Team 14P

No. 20 – 2388

IN THE

SUPREME COURT OF THE UNITED STATES

SAMANTHA GOLD,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether *Jaffee v. Redmond*'s psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 precludes the admission at trial of confidential communications made to a psychotherapist during the course of a patient's treatment, where the patient threatened harm to a third party and the threats were previously disclosed to law enforcement.

II. Whether an officer violates an individual's Fourth Amendment right when they exceed the scope of a private search of a digital device without first obtaining a warrant and seize these files to introduce into evidence at trial.

III. Whether the government violates *Brady v. Maryland* when it fails to disclose potentially exculpatory, material information *solely* based on the admissibility of the information at trial.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 50-59.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provision is provided below:

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Statement of Facts

Two budding entrepreneurs, Tiffany Driscoll ("Ms. Driscoll") and Samantha Gold ("Samantha") worked as saleswomen for HerbImmunity, a multi-level marketing organization. R. 13; 14. Ms. Driscoll first became involved with HerbImmunity while attending Joralemon University. R. 13. In 2016, Ms. Driscoll found herself struggling to make sales for HerbImmunity and allegedly owed money to an upstream distributor within the company, Martin Brodie ("Brodie"). R.11; 13. That same year, Ms. Driscoll recruited Samantha to join HerbImmunity and invest $2,000 in the product. R. 14. Samantha thought HerbImmunity was a legitimate business, but discovered it to be a pyramid scheme, leaving her in severe debt. R. 4.

Samantha expressed her frustrations with HerbImmunity during counseling sessions with her therapist, Dr. Chelsea Pollak ("Dr. Pollak"). R. 4. Through weekly sessions since 2015, Dr. Pollak diagnosed Samantha with Intermittent Explosive Disorder ("IED"). R. 17. Dr. Pollak believed Samantha's involvement with HerbImmunity "caused a setback in the treatment" of her

IED. R. 4. At the end of their session on May 25, 2017, Samantha left upset. R. 4. As Samantha exited, she stated, "I will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again." R. 4. Although Samantha did not specify who "her" was in the declaration, Dr. Pollak became concerned Samantha may harm Ms. Driscoll due to her "volatile history with IED." R. 22; 4. Therefore, Dr. Pollak called the police to report Samantha as a dangerous patient, under her "duty to report," according to Boerum Health and Safety Code § 711. R. 5.

Police units were then dispatched to Joralemon University to initiate a safety and wellness check. R. 5. First, officers went to Samantha's dorm room, where Samantha appeared "calm and rational." R. 5. The police determined she posed no threat to herself or others. R. 5. Still, officers located Ms. Driscoll to inform her of the potential threat from Samantha. R. 5. Because Ms. Driscoll was in class, she was "not in any imminent danger." R. 5.

Later that day, Samantha's roommate, Jennifer Wildaughter ("Wildaughter"), became concerned after Samantha stormed out of her room. R. 24. Wildaughter entered Samantha's room and browsed her open computer without consent. R. 24, 27. First, she clicked on the "HerbImmunity" folder and saw three subfolders, but she only opened "Customers." R. 24-25. Within "Customers," she opened one of two subfolders, titled "Tiffany Driscoll." R. 25. There, she found photos of Ms. Driscoll and another subfolder named "For Tiff" with three documents inside. R. 25. She opened two of these three documents: "Message to Tiffany" and "Market Stuff." R. 26. Wildaughter believed the message to Ms. Driscoll to be "so nice." R. 26. In the "Market Stuff" document, she discovered passwords, codes, and a reference to rat poison. R. 27. Even though the two roommates recently faced a rodent problem in their apartment, Wildaughter was concerned and copied the entire desktop onto a flash drive. R. 26. Notably, she did not

open all the files copied because she "felt like it was an invasion of privacy." R. 27. There was nothing specific in the documents that discussed potential harm to Ms. Driscoll. R. 28.

Wildaughter brought the flash drive to the Livingston Police Department and met with Officer Yap. R. 6. She informed the officer she copied Samantha's entire private desktop onto the flash drive after she had left her computer unattended. R. 6. However, Wildaughter mentioned she only personally viewed "some of the folders." R. 6, 26. Specifically, she viewed "timestamped photographs," "a short, unsigned note directed to Ms. Driscoll," and "a text file containing passwords and codes she did not understand, along with a mention of strychnine." R. 6. Officer Yap did not ask her any follow-up questions, such as the number of files on the drive or the location of the specific files. R. 29. Right after Wildaughter left, Officer Yap "conducted an examination of all of the drive's contents." R. 6. This thorough examination included Samantha's personal photos, "budget," "Health Insurance ID Card," and "Exam4." R. 6.

On May 25, 2017, Ms. Driscoll was found dead at the bottom of her father's townhouse stairs. R. 13. When found, "[s]he appeared to have suffered blunt force trauma to the head." R. 13. There was "nothing to suggest that foul play may have been involved." R. 13. After an investigation, there was no evidence discovered anywhere in the house. R. 13. Follow-up toxicology reports revealed a poison, strychnine, in Ms. Driscoll's system. R. 14. The FBI believed Samantha to be the lead suspect and arrested her on May 27, 2017. R. 14. Allegedly, the poison was injected into strawberries mailed to the Driscoll's townhome with a note, and anonymous sources claimed Samantha to be responsible. R. 14, 51. FBI agents and Joralemon police felt a huge relief after this arrest, as they initially were not able to discover "any physical evidence at the scene pointing to either the cause of death or a suspect." R. 14.

In June 2017, a Special Agent interviewed Chase Caplow ("Caplow") as part of the FBI's investigation into Ms. Driscoll's death. R. 11. Caplow also attended Joralemon University and was involved with HerbImmunity. R. 11. He explained Ms. Driscoll owed money to Brodie, who had "a reputation for violence and a quick temper." R. 44. The FBI's Investigative Report stated the Special Agent would again interview Brodie, but it is unclear whether additional investigation was conducted. R. 11, 44-45. Nearly a month later, the FBI received an anonymous phone call regarding Ms. Driscoll's death. R. 12. The caller alleged Belinda Stevens ("Stevens"), who was also involved with HerbImmunity, was guilty of the murder. R. 12. An agent conducted a preliminary investigation but did not further follow up. R. 12.

II. Procedural History

Samantha was charged with Delivery By Mail of an Item With Intent to Kill or Injure in violation of 18 U.S.C. §§ 1716 (j)(2), (3), and 3551 *et seq*. R. 1. Subsequently, Samantha moved for the District Court of the Eastern District of Boerum to suppress two pieces of evidence: (1) testimony and medical notes from Dr. Pollak; and (2) certain information seized from Samantha's computer. R. 16. The District Court denied both motions. R. 40. On February 1, 2018, Samantha was convicted of all charges. R. 51. Following the conviction, Samantha filed a motion for a directed verdict or new trial, alleging the government violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963). R. 52. The District Court denied the motion, and Samantha appealed all the District Court's rulings to the United States Court of Appeals for the Fourteenth Circuit. R. 51. The Fourteenth Circuit affirmed the District Court's rulings on all issues, with Circuit Judge Cahill dissenting. R. 51, 57-59. This Court granted writ of certiorari on November 16, 2020. R. 60.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit incorrectly adopted the dangerous-patient exception. This exception cannot be equated to Boerum Health and Safety Code § 711 because state duty to warn laws are separate from federal testimonial privileges. This Court should follow those circuit courts that refuse to recognize the exception because it would create a chilling effect between psychotherapists and their patients. Even if the dangerous-patient exception is accepted, Samantha's statements fail to meet the standard because they did not target Ms. Driscoll. Finally, Samantha did not waive the psychotherapist-patient privilege when Dr. Pollak read her a duty to protect warning. Therefore, this Court must suppress Dr. Pollak's testimony and notes.

The narrow approach to the private search doctrine as applied to digital devices should be adopted. Under this doctrine, officers are limited only to those documents viewed by the private individual during the original search. Government agents must be virtually certain of the contents before searching the digital device. In applying the narrow approach, Samantha's Fourth Amendment rights were violated when Officer Yap exceeded the scope of Wildaughter's original investigation. Thus, this Court must suppress the files.

When the prosecution failed to disclose two FBI reports regarding potential suspects, it violated its obligation to disclose under *Brady*. This Court should adopt the First, Third, and Eleventh Circuits in that inadmissible evidence can be material under *Brady* because it could lead to admissible evidence. Here, the inadmissible FBI reports should have been disclosed to the defense because it could have led to admissible evidence. In the alternative, this Court should adopt the Fifth Circuit's reasonable probability standard, and decide the undisclosed information had a reasonable probability to change the outcome of Samantha's trial. Therefore, post-conviction relief should be granted with the evidentiary consequences in mind.

I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE PRECLUDES ADMISSION OF CONFIDENTIAL COMMUNICATIONS BETWEEN THOSE PARTIES, REGARDLESS IF THE COMMUNICATIONS CONSTITUTE THREATENED HARM TO A THIRD PARTY PREVIOUSLY DISCLOSED TO POLICE.

Privileges that protect confidential communications are "'rooted in the imperative need for confidence and trust'" between parties. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). Federal courts have the authority to establish such testimonial privileges through Rule 501 of the Federal Rules of Evidence, as guided by the common law and judges' "reason and experience." Fed. R. Evid. 501. Creating such a privilege begins "with the primary assumption that there is a general duty to give what testimony one is capable of giving." *United States v. Bryan*, 339 U.S. 323, 331 (1950). Any exemptions must be "strictly construed" and have "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980); *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); *see also United States v. Nixon*, 418 U.S. 683, 710 (1974).

The psychotherapist-patient exception was born from the need to protect "the mental health of the Nation's citizenry," which "is a public good of transcendent importance." *Jaffee*, 518 U.S. at 1. *Jaffee* established this exception to protect "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment . . . from compelled disclosure under Rule 501." *Id.* at 15. By fostering a private environment, psychotherapists can give "appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Id.* at 11. Without this privilege, "the mere possibility of disclosure may impede development of the confidential relationship necessary for treatment." *Id.* at 10.

At contention here is a footnote in the *Jaffee* decision, stating future courts may encounter "situations in which the [psychotherapist-patient] 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." *Jaffee*, 518 U.S. at 18 n.19. Some courts interpret this *dictum* as establishing the dangerous-patient exception. *See United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998); *United States v. Hardy*, 640 F. Supp. 2d 75, 79-80 (D. Me. 2009). Others assert the footnote was a decision by this Court to "wisely decline[] to identify all situations where the privilege would and would not apply." *United States v. Haye*s, 227 F.3d 578, 582 (6th Cir. 2000); *see United States v. Chase*, 340 F.3d 978, 990 (9th Cir. 2003); *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012).[1]

This Court can clarify such confusion by rejecting the dangerous-patient exception. The dangerous-patient exception is a separate concept from state duty to protect laws. *Chase*, 340 F.3d at 982. Thus, although Samantha triggered the duty to warn under Boerum Health and Safety Code § 711, Dr. Pollak was not permitted to testify about those statements at trial. R. 36. Additionally, the Sixth, Eighth, and Ninth Circuits provide the proper rationale for refusing to accept the dangerous-patient exception. The exception would create a chilling effect in confidential medical communications, violating the policy embedded in the psychotherapist-patient privilege. *Hayes*, 227 F.3d at 584. Even if this Court did adopt the dangerous-patient exception, Dr. Pollak's testimony must be suppressed because Samantha's threat did not rise to the level of specificity in *Glass*. R. 53. Finally, simply because Dr. Pollak provided a duty to protect warning, Samantha did not simultaneously waive the psychotherapist-patient privilege. R. 21. Therefore, the Fourteenth Circuit erred in admitting Dr. Pollak's testimony and notes.

[1] Supreme Court footnotes invite discussion by lower courts because they may be "useful in elaborating the reasoning stated succinctly in the body of the opinion" or "plant[] the seeds for major developments in legal principles." Edward R. Becker, *In Praise of Footnotes*, 74 Wash. U. L.Q. 1, 4, 6 (1996) (citing *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938)).

A. The Duty to Warn Under Boreum Health and Safety Code § 711 Is Separate and Distinct from the Dangerous-Patient Exception.

Following *Jaffee*, the Tenth Circuit incorrectly interpreted this Court's footnote as establishing the dangerous-patient exception. *Glass*, 133 F.3d at 1360. This exception allows a psychotherapist to testify about a threat made by a patient if "the threat was serious when it was uttered," and "its disclosure was the only means of averting harm to the [threatened person] when the disclosure was made." *Id.* at 1360. Here, the Fourteenth Circuit followed the Tenth Circuit and adopted the dangerous-patient exception, allowing Dr. Pollak to testify at trial about private sessions with Samantha and introduce her notes into evidence. R. 52. Such a breach of confidentiality clearly violates the principles the psychotherapist-patient privilege intended to uphold. R. 52. Therefore, this evidence should have been suppressed.

In this case, there are two "separate and distinct" concepts at play: testimonial privilege and confidentiality. R. 36; *Chase*, 340 F.3d at 982. Testimonial privilege is "the specific right of a patient to prevent the psychotherapist from testifying in court," whereas confidentiality is "the broad blanket of privacy that state laws place over the psychotherapist-patient relationship." *Chase*, 340 F.3d at 982. To lift confidentiality under state law, California created the first duty to warn rule in *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425 (Cal. 1976). Specifically, "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." *Id.* at 345. Although *Tarasoff* removes confidentiality under state law, it does not affect the psychotherapist-patient privilege in federal court. *Id.* at 985.

In the wake of *Tarasoff*, nearly all states have created similar laws to protect "third parties from serious threats." 17 Cal. 3d at 425; *Hayes*, 227 F.3d at 583. In Boerum,

psychotherapists' duty to warn is set out in Boerum Health and Safety Code § 711. R. 2. Under this statute, all communications between a mental health professional and patient are confidential, except where "the patient has made an actual threat to physically harm either themselves or identifiable victims." Boerum Health and Safety Code § 711(1)(a). If such a threat is made, the mental health professional must believe the patient has the capability to commit such an act in the near future. Boerum Health and Safety Code § 711(b). Then, the professional must make a reasonable effort to notify law enforcement and provide information regarding the threat. Boerum Health and Safety Code § 711(2).

The Fourteenth Circuit erred in equating Boerum's duty to warn law with the dangerous-patient exception. R. 53. In actuality, there is only a "marginal connection" between the rationale underlying the two principles. *Hayes*, 227 F.3d at 584. As exhibited in *Tarasoff*, confidentiality "of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others." 17 Cal. 3d at 347. This rationale "is justified on the ground of protection," whereas allowing a psychotherapist to testify at trial about a "past act" does nothing to protect the victim. *Chase*, 340 F.3d at 987. The threat has typically already passed once court proceedings have begun, so permitting psychotherapists to testify serves no deterrent function. *Hayes*, 227 F.3d at 584. Therefore, the policy encompassing duty to warn laws should not be applied to the dangerous-patient exception.

Practically, if this Court conflated state duty to warn standards and the dangerous-patient exception, it would create inconsistent results in federal trials. For example, under Washington's duty to warn law, if a patient repeatedly harasses an individual, their psychotherapist can warn the third party without believing "the patient presents a 'serious danger of violence.'" *Chase*, 340 F.3d at 987. Compare this law to California's, where the psychotherapist is only warranted

in warning the third party if in addition to harassment, the patient presents "a 'serious danger of violence.'" *Chase*, 340 F.3d at 987. Therefore, "[i]f the federal evidentiary privilege were tied to the states' disclosure laws, then similarly situated patients would face different rules of evidence in federal criminal trials." *Id.* Such inconsistency contradicts the intent of the Federal Rules of Evidence, which were designed to "apply uniformly" across the nation. *Id.* at 988.

Rejecting the dangerous-patient exception ensures consistency among federal courts. States' duty to warn laws operate independently of testimonial privileges and should be treated as distinct concepts. This is further evidenced by noting that testimonial privileges serve no deterrent function, whereas duty to warn laws are primarily enforced to stop future crime. Additionally, tying the exception to state standards would impose different rules at federal trials depending on the state. Such inconsistency further demonstrates this Court should reject the dangerous-patient exception.

B. Reason and Experience Dictate This Court Should Not Adopt the Dangerous-Patient Exception.

This Court must follow the majority of circuits in refusing to recognize the dangerous-patient exception in order to preserve the confidentiality necessary for psychotherapists to effectively treat their patients. *Hayes*, 227 F.3d at 585-86. Additionally, the refusal by the majority of states and federal courts to recognize the dangerous-patient exception indicates adopting the exception is ill-advised. *Id.* at 585. Finally, the *Jaffee* footnote was merely an "aside," not the basis of an exception to the psychotherapist-patient privilege. *Id.*

1. The Sixth, Eighth, and Ninth Circuits correctly refused to recognize the dangerous-patient exception because of its chilling effect on patients.

If this Court adopted the dangerous-patient exception, it would contradict the policy embedded in the psychotherapist-patient privilege. *Jaffee*, 518 U.S. at 10. Due to the "sensitive

nature" of therapy, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee*, 518 U.S. at 10. The possibility of sharing these conversations would have a chilling effect because their exposure could cause patients "embarrassment or disgrace." *Id.* at 12-13. The Sixth, Eighth, and Ninth Circuits cited this reasoning in rejecting the exception. *See Hayes*, 227 F.3d at 584 ("A 'dangerous patient' exception surely would have a deleterious effect on the 'atmosphere of confidence and trust' in the psychotherapist/patient relationship."); *Chase*, 340 F.3d at 990 ("We think that a patient will retain significantly greater residual trust when the therapist can disclose only for protective, rather than punitive, purposes."); *Ghane*, 673 F.3d at 785 ("Adopting a 'dangerous patient' exception . . . would necessarily have a deleterious effect on the 'confidence and trust' . . . in the confidential relationship between the therapist and a patient.").

Allowing Dr. Pollak to testify resulted in the very dangers the circuit courts warned of. In seeking help to manage her anger, Samantha relied on a confidential environment with Dr. Pollak. R. 17. Eventually, Dr. Pollak reached the root of Samantha's problems and diagnosed her with IED. R. 17. Successful therapy was possible because Samantha trusted her psychotherapist not to disclose her personal thoughts. R. 17. But, if Samantha received an additional warning that her statements could be used against her in a subsequent criminal prosecution, a "chilling effect" may have ensued. *Hayes*, 227 F.3d at 585. Dr. Pollak even admitted if she had to give this warning, "patients may be more reluctant to share certain thoughts or urges" with her. R. 21. Thus, had this warning been given, Samantha may have been less honest, and her IED could have gone undiagnosed. Further, she may have never shared her thoughts about Ms. Driscoll, preventing the police from being notified about the threat. Thus, lower courts incorrectly assert that equating the duty to warn with the psychotherapist-

patient privilege protects public safety, when it threatens the very value it aims to uphold. *See People v. Kailey*, 333 P.3d 89, 97 (Colo. 2014); *People v. Wharton*, 53 Cal. 3d 522 (Cal. 1991).

This "chilling effect" was also noted by governing branches in refusing to recognize the exception. In 1972, the Chief Justice "submitted nine proposed testimonial privileges to Congress." *Chase*, 340 F.3d at 989. "Conspicuously absent from the list" was the dangerous-patient exception. *Id.* This list was based on a Connecticut statute, and the Proposed Rules cited an article by two of that statute's authors. George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 Wash. L. Rev. 33, 37 (1999). The authors explained they did not include the exception because patients who disclose threats to their psychotherapists are "'making a plea for help,'" and such pleas allow effective assistance. Harris, *supra* page 12, at 37. Such progress would not be possible "'if patients were unable to speak freely for fear of possible disclosure at a later date in a legal proceeding.'" Harris, *supra* page 12, at 37. Accordingly, the dangerous-patient exception was not included in the proposed list because it threatens successful mental health treatment.

Ultimately, this Court should not place great weight in a footnote intended to be "no more than an aside by Justice Stevens." *Hayes*, 227 F.3d at 585. As stated in the Fourteenth Circuit's dissent, "[t]he majority focuses so much on footnote 19 in *Jaffee v. Redmond* that they essentially disregard the holding of the case." R. 57. The language was simply meant to remind future courts that "psychotherapists will *sometimes* need to testify in court proceedings, such as those for the involuntary commitment of a patient, to comply with their 'duty to protect' the patient or identifiable third parties." *Hayes*, 227 F.3d at 585 (emphasis added). This *dictum* was meant to qualify the psychotherapist-patient privilege, not establish another exception.

Overall, *Jaffee*'s footnote was not intended to establish the dangerous-patient exception, as it would contravene the policy embedded within the psychotherapist-patient privilege. 518 U.S. at 10. The potential harm that would ensue from such an exception has been recognized not only by the circuit courts, but by states refusing to write the exception into their own criminal code. *Ghane*, 673 F.3d at 785; *Chase*, 340 F.3d at 989. Finally, the footnote should remain just that: a footnote. It should not establish precedent that will disrupt a relationship long preserved by this Court through the psychotherapist-patient privilege.

2. Even if this Court adopts the dangerous-patient exception, Dr. Pollak's testimony and notes should be suppressed.

If this Court applies the dangerous-patient exception, Dr. Pollak's testimony and notes should not be admitted because *Glass* is distinguishable. In *Glass*, after the defendant was admitted to a mental health unit, he told his psychotherapist "'he wanted to get in the history books like Hinkley [sic] and wanted to shoot Bill Clinton and Hilary [sic].'" 133 F.3d at 1357. After the defendant was released for outpatient treatment and could not be located for ten days, his nurse became concerned and notified local law enforcement. *Id.* Later, the Secret Service became involved and was subsequently informed of the threat by the defendant's psychotherapist. *Id.* The defendant was indicted for knowingly and willfully threatening to kill the President of the United States, and he moved to exclude the statements as privileged. *Id.*

The Tenth Circuit held the psychotherapist's testimony could only be admitted if the threat was serious and disclosing that threat "was the only means of averting harm to the President when the disclosure was made." *Glass*, 133 F.3d at 1360. Although the case was ultimately remanded to the district court, the Tenth Circuit did not regard the record as persuasive enough to admit the testimony. *Id.* at 1359. This was due to the psychotherapist's decision to recommend the defendant for outpatient treatment, rather than immediately report the

threat. *Glass*, 133 F.3d at 1360. As the court explained, "we have no basis upon which we can discern how ten days after communicating with his psychotherapist, [the defendant's] statement was transformed into a serious threat of a harm which could only be averted by disclosure." *Id.* Therefore, the case did not rise to the court's dangerous-patient exception standard. *Id.* at 1359.

Considering Samantha's statements did not rise to the level of specificity of the threat in *Glass*, the Fourteenth Circuit erred in applying the Tenth Circuit's dangerous-patient exception. R. 53. Here, Samantha stated "I'm going to kill her." R. 38. This is an ambiguous declaration because she never specifically named Ms. Driscoll. R. 4. The threat's harmlessness is further proven by Samantha's history as a "stable college student" who confided in Dr. Pollak to "vent about her problems." R. 38. Even so, the danger had passed once Dr. Pollak reported the threat to the police. R. 5. The local law enforcement conducted a wellness check, found Samantha to be "calm and rational," and determined "she posed no threat to herself or others." R. 5. Therefore, even under the dangerous-patient exception, Dr. Pollak's testimony should have been excluded. The threat was not so specific that its disclosure was the only means of averting harm to Ms. Driscoll, which is further evidenced by the context of the statements.

3. Samantha did not waive the psychotherapist-patient privilege when Dr. Pollak provided the duty to protect warning.

A separate justification for admitting psychotherapist testimony is through a waiver of the psychotherapist-patient privilege, as the privilege only applies to "those instances in which the patient's statement was made in confidence." *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008). Samantha did not exercise any such waiver here. As it relates to the *Tarasoff* duty to warn, "a therapist has a professional responsibility to disclose to a patient 'the relevant limitations on confidentiality.'" *Hayes*, 227 F.3d at 586. Yet, because psychotherapists' state-

imposed duty is separate and distinct from the dangerous-patient exception, this same warning cannot justify admitting psychotherapist testimony at federal *trial*.

The Sixth Circuit correctly rejected the government's constructive waiver theory in *Hayes*. 227 F.3d at 586. There, "when Hayes chose to continue discussions with the therapists after receiving" the *Tarasoff* "duty to protect" warning, he did not "constructively waive[] the protections of the psychotherapist/patient evidentiary privilege." *Id.* As the court stated, "[i]t is one thing to inform a patient of the 'duty to protect'; it is quite another to advise a patient that his 'trusted' confidant may one day assist in procuring his conviction and incarceration." *Id.* Because Hayes was never given a warning that his therapist could testify at trial if he threatened a third party, he did not knowingly waive his right to the psychotherapist-patient privilege. *Id.*

This rationale is instructive because it demonstrates that both the duty to warn and the psychotherapist-patient privilege require separate waivers. After Dr. Pollak gave her duty to protect warning, Samantha did not simultaneously waive the ability to prevent her "trusted confidant" from testifying about her at trial. R. 21; *Hayes*, 227 F.3d at 586. This would require an entirely different warning. Additionally, it must be noted that "it is the patient, alone, who has the authority to waive that evidentiary privilege." *Hayes*, 227 F.3d at 578. Thus, Dr. Pollak could not divulge Samantha's confidential statements at trial without Samantha's prior consent, which was not given here. Therefore, the waiver argument is misplaced here.

Ensuring psychotherapists remain trusted advisors, and not future adversaries at trial, is essential to preserving citizens' mental health. The dangerous-patient exception threatens this relationship by exposing confidential communications to the public. This exception is separate from state duty to warn laws. Additionally, the majority of circuit courts who have discussed this issue have refused to implement such an exception, recognizing the chilling effect it could

have on treatment. Even if the dangerous-patient exception is adopted, Samantha's statements did not rise to the level of specificity required by the Tenth Circuit's dangerous-patient exception. Samantha also did not waive the ability to invoke the psychotherapist-patient privilege by receiving a duty to protect warning. Ultimately, this Court should clarify *Jaffee* and reject the dangerous-patient exception. Therefore, this Court should reverse the Fourteenth Circuit and suppress Dr. Pollak's testimony and notes.

II. AN OFFICER VIOLATES AN INDIVIDUAL'S FOURTH AMENDMENT RIGHT WHEN THEY EXCEED THE SCOPE OF A PRIVATE SEARCH OF A DIGITAL DEVICE WITHOUT FIRST OBTAINING A WARRANT.

The Fourth Amendment provides: "[t]he 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 government search violates the Fourth Amendment when an individual's "constitutionally protected reasonable expectation of privacy" is violated. *Katz v. United States*, 389 U.S. 347, 360 (1967). For a search to be reasonable, officers must first obtain a warrant supported by probable cause from a neutral magistrate. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). A search conducted without a warrant is "per se unreasonable, subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. Thus, evidence obtained without a warrant must be suppressed, unless it falls under an established exception. *Nardone v. United States*, 308 U.S. 338, 441 (1939).

Notably, the Fourth Amendment only protects individuals from unreasonable searches by government agents, not private parties acting independently. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *see also Walter v. United States*, 447 U.S. 649 (1980). Thus, if a private party brings incriminating evidence to a government agent based on their private search, the agent does not need a warrant and can freely search and seize that evidence. *Jacobsen*, 466 U.S. at

113. If the agent goes beyond the private party's search, any "additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115. The individual retains a reasonable expectation of privacy in items the third party did not view. *Walter*, 447 U.S. at 658-59. Therefore, when "the private search merely frustrated that expectation in part," the officer must have an independent reason to conduct the search. *Id.* This "private search doctrine" was originally applied in the context of *physical* containers. *Jacobsen*, 466 U.S. at 114.

Circuit courts have varied their application of the private search doctrine to digital devices, such as computers, cellphones, and flash drives. *See United States v. Sparks*, 806 F.3d 1323, 1329 (11th Cir. 2015); *United States v. Litchenberger*, 786 F.3d 478, 480-81 (6th Cir. 2015); *United States v. Tosti*, 733 F.3d 816, 822 (9th Cir. 2013) (*dicta*); *United States v. Runyan*, 275 F.3d 449, 451 (5th Cir. 2001); *Rann v. Atchison*, 689 F.3d 832, 833 (7th Cir. 2012). "The specific issue of contention is how to define the scope of the search and what constitutes a 'container' for purposes of determining what the government agent is permitted to search." Brianna M. Espeland, *Implications of the Private Search Doctrine in a Digital Age: Advocating for Limitations on Warrantless Searches through Adoption of the Virtual File Approach*, 53 Idaho L. Rev. 777, 781 (2017). The container can be measured "as narrow as the specific images and videos enlarged and viewed by the private citizen, or as broad as the entire cell phone." *United States v. Suellentrop*, No. 4:17 CR 435 CDP (JMB), 2018 WL 4693082, at 9 (E.D. Mo. July 23, 2018). While the Sixth and Eleventh Circuits contend the unit of measurement should be the specific digital files viewed by the private party, the Fifth and Seventh Circuits assert it is the entire digital device on which the files are stored. *Sparks*, 806 F.3d at 1329; *Lichtenberger*, 786 F.3d at 480; *Runyan*, F.3d at 451; *Rann*, 689 F.3d at 833.

Here, this Court should adopt the narrow approach because it is consistent with the interests of both defendants and law enforcement. Some circuits have erred in adopting the broad approach. This standard contravenes Fourth Amendment precedent by, in certain situations, allowing an officer to view the entirety of a digital device based on a private citizen only viewing one file. Under the narrow approach, Officer Yap violated Samantha's reasonable expectation of privacy when he exceeded the scope of Wildaughter's search. Therefore, the files must be suppressed.

A. The Narrow Approach Safeguards Individuals' Reasonable Expectation of Privacy, While the Broad Approach Threatens This Fourth Amendment Right.

This Court should apply the same narrow approach it uses for physical containers and adopt it in the context of digital devices. *Jacobsen*, 466 U.S. at 114. Under this doctrine, a private party's search only removes an expectation of privacy for those *specific* items viewed, and the government's search must correspond one-to-one with those files. *Sparks*, 806 F.3d at 1329. Digital devices are so pervasive in nature that his doctrine is necessary to protect an individual's reasonable expectation of privacy. Espeland, *supra* page 17, at 816. Therefore, the lower court erred in denying Samantha's Motion to Suppress because Officer Yap needed a warrant to view any additional files beyond Wildaughter's search. R. 40.

The Eleventh Circuit properly applied the private search doctrine in the context of digital devices and limited the unit of measurement to the virtual file itself. *Sparks*, 806 F.3d at 1335. The government's search must align one-to-one with what the private party viewed. *Id.* When an officer goes further, the scope of the search is exceeded. *Id.* Additional viewing requires a warrant because the third party has not "expose[d] every part of the information contained" on the digital device. *Id.* at 1336. A third party only removes "certain information from the Fourth Amendment protections," maintaining an individual's reasonable expectation of privacy. *Id.*

Alternatively, the Fifth and Seventh Circuits have wrongly adopted the broad approach to private searches of digital devices. *See Runyan*, 275 F.3d at 464-65; *Rann*, 689 F.3d at 837. Under this theory, the unit of measurement for the search is the "physical storage device itself." Espeland, *supra* page 17, at 800. Thus, the government does not exceed the scope of the original search "when they examine more items within a closed container than did the private searchers." *Runyan*, 275 F.3d at 464; *see also United States v. Guindi*, 554 F. Supp. 2d 1018 (N.D. Cal. 2008). An individual's "expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers." *Id.* at 464-65. As soon as this privacy interest is frustrated, "anything on the device is fair game for police investigation." Espeland, *supra* page 17, at 800.

In choosing the unit of measurement, the Fifth and Seventh Circuits centered on language in *Jacobsen*. 466 U.S. at 120. As *Jacobsen* states, a government agent's search is constitutional if their search "enabled the agent to learn nothing that had not previously been learned during the private search." *Id.* In the context of digital devices, those circuits incorrectly interpreted this as "suggest[ing] that the critical inquiry . . . is whether the authorities obtained information with respect to which *the defendant's expectation of privacy has not already been frustrated*." *Runyan*, 275 F.3d at 461 (emphasis added). Yet as the Fourteenth Circuit dissent properly noted, *Sparks* provides the proper interpretation of *Jacobsen*. R. 58; *Sparks*, 806 F.3d at 1336. Under this view, when an officer exceeds, and does not replicate, "the breadth of the private search," the government goes beyond the scope. *Id.* Such an invasion of privacy constitutes a Fourth Amendment violation, adhering to the sentiment in *Jacobsen*.

The narrow approach also imposes a "virtual certainty" requirement when officers search the digital device. *Jacobsen*, 466 U.S. at 119. To stay within the third party's search, the

government must proceed with "virtual certainty" that their investigation will not reveal anything more than the private party's viewing. *Lichtenberger*, 785 F.3d at 488. The broad approach uses the far more lenient "substantial certainty" requirement. *Runyan*, 275 F.3d at 463. Police only go beyond the scope of a private search "when they examine a closed container that was not opened by the private searchers *unless* the police are already *substantially certain* of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise." *Id.* Police may view additional containers left unopened during the initial search if "the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search." *Id.* at 463-64. However, this standard is too low a bar because digital devices have such immense storage capabilities, raising "privacy concerns far beyond those implicated by the search of [a physical container]." *Riley v. California*, 573 U.S. 373 (2014). Therefore, the elevated "virtual certainty" requirement ensures officers are not left to their unfettered discretion to probe into the personal lives of individuals.

Furthermore, the policy rationale behind the broad approach is insufficient to warrant such an expansive doctrine in the modern, digital age. First, courts attempt to justify the broad approach by assuming the doctrine prevents overdeterrence of law enforcement. *Runyan*, 275 F.3d at 465. By imposing the "substantial certainty" requirement, officers are not worried about "coming across important evidence that the private searchers did not happen to see and that would then be subject to suppression." *Id.* Second, to promote judicial economy, the lower bar ensures police do not "waste valuable time and resources obtaining warrants" based on the testimony of private searchers. *Id.* This allows the police to search containers where they believe the individual's expectation of privacy has already been frustrated. *Id.*

The Fourteenth Circuit erred in relying on this policy rationale when it applied the broad approach. R. 55. The concerns of *Runyan* are obsolete because obtaining a warrant is no longer burdensome, as this Court recognized in *Missouri v. McNeely*, 569 U.S. 141, 154 (2013). Now, the warrant process is streamlined because "states allow police officers or prosecutors to apply for search warrants remotely through various means," such as phone, radio, e-mail, or video communication. *Id.* Additionally, the "virtual certainty" standard aligns with the Fourth Amendment in promoting "adherence to judicial processes." *United States v. Jeffers*, 342 U.S. 48, 51 (1951). It ensures officers seek a warrant when they cannot be almost certain of the contents of the digital device. Obtaining a warrant "does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality." *Id.* Officers then cannot "take matters into their own hands," ensuring individual's privacy rights are protected. *Id.*

Furthermore, Fourth Amendment protections are paramount in today's virtual world. Digital devices threaten privacy because of their enormous storage capacity, containing items such as messages, calendars, and photographs. *Riley*, 573 U.S. at 394. Given this, there should be a heightened privacy protection for digital devices, one which the narrow approach properly accommodates. This doctrine limits officers in scope to only those files the third party has viewed, not the entire digital device that could contain private information irrelevant to the investigation. *Lichtenberger*, 785 F.3d at 488. In the last year, the world has turned almost entirely digital. People spend every day on the computer to attend office meetings, keep in touch with family, and host dinner parties with friends. Thus, digital devices house many of the same private activities conducted in the home. Considering these changes, allowing an officer to search every file on a private individual's digital device without virtual certainty or a warrant "is

akin to allowing government agents to ransack every container within a person's home for evidence of alleged criminal activity." Espeland, *supra* page 17, at 830. The narrow approach upholds the foundation and purpose of the Fourth Amendment even in this digital age.

The Sixth and Eleventh Circuits correctly adopted the narrow approach in the context of private searches of digital devices. Officers must be "virtually certain" that they are searching the exact files the private party viewed. *Lichtenberger*, 785 F.3d at 488. This approach is superior to the broad approach, which sets too low of a bar for searches of digital devices. There, officers can review anything on the device, so long as they are "substantially certain" of its contents. *Runyan*, 275 F.3d at 463. Such a standard does not properly balance judicial efficiencies with individual's constitutional rights. Thus, this Court should adopt the narrow approach and reverse the Fourteenth Circuit's decision.

B. Officer Yap's Search of Samantha's Entire Desktop Exceeded the Scope of Wildaughter's Private Viewing, Requiring a Warrant Under Either Approach.

This Court should adopt the narrow approach and decide the additional files Officer Yap viewed on the flash drive must be suppressed. R. 6. Wildaughter frustrated Samantha's reasonable expectation of privacy only in the specific files she viewed prior to copying the entire desktop onto the flash drive. R. 6. When she brought Officer Yap the digital device, he failed to ask clarifying questions about its contents. R. 6. Thus, he could not be virtually certain, nor substantially certain, about the files he would view subsequently. R. 6. Thus, Officer Yap violated Samantha's Fourth Amendment rights under either the narrow or broad approach.

Officer Yap far surpassed the scope of Wildaughter's private search, an act that required a warrant under the Fourth Amendment. *Sparks*, 806 F.3d at 1336. Applying the narrow approach, the government must view the files one-to-one, exactly matching what the third party searched. *Lichtenberger*, 786 F.3d at 488. Here, Wildaughter *only* viewed the "HerbImmunity"

folder, which was one of nine folders on Samantha's desktop. R. 24. Notably, she limited her search to a few documents within the folder because she "felt a little weird, like it was an invasion of [Samantha's] privacy." R. 27. Thus, Samantha's reasonable expectation of privacy was only frustrated for those particular documents. It is not disputed that Officer Yap went beyond Wildaughter's search. R. 59. He even went so far as to view private matters, such as her health insurance ID card, budget file, and tax documents. R. 6, 32. Therefore, Officer Yap needed a warrant when he viewed the rest of the contents on the flash drive. R. 6.

Additionally, Officer Yap was not virtually certain of what he would view on the flash drive. R. 32. When Wildaughter brought the device to Officer Yap, he asked *no* questions "at all" about its contents. R. 29. For example, he did not ask how many total files were on the drive, nor where the photographs were that Wildaughter viewed. R. 29. He also did not ask if she copied additional files than she previously saw onto the drive. R. 29. Thus, Officer Yap was not virtually certainty that his investigation would not reveal anything more than Wildaughter's private search. Even under the broad approach, Officer Yap could not have been substantially certain of what he was viewing "based on the statements of [Wildaughter], [his] replication of the private search, and [his] expertise." *Runyan*, 275 F.3d at 463. Wildaughter's statements, without any clarification by Officer Yap, failed to meet this standard. Therefore, under both approaches, Officer Yap's search exceeded Wildaughter's private viewing.

These facts demonstrate the exact dangers warned of in *Riley*. 573 U.S. at 394. Officer Yap's search did not stop even when he "saw personal photos unrelated to the photographs Ms. Wildaughter had mentioned." R. 6. Because flash drives have immense storage capabilities, Officer Yap saw Samantha's "personal files without thinking twice." R. 35. These documents revealed "fact[s] previously unknown" to the government, such as Samantha's personal photos,

expenses, and daily agenda. *United States v. Powell*, 925 F.3d 1, 6 (1st Cir. 2018) (quoting *Jacobsen*, 466 U.S. at 122). Evidently, this refutes both lower courts' argument that flash drives do not implicate privacy concerns are not implicated with flash drives because they only have a "limited, locked quantity of documents." R. 34. This was no small pool of offline documents, but rather Samantha's *entire* desktop. One flash drive exposed Samantha's whole life to Officer Yap, which was this Court's fear in *Riley*. R. 6; 573 U.S. at 394.

Like Chief Justice Roberts stated in *Riley*, "[p]rivacy comes at a cost." 573 U.S. at 401. This Court should again uphold privacy interests and adopt the narrow approach to private searches of digital devices. Further, this approach is not unduly burdensome to law enforcement. Based on this approach, Officer Yap violated Samantha's reasonable expectation of privacy when he exceeded Wildaughter's original search. Officer Yap could not have been virtually certain of what files he would view when he opened the flash drive. Alternatively, under the broad approach, he also could not have been substantially certain of the device's contents. Thus, the evidence obtained from Samantha's personal computer must be suppressed because it was protected by her Fourth Amendment right to be free from unreasonable searches and seizures.

III. THE GOVERNMENT VIOLATED *BRADY V. MARYLAND* WHEN IT FAILED TO DISCLOSE POTENTIALLY EXCULPATORY INFORMATION BASED ON A PREEMPTIVE DETERMINATION REGARDING ITS ADMISSIBILITY AT TRIAL, AND THUS POST-CONVICTION RELIEF SHOULD BE GRANTED.

"Society wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Initially, this Court established that regardless of good or bad faith, the prosecution's failure to provide pretrial evidence as requested by the defense violates due process when the evidence is material either to guilt or punishment. *Id.* *Brady*'s progeny clarified this obligation arises even when there is no explicit request made by the defense. *United States v. Agurs*, 427 U.S. 97, 107 (1976). To demonstrate a *Brady* violation,

the defendant must prove (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 is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Giglio v. United States*, 405 U.S. 150, 154 (1972). A defendant is entitled to a new trial when a *Brady* violation is discovered post-trial. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995).

However, it is uncertain whether undisclosed inadmissible evidence can form the basis of a *Brady* violation. In *Wood v. Bartholomew*, 516 U.S. 1, 2 (1995), the defense was unsuccessful in alleging a *Brady* claim after the prosecution failed to disclose inadmissible polygraph results. This Court denied the *Brady* claim because "it [was] not 'reasonably likely' that disclosure of the polygraph results – inadmissible under state law – would have resulted in a different outcome at trial." *Id.* at 8. Yet, this Court in *Wood* did not elaborate as to "whether inadmissibility was determinative of, or simply a factor of, materiality." Blaise Niosi, *Architects of Justice: The Prosecutor's Role and Resolving Whether Inadmissible Evidence is Material Under the Brady Rule*, 83 Fordham L. Rev. 1499, 1517 (2014) (citing *Wood*, 516 U.S. at 8).

A three-way circuit split has resulted from *Wood* to determine whether undisclosed inadmissible evidence can form the basis for a *Brady* claim. Some courts improperly deem inadmissible evidence to be *per se* immaterial. *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996). Other courts properly consider evidence to be material under *Brady* if the inadmissible evidence could lead directly to the disclosure of admissible evidence. *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003). The third approach courts have taken is asking "whether

the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *Trevino v. Thaler*, 449 F. App'x 415, 424 n.7 (5th Cir. 2011) (vacated and remanded on other grounds by *Trevino v. Thaler*, 569 U.S. 413 (2013)).

Here, this Court should follow the First, Third and Eleventh Circuits and determine the prosecution violated *Brady* when it failed to disclose FBI reports to the defense. R. 59. The rule that a defendant has a viable *Brady* claim when the prosecution withholds inadmissible evidence if it "would have led directly to admissible evidence," preserves the integrity of the criminal justice system and judiciary's role. *Ellsworth*, 333 F.3d at 5. Should this Court decline to adopt that approach, it should adopt the Fifth Circuit's approach that evidence should not be removed from the defense's ambit of knowledge if it could change the outcome of the trial. *United States v. Lee*, 88 F. App'x 682, 685 (5th Cir. 2004). This standard provides a "clear and consistent measure by which judges can accurately gauge the effect of a *Brady* violation." *Strickler v. Greene*, 527 U.S. 263 (1999). Under either approach, post-conviction relief should be granted.

A. Evidence Is Not *Per Se* Immaterial Based on Its Subsequent Inadmissibility at Trial, as It Can Lead to the Discovery of Other Admissible, Material Evidence.

When inadmissible evidence could lead to admissible evidence, the government should not be excused of its obligation under *Brady*. This Court should follow the First, Third, and Eleventh Circuits' reasoning, as it aligns with the sentiment of *Brady* and the ABA Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT r.3.8(d) (AM. BAR ASS'N, 2010). This approach upholds the core purpose of *Brady*, "to ensure that a miscarriage of justice does not occur," because the prosecution's disclosure of any exculpatory evidence ensures a fair trial. *Bagley*, 473 U.S. at 675. By contrast, the Fourth and Eighth Circuits wrongly held inadmissible evidence is "as a matter of law, 'immaterial,' for Brady purposes." *Hoke*, 92 F.3d at 1356 n.3; *see also Madsen v. Dormire*, 137 F.3d 602 (8th Cir. 1998). However, such a standard defies

Brady's purpose and violates a defendant's due process rights because they are not given a proper opportunity to potentially exonerate themselves. Here, this Court must apply the correct standard and conclude the government violated *Brady* when it did not disclose evidence that could have led to admissible, exculpatory trial evidence.

1. The First, Third, and Eleventh Circuits' standard is appropriate because it encourages fair play.

Inadmissible evidence at trial can be material under *Brady*. *Ellsworth*, 333 F.3d at 5. Importantly, this Court has never held inadmissible evidence *cannot* be the basis of a *Brady* claim because it can lead to admissible evidence. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 279 (3d. Cir. 2016). The Fourteenth Circuit's dissent properly points out "due process protections in *Brady* make clear that inadmissible evidence may form the basis of a *Brady* claim if that inadmissible evidence could lead to other admissible evidence." R. 59. Such information includes that which speaks to the potential innocence of a defendant. Here, the reports revealing potential other suspects in Ms. Driscoll's death should have been disclosed to the defense to conduct its own investigation. Based on this, a new trial or directed verdict should be granted.

Here, the prosecution had no grounds for concealing evidence that could have assisted Samantha's defense strategy. As the First Circuit noted, "the policy underlying *Brady*" indicates "there could be no justification for withholding" inadmissible evidence that may turn into a promising lead. *Ellsworth*, 333 F.3d at 5. If the defense knew about the exculpatory evidence before trial, it "presumably could have traced those . . . [leads] who could testify as to the circumstances of the allegations." *Id.* at 5. Regardless of admissibility, the prosecution must disclose information that would allow the defense to conduct an investigation. *Id.* Similarly, here, had the FBI interview been disclosed to the defense, it could have conducted an investigation into Brodie. R. 11. Ms. Driscoll owed Brodie money, and he had a reputation for

violence. R. 44. The prosecution also failed to inform the defense about an anonymous 911 caller who named another potential suspect, Belinda Stevens. R. 12, 45. The FBI agent's belief that this call was not reliable is inconclusive as to whether it should have been disclosed. R. 59. Minimally, interviews with Brodie and Stevens would have painted a full picture of the murder.

This evidence "need not show [a] defendant's innocence conclusively," but can be material if it alters the jury's judgment regarding the verdict. *Dennis*, 834 F.3d at 287. Overall, "*Brady* jurisprudence focuses on the benefits of disclosure to the defense, not admissibility." *Id.* at 309. The defense must receive all relevant pieces of the puzzle and relies on the prosecution turning over potentially exculpatory evidence. *Id.* at 290-91. In *Dennis*, the defendant was unaware of evidence regarding another potential suspect in the murder, stripping him of the ability to cast doubt in the jury's mind as to his guilt. *Id.* at 304-05. Likewise, Samantha was utterly unaware of Brodie and Stevens. R. 44. The defense never had the opportunity to independently investigate these suspects because their existence was *only* known to the government. Therefore, like in *Dennis*, a new trial should be granted for Samantha. *Id.*

If Samantha was provided the FBI reports, this information would have directly led to admissible evidence. Mere speculation alone is insufficient to require the prosecution to turn over inadmissible evidence. *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). The lower court erred in analogizing this case to *Bradley* because there the prosecution thoroughly followed-up on the potential suspects. R. 46-47; *Bradley*, 212 F.3d at 567. There, the suspects were all *proven* to not be the perpetrator based on DNA or alibis with corroboration. *Id.* Thus, it was speculative that any investigation by the defense would have uncovered admissible evidence. *Id.* Whereas here, the government "merely concluded after 'preliminary investigation' that the leads were not reliable.'" R. 47. Potentially, the FBI reports could have

led to admissible witness testimony from HerbImmunity members regarding any power dynamic between Brodie and Ms. Driscoll. The defense also could have investigated the reliability of the anonymous phone call tip and questioned the source. This could have led to a motive and means for Stevens. Further, Brodie and Stevens could have been subpoenaed to testify at trial. It can hardly be said that the FBI reports would not have led to evidence allowed at trial.

The First, Third, and Eleventh Circuits' standard does not impose a burden on the prosecution, nor does it create inefficiencies in the criminal justice system. Instead, it "provides prosecutors with the much-needed guidance in determining when to disclose inadmissible exculpatory or impeachment evidence and also recognizes defendants' due-process guarantees." Abigail B. Scott, *No Secrets Allowed: A Prosecutor's Obligation to Disclose Inadmissible Evidence*, 61 Cath. U. L. Rev. 867, 891 (2012). This standard accounts for the nuances that affect trial. Niosi, *supra* page 25, at 1532. "Introducing admissible evidence would clearly alter a trial's disposition, but inadmissible evidence could also affect the trial outcome if it could strongly inform the defendant's case." Niosi, *supra* page 25, at 1532. This framework safeguards a defendant's due process rights and prevents trials "from unraveling into an open-ended series of inefficiencies." Niosi, *supra* page 25, at 1532.

Notably, the ABA's Ethics Committee Model Rule 3.8(d) goes even further than this proposed standard. MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2010). It requires the prosecution to disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." *Id.* Under Rule 3.8(d), favorable evidence should be disclosed regardless of materiality. *Id.* This goes a step further than the rule this Court should adopt. The ABA's rationale is rooted in the principle that

favorable "information" may lead "to admissible testimony or other evidence or assist [the defense] in other ways, such as in plea negotiations" and effective investigations. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009). Ultimately, the rule requires prosecutors give the defense an opportunity to put evidence to an effective use. *Id.* It follows that the suggested standard for the disclosure obligation under *Brady* does not impose too high of a burden, as it turns on materiality.

Here, this Court should adopt decide inadmissible evidence can form the basis of a *Brady* claim if it can lead to admissible evidence. If this rule was applied, the FBI reports would have led to admissible information, such as witness testimony. When a defendant receives all material evidence, they are ensured a fair opportunity to exonerate themselves. Accordingly, the prosecution violated their obligation under *Brady* here and there should be post-conviction relief.

2. *The Fourth and Eighth Circuits defy* Brady *and leave the question of admissibility of evidence to the prosecution, rather than to the court.*

The government requests a bright line rule based on the Fourth and Eighth Circuits that goes beyond this Court's holding in *Wood*. R. 43; *see Madsen*, 137 F.3d at 604. Their standard "that information that is inadmissible at trial is not evidence at all" is illogical. R. 43. *Wood*'s dicta that inadmissible evidence may play a role in the prosecution's *Brady* obligation should not be overlooked. 516 U.S. at 6. Under this framework, the prosecution would not be required to evaluate the evidence further, depriving the judge of any opportunity to determine admissibility. Scott, *supra* page 29, at 887. Therefore, it is an inappropriate standard.

Mistakenly, the government relies on the Fourth Circuit's ruling in *Hoke*. 92 F.3d at 1350. There, the defense's *Brady* claim failed because the undisclosed evidence could have been discovered had they conducted a "reasonable investigation." *Id.* at 1355. Still, even if this evidence had been discovered, it would not have been admissible at trial and was "not 'material'

to [the defendant's] prosecution." *Hoke*, 92 F.3d at 1354, 1356, 1356 n.3. That is not the case here because the defense relied on the prosecution to disclose Caplow's interview with the FBI and the anonymous 911 phone call. Without the government bringing this to the attention of the defense, the existence of these suspects was impossible to discover. Additionally, this evidence is distinguishable from *Hoke* because its divulgence would have led to material evidence. Therefore, this Court should not apply the holding of the Fourth Circuit to the present case.

Inviting the government to make premature determinations that relevant evidence is not discoverable under *Brady* because it may *potentially* be inadmissible at trial usurps the judge's role regarding such determinations. Scott, *supra* page 29, at 884. In turn, this undermines the effective administration of the justice system and leads to other serious implications. For instance, it incentivizes prosecutors to withhold information based on their beliefs regarding admissibility rather than materiality. Scott, *supra* page 29, at 884-85. This could result, for example, in a prosecutor withholding a witness' prior conviction that could be used for impeachment purposes based on their belief that the conviction is too old to be admissible. That, however, strips the court of its ability to make a proper ruling under the Federal Rules of Evidence. In order to avoid this absurd consequence, material information – though it *may* be deemed inadmissible at trial – should always be disclosed to the defense.

Samantha should have had an opportunity to construct a full defense strategy, yet the prosecution failed to reveal all necessary details. Additionally, the Fourteenth Circuit relied on the Fourth and Eighth Circuits, overlooking the practical impact of this slippery slope standard. R. 56. This framework would allow prosecutors to determine, subjectively, that evidence would be inadmissible at trial. Scott, *supra* page 29, at 884-85. Such a determination should be left to a judge, as there is too high of a risk that a prosecutor may be biased and wrong in this

determination. Even so, disclosure should be rooted in materiality, not admissibility. That standard does not encourage fair play and directly goes against the core of *Brady*.

B. Alternatively, Inadmissible Evidence at Trial Is Also Material If There Is a Reasonable Probability the Trial Outcome Would Have Been Different.

Alternatively, should this Court decline to adopt the rationale of the First, Third, and Eleventh Circuits, it should use the Fifth Circuit's reasonable probability standard. *See Lee*, 88 F. App'x at 682. This approach looks more to the trial outcome and inquires whether there is "a reasonable probability that the result of" a defendant's "trial would have been different had the evidence been disclosed to the defense." *Henness v. Bagley*, 644 F.3d 308 (6th Cir. 2011). Under this assessment, all suppressed evidence must be considered cumulatively. *Id.* As part of this standard, "[t]he evidence supporting the defendant's conviction also must be considered" to assess whether there was a reasonable probability that the outcome of the trial would have been different. *Id.* at 325. These courts properly acknowledge inadmissible evidence can be material.

Adopting this standard here, there is a reasonable probably the outcome of the trial would have been different had information about the potential suspects been disclosed. The jury was presented with circumstantial evidence that Samantha committed the charged offense, including an empty box of strawberries, a note "praising Ms. Driscoll," and a toxicology report reflecting poison in Ms. Driscoll's system. R. 14. The inadequacy of this paltry amount of evidence was exemplified by the FBI's "relief" in arresting Samantha because "initially they were unable to find any physical evidence at the scene pointing to either the cause of death or a suspect." R. 14. There was no evidence of Samantha's DNA on the box, nor evidence that the strawberries themselves contained poison. Furthermore, Samantha and Wildaughter had a rodent problem in their apartment not one month prior. R. 29. Samantha could have purchased rat poison to eliminate their home's rodent infestation. The government's contention that the trial outcome

would have been the same is erroneous. R. 47. Anything tipping the scales in the other direction, away from Samantha, may have changed the result.

If the jury had all information relevant to Ms. Driscoll's death, Samantha's trial would have been different. Investigatory methods could have led to information to provide the jury with viable suspects. Brodie not only had a history of violence, but a motive for the murder. R. 48. The government did not thoroughly consider Stevens to determine motive or means, even though Stevens had a connection with the victim through HerbImmunity. R. 12. This evidence, therefore, not only would have informed the jurors of all *material* circumstances surrounding the charged offenses, but also would have painted a different picture. This picture would have been a more accurate, less myopic one, of what happened to Ms. Driscoll. Moreover, the prosecution would be forced to explain why Samantha, rather than the other viable suspects, had committed the offense. Given this material conflicting evidence, there is a reasonable probability that the outcome of the trial would have been different had this evidence been presented.

CONCLUSION

For the foregoing reasons, Petitioner, Samantha Gold, respectfully requests this Court reverse the decision of the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

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