Team 8P - Original

Docket No. 20 - 2388

IN THE

Supreme Court of the United States

SAMANATHA 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 PETITIONER

Team 8P
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether a dangerous patient exception exists for the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 when a therapist previously disclosed to law enforcement alleged threats by the defendant to seriously harm a third party.

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

III. Whether the government's failure to disclose potentially exculpatory information, solely on the grounds the information would be inadmissible at trial, violates the requirement of *Brady v. Maryland*.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT

UNITED STATES COURTS OF APPEALS

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

OPINIONS BELOW

The District Court's Bench Opinion appears in the record at pages 15-49. 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 provisions are provided below:

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

The Fourteenth Amendment 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.

STATEMENT OF THE CASE

I. Factual History

Samantha Gold, a college student, was under the care of Dr. Chelsea Pollak, who had diagnosed her with Intermittent Explosive Disorder. R. at 4. Gold had been a patient of Dr. Pollak's for over two years after seeking treatment for "anger issues." R. at 17. Gold was involved in the HerbImmunity community, a multi-level marketing scheme that she had been introduced to by Tiffany Driscoll. Id. At a treatment session with Dr. Pollak on May 25, 2017, Gold expressed anger about a $2,000 debt she had incurred from buying HerbImmunity products at Driscoll's urging. Id. In a moment of anger, Gold said "I'm so angry! I'm going to kill her. I

will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again." Id. Gold never used Driscoll's name specifically in uttering the threat. R. at 21. Dr. Pollak felt concerned that Gold planned to harm Driscoll and contacted the Joralemon police department. R. at 4-5. Officer Nicole Fuchs answered Dr. Pollak's call and decided to visit Gold based on Dr. Pollak's report. R. at 5. Officer Fuchs went to Gold's dorm room at Joralemon University to check on her. Gold appeared "calm and rational" and Officer Fuchs believed she posed "no threat to herself or others" after speaking with her. R. at 5. Officer Fuchs also tracked down Tiffany Driscoll and notified her that a threat had been made against her, however, Driscoll was not concerned. Id.

Gold lived with Jennifer Wildaughter in an on-campus suite at Joralemon University where the women had private bedrooms. R. at 6. On the afternoon of May 25, 2017, Wildaughter became concerned because Gold was clearly "agitated" and stormed out of the room after exclaiming that she "would do anything to get out of this mess," which Wildaughter took to mean her HerbImmunity debt. Id. Without permission, Wildaughter entered Gold's bedroom to "loo[k] around at some of the desktop files" on Gold's computer. Id. Wildaughter opened four folders on Gold's computer, including the "HerbImmunity" root folder and its three subfolders entitled "receipts," "confirmations," and "customers." R. at 7.

Wildaughter also opened a "Tiffany Driscoll" subfolder that contained ten time-stamped photos depicting Driscoll going about her daily activities and a subfolder entitled, "For Tiff." R. at 7. Wildaughter opened the "For Tiff" folder and chose the following two files: "Message to Tiffany" and "Market Stuff." R. at 25-26. Wildaughter later testified that the "For Tiff" folder contained a "screenshot of a picture titled "receipt," though the exhibits depicting Gold's desktop files do not show a "receipt" screenshot inside the folder. R. at 8, 25. The folder "Message to Tiffany" contained a brief note addressed to Driscoll and "Market Stuff" contained passwords,

codes, website addresses, and a reference to "strychnine," a pesticide "commonly used for killing rodents." R. at 8, 9, 27-29. Wildaughter became concerned that Gold might be planning "to poison Ms. Driscoll" and copied the entire contents of Gold's desktop to a flash drive. R. at 6.

Wildaughter delivered the flash drive to the Livingston Police Department. R. at 6. Wildaughter spoke with Officer Yap, the head of digital forensics, and told him that Gold was "angry" about the debt she had incurred due to Driscoll and HerbImmunity. R. at 17-18. During the interview, Officer Yap did not conduct an inventory to detail the precise items included in Wildaughter's initial search of Gold's computer files, nor did he ask her to identify the locations of the items she had viewed. R. at 6, 29.

After Wildaughter left, Officer Yap "immediately conducted an examination of all of the drive's contents" without seeking a warrant. R. at 6. Officer Yap viewed several folders and files Wildaughter had not previously identified during her interview. Id. These extraneous items included the "photos" folder, "confirmations" folder, "Shipping Confirmation" document, and a "recipe" document which referenced a "secret stuff" ingredient. R. at 6-9.

Officer Yap later viewed "every document in the flash drive" in the order they were listed, including Gold's "Health Insurance ID Card," "exam4," and "to-do list," which included a list of poisons and the word "use" located next to "strychnine" and a list of various physical consequences of ingesting strychnine. R. at 6-10. Yap also viewed a "budget" that documented a $212 purchase for "Tiffany's strawberries - secret strychnine stuff." R. at 6. Officer Yap's report indicated that his thorough search of "every document" on the flash drive resulted in his ability "to confirm that Ms. Gold was planning to poison Ms. Driscoll." R. at 6.

On the night of May 25, 2017, Driscoll was found dead at her family's townhouse. R. at 13. On May 27, 2017, Gold was arrested by the FBI and charged with murder. R. at 14. According to a local news report, prior to arresting Gold, authorities "were unable to find any

physical evidence at the scene pointing to either the cause of death or a suspect." *Id*. One detective told the local paper that the arrest of Gold was a "huge relief" to officers. *Id*.

On June 2, 2017, following up a tip, FBI Special Agent Mary Baer interviewed Chase Caplow, a friend of Driscoll's from the HerbImmunity community. R. at 11. Caplow revealed that one of their HerbImmunity colleagues, Martin Brodie, was rumored to be violent, and that Driscoll called him two weeks before her death and told him she owed money to Brodie. Id. Agent Baer planned to interview Brodie to determine if this information required further investigation, but it is unclear what type of follow-up occurred. R. at 11. The FBI did not find "sufficient evidence" to proceed. R. at 56. Prosecutors never shared information about Caplow's tip with Gold's defense. R. at 43.

On July 7, 2017, FBI Special Agent Mark St. Peters received an anonymous phone call that alleged Belinda Stevens, who also participated in HerbImmunity, was the culprit responsible for Driscoll's murder. R. at 12. Agent St. Peters did not follow-up on the lead. Id. Prosecutors never shared information about the anonymous tip with Gold's defense. R. at 43.

On January 8, 2018, Gold's therapist, Dr. Pollak, willingly testified against Gold in federal court. R. at 15. Dr. Pollak testified about what Gold had told her during their session on May 25, 2017 and read directly from her notes on that session. R. at 19. Dr. Pollak admitted that she had sent her session notes to Officer Fuchs on May 25, 2017, immediately after their phone call that day. R. at 20. On cross-examination, Dr. Pollak admitted that she had never warned Gold that her statements in therapy could be used against her in a criminal prosecution. R. at 21.

II. Procedural History

Gold was arrested in connection with Driscoll's death on May, 27, 2017 and charged with murder by mail in violation of 18 U.S.C. § 1716 (j)(2), (3). R. at 51. Following her indictment, defendant brought a motion to suppress both the testimony of her psychiatrist, Dr. Pollak, and

digital evidence obtained by Officer Yap of the Livingston Police Department. After an evidentiary hearing, the motion to suppress was denied on all grounds. *Id*. Following her conviction in February, the defendant was sentenced to life in prison. *Id*. After the conviction, Gold's counsel filed a motion for a directed verdict or new trial, claiming that the government failed to disclose certain information in violation of its obligation under *Brady v. Maryland*, but the district court denied the motion. *Id.* Gold's counsel filed an appeal to the United States Court of Appeals for the Fourteenth Circuit. *Id*. The Fourteenth Circuit affirmed the District Court's ruling on all three issues. R. at 57. Gold then petitioned for a writ of certiorari which was granted on November 16, 2020. R. at 60.

SUMMARY OF THE ARGUMENT

The lower court's ruling recognizing a dangerous patient exception to the psychotherapist-patient privilege was an incorrect interpretation of the law. Such an exception directly undermines the initial aims of the psychotherapist-patient privilege by weakening the confidence and trust between patients and their therapists. While Ms. Gold was warned her statements to Dr. Pollak about Tiffany Driscoll could force Dr. Pollak to warn Driscoll under Boerum's duty-to-warn statute, she was never told Dr. Pollak could testify about those statements in court. Allowing therapists to testify against their patients would discourage patients from discussing their darkest thoughts with their therapists and receiving the treatment they need to get better. The duty-to-warn is grounded in the immediate need to protect the life of a third party, but the same cannot be said of an exception to testify in a murder case where no further harm could be visited upon the victim. A system which bases a waiver of a testimonial privilege on whether a duty-to-warn was exercised would result in unequal treatment of defendants in the federal criminal system, since some states have mandatory duties to warn while others have none. Here, the Court should find that there is no dangerous patient exception to the psychotherapist-patient privilege to protect patient

confidentiality, encourage the mentally ill to seek treatment, and prevent defendants from facing unequal treatment under the law.

Ms. Gold's contact with law enforcement constituted an illegal search within the meaning of the Fourth Amendment. Fourth Amendment jurisprudence has developed to adhere to the original safeguards against trespassory infringement by the government and acknowledge the importance of one's reasonable expectations of privacy. In today's digital age, the contours of Fourth Amendment protections must accommodate the unique features of movable electronic devices with the capacity to store thousands of documents and digital items. Officer Yap abused the private search doctrine when he conducted a warrantless search by viewing every item that was copied to a storage device given to him by Ms. Gold's roommate Jennifer Wildaughter. Yap viewed at least five previously unopened files, despite his lack of knowledge as to which items Wildaughter had opened, or what was contained on the device. Accordingly, this Court should adopt the "duplicate search" approach followed by the Sixth and Eleventh Circuits and find that Officer Yap's search was unreasonable under the Fourth Amendment.

The prosecution violated Ms. Gold's due process rights under the Fourteenth Amendment when it intentionally suppressed FBI reports regarding two potential suspects in Tiffany Driscoll's murder. Prosecutors are obligated to disclose evidence when disclosure would create a reasonable probability of a different trial outcome, or when its suppression would undermine confidence in the outcome of the trial. Here, the FBI received tips about potential suspects and the prosecution failed to alert defense counsel because they decided the tips would be inadmissible. This Court should adopt the Majority Approach, and shelter inadmissible evidence, because it aligns with Court precedent and protects due process rights for defendants like Ms. Gold while disincentivizing prosecutorial misconduct.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT RECOGNIZED A DANGEROUS PATIENT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

The Supreme Court created the federal psychotherapist-patient privilege in *Jaffee v. Redmond* holding that the therapist-patient relationship deserved the same protections afforded to attorneys and clients, and spouses. *Jaffee v. Redmond*, 518 U.S. 1 (1996). The Court's decision stressed the need to preserve the confidence and trust between patients and therapists, and the public good done by treating people through therapy. *Id*. at 11-12. In the years since the *Jaffee* decision, a single footnote has led to a circuit split regarding whether a "dangerous patient exception" exists to the psychotherapist-patient privilege. In *Jaffee*, Justice Stevens noted that "[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." *Jaffee,* 518 U.S. at 18 n. 19. The Sixth, Eighth and Ninth Circuits have all held that no such exception exists, while the Fifth, Tenth, and Fourteenth Circuits have all found that there is such an exception. This Court should reverse the ruling of the Fourteenth Circuit and remand Samantha Gold's case for a new trial because allowing a dangerous patient exception would undermine the very confidence and trust this court sought to foster in *Jaffee* and would create a situation in which defendants could receive unequal treatment in federal court based on which state their crime took place in. Moreover, even if this court decides to recognize a dangerous patient exception in limited circumstances, it should not apply here since Gold received no warning her statements could be used against her in trial, and she posed no future risk to the victim.

1. Adopting a dangerous patient exception would undermine the very confidence and trust the psychotherapist-patient privilege was created to protect and prevent defendants like Samantha Gold from getting the treatment they need.

No dangerous patient exception should have been applied in this case because the exception discourages patients like Gold from confiding in their therapists and undermines the confidence and trust the psychotherapist-patient privilege was created to protect. Evidentiary privileges asserted in federal court are governed by Federal Rule of Evidence 501. Fed.R.Evid. 501. The beginning of any analysis under Rule 501 is the principle that "the public has a right to every man's evidence." *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793 (8th Cir.1997). The Supreme Court recognized one exception to the "every man's evidence" rule when it recognized the psychotherapist-patient privilege. *Jaffee*, 518 U.S. at 10. The psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust" that also animates the attorney-client and spousal privileges. *Id*. In *Jaffee*, the court denied the request of a family of the victim of a police shooting to obtain the notes the officer's social worker made in his therapy session after the shooting but was denied by the court. *Id*. at 1. The court in *Jaffee* reasoned that "effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment." *Id.* at 2. While the *Jaffee* court did not outline the full contours of the privilege, it found the privilege applied to social workers, as well as psychiatrists and psychologists. *Id.* The Court explained the privilege serves the public good by ensuring the mental health of citizens. *Id*. at 11. The Court reasoned that psychotherapists and patients share a unique relationship, and the ability to communicate freely without the fear of public disclosure is the key to successful treatment. *Id*. at 6.

The Sixth Circuit in *United States v. Hayes* refused to recognize a dangerous patient exception in a case where a postal worker told his therapist and a social worker on multiple occasions about his plans to murder his supervisor at her home. *United States v. Hayes,* 227 F.3d

578, 580 (6th Cir. 2000). The court in *Hayes* closely examined the *Jaffee* footnote in analyzing whether to adopt a dangerous patient exception. *Id.* at 585. The court in *Hayes* explained the psychotherapist-patient privilege balances two needs: the improvement of citizens' mental health on the one hand, and the protection of innocent third parties, on the other. *Id.* Both needs, according to the court in *Hayes*, were public ends "which the federal common law should foster." *Id*. However, the court in *Hayes* found that while allowing a therapist to testify against a patient in a criminal prosecution about statements made to the therapist in the course of therapy arguably served the end of protecting innocent third parties, that end did not justify the means. *Id*. Such an exception would "chill and very likely terminate" open dialogue between the patient and the therapist. *Id*. The court in *Hayes* noted that a person who took the laudable step of seeking mental help should not find himself facing a felony conviction and incarceration solely because he engaged the services of a therapist who had a duty to warn. *Id*. at 584. The court in *Hayes* reasoned the price paid under such an exception would likely result in patients not seeking the professional help needed to regain their mental and emotional health. *Id*. at 585.

In *United States v. Ghane*, the Eighth Circuit similarly declined to recognize a dangerous patient exception in a case where a suicidal chemist told his therapist of his plans to use potassium cyanide against unnamed members of the Army Corps of Engineers. *United States v. Ghane*, 673 F.3d 771, 776 (8th Cir. 2012). The chemist's therapist reported his threats to the police. *Id.* The court in *Ghane* echoed the *Jaffee* court in explaining that the privilege serves a public good by "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Id*. at 785. Allowing a dangerous patient exception, according to the court in *Ghane*, would "have a deleterious effect on the "confidence and trust" the Supreme Court held is implicit in the confidential relationship between the therapist and a patient." *Id*. Both the courts in *Ghane* and *Hayes* highlighted the fact that the supposed source for the dangerous patient exception

was a single footnote in the lengthy *Jaffee* decision. *Ghane,* 673 F.3d at 784; *Hayes*, 227 F.3d at 585. The court in Hayes expressed doubt that the court in *Jaffee* would have buried such an important concept in a footnote when it noted that the *Jaffee* footnote "is no more than an aside" recognizing a therapist's duty to warn third parties of imminent danger to them. *Hayes*, 227 F.3d at 585.

Adopting the reasoning of the *Jaffee*, *Ghane*, and *Hayes* courts, this court should decline to create a dangerous patient exception. Like the postal worker in *Hayes* and the chemist in *Ghane,* Gold should not be punished for taking the laudable step of seeking the mental help she required. Like the cop in *Jaffee* who was entitled to the privacy of his records, the notes from Gold's session should not have been shared with a court by her therapist, especially when the therapist had already testified. The therapist in *Hayes* turned over the postal worker's records to authorities, while the therapist in *Ghane*, like Gold's therapist, reached out directly to law enforcement, and both courts still found a dangerous patient exception did not exist. Gold was wronged when her therapist testified at her trial, breaking the confidence and trust the psychotherapist-patient privilege was designed to protect.

2. A therapist's obligation to report a dangerous patient's threats at the time they were made differs from a testimonial privilege and would create unequal standards for federal criminal defendants depending on which state they were arrested in.

No dangerous patient exception should have been allowed in Gold's case because her therapist's duty to warn the police under Boerum law should be kept separate from her testimonial privilege at trial to prevent federal criminal defendants from facing unequal treatment under the law depending on the state in which they live. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Jaffee, 518 U.S. at 18. "The Federal Rules of Evidence should apply

uniformly and not vary depending on the state in which the defendant resides." *United States v. Chase*, 340 F.3d 978, 987–88 (9th Cir. 2003). In *Chase*, a clinic patient told his therapist in several sessions that he experienced homicidal thoughts about FBI Agents. *Id*. at 979-80. After consulting the clinic's legal counsel, the therapist informed the local authorities about the threats and later testified against the clinic patient at his trial. *Id*. at 981. The court in *Chase* held that allowing the therapist to testify was an error and the court declined to recognize a dangerous patient exception to the psychotherapist-patient privilege. *Id*. at 992-93. The court in *Chase* rejected arguments that a therapist's duty to warn under state law should waive the patient's testamentary privilege at trial in federal court, reasoning that "ordinarily. . . the *Tarasoff* duty (to warn) does not abrogate the testimonial privilege in state courts" and should not do so in federal court either. *Id*. at 985. The court in *Chase* noted that of the states in the Ninth Circuit, only California had an "evidentiary dangerous-patient exception." *Id*. at 985-86. The court in *Chase* reasoned that, as a practical matter, "the fact that different states have different standards regarding when a psychotherapist must (or may) breach confidentiality by disclosing a patient's threats" would lead to an unacceptable end if the duty to warn waived the testimonial privilege. *Id*. at 987-88. Under such a system, a defendant in Washington might not be able to keep their therapist from testifying while a defendant in California could block similar testimony. *Id*.

The postal worker in *Hayes* faced a similar dilemma when the government sought to have his therapist testify against him at trial. *Hayes*, 227 F.3d at 581. The court in *Hayes* declined to recognize a dangerous patient exception, reasoning that state law requirements that therapists "take action to prevent serious and credible threats from being carried out" served an immediate and far more important function than a dangerous patient exception allowing therapists to testify at trial months after a patient was arrested. *Id*. at 583. The court in *Hayes* echoed the court in *Chase* when it explained most states lack an exception as part of their evidence rules and that

"California, alone, has enacted a "dangerous patient" exception as part of its evidence code which would arguably apply in a criminal case." *Id*. at 585. The court in *Hayes* also noted that it "cannot be the case that the scope of a federal testimonial privilege should vary depending upon state determinations of what constitutes "reasonable" professional conduct" and that such a system would lead to different outcomes for defendants not only due to their state of residence, but also because of the competency of their therapist. *Id*. at 583-84.

Gold's therapist should not have been allowed to testify against her because the fact that she warned the police as required under Boerum state law should not have waived the testamentary privilege at trial because such a holding is illogical and would lead to unequal treatment of defendants in different states. The *Hayes* court found "a marginal connection, if any at all," between a therapist's duty to warn a third party for their own safety about a threat and a court's refusal to allow a patient's therapist to breach their confidential relationship at trial to testify about it. 227 F.3d at 583. The *Chase* court said the logic behind such a connection relies in large part "on a fiction that the patient knows that a disclosure for one purpose (warning a potential target of violence) is a disclosure for all purposes." 340 F.3d at 988. The *Hayes* court reasoned such a system would "devolve into a battle of experts testifying whether a psychotherapist behaved "reasonably" before disclosing what was believed to be a serious threat." 227 F.3d at 584. All these facts, the *Chase* court found, weighed "against hinging the *Jaffee* testimonial privilege on the protective disclosure laws of the states." *Chase*, 340 F.3d at 987.

Applying the reasoning of the *Chase* and *Hayes* courts, this Court should find that no dangerous patient exception should have been allowed in Gold's case. Unlike the clinic patient in *Chase*, whose therapist had the discretion to decide whether to notify the authorities about the patient's threats, Gold's therapist was required to notify Boerum authorities under state law.

Moreover, while the clinic patient in *Chase* made clearly serious threats, Gold's "threat" was vague, and more akin to venting than plotting a clear act of violence. Unlike the District Court in *Hayes*, which refused to allow the postal worker's therapist to testify at trial, Gold's court allowed her therapist to testify against her. The patient in *Chase* lived in Oregon, whereas the patient in *Hayes* lived in Tennessee, and Gold lived in Boerum, which meant their therapists operated under wildly varying state duty-to-warn statutes. Denying a dangerous patient exception would ensure that defendants are treated equally in federal courts no matter where they live.

3. Patients need to be properly warned and understand that they waived a testimonial privilege before any dangerous patient exception could apply.

No dangerous patient exception should have applied to Gold's case because her therapist did not warn Gold that her statements made in therapy sessions could be used against her at trial, and there was no compelling need to prevent future harm to a victim. A patient will retain significantly greater trust "when the therapist can disclose only for protective, rather than punitive, purposes." *Chase*, 340 F.3d at 990. Patients willing to express to psychiatrists their intention to commit crime are not ordinarily likely to carry out that intention, and treatment of those patients would be impeded if they were "unable to speak freely for fear of possible disclosure at a later date in a legal proceeding." *Id*. at 989. To secure a valid waiver of the psychotherapist-patient privilege, a therapist must provide a patient with an explanation of the consequences of that waiver. *Ghane*, 673 F.3d at 787. In *Ghane*, the chemist's therapist had him sign a waiver which said information about his threats could be released to "anyone." *Id.* at 786. The court in *Ghane* held that the consent obtained was insufficient because although the chemist's therapist had informed him that legal authorities would be notified about his general threats, the therapist did not tell the chemist his statements might be used against him in court. *Id*. at 787. The court in *Ghane* reasoned the chemist could not "have knowingly or voluntarily waived his rights to assert the

psychotherapist-patient privilege" because he did not have full awareness of the right he was abandoning and the consequences of that abandonment. *Id*.

The therapist in *Chase* told the clinic patient she had a duty to warn the FBI agents he threatened, but she never told him his words could be used against him at trial. *Chase,* 340 F.3d at 979. The clinic patient also called operators at the clinic and reiterated his threats to them. *Id*. at 980. The court in *Chase* refused to recognize a dangerous patient exception, noting the committee that drafted the proposed federal testimonial privileges for Congress chose specifically not to write a "future crime" exception into the bill. *Id*. at 989. The court in *Chase* believed a dangerous patient exception was unneeded because "it usually will be the case that there is other evidence of the crimes in question." *Id*. at 991. The ultimate harm from allowing an exception, according to the court in *Chase*, would be "the end of any patient's willingness to undergo further treatment for mental health problems" after a therapist testified against them. *Id*.

In *United States v. Auster*, a retired police officer with good command of the law used his therapist to communicate threats to his worker's compensation case managers. *United States v. Auster*, 517 F.3d 312, 313 (5th Cir. 2008). The court in *Auster* chose to recognize a dangerous patient exception reasoning that because Auster had actual knowledge his threat would be conveyed, it was therefore not confidential, and he waived his right to the testimonial privilege. *Id*. at 320. The court in *Auster* said when "a patient has no reasonable expectation of confidentiality, the cost-benefit scales favor disclosure" and there should be no testimonial privilege. *Id*. at 315-16. The court in *Auster* reasoned "if the therapist's professional duty to thwart the patient's plans has not already chilled the patient's willingness to speak candidly, it is doubtful that the possibility that the therapist might also testify . . . will do so." *Id*. at 318.

Gold should not have been subject to a dangerous patient exception because she was not properly warned by her therapist. The retired officer in *Auster* was warned repeatedly that his statements would be disclosed and actively tried to game the system, and the court found his clear knowledge of the consequences of his actions waived his testimonial privilege. *Auster*, 517 F.3d at 320. However, the chemist in *Ghane* was unaware of the consequences of his waiver. *Ghane*, 673 F.3d at 787. The officer in *Auster* knew the law's contours and only communicated his threats to his therapist to avoid liability, while the clinic patient in *Chase* also communicated threats to phone operators because he was unaware of the law. *Auster*, 517 F.3d at 313; *Chase,* 340 F.3d at 980.

Applying the reasoning of the *Chase*, *Ghane* and *Auster* courts, this Court should find no dangerous patient exception should have existed in Gold's case. Like the chemist in *Ghane* who was never fully informed that his threats could be used against him in court, Gold's therapist never warned her the statements she made in therapy could be used against her in court. Unlike the officer in *Auster* who used his knowledge of the law to try and evade justice, there is no evidence Gold intended to subvert the law when making her statements to her therapist. The police in Gold's case, like the police in *Chase*, also had admissible evidence from other sources and their case did not rely solely upon the testimony of a therapist. This Court should find Gold did not waive her testimonial privilege and was not properly warned of the consequences of her actions and deny a dangerous patient exception.

II. THE SEARCH CARRIED OUT BY THE POLICE IN SAMANTHA GOLD'S CASE WAS UNREASONABLE AND VIOLATED THE FOURTH AMENDMENT.

At its inception, the Fourth Amendment sought to protect American citizens from unreasonable searches and seizures by government actors such as the type perpetrated by British law enforcement via all-encompassing general warrants that authorized searches of citizens' homes, personal belongings, and property. U.S. Const. amend. IV. Since that time, Fourth

Amendment jurisprudence has developed to adhere to the original safeguards against trespassory infringement by the government, and with the *Katz* decision, expanded those protections to cover an individual's reasonable expectations of privacy. *See Katz v. U.S.*, 389 U.S. 347 (1967).

In today's digital age, the contours of Fourth Amendment protections must accommodate the unique features of movable electronic devices with the capacity to store thousands of documents and digital items. Notably, in *Riley v. California*, the Court acknowledged the unique privacy concerns for searching electronic devices as extending "far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" because electronic devices have the capacity to hold far vast amounts of sensitive, personal information than even a search of a person's home and private hardcopy files would uncover. *Riley v. California*, 573 U.S. 373, 393 (2014). The Sixth Circuit in *Lichtenberger* cited *Riley* to bolster its narrow "duplicate search" rule for government searches of electronic devices because these devices uniquely hold vast amounts of varying types of data that have been accumulated over many years. *U.S. v. Lichtenberger,* 786 F.3d 478, 487–88 (6th Cir. 2015).

Accordingly, this Court should adopt the "duplicate search" approach followed by the Sixth and Eleventh Circuits because it best protects citizens in the digital age against "unreasonable searches and seizures" prohibited by the Fourth Amendment. Finally, this Court should reverse and remand this case because the District Court committed clear error in denying the motion to suppress items found by Officer Yap when he conducted an "unreasonable search" in violation of the Fourth Amendment.

1. Officer Yap's search violated the Fourth Amendment because he "exceeded the scope" of a previous, private search.

The Supreme Court first addressed the limits law enforcement must observe in searching items previously seized and searched by private parties some forty years ago. *Walter v. U.S.*, 447 U.S. 649 (1980); *U.S. v. Jacobsen*, 466 U.S. 109 (1984). In *Walter* and *Jacobsen*, the Courts

reasoned the law enforcement may search items already viewed by the private searcher but must not exceed the original boundaries of the search, holding that projecting illicit films not yet viewed violated the owner's Fourth Amendment right, but a field test of white substance in plain view by law enforcement fell within the bounds of Fourth Amendment. *Walter*, 447 U.S. at 649; *Jacobsen*, 466 U.S. at 109.

In *Walter*, the Court found a Fourth Amendment violation when FBI agents viewed illicit films previously unseen by the employees who conducted a private search. *Walter*, 447 U.S. at 651-52. Several befuddled business employees received erroneously delivered packages containing boxes of films, all labeled with vivid drawings depicting their pornographic nature, and then opened the packages and enclosed boxes, but did not successfully view the contents of the films before alerting the FBI. *Id*. Without a warrant, the government agents seized the packages, opened the enclosed containers, and viewed the films' contents in an effort to establish sufficient evidence to indict the producers on obscenity charges. Justice Stevens clarified the rule that issued from the plurality opinion to mean: "the government may not *exceed the scope* of the private search unless it has the right to make an independent search." *Id*. at 657.

Although the *Walter* Court acknowledged "nothing wrongful about the Government's acquisition of the packages or its examination of their contents *to the extent that they had already been examined by third parties*," the Court deemed the "unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy" because the government engaged in a warrantless search absent both the owner's consent and exigent circumstances. *Id*. at 654, 656 (emphasis added). Notably, Justice Stevens observed that the owner of the films that were intercepted by unintended recipients retained a reasonable expectation of privacy despite the previous private search because the search "merely frustrated [the owner's] expectation in part" and left an "unfrustrated portion of that expectation." *Id.* at 658–

59. In conclusion, the Court majority agreed the government must not exceed the privacy invasions already made by the private searchers, and thus ruled the evidence procured by the government's unauthorized search should be suppressed. *Id*. at 649.

In *Jacobsen*, the Court found no Fourth Amendment violation when Federal agents opened four clear, plastic bags that FedEx employees had previously discovered, but not opened, and removed a trace amount of white powder for a field drug identification test. *Jacobsen*, 466 at 111–12. Prior to the federal agents' arrival, the FedEx employees thoroughly examined the contents of a damaged cardboard box that had arrived at their processing facility, discovered four plastic bags containing white powder, and returned the unopened plastic bags to their original resting place inside a duct-taped tube. *Id.* However, despite not having a warrant, the FBI agent removed the bags from the tube, opened them, and removed a portion of the white substance to identify whether it was cocaine. *Id*. at 111.

The Court in *Jacobsen* reversed the Circuit's holding that found the government's drug field testing constituted a "significant expansion" of the earlier private search and that a warrant was required, and instead ruled the field test did not unreasonably infringe on the owner's privacy interest because the employees had already discovered it and the agents conducted the test with virtual certainty that nothing [except what had already been plainly viewed by the private searchers] else of significance was in the package." *Id*. at 112, 126. Determining whether the government exceeded the scope of a private search depends on both how much "information the government st[ood] to gain when it re-examine[d] the evidence" and the government's certainty of what the reexamination would reveal. *Id*. at 119–20.

However, Justice White's concurrence raised strong doubts about the premise that an owner's subjective expectation of privacy completely evaporated after a private searcher transgressed the boundaries without the owner's consent. *Id*. at 134 (WHITE, J., concurring in part

and concurring in the judgment). Instead, Justice White reasoned that unless the evidence or contraband was plainly visible in a container that clearly announced its contents at the end of a private search, then "the government's subsequent examination of the previously searched object necessarily constitutes an independent, governmental search that infringes Fourth Amendment privacy interests." *Id*. Furthermore, the dissenting Justices, Marshall and Brennan, agreed with Justice White's concern that this decision had "expanded the reach of the private-search doctrine far beyond its logical bounds" and articulated the proper interpretation of the rule would allow the government to visually inspect contents of a container that were plainly visible when the private party handed the container over to law enforcement. *Jacobsen*, 466 U.S. at 134.

Therefore, both *Walter* and *Jacobsen* set boundaries on the "private search doctrine" by instructing law enforcement to adhere closely to the private search and refrain from expanding its scope while *Riley* appropriately acknowledged the unique vulnerabilities inherent in searching digital material.

Applying *Walter* and *Jacobson* to the present case reveals Officer Yap chose not to obtain a warrant before exceeding the scope of Jennifer Wildaughter's search of Samantha Gold's computer's desktop. Like the FBI agents in *Walter* who exceeded the scope of the employees' previous search by opening the closed container and viewing the contents of the films, Officer Yap opened several folders and files not opened previously by Wildaughter. Additionally, Officer Yap opened every folder and document contained on the thumb drive, exposing highly sensitive records pertaining to Gold's health, academic, and financial history. But unlike the government in *Jacobsen* who had reasonable certainty the plainly visible white powder in the plastic bags was likely contraband, Officer Yap had no certainty of the kind of material he would discover when he chose to open and view the subfolders and documents not mentioned by Wildaughter.

Furthermore, despite Officer Yap's position as Head of the Digital Forensics Department at the Livingston Police Department, he failed to inquire about the extent of the earlier search completed by Samantha's suitemate or obtain a warrant before exceeding the scope of the search and examining every document on the thumb drive, regardless of label or connection to the concerns. Thus, this Court should recognize the Fourth Amendment violation that occurred when Officer Yap exceeded the scope of the previous private search inside Gold's virtual desktop and infringed on what remained of her reasonable expectation of privacy.

2. Adopting the "duplicate search" approach would conform with court precedent; guarantee critical privacy protections in the digital age; and equip police with a bright line test.

Since the *Walter* and *Jacobsen* decisions, a Circuit split has resulted in which the Sixth and Eleventh Circuits advocate a narrow, "duplicate search" approach that permits law enforcement to retrace the private searcher's virtual steps and recognizes the unique risks electronic devices pose for law enforcement's adherence to Fourth Amendment boundaries. Conversely, the Fifth and Seventh Circuits proffer a broad approach that unnecessarily risks Fourth Amendment violations by permitting the government to deviate from the previous search of the private party and search the entire electronic device, despite the reality that these devices function more like nesting dolls or portals than "closed containers."

This Court should adopt the "duplicate search" notion advocated by Sixth and Eleventh Circuits because it provides law enforcement with a bright line test for warrantless searches -- they must strictly adhere to the scope of the private search -- and reinvigorates privacy protections to adequately meet the challenges of our digital age. The Sixth Circuit in *U.S. v. Lichtenberger* found a Fourth Amendment violation and suppressed evidence obtained when the police viewed illicit photographs without "virtual certainty" those items had already been viewed by the private searcher. *U.S. v. Lichtenberger*, 786 F.3d 478, 485–86 (6th Cir. 2015); *U.S. v. Sparks*, 806 F.3d

1323, 1335 (11th Cir. 2015), overruled by *U.S. v. Ross*, 963 F.3d 1056 (11th Cir. 2020) on different grounds.

In *Lichtenberger*, the defendant's girlfriend discovered child pornography inside innocuously labeled folders on the defendant's laptop and once onsite, the police instructed the girlfriend to open several images, but neglected to verify each image corresponded to the images she had previously viewed. *Lichtenberger*, 786 F.3d at 485–86. The Sixth Circuit ruled the police officer violated the defendant's Fourth Amendment rights because the police exceeded the scope of the previous search and directed the girlfriend to open files on the computer despite their lack of "virtual certainty" of the files' contents. *Id*. at 491. The Sixth Circuit reasoned that the significant "potential privacy interests at stake" attached to searches of electronic devices further tipped the scale towards restraining the government's ability to search, hence requirements for obtaining a warrant or manifesting "virtual certainty" of the contents about to be uncovered. *Id*. at 487-88.

In *US v. Sparks*, a case which was later overruled on different grounds, the Eleventh Circuit found a police detective exceeded the scope of the private search when he viewed a video that had not been played. *U.S. v. Sparks*, 806 F.3d 1323, 1335 (11th Cir. 2015), overruled by *U.S. v. Ross*, 963 F.3d 1056 (11th Cir. 2020) on different grounds. There, a Wal-Mart employee discovered a lost phone that contained illicit pictures of children and shared the phone with her fiancé who viewed only one of the two videos located in the same folder, but the detective played the video not previously viewed. *Sparks*, 806 F.3d at 1335. The Eleventh Circuit reasoned that a private search removes Fourth Amendment protection only from the discrete items previously viewed, however the unexposed information, such as a video file located inside a folder, retains protection against warrantless searches. *Id*. at 1336. Furthermore, the court in *Sparks* harmonized its reasoning with the *Riley* decision by recognizing the "tremendous storage capacity of cell phones and the broad

range of types of information [they] generally contain" necessitated search warrants for cell phones that specified which files fell within the searchable area. *Id*.

Thus, *Sparks* and *Lichtenburg* demonstrate how the narrow approach best protects privacy interests because it mandates a "duplicate search" to ensure the government does not violate the Fourth Amendment by "exceed[ing] the scope" of the private search. Moreover, the "duplicate search" approach to electronic devices provides a clear boundary for law enforcement to follow and incentivizes transparency in the investigative process. Of course, adhering to a "duplicate search" does not prevent police from applying for a warrant to expand the search parameters if applicable.

Applying the "duplicate search" approach to Samantha Gold's petition reveals a clear violation by Officer Yap because did understand the scope of Wildaughter's private search, making whatever search he did almost certain to violate the bounds of the previous search. Specifically, Officer Yap's warrantless search covered at least five items not previously viewed by Wildaughter: one folder labeled "confirmations" and four sensitive personal documents having no "plain view" relation to the allegations at issue, "Health Insurance ID Card," "Exam4," "budget," and the "to-do list."

As a result of his vague understanding of which folders had already been trespassed by Wildaughter, Officer Yap exceeded the scope significantly by opening folders and documents that contained items he could not anticipate with "virtual certainty." Similar to the *Lichtenberger* officer who never verified which images had already been viewed, Officer Yap neglected to confirm which files and folders had already been trespassed by Samantha's suite mate in the private search. In fact, Officer Yap, who functioned as Livingston Police's Head of Digital Forensics, failed to ask Wildaughter any follow-up questions after she listed specific folders she

had opened or to request that Wildaughter retrace her virtual path within the device so he could replicate the search on his own.

Furthermore, Officer Yap's thorough search of every item, including several folders and documents not previously viewed on the storage device, dwarfed even the scope of the *Sparks* officer's search, which the court held violated the Fourth Amendment when he merely viewed a yet unplayed video located in the same folder as files already viewed. Moreover, Officer Yap's search methodically covered the entirety of a storage device, whereas the *Sparks* officer trespassed on one file stored on a folder inside a cell phone. Here, a thumb drive's storage capacity could easily surpass the capacity of a modern cell phone, which the court in *Riley* observed possesses "tremendous capacity" to hold "the privacies of life. Because Officer Yap did not even attempt to limit himself to the scope of the private search and instead examined every item and folder on the thumb drive despite not knowing which items Wildaughter had opened, this Court should find Gold's Fourth Amendment rights were violated.

3. Applying the "closed container" approach to digital devices via *Riley*'s rationale reaffirms police violated Samantha Gold's Fourth Amendment rights in conducting an expansive, warrantless search of every digital subcontainer on her desktop.

Importantly, the *Riley* Court acknowledged privacy protections applied to individual items within the defendant's phone, rather than only to the device itself. Applying that reasoning to the "closed container" approach implies a change in paradigm; we must treat electronic devices less like brown-paper packages tied up with string and more like expansive digital containers that can itself hold numerous other digital containers in the form of folders. When applied appropriately to electronic storage devices, the "closed container" approach as demonstrated by the Fifth Circuit i and the Seventh Circuit emphasizes the need for police to have "substantial certainty" before opening a closed container, such as a folder or file stored on a thumb drive.

In *U.S. v. Runyan*, the Fifth Circuit held portions of a pre-warrant search violated the Fourth Amendment because the police opened floppy disks without "substantial certainty that all contained child pornography based on knowledge obtained from the private searchers, information in plain view, or their own expertise." *U.S. v. Runyan*, 275 F.3d 449, 452, 464 (5th Cir. 2001). An ex-wife took myriad items from the defendant's home, including a desktop computer and floppy disks, and delivered the items, even those devices she had not opened, to the police for examination. *Id.* at 453. The Court agreed with the defendant's accusation that the government "exceed[ed] the scope" of the private search when police opened closed containers (i.e. floppy disks) not previously opened by the private searchers absent substantial certainty of what they would find. *Id.* at 463-64.

However, the court simultaneously approved the police's examination of previously unexamined items within the device and signaled reasoning that acknowledged privacy protections for physical devices, but not for subcontainers within the device such as folders or files. *U.S. v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001); See, *U.S. v. Simpson*, 904 F.2d 607 (11th Cir. 1990)). In contrast, recent scholarship and jurisprudence suggests the *Riley* Court's privacy rationale "appl[ies] with equal force to warrantless searches of all files and folders on a digital device, not just to the government's initial intrusion." Michael Mestitz, *Unpacking Digital Containers: Extending Riley's Reasoning to Digital Files and Subfolders*, 69 Stan. L. Rev. 321 (2017).

Ten years post-Runyan, the Seventh Circuit in *Rann v. Atchison* found no Fourth Amendment violation when the police were "substantially certain" they would encounter child pornography during their expansive search of digital storage devices provided by the victim and the victim's mother. *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012). After S.R. reported to police that she had been sexually assaulted by her biological father, S.R. and her mother each delivered electronic storage devices containing pornographic images to law enforcement. *Id*. at 834. Though

the police may have viewed images previously not opened on the device, the court held the government's search did not "exceed the scope" because S.R. and her mother delivered the devices expressly to serve as evidence of the allegations, which caused the police to be "substantially certain" the devices contained child pornography. *Id.* at 837-38 (7th Cir. 2012); *See Runyan,* 275 F.3d at 463.

Applying the "closed container" approach in light of the *Riley* decision highlights the importance of privacy protections for virtual files, which function as digital subcontainers, stored inside physical devices. Yet again, the "closed container" approach reaffirms the illegality of Officer Yap's expansive search of a device that contained numerous digital subcontainers in the form of folders, subfolders, documents, and photographs from Gold's desktop. Like the *Runyan* policemen who opened electronic storage devices not viewed by the private searchers, Officer Yap opened folders and documents despite lacking certainty of what he would find. But unlike the *Rann* policemen who had "substantial certainty" based on the testimony of the victim and her mother who delivered the evidence that each of the images depicted illicit sexual activity, Officer Yap lacked "substantial certainty" based on Wildaughter's rushed search, her limited familiarity with the items she secretly copied from Gold's computer, and his own failure to inquire about the parameters of the private search despite his ostensible expertise as Head of Digital Forensics.

In summary, both the "duplicate search" and "closed container" approaches, properly understood through the *Riley* rationale, demonstrate that Officer Yap violated Samantha Gold's Fourth Amendment rights by conducting an unreasonable search of the storage device that replicated Gold's computer desktop. Officer Yap perpetrated this unreasonable, warrantless search by viewing every item that was copied to the storage device, including at least five previously unopened files, despite lacking "substantial certainty" of the items he would encounter.

III. THIS COURT SHOULD ORDER A NEW TRIAL BECAUSE THE PROSECUTION VIOLATED GOLD'S DUE PROCESS RIGHTS WHEN IT INTENTIONALLY SUPPRESSED FBI REPORTS THAT REVEALED TWO POTENTIAL SUSPECTS IN DRISCOLL'S MURDER.

In *Brady v. Maryland*, the Supreme Court reinforced the purpose of the criminal justice system when it repeated the phrase inscribed on the Department of Justice's edifice: "The United States wins its point whenever justice is done to its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Though fifty-eight years have passed since that seminal case, its rationale reverberates today for petitioner Samantha Gold who seeks relief from due process violations she suffered when the prosecution suppressed material, even if inadmissible, evidence favorable to her case. *Brady*, 373 U.S. at 87.

In *Brady*, after a defendant had been tried, convicted, and sentenced, he discovered the government withheld a key piece of material evidence, a statement from the defendant's companion where he admitted the killing. *Brady*, 373 U.S. at 84. The Court in *Brady* held suppression of this confession violated the protections guaranteed by the Due Process Clause of the Fourteenth Amendment, regardless of the prosecutions' good or bad faith, and thus justified a new trial. *Id.* at 87. The Court in *Brady* reasoned that "society wins not only when the guilty are convicted but when criminal trials are fair," and acknowledged the fundamental unfairness of a prosecutor who also architects the trial. *Id.* at 87-88.

Likewise, in *Giglio v. U.S.*, the Supreme Court found for Petitioner and ordered a new trial because the prosecutor violated a defendant's due process by not fulfilling his duty to present all material evidence to the jury. *Giglio v. U.S.*, 405 U.S. 150, 150 (1972). After the trial had concluded, defense counsel learned the Government had suppressed evidence about a leniency agreement they made with a key witness in return for his testimony. *Id.* at 150-51. Moreover, the Court in *Giglio* affirmed that evidence qualifies as material if there is a "reasonable likelihood" the

evidence would affect the jury's judgment and does not foreclose the possibility that inadmissible evidence could be material and form the basis for a *Brady* claim, if it leads directly to admissible evidence. *Id*. at 154.

In *Giglio*, the Court recognized the suppressed evidence regarding defendant's prior deal with the prosecution was material because disclosure would have negatively affected Taliento's credibility and the jury's judgment. *Id*. at 154–55. Finally, the reasoning put forth by the Courts in *Giglio* and *Brady* affirm that suppression of inadmissible evidence can nevertheless trigger a *Brady* violation if it would lead to admissible evidence, which in turn would create a "reasonable probability" of an altered outcome. *Brady*, 373 U.S. at 87; *Giglio,* 405 U.S. at 154.

Applying the reasoning of the Courts in *Brady* and *Giglio* to Samantha Gold's case, the prosecution failed in its responsibility to disclose evidence of the FBI reports and impartially evaluate the evidence's materiality, or possible effect on the outcome. Although the prosecution has argued they withheld the two statements from the accused, Samantha Gold, because the statements contained hearsay and were thus inadmissible, the reasoning from the *Giglio* Court debunks that justification because materiality depends on whether there is a "reasonable likelihood" disclosure of the evidence would alter the jury's judgment.

Regardless of inadmissibility, the Court in *Brady* instructed the prosecution to refrain from acting in the shoes of the court or defense, and rather focus on fulfilling their affirmative duty to disclose all known, favorable, and material evidence. Here, the FBI reports of their interviews with Chase Caplow, a HerbImmunity colleague who knew the victim, and the anonymous caller who had familiarity with at least one of Driscoll's colleagues participating in HerbImmunity, should have been disclosed to defense counsel. If disclosed, the reports would likely have resulted in further investigation and admissible evidence in the form of depositions and trial testimony from

Caplow, the anonymous caller if an investigation revealed their identity, and the two suspects named in the interviews, Martin Brodie and Belinda Stevens.

1. The prosecution failed in its obligation to disclose evidence because disclosure would have created a reasonable probability of a different trial outcome, and its suppression undermines confidence in the outcome of the trial.

The Supreme Court in *Kyles v. Whitley* further defined the materiality standard required for triggering a *Brady* violation and the affirmative duty of the government to disclose evidence favorable to the accused. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). Evidence qualifies as "material" under *Brady* when the prosecution's suppression "undermines confidence in the outcome of the trial" or when disclosure of the evidence would have a "reasonable probability" of a different outcome. *Id*. at 434-35. The Court in *Kyles* explained that a *Brady* claim might arise where the "government failed to volunteer exculpatory evidence never requested" because the Court held in *U.S. v. Agurs* that a prosecutor has a "constitutional duty" to disclose exculpatory evidence if the omission is significant enough "to result in the denial of the defendant's right to a fair trial." *Kyles*, 514 U.S. at 433; *U.S. v. Agurs*, 427 U.S. 97, 108 (1976), holding modified by *U.S. v. Bagley*, 473 U.S. 667 (1985).

Finally, the Court in *Kyles* delineated the "inescapable" responsibility the prosecution bears for disclosing any evidence that is known, favorable, and material. *Kyles*, 514 U.S. at 437–38. To fulfill that duty, the prosecution must fairly "gauge the likely net effect of all such evidence and make disclosure" when a "reasonable probability" exists that the evidence could alter the outcome, as well as proactively learn about favorable evidence known to other government advocates or related parties such as the police. *Id*.

Applying *Kyles* to the present case demonstrates the prosecution failed to uphold their constitutional duty to disclose evidence if its omission could result in denying the defendant a fair

trial, even when the defense did not specifically request the evidence. Here, the prosecution's suppression of the two FBI reports naming two alternative murder suspects cast doubt on the fairness of Gold's trial. Further, the prosecution attempted to evade their responsibility to disclose these reports even though the reports were known to prosecution as the FBI produced them, favorable to Gold's defense in presenting alternative suspects, one of whom possessed a specific motive to harm Driscoll and were capable of undermining confidence in the impartiality of Gold's trial. Finally, the prosecution leveraged their position to act as the gatekeeper of evidence, which is rightfully the court's domain, in suppressing exculpatory evidence for Gold; the paradigmatic scenario the Court in *Brady* sought to prevent.

2. This Court should adopt the Majority Approach, which shelters inadmissible evidence under Brady, because it aligns with Supreme Court precedent, protects due process for defendants like Gold, and disincentivizes prosecutorial misconduct.

In the same year the Supreme Court decided *Kyles*, their holding in *Wood v. Bartholomew* determined that a polygraph examination, which was inadmissible under state law, "could have had no direct effect on the outcome of trial" and thus, did not qualify as "evidence" susceptible to a Brady violation. *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995). The Court in *Wood* cited the earlier *Kyles* decision when it reasoned that the "material" standard under *Brady* is triggered when there is "reasonable probability" that disclosing the evidence at trial would have resulted in a different outcome. *Id*. at 5. This decision resulted in a Circuit split over whether inadmissible evidence may form the basis of a *Brady* violation claim. Although the Fourth, Seventh, and Eighth Circuits strictly interpret *Wood* as excluding inadmissible evidence from *Brady* violation, the majority of Circuits, including the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh, recognizes *Brady's* application to inadmissible evidence when it would lead directly to admissible evidence or to a "reasonable probability" of an altered trial outcome. *Compare Dennis v. Sec., Pennsylvania Dept.*

of Corrections, 834 F.3d 263 (3d Cir. 2016) *with U.S. v. Morales*, 746 F.3d 310 (7th Cir. 2014); *see generally*, § 24.3(b)Due process duty to disclose evidence favorable to the accused, 6 Crim. Proc. § 24.3(b) (4th ed.).

In *Dennis v. Sec., Pennsylvania Dept. of Corrections*, the Third Circuit held, in part, the Pennsylvania Supreme Court acted contrary to clearly established federal law in appending an admissibility requirement onto *Brady*. *Dennis*, 834 F.3d at 263. In *Dennis*, the prosecution suppressed three pieces of exculpatory and impeachment evidence, including evidence that someone else committed the murder, nevertheless, the Pennsylvania Supreme Court held this suppression did not violate *Brady* because the defendant could not prove admissibility and materiality. *Id*. at 275. The Third Circuit affirmed the District Court's rejection of the notion that admissibility is a precondition to claiming a *Brady* violation because "the United States Supreme Court has never stated such a rule and that most circuit courts, including the Third Circuit, have held to the contrary." *Id*. at 279. The Court in *Dennis* noted that the Court in *Wood* conducted a *Brady* analysis even after it acknowledged the polygraph results were inadmissible. *Id*. at 279.

Also, the Third Circuit affirmed the lower court's reasoning about the materiality of suppressed documents because they had "internal markers of credibility" such as accurate descriptions of the victim and alleged perpetrators, which "could have proved vital to the defense and could have been used to impeach the police investigation or provide a defense that another person committed the murder." *Id*. at 279. In addition, the Court in *Dennis* pointed out the leads the police followed demonstrate the government's belief that the information is material, and thus should qualify for disclosure to the defense. *Id.* at 280.

Applying *Dennis* to Samantha Gold's case further confirms the impropriety of the prosecution's choice to withhold evidence from her counsel and the probable negative effect that suppression had on her case. Like the lead in *Dennis* that the police investigated, if Chase

Caplow's interview was material enough for FBI Special Agent Baer to investigate, then it should have been disclosed. In addition, the interviews conducted by the FBI revealed specific facts about the potential suspects, including their possible motives and for Brodie, a violent propensity, that would likely only be known by acquaintances. In fact, Caplow spoke about a phone call with Driscoll in the weeks leading up to her death where she admitted that she owed money to the Brodie suspect. Taken together, this information was critical for the defense and could have led to admissible evidence. In conclusion, the prosecution unjustifiably suppressed these FBI reports, which were known, favorable to Gold, and material because their disclosure has undermined confidence in the outcome of the trial. For these reasons, this Court should find Samantha Gold's due process rights were violated and order a new trial based on the government's Brady violations.

CONCLUSION

For the foregoing reasons, Petitioner, Ms. Samantha Gold, respectfully requests that this Court reverse the Fourteenth Circuit Court of Appeals and remand this case to the District Court.

Respectfully submitted,

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