No. 23-695

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team 22

QUESTIONS PRESENTED

I. Whether the defendant has a reasonable expectation of privacy when she used a false name for the sole purpose of receiving packages containing a deadly new drug.

II. Whether recorded voicemail statements offered by Defendant to show a then-existing mental state can be admitted under Rule 803(3) of the Federal Rules of Evidence even though she had ample time and a motive to fabricate her state of mind to mislead the jury.

III. Whether the Government's use of Defendant's prior petit larceny conviction solely for impeachment purposes was proper when the conviction fell within the purview Rule 609(a)(2) of the Federal Rules of Evidence because it involved deceitful conduct and the potentially prejudicial effect on the jury was immaterial.

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STATEMENT OF THE FACTS

Joralemon is a predominantly low-income and high crime area that has been ravaged by a drug epidemic in recent years. R. 28. To make matters worse, the city's streets have been infiltrated by a dangerous and lethal concoction of a veterinary horse tranquilizer called xylazine, and the deadly opioid known as fentanyl. R. 7. This combination results in a potent and deadly new street drug, resulting in an intense and quickly fading high and leaving users craving it more immediately. R. 7. Commonly used treatments to battle drug overdoses are also ineffective against it. R. 7. The Joralemon Police Department and local Drug Enforcement Administration officials have faced intense criticism from their citizens as they have tried to mitigate the effects of this crisis; one being that there were 35 percent more deadly overdoses in 2022 compared to the year prior. R. 7. They have employed their resources to crack down on the suppliers and distributors of this drug. R. 7.

Robert Raghavan, a veteran DEA agent who has served Joralemon fifteen years, made it his mission to crack down on the distributors of this deadly drug. R. 28. On February 12, 2022, Agent Raghavan was investigating the death of a Joralemon citizen due to a fentanyl overdose. R. 29. Near the victim's body were partially used syringes containing the deadly new concoction. R. 29. There was also a package from a company called Holistic Horse Care. R. 29. Agent Raghavan believed that this company could be supplying the deadly drug and alerted the post office. R. 29.

On February 14, 2022, just two days after the fatal overdose, a post office official contacted Agent Raghavan to notify him that there were two packages from Holistic Horse Care. R. 30. These packages were addressed to Jocelyn Meyer. R. 30. They were meant for a P.O. Box addressed to the same name. R. 30. After obtaining a search warrant, Agent Raghavan retrieved

the packages from the P.O Box at the post office and took them to open and test at a local testing facility. R. 31. Agent Raghavan discovered that the packages had hundreds of grams of the xylazine-fentanyl mixture. R. 32. Back at the post office, Defendant opened the P.O. Box in question to discover her packages containing the xylazine were missing. R.68. When she went to the counter to inquire, she learned they had been flagged by authorities as potentially containing illegal substances, including fentanyl. R. 68. She was advised to check back tomorrow regarding their whereabouts. R. 68. Defendant subsequently called Angela Millwood, with whom she ordered the xylazine, to discuss the missing packages. R. 68. Millwood did not answer, so Defendant left 2 voicemails. R. 68. The first was sent at 1:32pm, and the second was sent 45 minutes later. R.68. In the voicemails, Defendant seemingly expressed concern that she had been unknowingly dragged into illicit activity. R.68.

The next morning, Agent Raghavan sealed the packages and directed the post office official to leave a slip for Jocelyn Meyer in her P.O. Box, notifying her to retrieve the packages from the counter. 32-33. Agent Raghavan monitored the security cameras in the post office for about an hour and a half. R. 32. Eventually, a woman approached the P.O. Box in question, removed the slip, and walked to the counter. R. 33. The post office official asked the woman if the packages belonged to her, to which she answered in the affirmative. R. 33. As the woman was leaving with the packages in hand, she had a brief friendly exchange with a fellow Joralemon resident. R. 33. When inquired by Agent Raghavan, the man stated that he knew the woman from their time together in college, and that her true name was Franny Fenty. R. 33. Defendant was then arrested. R. 34. Upon further investigation, Agent Raghavan discovered that Defendant had used the name Jocelyn Meyer to publish a few short stories in years prior. R. 33. Agent Raghavan also found from LinkedIn that Defendant had correspondence with Angela Millwood, her high school classmate who was previously investigated for drug dealing. R. 34.

Defendant was also aware of Millwood's previous history of drug possession and distribution prior to this correspondence. R. 55.

Defendant now claims that she acted only as an intermediary and was unaware that the packages contained the deadly drug combination. R. 55. She believed she was only buying the horse tranquilizer for Millwood so that Millwood could administer it to horses at her job despite Defendant and Millwood knowing that Millwood could be fired for this. Still, Defendant contends she was duped into buying what she thought was horse tranquilizer despite reading an article in The Joralemon Times highlighting the new horse tranquilizer and fentanyl mixture on its front page a few days prior.

The Fourteenth Circuit below properly denied the Defendant's motion to suppress the contents of the packages containing deadly narcotics. R. 17. It also properly held that Defendant's prior conviction under Boerum Penal Code Section 155.25 satisfied the requirements of Rule 809(a)(2) and that Defendant's voicemails should not be admitted into evidence. R. 26; R. 52.

SUMMARY OF THE ARGUMENT

Joralemon has always been at the forefront of the illegal drug trade. For its citizens, drugs have become commonplace. However, with the emergence of a deadly new drug mixture, Joralemon's citizens have been placed in heightened danger. This is further evidenced by the unfortunate rise in recent drug overdoses that can be attributed to this new drug. Knowing of the recent rise in fentanyl-mixed horse tranquilizer and knowing of Millwood's drug history, Defendant ordered horse tranquilizer by using a false name and a P.O. Box opened just 2 weeks prior to the delivery, that was registered under this same name. These were the only packages that Defendant addressed to her false name. Defendant has no use of horse tranquilizer and has never ordered the product before. Nonetheless, she claims that she was duped into buying horse

tranquilizer while having recent knowledge of horse tranquilizer being a main ingredient in the deadly new drug. This Court should affirm the holding of the Court of Appeals for the Fourteenth Circuit and hold Defendant accountable for her crime.

First, Defendant cannot have a reasonable expectation of privacy when using the mail to receive packages containing the deadly drug. Courts have held that when a defendant does not place their true name on the packages, there cannot be a reasonable expectation of privacy absent some indicia of ownership or interest in the package. Here, there was none. Defendant also cannot argue that she had a possessory interest in the contents of the packages. Even if Defendant placed her P.O Box on the packages, this alone does not create a reasonable expectation of privacy. Defendant is not publicly known by the false name she placed on the packages, so it is not as if the false name is Defendant's alter ego. This could create a privacy interest. Nonetheless, one cannot use this alter ego for the sole purpose of committing a crime, which is what Defendant did here. She had only used the false name to publish two short stories years ago and she only recently used the false name to receive the drug packages.

Second, Defendant's voicemail recordings to Angela Millwood do not demonstrate a then-existing mental state because she had ample time to reflect on how craft a self-serving message to deceive listeners into believing she was unaware of the contents within the packages. She had plenty of time from the moment she realized the packages were missing to the moment she called Angela Millwood to contemplate how to paint herself in an innocent light, thus removing the spontaneity element required by Rule 803(3). Additionally, her awareness that she was likely being investigated increases the likelihood that the messages were fabricated. It would therefore be an error for this Court to reward Defendant for her dishonesty by deeming these messages admissible under Rule 803(3).

Lastly, Defendant's impeachment for her prior petit larceny conviction was proper

pursuant to Rule 609(a)(2) because the petit larceny was a crime of deceit. By her own admission, Defendant's intention was to capitalize on the victim's distraction to steal her purse on a dare from a friend. Since this qualifies as a "dishonest act" the petit larceny conviction fell within the purview of Rule 609(a)(2), and therefore the district court had no discretion over its admission. Any risk of the jury being prejudiced by this conviction was quelled by the court's clear limiting instruction given to jurors, which courts must presume will be followed.

ARGUMENT

I. DEFENDANT CANNOT HAVE A REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT WHEN USING THE MAIL TO RECEIVE PACKAGES CONTAINING NARCOTICS.

The incriminating evidence that law enforcement gathered by searching the Defendant's packages containing lethal narcotics should not be suppressed because the search was constitutional. *See Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961) (holding evidence is inadmissible if in violation of the Fourth Amendment). When the government possesses a valid search warrant to search private property, that search is reasonable and thus constitutional. *See Camara v. Municipal Ct. of City and Cnty of San Francisco*, 387 U.S. 523, 528-28 (1967). Nonetheless, even if the government does not possess a valid search warrant, a search is still constitutional if an individual does not possess a reasonable expectation of privacy over the searched private property. *See Katz v. United States*, 389 U.S. 347, 355-56 (1967); *see also Rakas v. Illinois*, 439 U.S. 128, 143 (1978). This is because a party lacks Fourth Amendment standing if "[their] reasonable expectation of privacy has not been infringed." *United States v. Taketa*, 923 F.2d 665, 669 (9th Cir. 1991).

Here, Defendant cannot have a reasonable expectation of privacy in the packages containing narcotics. First, law enforcement possessed a valid search warrant and so the search of the packages is reasonable and therefore constitutional. R. 31. Second, Defendant's true name

was not present on the package nor was the P.O. Box registered under Defendant's true name. R. 31. So, there was nothing on the packages that signaled to law enforcement that Defendant was the true recipient of the packages. Neither was she known by the false name that she used to receive the packages. *See* R. 33. Lastly, Defendant used the false name to commit a crime by transporting narcotics via mail. *See* R. 31-32. Therefore, Defendant cannot possess a reasonable expectation of privacy in the packages.

A. Defendant Cannot Have A Reasonable Expectation Of Privacy When The Packages Were Not Addressed To Her And There Was No Evidence Of Her Having Any Interest or Control Over The Packages Or Their Contents.

An individual cannot have a reasonable expectation of privacy concerning a package if their true name is not listed anywhere on the package. *See United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021); *see also United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993) (holding there was no reasonable expectation of privacy in package containing narcotics when defendant was neither the sender nor the addressee); *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988) ("[b]ecause [defendant] was neither the sender nor the addressee of the package . . . [he] has no privacy in it . . . ."). This is true unless the defendant can show some connection to the package, or the package is addressed to the defendant's established alias. *Rose*, 3 F.4th at 728; *United States v. Stokes*, 829 F.3d 47, 52 (2016) (noting that defendant did not show a connection to the packages when he was not listed as the sender or the recipient).

In *Rose*, two packages containing cocaine were addressed to a deceased individual and not the defendant although the defendant was the true intended recipient of the packages. *Rose*, 3 F.4th at 724. Inside a FedEx facility, law enforcement was alerted by the suspicious nature of the package. *Id.* A FedEx official then opened the package, revealing the narcotics inside. *Id.* at 725. Law enforcement later conducted a controlled delivery of the packages, which revealed that the defendant was the intendent recipient of the packages. *Id.* In court, the defendant argued that

because he was the intended recipient of the two packages, he had a reasonable expectation of privacy in those packages. *Id.* at 727. The Fourth Circuit held that to establish a reasonable expectation of privacy in property not in the defendant's name or possession at the time of the search, a defendant must identify evidence objectively establishing his or her ownership, possession, or control of the property at issue. *Id.* at 727. Specifically, the Fourth Circuit examined whether the packages signaled anything to law enforcement that the defendant had a protected interest in the packages or exercised control or ownership over the packages. *Id.* at 729. This was not the case, and so the defendant had no reasonable expectation of privacy within the packages. *Id.* at 731-32.

Here, Defendant cannot have a reasonable expectation of privacy in the package containing a lethal concoction of horse tranquilizer and fentanyl. *See* R. 32. Like the defendant in *Rose*, Defendant here cannot identify evidence objectively establishing her ownership, possession, or control of the packages. *See Rose*, 3 F.4th at 729. There was nothing on the packages that signaled to Agent Raghavan that Defendant was their true owner or that Defendant exercised control over the packages. R. 31-32. Defendant, like the defendant in *Rose*, used a fictitious name when ordering them. R. 12; *Rose*, 3 F.4th at 724. The P.O. Box that Defendant used was also registered under the same fictitious name. R. 31. This would lead a reasonable person or a law enforcement officer to believe that the packages belonged to an individual named Jocelyn Meyer rather than Defendant, Franny. *See* R. 31-32. Although there are packages in the P.O. Box that were addressed to Defendant's true name, it is commonplace for packages to be misaddressed or misplaced. R. 12; R. 31. Therefore, Defendant cannot have a reasonable expectation of privacy regarding the packages since there was no indication whatsoever that she was the true owner.

Although Defendant can argue that she had a possessory or ownership interest in the

contents of the two packages, courts have denied this proposition. *See United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984). In *Givens*, the defendants argued that they had a reasonable expectation of privacy in the cocaine that was hidden inside of a mailed package. *Id.* at 340. The package was not addressed to any of the defendants, but like *Rose*, the defendants were the intended recipients. *Id.*; *see Rose*, 3 F.4th at 724. The First Circuit held that the defendants did not have a reasonable expectation of privacy in the contents of the packages since there was nothing that law enforcement could use to connect the defendants to the packages. *Givens*, 733 F.2d at 733-34. The court noted that by addressing the packages to an intermediary instead of the defendants, the "defendants . . . relinquished control over the area in which the drugs they claim[ed] an interest in were secreted." *Id.* at 342.

Similarly, here, Defendant cannot claim a possessory or ownership interest in the fentanyl-laced horse tranquilizer from Holistic Horse Care. Like the defendants in *Givens*, Defendant also "relinquished control over the area in which the drugs they claimed an interest in were secreted." *Id.* So, Defendant cannot claim a reasonable expectation of privacy since there was no indication the packages belonged to her, and she cannot claim an ownership interest in the narcotics hidden inside the package. *See* R. 30-31.

B. Defendant Cannot Have A Reasonable Expectation Of Privacy Regarding The Packages Addressed To Her P.O. Box Because An Address Alone Or A Mailbox Registered Under A False Name Cannot Create A Privacy Interest.

Defendant could argue that although she placed a fictitious name on the packages, she still has a reasonable expectation of privacy in them because the packages were addressed to her correct address; i.e. the P.O. Box. However, the First Circuit has ruled that an address alone cannot create a reasonable expectation of privacy in a package. *See United States v. Stokes*, 829 F.3d 47, 53 (1st Cir. 2016). This holds true even if the address on the packages is correct.

In *Stokes*, the defendant sent fraudulent invoices to numerous businesses. *Id.* at 49. Each

of the invoices were addressed in a manner where they appeared to have been sent by a trade organization demanding membership dues. *See id.* Additionally, the defendant's P.O. Box, which was rightfully registered under his name, was searched. *See id.* at 52. The First Circuit determined that because the defendant did not have any information about the accessibility of the P.O. Box to post office workers or any other details regarding the mailroom's layout, the defendant could not possess a reasonable expectation of privacy in the P.O. Box. *See id.* at 52. The First Circuit also held that the defendant could not have a reasonable expectation of privacy even when he placed his true personal addresses instead of the P.O. Box on the mail. *Id.* at 53.

Here, Defendant cannot have a reasonable expectation of privacy regarding the packages addressed to her P.O. Box. First, unlike the P.O. Box in *Stokes*, which was registered under Defendant's name, the defendant's P.O. Box was registered under a false name. *Id.* at 52; *see* 30-31. Even if the P.O. Box was registered under her name, as the First Circuit determined in *Stokes*, an address alone cannot create a reasonable expectation of privacy. Stokes, 829 F.3d at 53. So, Defendant here cannot solely rely on the P.O. Box to create a privacy interest in the packages.

C. Defendant Cannot Have A Reasonable Expectation Of Privacy Because The False Name That The Defendant Used To Receive Narcotics Is Not Her "Alter Ego."

The Fifth and Ninth Circuits have both held that when a defendant is using a pseudonym, alias, or a name that they are known by, there can be a privacy expectation in a package addressed under that name. *See United States v. Richards*, 638 F.2d 765, 772-73 (5th Cir. 1981); *see also United States v. Lozano*, 623 F.3d 1055, 1064 (9th Cir. 2010). This is because a defendant's mail is addressed to essentially their "alter ego" and they have some connection to this alter ego. *Lozano*, 623 F.3d at 1064. In *United States v. Richards*, the defendant was the owner of the company that was listed as the addressee. *Richards*, 638 F.2d at 770. "The owner of a company, as its agent, can send and receive mail on its behalf under the law." *Lozano*, 623 F.3d

at 1064. So, it was held that the owner of the store would have a reasonable expectation of privacy in mail that was addressed to his business. *Id.* In *United States v. Villarreal*, the defendant went by the name that was written on the package because at least one witness testified at trial that he knew the defendant only by that name, not the defendant's true name. *United States v. Villarreal*, 963 F.2d 770, 775 (5th Cir. 1992). Nonetheless, in *Lozano*, the Ninth Circuit held that because the defendant was not identified with the alias, the defendant's alias was not publicly established. *Lozano*, 963 F.2d at 775. Therefore, the defendant did not have a reasonable expectation of privacy in mail addressed to that alias. *Id.*

Here, Defendant does not have any connection to her alias excluding the fact that she used it to publish two short stories several years ago. *See* R. 4. She is not publicly known by the alias, as evidenced by her acquaintance calling her by her true name at the post office. *See* R. 33. Even the post office official recognized her by her true name, not her alias. *See* R. 33. Apart from the short stories, the public does not know her from her alias. So, it can hardly be said that Jocelyn Meyer was Defendant's alter ego. Therefore, even when taking the Fifth and Ninth Circuits' test into consideration, Defendant still cannot have a reasonable expectation of privacy in the packages containing a lethal concoction of fentanyl and horse tranquilizer because the packages were not addressed to her alter ego.

D. Even If The False Name Is The Defendant's "Alter Ego," Defendant Still Cannot Have A Reasonable Expectation Of Privacy Because She Used The False Name To Commit A Crime.

Nonetheless, even if the Court were to hold that Jocelyn Meyer was Defendant's alias and alter ego, that finding would not make a difference in the matter since one cannot use an alias for the sole purpose of committing a crime. Both the Fifth and the Eight Circuit have noted that a defendant cannot have a legitimate expectation of privacy in mail addressed to their public alias when that alias was used solely in furtherance of a criminal scheme. *United States v. Daniel*, 982

F.2d 146, 149 (5th Cir. 1993); *United States v. Lewis*, 738 F.2d 916, 920 (9th Cir. 1984). Lastly, in *Jacobsen*, the Supreme Court held that a "wrongful" interest cannot give rise to a legitimate expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109 (1984).

Here, Defendant is clearly using the alias solely to receive the fentanyl-laced horse tranquilizer. This is evidenced by her packages being shipped under her fictitious name only days after she registered the P.O. Box under the same name. *See* R.31. Defendant also testified that she had only used the fictitious name once when she published the short stories in the years prior. R. 13. Also, the fact that Defendant had other packages addressed to her true name and only the packages by Holistic Horse Care addressed to her alias further proves that she was only using her alias to cleverly divert law enforcement. *See* R. 31. Therefore, Defendant still cannot have a reasonable expectation of privacy even if the alias is her alter ego since she used the alias solely to commit a crime.

II. DEFENDANT'S RECORDED VOICEMAIL STATEMENTS ARE NOT ADMISSIBLE AS HEARSAY EXCEPTIONS UNDER RULE 803(3) OF THE FEDERAL RULES OF EVIDENCE.

As Defendant had ample time to reflect prior to sending both voicemail messages to Angela Millwood, they do not reflect a then-existing state of mind – such as motive, intent, or plan – as required by Rule 803. Fed. R. Evid. 803(3). In evidence law, conventional wisdom holds that statements about an event made while or *soon after* the declarant perceives that event are due great credence because "substantial contemporaneity of [the] event and statement negate the likelihood of deliberate or conscious misrepresentation." *Navarette v. California*, 572 U.S. 393, 399-400 (2014) (quoting Fed. R. Evid. 803(1) advisory committee's notes to 1972 proposed rules) (emphasis added). Under this rationale, statements that would otherwise be deemed inadmissible hearsay have been admitted on those grounds. *Id.* However, the fact that a statement falls within one of the exceptions described by Rule 803 does not mean that the statement is

automatically admissible. *United States v. Gupta*, 747 F.3d 111, 132 (2d Cir. 2014). It simply means that the statement – assuming the criteria specified in the exception is met – is "not excluded by the rule against hearsay." *Id.*; Fed. R. Evid. 803, 804(b).

A. Defendant's Recorded Voicemail Statements Do Not Indicate A Then-Existing Mental State Because Defendant Had Ample Time To Reflect And A Motive To Fabricate Them.

In determining whether statements indicating the declarant's state of mind are admissible under Fed. R. Evid. 803(3), three requirements must be satisfied: (1) "the statements must be contemporaneous with the . . . event sought to be proven; (2) it must be shown that the declarant had no chance to reflect – that is, no time to fabricate or to misrepresent [their] thoughts; and (3) the statements must be shown to be relevant to the issue in the case." *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). Defendant sent the first voicemail to Angela Millwood at 1:32 p.m. after discovering the packages from the xylazine shipment were missing from her P.O. box. The message indicates that Defendant believed the packages had been intercepted by law enforcement and conveys her concern that she may be being dragged into illicit activity. Similarly, in the second voicemail – left a whole 45 minutes later – Defendant expressed even more anxiety about the missing packages after speaking with the postal workers, who simply suggested she check back tomorrow.

The voicemails were clearly contemporaneous with the events Defendant sought to prove; that she was unaware of why the packages were missing and fearful that she had become unwittingly involved in a criminal drug scheme. Further, the statements are necessarily relevant because they are directly related to Defendant's then-existing mental state and whether she was aware of the actual content of the packages. Having settled that the first and third prong are not in dispute, this Court should uphold the Fourteenth Circuit's decision that the voicemails were inadmissible because Defendant had ample time to fabricate her thoughts.

1. Defendant Had Time To Contemplate How To Frame A Message That Would Paint Herself In A Good Light.

Defendant should not be rewarded for making self-serving statements designed to influence the jury in her favor. Underlying the Rule 803 exceptions is the premise that "circumstantial guarantees of trustworthiness" may exist in some hearsay statements, rendering them just as reliable as in court testimony. *See* Fed. R. Evid. 803 Advisory Committee's note. Such hearsay statements "have probative value because the declarant has no chance to reflect upon – and perhaps misrepresent – [their] thoughts." *United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir. 1992). "[T]rustworthiness is diminished if a declarant has had the time to reflect on the potential implications of [their] conduct." *United States v. Naiden*, 424 F.3d 718, 722. Accordingly, "[t]he more time that elapses between the declaration and the period about which the declarant is commenting, the less reliable is [their] statement . . . ." *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980), *rejected on other grounds by United States v. De Bright,* 730 F.2d 1255 (9th Cir. 1984).

The record does not indicate precisely how much time elapsed between the moment she realized her packages were missing, and the moment she sent the first voicemail to Angela Millwood. However, Defendant herself testified that she learned of the combination of xylazine and fentanyl being used as a recreational street drug in Joralemon through an article she read several days prior. With this knowledge – according to Defendant – she grew increasingly suspicious that she was involved in illegal activity once she discovered that her packages were missing. However, if this were true she still would have needed at least a few minutes to conceive that the packages could possibly have been intercepted by law enforcement because the xylazine that she ordered contained fentanyl. She then needed additional time to process the consequences of her involvement in this scheme and grow anxious enough to contact Angela

Millwood. The time required for all this to occur is enough to reflect on how to frame a message that would give a listener the impression that she was unaware of the true contents of the packages. This removes the spontaneity element from these statements, which is the bedrock of the Rule 803(3) hearsay exception. Accordingly, any seemingly exculpatory statements made in the first voicemail are not indicative of her true mental state as required by rule 803(3) and therefore not admissible.

Defendant's second voicemail also cannot be admissible, as it was sent an entire 45 minutes after the first. This constituted plenty of time for Defendant to further contemplate and misrepresent her true state of mind. See *United States v. Carter*, 910 F.2d 1524, 1530-31 (7th Cir. 1990) (finding it proper to exclude a defendant's renunciation of his confession made only one hour after the confession because such a period provided the defendant with ample opportunity to reflect upon his situation). Circuit courts have long held that the probative value of statements diminishes as time passes. *See Ponticelli*, 622 F.2d at 991 (holding that the trial court correctly concluded that the defendant had a chance for reflection and misrepresentation prior to meeting with his attorney to explain evidence connecting to a loansharking operation, and therefore his later exculpatory statements were inadmissible); *see also United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (concluding that the district court acted within its accorded discretion in excluding a recorded conversation favorable for the defendant because the duration between his criminal act and the conversation greatly diminished its probative value with respect to his then-existing mental state). The sheer amount of time that passed between the first and second voicemail not only greatly diminishes its probative value on Defendant's state of mind, but it also greatly increases the probability that the statements were contrived to mislead the jury. Like the first voicemail, this Court should deem the second voicemail inadmissible under Rule 803(3).

2. Defendant Was Aware That She Was Likely Being Investigated After Discovering Her Packages Were Missing, Making Her More Inclined To Fabricate Voicemail Messages.

Defendant's suspicion that she could possibly be the subject of an investigation further incentivized her to fabricate her state of mind through the voicemails. Some courts analyzing a statement under Rule 803(3) have required that there be no "suspicious circumstances suggesting a motive for the declarant to or misrepresent [their] thoughts." *United States v. Srivastava*, 411 Fed. App'x. 671, 684 (4th Cir. 2011). Consistent with this requirement, these courts have analyzed whether the declarant had the motivation or opportunity to misrepresent the relevant state of mind, such as when a criminal defendant, knowing that [they are] under investigation, gives a non-spontaneous, self-serving statement about [their] own state of mind." *United States v. Wenjing Liu*, 654 Fed. App'x. 149, 149 (4th Cir. 2016). Under these circumstances, it is within the court's discretion to conclude that whatever additional probative value statements may have are "outweighed by the danger that the jury would be exposed to a statement that, if considered for its content, would be inadmissible hearsay." *United States v. Miller*, 874 F.2d 1255, 1265 (9th Cir. 1989). Further, the likelihood that a conversation is being monitored or recorded "makes it probable that [a Defendant's] recorded remarks [are] more self-serving than they [are] candid, and therefore their probative value is greatly diminished." *Reyes*, 239 F.3d at 743.

A reasonable listener hearing the voicemails without context would likely believe that Defendant was unaware that the xylazine packages contained fentanyl, yet the facts before us suggest the opposite is true. Defendant was aware of the growing presence of the fentanyl-xylazine mixture in Joralemon *at least* one week prior to arriving at the post office to retrieve the packages. Defendant was also aware of Angela Millwood's high school suspension for drug possession and distribution and she further acknowledged in her testimony that she had not spoken to Angela since for several years until Angela reached out and asked Defendant to

procure the xylazine drug. With this backdrop, she proceeded to order xylazine despite having minimal familiarity with the drug and no expertise whatsoever in horse healthcare. The voicemails demonstrate that Defendant knew the extreme likelihood that the missing packages meant she was being investigated. This provided ample motive to contemplate an exculpatory message to send to Millwood, making it much more likely that the voicemails were "'self-serving' attempts to cover tracks already made." *United States v. Cianci*, 378 F.3d 71, 106 (1st Cir. 2004) (holding the district court properly exercised its discretion in concluding that the defendant's taped phone call statement denouncing corruption fell outside the ambit of the 803(3) hearsay exception during his RICO trial because he knew he was likely talking to an FBI agent). Defendant should not be rewarded for her ability to think on her feet.

Putting aside the sequence of events, case law alone also militates against admitting the recordings in this case. Circuit courts have been historically reluctant to make exceptions for hearsay statements under Rule 803(3) if the circumstances indicate that the declarant was motivated by knowledge that their statements would paint them in a positive light. *See Reyes*, 239 F.3d at 743 (holding that the likelihood that a conversation is being monitored or recorded "makes it probable that [a Defendant's] recorded remarks [are] more self-serving than they [are] candid . . ."); *see also United States v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995) (holding that exculpatory statements from Defendant politician accused of bribery were not admissible under Rule 803(3) because he knew he was under investigation and the FBI had recorded his admission of guilt). Defendant's attempts to absolve herself from liability in both voicemails – even laying blame at Angela Millwood's feet – were likely to convince the jury she was acting in good faith, a disingenuous proposition for reasons presented above. *See Jackson*, 780 F.2d at 1315 (ruling that statements defendants sought to introduce were inadmissible because they came after defendants knew of a pending investigation and they contained self-serving denials of

involvement in a fuel-stealing scheme). This probability alone is well-established grounds for non-admission.

Given the absence of spontaneity and the motive and opportunity for conscious misrepresentation, Defendant's voicemails are inadmissible under the 803(3) hearsay exception.

B. Failing To Apply The Spontaneity Element Required By earsay exceptions 803(1) and 803(2) would open the door to vast amounts of evidence Beyond The Boundaries Of Rule 803.

While Rule 803(3) may not contain a spontaneity requirement within its text, it must be understood in the context in which it was written and adopted. Rule 803(1), present sense impressions, is grounded in the premise that "substantial contemporaneity of [the] event and statement negate the likelihood of deliberate or conscious misrepresentation," but "[s]pontaneity is the key factor." *United States v. Orm Heing*, 679 F.3d 1131, 1146-47 (9th Cir. 2012) (quoting Fed. R. Evid. 803(1) advisory committee's note). Similarly for exception 803(2), the "justification for admitting an excited utterance . . . is based on the 'assumption that an excited declarant will not have had time to reflect on events to fabricate.'" *United States v. Jennings*, 496 F.3d 344, 349 (4th Cir. 2007).

As adduced above, courts have long used the same rationale to apply the 803(3) exception, some even considering it an extension of the present sense impression exception contained in Rule 803(1). *See Naiden*, 424 F.3d at 722; *see also* Fed. R. Evid. 803(3) advisory committee note ("Exception (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility."). They have routinely interpreted 803(1) and 803(2) as narrowly tailored exceptions to the rule against hearsay because interpreting otherwise would open the floodgates to admitting vast amounts of evidence far beyond the contemporaneous and spontaneous boundaries that rightfully constrain them. Both exceptions explicitly require an element of spontaneity for a piece of evidence to be admitted, so

it logically follows that the immediately succeeding rule does as well. *See Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir. 2004) (recognizing that spontaneity elements exist within Fed. R. Evid. 803(1)-(3)); *see also United States v. Udey*, 748 F.2d 1231, 1243 (8th Cir. 1984) (connecting Rule 803(3) to Rule 803(1) when analyzing the lapse of time between an event and a statement about the event). The hearsay rule itself was designed to protect against the admission of out-of-court statements specifically because they are extremely difficult to validate. Therefore, failing to apply the spontaneity requirement for Rule 803(3) simply because it focuses on a component of the declarant's mental state would undermine the drafter's intentions, a standard from which this Court should not deviate.

Considering the foregoing, Defendant's voicemails are not admissible under Rule 803(3) of the Federal Rules of Evidence.

III. THE GOVERNMENT HAD TO ADMIT EVIDENCE OF THE DEFENDANT'S PRIOR CONVICTION BECAUSE IT WAS A CRIME OF DECEIT AND ITS POTENTIALLY PREJUDICIAL EFFECT IS IMMATERIAL.

Rule 609(a)(2) of the Federal Rules of Evidence requires courts to admit evidence of any past criminal conviction if the past crime required proving an element of a "dishonest act or false statement" for the purposes of attacking the credibility of a witness. FED R. EVID. 609(a)(2). This is because it is likely for a person who has used deceit to commit a crime in the past "to perceive the witness stand as an attractive site for further deceit." *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989). Crimes that require the prosecution to prove an element of deceit such as embezzlement or perjury, are automatically admissible. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). Nonetheless, even if deceit is not an element of the past crime, that crime can still be automatically admissible if the defendant's conduct during the commission of the crime involved any sort of deceit. *See*

Altobello, 872 F.2d at 216; *see also Hayes*, 553 F.2d at 827.

A. Defendant's Prior Petit Larceny Conviction Is A Crime Involving A "Dishonest Act" Since The Defendant's Conduct Was Deceitful.

In *Hayes*, the defendant was convicted of two counts of robbery, using a weapon in connection with a robbery, and assaulting a federal officer. *Hayes*, 553 F.3d at 825-26. During trial, the district court admitted evidence of a defendant's prior narcotics conviction. *See Id.* at 826. The defendant wanted to testify but because of this decision, he did not take the stand since the Government went on to use the prior narcotics conviction against him. *Id.* The defendant claimed that this was wrongful. The Second Circuit held that because defendant's crime of importing cocaine did not involve an element of proving dishonesty or false statement, the Government had to present specific facts relating to dishonesty or false statement. *Id.* at 827. The Second Circuit specifically noted that if the importation involved something more than mere stealth, such as false written or oral statements, the conviction would be automatically admissible. *Id.* at 827-28. However, the Government failed to provide anything more than mere stealth and so the Second Circuit held that the prosecution had failed to carry its burden concerning the second prong of the rule. *Id.* at 828; FED R. EVID. 609(a)(2).

Defendant could argue that almost every crime involves deceit of some sort and therefore almost every crime could fall within the purview of Rule 609(a)(2). FED R. EVID. 609(a)(2). However, the Second Circuit in *Hayes* has already addressed this issue. *See Hayes*, 553 F.2d at 827. Specifically, the Second Circuit noted that "the words 'dishonesty or false statement,' . . . involve activities that are part of nearly all crimes." *Id.* Nonetheless, the Second Circuit still created the rule that convictions are automatically admissible if the crime

involved some deceitful acts other than mere stealth. *Id.* Other circuits have followed in adopting this rule. *See United States v. Yeo*, 739 F.2d 385 (8th Cir. 1984); *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982); *United States v. Seamaster*, 568 F.2d 188, 191 (10th Cir. 1978). Courts have further repelled this argument by excluding this rule from crimes committed by violence. *See Altobello*, 872 F.2d at 216; *see also United States v. Smith*, 551 F.2d 348, 362-63 (D.C. Cir. 1976). In *Altobello*, the Seventh Circuit ruled that the lower court rightfully allowed evidence of a prior conviction for impeachment purposes. *Id.* at 217. The prior conviction of a crime involved the defendant tampering with electric meters. *Id.* at 215-16. The Seventh Circuit held that meter tampering is a crime of deception since the goal is to always deceive the one who reads the meter. *Id.* at 217.

Here, although Defendant's petit larceny conviction did not require the prosecution to prove an element of deceit, Defendant can still be impeached because her conduct was deceitful. Unlike the defendant in *Hayes*, Defendant's conduct here involved more than just mere stealth. She did not just use stealth to go unnoticed when stealing a young mother's purse; rather, she carefully chose the victim out of a crowd of people because the victim was distracted by a performance on the street. R. 58-59. If Defendant was just being stealthy, she could have chosen any individual in the crowd. *See id.* However, she specifically testified that she chose the mother because she was distracted.

Further, like the defendant's in *Altobello*, Defendant's crime here is also a crime of deception since her goal was to deceive the victim into believing that her purse was secured. *See* R. 60. Defendant planned to steal the victim's bag without anyone noticing her, especially the victim. R. 58. This crime's goal was to deceive the victim, which makes it a crime of deception. *See id.* Defendant only resorted to physical violence when she was

discovered by the victim. Therefore, due to Defendant's conduct regarding the prior crime, the evidence of the conviction was properly admitted to impeach her.

B. Defendant's Impeachment Was Proper Because Trial Courts Have No Discretion Over Whether To Admit Evidence Falling Within The Purview Of Rule 609(a)(2) And A Clear Limiting Instruction Was Given To Jurors.

As a threshold matter, "[e]vidence offered under Rule 609(a)(2) is not subject to the general balancing provision of Rule 403." *United States v. Kiendra*, 663 F.2d 349, 354 (1st Cir. 1981). Rule 403 is a general evidentiary provision that permits the exclusion of relevant evidence that "is substantially outweighed by the danger of unfair prejudice" to a defendant. *United States v. Kuecker*, 740 F.2d 496, 502 (7th Cir. 1984). The First Circuit in *Kiendra* persuasively settled any doubt about a potential conflict between Rule 403 and Rule 609(a)(2), stating that: "Rule 403 is a general provision intended to govern a wide landscape of evidentiary concerns; Rule 609 is a narrow provision intended to regulate the impeachment of witness[es] who have been convicted of prior crimes." *Id.;* (quoting *Kiendra*, 663 F.2d at 354). Therefore, the language of Rule 609 controls over the general language of Rule 403, rendering the Rule 403 balancing test inapplicable in the instant matter. Proceeding squarely within the bounds of Rule 609(a)(2), Defendant's impeachment was proper.

1. Trial Courts Have No Discretion Over Whether To Admit Evidence That Falls Within The Purview Of Rule 609(a)(2).

Defendant's impeachment by evidence of her petit larceny conviction was proper because the text of Rule 609(a)(2) affords the trial court no discretion to exclude evidence of convictions of a crime involving dishonesty which are less than ten years old. *United States v. Dixon*, 547 F.2d 1079, 1083 (9th Cir. 1083). Further, it applies to *all* crimes involving deceit, irrespective of whether the conviction was a felony or a misdemeanor. *Id.* at 1084. This conclusion comes from Congress' belief that such convictions are highly probative of a witness' credibility. *Kuecker*, 740 F.2d at 501 (citing H.R. Rep. No. 1597, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S. Code

Cong. & Ad. News 7098, 7103). Therefore, unlike prior convictions for crimes falling under Rule 609(a)(1) – which may be admitted only if the trial court determines that their probative value outweighs their prejudicial effect – convictions under Rule 609(a)(2) simply "shall be admitted." *United States v. Wong*, 703 F.2d 65, 67 (3d Cir. 1983).

Accordingly, the district court did not err in finding that Defendant's prior misdemeanor conviction for petit larceny required admission under Rule 609(a)(2). Since Defendant intentionally targeted a distracted victim, the petit larceny conviction involved deceitful conduct, coming well within the parameters of the Rule. *See Altobello*, 872 F.2d at 217 (upholding the admission of a misdemeanor theft conviction to impeach a testifying Defendant because the manner in which the defendant committed the offense "may have involved deceit."); *see also United States v. Morrow*, 977 F.2d 222, 228 (6th Cir. 1992) (distinguishing Rule 609(a)(1) from Rule 609(a)(2) because the former gives broad discretion to the trial court that "ought not be disturbed absent proof of abuse of discretion", whereas the latter mandates the admission of crimes involving dishonesty). Since the crime involved at least some element of deceit, and there is no evidence to suggest that the conviction was barred by the ten-year provision set forth in Rule 609(b), the district court properly heeded the mandate in Rule 609(a)(2).

2. The Limiting Instruction Given To Jurors At The Trial Eliminated Any Danger Of A Prejudicial Effect On The Jury.

The limiting instruction given to jurors during Defendant's trial pursuant to Rule 105 was sufficient to mitigate "the tendency of jurors to punish [Defendant] for her past conduct" instead of the present charges she was facing. *United States v. Frazier*, 314 Fed App'x. 801, 805 (6th Cir. 2008). Courts typically presume that a jury will follow limiting instructions to not make incriminating inferences, unless there is an overwhelming probability they cannot do so. *Richardson v. Marsh*, 481 U.S. 200, 213-14 (1987). To disregard this presumption would "make

inroads into the entire complex code of criminal evidentiary law and would threaten other large areas of trial jurisprudence." *Samia v. United States*, 143 S. Ct. 2004, 2014 (2023). Hence, it is an error to infer that the jury did not or could not follow a trial judge's clear limiting instructions to confine the use of Defendant's prior conviction strictly for impeachment purposes. *Frazier*, 314 Fed App'x. at 805.

While some question whether limiting instructions are an adequate safeguard against prejudice, the risks that underlie these concerns are not present in the immediate case. The jury was admonished that the purpose of the prior conviction evidence was solely to assess the likelihood Defendant was testifying truthfully. Maintaining the integrity of our criminal justice system requires trust in jurors' ability to adhere to these straightforward instructions. *See United States v. Lapteff*, 160 Fed Appx. 298, 302 (holding that any danger that the jury would "subordinate reason to emotion in the factfinding process" was effectively cured by the court's limiting instruction, which trial juries are presumed capable of following). Furthermore, a jury is unlikely to infer criminal propensity from Defendant's prior conviction because petit larceny is drastically different from an illegal drug trafficking charge. Therefore, any prejudicial effect on the jury is negligible, assuming it exists at all. *See United States v. Kinslow,* 1993 U.S. App. LEXIS 23275 (9th Cir. Sep. 10, 1993, No. 92-56203) ("The probative value of admitting the prior conviction outweighed its prejudicial effect as the prior crimes and the charged crimes were not particularly similar . . . and the district court gave a limiting instruction to the jury.").

Thus, the district court properly admitted evidence of Defendant's prior conviction for impeachment purposes at trial.

CONCLUSION

For the foregoing reasons, we ask that this Court uphold the Fourteenth Circuit's holding that Defendant did not have a reasonable expectation of privacy in the drug packages, the recorded voicemail statements are not admissible under Rule 803(3), and Defendant's impeachment for her petit larceny conviction was proper under Rule 609(a)(2).

APPENDIX A

The relevant United States constitutional provision provides:

U.S. CONST. amend. IV

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.

APPENDIX B

Fed. R. Evid. 803(3)

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: (3) A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

APPENDIX C

Fed. R. Evid. 609(a)(2)

(a) The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.