Team 12P Original

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 23–695

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER, FRANNY FENTY

Counsel for the Petitioner

QUESTIONS PRESENTED

I. Whether Respondent's search of Petitioner's sealed packages pursuant to an invalid warrant violates Petitioner's reasonable expectation of privacy under the Fourth Amendment where the packages were addressed to her alias?

II. Whether Petitioner's hearsay statements are admissible under Federal Rule of Evidence 803(3) where the statements reflect her mental state at the time she made her statements?

III. Whether Petitioner's impeachment by evidence of her prior conviction of petit larceny was proper under Federal Rule of Evidence 609(a)(2) where dishonesty was not an element of the past crime committed?

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STATUTORY AND CONSTITUTIONAL PROVISIONS

This appeal concerns alleged violations of Petitioner's Fourth Amendment privilege against unreasonable searches and seizures. U.S. CONST. amend. IV. Additionally, this case involves the Federal Rules of Evidence 803(3) and 609(a)(2).

The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

Federal Rule of Evidence Rule 803(3) provides:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> . . .
>
> (3) *Then-Existing Mental, Emotional, or Physical Condition*. 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.

FED. R. EVID. 803(3).

Federal Rule of Evidence Rule 609(a)(2) provides:

> (a) In General. 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.

FED. R. EVID. 609(a)(2).

STATEMENT OF THE CASE

I. Statement of Facts

Franny Fenty ("Ms. Fenty") is a published author and resident of Joralemon, Boerum. (R. 65.) Since she was a college student, Ms. Fenty has frequently used the pseudonym, Jocelyn Meyer, in her writings because she values her privacy. (R. 4, 42–43.) While attending Joralemon College, Ms. Fenty published two short stories under the pseudonym in the university's creative writing magazine. (R. 4.) After college, she used the alias to write five unpublished novels and to send a manuscript to four publishers. (R. 42, 5.) The manuscript, attributed to Jocelyn Meyer, was sent to publishers using the email jocelynmeyer@gmail.com. (R. 42.) To this day, Ms. Fenty's college classmate recognizes Jocelyn Meyer as Ms. Fenty's pen name from her writings. (R. 33.) In January 2022, Ms. Fenty registered a P.O. Box under the name Jocelyn Meyer to receive packages. (R. 31.)

Despite her passion for writing, Ms. Fenty struggled to find publishers for her novel, so she posted on LinkedIn looking for new job opportunities. (R. 6.) Two individuals responded to her post offering their assistance, one of whom was Angela Millwood ("Milwood"), a handler at Glitzy Gallop Stables and Ms. Fenty's Joralemon High School classmate. (R. 6, 43.) Millwood and Ms. Fenty spoke several times over the phone about their careers and financial struggles. (R. 43.) Ms. Fenty explained that Millwood loved her job and was devoted to caring for horses. (R. 44.) Specifically, Millwood mentioned struggling watching the older horses suffer in pain. (R. 44.) One day, Millwood proposed a plan where Ms. Fenty would order a muscle relaxer,

xylazine, and Millwood would administer it to struggling horses to ease their pain. (R. 45.) Millwood was unable to place the order herself because she would lose her job at the horse stable if she did. (R. 45.) Ms. Fenty testified that she trusted Millwood's claims because of their similar difficult upbringings and Millwood's dedication to her job. (R. 45.)

After Ms. Fenty placed the order, she began researching xylazine and found a recent article discussing the substance and its use as a recreational street drug. (R. 46). The article detailed the rise in use of xylazine mixed with fentanyl throughout Joralemon. (R. 7.) Having never heard about the dangers of xylazine, Ms. Fenty was shocked and upset. (R. 45–46.) Ms. Fenty immediately called Millwood to express her concerns. (R. 46.) However, Ms. Fenty asserts Millwood quelled her fears, and assured Ms. Fenty that she was using the xylazine for the horses. (R. 46.)

On February 12, 2022, a Joralemon resident overdosed from a xylazine-fentanyl combination—the first overdose in the city resulting from horse drugs. (R. 8, 29.) At the scene, Drug Enforcement Administration (DEA) agents found a package from "Holistic Horse Care," a veterinarian pharmaceutical company. (R. 8.) After this discovery, DEA Agent Raghavan instructed Joralemon postal workers to flag any suspicious packages or those being shipped from horse veterinarian websites or companies. (R. 30.) On February 14, 2022, the Post Office informed Agent Raghavan that it flagged two packages sent from Holistic Horse Care addressed to Jocelyn Meyer. (R. 30). The Post Office put aside two additional Amazon packages, addressed to Franny Fenty, sent to the same P.O. Box. (R. 31.) That same day, Agent Raghavan obtained a search warrant to open and search the packages addressed to Jocelyn Meyer. (R. 31.) Agent Raghavan obtained this warrant based only upon the fact that the packages addressed to Jocelyn Meyer and the crime scene package were both from Holistic Horse Care. (R. 31.) He

subsequently took the packages, and pursuant to the warrant, opened and tested them for illicit substances. (R. 31.) The results indicated that the xylazine inside the packages contained fentanyl. (R. 31.)

The same day, Ms. Fenty received a delivery confirmation and went to the Post Office to retrieve her packages. (R. 46.) After she arrived, she realized her packages were not in her P.O. Box. (R. 46.) While at the Post Office, Ms. Fenty called Millwood, but she did not pick up. (R. 46.) Ms. Fenty left her a voicemail at 1:32 p.m. stating, "Angela, I just got to the Post Office. None of the packages I was expecting are here, they're missing. I read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here, right? Call me back as soon as you can. I'm getting worried that you dragged me into something I would never want to be part of." (R. 40.) Postal workers informed Ms. Fenty that she would need to return the following day to get her packages. (R. 40.) At 2:17 p.m., Ms. Fenty left a second voicemail message saying, "It's me again. I talked to the postal workers. They don't know what is going on with the packages. They said I should come back tomorrow. Angela, I'm really getting nervous. Why aren't you getting back to me? I thought the xylazine was just to help horses that are suffering. Why would they want to look at that? Is there something you aren't telling me? I'm really starting to get concerned that you involved me in something I had no idea was going on. Call me back." (R. 46, 40.)

On February 15, 2022, after searching the package and testing its contents pursuant to the warrant, Agent Raghavan returned the packages to the Post Office. (R. 31.) Agent Raghavan directed the Post Office manager to leave a slip inside Ms. Fenty's P.O. Box informing Jocelyn Meyer to retrieve her packages from the front desk. (R. 32.) When Ms. Fenty arrived at the Post Office, she took the slip to the counter and, after identifying herself as Jocelyn Meyer, was given

the packages. (R. 32–33.) While leaving, Ms. Fenty spoke with a college classmate who referred to her as "Franny." (R. 33.) After Ms. Fenty left, Agent Raghavan asked the classmate if he was just speaking with Jocelyn Meyer. (R. 33.) The classmate explained that Ms. Fenty had used that pen name in college, but her legal name was Franny Fenty. (R. 33.) Following Ms. Fenty taking the packages, Agent Raghavan decided to conduct further research about Ms. Fenty, Jocelyn Meyer, and Millwood. (R. 33–34.) He confirmed via an online search that Ms. Fenty used the name Jocelyn Meyer as a pseudonym when publishing her short stories. (R. 34.) Additionally, Agent Raghavan uncovered Ms. Fenty's LinkedIn post and Millwood's response. (R. 34.) Agent Raghavan noted that the DEA was familiar with Millwood because she had a history of drug dealing but had never been arrested or charged. (R. 34–35.) Upon uncovering this information, Agent Raghavan arrested Ms. Fenty on the evening of February 15, 2022. (R. 34.)

Eight years ago, Ms. Fenty was arrested on a charge of misdemeanor petit larceny for stealing a bag and $27 from a tourist on a dare. (R. 19, 53.) While the woman was distracted by a street performer, Ms. Fenty took her bag. (R. 59.) The woman attempted to retrieve it, but a scared Ms. Fenty grabbed the bag out of her hands, shoved her, and firmly told her to "let go or I'll hurt you." (R. 59–60.) Ms. Fenty fled the scene but was later arrested and pleaded guilty to petit larceny under Boerum Penal Code Section 155.25 ("Section 155.25"). (R. 60.) At the time of the incident, Ms. Fenty was only nineteen years old. (R. 19.)

II. Procedural History

Ms. Fenty was indicted on one count of possession with intent to distribute a controlled substance. (R. 34.) Prior to trial, the District Court heard two evidentiary motions, which were both denied.

First, Ms. Fenty moved to suppress evidence Respondent obtained from searching her sealed packages. (R. 66.) The court rejected Ms. Fenty's argument that she maintained a reasonable expectation of privacy in her packages addressed to her alias. (R. 16.) Moreover, the court determined that her use of the name Jocelyn Meyer did not constitute public use. (R. 17.) Despite acknowledging a legitimate concern that the Government may justify an unlawful search after-the-fact from finding evidence of illegal narcotics, the court denied Ms. Fenty's motion to suppress her packages' contents. (R. 17.)

Second, Ms. Fenty filed a motion *in limine* to exclude evidence of her prior conviction for petit larceny for purposes of impeaching the witness during trial, on the ground that it was not a crime of deceit under Federal Rule of Evidence ("Rule") 609(a)(2). (R. 21.) The court denied Ms. Fenty's motion and admitted her prior conviction with the inclusion of a limiting instruction. (R. 23, 26).

During trial, Ms. Fenty sought to admit two voicemail recording messages that she left to Millwood on February 14, 2022, on the grounds that the messages were statements of mind, admissible under Rule 803(3). (R. 47.) The court sustained Respondent's objection that the statements were inadmissible hearsay and the voicemails were excluded at trial. (R. 52.) The jury convicted Ms. Fenty on one count of possession with intent to distribute a controlled substance. (R. 66.) She was sentenced to ten years in prison. (R. 66.)

Ms. Fenty appealed her conviction to the Fourteenth Circuit on the same grounds that were argued at the District Court. (R. 65.) On June 15, 2023, the Fourteenth Circuit affirmed the lower court's decision. (R. 64.) On December 14, 2023, Ms. Fenty appealed the decision to this Court and her writ of certiorari was granted. (R. 74.)

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's ruling on three grounds. First, Ms. Fenty maintains a reasonable expectation of privacy in her sealed packages addressed to her alias Jocelyn Meyer. Second, Ms. Fenty's voicemail recordings are admissible statements of mind under Rules 803(3), 402 and 403, and were improperly excluded from evidence. Third, Ms. Fenty's prior petit larceny conviction is inadmissible under Rule 609(a)(2).

First, Respondent violated Ms. Fenty's reasonable expectation of privacy when Respondent searched Ms. Fenty's sealed packages addressed to her alias. The use of an alias to receive mail does not diminish an individual's Fourth Amendment rights to be free from government intrusion. Ms. Fenty used her pseudonym, Jocelyn Meyer, on numerous occasions to maintain her privacy in her personal writings, and asserts that same privacy interest in using the alias to receive items in the mail. Should this Court follow the "other indicia" approach, Ms. Fenty's use of her pseudonym constitutes public use. Ms. Fenty used her alias in short stories, unpublished novels, a manuscript, and emails. Further, Ms. Fenty has publicly identified herself to others as Jocelyn Meyer, and others recognize that she uses this pseudonym. Ms. Fenty's reasonable expectation of privacy is not diminished by her motivations for using her alias, regardless of whether they are innocent or criminal. Given Ms. Fenty's expectation of privacy in her mail, Respondent was required to obtain a valid search warrant or find a legitimate exception to the warrant requirement to conduct a lawful search. Respondent's warrant was invalid because it was not supported by probable cause, and no exception existed at the time of the search. Therefore, the contents of Ms. Fenty's packages should be suppressed because Respondent's search was impermissible under the Fourth Amendment.

Second, Ms. Fenty's voicemail messages are admissible hearsay under Rule 803(3) and meet the requirements of Rules 402 and 403. When state of mind is at issue, Rule 803(3) permits

the admission of out-of-court statements that reflect the declarant's then-existing mental state. Ms. Fenty's voicemail recordings illustrate her confusion over the packages' whereabouts, suspicion of her agreement with Millwood, and lack of awareness of any illicit drug scheme. Even if this Court finds that both of Ms. Fenty's voicemail recordings are reflections on the same prior event, they are still admissible because reflection is not a part of a Rule 803(3) inquiry. Nothing in the text of Rule 803(3) indicates that admissibility is determined by whether or not the declarant had a chance to reflect prior to making her statement. In other words, the Rule does not include a "no reflection" requirement. Furthermore, the voicemail recordings meet the relevancy requirement of Rule 402 and satisfy the Rule 403 balancing test because their probative value is not substantially outweighed by any potential to mislead the jury. Thus, the voicemail recordings are admissible evidence under Rules 803(3), 402, and 403.

Third, Ms. Fenty's prior conviction for petit larceny was improperly admitted under Rule 609(a)(2). If a crime does not require proving elements of dishonest acts or false statements, it cannot be admitted under the Rule. Here, Section 155.25 does not include dishonesty as an element of the crime. Rather, it only requires deprivation of property. Additionally, even if this Court finds that some instances of petit larceny involve deceit, Ms. Fenty's prior conviction should be categorized as a crime of violence, not one of dishonesty. The facts of Ms. Fenty's petit larceny conviction show that she solely used physical force to steal a woman's bag. Further, Ms. Fenty's use of stealth does not amount to deceit. Therefore, her prior conviction was not a crime of dishonesty. Finally, the limiting instructions are inadequate to mitigate against the prejudice created by admitting Ms. Fenty's prior conviction. Thus, despite the existence of limiting instructions, Ms. Fenty's prior conviction for petit larceny is nonetheless inadmissible under Rule 609(a)(2).

ARGUMENT

I. RESPONDENT ILLEGALLY SEARCHED MS. FENTY'S SEALED PACKAGES IN VIOLATION OF HER REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT.

The Fourth Amendment defends "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. A Fourth Amendment violation occurs when the government violates a reasonable expectation of privacy. *Kyllo v. United States*, 533 U.S. 27, 33 (2001). Whether a person has a reasonable expectation of privacy is premised upon both a subjective and objective inquiry. *United States v. Knotts*, 460 U.S. 276, 280-81 (1983). The subjective inquiry considers whether the individual has shown she seeks to preserve something as private. *Id*. The objective inquiry examines whether this expectation of privacy is one that society is prepared to recognize as reasonable. *Id*.

This Court should reverse the Fourteenth Circuit's ruling for on the constitutional issue for three reasons. First, Ms. Fenty maintains a reasonable expectation of privacy in sealed packages addressed to her alias, Jocelyn Meyer. Second, Ms. Fenty's privacy interest is not diminished by her reasons for using her alias, regardless of whether they are innocent or criminal. Third, Respondent violated Ms. Fenty's Fourth Amendment rights when Respondent failed to obtain a valid warrant supported by probable cause, and no exception to the warrant requirement applied.

A. Ms. Fenty maintains a reasonable expectation of privacy in sealed mail addressed to her alias.

This Court recognizes that an individual has a legitimate expectation of privacy in sealed mail. *United States v. Jacobsen*, 446 U.S. 109, 114 (1984). The use of an alias does not impact this privacy interest. *See United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003) (citing *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992); *see also United States v. Johnson*, 584

F.3d 995, 1002 (10th Cir. 2009). Therefore, this Court should hold that there is a reasonable expectation of privacy in sealed packages addressed to an alias. However, even if this Court does not establish this categorical expectation of privacy, Ms. Fenty has demonstrated a reasonable expectation of privacy in her packages through the "other indicia" approach.

1. Ms. Fenty has a subjective and objective expectation of privacy in sealed mail addressed to her fictional name.

Ms. Fenty's sealed mail addressed to her alias should be afforded the same constitutional protections as sealed mail addressed to her legal name. As to objective expectation, "[t]here is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package, and thus th[is] expectation of privacy . . . is one that society is prepared to recognize as reasonable." *Pitts*, 322 F.3d at 459. An individual may use a fictional name to receive mail for a variety of reasons, for example, to avoid harassment and intrusion, to address security concerns, or to prevent the misuse of confidential information gained through the mail. *See id.* at 458. As to subjective expectation, Ms. Fenty asserted that she used the alias Jocelyn Meyer for her P.O. Box because she wanted privacy. (R. 43.) Her justification for using this name in her writing and receiving mail creates a subjective expectation of privacy because it demonstrates that she expects her mail to remain private. Therefore, Ms. Fenty has established a reasonable expectation of privacy in her packages that Respondent violated.

2. Even if this Court follows the "other indicia" approach, Ms. Fenty retains a legitimate expectation of privacy in her sealed packages.

Several circuit courts have held that an individual's expectation of privacy in a sealed package addressed to an alias is maintained if she can establish other objective indicia of her ownership, possession, or control of the sealed mail at the time of the search. *See United States v. Stokes*, 829 F.3d 47, 50 (1st Cir. 2016); *United States v. Rose,* 3 F.4th 722, 730 (4th Cir. 2021);

United States v. Lewis, 738 F.2d 916, 920-21 (8th Cir. 1984). These indicia demonstrate whether there is an adequate connection between the defendant and the addressee to have a privacy interest. *Stokes*, 829 F.3d at 52. A defendant can meet this standard—and establish a reasonable expectation of privacy—if she can provide evidence that the fictitious name is an established or publicly used alias. *See Rose*, 3 F.4th at 728.

Ms. Fenty exhibited various objective indicia of ownership of the packages addressed to her alias. Notably, Ms. Fenty used the pseudonym Jocelyn Meyer on several prior occasions, including in the publication of two short stories in her college magazine in 2016 and 2017. (R. 4.) Ms. Fenty has written five unpublished novels under the alias, and used the email address "jocelynmeyer@gmail.com," in her business communications with four potential publishers. (R. 42, 5.) Further, in January 2022, Ms. Fenty registered a P.O. Box under the name Jocelyn Meyer to receive packages. (R. 31.) Ms. Fenty used the P.O. Box for mail sent to both her legal and fictitious names, making clear that Jocelyn Meyer and Franny Fenty are the same person. (R. 31.) When Ms. Fenty picked up her packages, she identified herself as Jocelyn Meyer to the Post Office employees. (R. 33.) Her known link to the alias has prevailed over the years, as a college classmate still remembers that Ms. Fenty used Jocelyn Meyer in her writings. (R. 33.) Agent Raghavan was also able to confirm via an online search that Ms. Fenty used this name in her work. (R. 33.)

The Fourteenth Circuit mistakenly held that Ms. Fenty's use of her alias is "too distant in timing" and "too tenuous" to constitute public use. (R. 67.) Public use of an alias does not require recent or widely-known public use; the standard can be met if evidence is presented that the defendant used the alias regularly under different circumstances or others recognize a defendant by the alias. *See Rose*, 3 F.4th at 730. Where a clear connection is established

between an individual and a publicly used alias, there is an expectation of privacy. *See id*. at 728. Ms. Fenty has put forth ample evidence demonstrating her connection to her alias and ownership in the sealed packages addressed to Jocelyn Meyer. Thus, even if this Court follows the "other indicia" approach, Ms. Fenty retains a reasonable expectation of privacy in her packages.

B. Ms. Fenty's reasonable expectation of privacy is not diminished by her motivations for using her alias, regardless of whether they are innocent or criminal.

While some courts have held that society no longer recognizes a reasonable expectation of privacy where a defendant uses her alias in furtherance of a criminal scheme, *Lewis*, 738 F.2d at 919 n.2, others have held that a defendant maintains her Fourth Amendment rights regardless of whether her purposes for using an alias in receiving mail are innocent or criminal. *See United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997), *cert. denied*, 522 U.S. 976 (1997); *Pitts*, 322 F.3d at 458 (7th Cir. 2003). Regardless of this Court's evaluation of Ms. Fenty's rationale for using her alias, her expectation of privacy in her packages remains.

1. Ms. Fenty's reasoning for using her alias to receive mail is immaterial in determining whether she has a reasonable expectation of privacy.

An individual's legitimate expectation of privacy is not dependent on her motivations for using an alias, whether innocent or criminal. *See Fields*, 113 F.3d at 321. Conditioning an expectation of privacy on intent would turn the Fourth Amendment on its head. *See Pitts*, 322 F.3d at 458. If the inquiry were motive-based, only individuals who use aliases for non-criminal purposes would retain Fourth Amendment protections, whereas those who use aliases for criminal purposes would not. *Id*. This would allow the Government to justify an illegal search or seizure where it uncovered drugs or other unlawful conduct after-the-fact by claiming a person had criminal motivations for using an alias. *Id*. Here, Respondent did not know that the packages contained fentanyl until after it opened and tested the xylazine. (R. 37.) This

understanding of a reasonable expectation of privacy would undercut Fourth Amendment protections against governmental intrusion. Thus, this Court should hold that Ms. Fenty's privacy interest in her mail was not impacted by her reasons for using the alias.

Even if motivation is relevant to a reasonable expectation of privacy inquiry, Ms. Fenty's rationale for using her alias was nevertheless innocent. She registered the P.O. Box and addressed her mail to her alias to maintain privacy for her personal items. Ms. Fenty would not have sent additional packages bearing her legal name to her P.O. Box—clearly tying her to the address—if she had criminal motivations. (R. 31.) Consequently, Ms. Fenty was not using her alias to "conceal her identity," nor was she "cho[osing] not to announce to society that [she] has a legitimate claim to the sealed contents of the package" as the Fourteenth Circuit held. (R. 67.) The existing public connection between Ms. Fenty and her alias demonstrates that she was not using Jocelyn Meyer to hide criminal activity. Therefore, if Ms. Fenty's motivations are relevant, the facts support that they were innocent, and she would ultimately maintain an expectation of privacy in her packages.

2. Even if this Court determines that Ms. Fenty's had criminal motivations in using her alias she retains a privacy interest because she also used it for innocent purposes.

Should this Court determine that Ms. Fenty used her alias to receive drugs, she still held a privacy interest in her packages because the name Jocelyn Meyer was not used *only* for criminal ends. Some courts claim that a defendant does not have a legitimate expectation of privacy in mail addressed to her public alias when that alias was used solely in a criminal scheme. *United States v. Lozano,* 623 F.3d 1055, 1064 (9th Cir. 2010) (citing *Lewis*, 738 F.2d at 919 n.2). Here, Ms. Fenty used Jocelyn Meyer in two short stories, five unpublished novels, a manuscript, and an email to four publishers. (R. 4, 5, 42.). She did not invent a fictitious name to use as a shield

to hide behind her crimes. Even if this Court finds she used her alias to receive drugs—though she did not—Ms. Fenty still has a privacy interest.

C. Respondent violated Ms. Fenty's Fourth Amendment rights when it searched her sealed packages with a warrant that was not supported by probable cause or a valid exception.

When the Government infringes upon a reasonable expectation of privacy, it is considered a search or seizure under the Fourth Amendment, and it must obtain a valid warrant or demonstrate an exception to the warrant requirement. *United States v. Lichtenberger*, 786 F.3d 478, 482 (6th Cir. 2015). The Fourth Amendment requires that the Government obtains a warrant based on probable cause. *Dalia v. United States*, 441 U.S. 238, 255 (1979). Probable cause exists when, given the totality of the circumstances, there is a fair probability that contraband or evidence will be found in the place described. *United States v. Moore*, 791 F.2d 13, 15 (1st Cir. 1986). A search without a valid warrant is only reasonable if it falls within an exception, such as the good faith and exigent circumstances exceptions. *United States v. Hammond*, 996 F.3d 374, 384 (7th Cir. 2021). Respondent's search of Ms. Fenty's sealed packages was unlawful because Respondent did not establish probable cause to sustain the validity of the warrant, nor did an exception justify the search.

1. Respondent failed to establish that probable cause supports the warrant used to open Ms. Fenty's sealed packages.

Probable cause is determined based on the totality of the circumstances. *See Illinois v. Gates*, 462 U.S. 213, 230 (1983). In general, association with potentially illicit activity, without more information, is insufficient to meet probable cause. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (finding that association with a known drug dealer was insufficient). Moreover, an officer lacks probable cause where the circumstances are susceptible to a variety of innocent

explanations that are not necessarily criminal. *See United States v. Selby*, 407 F.2d 241, 243 (9th Cir. 1969).

At the overdose crime scene, Agent Raghavan discovered a package from Holistic Horse Care. (R. 29, 30.) Following the overdose, the Post Office notified Agent Raghavan that there were two packages from Holistic Horse Care addressed to Jocelyn Meyer. (R. 30.) Based on a shared address alone, Agent Raghavan sought a warrant to search Ms. Fenty's packages. (R. 31.) The association with an address that is suspected, but not proven, to be related to drug activity is insufficient to establish probable cause. *See Ybarra*, 444 U.S. at 91. Moreover, Ms. Fenty testified she had an innocent explanation for receiving the packages, stating she and Millwood planned "to administer muscle relaxers to help horses with their pain." (R. 45.) Further, Post Office employees are permitted to inspect packages if they believe them to contain narcotics. (R. 30.) But here, instead of allowing the Post Office to do their job, Agent Raghavan sought a search warrant based only upon a shared return address. Without more information, a common address is insufficient to establish probable cause to acquire a warrant to open Ms. Fenty's packages.

2. Respondent's search without a valid warrant is not justified by the good faith exception.

The good faith exception applies when government officials acted reasonably in light of the existing law at the time of the search, including a facially valid warrant, a then-valid statute, or binding circuit precedent. *United States v. Aguilar*, 973 F.3d 445, 449 (5th Cir. 2020). "In determining whether the warrant was so facially deficient that the executing officer could not have reasonably presumed it to be valid, [courts] apply the objective test of whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's

authorization." *United States v. Martin*, 297 F.3d 1308, 1318 (11th Cir. 2002) (citing *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984)).

Here, the good faith exception does not apply. Agent Raghavan was a well-trained officer who likely knew the warrant was not supported by probable cause despite its approval. In his court testimony, he acknowledged that Postal Service inspectors can flag and open packages if there is a suspicion of drug trafficking. (R. 36.) However, despite his involvement in an estimated 200 federal drug mail investigations and fifteen years in this role, Agent Raghavan acted contrary to what his training taught him and "t[ook] matters into [his] own hands." (R. 36–37.) Respondent's investigative experience demonstrates he could not have reasonably presumed the warrant to be valid, and so the good faith exception does not apply. Therefore, this Court should suppress the contents of the packages because the unlawful search violated Ms. Fenty's constitutional rights.

3. Respondent's search without a valid warrant is not justified by the exigent circumstances exception.

The exigent circumstances exception applies when law enforcement's needs are so compelling that a warrantless search is reasonable under the Fourth Amendment. *See United States v. Carpenter*, 138 S. Ct. 2206, 2222-23 (2018). Exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. *Id.* Importantly, this exception does not serve as a tool of convenience for law enforcement to obtain evidence without a valid warrant; these emergency conditions must exist. *See United States v. Hobbs*, 24 F.4th 965, 971 (4th Cir. 2022). Courts evaluate the totality of the circumstances to determine whether an emergency is "enveloped by a sufficient level of urgency" to be reasonable under the Fourth Amendment. *Id.* at 970.

Here, there was no risk of imminent threat of harm or destruction of evidence to justify conducting a search with an invalid warrant. Agent Raghavan's claim that "stopping the delivery of deadly narcotics" justified the immediate search was incorrect. (R. 38.) "The presence of drugs alone does not give rise to exigent circumstances justifying a warrantless entry and search." *United States v. Howard*, 106 F.3d 70, 74 (5th Cir. 1997). In drug cases, exigencies are more likely to exist where the defendant is already in possession of the drugs. *See United States v. Mendoza*, 406 Fed. App'x. 513, 515 (2d Cir. 2011) (finding a warrantless entry was justified by exigent circumstances that the defendant would destroy evidence of drugs); *Howard*, 106 F.3d at 74 (same). Here, the Respondent stopped the drugs while they were in transit. (R. 12, 30.) Thus, because Ms. Fenty had not received the drugs, there was no imminent risk of harm, nor was there a valid concern regarding the destruction of evidence. Consequently, there were no exigent circumstances that justified Respondent's unlawful search, which infringed Ms. Fenty's constitutional rights.

Although it is documented that Joralemon has a significant drug problem, this is not a concern that rises to the level of exigent circumstances. (R. 7.) Respondent may not use a public health crisis as a tool of convenience to trump Ms. Fenty's constitutional rights. Failing to suppress this evidence allows law enforcement carte blanche to intrude upon citizens' privacy in their mail. Therefore, this Court should suppress the contents of Ms. Fenty's illegally searched packages addressed to her alias.

II. MS. FENTY'S VOICEMAIL MESSAGES ARE ADMISSIBLE UNDER RULES 803(3), 402, AND 403.

Hearsay is an out-of-court statement offered by a party "to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c). While hearsay is generally inadmissible, *see* FED. R. EVID. 802, Rule 803(3) provides an exception to this rule, finding admissible

"statement[s] of the declarant's then-existing state of mind, emotion, sensation, or physical condition . . ." where the declarant's mental state is at issue. FED. R. EVID. 803(3); *United States v. Peak*, 856 F.2d 825, 833 (7th Cir. 1988). If this statement of mind is "relevant," FED. R. EVID. 402, and the risk of misleading the jury, among other factors, do not substantially outweigh that statement's probative value, it is admissible. FED. R. EVID. 403.

This Court should reverse the Fourteenth Circuit's ruling on the hearsay issue for two reasons. First, the voicemail recordings satisfy the textual requirements of Rule 803(3) because they reflect Ms. Fenty's mental state at the time she discovered the packages were missing and obtained new information from postal workers. Second, the recordings meet the requirements of Rules 402 and 403 because they are relevant and their probative value is not substantially outweighed by any potential to mislead the jury.

A. Ms. Fenty's recorded voicemail messages are admissible hearsay under Rule 803(3).

Rule 803(3) requires that a statement of mind reflect the declarant's then-existing mental state. Here, the voicemail recordings demonstrate Ms. Fenty's then-existing mental state upon her discovery of and subsequent inquiry into the missing packages. However, even if this Court disagrees that each of her statements were made contemporaneously with the circumstances, thus reflecting her then existing mental state, the text of Rule 803(3) does not require that the declarant has no time to reflect between some particular event and her statement. *See* FED. R. EVID. 803(3).

1. Ms. Fenty's statements are admissible because they reflect her then-existing mental state.

A "then-existing" mental state is the state of mind the declarant held at the time she made her statement. It is *not* her mental state relative to a particular event. In other words, the "then" in "then-existing" may refer to any past moment in time, including the moment where the

statement was made. Thus, as long as the statement reflects a present mental state, it is admissible. *See United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977) (admitting a declaration because it is a "manifestation of his present state of mind"). For illustration, a statement such as "I love Mary" is admissible hearsay under Rule 803(3). Peter F. Valori, *The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule*, 48 U. MIAMI L. REV. 481, 504 (1993). This is because, although that the declarant's love could have arisen upon his first look at Mary or maybe after their first date, the statement reflects the love he has for her at the time he is making the statement. *Id*. Under Rule 803(3), "the point in time when some event giving rise to the feeling took place is immaterial; it matters only that it is a 'present' emotion." *Id*; *see also United States v. Dimaria*, 727 F.2d 265, 271 (2d Cir. 1984).

Here, Ms. Fenty's two voicemail recordings are tied to an event occurring immediately before each statement: (1) when she discovered that her packages were missing and (2) when she learned from postal workers that she would need to return the following day. (R. 40, 46.) Each voicemail reflects her thoughts and emotional state upon the happening of each event. Ms. Fenty sent the first voicemail message while she was still at the Post Office immediately after she first learned that the packages were not in her P.O. Box. (R. 46.) She states in the voicemail "none of the packages [she] was expecting" were in her P.O. Box, and, "I read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here, right?" (R. 40.) This comment indicates her then-existing confusion that the packages contained only the xylazine and would be used in her and Millwood's legitimate plan to help horses. It also shows her apprehension that the drug would potentially be used for illegal purposes.

Similarly, Ms. Fenty left the second voicemail immediately after she received news from postal workers that she would need to retrieve her packages the following day. (R. 40.) Given

the close proximity in time between the events and Ms. Fenty's statements, it is clear she did not have a chance to reflect prior to the voicemail recordings. Her second voicemail reiterates that she was unaware of Millwood's true intentions. In particular, Ms. Fenty states that she felt as though "there was something [Millwood wasn't] telling [her]." (R. 40.) In each voicemail, Ms. Fenty begs Millwood to call her back, showing her distress. (R. 40.) These voicemails' admission tends to show that, contrary to Respondent's argument, Ms. Fenty was unaware of any illicit drug scheme. Because the voicemail recordings reflect Ms. Fenty's then-existing state of mind, they satisfy Rule 803(3).

2. Whether a declarant had a chance to reflect is immaterial to admissibility under Rule 803(3).

Even if this Court finds that both of Ms. Fenty's voicemail recordings were made in response to the same event, they are still admissible because reflection is not a part of a Rule 803(3) inquiry. Nothing in the text of Rule 803(3) indicates that admissibility is determined by whether or not the declarant had a chance to reflect prior to making her statement. In other words, the Rule does not include a "no reflection" requirement.

The Federal Rules of Evidence are subject to "the traditional tools of statutory interpretation to determine their meaning and scope." *United States v. Bauzó-Santiago*, 867 F.3d 13, 18 (1st Cir. 2017) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988)). This Court has long held that "the meaning of a statute must, in the first instance," be determined by looking to its text. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Determining plain meaning requires examining "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). This Court presumes that legislatures act "intentionally and purposely" when they include

particular language in one section of a statute, while excluding that language from another. *Polselli v. Internal Revenue Serv.*, 598 U.S. 432, 439 (2023). .

Applying this statutory canon—*expressio unius est exclusio alterius*—to the case at bar indicates that if Congress intended for Rule 803(3) to evaluate whether the declarant had a chance to reflect, they could have written the Rule to mirror the text of the preceding Rules 803(1) and 803(2). These rules contain distinct requirements that the declarant has no chance to reflect between the event and the statement of the feeling described. *See* FED. R. EVID. advisory committee note 803(3). In Rule 803(1), the exception for present-sense impressions, the statement must have been "made while or immediately after the declarant perceived" the event being described. FED. R. EVID. 803(1). Similarly, in Rule 803(2), the exception for excited utterances, the statement must have been "made while the declarant was under the stress of excitement that [caused the] startling event or condition." FED. R. EVID. 803(2). Rule 803(3) has no such requirement. The plain meaning of the Rule states that the substance of a statement must reflect a "*then-existing* state of mind." FED. R. EVID. 803(3) (emphasis added). As such, the text of Rule 803(3) does not impose a temporal limit on statements of mind.

Evaluating whether a declarant has a chance to reflect prior to making a statement is, in essence, an analysis of whether a declarant has a motive to fabricate or deceive. There is no such requirement in Rule 803(3). The District Court mistakenly found that the recordings' lack of spontaneity weakens their credibility and thus were "self-serving statements that may mislead the finders of fact." (R. 69). However, Rule 803(3) does not bar admitting statements of mind even if they appear to be self-serving or fabricated. 6 WIGMORE, EVIDENCE § 1732, at 160 (Chadbourn rev. 1976); *see United States v. Cardascia*, 951 F.2d 474, 487 (2d Cir. 1991). The American Law Institute's Model Code, which the Federal Rules of Evidence are based upon, allows a

judge to find statements of mind inadmissible "based on a lack of trustworthiness or 'bad faith.'" Peter F. Valori, *The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule*, 48 U. MIAMI L. REV. 481, 482 (1993). Despite basing the Rules upon the Model Code, "the Advisory Committee, in drafting Rule 803(3), purposefully omitted the 'bad faith' provision because it believed that 'good or bad faith essentially bears upon credibility and is a matter for the jury.'" 4 Weinstein & Berger, *Weinstein's Evidence* ¶ 803(3)[04], at 803-121 (1992). Rule 803(3) statements of mind are presumed reliable because the declarant is the only one to know what her thoughts were at the time she made her declaration. *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980). Calculating a declarant's time to reflect is a key component in a "bad faith" analysis—an analysis that the Advisory Committee specifically left out of Rule 803(3). Peter F. Valori, *The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule*, 48 U. MIAMI L. REV. 481, 482 (1993). Therefore, basing Rule 803(3) admissibility upon the declarant's chance to reflect is in direct conflict with the drafters' intent.

B. The voicemail recordings meet the requirements of Rules 402 and 403.

If a statement falls within an enumerated exception, that statement must be admitted unless it is not relevant under Rule 402 or the balancing test allows its exclusion under Rule 403. *United States v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984). Here, Ms. Fenty's voicemail recordings are admissible because they are relevant under Rule 402 and satisfy the Rule 403 balancing test.

1. The voicemail recordings are relevant under Rule 402.

The voicemail recordings are relevant to determine whether Ms. Fenty knew that the packages contained fentanyl, proof of which is required for her conviction. Under Rule 402, to be admissible, relevant evidence must make any fact that is necessary to the conclusion of the action more or less probable. FED. R. EVID. 401. As such, the basic standard for relevance is "a

liberal one." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993). Here, as the Appellate Court explained, the voicemail recordings tend to show Ms. Fenty's lack of knowledge of any illicit drug scheme. (R. 68.) She stated that she did "not [know] what [was] going on here," and that she was concerned she was being "dragged [] into something [she] would never want to be part of." (R. 40.) The recordings demonstrate that Ms. Fenty did not have the requisite knowledge of the packages' contents and are thus relevant under Rule 402.

2. The voicemail recordings' probative value is not substantially outweighed by any potential to mislead the jury under Rule 403.

Rule 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . misleading the jury . . . ." FED. R. EVID. 403. The trial judge must balance the harm of admission against the probative value of and need for the evidence. FED. R. EVID. advisory committee's notes 403. Excluding relevant evidence under Rule 403 is "an extraordinary remedy to be used sparingly." *K-B Trucking Co.*, 763 F.2d 1148, 1155 (10th Cir. 1985) (quoting *United States v. Plotke*, 725 F.2d 1303, 1308 (11th Cir.), *cert. denied*, 469 U.S. 893 (1984)). In conducting this balancing test, a court must also consider the availability of evidentiary alternatives and the "offering party's need for evidentiary richness and narrative integrity in presenting a case." *Old Chief v. United States*, 519 U.S. 172, 183 (1997); 22 C. Wright & K. Graham, FEDERAL PRACTICE AND PROCEDURE § 5250, pp. 546-547 (1978).

Here, the voicemail recordings have significant probative value because there are no evidentiary alternatives to show that Ms. Fenty was unaware that the xylazine was laced with fentanyl. Statements of mind are particularly valuable because the declarant is the only person to know what she is thinking and feeling at the time she makes her declarations. *See Ponticelli*, 622 F.2d at 991. Ms. Fenty's awareness of the contents of the packages is crucial in determining whether she had the requisite intent. Without other evidence of Ms. Fenty's relevant intent, her

own statement of mind provides probative value as she is the only one to know her thoughts at that time.

Further, the majority's concern that the voicemail recordings were self-serving and, therefore, risk misleading the jury is misplaced. Rather, the greater risk of harm is that their exclusion would mislead the jury to think that Ms. Fenty was aware of Millwood's drug scheme, when in fact she was not. The jury, as is their province, should be given all the relevant evidence to make an informed decision. Since the voicemail recordings are the only evidence addressing her mental state, admitting the statements would make a material difference in her case for exoneration. Absent evidentiary alternatives, the voicemail recordings carry significant probative value that, if excluded, would mislead a jury. Therefore, the Rule 403 balancing test supports their admission.

III. MS. FENTY'S PRIOR CONVICTION FOR PETIT LARCENY WAS IMPROPERLY ADMITTED UNDER RULE 609(a)(2).

Rule 609(a) permits a party to attack a witness' character for truthfulness by evidence of a criminal conviction. FED. R. EVID. 609(a). Rule 609(a)(2) automatically admits "any crime [if] the elements of the crime require[] proving . . . a dishonest act or false statement." FED. R. EVID. 609(A)(2). The term "dishonest act" includes "*crimen falsi*," which are crimes of "false pretense" with characteristics of deceit. *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976). If a crime does not require proving elements of dishonesty or false statements, it does not fall under Rule 609(a)(2) and therefore cannot be used to impeach a witness' character.

This Court should reverse the Fourteenth Circuit's ruling on the prior conviction issue for three reasons. First, Section 155.25 does not require proving the existence of a dishonest act or false statement. Second, Ms. Fenty's petit larceny is not a crime of deceit, but rather one of

violence. Third, the limiting instructions provided to the jury with regard to her prior conviction are insufficient to ensure Ms. Fenty receives a fair trial.

A. Ms. Fenty's prior conviction is inadmissible under Rule 609(a)(2) because dishonesty is not an element of Section 155.25.

Rule 609(a)(2) provides that a prior conviction must be admitted as evidence if in "establishing the elements of the crime," the Government has to prove the existence of "a dishonest act or false statement." FED. R. EVID. 609(a)(2). In drafting Rule 609(a)(2), Congress narrowly defined the subset of crimes that could be used for impeachment to include only those crimes that "[bear] on the accused's propensity to testify truthfully." *United States v. Papia*, 560 F.2d 827, 846 (7th Cir. 1977) (citing H.R. CONF. REP. NO. 93-1597, at 93). To better fulfill that goal, Congress amended Rule 609(a)(2) in 2006 to make clear the Rule only encompasses crimes that explicitly include codified elements of dishonesty. *See* George Edward Spencer, *Interpreting the New Rule 609(A)(2)*, 57 CASE W. RES. L. REV. 717, 719–721 (2007); FED. R. EVID. committee notes on rules—2006 amendment 609 (The modified Rule 609(a)(2) "mandates the admission of evidence of a conviction only when the conviction *required . . . proof* . . . [that] an act [was] dishonest.") (emphasis added).

In accordance with congressional intent, this Court should follow the D.C. Circuit's reasoning in *United States v. Fearwell*. 595 F.2d 771, 777 (D.C. Cir. 1978). The *Fearwell* court found that, "unless specified to the contrary in the controlling statute," petit larceny does not involve the required elements to be admitted under Rule 609(a)(2). 595 F.2d at 777. As the court in *Fearwell* explained, petit larceny "simply has no bearing whatsoever" on a witness's ability to testify truthfully and is thus inadmissible unless otherwise specified. *Id*. Here, Boerum does not require elements of deceit in Section 155.25 of its penal code, titled "Petit Larceny." (R.3). Instead, it only requires a defendant to "deprive [a victim] of their property," without any

mention of deceit or dishonesty. (R.3.) As such, petit larceny as defined by Section 155.25 is not a facially deceitful crime and cannot fall within the scope of Rule 609(a)(2).

If the Boerum Legislature intended to require a showing of dishonesty in Section 155.25, it would have included such language. Here, using *expressio unius est exclusio alterius* reveals that if the Boerum Legislature wanted to include a "dishonesty" requirement in Section 155.25, it would have. *See supra* II.A.2. In fact, a neighboring provision, Section 155.45 of the Boerum Penal Code, titled "Theft by Deception," explicitly requires a showing of dishonesty, while Section 155.25 includes no such language. (R. 3.) Because the Boerum Legislature did not include elements of dishonesty in Section 155.25, Ms. Fenty's prior conviction does not fall under Rule 609(a)(2).

B. Even if this Court finds that some instances of petit larceny involve deceit, Ms. Fenty's prior conviction was a crime of violence, not one of dishonesty.

Courts will sometimes admit a prior conviction where the crime's statutory definition did not require a showing of dishonesty. *See United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977) (citing *Smith*, 551 F.2d at 364 n.28). This occurs when the court believes that the facts of the crime involved enough dishonesty to warrant admission under Rule 609(a)(2). *Id.* Such convictions are said to "leave room for doubt" as to whether the crime actually involves deceit. *Id.* In such instances, courts conduct a factual analysis to determine whether a crime bears on one's propensity to lie and thus falls within Rule 609(a)(2). *Smith*, 551 F.2d at 365 (quoting *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967). Where a prior conviction "leave[s] room for doubt," as to that inquiry, courts distinguish between crimes committed by violence and those committed by deceit. *See id.* at 615; *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982). Courts find that crimes of deceit occur when the perpetrators lie to their victims about

their intentions to commit the crime. *See Smith*, 551 at 362–63. Crimes that rest on violence do not fall under Rule 609(a)(2) while crimes resting on deceit do. *Hayes,* 553 at 827 (2d Cir. 1977); *see Gordon*, 383 F.2d at 940.

1. Ms. Fenty's actions in committing petit larceny were characteristic of a crime of violence.

Acts, or crimes, of violence "may result from a short temper, a combative nature, extreme provocation . . . [and] generally have little or no direct bearing on honesty and veracity." *Gordon*, 383 F.2d at 940. She did not lie or scheme to steal it; rather, her actions were predominantly combative. (R. 22.) Ms. Fenty physically shoved the victim hard enough that she yelled loudly. (R. 53). Further, Ms. Fenty threatened to shove the victim a second time if she did not let go of the bag, establishing a risk of further violence. (R. 60.) Because Ms. Fenty used physical violence to steal the bag, her prior misdemeanor was a crime of violence, not one of deceit. (R. 59–60.)

2. Ms. Fenty's choice of a distracted victim is not sufficient to make the petit larceny she committed a crime of deceit.

Most successful crimes involve "some quantum of stealth, [but] such conduct does not, as a result, constitute [a] crime of dishonesty" under Rule 609(a)(2). *United States v. Estrada*, 430 F.3d 606, 614–15 (2d Cir. 2005); *see also Fearwell*, 595 F.2d at 776 (discussing that many petty larceny crimes involve stealth, which is not the same as deceit). Ms. Fenty's choice of a victim distracted by a street performer indicates that this is a crime of stealth, not deceit. (R. 59.) Ms. Fenty's choice to commit the crime at an opportune moment and thus decrease her chances of getting caught was a mere tactical move in carrying out the crime. This tactical choice of victim did not involve any false statement or dishonest act, which is what Congress sought to admit in creating Rule 609(a)(2). *See supra* Part III.A.

C. The limiting instructions are insufficient to mitigate prejudice from the improper admission of Ms. Fenty's prior conviction.

The limiting instructions given to the jury during the trial did not alleviate concerns regarding Ms. Fenty's prior petit larceny inadmissibility under Rule 609(a)(2). (R. 25.) For limiting instructions to be proper, courts must ensure that they are not prejudicial to the defendant. *United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1235 (10th Cir. 1997). Empirical evidence supports that when a witness is the defendant, the jury is more likely to use a prior conviction improperly. *See* Alexander Straka, *Neither Seen Nor Heard: Impeachment by Prior Conviction and the Continued Failure of the Wisconsin Rule to Protect the Criminal Defendant-Witness*, 2018 WIS. L. REV. 1193, 1204 (2018). Specifically, jurors are more likely to infer that a defendant's prior conviction is indicative of their propensity to commit a crime, rather than their likelihood to be truthful on the stand. *See United States v. Moore,* 732 F.2d 983, 990–91 (D.C. Cir. 1984); *Id.* Here, the limiting instructions would lead to too great of a prejudice against Ms. Fenty because she is the defendant. Admitting Ms. Fenty's prior conviction could lead a jury to interpret her prior criminal behavior as indicative of a propensity to commit crimes and thus improperly infer that she committed the crime at issue.

More broadly, experimental research suggests that jurors do not follow limiting instructions. *See* Robert R. Calo, *Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 26–27 (1985). Some studies even indicate that they have the opposite effect of what they set out to do. *Id.* Specifically, empirical evidence indicates that limiting instructions may overly sensitize jurors to the information they are supposed to ignore, casting serious doubt on their effectiveness. *Id.* Thus, the limiting instructions provided to the jury do not properly address the inadmissibility of Section 155.25

under Rule 609(a)(2) and instead increase the risk of improper jury inferences. As such, this Court should find the provided jury instructions improper.

CONCLUSION

For the foregoing reasons, the judgment of the Fourteenth Circuit should be reversed.

Respectfully submitted,
/s/ Team 12P
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