evidence was material, and thus the basis of a *Brady* violation, because there was a "reasonable probability" that had the evidence been disclosed, the result of the proceeding would have been different. *Kyles*, 514 U.S. at 420. There, this Court held that a review of the suppressed statements of witnesses would not only have resulted in a notably weaker case for the prosecution and a notably stronger one for the defense, but it would have substantially contaminated some of the State's best evidence. *Id*. Additionally, this Court noted that disclosure of such inadmissible statements made to the police would have raised opportunities for the defense to attack the good faith and care of the investigation while also allowing the defense to question the value of certain physical evidence that became curtail to the trial. *Id.* Even more, this Court admits that though the evidence would not have completely undercut the State's case had it been disclosed, it would have affected the remaining physical evidence and hardly amounted to overwhelming proof that the defendant was the murderer. *Id*. Finally, this Court concluded that though the evidence did

not prove the defendant's innocence and the jury may have still found sufficient evidence to convict the defendant, there was a "reasonable possibility" that the proceedings would *not* have been the same with the suppressed evidence, thus, undermining the jury's confidence in the verdict. *Id*.

The similarities between the present case and *Kyles* are substantial. First, had the suppressed evidence in this case been disclosed, there would have been a "reasonable probability" that the result of the trial would have been different. Also, like *Kyles*, had the Caplow interview and anonymous 911 call been disclosed, there potentially would have been two additional suspects which would have resulted in a markedly weaker case for the prosecution and a significantly stronger case for the defense. R. at 59. Additionally, the interview and anonymous call to the FBI would have, at the very least, allowed the defense to question the thoroughness and good faith of the FBI's investigation, as well as conduct their own investigation that may have led to more exculpatory evidence. R. at 56, 59. Further, while the FBI reports might not completely ruin the prosecution's case, it would have given the jury two additional potential perpetrators and affected the remaining physical evidence as such evidence was already less than compelling. R. at 56, 59. Finally, even if this evidence did not prove the defendant's innocence and there was sufficient evidence for conviction, this newly disclosed evidence would have created a "reasonable probability" that a different trial would have occurred, thus undermining the jury's confidence in the verdict.

Further, the lower court failed to consider the cumulative effect of the favorable and suppressed evidence. The third circuit has found that all items of evidence, even those the court may not consider material on their own, must still be contemplated as part of a cumulative materiality analysis. *Johnson*, 705 F.3d at 130–33 (citing *Simmons v. Beard,* 590 F.3d 223, 237

(3d Cir.2009); *Smith v. Sec'y, Dep't of Corr.,* 572 F.3d 1327, 1346 (11th Cir. 2009) (finding "Cumulative analysis of the force and effect of the undisclosed pieces of favorable evidence matters because the sum of the parts almost invariably will be greater than any individual part."). It is imperative for this Court to look at the cumulative effect of the inadmissible evidence and weigh it against its ability to undermine confidence in the verdict. *Simmons,* 590 F. 3d at 237 (finding that overall, the defendant's trial would have looked significantly different had the *Brady* violations not occurred—such as the state's witness would have been less credible and the evidence implicating the defendant would have potentially been undermined—and that cumulatively, the *Brady* violations that were suppressed left the court without confidence in the conviction.)

While the appellate court argued that this information on its own was merely speculative, it does not seem that they performed a cumulative materiality analysis weighing this inadmissible evidence's effect against the whole of the case. R. at 47, 56. Like *Simmons,* the defendant's trial in our case would have looked vastly different had the inadmissible evidence been disclosed. Had the FBI reports been handed over, the defendant would have had a chance to incorporate the potential suspects into her defense and undergo her own investigation, creating a reasonable probability the proceedings would have been different. R. at 59. Had this evidence been analyzed cumulatively, it is clear it would have left the jury without confidence in the conviction. Accordingly, we ask this Court to reverse the lower court's decision and find that there was a *Brady* violation because the inadmissible evidence was still material.

## CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court reverse and remand the judgment of the United States Court of Appeals for the Fourteenth Circuit consistent with the findings of this Court.

Respectfully Submitted,

Team 32
*Counsel for Petitioner*

Dated: Februrary 16, 2021

**APPENDIX:**

## RELEVANT STATUTORY PROVISIONS

## 18 U.S.C. § 1716 - INJURIOUS ARTICLES AS NONMAILABLE

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

(3) Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life.

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

1. Communications between a patient and a mental health professional are confidential except where:
    - The patient has made an actual threat to physically harm either themselves or an identifiable victim(s); and
    - The mental health professional makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat.
2. Under such circumstances, mental health professionals must make a reasonable effort to communicate, in a timely manner, the threat to the victim and notify the law enforcement agency closest to the patient's or victim's residence and supply a requesting law enforcement agency with any information concerning the threat.
3. This section imposes a mandatory duty to report on mental health professionals while protecting mental health professionals who discharge the duty in good faith from both civil and criminal liability.

## FEDERAL RULE OF EVIDENCE 501

The common law – as interpreted by United States courts in light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:

- The United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.