P

No. 20-2388

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 2021

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

Brooklyn Law School Prince Cup Competition

Attorneys for the Petitioner

ISSUES PRESENTED

I) Whether the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 precludes the admission at trial of confidential communications that occurred during the course of a criminal defendant's psychotherapy treatment, where the defendant threatened serious harm to a third party and the threats were previously disclosed to law enforcement.

II) Whether the Fourth Amendment is violated when the government, relying on a private search, seizes and offers into evidence at trial files discovered on a defendant's computer without first obtaining a warrant and after conducting a broader search than the one conducted by the private party.

II) Whether the requirements of *Brady v. Maryland* are violated when the government fails to disclose potentially exculpatory information solely on the grounds that the information would be inadmissible at trial.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported as *Gold v. U.S.*, No. 19-142 (14th Cir. 2020). The opinion of the United States District Court for the Eastern District of Boerum is reported as *U.S. v. Gold*, 17 CR 651 (FN 2018).

STATEMENT OF FACTS

The questions at issue in this case are whether evidence improperly relied upon in the conviction of a person might be permitted to be used, or evidence that may have drawn into question that defendant's guilt beyond a reasonable doubt might be suppressed, in upholding that conviction. Specifically, this Court is being asked to determine: (1) whether a psychotherapist might be compelled to testify against a patient where it would not contribute to a victim's protection, and only serve as evidence for the punishment of a patient; (2) whether a government agent can search, without a warrant, in greater depth and breadth, a previous private party's search; and (3) whether potentially exculpatory evidence might be suppressed, irrespective of its potential admissibility.

Samantha Gold ("Gold") was a college student at Joralemon University; she had rent to pay, school fees, and credit card debt like countless others. R. at 10. In 2016, she was recruited into a multi-level pyramid scheme, "HerbImmunity," by Tiffany Driscoll ("Driscoll"), a Joralemon student and the daughter of HerbImmunity sales representative and CFO of Big Pyramid Marketing, Richard Driscoll. *Id.* at 13, 18. Though Gold was in debt to HerbImmunity, she was increasingly convinced to invest more and more money into the scheme by Driscoll. *Id.* at 18. Driscoll appeared to be an example of the success Gold could hope for, but when Gold found out that Driscoll's father had been the one funding Driscoll's sales, Gold became angry. *Id.*

Anger was not new to Gold, but she had been successfully seeking medical therapy for dealing with her anger. *Id.* at 17. She saw Dr. Chelsea Pollack ("Pollack") regularly for approximately two years, in hopes that she could help manage her issues with anger. *Id.* A breakthrough occurred between the two when Pollack diagnosed Gold with Intermittent Explosive Disorder ("IED"), or repetitive episodes of impulsive anger. *Id.* After Gold was diagnosed with IED, Pollack was able to effectively treat Samantha through weekly psychotherapy sessions. *Id.* Those therapy sessions frequently involved Gold expressing her frustrations to Pollack, often about being financially trapped in HerbImmunity's pyramid scheme. *Id.* at 18. On May 25, 2017, the day Gold learned about Driscoll's father subsidizing Driscoll's HerbImmunity sales, she sought Pollack out to express her ire; she appeared to Pollack angry, agitated, and disheveled. *Id.* at 3-4, 18. Gold confided in Pollack how angry she was, saying she would "take care of her and her precious HerbImmunity" and separately, that she would kill "her." *Id.* at 4. Though Gold did not mention Driscoll by name in those fraught statements, Pollack did not inquire as to who she meant. *Id.* at 22. Pollack was concerned about Gold's seemingly regressive behaviors, and contacted the Police Department as she believed was required under Boerum Health and Safety Code § 711[1]. *Id.* at 5.

On that same day, Jennifer Wildaughter, Gold's roommate, accessed Gold's computer without her permission. *Id.* at 23-4. Because Wildaughter saw Gold visibly upset after receiving

[1] 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

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.

what she believed to be a HerbImmunity bill, and because Gold continued to express her resentment about being involved in the pyramid scheme, Wildaughter went into Gold's room and searched through various folders and files on Gold's private computer. *Id.* at 24. Wildaughter navigated past particular folders and files to one titled "Tiffany Driscoll." *Id.* In that folder, Wildaughter viewed pictures of Driscoll and her father, a draft letter to Driscoll in which she expressed gratitude towards her, and a text document entitled "Market Stuff." *Id.* Wildaughter became concerned because of a reference to strychnine, a common rodent pesticide, even though they had a rodent problem in their apartment the previous month. *Id.* at 24, 27. Feeling "freaked out," and like it was an invasion of privacy, Wildaughter copied all of the folders—including those she had not opened—from Gold's computer onto a flash drive before providing it to Officer Yap. *Id.* at 27-9.

Once Wildaughter provided the USB flash drive to Officer Yap, Wildaughter, in general terms, described the photos she saw and text documents she read. *Id.* at 6. Officer Yap failed to inquire into how many files there were, which files Wildaughter opened, where they were located on the drive, or any other questions pertaining to the pictures or files she reviewed. *Id.* at 29. Instead, Officer Yap conducted a sweeping review of the entirety of the drive, encompassing folders and files unsearched by Wildaughter's review – including personal health insurance and school-related documents clearly marked as such. *Id.* at 6.

The result of this collective information led police to detain Samantha Gold in connection to Driscoll's death. Before Gold's initial trial commenced, between June 2, 2017, and June 7, 2017, the Federal Bureau of Investigation ("FBI") received two potentially exculpatory pieces of information. On June 2, 2017, Special Agent Mary Baer interviewed Chase Caplow ("Caplow"), another HerbImmunity salesman. *Id.* at 11. During that interview, Caplow disclosed that Driscoll

contacted him two weeks prior to her death, and said she owed money to an upstream distributor within the company. *Id.* Caplow further disclosed that there were rumors that the distributor to whom Driscoll owed money could be violent. *Id.* This information was not disclosed prior to Gold's trial. *Id.* at 43.

On July 7, 2017, FBI Special Agent St. Peters received an anonymous phone call in which the caller alleged a different individual, Belina Stevens, was responsible for the death of Driscoll. *Id.* at 12. The anonymous caller indicated that, like Caplow, Stevens was involved in HerbImmunity marketing operations. *Id.* Just as the FBI failed to disclose the information from Caplow's phone call prior to Gold's trial, they similarly failed to disclose the anonymous caller's alleged knowledge of Driscoll's killer. *Id.* at 43.

The United States District Court in the Eastern District of Boerum and the United States Court of Appeals for the Fourteenth Circuit denied Appellant's motion to suppress both the psychotherapist's testimony and information discovered through Officer Yap's warrantless search of Gold's computer files. *Id.* at 41, 57-9. Further, each court denied post-conviction relief for the FBI's non-disclosure of potentially exculpatory evidence. *Id.* at 48-9, 59. For reasons addressed below, the lower courts erred in each of those decisions, and should be reversed by this Court.

SUMMARY OF THE ARGUMENT

The Circuit Court erred in all three of its judgments that: (1) Dr. Pollack's testimony was properly admitted because there was no compelling interest to keep the testimony from the jury; (2) Officer Yap's examination of the files did not violate Gold's Fourth Amendment Rights; and (3) the suppressed evidence is not material, as required for a Brady claim.

First, holding that the dangerous-patient exception is inextricably linked to the evidentiary privilege established under *Jaffee* creates an undesirable chilling effect on the

psychotherapist-patient relationship. Because the purpose of the dangerous-patient exception is to protect a potential victim, if the victim is no longer in danger, then the exception no longer exists. Requiring a psychotherapist to notify the authorities of potential danger is significantly less chilling than requiring a psychotherapist provide the intimate details of therapy sessions. Therefore, the psychotherapist-patient privilege precludes the admission of confidential communications at trial, unless it can be demonstrated the admittance of such privileged information would protect the victim.

Second, not only has this Court indicated that digital storage may categorically implicate greater privacy concerns than physical objects, but in its limited review of the private-search doctrine related to physical objects, the rule is clear – whether there is an additional invasion of privacy by law enforcement officers is to be tested by the degree to which they exceeded the scope of the private search. Because Officer Yap's search of Samantha Gold's entire desktop was far more extensive than the predicate private party search, this Court should reverse the Circuit Court and reaffirm Fourth Amendment protections against warrantless government searches.

Third, this Court has yet to provide guidance on whether inadmissible information may be considered material if its disclosure could lead to admissible evidence. In order to balance the legitimate policy interests of limiting burdens on prosecutors and ensuring the truth is revealed in criminal cases, this Court should adopt the "leads to admissible evidence" standard. This standard states that inadmissible information is material if its disclosure could lead to admissible evidence. Thus, this Court should find that the prosecution committed a Brady violation when it did not disclose the FBI interview and anonymous phone call.

For these reasons, this Court should hold that (1) Dr. Pollack's testimony should have been suppressed by the trial court; (2) Officer Yap's search violated the Fourth Amendment because it exceeded the scope of the private search – or alternatively, that Officer Yap's search was improper because he could not have been substantially certain of what was inside the files; and (3) the prosecution did commit a Brady violation when it failed to disclose the inadmissible information to the accused. This Court should reverse the 14th Circuit's judgment.

STANDARD OF REVIEW

The 14th Circuit of the United States Court of Appeals erred as a matter of law when it reversed the District Court's decision. This Court accepts the District Court's findings of fact unless clearly erroneous, but decides questions of law *de novo*. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.* When the Court reviews conclusions of law *de novo*, it makes an independent review, and is free to arrive at its own holding. *First Options of Chicago v. Kaplan*, 514 U.S. 939, 947 (1995).

ARGUMENT

I. Federal Rules of Evidence 501 Precludes the Admission of Confidential Communications that Occurred During the Course of a Criminal Defendant's Psychotherapy Treatment at Trial Because the Dangerous-Patient Exception is not Linked to the Evidentiary Privilege.

Rule 501 of the Federal Rules of Evidence provides that "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." Fed. R. Evid. 501.

This Court held in *Jaffee* 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 of the Federal Rules of Evidence." *Jaffee v. Redmond,* 518 U.S. 1, 15 (1996). In *Jaffee*, this Court rejected a "case-by-case" balancing of patient privacy and interests of justice because it would "eviscerate the effectiveness of the privilege." *Id.* at 17. Alternatively, this Court found the balance to be unconditionally in favor of privilege because "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Id.* at 11. Furthermore, footnote 19 of *Jaffee* states, ". . . we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id.* at 18 n.19.

In *Tarasoff*, the California Supreme Court recognized a "specific and limited" exception to the psychotherapist-patient privilege when the therapist reasonably believes a patient is dangerous to himself or another person. *Tarasoff v. Regents*, 551 P.2d 334 (Cal. 1976). This exception, often referred to as the "dangerous-patient exception," requires a psychotherapist to disclose otherwise confidential information to protect the identified potential victim. *Id.* at 347.

Here, the Circuit Court claimed that "[t]he only way to read the *Jaffee* footnote is that when a serious threat requires disclosure, the psychotherapist's right to refuse to testify, or her patient's privilege to bar that testimony, ceases to exist." R. at 53. However, this analysis requires the assumption that the dangerous-patient exception to confidentiality is linked with the exception to the evidentiary privilege.

Boerum Health and Safety Code § 711 establishes a dangerous-patient exception to psychotherapist-patient privilege, requiring mental health professionals, upon a perceived legitimate threat from a patient, to notify the police and identified potential victim. R. at 2.

The Circuit Court held that the dangerous-patient exception extends to corresponding testimonial privilege in federal courts. *Id.* at 52. In other words, it ruled that the psychotherapist's duties to breach confidentiality to warn potential victims of patients is not separate or distinct from the federal evidentiary privilege. *Id.* at 53.

When the Circuit Court agreed with the Colorado Supreme Court that "[criminal cases] are the ones that are the most serious, so any marginal increase in the admissibility of probative evidence in criminal proceedings is especially valuable," it ignored the holding of this Court that the balance is in favor of the privilege because "the likely evidentiary benefit that would result from the denial of the privilege is modest." R. at 53 (quoting *People v. Kailey,* 333 P.3d 89, 98 (Colo. 2014)); *Jaffee*, 518 U.S., at 11-12. Therefore, if the value of maintaining the psychotherapist-patient privilege justifies any resulting loss of evidence, an exception to the privilege should not be allowed unless it would serve a greater purpose. For instance, the dangerous-patient exception may apply to the evidentiary privilege when it contributes to the victim's protection – such as testimony for a restraining order.

Here, the Circuit Court applies the protection-based dangerous-patient exception to require Dr. Pollack to testify in the criminal case against her patient. R. at 53. However, this testimony will not protect Tiffany Driscoll, as a threat no longer exists; alternatively, the testimony will exclusively punish the Petitioner. Punishment is not a permissible purpose of the exclusion to the psychotherapist-patient privilege, and therefore the privilege must remain intact. *Tarasoff*, 551 P.2d at 347.

On the other hand, the Respondent will likely reference the Supreme Court of California's conclusion that the exception to the evidentiary privilege should not be limited to only protective reasons because "a dangerous patient could regain the protection of the privilege by simply killing his victim, certainly an absurd result." *People v. Wharton*, 809 P.2d 290, 308 (Cal. 1991). However, it is equally absurd that a patient would actually commit murder with the sole purpose of preventing the therapist from disclosing confidential threats.

Additionally, the Circuit Court reasoned that the psychotherapist-patient privilege has a diminished value for the public good, and therefore no longer outweighs the need for probative evidence once the confidentiality has been breached by the therapist's notification to the authorities. R. at 53. This reasoning requires a case-by-case analysis of the facts to effectively balance the now diminished level of value and the need for probative evidence. However, this case-by-case analysis was specifically rejected by this Court in *Jaffee*. *Jaffee*, 518 U.S., at 17. Thus, the Circuit Court's rationale is not supported by the precedent of this Court.

Finally, connecting the dangerous-patient exception to the evidentiary privilege would have a significant chilling effect on the conversations between psychotherapists and their patients. Preventing these conversations from becoming chilled was the major policy rationale in creating the psychotherapist-patient exception in *Jaffee*. *Id.* at 11-12. The dangerous-patient

exception, which requires the mental health professional to breach confidentiality to protect a potential victim, typically only mandates the professional report the threat to the victim to law enforcement.

Here, Boerum Health and Safety Code § 711 requires the professional inform law enforcement of the possible threat. This does not require the professional to disclose the details of the conversations with the patient, but only a notification that the victim may be in danger from the patient.

On the contrary, an exception to the evidentiary privilege would include the professional's notes on every detail of the patient's thoughts and feelings. A significant chilling effect would occur and terminate open dialogue if a therapist is required to give an additional warning that the patient's statements may be used against him in criminal prosecution. *United States v. Hayes*, 227 F.3d 578, 585 (6th Cir. 2000). Therefore, if the evidentiary privilege is linked to the dangerous-patient exception, conversations between mental health professionals and patients will be greatly chilled; contradicting the very purpose of the exception.

II. The Fourth Amendment is Violated When the Government Offers Evidence Obtained from a Search that Exceeds the Scope of the Private Search, as well as Where the Government Cannot be Substantially Certain What is Inside the Computer Files.

The text of the Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

USCS Const. Amend. 4.

Under "third-party intervention" or the "private search" doctrine, this protection attends only to governmental action; it is wholly inapplicable to a search or seizure, even an

unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official. *See, Burdeau v. McDowell*, 256 U.S. 465 (1921); *United States v. Jacobsen*, 466 U.S. 109, 111 (1984). Both *Burdeau* and *Jacobsen* concerned physical objects, but at least one commenter has argued that the differences between physical and digital storage justify excluding digital devices from the ambit of the private-search doctrine entirely[2].

Here, both the lower courts and the respondent mischaracterize the already nebulous and controversial doctrine in order to expand it far beyond the scope this Court has ever considered or consented to.

A. The Private Search Doctrine is Limited by the Scope of the Private Search.

This Court has provided only two significant occasions in which the limits of the private search doctrine were explored, neither of which support the lower court's decision to apply such a broad analysis of the doctrine. *See, Walter v. United States*, 447 U.S. 649 (1980) and *Jacobsen*, 466 U.S., at 111. *Walter* held that the FBI agents violated Fourth Amendment privacy guarantees when it was provided multiple boxes of 8-millimeter film with explicit drawings and descriptions, but proceeded to watch the films to determine their contents without first obtaining a warrant. Because the private party had not actually viewed the films, and because prior to viewing only inferences could be drawn about their actual content, the projection of the films by the agents was a significant expansion of the previous search by a private party, and therefore had to be characterized as a separate search. *Walter*, 447 U.S. at 656-57. In the Court's plurality opinion, Justice Stevens noted that, "there was nothing wrongful about the Government's

[2] *See*, Dylan Bonfigli, *Get a Warrant: A Bright-Line Rule for Digital Searches Under the Private-Search Doctrine*, 90 S. Cal. L. Rev. 307 (2017) (arguing that society's privacy interest in digital information outweighs any legitimate government interest in conducting warrantless searches).

acquisition of the packages or its examination of their contents to the extent they had already been examined by third parties," however "the Government may not exceed the scope of the private search unless it has the right to make an independent search." *Id.* at 656.

Jacobsen held that where government agents were informed by private courier employees that the employees found a bagged, white, and powdery substance hidden inside tubes within a damaged box, those agents did not infringe an expectation of privacy when they replicated the employees' search. *Jacobsen*, 466 U.S. at 120. Pointedly, the *Jacobsen* majority explained that, because "the Government could utilize the Federal Express employees' testimony concerning the contents of the package," the government's re-examination of its contents did not provide any new information — it "merely avoided the risk of a flaw in the employees' recollection." *Id.* at 119. Beyond the two significant occasions this Court has addressed the issue directly, this Court has indicated that digital devices may categorically implicate greater privacy concerns than physical objects. See, *Riley v. California*, 573 U.S. 373 (2014). Even limited to those two instances this Court has addressed the private-search doctrine directly, the rule is clear — whether there is an additional invasion of privacy by law enforcement officers is to be tested by the degree to which they exceeded the scope of the private search. *Jacobsen*, 466 U.S. at 115. If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. *Walter*, 447 U.S. at 657.

B. Officer Yap's Search Went Well Beyond the Scope of the Private Party's Search and was Therefore, an Unlawful Search in Violation of the Fourth Amendment.

As articulated above, this Court's line-drawing when it comes to the private search doctrine is whether the Government's search extended beyond that of the private party. *Jacobsen*, 466 U.S. at 115. In other words, the agent must not learn any new information that it

would not have gotten beyond the testimony of the predicate private party search. *See*, *Id.* at 119; *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015). Here, Officer Yap's search of the entire USB flash drive provided by the third party runs afoul of this principle. Wildaughter, the private party in this case, viewed a limited number of files from Gold's computer. She then copied the entirety of Gold's laptop, including files she had not viewed, to the drive and took it to Officer Yap. Officer Yap did not inquire as to the extent of the files on the flash drive, which files Ms. Wildaughter viewed, nor obtain a warrant at any point. Instead, Officer Yap clearly learned more than would have been available through the testimony of Ms. Wildaughter alone.

For precisely the same reasons that this Court determined that the government impermissibly conducted a separate search in *Walter*, and a permissible search in *Jacobsen*, the evidence derived from Officer Yap's search must be suppressed. In *Walter*, where government agents simply replicated the search of the private individuals, they had not exceeded the scope of the private search. Conversely, in *Jacobsen*, even though the film containers were labeled, the Court found that the Government exceeded the scope of the private search by viewing the film — something the private party did not do. Officer Yap's "fishing expedition" certainly did not replicate Wildaughter's previous search, and there was less reason for him to expect the specific contents of the flash drive files than there was reason to suspect illegal content of the films in *Jacobsen*. As such, it would be contrary to this Court's only significant direction on the private search doctrine to affirm the Circuit Court's decision.

C. Officer Yap Could Not Have Been Substantially Certain of What Was Inside the Folders He Opened, Thus His Search Was Improper Even Under The Broad Scope Used By The Lower Circuit Court.

Alternatively, if this Court determines that it should adopt a more broad application of the private search doctrine, Officer Yap's search would still remain impermissible. Respondents argue, and the lower court held, that a broader application of the private search doctrine should be adopted, relying primarily on decisions of the Fifth and Seventh Circuits.

In carving out an additional exception into the private search doctrine — an exception in itself — the Fifth Circuit Court of Appeals held that:

> [P]olice exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise.

United States v. Runyan, 275 F.3d 449, 463 (5th Cir. 2001). The Seventh Circuit Court of Appeals found *Runyan*'s analysis "persuasive" and summarily adopted it. *See, Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012). Here however, not only are the facts highly distinguishable from those in both the Fifth and Seventh Circuit Courts, but Officer Yap's search fails to satisfy even this broader application of the private search doctrine.

First, both *Runyan* and *Rann* involved voluminous files of child pornography. In *Runyan*, the private search involved a duffle bag full of pornography, compact disks "CDs," computer disks, a Polaroid camera, vibrator, and developed Polaroid pictures of young teenager. *Runyan*, 275 F.3d at 453. Under the duffle bag, the private party found more pornography in waterproof boxes. *Id.* In a subsequent search by the same private party, more zip disks, CDs, and floppy disks were found. *Id.* The private party viewed approximately twenty of the digital storage devices, all containing images of child pornography, before, over a period of time, surrendering the materials to the police. *Id.* The government ultimately viewed a larger number of files and

devices than the private party, which the Court determined to be proper in articulating the above analysis. *Id.* at 454.

Rann similarly involved a private search that ultimately led to the submission of a camera memory card and zip file by that private party to the police, who viewed them in their entirety without a warrant. *Rann*, 689 F.3d at 834. In *Rann*, there was no record that the private party did or did not view only part, or all of the files provided to police before their subsequent review. *Id.* at 837. The Illinois Appellate Court determined that it was "highly likely" that the private party compiled the images on the zip drive herself, as she personally downloaded them from the family computer. *Id.* The Circuit Court of Appeals found that the Illinois Appellate Court's factual determinations were "presumably true." *Id.* Further, in *Rann*, the private parties included the subject of the petitioner's child pornography (his daughter) and her mother. Thus, the Court concluded that it was reasonable to find that they knew the contents of those devices, although there was no record to support the finding. *Id.*

The case-at-present is markedly different than those the respondent and the lower court relied on to apply the same analysis. Offenders of child pornography statutes often have thousands of images of videos[3]. It may be reasonable for a government agent to be "substantially certain" of what is inside un-inspected digital media devices when those devices had already been inspected in part, or were in close proximity to, other images of the same content. It may be particularly reasonable where those storage devices were found in a sealed bag alongside developed photos of underage teenagers, vibrators, and cameras. *See generally*, *Runyan*.

[3] Andrea Fisher, *Analysis: What Goes Into Sentencing Child Porn Crimes?*, Great Falls Tribune (Feb. 11, 2016, 9:44 AM), https://www.greatfallstribune.com/story/news/local/2016/02/11/soapbox-child-porn-sentences-vary/80230340/

Here, there is no such reason to believe that the entirety of Gold's computer would have related material when only a few files were inspected. Though the record in *Rann* was scarce as to the extent the private parties searched the devices handed over to police, the Circuit Court was not only bound by the lower court's factual findings, but the private parties were in fact victims themselves, making those officers' inspections more reasonable than Officer Yap's here.

While Officer Yap's inspection of the USB flash drive provided by Wildaughter is substantially different than the devices provided in *Runyan* and *Rann*, Officer Yap had no reason to believe that additional files on Gold's computer would contain substantially similar content. He failed to inquire about what was on the flash drive, which files Ms. Wildaughter viewed, or where they were. It cannot be sustained that Officer Yap's search was proper, either in comparison to those cases the respondent would highlight, or on the independent basis of the analysis provided therein.

III. When the Government Fails to Disclose Potentially Exculpatory Information on the Grounds That the Information Would be Inadmissible, A *Brady* Violation Does Occur Because That Inadmissible Information May Lead to Admissible Evidence.

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This evidence must be: (a) favorable to the accused, either because it is exculpatory, or because it is impeaching; (b) that evidence must have been suppressed by the State, either willfully or inadvertently; and (c) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Thus, the term "*Brady* violation" refers to any breach of the obligation to disclose exculpatory evidence. *Id.* at 281. Furthermore, this Court has held that a prosecutor has a duty to

"learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitely*, 514 U.S. 419, 426 (1995).

This Court held that evidence is not material if there is no reasonable probability that, had it been disclosed, would have created a different result at trial. *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995). In *Wood*, the defendant filed a complaint alleging a Brady violation because the prosecution did not disclose the results of polygraph tests taken by witnesses. *Id.* at 4. The Ninth Circuit held that the results of the polygraph were material because they may lead to admissible evidence. *Id.* This Court overturned the Ninth Circuit, stating that the Ninth Circuit's reasoning in finding the polygraph tests material was "based on mere speculation," because "the Court of Appeals did not specify what particular evidence it had in mind." *Id.*

However, this Court is yet to directly address whether inadmissible evidence could be material evidence under *Brady*. *Felder v. Johnson*, 180 F.3d 206, 212 n.6 (5th Cir. 1999). Consequently, the circuit courts have adopted four different approaches to answering this question[4].

First, the First and Fourth Circuit Courts have adopted the "immaterial as a matter of law" approach, which is the most restrictive of the circuit courts framework. *United States v. Ranney*, 719 F.2d 1183 (1st Cir. 1983); *Hoke v. Netherland*, 92 F.3d 1350 (4th Cir. 1996).

Because inadmissible evidence would never reach a jury, it is by definition immaterial. *Ranney*, 719 F.2d, at 1190. In *Ranney*, after the trial, the defendants obtained copies of the grand jury testimonies of two witnesses. *Id.* at 1184 The defendants then moved for a mistrial due to a *Brady* violation, as the testimonies contained exculpatory information. *Id.* at 1189. In its holding,

[4] Gregory S. Seador, *A Search for the Truth or a Game of Strategy? The Circuit Split Over the Prosecution's Obligation to Disclose Inadmissible Exculpatory Information to the Accused*, 51 SYRLR 139, 149-153 (2001)(discussing the different circuit court splits).

the First Circuit held that because the testimonies were inadmissible hearsay, they were not *Brady* material. *Id.* Likewise, the Fourth Circuit held that inadmissible evidence is not material under *Brady*. *Hoke*, 92 F.3d, at 1356.

Second, the Second and Eighth Circuit Courts have adopted a less restrictive approach – "mere speculation." *United States v. Persico*, 164 F.3d 796 (2d Cir. 1999); *Madsen v. Dormire*, 137 F.3d 602 (8th Cir. 1998).

If there is a connection between the inadmissible information and admissible evidence that is based upon more than mere speculation, then the inadmissible information is material under *Brady*. *Persico*, 164 F.3d, at 805. In *Persico*, the defendants alleged that the prosecution's failure to disclose that a witness was a government informant was a *Brady* violation. *Id.* at 799. The Second Circuit held that inadmissible information is inherently not evidence, however a following determination must be made of whether there is a link to admissible evidence that is not highly speculative. *Id.* at 805. Similarly, the Eighth Circuit held that inadmissible information is "not evidence at all," but also asked whether there is a link to admissible evidence that is more than mere speculation. *Madsen*, 137 F.3d, at 604.

Third, the Sixth and Eleventh Circuit Courts have adopted a "leads to admissible evidence" approach. *United States v. Phillip*, 948 F.2d 241 (6th Cir. 1991); *Wright v. Hopper*, 169 F.3d 695 (11th Cir. 1999); *Spaziano v. Singletary*, 36 F.3d 1028 (11th Cir. 1994).

In *Spaziano*, the defendant claimed a *Brady* violation because several investigative reports were not provided by the prosecution. *Spaziano*, 36 F.3d, at 1044. The Eleventh Circuit held that a *Brady* violation did not occur because "the information in question is not admissible evidence and would not have led to any admissible evidence." *Id.* Furthermore, in *Wright v. Hopper*, the Eleventh Circuit held that "inadmissible evidence may be material if the evidence

would have led to admissible evidence." *Wright*, 169 F.3d, at 704. Additionally, the Sixth Circuit also held inadmissible information that leads to admissible evidence must be disclosed by the prosecution. *Phillip*, 948 F.2d, 249-250. Moreover, the Sixth Circuit stated that this determination is facts-based and therefore must be determined on a case-by-case basis. *Id.*

Finally, the Fifth, Seventh, and Ninth Circuits have held that regardless of whether the information was admissible, if it would not have changed the outcome of the trial had it been disclosed, it is not material evidence under *Brady*. *See generally*, Felder, 180 F.3d, at 213; *United States v. Asher*, 178 F.3d 486 (7th Cir. 1999); *United States v. Kennedy*, 890 F.2d 1056 (9th Cir. 1989). Alternatively, a *Brady* violation occurs when there is a reasonable probability that the trial result would have been different if the information had been disclosed. Seador, *supra* note 4, at 153. Moreover, when determining whether a *Brady* violation occurred, "[the court] ask[s] only the general question whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *Felder*, 180 F.3d, at 212.

A. This Court Should Adopt the Leads to Admissible Evidence Standard for Determining Whether a *Brady* Violation Occurred.

This Court has been clear that the State has an obligation to disclose all exculpatory evidence to the accused party. *Brady*, 373 U.S., at 87. However, this Court has not been clear on whether inadmissible information may be material, and if the State has a duty to disclose this information. *Wood*, 516 U.S., at 6. Although this Court denied the admission of the polygraph results in *Wood* were inadmissible and thus not evidence at all, it has not decided whether inadmissible information may be considered material if it could lead to admissible evidence. *Id.* at 4. Consequently, the circuit courts do not have guiding precedent in this matter, resulting in

the courts splitting four ways. Therefore, this Court should follow the "leads to admissible evidence" approach set by the Sixth and Eleventh Circuit.

The concern of creating too great a burden on prosecutors is a major policy consideration mentioned by both this Court and the circuit courts. *Kyles*, 514 U.S., 437; *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 555 (4th Cir. 1999). However, *Brady* determinations are an extremely common task in the job of a prosecutor and do not require a significant amount of effort. *Kyles*, 514 U.S., 439. Therefore, any additional burden placed on prosecutors would be minimal in comparison to the gains in the due process rights of the accused.

Additionally, ensuring the truth comes to light in all criminal proceedings is a significant policy consideration, and has played a pivotal role in decisions by both this Court and circuit courts. "The State's role is not to convict, but to see that, so far as possible, truth emerges." *Giles v. Maryland*, 386 U.S. 66, 98 (1967). "Inadmissible evidence may be material if the evidence would have led to admissible evidence." *Wright*, 169 F.3d, at 703.

The appropriate approach should balance both truth-finding and the minimization of prosecutorial burden. This Court should adopt a variation of the "leads to admissible evidence" approach set by the Sixth and Eleventh Circuit. In practice, determining whether inadmissible information may lead to admissible evidence would follow a two-step process. First, any information obtained by the State that is inadmissible but may be exculpatory or lead to exculpatory evidence is provided to the court. Second, the judge would decide whether the information may lead the defense to admissible evidence. By requiring the prosecutor to provide the inadmissible evidence to the court, a balance is reached between revealing the truth and not increasing prosecutorial burden.

Here, the majority for the 14th Circuit held that the suppressed evidence did not meet the materiality requirements of *Brady* because "[t]here must be more than mere speculation that the inadmissible evidence would have led directly to admissible evidence." R. at 56 (*citing Bradley*, 212 F.3d, at 567). However, this Court has not adopted the mere speculation standard, and for the reasons stated above, should adopt the "leads to admissible evidence" standard.

Therefore, with this Court's adoption of the "leads to admissible evidence" standard, the requirements of *Brady* are violated when the government fails to disclose potentially exculpatory information solely on the grounds that the information would be inadmissible at trial. Thus, this Court should find that the prosecution committed a *Brady* violation when it did not disclose the inadmissible information, and order a new trial to occur.

CONCLUSION

The issues here are not difficult to resolve. Where this Court has left issues undecided, it should rule following both the spirit of its decisions, and the common sense and policy rationale that supports it. That is, where the disclosure of privileged psychotherapist-patient communications does not serve to protect a potential victim, and only serves to punish the accused, it should be foreclosed; where the government exceeds the scope of a private party's search, and cannot otherwise be substantially certain what that broader search will uncover, it should be precluded; and finally, where the government fails to disclose potentially exculpatory information that may lead to admissible evidence, regardless of the admissibility of the information itself, should be prohibited. The Circuit Court of Appeals of the Fourteenth Circuit erred on each of these issues, and should be reversed, in turn.