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 RESPONDENT

TEAM #6
Counsel for Respondent
United States of America

QUESTIONS PRESENTED

1. Whether the psychotherapist testimonial privilege under Federal Rule of Evidence 501 applies when a criminal defendant makes violent threats about her future victim to her psychotherapist and her therapist subsequently discloses the directed threats to law enforcement.

2. Whether the Fourth Amendment is violated when the government admits files from a flash drive into evidence, when the files were obtained by an individual's limited private search, and the government conducted a search of those files slightly broader than the individual's private search.

3. Whether the requirements of *Brady v. Maryland* to disclose exculpatory or prejudicial evidence are violated when the government did not disclose potentially exculpatory inadmissible evidence because it was inadmissible evidence and would not have resulted in a different outcome at trial.

PARTIES TO THE PROCEEDING

Petitioner is Ms. Samantha Gold, the Defendant in the United States District Court for the Eastern District of Boerum and the Appellant in the United States Court of Appeals for the Fourteenth Circuit.

Respondent is the United States of America, the Prosecution in the United States District Court for the Eastern District of Boerum and the Appellee in the United States Court of Appeals for the Fourteenth Circuit.

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The opinion of the United States Court of Appeals for the Fourteenth Circuit was issued on February 24, 2020. The Fourteenth Circuit's decision affirmed the rulings of the United States District Court for the Eastern District of Boerum which (1) denied two motions to suppress both psychotherapist testimony and evidence discovered through a private individual's search; and (2) denied a motion for post-conviction relief claiming that the government had withheld exculpatory evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional and statutory 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.

Section 1716 of the Injurious Articles as Nonmailable provides:

> (j) (2) Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by this section, whether or not transmitted in accordance with the rules and regulations authorized to be prescribed by the Postal Service, with intent to kill or injure another, or injure the mails or other property, shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (3) Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person shall be subject also to the death penalty or to imprisonment for life.

18 U.S.C. § 1716.

Section 711 of the Boerum Health and Safety Code: Reporting Requirements for Mental Health Professionals provides:

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

Boerum Health and Safety Code § 711: Reporting Requirements for Mental Health Professionals.

STATEMENT OF THE CASE

I. Factual Background and Petitioner's Criminal Conviction

On May 26, 2017, Ms. Tiffany Driscoll ("Ms. Driscoll"), having just begun her summer vacation, was found dead by her father at the bottom of his two-story townhouse in Livingston, Boerum. R. at 13. A toxicology report revealed that Ms. Driscoll had been poisoned with strychnine, a deadly neurotoxin. R. at 14. When FBI agents subsequently searched Ms. Driscoll's home, they found an empty box that had contained chocolate covered strawberries, which the FBI believed were laced with strychnine, and a note praising Ms. Driscoll. *Id.*

One day earlier, Ms. Chelsea Pollak ("Pollak"), Ms. Samantha Gold's ("Defendant") psychotherapist contacted the Joralemon Police Department concerning the safety of Defendant and Ms. Driscoll. Pollak had diagnosed Defendant with Intermittent Explosive Disorder ("IED") (a mental health disorder characterized by repeated episodes of aggressive, impulsive, or violent

behavior), which had manifested itself in an explosive conversation where Defendant directly threatened Ms. Driscoll. R. at 5. Prior to this outburst, Pollak informed Defendant that any direct threats made in therapy against identifiable individuals must be disclosed to law enforcement. R. at 21. Recalling this conversation during testimony at Defendant's trial, Pollak noted how angry Defendant had gotten about the lack of success she had selling products for HerbImmunity (a multi-level marketing organization), her mounting debt from joining the business, and how Ms. Driscoll had consistently lied to her about the profitability of the company. R. at 18. Law enforcement later performed a wellness on both Defendant and Ms. Driscoll, finding both to be mentally sound and safe. R. at 5.

That same day, Ms. Jennifer Wildaughter ("Wildaughter"), Defendant's roommate, was sitting in her dorm room when Defendant came home visibly enraged. R. at 6. Soon after, Defendant stormed out of the apartment, leaving her computer open on her desk. *Id*. Wildaughter later testified, that Defendant stated "[she]'d do anything to get out of this mess Tiff put [her] in." R. at 24. Concerned that Defendant might become violent, Wildaughter looked through her roommate's laptop, searching the documents and files on the desktop. *Id.* There she found several concerning files indicating that Defendant was planning "to hurt someone." R. at 26.

Wildaughter subsequently downloaded the contents of Defendant's desktop onto a flash drive and brought it to Officer Yap of the Livingston Police Department, assuming that law enforcement would know how to handle the situation. R. at 6, 26. Wildaughter told Officer Yap that "everything of concern" was on that flash drive, specifically: (1) photographs of Ms. Driscoll outside her home, eating chocolate strawberries at a café, and of Ms. Driscoll's father getting off the subway; (2) a note which matched the note later discovered at the crime scene; and (3) a text file which contained passwords and codes for an online marketplace and mentions of strychnine. R. at 6.

After Wildaughter informed Officer Yap about the concerning material she saw on Defendant's laptop, Officer Yap conducted his own search of the flash drive and confirmed that Defendant was planning to poison Ms. Driscoll. R. at 6. Additionally, Officer Yap opened some files that Ms. Wildaughter did not describe opening, including some personal photos, an HerbImmunity folder that contained a shipping confirmation for Ms. Driscoll, a recipe for chocolate covered strawberries with an ingredient labeled "secret stuff," and other subfolders labeled "College Stuff," "Games," "budget," "Exam4," "Health Insurance ID Card," and "To-Do List." R. at 7. Afterward, Officer Yap contacted his supervisor to confirm his findings and turned over the flash drive. R. at 6. On May 27, 2017, police arrested Ms. Gold for the murder of Ms. Driscoll. R. at 14.

After Defendant's arrest, the FBI received two dead-end tips about the case. R. at 11-2. First, a man named Chase Caplow ("Caplow"), who attended Joralemon University with both Defendant and Ms. Driscoll, stated that Ms. Driscoll called Caplow and told him that she owed money to an upstream distributor at HerbImmunity named Martin Brodie. *Id.* at 11. Mr. Caplow informed police that he heard rumors that Mr. Brodie might be violent, but he personally had not witnessed any violence from Mr. Brodie whatsoever. *Id.* Second, the FBI received a lead from an anonymous call. R. at 12. The anonymous caller claimed that Belinda Stevens, who was also an HerbImmunity member, killed Ms. Driscoll. *Id.* FBI agents determined that this lead was also unreliable and therefore required no further follow up. *Id.*

II. The Fourteenth Circuit's Affirmation of the District Court

The Federal Government indicted Defendant with Delivery by Mail of An Item With Intent to Kill or Injure in violation of Title 18, United States Code, Sections 1716(j)(2), (3) and 3551 et seq.

R. at 1. In preparation for trial, Defendant moved to suppress two pieces of evidence at trial: (1) Pollak's testimony and therapy notes; and (2) the information from Defendant's laptop. R. at 16. The district court denied Defendant's evidentiary challenges on all grounds. R. at 41. Defendant also filed a Motion for Post-Conviction Relief, claiming that because two reports from the FBI were not disclosed the government violated *Brady v. Maryland*. R. at 43. The district court denied Defendant Motion for Post-Conviction Relief. R. at 48. Defendant appealed her conviction to the Fourteenth Court of Appeals for the United States, stating that the district court had improperly dismissed her two Motions to Suppress and her Motion for Post-Conviction Relief. R. at 51. On February 24, 2020, the Fourteenth Circuit affirmed the rulings of the district court on all three issues. R. at 57. The Supreme Court granted Defendant's Writ of Certiorari on November 16, 2020. R. at 60.

SUMMARY OF THE ARGUMENT

Petitioner has brought three issues to this Court on appeal, claiming that the district court made a variety of evidentiary errors in this case and requesting that her judgment be set aside. First, Petitioner erroneously claims that the district court improperly denied her motion to suppress testimony from her psychotherapist, as she allegedly is entitled to the psychotherapist privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996); R. at 35. Second, Petitioner similarly asserts that that the district court improperly denied her second motion to suppress evidence found via a private search. R. at 31. Lastly, Petitioner claims that the district court improperly denied her motion for post-conviction relief raised when Petitioner discovered that the Government withheld two reports documenting the dismissal of two other suspects. R. at 43. The district court properly denied all these motions consistent with relevant state and federal law, this Court's precedent, and the Constitution. R. at 40, 48.

Addressing the first Motion to Suppress, Petitioner's conversation with her psychotherapist is not entitled to the federal psychotherapist privilege because Petitioner had no reasonable expectation of confidentiality. *Jaffee*, 518 U.S. at 9; *United States v. Auster*, 517 F.3d 312, 315-6 (5th Cir. 2008). While the Court in *Jaffee* formally recognized the federal psychotherapist privilege under Federal Rule of Evidence 501, it did not determine when a conversation between therapist and patient was "confidential." *Jaffee*, 518 U.S. at 9. The Court did not define the bounds of confidentiality in its decision, and as a result there is disagreement in the lower courts. *See Auster*, 517 F.3d at 315 (defined confidentiality as primarily locally defined); *but see United States v. Ghane*, 673 F.3d 771, 781 (8th Cir. 2012); *United States v. Chase*, 340 F.3d 978, 985-7 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578, 586 (6th Cir. 2000).

In *Auster,* the Fifth Circuit decided that confidentiality was best established by looking to state and local laws, which determined whether certain conversations between a psychotherapist and patient were legally confidential. *Auster*, 517 F.3d at 315-6. This method both respects State policymaking and creates consistent results within jurisdictions. Applying the "reasonable expectation of confidentiality" test here, Petitioner clearly could not have expected the conversation to remain confidential. State law mandated that Petitioner's psychotherapist disclose threats made during therapy to state officials, and Petitioner's psychotherapist informed her of this duty. BOERUM HEALTH AND SAFETY CODE § 711(1)(a); R. at 21. As such, the psychotherapist privilege does not apply, and Petitioner's motion fails.

Furthermore, the police search of a flash drive provided by a private citizen after a private search did not violate the Fourth Amendment, as flash drives do not create the same privacy concerns that other digital containers (like phones or laptops) create. Because flash drives are both limited in size and unable to update remotely, the privacy concerns recognized by this Court in

Riley v. California (which created a circuit split on how to best address those privacy concerns) are largely moot. *Riley v. California*, 573 U.S. 373, 385 (2014). As such, a broad approach to the private search doctrine should be adopted, stating that as long as the officer was substantially certain of what was on the drive when the search was conducted, then the police search was constitutional. *See Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012); *United States. v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001). Applied to this case, the police search did not violate the Fourth Amendment because Officer Yap was substantially certain that "everything" he needed was on the drive when he conducted his search. R. at 27. Thus, Petitioner's Motion to Suppress the flash drive evidence also fails.

Lastly, the prosecution did not have a duty to disclose two FBI reports, which dismissed several leads as unreliable, because those reports were (1) inadmissible hearsay and (2) not material for the purpose of establishing a *Brady* violation. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998); *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir. 1996). Inadmissible or immaterial evidence cannot serve at the basis for a *Brady* violation. *Brady*, 373 U.S. at 87 The purpose of *Brady* was to require the government to disclose potential exculpatory or impeachment evidence so that the defense could use the evidence in some tangible, direct way. *Id*. In *Wood v. Bartholomew*, this Court determined that inadmissible evidence was "not evidence at all," negating any claim to protections under *Brady* when such evidence is withheld. *See Wood v. Bartholomew,* 516 U.S. 1, 6 (1995). Furthermore, Petitioner claims that she could have conducted a more thorough investigation, potentially discovering an alternative murderer or accomplice, had she received these reports. R. at 45. This purpose is far to speculative to establish the materiality of the inadmissible reports, and thus the district court properly denied Petitioner's Motion for Post-Conviction Relief.

ARGUMENT

I. PETITIONER'S THREATENING AND VIOLENT CONVERSATION WITH HER PSYCHOTHERAPIST IS NOT ENTITLED TO THE FEDERAL PSYCHOTHERAPIST TESTIMONIAL PRIVILEGE.

Federal Rule of Evidence 501 allows federal courts to create common law privileges "in the light of reason and experience" unless the Constitution, federal statute, or Supreme Court rules provide otherwise. Fed. R. Evid. 501. In *Jaffee v. Redmond*, this Court recognized that, pursuant to Rule 501, "a privilege [exists which] protect[s] *confidential* communications between a psychotherapist and her patient." 518 U.S. at 9-10 (emphasis added). While the Court broadly determined that this privilege "promotes sufficiently important interests to outweigh the need for probative evidence," it also recognized that such a privilege was not absolute. *Id.* at 18, n.19.

In noting that there were situations in which the federal psychotherapist 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 disclosure by the therapist," the Court did not create an exhaustive list of potential exceptions to the psychotherapist privilege. *Id.* Instead, the Court left open the possibility that the privilege might be limited depending on the facts of the case. This is such a case.

First, the record clearly indicates that the conversation between Petitioner and her psychotherapist was not confidential, as Petitioner did not have a reasonable expectation of confidentiality under applicable state and federal law. *See Auster*, 517 F.3d at 315-6; BOERUM HEALTH & SAFETY CODE § 711(1)(a) ("Communications between a patient and a mental health professional are confidential except where . . . [t]he patient has made an actual threat to physically harm either themselves or an identifiable victim."). Second, even if Petitioner did have a reasonable expectation of confidentiality, disclosure of the conversation by her therapist barred any claim to the psychotherapist privilege. Lastly, even if this Court finds that the psychotherapist's testimony was improperly admitted, such an admission is not sufficient to

overturn Petitioner's conviction or merit a new trial. As such, we pray that this Court affirm the decision of the Fourteenth Circuit.

A. The Psychotherapist Privilege is Not Available to Petitioner Because Her Conversation with Her Therapist was Not Confidential Under Federal and State Law.

Petitioner's threatening conversation with her psychotherapist is not entitled to the federal psychotherapist privilege. In *Jaffee*, this Court expressly stated that only confidential communications between a psychotherapist and patient are privileged. *Jaffee*, 517 F.3d at 9-10. While conversations between a patient and her psychotherapist are generally confidential, the Court in *Jaffee* declined to delineate exactly where confidentiality began and ended. *See id.* at 1-17.

While the Court did not provide guidance on how confidentiality might be defined, it did provide some guidance on how the limitations of the psychotherapist privilege might be defined. *Id.* at 17-8. The Court expressly rejected adoption of a judicial "balancing component" to help determine whether a conversation was privileged on the basis that "the participants in the confidential conversation 'must be able to predict with some degree of certainty whether a particular discussion will be protected.'" *Id.* at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981)).

In this case, as will be discussed in depth below, adoption of a broad psychotherapist privilege will simply lead to confusion, as relevant federal and state laws clearly limit the psychotherapist privilege when (1) the psychotherapist has expressly disclosed that certain communications are subject to mandatory disclosure, and (2) threats are made against identifiable individuals. As such, a common-sense definition of confidentiality and mandatory state disclosure laws limits the psychotherapist privilege. This appropriately balances the need for candor and trust

in therapy sessions with the recognition that state legislatures are in the best position to determine the extent to which confidentiality serves the public good.

i. When a patient has been expressly informed that certain communications are subject to disclosure, there is no reasonable expectation of confidentiality.

A plain reading of this Court's precedent in *Jaffee* requires that communications between a patient and psychotherapist be confidential in order to establish the psychotherapist testimonial privilege. *Id.* at 15-6. As was previously discussed, the Supreme Court did not, and has not since, defined which communications are confidential and which are not. The only clear standard established in *Jaffee* was a rejection of balancing components which "[m]ak[e] the promise of confidentiality contingent upon a trial judge's later evaluation of the patient's interest in privacy and the evidentiary need for disclosure." *Id.* at 17. As such, a more reliable test is required, one which provides a "degree of certainty whether a particular discussion will be protected." *Id.* at 18.

Fortunately, the Fifth Circuit has elucidated a simple test: "whether there was a reasonable expectation of confidentiality when the statement was made." *Auster*, 517 F.3d at 317. There are several factors which might affect the determination of confidentiality, including the extent to which confidentiality is recognized by state law. *Id.* Not only does this provide a clear test with predictable results based on state and federal law, but it also defers to the state legislative process for the definition of confidentiality in the context of the psychotherapist privilege.

This deference is especially important regarding the psychotherapist privilege, as confidentiality laws vary widely among the various states. *Id.* at 320. As the Fifth Circuit noted, state confidentiality laws are anything but consistent. *Id.* Specifically, the court focused on states where the psychotherapist-patient privilege either does not apply or is not universal. *Id.* These states include California, West Virginia, Connecticut, Wyoming, North Carolina, and Texas. *Id.* Given this divergence, a decision which determines that threatening conversations are confidential

would undermine state laws, like § 711(1)(a) in Boerum, which provide testimonial privilege for confidential communications in limited circumstances.

While the Sixth, Eight, and Ninth Circuits have adopted a standard which heavily prioritize patient confidentiality, such an approach requires an absurd reading of both Supreme Court precedent and statutory law. *See Ghane*, 673 F.3d at 781; *Chase*, 340 F.3d at 985-7; *Hayes*, 227 F.3d at 586. Patient-centric policies are not inherently objectionable, but these courts have gone far beyond what current Supreme Court precedent allows by separating the breach in confidentiality inherent to *Tarasoff* disclosures from the confidentiality necessary to establish the federal psychotherapist privilege. In doing so, these courts also make broad, and incorrect, generalizations concerning the state of state privilege law. *See e.g., Chase*, 340 F.3d at 985-6.

For example, in *Chase*, the Ninth Circuit declined to recognize an exception to the federal psychotherapist testimonial privilege, but the reasons the court did so is enlightening. *Id.* at 985-92. The court began its reasoning with an extensive look at state level confidentiality within the Ninth Circuit's jurisdiction. *Id.* at 985-9. The court observed that all the states within its jurisdiction, with the exception of California, did not have an evidentiary dangerous-patient exception to the psychotherapist privilege. *Id.* The Ninth Circuit found this fact to be particularly instructive and determined, in part, that federal exceptions to privileges are inappropriate "where state laws contain no parallel exception[s]." *Id.*

This view of privilege prioritizes state level decision making and policy in order to inform federal policy within jurisdictions. Consistent with this view, a rule which adopts state-defined definitions of confidentiality, like the Fifth Circuit's, inherently prioritizes and respects state-level legislative policymaking. Thus, even applying the Ninth Circuit's logic to this case, it is clear that the standard should be consistent with § 711(1)(a) of the Boerum Health and Safety Code, as state

law places clear limitations on psychotherapist-patient confidentiality which go beyond a simple duty to report potential violence. Section 711(1)(a) states that "communication[s] between a patient and a mental health professional" are not confidential when "[t]he patient has made an actual threat to physically harm either themselves or an identifiable victim." BOERUM HEALTH & SAFETY CODE § 711(1)(a). Such a broad restriction on confidentiality clearly indicates that the Boerum legislature prioritizes effective management and prosecution of dangerous individuals over marginal increases in therapeutic effectiveness, establishing the appropriateness of the Fifth Circuit's approach.

Applying the "reasonable expectation of confidentiality" test to this case, it is clear that the duly elected legislature of Boerum has determined that violent threats should not be confidential between psychotherapists and their patients. *Id.* Additionally, it is clear that threats made in therapy cannot be confidential when psychotherapists expressly inform their patients that violent, specified threats against identifiable individuals must be reported to state officials. Here, Petitioner's psychotherapist testified that she informed Petitioner of her duty to report serious threats of harm consistent with the Boerum Health and Safety Code. R. at 21. Additionally, as was previously discussed, the Boerum Health and Safety Code § 711(1)(a) states that communications where "[t]he patient has made an actual threat to physically harm themselves or an identifiable victim" are not confidential. BOERUM HEALTH AND SAFETY CODE § 711(1)(a). As such, it cannot be said that, under state law, Petitioner had any reasonable expectation that her threats against Ms. Driscoll would be kept confidential. Thus, the federal psychotherapist privilege does not protect the psychotherapist's testimony, and its admission as evidence was appropriate.

B. Even If the Psychotherapist Privilege Did Apply to Petitioner's Conversation with Her Psychotherapist, Her Therapist's Subsequent Disclosure of the Threats in Compliance with State Law Destroyed the Purpose of the Privilege.

Even assuming that confidentiality extends to violent threats made in psychotherapy sessions—contradicting state law, public policy, and Supreme Court precedent—disclosure of the threats in compliance with state law by Petitioner's psychotherapist amounted to a breach in confidentiality sufficient to defeat the purpose of the privilege. In *Jaffee*, the Court states that the primary purpose of "the psychotherapist privilege is . . . the imperative need for confidence and trust [between a patient and their psychiatrist]." *Jaffee*, 518 U.S. at 10 (internal citations omitted). That confidence and trust, however, is broken when a psychotherapist complies with state law and discloses violent, targeted threats to the authorities, as the details of those threats are shared not only with the police, but also the potential victim.

One can assume that the victim would share these threats with their loved ones and others, effectively guaranteeing that some amount of "embarrassment or disgrace" for the patient would follow. *See id*. ("Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling session may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."). As such, the primary purpose and goal of the psychotherapist privilege is tarnished beyond repair by the initial disclosure. As such, further disclosure at trial, especially when the trial concerns violence against the subject of the disclosed threats, is inconsequential.

Additionally, as a matter of public policy, allowing the psychotherapist privilege to be reestablished by the commission of the crime at issue creates a perverse incentive for patients to commit crime to protect their privacy. When the confidentiality between a psychotherapist and patient has been breached pursuant to mandatory disclosures, it is improper to permit the

reestablishment of the privilege through the commission of crime. This fundamental precept illuminates a distinguishing factor between this case and those which reject the dangerous patient exception.

In this case, the testimony is being offered in a criminal trial where the threat made in therapy is *not* the direct subject of the criminal investigation. *See* R. at 1. In *Chase* and *Hayes*, for example, the Sixth and Ninth Circuit courts of appeal considered crimes where the threats made in therapy were the subjects of indictment. *See Chase*, 340 F.3d at 981 (In two separate counts, defendant was charged with "threatening to murder federal law enforcement officers."); *Hayes*, 227 F.3d at 581 ("Hayes's murderous remarks to psychotherapists constituted criminal wrongdoing under 18 U.S.C. § 115(a)(1)."). It is clear how testimony concerning such crimes would breach the confidence and trust between psychotherapist and patient, but the crime committed in this case does not create the same parallels. Murder is not analogous to illegal threats.

When a patient makes threats in a heightened state of emotional release during a therapy session, it is reasonable to believe that the patient, presumably, does not truly intend to act on those threats and is instead simply venting in order to receive psychiatric help from her therapist. The dynamic changes when those threats manifest themselves in murderous behavior. At that point there is no clinical value in protecting the patient's privacy, as the patient has already demonstrated that they are too dangerous for therapy to be of any help. Justice requires that the patient be prosecuted to the full extent of the law, with all evidence relevant to the commission of their crime. As such, even if the psychotherapist privilege at one point applied to Petitioner's conversation with her psychotherapist, it should not be recognized given the nature of her crime and her therapist's previous disclosure. Thus, Petitioner is not entitled to the federal psychotherapist privilege, as

confidentiality had already been breached and any protection afforded by the privilege was already moot.

C. Even Assuming that the Psychotherapist's Testimony is Inadmissible, the Improper Admission of that Testimony is Not Sufficient to Overturn Petitioner's Conviction or Grant a New Trial.

Even if the Court is inclined to decide in favor of Petitioner on this issue, calling into question numerous state confidentiality laws and creating confusion regarding the place of state legislatures in defining public policy, the error committed in this case is clearly harmless. Federal Rule of Civil Procedure 61 provides that:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

FED. R. CIV. P. 61. In interpreting this rule, this Court has stated that "courts should exercise judgment in preference to the automatic reversal for error and ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).

Here, the essential fairness of the trial was not affected by the psychotherapist's testimony, as it is certain that the same result would have been reached even if the therapist's testimony had been barred. Petitioner was convicted of "Delivery By Mail of An Item With Intent to Kill or Injure." R. at 1. Consistent with federal precedent, the psychotherapist's testimony was not necessary to establish any element of the crime. For example, in *Chase* the Ninth Circuit determined that even though a psychotherapist's testimony had been improperly admitted, the error was harmless because the testimony had little to no bearing on the outcome of the trial. *Chase*, 340 F.3d at 993. There, the testimony was unrelated to the charge that the patient had been convicted

of, resulting in the determination that the error was harmless. *Id.* at 993. The Eighth Circuit came to a similar conclusion in *Ghane*, concluding that because the government had provided sufficient evidence to convict the petitioner outside the testimony, reversal of the conviction was inappropriate. *Ghane*, 673 F.3d at 787-9.

Even excluding the psychotherapist's testimony, there was a plethora of evidence indicating that Petitioner intended to kill Ms. Driscoll. The contents of Ms. Wildaughter's testimony, as well as the flash drive provided by Ms. Wildaughter, provided sufficient evidence to establish that Petitioner intended to use the mail service to kill or injure Ms. Driscoll. R. at 23-7. Ms. Wildaughter specifically testified that Petitioner stated "[she]'d do anything to get out of this mess Tiff put [her] in." R. at 24. Furthermore, considered with Ms. Wildaughter's testimony, the contents of the flash drive clearly indicate that Petitioner planned to send Ms. Driscoll chocolate-covered strawberries laced with strychnine. *See* R. at 7-10. Because this evidence was more than sufficient to establish any potential missing elements of the charge, any error was harmless.

The psychotherapist privilege has an important place in the federal legal system, protecting the trust and confidence between a therapist and her patient. Invocation of the privilege, however, is not appropriate when its only purpose is to protect the pre-disclosed privacy of a murderer, especially when state law expressly calls for full disclosure. Strict adherence to such a privilege, as Petitioner undoubtably suggests is appropriate, would only serve to devalue fairness and the legal system, protecting the theoretical interests of the criminal over tangible justice for the victim.

II. THE FOURTH AMENDMENT IS NOT VIOLATED WHEN THE GOVERNMENT ADMITS FILES FROM PETITIONER'S COMPUTER INTO EVIDENCE AFTER CONDUCTING A SEARCH BROADER THAN THE PRIVATE PARTY'S.

The Fourth Amendment provides for people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" stating that "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. However, when someone "knowingly exposes [information] to the public, even in his own home or office," then it is "not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

In order for the government to conduct a valid search of a person, the search must be reasonable under the Fourth Amendment. *Id.* at 353. A government search "conducted outside the judicial process, without prior approval by judge or magistrate," or a warrant, is unreasonable under the Fourth Amendment. *Id.* at 358. However, the law provides some "specifically established and well-delineated exceptions," including the private search doctrine. *United States v. Jacobsen*, 466 U.S. 109, 115 (1984); *Id.* The "private character" of a private search negates whether the search needs to meet the requirement of "reasonable or unreasonable." *Jacobsen*, 466 U.S. at 115. In order to qualify as an exception under the Fourth Amendment, two elements of the private search doctrine should be satisfied: (1) a "private action" must conduct the initial search; and (2) the additional government search should not exceed the scope of the private party's search. *Id.* at 114.

Here, Ms. Wildaughter was a private party[1] that conducted a private search of the defendant's laptop. R. at 6. Additionally, the government did not exceed the scope of Ms. Wildaughter's private search for three reasons. First, the private search doctrine's scope is broad and extends to digital devices, such as the flash drive in this case, when the officer is already substantially certain of what is inside that container. *See Rann*, 689 F.3d at 837; *Runyan*, 275 F.3d at 463. Because a flash drive is a closed container, it does not have the same privacy concerns that

[1] A private party is an "'individual not acting as an agent of the Government or with the participation or knowledge of any government official.'" *Jacobsen*, 466 U.S. at 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)).

other digital devices do, like a cell phone or laptop. *Cf. Riley,* 573 U.S. at 385. Second, even if this Court declines to adopt the single-unit approach, Officer Yap's search of the flash drive did not exceed the scope of the private party's search. *United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015), *overruled* [on other grounds] by *United States. v. Ross*, 963 F.3d 1056 (11th Cir. 2020); *United States. v. Lichtenberger*, 786 F.3d 478, 486 (6th Cir. 2015). Third, the narrow approach creates additional issues that this Court would have to overcome (including an extra agency question) and hampers law enforcement by wasting their time and resources.

A. The Private Search Doctrine's Scope is Broad and Extends to Digital Devices When the Government Officer is Already Substantially Certain of What is Inside.

Under the Fourth Amendment, the Court balances "'the degree to which [a search] intrudes upon an individual's privacy and . . . the degree to which [the search] is needed for the promotion of legitimate government interests'" in order to determine whether certain evidence is admissible. *Riley,* 573 U.S. at 385 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). In response to the privacy concerns raised by the Court in *Riley*, a circuit split developed over the question of how to address privacy concerns involving digital containers. *Sparks*, 806 F.3d at 1336; *Lichtenberger*, 786 F.3d at 486; *Rann*, 689 F.3d at 837; *Runyan*, 275 F.3d at 463. The Fifth and Seventh Circuits correctly adopted a broad, single-unit approach, as a private search of a digital container frustrates any privacy claims. *See Rann*, 689 F.3d at 837; *Runyan*, 275 F.3d at 463.

A single-unit approach to the private search doctrine properly balances the privacy concerns of the searchee with the investigative concerns of the government. In*. Runyan*, the Fifth Circuit held that:

> police 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.

Runyan, 275 U.S. at 463. If the "contents" of the container "were rendered obvious by the private search," then "the defendant's expectation of privacy in the contents of the container has already been frustrated." *Id.* at 463-4. The operative question for the Fifth Circuit was "whether the government learned something from the police search that it could not have learned from the private searcher's testimony and, if so, whether the defendant had a legitimate expectation of privacy in that information." *Id.* at 460.

In *Runyan*, the private party viewed approximately twenty of the CDs and floppy disks, discovered incriminating evidence, and "turned over twenty-two CDs, ten ZIP disks, and eleven floppy disks" to police. *Id.* The court found that the police did not exceed the scope of the private party's search when the police "examined more files on each of the disks than did the private searchers." *Id.* at 461. Rather, this is simply "examin[ing] the same materials that were examined by the private searchers," but "more thoroughly than . . . the private parties." *Id.* at 461. The search "provide[d] police with no additional knowledge that they did not already obtain from the underlying private search." *Id.* at 463. Thus, the police do not "engage in a new 'search' for Fourth Amendment purposes each time they examine a particular item found within the container." *Id.* at 465. Rather, police simply confirm what the private searches already told them. *Id.* at 463.

Similarly, the Seventh Circuit adopted the broad, single-unit approach in *Rann v. Atchison*. *See* 689 F.3d at 837. In *Rann*, the Seventh Circuit adopted the Fifth Circuit's holding in *Runyan* and held that even if a private party did not open a closed container, the police are permitted to open it as long as they are "substantially certain" of its contents. *Id.* at 836. Under the court's reasoning, as long as the private searcher viewed "at least one file" in the closed container, the police search is valid under the private search doctrine. *Id.* In *Rann*, two private parties turned "exactly one memory card over to the police" and "exactly one zip drive." *Id.* at 837. Because the

private parties "knew [and shared] the contents of the digital media devices when they delivered them to the police, the police were 'substantially certain'" of what those devices contained. *Id.* at 838. It is hard to "imagine more conclusive evidence that [the private parties] knew exactly what" the devices contained. *Id.*

i. The privacy concerns raised by the Sixth and Eleventh Circuits are not applicable because a flash drive is a closed container.

In contrast, the concerns of the Sixth and Eleventh Circuits are irrelevant in this case. *See Sparks,* 806 F.3d at 1336; *Lichtenberger*, 786 F.3d at 487. These circuits focused their holdings on the privacy concerns raised in *Riley*. *See id*; *Riley*, 573 U.S. at 393-4. In *Riley*, the Supreme Court expressed concern over the lack of privacy protections in modern cell phones, reasoning that "as a category, [cell phones] implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Riley,* 573 U.S. at 393. Specifically, the court noted that the "immense storage capacity" of a modern cell phone is a large concern for privacy protection. *Id.*

In addition to large storage capacity, the Supreme Court considered the privacy concerns inherent to a cell phone's GPS monitoring capability and its ability to track the exact location of an individual, including the specific building they are in. *Id.* at 396. Also, cell phones have "cloud computing," which is the "capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself." Aya Hoffman, *Lost in the Cloud: The Scope of the Private Search Doctrine in a Cloud-Connected World,* 68 Syracuse L. Rev. 277, 283 (2018). It is reasonable to assume then that a "secondary search of a cloud-linked device" by the government is "unlikely to have 'virtual certainty' regarding its contents." *Id.* at 296.

The Sixth and Eleventh Circuits used the concerns raised in *Riley* to conclude that there is no virtual certainty when a police officer conducts a secondary search of essentially open devices,

like cell phones or laptops. *See Sparks*, 806 F.3d at 1336; *Lichtenberger*, 786 F.3d at 488. However, in this case, the flash drive is a closed device. Unlike a computer or a cell phone, a flash drive does not implicate the same types of privacy concerns that courts have recognized in the modern age. *Cf. Riley*, 573 U.S. at 394. While "a CD or flash drive . . . can contain only a limited amount of data, cloud storage has infinite capacity—enabling the centralized storage of almost all digital information relevant to a person's life." Hoffman, *supra,* at 283.

Here, Ms. Wildaughter copied only the contents of Petitioner's desktop and brought it to the police, telling them that "everything of concern" was on the flash drive. R. at 6. The flash drive was not the whole hard drive of the laptop, nor does it face nearly the same types of privacy concerns of a laptop or modern cell phone. *See Riley*, 573 U.S. at 394. The flash drive does not have any "cloud computing," rather, it is a closed device that downloads specific items off a computer or laptop. *See* Hoffman, *supra,* at 283. There is absolutely no concern with a flash drive monitoring GPS or "centraliz[ing] storage of almost all digital information relevant to a person's life." *See id.* at 296. Instead, a flash drive contains only a limited amount of information that is stored on the device, requiring active download from an individual, which Ms. Wildaughter did herself when she placed files from the Petitioner's desktop onto the drive. R. at 6.

In this case, the contents of the flash drive were "substantially certain" because Officer Yap used his experience and Ms. Wildaughter's initial statements that he believed to be true. *See Runyan* 689 F.3d at 836. Officer Yap not only used his "expertise" as head of the Livingston Police Department's digital forensics unit for eight years, but also relied on Ms. Wildaughter's statements that "everything of concern was on this drive." *See Runyan* 689 F.3d at 463; R. at 6. In particular, the "contents were rendered obvious" when Ms. Wildaughter said "specifically" which photographs she saw, including one "taken from across the street of Ms. Driscoll's home, depicting

her unlocking her door and entering the house; at a café where Ms. Driscoll was eating chocolate covered strawberries; and of Ms. Driscoll's father exiting the subway." R. at 6. If the photographs were not enough to make it obvious, additionally, Ms. Wildaughter also told Officer Yap that she "specifically viewed a short, unsigned note directed to Ms. Driscoll" where the defendant offered Ms. Driscoll a gift and a "text file containing passwords and codes" with the singular word "strychnine, a common rat poison" embedded in it. *Id.*

There was no mystery as to what Officer Yap was going to find on the flash drive. The contents clearly contained references to poison, confirmation of what Ms. Driscoll was eating, and potentially whatever gift the Petitioner was going to give her. Officer Yap was not going to attain "additional knowledge that [the police] did not already obtain from the underlying private search" because the defendant's expectation of privacy was frustrated when Ms. Wildaughter searched her laptop and downloaded files onto a flash drive. *See Runyan* 689 F.3d at 463. Even though Officer Yap may have "examine[d] more items" in the flash drive "than . . . the private searcher," this is not a "new 'search'" because the defendant's expectation of privacy had "already been compromised." *See id.* at 465; R. at 6.

B. Even if This Court Does Not Adopt the Broad Approach, Officer Yap's Search Did Not Exceed the Scope of the Private Party's Search Under the Narrow Approach.

If this Court declines to adopt the broad, single-unit approach, Officer Yap's search still did not exceed the scope of the private party's search because a flash drive is a closed container void of the essential privacy concerns necessary under the narrow approach. Under the narrow approach, the Sixth and Eleventh Circuits have adopted a file-or-folder approach to the scope of the private search doctrine. *See Sparks*, 806 F.3d at 1336; *Lichtenberger*, 786 F.3d at 486. Because the Sixth and Eleventh Circuits' approach is primarily concerned with the violation of privacy rights, there is no violation in this case as any breach in privacy is limited.

In *Lichtenberger*, the Sixth Circuit held that the government's search of the defendant's laptop exceeded the private party's search, violating the Fourth Amendment. *Lichtenberger*, 786 F.3d at 485. The court relied on *Jacobsen*'s reasoning that an important part of the analysis is to determine "how much information the government stands to gain when it re-examines the evidence." *Id.* at 485-6. But the court also added a virtual certainty requirement to the *Jacobsen* analysis in which the court determined "how certain" a police officer was in what he or she would find in the secondary search. *Id.* at 486. The court reasoned that because the police officer's secondary search told him "more than he already had been told" by the private party, that there was no virtual certainty. *Id.* at 488. The holding primarily concerned the fact that the private party was "not at all sure whether she opened the same files with [the police officer] as she had opened earlier that day" when she searched her live-in boyfriend's laptop and then subsequently turned it over to police. *Id.* at 490. Additionally, the court found that because of "the extent of information that can be stored on a laptop computer," i.e., a "greater capacity than cell phones," the 'virtual certainty' threshold in *Jacobsen* requires more." *Id.* at 488.

Similarly, in *Sparks*, the Eleventh Circuit held that privacy interests are frustrated when the private party actually opens and views a file. *Sparks*, 806 F.3d at 1336. In *Sparks*, the court found that when law enforcement viewed a second video that was not viewed by the private party, the scope of the private search was exceeded. *Id.* at 1335. However, this reasoning is not persuasive because while it adopts a stricter interpretation of *Jacobsen*, the court's reasoning was not consistent with their holding. *Id.* at 1336. The court in *Sparks*, adopted a more limited approach than the narrow approach adopted in *Lichtenberger*, explaining that the government's secondary search must "replicate…the breadth of the private search." *Id.* This application is inconsistent with the virtual certainty requirement adopted by the Sixth Circuit in *Lichtenberger*. Essentially, the

Eleventh Circuit's interpretation that the virtual certainty requirement is limited to exact replication nullifies it under the Sixth Circuit's interpretation.

In this case, even if Officer Yap opened folders that Ms. Wildaughter did not, the files that were actually opened by Ms. Wildaughter frustrated the defendant's expectation of privacy and still contained incriminating information. The additional "virtual certainty" requirement by *Lichtenberger* is irrelevant for a closed container like a flash drive. *Lichtenberger*, 786 F.3d at 488. Unlike in *Lichtenberger*, Officer Yap was examining a small portion of information on a flash drive and not an entire laptop. R. at 6; *see id*. Officer Yap was certain that he would find incriminating information on the flash drive against Petitioner based on Ms. Wildaughter's statements to him that she believed her roommate was going to poison Ms. Driscoll. R. at 6; *See Lichtenberger*, 786 F.3d at 486. The contents of Officer Yap's search may have exceeded that of Ms. Wildaughter's, but the limited privacy concerns present in this case are far outweighed by the need for a full and proper investigation consistent with Ms. Wildaughter's testimony.

The broad, single-unit approach extends to closed digital containers, like the flash drive in this case, without the privacy concerns of open containers when an officer is substantially certain of the contents. Officer Yap was substantially certain of the contents in the flash drive Ms. Wildaughter handed over to him because she told him that "everything was of concern" was on there. R. at 6. Even if this Court decides to adopt the narrow approach, Officer Yap's search of the flash drive did not inappropriately exceed the scope of Ms. Wildaughter's search because the flash drive is a closed container and does not require the additional virtual certainty requirements under the narrow approach. However, this Court should adopt the broad approach over the narrow approach because the narrow approach creates additional issues for this Court to solve and severely hampers law enforcement.

C. The Narrow Approach Creates Unnecessary Issues the Court Must Overcome and Hampers Law Enforcement.

The narrow approach to the private search doctrine forces the court to answer not only the question of whether the search was done by a private party without influence of a governmental entity, but also the question of whether the police directed the private party in the secondary search. *See* Adam A. Bereston, *The Private Search Doctrine and the Evolution of the Fourth Amendment Jurisprudence in the Face of New Technology: A Broad or Narrow Exception?,* 66 CATH. U.L. REV. 445, 468. (2016). This second question will almost always be in the affirmative since, under the narrow approach, if the police are to remain within the confines of the private party's search, then commanding the private party to retrace their own steps to the police makes the secondary search "at the direction of the government." *See id.* This forces the courts to "rely on the actions and accounts of the private citizen in determining the reasonableness of police conduct." *Id.*

The courts then have to engage in a "fact-finding exercise" in order "to determine whether the private citizen can recall if the files shown to the police officer were the exact files searched during the initial private search." *Id.* This becomes a daunting task if there are "hundreds or thousands of files exist[ing] across many different subfolders." *Id.* If the private party cannot remember what he or she viewed "during the initial search, the secondary search by the private citizen under the direction of the police would be impermissible despite the fact the police officer arguably took all reasonable steps to limit the secondary search to only those items in which the expectation of privacy had already been frustrated." *Id.* at 468-9.

The broad, or single-unit, approach avoids the almost always impermissible secondary police search because "[w]hen the privacy interest in the entire device has been frustrated, there is no need to untangle the particular facts to determine whether the police search was limited to only the files that the private party initially searched." *Id.* at 469. Instead, the courts are certain that the

"privacy interest in the entire device has already been frustrated once the private party views at least one file in that device." *Id.* The certainty from the courts also "discourages police from going on 'fishing expeditions' by opening closed containers." *Runyan*, 275 F.3d at 464. This leaves only one agency issue that the courts must resolve under the private search doctrine: "whether the government directed the initial search by the private party." Bereston, *supra*, at. 469. This is "a much simpler fact-finding exercise than the exercise required by the narrow approach." *Id.*

Additionally, because of the added requirements under the narrow approach, police would be discouraged from even conducting a secondary search and would thereby waste their time and resources trying to obtain a warrant for each individual file in an already opened container. *See Runyan*, 275 F.3d at 465. Not only does the secondary search become inherently impermissible under the narrow approach, but the government is "disinclined to examine even containers that had already been opened and examined by private parties for fear of coming across important evidence that the private searchers did not happen to see and that would then be subject to suppression." *Id*. The additional virtual certainty requirement of the narrow approach is not a requirement under the Fourth Amendment. Bereston, *supra*, at 472-3. Rather, frustrating the entire container when the private party conducts its own search of the container maintains the intention behind the Fourth Amendment if the police "conduct a more thorough search of the container than the private searcher, so long as they can confirm the private searcher viewed at least one item inn that container." *Id.* at 471.

Further, the narrow approach "waste[s] valuable time and resources" because the police have to "obtain warrants based on intentionally false or mistaken testimony of private searchers." *Runyan,* 275 F.3d at 464. This steams from a "fear that, in confirming the private testimony before obtaining a warrant, [police] would inadvertently violate the Fourth Amendment if they happened

upon additional contraband that the private searchers did not see." *Id.* The narrow approach essentially "signal[s] the death of the private search doctrine" by abolishing what the private search doctrine was intended to do—allow police to conduct a reasonable search. Bereston, *supra*, at 473.

The scope of Officer Yap's search of the flash drive that Ms. Wildaughter turned over to him did not exceed the scope of her private search. The broad, single-unit approach extends to closed digital devices, like the flash drive in this case, when an officer is already substantially certain what is inside. This is because a flash drive is devoid of the additional privacy concerns that a cell phone or laptop may have. However, even if this Court adopts a narrow approach, Officer Yap's search of the flash drive did not exceed the scope of the private search because a closed container does not require the additional virtual certainty requirement. Lastly, the narrow approach requires an additional agency issue and hampers law enforcement through time-wasting measures. Thus, the Court should reject the Sixth and Eleventh Circuits' narrow approach and affirm the decision of the lower court that Officer Yap did not exceed the scope of the private search doctrine.

III. THE GOVERNMENT DID NOT VIOLATE THE REQUIREMENTS OF *BRADY V. MARYLAND* BECAUSE THERE IS NO DUTY TO DISCLOSE INADMISSIBLE EVIDENCE, ESPECIALLY WHEN THAT EVIDENCE IS ALSO IMMATERIAL.

The government's suppression of evidence "favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In order to prove a *Brady* violation, a defendant must show that the evidence at issue satisfies three critical elements. *Strickler v. Greene*, 527 U.S. 263, 281-2 (1999). First, "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching." *Id*. Second, "that evidence must have been suppressed by the State, either willfully or inadvertently." *Id.* at 282. Lastly, "prejudice must have ensued." *Id.*

Here, Petitioner claims that the Government committed two *Brady* violations when it declined to disclose two inadmissible investigative reports which dismissed alternative theories concerning who may have committed the crime. R. at 47. This argument fails in three respects. First, Petitioner's arguments neglect to recognize that the failure to disclose evidence which would be inadmissible at trial can never form the basis of a *Brady* violation. *See Wood,* 516 U.S. at 5-6; *Jardine v. Dittman*, 658 F.3d 772, 777 (7th Cir. 2011); *Madsen,* 137 F.3d at 604; *Hoke*, 92 F.3d at 1355. Second, even if inadmissible evidence could be considered as the basis of a *Brady* violation, the evidence must directly lead to the disclosure of admissible evidence, more than mere speculation. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3rd Cir. 2016); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). Lastly, even if the Court considered the inadmissible evidence in full, the evidence was not material and thus could not form the basis of a *Brady* violation. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

A. Inadmissible Evidence at Trial Can Never Form the Basis of a Brady Violation.

Because a *Brady* violation requires the disclosure of "evidence," either impeaching or exculpatory, to a criminal defendant, *inadmissible* evidence cannot form the basis of a *Brady* violation. In *Wood v. Bartholomew*, this Court stated that pieces of evidence which were inadmissible at trial were "not 'evidence' at all." 516 U.S. at 6 (internal citations omitted). Both the Fourth and Eighth Circuits have correctly held, consistent with this controlling precedent, that inadmissible evidence is not evidence and therefore cannot form the basis of a *Brady* violation. *Madsen*, 137 F.3d at 604; *Hoke*, 92 F.3d at 1355.

In *Madsen*, the prosecution failed to disclose evidence concerning the incompetency of witnesses because the evidence was immaterial and, by the court's own determination, not sufficient to support a *Brady* violation. *Madsen*, 137 F.3d at 604. Furthermore, in *Hoke*, the Fifth

Circuit determined that the prosecution did not violate *Brady* by not disclosing some witness interviews because the evidence was inadmissible and "immaterial" for *Brady* purposes. *Hoke*, 92 F.3d at 1355. The court reasoned that if possible exculpatory information can be found in a place where a "reasonable defendant would have looked," then *Brady* is not violated. *Id.*

In this case, the two challenged FBI reports are inadmissible hearsay. The first report described an interview with Chase Caplow, who was also involved in HerbImmunity, in which he discussed an out of court conversation with Ms. Driscoll where she stated that she owed money to an upstream distributor, Martin Brodie. R. at 11. Caplow then indicated that Brodie could be violent. *Id.* The second report was an anonymous phone call naming Belinda Stevens as Ms. Driscoll's murderer. R. at 12. The FBI's investigation determined that this was an unreliable lead. *Id.* As such, because both reports were inadmissible hearsay, neither can be properly considered evidence. Thus, the withholding of these reports does not amount to a *Brady* violation.

B. Alternatively, Inadmissible Evidence Can Only Form the Basis of a *Brady* Violation When the Inadmissible Evidence Would Necessarily Lead to the Disclosure of Admissible Evidence.

Even if this court determined that inadmissible evidence could form the basis of a *Brady* violation, that evidence must lead directly to the disclosure of admissible evidence, more than mere speculation. The First, Third, and Eleventh Circuits correctly interpret *Wood* to mean that inadmissible evidence can still form the basis of a *Brady* claim if the evidence leads to admissible evidence. *See Dennis*, 834 F.3d at 310; *Ellsworth,* 333 F.3d at 5; *Bradley*, 212 F.3d at 567. The connection between the admissible and inadmissible evidence must be strong enough that the inadmissible evidence leads directly to the admissible evidence. *See id.* Mere speculation on the presence of admissible evidence is insufficient to prove that a *Brady* violation occurred. *See id.*

The Eleventh Circuit described this process in *Bradley*, reasoning that "in order to find that actual prejudice occurred—that our confidence in the outcome of the trial has been undermined—

we must find that the evidence in question, though inadmissible, would have led the defense to some admissible material exculpatory evidence." *Bradley*, 212 F.3d at 567. In *Bradley*, the prosecution allegedly withheld (1) the identity of someone who confessed to killing the victim; (2) "notes taken by the police concerning a call from an anonymous woman" stating that someone else killed the victim; and (3) a note received by the police saying that yet another individual had killed the victim. *Id.* at 566. Each piece of evidence was determined to be "inadmissible at trial" under state law. *Id.* at 567. While the prosecution presented evidence that ruled out the possible suspects, the defense argued that "had he been aware of the evidence, he might himself have uncovered evidence" that other suspects were involved in the crime "that the prosecution failed to uncover." *Id.* Thus, "he might have successfully created reasonable doubt in jurors' minds as to his guilt." *Id.*

The court determined that the required "lack of confidence" did not exist because the defense presented "only speculation" that admissible evidence would have been discovered from those hearsay leads. *Id.* Additionally, the court concluded that "had the jury heard the evidence of the existence of these tenuous and ultimately fruitless police suspicions and weighed that evidence with all the evidence against [the defendant]," it still could not say that the jury would have reached a different conclusion. *Id.*

Similar to the Eleventh Circuit's case in *Bradley*, the prosecution in this case withheld two reports stating that FBI agents had dismissed two other suspects: Belinda Stevens and Martin Brodie. R. at 11-2. Even a basic analysis of these facts shows that these reports create only the barest possibility that any other individual may have been involved, certainly not creating any confidence that the jury would have reached a different outcome. Additionally, allowing such a withholding to form the basis of a *Brady* violation creates an almost impossible standard for police

and prosecutors to satisfy. Requiring that law enforcement provide the defense with any potential lead, no matter how flimsy, clearly goes outside the bounds of what was intended by this Court in *Brady*. As such, the withholding of these two reports does not amount to a *Brady* violation.

C. The Government's Failure to Disclose Inadmissible Evidence in this Case Did Not Violate *Brady v. Maryland* Because the Inadmissible Evidence is Not Material.

If the Court determines that inadmissible evidence, with no reasonable connection to admissible material evidence, can serve as the basis for a *Brady* violation, the Court must still consider whether the disclosure of the evidence would have created a reasonable probability that the result of the trial would have been different. Here, the defense has not proved that the disclosure of the two FBI reports would have led to a reasonable probability that the outcome of the case would have changed.

This Court held in *Kyles v. Whitley* that evidence is material under *Brady* 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. at 435 (internal citations omitted). Applied to this case, there was sufficient corroborating evidence that the defendant committed the crime to support the conclusion that the jury would have found her guilty regardless of the admission of this evidence.

The jury was presented evidence of clear murderous intent on the part of Petitioner directed at Ms. Driscoll. R. at 4. For example, the prosecution presented evidence that Petitioner was stalking Ms. Driscoll and her father. R. at 25. Additionally, the prosecution introduced evidence to the jury that Petitioner planned to and did buy strawberries, which she intended to lace with a deadly neurotoxin in order to kill Ms. Driscoll. R. at 9-10. Lastly, the jury was presented evidence that Petitioner carried out her plan, shipping the deadly treat which led to Ms. Driscoll's tragic death. R. at 7. This evidence is overwhelming and clearly demonstrates that these reports would

not have changed the outcome of this case. Thus, we pray this Court affirm the decision of the Fourteenth Circuit, which determined that no *Brady* violation occurred.

CONCLUSION

For the reasons set forth above, Respondent prays that this Court affirm the decision of the Fourteenth Circuit Court of Appeals, which (1) recognized reasonable limits on the psychotherapist privilege when threats of violence are invoked; (2) allowed police to conduct investigations without overbroad and counterproductive regulation; and (3) maintained this Court's strict standard established in *Brady* for determining the materiality of exculpatory evidence.

To hold otherwise would expand this Court's precedent to an extent that only the most perfectly executed prosecutions would survive the appeals process. Not only would this materially inhibit law enforcement, but it would also allow dangerous criminals to walk free based on rigid technicalities. Justice requires that the rights of the accused and rights of the victim be respected. An adverse holding here would, in effect, turn the judiciary into another victimizer, further stepping on the throats of the wounded just as they found some sense of closure.

Respectfully submitted,

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