IN THE

Supreme Court of the United States

SAMANTHA GOLD,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the Supreme Court of the United States

Brief for the Petitioner

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QUESTIONS PRESENTED

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

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

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

STATEMENT OF JURISDICTION

The Fourteenth Circuit Court of Appeals entered its judgment on this case. Petitioners filed for a Writ of Certiorari, and this Court granted the petition. This Court has jurisdiction under 28 U.S.C. § 1254 (2019).

SUMMARY OF ARGUMENT

I. Ms. Gold's Statements Were Confidential And Privileged Preventing Her Therapist From Testifying At Trial

Petitioner's, Ms. Gold, statements during her therapy session with her psychiatrist do not rise to the mandatory reporting requirements for mental health professionals under Boerum Health and Safety Code § 711. Ms. Gold's statements were hyperbolic in nature made during expressions of extreme frustration coupled with her Intermittent Explosive Disorder. Ms. Gold did not make a specific threat to physically harm a specified individual. Ms. Gold's psychiatrist improperly inferred who Ms. Gold was referring to, instead of asking if Ms. Gold was talking about a specific individual. Additionally, Ms. Gold's therapy session notes indicate she did not have the capacity at the moment to carry out her apparent threat and was not able to commit a heinous act in the near future. However, Ms. Gold's psychiatrist went against her own notes and decided Ms. Gold did have the capacity, directly contradicting her own notes. Further, Ms. Gold believed her statements to her psychiatrist to be privileged and not used against her. The psychiatrist did not warn Ms. Gold that her statements could be used against her. Also, stating that Ms. Gold's statements rose to the level requiring their disclosure and allowing her therapist to testify, ultimately results in doublethink where Ms. Gold is emotionally unstable and impulsive, but also cold and calculating.

II. Private Search Doctrine.

In *Walter* and *Jacobsen*, this Court established the private search doctrine as an exception to the Fourth Amendment's warrant requirement. Under this doctrine, the Government does not conduct a "search" when it reexamines materials that are within the scope of a private party's prior search. The Circuit Courts are split, however, in determining how the private search

doctrine applies to files stored on modern electronic devices. The Fourteenth Circuit opinion from which Petitioner appeals erroneously adopted the "broader approach" implemented by the Fifth and Seventh Circuits, which allows the Government to exceed the scope of the private party's prior search so long as the private party has at least viewed some of the files. Since these cases were decided, the *Riley* Court has held that the increasing storage capacities of modern electronic devices present additional privacy concerns that must be weighed against the Government's interest in conducting a warrantless search. Instead, this Court should adopt the "narrower approach" implemented by the Sixth and Eleventh Circuits due to the fact that these circuits have already considered these additional privacy concerns in holding that the government exceeds the scope of the private search doctrine when it views files that were not viewed during the private party's search.

In addition, this Court should hold that the Fourteenth Circuit applied the wrong standard when it reviewed the district court decision under the "clearly erroneous" standard, rather than reviewing the case *de novo*. Due to these errors, this Court should reverse and remand the Fourteenth Circuit opinion.

IV. The Evidence Withheld By The Government Is A *Brady* Violation

The evidence withheld by the government was material and has a reasonable probability of altering the outcome of trial creating a *Brady* violation. Ms. Gold did not learn of evidence relating to a witness identifying a suspect who had a substantial financial motive with a possible history of violent behavior and an anonymous phone call naming a second potential suspect until after Ms. Gold was tried and convicted. This information would have greatly changed the way Ms. Gold would have approached her defense and it would have allowed her to conduct her own investigations into these possible suspects. Instead, the government withheld this evidence,

whether intentional or accidental is moot, and tunnel visioned on Ms. Gold instead of performing adequate investigations into the two separate named suspects. The evidence itself is material because a jury hearing that there are two other potential suspects, with one how also has a substantial financial motive would likely be moved to determine there is reasonable doubt that Ms. Gold is not guilty.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

1. Communications between a patient and a mental health professional are confidential except where:
   (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 professional while protecting mental health professionals who discharge the duty in good faith from both civil and criminal liability.

II. FED. R. EVID. RULE 501: PRIVILEGE IN GENERAL

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

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

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

III. Fourth Amendment to the United States Constitution

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

STATEMENT OF THE CASE

Procedural History

On June 6, 2017, Ms. Samantha Gold ("Ms. Gold") was indicted under 18 U.S.C. §1716 for delivering by mail a nonmailable item with the intent to kill or injure another. Jt. App. p.1. Ms. Gold filed motions to preclude the government from calling Ms. Gold's psychiatrist to testify and to suppress evidence obtained from an unwarranted search of digital files that Ms. Gold's roommate provided to police. Jt. App. p. 16. On January 8 and 9, 2018, the United States District Court Eastern District of Boerum held hearings regarding Ms. Gold's motions to suppress evidence. Jt. App. p. 16, 30. Ms. Gold was convicted and sentenced by a jury on February 1, 2018. Jt. App. p. 51. After her conviction, Ms. Gold filed a motion for post-conviction relief, requesting a directed verdict in Ms. Gold's favor or a new trial due to the government's withholding of pertinent evidence. Jt. App. p. 42. On August 22, 2018, Ms. Gold's requested relief was denied by the District Court, after which Ms. Gold filed a timely appeal. Oral argument was held before the United States Court of Appeals for the Fourteenth Circuit on December 2, 2019 and on February 24, 2020 the Fourteenth Circuit upheld Ms. Gold's conviction. Jt. App. p. 50. Ms. Gold filed a writ of certiorari to the Supreme Court of the United States which was granted on November 16, 2020. Jt. App. p. 60.

Statement of Facts

I. Background

Ms. Samantha Gold and Tiffany Driscoll were students at Joralemon University. Jt. App. p. 5. Ms. Driscoll worked as a sales representative for the company, HerbImmunity, which some students indicated was a pyramid scheme. Jt. App. p. 13. As a sales representative, Ms. Driscoll recruited Ms. Gold to purchase HerbImmunity products for resale which resulted in Ms. Gold

paying around $2,000.00. Jt. App. p. 4. Ms. Gold has been diagnosed with "Intermittent Explosive Disorder" (IED) and participated in psychotherapy with her therapist, Doctor Chelsea Pollak. Jt. App. p. 4.

On May 25, 2017, Ms. Driscoll was found dead in her father's townhouse at Joralemon University at the bottom of some stairs leading to her basement. Jt. App. p. 13. There were indications of blunt force trauma and medical examiners noted there were no appearances of a struggle. *Id.* On May 27, 2017, Ms. Gold was arrested for the death of Ms. Driscoll. Jt. App. p. 14. Toxicology reports from Ms. Driscoll indicated she had traces of the poison strychnine in her system. *Id*. During a search of Ms. Gold's residence, an empty box was found and authorities believed the box was delivered by mail to Ms. Driscoll which contained chocolate covered strawberries laced with the strychnine poison. *Id*. After the discovery of the empty box, Detective Barry Apple stated, "We feel like we finally may be onto something, which is a huge relief." *Id.*

Before Ms. Driscoll's death, she told a friend, Chase Caplow, that she owed money to an upstream distributor within the company, Martin Brodie. Jt. App. p. 11.

II. Psychotherapist-Patient Testimonial Privilege Issue

On May 25, 2017, Ms. Gold attended a psychotherapy session with Dr. Chelsea Pollack. Jt. App. p. 17. Dr. Pollack testified that Ms. Gold sought treatment with her since 2015 for what Ms. Gold described as "anger issues". Dr. Pollack stated that she had diagnosed Ms. Gold with Intermittent Explosive Disorder, after which Ms. Gold's condition began to significantly improve with weekly psychotherapy sessions. *Id*. During the May 25 appointment, Dr. Pollack stated that Ms. Gold appeared agitated, a symptom of IED. Jt. App. p. 17-18. Dr. Pollack testified that Ms. Gold was agitated due to her debt resulting from her involvement with

HerbImmunity. Specifically, Ms. Gold was angry at Ms. Driscoll for convincing her to become more and more involved with HerbImmunity. Jt. App. p. 18. According to Dr. Pollack, Ms. Gold stated, "I'm so angry! I'm going to kill her. I will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again". Jt. App. p. 19. Dr. Pollack testified that she was not sure if this was a serious threat or merely an expression of frustration. Jt. App. p. 22. Nonetheless, fearing that Ms. Gold would harm Ms. Driscoll, Dr. Pollack called the police and sent Officer Fuchs her notes. Jt. App. p. 19-20.

Dr. Pollack testified that it is standard practice for her to explain to prospective patients that she has a duty to protect the intended victim in the event that the patient expresses a desire to harm themselves or another. Jt. App. p. 21. However, Dr. Pollack stated that she did not warn Ms. Gold that her statements during psychotherapy sessions could be used against her in a subsequent criminal prosecution. *Id*.

III. Private Search Doctrine Issue

Ms. Jennifer Wildaughter testified that, after Ms. Gold had left the apartment, she went into Ms. Gold's bedroom and viewed documents that were on Ms. Gold's computer desktop. Jt. App. p. 24. Specifically, Ms. Wildaughter opened the file titled "HerbImmunity", after which she opened the subfolder titled "customers". Within the "customers" folder, Ms. Wildaughter opened another subfolder titled "Tiffany Driscoll". Ms. Wildaughter testified that the "Tiffany Driscoll" folder contained ten pictures of Ms. Driscoll taken from a distance, as well as an additional subfolder titled "For Tiff". After viewing the photographs, Ms. Wildaughter testified that she opened the "For Tiff" subfolder. Within the "For Tiff" subfolder, Ms. Wildaughter found three text files titled "Message to Tiffany - draft", "Market Stuff", and "recipe". Ms. Wildaughter also found an image file titled "receipt". Of these four documents, Ms. Wildaughter only opened the

"Message to Tiffany" and "Market Stuff" files. Based on a reference to strychnine, a common rat poison, Ms. Wildaughter testified that she copied the entire Desktop folder onto a flash drive. Jt. App. p. 24-26. Ms. Wildaughter also testified that she and Ms. Gold had experienced a rodent infestation during the month prior. Jt. App. p. 29.

On May 25, 2017 between 4:30 and 5:00 PM, Ms. Wildaughter went to the Livingston Police Department to report the files she had found on Ms. Gold's computer desktop. Jt. App. p. 23. Ms. Wildaughter spoke with Officer Yap and described the photographs that she had viewed, as well as the contents of the documents titled "Message to Tiffany" and "Market Stuff". Ms. Wildaughter testified that she gave Officer Yap the flash drive containing Ms. Gold's entire desktop folder and said "everything is on there". Jt. App. p. 26-27. During her conversation with Officer Yap, Ms. Wildaughter testified that Officer Yap did not ask where the documents Ms. Wildaughter had referenced were located on the drive, nor did he ask how many files in total were on the flash drive. During their conversation, Officer Yap did not ask any questions about the photographs or other files that Ms. Wildaughter had viewed on Ms. Gold's desktop. Jt. App. p. 29. Officer Yap took the flash drive from Ms. Wildaughter. Jt. App. p. 27.

V. *Brady* Issue

On June 2, 2017, during the FBI investigation into Ms. Driscoll's death, special agent Mary Baer interviewed Chase Caplow. Jt. App. p. 11. During the interview with special agent Baer, Caplow indicated that he talked with Ms. Driscoll two weeks before her death and she told her she owed a large sum of money to an upstream distributor of the company, Martin Brodie. *Id.* Caplow stated there were rumors Mr. Brodie could be violent. *Id.* Special agent Baer stated she would follow-up with Mr. Brodie, but there no indications an interview took place. *Id.*

The FBI received an anonymous phone call on July 7, 2017 with the caller stating Ms. Driscoll was murdered by a Belinda Stevens, who worked with Ms. Driscoll at HerbImmunity. Jt. App. p. 12. Special agent Mark Peters conducted a preliminary investigation into the veracity of the lead and concluded the lead did not appear reliable and required no further follow-up. *Id.*

After Ms. Gold was tried, convicted and sentenced, she became aware that the government was in possession of a witness statement which named a potential suspect with a motive and an anonymous tip naming a second suspect. Jt. App. p. 11, 12 & Jt. App. p. 43:9-16. She subsequently filed a motion requesting post-conviction relief of a directed verdict or a new trial due to the government withholding this information. Jt. App. p. 42.

ARGUMENT

I. Ms. Gold's Statements And Actions Did Not Meet The Reporting Requirements For Mental Health Professionals.

The statements made by Ms. Gold during her therapy session with her psychiatrist did not meet the reporting requirements for mental health professionals. Under the Boerum Health and Safety Code § 711, communications between a patient and mental health professional are confidential except when a patient has made an actual threat to physically harm either themselves or an identifiable victim and the mental health professional makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat. Jt. App. p. 2. During a weekly therapy session, Ms. Gold appeared angry and stated she is $2,000.00 in debt due to trying products from Ms. Driscoll's HerbImmunity. Ms. Gold later stated "I'm so angry! I'm going to kill her. I will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again." Jt. App. p. 4. Ms. Gold's therapist, Doctor Pollak, reported this statement to Joralemon University pursuant to Boerum Health and Safety Code § 711. Jt. App. p. 5.

Ms. Gold's statements do not rise to the requirements of the Boerum Health and Safety Code and should have remained confidential. In order to meet the exception, Ms. Gold needed to have made an actual threat to physically harm an *identifiable* victim. However, Ms. Gold's words were clearly hyperbolic statements related to her diagnosed Intermittent Explosive Disorder. Ms. Gold did not state how she would "kill her" and did not actually state who the individual was. When asked on cross-examination if Ms. Gold had made an actual threat, Dr. Pollak stated she did not for certain if Ms. Gold made a serious threat or if she was just displaying an expression of frustration. Jt. App. p. 22:16-21. Additionally, Dr. Pollak admitted that Ms. Gold never

actually named Ms. Driscoll, and instead she "knew she meant Tiffany". Jt. App. p. 22:1-2. In a moment of extreme frustration Ms. Gold made a hyperbolic statement and Dr. Pollak inferred that Ms. Gold was referring to a specific individual which Ms. Gold never actually named. This does not meet the requirements of § 711(1)(a).

Further, Dr. Pollak made an improper clinical judgment regarding Ms. Gold's apparent capability to commit a violent act towards another and that she would carry out the threat in the near future. Jt. App. p. 22. This clinical judgment runs contrary to the Therapy Progress Notes Dr. Pollak filled out for the therapy session on May 25, 2017. Jt. App. p. 3. Dr. Pollak noted Ms. Gold's appearance to be unkempt, disheveled, unusual/bizarre, her behavior to be aggressive, dramatic and agitated, stream of thought to be rapid and her judgment to be grossly inadequate. *Id.* Taken all together, coupled with Ms. Gold's diagnosis of Intermittent Explosive Disorder, it is clear Ms. Gold did not have the capacity to carry out a threat, let alone in the near future. Therefore, Dr. Pollak should not have reported Ms. Gold's statement due to her words not reaching the levels identified by § 711(1)(b) and should have stayed confidential.

A. Ms. Gold's Statements Were Privileged And Should Be Protected

The Fourteenth Circuit's opinion relies heavily on a single note in a case that otherwise does not support the circuit court's own argument. *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996); *see also Id*. at 18 n.19. In doing so, the Fourteenth Circuit advances a public policy argument that states that the dangerous-patient exception to the psychotherapist-patient evidentiary privilege applies not only to the confidentiality covering these communications, but also the testimonial privilege associated with this doctrine. Jt. App. p. 52. The Fourteenth Circuit argues that an exemption is necessary because a forward-thinking patient could simply kill the victim in order to maintain the privilege. *Id*. at 53. This argument requires this Court to ignore the actual facts of

the present case and engage in a form of doublethink by simultaneously agreeing that Petitioner was both emotionally unstable and impulsive, while at the same time being a cold and calculating threat to Ms. Driscoll. Dr. Pollack's records and testimony show that Petitioner was the prior, rather than the later. On May 25, Dr. Pollack noted that Petitioner was unkempt, agitated, and aggressive. Jt. App. p. 3. This is precisely the type of patient who should be incentivized to be candid with their psychotherapist, both for their safety and the safety of others.

This Court should adopt the public policy argument advanced in Judge Cahill's dissent that a patient's knowledge that their statements might later be used against them in a criminal proceeding would "certainly chill and very likely terminate open dialogue". Jt. App. p. 57; *see also U.S. v. Hayes*, 227 F.3d 578, 585 (6th Cir. 2000). This knowledge would merely incentivize a patient contemplating harm to themselves or another to simply keep quiet, rather than to ask for help. In other words, if Petitioner was actually the deliberate actor that the Fourteenth Circuit's logic requires her to be, then providing such a broad and sweeping exemption to the psychotherapist-patient evidentiary privilege would have done nothing to save Ms. Driscoll's life. As such, this Court should hold that a therapist's duty to report imminent harm to their patient or another is "separate and distinct from the public interest served by the psychotherapist-patient evidentiary privilege". Jt. App. p. 57.

II. The Government's Unwarranted Search And Seizure Of The Files Contained On Ms. Gold's Desktop Was Not Permissible Under The Private Search Doctrine, And Therefore Must Be Excluded As The "Fruit Of A Poisoned Tree".

The Fourth Amendment of the U.S. Constitution guarantees that, "the right of the people to be secure in their persons […] 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. While this Court has recognized several exceptions to the Fourth Amendment's warrant requirement, this Court has tempered these exemptions by weighing the government's interest in conducting the warrantless search against the individual's privacy interest in that property. *U.S. v. Lichtenberger*, 786 F.3d 478, 488 (6th Cir. 2015). One such exemption is known as the "private search doctrine". This Court has long held that the Fourth Amendment's protections apply only to government action, and therefore, are not implicated when a private party searches the property of another. *Burdeau v. McDowell*, 256 U.S. 465 (1921). Under the private search doctrine, the government is not required to obtain a warrant so long as it does not exceed the scope of a prior private search. *Walter v. U.S.*, 447 U.S. 649, 657 (1980).

The Fourteenth Circuit erred in its holding that: (1) the government did not exceed the scope of the prior private search; (2) the *Riley* Court's decision does not apply to flash drives and that the "broader approach" advanced by the Fifth and Seventh Circuits does not conflict with this Court's precedent; and (3) the correct standard of review is 'clearly erroneous'. Therefore, this Court should reverse the Fourteenth Circuit decision.

i. Law enforcement was not "substantially certain" of the contents of Ms. Wildaughter's flash drive when the Government exceeded the scope of Ms. Wildaughter's private search.

Following a private search, the government need not obtain a warrant to conduct a search of the same materials so long as its agents do not exceed the scope of the prior private search. *Walter*, 447 U.S. at 657. When the government reexamines materials within the scope of a prior private search, it learns nothing that had not already been learned during the prior private search.

Therefore, it infringes no legitimate expectation of privacy and hence is not a "search" within the meaning of the Fourth Amendment. *U.S. v. Jacobsen*, 466 U.S. 109, 120 (1984).

In *Walter*, employees of a private carrier opened and inspected 12 large packages that had been mistakenly delivered to the wrong substation. The employees found over 800 smaller boxes of film with suggestive depictions of homosexual activity drawn on the sides of the boxes. However, the employees were not able to view what was on the film when held to the light. The employees reported the shipment to the FBI, after which the FBI took possession of the tapes and viewed them. The petitioners were indicted on obscenity charges relating to five of the films that the FBI viewed. This Court held that, because the FBI exceeded the scope of the private search by viewing the films, the government had violated the Fourth Amendment.

Similarly, the *Jacobsen* Court held that the DEA did not exceed the scope of a prior private search because DEA agents "[learned] nothing that had not previously been learned during the private search." *Jacobsen*, 466 U.S. at 109. In *Jacobsen*, employees of a private carrier inspected a damaged package and found that it contained a tube with several small bags containing a white powder. The employees alerted the DEA but put the bags back in the tube and placed the tube back in the damaged package before federal agents arrived. When the federal agents inspected the package, they once again removed the tube and the bags contained therein and tested the substance to confirm that it was cocaine. This Court held that the DEA agents did not exceed the scope of the prior search when they removed the contents of the package, and that the subsequent test of the powder was not unreasonable because the suspicious nature of the package made it "virtually certain" that the powder was an illicit substance. *Id*. at 125-126.

Based upon this Court's decisions in *Walter* and *Jacobsen*, the government exceeded the scope of Ms. Wildaughter's private search when it reviewed files on the flash drive that Ms.

Wildaughter had neither previously viewed nor described to Officer Yap. Specifically, Ms. Wildaughter had not viewed the files titled "Shipping Confirmation", "Recipe", "budget", or "To-Do List". Jt. App. p. 24-29. By viewing these files, the government exceeded the scope of the prior private search and thus conducted an unwarranted "search" within the meaning of the Fourth Amendment.

***ii. This Court should adopt the "narrower approach" advanced by the Sixth and Eleventh Circuits because the Fifth and Seventh Circuits' "broader approach" fails to consider this Court's Riley* decision.**

In the three decades since this Court announced its *Walter* and *Jacobsen* decisions, technological advancements have complicated the application of the private search doctrine. In the decision from which Petitioner appeals, the Fourteenth Circuit adopted a "broader approach" advanced by both the Seventh and Fifth Circuits in *U.S. v. Runyan* and *Rann v. Atchison*, respectively. In doing so, the Fourteenth Circuit rejected a "narrower approach" advanced by the Sixth and Eleventh Circuits in *U.S. v. Lichtenberger* and *U.S. v. Sparks*. However, the Fourteenth Circuit erroneously failed to adequately consider subsequent precedent advanced by this Court in *Riley v. California*, a decision in which this Court considered the privacy implications posed by modern devices' increased storage capacity relative to government interests in conducting unwarranted searches of such devices. Therefore, this Court should reverse the Fourteenth Circuit decision and adopt the Sixth and Eleventh Circuits' "narrower approach".

Applying *Jacobsen* to digital devices, the Fifth Circuit held in *Runyan* that the private search doctrine allows officers to examine files that had not been viewed during the prior private search so long as the files are stored on the same device. *U.S. v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001). In *Runyan*, the defendant's ex-wife found a collection of CDs, floppy disks, and ZIP

drives, among other materials that contained child pornography. The ex-wife viewed several, but not all, of the files on the CDs and floppy disks, but did not view any of the ZIP drives before giving these devices to the police. *Id*. at 453. The Fifth Circuit held that while the police exceeded the scope of the prior search by viewing the files on the drives that the ex-wife had not viewed at all, the police did not exceed the scope of the prior private search when they viewed additional files on the drives that the ex-wife had partially viewed because they were "substantially certain" of what they would find inside. *Id*. at 463.

The Seventh Circuit adopted the Fifth Circuit's approach when it held that police did not exceed the scope of a prior private search when it reviewed more files than had been previously viewed by the private party. *Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012). In *Rann*, the defendant's 15-year-old daughter told police that she had been sexually assaulted by her father, who took pornographic pictures of her. The daughter then gave the police the camera her father had used, along with the memory card inside. *Id*. at 834. In holding that police did not exceed the scope of the prior private search, the Seventh Circuit emphasized that police were already "substantially certain" of what they would find. *Id*. at 836-37. However, the reason that police were "substantially certain" of what they would find is because the daughter already knew that the camera's memory card contained the pictures of her taken by her father. *Id.* at 834. As such, it wasn't necessary for the daughter to review the contents of the memory card to determine what it contained. Conversely, neither Ms. Wildaughter nor Officer Yap were "substantially certain" of what Petitioner's entire desktop folder contained both because Ms. Wildaughter viewed only a small number of the files that she copied to her flash drive and because Officer Yap failed to inquire about the files that Ms. Wildaughter had already viewed. Jt. App. p. 24-29.

Following the *Runyan* and *Rann* decisions, the *Riley* Court considered the increased privacy concerns involving warrantless searches of digital devices. In *Riley v. California*, this Court held that searches of digital devices are not "materially indistinguishable" from searches of physical items. *Riley v. California*, 573 U.S. 373, 393 (2014). In *Riley*, the arresting officer conducted a search incident to the arrest and discovered the defendant's cell phone. The officer accessed the information on the phone and noticed the repeated use if a term associated with a street gang. Two hours later, a detective specializing in gangs accessed the defendant's cell phone again and viewed photos and videos on the phone linking the defendant to a shooting that had occurred a few weeks prior. *Id*. at 379.

This Court considered the increased privacy concerns involved with the warrantless search of the defendant's cell phone and placed a particular emphasis on the increased storage capacity of modern devices. Specifically, the increased storage capacity created four interrelated consequences for privacy. First, a cell phone collects several types of data that reveal far more in combination than any isolated record. Second, modern devices' increased storage capacity allows even a single type of information to convey more than was previously possible due to the metadata attached to the digital files. Third, modern devices can carry information dating back months or even years. Lastly, modern devices allow individuals to carry sensitive personal information with them at all times in a way that was not common before the advent of these devices. *Id*. at 394-95. The *Riley* Court acknowledged that in the Fourth Amendment balance between the government's interest in conducting the warrantless search and the privacy interests involved, the increased storage capacity of modern devices weighs heavily on the side of the privacy interests while the government's interest remains the same. *Id*. at 374. Due to this

imbalance, this Court held that officers must generally secure a warrant before searching these devices. *Id*. at 386.

Since this Court issued its *Riley* decision, the Eleventh and Sixth Circuits have interpreted this Court's emphasis on mass storage devices to apply to warrantless searches under the private search doctrine. In *U.S. v. Sparks*, the Eleventh Circuit held that police violated the Fourth Amendment when they viewed a video on the defendant's cell phone that had not been previously viewed during the private search. *U.S. v. Sparks*, 806 F.3d 1323, 1335 (11th Cir. 2015). In *Sparks*, the defendants misplaced a cell phone containing pictures and videos depicting child pornography at a Walmart store. An employee found the phone and contacted the defendants to return it. *Id*. at 1330. Before doing so, however, the employee viewed the images and turned the phone over to another employee. The second employee went through the photos but did not view all of the videos before turning the phone over to the police. *Id*. at 1332. The police then viewed videos that had not been seen by the second Walmart employee before applying for a warrant. *Id*. The Sixth Circuit held that the officers had exceeded the scope of the prior private search when they viewed these videos before applying for the warrant, but nonetheless upheld the district court's denial of the defendants' motion to suppress the evidence because it had no effect on the state court's determination of probable cause supporting the issuance of the warrants. *Id*. at 1335. In holding so, the Eleventh Circuit specifically considered the *Riley* Court's discussion of the increased privacy interests implicated by a cell phone's increased storage capacity. *Id*. at 1336.

Similarly, the Sixth Circuit has held that police exceed the scope of a prior private search when they view files that have not been previously viewed by the private party. *U.S. v. Lichtenberger*, 786 F.3d 478, 485 (6th Cir. 2015). In *Lichtenberger*, officers arrested the

defendant after it was discovered that the defendant had failed to register as a sex offender. After the police arrived at the residence and arrested the defendant, the defendant's girlfriend accessed the defendant's laptop and discovered a folder containing child pornography. *Id*. at 480. The defendant's girlfriend testified that she had viewed roughly 100 photos, but was not certain of which ones, before calling the police once again. *Id*. at 481. When the officer arrived, he asked the defendant's girlfriend to show him what she had found, at which point she showed the officer about five of the photos that she had viewed. The officer then instructed her to turn off the laptop and the officer took the laptop with him. In addition to the laptop, the defendant's girlfriend gave the officer the defendant's cell phone, a flash drive, and some marijuana. *Id*. The district court granted the defendant's motion to suppress the evidence recovered from his laptop. *Id*. at 480. The Sixth Circuit considered the *Riley* Court's decision when it affirmed the district court decision, holding that the officer had exceeded the scope of the girlfriend's prior search. *Id*. at 487.

This Court should adopt the Sixth and Eleventh Circuits' "narrower approach" to private searches of electronic devices because, unlike the Fifth and Seventh Circuits, these Circuits issued their rulings following this Court's *Riley* decision and properly considered the additional privacy concerns that electronic storage creates. In its decision, the Fourteenth Circuit held that a flash drive is more analogous to a physical storage container than a cell phone or laptop. Jt. App. p. 54. This simply is not true. A flash drive's ability to store a wide range of file types, its ability to store tremendous amounts of that data, its ability to store data spanning a significant period of time, and its ability to store highly sensitive data shows that a flash drive implicates the same increased privacy concerns that the *Riley* Court attributed to cell phones. This Court should reject the Fourteenth Circuit's adoption of the "broader approach" advanced by the Fifth and Seventh

Circuits and instead adopt the Sixth and Eleventh Circuits' "narrower approach" that has already weighed this Court's *Riley* decision.

The Fourteenth Circuit incorrectly characterized the files that Ms. Wildaughter put on her flash drive as a "small, defined, handpicked pool of offline documents". Jt. App. p. 54. However, the facts in the record should lead this Court to a very different conclusion. Ms. Wildaughter only examined a very small number of files before copying Petitioner's entire desktop folder onto her flash drive. Jt. App. p. 24-26. Ms. Wildaughter did not communicate the location of the files that she had already viewed, nor did Officer Yap ask for such information. Jt. App. p. 29. The police then exceeded the scope of Ms. Wildaughter's prior search when it reviewed several files that Ms. Wildaughter had not viewed. Therefore, this Court should reverse the Fourteenth Circuit's decision.

iii. The Fourteenth Circuit should have reviewed the district court's decision de novo.

Circuit courts must apply the appropriate standard when reviewing district court decisions, which in turn dictates the level of deference the circuit court will grant the lower court decision. To determine the appropriate standard, the circuit court must first determine whether the question presented on appeal is a question of fact or law, or both. In the Fourteenth Circuit decision from which Petitioner appeals, the circuit court applied the "clearly erroneous" standard of review, which is used to review judge-made factual findings. Jt. App. p. 54. Under the "clearly erroneous" standard the circuit court will overturn the lower court's factual findings only if they are "left with the definite and firm conviction that a mistake has been committed". *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (internal quotations omitted). This standard grants substantial deference to the lower court's decision, as the circuit court must uphold the district

court decision barring "clear error", even if the circuit court might otherwise make a different factual determination on its own. *Id*. Conversely, the *de novo* standard of review applies when deciding questions of law, and the circuit court will make an independent determination with no deference to the lower court's decision. *See Williams v. Taylor*, 529 U.S. 362, 400 (2000).

The Fourteenth Circuit improperly applied the "clearly erroneous" standard when reviewing the district court decision to deny Petitioner's motion to suppress the evidence obtained as a result of the government's unwarranted search. In *Ornelas v. U.S.*, this Court held that warrantless searches must be reviewed *de novo*. *Ornelas v. U.S.*, 517 U.S. 690, 699 (1996). The Ornelas' filed a motion to suppress evidence resulting from an officer's warrantless search of their vehicle in which the officer removed a panel and discovered two kilograms of cocaine. *Id*. at 691. Similar to the present case, the Court of Appeals for the Seventh Circuit applied the "clearly erroneous" standard and upheld the district court decision to deny the Ornelas' motion. This Court held that the proper standard to review a warrantless search is *de novo* because "[t]he Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant', and the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches". *Id*. at 699 (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). This Court further reasoned that, without this distinction, officers would have little incentive to secure a warrant before conducting a search. *Id*.

The same principles that this Court espoused in *Ornelas* apply to a warrantless search under the private search doctrine. The Fourteenth Circuit erred by applying a "clearly erroneous" standard instead of reviewing the district court decision *de novo*.

III. The Government Committed A *Brady* Violation By Withholding Statements Of Potential Suspects

The Government committed a *Brady* violation by withholding statements of potential suspects including one individual who was briefly investigation. The Supreme Court has held that "the suppression by the prosecution 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 v. Maryland*, 373 U.S. 83, 87 (1963). Ms. Gold did not learn of any FBI investigation into other suspects or their receipt of an anonymous tip of another suspect until after Ms. Gold was convicted and sentenced. This lack of prosecutorial integrity prevented Ms. Gold from being able to conduct her own investigation related to the anonymous tip and into the other potential suspects the FBI briefly looked into. A potential investigation by Ms. Gold into these matters could easily have led to admissible evidence and allowed her to put on a different defense strategy which unfortunately, she was denied because the FBI decided after a "preliminary investigation" that the anonymous tip was not reliable.

In order for Ms. Gold to establish that a *Brady* violation, she must prove that 1) "the prosecution suppressed evidence," 2) "the evidence was favorable to the defense," and 3) "the evidence was material." *United States v. Erickson,* 561 F.3d 1150, 1163 (10th Cir. 2009). Evidence will be considered to be "material" under *Brady* "only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

The Government suppressed evidence that there may have been another individual or individuals involved in the murder of Ms. Driscoll due to Ms. Driscoll being involved in a

pyramid scheme type company and owing a large sum of money. The Government decided after a "preliminary" investigation that the leads were not credible and did not alert Ms. Gold to this information. This information would have allowed Ms. Gold to present a defense focusing on Ms. Driscoll's involvement in a pyramid scheme where she owed a large sum of money and had not yet paid, causing her to be the targeted. The introduction of another possible, and quite likely the actual, perpetrator of Ms. Driscoll's murder is highly favorable to Ms. Gold. She would have been able to make the argument of someone else committing the murder of Ms. Driscoll with a motive to do it as well, and this likely may have swayed jurors that the Government did not prove Ms. Gold's guilt beyond a reasonable. Additionally, the statements and document detailing other suspects and an anonymous tip of who the real perpetrator was, is evidence that is material.

i. The Prosecution Suppressed the Evidence

The Government interviewed a witness on June 2, 2017, a colleague of Ms. Driscoll's at the pyramid scheme style business, HerbImmunity. *See* App. pg. 11. The investigative report indicated that during this interview, the witness detailed how two weeks before Ms. Driscoll's death, she called the witness and stated she owed money to an "upstream distributor within the company, Martin Brodie." It was stated that there were rumors this Martin Brodie could be violent. *Id.* Additionally, on July 7, 2017, the FBI received an anonymous phone call about Ms. Driscoll's death which indicated a Belinda Stevens was the individual responsible for Ms. Driscoll's death and she also worked at HerbImmunity. *See* App. pg. 12. The Special Agent stated he conducted a "preliminary investigation" and stated it was not reliable. *Id.*

The fact that the FBI talked to a witness who identified a potential suspect but was not disclosed to Ms. Gold indicates that they were not interested in any other theories since they believed they had already found the perpetrator. No information was provided about this

potential suspect which would have allowed Ms. Gold's team to investigate further and potentially put on a whole different defense at trial. The Supreme Court has previously held that the results of a polygraph which were not admissible at trial, were "not 'evidence' at all." *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). The Court explained their decision by stating that since the polygraph was not able to be mentioned during trial, it would have no direct effect on the outcome of trial. *Id.* However, in *Wood*, the controversy is over a polygraph examination with the results not being disclosed to the Defense. Polygraphs themselves are quite controversial often not used at trial. In our case, we are discussing an interview with a witness who identified a potential suspect with a motive to harm Ms. Driscoll and an anonymous tip which identified another potential suspect with a possible motive to harm Ms. Driscoll. This is not a mere polygraph, but an identification of two separate suspects which the Government failed to disclose to Ms. Gold's team. Ms. Gold's team could have investigated these potential suspects and garnered a whole new defense at trial.

In *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000), the Court stated that "[T]here must be more than mere speculation that the inadmissible evidence would have led directly to admissible evidence." In this case, it is not speculation that an investigation would have led to information showing that Mr. Brodie and Ms. Stevens were both working at HerbImmunity with Ms. Driscoll and that Ms. Driscoll owed Mr. Brodie a large sum of money. Ms. Driscoll's own father is quoted in an article after his daughters death that "[S]he looked like she really hit her head hard, and at first I thought she just fell or tripped or something. But something just didn't feel quite right." Jt. App. at p. 13. That same article mentioned that some students at the college Ms. Driscoll attended were disgruntled due to HerbImmunity operating as a pyramid scheme. *Id.* Further, there were indications of blunt force trauma to Ms. Driscoll's head and medical

examiners stated there was not a struggle. *Id.* This lends credence to other individuals being the real perpetrators behind Ms. Driscoll's death. It is not mere speculation that the information withheld from Ms. Gold would have led to admissible evidence, it is almost certainly a fact.

After Ms. Gold was arrested, her home was searched and an empty box was found. The detectives believed the box was used to transport chocolate covered strawberries laced with poison to Ms. Driscoll. After the box was found, Detective Barry Apple stated, "We feel like we finally may be onto something, which is a huge relief." Jt. App. p. 14. At trial Ms. Gold would have been able to make the case that the FBI failed to investigate other suspects because they had already decided that Ms. Gold was the perpetrator. Based off of Detective Apple's statement, it is readily apparent that they strongly believed they had found their perpetrator and were not interested into looking at other potential suspects. This defense would have shown the jury that the FBI dropped the ball and failed to fully do their jobs by fully investigating the potential suspects.

ii. The Evidence Was Favorable To Ms. Gold.

"[T]here must be more than mere speculation that the inadmissible evidence would have led directly to admissible evidence." *Bradley*, 212 F.3d 559 (11th Cir. 2000). Also, when determining if inadmissible evidence can rise to a *Brady* violation, a key question is "whether the disclosure of evidence would have created a reasonable probability that the result of the proceeding would have been different." *Trevino v. Thaler*, 449 Fed. App'x 415, 424 n. 7 (5th Cir. 2011).

The evidence withheld by the Government, although perceived to be inadmissible hearsay, would have led directly to admissible evidence. The Government indicated they had the perpetrator of Ms. Driscoll's death after they arrested Ms. Gold and found the empty box in her

residence. The statement of Detective Apple coupled with the actions of the FBI special agents handling the anonymous phone call and interview with a witness indicate the investigators were engaged in "tunnel vision". The Government believed they found their perpetrator and she was their sole focus. This tunnel vision by investigators prevented them from conducting a full and thorough investigation into all potential suspects and leads. At the very least, the Government should have informed Ms. Gold of the other suspects which were *named*, one by a witness and another in an anonymous phone call.

The Court in *Thaler* stated the disclosure of the inadmissible evidence needed to create a reasonable probability that the result of the proceeding would have been different in order to rise to a *Brady* violation. Presenting a jury with an alternate suspect with a strong motive would quite likely alter the result of trial. The Government made the argument that Ms. Gold had a financial motive to harm Ms. Driscoll, while at the same time they effectively prevented Ms. Gold from presenting the jury with a different suspect who also had a financial motive to harm Ms. Driscoll. The jury is the finder of fact and it should have been left up to the jury to decide who to believe, who actually killed Ms. Driscoll. Further, the FBI did not conclusively rule out both potential suspects as perpetrators of Ms. Driscoll's murder. In fact, the FBI never performed a follow-up interview with Mr. Brodie and only after a "preliminary investigation" did they conclude that the anonymous phone call was not reliable.

Taken together, the evidence withheld from Ms. Gold is favorable to her and have a strong likelihood to have changed the outcome of trial. She was effectively denied a chance to properly defend herself from the charges against her due to the Government withholding the information of two other named suspects. Therefore, this Court should vacate Ms. Gold's conviction and remand for a new trial.

iii. The Suppressed Evidence Was Material

The third prong of the *Brady* analysis is whether the suppressed evidence was "material." *United States v. Erickson,* 561 F.3d 1150, 1163 (10th Cir. 2009). "Material" evidence in this circumstance is evidence which had it been disclosed the outcome of trial would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

The Government believes the disclosure of the evidence was not material because any discussion of the outcome of trial being different is pure speculation. However, this statement is contrary to the truth: presenting a jury with two alternate suspects, one with a financial motive and apparent reputation for violence are likely to sway at least one juror. The case against Ms. Gold involved a plethora of circumstantial evidence and assumptions by witnesses regarding statements by Ms. Gold and information on her computer. The Government indicated Ms. Gold had a financial motive for murdering Ms. Driscoll due to her being out $2,000.00 because of the pyramid scheme company. However, the Government conveniently did not disclose to Ms. Gold that there was a named suspect who also had a strong financial motive to murder Ms. Driscoll. A suspect with a financial motive similar to Ms. Gold and who is noted to possibly be violent would very likely play well with a jury. It is not speculation that the outcome of trial may have been different. One cannot say definitively one way or another how a jury would decide, but one can easily infer that this information would have caused a jury to heavily debate as to who the real perpetrator was.

The Fourteenth Circuit stated that due to the "substantial evidence" which linked Ms. Gold to Ms. Driscoll, the withholding of the evidence did not create "a reasonable probability that the outcome of the trial would have been different." *United States v. Lee*, 88 F. App'x 682, 685 (5th Cir. 2004). Although Ms. Gold respects the Fourteenth Circuit's opinion, she does not

agree with their analysis that the withholding of the evidence did not create "a reasonable probability that the outcome of the trial would have been different." Ms. Gold does not want to iterate her previous argument, but overall being able to present a separate theory with at least one other suspect who has a strong financial motive to harm Ms. Driscoll, who is at the same company as Ms. Driscoll and who is said to be violent is more than enough to cause a jury to have reasonable doubt as to who the real perpetrator was. Considering how tunnel visioned the investigators were in their pursuit of Ms. Gold, a jury would likely understand that the Government did not adequately investigate these other possible suspects to a degree where they could be properly excused as suspects.

Conclusion

This court should reverse the Fourteenth Circuit's decision and vacate Ms. Gold's conviction and remand for a new trial. The Government suppressed pertinent evidence from Ms. Gold which would have been favorable to Ms. Gold at trial and the evidence was material since it has a reasonable probability of altering the outcome of trial. Two different named suspects were withheld from Ms. Gold including one who worked at the same company as Ms. Driscoll who owed this individual a large sum of money and this individual is said to be violent. The investigators tunnel visioned on Ms. Gold and did not complete full investigations into other potential suspects. This information was not disclosed by the Government preventing Ms. Gold from conducting her own investigation into these suspects and presenting a different defense at trial.

Therefore, Ms. Gold respectfully asks this court to reverse the Fourteenth Circuit's ruling that the suppressed evidence did not meet the materiality requirements of a *Brady* claim, vacate Ms. Gold's conviction and remand for a new trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court hold the following:

1. That this Court reverse the Fourteenth Circuit's opinion that Petitioner's psychotherapist had a duty to report Petitioner's statements to the police, or in the alternative, that Petitioner's psychotherapist was permitted to testify against her client regarded statements made during a psychotherapy session.
2. That this Court reverse the Fourteenth Circuit's ruling that Respondent did not exceed the scope of the prior private search.
3. That this Court reverse the Fifth Circuit's opinion in *U.S. v. Runyan* and the Seventh Circuit's opinion in *Rann v. Atchison*.
4. That this Court remand this case so that the Fourteenth Circuit may apply the proper, *de novo*, standard of review for the private search doctrine issue.
5. That this Court reverse the Fourteenth Circuit's ruling that the suppressed evidence did not meet the materiality requirements of a *Brady* claim, vacate Ms. Gold's conviction and remand for a new trial.

/s/ Team 7