Team 12R
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No. 20-2388

In the Supreme Court of the United States

SAMANTHA GOLD,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

BRIEF FOR THE RESPONDENT

ORIGINAL BRIEF

QUESTIONS PRESENTED

I. Does a doctor's right to refuse to testify under Federal Rule of Evidence Rule 501's psychotherapist-patient privilege terminate when that doctor's patient threatened serious harm to a third party, that doctor believed in their professional judgment that the patient was capable of carrying out the harm, and the doctor had already fulfilled her legal requirement to report that threat to law enforcement?

II. Does a government search following a prior private search of some of a container's contents abide by the Fourth Amendment when the private party informed a government agent of its contents, the searching government agent is an expert, and the container had finite content?

III. Does the government still fulfill its obligations under *Brady v. Maryland* when it does not disclose inadmissible reports that contain merely speculative accusations that the government found unreliable and do not create a reasonable probability of leading directly to material admissible evidence?

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The transcripts of the hearings of the United States District Court for the Eastern District of Boerum on the motions in this case are contained in the record on appeal. R. at 15–49. The opinion of the United States Court of Appeals for the Fourteenth Circuit is also contained in the record on appeal. R. at 50–59.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the relevant constitutional provisions are provided below. The relevant statutory provisions include 18 U.S.C. § 1716 and Boerum Health and Safety Code § 711, as set forth in Appendix A: Statutory Provisions.

The Fourth Amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV.

The Fourteenth Amendment to the United States Constitution Provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Statement of the Facts

In 2016, decedent Tiffany Driscoll ("Driscoll") recruited Petitioner Samantha Gold (the "Petitioner" or "Gold") to join HerbImmunity, a multi-level marketing company, investing $2,000.

R. at 4, 6, 10, 14, 18, 51. Both Driscoll and Gold were college students at Joralemon University. R. at 5. Gold subsequently had significant issues selling the products that she purchased via Driscoll. R. at 18, 51. Gold, who has been diagnosed with Intermittent Explosive Disorder ("IED"), a condition that results in episodes of "aggressive, impulsive, or violent behavior," became increasingly distraught and angry regarding her involvement in HerbImmunity. R. at 4, 5, 17. Gold's behavior culminated in a May 25, 2017, session with her treating psychiatrist, Doctor Chelsea Pollak ("Doctor Pollak" or "Pollak"), where she expressed rage due to the HerbImmunity situation and stormed out of the session stating, "I'm so angry! I'm going to kill [Driscoll]." R. at 4, 18–19.

After Gold expressed her intent to kill Driscoll and left the office, Doctor Pollak believed Gold was capable of harming Driscoll and was going to do so. R. at 2, 5, 19. Therefore, she followed her mandated duty to report threats to law enforcement under Boerum Health and Safety Code § 711 ("§ 711"), which provides an exception to confidential communications between a mental health professional and her patient. R. at 2, 5. To fulfill this duty, Driscoll contacted the Joralemon Police Department (the "Department") to report the dangerous patient and potential for physical harm as required under § 711. R. at 2, 5, 19. Doctor Pollak additionally sent Gold's treatment records to an officer at the Department. R. at 20. The investigating officer determined that Gold did not pose a threat and notified Driscoll of the reported threat. R. at 5.

However, that same evening, Jennifer Wildaughter ("Wildaughter"), Gold's roommate, brought a flash drive to the Department and met with Aaron Yap ("Yap"), head of the digital forensics department. R. at 6, 23. Wildaughter reported that Gold was always angry about her HerbImmunity debt and had been agitated that afternoon, subsequently leaving her computer open. R. at 6, 24. Wildaughter accessed the computer and browsed through its documents and files until

she saw concerning content. R. at 6. Wildaughter saw photographs of Driscoll including Driscoll entering her home and eating chocolate-covered strawberries at a café, a short note to Driscoll offering her a gift, and a text file with passwords and codes that mentioned strychnine (a rat poison). R. at 6, 24–26, 51. Wildaughter subsequently copied Golds' desktop onto the flash drive and brought it to the Department, telling Yap that she believed Gold was planning to poison Driscoll. R. at 6, 26–27, 51.

Yap examined all the hard drive's contents, where he uncovered the documents identified by Wildaughter as well as a shipping confirmation to Driscoll, a recipe for chocolate-covered strawberries, a budget, and a to-do list. R. at 6–10. On further examination, the recipe contained an ingredient titled "secret stuff," the budget included "secret strychnine stuff," and the to-do list included strychnine with the word "use" next to it and text explaining dosages that cause death. R. at 6, 9–10. Yap concluded that Gold planned to poison Driscoll. R. at 6. Driscoll subsequently died on May 25, 2017, due to eating strawberries injected with strychnine. R. at 13–14, 51. Toxicology reports confirmed that strychnine injected into the strawberries she ate was the cause of death. R. at 14, 51. Police then arrested Gold as a suspect in Driscoll's murder. R. at 14, 51.

After Gold's arrest, the Federal Bureau of Investigation ("FBI") interviewed one person during their investigation of Driscoll's murder and received an anonymous phone call regarding the murder but determined neither were worth further pursuit. R. at 11–12. One June 2017 investigative report documented an interview with Chase Caplow ("Caplow"), another student at Joralemon University; he indicated that Driscoll had said that she owed money to another person involved in HerbImmunity. R. at 11. Caplow, however, did not know any specifics on how much money was owed and had no idea if the individual had any history of violence. R. at 11. The other July 2017 investigative report documented an anonymous phone call where a tipster claimed that

another person was responsible for Driscoll's murder. R. at 12. An FBI agent investigated the tip and concluded that it did not appear reliable. R. at 12.

II. Procedural History

In June 2017, the U.S. Attorney for the Eastern District of Boerum charged Gold with knowingly and intentionally mailing a package containing unmailable items with the intent to kill or injure another that resulted in the death of another in violation of 18 U.S.C. § 1716(j). R. at 1. Gold brought a motion to suppress two pieces of evidence in the U.S. District Court for the Eastern District of Boerum. R. at 16. First, Gold sought to preclude testimony against her from her psychiatrist, Doctor Pollak, and to block admission of Pollak's notes into evidence under the psychotherapist-patient privilege in Federal Rule of Evidence 501 even though Doctor Pollak had already breached the privilege under her required duty to report Gold's threats. R. at 16, 35–36. Second, Gold sought to suppress information recovered during a warrantless search of a flash drive that she alleged exceeded the scope of a prior private search and thus violated the Fourth Amendment. R. at 16, 31–32. The district court denied her motion, admitting Doctor Pollak's testimony by recognizing that the "dangerous patient" exception to the psychotherapist-patient privilege extended to any testimonial privilege and determining the government search was within the scope of the prior private search to allow admission of information on the flash drive. R. at 40–41. After Gold's conviction, she sought post-conviction relief for two alleged *Brady* violations. R. at 43. Gold argued that the government did not disclose two inadmissible FBI reports before her trial that could still be material by leading directly to other admissible evidence. R. at 43–44, 46. The district court denied the motion for post-conviction relief, concluding that the inadmissible hearsay statements in the reports were not evidence at all and therefore could not sustain a *Brady*

claim, nor was there sufficient evidence to support that disclosure of the reports would have led directly to admissible evidence. R. at 48–49.

The United States Court of Appeals for the Fourteenth Circuit subsequently affirmed the district court's decisions on the motion to suppress and the motion for post-conviction relief in February 2020. R. at 51, 57. The Fourteenth Circuit concluded that the dangerous patient exception to the psychotherapist-patient privilege applied to both doctor-patient communications and a doctor's testimonial privilege. R. at 52. The court also held that the government agent was substantially certain of the flash drive's contents before the government search and so the search was within the scope of the private search. R. at 54–55. The court also concluded that a movant must show more than mere speculation that inadmissible evidence would lead to admissible evidence or a reasonable probability the outcome would have been different to sustain a *Brady* claim. R. at 55–56. This Court subsequently granted Gold's petition for writ of certiorari to the Fourteenth Circuit on November 16, 2020. R. at 60.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Fourteenth Circuit on all three counts, and uphold the Petitioner's conviction and sentence for delivery by mail of an item with intent to kill or injure another, which resulted in the death of another, in violation of 18 U.S.C. § 1716 (j)(2), (3).

First, the lower courts properly denied the Petitioner's motion to suppress Doctor Pollak's testimony because once Pollak fulfilled her mandated duty to report the Petitioner's serious threats to law enforcement, she terminated her right to claim privilege to refuse to testify. Doctor Pollak properly breached her psychotherapist-patient privilege under Boerum's codification of the dangerous-patient exception to confidentiality, Boerum Health and Safety Code § 711, after the

Petitioner threatened to kill the decedent and Doctor Pollak believed she was both capable of doing so and more likely than not to do so. Once that privilege was breached, the corresponding testimonial privilege under Federal Rule of Evidence 501 terminated because the confidentiality had already been breached. Further, because Doctor Pollak informed the Petitioner of her mandatory duty to report, the Petitioner already lacked a reasonable expectation of confidentiality. Thus, the potentially deleterious impact on the patient-doctor relationship is outweighed by the testimony's probative value. Additionally, this Court has held that the public has a right to know as much as possible in a public trial, and exceptions to the duty to testify should be construed narrowly. Therefore, this Court should affirm the decision below and hold that once a doctor discloses a confidential communication to law enforcement under a duty to report, the dangerous patient exception requires its admission into evidence if requested.

Second, the government's warrantless search of a flash drive that contained the Petitioner's hard drive was a permissible search under the Fourth Amendment's private search doctrine. A private party, Wildaughter, had already opened numerous files on the hard drive before bringing it to law enforcement, frustrating the Petitioner's expectation of privacy in the files within it. Further, the private party described the flash drive's contents before the subsequent government search, and the government agent conducting the search was an expert in digital forensics. The flash drive containing the hard drive also only contained a finite number of files and was not connected to the internet. Given these circumstances, the government was substantially certain of the flash drive's contents before the government agent began his search, and a broader search than Wildaughter had conducted did not further frustrate the Petitioner's expectation of privacy. Therefore, the evidence recovered on the flash drive is admissible against the Petitioner.

Finally, the government met its requirements under *Brady v. Maryland* because the two inadmissible FBI reports are not material for purposes of a *Brady* claim. It is uncontroverted that the FBI reports constituted inadmissible hearsay that could not have been used during the initial trial even if they had been disclosed. Because inadmissible hearsay cannot be material for trial, inadmissible hearsay can never form the basis of a *Brady* violation. However, even if the Court holds that inadmissible evidence can form the basis of a *Brady* claim under some circumstances, the reports would still be immaterial for *Brady* purposes under either existing standard. First, the Petitioner offers nothing more than mere speculation that disclosure of the reports would have led directly to the discovery of admissible material evidence, and alternatively but relatedly, there is no reasonable probability that the disclosure would have altered the decision below. Therefore, the inadmissible FBI reports lack the required materiality to form the basis of a *Brady* violation under any existing judicial framework. Thus, because each of the Petitioner's three independent challenges to her conviction and sentence fails, this Court should affirm the decision below.

ARGUMENT

I. DOCTOR POLLAK'S TESTIMONY WAS ADMISSIBLE BECAUSE THE STATUTORY DANGEROUS PATIENT EXCEPTION TO PSYCHOTHERAPIST-PATIENT CONFIDENTIALITY EXTENDS TO TESTIMONIAL PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501.

The general principle of admitting testimony to the greatest extent possible is foundational to the right of the public to evidence in a criminal case. *See Trammel v. United States*, 445 U.S. 40, 50 (1980). With that principle in mind, the Court has been careful to construe any exemptions from testimony narrowly to ensure these exemptions are "distinctly exceptional." *See United States v. Bryan*, 339 U.S. 323, 331 (1950). One such limited exemption is a psychotherapist-patient exemption that ensures communications between a patient and a mental health professional remain confidential, outside specific circumstances where the public interest requires breaking that

confidentiality. *See Tarasoff v. Regents of Univ. of Cal*., 551 P.2d 334, 347 (Cal. 1976); FED. R. EVID. 501. Thus, while an important psychotherapist-patient privilege exists to protect the critical trust between patient and doctor, the privilege is far from absolute, and serious threats of harm necessitate the breach of this privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996); *Trammel*, 445 U.S. at 50; *Tarasoff*, 551 P.2d at 347; *see also United States v. Auster*, 517 F.3d 312, 316 (5th Cir. 2008). To ensure the ability to mitigate threat of harm, once the dangerous patient exception to the psychotherapist-patient evidentiary privilege requires the disclosure of a threat, it also terminates the right to refuse to testify under Federal Rule of Evidence 501, because even if there had existed a reasonable expectation of confidentiality, the confidentiality had already been breached. *See Jaffee*, 518 U.S. at 18 n.19; *Auster*, 517 F.3d at 316; *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998).

In this case, Doctor Pollak properly reported her otherwise privileged communications with the Petitioner to law enforcement under Boerum's codification of the dangerous-patient exception. *See* Boerum Health and Safety Code § 711. Once the psychotherapist-patient privilege had been rightfully breached under this required duty to report, Doctor Pollak no longer had the right to refuse to testify under Federal Rule of Evidence 501's psychotherapist-patient testimonial privilege. *See* FED. R. EVID. 501. By disclosing the confidential communications to police, Doctor Pollak no longer retained the testimonial privilege with respect to those specific communications because the public interest that privilege seeks to protect no longer existed. An alternative understanding would lead to an absurd result where a defendant could shield themselves from reported threats under privilege by simply succeeding in murdering a victim. Given the public's right to know as much evidence as possible, and the principle that exceptions to the duty to testify be construed narrowly, the societal interest in Pollak's testimony outweighs any remaining private

interest to justify its exclusion under a claimed privilege. Thus, the district court properly admitted Doctor Pollak's testimony because the dangerous patient exception to psychotherapist-patient confidentiality extends to the corresponding testimonial privilege under Federal Rule of Evidence 501. Accordingly, the right to refuse to testify terminates along with the initial breach of privilege.

A. Once the statutory dangerous patient exception to the psychotherapist-patient evidentiary privilege required Doctor Pollak's disclosure of communications with the Petitioner to law enforcement, her corresponding right to refuse to testify terminated because the confidentiality had already been breached.

While there is no doubt that a general testimonial privilege exists to protect psychotherapist-patient communication under Federal Rule of Evidence 501, the Supreme Court explicitly left open the necessity of admitting some communication when a serious threat or other condition requires. *See Jaffee*, 518 U.S. at 18 n.19. In *Jaffee v. Redmond*, while the Court refrained from outlining the exact rules of when the privilege gives way, it explicitly recognized that a serious threat of harm would present a situation in which the privilege "must give way" for other societal protections. *Id.* ("[W]e do not doubt that 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."). Further, *Tarasoff v. Regents of the University of California* established the widely accepted standard of a doctor's duty to report otherwise confidential patient communications when it is necessary to "avert danger to others." 551 P.2d at 347. Therefore, when a dangerous threat triggers a doctor's mandated duty to report under state law, the corresponding testimonial privilege under Federal Rule of Evidence 501 also disappears, particularly given the principle that the privilege from testimony is to be construed narrowly. *See Jaffee*, 518 U.S. at 18 n.19; *Trammel*, 445 U.S. at 50; *Tarasoff*, 551 P.2d at 347; FED. R. EVID. 501.

Although some circuits have sought to differentiate between the fundamental duty to warn and the federal testimonial privilege of Federal Rule of Evidence 501, the proper reading of

Jaffee's footnote requires coupling the federal testimonial privilege with the psychotherapist-patient privilege because the confidentiality and subsequent breach of confidentiality for both serve identical purposes. The Sixth, Eighth, and Ninth Circuits attempt this bifurcation, but in doing so, misapply the *Jaffee* footnote by attempting to differentiate the cost-benefit analysis on the psychotherapist-patient trust between disclosure to law enforcement and subsequent testimony in a trial. *See United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012); *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000). Unlike these courts have held, once the privilege has been broken under required disclosure, testimony about this same conversation does not have a deleterious impact on the client-psychotherapist relationship because the privilege has already been breached. *See Auster*, 517 U.S. at 318.

Once the trust between a psychotherapist and her patient has been severed through required disclosure to law enforcement, there is quite minimal value in preserving the confidentiality solely regarding a criminal trial. Thus, the approach of the Fifth and Tenth Circuits, along with several district and state courts, more appropriately reflect that the *Jaffee* footnote implies a correlation terminating the testimonial privilege once a serious threat triggers the doctor's duty to report. *See Auster*, 517 F.3d at 315; *Glass*, 133 F.3d 1356, 1358 (10th Cir. 1998); *United States v. Hardy*, 640 F. Supp. 2d 75, 79–80 (D. Me. 2009); *United States v. Highsmith*, No. 07-80093-CR, 2007 WL 2406990, at *3 (S.D. Fla. Aug. 20, 2007); *People v. Kailey*, 333 P.3d 89, 91, 93–96 (Colo. 2014).

Additionally, central to the psychotherapist-patient privilege is the limiting principle that it only covers statements that a patient made in confidence. *See Jaffee*, 518 U.S. at 15. Thus, if a patient makes a statement without a reasonable expectation of confidentiality, it is not covered by the privilege. *E.g.*, *Auster*, 517 F.3d at 315. Therefore, given the duty to warn of serious threats of harm, established in *Tarasoff* and codified by the states, patients are presumed to be placed on

notice of this duty to warn. As a result, serious threats of harm may lack the presumption of confidentiality and therefore be exempt from the privilege. *See Jaffee*, 518 U.S. at 15; *Auster*, 517 F.3d at 315 ("As a matter of law, where the confidentiality requirement has not been satisfied, the psychotherapist-patient privilege—as with other privileges—does not apply."). However, even if there was a presumption of confidentiality, *Jaffee* makes clear that the societal importance of protecting against serious threats of harm would mean that confidentiality must give way. *See Jaffee*, 518 U.S. at 18 n.19; *Auster*, 517 F.3d at 315; *Glass*, 133 F.3d at 1358; *Hardy*, 640 F. Supp. 2d at 79–80.

In this case, Doctor Pollak fulfilled her required duty to report the Petitioner's serious threat of harm against Driscoll under Boerum Health and Safety Code § 711 when she reached out to law enforcement. *See Jaffee*, 518 U.S. at 18 n.19; *Tarasoff*, 551 P.2d at 347; Boerum Health and Safety Code § 711; R. at 5, 19. When the Petitioner, who was diagnosed with IED, stormed out of an appointment where she had complained about Driscoll screaming about how she was going to kill Driscoll and appeared disheveled and agitated, § 711 compelled Doctor Pollak's disclosure of the threat to law enforcement. Boerum Health and Safety Code § 711; R. at 4.

Once Doctor Pollak properly disclosed the risk, the confidentiality had been breached, and she no longer retained a right to refuse to testify under Federal Rule of Evidence 501's testimonial privilege because the dangerous patient exception extends to the corresponding testimonial privilege. *See Auster*, 517 F.3d at 315; *Glass*, 133 F.3d at 1358. Further, the Petitioner is presumed to have understood Doctor Pollak's duty to warn authorities of threatening comments and therefore lacked a reasonable expectation of confidentiality, such that the testimonial privilege would dissolve for the offending comments. *See Jaffee*, 518 U.S. at 15; *Auster*, 517 F.3d at 315. Thus, there was minimal harm in allowing Doctor Pollak's testimony once she made the report, and it

strains credulity to believe that the deleterious impact on patient trust would be drastically exacerbated by understanding the dangerous patient exception to extend to testimony. Despite any concerns about an "atmosphere of trust" between patient and doctor, once the Petitioner uttered a threat that she knew Doctor Pollak was required to disclose, she had a minimal expectation of confidence to begin with. *See, e.g.*, *Auster*, 517 F.3d at 315.

Further, the public interest in notifying the police was not sufficiently distinct from the interest to be served by Doctor Pollak's testimony at trial to justify the testimonial privilege, and there is a substantial public interest in ensuring safety from future harm. This is further evidenced by the fact that the government only sought Doctor Pollak's testimony with a scope limited to the disclosure she had already made. R. at 31. The testimony would not allow a fishing expedition into the entire treatment history, but instead would be limited only to the areas where the confidentiality had already, justifiably, been breached.

Thus, Doctor Pollak's testimony is precisely the type of testimony alluded to by the Court in *Jaffee*, and the Court should affirm the holding that Pollak no longer retained the right to refuse to testify under Federal Rule of Evidence 501 once she had fulfilled her mandatory duty to report under Boerum Health and Safety Code § 711. Further, the Court should clarify that when the dangerous patient exception to the psychotherapist-patient privilege compels disclosure of a serious threat to law enforcement or the intended victim, it simultaneously terminates any right to refuse to testify under the privilege because the confidentiality has already been breached.

B. Adopting the Petitioner's proposed rule would lead to absurd results because a defendant could escape potentially damning testimony simply by succeeding in committing a murder.

Accepting the notion that the value in testimony allowed under the dangerous patient exception to the psychotherapist-patient privilege disappears when the victim dies establishes a dangerous paradigm whereby a patient can regain the protection of privilege by simply murdering

the threatened victim. Under a system where testimonial privilege would only be triggered if the threat to the directly threatened individual remained, a doctor would be required to testify in an attempted murder case, but had the dangerous patient succeeded in their attempt, the doctor would be cut off from the final step of the criminal justice process. This cuts against the public policy rationale underlying the dangerous patient exception and undermines the purpose of this breach of confidentiality proffered in *Jaffee*. *See Jaffee*, 518 U.S. at 18 n.19. As argued below, the testimony's value does not expire simply because the target has since died, and there are other societal interests in deterring potential future harm and holding people accountable that outweigh any claim to privilege once the disclosure was already made to law enforcement.

As several courts have articulated, the most efficient means of serving the social value of protecting potential victims is allowing the psychotherapist to testify in a criminal prosecution once the disclosure has already been made. *See, e.g.*, *Auster*, 517 F.3d at 315; *Highsmith*, 2007 WL 2406990, at *3–4; *Kailey*, 333 P.3d at 93–96. It strains credulity to read *Jaffee* to allow the doctor to participate in every aspect of the criminal process up to the trial, but then be barred from the trial simply because this individual victim had died. Therefore, this Court should hold that Doctor Pollak no longer retained the right to refuse to testify under Federal Rule of Evidence 501, and the testimony was properly admitted.

II. EVIDENCE UNCOVERED IN THE GOVERNMENT'S SEARCH WAS ADMISSIBLE BECAUSE SEARCHING A CLOSED CONTAINER THAT WAS PREVIOUSLY THE SUBJECT OF A PRIVATE SEARCH WITHOUT A WARRANT WITHIN THE SCOPE OF THE PRIVATE SEARCH DOES NOT VIOLATE THE FOURTH AMENDMENT.

The second question that this Court must address is whether the government needs a warrant to examine a device that a private party previously searched. This Court should affirm the holdings of the lower courts and hold that law enforcement, in this case, did not exceed the scope

of a prior private search when it limited its search to the same hard drive that was disconnected from the internet.

The Fourth Amendment establishes that people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. The first step in any Fourth Amendment analysis is determining whether a "search" has even occurred in order to trigger the Fourth Amendment. *E.g.*, *United States v. Jacobsen*, 466 U.S. 109, 113–16 (1984). Government actions constitute a search when those actions infringe on an "expectation of privacy that society is prepared to consider reasonable." *Id.* at 113; *see Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (enunciating a two-factor analysis based on both subjective and objective expectations of privacy to determine whether a person has a "reasonable expectation of privacy").

However, the Fourth Amendment does not apply to searches by private individuals that are not acting on behalf of or with the knowledge of the government. *Walter v. United States*, 447 U.S. 649, 656 (1980); *id.* at 662 (Blackmun, J., dissenting). A subsequent government search only requires a warrant if it exceeds the scope of the prior private search; within that scope, the private search has already terminated any reasonable expectation of privacy. *Id.* at 656–57 (plurality opinion); *see also Jacobsen*, 466 U.S. at 113, 116–17. Any further intrusion on an individual's privacy by the government "must be tested by the degree to which [the government] exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115.

In this case, the government did not need a warrant to conduct a search of a flash drive containing a computer hard drive because that hard drive was the subject of a preceding private search and the subsequent government search did not exceed the scope of the prior search. First, this brief argues that a flash drive or hard drive is more akin to a traditional container and the

government's more extensive search of the previously searched contained did not exceed the private search's functional scope. Second, the government was substantially certain of the flash drive's contents, and thus the subsequent search was not a separate search.

A. A more extensive government search of a closed container that was previously searched by a private individual does not exceed the scope of prior search if the government is substantially certain of the container's contents.

The standard for determining whether a government search of a container exceeds the scope of a prior private search is the amount of additional information the government uncovers in its subsequent search. *See Jacobsen*, 466 U.S. 109 at 115; *United States v. Lichtenberger*, 786 F.3d 478, 482 (6th Cir. 2015); *Rann v. Atchison*, 689 F.3d 832, 836 (7th Cir. 2012); *United States v. Runyan*, 275 F.3d 449, 460 (5th Cir. 2001). If a government agent opens a closed container that remained unopened after a prior private search, it does not constitute an additional Fourth Amendment search if the agent is substantially certain of its contents based on "statements of the private searchers, their replication of the private search, and their expertise." *Rann*, 689 F.3d at 836–37 (quoting *Runyan*, 275 F.3d at 463); *see United States v. Oliver*, 630 F.3d 397, 408 (5th Cir. 2011). Any expectation of privacy an individual previously had in the unopened container is frustrated after a private search makes the contents of the container obvious. *Runyan*, 275 F.3d at 463–64; *Rann*, 689 F.3d at 832.

When a government official will not learn anything that was not previously learned from the prior search, it does not violate the Fourth Amendment. *Jacobsen*, 466 U.S. at 120. In *United States v. Jacobsen*, FedEx employees cut open a tube in a package they were examining for damage and discovered white powder in plastic bags. *Id.* at 111. The employees notified the DEA, and a DEA agent examined the package without a warrant, removing the plastic bags from the tube the employees had cut open and then opening the bags and field testing the inside substance, which was cocaine. *Id.* at 111–12. This Court concluded that the FedEx employees had already frustrated

the defendant's privacy in the package's contents during the "initial invasions . . . occasioned by private action." *Id.* at 115. This Court analyzed the subsequent warrantless search based on the amount that it exceeded the scope of the private search; the Court held that the Fourth Amendment is no longer implicated where a defendant's expectation of privacy is already frustrated. *Id.* at 117–18. The subsequent search was therefore permissible given the "virtual certainty" that no further information would be revealed than what the agent "had already been told." *Id.* at 119.

Further, even if the private searcher did not access the container, a warrant is still not required as long as its contents are obvious. *Oliver*, 630 F.3d at 408. Obviousness can be demonstrated through an agent's observations and expertise, such as when an agent searches an unopened notebook that was inside a privately searched cardboard box. *Id.* at 408.

1. *Given Yap's expertise and the information that Wildaughter provided about the contents of Gold's hard drive, Yap was already substantially certain of the flash drive's contents and the government search only confirmed its contents.*

The container search approach in *Jacobsen* is applicable to electronic devices. *See Rann*, 689 F.3d at 838 (analyzing media devices under traditional container theories); *Runyan*, 275 F.3d at 462–64 (computer disks). In *United States v. Runyan,* government agents examined computer disks that were not opened during a prior private search as well as unopened images on disks that had been opened previously. *Runyan*, 275 F.3d at 460. The private searchers gave the disks, including floppy discs, ZIP discs, and CDs, to law enforcement after finding child pornography on them. *Id.* at 453. The Fifth Circuit held that the search of other disks that were not previously examined in the private search exceeded the scope of the private search as the government agents lacked "substantial certainty" that the disks contained child pornography based on the information in plain view, their expertise, and the information the private searchers identified. *Id.* at 464. The private searchers did not know the contents of the disks they turned over. *Id.* However, merely examining more files on the same privately searched disk did not exceed the scope of the prior

search; government agents "do not engage in a new 'search' for Fourth Amendment purposes each time they examine a particular item found within the container." *Id.* at 464–65.

The Seventh Circuit similarly concluded that a more thorough search of digital devices private searchers had already accessed that resulted in viewing previously unviewed images did not exceed the scope of the prior search. *Rann*, 689 F.3d at 838. In *Rann v. Atchison*, the court found that a child and her mother knew the contents of the digital camera memory card and zip drive containing child pornography, and thus the government agents that conducted a more exhaustive search of the devices were substantially certain they contained child pornography. *Id.* at 834, 838.

The traditional container scope of search test, operationalized as a substantial certainty analysis, effectively addresses digital container searches. *See United States v. Crist*, 627 F. Supp. 2d 575, 576–79 (M.D. Pa. 2008). In *United States v. Crist*, a private searcher browsed through parts of a computer and found a couple of possible child pornography videos. 627 F. Supp. 2d at 576–77. The court rejected a warrantless full forensic exam by government agents that uncovered 171 suspected child pornography videos and almost 1,600 child pornography images, holding under *Jacobsen* and *Runyan* that the much more expansive search violated the defendant's remaining reasonable expectation of privacy in the computer's contents. *Id.* at 578–79.

In this case, Office Yap did not exceed the scope of Wildaughter's prior private search when he examined all the hard drive's contents, which Wildaughter had already accessed before copying it onto a flash drive. R. at 6, 26–27, 51. While Yap did access files that Wildaughter did not previously open, he only did so after being told by Wildaughter that she had browsed the Petitioner's hard drive and concluded that the Petitioner planned to poison Driscoll. R. at 6. Wildaughter also noted specific examples of concerning information to Yap located in various

parts of the hard drive, including photos of Driscoll and her father, the note to Driscoll, and a text file with passwords that mentioned strychnine. R. at 6. Like the government agents in *Runyan* and *Rann* that merely accessed more files on the same isolated device or the DEA agent in *Jacobsen* that just opened another bag inside a previously opened box, Yap only opened different files on that specific hard drive. R. at 6.

Here, Yap began his search with substantial certainty of the contents within, and his search was within the scope of the prior private search. Wildaughter knew that the hard drive contained evidence of Gold's plan to poison Driscoll after her private search, and she copied the hard drive to a flash drive and conveyed that the concerning information was on the drive before Yap began his search. R. at 6. Subsequently, Yap used his expertise as the Department's head of the digital forensics department to replicate the search that Wildaughter had done previously, browsing documents and files to confirm that Gold was indeed planning to poison Driscoll. R. at 6. Therefore, Yap's search was not an open-ended one but was instead limited to a finite set of files on a flash drive that mirrored Gold's hard drive, with *Jacobsen* acting as a check to limit the scope to the prior private search. A situation like *Crist*, with a far more expansive search, did not occur, particularly given that Wildaughter had already accessed numerous files on the hard drive. R. at 6.

2. A flash drive that only contains a finite number of files and is disconnected from the internet is akin to a search of a traditional closed container and lacks the unique risks of a cell phone.

Electronic devices, particularly cell phones, can pose unique concerns given the amount of information they can store. *Riley v. California*, 573 U.S. 386, 393 (2014). In *Riley v. California*, this Court found that warrantless searches of digital content on cellphones incident to defendants' arrests were impermissible in part given the distinct types of information they contain. *Id.* at 378–81, 393–94. The Court focused on the aspects of a cell phone that act as a "digital record of nearly every aspect of [our] lives" and noted how data on cell phones can also be qualitatively different,

such as internet search or location history. *Id*. at 395. Further, the Court noted how cell phones can often store data via cloud computing utilizing remote servers. *Id.* at 397.

The traditional container test can function effectively as applied to digital devices. In *Riley*, the Court noted the aspects of cell phones that make them unique, but these same aspects also demonstrate the variety of ways that data is stored on devices connected to the internet. *See id.* at 393–97. In this case, the device in question was not a cell phone or other digital device connected to cloud storage. Rather, the device was a hard drive, isolated from a computer or other digital device and replicated on a flash drive. R. at 6. The private searcher that searched the hard drive had already browsed its contents before turning it over to Yap. R. at 6. In this case, the container lacked the types of data that make cell phones and similar digital devices "qualitatively different." *Riley*, 573 U.S. 386 at 395.

Instead, a flash drive is more analogous to a traditional container like a filing cabinet, with a fixed number of documents and files stored in folders. That circumstance is precisely the type of circumstance that the Court faced in *Jacobsen* when it held that merely accessing an unopened container inside a previously searched container did not violate the Fourth Amendment. *Jacobsen*, 466 U.S. at 119–20. This case does not present a circumstance where a government agent searched other data on the computer other than browsing the documents and files in the same manner that the private searcher did. Cases like *Crist* show that an overly broad exam such as that would lack the substantial certainty necessary to remain within the scope of the initial private search. *See* 627 F. Supp. 2d at 578–79. Therefore, this Court should analyze digital containers such as the flash drive in this case with reference to its overall function and available data and consider that information when assessing it under the scope test as measured by analyzing the substantial certainty of the government agent in question.

B. The substantial certainty test is most consistent with the virtual certainty standard this Court enunciated in *Jacobsen* because it limits the scope of the prior search while not unduly inhibiting law enforcement investigations.

The Supreme Court has approached government searches that follow private searches with a holistic analysis of the search's scope, rather than precisely matching the contents of the searches. *See Jacobsen*, 466 U.S. at 119. Instead, the Court has emphasized three key Fourth Amendment principles: standards should be (1) "workable for application by rank and file, trained police officers," (2) reasonable, and (3) objective. *Illinois v. Andreas*, 463 U.S. 765, 772–73 (1983). The "substantial certainty" standard for digital device contents most consistently mirrors the core rationale in *Jacobsen* that a government agent's "virtual certainty" of a package's contents did not infringe on the defendant's expectation of privacy despite the agent searching more of the package than the prior private searcher. *See Jacobsen*, 466 U.S. at 119; *Runyan*, 275 F.3d at 463 (noting that "confirmation of prior knowledge does not constitute exceeding the scope of a private search" under *Jacobsen*). The focus of scope in *Jacobsen* was on whether the government search gave government agents an "advantage" in their search as compared to merely "avoiding the risk of a flaw" in a person's recollection. *See Jacobsen*, 466 U.S. at 119. Other circuits have also reflected a similar understanding in their interpretations of *Jacobsen*, whether finding that enlarging thumbnails or that merely being more thorough in the subsequent search of a box and videotapes did not increase the scope of a prior search. *United States v. Tosti*, 733 F.3d 816, 822 (9th Cir. 2013); *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990).

Two other circuits have erroneously limited the scope of a government search by interpreting the substantial certainty analysis in terms of the particular data the private searcher accessed previously instead of the general substantive content accessed. *Lichtenberger*, 786 F.3d at 486–88; *United States v. Sparks*, 806 F.3d 1323, 1332, 1335–36 (11th Cir. 2015), *overruled on other grounds by United States v. Ross*, 963 F.3d 1056 (11th Cir. 2020). In one case, the court

found that accessing child pornography images a prior private searcher may or may not have accessed on the same laptop lacked virtual certainty the content was limited to those images. *Lichtenberger*, 786 F.3d at 488. In the other case, the court concluded that opening full-sized versions of thumbnails a private searcher viewed did not exceed the scope of the prior search but that merely viewing one additional video on a cell phone than the private searcher had viewed frustrated the defendant's expectation of privacy. *Sparks*, 806 F.3d at 1336.

This Court should adopt the substantial certainty standard utilized by the Fifth and Seventh Circuits as that test is most consistent with private search precedent in *Jacobsen* regarding the scope of a prior search and is appropriately limited to protect containers of all kinds. The standard only allows a subsequent warrantless search where private searcher statements, government agent replication of the search, and government agent expertise establish substantial certainty of a container's contents. *Runyan*, 275 F.3d at 463. In law enforcement investigations, digital evidence is increasing rapidly and has already resulted in substantial evidence backlogs. *See, e.g.*, Maggie Brunner, *Challenges and Opportunities in State and Local Cybercrime Enforcement*, 10 J. NAT'L SEC. L. & POL'Y 563, 571 (2020). The substantial certainty standard allows government agents to conduct their jobs in a workable manner while not allowing an open-ended search. This case involved precisely such a limited search; a digital forensics expert searched a flash drive after a private searcher explained its contents to him in detail, including specific documents and her belief that another individual's safety and health were at risk. *See* R. at 6, 23–27. Therefore, this Court should adopt the substantial certainty test for digital devices and hold that the government's search was permissible under the Fourth Amendment.

III. NO *BRADY* VIOLATION OCCURRED BECAUSE INADMISSIBLE EVIDENCE IS NEVER MATERIAL, AND ALTERNATIVELY, EVEN IF IT COULD BE MATERIAL, THIS INADMISSIBLE EVIDENCE WOULD NEITHER HAVE CLEARLY LED TO DISCOVERING ADMISSIBLE EVIDENCE NOR CREATED A REASONABLE PROBABILITY OF A DIFFERENT RESULT.

While *Brady v. Maryland* sets an important guideline to protect a defendant's due process rights under the Fourteenth Amendment, it does not create an unbounded duty for the government to inform each defendant of every aspect of their operations regardless of its probative nature. *See* 373 U.S. 83, 87 (1963); U.S. CONST. amend. XIV, § 1; *see also Wood v. Bartholomew*, 516 U.S. 1, 5–6 (1995); *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985). Importantly, the Court emphasized the bounds of this test by limiting disclosure requirements only to evidence that is both favorable to the defendant and material. *See* 373 U.S. at 87 ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ."). For purposes of *Brady*, evidence is material only when there is a "reasonable probability" that had the evidence been disclosed, the result of the trial would have been different, or it would have impacted the jury's judgment. *Kyles*, 514 U.S. at 433–34; *Bagley*, 473 U.S. at 682; *Strickland v. Washington*, 466 U.S. 688, 696 (1984); *United States v. Agurs*, 427 U.S. 97, 104 (1976); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Thus, inadmissible evidence, which, by definition, cannot have a direct impact at trial because it could not be used, is not "evidence" for purposes of required *Brady* disclosures. *Wood*, 516 U.S. at 5–6; *Kyles*, 514 U.S. at 434; *Madsen v. Dormire*, 137 F.3d 602, 204 (8th Cir. 1998); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996).

In the alternative, even if inadmissible evidence could form the basis of a *Brady* violation, it could only do so if the disclosure of that evidence would either (1) lead directly to admissible material evidence, or (2) create a "reasonable probability" that the decision below would have been different. *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016); *Trevino v.*

Thaler, 449 F. App'x 415, 424 n.7 (5th Cir. 2011) (vacated and remanded on other grounds by 569 U.S. 413 (2013)); *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). Further, mere speculation that it might lead to this evidence is insufficient for *Brady* purposes. *Bradley*, 212 F.3d at 567.

In this case, the Petitioner's tenuous *Brady* claim relies solely on two minor FBI reports that the Petitioner herself admits were inadmissible. R. at 43–44. Given that the reports were inadmissible evidence that presented mere unsubstantiated accusations against other individuals, the reports themselves could not have been utilized at trial to alter the result and thus were not material for purposes of *Brady*. Further, because the reports were inadmissible and could not have been used to alter the result of the trial, they were not even considered evidence in a *Brady* context and thus could not form the basis of a *Brady* violation. Alternatively, even if inadmissible evidence could serve the basis of a *Brady* violation, the FBI reports' potential to lead directly to admissible material evidence was, at most, merely speculative, and they fail to create a reasonable probability that the result below would have been different. Therefore, the lower courts properly rejected the Petitioner's *Brady* claim because it lacked the essential materiality component under any interpretation of *Brady*.

A. As inadmissible evidence, the FBI reports cannot meet *Brady*'s materiality standard, because inadmissible evidence is not evidence for trial purposes and thus creates no reasonable probability of an altered result below.

Inadmissible evidence inherently cannot be used at trial and thus cannot constitute material evidence to form the basis of a *Brady* violation. *See Wood*, 516 U.S. at 5–6 (holding that polygraph results, which were inadmissible for any purpose, were not considered evidence at all and therefore could not be material to form the basis of a *Brady* claim). Thus, *Brady* does not require disclosure of inadmissible evidence. *Id.* While the circuits have not uniformly applied *Wood v.*

Bartholomew's holding to create a blanket rule, several circuits have recognized the inherent logic connecting *Wood* to the purpose of *Brady* and its progeny. *See Madsen*, 137 F.3d at 604 (explicitly adopting *Wood*'s logic in holding that evidence that was inadmissible for both impeachment and exculpatory purposes was not "evidence at all" for purposes of *Brady*); *Hoke*, 92 F.3d at 1356 n.3 (embracing *Wood*'s rule that inadmissible statements cannot form the basis of a *Brady* violation for lack of materiality). This Court should continue this framework.

Given that inadmissible evidence cannot create a different result during trial, it is, by definition, not material. *See Kyles*, 514 U.S. at 433–34. This draws from the underlying principle that even in expanding the requirements on the government under *Brady*, the Court has ensured it retained the standard that to constitute a *Brady* violation, disclosure of the evidence would have altered the result of the proceeding. *See, e.g.*, *Agurs*, 427 U.S. at 107 (expanding *Brady* to include some evidence even if the defendant has only made a general request that lacked specificity, but only if the undisclosed evidence is material); *Bagley*, 473 U.S. at 676 (extending *Brady* to cover impeachment evidence as well but only if material). Thus, regardless of the type of inadmissible evidence, the Fourth and Eighth Circuits' interpretation of *Wood*, that inadmissible evidence can never form the sole basis for a *Brady* violation, is most consistent with the original purpose of *Brady* and its early progeny.

In this case, it is uncontroverted that the FBI reports are inadmissible. R. at 44. Thus, there is no contention from the Petitioner that the reports, as hearsay, could have been themselves used to further the Petitioner's case at trial. *Id.* Two unsubstantiated reports to the FBI are precisely the type of inadmissible evidence that *Wood* sought to ensure could not form the basis of a *Brady* violation. *See Wood*, 516 U.S. at 5–6; R. at 43–44. The reports merely detail two separate unsubstantiated allegations against other purported suspects and blatantly constitute hearsay that

cannot be utilized at trial for any purpose. R. at 43–44; FED. R. EVID. 801. As hearsay, these reports are properly inadmissible for the same purpose as the polygraph tests in *Wood* due to the lack of reliability, and therefore, a similar logic should apply. *See Wood*, 516 U.S. at 5–6; R. at 43–44. If the reports had included any sort of admissible evidence, the analysis certainly would have been different; however, mere hearsay that could not be offered in any context at trial is not "evidence" for purposes of a *Brady* claim.

Further, these reports, which include merely cursory interviews with tipsters, mirror the inadmissible evidence the Fourth and Eighth circuits have identified to interpret *Wood* to place a blanket ban on the consideration of inadmissible evidence in a *Brady* analysis, and this Court should clarify that approach as the proper analysis. For instance, in *Madsen v. Dormire*, the Eighth Circuit rejected the claim that failure to disclose inadmissible evidence about a non-testifying witness constituted a *Brady* violation because *Wood* articulated the rule that evidence that is inadmissible, and thus cannot be used at trial, is not "evidence" in a *Brady* context. *See Madsen*, 137 F.3d at 604. Similarly, here, the FBI reports, without any admissible aspects, are not "evidence at all" because even if they had been disclosed, they could not have been used at trial for any purpose.

Even more directly on point, the Fourth Circuit concluded that inadmissible witness interviews, like the inadmissible reports regarding tipster interviews, could not form the basis of a *Brady* claim because of *Wood*'s principle that inadmissible evidence cannot be considered "material" in a *Brady* context. *See Hoke*, 92 F.3d at 1355–56, 1356 n.3; R. at 11–12, 43–44. Given the inherent logic underpinning the exclusion of these types of inadmissible evidence in a *Brady* claim under *Wood*, the Court should clarify this principle. Thus, the undisputed inadmissibility of the reports should, in and of itself, be wholly sufficient to dispose of the purported *Brady* violation,

and this Court should reiterate its prior holdings that inadmissible evidence is "not evidence at all," and failure to disclose inadmissible evidence is allowed under *Brady*.

B. In the alternative, even if the inadmissible FBI reports could form the basis of a *Brady* violation, they could not do so because their potential to lead directly to admissible material evidence was, at most, merely speculative, and fails to create a reasonable probability that the result below would have been different.

Even if this Court adopts either of the broader standards that allow for inadmissible evidence to possibly form the basis of a *Brady* violation, the inadmissible evidence could only do so if its disclosure would have either (1) led directly to the discovery of admissible material evidence, or (2) created a reasonable probability that the result below would have been different. *See Dennis*, 834 F.3d at 310; *Trevino*, 449 F. App'x at 424 n.7; *Henness*, 644 F.3d at 325; *Ellsworth*, 333 F.3d at 5; *Bradley*, 212 F.3d at 567. Absent meeting those lofty thresholds, inadmissible evidence remains exempt from any *Brady* disclosure requirements. *See Brady*, 373 U.S. at 87; *Kyles*, 514 U.S. at 433–34; *see also United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009).

While some circuits have chosen to expand the scope of *Brady* and established the principle that inadmissible evidence may serve as the basis of a *Brady* claim if its disclosure would have led directly to the discovery of admissible material evidence, the courts have all placed a burden on the defendant to establish that fact. *See Dennis*, 834 F.3d at 310; *Erickson*, 561 F.3d at 1163; *Ellsworth*, 333 F.3d at 5; *Bradley*, 212 F.3d at 567. The courts have been consistently clear that "mere speculation" is wholly insufficient to meet the bar of leading directly to admissible evidence. *See, e.g.*, *Bradley*, 212 F.3d at 567 (denying a *Brady* claim because the defendant could present "only speculation" that admissible; *Erickson*, 561 F.3d at 1163 ("A *Brady* claim fails if the existence of favorable evidence is merely suspected"). Thus, this standard, although more

permissive, still places a substantial burden on the defendant to overcome *Wood*'s declaration that inadmissible evidence cannot be the basis of a *Brady* violation.

Similarly, while other circuits have expanded the scope of *Brady* in slightly different terms by adopting as the key question, whether the disclosure of the inadmissible evidence would have created a reasonable probability that the result below would have been different, the analysis essentially becomes the same. *See Trevino*, 449 F. App'x at 424 n.7; *Henness*, 644 F.3d at 325. Despite a different articulated standard, in practice, the same overarching analysis is conducted. The central inquiry is whether there is a reasonable probability of a different result. If there is nothing more than mere speculation that the inadmissible evidence would have led to admissible material evidence, then the standard for reasonable probability cannot be met to constitute a cognizable *Brady* claim.

In this case, the FBI reports fail to meet either of these more expansive standards for the same reason. These two FBI reports present inadmissible hearsay evidence, and in follow-up investigations were deemed unreliable and not requiring further examination. R. at 43–45. In raising her claim, the Petitioner presents nothing more than speculation that the disclosure of these reports would have led to admissible material evidence. *Id.* The First, Third, Tenth, and Eleventh Circuits have all heard and rejected *Brady* claims premised on similarly speculative grounds as the Petitioner's because *Brady* does not impose a duty to share every piece of the government investigation irrespective of its materiality. *See Dennis*, 834 F.3d at 310; *Erickson*, 561 F.3d at 1163; *Ellsworth*, 333 F.3d at 5; *Bradley*, 212 F.3d at 567. This *Brady* claim, likewise, should fail, as it presents the identical question, and the circuits have wisely placed limitations on the expansiveness of their holdings. R. at 43–45. Like the grasping claims in those circuits that sought to compel disclosure of inadmissible evidence, the Petitioner has presented zero support for her

contention that the disclosure of these reports would lead directly to admissible, material, favorable evidence.

Similarly, because these reports could not have been utilized at the trial below and there is nothing more than speculation that they would have led to admissible evidence, there is no reasonable probability that the disclosure would have led to a different result below. Even in the circuits that have adopted this key question, they require more than hope that it would have altered the result and established a "reasonable probability" standard that requires a probability "sufficient to undermine confidence in the outcome." *See Trevino*, 449 F. App'x at 424 n.7; *Henness*, 644 F.3d at 325; *see also Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.) (quoting *Strickland*, 466 U.S. at 694). Under this standard, the reports, like the statements to police in *Trevino* and the police interview in *Henness*, present no reasonable probability of a different result below because they are inconsequential in the context of the case. *See Trevino*, 449 F. App'x at 424 n.7; *Henness*, 644 F.3d at 325; R. at 44. Thus, just because a statement is given to law enforcement, it is not inherently required to be disclosed under *Brady* unless it presents a reasonable probability of altering the result.

This reality is only further solidified because the FBI followed up on the reports and found them unreliable and not requiring further investigation. R. at 11–12, 43–44. Certainly, if any of these follow-up investigations had led to any sort of admissible potentially material evidence, that new evidence could possibly serve the basis of a *Brady* claim, but nothing in the record or the Petitioner's argument purports to make that claim. R. at 43–45. Instead, the Petitioner wishes to impose an unreasonable duty stretching far beyond the *Brady* standard that would require the government to essentially make a defendant a full party to all their internal workings, whether material or not. This is not the duty imposed, nor desired, by this Court in *Brady*. Accordingly,

even if this Court adopts a new broader understanding of *Brady*, allowing some inadmissible evidence to form the basis of a *Brady* claim, the FBI reports fall well short of the thresholds absent stretching *Brady* beyond its intended bounds.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

s/o Team 12R

Attorneys for the Respondent

APPENDIX A: STATUTORY PROVISIONS

The text of the relevant statutory provisions are provided below:

18 U.S.C. § 1716 – Injurious Articles as Nonmailable:

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

(3) Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life."

18 U.S.C. § 1716(j)(2)–(3).

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

1. Communications between a patient and a mental health professional are confidential except where:
    a. The patient has made an actual threat to physically harm either themselves or an identifiable victim(s); and
    b. The mental health professional makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat.

2. Under such circumstances, mental health professionals must make a reasonable effort to communicate, in a timely manner, the threat to the victim and notify the law enforcement agency closest to the patient's or victim's residence and supply a requesting law enforcement agency with any information concerning the threat.

3. This section imposes a mandatory duty to report on mental health professionals while protecting mental health professionals who discharge the duty in good faith from both civil and criminal liability.

Boerum Health & Safety Code § 711.