No. 20 – 2388

# Supreme Court of the United States

**SAMANTHA GOLD,**
Petitioner,

--against--

**UNITED STATES OF AMERICA,**
Respondent.

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**ON WRIT OF CERTIORARI**

**TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT**

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**BRIEF ON BEHALF OF PETITIONER**

**Team #9**
***Counsel for the Petitioner***

## QUESTIONS PRESENTED

1. Whether the dangerous-patient exception applies to Federal Rule of Evidence 501 thereby allowing a psychotherapist to testify in open court about previously disclosed information that was obtained during a confidential treatment session with a patient.

2. Whether a Fourth Amendment violation occurs when evidence admitted at trial was obtained through a private search and given to the police who subsequently conducted a warrantless search that was broader in scope than the initial private search.

3. Whether the prosecution violates the requirements of *Brady v. Maryland* when they withhold potentially exculpatory evidence from the defense where the evidence in question would have been inadmissible at trial but would have led to promising investigatory leads or other admissible evidence.

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## OPINIONS BELOW

The decisions of the United States District Court for the Eastern District of Boerum, *United States v. Gold*, No. 17 CR 651 (FN), are set forth in the transcript of Record ("R"). R. at 40–41, 48–49. The opinion of the United States Court of Appeals for the Fourteenth Circuit, *Gold v. United States*, No. 19-142 (Feb. 24, 2020), is set forth in the transcript of Record. R. at 50-59.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment:

> 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 warrant shall issue but upon probably 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.

## STATUTORY PROVISIONS INVOLVED

The state of Boerum recognizes the psychotherapist-patient privilege stating that "communications between a patient and a mental health professional are confidential . . . ." Boerum Health and Safety Code § 711(1). The state outlines an exception to this privilege when a patient makes "an actual threat to physically harm either themselves or an identifiable victim(s) . . . ." *Id.* § 711(1)(a). The state requires that a mental health professional may use their professional judgment to determine whether "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." *Id.* § 711(1)(b). This provision imposes a mandatory duty on the mental health professional to "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 . . . ." *Id.* § 711(2), (3).

## STATEMENT OF THE CASE

### I. FACTUAL HISTORY

Samantha Gold ("Ms. Gold") was a student and resident of Joralemon University. R. at 5. Ms. Gold began meeting with a therapist ("Dr. Pollack") at the university in 2015 to learn how to manage anger issues she was experiencing. R. at 17. Ms. Gold had a "breakthrough" in her treatment when Dr. Pollack diagnosed her with intermittent explosive disorder and was able to help her through treatment that consisted of weekly psychotherapy sessions. *Id*.

While studying at Joralemon University, Ms. Gold met Tiffany Driscoll ("Ms. Driscoll"), a fellow student at Joralemon. Ms. Driscoll was a sales representative for the company "HerbImmunity." R. at 4, 13. Ms. Driscoll encouraged Ms. Gold to join HerbImmunity and sell vitamins as one of her recruited team members. R. at 4–5. To Ms. Gold's dismay, the business venture was not as profitable as she had hoped, causing considerable stress in Ms. Gold's life. R. at 4. During one of her psychotherapy sessions with Dr. Pollack, Ms. Gold expressed anger about the debt she incurred as a result of joining HerbImmunity. R. at 18. During this treatment session, Ms. Gold exclaimed that she was going to kill "her."[1] R. at 19. Ms. Gold also stated that she was going to "take care of her" and HerbImmunity while expressing relief that she would not have to see or think about either ever again. R. at 19. Dr. Pollack noted that Ms. Gold appeared more agitated than normal, although, due to her condition, Ms. Gold regularly attended these sessions in an agitated state. R. at 18.

Dr. Pollack, using her professional judgment, decided that she had a duty to report Ms. Gold's statements to the police. R. at 5. The police immediately visited Ms. Gold in her dorm room and noted that "she appeared calm and rational." *Id.* The police spoke with and observed Ms. Gold

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[1] The government claims that "her" is referring to Ms. Driscoll. However, this assumption is not reflected in the record. Even Dr. Pollack noted that Ms. Gold never clarified what she meant by this statement. R. at 22.

for fifteen minutes before determining "that she posed no threat to herself or to others." *Id.* The police took the additional measure of locating Ms. Driscoll to warn her that she had potentially been threatened. *Id.* Ms. Driscoll "expressed no concern and returned to class." *Id.*

That same day, when Ms. Gold returned home, her roommate, Jennifer Wilddaughter ("Ms. Wilddaughter"), sensed she was more agitated than usual. R. at 6. When Ms. Gold left her dorm, she forgot to log out of her computer. Ms. Wilddaughter noticed the unattended computer and decided to look through documents and files on the desktop. *Id.* Ms. Wilddaughter came across photographs of Ms. Driscoll and a note addressed to Ms. Driscoll, complimenting her. *Id.* Ms. Wilddaughter also read a text file that referenced a common rat poison. *Id.* Upon viewing these documents, she copied the entire desktop onto a flash drive and handed it over to the Livingston Police Department, indicating that "everything of concern was on this drive." *Id.* Officer Yap, of the Livingston Police, "immediately conducted an examination of all of the drives contents," including files unopened by Ms. Wilddaughter; these files contained sensitive information like health insurance documents. *Id.*

On May 25, 2017, Ms. Driscoll was found dead after being poisoned. R. at 13-14. The murder investigation initially led to multiple suspects, including Martin Brodie ("Mr. Brodie"), an "upstream distributor" for HerbImmunity who had a reputation for being violent. R. at 11. During an interview with one of Ms. Driscoll's classmates, the FBI was informed that Ms. Driscoll owed money to Mr. Brodie and the agent indicated she was going to seek an interview with Mr. Brodie. *Id.* The record does not indicate this interview ever took place. *Id*. Also, there was an anonymous tip accusing Belinda Stevens, who was also involved with HerbImmunity, of murdering Ms. Driscoll. R. at 12. The FBI "conducted a preliminary investigation" and determined the tip did not appear reliable. *Id.* The FBI arrested Ms. Gold on May 27, 2017. R. at 14.

## II. PROCEDURAL HISTORY

This matter comes before this Court on appeal from a final judgment of the Fourteenth Circuit upholding Ms. Gold's conviction on February 24, 2020. R. at 50. Ms. Gold was indicted by grand jury under 18 U.S.C. §§ 1716(j)(2), (3). R. at 1. The government filed charges against Ms. Gold in the United States District Court for the Eastern District of Boerum, alleging that she mailed poisoned food items to the victim with the intent to kill or injure her, resulting in the victim's death. R. at 51.

Before the trial commenced, Ms. Gold filed a motion to suppress the testimony of her therapist and the computer files collected and given to the police by Ms. Gold's roommate. *Id.* After hearing the parties' arguments at an evidentiary hearing, the district court denied the motion. *Id.* The court held that the dangerous-patient exception applied to Boreum's psychotherapist-patient privilege as well as to the Rule 501 testimonial privilege. This allowed Dr. Pollack to testify about confidential information shared during Ms. Gold's treatment session. R. at 52. The district court adopted a broad approach to the private search doctrine and thereby found that the police officer's search of the digital evidence without a warrant did not violate Ms. Gold's Fourth Amendment rights. R. at 55.

On February 1, 2018, the district court entered a judgment of conviction and sentenced Ms. Gold to life in prison. R. at 51. After sentencing, Ms. Gold filed a motion for either a directed verdict or a new trial based on a claim that the government violated the rule set forth in *Brady v. Maryland* which requires that the government disclose potentially exculpatory information to the defense. R. at 55. The district court held that this failure to disclose did not constitute a *Brady* violation as the evidence in question would have been inadmissible at trial and denied Ms. Gold's motion. *Id.*

## SUMMARY OF THE ARGUMENT

This is a case about one's constitutional rights to a fair trial being violated. Ms. Gold was a hard-working college student who got roped into a pyramid scheme by a fellow classmate. Now, the government is trying to keep Ms. Gold in prison for the rest of her life without having had access to a fair trial. For the following three reasons, this Court should reverse the Fourteenth Circuit's holdings and grant Ms. Gold a new trial.

First, the dangerous-patient exception should not be applied to Federal Rule of Evidence 501. The dangerous-patient exception mandates a psychotherapist disclose a threat made in a confidential therapy session so that imminent harm can be avoided. Applying the dangerous-patient exception in a way that allows a psychotherapist to testify in subsequent criminal proceedings when the initial threat no longer exists, does not serve the purpose of the exception.

Second, this Court should adopt the narrow approach to the Fourth Amendment private search doctrine and find that the Livingston Police Department infringed upon Ms. Gold's reasonable privacy interest in her computer when they conducted an extensive, warrantless search of her private property. Ms. Gold's privacy interest in the contents of her entire desktop was not frustrated by the previously conducted private search of only a few files, and therefore the police exceeded the scope of the private search.

Third, a *Brady* violation can be based upon evidence that would itself be inadmissible during the trial. The government violated Ms. Gold's due process rights by withholding information regarding other potential suspects that could have led the defense to additional investigatory avenues or admissible evidence which would have altered the course of the trial.

Accordingly, this Court should reverse the Fourteenth Circuit's findings, vacate Ms. Gold's conviction, and grant her a new trial.

## LEGAL ARGUMENT

### I. THIS COURT SHOULD REJECT THE DANGEROUS-PATIENT EXCEPTION TO FEDERAL RULE OF EVIDENCE 501.

"Confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). However, all states have also imposed some form of a duty on therapists to breach confidentiality and protect potential victims against foreseeable violence committed by their patients. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976).

The state of Boerum recognizes this exception to the otherwise strict duty of confidentiality psychotherapists owe their patients. Boerum Health and Safety Code § 711: REPORTING REQUIREMENTS FOR MENTAL HEALTH PROFESSIONALS. While it was proper for Dr. Pollack to disclose Ms. Gold's statements made during their confidential therapy session to authorities, it was subsequently unacceptable for Dr. Pollack to then testify about those statements in Ms. Gold's criminal trial. *See* R. at 15. These statements were made in the course and scope of psychiatric treatment and are subject to the same confidentiality laws that all fifty states have enacted to protect psychotherapist-patient confidentiality. *See* 3 Jack B. Weinstein & Margaret E. Berger, WEINSTEIN'S FEDERAL EVIDENCE § 504.03[4][b], at 504-11 & n.12 (2d ed. 1997, Release No. 67-02/00) (listing statutes). This Court should reject the Fourteenth Circuit's holding and find that the dangerous-patient exception does not apply to Federal Rule of Evidence 501 for three reasons: (A) there is no connection between a psychotherapist's ethical duty to warn a third-party to prevent harm and testimony at a later prosecution; (B) applying the dangerous-patient exception to Federal Rule of Evidence 501 directly circumvents Congress's intent; and (C) allowing the dangerous-patient exception will chill all of the vital benefits of psychotherapy.

A. <u>There is no connection between a psychotherapist's ethical duty to warn a third-party to prevent harm and a court's order compelling a psychotherapist to testify about such a threat at a later prosecution.</u>

Testimony at a criminal trial focuses on establishing a past act, not protecting a potential victim. As such, this Court should not extend the dangerous-patient exception to federal evidentiary practice because the two obligations are grounded in entirely different rationales. *United States v. Hayes*, 227 F.3d 578, 583 (6th Cir. 2000) (rejecting the dangerous-patient exception and finding only a "marginal connection, if any at all," between a psychotherapist's ethical duty to warn a third party and a court's order compelling the therapist to testify about such a threat at a later prosecution). The dangerous-patient exception is justified on the grounds of protection in the face of imminent harm, which is no longer applicable when later giving testimony after the risk has passed. *See Tarasoff*, 17 Cal. 3d at 442 (reasoning that the prevention of harm to third parties supports allowing, or even requiring, a psychotherapist to breach confidentiality).

In arguing that these rules are indeed connected and this Court should apply the dangerous-patient exception to Federal Rule of Evidence 501 the government contends that: (i) Ms. Gold poses a serious threat of harm and qualifies for the potential exception this Court delineated in the *Jaffee* footnote; (ii) that as soon as Dr. Pollack disclosed Ms. Gold's potential for violence to the Livingston police she waived her psychotherapist-patient privilege and (iii) by adopting this exception courts will have clarity involving when the dangerous-patient privilege applies. This Court should instead find that, because the two rules are so dissimilar, one should not be applied to another.

*i. Ms. Gold poses no future threat of harm and therefore does not fall under the Jaffee footnote.*

Ms. Gold poses no future threat of harm and this Court should not apply the dangerous-patient exception to Federal Rule of Evidence 501. This Court, in deciding *Jaffee,* concluded that

"because this is the first case in which [it has] recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'" *Jaffee*, 518 U.S. at 17-18 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)). In justifying disclosure, the government relies on a footnote where this Court stated:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that the there are situations in which the privilege must give way, for example, if *a serious threat of harm to the patient or to others* can be averted only by means of a disclosure by the therapist.

*Id*. at 18 n.19 (emphasis added).

However, at the time of trial, Ms. Gold posed no serious threat of harm that could be averted only by means of disclosure by the therapist. The court in *United States v. Glass* relied on this footnote to uphold the dangerous-patient exception to the Rule 501 privilege. 133 F.3d 1356, 1356–57 (10th Cir. 1998). In *Glass*, the defendant was prosecuted for threatening to kill the President of the United States. *Id*. at 1357. Upon admission to a psychiatric hospital, the defendant told the examining psychotherapist that "he wanted to get in the history books like Hinkley [sic] and wanted to shoot Bill Clinton and Hillary [sic]." *Id*. An outpatient nurse who knew of the threat alerted law enforcement. Secret Service agents subsequently interviewed the admitting psychotherapist, who disclosed the threatening statements. *Id.* This disclosure by the psychotherapist comprised the sole evidence at Glass's trial for violating 18 U.S.C. § 871(a). *Id*. at 1356. Implicitly accepting the dangerous patient exception, the Tenth Circuit remanded the case to "determine whether….the threat was serious when it was uttered and whether its disclosure was the only means of averting harm to the President when the disclosure was made." *Id.*

In *Glass*, it is no surprise that the court implicitly accepted the footnote from *Jaffee* and extended the psychotherapist-patient privilege; the defendant was still very much a threat. Here,

however, Ms. Gold posed no risk and made nowhere near as explicit threats. While in a confidential treatment session Ms. Gold stated, "I'm so angry! I'm going to kill her." R. at 19. This threat does not rise to the level of *Glass*, where defendant stated he wanted to "get into the history books" and "shoot Bill Clinton and Hillary." *See* 133 F.3d at 1357. Ms. Gold used no specifics like the defendant in *Glass* did, only noting that "I will take care of her and her precious HerbImmunity." R. at 19. It is unclear who Ms. Gold is even referring to in these statements. Ms. Gold never used Ms. Driscoll's name, she merely said she was going to kill "her." R. at 21-22. In fact, it is indeed possible that the "take care of" statement meant Ms. Gold was going to pay off her debt, whereas the defendant in *Glass* could make no such showing—it was evident he wanted to kill the President and First Lady because he explicitly said so. The harm in this instance had clearly passed by the time of trial, and this Court should not extend the dangerous-patient exception to Federal Rule of Evidence 501.

The government alleges that the reason the "harm has been averted" is because Ms. Driscoll was murdered. R. at 39. By this rationale, they argue that a patient regains her privilege "by simply killing the victim." *Id*. This Court should recognize that "society's interest in preventing threatened violence is infinitely greater than its interest in making it easier to prove the commission of a crime already committed." John G. Fleming & Bruce Maximov, THE PATIENT OR HIS VICTIM: THE THERAPIST'S DILEMMA, 62 Cal. L. Rev. 1025, 1066 (1974). Proving the commission of a crime already committed is precisely what the government is doing here, under the guise of "patient protection." If a patient was dangerous at the time of the dangerous-patient disclosure, but by the time of trial the patient is stable and harmless, the protection rationale that animates the exception to the states' confidentiality laws no longer applies. *United States v. Chase*, 340 F.3d 978, 991 (2003). There is absolutely no connection between the goals of protection imposed by the

dangerous-patient exception and the goals of proof imposed by the Federal Rules of Evidence. Therefore, this Court should not adopt the dangerous-patient exception to the psychotherapist-patient evidentiary privilege under Federal Rule of Evidence 501.

*ii. Psychotherapists do not waive their privilege by disclosing a confidential statement to authorities to protect third parties.*

The age-old notion that "when the secret is out, it is out for all time" does not apply to the dangerous-patient exception. *See People v. Bloom*, 85 N.E. 824, 826 (N.Y. 1908). When a psychotherapist discloses a threat to the police, she is telling one person in the hopes of protecting another. Such a disclosure is not made in a public setting, on the record, for all to hear. In addition, while patients are often warned of the potential disclosure of a serious threat of harm to an identifiable victim, Ms. Gold was never informed that her statements could be used against her in a subsequent criminal prosecution. R. at 21.

It is incorrect to conclude that the confidentiality between doctor and patient ha[s] already been breached" and there is "nothing to preserve," as argued by the government, because the two types of disclosures at issue are so different. R. at 38. The public interest in warning of future danger rarely justifies a full disclosure of the patient's confidences, rather it justifies merely disclosing the existence of the threat itself. *United States v. Chase*, 340 F.3d 978, 986 (9th Cir. 2003) (quoting *State v. Miller*, P.2d 225, 236 (Or. 1985)). In addition, a limited disclosure to protect someone from imminent harm would never justify full disclosure of a patient's confidences in open court on the record, as the dangerous-patient exception would allow for if the rule was expanded. *Id.* Implying that the "cat is out of the bag" creates a slippery slope for *all* of a patient's statements during therapy to subsequently be used against them in a criminal trial. Dr. Pollack simply needed to disclose the potential threat to prevent harm to Ms. Driscoll. Testifying in court and on the record created a much more intrusive and flagrant violation of the privilege.

*iii. Adopting the dangerous-patient exception to the psychotherapist-patient evidentiary privilege will produce unstable and dissimilar results.*

Because there is no connection between a psychotherapist's ethical duty to warn a third-party to prevent harm and a court's order compelling a psychotherapist to testify about such a threat at a later prosecution, combining the two will lead to uncertainty and incongruency. *Jaffee* itself reiterates the principle that psychotherapy patients in a privileged relationship "must be able to predict with some degree of certainty whether particular discussions will be protected." *Jaffee*, 518 U.S. at 18 (citing *Upjohn*, 449 U.S. at 393). In fact, this Court reviewed and rejected the Seventh Circuit's balancing test for its discordance. *Id*. at 17 (stating that by making the "promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."). Psychotherapists and patients alike need to be able to predict when their communications will be privileged, and most importantly, when they will not be. Uncertainty, or "widely varying applications by the courts, is little better than no privilege at all." *Id*. at 17-18 (citing *Upjohn*, 449 U.S. at 393). Thus, extending the dangerous-patient exception will lead to varying applications of the rule and tremendous uncertainty, on both the part of patients and the psychotherapist, which is fundamentally unfair to both parties.

In addition, if the federal evidentiary privilege were tied to states' disclosure laws, as the government insists it is, then similarly situated patients would face different rules of evidence in federal criminal trials. *Compare* Wash. Rev. Code § 71.05.390(10) *with Tarasoff*, 551 P.2d at 340 (showing materially different standards). The Federal Rules of Evidence should apply uniformly and not vary depending on the state in which the defendant resides. *See United States v. DeWater*, 846 F.2d 528, 530 (9th Cir. 1988) ("Using federal rules of evidence and procedure and case law promotes the uniform disposition of criminal matters in the federal system."); *see also Lippay v.*

*Christos*, 996 F.2d 1490, 1497 (3d Cir. 1993) (discussing "Congress' intent that the Federal Rules of Evidence have uniform nationwide application").

B. Congress did not intend for this Court to adopt the dangerous-patient exception to Federal Rule of Evidence 501.

While "[the public] has a right to every man's evidence," this Court has declared that testimonial privileges are "not lightly created *nor expansively construed*." *United States v. Nixon*, 418 U.S. 683, 710 (1974) (emphasis added). Although a witness has a general duty to testify, exceptions may be justified on the basis of a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jaffee*, 518 U.S. at 9 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Congress was originally presented with proposed rules of evidence that defined nine specific testimonial privileges, including the psychotherapist-patient privilege. *Trammel v. United States*, 445 U.S. 40, 100 (1980) (proposing Federal Rule of Evidence 504). The Senate Judiciary Committee rejected the proposed privileges and instead opted for a single general rule: Federal Rule of Evidence 501, which states that "privileges shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Congress made clear that this action did not connote disapproval of the psychotherapist-patient privilege contained in the proposed rules. S. Rep. No. 93-1277, at 13 (1974), *reprinted in* 1978 U.S.C.C.A.N. 7051, 7059. In fact, this Court held that the delineated privileges in the proposed drafts were to be influential in the recognition or denial of new privileges. *See Jaffee*, 518 U.S. at 15; *see also United States v. Gillock*, 445 U.S. 360, 367-68 (1980). The Congressional committee specified three situations where a psychotherapist may disclose confidential communications: (1) proceedings to hospitalize a patient for mental illness; (2) proceedings to examine the mental or emotional condition of the patient; and (3) proceedings in which the

patient's mental or emotional condition is relevant to a claim or defense. *Net Worth Tax League v. Wisconsin*, 56 F.R.D. 141 (E.D. Wis. 1972).

Notably absent from this list is an exception for a psychotherapist to testify at their patient's criminal trial. Thus, "[a]lthough some . . . have argued that the need for disclosure is paramount when possible harm is threatened, [Proposed Rule] 504 proceeds on the assumption that less harm will ensue if patients feel free to ventilate their intentions." George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The* Tarasoff *Duty and the* Jaffee *Footnote*, 74 Wash. L. Rev. 33, 38 (1999) (quoting 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 504[05], at 504-27 (2d ed. 1996, Release No. 35-8/89)). Thus, this Court must consider this legislative history when determining the scope of the dangerous-patient exception. *See Jaffee*, 518 U.S. at 15. This Court should not adopt the dangerous-patient exception as it was not noted in proposed Rule 504, a legislative history this Court relied on in *Jaffee* in creating the testimonial privilege.

C. Allowing a psychotherapist to testify for punitive purposes will chill the beneficial effects of psychotherapy.

"[T]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee*, 518 U.S. at 11. Even the dissent in *Jaffee* recognizes that "effective psychotherapy undoubtedly is beneficial to individuals with mental problems, and surely serves some larger social interest in maintaining a mentally stable society." *Id*. at 22 (Scalia, J., dissenting). "[R]eason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment." *Id*. at 6. Effective psychotherapy depends on an atmosphere of confidence and trust in which a patient feels free to make complete disclosures. *Id.* at 10. The possibility of disclosure for punitive purposes would impede successful treatment by interfering with the

development of a relationship "rooted in the imperative need for confidence and trust." *Id*. (quoting *Trammel*, 445 U.S. at 51).

While even the initial disclosure of a threat to authorities can be damaging to the psychotherapist-patient relationship, a patient will take comfort in knowing that a therapist may only disclose for one purpose. When a psychotherapist tells their patient that, in the event of the disclosure of a serious threat to an identifiable victim, the therapist will have a duty to alert the authorities to the situation, there may well be a marginal effect on that patient's candor in therapy sessions. However, when the dangerous-patient exception is taken to its extreme, requiring an additional warning that a patient's statements may be used against him in a subsequent criminal prosecution, a patient will likely terminate all subsequent open dialogue. *See, e.g.*, Gregory B. Leong, et al., *The Psychotherapist as Witness for the Prosecution: The Criminalization of* Tarasoff, Am. J. Psychiatry 149:8, at 1011, 1014 (Aug. 1992).

Thus, imagine a person convicted with the help of their psychotherapist's testimony; surely this will end that patient's (and likely others') willingness to undergo further treatment for mental health problems. *See Hayes*, 227 F.3d at 585 ("Once in prison, even partly as a consequence of the testimony of a therapist to whom the patient came for help, the probability of the patient's mental health improving diminishes significantly . . . ."). If a psychotherapist is permitted to testify in a federal criminal case involving matters discussed with their patients during treatment, it is certainly more likely those patients will be convicted. *Chase,* 340 F.3d at 992. But, at what cost? Although incarceration is one way to eliminate a threat of imminent harm, psychotherapy treatment is a long-lasting and more effective solution. *Id*; *see also Hayes*, 227 F.3d at 585. By extending the dangerous-patient exception to the psychotherapist-patient evidentiary privilege this Court will deter those most vulnerable in our society from seeking this vital treatment.

## II. THIS COURT SHOULD ADOPT THE NARROW VIEW OF THE PRIVATE SEARCH DOCTRINE AND FIND THAT THE LIVINGSTON POLICE DEPARTMENT EXCEEDED THE SCOPE OF MS. WILDDAUGHTER'S SEARCH.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. A "search" occurs when "first . . . a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, . . . the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (holding that the government must obtain a warrant or demonstrate that an exception to the warrant requirement applies if a reasonable expectation of privacy is infringed upon). The Fourth Amendment only protects against "governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

The private-search doctrine is one of the exceptions to the Fourth Amendment's warrant requirement. *Id*. This doctrine allows a private party to show law enforcement evidence he found during a previous private search, even if law enforcement lacks probable cause. *Id.*; *see also, e.g.*, Paul G. Reiter, *Annotation, Admissibility, In Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 557-58 (1971); Benjamin Holley, Note, *Digitizing the Fourth Amendment: Limiting the Private Search Exception in Computer Investigations*, 96 Va. L. Rev. 677, 677-78 (2010) ("It is well-established that government agents may, without a warrant, re-create a search that was originally conducted by a private individual, so long as they do not exceed the scope of that original search."). A wrongful search conducted by a private party does not violate the Fourth Amendment nor deprive the government of the right to use evidence that it has acquired

lawfully. *See Coolige v. New Hampshire*, 403 U.S. 443, 487-490 (1971).

The private-search doctrine contains two prongs: (1) the initial search must not be made by an agent of the government; and (2) the subsequent government search must not be significantly more intrusive or extensive than the earlier search committed by a private actor. *Walter v. United States*, 447 U.S. 649 (1980); *see also United States v. Jacobsen*, 446 U.S. at 116 (affirming the *Walter* plurality insofar as "the legality of the governmental search must be tested by the scope of the antecedent private search"). If either prong of this test is not satisfied, the government may not use the discovered evidence at trial. *Jacobsen*, 446 U.S. at 117. This Court should adopt the narrow reading of the private search doctrine and find that, under such approach, the Livingston Police Department exceeded the scope of the private search conducted by Ms. Wilddaughter.

A. Ms. Gold maintained a reasonable expectation of privacy in the unopened contents of her computer.

Ms. Gold's reasonable expectation of privacy was only frustrated in the few files Ms. Wilddaughter viewed, not her entire computer. Ms. Gold maintains a reasonable expectation of privacy, and thus Fourth Amendment protection, in the other files on her personal computer. "The Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States v. Ross*, 456 U.S. 798, 822-823 (1982); *see also Katz*, 389 U.S. 351–52 ("What a person knowingly exposes to the public . . . . is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."). For purposes of the Fourth Amendment, individuals generally possess a reasonable expectation of privacy in their personal computers. *See United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007); *see also United States v. King,* 560 F. Supp. 2d 906, 914 (N.D. Cal. 2008). The government is advocating for this Court to adopt the broad view of the private search doctrine which maintains that once a private party has searched

even a single file or folder within a computer, the expectation of privacy for the whole computer has been frustrated, and police may search what they want, as they did here. However, this Court should adopt the narrow view of the private search doctrine and determine that Ms. Wilddaughter's initial search did not frustrate Ms. Gold's expectation of privacy in her entire computer.

The private search doctrine rests on the assumption that once an individual searches another's possessions the owner's expectation of privacy over the item searched has been destroyed. *Id.* ("[T]he Fourth Amendment does not prohibit governmental use of the now nonprivate information."). However, "[c]onsent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers." *Walter*, 447 U.S. at 657. While the private search doctrine allows the government to examine what was already searched, it is precisely these types of indiscriminate searches and seizures that motivated the framing and adoption of the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 583 (1979). "If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy." *Walter*, 447 U.S. at 657 (holding that the private search merely frustrated the expectation in part but did not strip the remaining un-frustrated portion of that expectation of all Fourth Amendment protection).

It is undisputed that Ms. Gold's privacy interest was frustrated and thus the government is entitled to view the material that Ms. Wilddaughter viewed on Ms. Gold's computer. R. at 25-27. However, what Ms. Wilddaughter found was merely some photographs of Ms. Discroll, a letter to Ms. Discroll, and "a reference to rat poison." R. at 26. The government is urging this Court to adopt the broad reading of the private search doctrine because they know these materials contain nothing incriminating. In fact, Ms. Wilddaughter admitted that she and Ms. Gold had a rodent

problem in their apartment. R. at 29. After Ms. Wilddaughter copied the whole desktop onto a flash drive, she took that evidence to the police. R. at 26. Even Ms. Wilddaughter admits that there was nothing in the files that said anything specific about harming Ms. Driscoll or poisoning her. R. at 28. Therefore, anything that Officer Yap opened, that Ms. Wilddaughter did not—like the receipt for the purchase of strawberries—should not be admitted into evidence because opening one single file does not frustrate one's privacy interest over the rest of their computer.

B. Officer Yap was not virtually certain what he would find when he searched Ms. Gold's desktop.

The government's search of an unopened container exceeds the scope of a private search unless the government searcher is virtually or "substantially," certain of what they would find inside. *Walter v. United States,* 447 U.S. at 463. Under the broad application of the private search doctrine, officers do not exceed the scope of a private search if they examine a closed container not opened by the private individual, so long as the officer was "already substantially certain of what is inside that container based on the statements of the private searches, their replication of the private search doctrine, and their expertise." *Rann v. Atchison*, 689 F.3d 832, 836-37 (7th Cir. 2012) (quoting *Runyan*, 275 F.3d at 463). This virtual certainty requirement is met when a police officer has a degree of certainty equivalent to seeing contraband in "plain view." *See Rann*, 689 F.3d at 838 (holding that a police officer did not exceed the scope of the private search because he was "substantially certain" the devices contained child pornography) *See, e.g.*, *Texas v. Brown*, 460 U.S. 730, 750-51 (1983) (Stevens, J., concurring).

When an officer is not virtually certain what a folder will contain, privacy interests in unopened items remain intact. *See Lichtenberger*, 786 F.3d at 488-89 ("[A] government search [is] permissible--that is, properly limited in scope--in instances involving physical containers and spaces on the grounds that the officers in question had near-certainty regarding what they would

find and little chance to see much other than contraband."). This Court, in *Walter v. United States*, determined that when an officer tries to "draws inferences" about the contents of the container, the party's expectation of privacy has not been frustrated. *Walter*, 447 U.S. at 658 (determining that the projection of the films not previously played was a significant expansion of the private party search and therefore must be characterized as a separate search).

This was not a case where the contents of the private search were rendered "obvious" as in *Rann*. 689 F.3d at 837 (quoting *Runyan*, 275 F.3d at 463-64). In *Rann*, the Seventh Circuit determined that a defendant's expectation of privacy in an unopened container had already been frustrated because the contents were rendered obvious by the private search. *Id*. Despite his experience, Officer Yap did not ask Ms. Wilddaughter the specific contents of the flash drive she brought into the police station, or specifically what she saw or where she saw it. R. at 34. Officer Yap instead opened the personal files without thinking twice. R. at 6. He was certainly not "substantially certain" as this Court requires him to be to have undertaken such an extensive warrantless search. As such, Ms. Gold's reasonable privacy interest was infringed upon and the search should be rendered improper.

C. <u>The private-search doctrine must be narrowly applied to new technologies because of their expanding capacities to hold vast amounts of information.</u>

Current technology, including the technology at issue in this case, increases the privacy interests at stake, tipping the balance in favor of the individual's privacy interest over the government's interest in obtaining the evidence in question. *See Lichtenberger,* 786 F.3d at 488 ("As with any Fourth Amendment inquiry, we must weigh the government's interest in conducting the search of [defendant]'s property against his privacy interest in that property.").

Computers are "playing an ever greater role in daily life… Today they are postal services, playgrounds, jukeboxes, dating services, movie theaters, daily planners, shopping malls, personal

secretaries, virtual diaries, and more." Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 569 (2005). While the Framers could not have imagined the new search-and-seizure issues that Americans face today due to new transformative technologies, the principles behind the Fourth Amendment remain the same: American citizens have the right to be free from fanatical government intrusion in their homes and personal lives.

Before the rise of technology, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion of privacy. *Riley v. California*, 573 U.S. 373, 393 (2014) (stressing how new technologies are different from the physical containers seen in *Jacobsen* due to the amount of information they can hold). "One of the most notable distinguishing features of modern [technology] is its immense storage capacity." *Id*.

The government argues that the drive in this case was not connected to the internet and there was a limited quantity of documents, thus this Court should allow Officer Yap's extensive search. R. at 32. However, it is irrelevant whether Office Yap accessed a flash drive, rather than a phone screen or actual desktop computer. The sheer plethora of information, regardless of whether it was connected to the internet or not, is what is at issue here. Flash drives can hold thousands of items, including our most personal information. *See Abbott v. Lockheed Martin Corp., No. 06-0701, 2007 U.S. Dist. LEXIS 19600 (S.D. Ill. Mar. 20, 2007).* These folders within flash drives are functionally unlimited in size. *Id.* Ms. Gold retains a privacy interest in each of those items not viewed by Ms. Wilddaughter. Providing otherwise allows the government to potentially rifle through things like bank records, tax documents, and health information. R. at 32.

D. <u>By adopting the "whole-computer" approach this Court would undermine the principles of the Fourth Amendment by impermissibly expanding governmental power.</u>

This Court should adopt the narrow view of the private search doctrine and determine that Officer Yap's subsequent search far exceeded Ms. Wilddaughter's initial viewing. The narrow

interpretation of the private-search doctrine does not hinder the government's ability to find and arrest criminals; the doctrine merely fails to give law enforcement the green light to extinguish an individual's privacy in the name of collecting evidence. The standard law enforcement needs to meet in order to obtain a warrant for anything beyond a private search is probable cause, a notably low burden of proof. *Illinois v. Gates*, 462 U.S. 213 (1983); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (requiring a reasonable ground for belief that a suspect was involved in criminal activity); *see also Lichtenberge*r, 786 F.3d at 488-89.

"Exploratory searches…cannot be undertaken by officers with or without a warrant." *United States v. Rabinowitz*, 339 U.S. 56, 62 (1950). Under the broad approach, this Court would be allowing exploratory searches directly contradicting its previous holdings that prohibit precisely these types of searches. The narrow approach makes police demonstrate probable cause when obtaining warrants to search for information beyond the scope of the initial private search. The warrant requirement was created to protect an individual's reasonable expectation of privacy to be free from government intrusion. The guidelines imposed by the narrow view are not "strict and formalistic," instead they are in-line with the Framer's intent. In fact, in *Jacobsen*, the case upon which the private-search doctrine is based, the government actor "learn[ed] nothing that had not been learned during the private search" and its actions did not constitute a search under the Fourth Amendment since it "infringed no legitimate expectation of privacy." *Jacobsen*, at 120. Therefore, because when examining unopened files in a computer, a government actor will surely learn more than "nothing," adopting a broad approach directly contradicts the spirit of *Jacobsen* and the private search doctrine.

Through the "broad approach" law enforcement can discover evidence completely unrelated to the case at hand. This Court should not allow such "fishing expedition"-type behavior.

If this Court adopts the broad view of the private search doctrine, it will not matter that Officer Yap was limited to a "small, defined handpicked pool of offline documents." R. at 33. Officers will be able to search anything they want within a computer, merely because a person's privacy interest in a single computer file was frustrated by a third party.

Advocates of the whole-computer approach fear a narrow application of the private-search doctrine will over-deter police from conducting a lawful search and investigation. However, this overdeterrence is precisely what was intended when the Framers instituted the warrant clause in the Fourth Amendment of the Constitution. In *United States v. Sparks*, the Eleventh Circuit held that anything not seen by the private party was outside of the scope of the private search. 806 F.3d 1323, 1336 (11th Cir. 2015) (requiring an officer's examination to be "coextensive with the scope."). Yes, this approach does require meticulously "splitting factual hairs," but this is necessary to establish what law enforcement can and cannot view. There is no other way to render any search "coextensive with the scope" and thus in-line with critical Constitutional principles the framers envisioned. As such, this Court should adopt the narrow view of the private search doctrine.

## III. THE PROSECUTION VIOLATED THE DUE PROCESS PROTECTIONS OF *BRADY V. MARYLAND* AS THERE IS A REASONABLE PROBABILITY THAT THEIR FAILURE TO DISCLOSE EVIDENCE UNDERMINED MS. GOLD'S RIGHT TO A FAIR TRIAL AND A VERDICT WORTHY OF CONFIDENCE.

The objective of any criminal proceeding is not merely to secure a conviction, but to ensure that justice is done without violating a defendant's due process rights. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair."). To ensure that fair trials are conducted in accord with constitutional due process, this Court prohibits the government from "serving as the architect" of a criminal proceeding by withholding potentially exculpatory evidence a defendant could use to make their case. *Id*. at 87–

88. Withholding potentially exculpatory evidence from a defendant not only violates their due process rights, but also undermines public confidence in the outcome of criminal trials. *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995).

In order to establish that a *Brady* violation occurred during a trial, a defendant must prove that: (1) the prosecution failed to disclose evidence to the defense; (2) the evidence in question was favorable to the defense; and (3) "the evidence was material." *United States v. Erickson*, 561 F.3d 1150, 1162 (10th Cir. 2009).[2] Evidence is material for the purposes of establishing a *Brady* violation when there is a "*reasonable probability*" that, had it been disclosed to the defense, "the result of the proceeding would have been different." *U.S. v. Bagley*, 473 U.S. 667, 682 (1985) (emphasis added). This Court's jurisprudence makes clear that—when using the reasonable probability standard to evaluate *Brady* materiality— the dispositive question is not whether the defendant would have received a different *verdict*, but whether, lacking the withheld evidence, they received a fair trial "resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

The prosecution failed to disclose two favorable pieces of evidence to Ms. Gold prior to her trial: (1) an interview conducted by the FBI with Chase Caplow in which he identified a potential alternative suspect who was rumored to be violent and to whom the victim was in debt; and (2) an anonymous tip received by the FBI naming another person—Belinda Stevens—as the murderer. R. at 44. In post-conviction proceedings, the government argued that neither piece of evidence was material for the purposes of establishing a *Brady* violation because both were inadmissible hearsay. R. at 43. The government claimed that this Court's decision in *Wood v. Bartholomew*, 516 U.S. 1 (1995), as construed by the Fourth and Eight Circuits, creates a per se

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[2] The government did not challenge the first two prongs of this test—that the evidence: (1) was withheld from the defense by the prosecution; and (2) was favorable to the defense—in any of the proceedings below. Therefore, the only element of the alleged *Brady* violation properly on appeal here is the third prong: materiality.

rule that inadmissible evidence automatically fails the materiality prong of *Brady*. R. at 43, 45. This is a fundamental misunderstanding of this Court's jurisprudence and the application of the reasonable probability standard for *Brady* materiality.

The evidence withheld by the prosecution is material for the purposes of *Brady* because there is a reasonable probability that—had it been disclosed —the results of the proceedings at trial would have been different. The prosecution's decision to withhold the evidence prevented Ms. Gold and her counsel from investigating and presenting potential alternative suspects who may have murdered Ms. Driscoll. The government violated Ms. Gold's due process rights to a fair trial and severely undermined confidence in the verdict by choosing to make themselves the "architect of the proceeding" when they withheld the evidence from Ms. Gold so she could not pursue those leads herself. This section will demonstrate that: (A) the trial court and the Fourteenth Circuit were incorrect in construing *Wood* as holding that inadmissible evidence is per se immaterial for the purposes of *Brady*; and (B) the evidence withheld from Ms. Gold meets the reasonable probability standard for *Brady* materiality because the prosecution's decision to withhold the evidence prevented Ms. Gold from receiving a fair trial and a verdict worthy of confidence.

A. The inadmissible evidence the prosecution withheld from Ms. Gold can form the basis of a *Brady* claim and must be evaluated under the well-established reasonable probability standard for materiality.

This Court did not create a per se rule of immateriality in *Wood*, it merely applied the reasonable probability standard to a set of facts far afield from those at issue here. This Court has held that evidence satisfies the materiality prong of *Brady* if there is a "reasonable probability" that the results of the trial would have been different had it been disclosed to the defense. *Wood*, 516 U.S. at 5. The defendant in *Wood* brought a *Brady* claim based on the prosecution's failure to

disclose the results of a polygraph that the defendant's brother had taken prior to testifying at trial. *Id*. at 4. Those polygraph results were inadmissible under state law for any purpose. *Id*. at 6.

Importantly, the polygraph results at issue in *Wood* were not simply inadmissible, but there was also no reasonable basis to think that their disclosure would have led to anything admissible, generated any new leads for investigation, or provided the defense with any new avenues of trial strategy. *Id*. at 8. The defendant's brother answered the polygraph question in a manner which was completely consistent with his eventual testimony at trial and displayed no indication of deception. *Id*. at 4. There was nothing in the polygraph results that would have contradicted the prosecution's case at trial, and nothing that indicated avenues for additional investigation. *See id*. In postconviction proceedings the defendant's counsel—after having had the opportunity to examine the polygraph results *and* question the defendant's brother again armed with those results—admitted that nothing in the polygraph would have affected his trial strategy or cross-examination of the witness. *Id*. at 7–8.

After acknowledging that the evidence in question would have been inadmissible, the *Wood* court did not conclude its analysis by applying a per se rule of immateriality based on inadmissibility. Rather, it applied the operative standard of reasonable probability for *Brady* materiality established by *Bagley* and reiterated by *Kyles*.[3] The Court noted that the Ninth Circuit theorized that disclosure of the polygraph could have led the defense to discover admissible evidence. *Id*. at 6. However, the Court pointed out that there was no indication whatsoever of any admissible evidence the polygraph results could have led the defense to discover. *Id*. What the *Wood* court rejected was the Ninth Circuit's "mere speculation" that admissible evidence could

[3] *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 308 (3d Cir. 2016) ("[T]he *Wood* Court analyzed the effect of suppressing the polygraph results, despite their uncontroverted inadmissibility . . . As the District Court aptly observed, '[i]f inadmissible evidence could never form the basis of a *Brady* claim, the Court's examination of the issue would have ended when it noted that the test results were inadmissible.'").

exist, without any specification of what "particular evidence" may have been discoverable. *Id*.

The trial court and the Fourteenth Circuit below correctly held that the anonymous tip and testimony by Caplow about the victim's statements or the rumors about Brodie would have been inadmissible hearsay at trial. R. at 48, 56. However, both courts then incorrectly reasoned that this Court's holding in *Wood* created a rule that inadmissible evidence is per se immaterial because it is "not evidence" that can be used at trial and thus cannot form the basis of a *Brady* claim. R. at 48-49, 56. Notably, the Fourteenth Circuit acknowledged that *Wood* explicitly states that the reasonable probability standard is controlling when evaluating materiality under *Brady*, but took the position that there is a three-way division among the circuits as to whether inadmissible evidence can ever serve as the basis for demonstrating reasonable probability of a different result. R. at 49, 56. The court described three different positions it perceived among its sister circuits: (1) that inadmissible evidence is per se immaterial for *Brady* purposes; (2) that inadmissible evidence may be material for the purposes of a *Brady* claim if it "would lead directly to the disclosure of admissible evidence; or (3) that "the key question" for materiality is "whether the disclosure of evidence would have created a reasonable probability that the result of the proceeding would have been different." R. at 56 (internal quotation marks omitted). As will be discussed thoroughly in section B below, what the Fourteenth Circuit understood as a clean division—with position (1) allegedly held by the Fourth and Eight Circuits, and position (2) allegedly held by the First, Third, and Eleventh Circuits—is better understood simply as different courts applying the reasonable probability standard to disparate sets of facts.

Notably, what the Fourteenth Circuit perceived to be a *third* possible position in this division amongst the circuits is, in fact, *the* controlling standard this Court established in *Bagley*, reiterated in *Kyles*, and applied again in *Wood*. This Court did not create a new per se rule of

immateriality following from inadmissibility in *Wood*. Rather, it simply applied the reasonable probability standard for evaluating *Brady* materiality to a set of facts in which there was no reasonable probability whatsoever that disclosure of the evidence in question could have led to any new investigatory leads, admissible evidence, or trial strategy by the defense. The defense counsel in *Wood*, after seeing the withheld evidence, admitted that they would not and could not have used the evidence in any way, and that it would not have changed their trial strategy. *Wood*, 516 U.S. at 7–8. This is not the situation in the case at bar. The evidence at issue here presented two possible avenues for the defense to investigate and present potential alternative suspects for the murder. R. at 44–45. This Court should rectify the Fourteenth Circuit's misunderstanding of the materiality standard and continue to apply its well-established rule of reasonable probability to evaluate *Brady* materiality in this case.

B. The evidence that the prosecution withheld is material because there is a "reasonable probability" the results of the trial would have been different had it been disclosed, thereby depriving Ms. Gold of a fair trial and a "verdict worthy of confidence."

The Fourteenth Circuit was incorrect in stating that only "a few circuits" take the position that the "key question" in evaluating *Brady* materiality is "whether the disclosure of evidence would have created a reasonable probability that the result of the proceeding would have been different." *See* R. at 56 (internal quotation marks omitted). In fact, *all* the decisions cited as evidence of a division amongst the circuits acknowledge that *the controlling standard* for evaluating *Brady* materiality is the reasonable probability standard created by this Court in *Bagley*. *See Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998) (citing *Wood*, 516 U.S. at 5 (citing *Bagley*, 473 U.S. at 682)); *see also Hoke v. Netherland*, 92 F.3d 1350, 1356 (4th Cir. 1996) (citing *Bagley*, 473 U.S. at 682); *Ellsworth v. Warden*, 333 F.3d 1 (1st Cir. 2003) (same); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 309 (3d Cir. 2016) (same); *Bradley v. Nagle*, 212 F.3d 559, 566

(11th Cir. 2000) (same); *Trevino v. Thaler*, 449 Fed. App'x 415 (5th Cir. 2011) (vacated and remanded on other grounds by *Trevino v. Thaler*, 569 U.S. 413 (2013)) (citing *Banks v. Dretke*, 540 U.S. 668, 698–99 (2004) (citing *Kyles*, 514 U.S. at 434 (citing *Bagley*, 473 U.S., at 678))); *Henness v. Bagley*, 644 F.3d 308, 324 (6th Cir. 2011) (citing *Cone v. Bell*, 556 U.S. 449 (2009) (citing *Bagley*, 473 U.S. at 682)). All these decisions apply the *Bagley* reasonable probability standard to *Brady* claims based on the prosecution's withholding evidence which may have been inadmissible at trial. In each case, the fact that the evidence which formed the basis of the claim may have been inadmissible is certainly *relevant* to the reasonable probability analysis but is not alone *dispositive* on the question of materiality.

Both the Fourth Circuit in *Hoke* and the Eight Circuit in *Madsen* clearly acknowledged that the reasonable probability standard is controlling. They then applied that standard to a set of facts where no reasonable probability existed that the evidence in question—whether admissible or not—would have created any new leads for the defense, led directly to other admissible evidence, or altered the course of the trial. The defendant in *Hoke* was convicted of abducting, brutally raping, and murdering a woman after he confessed to police, his description of the murder corroborated the physical evidence, and his DNA matched semen taken from the victim. *Hoke*, 92 F.3d at 1352–53. The defendant brought a postconviction *Brady* claim based on the prosecution withholding transcripts of interviews they held with three other men who had consensual sex with the victim weeks or months prior, including one man who had anal sex with the victim a year prior. *Id*. at 1354.

The defendant in *Hoke* argued that evidence of the victim previously engaging in "kinky" consensual sexual behavior was material because it would allow him to argue that his sexual encounter with the victim was consensual. *Id*. at 1357–58. The Court held that there was "*no*

*chance at all* that the outcome of Hoke's capital murder trial would have been different had the defense known of these prior incidents of sexual intimacy." *Id*. at 1357 (emphasis added). "No reasonable juror" would have believed that evidence the victim had previously consented to anal sex on one occasion with someone else a year prior was in any way material to whether she consented to sex with the defendant, whom the evidence overwhelmingly demonstrated had brutally bound, gagged, and viciously raped her. *Id*. at 1357–58.

The court in *Hoke* also noted, in a footnote, that the interviews with the three other men "may well have been inadmissible at trial under Virginia's Rape Shield Statute.". *Id*. at 1356 n.3. The court opined that this would have made them, "as a matter of law . . . 'immaterial' for *Brady* purposes," and cited to *Wood* for that proposition. *Id*. Crucially, this portion of the opinion is dicta, as it does not reach a conclusion on whether the statements would have been inadmissible, and—as this Court did itself in *Wood*—the Fourth Circuit proceeded to conduct the reasonable probability analysis and hold against the defendant on the grounds discussed above. *Id*. at 1356–58. It is the dicta from this footnote that the Fourteenth Circuit cited for the proposition that "some circuits take the position that, based on *Wood*, inadmissible evidence is 'as a matter of law,'" immaterial for *Brady* purposes. R. at 56 (quoting *Hoke*, 92 F.3d at 1356 n.3). However, the holding of the *Hoke* court was premised not on whether the evidence would have been admissible, but on whether there was a reasonable probability that its disclosure to the defendant would have altered the proceedings at trial. *Hoke*, 92 F.3d at 1358. And as discussed above, *Wood* did not create such a rule that inadmissible evidence is per se immaterial for the purposes of *Brady*.

The use of *Madsen* to support the existence of a per se rule of *Brady* immateriality following from inadmissibility is even more tenuous. The defendant in *Madsen* was convicted of forcible rape after he used a knife to threaten his victim. *Madsen*, 137 F.3d at 603. During the

attack the victim cut herself on the knife in an unsuccessful attempt to escape, and subsequently bled on multiple objects in the defendant's home. *Id*. Those objects were tested by a forensic chemist, who concluded that the blood type did not match the victim. *Id*. The defendant attempted to introduce the chemist's report at trial to impeach the testimony of the victim, but the trial court excluded the report based on the prosecution's objection that the chemist was not competent to perform blood tests. *Id*.

Crucially, the "evidence" whose materiality was at issue in *Madsen* was not the report which was held to be inadmissible. Rather, the defendant sought to premise his *Brady* claim on his desire that the prosecution told him they planned to challenge the admissibility of the report by attacking the expert's credibility, which allegedly would have allowed him to attempt to procure a new report from a more reliable expert. *Id*. at 604. The Eight Circuit referred to the language from *Wood* where this Court noted that the evidence at issue was "not 'evidence' at all." *Id*. (citing *Wood*, 516 U.S. at 6). The Eighth Circuit concluded that the information at issue in *Madsen*—the fact that the prosecution planned, as a matter of trial strategy, to object to the admission of an expert report—was also not "evidence" for the purposes of *Brady*. *Id*. The court explicitly acknowledged that the controlling standard for materiality is whether "there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different." *Id*. (internal quotation marks omitted). The court held that the information was not material because there was no reasonable probability that informing the defendant of the prosecution's planned objection to his expert would have allowed him to secure another, similar report by a more reputable expert; nor would it have done anything to impeach the testimony of the police or the victim herself. *Id*. at 604–05. The dispositive issue in both *Hoke* and *Madsen* was not simply that inadmissible evidence was potentially involved, but that there was no reasonable probability that

disclosure of the evidence in question—whether admissible or not—would have altered the course of the trial.

Likewise, the Fourteenth Circuit cited cases from the First, Third, and Eleventh Circuits. These courts applied the reasonable probability test to circumstances where—although inadmissible evidence was at issue—there *was* potentially a reasonable probability that the proceedings would have been different had the information been disclosed. In *Ellsworth v. Warden*, the First Circuit held that the evidence at issue, while "itself inadmissible," was "so promising a lead to strong exculpatory evidence that there could be no justification for withholding it." 333 F.3d at 5 (citing *Wood*, 516 U.S. at 6–8). In *Dennis*, the Third Circuit held that the evidence at issue, which itself may have been be inadmissible at trial, was material because it would have formed the basis for "investigative activities" by the defense and allowed them to "attack the reliability of the [government's] investigation." 834 F.3d at 308 (citing *Kyles*, 514 U.S. at 446). In *Bradley*, the Eleventh Circuit acknowledged that the evidence in question was inadmissible but recognized that the dispositive question was whether it "would have led the defense to some admissible material exculpatory evidence." 212 F.3d at 567. These holdings do not, as the court below characterized them, represent some middle position between the alleged per se inadmissibility rule followed by the Fourth and Eighth Circuits and the actual reasonable probability standard allegedly followed only by the Fifth and Sixth Circuits. *See* R. at 56. Rather, the First, Third, and Eleventh Circuits have recognized that, under the reasonable probability standard, inadmissible evidence can be material for the purposes of a *Brady* claim if it would have led directly to admissible exculpatory evidence or created promising investigatory leads for the defense which would allow them to undercut the government's case, *because* those conditions create a reasonable probability that the trial would have gone differently.

When evaluating whether there is a reasonable probability that the results of the trial would have been different, the withheld evidence must be considered collectively rather than individually. The materiality inquiry is not a "sufficiency of the evidence test" where the defendant must show that the jury would not have convicted the defendant had the defense possessed the evidence in question. *Kyles*, 514 U.S. at 434. The question is whether the defendant received a fair trial in the absence of the evidence. *Id*. The policy rationale underlying *Brady* favors disclosure because the prosecutor is not meant to be the "architect of a proceeding" by selectively withholding evidence which would allow the defense to pursue investigations and alternative strategies. *Brady*, 373 U.S. at 87–88. This Court must "consider the constitutional error in light of all the evidence" and determine whether the disclosure of the evidence at issue would have created promising investigatory leads or led the defense directly to exculpatory evidence such that it "put[s] the whole case in such a different light as to undermine confidence in the verdict." *Dennis*, 834 F.3d at 295 (citing *Kyles*, 514 U.S. at 435).

Here there is a reasonable probability that the trial would have been different had the evidence in question been disclosed to Ms. Gold. R. at 59. The anonymous tip and the interview of Mr. Caplow could have led to new investigatory leads and potentially admissible evidence had they been provided to the defense. Mr. Caplow spoke to the victim two weeks prior to her death and learned that she was in debt to a HerbImmunity distributor named Martin Brodie. R. at 11. Mr. Caplow stated that he was aware of rumors that Mr. Brodie was violent, but Mr. Caplow had not witnessed any violence personally. *Id.* The FBI agent who interviewed Mr. Caplow intended to interview Mr. Brodie, but there is no indication in the record that any such interview took place. R. at 11, 47. Later, an anonymous caller informed the FBI that Belinda Stevens, another member of the HerbImmunity organization, murdered the victim. R. at 12. An FBI agent noted that they

conducted a "preliminary investigation" and, without any elaboration, stated that the tip did "not appear reliable" or "require further follow-up." *Id*. Evidence that points to another perpetrator is "the clearest example of the type of exculpatory evidence covered by *Brady*." R. at 59.

The verdict here is not worthy of confidence because the prosecution deprived Ms. Gold of a fair trial by withholding evidence which could have led to admissible evidence of alternative suspects for the murder. Had the evidence been disclosed, the defense could have investigated Mr. Brodie and Ms. Stevens, and potentially obtained admissible, exculpatory evidence. This Court should hold that the prosecution violated the due process protections of *Brady* notwithstanding the inadmissibility of the evidence in question, and remand for a new trial.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court: (1) reject the dangerous-patient exception to Federal Rule of Evidence 501 and hold that Dr. Pollack's testimony was inadmissible; (2) adopt the narrow view of the private search doctrine and hold that Officer Yap conducted a warrantless search in violation of the Fourth Amendment; (3) explicitly hold that inadmissible evidence may form the basis for a *Brady* violation and that the government therefore violated Ms. Gold's due process rights; and (4) reverse the holdings of the Fourteenth Circuit and grant Ms. Gold a new trial.

Respectfully submitted,

/s/ Team #9
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