No. 23-695

In the Supreme Court of the United States

FRANNY FENTY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

BRIEF OF THE PETITIONER

Team 10
Counsel for Petitioner

Brief Color: Blue

QUESTIONS PRESENTED

I. Does Ms. Fenty have a reasonable expectation of privacy under the Fourth Amendment in sealed mail sent to Jocelyn Meyer, Ms. Fenty's alias?

II. Can recorded voicemails statements offered by Ms. Fenty to show her then-existing state of mind be admitted as a hearsay exception under Federal Rule of Evidence 803(3) if Ms. Fenty had time to reflect before making the statements?

III. Was Ms. Fenty's impeachment by evidence of her prior conviction for petit larceny proper pursuant to Federal Rule of Evidence 609(a)(2)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fourteenth Circuit, Franny Fenty v. United States of America, No. 22-5071, was entered June 15, 2023, and may be found in the Record. (R. 64-73.)

CONSITUTIONAL PROVISIONS

The text of the following constitutional provision is provided below:

The Fourth Amendment states:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Statement of the Facts

Franny Fenty ("Ms. Fenty") is a writer, residing in Joralemon, who found herself struggling to find publishers willing to publish her work. (R. 66.) After publishing a few short stories in college, she wrote novels under the alias Jocelyn Meyer and reached out to publishers under that same alias to no avail. (R. 5, 42-43.) In need of work, Ms. Fenty posted on LinkedIn on December 28, 2021, asking her network for leads on job opportunities, ideally involving writing, but willing to accept jobs in other fields. (R. 6.) Angela Millwood ("Millwood"), an acquaintance from high school, commented on her post that she could help Ms. Fenty get a job. (R. 6.) Millwood explained to Ms. Fenty that she worked at a horse stable and had a plan to help horses in pain by giving them xylazine. (R. 45.) Millwood convinced Ms. Fenty to buy the xylazine so she wouldn't get in trouble with her job. (R. 45.) On February 8, 2022, the Joralemon

Times posted an article warning readers of a dangerous new drug called xylazine, a horse tranquilizer. (R. 7.) Shortly thereafter, on February 12, 2022, a Joralemon resident was found dead from an overdose of xylazine mixed with fentanyl. (R. 65.) He was found next to used syringes and an open box from Holistic Horse Care. (R. 65.) Based on this information alone, the DEA Agent in charge of the investigation, Robert Raghavan ("Raghavan"), concluded that this was the source of the drugs and asked post office employees to look for boxes with a Holistic Horse Care label. (R. 36-37.) On February 14, 2022, Raghavan was notified of two packages matching the description being held at the post office that was addressed to Ms. Fenty's P.O. Box and obtained a warrant to search the packages. (R. 37.) Despite seeing packages addressed to both Ms. Fenty and Jocelyn Meyer at the same P.O. Box address, Raghavan proceeded with the search without attempting to establish a connection between the two women. (R. 37.) Upon discovering xylazine mixed with fentanyl in the packages, Raghavan arranged for a controlled delivery of the packages. (R. 37.) Unaware any of this was happening, Ms. Fenty received a delivery confirmation for her packages and went to the post office. (R. 46.) When the packages were not in her mailbox, Ms. Fenty called Millwood and left her a voicemail expressing concern. (R. 46.) Ms. Fenty had seen the newspaper on xylazine and started to get nervous she was involved in something terrible. (R. 46.) Still worried, Ms. Fenty left another voicemail forty-five minutes later. (R. 46.) Ms. Fenty was told to return the next day for her packages, at which point she found a slip directing her to the front desk. (R. 66.) Ms. Fenty confirmed that the packages were hers and attempted to leave, but she was arrested by Raghavan. (R. 66.) Law enforcement never located Millwood. (R. 66.)

II. Proceedings Below

On February 15, 2022, Ms. Fenty was formally indicted by a grand jury on one count of possession with intent to distribute. (R. 2, 66.) Prior to trial, Ms. Fenty filed two motions: (1) a motion to suppress evidence from the DEA agents' search of sealed packages mailed from Holistic Horse Care on the grounds that the search violated her Fourth Amendment rights; and (2) a motion in limine to exclude impeachment evidence of Ms. Fenty's misdemeanor conviction for petit larceny from when she was nineteen years old on the grounds that the crime did not qualify as a crime of deceit under Rule 609(a)(2). (R. 10 – 26.) The trial court improperly denied both motions. (R. 10, 26.) However, the court included a limiting instruction to the jury relating to the motion in limine. (R. 63, 66). During the trial, the Government moved to exclude recordings of two exculpatory voicemail messages left by Ms. Fenty on Millwood's phone on the grounds that they were hearsay and failed to qualify as an exception under Rule 803(3). (R. 47-52, 66.) The trial court sustained this motion, precluding Ms. Fenty from presenting her best defense. (R. 52). Ms. Fenty was convicted on one count of possession with intent to distribute a controlled substance and sentenced to ten years in prison. (R. 66.) On December 14, 2023, this Court granted Ms. Fenty's petition for writ of certiorari. (R. 74.)

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit incorrectly denied Ms. Fenty's Fourth Amendment Rights when it determined she did not have standing to challenge the search of her mail. Ms. Fenty has standing to challenge the impermissible search because she has a reasonable expectation of privacy in the contents of her mail. This requires a two-prong inquiry: (1) did the defendant show a subjective expectation of privacy, and (2) are those subjective expectations ones that society is prepared to accept as reasonable. Ms. Fenty satisfies the first prong of the *Katz* test because she manifested a subjective expectation of privacy as the intended recipient of the packages. Ms. Fenty satisfies

the second prong of the *Katz* test because her alias is a fictitious name, not an alter ego, and society is prepared to accept the use of a fictitious name for privacy reasons as reasonable. Most Circuit Courts have added an additional layer to the *Katz* test, requiring the defendant to show "other indicia" of ownership, possession, or control. Still, Ms. Fenty meets this burden.

Second, the Fourteenth Circuit abused its discretion in excluding the voicemails offered by Ms. Fenty under Rule 803(3) of the Federal Rules of Evidence because spontaneity is not required and credibility assessments belong to the jury. Because spontaneity is not required by Rule 803(3), Ms. Fenty's proffered voicemail statements are admissible to show her then-existing state of mind. First, spontaneity is not required for admission of evidence under 803(3) because the Rules demand a categorical, not individualized, approach to admission of hearsay. Second, spontaneity is not required for admission of evidence under 803(3) because, in accordance with basic, yet critical, tools, principles, and canons of statutory interpretation, the Rules provide no authorization for such considerations. Additionally, even if the trial court doubted Ms. Fenty's sincerity or trustworthiness, it should not have refused to admit Ms. Fenty's voicemails because it is the jury's role to assess the credibility of the declarant's statements. A trial court's exclusion of evidence upon an assessment of insincerity or un-trustworthiness invites delay, prejudgment, and encroachment on the province of the jury. In reading the Rules in their entirety, it is apparent that reading an explicit trustworthiness requirement into the language of 803(3) contradicts the relevant canons of statutory construction while negating the purpose and analysis promulgated in FRE 403.

Lastly, Ms. Fenty's prior conviction for petit larceny should not have been admissible to impeach her credibility under Federal Rules of Evidence 609(a)(2) because petit larceny does not

involve a "dishonest act or false statement." It also does not bear upon Ms. Fenty's propensity to testify truthfully, and public policy favors interpreting Rule 609(a)(2) narrowly.

ARGUMENT

I. MS. FENTY HAS STANDING TO CHALLENGE THE SEARCH OF HER PACKAGES BECAUSE SHE HAS A REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT IN SEALED MAIL ADDRESSED TO HER ALIAS.

Ms. Fenty has a reasonable expectation of privacy ("REOP") in her sealed mail sent to her alias, giving her standing to challenge the violation of her Fourth Amendment rights. The Fourth Amendment protects the right of the people against unreasonable searches and seizures without a warrant. U.S. CONST. amend. IV. A standing analysis involves an inquiry into whether the disputed search and seizure has infringed on an interest that the Fourth Amendment was designed to protect. *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). These rights are personal and may not be vicariously asserted. *United States v. DiMaggio*, 744 F. Supp. 43, 45 (N.D.N.Y. 1990) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). This means that to challenge a search, a person must show that their own Fourth Amendment rights were violated by the search. *Id.* "[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Thus, defendants have the burden of proving a REOP in in the area searched. *United States v. Pitts*, 322 F.3d 449, 456 (7th Cir. 2003). Whether a defendant has a REOP is a two-prong inquiry: (1) did the defendant show a subjective expectation of privacy, and (2) are those subjective expectations ones that society is prepared to accept as reasonable. *Katz*, 389 U.S. at 361. Some courts have added another layer to this test by requiring additional evidence of ownership when mail is sent to an alias. *See, e.g.*, *United States v. Rose*, 3 F.4th 722, 730 (4th Cir. 2021). The legal conclusions in a motion to suppress are reviewed de novo while factual

findings are reviewed for clear error. *United States v. Castellanos*, 716 F.3d 828, 832 (4th Cir. 2013). Ms. Fenty clearly has a subjective expectation of privacy in her sealed mail as she maintains that she was the intended recipient of the package and made no efforts to distance herself from her alias. (R. 42-43, 66.) Additionally, Ms. Fenty's use of an alias for professional reasons is one that society is prepared to recognize as reasonable. (R. 42-43.); *see also Pitts*, 322 F.3d at 457-59. Lastly, Ms. Fenty exhibited other indicia of ownership by exerting ownership, possession, and control of the packages. *See* (R. 42-43, 65-66.) Therefore, Ms. Fenty satisfies every element of the test and should not be deprived of her ability to challenge the violation of her Fourth Amendment rights.

A. Ms. Fenty Satisfies the First Prong of the *Katz* Test Because She Manifested a Subjective Expectation of Privacy as the Intended Recipient of the Packages.

Ms. Fenty maintained throughout her trial that she was the intended recipient of the packages, showing a subjective expectation of privacy in her sealed mail. (R. 41-61.) Subjective expectation of privacy manifests in various ways, such as signed affidavits, or personally picking up the package. *Pitts*, 322 F.3d at 456; *United States v. Givens*, 733 F.2d 339, 340-41 (4th Cir. 1984). However, attempts by defendants to distance themselves from their alias have been interpreted as evidence negating a subjective expectation of privacy. *See Castellanos*, 716 F.3d at 831; *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992); *but see United States v. Daniel*, 982 F.2d 146, 149 n.1 (5th Cir. 1993) (accepting "Lynn Neal" as an alias despite the defendant's assertions that they were different people solely because the defendant had a utility bill under that name).

In *United States v. Pitts*, the defendants showed a subjective desire to maintain control of packages sent to and from an alias by supplying affidavits stating that they were the intended recipients of the packages. 322 F.3d at 456. However, the court took note of the defendant's

objective actions, noting that the recipient, when asked, explicitly refused receipt of the package. *Id.* The court reasoned that a reasonable person in the postal inspector's position would not have known that the defendant actually intended to receive the package. *Id.* In *United States v. Pierce*, the defendant also maintained that he was the intended recipient of the package at issue, but the court rejected this assertion because he made multiple attempts to disassociate himself from the package before and during the trial. 959 F.2d at 1303. At the trial, a police officer testified that the defendant denied ownership of the package and the defendant himself stated that he had not possessed the package. *Id.* Further, the defendant made a point of noting on multiple occasions that he was neither the sender nor the recipient listed on the package. *Id.* Based on this testimony, the Fifth Circuit concluded that the defendant had no subjective expectation of privacy. *See id.* In *United States v. Castellanos*, the defendant moved to suppress evidence found in the gas tank of a car shipped under an alias to a fake address. 716 F.3d at 831. However, the defendant repeatedly asserted that he and the alias were different people and that he was simply in the process of purchasing the vehicle in question from the alias. *Id.* The court reasoned that because the defendant made no attempts to show that he and the alias were the same person, there was no evidence to support the defendant's expectation of privacy. *Id.* at 834.

Unlike the defendants in *Pitts, Pierce,* and *Castellanos*, Ms. Fenty has made no attempts to disassociate herself from her alias or the package. *See* (R. 41-61.); *Pitts*, 322 F.3d at 456; *Pierce*, 959 F.2d at 1303; *Castellanos*, 716 F.3d at 831. Like both defendants in *Pitts*, Ms. Fenty testified that she was the intended recipient of the package. (R. 41-61.) Further, unlike the recipient in *Pitts*, Ms. Fenty did not reject receipt of the package. *See* (R. 66.) Rather, Ms. Fenty went to the post office on more than one occasion to pick up the packages and answered affirmatively when the postal worker asked if the packages were hers. (R. 40, 66). Additionally,

unlike the defendant in *Pierce*, Ms. Fenty has never attempted to distance herself from the packages or claim that they weren't in her possession. (R. 45.) ("I told [Millwood] that I would help get xylazine for her so that she could help these older horses that were in pain."); *Pierce*, 959 F.2d at 1303. Instead, unlike the defendant in *Castellanos*, Ms. Fenty maintained that Jocelyn Meyer was an alias she used for professional reasons and that, in essence, she was Jocelyn Meyer. (R. 42-43); *Castellanos*, 716 F.3d at 831. Thus, Ms. Fenty took no actions that would contradict the fact that she had a subjective expectation of privacy over her packages, despite them being sent to an alias.

B. Ms. Fenty Satisfies the Second Prong of the *Katz* Test Because Her Alias is a Fictitious Name, Not an Alter Ego and Society is Prepared to Accept this Use of an Alias as Reasonable.

Jocelyn Meyer is a fictitious name that has been used by Ms. Fenty on multiple occasions in her professional career, not an alter-ego, and society is prepared to accept this type of alias use as reasonable. Individuals may assert a REOP in packages that are addressed to them under fake names. United States v. Villareal, 963 F.2d 770, 774 (5th Cir. 1992). Courts are more likely to find that a person has a REOP when mail is sent to an alias that is a fictitious name rather than an alter ego. Compare United States v. Richards, 638 F.2d 765, 770 (holding a package sent to a P.O. Box registered to an alias by the defendant showed that they were, in effect, the same person) and Villareal, 963 F.2d at 774-75 (finding defendants had a REOP despite the court not being able to determine to which defendant the alias belonged) with Pierce, 959 F.2d at 1303 n.11 (distinguishing between packages sent to a fictitious entity versus a real person) and Rose, 3 F.4th at 729 (rejecting the assertion that a package mailed to a deceased person equates to a package mailed to an alias). Courts frown upon granting privacy rights to persons using another's identity to mail packages. United States v. Johnson, 584 F.3d 995, 1002 (10th Cir.

2009) ("[T]here is a fundamental difference between merely using an alias to receive a package and using another's identity."). Additionally, courts differ on how established an alias must be before it manifests a REOP. Compare Rose, 3 F.4th at 728 ("[T]he defendant must provide evidence that the fictitious name is an established alias.") with Richards, 638 F.2d at 770 (imposing no restrictions on the use of an alias). Moreover, there is no test to determine whether an expectation of privacy is reasonable to society. Id. at 999. There are numerous reasons a person would use an alias in a way that society is prepared to accept[1]. See Rose, 3 F.4th at 738 (Gregory, C.J., dissenting); Pitts, 322 F.3d at 458.

For example, in *Pitts*, the Seventh Circuit listed various legitimate reasons why a person might use an alias: an author for professional reasons, a celebrity to keep their private life from the public, a politician for security reasons, and an executive to keep their business dealings secret. 322 F.3d at 458 (internal citations omitted). The court reasoned that an author may choose to remain anonymous for a variety of reasons including to preserve their privacy. *Id.* "This is a common and unremarkable practice." *Id.* The court also cautioned against limiting Fourth Amendment protections because a person was engaged in criminal activity. *Id.* Taking this action could result in the dissolution of privacy interests for all people in any avenue used by criminals to conceal their activities. *Id.* (reasoning that hotel rooms and cell phones would no longer be protected by the Fourth Amendment because drug dealers often use them to do business). Alternatively, taking this action could result in only criminals forfeiting their Fourth Amendment

[1] In recent years the use of an alias has become more commonplace. In an age of ransomware and hacking, members of the healthcare industry are considering using pseudonyms to protect patient privacy when inputting their data to keep hackers from accessing information belonging to specific patients. *See* Mishall Al-Zubaidie et al., *PAX: Using Pseudonymization and Anonymization to Protect Patients' Identities and Data in the Healthcare System*, 16 Int'l L.J. Env't. Rsch. Pub. Health 1490 (2019). Additionally, courts have affirmed the use of an alias when it furthers their interests. *See Dooley v. State*, 575 So. 2d 1191. 1195 (Ala. Crim. App. 1990) (upholding a warrant listing the defendant's incorrect legal name on the grounds that it listed his correct alias); *Thrall v. State*, 177 S.E. 2d 192 (Ga. Ct. App. 1970) (holding that listing an alias on a warrant was sufficient because the defendant was travelling under that alias).

protections which controverts the intent of the Fourth Amendment. *Id.* ("We may not justify the search after the fact, once we know illegal activity was afoot.").

In *United States v. Rose*, the Fourth Circuit reasoned that a defendant must prove their fictitious name is an established alias for them to demonstrate a REOP. 3 F.4th at 728. Because the defendant addressed the package at issue to a deceased individual, the court reasoned that he would have no means of asserting possession or control over the package and that, therefore, the alias was not established. *See id.* at 729. In his dissent, Chief Judge Gregory disagreed with the majority's requirement that a defendant's alias be established to demonstrate a REOP. *Id.* at 737 (Gregory, C.J., dissenting). "By protecting only formal pseudonyms . . . the rule undermines Fourth Amendment protection as to virtually every purpose for which a person might use an alias on their mail." *Id.* at 738. Citing multiple socially acceptable reasons that a person may use an alias, including to hide sensitive purchases, Judge Gregory reasoned that such a person would use an informal alias because it was reasonably to keep identifying information private, including a public alias. *Id.* at 739. Judge Gregory concluded that disregarding these legitimate expectations based on a person's involvement in illegal activity would undermine the privacy of law-abiding citizens. *Id.*

Ms. Fenty testified to being a published author who has used the alias Jocelyn Meyer on multiple occasions in her professional career – one of the circumstances in which the Seventh Circuit in *Pitts* deemed the use of an alias would be acceptable to society. 322 F.3d at 458; (R. 4-5, 42.) Just as the court in *Pitts* hypothesized, Ms. Fenty stated that she used an alias because her writing is very personal, and she wanted privacy. 322 F.3d at 458; (R. 43.) This is a legitimate use of an alias that society would accept as reasonable. *See Pitts*, 322 F.3d at 458. Further, the name Jocelyn Meyer is a fictitious name; Jocelyn Meyer is not the name of a real individual,

unlike the alias used by the defendant in *Rose.* 3 F.4th at 729. Moreover, Ms. Fenty can document her use of the alias Jocelyn Meyer over of six years, sufficient time to satisfy the requirement set forth in *Rose.* (R. 4-5, 42.); 3 F.4th at 728. Despite substantial evidence showing that Jocelyn Meyer is an established alias, as required by *Rose*, the Fourteenth Circuit penalized Ms. Fenty for not finding success in her profession, finding that her uses of a professional alias were "either too distant in timing or too tenuous to create a currently existing public use alias." *Rose*, 3 F.4th at 728; (R. 67.) Ms. Fenty faced a Catch-22 – when she presented evidence of having used the alias historically, the court found that the alias was stale, but when she presented evidence of more recent use, it was dismissed as being part of her alleged criminal scheme. (R. 67.) Moreover, per the *Rose* dissent, Ms. Fenty should not have to meet this burden at all given that there are multiple legitimate reasons that a person would use an informal alias, such as for online shopping, another reason Ms. Fenty gave for registering her P.O. Box under an alias. *Rose*, 3 F.4th at 737; (R. 43.) When the Fourteenth Circuit denied her Fourth Amendment protections on the grounds that the alias was part of her criminal scheme, it fell into the exact trap that the Fourth and Seventh Circuits warned about in *Rose* and *Pitts*, respectively. *Rose*, 3 F.4th at 739 (Gregory, C.J., dissenting); *Pitts*, 322 F.3d at 458. Because the police found drugs in Ms. Fenty's mail, the Fourteenth Circuit justified the search of her mail after the fact. *See Pitts*, 322 F.3d at 458. This is a slippery slope that could lead to the forfeiture of other Fourth Amendment protections. *Rose*, 3 F.4th at 739 (Gregory, C.J., dissenting); *Pitts*, 322 F.3d at 458. Not only did the Fourteenth Circuit err in finding that Jocelyn Meyer was not an established alias

being used for reasons that society would be willing to accept, but it also set a precedent that undermines the privacy of many law-abiding citizens in addition to Ms. Fenty.

C. Using the Majority of Circuit Courts' "Other Indicia" Analysis, Ms. Fenty Meets her Burden of Establishing Reasonable Expectation of Privacy in Packages Sent to Her Alias.

Sealed packages enjoy a significant level of protection under the Fourth Amendment. *United States v. Van Leeuwen*, 307 U.S. 249, 253 (1970). The First, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have all adopted an "other indicia" analysis, in addition to the *Katz* test, for occasions when a sealed package is addressed to someone other than the intended recipient.[2] *See, e.g.*, *United States v. Stokes*, 829 F.3d 47 (1st Cir. 2016); *Rose*, 3 F.4th at 722; *United States v. Richards*, 638 F.2d 765 (5th Cir. 1981); *Pitts*, 322 F.3d at 459 n.1; *United States v. Lewis*, 738 F.2d 916 (8th Cir. 1984); *United States v. Garcia-Bercovich*, 582 F.3d 1234 (11th Cir. 2009). In such cases, the recipient has no REOP absent some other indicia of ownership possession or control. *Rose*, 3 F.4th at 728. Courts consider factors such as: ownership, possession/control, historical use of the property, ability to regulate access, the existence or lack thereof of a subjective anticipation of privacy, the reasonableness of such anticipation based on the facts, establishment of an alias,[3] and the totality of the circumstances in their analyses. *See Stokes*, 829 F.3d at 53 (citing *United States v. Aguirre*, 839 F.2d 854, 856 (1st Cir. 1988)); *Givens*, 733 F.2d at 342 ("[T]he right to exclude others affords a significant indicator of whether one has a legitimate expectation of privacy in an area."); *Rose*, 3 F.4th at 728 (noting to establish

[2] There are intra-circuit splits in the Fifth, Seventh, and Eleventh Circuits where the other side adopts the approach that there is no REOP in mail sent under an alias. *See United States v. Daniel*, 982 F.2d 146 (5th Cir. 1993); *United States v. Koenig*, 856 F.2d 843 (7th Cir. 1987); *United States v. Smith*, 39 F.3d 1143 (11th Cir. 1994). However, the amount of jurisprudence adopting the "other indicia" approach outweighs the amount of jurisprudence adopting the "no REOP approach." Alternatively, the Tenth Circuit has formally adopted the approach that mail sent under an alias is protected by the Fourth Amendment. *See United States v, Johnson*, 584 F.3d 995, 1001 (10th Cir. 2009) ("[I]t is not necessarily illegal to use a pseudonym to receive mail unless fraud or a stolen identification is involved.").

[3] Analysis supporting Ms. Fenty's established alias can be found *supra* Part I.B.

a REOP, the defendant must prove that the fictitious name is an established alias); *Lewis*, 738 F.2d at 920 n.2 (reasoning the defendant lacked standing because the mailbox in question was unlocked in a rural area that was accessible to the public). While property law concepts are not determinative of a defendant's constitutional rights, those concepts may be considered in a court's analysis. *Jones v. United States*, 362 U.S. 257, 734 (1960); *see also DiMaggio*, 744 F. Supp at 46.

In *United States v. Allen*, the defendant moved to suppress drug evidence found in a sealed envelope addressed to another individual. 741 F. Supp. 15, 15 (D. Me. 1990). The defendant claimed ownership over the envelope, claiming that he paid the addressee to let him send mail to his name and address. *Id.* Though decided in the district court, the court used the same factors outlined in *United States v. Stokes* in its analysis of whether the defendant exhibited sufficient indicia of ownership to establish a REOP in the envelope. *Id.* at 17; *Stokes*, 829 F.3d at 53. These factors include:

> ownership, possession, and/or control; historical use of the property searched or the things seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case.

Allen, 741 F. Supp. at 17. First, the court found that the defendant claimed ownership over the envelope and its contents and no one else claimed ownership over the package. *Id.* at 17-18. Second, the defendant has successfully mailed packages to the same addressee on two prior occasions without incident, which the court found sufficient to establish historical use. *Id.* at 18. Third, since federal law precludes access to sealed mail while en route and the addressee never attempted to access the mail, the defendant reasonably restricted access to the envelope. *Id.* Fourth, the court reasoned that the defendant kept a close eye on the progress of his package by

calling regularly and inquiring about its arrival. *Id.* Fifth, the court found that the defendant had a subjective anticipation of privacy, though it gave no information on how it came to that conclusion. *Id.* Sixth, the court found the defendant's expectation of privacy to be objectively reasonable because federal law protects objects in the mail from unauthorized access. *Id.* Based on these findings, the court held that the defendant had a REOP in the envelope in question, despite it not being sent or addressed to him. *Id.*

In *Walter v. United States*, this Court analyzed a petitioner's expectation of privacy over videos that were sent to the wrong address and opened by a private entity. 447 U.S. 649, 651-52 (1980). After the private entity opened the packages, they called the police, who then viewed the videos and charged the petitioner with obscenity. *Id.* at 652. This Court determined that the petitioner had an expectation of privacy because the package was sealed, securely wrapped, and nothing on the label spoke to the nature of its contents. *Id.* at 658.

Ms. Fenty satisfies all these factors for similar reasons to those in *Allen*. *See id.* at 17-18. First, like the defendant in *Allen*, Ms. Fenty was the only person who claimed ownership over the package. *Id.*; (R. 60.) Ms. Millwood, the only other person who may have had a claim to the package, never came forward to claim it. *See* (R. 66.) ("To date, law enforcement has not been able to locate Millwood."). Second, while this was the first and only time Ms. Fenty ordered xylazine from Holistic Horse Care, it was not the first time she had used the alias, Jocelyn Meyer. (R. 4-5, 42-43.) Like the defendant in *Allen,* who used the services of the addressee on two prior occasions to protect his identity, Ms. Fenty used the alias at least three times prior to her arrest to protect her identity and privacy. (R. 4-5, 42-43.); *Allen*, 741 F. Supp. at 18. Third, the same federal laws that preclude access to mail that applied in *Allen*, apply to Ms. Fenty. *Id.* Moreover, like the petitioner in *Walter*, the packages were sealed, wrapped, and the only label on

the box was from the shipper. *Walter*, 447 U.S. at 658. Had Special Agent Raghavan not seen a similar package at the scene of an overdose a few days prior, he would not have suspected that Ms. Fenty's package contained drugs. *See* (R. 65.) Fourth, similar to the *Allen* defendant calling to inquire about the progress of his package, Ms. Fenty immediately went to the post office upon receiving confirmation that it had been delivered (R. 46.) and returned again the next day as instructed by the post office. (R. at 66.); *Allen*, 741 F. Supp. at 18. Last, Ms. Fenty's expectation of privacy was reasonable because mail is protected by the Fourth Amendment.[4] *See Allen*, 741 F. Supp. at 18; *see also Villareal*, 963 F.2d at 774. Because Ms. Fenty satisfies all of these factors, she has exhibited multiple indicia of ownership over the packages

II. THE 14TH CIRCUIT ABUSED ITS DISCRETION IN EXCLUDING THE VOICEMAILS OFFERED BY MS. FENTY UNDER RULE 803(3) OF THE FEDERAL RULES OF EVIDENCE BECAUSE SPONTANEITY IS NOT REQUIRED AND CREDIBILITY ASSESSMENTS BELONG TO THE JURY.

The voicemail statements proffered by Ms. Fenty to show her then-existing mental state fall squarely within Federal Rule of Evidence 803(3). Rule 803(3) provides a hearsay exception that allows admission of evidence reflecting the "declarant's then existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling . . .)" FED. R. EVID. 803(3); *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295 (1892). Because the declarant knows her own thoughts and feelings, there is often no better way to prove a relevant mental state at issue. 2 McCormick on Evidence, § 274 (Kenneth S. Brown et al. eds., 7th ed. 2013). Currently, federal circuit courts are split regarding two issues that arise in admission of statements under 803(3). The first question splitting the circuits is whether 803(3) contains an

[4] Because the court in *Allen* gave no reasoning behind its conclusion that the defendant had a subjective expectation of privacy, there is no way to compare it to Ms. Fenty's case. For a discussion of Ms. Fenty's subjective expectation of privacy, *see supra* Part I.A.

extratextual spontaneity requirement, amounting to a judicially imposed brightline rule against defendants. *Compare United States v. Peak*, 856 F.2d 825, 833-34 (7th Cir. 1988), *with United States v. Faust*, 850 F.3d 575, 585 (9th Cir. 1988). The second related issue splitting the circuits is whether the trial court may assess the credibility of an admissible 803(3) statement and then deny admission due to "doubts" of the declarant's sincerity. *Compare United States v. DiMaria*, 727 F.2d 265, 271-272 (2d Cir. 1984), *with United States v. Naiden*, 424 F.3d 718, 722-23 (8th Cir. 2005).

First, this Court should hold that spontaneity is not required under 803(3) because this extratextual requirement cannot be reconciled with either the evidentiary categorical approach or basic principles of statutory interpretation. *See* FED. R. EVID. art. VIII advisory committee's introductory note. Second, this Court should hold that removing the credibility determination from the jury is encroaching on both the Federal Rules of Evidence and the jury's purpose. *DiMaria*, 727 F.2d at 272. As a result, both voicemails offered by Ms. Fenty were admissible under 803(3) to reflect that she was engaged in a plan to help horses, the purchase of xylazine was legitimate, and Ms. Fenty had no idea that she was involved in an illicit drug scheme. Thus, the Fourteenth Circuit's exclusion of the voicemails was an abuse of discretion.

A. **Because Spontaneity is not Required by Federal Rule of Evidence 803(3), Ms. Fenty's Proffered Voicemail Statements are Admissible to Show Her Then Existing State of Mind.**

i. *Spontaneity is not required for admission of evidence under 803(3) because the Federal Rules of Evidence demand a categorical, not individualized, approach to admission of hearsay*.

Because the language of 803(3) does not include any criteria of spontaneity, the exception is "categorical," meaning if hearsay falls within one of the textually delineated hearsay exceptions, the court is required to admit the statement. FED. R. EVID. art. VIII advisory

committee's introductory note. The statement's evidentiary effect is broadened by the continuity in time of states of mind. McCormick et al., supra, § 274. While few circuit courts implement the proper approach, the quintessential case is exemplified by the Second Circuit in *DiMaria*. 727 F.2d at 271-272. In *DiMaria*, Judge Friendly explained how admitting hearsay mandates adherence to the categorical approach; 727 F.2d at 272. The court found DiMaria's statement that he "only came here to get some cigarettes real cheap" admissible under 803(3) to reflect that he only meant bootleg cigarettes, not stolen cigarettes. *Id*. at 270-71. Therefore, the Second Circuit held exclusion of the defendant's proffered statements as an abuse of discretion. *Id*. at 270-72; *but see United States v. Ponticelli*, 622 F.2d 985, 992 (9th Cir. 1980) (excluding statements made post-arrest, the duration of time elapsed between the arrest and statements was unknown, he knew he was under investigation, and the statements were made while consulting an attorney).

Similar to the Second Circuit, the Seventh Circuit, in *United States v. Peak*, held that despite the time for fabrication, the defendant's exculpatory 803(3) statement was squarely admissible to show that he lacked the requisite state of mind. 856 F.2d 833-34. In doing so, the court rejected the contention that 803(3) only admits bare assertions of state of mind, and found that the "details" of the recorded call reflected the bare assertion of his state of mind—i.e., the lack of intent to possess and distribute illegal drugs. *Id*.; *but see United States v. Jackson*, 780 F.2d 1305 (7th Cir. 1986).

Here, in properly applying the categorical approach utilized in *DiMaria* and *Peak*, Ms. Fenty's voicemail statements fall squarely within the textual requirements of 803(3). *See DiMaria*, 727 F.2d at 270-72; *Peak*, 856 F.2d 833-34. Similar to DiMaria's statements, Ms. Fenty's voicemails were proffered to reflect her belief that purchasing the xylazine was to help horses, and thus, to reflect that she believed the agreement between her and Millwood was legal.

727 F.2d at 270-71; (R. 40.) Like in *DiMaria*, Ms. Fenty's voicemails categorically satisfy 803(3), and are in turn admissible. 727 F.2d at 270-71; *see* (R. 40.) Moreover, like the statements in *United States v. Jackson* and *United States v. Ponticelli*, Respondent argues Ms. Fenty's second voicemail is inadmissible due to the amount of time that Ms. Fenty had to allegedly reflect. 780 F.2d at 1315; (R. 47-49.) But, unlike the two-year gap in *Jackson*, Ms. Fenty's first voicemail was made upon arrival to the Post Office at 1:32 p.m. while the second voicemail was made forty-five minutes later at 2:17 p.m. *See* 780 F.2d at 1315; (R. 68.) After leaving the second voicemail, Ms. Fenty left the Post Office and, followed the postal workers' orders by returning the next day, where she was then arrested. (R. 68.). So, unlike in *Jackson*, there was no similar time gap between the voicemails and commission of the alleged crime. 780 F.2d at 1315; *see* (R. 68-69.)

In contrast to how the Ninth Circuit supported its holding with a multitude of germane facts, the Fourteenth Circuit's holding is not supported by any one of those facts. Unlike how the statements in *Ponticelli* were made post-arrest, Ms. Fenty's voicemails were recorded before her arrest. 622 F.2d at 992; (R. 68-69.) Hence, while the court in *Ponticelli* was entitled to infer fabrication, the Fourteenth Circuit was not entitled to that inference. 622 F.2d at 992; (R. 68-70.). Finally, unlike *Ponticelli*, nothing indicates that Ms. Fenty was thinking about the legal significance of her statements when she made them. 622 F.2d at 992; (R. 68-70.) Therefore, Ms. Fenty's voicemails are admissible. Moreover, similar to Peak's statements, the details of Ms. Fenty's voicemails reflect her lack of intent to possess and distribute illegal drugs. 856 F.2d 833-34; (R. 40.) From the time she arrived at, to the time she left the Post Office, she became increasingly emotional because she believed the plan and purchase was legitimate, not illicit. (R. 40.) Evidenced by the first voicemail, once Ms. Fenty arrived at the Post Office and noticed the

missing packages, she began to get "worried." *Id*. Therefore, like in *Peak*, Ms. Fenty's second voicemail still reflects her then-existing state of mind. 856 F.2d 834; (R. 47-48.)

After already being "worried," and talking to the postal workers, her mental state "continued," and she got really "nervous" because she was confused as to why the postal workers wanted to look at the xylazine. *Id*.; *see also* McCormick et al., supra, § 274. She was "worried" that there might be fentanyl because she "read that article that xylazine is sometimes mixed with fentanyl." (R. 40.) She felt confused because she was under the impression that it was "just to help horses that are suffering," and because her emotions only continued to escalate as time passed, she "really start[ed] to get concerned" that Millwood involved her in something that she had "no idea" about. (R. 40.) Therefore, this Court should reject the argument that 803(3) excludes details of both voicemails because, as in *Peak*, the details in this case are necessary to reflect the bare assertion of Ms. Fenty's state of mind. 856 F.2d 833-34; (R. 40.) Thus, like how the Government in *Peak* failed to prove the requisite intent, this Court, in taking the categorical approach should admit the voicemails as tending to show she lacked the requisite state of mind. 856 F.2d 833-34; (R. 40.) In conclusion, because spontaneity is not required by the text and is antithetical to the categorical approach, Ms. Fenty's voicemail statements are admissible to show her then-existing state of mind under 803(3).

ii. *Spontaneity is not required for admission of evidence under 803(3) because, in accordance with basic yet critical tools, principles, and canons of statutory interpretation, the Federal Rules of Evidence provide no authorization to such considerations*.

First, in requiring spontaneity, most circuit courts are not interpreting 803(3) in accordance with the fundamental canons of statutory interpretation required by the Supreme Court. *See generally Rules of Statutory Construction and Interpretation*, Supremecourt.gov, https://www.supremecourt.gov. (requiring courts to begin by looking to the "ordinary" or "plain"

meaning of the statutory text). Even though courts claim that spontaneity is mandated by the Advisory Committee, the courts have taken the analogy of 803(3) to 803(1) and 803(2) too far.

A majority of circuit courts have not based the spontaneity requirement in the language of 803(3) itself, but instead on a comment in the Advisory Committee Note to 803(3). *See e.g.*, *United States v. Naiden*, 424 F.3d 718, 722 (stating 803(3) "is essentially a specialized application of Exception (1), presented separately to enhance its usefulness and accessibility[,]"); *Ponticelli*, 622 F.2d at 991 (noting how 803(3) overlaps substantially with 803(2)). However, the plain language of 803(1) and 803(2) requires contemporaneity between perception of the event and the making of the hearsay statement; the plain language of 803(3) enumerates no such requirement. *Compare* FED. R. EVID. 803(1) (admitting statements "describing or explaining an event or condition, made *while or immediately after* the declarant perceived it.") (emphasis added), *and* FED. R. EVID. 803(2) (admitting statements "relating to a startling event or condition, *made while the declarant was under the stress of excitement that it caused*.") (emphasis added), *with* FED. R. EVID. 803(3) (admitting statements "of the declarant's then-existing state of mind (such as mental feeling, pain, or bodily health). . . ."). Despite how most circuits rely on this analogical reasoning to exclude 803(3) evidence, the courts can still admit non-contemporaneous statements that satisfy the textual requirements of 803(3) while keeping the analogy in mind. *Compare United States v. Cardascia*, 951 F.2d 474, 478 (2d Cir. 1991) (reasoning 803(3) is a specialized application of 803(1) and 803(2), *with DiMaria*, 727 F.2d at 272 (admitting 803(3) statements despite time to reflect and fabricate).

Here, the Fourteenth Circuit erroneously based its exclusion of both voicemails solely on the premise that Ms. Fenty had "ample opportunity to decide how she wished to respond after becoming aware that her packages were missing and believing the packages had been

intercepted." (R. 69.) Because the court assumed that Ms. Fenty's realization was that she was about to be caught as the event that Ms. Fenty "perceived," the court improperly infers that her alleged realization was the subject of Ms. Fenty's statements. (R. 69.) However, that string of inferences and assumptions is wrong. When Ms. Fenty left those voicemails for Millwood, she was not realizing that she was about to be caught or realizing that her packages were missing "because they had been flagged by authorities as potentially containing illicit substances." (R. 68.) All she realized was that the packages were not in her P.O. box. (R. 66.) This set of events perceived by Ms. Fenty is different from the former set of events assumed by the Fourteenth Circuit. (R. 69-70.) Ms. Fenty made the first call to Millwood immediately after seeing that the packages were not in her P.O. box, she did not have "ample opportunity to decide how she wished to respond," she was simply confused and worried. *Id*. Therefore, the first voicemail is admissible to demonstrate that she was engaged in a legitimate plan to help horses; it is admissible in tending to show Ms. Fenty's lack of criminal intent and lack of knowledge regarding the packages' contents and the purpose of the xylazine—all of which are permissible purposes textually delineated in 803(3).

Again, when Ms. Fenty left the second voicemail for Millwood at 2:17 p.m., she only did so after seeing her empty P.O. box, calling Millwood, and then talking to the postal workers. *Id*. Ms. Fenty did not call Millwood a second time because she realized that she was about to be caught; if she thought she was going to be caught, why would she have gone back the next day to collect the packages? *Id*. Instead, Ms. Fenty simply realized there was an issue with the packages because the workers told her to come back tomorrow. *Id*. And it was that realization, in combination with her impression that the xylazine "was just to help horses that are suffering," on top of her already then-existing worries, that caused her to get nervous and "concerned." *Id*. This

set of events perceived by Ms. Fenty is different from the set of events assumed by the Fourteenth Circuit. *Id*. Thus, she did not have "ample opportunity to decide how she wished to respond," she was simply trying to figure out what was going on. *Id*. And therefore, the second voicemail is admissible because Ms. Fenty's continuously developing then-existing state of mind tends to show her lack of criminal intent and lack of agreement to partake in Millwood's illicit drug scheme, both of which are permissible purposes of 803(3). In conclusion, the circuit courts imposing a spontaneity requirement are not interpreting 803(3) in accordance with the plain language nor its meaning.

Second**,** most circuit courts are not interpreting 803(3) in a manner that is consistent with the legislative intent and history behind the rule. According to this Court, "all laws are to be interpreted consistent with the legislative intent for which they were ***originally*** enacted ...." *Rules of Statutory Construction and Interpretation*, Supremecourt.gov, https://www.supremecourt.gov. In determining legislative intent, courts read "the expression of one thing" as implying the exclusion of others. *See* Scalia & Garner, *supra*, at 107. In defining what was expressed, and thus excluded, courts must interpret statutes together, as though they were one law. *Id*. at 252. In doing so, every word and provision must be given effect; no provision should needlessly be interpreted in a way that causes it to either duplicate another provision or to have no consequences. *See* Scalia & Garner, *supra*, at 174. For example, in drafting the Federal Rules of Evidence, the legislature intentionally chose to delineate spontaneity requirements in both 803(1) and 803(2). *See* Scalia & Garner, *supra*, at 107. Because the courts are supposed to interpret the statutes together, 803(1) through 803(3) must be interpreted together, and it is apparent that the legislature's expression of the requirement in 803(1) and 803(2), implies the exclusion of the requirement in 803(3). *Id*. at 252. Moreover, because reading a spontaneity requirement into

803(3) needlessly duplicates 803(1) and/or 803(2), the courts who interpret 803(3) as requiring spontaneity are in direct contradiction with legislative intent. *Id*. at 174. In conclusion, this Court should hold that Ms. Fenty's voicemails are admissible under 803(3); therefore, the Fourteenth Circuit abused its discretion.

B. Even if the Trial Court "Doubts" Ms. Fenty's Sincerity or Trustworthiness, the Court Should Not Refuse to Admit Ms. Fenty's Voicemails Because it is the Jury's Role to Assess the Credibility of the Declarant's Statements.

iii. *A trial court's exclusion of evidence upon an assessment of insincerity or untrustworthiness invites delay, prejudgment, and encroachment on the province of the jury*.

While the issues of spontaneity and credibility are related, the issues are distinct; in turn, there are distinct circuit splits. *Compare DiMaria*, 727 F.2d at 272 (explaining how the categorical approach excludes statements with a high degree of trustworthiness and admits statements with a low one), *with United States v. Cianci*, 378 F.2d 71, 106. As established in Part II.A(i), the Advisory Committee explicitly chose to control the admission of hearsay through categorical exceptions. *See* Fed. R. Evid. Art. VIII advisory committees introductory note. The Committee explicitly rejected the individualized approach because it implicates "too great a measure of judicial discretion." *Id*. Because the categorical approach curbs judges' ability to further limit admission of hearsay, it inherently exemplifies a pro-jury practice. *See id*. Leaving the issue of credibility to the jury is especially appropriate when the issue can be recognized by the jury, which is typically the case when the jury is confronted with the declarant's self-serving motivation. *Id*. Therefore, the Rules demand allowing the jury to determine credibility. *See* McCormick et al., supra, §270 ("Under the structure of the Federal Rules, judgments about credibility should [] be left to the jury rather than preempted by a judicial determination of

inadmissibility."). What is more, is that allowing the jury to assess credibility is the approach this Court demands. *See Hillmon*, 145 U.S. at 296.

To illustrate, this Court found in *Mutual Life Ins. Co v. Hillmon* that "[s]uch declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." *Id*. In holding the letters admissible, this Court indicated that when a hearsay statement incorporates both present intentions and underlying past facts, both are admissible under 803(3). *Id*. at 288-89, 299-300. By its plain language, Rule 803(3)'s mandate is categorical without authorizing the trial court to assess the trustworthiness or credibility of the declarant as a prerequisite for admissibility. *Id*. In particular, 803(3) only excludes statements that are not truly declarations of a "then existing" mental state. *Id*. Though the Rule's mandate is clear, only two circuits comply. *See DiMaria*, 727 F.2d at 272; *Peak*, 856 F.2d at 834; *but see Ponticelli*, 622 F.2d at 991-92 (concluding declarant had sufficient time to concoct a story); *United States v. LeMaster*, 54 F.3d 1224, 1231-32 (6th Cir. 1995).

In reversing the defendant's conviction, the Seventh Circuit in *Peak* held "the district court, which has broad discretion in evidentiary matters, does not have discretion to exclude testimony because the judge does not believe the witness." 856 F.2d at 834; *see Jackson*, 780 F.2d at 1314 (finding subjective credibility of the declarant as a question for the jury); *but see Reyes*, 239 F.2d at 734 (holding statements inadmissible because they were more self-serving than candid in that he suspected the listener of cooperating with authorities). Therefore, the court explained that an argument for exclusion should be based on the degree of reliability inherent in the statement rather than on the declarant's individual credibility. *Id*. Likewise, even where the evidence is "self-serving" hearsay, the Second Circuit requires that the jury decide whether a declarant is credible under 803(3). *DiMaria*, 727 F.2d at 271. In *DiMaria*, Judge Friendly swiftly

disassembled the government's insistence that the statement constituted "an absolutely classic false exculpatory statement." 727 F.2d at 271. He reasoned that relying on the "possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proved guilty . . . would be inconsistent with the presumption of innocence." *Id*. at 271. The court emphasized that any additional obstacle to admissibility invites "delay, prejudgment, and encroachment on the province of the jury." *Id*. at 272.

Similar to the statements in *Hillmon*, Ms. Fenty's proffered voicemails incorpate both present intentions and underlying past facts. 145 U.S. at 296. At the time of the voicemails, Ms. Fenty's present intention was to confirm that she was not involved in any sort of illicit scheme that could cause harm to others seeing as how she agreed to work for Millwood to help horses that are suffering; the fact that she read the article and was under the impression that the xylazine was only to help horses are the primary underlying past facts from which that intention arose. (R. 68.) Therefore, as in *Hillmon*, because both sets of facts are relevant to the issue of her mental state, the determination of their truth or falsity is an inquiry for the jury. *See* 145 U.S. at 296. Following the reasoning in *Peak*, the court's analysis should have been based on the degree of reliability inherent in Ms. Fenty's statements rather than the degree of credibility inherent in her. 856 F.2d at 834; (R. 69.) Evidenced by the Seventh Circuit's decisions in *Peak* and *Jackson*, the Fourteenth Circuit should have left the question of Ms. Fenty's subjective credibility to the jury because the trial court does not have discretion to exclude evidence based on the judge's disbelief of Ms. Fenty. *See* 856 F.2d at 834;780 F.2d at 1314. However, the Fourteenth Circuit improperly relied on *Reyes* and *Ponticelli*. *See Id*.; (R. 68-69.)

Unlike the defendant's statements in *Reyes*, Ms. Fenty's statements are more candid than self-serving because she did not suspect that Millwood was already cooperating with authorities,

she only thought she was getting paid to help horses. 239 F.2d at 734; (R. 44-46). And dissimilar from the reasoning used in supporting *Ponticelli*, Ms. Fenty told the trial court that only forty-five minutes elapsed between voicemails one and two; therefore, unlike the court in *Ponticelli*, the Fourteenth Circuit was not entitled to conclude that she had sufficient time to concoct an explanation. 622 F.2d at 991-92; (R. 46.) Thus, the determination is the jury's, and the jury's alone. *See DiMaria* 727 F.2d at 271. Finally, as Judge Friendly explains, in relying on the possible trickery that Ms. Fenty could've used in "making self-serving statements," the Fourteenth Circuit's decision was an abuse of its discretion. The Fourteenth Circuit was in contravention with the presumption of innocence, but it affirmed an additional obstacle to admissibility of the voicemails. *Id*.; (R. 69.) Therefore, as explained by *DiMaria* and *Peak*, the Fourteenth invited "delay, prejudgment, and encroachment on the province of the jury" in Ms. Fenty's case. *See* 727 F.2d at 271; 856 F.2d at 834. Thus, this Court should find that the Fourteenth Circuit abused its discretion in excluding Ms. Fenty's proffered voicemails.

iv. *In reading the Federal Rules of Evidence in their entirety, it is apparent that reading an explicit trustworthiness requirement into the language of 803(3) contradicts the relevant canons of statutory construction while negating the purpose and analysis promulgated in FRE 403.*

When engaging in statutory interpretation, the text should be construed as a whole, and statutes dealing with the same subject are to be interpreted together, as though they were one law. *See* Scalia & Garner, *supra*, at 167, 252. Further, in the criminal context, the "Rule of Lenity" demands that ambiguity in a statute should always be resolved in favor of the defendant. *Id*. at 296. Hence, it becomes clear that there are standalone mechanisms—i.e., Rule 403, legislated into the Rules protecting against the danger of unfairly prejudicial or misleading evidence. For example, in *United States v. Miller*, the Ninth Circuit properly excluded hearsay statements after conducting a 403 balancing test because the statements were "unreliable and self-serving." 874

F.2d at 1265-66 (noting defendant knew conversation was recorded). Therefore, the Ninth Circuit determined that not only was the evidence likely to confuse the jury, but "[g]iven the potentially manufactured nature of this evidence, the [ ] court properly recognized that [the statement] was unreliable and of little probative value." *Id*. at 1266. Therefore, it is apparent that the exclusion of evidence evincing a prior motive to fabricate is rooted in 403 rather than in 803(3). *See Peak*, 856 F.2d at 834 n.6 (explaining trial court can exclude 803(3) statements that are otherwise admissible under 403).

Here, unlike the court in *Miller*, the Fourteenth Circuit did not conduct a 403 balancing test. *See* 874 F.2d at 1265-66; (R. 68-69.) Because the Fourteenth Circuit excluded Ms. Fenty's voicemails for reasons similar to that in *Miller*, its analysis is incorrect. *See* 874 F.2d at 1265-66; (R. 68-69.) Therefore, by infusing a diluted balancing test into 803(3), the Fourteenth Circuit improperly affirmed a less-stringent 403 analysis under a different designation. Thus, this Court should hold that the Fourteenth Circuit abused its discretion in excluding Ms. Fenty's voicemails under 803(3) instead of conducting the requisite balancing test under 403. In conclusion, because the Fourteenth Circuit did not conduct a 403 analysis, it should have left the credibility determination to the jury.

III. Ms. Fenty's Prior Conviction for Petit Larceny Should not Have Been Admissible to Impeach her Credibility Under Federal Rule of Evidence 609(a)(2) Because Petit Theft does not Involve a "Dishonest Act or False Statement," it does not Bear Upon Ms. Fenty's Propensity to Testify Truthfully, and Public Policy Favors Interpreting 609(a)(2) Narrowly.

It was an abuse of discretion for the Fourteenth Circuit to admit Ms. Fenty's prior misdemeanor conviction under Rule 609(a)(2) because petit theft is not a crime of deceit, nor does it involve a "dishonest act or false statement." Rule 609(a)(2) requires admission of conviction evidence of a crime "regardless of the punishment . . . 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." FED. R. EVID. 609(a)(2). The circuits are split on the question of whether prior theft-based convictions involve a "dishonest act or false statement." *Compare United States v. Carden*, 529 F.2d 443, 446 (5th Cir. 1976) (holding evidence of prior conviction for petty theft admissible under 609(a)(2), *with United States v. Fearwell*, 595 F.2d 771 (1978) (holding evidence of a prior conviction for petit larceny inadmissible under 609(a)(2)).

First, this Court should hold that petit theft does not involve a "dishonest act or false statement" within the meaning of 609(a) because the crime does not contain an element of deceit. (R. 3.) Second, this Court should hold that 609(a)(2) must be interpreted narrowly because limiting instructions are inadequate guards against the risk of prejudice, and if petit larceny is found to be a crime of deceit, nearly every crime could fall into the intentionally narrow Rule of 609(a)(2). *See id.*; *Thompson v. United States*, 546 A.2d 414 (D.C. Cir. 1988). And thus, because petit larceny does not satisfy the textual requirements of 609(a)(2), it was an abuse of discretion for the Fourteenth Circuit to admit Ms. Fenty's prior misdemeanor conviction for purposes of impeachment.

A. Petit Theft does not Involve a "Dishonest Act or False Statement," Within the Meaning of 609(a).

Petit theft is not a crime containing an element of deceit. Crimes containing an element of deceit, such as perjury, embezzlement, false pretense, or other crimes "in the nature of crimen falsi," the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully, are automatically admissible because they bear directly on a witness's credibility. *Hayes*, 553 F.2d at 827 (citing H.R. Rep. No. 93-1597, at 9 (1974) (Conf. Rep.)). Congress legislatively makes clear the category of crimes

entailing a "dishonest act or false statement" embraces a "fairly narrow subset of criminal activity." *See Fearwell*, 551 F.2d at 777; 28 Wright & Miller, *Federal Practice and Procedure*, § 6135 (2d ed. 2023) ("[I]t seems unlikely Congress intended such a broad construction in light of the fact subdivision (a)(2) leaves the court no discretion to weigh probative value against prejudice.").

For example, in *United States v. Fearwell*, the D.C. Circuit held that "evidence of a prior conviction for petit larceny may not be admitted" to attack a witness's credibility. 595 F.2d at 776. In further elaborating on what it takes to meet this intentionally rigid standard, the court explained that a prior conviction must involve "crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." *Id*. at 776. In realizing that the drafters intended a more nuanced approach to 609(2)(2), most courts look to the Rule's policy and legislative history for support in finding that theft-based convictions are not automatically admissible. *See United States v. Washington*, 702 F.2d 886, 893 (6th Cir. 2012) ("Congress in drafting Rule 609(a)(2) directed courts specifically toward crimes 'in the nature of *crimen falsi* . . . . The rule is intended to inform fact-finders that the witness has a propensity to lie, and . . . crimes of violence or stealth have little bearing on a witness's character for truthfulness."). Ultimately, while a significant amount of courts follow the congressional description of dishonesty or false statement, some courts find it necessary to look at the basis of conviction. *See Walker v. Horn*, 385 F.2d 321, 332-34 (3d Cir. 2005) (holding robbery does not involve dishonesty or false statement; requiring "expressive dishonesty," while acknowledging that stealing by false pretenses may change the result); *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984) (noting crimes of theft and stealth do not involve dishonest or false statements).

Because deceit not an element of petit larceny, some courts look to "the manner in which the witness committed the offense." For example, in *United States v. Estrada*, the Second Circuit looked to the "underlying facts of a prior conviction to hold that a larceny conviction did not qualify as a crime of deceit under 609(a)(2). 431 F.3d 606, 614 (2d Cir. 2005) ("While much successful crime involves some quantum of stealth, all such conduct does not, as a result, constitute [a] crime of dishonesty or false statement."). The court reasoned that simply because the defendant used poor judgment in committing a crime and attempting to get away with it, does not render the crime one of deceit for 609(a)(2) purposes. *Id*. at 614-15. In *Altobello v. Borden Confectionary Prods., Inc*., the Seventh Circuit found that where "the manner in which the witness committed the offense may have involved deceit," the conviction is admissible under 609(a)(2). 872 F.2d 215, 216 (7th Cir. 1989) (noting the determination is extremely fact specific).

Some courts have delineated a test for determining when an offense that "leaves room for doubt" can come under 609(a)(2)'s scope; the prosecution must "demonstrate to the court that a particular prior conviction rests on facts warranting the dishonesty or false statement description." *Hayes*, 553 F.2d at 827. The prior conviction does not "leave[] room for doubt" because it does not rest on facts warranting the dishonesty or false statement description. *See Smith*, 551 F.2d at 364 n.28. Courts have distinguished between a crime committed via violence from a crime committed via deceitful or dishonest acts. *See, e.g.*, *Altobello*, 872 F.2d at 216.

Moreover, in *Estrada*, the Second Circuit looked to the "underlying facts" of a prior conviction to hold that a larceny conviction did not qualify as a crime of deceit under 609(a)(2). 430 F.3d at 614; *see United States v. Dorsey*, 591 F.2d 922, 933 (D.C. Cir. 1978) (holding shoplifting, absent a showing of fraud or deceit, involves stealth). In explaining that even though much successful crime involves some aspect of stealth, all such conduct does not constitute a

crime of dishonestly or false statement as a result, the court delineated between "crimes of stealth," such as petit larceny, and a crime that required deceit. *Id*; *United States v. Papia*, 560 F.2d 827, 847 n.14 (7th Cir. 1977) (distinguishing theft, as an "act of stealth); *Hayes*, 553 F.2d at 827 (noting "crimes of force, such as armed robbery, or crimes of stealth such as petit larceny, do not come within" 609(a)(2) (internal citations omitted)).

Here, as the court held in *Fearwell*, evidence of Ms. Fenty's conviction for petit larceny cannot be admitted under 609(a)(2) because Congress did not intend for petit larceny to fall within 609(a)(2)'s ambit. *See* 595 F.2d at 776. As in *Fearwell*, Ms. Fenty's prior conviction lacks an element of deceit because there was never "expressive dishonesty" as there was in *Walker v. Horn*. 385, F.2d 321, 332-34; *see* (R. 69-70.). And Ms. Fenty never deliberately interfered with the court's ascertainment of truth. *Id*. at 776; (R. 69-70.) In reliance on the Eight Circuit's conclusion in *Yeo*, Ms. Fenty's prior conviction of petit larceny does not involve dishonesty or false statements. 739 F.2d at 387; *see* (R. 69-70.) Moreover, like the court in *Estrada*, even in looking to "the manner in which the witness committed the offense," the "underlying facts of" Ms. Fenty's prior conviction do not qualify as a crime of deceit under 609(a)(2); as the court reasoned in *Estrada*, simply because Ms. Fenty used poor judgment in committing a crime based on a dare and then attempted to get away with it, does not render her conviction one of deceit. 431 F.3d at 614-15; (R. 53.) However, even in examining Ms. Fenty's prior conviction to determine if there is "room for doubt," the prosecution still failed in demonstrating that her conviction rests on facts warranting the dishonesty or false statement description enumerated in *Hayes*. 533 F.2d at 827; (R. 53-54.) Ms. Fenty was only nineteen years old when she attempted to impress her former friend by engaging in a dare to grab a woman's bag; Ms. Fenty admits that she did not even have a plan if she got caught. (R. 53-54.) Not only do these facts fail to rise to

the requisite level, but the facts are not enough to satisfy the "Theft by Deception" statute that Respondent claims. Ms. Fenty did not intentionally (a) "create[], reinforce[], or leverage[] a false impression, (b) prevent[] another from acquiring material information that would impact her judgment, or (c) fail[] to correct a false impression that [she] previously created, reinforced, or influenced. *See* (R. 3, 53-54.)

In fact, as in *United States v. Dorsey*, the underlying facts of Ms. Fenty's prior conviction involved stealth. 591 F.2d at 933; *see Estrada*, 430 F.3d at 614 (clarifying larceny does not qualify as a crime of deceit). Therefore, just as the court in *Hayes* found, Ms. Fenty's crime operates as a crime of stealth, and in turn, her prior conviction should be excluded under 609(a)(2). 553 F.2d at 827. Thus, this Court should hold that the Fourteenth Circuit abused its discretion in affirming the prosecution's impeachment of Ms. Fenty under 609(a)(2).

B. Public Policy Favors Interpreting 609(a)(2) Narrowly Because Limiting Instructions are Inadequate Guards Against the Risk of Prejudice.

The limiting instruction in Ms. Fenty's case was an inadequate guard against the risk of prejudice. "If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court . . . must restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105. However, the availability and effectiveness of issuing a limiting instruction must be taken into consideration in reaching a decision of whether to exclude under 403. FED. R. EVID. 105 advisory committee note; *see* FED. R. EVID. 403. Therefore, because the risk of unfair prejudice is substantial in the context of 609(a)(2), the utility of a limiting instruction in this context has been widely questioned. *See Thompson v. United States*, 546 A.2d 414, 425 (D.C. Cir. 1988). For example, the court in *Thompson* found empirical support for the proposition that limiting instructions about 609(a)(2) evidence "are less than uniformly efficacious." *Id*. at 425 (concluding jurors were universally

unable or unwilling to understand or follow the court's instruction to consider prior convictions only for impeachment). In examining the limiting instructions provided by courts, *Thompson* gives us a two-prong inquiry—whether the distinction advanced in the limiting instruction make any sense to a jury of lay people, and whether the limiting instruction been phrased in terms that a jury is likely to understand. *Id*. at 426.

Here, the Fourteenth Circuit's limiting instruction prejudiced Ms. Fenty. In utilizing the analysis promulgated by the D.C. Circuit, the Fourteenth Circuit's instruction likely did not make sense to the jurors. *Thompson*, 546 A.2d at 426; (R. 62-63.) Lay people are not going to know the evidentiary difference between "deciding whether or not to believe the defendant" followed up with the qualifier that the evidence is "intended only for a limited purpose." (R. 63.) As described in *Thompson*, there is an inherent danger in limiting instructions for past convictions like Ms. Fenty's. 546 A.2d at 425. Therefore, even if some lay jurors did understand parts of the limiting instruction, the results set forth by the D.C. Circuit indicate that Ms. Fenty, and criminal defendants alike, are unfairly prejudiced. *Id*. In conclusion, because the limiting instruction in was an inadequate guard against the risk of prejudice, this Court should hold that the Fourteenth Circuit abused its discretion in not conducting a 403 balancing test and subsequently issuing an insufficient limiting instruction.

CONCLUSION

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

Respectfully Submitted,
/s/ Team 10
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