No. 2020—2388

IN THE

Supreme Court of the United States

OCTOBER TERM 2021

SAMANTHA GOLD,

***Petitioner*,**

— against —

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Team 33

Attorneys for Petitioner

QUESTIONS PRESENTED

I. The psychotherapist-patient privilege in the Federal Rules of Evidence protects practitioners' notes from compelled discovery. Samantha Gold made statements to her therapist that were disclosed to police under the state statutory duty to warn to ensure Gold's and her friend's imminent safety. After their imminent safety has been assured, does a dangerous patient exception to the psychotherapist-patient privilege still exist at trial?

II. Law enforcement officers violate the Fourth Amendment if they conduct a search exceeding the scope of prior privacy intrusions by private citizens. After reviewing a few files on the defendant's computer, the defendant's roommate brought a copy of the defendant's entire computer desktop to the police. Is the Fourth Amendment violated when law enforcement subsequently searches all digital files the roommate had not viewed?

III. Prosecutors violate the Due Process Clause of the Fourteenth Amendment when they withhold evidence favorable to the defendant which would likely undermine confidence in the outcome of a trial. Prosecutors suppressed evidence of additional suspects of which the defendant was unaware and could have used to develop exculpatory evidence. Is a *Brady* claim foreclosed simply because the evidence would not have itself been admissible?

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The decision of the U.S. District Court for the Eastern District of Boerum was entered on February 1, 2018. The opinion has not been officially reported. The motion to suppress was denied on January 9, 2018. The decision of the U.S. Court of Appeals, Fourteenth Circuit, was entered on February 24, 2020. The opinions are unreported, though they are set out at pages 50-59 of the Transcript of Records.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and Boerum state statutes are relevant and set forth in the Appendices: U.S. Const. amend. IV; 18 U.S.C. § 1716(j)(2-3); Boerum Health & Safety Code § 711.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The Therapist's Report. Ms. Samantha Gold is a resident of Boerum, studying at Joralemon University. R. at 5. Ms. Gold was friends with Tiffany Driscoll, a fellow student at Joralemon and vendor of HerbImmunity Products. R. at 5—6. Ms. Driscoll recruited Ms. Gold to sell HerbImunnity Products, but Ms. Gold quickly accumulated debt in her venture. R. at 4, 10. Ms. Gold, who had been diagnosed with Intermittent Explosive Disorder, explained her frustrations with the debt and potential misrepresentations by Ms. Driscoll during her counseling appointments. R. at 4. On May 25, 2017, Ms. Gold was especially frustrated with Ms. Driscoll, to the point of having an outburst at her appointment and threatening to "take care of" her and her business. R. at 4. In compliance with the Boerum Health and Safety Code § 711, her therapist relayed Ms. Gold's remarks to the police, who spoke to both Gold and Driscoll. R. at 5. The police determined that Ms. Gold was no longer a threat to herself or others, and Ms. Driscoll was unconcerned by any threats of violence to her. R. at 5.

The Private Search. Contrary to the police's assessment, Ms. Gold's roommate described Gold as being upset about Ms. Driscoll and the debt to HerbImmunity on the afternoon of May 25. R. at 6. Once Ms. Gold departed their suite that afternoon, the roommate entered Gold's room uninvited and began browsing through Gold's laptop computer. R. at 6. The roommate saw three digital items of note: a series of photos of Ms. Driscoll taken from a distance, a note to accompany a gift to Ms. Driscoll, and a login for an online marketplace. R. at 6. She then copied the entirety of the desktop files to a flash drive and brought them to the police. R. at 6. At the police station, the roommate relayed her story and gave the files to Officer Yap. R. at 6. She explained to Officer Yap which files she had seen, and they looked through those files together.

R. at 6. Once the roommate left, Officer Yap combed every other file on the desktop, including those beyond what the roommate had seen. R. at 6. Officer Yap clicked through Ms. Gold's personal photos, health insurance card, weekly budget, and schoolwork, including a file called "Exam4." R. at 6. Among the files, he found a recipe for chocolate covered strawberries, as well as research on a to-do list about strychnine rat poison. R. at 6. Only at that point was Officer Yap able to reasonably articulate a suspicion that Ms. Gold planned to poison Ms. Driscoll. R. at 6.

The Suspect Tips. Tragically, Ms. Driscoll was found dead at her father's townhome in Livingston on the night of May 25, 2017. R. at 13. The initial suspected cause of death was blunt force trauma to the head, though later toxicology reports showed traces of the poison strychnine in her system at the time of death. R. at 13—14. No forensic evidence was found at the house except for an empty box containing the note from Ms. Gold. R. at 13—14. Police received two additional tips, including a tip from a fellow student that Ms. Driscoll owed money to a potentially violent HerbImmunity distributor named Martin Brodie, and an anonymous tip alleging the murder was committed by Belinda Stevens. R. at 11—12. The FBI did not pursue these tips beyond a preliminary investigation. R. at 11—12. The government failed to disclose these tips to Ms. Gold during discovery. R. at 43.

II. NATURE OF THE PROCEEDINGS

The District Court. Ms. Gold was charged with the murder of Ms. Driscoll with delivery of an item with intent to kill or injure under 18 U.S.C. § 1716(j)(2-3). R. at 1. Ms. Gold moved to suppress both her therapist's testimony regarding the contents of her sessions at trial and the fruits of the police search of her laptop beyond the roommate's search, but the motion was denied on January 9, 2018. R. at 40. A jury convicted her of the charges on February 1, 2018. R.

at 51. Ms. Gold moved for a directed verdict or new trial on the basis of two *Brady* violations regarding the two undisclosed tips. R. at 43.

The Court of Appeals. The U.S. Court of Appeals for the Fourteenth Circuit affirmed the conviction on February 24, 2020. R. at 50. In that decision, the Fourteenth Circuit adopted a "dangerous patient exception" to the doctor-patient privilege, a "broad" application of the private search doctrine to digital devices, and a position that inadmissible evidence can never comprise a *Brady* violation even if it would have led to other admissible evidence. R. at 51—57.

This court granted certiorari on November 16, 2020. R. at 60.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit improperly upheld the district court's decision. The district court erred in allowing a therapist to testify under the dangerous patient exception. The district court improperly denied a motion to suppress digital evidence. Additionally, the district court erred in not recognizing the government's *Brady* violations. The Court should reverse the lower court's decision and grant the appellant a new trial.

I.

This Court should refuse to apply a "dangerous patient" exception to the psychotherapist-patient privilege granted by the Federal Rules of Evidence. The privacy interest of the patient far outweighs any evidentiary need for therapist testimony in this case. There is no imminent threat that places a duty on the therapist to testify in this manner. In cases where a "dangerous patient" exception has been applied, the facts of the case have been much different than the case at hand, where applying the exception would be inappropriate.

II.

Documents collected by law enforcement were also beyond the scope of an allowable private search, posing grave Fourth Amendment concerns for the appellant. The documents that prosecution used as its evidentiary foundation were collected by Ms. Gold's roommate off of her laptop. Many of the documents were not searched by the roommate before they were transferred to law enforcement. In the case of electronic documents, individuals still retain a reasonable privacy interest in unsearched documents. Due to the vast amounts of personal data stored within laptops, additional Fourth Amendment protections should be allowed for these digital documents. Since officers should be limited to the documents that were previously searched by

the roommate, any additional document collection by the officer was beyond the scope of a permissible search under the Fourth Amendment.

III.

The Court should also recognize *Brady* violations where the prosecution withheld material evidence from the defense at trial even if the evidence would have likely been inadmissible. A majority of circuits have found that inadmissibility of evidence does not preclude a *Brady* violation. Withholding evidence in this manner also undermines the due process policy priorities of recognizing *Brady* violations. The inadmissible evidence can lead to other admissible evidence and allowing the prosecution to withhold material documents poses both due process and fairness issues.

ARGUMENT

Prior to trial, the district court denied Ms. Gold's motion to suppress as a matter of law, "adopting" stances on the dangerous patient exception to doctor-patient privilege and private search doctrine. R. at 40—41. Because this Court reviews the district's court finding on the motion to suppress as a matter of law, the standard of review is *de novo*. *United States v. Holly*, 983 F.3d 361, 363 (8th Cir. 2020); *United States v. Gonzalez Flores*, 811 Fed. App'x 427, 427 (9th Cir. 2020). The district court also denied the defendant's motion for post-conviction relief because of a *Brady* violation. R. at 48—49. Claims that the prosecution violated *Brady*, including determinations of the evidence's materiality, are reviewed *de novo*. *United States v. Williams*, 576 F.3d 1149, 1163 (10th Cir. 2009).

I. A DEFENDANT'S THERAPIST'S TESTIMONY REMAINS PRIVILEGED EVEN IF THE SUBJECT MATTER IS DISCLOSED TO POLICE UNDER A DUTY TO WARN.

This case strikes at the heart of the doctor-patient relationship that undergirds the nation's healthcare system. State statute outlines the boundaries of a psychotherapist's duty to report patient's threats to harm themselves or others, but circuits are split on how those disclosures to police impact the provider's later testimony. Patients' privacy interests form the bedrock of psychotherapy. Though confidential information could possess evidentiary value, the "dangerous patient exception" should remain limited in trial proceedings because of the privacy interests of patients and the principles underlying sound medical practice.

A. Privacy Interests of Therapy Patients and Societal Interests in Proper Healthcare Supersede Evidentiary Value that Therapy Notes Offer at Trial.

The established policy of this Court dictates that the individual and societal benefits from successful psychotherapy outweigh the evidentiary value of psychotherapist's notes. In *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996), this Court held that "confidential communications between a

licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501." The mere possibility of a therapist disclosing what a patient tells them would impede the progress of mental health treatment. *Id.* at 10. Society benefits greatly from citizens receiving effective mental care, a goal of "transcendent importance." *Id.* at 11. If patients feel their conversations are no longer private and confidential, individuals will be less likely to seek out treatment, leading to a larger mental health crisis across the country.

This privilege between individuals and their therapists takes higher priority than the evidentiary value the therapist's notes offer a finder of fact. While the Federal Rules of Evidence generally do strive to admit all relevant evidence to ascertain the truth and secure a just determination, numerous exceptions exist in the U.S. Constitution, federal statute, and other rules. Fed. R. Evid. 102, 402. Creating a rule permitted by Fed. R. Evid. 501, *Jaffee* establishes the policy of this Court that the societal benefit of effective healthcare with guarantees of confidentiality supersedes the value that information could provide a finder of fact.

Like in *Jaffee*, Ms. Gold made statements to her therapist in confidence, even though they could be dispositive of her motive and intent on May 25, 2017. Ms. Gold made a statement during an emotional outburst, a symptom she was attempting to remedy with counseling. R. at 3—4. To permit the testimony of therapists in federal court would have a significant chilling effect on individuals seeking mental health treatment, especially among those most likely to seek treatment for emotional outbursts.

B. A Statutory "Duty to Warn" Differs from an Evidentiary "Dangerous Patient Exception" Because of the Temporary Imminent Threat to an Individual.

Though a state may enact a mandatory "duty to warn," the "dangerous patient exception" suggested by several circuits conflates two situations differentiated by the level of imminent

threat to individuals' safety. The State of Boerum imposes a "duty to warn" on therapists who receive threats by their clients to harm themselves or an identifiable other individual. Boerum Health & Safety Code § 711. In light of a technical breach of confidentiality by the therapist speaking to police, the Tenth Circuit established the possibility of statements made in therapy being admissible against the patient at trial. But most circuit courts interpret the therapist-patient privilege as compatible with the duty to warn.

Disclosures made in compliance with a duty to warn do not breach the therapist-patient privilege in a way that opens the therapist's notes to the public. The Sixth Circuit held that there is a "marginal connection, if any at all," between the therapist's disclosure to police for safety and a court's later decision to admit therapist testimony about the threat. *United States v. Hayes*, 227 F.3d 578, 583 (6th Cir. 2000); s*ee also United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012). The goal of public safety underlying duty to warn disclosures is only valid during the immediate time around the threat. *Hayes*, 227 F.3d at 583. Besides recognizing that a dangerous patient exception offers little of evidentiary value, the Ninth Circuit has held explicitly that the safety goal of a duty to warn is distinctly different from evidentiary function. *United States v. Chase*, 340 F.3d 978, 987 (9th Cir. 2003). The Ninth Circuit also raises the practical concern that each state varies significantly in their duty to protect laws, so basing a federal dangerous patient exception on a state's determination of duty to protect would apply differently to defendants in different states. *Id.* at 987-88.

The Tenth Circuit has accepted the dangerous patient exception, holding that a therapist may testify where the threat made to the therapist was serious and its disclosure was the only means of averting the harm. *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998). In *Glass*, the court held that the threats of a patient made during a mental hospital intake towards Bill and

Hillary Clinton could be admitted for trial about said threats. *Id.* at 1357. The court relied on footnote 19 in *Jaffee*, which indicates the existence of factual circumstances where the therapist-patient privilege "must give way," such as where a serious threat of harm to a patient or others can be averted only by means of disclosure by the therapist. *Id.* at 1359 (citing *Jaffe*, 518 U.S. at 18 n.19). The Tenth Circuit interprets the words, "must give way," specifically to mean that the utterance of a threat waives the therapist-patient privilege through trial. The phrase could be interpreted as merely leaving room for states to pass duty to protect statutes as they see fit. But the Tenth Circuit's interpretation requires the court to ensure both the seriousness of the threat and the possible alternative means of aversion independent of whether the therapist contacted law enforcement. Notably, the purported standard to avert potential harm in the *Jaffee* footnote, "averted only by means of disclosure," is higher than that passed by the Boerum legislature, which merely requires that the act is "more likely than not" to occur. Boerum Health & Safety Code § 711(1)(b). This outcome seems antithetical to the purported reasoning that disclosure to police itself breaches the privilege and warrants evidentiary admission.

Though Ms. Gold made a statement to her therapist that invoked the therapist's duty to warn, that statement made in confidence should not be held against her at a trial. The therapist talked to police, the police consulted both Ms. Gold and Ms. Driscoll, and the duty resolved. R. at 5. Once Ms. Gold went to trial, the immediacy of the disclosure had passed. Ms. Gold's threats could have been useful in preventing potential harm to Ms. Driscoll, but they are not necessarily dispositive of whether Ms. Gold followed through on any intention. In *Glass*, the defendant indicated he was going to shoot the president. *Glass*, 133 F.3d at 1357. Ms. Gold's threat, "I'm going to kill her," lacked specificity indicating any sort of preparation or plan. Ms. Gold was seeking treatment for Intermittent Explosive Disorder; she presumably suffered numerous

emotional outbursts that call into question whether any of her threats during treatment could even be taken seriously.

This Court should reject the "dangerous patient" exception to compel testimony of Ms. Gold's therapist. Compelling this type of testimony severely undermines mental health treatment across the country. Protecting these relationships outweighs the need for probative evidence, especially where the imminent threat has passed.

II. ANY DOCUMENTS SEARCHED BY OFFICER YAP THAT WERE NOT SEARCHED BY MS. GOLD'S ROOMMATE ARE INADMISSIBLE BECAUSE THEY WERE BEYOND THE SCOPE OF THE PRIVATE SEARCH.

Though law enforcement may use the private search doctrine to search containers previously searched by a third party, developments in digital data storage require a more nuanced rule to protect individuals' Fourth Amendment privacy interests. For decades, the term "container" sufficiently described the physical barriers that separated individuals' private papers and effects from prying government eyes. However, the rapid advancements in digital storage signal a paradigm shift that renders old words inadequate. A digital folder is not the same as a zip drive, which is not the same as a physical container. An individual whose computer desktop is briefly compromised by another citizen does not lose all right to privacy from the state in other data on that device.

The Fourteenth Circuit erred in adopting the policy that an officer need not know the exact contents of a digital device before searching it, so long as they are "substantially certain" of its contents based on the concerns of the searching third party. Individuals have a reasonable privacy interest in their digital devices, frustrated only to the extent a third party views individual files. Modern devices contain too much personal data for officers to be certain of digital contents unless the third party identifies specific files' contents. Officer Yap violated the Fourth

Amendment by searching Ms. Gold's computer files in a broader search than that conducted by Ms. Gold's roommate.

A. Individuals Possess a Reasonable Privacy Interest in Electronic Documents Unexamined by a Third Party.

The Fourth Amendment protects individuals and their houses, papers, and effects from unreasonable searches and seizures by the government. U.S. Const. amend. IV. The government may not intrude on an individual's privacy where the person has a legitimate expectation of privacy and the expectation is objectively reasonable. *Katz v. United States*, 389 U.S. 347 (1967). The Constitution mandates that searches conducted without the approval of a warrant are per se unreasonable. *Id.* at 357. However, an individual's privacy may be invaded by a third party's private action, which does not violate the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921). The government may search evidence that has been examined by third parties without a warrant, but the government's search may not exceed that of the third party's without a warrant. *Walter v. United States*, 447 U.S. 649, 657 (1980). Officer Yap opened files unviewed by Ms. Gold's roommate, and therefore exceeded the search conducted by the third party. R. at 6. For this reason, the subsequent evidence searched was inadmissible per the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643 (1961). The illegally searched files, in addition to any other evidence found as a result of the violation, were inadmissible. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

Ms. Gold possessed a reasonable expectation of privacy on any electronic files that were not opened by her roommate. Government agents are only permitted to search containers where they have "virtual" or "substantial" certainty of its contents. Electronic devices such as computers and cell phones contain such magnitudes of diverse data that certainty is impossible. Individuals retain their privacy interest in digital files whose contents a third party has not

verified. Though this principle often coincides with independent source exceptions to warrants, the two should not be conflated into a single rule.

Whether the government violates the Fourth Amendment following a private search hinges on whether the government exceeded the scope of the private search. *United States v. Jacobsen*, 466 U.S. 109 (1984). In *Jacobsen*, officers encountered a package leaking white powder that had already been examined by delivery employees. *Id.* at 111. This Court held that "[t]he additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115; *see also Walter v. United States*, 447 U.S. 649 (1980). Law enforcement did not commit a Fourth Amendment violation by searching the box because the privacy interest had already been frustrated by the private search conducted by the delivery employees. *Jacobsen,* 466 U.S. at 126. For law enforcement to expand their search beyond plain view, they must possess "virtual certainty" that nothing else of significance is in the package. *Id.* at 119.

Circuit courts have sought to clarify law enforcement's boundaries when the third party brings several packages to an officer's attention but only searched a small portion of their contents. Most circuits have adopted reasoning that law enforcement is permitted to search other containers when they possess "virtual certainty" of what it contains. The Eighth Circuit has held that where a third party searches one of several, identical towel-wrapped packages carried in a suitcase, law enforcement do not violate the Fourth Amendment by searching the other unopened, identical packages. *United States v. Bowman*, 907 F.2d 63 (8th Cir. 1990). The Tenth Circuit deemed officers committed a Fourth Amendment violation by looking inside a camera lens case found inside a glove when the third party had only looked inside the glove. *United States v. Donnes*, 947 F.2d 1430 (10th Cir. 1991). Even though the glove also contained needles

associated with drug use, the investigating officer still required approval of a warrant to search the smaller container within.

1. A digital desktop deserves additional Fourth Amendment protections due to the width and breadth of personal data stored within.

Digital devices such as cell phones and computers present unique privacy concerns with regard to the quantity of data accessible from a single seized item. *Riley v. California*, 573 U.S. 373 (2014). The immense quantities of data from an expansive period of time justify requiring law enforcement to acquire a warrant before searching a cell phone incident to arrest. *Id.* at 393. Not only are modern devices capable of containing "millions of pages of text, thousands of pictures, or hundreds of videos," but the data within is pervasive across many areas of life. *Id.* at 394. Changing technology means restrictions on government searches also needs to change: "[a]llowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case." *Id.* at 395. Though *Riley* applied to the "search incident to arrest" warrant exception, concerns of law enforcement's ability to overstep their authority also apply to devices searched under the private search doctrine.

Following *Riley*, the Sixth and Eleventh Circuit Courts applied this Court's concerns for data-rich files to the private search doctrine, closely circumscribing officers' permissible search to the digital files examined by the third party. These courts adopted a "narrow" interpretation of digital files in private searches. The Sixth Circuit prohibited law enforcement from searching other digital files on a computer beyond the third party's examination because the device, though known to contain child pornography, could have contained information that was "private, legal, and unrelated to the allegations prompting the search." *United States v. Lichtenberger*, 786 F.3d 478, 489 (6th Cir. 2015). The Eleventh Circuit also held that an officer's search of files unseen

by the third party violates the Fourth Amendment, but afforded law enforcement the independent source doctrine to ameliorate the sharp exclusionary principle espoused in *Jacobsen*. *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015) (overruled on other grounds).

In the years preceding *Riley*, several courts developed a "broad" interpretation of digital private search doctrine before the rapid technological developments to data storage in the 2000s. The Fifth Circuit held that when a defendant's girlfriend and daughter brought floppy disks and CDs of child pornography to the police, the police were permitted to search floppy disks and CDs unopened by the third party when they were "substantially certain" of what is in the container. *United States v. Runyan*, 275 F.3d 449, 463-64 (5th Cir. 2001). The Seventh Circuit adopted an identical rule, explicitly relying on *Runyan*. *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012). However, this rule predates this Court's instruction in *Riley* to grant greater protection to electronic data searched without warrant. Understandably, the devices in Runyan are pre-2000 floppy disks and CDs. Devices two decades later carry more data by orders of magnitude, which contain more personal information, files, photos, and documents.

Ms. Gold's desktop contains the rich types of data about her personal life that warrant additional protection. She stored her personal photos, medical insurance card, and personal financial records there, and she possessed a reasonable expectation of privacy for anything on that device. R. at 6. Though her privacy interest in the files examined by the roommate was frustrated, Ms. Gold maintained her privacy interest in any files outside of the scope of the roommate's search.

2. The independent source exception to the exclusionary rule does not apply to Ms. Gold's desktop files.

Unlike in *Jacobsen* or in the vast canon of digital private search cases, no contraband was uncovered in the files reviewed by Ms. Gold's roommate. Due to the factual circumstances that

give rise to private search issues, most contents that third parties bring to police are prima facie contraband. By nature, an item that warrants contacting the police often suffices as probable cause to secure a warrant under the independent source doctrine. Ms. Gold's case is unique in that the note, shopping list, and marketplace information were not contraband.

Independent source doctrine allows law enforcement to include evidence discovered during an illegal search so long as the officers would have received a warrant based on the information known legally before the intrusion. *Murray v. United States*, 487 U.S. 533 (1987). Together with private search doctrine, independent source exception allows law enforcement to admit evidence found outside of the scope of the third-party search if what the third party uncovered would have justified a warrant. Some circuits explicitly define this reasoning, as in *United States v. Sparks* in the Eleventh Circuit, while other circuits craft overinclusive rules to meld the two doctrines together, such as in the Fifth Circuit's *United States v. Runyan*. Many digital private search cases pertain to possession of child pornography. If a third party shows evidence of a few images to law enforcement, law enforcement has strong probable cause to secure a warrant.

No independent source doctrine applies to Ms. Gold's case that would justify not applying the exclusionary rule to her remaining desktop files. Most other private search cases produce evidence of drug or child pornography charges, which immediately grant reasonable articulable suspicion or probable cause for the rest of the container. In Ms. Gold's case, the few files examined by the roommate did not produce obvious probable cause. The few photos presented were of Ms. Gold's friend, Ms. Driscoll. R. at 6. The online marketplace account could be used merely for increased privacy while conducting legitimate HerbImmunity business. R. at 6. Officer Yap expressed he only reached an articulable suspicion at the end of viewing all the

files. R. at 6. Even if Officer Yap had reasonable suspicion that Ms. Gold might be pursuing a nefarious end, he was required to seek a warrant to access the remaining files, which would have required probable cause.

B. Law Enforcement Exceeded the Permissible Documents Viable for Search Because they Were Not Substantially Certain of What Was in the Other Desktop Folders.

Officer Yap violated the Fourth Amendment by exceeding the scope of the search conducted by Ms. Gold's roommate. Ms. Gold held a substantial privacy interest in the contents of her laptop, and the police were not entitled to categorically probe every document under any interpretation of private search doctrine.

In the circuits that recognize a "narrow" approach to private searches of digital devices, the police would have only been permitted to look at the files explicitly listed by the roommate as being the files she had searched. Just as officers were only permitted to look at the breached box in *Jacobsen*, Officer Yap was only permitted to conduct a search of the same scope as Ms. Gold's roommate. The roommate breached Ms. Gold's privacy by viewing three items: a few specific photos, a note, and access information for an online marketplace. R. at 6. Any other files are inadmissible and must be excluded.

Even under the "broad" interpretation, the police would have only been permitted to open containers that they were "substantially certain" of their contents. Unlike in *Runyan* where officers could substantially know that the floppy disks contained more child pornography, Officer Yap had no such substantial knowledge. Of an entire desktop, the police knew the contents of three items. R. at 6. The police could not have any "substantial certainty" of what the other files or folders contained. Not only did the police conduct a system search of every document on the computer rather than some circumscribed search, but Officer Yap also opened

files titled “Exam4” and “Health Insurance ID Card,” which were entirely irrelevant to criminal activity. R. at 6. The roommate and the police were never “substantially certain” of what was on the desktop, otherwise the roommate would not have brought Ms. Gold’s incredibly sensitive information to the police. The police recorded the roommate’s story in full detail; no party would be confused about the boundaries of the roommate's search. R. at 6. A search beyond those three documents among other unknown, private information required a warrant. Because the scope of Officer Yap’s search exceeded that of the private party, the subsequent fruits of the search are a violation of the Fourth Amendment and inadmissible in court.

III. CONFIDENCE IN THE TRIAL OUTCOME WAS UNDERMINED BY MS. GOLD LACKING THE TWO WITHHELD SUSPECT LEADS BECAUSE FURTHER INVESTIGATION COULD HAVE LED TO ADMISSIBLE EVIDENCE OR PREDICATED A STRONGER TRIAL STRATEGY.

The government’s failure to disclose two additional suspects to Ms. Gold, even if the tips were inadmissible, was a violation of her right to due process under the Fourteenth Amendment of the U.S. Constitution. In *Brady v. Maryland*, the Court held that the government violates the Due Process Clause of the Constitution when it withholds certain evidence from the defense. 373 U.S. 83 (1963). A *Brady* violation contains three elements: (1) the evidence at issue must be favorable to the accused by its exculpatory or impeaching capacity, (2) the evidence was suppressed by the state willfully or inadvertently, and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Prejudice ensues when the alleged *Brady* information would be material to the defense, either for exculpatory or impeachment purposes. *Id.* The materiality inquiry asks whether there is a reasonable probability that, had the alleged *Brady* material been disclosed, the outcome of the trial would have been different. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). This standard does not require the defendant to demonstrate that the withheld information would have resulted in defendant’s acquittal. *Id.* Rather, “[a] ‘reasonable

probability' is a probability sufficient to undermine confidence in the outcome" of the trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Additionally, the materiality inquiry is not a sufficiency of the evidence test, so a defendant need not show that the withheld information would discount the inculpatory evidence enough to change the verdict. *Kyles v. Whitley*, 514 U.S. at 434–35. Rather, a court should consider the suppressed information cumulatively to determine if it casts the whole trial in a different light to undermine confidence. *Id.* at 435–36.

A. Inadmissibility of Alleged Evidence Does Not Preclude a *Brady* Violation.

This Court addressed admissibility of *Brady* information in *Wood v. Bartholomew*, though the holding relied on the prejudice the evidence presented rather than its inadmissibility. 516 U.S. 1 (1995). In *Wood*, the defendant alleged a *Brady* claim that the prosecution withheld the results of a polygraph test of a key witness. *Id.* at 2-3. The Court reasoned that the results were not material, noting that they were inadmissible under state law, but relying on the conclusions that the impeachment of the key witness would have still left an overwhelming case against the defendant. *Id.* at 8. The logical chain connecting disclosure of the polygraph results and actual admissible evidence was too speculative. *Id.* Circuits have generally interpreted the case as allowing for *Brady* violations even when the information is inadmissible. Scholars have argued that *Wood* does not stand for the direct proposition that inadmissible evidence cannot be material for *Brady* purposes, and the behavior of the circuit courts since *Wood* supports that conclusion. *See* Brian D. Ginsberg, *Always Be Disclosing: The Prosecutor's Constitutional Duty to Divulge Inadmissible Evidence*, 110 W. Va. L. Rev. 611, 631 (2008). Here, the prosecution's case is not nearly as strong as that in *Wood*, nor is the connection between the withheld material and exculpatory evidence merely speculative.

An overwhelming majority of circuit courts have agreed that inadmissible evidence can be material for the purposes of a *Brady* violation because the suppressed evidence could lead to admissible evidence. The First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have all expressed this position. *See Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) ("[G]iven the policy underlying *Brady*, we think it plain that evidence itself inadmissible could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it."); *United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. 2012) ("[I]tems may still be material and favorable under *Brady* if not admissible themselves so long as they 'could lead to admissible evidence.'"); *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013) ("[T]he admissibility of the evidence itself is not dispositive for *Brady* purposes."); *Spence v. Johnson*, 80 F.3d 989, 1005 n.14 (5th Cir. 1996) ("The Fifth Circuit has held that inadmissible evidence may be material under *Brady*."); *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011) ("Because this statement is hearsay and therefore inadmissible, Henness must demonstrate that the statement would lead to the discovery of additional, admissible evidence that could have resulted in a different result at trial."); *Gumm v. Mitchell*, 775 F.3d 345, 368–69 (6th Cir. 2014) ("Some of this evidence consists of rumors and double-hearsay statements which would likely have been inadmissible at trial, but much of the evidence could very well have been admitted or clearly led to the discovery of admissible evidence."); *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 466 (6th Cir. 2015) ("Although the Kellys' unrecorded statements might have been inadmissible hearsay, disclosure of the substance of these statements might have led directly to admissible evidence."); *United States v. Morales*, 746 F.3d 310, 315 (7th Cir. 2014) (stating, after recognizing the materiality of inadmissible impeachment evidence, that "it is hard to find a principled basis for distinguishing inadmissible impeachment evidence and other inadmissible

evidence that, if disclosed, would lead to the discovery of evidence reasonably likely to affect a trial's outcome"); *United States v. Ballard*, 885 F.3d 500, 505, 507 (7th Cir. 2018) (holding evidence was material over a dissent that said it was inadmissible); *United States v. Bundy*, 968 F.3d 1019, 1040 n.8 (9th Cir. 2020) ("*Brady* evidence does not necessarily have to be admissible."); *Banks v. Workman*, 692 F.3d 1133, 1142 (10th Cir. 2012) (emphasis added) ("[E]vidence cannot qualify as material without first being admissible or at least 'reasonably likely' *to lead to the discovery of admissible evidence.*"); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000) ("[W]e must find that the evidence in question, although inadmissible, would have led the defense to some admissible material exculpatory evidence.").

On the other hand, the Fourth and Eighth Circuits have asserted that only admissible evidence may be material for purposes of a *Brady* violation. *See Hoke v. Netherland*, 92 F.3d 1350 (4th Cir. 1996); *Madsen v. Dormire*, 137 F.3d 602 (8th Cir. 1998).

In *Hoke*, the Fourth Circuit refused to allow inadmissible evidence as material for a *Brady* claim because of the overwhelming evidence against the defendant, the capacity of the defense to discover the information themselves, and the potential coverage of the state Rape Shield Law. 92 F.3d at 1355-56, n.3. The *Hoke* defendant brought a *Brady* claim alleging statements by rape and murder victim's sexual partners about victim's sexual history were material, but the defendant had confessed three times and left semen evidence at the scene. *Id.* at 1356. Unlike in this case, the court did not need to address the admissibility because the evidence against the defendant was overwhelming and the victim's previous sexual history was irrelevant. *Id.* at 1357. Here, the evidence against defendant is fairly circumstantial, lacking in forensic evidence at the scene and without a confession. While the *Hoke* suppressed evidence at most

would only have indicated sexual consent prior to the murder, the evidence in this case would lead to alternative suspects.

In *Madsen*, defendant brought a *Brady* claim alleging that the prosecution withheld the fact that the forensic chemist who performed serology tests on rape evidence was "unreliable." 137 F.3d at 603–04. At trial, defendant attempted to introduce the supposedly exonerating serology report, but the court prohibited it based on the state's impeachment of the chemist. *Id.* The court held that the chemist's incompetency was not material because the defendant could have sought testing by an independent chemist. *Id.* at 605. Relying on *Wood*, the court also noted that the alleged *Brady* information was inadmissible. *Id.* at 604. In this case, the alleged *Brady* information is new information withheld from the defendant, not information that would have warned the defendant against relying on evidence produced by the state. Defendant in no way relied on law enforcement to identify suspects and subsequently had the rug pulled out from under her.

B. Precluding a *Brady* Claim Solely Because of Inadmissibility Undermines *Brady*'s Policy Goal of Providing a Fair Trial.

The *Brady* holding is based on two interlocking policy priorities rooted in due process that require imposing a duty on prosecutors to share favorable evidence with the defense. First, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." *Brady*, 373 U.S. at 87. Second, "though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done." *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (internal quotations omitted).

Just as the Court refined the *Brady* standard thirteen years after its initial decision to require disclosure of favorable material even absent a request by a defendant, the Court should again make clear that inadmissibility does not, as a matter of law, preclude favorable information

from being *Brady* material. *See Strickler*, 527 U.S. at 280 (citing *Agurs*, 427 U.S. at 107). Requiring a defendant to request information before it can be the basis for a *Brady* claim lends itself to gamesmanship rather than to the goal of a fair trial. As the Court has noted, if a defendant is unaware of *Brady* material, he is unlikely to know that he should ask for it. *See Agurs*, 427 U.S. at 106. Likewise, requiring favorable suppressed evidence to be admissible places too much discretion on the prosecution. The inadmissibility of any piece of information already makes it less likely that it will be material under the Court's standard, but where the inadmissible information is material, the defendant would still be denied a fair trial by the withholding of evidence. In this case, the prosecution unilaterally decided that the withheld FBI reports would not be admissible. Whether or not the reports actually are admissible should be a decision for a judge.

Achieving the goal of a fair trial requires not only classifying inadmissible material that could reasonably lead directly to admissible evidence as *Brady* material, but also inadmissible material that could fundamentally alter a defendant's trial strategy. *See Case v. Hatch*, 731 F.3d 1015 (10th Cir. 2013). *But see England v. Hart*, 970 F.3d 698 (6th Cir. 2020).

In *Case*, the defendant in a rape and murder case claimed a withheld witness statement was *Brady* material, in part, because defendant would not have taken the stand and testified the way he did if he had known about it. 731 F.3d at 1040. Though the court "will consider how *Brady* material might meaningfully alter a defendant's choices before and during trial . . . [including] whether the defendant should testify," the court held the statement immaterial. *Id.* (internal quotations omitted). The court reasoned that the defendant had the opportunity to cross-examine the witness giving substantially the same testimony as was contained in his statement, and the defendant's trial strategy to be altered was perjuring himself by testifying against the

weight of substantial testimony. *Id.* Thus, the court left open the possibility that effect on trial strategy could form materiality for a *Brady* violation if the changed strategy could alter the outcome of the trial, and it is not just an excuse for having violated a preexisting duty to the court. Here, following up on additional third-party suspects presents a valid alternative trial strategy, and considering the circumstantial nature of the inculpatory evidence, could have altered the outcome of the trial.

In *England*, the defendant in a rape and murder case claimed the identification of the sperm found in victim as belonging to victim's boyfriend was *Brady* material because it would have allowed defendant to focus more on a theory that the boyfriend was the killer. 970 F.3d at 717. The court held that the information was not material and stated, "the prejudice inquiry does not extend to assessments of the impact that the suppression may have had on [Defendants'] subsequent trial strategy." *Id.* at 718 (internal quotations omitted). Unlike this case, the purported *Brady* material was presented to the jury. *Id.* at 717. Additionally, earlier revelation of the information could not have been as strategically beneficial because, although only one person can murder a victim, many people can commit sexual acts with a victim. Evidence tending to show the victim's boyfriend had sex with the victim in no way precludes the defendant from having raped the victim. Here, there is no suggestion that multiple people murdered Ms. Driscoll, so any evidence inculpatory of third parties necessarily weakens the case against defendant.

In neither *Case* nor *England* was the defendant denied a fair trial because the alleged *Brady* material was essentially presented to the jury and any benefit received from earlier disclosure would likely not have substantially altered the defense strategy. In this case, tips regarding other possible suspects were never revealed at trial. R. at 43. Knowing such

information would have fundamentally altered the defense strategy by opening up a new theory of third-party guilt and allowing for independent investigation.

C. The Withheld Police Reports are Material Because They Undermine the Confidence in the Trial Outcome by Developing a Theory of Third-party Guilt.

The two suppressed reports in this case are material, despite their inadmissibility, because they present exculpatory evidence in the form of potential third-party guilt. In determining whether a trial outcome was undermined by withheld evidence, circuit courts rely on two determinative methodologies as outlined below. Exculpatory evidence, like that in Ms. Gold's case, factor strongly in both analytic approaches because it develops a theory of third-party guilt.

First, if suppressed evidence undermines one of the main pillars of the government's trial argument, then the subsequent trial verdict is undermined as well. In many cases, the evidence impeached the testimony of an important witness. *See Smith v. Cain*, 565 U.S. 73, 76 (2012) (holding the withheld information material because it could impeach the only evidence connecting defendant to the crime); *Clark v. Warden*, 934 F.3d 483, 492 (6th Cir. 2019) (holding the withheld evidence material because "Jackson's eyewitness identification of a suspect other than Clark squarely contradicts the one piece of evidence linking Clark to this crime"); *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (stating that the prosecution resembled a "house of cards" built on the testimony of a witness the *Brady* material could impeach). Of course, a single witness's impeachment does not undermine an entire case. *Agurs*, 427 U.S. at 112-113. But, the Ninth Circuit has also indicated that certain evidence can be material when the prosecution brings a circumstantial case. *United States v. Bruce*, 984 F.3d 884, 898 (9th Cir. 2021) ("Evidence is sometimes considered material if the government's other evidence at trial is circumstantial, or if defense counsel is able to point out significant gaps in the government's case through cross-examination, or if witnesses provided inconsistent and inaccurate testimony.").

Second, courts weigh the materiality of *Brady* information against the strength of the prosecution's case. *See Turner v. United States*, 137 S. Ct. 1885, 1894 (2017) (reasoning that withheld evidence which would have allowed defendant to advocate a lone attacker theory was not material because "virtually every witness to the crime itself agreed as to a main theme: that Fuller was killed by a large group of perpetrators"); *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014) ("Given the strength of the exculpatory evidence that was suppressed by the State, and the relative weakness of the State's case against Bies, the failure to disclose the evidence unquestionably put the whole case in such a different light as to undermine confidence in the verdict.").

Even stronger than impeachment evidence, the two police reports in Ms. Gold's case develop theories of third-party guilt, a strong factor in dissuading jury members of her involvement. Indications of third-party guilt are "classic *Brady* material." *Juniper v. Zook*, 876 F.3d 551, 570 (4th Cir. 2017); *see also Haskins v. Superintendent Greene SCI*, 755 Fed. App'x 184, 189–90 (3d Cir. 2018) (reasoning that a testimonial letter identifying a third-party as the victim's shooter was material despite prosecution's physical and testimonial evidence); *Bridges v. Sec'y of Penn. Dept. of Corr.*, 706 Fed. App'x 75, 84 (3d Cir. 2017) (holding that suppressed police reports that suggest that "the police repeatedly turned a blind eye to [a third-party's] criminal activity" were material); *Dennis v. Sec'y, Penn. Dept. of Corr.*, 834 F.3d 263, 306 (3d Cir. 2016) (referring to a statement casting suspicion on a third-party stating, "[t]here is no requirement that leads be fruitful to trigger disclosure under *Brady*, and it cannot be that if the Commonwealth fails to pursue a lead, or deems it fruitless, that it is absolved of its responsibility to turn over to defense counsel *Brady* material"). When courts decide indications of third-party suspicion are immaterial, it is typically where third-party guilt is not dispositive of defendant's

guilt, like in a conspiracy charge, or where the withheld information was cumulative. *See United States v. Davis*, 863 F.3d 894, 909 (D.C.C. 2017) ("Even assuming the evidence would have assisted Sherri in showing LaDonna was the "mastermind," it would not detract from the evidence of Sherri's major role in the conspiracy. . . ."); *United States v. Archer*, 59 Fed. App'x 183, 184 (9th Cir. 2003) (reasoning that a report indicating another source of drugs was not material to defendant's drug conspiracy charge because it had no bearing on whether defendant was also a drug source); *Smith v. Wasden*, 747 Fed. App'x 471, 477 (9th Cir. 2018) ("Much of the allegedly suppressed material was cumulative of facts trial counsel already knew."); *United States v. Sessa*, 711 F.3d 316, 321 (2d Cir. 2013) ("As evidence to impeach Ambrosino's credibility, it was cumulative of abundant other evidence.").

The two suppressed reports in Ms. Gold's case establish the foundation of a defense predicated on a third-party perpetrator. Instead of furnishing the reports for Ms. Gold to consider as part of her trial strategy, the government foreclosed that possibility. Given the circumstantial nature of the government's case, suspicion cast on a third-party would be enough to introduce reasonable doubt in the trial outcome. The lack of forensic evidence at the scene of the crime, the presence of the victim's head wound, and Ms. Driscoll's debt to her HerbImunnity distributor all cohere to a reasonable theory of third-party guilt. R. at 11, 13. This is especially true considering the record does not indicate that the Federal Bureau of Investigation completed its investigation into Mr. Brodie. R. at 11. Setting aside the evidence against Ms. Gold that was a product of violated privilege and unconstitutional search, the trial verdict likely would be overturned. The suppressed reports undermine the outcome of the trial, and therefore are material for purposes of a *Brady* violation.

CONCLUSION

This Court should hold that (1) the dangerous patient exception does not apply to the psychotherapist-patient evidentiary privilege at trial, (2) the government violated the Fourth Amendment by conducting an improper search of digital files not identified in a previous private search, and (3) failing to disclose potentially exculpatory information constitutes a *Brady* violation even when the information would be inadmissible. We respectfully ask this Court to reverse the lower court's decision and grant Ms. Gold a new trial.

Respectfully submitted,

/s/Team 33
Team 33

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APPENDIX A

U.S. Const. amend. IV:

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.

APPENDIX B

18 U.S.C. § 1716(j)(2-3) – 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.

APPENDIX C

Boerum Health & Safety Code § 711 – Reporting Requirements for Mental Health Professionals:

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

APPENDIX D

Fed. R. Evid. 102 – Purpose:

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

APPENDIX E

Fed. R. Evid. 402 – General Admissibility of Relevant Evidence:

Relevant evidence is admissible unless any of the following provides otherwise:

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

Irrelevant evidence is not admissible.

APPENDIX F

Fed. R. Evid. 501 – General Admissibility of Relevant Evidence:

The common law — as interpreted by United States courts in the 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.