Team 21P

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 22 – 695

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER, FRANNY FENTY

Attorneys for the Petitioner

QUESTIONS PRESENTED

I. Whether Franny Fenty has a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to her alias when the alias is fictitious, publicly known, and she otherwise establishes sufficient control over the package?

II. Whether Federal Rule of Evidence 609(a)(2) encompasses crimes of stealth that do not involve any affirmative dishonesty but pose a risk of encouraging the jury to engage in improper reasoning?

III. Whether Federal Rule of Evidence 803(3) includes a spontaneity requirement despite none being contained within its text?

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The transcript of the hearings on the motion to suppress involving the Fourth Amendment to the United States Constitution before the United States District Court for the District of Boerum appear on pages 10–17 of the record. The transcript of the hearings on the Rule 609(a)(2) issue appears on pages 18–26. The Rule 803(3) issue appears on pages 47–52. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record on pages 64–73.[1]

CONSTITUTIONAL PROVISIONS

The Fourth Amendment states:

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

U.S. CONST. amend. IV.

STATEMENT OF FACTS

Franny Fenty (hereinafter "Fenty") was an aspiring novelist who was down on her luck. (R. 42.) She had published two short stories in college, under the pen name Jocelyn Meyer, which she used to preserve her privacy. (R. 42.) She also wrote five novels under the same pen name. (R. 42.) She emailed four publishers just a few months prior to the events underlying this action, in an attempt to have the novels published, but none of the publishers responded. (R. 43.)

Upon realizing her career as a novelist was not taking off, Fenty posted to her LinkedIn that she was "open to work." (R. 44.) In response to her post, Angela Millwood (hereinafter

[1] The standard of review on appeal for the evidentiary issues is *de novo* because a district court's interpretation of a Rule of Evidence is a question of law. *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006). For the motion to suppress, appellate courts apply a mixed standard of review, reviewing findings of fact for clear error and findings of law *de novo*. *United States v. Trice*, 966 F.3d 506, 512 (6th Cir. 2020).

"Millwood"), a former high school classmate of Fenty's, commented on the post saying, "I can help you out with that! Shoot me a message!" (R. 34.) Millwood and Fenty exchanged numbers and started talking about jobs. (R. 44.) Millwood explained that she worked for a horse stable, and she wanted to help horses who were in pain by administering muscle relaxers. (R. 45.) She told Fenty that although she did not make much money, she loved what she did. (R. 44.) The muscle relaxing drug Millwood used is called xylazine and is a known horse tranquilizer regularly administered by veterinarians. (R. 7.) However, Millwood would be fired if she was caught administering the muscle relaxers; so, she could not order the xylazine herself. (R. 45.) She asked Fenty to order them for her. (R. 45.)

Fenty initially felt nervous about ordering this medication. (R. 45.) But she was persuaded by the fact that Millwood told her she would be helping horses. (R. 45.) Fenty—a former dog sitter—found the idea of helping to relieve the pain of animals a good cause that she wanted to be a part of. (R. 56.). She also knew that Millwood could not do it herself, since she could lose her job if anyone found out she was administering the xylazine to the horses. (R. 45.) Seeing an opportunity to make some money, while helping her friend and the horses, Fenty agreed to order the medication. (R. 45.)

Fenty still had some apprehensions, spurred by her research of the drug. (R. 45.) She read a news article that explained xylazine, when combined with fentanyl, created a recreational drug that Joralemon was experiencing problems with. (R. 46.) Immediately upon learning of this, Fenty called Millwood. (R. 46.) Millwood reassured Fenty that the xylazine was only intended to be used to relieve horses of their pain—not for use as an illicit drug. (R. 46.) Trusting her friend, Fenty agreed to continue working for Millwood. (R. 45.)

Fenty then ordered two shipments of xylazine from Holistic Horse Care, under her pen name, Jocelyn Meyer, to the P.O. box she had under the same name. (R. 46.) She used the P.O. box for her work with Millwood, as well as for other packages, including from Amazon. (R. 55.) When she went to her P.O. box, the packages she expected to contain xylazine were missing. (R. 46.)

Fenty called Millwood immediately but got no answer. (R. 46.) She left a voicemail for Millwood, in which she said:

> Angela, I just got to the Post Office. None of the packages I was expecting are here, they're missing. I read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here, right? Call me back as soon as you can. I'm getting worried that you dragged me into something I would never want to be part of. Plus, you still owe me the money.

(R. 40.) 45 minutes later, Fenty attempted to call Millwood again. (R. 46). Millwood ignored this call too and Fenty left another voicemail, in which she said:

> It's me again. I talked to the postal workers. They don't know what is going on with the packages. They said I should come back tomorrow. Angela, I'm really getting nervous. Why aren't you getting back to me? I thought the xylazine was just to help horses that are suffering. Why would they want to look at that? Is there something you aren't telling me? I'm really starting to get concerned that you involved me in something I had no idea was going on. Call me back. (R. 40.)

Millwood never responded to these voicemails, and Fenty has not had contact with her since. (R. 52.) It was later confirmed by DEA agents that Millwood took a one-way flight to Jakarta on February 14, 2022. (R. 35.) Millwood's current whereabouts are unknown. (R. 35.)

By this time, the DEA had already informed the local post office manager, Oliver Araiza (hereinafter "Araiza"), that they were on the lookout for drugs being shipped in the mail. (R. 29.) DEA Agent Robert Raghavan (hereinafter "Raghavan") told Araiza to let him know if he sees any suspicious packages, including those being shipped from purported horse veterinarians. (R. 30.)

On February 14, 2022, Raghavan received a call from Araiza, who told him he flagged two packages from Holistic Horse Care—the packages Fenty ordered. (R. 30.) Raghavan took his partner, Harper Jim, down to the post office, where they discovered the packages were ordered by Jocelyn Meyer. (R. 30–31.) They found two Amazon packages addressed to "Franny Fenty" in the same P.O. box as the Holistic Horse Care packages. (R. 31.) Before Fenty picked up the packages in the P.O. box, Raghavan got a search warrant and tested the contents of the Holistic Horse Care packages. (R. 31.) He discovered they contained both fentanyl and xylazine. (R. 32.) He then resealed the packages and did a controlled delivery—whereby it was arranged that Araiza would give Fenty the packages. (R. 32.)

The agents then waited in a backroom of the post office and watched the security system. (R. 33.) They watched Fenty walk into the post office, grab the slip and the amazon packages from the P.O. box, walk up to the counter, and pick up the Holistic Horse Care packages. (R. 33.) As Fenty left the post office, she engaged in a brief conversation with a classmate, during which the classmate said, "Bye Franny!" (R. 33.) Raghavan then went up to the counter and asked the classmate if he knew Jocelyn Meyer. (R. 33.) The classmate identified Jocelyn Meyer as Fenty. (R. 33.) The next day, February 15, agents arrested Fenty. (R. 33.)

STATEMENT OF THE CASE

On February 15, 2022, Fenty was charged by way of indictment with possession of a controlled substance with intent to distribute under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). (R. 2.) Before trial, Fenty filed a motion to suppress the contents of the two packages seized by the DEA. (R. 11.) The District Court denied that motion because Fenty did not have a reasonable expectation of privacy in the sealed packages. (R. 16.) Therefore, Fenty lacked standing to vindicate her Fourth Amendment rights. (R. 16.) The Fourteenth Circuit affirmed. (R. 67–68.)

Fenty filed a motion in limine on August 25, 2022, seeking to exclude a prior conviction for petit larceny. (R. 19.) The government sought to introduce the conviction under Federal Rule of Evidence 609(a)(2), to impeach Fenty if she took the stand to testify in her own defense. (R. 19.) Fenty was convicted when she was 19 years old after she attempted to sneak up on a tourist and steal her bag. (R. 53.) The tourist quickly noticed, resulting in an altercation which ended with Fenty taking the bag and running until the police caught her. (R. 53.) She was charged with and convicted of petit larceny under Boerum Penal Code § 155.25. (R. 19.) After hearing argument on the motion, the District Court denied the motion and admitted the prior conviction under Rule 609(a)(2). (R. 26.) Fenty testified, and the United States did use her prior conviction to impeach her. (R. 58–60.) This allowed the jury to infer that Fenty had a propensity to commit crimes—denying her a fair trial.

At trial, Fenty moved to admit the two exculpatory voicemail recordings she left Millwood into evidence under Federal Rule of Evidence 803(3). (R. 47.) The United States objected, arguing 803(3) required the statements to be spontaneous with the events described. (R. 48.) After hearing argument on the motion, the District Court denied the motion, and refused to admit the voicemails that tended to show Fenty's innocence. (R. 52.)

After trial, the jury convicted Fenty on one count of possession with intent to distribute a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). (R. 8.)

SUMMARY OF THE ARGUMENT

This Court should reverse the decisions of the Fourteenth Circuit and District Court and vacate Fenty's conviction. First, Fenty has a reasonable expectation of privacy in the packages delivered to her alias because aliases have legitimate societal purposes that this Court should seek to protect. Fenty's alias, Jocelyn Meyer, which is both fictitious and publicly known, falls within

the ambit of aliases that courts have recognized as granting an objectively reasonable expectation of privacy. Moreover, even if Fenty's alias is not sufficient to identify Fenty as the intended recipient of the package, her possessory interest in the package gives her a reasonable expectation of privacy in it.

Next, Fenty's prior conviction for petit larceny should not have been admitted. Rule 609(a)(2) only extends to crimes which require the prosecution to prove that the defendant committed a dishonest act or false statement. Boerum Penal Code § 155.25—the petit larceny statute Fenty was charged under—does not require the defendant to have committed a dishonest or false act to be convicted. Further, the underlying facts of Fenty's conviction involved stealth—not affirmative misrepresentation. Since only crimes involving affirmative misrepresentation bear directly on a witness's propensity to testify truthfully, Fenty's conviction is inadmissible.

Finally, the exculpatory voicemails Fenty left Millwood are admissible under Federal Rule of Evidence 803(3) as statements of Fenty's then existing state of mind. The District Court and Fourteenth Circuit improperly read a spontaneity requirement into Rule 803(3), as a check on the trustworthiness of statements admitted under the rule. This was in error because Rule 803(3)'s text does not contain such a requirement, whereas several other rules explicitly do. Further, Rule 803(3) does not contain a clause empowering the judge to reject evidence that is not trustworthy, while other rules do. Since the voicemails involve statements that were made contemporaneously with the events and feelings Fenty was experiencing, and since there is no spontaneity requirement, they are admissible under the rule.

For these reasons, this Court should reverse the decisions of the Fourteenth Circuit and District Court and vacate Fenty's conviction.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT AND HOLD THAT FENTY HAD A REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT BECAUSE SHE USED A FICTITIOUS PUBLICLY KNOWN ALIAS AND EXERCISED SUFFICIENT CONTROL OVER THE PACKAGE.

The Fourteenth Circuit and the District Court incorrectly held that Fenty did not have a reasonable expectation of privacy in sealed packages under her control and addressed to her fictitious and publicly known alias. This Court should reverse the Fourteenth Circuit's decision and hold that Fenty has standing under the Fourth Amendment to challenge the search of her mail because she has a reasonable expectation of privacy in packages delivered to her alias.

The Fourth Amendment prohibits "unreasonable searches" of "persons, houses, papers, and effects." U.S. CONST. amend. IV. Determining whether a search occurred requires an inquiry into whether a defendant possesses a legitimate expectation of privacy by using a two-part analysis: (1) whether the defendant demonstrated an actual, or subjective expectation of privacy; and (2) whether that subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).[2] For an expectation of privacy to be objectively reasonable, "it must flow from a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 145 (1978). The "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy." *Id*. at 143.

[2] Although a search can also occur if there is a physical trespass to property, that analysis is not relevant to this appeal. *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

In order to challenge a search under the Fourth Amendment, a defendant must make a threshold showing that they have a "reasonable expectation of privacy in the area searched and in relation to the item seized" under what is known as the "standing" doctrine. *United States v. Salvucci*, 448 U.S. 83, 90–92 (1980). The "state of mind of the searcher regarding the possession or ownership of the item searched is irrelevant to the issue of standing." *United States v. Han*, 74 F.3d 537, 545 (4th Cir. 1996). Once the defendant crosses the "standing" threshold they can "challenge the admissibility of evidence on Fourth Amendment grounds." *United States v. Gomez*, 770 F.2d 251, 253 (1st Cir. 1985). Here, Fenty has made the threshold showing that she has standing to challenge the search of her packages.

Mail and sealed packages historically have been considered to have a high degree of privacy. *United States v. Van Leeuwen*, 397 U.S. 249 (1970); *Ex parte Jackson*, 96 U.S. 727, 733 (1877). This Court has already decided that letters and sealed packages must be treated as if currently residing within the individual's domicile. *Van Leeuwen*, 397 U.S. at 251 (citing *Ex parte Jackson*, 96 U.S. at 733). It is beyond dispute that mail is subject to Fourth Amendment protection. *United States v. Smith*, 39 F.3d 1143, 1144 (11th 1994). Letters and 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). Both the named senders and addressees of sealed letters and packages "have a legitimate expectation of privacy in their contents, even those letters and packages that are in transit." *Walter v. United States*, 447 U.S. 649, 658 n.12 (1980). The Supreme Court has long recognized that "[c]ustom and contemporary norms" play a large role in the constitutional analysis when it comes to determining expectations of privacy. *Payton v. New York*, 445 U.S. 573, 600 (1980).

Here, Fenty manifested an actual, or subjective expectation of privacy because she desired to remain anonymous by using an alias when receiving the packages. (R. 12.) Fenty published two short stories in college under the pen name Jocelyn Meyer, which she specifically used to preserve her privacy. (R. 42.) There is evidence that she continued to use this fictious alias to protect her privacy up until her conviction. In fact, Fenty emailed four publishers just a few months prior to the events underlying this action using her alias. (R. 42.) Fenty continued to exercise a subjective expectation of privacy by mailing these packages to the name Jocelyn Meyer. (R. 42.) The packages Fenty received were sealed and delivered to a locked P.O. box registered under her alias for the same reason. (R. 65.)

Fenty had a reasonable expectation of privacy because she used a publicly known fictitious alias, rather than another individual's name. (R. 33.) Moreover, if the Court determines that Fenty's alias did not establish her as the intended addressee, Fenty still retained her expectation of privacy by exercising "other indicia" of control over the package because it was in a P.O. box, and she could control who had access to it. (R. 32; 66.) Fenty could also retrieve the package despite not using her actual name. (R. 65–66.) These facts demonstrate that Fenty established sufficient control over the package to retain her expectation of privacy. Therefore, this Court should reverse the decision of the Fourteenth Circuit and District Court and find that Fenty has standing under the Fourth Amendment.

A. The Use Of An Alias Does Not Destroy An Objectively Reasonable Expectation Of Privacy In Mail Because Aliases Have Important Innocuous Uses Society Recognizes As Reasonable.

The use of an alias to receive sealed packages does not diminish an expectation of privacy that would otherwise be viewed as reasonable, even if used for criminal purposes. *United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009). There is nothing inherently illegal about using an

alias to receive mail "unless fraud or a stolen identification is involved." *Id*. A legitimate expectation of privacy does not depend on the nature of the defendant's activities, whether innocent or criminal. *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997).

Aliases are objectively reasonable given their many legitimate uses by society. In *United States v. Pitts*, the defendant mailed a package containing illegal drugs addressed to an alias, James Reed, Jr. *United States v. Pitts*, 322 F.3d 449, 451 (7th Cir. 2003). The Seventh Circuit acknowledged that "there are a number of legitimate reasons that a person might wish to send or receive a package using a[n] [alias]." *Id.* Specifically, the Seventh Circuit identified authors and journalists, celebrities who wish to avoid harassment, and government officials who may have security concerns, among any number of other reasons. *Id*. The use of an alias to protect a person's privacy is a concept as old as our country and dates back to the days of debates over the ratification of our Constitution when Alexander Hamilton wrote letters under the alias "Publius." *Kentucky v. Yellen*, 67 F.4th 322, 322 (6th Cir. 2023). Courts have held that people have a reasonable expectation of privacy when using an alias for other purposes. *See United States v. Thomas*, 65 F.4th 922, 923 (7th Cir. 2023) (leases); *United States v. Watson*, 950 F.2d 505, 507 (8th Cir. 1991) (purchasing property); *United States v. Newbern*, 731 F.2d 744, 748 (11th Cir. 1984) (motel rooms).

The Seventh Circuit, in *Pitts*, recognized that a rule which eliminates the privacy interests of all people merely because some use aliases for criminal means, or a rule that eliminates Fourth Amendment protections only for criminals, would "turn the Fourth Amendment on its head." *Pitts*, 322 F.3d at 458. For example, people would not retain a reasonable expectation of privacy in their homes simply because some people engage in criminal activity in their homes. *Id.* Or the underlying criminal use would serve as an after-the-fact justification which promotes warrantless

searches if illegal activities are discovered. *Id.* As such, the Seventh Circuit concluded that society is willing to recognize as reasonable an expectation of privacy in receiving packages using aliases even though they are also used for criminal purposes because "there is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package." *Id.* at 459. Although the Seventh Circuit determined that people generally have a reasonable expectation of privacy in packages addressed to an alias, they nonetheless held that the defendant relinquished his privacy interest because he "abandoned" the package. *Id.* at 454.[3]

Fenty had a reasonable expectation of privacy in mail addressed to her alias, even if she—or others—would use an alias to engage in criminal activity. Fenty's usage highlights the legitimate uses of aliases identified in *Pitts*. *Id*. at 451. First, as a writer, Fenty used her alias, Jocelyn Meyer, to publish two short stories in her university's creative writing magazine. (R. 65.) Additionally, even though the packages addressed to Fenty's alias contained a mixture of fentanyl and xylazine, that discovery is an after-the-fact justification and cannot be used to determine whether society recognizes as reasonable the use of that alias to receive mail. (R. 66.) Therefore, this Court should hold that people do have a reasonable expectation of privacy in mail addressed to an alias and allow Fenty to vindicate her constitutional rights.

B. Franny Fenty Had A Reasonable Expectation Of Privacy In Receiving Mail Using Her Alias Jocelyn Meyer Because It Is Fictitious And Publicly Known.

Fenty had a reasonable expectation of privacy in the package addressed to her alias, Jocelyn Meyer, because her alias is fictitious and publicly known. When an addressee uses a publicly known and fictitious alias to receive a package, the alias is in effect the name of the addressee. *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981). "There is a fundamental difference

[3] Here, Fenty did not abandon the packages delivered to her P.O. box because she never attempted to deny that the packages were hers and did not refuse delivery. *Pitts*, 322 F.3d at 452–53; (R. 33.)

between merely using an alias to receive a package and using another's identity." *United States v. Johnson*, 584 F.3d 995, 1002. (10th Cir. 2009). Courts have discussed that a non-sender of mail cannot assert an expectation of privacy in mailing addressed to a third party because the privacy right belongs to that third party. *United States v. Castellanos*, 716 F.3d 828, 848 (4th Cir. 2013) (Davis, J., dissenting). But when the individual asserting an expectation of privacy is in fact the addressee but has disguised his true identity by using an alias, he retains an expectation of privacy in the object. *Id.*

For a fake name to effectively be the actual name of an individual—an alias—the name must be publicly known. In *United States v. Rose*, the defendant sent packages containing illegal drugs to his friend's address under the name Ronald West—the name of his friend's deceased brother—so that defendant could pick up the packages without detection. *United States v. Rose*, 3 F.4th 722, 725 (4th Cir. 2021). The defendant sought to suppress the evidence derived from the search of the packages under the theory that Ronald West was his alias. *Id.* The court found that "[t]he record contained no evidence that anyone recognized Rose by the name Ronald West, nor did any evidence show that Rose used the name Ronald West regularly under different circumstances." *Id.* at 730. As such the court held that Rose failed to establish an expectation of privacy in the packages because he could not establish that Ronald West was his alias as he was not commonly known by that name. *Id.*

Fenty's alias is publicly known because she used the name regularly for other purposes than receiving the sealed packages containing narcotics. In *Rose*, the defendant only used the fake name to send packages containing illegal drugs so that he would not be detected. *Rose*, 3 F.4th at 725. Mainly for that reason, the court determined that the alias was not publicly known. *Id.* Unlike in *Rose*, Fenty used her alias for other legitimate reasons under different circumstances. Fenty used

her alias, Jocelyn Meyer, as a pen name to publish two short stories in her university's creative writing magazine. (R. 65.) Additionally, Fenty held herself out as Jocelyn Meyer and went by that name when emailing potential publishers to gauge interest in her novels. (R. 5; 65.) Using the name Jocelyn Meyer, Fenty reached out to four publishers. (R. 65.) Further, Fenty opened the P.O. box under the name Jocelyn Meyer where several packages, addressed to both Fenty, and her alias were delivered, including Amazon packages containing face cream. (R. 30–31; 38.) Therefore, Fenty's alias, Jocelyn Meyer, is publicly known.

A fictitious name is an alias, sufficient to grant a reasonable expectation of privacy, when an actual name and a fake name represent the same person. In *United States v. Daniel*, the DEA performed a controlled delivery of a box addressed to "Lynn Neal c/o Dottie's Hair Design" that contained methamphetamine to "Rickie Lynn Daniel"—the actual resident of the address listed on the box. *United States v. Daniel*, 982 F.2d 146, 147–48 (5th Cir. 1993). Defendant attempted to argue that the DEA's conduct prior to obtaining the search warrant was in violation of his Fourth Amendment rights. *Id.* The Fifth Circuit held that defendant did not have a legitimate expectation of privacy in the package addressed to Lynn Neal because defendants "theory of defense [at trial] was that Ricky Lynn Daniel and Lynn Neal were different persons," essentially admitting that the packages were addressed to someone else. *Id.* at 149. Courts have continued to draw a distinction between packages addressed to an "alter ego" and those addressed to individuals other than a defendant. *United States v. Pierce*, 959 F.2d 1297, 1303 n.11 (5th Cir. 1992).

The sealed package at issue was addressed to Fenty because it is established that Franny Fenty and Jocelyn Meyer represent the same person. Unlike the defendant in *Daniel* who expressly avowed that the separate names represented different people, Fenty has never attempted to challenge that the names represent the same person. *Daniel*, 982 F.2d 146. Fenty represented

herself as Jocelyn Meyer while retrieving packages and was able to accept the packages on behalf of her alias. (R. 33.) When DEA agent, Raghavan was asked at trial whether Franny Fenty or Jocelyn Meyer picked up the package during the controlled delivery, he answered, "apparently both." (R. 33.) It cannot be disputed that Jocelyn Meyer is a fictitious alias that Fenty created in college to publish her short stories anonymously and that Fenty continued to use that alias whenever she desired to remain private. (R. 12; 33; 65.) Agent Raghavan testified that the DEA "did a search online and confirmed that Ms. Fenty used her pseudonym Jocelyn Meyer when she published her short stories." (R. 33.) Therefore, Fenty's alias is one that does not represent the identity of a third party, but rather Fenty herself. As such, Fenty has a reasonable expectation of privacy in the sealed packages addressed to her alias because her alias is fictitious, publicly known, and effectively her actual name.

C. Even If This Court Determines That The Use Of An Alias Makes An Expectation of Privacy In Mail Unreasonable, Fenty Still Has A Reasonable Expectation Of Privacy In The Package Addressed To Her Alias Because She Has A Possessory Interest In It.

Even if Fenty's use of an alias alone does not establish a reasonable expectation of privacy in the package, Fenty still has a reasonable expectation of privacy because she exercises a possessory interest in the package. A person who is neither the sender nor the addressee can still have a reasonable expectation of privacy in a package if they can establish "other indicia of ownership, possession, or control at the time of the search." *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021); *see also United States v. Stokes*, 829 F.3d 47, 52 (1st Cir. 2016). In the absence of a rule categorically recognizing a privacy interest for all packages addressed to an alias, the "other indicia" approach provides an alternative means for maintaining the important societal practice of using an alias, by recognizing that there is more than one address line on a package. Rachel Key, *Criminal Procedure Resolving the Circuit Split Regarding the Expectation of Privacy*

in Mail Addressed With an Alias, 46 U. ARK. LITTLE ROCK L. REV. 303, 307 (2023). Such a fact-intensive approach is supported by *United States v. Miller*, where this Court implied that the expectation of privacy analysis depends, in large part, on the circumstances of each case. *United States v. Miler*, 425 U.S. 435, 442 (1976). Courts "must examine the nature of the *particular* document sought to be protected in order to determine whether there is a legitimate 'expectation of privacy.'" *Id.* at 442 (emphasis added). "It has long been established that an *addressee* has both a possessory and a privacy interest in a mailed package." *United States v. Hernandez*, 313 F.3d 1206, 1209 (9th Cir. 2002) (emphasis added).

Individuals can establish a reasonable expectation of privacy in sealed mail, even when they are not the sender or addressee, if they can demonstrate a connection to the address or the ability to retrieve packages under the alias's name. In *United States v. Rose*, the court noted that when an individual cannot establish that a fictitious name is an established alias—as was the case in *Rose*—then that individual is not an intended recipient and does not have a legitimate expectation of privacy "absent other indicia of ownership, possession, or control existing at the time of the search." *Rose*, 3 F.4th at 728. The court found that nothing about the packages, "including the sender's name, the named recipient, the address, or the phone number listed on the package" suggested "in an objective sense" that Rose had a reasonable expectation of privacy in the packages. *Id.* at 729. Other factors to determine possessory interest include: "whether anyone else had access to these [addresses], what the nature of the delivery receptacle was, or any other information that could shed light on the reasonableness of his privacy interest." *Stokes*, 829 F.3d at 52.

Fenty demonstrated sufficient control over the packages to grant her a reasonable expectation of privacy in them, because she established a connection to the P.O. box registered

under Jocelyn Meyer and had the ability to retrieve packages addressed to that name. Unlike in *Rose*, Fenty did not use the name of an actual person to receive her packages. *Rose*, 3 F.4th at 725. Also in contrast to *Rose*, Fenty was able to gain possession of the package addressed to Jocelyn Meyer. *Id.* at 729. Fenty used a P.O. box registered under the alias where packages addressed to her actual name were also sent. (R. 31.) An address alone can create a reasonable expectation of privacy. *Stokes*, 829 F.3d at 53. Additionally, Fenty was able to accept her packages at the post office even though she used an alias to register the P.O. box. (R. 65–66.) Thus, because Fenty established a connection to the address and had the ability to accept the packages addressed to her alias, Fenty established a possessory interest sufficient to receive Fourth Amendment standing.

When an actual third-party is the addressee of a package, a person cannot claim a possessory interest in the package. In *United States v. Givens*, the defendants were sent a sealed envelope containing cocaine addressed to " . . . Debbie Starkes, [sic] ("hereinafter Debbie Starks")." *United States v. Givens*, 733 F.2d 339, 340 (4th Cir. 1984). In determining whether the defendants had a reasonable expectation of privacy in the package, the Fourth Circuit found they were not the intended recipients because Debbie Starks was not their alias but rather an actual third party. *Id.* at 341. As the defendants were not the intended recipients, the Fourth Circuit suggested they could only have a reasonable expectation of privacy in the package if they had some possessory interest in it. *Id.* at 342. The Fourth Circuit held that the defendants could not have a possessory interest, and thus could not have a reasonable expectation of privacy, because they had no ability at the time of the search to control access to, or exclude others from, taking possession of the package. *Id.* at 342.

Fenty has a possessory interest in the package addressed to Jocelyn Meyer because there is not an actual third-party named Jocelyn Meyer who can pick up the package to the exclusion of

Fenty. In *Givens*, the Fourth Circuit held that the defendants lacked a possessory interest in the package containing cocaine because they had no ability to control access to, or exclude others from taking possession of the package at the time of the search. *Givens*, 733 F.2d at 342. But Fenty did have the ability to control access to and exclude others from taking the packages at the time of the search. For Fenty to receive the packages, she needed to unlock the P.O. box assigned to her and bring a slip to the counter indicating which packages were hers. (R. 32; 66.) Renters of locked lockers have a reasonable expectation of privacy under the Fourth Amendment even though a lessor possesses a key and maintains a limited right to enter. *United States v. Osunegbu*, 822 F.2d 472, 478 (5th Cir. 1987). Also, there is not an actual third-party named Jocelyn Meyer who can access the P.O. box. Thus, Fenty had the sole ability to control access to and exclude others from the P.O. box containing the slip indicating the packages from Holistic Horse Care were hers. Therefore, even if Fenty's alias does not establish a reasonable expectation of privacy in the packages, Fenty has a reasonable expectation of privacy in the packages addressed to her alias because she has a possessory interest in it.

This Court should reverse the decision of the Fourteenth Circuit and hold that Fenty has standing under the Fourth Amendment to challenge the violation of her constitutional rights because she has a reasonable expectation of privacy in the packages addressed to her alias.

II. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT AND HOLD THAT FENTY'S PRIOR CONVICTION FOR PETIT LARCENY IS NOT ADMISSIBLE UNDER RULE 609(A)(2) BECAUSE ONLY CRIMES OF DECEPTION—NOT OF STEALTH—ARE ADMISSIBLE UNDER THE RULE.

Fenty's prior conviction for petit larceny is not admissible under the Federal Rules of Evidence, and as such, the Fourteenth Circuit and the District Court erred. Rule 609 of the Federal Rules of Evidence only allows two categories of crimes to be used for impeachment of a witness: (1) crimes punishable by a year or more in prison, or by death; and (2) crimes that require the

witness to commit a dishonest act. FED. R. EVID. 609(a)(1)–(2). Such evidence is admissible only insofar as it relates to the witness's propensity to tell the truth—not their propensity to commit crimes. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). Admitting evidence outside this scope thwarts the defendant's ability to receive a fair trial, as it did for Fenty, by heightening the chance of jury misuse.

Crimes of stealth, as opposed to crimes of deceit, are generally not admissible under Rule 609(a)(2). This is demonstrated by the rule's text, history, structure, and rationale. First, the text is expressly limited to crimes whose elements require proving a dishonest act or false statement. Second, the rest of the rule creates a rigid structure for admission of prior convictions. Finally, the rule only paves the way for convictions which bear directly on the witness's propensity to testify truthfully. Fenty's prior conviction is for petit larceny—a crime of stealth that does not require proof of a dishonest statement or false act as an element of the crime. Additionally, the underlying facts did not involve deceit. As such, it is not admissible under Rule 609(a)(2). Thus, this Court should reverse the decisions of the Fourteenth Circuit and the District Court and vacate Fenty's conviction to give her a fair trial.

A. Crimes Of Stealth Are Not Admissible Under Rule 609(A)(2) Because Only Crimes Requiring Proof Of An Affirmative Misrepresentation Are Admissible Under The Rule, As Evidenced By The Rule's Text, Rationale, And Structure.

Rule 609(a)(2) only allows the admission of crimes requiring affirmative misrepresentation, and thus the Fourteenth Circuit and the District Court erred. Rule 609(a)(2) requires the district courts to admit evidence of a prior conviction if "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 Drafters set a "rigid standard" by limiting the rule's scope to those crimes whose elements require proving a dishonest act or false statement, "denot[ing] a fairly narrow

subset of criminal activity." *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976). This narrow subset of criminal activity only includes those crimes that "bear *directly* on the likelihood that the defendant will *testify* truthfully." *Hayes*, 553 F.2d at 827 (emphasis in original).

Since Rule 609(a)(2) is limited to convictions that bear on the witness's propensity to testify truthfully, only those crimes which require affirmative deceit—and not mere stealth—fall within its ambit. *Id.* Crimes of stealth, such as burglary or petit larceny, do not come within Rule 609(a)(2). *Id.* The Sixth and Second Circuits have refused to admit convictions where defendant stole through stealth, rather than misrepresentation or fraud. *United States v. Washington*, 702 F.3d 886, 894 (6th Cir. 2012); *United States v. Estrada*, 430 F.3d 606, 614–15 (2d Cir. 2005). The rule is intended to inform factfinders whether the witness is likely to lie, and crimes of stealth have little bearing on that. *Washington*, 702 F.3d at 893. Congress provided several examples of crimes that do bear on the question of whether a witness is likely to lie, including: "perjury or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature *crimen falsi*." *Smith*, 551 F.2d at 362. Unlike the examples provided by Congress, all of which involve some element of "active misrepresentation," crimes of stealth do not involve even "a tinge of falsification." *Washington*, 702 F.3d at 893. As a result, several crimes of stealth including shoplifting, smuggling, and burglary, have been found outside of Rule 609(a)(2)'s ambit since they do not involve "deceit or deliberate interference" with the truth, or "active misrepresentation." *United States v. Amaechi*, 991 F.2d 374, 378 n.1 (7th Cir. 1993) (shoplifting); *United States v. Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982) (smuggling); *United States v. Seamster*, 568 F.2d 188, 191 (10th Cir. 1978) (burglary). Petit larceny—the crime at issue in this case—has also been excluded by several courts for the same reason. *Gov't of the Virgin Islands v. Testamark*, 528 F.2d 742, 743 (3d Cir. 1976); *United States v. Fearwell*, 595 F.2d 771,

776 (D.C. Cir. 1978). Accordingly, this Court should find that Fenty's petit larceny conviction is inadmissible under Rule 609(a)(2).

Additionally, Rule 609(a)(2)'s text limits the rule to crimes whose elements require proving a dishonest statement or false act. The rule instructs that evidence of a prior conviction must be admitted if the court can readily determine that establishing the elements of the crime required proving a dishonest act or false statement. FED. R. EVID. 609(a)(2). The rule excludes those crimes which merely *involve* a dishonest act or false statement. *Id.* The Drafters deliberately chose the language, "the elements of the crime," in the rule; that much is confirmed by the 2006 amendment to Rule 609(a)(2). The amendment changed Rule 609(a)(2)'s language from crimes which "involved" a dishonest statement or false act to those whose "elements . . . required proving" a dishonest or false act. *United States v. Cavanaugh*, 476 F. Supp. 3d 916, 920 (D. N.D. 2020). The advisory committee notes on the amendment confirm the significance of the change: "the amendment does not contemplate a 'mini-trial' in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*." *Id.* (quoting FED. R. EVID. 609(a)(2) advisory committee's note to 2006 amendment). The advisory committee notes also state that "evidence of all other convictions is inadmissible. . . irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction." *Id.* This makes clear that "the statutory elements of the crime will indicate whether it is one of dishonesty or false statement," and not the underlying facts of the conviction. *United States v. Jefferson*, 623 F.3d 227, 234 (5th Cir. 2010).

If this Court interpreted Rule 609(a)(2) to include crimes of stealth, it would disrupt the balance the rule strikes, and would become the exception that swallows the rule. Most successful crime involves some quantum of stealth. *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir.

2005). Rule 609(a)(2) is "confined to a narrow class of crimes which by their nature bear directly upon the witness' propensity to testify truthfully." *United States v. Cunningham*, 638 F.2d 696, 698 (4th Cir. 1981). If this Court recognizes crimes of stealth as within 609(a)(2)'s domain then this "narrow class of crimes" will be nearly limitless, since virtually all non-violent crimes require some degree of stealth. *See Amaechi*, 991 F.2d at 379.

This narrow approach is also consistent with the rest of Rule 609. Rule 609 reflects concerns that jurors might misuse information regarding prior convictions of a witness, while still recognizing the potential value of a prior conviction in assessing propensity for truthfulness. Aviva Orenstein, *Honoring Margaret Berger with a Sensible Idea: Insisting that Judges Employ a Balancing Test Before Admitting the Accused's Convictions under Federal Rule of Evidence 609(a)(2)*, 75 BROOKLYN L. REV. 1291, 1294 (2010). Thus, Rule 609 only admits two kinds of crimes. *Id.* First, Rule 609(a)(1) admits prior felonies. FED. R. EVID. 609(a)(1)(B). Further, Rule 609(a)(1) only admits prior felonies if the probative value of the conviction outweighs the prejudicial effect to the defendant. *Id*.[4] This reverse Rule 403 balancing test imposes a presumption *against* admissibility, reflecting the Drafters' concern about jury misuse. Second, Rule 609(a)(2) admits crimes of falsity, but only for a "narrow subset of criminal activity." *Fearwell*, 595 F.2d at 775–76. Allowing crimes of stealth to be admitted would upset the balance of this system created by the Drafters to prevent juries from using prior convictions to infer a propensity for criminality. 75 BROOKLYN L. REV. at 1294

Crimes of stealth do not fall within the scope of Rule 609(a)(2) since they do not involve active misrepresentation. This is confirmed by the text of the rule, which requires a dishonest statement or false act be an element of the crime; not just that the crime involve a dishonest

[4] This additional restriction only applies where the defendant is the witness; where the witness is a third party, the regular Rule 403 balancing test applies. FED. R. EVID. 609(a)(1)(A).

statement or a false act. Thus, petit larceny is not admissible under Rule 609(a)(2), and the Fourteenth Circuit and the District Court erred by admitting Fenty's conviction.

B. Fenty's Prior Petit Larceny Conviction Is Not Admissible Under Rule 609(A)(2) Because The Elements Of The Crime Do Not Require Proof of A Dishonest Act Or False Statement And The Underlying Facts Of The Conviction Did Not Involve Affirmative Misrepresentation.

Fenty's prior conviction for petit larceny does not fall within Rule 609(a)(2)'s domain because the elements of the crime do not require proof of a dishonest statement or false act. Alternatively, the underlying facts of the conviction also do not involve a dishonest statement or false act. Thus, admitting the prior conviction allowed the jury to impermissibly infer Fenty had a propensity to commit crimes, depriving her of a fair trial.

The elements of petit larceny do not require proof of a dishonest or false act. The jury convicted Fenty under Boerum Penal Code § 155.25, which provides:

> A person is guilty of petit larceny when that person knowingly takes, steals, carries away, obtains, uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another, with the intent to, either temporarily or permanently: (a) Deprive the other person of the right to benefit from his or her property, (b) Exercise control over the property without the owner's consent, or (c) Appropriate the property as his or her own. (R. 3.)

Rule 609(a)(2) instructs that "evidence [of a prior conviction] must be admitted if the court can readily determine . . . that the elements of the crime. . . required proving—or the witness's admitting—a dishonest act or false statement." FED. R. EVID. 609(a)(2). No part of the statute requires the prosecution to prove, or Fenty to admit to, having committed a dishonest or false act in the commission of the crime. It merely requires the defendant to act knowingly with the intent to deprive, exercise control over, or appropriate the property of another as their own. In *United States v. Cavanaugh*, the court refused to admit a prior conviction for misdemeanor escape, because it contained no facial element of dishonesty or false statement. *United States v.*

Cavanaugh, 476 F. Supp. 916, 920 (D. N.D. 2020). Similarly, Boerum Penal Code § 155.25 does not require the prosecution to prove that Fenty engaged in a dishonest or false act. Thus, her petit larceny conviction is not admissible under Rule 609(a)(2).

Alternatively, even if this Court finds that crimes of stealth are admissible when the underlying facts of the conviction involved deceit, the underlying facts of Fenty's prior conviction did not involve deceit. Fenty's conviction for petit larceny is a conviction for a crime of stealth, albeit a poor attempt at stealth. In *United States v. Payton*, the defendant was convicted of larceny after falsely stating they qualified for welfare in a sworn statement to get food stamps. *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998). The court found that "[b]ecause her conduct arises out of the making of a false statement, it falls within the categories of crimes contemplated by Rule 609(a)(2)." *Id.* Unlike the defendant in *Payton*, Fenty engaged in no affirmative deception to commit her crime; she did not make any false statements. Fenty's crime involved an attempt to steal a bag from a tourist. (R. 53.) At no point did Fenty attempt to deceive or even distract the tourist. Instead, Fenty attempted to sneak up behind the tourist and steal her bag, ideally unnoticed. (R. 53.) She failed to even do that, as the woman she sought to steal from noticed her quickly, resulting in a physical altercation over the bag. (R. 53.) Fenty's conduct was no more deceitful than the shoplifter who conceals an item in the hope that it is not seen by loss protection officers, or the smuggler who attempts to sneak an item passed border patrol agents—both instances in which courts have refused to admit a prior conviction. *United States v. Dorsey*, 591 F.2d 922, 934 (D.C. Cir. 1978) (shoplifting not a crime of deceit); *United States v. Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982) (smuggling not a crime of deceit).

Ultimately, since petit larceny does not require proof of a dishonest statement or false act, and since the underlying facts of Fenty's conviction do not involve a dishonest statement or false

act, the conviction does not "bear *directly* on the likelihood that" Fenty would testify truthfully. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977) (emphasis in original). While it may show a lack of respect for the property of others, such moral turpitude is not an indicium of propensity towards testimonial dishonesty. *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977). The prior conviction's low probative value in that regard can be contrasted with its high probative value for an improper use: Fenty's propensity to commit crimes. *Id.* This is the misuse that Rule 609 is designed to guard against. Aviva Orenstein, *Honoring Margaret Berger with a Sensible Idea: Insisting that Judges Employ a Balancing Test Before Admitting the Accused's Convictions under Federal Rule of Evidence 609(a)(2)*, 75 BROOKLYN L. REV. 1291, 1294 (2010).

Fenty's prior conviction did not require the prosecution to prove a dishonest statement or false act. Additionally, the underlying facts show that her crime was one of mere stealth—not deceit. As a result, her prior conviction is not admissible under Rule 609(a)(2), because it does not bear on her propensity for truthfulness. The only real worth is to infer a propensity to commit crimes, an improper use of the evidence—and one that thwarted Fenty's ability to get a fair trial. Thus, this Court should reverse the decisions of the Court of Appeals and the District Court and vacate Fenty's conviction.

III. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT AND HOLD THAT THE VOICEMAILS WERE ADMISSIBLE BECAUSE THEY MEET THE REQUIREMENTS OF RULE 803(3), WHICH DOES NOT INCLUDE SPONTENEITY OR TRUSTWORTHINESS.

The Fourteenth Circuit and the District Court erred by reading a spontaneity requirement into Rule 803(3) where none exists, improperly refusing to admit Fenty's voicemails into evidence. Because of that, evidence that potentially exculpated Fenty by showing she had no idea that Millwood was asking her to order illegal drugs was never heard by the jury. Thus, Fenty's conviction should be vacated.

Federal Rule of Evidence 803(3) creates the then-existing state of mind exception to hearsay. The rule provides that "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health) is not excluded by the rule against hearsay." FED. R. EVID. 803(3). The key requirement of the rule is the statement must be contemporaneous: it must relate to the declarant's state of mind as it existed at the time it was uttered—not any time prior to the utterance. *United States v. Peak*, 856 F.2d 825, 833 (7th Cir. 1988). By refusing to admit the exculpatory voicemails, the District Court prevented Fenty from introducing evidence of her state of mind, and thus prevented the jury from considering that information in reaching their verdict.

First, the text of Rule 803(3) does not create a spontaneity requirement. The text of Rule 803(3) only requires that the statement be of a "then-existing" state of mind: what the declarant was thinking in that moment; not another. FED. R. EVID. 803(3). This is not the same as making the statement spontaneously with the events it refers to in the real world, and the text of the rule does not impose such a requirement. *United States v. Naiden*, 424 F.3d 718, 724–25 (8th Cir. 2005) (Bye, J. Concurring). The lack of an explicit spontaneity requirement in 803(3) stands in stark contrast to Rules 803(1) and 803(2)—the present sense and excited utterance exceptions—which do contain *explicit language* that the statements must be made spontaneously to be admissible. FED. R. EVID. 803(1), (2). Federal Rule of Evidence 803(1) states: "A statement describing or explaining an event or condition, *made while or immediately after the declarant perceived it*, is not excluded by the rule against hearsay." FED. R. EVID. 803(1) (emphasis added). Rule 803(2) states: "A statement relating to a startling event or condition, *made while the declarant was under the stress of excitement that it caused*, is not excluded by the rule against hearsay." FED. R. EVID.

803(2) (emphasis added). The omission of a similar requirement in Rule 803(3) it itself a statement that no such requirement exists.

Further, the text of Rule 803(3) does not empower the trial judge to read in an additional requirement to prove reliability. Rule 803(3) is founded on an added assurance of credibility because statements that fit the exception are less likely to have been deliberately or consciously misrepresented—but that function is served by the contemporaneity requirement. *United States v. Farhane*, 634 F.3d 127, 171 (2d Cir. 2011) (Raggi, J., Concurring). There is no additional trustworthiness requirement for admissibility. *United States v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984). Nothing in the text of Rule 803(3) allows the trial judge to exclude self-serving statements or statements that are untrustworthy. Peter F. Valori, *Special Topics in the Law of Evidence: The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule*, 48 U. MIAMI L. REV. 481 (1993). The lack of such empowerment stands in stark contrast to other rules, such as the business records and public records exceptions, which both indicate evidence should be excluded if "a lack of trustworthiness is shown." FED. R. EVID. 803(6), (7). In fact, the advisory committee purposefully left out any trustworthiness provision in Rule 803(3). 48 U. MIAMI L. REV. 481, 482. The Model Evidence Code, which the Federal Rules of Evidence are based on, permitted denial of admissibility based on lack of trustworthiness in its version of Rule 803(3). *Id.* In adopting the version we know today, the advisory committee purposefully omitted that requirement. *Id.*

With the lack of an explicit textual requirement to either assess spontaneity or general reliability, it is the job of the fact-finder—not the court—to make such an assessment. If a declaration comes within a category defined as a hearsay exception, it is admissible without any preliminary finding of probable credibility by the judge. *United States v. Di Maria*, 727 F.2d 265, 272 (2d Cir. 1984). The self-serving nature of a statement is considered by the jury when it weighs

the evidence at the conclusion of the trial. *United States v. Cardascia*, 951 F.2d 474, 487 (2d Cir. 1991). Although statements with a low degree of trustworthiness might be admitted, "this evil is doubtless thought preferable to requiring preliminary determinations of the judge with respect to trustworthiness with attendant possibilities of . . . encroachment on the province of the jury." *Di Maria*, 727 F.2d at 272.

Here, the Fourteenth Circuit and the District Court improperly read a spontaneity or credibility requirement into Rule 803(3) where none exists. The voicemail messages meet the textual requirements of the rule. First, they both describe Fenty's state of mind. In the first voicemail, Fenty explained: "I'm worried that you dragged me into something I would never want to be a part of." (R. 40.) In the other, Fenty says: "I'm really starting to get concerned that you involved me in something I had no idea was going on." (R. 40.) Second, the statements were made contemporaneously with her state of mind: "These statements were made as part of a "continuous mental process" as Fenty processed the fact that the packages were missing. *Cardascia*, 951 F.2d at 488. Like the defendant in *United States v. Di Maria*, who said, "I only came here to get cigarettes real cheap," indicating what he was thinking in that present moment, Fenty's statements that she was "concerned" and "worried" indicate what she was thinking in that moment—that she was nervous Millwood set her up. *Di Maria*, 727 F.2d at 271. Thus, the voicemails meet the textual requirements of Rule 803(3). Since the rule does not require spontaneity, the lack of spontaneity with her realizing the packages were missing is not an issue. *Id.* at 272. Fenty made these statements contemporaneously with her own mental process; that meets the requirements of the rule, and thus the voicemails are admissible.

Rule 803(3)'s text does not contain a spontaneity or trustworthiness requirement. Credibility is assured by the fact that the statement must be contemporaneous with the declarant's

mental process. Further, the fact-finder will consider the circumstances surrounding the statement and will afford less weight to the statement if they find the circumstances untrustworthy. Since Fenty's statement is a contemporaneous statement of her state of mind, it is admissible, and it should have been admitted under Rule 803(3). The Fourteenth Circuit and the District Court's failure to admit the voicemails prevented the jury from analyzing all the relevant and admissible evidence. Thus, Fenty did not get a fair trial and her conviction should be reversed.

CONCLUSION

This Court should reverse the Fourteenth Circuit and the District Court and vacate Fenty's conviction. Fenty had standing to challenge the admissibility of the package under the Fourth Amendment because she used a fictitious and publicly known alias to receive the package. She otherwise has a reasonable expectation of privacy in the package because she exercised a possessory interest in the package. Further, Fenty's prior conviction for petit larceny is a crime of stealth, not of deceit, and thus is not admissible under Rule 609(a)(2). Finally, the voicemails are contemporaneous statements that reflect Fenty's state of mind, meeting the textual requirements of Rule 803(3).

Respectfully Submitted,

/s/ Team 21

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