Team 17R - Original

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 23 – 695

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT, THE UNITED STATES OF AMERICA

Attorneys for the Respondent

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 Federal Rule of Evidence 803(3) permits admission of recorded voicemail statements of a Defendant's then-existing state of mind despite Defendant having 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases: **Page(s)**

United States Court of Appeals Cases:

United States District Court Cases:

United States Constitution:

Statutes:

Rules:

Secondary Sources:

OPINION BELOW

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

CONSITUTIONAL PROVISION

The text of the following constitutional provision is provided below.

The Fourth Amendment to the United States Constitution states:

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

U.S. CONST. amend. IV.

STATEMENT OF THE FACTS

I. Facts Surrounding Ms. Fenty's Current Conviction of Possession With Intent to Distribute a Controlled Substance

Franny Fenty ("Ms. Fenty") was an unemployed writer at the time of her arrest. (R. 65.) Five to six years ago, while Ms. Fenty was in college, she only published two short stories under the alias "Jocelyn Meyer" in her university's creative writing magazine. (R. 4, 13.) On October 19, 2021, Ms. Fenty privately reached out to four publishers using the name Jocelyn Meyer and inquired about publication, but did not receive any responses. (R. 5.) To date, Ms. Fenty has not published any more novels under the alias. (R. 65.) After months of being unemployed, Ms. Fenty posted on LinkedIn on December 28, 2021, stating that she was seeking employment. (R. 6.) That same day, Angela Millwood ("Ms. Millwood") sent Ms. Fenty a LinkedIn message. (R. 6, 33.) Ms. Millwood reached out to Ms. Fenty about ordering horse tranquilizers for "Holistic Horse Care" at the end of 2021 and in early 2022. (R. 43.)

On January 31, 2022, Ms. Fenty registered to open a P.O. Box under the name "Jocelyn Meyer." (R. 54.) Ten days later, on February 10, 2022, Ms. Fenty placed an order from Holistic Horse Care for $1,2000 dollars' worth of xylazine, despite being unemployed and not having a steady income. (R. 55, 58.) In the meantime, on February 8, 2022, The Joralemon Times published an article about the increased surveillance of a street drug created from a combination of a horse tranquilizer called xylazine and fentanyl. (R. 7.) After several communications with Ms. Millwood about helping her administer xylazine, Ms. Fenty came across the Joralemon Times news article. (R. 46.) This article concerned Fenty. (R. 57.) On February 12, 2022, a resident of Jorelemon was found deceased in his apartment and an autopsy confirmed a fatal fentanyl overdose from a syringe that had been mailed by Holistic Horse Care. (R. 29.)

This incident led the Joralemon DEA office, led by Supervisory Special Agent Robert Raghavan ("Mr. Raghavan"), to heighten monitoring of the Joralemon post office and to put post office employees on high alert for suspicious packages connected with horse care. (R. 30.) On February 14, 2022, Special Agent Raghavan obtained a search warrant and seized two packages shipped to P.O. Box 9313 in the Joralemon Main Post Office. (R. 12, 30.) The P.O. Box was registered under the name "Jocelyn Meyer" and was determined that the P.O. Box was opened on January 31, 2022, just two weeks before the Holistic Horse Care packages arrived at the post office. (R. 31.) The two seized packages were also addressed to the name "Jocelyn Meyer." (R. 30.) Ms. Fenty was listed as neither the sender nor the addressee of the two packages seized. (R. 14.) These packages were flagged by postal employees because they were addressed from Holistic Horse Care. (*Id*.) However, there were two other packages that had been shipped from Amazon to the same P.O. Box 9313, but these packages were addressed to "Franny Fenty." (R. 31, 38.) The DEA

agents opened the two Holistic Horse Care packages and tested their contents and found that the packages contained a total of 800 grams of xylazine laced with 400 grams of fentanyl. (R. 65-66.)

On February 15, 2022, the DEA agents resealed the Holistic Horse Care packages and returned them to the post office manager, Oliver Araiza ("Araiza") to conduct a controlled delivery. (R. 32.) Araiza placed a slip inside P.O. Box 9313 mandating Jocelyn Meyer to pick up her Holistic Horse Care packages from the front counter. (*Id*.) The Amazon packages, however, were delivered to the P.O. Box. (*Id*.) Captured by the post office's surveillance cameras, Ms. Fenty entered the post office hours later. (*Id*.) Ms. Fenty then walked to P.O. Box 9313, unlock the P.O. Box, retrieved the two Amazon packages, read the slip, then brought the slip to the counter. (*Id*.) Araiza handed Ms. Fenty the Holistic Horse Care packages and asked if the packages belonged to her. (*Id*.) Ms. Fenty confirmed that they belonged to her. (R. 33.) As Ms. Fenty left the post office, she engaged in a minute-long, brief encounter with a former college classmate who referred to Ms. Fenty as "Franny." (*Id*.) Mr. Raghavan then asked the man if he knew Jocelyn Meyer, which the man responded "Who? You mean Franny? That was Franny Fenty." (*Id*.)

Later that day, Ms. Fenty left Ms. Millwood two recorded voicemails after Ms. Millwood did not answer her calls. (R. 40.) The first voicemail was left at 1:32 pm, and the second voicemail was left forty-five minutes after the first voicemail, at 2:17 pm. (*Id*.) Both recorded voicemails contained detailed statements from Ms. Fenty and even implicated Ms. Millwood, stating "I'm really starting to get concerned that you involved me in something I had no idea was going on." (*Id*.) On February 15, 2022, Ms. Fenty was indicted. (R. 66.) Following Ms. Fenty's arrest and further investigation, the Government obtained an arrest warrant for Ms. Millwood but was unable to arrest her because she fled the country on February 14, 2022. (R. 35.)

II. Facts Surrounding Ms. Fenty's Previous Conviction of Petit Larceny

When Ms. Fenty was 19 years old, she was convicted of petit larceny of the Boerum Penal Code § 155.25 for stealing a bag containing diapers and $27 on August 4, 2016. (R. 53-54.) Although prompted by a friend's dare, Ms. Fenty was in a dire financial situation. (R. 53.) As a result, Ms. Fenty arrived at the scene of the crime with no weapons but rather a plan to deceive a tourist and steal from them. (*Id*.) Ms. Fenty selectively targeted the tourist victim out of a crowd because the tourist seemed distracted and preoccupied with her family. (R. 58-59.) Then, Ms. Fenty attempted to go unnoticed among the bustling crowd and to steal the bag by quietly walking over to the tourist and her family, hoping she would not get caught. (R. 53, 58.) However, this attempt was unsuccessful as there was a loud and public altercation that ensued between Ms. Fenty and the victim, which forced Ms. Fenty to acknowledge her behavior publicly. (R. 53.) After the victim noticed and attempted to take back her bag, it was not until then that Ms. Fenty used force to steal the bag and yelled "Let go or I'll hurt you." (*Id*.) Evidence of Ms. Fenty's petit larceny conviction was admitted as evidence for impeachment purposes but the jury was given a limiting instruction, explaining that the purpose of the prior conviction evidence was for impeachment purposes only, and not for any other purpose. (R. 25, 63.)

STATEMENT OF THE CASE

Ms. Fenty was formally indicted by the grand jury on February 15, 2022. (R. 1.) Ms. Fenty later filed two evidentiary motions: (1) a motion to suppress the contents of the sealed packages found in her P.O. box; and (2) a motion in limine to exclude evidence of Ms. Fenty's prior conviction. *See* (R. 10, 18.). On her motion to suppress, Ms. Fenty argued that she had a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to her alias. *See* (R. 10–11.). On her motion in limine, Ms. Fenty argued that her prior conviction for petit larceny could not be used for impeachment purposes because it is not a crime of deceit

under Federal Rule of Evidence 609(a)(2). *See* (R. 19). District Court Judge Ava Brakman Reiser held oral arguments on August 25, 2022, denied both motions, and included a limiting instruction to the jury relating to the prior conviction evidence. (R. 17, 26.)

After the pretrial motions were completed, Ms. Fenty was tried before a jury on September 14, 2022. During direct examination of Ms. Fenty, the Government sought to exclude two voicemail statements from Ms. Fenty to Angela Millwood on the grounds that the voicemail statements were hearsay, and that they failed to qualify as hearsay statements of a declarant's then existing state of mind under Federal Rule of Evidence 803(3). (R. 47.). The District Court sustained the Government's objection and the recordings were excluded at trial. (R. 52.).

At the conclusion of the jury trial, Ms. Fenty was convicted on one count of 21 U.S.C. § 841(a)(1) for possession with intent to distribute a controlled substance, and was sentenced to ten years in prison (R. 66.) Ms. Fenty appealed her conviction to the Fourteenth Circuit on the same grounds that were argued at the trial court. (R. 65.) The Fourteenth Circuit affirmed the conviction on all three grounds on June 15, 2023. (R. 70). Ms. Fenty then appealed to this Court and was granted certiorari on all three issues on December 14, 2023. (R. 74.).

SUMMARY OF ARGUMENT

The Fourteenth Circuit properly concluded that the search of the sealed packages addressed to Ms. Fenty's alias did not violate the Fourth Amendment. Ms. Fenty cannot maintain a reasonable expectation of privacy in mail where she is neither the sender nor the addressee of the packages. Nor can Ms. Fenty create a reasonable expectation of privacy in a P.O. box or the mail contained therein by her minimal use of a P.O. box that is registered under an alias. Even if an individual may maintain a reasonable expectation of privacy in mail addressed to an alias, Ms. Fenty's Fourth Amendment challenge still fails because her alleged alias "Jocelyn Meyer" was not publicly established and used

for legitimate purposes. Ms. Fenty only collected packages addressed to her alias on one occasion and previously used the false name a half-decade prior to publish short stories. Here, the alias used solely in furtherance of a criminal scheme and therefore she cannot maintain a legitimate expectation of privacy in mail addressed to her alias.

Additionally, Ms. Fenty's voicemail recordings to Angela Millwood were properly excluded as hearsay. As a firmly rooted hearsay exception, Rule 803(3) allows admission of a declarant's then-existing state of mind only when the statements were made spontaneously, thus not allowing the declarant any time to reflect. This spontaneity requirement comports with longstanding judicial and legislative experience and is consistent with the statutory construction and plain meaning of the hearsay rules. Ms. Fenty had ample time to reflect before making both voicemail statements after becoming aware that her packages had been intercepted.

Finally, Ms. Fenty's impeachment by evidence of her prior conviction was proper under Rule 609(a)(2) because petit larceny is a crime of deceit. Ms. Fenty committed the crime in a deceitful manner, rather than by violence, and thus bears directly on Ms. Fenty's propensity to testify truthfully. Furthermore, the admission of Ms. Fenty's prior conviction was not prejudicial and the admission was harmless.

ARGUMENT

I. MS. FENTY LACKS FOURTH AMENDMENT STANDING TO OBJECT TO THE SEARCH OF THE PACKAGES ADDRESSED TO JOCELYN MEYER

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. However, "an individual's Fourth Amendment rights are not infringed--or even implicated--by a search of a thing or place in which he has no reasonable expectation of privacy." *United States v. Ross*, 963 F.3d 1056, 1062 (11th Cir. 2020) (en banc). Accordingly, to claim the protections of the Fourth Amendment, defendants must demonstrate that they had a "subjective expectation of privacy in the property searched," and that subjective expectation must be one that "society is prepared to recognize as reasonable." *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

It is well established that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy." *United States v. Jacobsen*, 466 U.S. 109, 114 (1984). Specifically, "both the named senders and addressees of sealed letters and packages" may maintain "a legitimate expectation of privacy" in their contents. *United States v. Morta*, No. 1:21-cr-00024, 2022 WL 1447021, at *6 (D. Guam May 9, 2022) (citing *Walker v. United States*, 447 U.S. 649, 658 n.12 (1980)). Here, however, Ms. Fenty was neither the sender nor the addressee of the two packages seized pursuant to a search warrant. *See* (R. at 12).

As set forth below, Ms. Fenty lacks Fourth Amendment standing to challenge the search and seizure of the two packages addressed to "Jocelyn Meyer" because (A) an individual cannot maintain a reasonable expectation of privacy in mail where the defendant is neither the sender nor addressee; and (B) the use of a P.O. Box alone cannot give rise to a reasonable expectation of

privacy in all mail destined for that address. Conversely, even if this Court finds that an individual *may* maintain a reasonable expectation of privacy in mail addressed to an alias, Ms. Fenty nevertheless fails to establish Fourth Amendment standing because (C) Ms. Fenty's alleged alias "Jocelyn Meyer" was not publicly established; and (D) her use of the alias was solely part of a criminal scheme.

A. An Individual Cannot Maintain a Reasonable Expectation of Privacy in Mail Where They are Neither the Sender Nor Addressee

This Court should hold that an individual cannot maintain a reasonable expectation of privacy in mail where, as here, the defendant is neither the sender nor addressee. This Court has not addressed whether an individual may exert a reasonable expectation of privacy with respect to a package that is not addressed to her. Accordingly, this is a case of first impression. Of the Circuits that have addressed this issue, six out of the seven have held that a defendant generally does not have a reasonable expectation of privacy in mail when they are neither the listed sender nor addressee. *United States v. Stokes,* 829 F.3d 47, 52 (1st Cir. 2016); *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021); *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993) (per curiam); *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988); *United States v. Lewis*, 738 F.2d 916, 920 n.2 (8th Cir. 1984); *United States v. Smith*, 39 F.3d 1143, 1145 (11th Cir. 1994).

In one line of cases, the Fifth, Seventh, and Eleventh Circuits have adopted a bright line rule, holding that a defendant cannot maintain a reasonable expectation of privacy in mail when they are neither the sender nor addressee. *Daniel,* 982 F.2d at 149 (explaining that defendant lacked standing in a box of narcotics not addressed to him); *Koeing*, 856 F.2d at 846 (finding that the defendant had no privacy right where the defendant "was neither the sender nor the addressee of the package"); *Smith*, 39 F.3d at 1145 (same). In an alternate line of cases, however, these Circuits have held that a defendant using a pseudonym or publicly known alias may *nevertheless* maintain

a legitimate expectation of privacy, despite being neither the sender nor the addressee, so long as the defendant could establish some connection to a publicly established "alter ego" or "alias". *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981); *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009). Similarly, the First and Fourth Circuits have developed the "other indicia" test, holding that a defendant lacks a reasonable expectation of privacy in mail when they are neither the sender nor addressee, "*absent other indicia* of ownership, possession, or control." *Rose*, 3 F.4th at 728 (emphasis added); *see Stokes*, 829 F.3d at 52. Although those circuits employing the "publicly established alias" approach do not explicitly mention the "other indicia" factors, the former seems to employ the same rationale: when a defendant successfully demonstrates a connection to their publicly established alias, this evidence is sufficient to establish the defendant's "ownership, possession, or control" of the package, and consequently, the defendant has met her burden of establishing Fourth Amendment standing. *See Rose,* 3 F.4th at 720 (finding that defendant failed to demonstrate "ownership, possession, or control" over the package where his use of an alias was not publicly established). Thus, for the purposes of the Government's argument, the "publicly established alias" and the "other indicia" tests will be considered one unitary approach.

In consideration of the irreconcilable authorities on this issue, this court should adopt the bright line rule followed by the Fifth, Seventh, and Eleventh Circuits because Ms. Fenty's asserted privacy right is not one that society is prepared to recognize as reasonable.

1. Society is not prepared to recognize Ms. Fenty's *subjective* expectation of privacy as reasonable.

Ms. Fenty asserts that she "maintained an expectation of privacy in the sealed packages" despite her use of a fictitious name (R. at 12-13). Under this logic, Ms. Fenty posits that this Court should protect *anyone's* wanton wish to remain anonymous, merely because the use of a fake name

suggests an intent to avoid detection. *See* (R. at 11). However, as this Court has previously cautioned; "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." *Jacobsen,* 466 U.S. at 122. "The test of legitimacy", therefore, "is not whether the individual chooses to conceal assuredly private activity, but instead, whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *California v. Ciraolo*, 476 U.S. 207, 207 (1986).

In contravention of established societal expectations, Ms. Fenty argues that a subjective wish to remain anonymous, in order to remain free from unfettered government intrusion, "is a desire our nation's Founders surely would have endorsed." (R. at 12). Legitimate expectations of privacy, however, "must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society". *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). As courts have recognized, "[n]onaddressees cannot base their claim on either source of legitimation." *United States v. Lozano*, 623 F.3d 1055, 1062 (9th Cir. 2010) (O'Scannlain, D. concurring). In the real property context, most individuals would rightfully expect their privacy interests to be tethered to their name on the package. Indeed, "[a]n individual who is the intended recipient of mail has a property right to delivery." *Id.* A nonaddressee, in contrast, "is not the intended recipient and, therefore, does not enjoy that right." *Id.*

Moreover, societal understandings cannot legitimize a nonaddressee's expectation of privacy because the recipient, by use of a phony name, has not announced an "exclusive use" of the object. *See id.* (noting that "exclusive use of the object of the search is crucial to Fourth Amendment standing) (internal quotations omitted). Rather, by "opt[ing] to conceal any purported

interest" and by "consciously avoid[ing] any public announcement that he had a subjective expectation of privacy in the package", the defendant "effectively repudiated his connection to the package and lost the means to exclude others from intrusion upon his interest." *United States v. Wood*, 6 F. Supp. 2d 1213, 1224 (D. Kan. 1998). Consequently, "where the individual has not legitimately manifested to society--in some appropriate manner given the particular context[1]--that he is entitled to such privacy . . .[s]ociety would not be prepared to recognize such an expectation of privacy as reasonable." *United States v. Dimaggio*, 744 F. Supp. 43, 46 (N.D.N.Y. 1990).[2]

In a similar context, several courts have agreed that a defendant has no reasonable expectation of privacy in cell phone records where he was not the legitimate subscriber to the phone. *United States v. Skinner,* No. 3:06-cr-100, 2007 WL 1556596, at *15-17 (E.D. Tenn. May 24, 2007); *United States v. Singleton*, No. 11-076, 2013 WL 3196378, at *5 (E.D. Pa. June 25, 2013); *United States v. Suarez-Blanca,* No. 1:07-cr-0023, 2008 WL 4200156, at "6-7 (N.D. Ga. Apr. 21, 2008). Importantly, despite the vastly personal nature of cell phone data and usage, these courts have nevertheless found that "subscriber information relating to another person or a fictitious person undercuts any claim that the [defendant] has a subjective privacy interest in the cell phone." *Suarez-Blanca*, 2008 WL 4200156, at *6-7. Because even a defendant's vast personal interest in his cell phone is not enough to overcome the use of a false name in subscribing to that

[1] While there may be legitimate reasons for using a fictitious name, the use of an alter ego in a way society recognizes as legitimate is limited to someone like "Esther Pauline Lederer who, for *years* dispensed advice as a syndicated columnist." *Pitts,* 322 F.2d at 461 (Evans, T. concurring) (emphasis added). Thus, while "Jocelyn Meyer" may have a privacy interest, she does not actually exist and for the reasons described below, "no amount of pushing and shoving" can turn the Defendant into the fictitious "Jocelyn Meyer" in the same way. *See id.*

[2] Indeed, at least two courts have found that by utilizing a fictitious name to send or receive mail, defendants run the risk of losing or "abandoning" control of their property. *See Pitts,* 322 F.3d at 459; *Dimaggio*, 744 F. Supp. at 46. In a frequently cited opinion, the District Court in *Dimaggio* found that any time defendants use an alias to conceal their connection to the package, "it is as if the package has[s] been abandoned." 744 F. Supp. at 46. Under this rationale, not only would Ms. Fenty lack a privacy interest that "society is willing to recognize as reasonable," but the entirety of her argument would necessarily fail because "no person can have a reasonable expectation of privacy in an item that [s]he has abandoned." *Pitts,* 322 F.3d at 456 (internal citations omitted).

phone, it follows that an individual should not maintain a privacy interest in a package addressed to a fictitious name.

B. The Respondent's Minimal Use of a P.O. Box, Registered in a False Name, Cannot Create a Reasonable Expectation of Privacy as to the P.O. Box or All Mail Therein.

Moreover, the Respondent's subjective expectation of privacy cannot be legitimized by her minimal use of a P.O. Box because an address alone cannot create a reasonable expectation of privacy and the P.O. Box, like the package, was not registered in her name. *See Stokes*, 829 F.4th at 728; *Lozano*, 623 F.3d at 106.

Courts addressing similar claims have repeatedly held that "an individual does not have a legitimate expectation of privacy in all things that *enter* his P.O. box." *Lozano*, 623 F.3d at 1062 (emphasis in original) (*citing United States v. Hinton*, 222 F.3d 664, 676 (9th Cir. 2000) (upholding the warrantless search and seizure of mail from a locked parcel box in a postal facility); *Stokes*, 829 F.3d 47 (no legitimate expectation of privacy in a rented P.O. Box); *Lewis*, 738 F.2d 916 (no legitimate expectation of privacy in a mailbox because defendant had "every expectation that government officials would regularly open the box to deliver mail"). Indeed, even where the defendant resided at the delivery address or used the delivery address "as his primary address to receive mail," courts find this evidence, standing alone, "insufficient to establish a reasonable expectation in *all* mail or packages sent to that address." *United States v. Williams*, No. 1:22-cr-8, 2023 WL 2061164, at *4-5 (M.D. Ga. Feb. 16, 2023) (emphasis in original) (citing *United States v. Campbell*, 434 F. App'x 805, 809 (11th Cir. 2011)). Because even the *named* lessee or owner of a delivery address cannot establish a Fourth Amendment interest in *all* parcels arriving at that address, it follows that *even if* Ms. Fenty had registered the P.O. Box under her name "Fanny Fenty", she would nevertheless lack a privacy interest in the packages within the Box addressed to "Jocelyn Meyer". *See id.*

Ms. Fenty's argument, however, is even further attenuated. Ms. Fenty argues that she should maintain a privacy interest in the P.O. Box itself, because she, on one occasion, retrieved personal packages from the P.O. Box addressed to her legal name. (R. at 12). Under her argument, then, she would maintain a privacy interest both in packages addressed to "Jocelyn Meyer" and those addressed to "Fanny Fenty," although the packages arrived to a P.O. Box registered to "Jocelyn Meyer." *See id.* Ms. Fenty cannot have it both ways. Firstly, as a matter of policy, "[i]t seems contrary to reason to let a person use an alias to hide [her] connection with leased property and yet maintain that [s]he has standing to challenge a search of the premises." *United States v. Salameh*, No. 93-cr-0180, 1993 WL 364486 (S.D.N.Y. Sep. 15, 1993) (citing *Daniel*, 982 F.2d at 149). Secondly, assuming *arguendo* that the Defendant properly established a reasonable expectation of privacy in the P.O. Box and packages addressed to "Jocelyn Meyer;" such an expectation would necessarily negate any interest in the packages addressed to "Fanny Fenty." Indeed, "Fourth Amendment rights are personal rights that may not be asserted vicariously." *Rakas*, 439 U.S. 128. Defendant, to the degree that she *is* "Jocelyn Meyer", can only assert the "personal rights" associated with Jocelyn (i.e. the P.O. Box and Holistic Horse Care Packages). *See id.* Jocelyn's rights, in turn, would not extend to the packages within the P.O. Box addressed to "Fanny Fenty" because such an assertion is *per se* vicarious. *See id.* Just as "Jocelyn" would not be able to vicariously assert privacy rights over "Fanny's" packages, the Defendant, to the degree she wants to be "Fanny," cannot vicariously assert a privacy interest in both the P.O. Box and any package addressed to "Jocelyn". *See id.* Consequently, Defendant cannot argue that her one-time collection of packages as "Fanny Fenty" gives rise to a privacy interest in the P.O. Box registered to "Jocelyn Meyer," regardless of how established the alias is.

C. Ms. Fenty has Failed to Establish that "Jocelyn Meyer" is her Publicly Established Alias

Even if this Court agrees that a defendant may assert a reasonable expectation of privacy in parcels addressed to fictitious names, Ms. Fenty has not presented evidence sufficiently alleging that the alias "Jocelyn Meyer" was publicly established.

In the line of cases holding that a defendant may have a reasonable expectation of privacy, despite being neither the sender nor the addressee, the defendant must nevertheless establish some connection to the "alter ego," "alias," or "fictitious name" listed on the package. *See United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992); *Morta*, 2022 WL 1447021, at *8. "Thus, presumptively, [d]efendant[s] do[] not have a reasonable expectation of privacy," absent some showing that the defendant has a "publicly-established connection to [the] alias" or "alter-ego." *Morta*, 2022 WL 1447021, at *9; *Rose*, 3 F.4th at 729.

A defendant's limited use of a fictitious name does not automatically render the alias one of "public use" where the defendant submits no evidence that anyone recognized her by that alias or that she consistently used the name under different circumstances. *See Rose*, 3 F.4th at 730. In *Rose*, the defendant claimed that his collection of "multiple packages addressed to [the same alias] using the same delivery scheme" was sufficient to establish his use of that alias. 3 F.4th at 730. In rejecting this claim, the Fourth Circuit held that where the record "contains no evidence that anyone recognized [the defendant] by the name . . ., nor did any evidence show that [the defendant] used the name regularly under different circumstances," the defendant's "limited use" of that name to retrieve packages on *multiple* occasions "does not establish" that the defendant used the name listed on the packages "as an alias or was commonly known by that name." *Id.* (emphasis added).

Conversely, courts deem an alias publicly established where the defendant was exclusively or notoriously known by that name, such that the defendant and the alias are "the same entity." *See United States v. Terriques*, 211 F. Supp. 2d 1137, 1144 (D. Neb. 2002); *United States v. Boyd*,

No. 05-10037, 2006 WL 314344, at *4 (D. Mass. Feb 8, 2006); *United States v. Yodprasit*, No. 19-4088, 2020 WL 1076044, at *2 (N.D. Iowa Mar. 6, 2020). In *Boyd*, the District Court found that the defendant's alias was "notoriously known" and thus publicly established where the defendant was registered under that name at a hotel, "the phone by which he could be contacted used that name to identify the voice mail recipient", and the agents investigating the defendant "*knew*" he was using that alias. 2006 WL 314344, at *4 (emphasis added). Similarly, in *Terriques*, the court found the defendant's use of a fictitious name sufficient to establish that he and the alias were the "same person," where an inspector testified that at the time of the controlled delivery, he identified himself verbally by the false name and "provided photographic identification in support of that claim." 211 F.Supp.2d at 1144. Relying on the court's holding in *Terriques,* the court in *Yodprasit* found that the delivery of "sixteen prior packages fitting the same profile" to the defendant's home address was sufficient to show that a fictitious name was used by the defendant. 2020 WL 1076044, at *2. Notably, the sixteen packages, delivered to the defendant over a six-month period, bore the name "Jonathan Lee" or some variation of that name, and on one occasion, an officer witnessed the defendant personally accept one of these packages from a postal worker. *Id*. at *2, *7. In holding that "these factors combined" established the defendant's use of a fictitious name, the court was careful to distinguish this case from those where the package "was not sent to the defendant's address." *Id.* at *4 (distinguishing *United States v. Williams*, 349 F.Supp. 3d 1007 (D. Haw. 2018)).

Here, Ms. Fenty contends that "Jocelyn Meyer" is her publicly established alias because she collected packages addressed to "Jocelyn Meyer" on one occasion, and she previously used that name to publish short stories more than a half-decade ago. (R. at 13-14). Ms. Fenty's case, however, is most analogous to *Rose*, where the Fourth Circuit found that the defendant's alias was

not publicly established. *See* 3 F.4th at 730. In fact, Ms. Fenty's collection of a *single* package presents an even weaker argument than considered in *Rose*, where the defendant's use of a false name to retrieve packages on *multiple* occasions "[did] not establish" that the defendant used the name "as an alias or was commonly known by that name." *Id.* While Ms. Fenty may be attempting to rely on *Yodprasit*, where the defendant's receipt of sixteen similar packages was sufficient to establish his use of an alias, Fenty's collection of packages addressed to Jocelyn Meyer, *on one occasion*, is factually distinct. *See* 2020 WL 1076044, at *2. Further, unlike in *Yodprasit* where the court gave great weight to the defendant's receipt of the packages at his home, Fenty's collection of one package from a P.O. Box, rather than her home address, does not weigh in her favor. *See id* at *4. (distinguishing cases where the package "was not sent to the defendant's address.").

Moreover, Ms. Fenty's prior use of the name to publish two short stories and to correspond with publishers is too attenuated to create a currently existing public alias. Unlike the defendant in *Boyd*, who was "notoriously known" by his alias after he repeatedly identified himself by that name at a hotel and on his cell phone, Fenty's use of the name Jocelyn Meyer to publish two short stories fails to establish that anyone knew her by that name. *See* 2006 WL 314344, at *4. Indeed, even Fenty's college classmate, an individual who knew Fenty at the time of publication, failed to recognize her by that name. (R. at 33). Furthermore, the court in *Boyd* noted that the defendant's use of an alias was so pervasive that the agents investigating him *knew* of the alias. *See* 2006 WL 314344, at *4. In stark contrast, the agents in this case had no knowledge of Fenty's minimal use of the name Jocelyn. (R. at 37). Finally, although Ms. Fenty represented herself as Jocelyn Meyer at the time of the controlled delivery, such representation is not enough where, unlike in *Terriques*, she failed to provide "photographic identification in support of that claim." 211 F.Supp.2d at 1144.

As the record clearly indicates, "Jocelyn Meyer" is not Fenty's publicly established alias. Because Fenty has failed to present "evidence that anyone recognized [her] by the name," and her limited use of the name is insufficient to "show that [she] used the name *regularly* under different circumstances," Fenty has failed to establish a public connection to the name Jocelyn. *See Rose*, 3 F.4th at 730. (emphasis added). Consequently, this Court should affirm the Fourteenth Circuit's finding that Ms. Fenty lacks Fourth Amendment standing.

D. Ms. Fenty Nevertheless Lacks a Fourth Amendment Claim because the Alias was Obviously Part of a Criminal Scheme

Finally, even if the Defendant's alias is deemed "publicly established," she nevertheless fails to establish a cognizable Fourth Amendment interest because "[a] nonaddressee's expectation of privacy over mail not addressed to him is not rendered legitimate" when, as here, "that assertion is made for the wrongful reasons." *Lozano*, 623 F.3d at 1063. Rather, such an expectation of privacy, as aptly stated by the Eighth Circuit, is "akin to that of a burglar plying his or her trade in a summer cabin during the off-season." *Lewis*, 738 F.2d at n.2 (citing *Jacobsen*, 466 U.S. at 122). Just as the burglar expects he will operate in privacy because no one is present during the off-season, a criminal who opens a post office box using an alias expects that her criminal mailings received through that alias will not be traced back to her. *See id.* For this reason, courts have repeatedly expressed doubt that a defendant may maintain a legitimate expectation of privacy in an alias where, as here, that alias was used *solely* in a criminal scheme. *See id; Daniel,* 982 F.2d at 149; *Pitts*, 322 F.3d at 460 (Evans, J. Concurring); *Lozano*, 623 F.3d at 1064 (O'Scannlain, J. concurring); *United States v. Walker*, 20 F. Supp. 2d 971, 974 (S.D. W. Va. June 30, 1998). This conclusion accords with the principle expressed by this Court that "wrongful interests do not give rise to legitimate expectations of privacy." *Lozano*, 623 F.3d at 1064 (citing *Jacobsen*, 466 U.S. at 122 n.22).

Ms. Fenty asserts that the nature of an alias, whether criminal or innocent, is irrelevant when analyzing an individual's reasonable expectation of privacy because "to hold otherwise would open the door to law enforcement officials banging down any door they desire, looking for narcotics, and justifying their entrance after-the-fact if drugs were found." (R. at 13). This argument does not withstand scrutiny for two reasons. Firstly, the assertion that the Fourth Amendment *necessarily* requires more than an after-the-fact justification ignores instances in which this Court has retroactively justified an otherwise illegal search.[3] *See* (R. at 13.)

Secondly, Ms. Fenty's argument wrongly assumes that the adoption of an alternative approach would eliminate the problem of government agents searching potentially innocent items *See* (R. at 13). In reality, however, both the "other indicia" and "publicly established alias" approaches are characterized by "[a] highly sophisticated set of rules . . . requiring the drawing of subtle nuances and hairline distinctions." *United States v. Robinson*, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J. dissenting). Because these analyses may be "literally impossible [to apply] by the officer in the field," particularly where the true owner of the parcel has avoided detection through the use of an alias, it follows that innocent packages will nevertheless be searched by law enforcement, subject only to the retroactive application of the exclusionary rule. *Id.* A rule which has no use for innocent individuals. *See Mapp v. Ohio*, 367 U.S. 643, 681 (1961) (Harlan, J. dissenting) (explaining that the exclusionary rule "reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims."). Thus, by preserving anonymity and affording more privacy rights *only* to individuals engaged in behavior that is counterproductive to society, the test effectively promotes the use of the U.S. postal service to send and receive drugs and other harmful contents. *See Dimaggio,* 744 F. Supp. at 46. Surely, "[t]he Fourth Amendment does not

[3] For instance, where police illegally search a home and find a burglar inside, the search would subsequently become legal, at least against the burglar.

extend its protections to such conduct." *Id.* Rather, as implied by this Court through the burglar analogy, the law should not recognize "a reasonable privacy expectation which, at least in contemporary society, would benefit only criminals." *United States v. Alabi*, 943 F. Supp. 2d 1201, 1287 (D.N.M. 2013) (citing *Rakas*, 439 U.S. at 144-45 n.12).

For these reasons, even courts adopting the "publicly established alias" or "other indicia" approach have held that "the burden remains on the defendant to establish that his or her moniker is not one used solely for criminal purposes." *Morta*, 2022 WL 1447021, at *9; *Walker*, 20 F.Supp. at 974; *Skinner*, 2007 WL 1556596, at *15-17. Ms. Fenty has not met this burden. In support of her assertion that her use of an alias was for privacy, rather than criminal purposes, Ms. Fenty urges that she "had no idea" that the xylazine packages contained illegal drugs. *See* (R. at 55). It makes little sense, however, that an individual truly seeking privacy would use a false name to receive packages from a friend but use her legal name to order personal packages from a corporation. (*See id*). This inconsistency, combined with Fenty's admission that her personal knowledge of xylazine in Joralemon's community "concerned" her, leads to an inference that the alias was for protection rather than privacy. (R. at 54). The fact that Ms. Fenty may have intentionally buried her head in the sand to avoid learning the truth is insufficient to establish that "her moniker is not one used solely for criminal purposes." *See Morta*, 2022 WL 1447021, at *9. Consequently, because Ms. Fenty's subjective state of mind is material, and she has failed to meet her burden of showing that her use of the name was not solely for criminal purposes, she has failed to establish a legitimate Fourth Amendment interest such that she may challenge the search of the Holistic Horse Care packages.

II. MS. FENTY'S VOICEMAIL STATEMENTS REGARDING THE INTERCEPTED PACKAGES ARE INADMISSIBLE TO SHOW HER STATE OF MIND WHEN MS. FENTY HAD TIME TO REFLECT BEFORE MAKING BOTH RECORDED STATEMENTS

Ms. Fenty's voicemails are precisely the type of out-of-court statements that the rules of evidence are designed to exclude because of their inherent unreliability. Rule 803(3) is a "firmly rooted" hearsay exception that allows admission of a declarant's then-existing state of mind such as "motive, intent, or plan," but does not include a statement of memory or belief to prove the fact remembered or believed. Fed. R. Evid. 803(3) (codifying *Shepard v. United States*, 290 U.S. 96, 105–106 (1933)). Courts have required three elements to be satisfied for a statement to be reflective of a declarant's then-existing state of mind. *United States v. Ponticelli*, 622 F.2d 985, 992–93 (9th Cir. 1980). First, the statement must be contemporaneous with the mental state sought to be proven. *United States v. Carter*, 910 F.2d 1524, 1530 (7th Cir. 1990). Second, it must be shown that the statement was spontaneous. *Id.* That is, the declarant had no time to reflect, fabricate, or misrepresent his thoughts. *Id.* Third, the declarant's state of mind must be relevant to an issue in the case. *Id.* The spontaneity requirement is the only element on appeal. (R. 74). Congress enacted the Federal Rules of Evidence with the purpose of inculcating fair, efficient, and just determinations. Fed. R. Evid. 102. Inherent in this purpose is to assign to the judge the task of ensuring the reliability of evidence that is admitted at trial. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). Therefore, these rules should be interpreted with a keen eye towards excluding unreliable evidence.

This Court should hold that spontaneity is required in order to admit inherently unreliable out of court statements, consistent with the spirit and framework of the firmly rooted exceptions to the hearsay rules. Statements admitted under Rule 803 are reliable due to their spontaneity and resulting probable sincerity. 2 MCCORMICK ON EVIDENCE § 274, at 267 (Kenneth S. Broun ed., 6th ed. 2006); *see also United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011) (Raggi, R., concurring). To dispose of the spontaneity requirement would effectively deprive the foundational reliability

that is indispensable to the firmly rooted hearsay exceptions. Therefore, this Court should affirm the Fourteenth Circuit's exclusion of Ms. Fenty's voicemail statements.

A. As a Firmly Rooted Hearsay Exception, the State of Mind Rule Requires Spontaneity In Order to be Considered Inherently Reliable and Admissible

Firmly rooted hearsay exceptions satisfy the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. *See Idaho v. Wright*, 497 U.S. 805, 817 (1990). Therefore, courts must not engage in an assessment of reliability when a statement is considered "firmly rooted" because they are considered inherently reliable. *Ohio v. Roberts,* 448 U.S. 56, 65 (1980). However, this inherent reliability rests on the statement's spontaneous nature. This standard is designed to only admit statements whose conditions have "proved over time to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath and cross-examination at trial." *Lilly v. Virginia*, 527 U.S. 116, 127 (1999).

1. An Overwhelming Majority of Circuits Have Continued to Recognize a Spontaneity Requirement of the State of Mind Exception

All hearsay exceptions, including the state of mind exception, have been deemed reliable through the fiery crucible of a long history of jurisprudence. The state of mind exception is firmly rooted because of its longstanding judicial experience, as it has been recognized by the Supreme Court for over a century and "exists in every jurisdiction in the country, whether by statute, court rule, or common law tradition." *Horton v. Allen*, 370 F.3d 75, 85 (1st Cir. 2004).[4] Therefore,

[4] The Supreme Court first recognized the state of mind hearsay exception in *Mut. Life Ins. Co. of New York v. Hillmon*, which led to its codification in Federal Rule of Evidence 803(3). 145 U.S. 285, 295 (1892). The First Circuit in *Horton* cited other courts that have recognized Rule 803(3) as a firmly rooted hearsay exception. *See, e.g., Hayes v. York*, 311 F.3d 321, 326 (4th Cir. 2002); *Moore v. Reynolds*, 153 F.3d 1086, 1107 (10th Cir. 1998); *Terrovana v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988); *Barber v. Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984); *Lenza v. Wyrick*, 665 F. 2d 804, 811 (8th Cir. 1981); *Frazier v. Mitchell*, 188 F. Supp. 2d 798, 813–14 (N.D. Ohio 2001); *United States v. Alfonso*, 66 F. Supp. 2d 261, 267 (D.P.R. 1999); *Reyes v. State*, 819 A.2d 305, 313 (Del. 2003); *People v. Waidla*, 996 P.2d 46, 67 n.8 (2000); *Wyatt v. State*, 981 P.2d 109, 115 (Alaska 1999); *State v. Wood*, 881 P.2d 1158, 1169 (1994)).

dispensing with the spontaneity requirement of the state of mind exception would renounce centuries worth of judicial precedent.

An overwhelming majority of circuits have engrafted a spontaneity requirement as an additional safeguard for ensuring that the hearsay evidence is reliable by mandating that the declarant "had no time to reflect and possibly fabricate or misrepresent his thoughts." *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986); *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005) (likening the excited utterance exception of Rule 803(1) with the state-of-mind exception of Rule 803(3) because both demand "substantial contemporaneity of [the] event and statement [to] negate the likelihood of deliberate or conscious misrepresentation"). This "time to reflect" has been referred to as *any time lapse* between the event which triggers the declarant's state of mind and the making of the hearsay statement. *Naiden*, 424 F.3d at 722-23 (emphasis added).

A vast majority of circuits have required an affirmative showing that the declarant had "no time to reflect." *See, e.g. United States v. Torres-Rosario*, 658 F.3d 110, 115 (1st Cir. 2011) (stating the rule's "spontaneity in expressing one's present state of mind is thought to reduce the risk of deception"); *United States v. Srivastava*, 411 Fed. Appx. 671, 684 (4th Cir. 2011) (requiring that "there must be no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his or her thoughts" in addition to the contemporaneity requirement); *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (stating defendant must "not have a chance to reflect" and thus no time to fabricate or misrepresent his thoughts); *United States v. Taylor*, 991 F.2d 797, 1993 WL 94319, at *3 (6th Cir. March 29, 1993) (unpublished) (reasoning that the "spontaneousness of the outcry provides [the statement's] trustworthiness"); *United States v. Neely,* 980 F.2d 1074, 1083 (7th Cir. 1992) (requiring a showing that the "declarant had no chance to

reflect"); *United States v. Dierks*, 978 F.3d 585, 593 (8th Cir. 2020) (excluding statements because the declarant had "time to reflect" on his situation before making the statements); *United States v. Palmer*, 91 F.3d 156, 1996 WL 382303, at *3 (9th Cir. 1996) (unpublished) (excluding statements because they "lack[ed] the spontaneity and resulting probable sincerity" since declarant had "ample time for reflection"); *United States v. Day*, 591 F.2d 861, 888 (D.C. Cir. 1978) (holding there "must be a spontaneous statement" describing a contemporaneous condition).

The only circuits that have expressly refused to require an affirmative showing of spontaneity are the Second and Fourth Circuits. *See United States v. Lawal*, 736 F.2d 5, 9 (2d Cir. 1984) (citing *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984)) (pronouncing all statements of a declarant's state of mind are "categorically admissible even if they are self-serving and made under circumstances which undermine their trustworthiness"); *Hayes v. York*, 311 F.3d 321, 326 (4th Cir. 2002) (upholding a state analogue to Rule 803(3) because the Supreme Court has not yet articulated whether spontaneity forms the basis for the reliability of state of mind declarations). Only the Second Circuit characterizes the state of mind exception as "categorical," thus allowing self-serving and non-spontaneous statements as evidence of a declarant's present state of mind. *See Lawal*, 736 F.2d at 9; *DiMaria*, 727 F.2d at 271. On the other hand, the Fourth Circuit merely declined to recognize a spontaneity requirement because this Court has not yet decided the issue and left it to the state courts to decide whether such a requirement should be engrafted in state counterparts of Rule 803(3). *See Hayes*, 311 F.3d at 326.

Ms. Fenty's voicemail recordings were not spontaneous and thus Fenty had ample time to reflect prior to making the self-serving statements. Pertaining to Ms. Fenty's first recorded voicemail statement, more than enough time had passed after Fenty believed the packages had been intercepted. According to Special Agent Raghavan's testimony, within that period of time

Fenty read the slip that was placed in her P.O. box notifying her to pick up the packages from the counter, walked over to the counter, handed the slip to Ms. Araiza, and engaged in a conversation regarding the ownership of the packages. *See* (R. at 32–33); *United States v. LeMaster*, 54 F.3d 1124, 1231 (6th Cir. 1995) (holding declarant had time to reflect when the statement was made "the day after the interview when he knew he was under investigation"); *Ponticelli*, 622 F.2d at 992 (reasoning there was a chance for reflection and misrepresentation because the declarations came after declarant's arrest and declarant "was aware that he was under investigation"); *Reyes*, 239 F.3d at 743 (holding probative value of state of mind evidence was greatly diminished where "duration was large enough" and the "likelihood that the conversation was being monitored or recorded").

Even more time elapsed when Ms. Fenty recorded her second voicemail. After leaving her first voicemail to Millwood at 1:32 p.m., Ms. Fenty left a second voicemail forty-five minutes later at 2:17 p.m. (R. at 39, 46). Forty-five minutes is more than enough time for Ms. Fenty to reflect and fabricate an explanation after becoming aware that her packages had been intercepted. *See Carter,* 910 F.2d at 1531 (less than one hour after declarant confessed provided declarant ample opportunity to reflect); *United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989) (lapse of two hours before declarant made his statement was "sufficient opportunity to fabricate the explanation"); *United States v. Macey*, 8 F.3d 462, 467–68 (7th Cir. 1993) (excluding a declarant's statement because the court could have reasonably concluded that [the defendant] had time to fabricate a story in the four hours between his fraud and his statement"); *LeMaster*, 54 F.3d at 1231 (24 hours was sufficient time "to think about an explanation…to fabricate one"). Thus, Ms. Fenty's statement is an unreliable recounting of her state of mind and is inadmissible because of the substantial lapse in time that provided Ms. Fenty ample opportunity to reflect on her conduct.

2. The Spontaneity Requirement Comports With Longstanding Legislative Experience and Statutory Construction

In addition to its longstanding jurisprudence, the spontaneity requirement is derivative of Rule 803's legislative history and statutory framework. As a legislative enactment, the Court's interpretative analysis of the Federal Rules of Evidence must rely on "the traditional tools of statutory construction" in construing their provisions." *INS v. Cardoza-Fonsceca*, 480 U.S. 421, 443 (1987) (relying on the Advisory Committee's commentary in determining the meaning of the Rules because the rule and its amendments were silent on the question before the Court); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988).

A spontaneity requirement to Rule 803(3) effectuates the House and Senate Committee's narrow construction of the hearsay exceptions as a means of safeguarding against unreliable evidence. *See United States v. Bailey*, 581 F.2d 341, 346 (3d Cir. 1978). The House Judiciary Committee removed the residual exceptions from Rules 803 and 804 on the grounds that the rules added too much uncertainty to the law of evidence and the committee was fearful of granting a broad license for trial judges to admit hearsay statements that did not fall within one of the exceptions. H.R. REP. No. 650, 93d Cong., 2d Sess. (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7079 (reasoning "if additional hearsay exceptions were to be created, they should be by amendments to the Rules, not on a case-by-case basis"); *see also Bailey*, 581 F.2d at 347. However, the Senate Committee noted its fear that without the residual rules, the twenty-three established exceptions would be tortured in order to allow reliable evidence to be introduced. S. REP. No. 1277, 93d Cong., 2d Sess. (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7056. Thus, Congress intended that all the hearsay exceptions in Rule 803 are to be narrowly construed and "rest on a belief that declarations of the sort there described have 'some particular assurance of credibility.'" *DiMaria*, 727 F.2d at 272.

Disposal of the spontaneity requirement would be inconsistent with the framework and spirit of the Federal Rules of Evidence. Rule 803 delineates twenty-three specific exceptions to the hearsay rule. *See* Fed. R. Evid. 803(1)-(23). There is no place in the scheme of the Rules of Evidence for selective waiver of the requirements of the particular exceptions. *United States v. Kim*, 595 F.2d 755, 760–61 (D.C. Cir. 1979). If the requirements of an exception are not met, such as the spontaneity requirement of the state of mind exception, then the evidence must be excluded unless it falls within the residual exception. *See* Fed. R. Evid. 803(24); *Kim*, 595 F.2d at 761. Here, Ms. Fenty does not argue that the voicemail recordings fall within the residual exception but rather attempts to admit the out-of-court statements under the guise of Rule 803(3), despite the statements' failure to meet the spontaneity requirement. Therefore, Ms. Fenty attempts to water-down the requirements of Rule 803(3) that make state-of-mind exceptions reliable.

B. The Plain Meaning of 803(3) Does Not Preclude a Spontaneity Requirement

This Court is endowed with the ultimate power to promulgate nationally applicable rules of practice, procedure, and evidence for the federal courts. *See* 28 U.S.C. § 2072(a). Under these considerations, this Court has strayed from a rigid plain meaning approach to the Federal Rules and has instead adopted a moderate approach in construing the Rules. The moderate approach therefore allows for a limited inquiry into legislative history; and where that history clearly indicates that legislators intended a different meaning than the plain meaning, the intended meaning will prevail. *See, e.g., Train v. Colo. Pub. Interest Research Grp., Inc.,* 426 U.S. 1, 6 (1976) (holding the lower courts erred in excluding reference to legislative history of a congressional statute); *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544 (1940) (stating "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use however clear the words may appear

on 'superficial examination.'"). *See, e.g., United States v. Dowdell*, 595 F.3d 50 (1st Cir. 2010) (a Federal Rule of Evidence need not be interpreted in accordance with its plain language, if a literal and unqualified enforcement of the rule would violate its plain purpose; a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute).

The construction of the Rule for which Ms. Fenty advocates—that a declarant's statement of a then-existing state of mind does not require any spontaneity requirement – is an unusual application of 803(3) upon which there is little to no support among the federal circuit courts. Moreover, the Advisory Committee Notes to Rule 803(3) and its preceding subsections indicate an element of spontaneity is required. While the plain text of Rule 803(3) does not explicitly state "spontaneity is required," mere congressional silence is not enough for Defendant to contend that the Rule is devoid of any spontaneity requirement. This Court has repeatedly held that "congressional silence lacks persuasive significance." *Brown v. Gardner*, 513 U.S. 115, 121 (1994); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994); *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990); *see also Zuber v. Allen*, 396 U.S. 168, 185–186, n. 21, (1969) ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible.... Congressional inaction frequently betokens unawareness, preoccupation, or paralysis"). Ms. Fenty's argument impermissibly relies on this congressional silence, thus ignoring the long list of authorities that lend credence to a spontaneity requirement including an overwhelming majority of the circuit courts, legislative history, commentary from the Advisory Committee, and the inherent spirit and purpose of the Rule 803 hearsay exceptions.

Because the spontaneity requirement of Rule 803(3) is firmly rooted and not precluded by the plain language of the Rule, this Court should comport with the longstanding judicial and legislative experience by recognizing such a requirement. As a result, the courts below acted correctly in ordering exclusion of the voicemail statements because Ms. Fenty had time to reflect before making the statements.

III. EVIDENCE OF THE DEFENDANT'S PRIOR CONVICTION WAS ADMISSIBLE WHERE THE CONVICTION WAS FOR A CRIME OF DECEIT AND THE JURY INSTRUCTIONS ADEQUATELY LIMITED THE SCOPE OF USE.

This Court should hold that the trial court's admission of Ms. Fenty's prior conviction for petit larceny was appropriate because the crime involved an element of deceit as required by Rule 609(a)(2). (R. 70). Additionally, the Fourteenth Circuit correctly determined that the prejudicial effect to Ms. Fenty's trial was insignificant, and that the limiting instructions given to the jury were sufficient. (R. 70). Even if this Court believes that the trial court erred in admitting the Defendant's previous conviction, the error could not have substantially impacted the jury's decision. Accordingly, this Court should honor the jury's decision and affirm Ms. Fenty's conviction.

A. Under Rule 609(a)(2), a Prior Conviction Shall Be Admissible for Purposes of Establishing Witness Credibility When the Offense Contained An Element of Deceit or Dishonesty.

This Court should affirm the decision below permitting the admission of evidence of a prior conviction because the underlying facts of the conviction demonstrate that the crime involved an element of deceit as required by Rule 609(a)(2).

FRE Rule 609 divides prior convictions into two categories for admission:

> (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

U.S. v. Hayes, 553 F.2d 824, 827 (2d Cir. 1977). Rule 609(a)(2) requires the admission of a prior conviction as evidence to attack a witness's character for truthfulness, "for any crime regardless of the punishment....if the court can readily determine that establishing the elements of the crime require proving- or the witness admitting- a dishonest act or false statement." Fed. R. Evid. 609(a)(2). As such, convictions that involve dishonest acts or false statements are automatically admitted as they bear directly on the witness's credibility.[5] When the elements of a crime do not facially implicate the use of dishonesty or false statements, the Government bears the burden to demonstrate that the prior crime involved dishonesty or false statements. See *Hayes*, 553 F.2d 824, 827.

Generally, Circuit Courts have refused to admit prior convictions for crimes of violence under Rule 609(a)(2), stating that such crimes do not bear on a witness's ability to testify truthfully. *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). However, even when a prior conviction does not fall within the scope of *crimen falsi*[6] crimes, some courts have stated that certain convictions may be admissible when the facts underlying the conviction demonstrate a propensity for dishonesty or a false statement. *United States v. Payton*, 159 F.3d 49, 57 (2d Cir.1998).

When analyzing whether to admit a prior conviction under Rule 609(a)(2), some courts look to the crime charged, the language of the statute, and the Defendant's acts whilst committing the crime. See *Payton*, 159 F.3d 49, 57. In *Payton*, the Second Circuit found that a conviction for third degree larceny was admissible because the witness had committed the crime in a deceitful manner.

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[5] In Walden v. Georgia-Pacific Corp., the Third Circuit stated that "a person with an untruthful character is more likely to act in conformity with that character while testifying than a person without that character." Walden v. Georgia-Pacific.,

[6] "[t]he commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."

Fed. R. Evid. 609

Id. There, the witness had been convicted with third degree larceny because she unlawfully received food stamps after falsely stating that she qualified for welfare. *Id*. In its opinion the Court reasoned that because the conviction arose out of the making false statements, that it was admissible under Rule 609. *Id*. There, the court looked beyond the elements of the offense and looked to the manner in which the crime was committed. Because the witness had unlawfully acquired food stamps by falsifying her application, the conviction was admissible because it was committed in a "deceitful manner." *Id*. In its opinion, the court stated that the facts underlying the witness's prior conviction for larceny were the type of facts that could demonstrate a propensity for dishonesty. *Id*.

While Circuit Courts have held that ordinarily, petit larceny does not automatically qualify as a *crimen falsi* crime, they have also stated that in some cases it may be. *Walker v. Horn*, 385 F.3d 321, 334 (3d Cir. 2004). In Horn, the court stated that "[i]t is conceivable that a conviction for petit larceny may subsume a crime in the nature of *crimen falsi*. . . ." See *Id*. at 335. Furthermore, the Third Circuit held that the proper test for admissibility under Rule 609(a)(2) doesn't measure the severity of the crime, but rather focuses on determining a witness's propensity for falsehood, deceit, or deception. *Cree v. Hatcher*, 969 F.2d 34, 38 (3d Cir. 1992). Under this reasoning, the court in Horn found that the district court erred when it held that a prior conviction for robbery was admissible because the facts and nature of the crime did not reveal any information to determine the witness's credibility. *Horn*, 385 F.3d 221, 334.

In the present case, evidence of the Defendant's prior conviction was properly admitted because it demonstrates that the Defendant has a propensity for falsehood or deception. Similar to the witness in Payton, Ms. Fenty committed a crime in a "deceitful manner" by selecting a victim that she could deceive. (R. 58, 59). Although Ms. Fenty did not lie directly to the woman whose

bag she stole, she committed a crime under false pretenses by planning to steal the bag, selecting a target whom she felt she could deceive, and attempting to commit the crime unnoticed. *Id.* The mere fact that Ms. Fenty was ultimately unsuccessful in her attempt does not diminish the value of facts that allow the fact-finder to assess her credibility as a witness.

The Government does not assert that the Court should create a bright-line rule allowing all evidence of prior convictions for petit larceny to be admissible. Instead, this Court should adopt the Second Circuit's "deceitful manner," understanding of the dishonesty requirement in Rule 609(a)(2). *See Payton*, 159 F.3d 49, 57. The D.C. Circuit highlighted the difficulty by courts to determine which crimes fall within the category of involving dishonest or false statements. *U.S. v. Lipscomb*,702 F.2d 1049, 1057 (D.C. Cir. 1983). In interpreting Rule 609(a)(2), the D.C. Circuit has recognized that while Congress did intend for the rule to be applied rigidly, it is "implausible" to believe that Congress meant that crimes that fall right outside of the nature of *crimen falsi* are no longer probative of credibility. *Id*. Instead, the D.C. Circuit distinguished between crimes "that bear directly upon the accused's propensity to testify truthfully" and crimes that may have "some bearing on an individual's credibility." *Id*. In the present case, the trial court ruled correctly when they admitted evidence of the Defendant's prior conviction because the underlying facts bear directly on Ms. Fenty's propensity to testify truthfully.

B. The Admission of Defendant's Prior Conviction For Purposes of Impeachment Was Not Prejudicial and the Admission Was Harmless.

Even if the Court believes that the admission of the prior conviction was inappropriate under Rule 609(a)(2), the district court's ruling should still be affirmed because the error involved was harmless. 28 U.S.C. § 2111 established that judgments need not be reversed for "errors or defects which do not affect the substantial rights of parties." Similarly, FRE Rule 103(a) states that admission of a conviction for impeachment is not reversable error unless it affected one of the

party's substantial rights. Further, this Court has stated that a trial court's error can be considered harmless even if it did have a slight effect on the jury's decision. *Kotteakos v. United States*, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 90 L.Ed 1557 (1946). The question in a harmless error analysis is whether there is a reasonable possibility that the evidence introduced may have contributed to the conviction, and in the present case, it did not. *Fahy v. State of Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171.

When determining whether the admission of a prior conviction was harmless, the beneficiary of the alleged error bears the burden to prove that the error did not substantially alter the outcome of the case. *Chapman* v. California, 386 U.S. 18, 23, 87 S.Ct 824, 17 L.Ed.2d 705 (1967). Furthermore, the beneficiary must prove beyond a reasonable doubt that the error was harmless. *Id*.

In the present case, admission of the Ms. Fenty's prior conviction was harmless because it could not have had a substantial effect on the jury's decision to convict. First, the limiting instruction to the jury specifically stated that testimony regarding the conviction for petit larceny was strictly limited to the purpose of assessing the defendant's character for truthfulness. (R. 63). This instruction significantly limited the potential for prejudice by limiting the scope of use by jurors. The instructions further limited the scope of use by ordering jurors not to use the evidence to support a finding that Ms. Fenty "knowingly possessed illegal drugs with the intent to distribute them." *Id*. The nature of the prior conviction and the nature of the crime for intent to distribute are so fundamentally different that a reasonable person would not use evidence of one as substitute evidence for the other. (R. 1-3). This Court has found that an error was harmful when admission of a prior conviction prompted the defendant not to take the stand because they did not want to discuss the conviction. *Luce v. U.S.*, 469 U.S. 38, 42 (1984). There is no such instance here where

Ms. Fenty was set to take the stand before the admission of evidence, and proceeded to testify at trial thereafter. (R. 19, 52-54). It is for these reasons that the admission of the evidence for purposes of impeachment was appropriate.

CONCLUSION

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

Respectfully Submitted,
/s/ Team 17R
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