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Docket No. 20 – 2388

IN THE

Supreme Court of the United States

SAMANTHA GOLD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether psychotherapists may terminate patients' ability to assert the psychotherapist-patient testimonial privilege ("PPP") at trial by disclosing to law enforcement confidential communications made by patients seeking treatment.

II. Whether the Fourth Amendment permits government agents to, without a warrant, exceed the scope of unauthorized private searches.

III. Whether *Brady v. Maryland* permits prosecutors to withhold exculpatory information from defendants solely because the evidence is inadmissible at trial.

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The District Court's bench opinion appears in the record at pages 15-49. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears at pages 50-59.

CONSTITUTIONAL PROVISIONS

The texts of the following constitutional provisions are provided below:

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

The Fifth Amendment provides:

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

U.S. Const. amend. V.

STATEMENT OF THE CASE

I. Factual History

The facts giving rise to Petitioner's conviction began one year before Tiffany Driscoll ("Driscoll") died. R. at 18. In 2016, Driscoll urged Petitioner, Samantha Gold ("Gold"), to become a vitamin saleswoman for HerbImmunity, a multi-level marketing pyramid scheme. *Id*. Like many students at Joralemon University ("JU"), Gold spared no effort in trying to sell the

vitamins. *Id*. Like many JU students, she was unsuccessful. *Id*. Driscoll encouraged Gold and others to increase their investments. *Id*. Still hopeful, Gold did so and sank deeper into debt. *Id*. Like her classmates, she became disgruntled with both Driscoll and HerbImmunity when she realized that she had invested in franchise fraud. R. at 13.

Dr. Pollak Breaches Gold's Psychotherapist-Patient Confidentiality

On 25 May 2017, between 12:00 p.m. and 1:00 p.m., Gold met with her psychotherapist, Dr. Pollak ("Pollak"). R. at 3. Gold suffers from Intermittent Explosive Disorder ("IED"). *Id*. IED symptoms include "episodes of aggressive, impulsive, or violent behavior." R. at 17. The record does not show that Gold is a violent person. *Passim*. On her own initiative, she sought counseling. R. at 15. Pollak began treating her in 2015. *Id*.

Frustrated by her mounting debt and influenced by her illness, Gold exclaimed during the May 25 therapy session: "I'm going to kill her!" R. at 19. She did not state who. R. at 4. She did not state how. *Id*. She did not state when. *Id*. Pollak admits that she was unsure whether the threat was serious or simply an impulsive expression of frustration. R. at 22. Pollak *inferred* that Gold was speaking about Driscoll. *Id*.

The Boerum Health and Safety Code ("BHSC") excepts patient statements from confidentiality only when (1) "[t]he patient has made an actual threat to physically harm . . . an identifiable victim,"; (2) "[t]he mental health professional makes a clinical judgment that the patient has the apparent capability to commit such an act,"; and (3) "it is more likely than not that in the near future the patient will carry out the threat."[1] Pollak did not ask any follow-up questions to ensure that her confidentiality breach met BHSC requirements. *Passim*.

[1] BHSC § 711(1)(a)-(b).

Pollak admits that she never warned Gold that the statements she made while seeking treatment could be used against her in a court of law. R. at 21. Pollak believes that patients would be more reluctant to share thoughts or urges if they knew that therapists might be required to testify against them in court. *Id*.

At 1:15 p.m. Pollak broke confidentiality and called the police to warn about Gold's statement. Officer Nicole Fuchs ("Fuchs") of the Joralemon Police Department ("JPD") immediately responded to Pollak's phone call and visited the women's residence at JU where Gold and Driscoll resided. *Id*. Fuchs spoke with Gold for fifteen minutes. *Id*. She noted that Gold appeared calm and rational. *Id*. Additionally, Fuchs warned Driscoll that she had been threatened. *Id*. Driscoll was unconcerned. *Id*.

Officer Yap Illegally Searches Gold's Personal Laptop Computer

That same day, Gold's roommate, Jennifer Wildaughter ("Wildaughter") snuck into Gold's room. R. at 24. She sat down at Gold's laptop computer and began opening files. *Id*. She clicked on a file labeled "HerbImmunity." *Id*.

Therein, Wildaughter found three subfolders labeled "receipts," "confirmations," and "customers." *Id*. She opened all three. R. at 25. In the "receipts" and "confirmations" subfolders, she found a file labeled Randolph Jackson. R. at 7. She did not open the Jackson file. R. at 5. In the "customers" subfolder, she found another subfolder for Jackson and a second subfolder labeled "Tiffany Driscoll." R. at 24. She opened the Driscoll folder. *Id*. It contained pictures of Driscoll and her father taken from a distance. *Id*. That folder contained another subfolder labeled "For Tiff." *Id*. There, Wildaughter found four documents. *Id*. In turn, they were labeled "Message to Tiffany - draft," "Market Stuff," "recipe," and "receipt." *Id*. She only opened the documents labeled "Message to Tiffany - draft," and "Market Stuff." *Id*. Wildaughter stated that

the message to Tiffany was short and kind. *Id*. The "Market Stuff" subfolder contained passwords and codes she did not understand. *Id*. In that same folder, she saw a reference to rat poison. *Id*. She and Gold had a rodent problem in their dorm. R. at 29.

Wildaughter grabbed a flash drive and downloaded all of the desktop files. R. at 26. She did not look through all of the files that she downloaded. *Id*. She took the flash drive to the Livingston Police Department ("LPD") and met with Officer Yap ("Yap"). *Id*. She summarized her findings without describing which files she had searched. R. at 27. Yap did not ask, and he conducted a thorough examination of the entire flash drive. R. at 6.

During his illegal search, he found personal photos unrelated to Wildaughter's report. *Id*. He did not stop searching. *Id*. He searched every folder in the flash drive in the order that they were listed. *Id*. After he searched through the folders that Wildaughter viewed, he searched through folders labeled "Exam4," "Health Insurance ID Card," "Tax Docs," "Budget," and "To-Do List." R. at 6-7. He reviewed Gold's home, transportation, utilities, financial, enjoyment, routine, school, and job expenses. R. at 10. In the "recipe" folder that Wildaughter did not open, Yap discovered a recipe for chocolate covered strawberries. R. at 6. Gold mailed chocolate covered strawberries to Driscoll on 24 May 2017. R. at 13.

The FBI's Conceals Crucial Evidence

Driscoll died the following day. *Id*. The Joralemon Journal covered her death. *Id*. It reported that Driscoll suffered blunt force trauma to the head, that medical experts did not suspect foul play, and that the police had no suspects. *Id*. Three days later, the Journal reported that Gold was the prime suspect. R. at 14. The second article included three key unsubstantiated claims about Gold: that (1) she struggled in class; (2) she threatened Driscoll many times; and (3)

she injected rat poison into the strawberries. *Id*. An FBI officer expressed his relief at finally having found a suspect. *Id*.

The record is devoid of evidence to prove those claims. *Passim*. It does not contain her academic records. *Id*. It does not contain evidence of multiple threats. *Id*. It does not contain toxicology reports for Driscoll or the strawberries. *Id*. It is unclear whether the conclusion that Gold injected the strawberries with poison came from the unverified news article or from scientific testing. R. at 14 and 51.

On 2 June 2017, the FBI conducted an interview with one Chase Caplow ("Caplow") who explained that Driscoll was in debt to an HerbImmunity distributor named Martin Brodie ("Brodie"). R. at 44. Caplow described Brodie's violent reputation. R. at 11. On 7 July 2017, the FBI received an anonymous phone call alleging that one Belinda Stevens ("Stevens") killed Driscoll. R. at 12. By concealing the reports, the FBI prevented Gold from uncovering admissible evidence stemming from the leads. *Id*. Although FBI agents Peter and Baer indicated that they investigated the leads, nothing in the record shows that they did. R. at 11-12.

II. Procedural History

Gold was charged and convicted with delivery by mail of an item with the intent to kill or injure in violation of 18 U.S.C. § 1716(j)(2) and (3). Gold moved before the United States District Court for the Eastern District of Boerum to suppress two pieces of evidence: (1) the privileged statements she made to Pollak while seeking treatment; and (2) the private information Yap viewed while exceeding the scope of Wildaughter's unauthorized private search. The District Court denied both motions. After trial, Gold moved before the same court for post-conviction relief. She asserted *Brady* violations for the two undisclosed FBI reports. The

District Court again denied her motion. Gold appealed all three denials to the United States Court of Appeals for the Fourteenth Circuit. The Fourteenth Circuit affirmed.

This Honorable Court granted her *writ of certiorari*. Gold prays this Court review the decision of the United States Court of Appeals for the Fourteenth Circuit *de novo*.

SUMMARY OF THE ARGUMENT

Gold respectfully requests that this Court overturn the decision arising from the United States Court of Appeals for the Fourteenth Circuit because (I) Pollak could not terminate Gold's ability to assert her psychotherapist-patient privilege ("PPP") at trial; (II) the Fourth Amendment forbade Yap from, without a warrant, exceeding the scope of Wildaughter's unauthorized private search; and (III) *Brady* forbade the government from denying Gold the opportunity to investigate exculpatory information solely because it was inadmissible at trial.

First, Gold's statements to Pollak were protected by the PPP. This Court created the privilege to encourage citizens to seek necessary mental health treatment. The dangerous-patient exception to the PPP erroneously terminates the privilege when doctors disclose confidential communications. The exception is based on the misunderstanding that confidentiality and privilege are the same. They are two distinct concepts. Therapists patients the duty of confidentiality. Patients own their privilege. Only patients can waive it.

Second, Yap violated the Fourth Amendment when he exceeded the scope of Wildaughter's unauthorized private search. This Court protects individuals' legitimate expectations of privacy. It does not permit officers to exceed the scope of private searches. It should not allow unauthorized private searchers to hand over sensitive information to the government on a silver platter. Allowing officers to search files on flash drives not yet viewed by

unauthorized private searchers is tantamount to allowing general warrants. Each click on each file potentially exposes officers to highly sensitive, private information.

Third, the government violated Gold's Fifth Amendment right to due process when it prevented her from uncovering admissible exculpatory evidence related to the undisclosed leads. To protect due process, prosecutors must give defendants exculpatory information even if it is inadmissible. Defendants need the opportunity to defend themselves. The FBI had exclusive access to the leads, and its refusal to disclose favorable evidence denied Gold due process.

ARGUMENT

I. The PPP Privileged Gold's Statements Because (A) Gold Made Them While Seeking Treatment From Her Licensed Psychotherapist; (B) Pollak's Confidentiality Breach Could Not Affect Gold's Privilege; And (C) Even If This Court Finds That The PPP Requires Confidentiality, Gold's Statements Were Confidential Because She Reasonably Expected That Pollak Would Not Breach Her Confidence.

The American justice system is adversarial, not gladiatorial. Litigants seek justice by presenting evidence and sharpening issues.[2] Parties' passions are tempered by rules governing privilege, privacy, and evidence production. These rules promote the public health, protect private information, and prevent erroneous convictions. Prosecutors are bound by the law and by the public good in their search for justice. This Court's decision will determine whether prosecutors are adversaries seeking justice or gladiators seeking convictions.

"The common law—as interpreted by United States courts in light of reason and experience—governs a claim of privilege unless" the United States Constitution, a federal statute, or a Supreme Court rule provides otherwise.[3] This Court recognized the PPP in *Jaffee v. Redmond*, 518 U.S. 1 (1997). In a 7-2 decision, Justice Stevens explained that while the public

[2] *Allen v. Wright*, 468 U.S. 737 (1984).

[3] Fed. R. Evid. 501.

has a right to every man's evidence,[4] psychotherapist-patient communications should be privileged because they promote significant public and private interests. *Id*. at 11.

The Tenth Circuit, in error, "was the first to suggest in *United States v. Glass*,[5] that *Jaffee* provides for a dangerous-patient exception" to the PPP. Philip A. Sellers II, *United States v. Landor: The Federal Circuit Split over the Dangerous Patient Exception to the Psychotherapist-Patient Privilege*, 34 Am. J. Trial Advoc. 417, 427 (2010). The *Glass* court failed to "distinguish between [a] psychotherapist's 'ethical duty to warn' [potential victims] and the psychotherapist-patient 'evidentiary privilege.'" *Id*. at 428.

The Ninth and Sixth circuits reject the exception. *Id*. They find "no conflict between the duty . . . to warn potential victims of a dangerous patient's intentions and preventing psychotherapists from testifying to their patients' statements in court."[6] *Id*. at 423. The Eighth Circuit agrees that "[t]here is no dangerous patient exception to the [PPP], since adopting such an exception would necessarily have a deleterious effect on the confidence and trust implicit in the confidential relationship between a therapist and a patient." *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012). The Fifth Circuit struck a balance and recognizes the privilege only when patients have a "reasonable expectation" that their statements will remain confidential.[7] Like the Ninth and Sixth circuits, the Fifth Circuit bases the existence of the privilege on the patient's expectations.

> Psychotherapy is the context in which, perhaps more than in any other, a person is most likely to reveal unflattering information about herself, as well as her fears, vulnerabilities, guilt, disappointments,

[4] *United States v. Bryan*, 399 U.S. 323, 331 (1950).

[5] *United States v. Glass*, 133 F.3d 1356, 1359-60 (10th Cir. 1998).

[6] *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000).

[7] *United States v. Auster*, 517 F.3d 312, 317 (5th Cir. 2008).

> doubts, and anxieties. By recognizing the privilege in broad terms, the Court appeared to create a wall of protection against disclosure of such statements in litigation, including responses to discovery requests marking the first time that the Court had recognized the overriding significance of mental health treatment.

Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in Federal Courts*, 58 DePaul L. Rev. 79, 79-80 (2008).

Anxiety disorders affect 40 million adults in the United States.[8] Between 11.5 and 11.16 million Americans are affected by IED within their lifetimes.[9] Millions of Americans are looking to this Court to protect their right to seek confidential and effective treatment.

Gold, who suffers from IED, expressed anger to her psychotherapist. R. at 4. She asks this Court to adopt the Ninth Circuit's approach and find that Pollak's disclosure could not terminate her ability to assert the PPP. Even if this Court disagrees, she asks this Court to adopt the Fifth Circuit's approach and find that patients may implicitly waive the PPP only when they have no reasonable expectation that their statements will be held in confidence.

The PPP privileged Gold's statements because (A) she made them while seeking treatment from a licensed psychotherapist; (B) Pollak's confidentiality breach could not affect her privilege; and (C) even if this Court finds that the PPP requires confidentiality, her statements were confidential because she reasonably expected that Pollak would not breach her confidence. For these reasons, Gold respectfully requests that this Court overrule the decision of the United States Court of Appeals for the Fourteenth Circuit.

A. The PPP privileged the statements Gold made to her psychotherapist while seeking treatment because (1) the evidentiary cost of privileging her statements is

[8] *Facts and Statistics*, Anxiety and Depression Association of America, https://adaa.org/about-adaa/press-room/facts-statistics, (last visited January 31, 2021).

[9] *Intermittent Explosive Disorder Affects up to 16 Million Americans*, National Institutes of Health, https://www.nih.gov/news-events/news-releases/intermittent-explosive-disorder-affects-16-million-americans#:~:text=Depending%20upon%20how%20broadly%20it's,million%20Americans%20%E2%80%94%20in%20their%20lifetimes, (last visited January 31, 2021).

low; and (2) society's interest in promoting the public health outweighs the government's desire to obtain all evidence by any rational means.

1. *The evidentiary cost of privileging Gold's statements is low.*

The PPP protects all patient statements made while seeking treatment from licensed professionals. "The [PPP only] contemplates treatment." *Ghane*, 673 F.3d at 782. This narrow privilege allows other office employees to testify about their observations. *Id*. Therefore, the evidentiary cost of applying the PPP when patients behave erratically is low.

This Court protects confidential communications between psychotherapists and patients. *Jaffee*, 518 U.S. at 2. The burden to prove that the statement was made while seeking treatment falls on the party asserting the privilege. *United States v. Romo*, 413 F.3d 1044, 1047 (9th Cir. 2005). Gold needed to show "that (1) [Pollak] is a licensed psychotherapist; (2) [her] communications were confidential; and (3) [her] communications were made during the course of diagnosis or treatment." *Id*.

The PPP only protects statements made to psychotherapists and social workers. For example, in *Ghane*, the Eighth Circuit determined that statements made to medical staff are not privileged. *Ghane*, 673 U.S. at 777. Ghane suffered from suicidal ideations, and he approached hospital staff for help. *Id*. at 776. Ghane spoke with a physician's assistant ("PA") who conducted the hospital's routine intake procedures. *Id*. He told the PA that he wanted to kill himself with cyanide. *Id*. He refused to surrender the poison because wanted the option to commit suicide in the future. *Id*. After admission, he began treatment with a psychiatrist to whom he told of his plans to kill various government officials with cyanide. *Id*. at 777. The doctor informed the police. *Id*. After his arrest, Ghane's statements to the PA were admitted at trial, and he was convicted. *Id*. Upholding the conviction, the court reasoned that Ghane sought admission and not treatment from the PA. *Id*.

As in Ghane, the evidentiary cost of privileging Gold's statements is low. Any member of Pollak's office could have testified that Gold appeared angry or violent. They did not. *Passim*. Because other evidence is available, this Court should not disturb Gold's privilege.

Moreover, Gold's statements are protected under *Jaffee* and *Romo*. First, Pollak is a licensed psychotherapist. *Passim*. Second, Gold reasonably believed that Pollak lacked the authority to breach confidentiality. Gold did not (1) make a serious threat or name an identifiable victim; (2) tell Pollak that she had the means to carry out violence against anyone; or (3) make statements suggesting that she would become violent in the near future. *Passim*. Gold would have needed to do all three things before Pollak could breach confidentiality under the BHSC. R. at 2. Third, she made her statements while seeking treatment. R. at 4. Because Gold satisfied the *Jaffee* and *Romo* requirements she asks this Court to reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

Having explained why her statements were privileged, Gold now addresses why this Court should continue to protect society's interest in protecting the PPP from the government's desire to obtain all evidence by any rational means.

2. *Society's need for mental health treatment outweighs the government's desire to obtain all evidence by any rational means.*

While the public generally has a right to every man's evidence,[10] the benefits of preserving the privilege are high, and the costs are low. The PPP protects communication.[11]

[10] *United States v. Bryan*, 339 U.S. 323, 331 (1950).

[11] *In re Sims*, 534 F.3d 117 (2d Cir. 2008).

Courts are divided on whether physicians' observations are privileged.[12] A narrow construction would ensure that "evidence of behavior [like] striking other patients" is admissible.[13]

This Court abandons the "general rule disfavoring testimonial privileges [to promote] 'public good[s] transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *United States v. Trammel*, 445 U.S. 40, 50 (1980)(quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J. dissenting)). "The [PPP] promotes the public good by facilitating appropriate treatment for individuals suffering from mental or emotional disorders. *Jaffee*, 518 U.S. at 11. "The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id*.

In *Jaffee*, this Court acknowledged the PPP's societal benefits. *Id*. at 1. In that case, an officer named Redmond, after shooting a man while in the line of duty, began extensive therapy sessions with Dr. Beyer. *Id*. at 4. The trial court ordered Redmond and Beyer to turn over notes made during the therapy sessions. *Id*. at 1. They refused. *Id*. The judge instructed the jury that the non-disclosure was both legally unjustified and evidence of an attempt to conceal unfavorable evidence. *Id*. The jury found Redmond liable. *Id*. She appealed. *Id*. The Court addressed "whether a privilege protecting confidential communications between a psychotherapist and her patient promotes sufficiently important interests to outweigh the need for probative evidence." *Id*. at 10. This Court concluded that compelling private patient conversations into evidence would greatly reduce the number of people who seek treatment. *Id*. at 11. This "chilling effect" would logically reduce the number of patient statements being made in the first place. *Id*. The Court reasoned that "[t]his unspoken 'evidence' [would] therefore serve no greater truth-seeking

[12] David M. Greenwald, Erin R. Schrantz, & Michele L. Slachetka, *§ 7:11. Other information gained in examinations or treatment, 2 Testimonial Privileges* (September 2019).

[13] *Id*. at 637.

function than if it had been spoken and privileged." *Id*. This Court decided that "[conversations and notes] taken during [counseling sessions are] protected from compelled disclosure under [Federal Rule of Evidence] 501." *Id*.

The same societal factors at play in *Jaffee* are present in Gold's case. Gold, like Redmond, was troubled and sought extensive counseling. Like Redmond, the private statements adduced at trial were made during therapy. Absent the PPP, patient statements are unlikely to ever arise. For this reason, Gold asks this Court to reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

Having explained why the PPP's societal benefits outweigh the government's desire to obtain all evidence by any rational means, Gold now explains how Pollak's disclosure promoted safety without terminating Gold's testimonial privilege.

B. Pollak's confidentiality breach could not affect Gold's testimonial privilege because confidentiality and privilege are two distinct concepts.

The Tenth Circuit created the dangerous-patient exception because it failed to recognize that confidentiality and privilege are distinct concepts. Confidentiality stops psychotherapists from gossiping at the market. *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003). Privilege is the specific right of a patient to prevent the psychotherapist from testifying in court. *Id*. Gold addresses both concepts in turn and then explains why there is no conflict between her testimonial privilege and Pollak's duty to warn third parties of potential harm.

1. *Confidentiality is an ethical duty.*

Confidentiality appears in various professional contexts. The American Bar Association defines confidentiality as the ethical duty lawyers owe clients."[14] In the context of psychotherapy, BHSC § 711 governs only confidentiality. R. at 2.

> [G]iven the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation [enacted to] foster these confidential communications.

Jaffee, 518 U.S. at 13. Statements are confidential when the patient reasonably expects that her statements will not be shared. *United States v. Auster*, 517 F.2d 312, 315 (5th Cir. 2008).

2. *Privilege is a defendant's right.*

Privilege, like confidentiality, arises in professional relationships. The American Bar Association defines privilege as being "governed by an evidentiary rule protecting [an attorney's] communications with [a] client from disclosure during litigation or another proceeding. It is owned *by the client*, [and] can be waived *by the client* . . . ."[15]

Similarly, in psychotherapy, only clients may waive the PPP. Such waivers may be express or implied.[16] "Generally, a patient may waive the privilege by expressing the desire to do so, as long as [their] statement satisfies any general or specific state laws on waiver . . . ."[17]

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[14] *Confidentiality, Privilege, or Both?*, American Bar Association, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/ethics/confidentiality-privilege-or-both/ (last viewed January 31, 2021).

[15] *Id*. (*emphasis added)*.

[16] David M. Greenwald, Erin R. Shrantz, & Michele L. Slachetka. *Chapter 7. The Physician-Patient, Psychotherapist-Patient, and Related Privileges § 7:21. Express Waivers*, (September 29).

[17] *Id*.

Common implied waivers include clients' extrajudicial disclosures, clients' failure to object at trial, or clients' placement of medical conditions in issue during judicial proceedings.[18]

3. *Pollak's confidentiality breach could not affect Gold's testimonial privilege.*

Gold owned her privilege. Only she could waive it. "[A]nalytically, there is little connection between a psychotherapist's state-imposed obligation to report a dangerous patient at the time the patient makes a threat, on the one hand, and the later operation of the federal testimonial privilege, on the other."[19]

Pollak could not take the privilege from Gold's hands and surrender it to the courts. For example, in *United States v. Chase*, Chase communicated to Dr. Dieter multiple threats to harm third parties. 340 F.3d at 981. He presented his therapist with a day planner containing names, addresses, and social security numbers of people that he had thought about injuring, killing, and had in fact threatened during the past five years. *Id*. at 979. Dr. Dieter disclosed those threats to law enforcement. *Id*. at 981. The Ninth Circuit found that psychotherapist disclosure laws established both "a testimonial privilege . . . [and] a more general blanket of confidentiality to cover the relationship in all contexts." *Id*. at 982. The court reasoned that "the privilege is justified independently by important private and public interests," and these are distinct from the justifications underlying *Tarasoff* disclosures.[20] *Id*. at 984.

This Court should find that therapist confidentiality breaches cannot affect patients' testimonial privilege. Like the therapist in *Chase*, Pollak disclosed the threat to law enforcement.

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[18] *Id*. at § 7:22.

[19] Sellers II, *supra* at 423.

[20] *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976)(therapists incur an obligation to use reasonable care to protect intended victims from danger from patients).

R. at 38. Her choice to report was independent of Gold's privilege. The safety concerns underlying Pollak's duty are distinct from the societal concerns promoting the PPP.

Protecting the PPP from therapist confidentiality breaches promotes the public's twin needs for safety and mental health treatment. Because the Ninth Circuit correctly concluded that there is no conflict between confidentiality and privilege, Gold requests that this Court adopt that approach and overturn the decision arising from the United States Court of Appeals for the Fourteenth Circuit. Gold now addresses why her privilege survived Pollak's disclosure even if this Court finds that the PPP requires confidentiality.

C. Even if this Court finds a conflict between therapists' duty to warn and the PPP, Gold's privilege survives because she reasonably expected that Pollak would not breach her confidence.

The Fifth Circuit resolved the perceived conflict between confidentiality and privilege by deciding that patients cannot claim the PPP when they lack a reasonable expectation of privacy. *Auster*, 517 F.3d 315.

In *Auster*, "Auster was informed repeatedly by his therapists that his violent threats, although made during therapy, would be communicated to potential victims." *Id*. at 316. Notwithstanding these continuing warnings, he told his therapist that "unless the managers of his workers' compensation claim continued to pay the benefits that he believed he was owed, he would 'carry out his plan of violent retribution' against them and others." *Id*. at 313. He named specific personnel, city authorities, and police officials. *Id*. at 314. The Fifth Circuit ruled that because Auster lacked any reasonable expectation of privacy, his statements were never confidential and were therefore not subject to the PPP. *Id*. at 315. Significantly, the court's decision turned on Auster's expectation of privacy. *Id*.

If this Court finds a conflict between therapists' duty to warn and the PPP, it should still protect patients' reasonable expectations of privacy. Unlike Auster, Gold had a reasonable expectation that her statements would remain confidential. Unlike Auster's therapists who repeatedly warned him of disclosure, Pollak was only "pretty sure" that she told Gold that she would have to advise any potential victims of threats. R. at 21. As someone who made a vague, angry statement while seeking treatment for her anger, Gold reasonably believed that Pollak would not breach her confidence. Because the PPP protects patients seeking treatment, its existence should turn on patients' expectations. Therefore, Gold requests that, if this Court does find a conflict between therapists' duty to report and the PPP, it adopt the *Auster* framework and reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

Having explained why Pollak could not terminate her privilege, Gold now explains how Officer Yap violated the Fourth Amendment.

II. Officer Yap Violated Gold's Fourth Amendment Right To Be Secure Against Unreasonable Searches And Seizures Because (A) Gold Had A Reasonable Expectation Of Privacy In Her Personal Laptop Because She Never Conveyed It To Wildaughter; And (B) Even If This Court Finds That Gold Had No Legitimate Expectation Of Privacy In Her Personal Laptop, Yap Still Violated The Fourth Amendment By Exceeding The Scope Of Wildaughter's Private Search.

Adversarial prosecutors are bound by the law and the public good in their search for justice. Their investigations do not violate the Fourth Amendment. Gladiatorial prosecutors, by contrast, take evidence without regard to citizens' legitimate privacy interests.

The Framers enacted the Fourth Amendment in response to their experiences with colonial era general warrants. Orin S. Kerr, *Searches and Seizures in A Digital World*, 119 Harv. L. Rev. 531, 536 (2005).

> General warrants permitted the King's officials to enter private homes and conduct dragnet searches for evidence of any crime. The Framers of the Fourth Amendment wanted to [ensure] that the

> nascent federal government lacked that power. To that end, they prohibited general warrants: every search or seizure had to be reasonable, and a warrant could issue under the Fourth Amendment only if it particularly described the place to be searched and the person or thing to be seized.

Id. As of 2019, 96% of Americans own cell phones; 81% own smartphones; nearly 75% own desktop or other laptop computers; and roughly 50% own tablet computers or other e-reader devices.[21] "Hard drives have replaced filing cabinets, comprehensive financial and medical records are stored in massive databases, and some of our most personal information, including pictures of loved ones and personal correspondences, are stored in the almost endless space that exists on a modern personal computer."[22] In light of this advancing technology, Gold implores this Court to restructure the private search doctrine and uphold the Fourth Amendment's guarantee against unreasonable searches.

To protect American citizens from unreasonable government intrusions, this Court should adopt an "exposure-based approach" to digital searches. "Under this approach, a search of data stored on a hard drive occurs when that data . . . is exposed to human observation. Any observable retrieval of information stored on a computer hard drive, no matter how minor, should be considered a distinct Fourth Amendment search.[23] Like opening different filing cabinets in an office or searching different rooms in a home, each click on each digital file potentially exposes officers to information beyond the scope of a reasonable search.

In the case at bar, Officer Yap violated Gold's Fourth Amendment right against

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[21] *Mobile Fact Sheet*, Pew Research Center, https://www.pewresearch.org/internet/fact-sheet/mobile/ (June 12, 2019).

[22] James Saylor, *Computers as Castles: Preventing the Plain View Doctrine from Becoming a Vehicle for Overbroad Digital Searches*, 79 Fordham L. Rev. 2809, 2812 (2011).

[23] Orin S. Kerr, *Searches and Seizures in A Digital World*, 119 Harv. L. Rev. 531, 547-548 (2005).

unreasonable searches and seizures because (A) Gold had a reasonable expectation of privacy in her laptop because she never conveyed it to Wildaughter; and (B) even if this Court finds that Gold had no reasonable expectation of privacy in her personal laptop, Yap violated the Fourth Amendment by exceeding the scope of Wildaughter's search.

A. Gold had a reasonable expectation of privacy in her laptop because she never conveyed it to Wildaughter.

Gold's reasonable expectation of privacy limited Yap's ability to search her laptop. Gold never conveyed her laptop to Wildaughter, and she never surrendered her privacy.

This Court explained that searches and seizures "become unreasonable when the Government's activities violate the privacy upon which a person justifiably relies." *United States v. Miller*, 425 U.S. 435, 442 (1976). In *Smith v. Maryland*, 442 U.S. 735 (1979), Justice Blackmun explained that to invoke the Fourth Amendment, "a defendant must show both that he had a 'subjective expectation of privacy' in the place searched and that his expectation was 'reasonable' or 'legitimate.'"[24]

In *United States v. Jacobson*, 466 U.S. 109 (1984), this Court created the private search doctrine to allow officers to search items turned over by private parties; however, the doctrine should not apply to unauthorized searches of private residences.[25] Notably, in *Jacobson*, the Court held that "[an] agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." *Jacobson*, 466 U.S. at 104. The Sixth Circuit has unequivocally refused to extend this doctrine into private homes where individuals have not

[24] *4. Search and Seizure-Reasonable Expectation of Privacy-Short-Term Invitees in Private Home.*, 113 Harv. L. Rev. 265 (1999).

[25] *United States v. Spicer*, 423 Fed.Appx. 522 (6th Cir. 2011).

made private information available to third parties.[26] In so doing, it recognizes the fundamental difference between parcels sent through the mail and personal property inside of homes.

By contrast, the First[27] and Fifth[28] Circuits allow any person to violate another individual's legitimate expectation of privacy and hand information over to the police. This overbroad reading has been criticized for "admit[ting] evidence unlawfully seized by [private persons] while rejecting the same evidence similarly obtained by police [and producing] an anomalous result . . . [that] could be regarded as an application of the 'silver platter' doctrine"[29] rejected in *Elkins v. United States*, 364 U.S. 206 (1960).

In *Elkins* this Court considered whether evidence unreasonably seized by state officers could be used in a federal criminal trial. *Id*. at 208. The Court determined that it could not. *Id*. While *Elkins* involved officers and individuals acting under color of law[30] the logic should extend to private parties who search through private belongings without permission. To hold otherwise allows the government to obtain information that it could not otherwise acquire from reasonable searches. This loophole encourages citizens to act unreasonably and unlawfully by rifling through private belongings in which individuals have legitimate expectations of privacy.

Even if this Court disagrees and finds that the private search doctrine should apply to evidence obtained through unauthorized residential searches, Yap impermissibly exceeded the scope of Wildaughter's search.

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[26] *United States v. Allen*, 106 F.3d 695, 699) (6th Cir. 1997).

[27] *United States v. Rivera-Morales*, 961 F.3d 1, 4-5 (1st Cir. 2020).

[28] *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001).

[29] *Admissibility, in criminal case, of evidence obtained by search by private individual*, American Law Reports 36 ALR3d 553 (Originally Published 1971).

[30] *See also Byars v. United States*, 273 U.S 28 (1927).

B. Even if this Court finds that Gold had no legitimate expectation of privacy in her personal laptop, Yap still violated the Fourth Amendment by exceeding the scope of Wildaughter's private search.

No courts allow officers to exceed the scope of private searches. "Even when government agents may lawfully seize [a package] . . . the Fourth Amendment requires that they obtain a warrant before examining the contents of [the package]. Such a warrantless search could not be characterized as reasonable simply because, after the official invasion of privacy occurred, contraband is discovered." *United States v. Jacobsen*, 466 U.S. 109, 114-15 (1984). "The Fourth Amendment is implicated [when] authorities use information with respect to which the expectation of privacy has not already been frustrated . . . and [agents] therefore presumptively violate the Fourth Amendment if they act without a warrant." *Id*. "The government may not exceed the scope of [a private party search], including expansion of the search into a general search." *United States v. Wicks*, 73 M.J. 93 (2014)(quoting *Jacobson*, 466 U.S. at 117-1117). "This is, in large part, due to the extensive privacy interests at stake in [modern electronic devices like laptops]." *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015).

Agents may only re-examine what private searchers have already uncovered. For example, in *United States v. Jacobsen*, this Court considered "the removal by federal agents . . . of a series of four plastic bags that had been concealed in a tube inside a damaged package" after freight carrier employees informed officers that they had observed a white powdery substance in one of the four bags. *Jacobsen*, 466 U.S. at 109. The bags belonged to Jacobsen who had handed the tube over to freight line carriers. *Id*. at 114. The Court reasoned that "if the results of [a] private search are in plain view when materials are turned over to the Government . . . the Government's reexamination of the materials [is justified]." *Id*. at 116. The Court stated that

"surely the government may not exceed the scope of [a] private search unless it has the right to make an independent search." *Id*.

The extensive privacy interests at stake in electronic devices increase the need for officers to limit their searches only to what has been uncovered. In *Lichtenberger*, Holmes, Lichtenberger's girlfriend, searched his laptop and discovered child pornography by clicking on various files. *Lichtenberger*, 786 U.S. at 479-480. She contacted the police. *Id*. The officer who arrived on the scene asked her to show him what she had uncovered. *Id*. at 481. After reviewing some images, he asked Holmes to give him Lichtenberger's other electronic devices. *Id*. "She gave him Lichtenberger's cell phone, flash drive, and some marijuana." *Id*. Lichtenberger successfully moved to suppress the evidence. *Id*. The Court found that the officer's laptop search exceeded that of Holmes' private search conducted earlier that day. *Id*. at 485. Harkening back to this Court's decision in *Riley v. California*, 573 U.S. 373 (2014), the court reasoned that officers must generally secure a warrant before conducting searches of electronic data. *Id*. at 487. The court therefore upheld Lichtenberger's motion to suppress. *Id*. at 491.

Gold's case is unlike *Jacobsen* because Yap clearly searched beyond what Wildaughter uncovered. Wildaughter did not open the recipe file. R. at 26. Yap did. Wildaughter did not open the health insurance, tax, exam, or financial information files. *Passim*. Yap did. By applying the reasoning in *Jacobsen*, this Court should find in favor of Gold.

This case is like *Lichtenberger*. Wildaughter, an unauthorized private person, searched through Gold's computer. R. at 25. She reported what she found to the LPD. R. at 6. As in *Lichtenberger*, Yap exceeded the scope of the private search. He reviewed all of Gold's tax and financial information. *Id*. This Court should uphold its precedent and find that officers need a warrant before delving into unexplored electronic content. Because Gold never surrendered her

reasonable expectation of privacy in her laptop, and because Yap's search exceeded the scope Wildaughter's search, Gold prays this Honorable Court overturn the decision of the United States Court of Appeals for the Fourteenth Circuit.

Having explained why her statements to Pollak were privileged and that Yap violated her Fourth Amendment right against unreasonable searches and seizures, Gold now argues that the FBI violated *Brady* and her Fifth Amendment right to due process.

III. The Government Violated *Brady* By Withholding The Two FBI Investigative Reports Because (A) *Brady* Seeks To Put Defendants and Prosecutors On Equal Footing By Providing Defendants With Material Exculpatory Evidence; (B) Requiring Prosecutors To Automatically Disclose All Exculpatory Evidence Will Ensure That *Brady* Protects All Defendants; And (C) Requiring Prosecutors To Disclose Inadmissible Exculpatory Evidence Will Not Impose A Heavy Burden On Prosecutors.

If prosecution is the government's sword, *Brady v. Maryland*[31] is the defendant's shield. It guarantees the defendant's right to the fair disclosure of exculpatory evidence. As adversaries seeking truth, prosecutors do not cast this shield aside. They disclose favorable information and allow defendants to defend themselves. Gladiatorial prosecutors, by contrast, seek convictions at all cost. They disregard due process, conceal evidence, and leave citizens defenseless.

The Due Process Clause states that "[n]o State . . . shall deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. V. In the landmark *Brady v. Maryland* decision, this Court held "that the suppression of evidence favorable to an accused [person] . . . violates due process when the evidence is material either to guilt or to punishment, irrespective of the good . . . or bad faith of the prosecution."[32]

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[31] 373 U.S. 83 (1963).

[32] *Supra*.

For the first time, this Court recognized that the justice system is not a gladiatorial brawl, but a process based on fairness and integrity.[33] Like exculpatory evidence, impeachment evidence is invaluable to juries determining guilt and sentencing.[34] In order to establish a *Brady* claim, Gold must show that the evidence was (1) favorable because it was exculpatory or impeaching, (2) suppressed by the government, and (3) material. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In this case, the leads were (1) favorable because they identified other suspects, (2) suppressed by the FBI, and (3) material to Gold's innocence.

The circuit courts are divided on whether inadmissible evidence is material. This Court's decision in *Wood v. Bartholomew*[35] sparked the debate when it held that inadmissible polygraph results were immaterial because they would not affect the trial's outcome. This Court so held because other evidence against the defendant was overwhelming. This Court did not decide that inadmissible evidence is *per se* immaterial. *Brady* requires the government to disclose inadmissible, material, exculpatory evidence because (A) defendants have the right to incorporate exculpatory evidence into their defenses; (B) *Brady* requires prosecutors to disclose all exculpatory evidence that may lead to admissible evidence; and (C) such disclosure do not impose a serious burden on prosecutors.

A. *Brady* seeks to put defendants and prosecutors on equal footing by providing defendants with material exculpatory evidence.

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[33] Robert Hochman, Comment, Brady v. Maryland and the Search for Truth in Criminal Trials, 63 U. Chi. L. Rev. 1673, 1674 (1996).

[34] *Giglio v. United States*, 405 U.S. 150 (1972).

[35] 516 U.S. 1, 6 (1995).

Withholding exculpatory evidence because it is inadmissible contravenes *Brady's* primary purpose.[36] Justice Douglas, emphasizing *Brady's* reverence for disclosure, stated that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair."[37] Prosecutors know that failing to disclose exculpatory evidence inhibits due process.[38] *Brady* values "[i]nnocence . . . [because it] is not a technicality [of] the criminal process. It is the main touchstone . . . . The justice system must [strive both] to convict the guilty [and to] acquit the innocent."[39]

This Court should defend the innocent and favor disclosure. In Gold's case, the FBI failed to disclose two investigative reports. Although inadmissible, these reports named two potential suspects with motives and means to kill Driscoll. Due process requires the government to disclose evidence that (1) attacks the reliability, thoroughness, and good faith of police investigations; (2) impeaches the credibility of state witnesses; and (3) builds stronger defense cases.[40] Because the FBI failed to disclose all three types of evidence, Gold requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

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[36] *Ellsworth v. Warden*, 333 F.3d 4 (1st Cir. 2003).

[37] 2 Peter Henning, Andrew Taslitz, Margaret Paris & Cynthia Jones, & Ellen Podgor, *Mastering Criminal Procedure,. The Adjudicatory Stage*, § 9.3 (2d. 2015).

[38] *Cone v. Bell*, 129 U.S.. 1769, 1783 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure").

[39] Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence, Criminal Procedure Stories*, Carol S. Steiker, ed., Foundation Press (2006).

[40] *Kyles v. Whitley*, 514 U.S. 419, 442, 445-451 (1995).

Having addressed why *Brady* entitles defendants to incorporate exculpatory evidence into their defenses, Gold now demonstrates how requiring prosecutors to automatically disclose inadmissible exculpatory evidence protects the innocent.

B. Requiring prosecutors to automatically disclose all exculpatory evidence will ensure that *Brady* protects all defendants because (1) inadmissible exculpatory evidence may lead to admissible exculpatory evidence; and (2) had the FBI disclosed the two investigative reports, Gold could have uncovered an abundance of admissible evidence to bolster her defense.

Defendants' ability to prove that undisclosed evidence is "material" depends on prosecutors' willingness to disclose.[41] This Court determined that exculpatory evidence is material when there is a "reasonable probability" that [a trial's result] would have been different if the evidence had been disclosed before trial.[42] To prove that disclosure could have affected a trial's outcome, defendants need to show that the evidence "[has presented the] case in such a different light as to undermine confidence in the verdict."[43]

This Court first considered the materiality of inadmissible exculpatory evidence in *Wood v. Bartholomew,* 516 U.S. 1, 2 (1995). This Court decided that certain suppressed polygraph results were not material because there was no "reasonable probability" that disclosure would have changed the trial's outcome. *Id*. at 8. Significantly, the Court's decision turned on the existence of other overwhelming evidence of the defendant's guilt. *Id*. While this Court noted

[41] *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

[42] *United States v. Bagley*, 473 U.S. 667 (1985).

[43] *Id*. at 434–35.

that the polygraph results were "not evidence" because they were inadmissible, the Court did not directly address whether inadmissible information is material under *Brady*.[44]

Arguing that inadmissible information is material, Gold first addresses how inadmissible evidence may lead to admissible exculpatory evidence and then explains how the FBI's failure to disclose the reports prevented Gold from uncovering admissible exculpatory evidence.

1. *Inadmissible exculpatory evidence may lead to admissible exculpatory evidence.*

The Fifth Circuit described the materiality dilemma in *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999). "*Brady* claims about inadmissible evidence [are] a matter of some confusion in federal courts." *Id*. To cope with the confusion, circuit courts have adopted different approaches when defining prosecutors' duty to disclose inadmissible exculpatory information.[45]

The Fourth Circuit[46] ruled that inadmissible evidence is "as a matter of law, 'immaterial' for *Brady* purposes." Dangerously, this approach does not consider how inadmissible information might lead to admissible evidence that can be used by defendants at trial.[47]

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[44] Gregory S. Seador, *Note: 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 Syracuse L. Rev. 139 (2001).

[45]Abigail B. Scott, *No Secrets Allowed: A Prosecutor's Obligation To Disclose Inadmissible Evidence*, 61 Cath. U.L. Rev. 869.

[46] *Hoke v. Netherland*, 92 F.3d 350 (4th Cir. 1996).

[47] Blaise Niosi*, Architects Of Justice: The Prosecutor's Role And Resolving Whether Inadmissible Evidence Is Material Under The Brady Rule*, 83 Fordham L. Rev. 1499 (2014).

The Fifth[48] and Ninth[49] Circuits decided that the "key" question is "whether the [evidentiary disclosure] would have created a reasonable probability that the [proceeding's result] would have been different."[50]

The First,[51] Second,[52] Third,[53] Sixth,[54] Seventh,[55] and Eleventh[56] Circuits require prosecutors to disclose inadmissible evidence that may reveal admissible, exculpatory evidence. These circuits evaluate evidence holistically.[57] This approach best promotes the *Brady* doctrine because it prioritizes the benefits that flow to defendants from disclosure over mere admissibility. *Kyles v. Whitley* provides that evidence is material "if there is a reasonable probability that, *had the evidence been disclosed to the defense*, the result of the proceeding would have been different." 514 U.S. 419, 433-34 (1995)(emphasis added). Simply, the *Brady* analysis focuses on whether material evidence is "disclosed to the defense," and not on whether it is admissible. *Id*. Just as this Court refused to add a due diligence prong to the three-prong

[48] *Trevino v. Thaler,* 449 Fed. App'x 415, 424 n.7 (5th Cir. 2011).

[49] *Coleman v. Calderon*, 150 F.3d 1105, 1117 (9th Cir. 1998).

[50] *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); *see also* Bradley v. Nagle, 212 F.3d 559, 567 (11th Cir. 2000).

[51] *DeCologero v. United States*, 802 F.3d 155 (1st Cir. 2015)(citing *Ellsworth v. Warden*).

[52] *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002).

[53] *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016).

[54] *United States v. Phillip,* 948 F.2d 241 (6th Cir. 1991).

[55] *United States v. Ballard*, 885 F.3d 500 (7th Cir. 2018).

[56] *Wright v. Hopper*, 169 F.3d 695 (11th Cir.).

[57] *Apanovitch v. Houk,* 466 F.3d 460, 475 (6th Cir. 2006).

Brady inquiry in *Williams v. Taylor*,[58] this Court should refuse to adopt an admissibility prong because such an addition would limit defendants' protections.[59]

This Court's decision in *Cone v. Bell*, 556 U.S. at 470-71 (2009) illustrates the importance disclosure regardless of admissibility. In *Bell*, the defendant was convicted of murder and sentenced to death. *Id*. at 470. He argued that the prosecution failed to disclose police bulletins, statements, and FBI reports that corroborated his insanity defense. *Id*. at 471. This Court remanded the case because the lower courts failed to "thoroughly review the suppressed evidence [and] consider what its cumulative effect on the jury would have been" during sentencing." *Id*. at 472. Most importantly, this Court emphasized that the materiality standard for all undisclosed evidence is simply "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id*. at 470, 476.

Even if this Court chooses not to require disclosure whenever inadmissible evidence may lead to admissible evidence, it should adopt the approach followed by the Fifth and Ninth circuits because that approach bears the closest resemblance to the "reasonable probability" standard proffered by this Court. Having explained how requiring prosecutors to disclose inadmissible, exculpatory evidence protects the innocent, Gold now explains how the government's failure to disclose the two FBI investigative reports prevented her from uncovering admissible evidence.

2. *Had the FBI disclosed the two investigative reports, Gold could have uncovered an abundance of admissible evidence to bolster her defense.*

[58] 529 U.S. 362, 393 (2000).

[59] *Id*.

By withholding the two exculpatory reports, the FBI prevented Gold from presenting a stronger defense and from undermining confidence in her verdict. Gold had no way to learn about the private FBI interviews or the two other suspects.

Fair trials depend on parties' equal footing. For example, in *Spaziano v. Singletary*, the Eleventh Circuit held that the government did not violate *Brady* when it failed to disclose inadmissible investigative reports because the defendant already had knowledge of the reports' contents. *Singletary* 36 F.3d at 1030 (1994). The defendant was convicted of murder and sentenced to death. *Id*. On federal *habeas* review, he argued that his conviction resulted from the prosecution's failure to disclose the reports. *Id*. at 1044. The court reasoned that the government did not violate *Brady* because the reports contained information that the defense counsel already had. *Id*. Therefore the reports would not have led to any new admissible evidence. *Id*.

In this case, by contrast, Gold's defense counsel did not know about the FBI reports. *Passim*. This Court has acknowledged that evidence cannot be suppressed if the defendant either knows or should have known about it.[60] However, defendants need not "hunt for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."[61] The investigative reports pinpoint concrete suspects with stronger motivations and greater means to do harm. Without the reports, Gold's search for other suspects was akin to finding a needle in the haystack of students who were angry with Driscoll. R. at 18.

There is ample evidence in the record showing that the Government engaged in exactly the type of prosecutorial gamesmanship that this Court condemned in *Brady*. Initially, FBI agents

[60] See, e.g., Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001); Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir. 2000) (finding no Brady violation where the defense could have obtained the evidence through "reasonable diligence"); Felker v. Thomas, 52 F.3d 907 (11th Cir. 1995).

[61] Banks v. Dretke, 540 U.S. 668, 695 (2004).

and Joralemon police detectives found no physical evidence of foul play. R. at 16. The LPD admits there was no forensic evidence in Driscoll's home suggesting that Gold committed the murder. *Id*. There were no footprints, fingerprints, or weapons. *Id*. Gold could have used the investigative reports to show that the FBI was rushed, embarrassed and desperate.

The first investigative report was composed on 2 June 2017, four days before Gold was indicted. R. at 11. Caplow, a fellow JU student and HerbImmunity salesman, reported that he spoke to Driscoll two weeks before she died. *Id*. Driscoll told Caplow about her extensive debt to an upstream distributor named Brodie. *Id*. Caplow described Brodie's reputation for violence. *Id*. Although Agent Baer's report suggests that she investigated Brodie further, the record does not demonstrate that she did.

The FBI released the second investigative report almost one month after Gold's indictment. R. at 12. An anonymous caller alleged that Stevens killed Driscoll. *Id*. Agent Peter found the lead unreliable. *Id*. Gold, however, could have undermined confidence in his investigation by showing that the report did not describe his methods and techniques. Defects in criminal investigations are favorable evidence for defendants.[62] Gold had the right to question whether investigators pursued proper courses of action, interviewed relevant witnesses, or obtained necessary scientific evidence.[63] Gold could have called witnesses who knew the suspects and had information about their plans to harm Driscoll. All of these potential pieces of evidence might have presented the case in a different light and raised reasonable doubt as to Gold's guilt.

C. Requiring prosecutors to disclose inadmissible exculpatory evidence will not impose a heavy burden on prosecutors.

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[62] Bershman, Bennett L. (2012) *Article: Educating Prosecutors And Supreme Court Justices About Brady v.. Maryland*, 13 Loy. J. Pub. Int. L. 517.

[63] *Kyles v. Whitley*, 514 U.S. 419 (1995).

Critics of automatic disclosure argue that requiring prosecutors to disclose inadmissible exculpatory evidence is overly burdensome because in addition to handling large caseloads and securing convictions, the attorneys will have to spend time sifting through files and weighing item-by-item the relevance each piece of evidence.[64] Others suggest that prosecutors will not be impartial when deciding what evidence is material.

Justice Marshall addressed these concerns in his *United States v. Bagley,* 473 U.S. 667 (1985) dissent:

> At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of the truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pour through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence.

Id. at 696-97. The concerns are ill founded. Prosecutors try cases. They know what information in their files will be detrimental to their case if utilized by the defense.[65] This skill makes them capable of identifying and disclosing *Brady* material. These determinations require little or no effort on the part of experienced prosecutors.[66]

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[64] S*picer v. Roxbury Corr. Inst*., 194 F.3d 547, 555 (4th Cir. 1999).

[65] Gregory S. Seador, *Note: 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 Syracuse L. Rev. 157 (2001).

[66] *Id*.

The Department of Justice ("DOJ") recognizes that the arsenal of resources that prosecutors have to help them fulfill their discovery obligations provide many practical advantages. For example, the DOJ gives prosecutors access to supervisors, discovery coordinators, the Professional Responsibility Advisory Office, online resource websites, and other prosecutors with whom they may consult. U.S. Dep't of Justice, U.S. Attorney's Manual, § 9-5.002, Cmt. 1 (2017). To account for these advantages, the DOJ's mission is to ensure fair trials by requiring prosecutors to develop formal process for reviewing and disclosing relevant exculpatory evidence. *Id*.

This Court should protect defendants and find that suppressed, inadmissible exculpatory evidence is material because it can lead to admissible evidence. This approach will promote uniformity and prevent erroneous convictions. It will prevent adversarial prosecutors from behaving like gladiators.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

Team 5P
Counsel for Respondent