No. 23-695

In The
Supreme Court of the United States
April Term 2024

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

No. 23 – 695

Original Brief for Respondents

Date: February 5, 2024

QUESTIONS PRESENTED

I. Whether Defendant Fenty has a reasonable expectation of privacy in the packages addressed to an alias when she was neither the named addressee nor recipient, there was no indication at the time of the search connecting her to the packages, and when she used the name for wrongful and criminal conduct?

II. Whether recorded voicemail statements offered by Defendant Fenty show a then-existing state of mind and can be admitted as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence when Defendant had time to reflect on the fact she was being investigated before making the statements?

III. Whether Defendant Fenty's crime of petit larceny was an act of dishonesty when she attempted to leverage false pretenses, stealth, and lies to steal from her victim?

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A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of the Brooklyn Law School's Dean Jerome Prince Memorial Evidence Competition.

STATEMENT OF THE CASE

A. Statement of Facts

On February 14, 2022, Special U.S. Drug Enforcement Administration Agents Raghavan and Jim in Joralemon, Boerum, seized a package addressed to P.O. Box 9313 listed under "Jocelyn Meyer" from Holistic Horse Care. Raghavan Test. ¶ 30. A post office employee flagged the packages for the agents because a Joralemon resident overdosed on fentanyl two days prior. Raghavan Test. ¶ 29. The resident's body was discovered next to partially used syringes and an opened package from Holistic Horse Care. Raghavan Test. ¶ 29. The agents then obtained a search warrant for the packages. Raghavan Test. ¶ 29.

Upon their search, the agents discovered that the mail contained 400 grams of fentanyl. Raghavan Test. ¶ 32. The agents then returned the mail to the post office for a controlled delivery. Raghavan Test. ¶ 32. The post office employee left a slip in the Defendant's P.O. Box notifying her to pick up the Holistic Horse Care packages at the counter. Raghavan Test. ¶ 32. After picking up the packages from the counter on February 15, Defendant Fenty ran into a college friend. Raghavan Test. ¶ 33. The agents asked the friend if he knew Jocelyn Meyer. Raghavan Test. ¶ 33. He responded, "Who? You mean Franny? That was Franny Fenty." Raghavan Test. ¶ 33. The agents asked whether the woman was Franny Fenty or Jocelyn Meyer. Raghavan Test. ¶ 33. The friend said her name is Franny Fenty but used Jocelyn Meyer a few times to publish short stories in their college magazine. Raghavan Test. ¶ 33. The short stories were published in 2016 and 2017. Fenty Test. ¶ 42.

When Defendant Fenty learned she needed to receive the packages from Holistic Horse Care at the counter, she became concerned and called Ms. Angela Millwood. Fenty Test. ¶ 19. Defendant Fenty agreed to order xylazine, a horse tranquilizer because Ms. Millwood would

have lost her job if she ordered them herself. Fenty Test. ¶ 45. The first voicemail to Ms. Millwood was made at 1:32 P.M. Def. Ex. 16. Defendant Fenty informed Ms. Millwood that the packages were missing and asked her whether the Holistic Horse Care packages contained fentanyl. Def. Ex. 16. Defendant Fenty also said she had previously researched xylazine and learned that it is sometimes mixed with fentanyl. Def. Ex. 16; Fenty Test. ¶ 2. After Ms. Millwood did not answer any of Defendant Fenty's calls, she sent Ms. Millwood another voicemail at 2:17 P.M. Def. Ex. 17. Defendant Fenty stated that she was getting increasingly nervous about the contents of the packages and a potential investigation against her. Def. Ex. 17.

Defendant Fenty was then arrested for one count of possession with intent to distribute under Title 21, United States Code, Section 853. R. at 1. Special Agent Robert Raghavan reviewed Defendant Fenty's public social media accounts. Raghavan Test. ¶ 6. Defendant Fenty posted a LinkedIn post on December 28, 2021, stating she was "open for work." Fenty Test. ¶ 4. Angela Millwood, who attended high school with Defendant Fenty and had previously been on the DEA agent's radar for illegal drug distribution, replied to Defendant Fenty's message that same day. Fenty Test. ¶ 21; Raghavan Test. ¶ 16-17. Agent Raghavan discovered Millwood had recently started working at a Joralemon horse stable. Raghavan Test. ¶ 24. Suspicious of Ms. Millwood's connection to Defendant Fenty, the agents obtained an arrest warrant for her but subsequently learned she had taken a one-way flight to Jakarta on February 14, 2022. Raghavan Test. ¶ 6. The authorities have been unable to locate Ms. Millwood's whereabouts since then. Raghavan Test. ¶ 12-14.

At trial, Defendant Fenty moved to exclude a prior petit larceny conviction. R. at 60-61. Defendant Fenty pled guilty to petit larceny after she attempted to sneak up on a woman and steal her bag while the woman was distracted, watching an Elmo concert. Fenty Test ¶ 8-9, 13

When the woman noticed that her purse was being stolen, she resisted, but Defendant Fenty told the woman to give her the bag or she would "hurt" her. R. at 60-61; Fenty Test ¶ 7, 8, 11. Defendant Fenty later stated that she had no intention to hurt anyone during the larceny and deceived the woman because she wanted the encounter to end. R. at 60-61; Fenty Test ¶ 7-8, 11.

B. Procedural History

At trial, Defendant Fenty filed several motions to suppress. Defendant Fenty first moved to exclude her prior conviction of petit larceny. R. at 60-61. The trial court ruled the admission of Defendant Fenty's conviction was proper under Federal Rules of Evidence Rule 609(a)(2). R. at 66. Defendant Fenty appealed this judgment, and her appeal was heard on April 6, 2023. R. at 64. Defendant Fenty filed a motion to suppress the evidence obtained by searching the package addressed to Jocelyn Meyer. R. at 66. Defendant Fenty argued that the search of her mail violated her Fourth Amendment rights. R. at 66. Defendant Fenty's motions were denied, and Defendant Fenty was convicted on September 21, 2022. R. at 70. On June 15, 2023, the 14th Circuit upheld the denial of Defendant Fenty's motions to suppress. R. at 64. Defendant Fenty again appealed, and this Court granted certiorari. R. at 74.

At trial, the government moved to exclude evidence of two voicemails Defendant Fenty placed after learning the mail in her P.O. Box was missing. R. at 66. The government contended that the voicemails were inadmissible hearsay. R. at 66. The trial court agreed and excluded both voicemails as hearsay. R. at 66. Defendant Fenty appealed this judgment. R. at 66. The Fourteenth Circuit upheld the trial court's ruling and found that Defendant Fenty's voicemails were inadmissible hearsay. R. at 70. Defendant Fenty again appealed, and this Court granted certiorari. R. at 74.

C. Standard of Review

In reviewing the lower court's denial of a motion to suppress the evidence seized from the packages, this Court applies the clearly erroneous standard to factual findings and legal conclusions *de novo*. *United States v. Ross*, 713 F.2d 389, 392 (8th Cir. 1983); *United States v. Brummels*, 15 F.3d 769, 771 (8th Cir. 1994). Under the clearly erroneous standard, this Court must affirm the factual findings of the lower court unless it lacks the support of substantial evidence, evolves from an erroneous view of the applicable law, or there is a definite and firm belief that a mistake has occurred upon considering the entire record. *Ross*, 713 F.2d at 392.

When reviewing evidentiary rulings, such as hearsay and evidence used to impeach a witness, appellate courts have held that a trial court's decision on the admissibility of evidence should not be overturned absent a clear showing of abuse of discretion. *United States v. Harris*, 761, F.2d 394, 398 (7th Cir. 1985);*General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997) (holding that appellate courts will only overrule trial court's verdicts if the court finds clear abuse of discretion); *Michelson v. United States*, 335 U.S. 469 (1948) (holding that a trial court's ruling on hearsay issues will only be overturned if there is an abuse of discretion). The scope of discretion has been "broadly construed, and the trial court's actions are to be maintained unless manifestly erroneous." *Persian Galleries Inc. v. Transcon Ins. Co.*, 38 F.3d 253, 257 (6th Cir. 1994). Under this standard, reversal of a ruling is only warranted where the court finds the trial court "relies on clearly erroneous findings of fact . . . or where it improperly uses an erroneous legal standard." *Romstadt v. All State Ins.*, 59 F.3d 608, 615 (6th Cir. 1995).

SUMMARY OF THE ARGUMENT

The lower courts correctly found that Defendant Fenty did not have a reasonable expectation of privacy in the packages addressed to Jocelyn Meyer at the time of the search. Defendant Fenty has no reasonable expectation of privacy in the packages because she was neither the addressee nor the sender, and the P.O. Box was not registered under her name. *See United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988). Defendant Fenty failed to meet her burden of showing there was sufficient indication connecting her to Jocelyn Meyer at the time of the search. *See id.*; *United States v. Stokes*, 829 F.3d 47, 53 (1st Cir. 2016). Defendant Fenty does not have a reasonable expectation in the alias "Jocelyn Meyer" because she did not show she was generally known by that name or used it frequently. *See United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981). Even if she does have a reasonable expectation of privacy in the alias, it is not one society is ready to recognize as reasonable because it involves wrongful and criminal conduct. *See State v. Hebert*, 2023 WL 8597558, at *38 (Ohio Ct. App., Dec. 11, 2023).

The lower courts correctly found Defendant Fenty's voicemail messages were inadmissible hearsay. Hearsay is any out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801. Hearsay is prohibited to be used in court unless an exception applies. Fed. R. Evid. 802. Defendant Fenty's voicemails were both hearsay statements because they were out-of-court statements concerning Defendant Fenty's level of knowledge of the fentanyl scheme offered to prove Defendant Fenty's level of knowledge of the scheme. Defendant Fenty claims her statements qualify as a then-existing mental state. Fed. R. Evid. 803(3). However, this argument must fail because the statements fail under the *Jackson* test. *See United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). Defendant Fenty's statements do not meet the spontaneous element of the Jackson test because they were made after Defendant

Fenty had enough time to realize that she was under investigation. *See United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980) *overruled on other grounds by United States v. De Bright*, 730 F.2d 1255, 1259 (9th Cir. 1984).

Finally, the lower courts correctly ruled that Defendant Fenty's prior crime is admissible to impeach Defendant Fenty as a witness because her crime was one of dishonesty. The Federal Rules of Evidence permit the admissibility of crimes of dishonesty to impeach a defendant testifying at trial. Fed. R. Evid. 609(a)(2). Defendant Fenty's crime of petit larceny was a crime of dishonesty when she intended to leverage false pretenses to steal her victim's bag. *See United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir., 1976). Additionally, Defendant Fenty lied to her victim by stating she would hurt her to obtain the bag. R. at 60, 61; Fenty Test ¶ 7, 8, 11.

ARGUMENT

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." U.S. Const. amend. IV. Additionally, the Federal Rules of Evidence prohibit the admission of out-of-court statements to prove the truth of the matter asserted. Fed. R. Evid. 801. The Federal Rules of Evidence do, however, mandate the admission of a defendant's prior conviction of any crimes of dishonesty, should the defendant choose to testify. Fed. R. Evid. 609(a)(2).

I. The lower courts did not err in denying Defendant Fenty's motion to suppress the evidence seized from the packages addressed to Jocelyn Meyer because Defendant Fenty does not have a reasonable expectation of privacy in the package and has failed to meet the burden of establishing other indicia sufficient to connect her to the package.

An individual must have 'standing' to assert a Fourth Amendment claim. *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). A defendant lacks standing when they do not have a reasonable expectation of privacy in the property searched or seized. *Id.* The individual must have a subjective reasonable expectation of privacy, and that subjective expectation must be one that society is ready to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (J. Harlan, concurring). An individual does not have an expectation of privacy in a package when they are neither the sender nor the addressee, absent some indicia of ownership. *Koenig*, 856 F.2d at 846; *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021). An individual has no reasonable expectation of privacy in a package addressed to an alias when used for criminal or wrongful conduct. *United States v. Johnson*, 584 F.3d 995, 999 (10th Cir. 2009); *United States v. Lewis*, 738 F.2d 916, 920 n.2 (8th Cir. 1984); *United States v. Jacobsen*, 466 U.S. 109, 122 (1984).

This Court should affirm the Fourteenth Circuit's decision that Defendant Fenty did not have a reasonable expectation of privacy in the package or the alias "Jocelyn Meyer" because there

was no indication that Defendant Fenty was the same person as Jocelyn Meyer at the time of the search, and she has failed to show she is generally known by that name. Additionally, Defendant Fenty used the alias for wrongful conduct, which is not an expectation of privacy society is willing to recognize.

A. Defendant Fenty had no reasonable expectation of privacy in the sealed package when she was neither the sender nor addressee and failed to establish sufficient indicia of ownership.

An individual must have a reasonable expectation of privacy to have standing to assert a Fourth Amendment claim. *Rakas*, 439 U.S. at 134. A defendant who is neither the sender nor the addressee of a package has no privacy interest, absent other indicia of ownership, possession, or control. *See United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992); *Koenig*, 856 F.2d at 846; *United States v. Perez*, 63 Fed. Appx. 635, 636 (9th Cir. 2003); *United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984); *Rose*, 3 F.4th at 728; *United States v. Smith*, 39 F.3d 1143, 1145 (11th Cir. 1994). The defendant can establish ownership by showing the historical use of the property, the ability to regulate access, the totality of the surrounding circumstances, and the objective reasonableness of such privacy expectations. *Stokes*, 829 F.3d at 53. These factors together must be sufficient to confer a legitimate expectation of privacy. *United States v. Morta*, No. 1-21-cr-00024, 2022 U.S. Dist. LEXIS 84353, at *31 (D. Guam May 9, 2022).

An individual has no privacy interest in a package when they are neither the sender nor the addressee, even if they are the intended recipient. *Givens*, 733 F.2d at 341-42. The defendants in *Givens* were neither the named addressees nor the recipients of a package and used false names to receive illegal packages. *Id.* at 340. Yet, the defendants argued they had a reasonable expectation of privacy because they were the intended recipients of the packages' contents. *Id.* at 341. The court held that the defendants had no privacy interest despite being the intended

recipients. *Id.* at 342. The court reasoned that without being the addressee, any possessory interest in the contents of a package does not extend to the mailing envelope. *Id.*; *e.g.*, *Perez*, 63 Fed. Appx. at 636 (holding that an individual does not have a legitimate expectation of privacy in a package not addressed to him); *Koenig*, 856 F.2d at 846 (holding that the defendant did not have a privacy interest without any indication the defendant owned the package).

A defendant has no reasonable expectation of privacy in a package not addressed to him without an objective indication of ownership, possession, or exercised control over the package at the time of the search. *Rose*, 3 F.4th at 728. In *Rose*, the defendant addressed and received packages of cocaine at his friend's house under the name of the friend's deceased brother. *Id.* at 725. The court held that the defendant did not have a reasonable expectation of privacy in the packages because there was no "objective indicia" of "ownership, possession, or control" over the package at the time of the search. *Id*. at 729. The court reasoned that neither the sender's name, the named recipient, the address, nor the phone number of the package indicated an objective indication of the defendant's ownership interest over the package. *Id.*; *see also Smith*, 39 F.3d at 1145 (finding no reasonable expectation of privacy when the defendant was neither the sender nor addressee and could not establish an ownership interest).

A defendant has failed to establish ownership over a package when they have not shown previous use of the searched property, ability to regulate access, and that the expectation of privacy is objectively reasonable based on the totality of the circumstances. *See Stokes*, 829 F.3d at 53. The defendant in *Stokes* was neither the sender nor addressee of the letter searched by law enforcement, but other letters in the P.O. Box were registered to their address. *Id.* at 53. The court held they had no privacy interest in the letter not addressed to them. *Id.* The court reasoned the letters in the P.O. Box addressed to their address were insufficient to establish a reasonable

expectation of privacy in the letter not addressed to him. *Id.*; *see Morta*, 2022 U.S. Dist. LEXIS 84353, at *31 (holding that a defendant living at the recipient address without previous ownership of the package is insufficient indicia connecting the defendant to the package despite having a subjective anticipation of privacy in the package).

Defendant Fenty has no reasonable expectation of privacy in the packages despite being the intended recipient because she was neither the recipient nor the addressee. *See Givens*, 733 F.2d at 341-42. Like the defendants in *Givens,* who used a false name to receive illegal packages, Defendant Fenty used an alias instead of her real name to receive xylazine. *Givens*, 733 F.2d at 341-42; Fenty Test. ¶ 45. Like the defendants in *Givens,* who were the intended recipients, Defendant Fenty was the intended recipient but still has no reasonable expectation of privacy. *Givens*, 733 F.2d at 341-42; Fenty Test. ¶ 46.

Defendant Fenty had no reasonable expectation of privacy in the packages addressed to Jocelyn Meyer because there was no indication connecting her to the package at the time of the search. *See Rose*, 3 F.4th at 729; Raghavan Test. ¶ 31. Like the package in *Rose* that did not have the defendant's name, address, or phone number attached, the package nor the P.O. Box was registered or addressed to Defendant Fenty. *See id.*, 3 F.4th at 729; Raghavan Test. ¶ 31. The packages were addressed to Jocelyn Meyer, the P.O. Box was registered under Jocelyn Meyer, and the Record does not indicate a phone number. Raghavan Test. ¶ 31. Although two Amazon packages were in the same P.O. Box addressed to Defendant Fenty, this does not imply ownership of the packages addressed to Jocelyn Meyer. *See Stokes*, 829 F.3d at 53 (holding that an address alone does not create a reasonable expectation of privacy in a parcel); Raghavan Test. ¶ 31.

Absent any indications of ownership at the time of the search, Defendant Fenty has no reasonable expectation of privacy in the packages addressed to Jocelyn Meyer. *See Stokes*, 829 F.3d at 53; Raghavan Test. ¶ 31. Like the defendant in *Stokes*, whose only indication of ownership were other letters addressed to his address, the only indication of ownership at the time of the search was two Amazon packages addressed to Defendant Fenty. *See Stokes*, 829 F.3d at 53; Raghavan Test. ¶ 31. The Amazon packages, like the letters addressed to the Defendant in *Stokes*, are insufficient to establish a legitimate expectation of privacy in the package addressed to Jocelyn Meyer. *See id.* at 53; Raghavan Test. ¶ 31. The other factors applied in *Stokes*, such as historical use of the package or ability to regulate access, do not apply because Agent Raghavan and Jim searched the package before Defendant Fenty obtained or possessed it. *See id.*; *Morta*, 2022 U.S. Dist. LEXIS 84353, at *31 (holding that the defendant had no historical use of the package because it was seized before the defendant obtained or possessed it).

This Court must affirm the lower court's decision because Defendant Fenty did not have a reasonable expectation of privacy in the packages. She was neither the sender nor the addressee, and the P.O. Box was registered under Jocelyn Meyer. Further, she has failed to show that there was an objective indication of ownership, possession, or exercised control over the package at the time of the search. Thus, she has not met her burden of establishing a reasonable expectation of privacy.

B. Defendant Fenty does not have a reasonable expectation of privacy in her alias because she failed to show a sufficient connection to her alias to establish a reasonable expectation of privacy, that she was generally known by that name, and that she used the alias for a non-criminal purpose.

Defendants may not assert a reasonable expectation of privacy in packages addressed to an alias unless the defendant establishes a sufficient connection to the addressee. *United States v.*

Campbell, 434 F. Appx. 805, 809 (11th Cir. 2011). At the time of the search, it must be established that the defendant and the alias are essentially the same person, have used the alias before, and are recognized by that name. *See Richards*, 638 F.2d at 770; *United States v. Williams*, No. 1:22-CR-8 (LAG), 2023 U.S. Dist. LEXIS 26755, at *18 (M.D. Ga Feb. 16, 2023); *United States v. James*, No. 19-2057, 2020 U.S. App. LEXIS 22766, at *3 (6th Cir. July 21, 2020). Even if the defendant has a reasonable expectation of privacy in an alias, using the alias for criminal purposes or wrongful conduct diminishes that expectation. *See United States v. Lewis*, 738 F.2d 916, 920 n. 2 (8th Cir. 1984); *United States v. Walker*, 20 F.Supp.2d 971, 974 (S.D. W. Va. 1998) (citing *Jacobsen*, 466 U.S. at 122); *United States v. Lozano*, 623 F.3d 1055, 1062 (9th Cir. 2010); *United States v. Daniel*, 982 F.2d 146, 148 (5th Cir. 1993); *Morta*, U.S. Dist. LEXIS 84353, at *27-28.

An individual does not have a reasonable expectation of privacy in a package addressed to an alias unless, at the time of the search, the defendant and the alias appear to be the same person. *Richards*, 638 F.2d at 770. The defendant in *Richards* applied for a P.O. Box under the name of his company and signed the application using a false name. *Id.* at 767, 769. During a controlled delivery, the defendant arrived and saw a note in the P.O. Box to receive his package at the counter. *Id.* at 768. The agents addressed the defendant by the name registered under the P.O. Box, and he responded by giving his correct name. *Id.* The agents then arrested him and searched the package without a warrant outside his presence. *Id.* The court held that the defendant had a reasonable expectation of privacy in the package because it was established that he was the same person as the alias. *Id.* at 770. Since the defendant indicated he was the alias and asserted his ownership over the package at the time of the seizure, the defendant had a reasonable expectation of privacy in the package. *Id.* at 770.

A defendant has no reasonable expectation of privacy in a package addressed to an alias unless the defendant can show they previously used it and is recognized by that name. *Williams*, 2023 U.S. Dist. LEXIS 26755, at *6. In *Williams*, the defendant failed to present evidence to establish he previously used the fictitious name, that anyone recognized him by that name, or that he was connected to the named addressees. *Id.* The court held that the defendant did not meet his burden of demonstrating a reasonable expectation of privacy in the packages. *Id.* The court reasoned that the defendant must have established he was recognized by the name on the package or previously used the name as an alias. *Id.*; *see James*, 2020 U.S. App. LEXIS 22766, at *3 (holding that the defendant had no reasonable expectation of privacy in an alias without offering sufficient evidence to assert that he frequently used the alias).

A defendant has no reasonable expectation of privacy in a package addressed to an alias when it is used to receive illegal contraband. *Lewis*, 738 F.2d at f.2. In *Lewis*, the defendant registered a mailbox bearing a false name and address to receive fraudulently obtained mailings. *Id.* at 918. The court held that the defendant did not have a reasonable expectation of privacy in the package addressed to an alias or false name when he used the name only for criminal purposes. *Id.* at f.2. The court reasoned that using an alias for criminal purposes is not an expectation of privacy that society is prepared to recognize as reasonable. *Id.* (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)); *see also Walker*, 20 F.Supp.2d at 974 (concluding a defendant does not have a reasonable expectation of privacy in a package addressed to an alias used as part of a criminal scheme).

Even if a defendant has a subjective expectation of privacy in a package, society is unwilling to recognize that expectation as legitimate when it involves wrongful conduct. *State v. Hebert*, 2023 WL 8597558, at *14, 38 (Ohio Ct. App.). In *Herbert*, the defendant was neither the sender

nor the named recipient of a package containing methamphetamine. *Id.* at *38. The court held that the defendant did not have a reasonable expectation of privacy in the alias. *Id.* The court analyzed whether wrongful conduct was involved and did not examine the defendant's knowledge of the package's illegal contents. *Id.* The court explained that society is unwilling to recognize a defendant's expectation of privacy in an alias as legitimate when it involves wrongful conduct. *Id.*; *see also United States v. Ligon*, 861 Fed. Appx. 612, 615 (6th Cir. 2021) (analyzing whether the use of a false name involved wrongful conduct, not the subjective intent of the defendant to receive fentanyl).

Similarly, the defendant in *United States v. Walker* used an alias as part of a criminal scheme to receive a package containing methamphetamine. 20 F.Supp.2d at 972. The court held that the defendant's expectation of privacy in an alias for criminal purposes is wrong and not one society is prepared to recognize as reasonable. *Id.* at 974 (citing *Daniel*, 982 F.2d at 148) (questioning whether the defendant had standing when the use of an alias was part of his criminal scheme); *Morta*, 2022 U.S. Dist. LEXIS 84353, at *28 (holding that the defendant lost their privacy right in an alias when she used it solely for obtaining narcotics through the mail); *Lozano*, 623 F.3d at 1064 (O'Scannlain, J., concurring) (stating that a defendant does not have a legitimate expectation of privacy in a package not addressed to him when the addressee was his criminal alias).

Defendant Fenty does not have a reasonable expectation of privacy in the package because there was no objective indication that she was the same person as Jocelyn Meyer at the time of the search. *See Richards*, 638 F.2d at 770; Raghavan Test. ¶ 31. Unlike *Richards*, where the defendant proactively asserted their possessory interest before the search, Defendant Fenty did not establish ownership until after the search occurred. *See Richards*, 638 F.2d at 770;

Raghavan Test. ¶ 31-33. It wasn't until the day after the search that Defendant Fenty established a connection to Jocelyn Meyer by picking up the packages at the counter. Raghavan Test. ¶ 32.

Absent Defendant Fenty presenting evidence that she was generally known by the name "Jocelyn Meyer," she has failed to bear the burden of establishing a reasonable expectation of privacy in the alias. *See Williams*, 2023 U.S. Dist. LEXIS 26755, at *18; Fenty Test. ¶ 42; Raghavan Test. ¶ 33. Like the defendant in *Williams*, who did not establish he was recognized by the alias, Defendant Fenty failed to show that she was known by the name "Jocelyn Meyer." *See id.*; Fenty Test. ¶ 42. Defendant Fenty used the alias "Jocelyn Meyer" to publish two short stories in college in 2016 and 2017 but has not been published under the name since. Fenty Test. ¶ 42; R. at 65. She emailed four publishers in October 2021 under the alias, but she was not generally known by the alias. Fenty Test. ¶ 42; Raghavan Test. ¶ 33. While at the Joralemon post office after the controlled delivery, Defendant Fenty ran into an old college friend who later told Agent Gold that her name was Franny Fenty, not Jocelyn Meyer. Raghavan Test. ¶ 33.

Additionally, Defendant Fenty has no reasonable expectation of privacy in her alias because she did not use the alias to register the P.O. Box and address the package for non-criminal purposes. *See Lewis*, 738 F.2d at f.2.; Fenty Test. ¶ 43. Defendant Fenty registered the P.O. Box under Jocelyn Meyer ten days before the Holistic Horse Care packages arrived because she "wanted privacy." Raghavan Test ¶ 31; Fenty Test. ¶ 55. Like the defendant in *Lewis*, who registered a mailbox under a false name to receive illegal content, Defendant Fenty registered the P.O. Box after agreeing to help Ms. Millwood administer xylazine that she actively worried contained fentanyl. *See id.*; Fenty Test. ¶ 57-58.

Similarly, even if Defendant Fenty has a subjective expectation of privacy in the packages, society is unwilling to recognize that expectation as legitimate because it involves

wrongful conduct. *See Herbert*, 2023 WL 8597558, at *14; Raghavan Test. ¶ 32. Like the defendant in *Herbert*, who used an alias to receive methamphetamine, Defendant Fenty addressed the packages containing xylazine and fentanyl to "Jocelyn Meyer." *See id.*; Raghavan Test. ¶ 31. Like the defendant in *Herbert,* who had no reasonable expectation of privacy in the package, Defendant Fenty has no reasonable expectation of privacy in the packages that contained 400 grams of fentanyl. *See id.*; Raghavan Test. ¶ 32. Society is unwilling to recognize Defendant Fenty's expectation of privacy in the package as legitimate because it involved wrongful conduct. *See Ligon*, 861 Fed. Appx. at 615; Fenty Test. ¶ 45. Similarly, like the defendant's subjective intent in *Ligon*, Defendant Fenty's intent to receive fentanyl is not of consequence. *See id.*

Similarly, Defendant Fenty's expectation of privacy, like the defendants in *Walker* and *Daniel,* is not one society is ready to recognize as reasonable. *See Walker*, 20 F.Supp.2d at 972; *Daniel*, 982 F.2d at 148; Raghavan Test. ¶ 31; Fenty Test. ¶ 46. Like the defendant in Walker, who used an alias as part of a criminal scheme to receive narcotics, Defendant Fenty addressed the package of xylazine containing fentanyl to "Jocelyn Meyer" instead of her real name. *See* 20 F.Supp.2d at 972; Raghavan Test. ¶ 31. Defendant Fenty was aware of xylazine and fentanyl being used as a recreational street drug. Fenty Test. ¶ 46, 57. Although Defendant Fenty did not know she was in a criminal scheme, she was suspicious criminal activity could be occurring and knew the conduct was wrong. Fenty Test. ¶ 46.

This Court must find that Defendant Fenty has no reasonable expectation of privacy in the alias because she has failed to show that she was generally known by that name or that she frequently uses that name. At the time of the search, Defendant Fenty did not appear to be the same person as Jocelyn Meyer. Further, Defendant Fenty does not have an expectation of privacy

in the alias because the use of the alias involved criminal or wrongful conduct, regardless of her intent or knowledge.

II. The lower courts did not err in finding Defendant Fenty's voicemails were inadmissible hearsay and that her prior conviction for petit larceny can be used to impeach her as a witness.

The Court must determine if Defendant Fenty's voicemails are admissible. The Federal Rules of Evidence prohibit hearsay statements from being admitted into evidence unless one of the outlined exceptions applies. Fed. R. Evid. 802. Hearsay is defined as any out-of-court statement being presented in court to prove the truth of the matter asserted. Fed. R. Evid. 801. Defendant Fenty's voicemails are both hearsay statements because they were out-of-court statements concerning Defendant Fenty's level of knowledge of the fentanyl scheme offered to prove Defendant Fenty's level of knowledge of the scheme. Defendant Fenty contends that while her statement is hearsay, it qualifies as an exception as a then-existing state of mind under Federal Rule of Evidence 803(3). Fed. R. Evid. 803(3).

When examining whether a statement qualifies as a then-existing mental state, courts apply the three-part *Jackson* test, which is satisfied when (1) the statement is contemporaneous with the events that the party seeks to prove, (2) the statement did not allow the declarant time to reflect, and (3) the statement is relevant to the crime in question. *Jackson*, 780 F.2d, at 1315. Here, the statement was contemporaneous with what Defendant Fenty seeks to prove because her statements concern apprehension about a crime while the crime was occurring. Additionally, the statements are relevant to the crime in question because the voicemails contain admissions that the defendant was trying to pick up the fentanyl packages from the post office. Therefore, the issue is whether Defendant Fenty had the opportunity to reflect on her statements before sending the two voicemails.

The Court must also determine whether Defendant Fenty's prior petit larceny conviction may be used to impeach her should she testify. The Federal Rules of Evidence state that any past criminal conviction "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). The issue is whether Defendant Fenty's crime of petit larceny was a crime of dishonesty when she utilized false pretenses to commit her crime. The lower courts correctly found that Defendant Fenty's statements did not pass the *Jackson* test because she had enough time to reflect on the ongoing investigation against her and tailor her statements accordingly. The lower courts correctly found that Defendant Fenty's prior crime was a crime of dishonesty because she used the false pretense that no crime was afoot to aid her in her theft of her victim's bag. Accordingly, we respectfully request that this Court affirm the lower court's decision to suppress Defendant Fenty's voicemails while allowing evidence of her prior crime should she testify.

A. <u>The lower courts were correct in finding that Defendant Fenty's voicemails do not qualify as a then-existing mental state under Federal Rule of Evidence 803 because the statement was not spontaneous.</u>

The Federal Rules of Evidence allow for an admission of "[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)." Fed. R. Evid. 803(3).

To determine whether a statement is admissible as a then-existing mental state, courts use a three-prong test provided in *United States v. Jackson*. 780 F.2d at 1315. In *Jackson*, the court considered the admissibility of a statement in which the defendant denied knowing of a mail fraud operation they were accused of participating in. *Id.* The court ruled a statement is admissible as a then-existing mental state when (1) the statement is contemporaneous with the

events that the party seeks to prove, (2) the statement did not allow the declarant time to reflect, and (3) the statement is relevant to the crime in question. *Id.* The court ruled that the statements were inadmissible because too much time had passed, allowing the defendant time to reflect and make "self-serving" statements. *Id.* Thus, the defendant's statements were not spontaneous under prong two of the *Jackson* test. *Id.*

A statement is not spontaneous when the declarant has enough time to realize they are under investigation and can reflect on how they want to frame their statements. *Ponticelli*, 622 F.2d at 991. In *Ponticelli*, the court ruled the trial court did not abuse its discretion when it excluded the defendant's statement to his lawyer as hearsay. *Id.* The defendant was arrested before the statement and thus realized he was under investigation several days before making the statement in question. *Id.* at 992. The defendant's lawyer admitted that less than eleven days passed between the arrest and the defendant's statements and refused to state exactly how many days had passed. The court held that the trial court did not abuse its discretion in finding that the knowledge of the investigation meant the statements were not spontaneous, regardless of how many days, if any, had passed. *Id.* The court stated that a statement is less likely to be spontaneous when the circumstances indicate a motive of misrepresentation. *Id.*

In *United States v. Reyes*, the court aligned with *Ponticelli* and held that a statement may be admissible as a mental state only if the defendant had no time to reflect on the statement while the event was unfolding. 239 F.3d 722, 743 (5th Cir. 2001). The court in *Reyes* held that statements during a phone call were not hearsay because the defendant made the statements after he suspected the accomplice he was talking to had cooperated with police. *Id.* at 743. The court ruled that since the defendant previously suspected his partner was cooperating with authorities,

the defendant had enough time to develop a motive to alter his statements, thus failing the *Jackson* test. *Id.*

The trial court did not abuse its discretion in finding that Defendant Fenty had enough time to realize she was under investigation before calling Ms. Millwood. Def. Ex. 16-17. In *Reyes*, the court ruled that if the defendant had time to realize they might be under investigation, prong two of the Jackson test failed, and their statement was inadmissible. *See Reyes*, 239 F.3d at 743. In *Reyes*, the mere fact that the defendant's partner was cooperating with authorities was enough for the court to find the defendant may have begun to suspect that he was under investigation. *See id.* The facts here are stronger than *Reyes* because Defendant Fenty had ample reason to believe she was under investigation as opposed to the defendant in *Reyes,* who had a mere hunch. *See id.*; Fenty Test. ¶ 19. Like the defendant in *Reyes*, Defendant Fenty was suspicious she might be under investigation when she recorded her voicemails. *See id.*; Fenty Test. ¶ 19. Furthermore, Defendant Fenty's voicemails were less spontaneous than the statement in *Reyes* because the Court can conclude that Defendant Fenty realized she may have been under investigation from her admissions. *See id.*; Fenty Test. ¶ 19. Defendant Fenty's voicemail statements show she was suspicious she was under investigation. Def. Ex. 16-17. The messages include statements such as, "I'm getting worried you dragged me into something" and "Why would they want to look at the [mail]." Def. Ex. 16-17. These statements more strongly indicate that Defendant Fenty knew she was under investigation than any indications given by the defendant in *Reyes*. *See id.*; Def. Ex. 16-17. In *Reyes*, the court found the trial court did not abuse its discretion when it found that the mere possibility the defendant suspected an investigation was underway was sufficient to render his statements not spontaneous under *Jackson*. *See id*. It would be a departure from case law to determine that the trial court abused its discretion when it

found Defendant Fenty's statements were not spontaneous when she admitted that she believed an investigation may have been underway. Def. Ex. 16-17.

Defendant Fenty may argue that her statements were spontaneous because she sent both voicemails within an hour of discovering her mail was missing. Def. Ex. 16-17. This argument must fail because the similarities to *Ponticelli* alleviate concerns that the trial court abused discretion. *See Ponticelli*, 622 F.2d at 991. Defendant Fenty's voicemails were like the defendant's inadmissible statement in *Ponticelli* because it came after she realized she was under investigation due to a series of events that had unfolded over several days. *See id.* at 992; Fenty Test ¶ 2, 19. Defendant Fenty stated she became suspicious she was involved in a crime on February 8, when she first Googled xylazine. Fenty Test ¶ 2. Since Defendant Fenty stated she believed she may have been involved in a crime on February 8, it is reasonable that Defendant Fenty understood the possibility of being under a present or future investigation. Fenty Test ¶ 2. Once the police searched Defendant Fenty's mail, the suspicion that she had developed six days prior was heightened, and she believed an investigation was occurring. Fenty Test. ¶ 2, 19. Similarly, in *Ponticelli,* the defendant had between zero and eleven days to consider the possibility of an investigation. *See* 622 F.2d at 992. The statement was still inadmissible because they knew they were under investigation for some period before speaking. *See id.* The Court here should follow the ruling of *Ponticelli* and find that the lack of temporal clarity as to when exactly Defendant Fenty began considering an investigation is insufficient and does not render a statement spontaneous when the defendant had some time to consider the possibility of an investigation against them. *See id.;* Fenty Test. ¶ 2, 19.

Defendant Fenty realized she was under investigation before sending the voicemails she wishes to admit. The lower courts found that because Defendant Fenty considered that her

statements could be used against her in an investigation, her statements did not satisfy the spontaneity prong of the *Jackson* test. Since the lower courts' rulings are supported by cases such as *Reyes* and *Ponticelli*, this Court should not find lower courts' rulings satisfy the "manifestly erroneous" standard required to overturn its ruling. Accordingly, Defendant Fenty's statements cannot be considered spontaneous, and this Court must find that prong two of the *Jackson* test is not met.

B. The lower courts did not err in finding that Defendant Fenty's prior conviction for petit larceny could be admitted to impeach her as a witness under Rule 609(a)(2).

Federal Rule 609(a)(2) mandates that evidence of any past criminal conviction, irrespective of the punishment, "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). Courts have held crimes of dishonest acts to include any crime that relies on deception and crimes committed under false pretenses. *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989); *United States v. Smith*, 551 F.2d 348 at 362.

Rule 609(a)(2) applies where the prosecution can "demonstrate to the court 'that a particular prior conviction rested on facts warranting the dishonesty or false statement description.'" *United States v. Hayes*, 553 F.2d 824, 827 (2nd Cir. 1977). In *Altobello*, the court distinguished between crimes of violence and "dishonest acts." 872 F.2d at 216. In *Altobello*, the defendant challenged the court's admission of a prior conviction of meter tampering against him because no verbal lie was involved in his crime. *Id.* The court rejected this argument, finding that although the defendant did not verbally lie to anyone, his crime still involved deception. *Id.* The court reasoned that as opposed to crimes that entail using force, meter tampering required

anonymity and covertness; accordingly, for meter tampering to be successful, the crime inherently entailed deception. *Id.*

The reasoning in *Altobello* is supported by *United States v. Smith,* which states that crimes of dishonesty include crimes committed under some "false pretenses." *See Smith*, 551 F.2d at 362. In *Smith*, a defendant challenged the use of a prior armed robbery conviction to be used to impeach him upon testifying. The court ruled the conviction was inadmissible for impeachment because his specific act, robbing bank officers at gunpoint, did not involve any false pretenses. *Id.* The court reasoned that there were no secrets in this armed robbery. *Id.* The defendant intended everyone to know that they were being robbed, and the defendant wanted the officers to know his real intention to shoot them if they did not cooperate. *Id. Altobello* implicitly allows for crimes outside of fraud and perjury to be impeachable under Rule 609(a)(2). *Id.* Like *Altobello*, the Boerum Penal Code allows for crimes such as theft to be crimes of dishonesty if the act "(a) creates reinforces or leverages a false impression, (b) prevents another from acquiring material information that would impact his or her judgment, or (c) Fails to correct a false impression that the deceiver previously created, reinforced, or influenced." Boerum PC § 155.45(2)(a)(b)(c).

Like the defendant in *Altobello*, Defendant Fenty intended to use stealth and false pretenses to steal her victim's bag. *See Altobello*, 872 F.2d at 216; R. at 23, 59; Fenty Test ¶ 8-9, 13. Defendant Fenty intended to sneak up on her victim while she was distracted. R. at 23, 59; Fenty Test ¶ 8-9, 13. Defendant Fenty admitted she wanted to take the bag from her victim without noticing. R at 60. By doing so, Defendant Fenty intended to deceive her victim into thinking nothing untoward was happening when her bag was being taken from her. R. at 23, 59; Fenty Test ¶ 8-9, 13. While petit larceny differs from the meter tampering in *Altobello*, the goals

of the crimes are the same. *See* 872 F.2d at 216-17. The defendant's motivation in *Altobello* was to trick people into believing a tampered meter was up to standard. *See id.* Similarly, Defendant Fenty's motivation was for the crowd and her victim to believe their belongings were safe while the crime was afoot. *See id.*; R. at 23, 59; Fenty Test ¶ 8-9, 13. Defendant Fenty's crime was one of deception and false pretenses.

Defendant Fenty's motivation puts her crime within the scope of *Altobello* and Boerum's Penal Code. Boerum PC § 155.45(2)(a)(b)(c). *See id*. Defendant Fenty insisted she intended to take the victim's bag while she was distracted, unaware that the crime was occurring. R. at 23, 59; Fenty Test ¶ 8-9, 13. Through her testimony, Defendant Fenty admitted she intended to "leverage a false impression" that nothing was astray in aiding her in stealing the bag. Fenty Test ¶ 8-9, 13; Boerum PC § 155.45(2)(a). Defendant Fenty also revealed that she attempted to "walk over quietly" and "sneak up on" the victim to prevent her from knowing that Defendant Fenty was behind her. R. at 59; Fenty Test ¶ 3-7. Defendant Fenty has stipulated through this admission that she "prevent[ed] another from acquiring material information that would impact his or her judgment." Boerum PC § 155.45(2)(b). Finally, Defendant Fenty told the victim to let go of the bag, or she would "hurt her." R. at 60-61; Fenty Test ¶ 7, 8, 11. However, Defendant Fenty admitted she did not want to hurt the victim and that she just threatened the victim so the encounter would end. R. at 60-61; Fenty Test ¶ 7, 8, 11. In these statements, Defendant Fenty conceded she created the false impression that she would hurt the victim and "fail[ed] to correct" that impression. Boerum PC § 155.45(2)(c). In Defendant Fenty's own words, she has met every definition Boerum has for a crime of dishonesty. R. at 60-61 Fenty Test ¶ 7, 8, 11. This Court should hold Defendant Fenty to her words and consider Boerum's intent in defining the crime that Defendant Fenty committed as one of dishonesty.

Defendant Fenty may compare this case to *Smith,* where the court ruled that a specific instance of theft was not a crime of dishonesty. *See* 551 F.2d at 362. The facts here, however, are distinguishable from the facts of *Smith*. Fenty Test ¶ 8-9, 13. *Id.* While both crimes involve theft, the type of theft that Defendant Fenty committed here is quite different from the theft determined to be inadmissible in *Smith*. *See id.* As the court stated in Smith, the defendant was not deceptive because they had no intention and took no measures to conceal their intentions or the reality that they were committing a crime. *See id.* Here, Defendant Fenty insisted that she planned to take the purse while no one was watching. Fenty Test ¶ 8-9, 13. Defendant Fenty had every intention to conceal the reality that she was committing a crime, and thus, her theft required the deception lacking in *Smith*. *See id.*; Fenty Test ¶ 8-9, 13.

Defendant Fenty may also rely on the *United States v. Fearwell* ruling, which held that a larceny conviction could not be used to impeach a witness under Rule 609 because the crime involved stealth rather than deception. *See* 595 F.2d 771, 776 (D.C. Cir. 1978). This case is distinguishable from *Fearwell* because there is both stealth and deception. Defendant Fenty said, "Let go of the bag, or I'll hurt you." *See id*.; R at 60-61; Fenty Test ¶ 7-8, 11. However, Defendant Fenty had no real intention to hurt the victim, as she stated multiple times that she intended to take the bag quietly without anyone being hurt. *See id*. Thus, unlike *Fearwell,* where the defendant utilized merely stealth, lying was central to Defendant Fenty's crime, and an analysis that treats this crime merely as one of stealth is inapplicable. *See id*.

The lower courts did not err in finding that Defendant Fenty's prior Conviction for petit larceny could be admitted to impeach Defendant Fenty as a witness under Rule 609(a)(2).

CONCLUSION

Respondents respectfully request that this Court AFFIRM the decision of the United States Court of Appeals for the Fourteenth Circuit because the lower court did not err in denying Defendant Fenty's motion to suppress the evidence obtained from the packages, her voicemails made at the post office, and her prior conviction of petit larceny.

Dated: February 5, 2024

Respectfully submitted,

Team 9

Attorneys for Respondents