Team 11R

No. 23–695

Supreme Court of the United States

FRANNY FENTY,

Petitioner,

--against--

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

QUESTIONS PRESENTED 8

STATEMENT OF THE CASE 8

SUMMARY OF THE ARGUMENT 11

ARGUMENT 14

I. Fenty has no reasonable expectation of privacy in the sealed packages that are not sent from or addressed to her. 15

a. Defendants lack a reasonable expectation of privacy in sealed packages addressed to an alias; as a result, Fenty lacks a reasonable expectation of privacy in the sealed packages because she is neither the sender nor addressee of those packages. 17

b. Alternatively, if this Court chooses to use the "other indicia" test, then Fenty still lacks a reasonable expectation of privacy in the sealed packages because there are not sufficient "other indicia" to indicate that Fenty owned, possessed, or controlled the packages. 21

II. Recorded voicemails statements made after time for reflection should not be admitted as a then-existing mental state exception to hearsay under Rule 803(3). 23

a. Under the Rule 803(3) then-existing state of mind exception to hearsay, out-of-court statements are only admissible if they are spontaneous; as a result, the District Court properly suppressed the voicemails because Fenty had time to reflect before making the recordings. 24

b. Even if Rule 803(3) does require spontaneity, only a small portion of the recorded voicemails would be admissible under the then-existing state of mind exception because Rule 803(3) is a narrow rule that only allows in evidence of how the declarant is feeling, not the reasons for those feelings. 29

c. Alternatively, even if the district court abused its discretion by suppressing the voicemails under Rule 803(3), this Court should find that the voicemails were properly suppressed under Rule 403 because the risk of misleading the jury substantially outweighs the probative value of the voicemails. 31

III. The District Court properly found that Fenty's prior conviction for petit larceny was a crime involving "dishonest act or false statement" admissible under Rule 609(a)(2) for impeachment purposes. 33

a. Since stealing is commonly understood to affect a person's honesty, the District Court properly admitted Fenty's prior conviction of petit larceny as a crime involving a "dishonest act or false statement" under Rule 609(a)(2). 34

b. However, even under a narrower interpretation of "dishonesty," the District Court properly admitted Fenty's prior conviction of petit larceny because Fenty used deceit to steal the victim's purse. 35

c. Under Rule 609(a)(2), prior convictions for dishonest and deceitful crimes must be admitted regardless of any prejudice concerns. 39

d. The District Court's jury instruction was proper as Fenty did not present sufficient evidence to rebut the instruction's presumptive effectiveness. 39

CONCLUSION 40

TABLE OF AUTHORITIES

Supreme Court Cases

Bruton v. United States, 391 U.S. 123 (1968)), ... 39

Hemphill v. New York, 142 S. Ct. 681 (2022). 31

Kansas v. Carr, 577 U.S. 108 (2016) 39

Katz v. United States, 389 U.S. 347 (1967)..... 15, 21

Old Chief v. United States, 519 U.S. 172 (1997). 24, 33

Rakas v. Illinois, 439 U.S. 128 (1978) 14, 15, 17, 20, 21

Richardson v. Marsh, 481 U.S. 200 (1987)),..... 39

State v. Tennant, 394 S.C. 5 (S.C. 2011). 23, 29

United States v. Jacobsen, 466 U.S. 109 (1984)..... 15, 18

Weeks v. Angelone, 528 U.S. 225 (2000)..... 39

Zafiro v. United States, 506 U.S. 534 (1993)..... 34, 39

Circuit Court Cases

Altobello v. Borden Confectionary Prods., Inc., 872 F.2d 215 (7th Cir. 1989)..... 32, 36, 37

Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967) 34

Loehr v. Walton, 242 F.3d 834 (8th Cir. 2001)..... 38

Ryan v. Bd. of Police Comm'rs, 96 F.3d 1076 (8th Cir. 1996)..... 38

United States v. Aguirre, 839 F.2d 854 (1st Cir. 1988). 20

United States v. Ashley, 569 F.2d 975 (5th Cir. 1978)..... 32, 35

United States v. Cardascia, 951 F.2d 474 (2d Cir. 1991)..... 25

United States v. Castellanos, 716 F.3d 828 (4th Cir. 2013) 22

United States v. Daniel, 982 F.2d 146 (5th Cir., 1993) 13, 14, 15, 16, 17, 19, 39

United States v. Del Toro Soto, 676 F.2d 13 (1st Cir. 1982). 13, 32, 33, 34, 39

United States v. Estrada, 430 F.3d 606 (2d Cir. 2005) 32, 35

United States v. Garcia-Bercovich, 582 F.3d 1234 (11th Cir. 2009) 16

United States v. Glenn, 667 F.2d 1269 (9th Cir. 1982) 33, 38

United States v. Harris, 942 F.2d 1125 (7th Cir. 1991) 26

United States v. Hayes, 553 F.2d 824 (2d Cir. 1977) 33, 34, 35, 36

United States v. Hughes, 970 F.2d 227 (7th Cir. 1992). 30

United States v. Jackson, 780 F.2d 1305 (7th Cir. 1986). 23, 26

United States v. Joe, 8 F.3d 1488 (10th Cir. 1993). 28, 29

United States v. Johnson, 584 F.3d 995 (10th Cir. 2009). 14, 15

United States v. Koenig, 856 F.2d 843 (7th Cir., 1988) 15

United States v. Miller, 874 F.2d 1255 (9th Cir. 1989) 26

United States v. Neely, 980 F.2d 1074 (7th Cir. 1992 26

United States v. Ortega, 561 F.2d 803 (9th Cir. 1977) 32, 35

United States v. Papia, 560 F.2d 827 (7th Cir. 1977) 33, 34, 35, 36

United States v. Peak, 856 F.2d 825 (7th Cir. 1988 30

United States v. Pitts, 322 F.3d 449 (7th Cir., 2003) 16, 18

United States v. Ponticelli, 622 F.2d 985 (9th Cir. 1980) 13, 22, 23, 24, 25, 26, 39

United States v. Reyes, 239 F.3d 722, 743 (5th Cir. 2001) 23

United States v. Richards, 638 F.2d 765 (5th Cir. 1981) 15, 16, 19, 20, 21

United States v. Rose, 3 F.4th 722, 727 (4th Cir. 2021) 16, 19, 20, 21, 22

United States v. Seamster, 568 F.2d 188 (10th Cir. 1978) 32

United States v. Smith, 39 F.3d 1143 (11th Cir., 1994). 15

United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976). 35

United States v. Stokes, 829 F.3d 47 (1st Cir. 2016) 15, 16, 20, 21

United States v. Tome, 61 F.3d 1446 (10th Cir. 1995)..... 28

United States v. Villarreal, 963 F.2d 770 (5th Cir. 1992)..... 16, 19

Walker v. Horn, 385 F.3d 321 (3d Cir. 2004). 36

District Court Cases

United States v. Morta, 2022 U.S. Dist. LEXIS 84353 15

Constitutional Provisions

U.S. Const. amend. IV 14

Federal Rules of Evidence

Fed. R. Evid. 403 ..... 23, 30

Fed. R. Evid. 609(a)(2). 32, 38

Fed. R. Evid. 801(c)(1) -(2) 23

Fed. R. Evid. 803(1)..... 24

Fed. R. Evid. 803(2)..... 24

Fed. R. Evid. 803(3)..... 23, 28

Other Authorities

Christopher B. Mueller and Laird C. Kirkpatrick, 2012 Federal Rules of Evidence with Advisory Committee Notes and Legislative History 209 (Wolters Kluwer, 2012) 24, 25

Conf. Rep. No. 93-1597, as *reprinted in* 1974 U.S.C.C.A.N. 7098, 7103 35

Deceit, Merriam Webster (2024), https://www.merriam-webster.com/dictionary/deceit 35

Delivering Justice to Opioid Dealers, U.S. Postal Inspection Service, https://www.uspis.gov/the-opioid-epidemic (last visited Feb. 3, 2024). 17

Dishonesty, Dictionary.com (2024), https://www.dictionary.com/browse/dishonesty 33

Eric Jardine, *Policing Cybercrime Script of Darknet Drug Markets: Methods of Effective Law Enforcement Intervention*, 46 American J. Crim. Just. 980-1005, 982 (2021) 17

Federal Trial Guide § 40.52 (2023)..... 28

H.R. Rep. No. 93-1597, at 3 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7103 34

Random House College Dictionary 380 (abr. ed. 1973)); 33

Spontaneous, Merriam-Webster (2024), https://www.merriam-webster.com/dictionary/spontaneous..... 23

Stealth, Merriam Webster (2024), https://www.merriam-webster.com/dictionary/stealth 36

QUESTIONS PRESENTED

I. Whether Defendant has a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to Defendant's alias.

II. Whether recorded voicemail statements offered by Defendant to show a then-existing mental state can be admitted as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence if Defendant had time to reflect before making the statements.

III. Whether Defendant's impeachment by evidence of her prior conviction for petit larceny was proper under Rule 609(a)(2) of the Federal Rules of Evidence.

STATEMENT OF THE CASE

In December 2021, Franny Fenty posted on LinkedIn that she was looking for work. R. at 6. Angela Millwood, a horse handler, responded and told Fenty that she could help her find work. R. at 6. Fenty knew Millwood from high school and was aware that Millwood had been suspended from school for drug possession and distribution. R. at 56:23-25. After getting into contact with Millwood, Fenty testified that Millwood claimed she worked with sick horses who needed pain medication. R. at 45:20-23. Fenty agreed to help Millwood and placed an order for xylazine from Holistic Horse Care. R. at 46:13-14. Fenty ordered the drugs under her alias "Jocelyn Meyer" and shipped the drugs to a P.O. box she had opened two weeks prior under the same alias. R. at 31:19-32:8. Fenty had created this alias several years prior to publishing short stories while in college. R. at 34:22-23.

On February 14th, 2022, two days after a Joralemon resident died from an overdose of a fentanyl-xylazine mixture, Agent Raghavan of the United States Drug Enforcement Agency ("DEA") received a call from the Joralemon Post Office. R. at 29:4-31:25. The post office contacted Agent Raghavan after flagging two suspicious packages from Holistic Horse Care that

were addressed to "Jocelyn Meyer" and sent to Jocelyn Meyer's P.O. box. R. at 31:14-32:1. Upon arrival at the post office, Agent Raghavan picked up the packages and noted that there were two other packages addressed to "Franny Fenty" inside Jocelyn Meyer's P.O. box. R. at 32:11-12. After he obtained a search warrant for the packages, Agent Raghavan left the post office with the packages and dropped them off at a testing facility. R. at 32:20-22. At some point later that day, Fenty tried to pick up the Holistic Horse Care packages, but postal employees told Fenty that the packages were not there. R. at 41:24-26.

After failing to pick up the packages, Fenty called and left Millwood a voicemail. R. at 41. In her message, Fenty explained that the packages were not at the post office and that she was getting worried because she had read an article about how xylazine was being mixed with fentanyl. R. at 41:7-9. Fenty also said she was worried that Millwood had involved her in something that she didn't want to be a part of. R. at 41:11-12. Forty-five minutes later, Fenty left Millwood another voicemail explaining that she was nervous and worried that Millwood had involved her in a drug scheme without her knowledge. R. at 41:26.

On February 15th, Agent Raghavan learned that the bottles from Jocelyn Meyer's packages contained 400 grams of xylazine mixed with 200 grams of fentanyl. R. at 32:25-33:3. With this in mind, Agent Raghavan returned to the post office and told post office employees to leave a note in Meyer's P.O. Box, instructing Meyer to pick up her packages at the counter. R. at 33:6-11. That same day, Fenty went back to the post office to try and retrieve the packages. R. at 33:18-20. Seeing the note, Fenty went to the counter and asked for her packages. R. at 33:20-21. After confirming that the packages from Holistic Horse Care were hers, the postal employee gave Fenty the packages. R. at 34:1-5. On her way out, Fenty chatted with a man who said "[b]ye Franny" when the conversation was over. R. at 34:10-13. After she left the post office, Fenty was

arrested and later charged with possession of a controlled substance with intent to distribute on February 15, 2022. R. at 1. Investigators later spoke with the man Fenty had spoke with and confirmed that Jocelyn Meyer and Franny Fenty were the same person. R. at 34:15-18.

Prior to trial, Fenty moved to suppress the contents of the Holistic Horse Care Packages. R. at 11. Fenty argued that her Fourth Amendment rights were violated when the packages addressed to Jocelyn Meyer were searched. R. at 12:15-17. The District Court ruled that Fenty did not have privacy interests in the sealed packages because "Jocelyn Meyer" was not a publicly established alias and the use of an alias "destroys any expectation of privacy" a person may have. R. at 17:18-18:9. Thus, Fenty could not challenge the search under the Fourth Amendment.

Fenty also brought a motion in limine to prevent the government from introducing evidence of Fenty's prior petit larceny conviction under Federal Rule of Evidence 609(a)(2) ("Rule 609(a)(2)). R. at 19. Six years prior, Fenty was dared by her friend to steal a bag. R. at 20:4-5. As a result, Fenty tried to blend in with the crowd to get near her victim and steal her bag. R. at 59:19-22. As she explained, Fenty meant to walk quietly over to the victim and attempt to steal the bag without anyone knowing that the bag was not her own. R. at 60:6-13. However, the victim noticed her, so she shoved and threatened the victim to get away with the bag. R. at 60:13-61:2. Fenty plead guilty to misdemeanor petit larceny. R. at 55:9-12.

Because Fenty was not charged under Boreum's theft by deception statute, Fenty argued that her petit larceny conviction was not a crime of "dishonesty" admissible under Rule 609(a)(2). R. at 22:7-19. The government argued that Fenty's prior conviction was admissible as a crime of dishonesty under Rule 609(a)(2) because Fenty used deceit to steal the bag. R. at 23:24-24:1. Further, the government noted that a limiting instruction would cure any concern that the jury would improperly use Fenty's conviction when determining the merits of the case. R. at

26:9-10. However, Fenty argued that limiting instructions, in general, are not effective. R. at 26:22-25. Ultimately, the judge determined that because Fenty had used deception to commit the crime, her prior conviction for petit larceny was admissible under Rule 609(a)(2). R. at 27: 8-14.

During the trial, Fenty sought to introduce the two voicemails she recorded as statements of her then-existing mind admissible under Federal Rule of Evidence 803(3) ("Rule 803(3)"). R. at 47:20-48:4. The government argued that the voicemails lacked the spontaneity required under Rule 803(3) because Fenty had time to reflect on her statements before recording the voicemails. R. at 48:15-23. The Court found that these voicemails were inadmissible because they did not represent Fenty's then-existing state of mind since Fenty had time to reflect on her situation before recording the voicemails. R. at 53:3-11. Ultimately, Fenty was convicted of possession with intent to distribute a controlled substance on September 21, 2022. R. at 66.

Fenty appealed her conviction to the Fourteenth Circuit Court of Appeals arguing that she had a privacy interest in the sealed packages addressed to her alias, the voicemails were improperly excluded, and that evidence of her petit larceny conviction was improperly allowed to impeach her testimony. R. at 66. The Fourteenth Circuit affirmed the District Court's ruling and held that Fenty did not have a privacy interest in the packages addressed to Jocelyn Meyer, the voicemails were properly excluded, and her prior conviction was properly allowed into evidence. R. at 66. Fenty now appeals the Fourteenth Circuit's ruling to this court. R. at 75.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decision for three reasons. First, Fenty has no reasonable expectation of privacy in the sealed packages which were addressed to her alias. Courts determine whether a defendant's Fourth Amendment rights were violated by examining if (1) the defendant had a subjective expectation of privacy in area or object searched or seized and

(2) society is willing to recognizes that subjective expectation of privacy as reasonable. Fenty had a subjective expectation of privacy in the sealed packages addressed to her alias, but the issue here was whether society was willing to recognize that expectation of privacy as reasonable.

Defendants lack a reasonable expectation of privacy in sealed packages addressed to an alias for three reasons. First, society is not willing to recognize as reasonable an expectation of privacy based on an alias because aliases are frequently used to send and receive drugs through the mail. Second, courts would be able to easily determine whether defendants have a reasonable expectation of privacy in sealed packages. Third, fewer costs would be imposed on the judicial system because defendants who use an alias to send themselves illicit substances could not challenge a search or seizure under the Fourth Amendment and suppress relevant, probative evidence. Therefore, because Fenty is neither the sender nor addressee of the package, Fenty lacks a reasonable expectation of privacy in the sealed packages.

Even if this Court decides that defendants may have a reasonable expectation of privacy in packages addressed to their alias if "other indicia" of ownership are present, Fenty lacks a reasonable expectation of privacy in the sealed packages. While Fenty did send the packages to a P.O. box where she could exclude others from accessing her mail, an address alone cannot create a reasonable expectation of privacy. Also, Fenty was not in possession of the packages at the time of the search and seizure, and Fenty only gained possession of the packages because of a controlled delivery by the DEA. Finally, Fenty's few prior, relatively unknown uses of her alias "Jocelyn Meyer" were not enough to establish ownership. Ultimately, there are not sufficient "other indicia" present to establish that Fenty had a reasonable expectation of privacy in the packages.

Second, the District Court properly suppressed the two voicemails Fenty left Millwood because Fenty had time to reflect prior to making the calls. Statements reflecting a declarant's then-existing state of mind are admissible under Rule 803(3). However, to be admissible under Rule 803(3), the statements must be spontaneous. The plain language of Rule 803(3) does not require spontaneity, but Rule 803(3) follows two rules that do require spontaneity. The key to admissibility under Rules 803(1) and (2) is spontaneity because if declarants have time to reflect on the situation, they may make self-serving statements which do not accurately reflect their state of mind when the event in dispute occurred. Because Rule 803(3) is a specialized version of Rule 803(1), and Rule 803(1) and (2) overlap significantly, Rule 803(3) should also require spontaneity.

As a result, since Fenty had time to reflect before making each voicemail, the voicemails were properly suppressed under Rule 803(3). Even if the voicemails were admissible under Rule 803(3), only a small portion of the voicemails would be admissible because most of Fenty's statements in the voicemails refer either to things that have nothing to do with her state of mind or are explanations for the reasons behind Fenty's feelings. Furthermore, if the voicemails were admissible under Rule 803(3), the voicemails were still properly suppressed under Rule 403 because the voicemails would mislead the jury about the level of knowledge and involvement Fenty had in the drug operation.

Third, the District Court properly admitted Fenty's prior conviction for petit larceny under Rule 609(a)(2). Prior convictions are admissible into evidence under Rule 609(a)(2) for impeachment purposes if the crimes involved dishonesty or false statements. Stealing is commonly understood to be dishonest, so any statute which includes "stealing" should be considered a crime of dishonesty. Since Boreum's statute for petit larceny includes the word

"stealing," Fenty's conviction for petit larceny was a crime of "dishonesty" admissible under 609(a)(2) for impeachment purposes.

Alternatively, Fenty's conviction for petit larceny was admissible because she used deceit to carry out the crime. Fenty disguised herself as a typical member of the crowd when she intended to steal the victim's purse. The fact that she was discovered and had to use violence to steal the purse is irrelevant. Because Fenty used deceit to carry out the crime, Fenty's conviction for petit larceny was a crime of dishonesty that is admissible under Rule 609(a)(2). Furthermore, Fenty's prior conviction is admissible regardless of prejudice concerns since judges have no discretion in admitting crimes of dishonesty or false statements. Finally, the District Court's jury instruction is presumptively effective. Fenty's general disagreement with the use of jury instructions in general was not sufficient to dispute this presumption of reasonableness. For these reasons, this Court should affirm the decision of the Fourteenth Circuit Court of Appeals.

ARGUMENT

This Court should affirm the Fourteenth Circuit's decision for three reasons. First, Fenty has no reasonable expectation of privacy in the sealed packages because she is neither the listed sender nor addressee. *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993). Second, Fenty's recorded voicemails to Millwood before her arrest were properly suppressed from evidence under Rule 609(a)(2) because Fenty had time to reflect on the legal consequences of her actions prior to making the calls. *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980) (overruled on other grounds). Finally, Fenty's prior conviction of petit larceny was properly admitted into evidence under Rule 803(3) because Fenty used deceit to steal the victim's bag. *United States v. Del Toro Soto*, 676 F.2d 13, 18 (1st Cir. 1982).

I. Fenty has no reasonable expectation of privacy in the sealed packages that were not sent from or addressed to her.

This Court should find that Fenty has no reasonable expectation of privacy in the sealed packages because she was neither the listed sender nor addressee on the packages. *Daniel*, 982 F.2d at 149. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures…." U.S. Const. amend. IV. Furthermore, "'Fourth Amendment rights are personal rights which… may not be vicariously asserted.'" *Rakas v. Illinois*, 439 U.S. 128, 133-134 (1978).

When evaluating a motion to suppress evidence based on an unreasonable search or seizure, the question is whether the movant's personal Fourth Amendment rights were infringed. *Id.* Traditionally, courts viewed motions to suppress evidence based on an unreasonable search or seizure as a question of whether the movant had standing to challenge the search or seizure under the Fourth Amendment. *United States v. Johnson*, 584 F.3d 995, 999, n. 3 (10th Cir. 2009). Courts still label this inquiry as a standing issue, but the Supreme Court has said that motions to suppress evidence based on an unreasonable search or seizure involve an inquiry into whether the movant's substantive Fourth Amendment rights have been violated. *Rakas*, 439 U.S. at 132-133.

To determine whether a movant's substantive Fourth Amendment rights have been violated, the Supreme Court has explained that movants must show that they had both a subjective expectation of privacy in the object or area being searched and that their subjective expectation of privacy is one which "society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also, United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (explaining that an unreasonable "'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed"). At issue in this case is

whether Fenty had a reasonable expectation of privacy in sealed packages addressed to her alias. Courts evaluate conclusions about whether a case involved a Fourth Amendment violation de novo. *United States v. Stokes*, 829 F.3d 47, 50 (1st Cir. 2016).

"Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy." *Jacobsen*, 466 U.S. at 114. However, the Circuits are split as to whether a defendant has a reasonable expectation of privacy in a package which was addressed to or sent by an alias. *United States v. Morta*, 2022 U.S. Dist. LEXIS 84353.

The Tenth Circuit is the only Circuit to suggest that individuals do not forfeit their reasonable expectation to privacy when using an alias because "it is not necessarily illegal to use a pseudonym to receive mail unless fraud or a stolen identification is involved." *Johnson*, 584 F.3d at 1002. However, this language was dicta because the Tenth Circuit ultimately decided that the defendant lacked a reasonable expectation of privacy because the defendant was using a stolen identity. *Id*. at 1002-03.

The Fifth, Seventh, and Eleventh Circuits are internally split on whether a defendant forfeits their reasonable expectation of privacy when using an alias. *Morta*, 2022 U.S. Dist. LEXIS 84353. One line of cases states that defendants do not have an expectation of privacy in sealed packages using an alias because the defendant is neither the listed sender nor the addressee. *Daniel*, 982 F.2d at 149; *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir., 1988); *United States v. Smith*, 39 F.3d 1143, 1145 (11th Cir., 1994).

Another line of cases suggests that defendants do not have a reasonable expectation of privacy in sealed packages using an alias absent other indicia of ownership. *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981); *United States v. Villarreal*, 963 F.2d 770, 774 (5th

Cir. 1992); *United States v. Pitts*, 322 F.3d 449, 456 (7th Cir., 2003).; *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009). A few other circuits have adopted this rule. *See E.g., United States v. Rose*, 3 F.4th 722, 727 (4th Cir. 2021) and *Stokes*, 829 F.3d at 53.

This Court should find that Fenty lacks a reasonable expectation of privacy in the sealed packages because she is neither the sender nor addressee of the package. *Daniel*, 982 F.2d 146, 149 (5th Cir., 1993). Alternatively, if this Court adopts the "other indicia" test, then Fenty still lacks a reasonable expectation of privacy in the sealed packages because there are not sufficient "other indicia" present to illustrate that Fenty had control, possession, or ownership of the packages. *Stokes*, 829 F.3d at 53; *Richards*, 638 F.2d at 770; *Rose*, 3 F.4th at 730.

a. Defendants lack a reasonable expectation of privacy in sealed packages addressed to an alias; as a result, Fenty lacks a reasonable expectation of privacy in the sealed packages because she is neither the sender nor addressee of those packages.

This Court should find that defendants lack a reasonable expectation of privacy in sealed packages which were not sent under or addressed to their legal name for three reasons. First, society is not prepared to recognize as reasonable an expectation of privacy in sealed packages containing illicit substances based on a defendant's alias. *Daniel*, 982 F.2d at 149. Second, courts will be able to efficiently determine who has a reasonable expectation of privacy in sealed packages by looking at the shipping label. *See e.g., Villarreal*, 963 F.2d at 774-75 and *Rose*, 3 F.4th at 729-30. Finally, basing privacy determinations on who the listed sender and addressee are would impose far fewer costs on the judicial system than a fact-specific approach. *See Richards*, 638 F.2d at 770; *Rakas*, 439 U.S. at 136-37. As a result, this Court should find that Fenty had no reasonable expectation of privacy in the sealed packages she ordered from "Holistic Horse Care" because Fenty was neither the listed sender nor addressee.

First, defendants lack a reasonable expectation of privacy in sealed packages addressed to an alias because society is unwilling to recognize as reasonable an expectation of privacy based on an alias used in the commission of a crime. *Daniel*, 982 F.2d at 149. In *Daniel*, Ricky Lynn Daniel was convicted of possession with intent to distribute methamphetamines after the Drug Enforcement Administration searched a box addressed to "Lynn Neal" and found methamphetamines. *Id*. at 147-48. When Daniel challenged the search of the package, the Fifth Circuit concluded that Daniel did not have a legitimate expectation of privacy in the package because "Ricky Lynn Daniel" was neither the sender nor addressee of the package. *Id.* at 149. The Fifth Circuit partially reasoned that Daniel could not have a legitimate expectation of privacy in the package because Daniel argued at trial that he and "Lynn Neal" were different people. *Id.* However, the Fifth Circuit also noted that even if "Lynn Neal" were Daniel's alias, they doubted Daniel would have a legitimate expectation of privacy in the package because the alias "was obviously part of [Daniel's] criminal scheme." *Id.*

The Supreme Court has also doubted that society would find a defendant's subjective expectation of privacy reasonable when that expectation is not based on "legitimate" reasons. *Jacobsen*, 466 U.S. at 122, n. 22. In dicta, the Supreme Court in *Jacobsen* explained that "[a] burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" *Id.* In the same way that society would not be willing to recognize as reasonable a bulgar's privacy interest in a cabin he burglarized, society would not be willing to recognize as reasonable a person's privacy interest in a package that contains illicit substances and is addressed to an alias.

Ultimately, since drug trafficking through the mail has become increasingly common because of aliases and the internet, society would simply not be willing to recognize as

reasonable a defendant's subjective expectation of privacy in sealed packages addressed their alias. Increasingly, illegal drugs are bought and sold online through the Darknet. Eric Jardine, *Policing Cybercrime Script of Darknet Drug Markets: Methods of Effective Law Enforcement Intervention*, 46 American J. Crim. Just. 980-1005, 982 (2021). Once purchases are made, sellers often ship drugs, using aliases, through official mail services, like the United States Postal Service, that have more restrictions on the searches and seizures of packages. *Id.* In the fiscal year of 2020 alone, the United States Postal Inspection Service made 2,221 arrests for drug trafficking and seized 124,000 pounds of illegal narcotics. *Delivering Justice to Opioid Dealers*, U.S. Postal Inspection Service, https://www.uspis.gov/the-opioid-epidemic (last visited Feb. 3, 2024). Considering the prevalence of drug trafficking through the mail using aliases, this Court should find that society is unwilling to recognize as reasonable a defendant's expectation of privacy in sealed packages addressed to an alias. After all, this bright-line rule would take away the benefits of using an alias thereby discouraging the use of drug trafficking through the mail and potentially reducing drug addictions and overdoses.

Furthermore, even though this rule would mean that people who send or receive packages using pseudonyms for legitimate reasons would not have a reasonable expectation of privacy in their sealed packages, *Pitts*, 322 F.3d at 458, packages sent under pseudonyms for legitimate reasons are less likely to be searched. Mail services often identify which packages to search based on features which are commonly found on packages containing illicit substances, such as excessive tape and fake return addresses. *Id.* at 451-52. Because packages sent under pseudonyms for legitimate reasons may not share some of these characteristics, postal officials would probably be less likely to search packages sent by people who are using pseudonyms for legitimate reasons. Thus, there would be no Fourth Amendment concerns to litigate.

Second, this Court should find that defendants lack a reasonable expectation of privacy in packages addressed to their alias because Courts would be able to efficiently determine whether a defendant has grounds to challenge a search or seizure under the Fourth Amendment. *See, Villarreal*, 963 F.2d at 774-75 and *Rose*, 3 F.4th at 729-30. The "other indicia" test involves a highly fact-intensive examination of the specific circumstances in which each search or seizure occurred. *Id.* In contrast, if defendants never have a reasonable expectation of privacy in packages which are addressed to their alias, then courts would be able to easily determine who can challenge a search or seizure under the Fourth Amendment.

Finally, defendants should lack a reasonable expectation of privacy in sealed packages addressed to an alias because holding otherwise would impose heavy costs on the judicial system. Excluding relevant, probative evidence imposes a heavy cost on the judicial system. *Rakas*, 439 U.S. at 137. The "other indicia" test would sometimes allow courts to suppress evidence under the Fourth Amendment where the defendant is neither the sender nor the addressee of a package. *See Richards*, 638 F.2d at 770; *Rakas*, 439 U.S. at 137. As a result, the "other indica" test imposes a heavier cost on the judicial system than a rule which prevents defendants who are neither the sender nor addressee of a package from challenging a search or seizure under the Fourth Amendment. *Id.*

Ultimately, this Court should find that defendants do not have a reasonable expectation of privacy in packages addressed to an alias because society is not prepared to recognize privacy interests in mail containing illicit substances. *Daniel*, 982 F.2d at 149. This rule would provide the most judicially efficient and least costly approach to determining privacy interests in sealed packages. *See Villarreal*, 963 F.2d at 774-75; *Rose*, 3 F.4th at 729-30; *Richards*, 638 F.2d at 770; and *Rakas*, 439 U.S. at 137. As a result, since Fenty was neither the listed sender nor addressee

of the packages in this case, this Court should find that Fenty has no reasonable expectation of privacy in the sealed packages containing the xylazine-fentanyl mixture.

b. Alternatively, if this Court chooses to use the "other indicia" test, then Fenty still lacks a reasonable expectation of privacy in the sealed packages because there are not sufficient "other indicia" to indicate that Fenty owned, possessed, or controlled the packages.

Even if this Court adopts the "other indica" test, Fenty would still not have a reasonable expectation of privacy in the sealed packages because there are not enough "objective indicia" to indicate that the packages belonged to her. *Stokes*, 829 F.3d at 53; *Richards*, 638 F.2d at 770; *Rose*, 3 F.4th at 730. Under the "other indicia" test adopted by some circuits, defendants must establish, based on objective factors, that they owned, possessed, or controlled the sealed packages at the time of search or seizure. *Rose*, 3 F.4th at 727. Although the Supreme Court has said that "arcane distinctions developed in property…ought not to control," *Rakas*, 439 U.S. at 143, courts have used factors relating to property rights to help determine if defendants have objectively established that they have a reasonable expectation of privacy in the sealed package. *Rose*, 3 F.4th at 728 n.2. As the First Circuit in *Stokes* explained, the following factors are relevant to the standing inquiry at issue here: "'ownership, possession and/or control; historical use of the property searched or the thing seized; ability to regulate access; [and] the totality of the surrounding circumstances....'" 829 F.3d at 53, *(quoting United States v. Aguirre*, 839 F.2d 854, 856-57 (1st Cir. 1988)).

Here, these objective property factors weigh in favor of finding that Fenty lacked a reasonable expectation of privacy. First, because she rented a P.O. box to receive her mail, rather than just a mailbox, Fenty can exclude others from accessing her mail. However, in *Stokes*, the Court held that the defendant's address on the envelope, alone, was not enough to create a

reasonable expectation of privacy in the package. 829 F.3d at 53. Furthermore, the Supreme Court in *Katz* emphasized that "the Fourth Amendment protects people, not places." 389 U.S. at 351. Thus, the mere fact that the packages were addressed to a P.O. box is not enough, on its own, to establish a reasonable expectation of privacy. *Stokes*, 829 F.3d at 52-53.

Second, Fenty was not in possession of the package at the time of the search and seizure. In *Richards*, the Fifth Circuit found that Richards had a reasonable expectation of privacy in a package addressed to his alias. 638 F.2d at 770. The court reasoned that even though the defendant had denied ownership of the package, the fact that the defendant had possession of the package at the time of the seizure indicated that he had an objective expectation of privacy in the package. *Id.* Here, Fenty was not in possession of the packages at the time of the search and seizure. Further, Fenty was only able to gain possession of the packages because Agent Raghavan set up a "controlled delivery" where agents monitored the post office to see who would pick up the resealed packages. Immediately after Fenty left the post office with the packages, she was arrested. Thus, the possession factor weighs against Fenty because Fenty was not in possession of the packages at the time of the search and seizure and because Fenty was only able to gain possession of the packages because of the surveillance operation conducted by the DEA.

Finally, Fenty did not sufficiently establish ownership of the sealed packages because her alias was not publicly established, nor did Fenty have sufficient connection to the alias to fully establish that she was the owner of the sealed packages. *Rose*, 3 F.4th at 730. Recently, the Fourth Circuit held that a defendant, Rose, had no reasonable expectation of privacy in a package where there were no objective indicia that Rose owned, possessed, or controlled the package. *Id.* The Fourth Circuit stated that their conclusion was not changed by the fact that the packages

were addressed to Rose's alias, West. *Id.* The Court explained that West was not Rose's publicly established alias. *Id.* No one knew Rose as West, and Rose had only used the name to send himself packages on a few other occasions. *Id.*

While the dissent in *Rose* disagrees with the "publicly established alias" requirement, *Rose*, 3 F.4th at 737, courts which do not require a defendant's alias to be publicly established still rely on the underlying rationale for this requirement: defendants must demonstrate that they are the person to whom the alias refers. *See United States v. Castellanos*, 716 F.3d 828, 834 (4th Cir. 2013) (holding that Castellanos had no reasonable expectation of privacy in a vehicle partly because he did not prove that Castenada, the listed owner of the vehicle, was Castellanos's alias).

Here, Fenty did not go by Jocelyn Meyer in public. Her only connection to the name was on a few pieces of writing that were either unpublished or not widely circulated. Just as Rose's few uses of the alias "West" were not enough to establish that Rose owned the packages, Fenty's few, unknown uses of Jocelyn Meyer several years ago are not sufficient to demonstrate that Fenty owned the packages at the time they were seized and searched. Ultimately, there are simply not enough objective indica to indicate that Fenty has a reasonable expectation of privacy in the packages.

II. Recorded voicemails statements made after time for reflection should not be admitted as a then-existing mental state exception to hearsay under Rule 803(3).

This Court should affirm the Court of Appeals' decision because the District Court properly suppressed the two recorded voicemails. *Ponticelli*, 622 F.2d at 991. Fenty made those voicemails after having a chance to reflect, so the recordings fail to meet the spontaneity requirement in Rule 803(3). *Id.* Even if the voicemails were admissible under Rule 803(3), only a small portion would be admissible as a statement Fenty's "then-existing state of mind" since

most of the voicemails explain the reasons for Fenty's feelings. *State v. Tennant*, 394 S.C. 5, 16 (S.C. 2011). Finally, if the voicemails were admissible under Rule 803(3), the District Court still properly suppressed the voicemails under Rule 403 because the voicemails would have mislead the jury. Fed. R. Evid. 403. This Court reviews evidentiary rulings for abuse of discretion. *Old Chief v. United States*, 519 U.S. 172, 174 n. 1 (1997).

a. Under the Rule 803(3) then-existing state of mind exception to hearsay, out-of-court statements are only admissible if they are spontaneous; as a result, the District Court properly suppressed the voicemails because Fenty had time to reflect before making the recordings.

This Court should find that out-of-court statements are admissible as "then-existing state of mind" exceptions to hearsay under Rule 803(3) only if the statements were spontaneous. *Ponticelli*, 622 F.2d at 991. The "opportunity to present evidence, as part of the right to present a meaningful defense in criminal cases, applies only evidence deemed competent." *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001). Hearsay is usually not competent evidence. *See Id.* "Hearsay" refers to statements that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c)(1) -(2).

However, Rule 803(3) explains that 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" is "not excluded by the rule against hearsay." Fed. R. Evid. 803(3). Under this rule, the movant must show that (1) the statements were contemporaneous with the event in dispute; (2) the statements are relevant to the dispute; and (3) the statements were spontaneous. *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). The plain language of Rule 803(3) does not require spontaneity; however, many courts will only

admit out-of-court statements as then-existing state of mind exceptions if the statements were spontaneous. *E.g., Ponticelli*, 622 F.2d at 987. A statement is "spontaneous" if it resulted from a "natural feeling or native tendency without external constraint," "[arose] from a momentary impulse," "develop[ed] or occur[ed] without apparent external influence, force, cause or treatment," or occurred without being "apparently contrived or manipulated." Spontaneous, Merriam-Webster (2024), https://www.merriam-webster.com/dictionary/spontaneous.

This Court should find that evidence is not admissible under the then-existing state of mind exception unless the statements were spontaneous because Rule 803(3) is closely related to two other hearsay exceptions which require spontaneity. *Ponticelli*, 622 F.2d at 991.The Advisory Committee Notes explain how, in some instances, "a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify" admission into evidence under one of the exceptions. Christopher B. Mueller and Laird C. Kirkpatrick, 2012 Federal Rules of Evidence with Advisory Committee Notes and Legislative History 209 (Wolters Kluwer, 2012). However, the Notes make clear that the "key" to admission under Rules 803(1) and (2) is spontaneity. *Id.* at 210.

Rule 803(1) provides that statements "describing or explaining an event or condition, *made while or immediately after* the declarant perceived it" are "not excluded by the rule against hearsay." Fed. R. Evid. 803(1) (emphasis added). The Advisory Notes explain that such statements are admissible because the "substantial contemporaneity of an event and statement negative the likelihood of deliberate or conscious misrepresentation." Christopher B. Mueller and Laird C. Kirkpatrick, 2012 Federal Rules of Evidence with Advisory Committee Notes and Legislative History 209 (Wolters Kluwer, 2012). Rule 803(2) provides that statements "relating to a startling event or condition, *made while the declarant was under the stress of excitement* that

it caused" are also "not excluded by the rule against hearsay." Fed. R. Evid. 803(2) (emphasis added). Like Rule 803(1), such statements are admissible because statements "relating to a startling event or condition" may "produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Christopher B. Mueller and Laird C. Kirkpatrick, 2012 Federal Rules of Evidence with Advisory Committee Notes and Legislative History 209 (Wolters Kluwer, 2012). Thus, the Advisory Notes explain that statements admitted under Rules 803(1) and (2) "possess circumstantial guarantees of trustworthiness" because the Rules' spontaneity requirements ensures that admitted statements capture a declarant's immediate, automatic response to an event rather than responses altered by manipulation or external stimuli. *Id.*

The key to admissibility under Rule 803(3) should also be spontaneity because Rule 803(3) is closely related to Rules 803(1) and (2). Christopher B. Mueller and Laird C. Kirkpatrick, 2012 Federal Rules of Evidence with Advisory Committee Notes and Legislative History 210 (Wolters Kluwer, 2012); *Ponticelli*, 622 F.2d at 991; *United States v. Cardascia*, 951 F.2d 474, 487 (2d Cir. 1991). Rule 803(3) is merely a "specialized application" of Rule 803(1) that focuses specifically on statements regarding the declarant's own state of mind. Christopher B. Mueller and Laird C. Kirkpatrick, 2012 Federal Rules of Evidence with Advisory Committee Notes and Legislative History 211 (Wolters Kluwer, 2012). Indeed, Rule 803(3) is separated from Rule 803(1) merely to "enhance [the Rule's] usefulness and acceptability." *Id.* Furthermore, there is "considerable… overlap" between Rules 803(1) and (2). *Id.* at 209. Thus, if the key to admissibility under Rules 803(1) and (2) is spontaneity, then the key to admissibility under a "specialized application" of Rule 803(1) should also be spontaneity because time for reflection

would have the same impact on the trustworthiness of a declarant's statement. *See Id.* at 209-211. Thus, this Court should require spontaneity under Rule 803(3).

Overwhelmingly, Courts have followed this approach and concluded that statements will only be admissible under Rule 803(3) if they were spontaneous because a statement's trustworthiness declines as more time passes. *E.g., United States v. Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989); *United States v. Harris*, 942 F.2d 1125, 1130 n. 5 (7th Cir. 1991); *United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir. 1992); and *Jackson*, 780 F.2d at 1315.

For instance, in *Ponticelli* the defendant was arrested for his involvement in a loan shark operation. *Ponticelli*, 622 F.2d at 987. At the time of his arrest, he was carrying a list of names. *Id.* at 988. After his arrest, he told his lawyer that he did not know where the list came from. *Id.* at 991. Later, the defendant was convicted of perjury for falsely claiming before a grand jury that he did not know where the list came from. *Id.* at 987. The Ninth Circuit concluded that the lawyer's testimony was properly suppressed under Rule 803(3). *Id.* at 992. The Court reasoned that when the defendant was arrested, the defendant was aware that he was "under investigation and that anything he said could be used against him," and the defendant had time before meeting with his lawyer to "concoct an explanation for his possession" of the list. *Id*. In other words, the district court properly suppressed the testimony under Rule 803(3) because Ponticelli's statements were not spontaneous. *Id.*

Here, the District Court properly suppressed the recorded voice mails under Rule 803(3) because Fenty had a chance to reflect before making the recordings. *Ponticelli*, 622 F.2d at 992. Prior to recording the voicemails, Fenty was likely aware that her actions could have legal consequences. First, Fenty ordered the xylazine under her alias and shipped the packages to a P.O. box she opened under her alias. Since Fenty only used her alias for her order of xylazine and

used her legal name for other packages, Fenty likely knew that there was at least a possibility that her actions could have legal consequences. Second, in the first voicemail, Fenty indicated that she had previously read the article "Animal Sedative Mixed With Fentanyl Gripping Joralemon." Once she read that article, Fenty, at the very least, had to have been extremely suspicious that ordering a horse sedative for her friend with a history of drug problems could be part of an illegal drug scheme.

Because of Fenty's preexisting knowledge about the potential legal consequences of ordering xylazine, the first voicemail was more likely a planned self-serving statement rather than a spontaneous reaction to Fenty's failure to pick up the packages. The record does not indicate how much time elapsed between when Fenty failed to pick up the packages from the post office and her first voicemail on February 14. However, the record strongly indicates that Fenty had preexisting concerns about the legal consequences of ordering xylazine. Further, there was likely at least some time between when Fenty failed to pick up the packages and her first voicemail. Together, this suggests that Fenty's voicemail was likely a reflection of her preexisting knowledge rather than any immediate, automatic reaction to her failure to retrieve the packages.

If there is any doubt that Fenty had time to reflect and prepare a legally significant statement in the first voicemail, there can be no doubt that Fenty had time to reflect before making the second voicemail 45 minutes later. Indeed, Fenty's second voicemail appears more legally beneficial to Fenty than the first since Fenty more explicitly denies having any knowledge of the legal consequences of ordering xylazine: "I'm really starting to get concerned that you involved me in something I had no idea was going on." R. at 40: 29-31. Because of the substantial lapse in time between when Fenty failed to pick up the packages and the second voicemail, Fenty had

more than enough time to reflect on the consequences of her actions and carefully craft a statement that would make herself appear completely ignorant of the criminal scheme she was involved in. Ultimately, this Court should find that both voicemails lack the spontaneity required under Rule 803(3) since Fenty had ample time before each voicemail to reflect on her preexisting knowledge and craft self-serving, legally significant statements.

b. Even if Rule 803(3) does require spontaneity, only a small portion of the recorded voicemails would be admissible under the then-existing state of mind exception because Rule 803(3) is a narrow rule that only allows in evidence of how the declarant is feeling, not the reasons for those feelings.

Even if this Court finds that the recorded voicemails could be admissible under Rule 803(3), only a small portion of the voicemails would be admissible since Rule 803(3) limits the admissibility of statements to those about the declarant's "then-existing state of mind… or emotional, sensory, or physical condition." Fed. R. Evid. 803(3). Statements "of memory or belief" offered "to prove the fact remembered or believed" are not admissible under Rule 803(3). *Id.* Accordingly, the Court in *Tennant* held that a defendant's suicide note was inadmissible hearsay because the note contained Tennant's "memory or belief" that the victim consented to the sexual interaction which was offered "to prove the fact" that Tennant believed his memory was correct and the victim consented. *Tennant*, 394 S.C. at 16.

Likewise, this limitation on Rule 803(3) means that out-of-court statements explaining the reason for the declarant's state of mind are also inadmissible hearsay. *United States v. Tome*, 61 F.3d 1446, 1454 (10th Cir. 1995); Federal Trial Guide § 40.52 (2023). For instance, the 10th Circuit held in *Joe* that a woman's statement to her doctor after being treated for rape that she "was afraid sometimes," was an admissible then-existing statement of mind under Rule 803(3). *United States v. Joe*, 8 F.3d 1488, 1492-93 (10th Cir. 1993). However, the Court held that the

remainder of the statement—that she was afraid because her husband had threatened to kill her—was not admissible because the out-of-court statement was explaining the reason for her state of fear. *Id.* In other words, the woman's statement about her husband was a statement of memory offered to prove her then-existing state of mind, that she was afraid, and was therefore not admissible. *Id.*

Here, in the first voicemail, the only portion that would be an admissible statement of Fenty's "then-existing state of mind" would be when she says she is "getting worried." R. at 40:11. The rest of the first voicemail either does not relate to her then-existing state of mind (e.g., "plus, you still owe me money") or explains why Fenty is "getting worried" (e.g., "that's not what's going on here, right?" and "…that you dragged me into something I would never want to be a part of"). R. at 40: 7-13. Thus, just like how the rape victim's explanation of why she was afraid was inadmissible hearsay in *Joe*, Fenty's explanation for why she was "getting worried" is also an inadmissible statement of "memory or belief" offered "to prove the fact remembered or believed."

For the same reasons, the only portion within the second voicemail that could potentially be admissible under Rule 803(3) as a statement revealing a then-existing state of mind would be when Fenty says "Angela, I'm really getting nervous" and "I'm really starting to get concerned." R. at 40: 26-30. Just like the first voicemail, the rest of the second voicemail either does not relate to her then-existing state of mind (e.g., "I talked to the postal workers again. They don't know what is going on…" and "why would they want to look at that?") or explains why she is "getting nervous" (i.e., "Is there something you aren't telling me;" "…you involved me in something I had no idea was going on;"). R. at 40:24-31. Ultimately, even if this Court declines

to read a spontaneity requirement into Rule 803(3), only small portions of the voicemails would be admissible as then-existing statements of mind.

c. Alternatively, even if the district court abused its discretion by suppressing the voicemails under Rule 803(3), this Court should find that the voicemails were properly suppressed under Rule 403 because the risk of misleading the jury substantially outweighs the probative value of the voicemails.

Even if Fenty's voicemails were admissible as a hearsay exception under Rule 803(3), they were nevertheless properly excluded under Rule 403 because the risk of misleading the jury substantially outweighs the probative value of the voicemails. Fed. R. Evid. 403. Statements which may be admissible under one rule of evidence, like Rule 803(3), must still pass the scrutiny of Rule 403. *See Hemphill v. New York*, 142 S. Ct. 681, 693 (2022). Under Rule 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Great deference is accorded to the trial judge's assessment of the evidence's probative value since the trial judge has the most familiarity with the evidence. *United States v. Hughes*, 970 F.2d 227, 233 (7th Cir. 1992). As such, this Court will only overrule a trial judge's Rule 403 decisions if the trial judge abused their discretion. *Id.*

While district courts do not have discretion to exclude testimony merely because they believe a witness is not credible, *United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988), district courts must still determine if the probative value of the evidence is substantially outweighed by dangers like misleading the jury. Fed. R. Evid. 403. Here, the recorded voicemails have some probative value because the voicemails could suggest that Fenty did not knowingly or intentionally possess with the intent distribute a mixture containing fentanyl.

However, the danger of misleading the jury substantially outweighs any amount of probative value these voicemails have. In both voicemails, Fenty suggests that she had no knowledge of the potential legal ramifications of her actions prior to ordering the xylazine. For instance, Fenty says that she "read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here right?"; "I thought the xylazine was just to help horses that are suffering"; and "I'm really starting to get concerned that you involved me in something I had no idea was going on." R. at 45: 8-12, 27-31.

However, Fenty's use of an alias to order and receive the xylazine strongly disputes the notion that Fenty was completely ignorant of the possibility that her actions were not entirely legal. If Fenty truly thought her actions were completely innocuous, then Fenty would have ordered the packages under her name, as she did for several other packages delivered to her P.O. box. Her use of the name "Jocelyn Meyer" for only the orders for xylazine strongly disputes the notion that Fenty was completely unaware of the potential legal ramifications of her actions. Furthermore, given that these voicemails were made after Fenty was unable to retrieve the packages at the post office, these voicemails were more likely Fenty's attempt to create a legally significant defense to potential criminal charges than they were an honest reaction to new concerns about potential legal consequences. Ultimately, because the voicemails would likely lead the jury to incorrectly assume that Fenty was completely unaware of the potential legal ramifications of ordering xylazine, the voicemail evidence was properly suppressed under Rule 403.

III. The District Court properly found that Fenty's prior conviction for petit larceny was a crime involving "dishonest act or false statement" admissible under Rule 609(a)(2) for impeachment purposes.

This Court should uphold the District Court's admission of Fenty's prior conviction under Rule 609(a)(2) because petit larceny is a crime involving a "dishonest act or false statement." *Del Toro Soto*, 676 F.2d at 18. Rule 609(a)(2) of the Federal Rules of Evidence states that evidence of a witness's prior conviction for "any crime regardless of the punishment…[involving] a dishonest act or false statement" may be admitted to impeach a witness's credibility. Fed. R. Evid. 609(a)(2). When a criminal statute contains an element of deception or misstatement that the prosecution must prove, the crime will involve a "dishonest act or false statement" and be admissible under Rule 609(a)(2). *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989). However, crimes which do not have an element of deceit may still be crimes "involving a dishonest act or false statement" depending on the circumstances of the case. *Id.* Since the Boerum Penal Code does not include dishonesty or false statements as an element of the crime of petit larceny, at issue here is whether Fenty's prior conviction for petit larceny involved dishonesty or false statements.

Some courts interpret "dishonesty" to include "stealing" and find that petit larceny is a crime of "dishonesty" admissible under 609(a)(2). *Del Toro Soto*, 676 F.2d at 18 . Other courts interpret "dishonesty" narrowly and find that petit larceny is not a crime of "dishonesty" unless the facts of the case show that the defendant used deceit to carry out the theft. *United States v. Seamster*, 568 F.2d 188, 190-91 (10th Cir. 1978). Finally, some courts have held that petit larceny is per se not a crime of "dishonesty" admissible under 609(a)(2). *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977); *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005); *United States v. Ashley*, 569 F.2d 975, 979 (5th Cir. 1978).

This Court reviews evidentiary rulings for abuse of discretion. *Old Chief*, 519 U.S. at 174 n. 1. Here, the District Court did not abuse its discretion in admitting Fenty's prior conviction for petit larceny. *Del Toro Soto*, 676 F.2d at 18. Because stealing relates to a person's honesty, petit larceny should be admissible as a crime involving "dishonesty" under Rule 609(a)(2). *Del Toro Soto*, 676 F.2d at 18; *and see United States v. Papia*, 560 F.2d 827, 845 (7th Cir. 1977). As a result, Fenty's prior conviction of petit larceny was properly admitted into evidence. Even under a narrower definition of "dishonesty," however, the District Court still properly admitted Fenty's prior because she used deceit to steal the victim's purse. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977).

Additionally, the District Court properly admitted Fenty's prior conviction into evidence despite prejudice concerns because courts have no discretion to decide whether to admit a crime admissible under Rule 609(a)(2). *United States v. Glenn*, 667 F.2d 1269, 1269 (9th Cir. 1982). Finally, the District Court's instructions to the jury were proper because Fenty did not present enough specific evidence to support her claim that the jury instructions were ineffective. *Zafiro v. United States*, 506 U.S. 534, 540 (1993).

a. Since stealing is commonly understood to affect a person's honesty, the District Court properly admitted Fenty's prior conviction of petit larceny as a crime involving a "dishonest act or false statement" under Rule 609(a)(2).

This Court should find that "stealing" is dishonest and hold that the District Court properly admitted Fenty's petit larceny conviction. *Del Toro Soto*, 676 F.2d at 18. "Dishonesty" sometimes refers to the "disposition to lie, cheat, or steal." *Papia*, 560 F.2d at 845, (*quoting Random House College Dictionary* 380 (abr. ed. 1973)); *see also Dishonesty*, Dictionary.com (2024), https://www.dictionary.com/browse/dishonesty (dishonesty means "1. Lack of honesty; a disposition to lie, cheat, or steal"). Beyond dictionary definitions, "'in common human

experience, acts of deceit, fraud, cheating or stealing… are universally regarded as conduct which reflects adversely on a man's honesty and integrity'" *Papia*, 560 F.2d at 845, (*quoting Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)). Ultimately, the goal of 609(a)(2) is to admit any past conviction that may suggest whether the defendant will testify honestly. *Hayes*, 553 F.2d at 827. As a result, crimes like stealing, which are commonly understood as dishonest, should be admitted into evidence.

Indeed, some courts have found that larceny is a per se crime of deceit. *Del Toro Soto*, 676 F.2d at 18. For instance, the First Circuit stated in *Del Toro Soto* that "[t]he grand larceny conviction could certainly have been introduced under Federal Rule of Evidence 609(a)(2) on the general question of the defendant's credibility." *Id.*

If this Court follows the commonly accepted premise that stealing is dishonest, then the District Court properly admitted Fenty's prior conviction for petit larceny. According to Boerum Penal Code § 155.25, "[a] person is guilty of petit larceny when that person knowingly takes, *steals*, carries away, obtains, or uses, or endeavors to take, *steal*, carry away, obtain, or use, any personal property of another…." R. at 3 (emphasis added). If stealing is "universally regarded" as dishonest, then any statute which includes "stealing" should be considered a crime of dishonesty. It follows then, that since Boreum's penal code defines petit larceny to include stealing, this Court should hold that Fenty's conviction of petit larceny was a crime of dishonesty admissible under Rule 609(a)(2).

b. However, even under a narrower interpretation of "dishonesty," the District Court properly admitted Fenty's prior conviction of petit larceny because Fenty used deceit to steal the victim's purse.

If this Court chooses not to follow the colloquial understandings of "dishonesty" and "stealing," then this Court should at least find that under the facts of this case, Fenty's conviction

for petit larceny was a crime involving "dishonesty" because she used deceit to steal the purse. *Hayes*, 553 F.2d at 827. Rather than adopting the broader definition of dishonesty and adopting a per se rule that petit larceny is always a crime of dishonesty, some courts have pointed out that the Conference Committee Report for Rule 609(a)(2) suggests that "dishonesty" should be narrowly interpreted:

> By the phrase 'dishonesty and… false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other crime 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.

Papia, 560 F.2d at 846, (*quoting* H.R. Rep. No. 93-1597, at 3 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7103). Proponents of this narrower interpretation explain that because Congress did not enumerate theft or larceny within this list, Congress intended "dishonesty" to "mean something more than a man's propensity to steal." *Papia*, 560 F.2d at 846. Rather, "dishonesty" is meant to include those crimes which are "'peculiarly probative of credibility.'" *Hayes*, 553 F.2d at 827, (*quoting* Conf. Rep. No. 93-1597, as *reprinted in* 1974 U.S.C.C.A.N. 7098, 7103).

Under this interpretation of "dishonesty," some courts have held that petit larceny, or theft, is not a crime of "dishonesty." *E.g., Estrada*, 430 F.3d at 614; *Ashley*, 569 F.2d at 979; *Ortega*, 561 F.2d at 806. However, other courts recognize that petit larceny can involve deceit and conclude that petit larceny and other forms of theft are not crimes of "dishonesty" unless there are facts presented which illustrate that the specific instance of theft was carried out using deceit. *Hayes*, 553 F.2d at 827 (*quoting United States v. Smith*, 551 F.2d 348, 364 n. 28 (D.C. Cir. 1976)).

Under this fact-specific approach, a specific instance of petit larceny will be "dishonest" if the defendant used deceit to carry out the crime. *Hayes*, 553 F.2d at 827. "Deceit" refers to "the act of causing someone to accept as true or valid what is false or invalid." *Deceit*, Merriam Webster (2024), https://www.merriam-webster.com/dictionary/deceit. As such, a crime involving a false written or oral statement is deceitful. *Papia*, 560 F.2d at 847-48 (holding that theft involving forgery in a loan application was a "dishonest" crime admissible for impeachment purposes). Additionally, a crime where the defendant's actions misled another is also deceitful. *Altobello,* 872 F.2d at 217. For instance, in *Altobello*, the defendant was convicted of misdemeanor theft by tampering with electric meters in restaurants to make the electric company record lower rates of electric usage than the restaurants were actually using. *Id.* The Seventh Circuit held that the defendant's theft was an admissible crime of dishonesty under 609(a)(2) because "[m]eter tampering is necessarily a crime of deception; the goal is always to deceive the meter reader." *Id*.

Yet courts have cautioned that deceitfulness is not the same as stealth. *Hayes*, 553 F.2d at 827. Stealth refers to a "cautious, unobtrusive, and secretive way of moving or proceeding intended to avoid detection." *Stealth*, Merriam Webster (2024), https://www.merriam-webster.com/dictionary/stealth. Ultimately, because crimes that involve stealth have no bearing on a defendant's honesty, they are not admissible under 609(a)(2). *See Hayes*, 553 F.2d at 827.

Finally, some courts using this fact-specific approach focus on whether the crime was one of violence or one of deceit. *See Hayes*, 553 F.2d at 828. Indeed, some courts have held that more serious forms of theft, like robbery, are inherently "violent" and not deceitful. *Walker v. Horn*, 385 F.3d 321, 334 (3d Cir. 2004). While this may be true for a few crimes, the proper focus should be on whether the prior conviction involved deceit. *See Altobello*, 872 F.2d at 216. After

all, whether the crime involved violence says nothing about the person's level of honesty. *Id*. (explaining that a person who kills someone is "violent and lawless" but not necessarily dishonest). As a result, even though Fenty used some violence to take the purse from the victim, Fenty's prior conviction for petit larceny could still be a crime of "dishonesty" if she used deceit to steal the purse.

Here, Fenty's prior conviction for petit larceny should be admissible as a 609(a)(2) crime of "dishonesty" because she used deceit to steal the purse. Like how the defendant in *Altobello* led the meter reader to falsely believe that restaurants were consuming less electricity than they actually were, here Fenty acted casually to falsely lead her victim to believe that she was just another member of the crowd rather than a purse thief. The fact that Fenty's efforts to represent herself as another passerby failed, leading her to use force, does not change the fact that Fenty used deceit to try and steal the victim's purse.

Furthermore, Fenty's attempts to disguise herself as a member of the crowd did not involve stealth. Fenty was not necessarily trying to "avoid detection." Rather, Fenty was trying to avoid suspicion by acting like a normal member of the crowd, presumably so she could get close enough to the victim to grab the purse and run away. In other words, Fenty was not necessarily trying to steal the purse without being seen or detected by the victim. Instead, Fenty's attempts to disguise herself as another member of the crowd suggest that she intended to mislead the victim about what her true intentions were just long enough to grab her purse and run. Ultimately, if this Court adopts a narrower definition of "dishonesty," then the District Court still properly admitted Fenty's petit larceny conviction under 609(a)(2) because Fenty used deceit to steal the victim's purse.

c. Under Rule 609(a)(2), prior convictions for dishonest and deceitful crimes must be admitted regardless of any prejudice concerns.

A plain reading of Rule 609(a)(2) reveals that even if admitting a prior conviction would be highly prejudicial, judges have no discretion over whether to admit crimes involving dishonest acts or false statements. Fed. R. Evid. 609(a)(2). Rule 609(a)(2) clearly states that "for any crime regardless of the punishment, the evidence *must* be admitted if the court can readily determine that establishing the elements of crime required proving—or the witness's admitting—a dishonest act or false statement." *Id.* (emphasis added). As a result, some circuits have determined that if a conviction is covered under Rule 609(a)(2), evidence of a conviction is "automatically admissible" and "the court need not conduct a balancing test." *Glenn*, 667 F.2d at 1269. Therefore, even if admitting a prior conviction would be prejudicial to a defendant, evidence of prior convictions for crimes involving dishonesty or false statements must be admitted into evidence. *Id.*

d. The District Court's jury instruction was proper as Fenty did not present sufficient evidence to rebut the instruction's presumptive effectiveness.

This Court should find that the District Court properly admitted Fenty's petit larceny conviction because the District Court's instruction ensured that the jury used Fenty's conviction solely for determining her credibility. *See Zafiro*, 506 U.S. at 540. There is a strong presumption that a judge's limiting instructions were effective unless there is clear evidence to the contrary in the record. *E.g.*, *Zafiro*, 506 U.S. at 540 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)), *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson*, 481 U.S. at 211), *Kansas v. Carr*, 577 U.S. 108, 109 (2016) (citing *Bruton v. United States*, 391 U.S. 123 (1968)), *Loehr v. Walton*, 242 F.3d 834, 836 (8th Cir. 2001) (citing *Ryan v. Bd. of Police Comm'rs*, 96 F.3d 1076, 1083 (8th Cir. 1996)) (holding that an instruction to the jury that a witness's prior

conviction could only be used for determining the credibility of the witness was presumably effective).

In this case, Fenty did not make a specific showing as to why the District Court's limiting instructions were insufficient. Fenty argued at trial that "jurors often do not follow limiting instructions" and may lead the jury to "consider the evidence for precisely what the instruction tells them not to." R. at 25. These statements do nothing to explain why the specific limiting instructions used in this case were ineffective; rather Fenty's arguments at trial attacked the effectiveness of limiting instructions in general. Unless this Court is prepared to halt the use of jury instructions in every case, this Court should find that such a general attack on the use of limiting instructions was insufficient to prove that the jury instructions in this case were ineffective.

In conclusion, petit larceny is a crime involving dishonesty or false statements. As a result, this Court should find that the District Court did not abuse its discretion when the court admitted Fenty's prior conviction of petit larceny under Rule 609(a)(2).

CONCLUSION

Ultimately, this Court should affirm the Court of Appeals' decision for three reasons. First, Fenty had no reasonable expectation of privacy in the sealed packages because she was neither the listed sender nor addressee of the packages. *Daniel*, 982 F.2d at 149. Second, Fenty's voicemails were properly suppressed because Fenty had time to reflect on her situation prior to making the calls. *Ponticelli*, 622 F.2d at 991. Third, Fenty's prior convictions were properly admitted because petit larceny is a crime of dishonesty. *Del Toro Soto*, 676 F.2d at 18.