Team 31*P* – Original Copy

No. 23-695

IN THE

Supreme Court of the United States

FRANNY FENTY,

Petitioner,

--against—

UNITED STATES OF AMERICA,

Respondent.

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

Brief for Petitioner

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Under the Fourth Amendment, does an individual who opts to use a pseudonym retain their reasonable expectation of privacy in sealed mail that is addressed to the pseudonym?

II. Under Federal Rule of Evidence 609(a)(2), should a prior conviction for petit larceny be excluded when neither the elements of the crime, nor the underlying facts of the crime, required the factfinder to find a dishonest act?

III. Under Federal Rule of Evidence 803(3), can statements that describe a declarant's then-existing state of mind be admitted into evidence when the statements were not made contemporaneously?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 65-70.

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the following constitutional provision is provided below:

The Fourth Amendment provides:

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

U.S. CONST. AMEND. IV

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. AMEND. VI

STATEMENT OF THE CASE

I. Statement of Facts

In the fall of 2016, Franny Fenty, an aspiring writer, began contributing to her college magazine, the Joralemon College Zine. R. 42. For privacy, she published under the pseudonym "Jocelyn Meyer." R. 42. She continued to contribute to the magazine, publishing another work under "Jocelyn Meyer" in the spring of 2017. R. 42. Over the next few years, Ms. Fenty persisted in her pursuit of literary success, pitching novels and seeking opportunities to share her stories with the world. R. 42. In October of 2021, Ms. Fenty reached out to Charlotte Hazeldean, a publisher at Bridgewater Books, pitching her new thriller novel *The Twisted Violin* under the same pseudonym. R. 5. Not stopping there, she offered to share a collection of her other novels, including *Touch of Winter*, *Cold Judgment*, *Dead Prayer*, and *Strange Grace*, all written as Jocelyn Meyer. R. 5.

While awaiting a response from Bridgewater Books, Ms. Fenty sought avenues for new income. In December of 2021, she turned to LinkedIn, posting that she was "open to work." R. 6. That day, she received two responses. R. 6. The first was from Hank Rodgers telling her, "I'll keep you in mind if anything comes up." R. 6. The second was from Angela Millwood ("Millwood"), a horse handler at Glitzy Gallop Stables commenting, "It's rough out there, but don't worry. I can help you out with that! Shoot me a message!" R. 6. After posting the LinkedIn update, and while still hopeful for her literary career, Ms. Fenty opened a P.O. Box to receive her online orders and mail. R. 43. Out of an abundance of caution for her privacy, Ms. Fenty registered the P.O. Box under the same name: Jocelyn Meyer. R. 43.

Because she had yet to hear back from the publisher, Ms. Fenty decided to message Millwood. R. 44. As it turns out, Ms. Fenty had gone to high school with Millwood. R. 43. They

were not close, but Ms. Fenty was aware that Millwood had been investigated for drug dealing in high school. R. 34. Having experienced her own unfortunate run in with the law,[1] Ms. Fenty was empathetic to making a silly mistake early in life. R. 44. Moreover, it had been nearly ten years since high school, and it seemed to Ms. Fenty that Millwood had changed her ways. R. 43-44.

While discussing the trajectory of their lives, Millwood informed Ms. Fenty that her work at Glitzy Gallop Stables was emotionally challenging but rewarding. R. 44. Millwood portrayed herself to be a sympathetic animal-lover, driven by the desire to alleviate the older horses' pain. R. 44. Millwood told Ms. Fenty that it was very difficult to watch the older horses suffer in pain, especially since the medicine provided by Glitzy Gallop Stables was ineffective. R. 44. Millwood told Ms. Fenty that she planned to administer xylazine, a muscle relaxer, to the horses to help with their pain. R. 45. Millwood explained that due to her position at Glitzy Gallop, she could not order the xylazine directly. R. 45. At this point, Millwood asked Ms. Fenty for help. R. 45. Specifically, Millwood asked Ms. Fenty to order the xylazine on her behalf. R. 45. Because the two grew up poor, Ms. Fenty recognized that Millwood would only sacrifice financial security for a cause important to her. R. 44. Based on this established trust, Ms. Fenty agreed to help the horses by ordering xylazine on Millwood's behalf. R. 45. Given Millwood's explanation of the situation, Ms. Fenty did not feel compelled to independently research xylazine, nor was she aware of any nefarious ties it could have. R. 46.

It was not until February 8, 2022, that Ms. Fenty read an article by Andrew Baer published in The Joralemon Times, describing a new drug cocktail being used on the street. R. 7. The article informed Ms. Fenty, for the first time, that xylazine can be mixed with fentanyl,

[1] When Ms. Fenty was 19, she stole a purse on a dare from a friend. R. 19. When the victim noticed her trying to steal it, Ms. Fenty used force to grab the bag. The purse contained diapers and $27 in cash. She ultimately pleaded guilty and was convicted for petit larceny under Boerum Code Section 155.25. R. 19.

resulting in a potent and deadly concoction. R. 7. Then, on February 12, 2022, Joralemon resident Liam Washburn overdosed, and an autopsy and testing showed that Washburns blood, as well as syringes found at the scene, contained the xylazine-fentanyl mixture. R. 29.

With public pressure mounting, immediately after Washburn's overdose, federal drug enforcement authority ("DEA") Agent Robert Raghavan contacted the manager of the Joralemon Post Office, Oliver Araiza, who he had worked with previously. R. 29. DEA agents routinely targeted the Joralemon post office, in large part because postal service inspectors have the power to flag and open packages for suspicion of drug trafficking without first obtaining a warrant. R. 36. Agent Raghavan had fifteen years of experience targeting low-income and high-crime areas. R. 28. But even though Washburn's death was the first one involving xylazine, Agent Raghavan instructed the Joralemon Postal Inspection Officers to flag "all packages being shipped from a horse veterinarian website or company." R. 30.

On February 14, 2022, Araiza personally contacted Agent Raghavan to tell him that Postal Inspectors had flagged two packages sent from Holistic Horse Care to Jocelyn Meyer, P.O. Box 9313. R. 30. The P.O. Box also contained two Amazon packages, addressed to Franny Fenty. R. 31. On these facts alone, Agent Raghavan and his partner obtained a search warrant for the Holistic Horse Care packages. R. 31. Once they obtained the warrant, the DEA agents took the packages to a testing facility, where they discovered the contents contained a mixture of xylazine and fentanyl. R. 31-32.

While Agent Raghavan had possession of the packages, Ms. Fenty went to the post office to retrieve her mail, but realized the packages were missing. R. 46. Confused as to why her P.O. Box was empty, Ms. Fenty immediately called Millwood. R. 40. Having just read the article about xylazine in the Joralemon Times, Ms. Fenty grew nervous and began to have reservations

about the nature of her order from Holistic Horse Care. R. 46. Millwood did not answer, so Ms. Fenty left her a voicemail from the post office explaining her confusion as to why the packages were missing and reservations about the plan. R. 40. Forty-five minutes later, Ms. Fenty called Millwood for a second time, leaving another message expressing her concern for what Millwood had deceitfully roped her into. R. 40.

The next morning, on February 15, 2022, Agent Raghavan ordered the Post Office to perform a controlled delivery of the packages, while he waited in a back room watching a security camera. R. 32. Agent Ragahvan observed Ms. Fenty open P.O. Box 9313 where she found a slip notifying her that the packages needed to be retrieved from the counter. R. 32. Agent Raghavan knew the packages to be addressed to Jocelyn Meyer, but confirmed they were retrieved by Ms. Fenty, leading him to believe that Jocelyn Meyer and Franny Fenty were the same person. R. 33. Agent Raghavan relayed his findings to AUSA Janice Herman on the same day, and the empaneled grand jury returned an indictment. R. 34. Ms. Fenty was arrested the same day, February 15, 2022, commencing the Government's case. R. 34.

II. Procedural History

Ms. Fenty was charged with one count of possession with intent to distribute a deadly mix of fentanyl and xylazine, in violation of 21 U.S.C. Sections 841(a)(1) and (b)(1)(A)(vi). R. 1-2. Subsequently, Ms. Fenty moved for the District Court of the Eastern District of Boerum to (1) suppress the contents of the sealed packages and (2) exclude her prior conviction for petit larceny. R. 10-26. The District Court denied both motions. R. 17, 26. At trial, Ms. Fenty attempted to introduce two voicemails into evidence under Federal Rules of Evidence 803(3), the then-existing state of mind exception to the prohibition against hearsay. R. 46. The Government objected to the introduction of both voicemails because they were not made contemporaneously

to the events described. R. 46. The trial court sustained the Government's objection and excluded both voicemails. R. 52. On September 21, 2022, Ms. Fenty was convicted and sentenced to ten years in prison. R. 66. Ms. Fenty appealed the District Court's rulings to the United States Court of Appeals for the Fourteenth Circuit. The Fourteenth Circuit affirmed the District Court's ruling on all issues, with Circuit Judge Hoag-Fordjour dissenting. This Court granted writ of certiorari on December 14, 2023.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision because (1) individuals have a reasonable expectation of privacy in packages delivered to them, even when they opt to use a pseudonym; (2) a conviction for petit larceny is inadmissible impeachment evidence under Rule 609(a)(2) because it is not a crime of dishonesty; and (3) statements of a declarant's then-existing state of mind are admissible, regardless of when they were made, because the plain language of Rule 803(3) does not require the statements to be made contemporaneously.

First, this Court should find that Ms. Fenty had a reasonable expectation of privacy in the packages addressed to her pseudonym "Jocelyn Meyer." This Court engages in a two-part inquiry to evaluate an individual's reasonable expectation of privacy. First, whether the defendant manifested a subjective expectation of privacy in the property searched and, if so, whether the defendant's expectation is one society is prepared to recognize as reasonable. Under the second inquiry, the illegal contents of a package may not serve as an after-the-fact justification for curtailing Fourth Amendment protections. Here, Ms. Fenty registered a P.O. Box under the pseudonym "Jocelyn Meyer." She used the P.O. box to accept mail under both her legal name and pseudonym, alike. Because Ms. Fenty and Jocelyn Meyer are effectively the

same person, Ms. Fenty established an expectation of privacy in the contents of the packages, and society is prepared to recognize that expectation as reasonable.

Second, this Court should hold that convictions for theft crimes where establishing the elements of the crime does not require proving a dishonest act are *per se* inadmissible under Federal Rule of Evidence 609(a)(2). The rule is meant to cover only a sliver of convictions peculiarly probative of credibility, such as those for perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretenses, or any other offense in the nature of *crimen falsi*, commission of which involves some element of deceit, untruthfulness, or falsification. Here, absent from the requirements to obtain a conviction for petit larceny is any element of deceit or fraud. On this fact alone, this Court should reverse. But even if this Court conducts a limited inquiry behind the conviction, it still should have been excluded because the underlying facts of the conviction did not require the factfinder to find a dishonest act. Ms. Fenty used stealth to approach an unsuspecting victim and steal her purse. When she was detected, Ms. Fenty used force to gain control of the bag. Stealth and force have been distinguished from dishonesty in the majority of federal circuit courts. Thus, even under a limited inquiry, this Court should reverse.

Third, this Court should hold that the plain meaning of Federal Rule of Evidence 803(3) allows the admission of the then-existing state of mind of a declarant, regardless of whether the statements were made contemporaneously to the event in question. In the instant case, Ms. Fenty left two voicemails stating her confusion that the packages she was expecting were missing. The time stamps on the voicemails are of no moment so long as her statements reflected her then-existing state of mind–namely, confusion. But even if this Court were to impose a contemporaneous requirement seen nowhere in the text of the rule, it should still find that the

first voicemail should have been admitted. While the record is silent to what time Ms. Fenty entered the post office, her statements indicate she was calling from the P.O. Box explaining events occurring in real time. Because these voicemails would have been exculpatory for Ms. Fenty, the exclusion of the voicemails substantially influenced the verdict.

Accordingly, this Court should REVERSE the decision of the Fourteenth Circuit.

ARGUMENT

I. Under the Fourth Amendment of the United States Constitution, individuals retain a reasonable expectation of privacy in their mail, even when using a pseudonym.

This Court should reverse the United States Court of Appeals for the Fourteenth Circuit and hold that Ms. Fenty had a reasonable expectation of privacy in the packages addressed to her pseudonym.[2] The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. These constitutional guarantees must be "liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection ... [for] which it was adopted." *Ker v. State of Cal.*, 374 U.S. 23, 33 (1963). Further, the "ultimate touchstone" of the Fourth Amendment is reasonableness. *Brigham City v. Smart*, 547 U.S. 398, 403 (2006).

To challenge a government intrusion under the Fourth Amendment, an individual must show they have a reasonable expectation of privacy in the property searched. *United States v. Gray*, 491 F.3d 138, 144 (4th Cir. 2007) (quoting *Alderman v. United States*, 394 U.S. 165, 171

[2] The Fourteenth Circuit Court of Appeals' opinion did not reach the merits of any further claims or challenges relating to the search and seizure of the packages. On appeal to the Supreme Court, the narrow issue presented is whether Ms. Fenty has a reasonable expectation of privacy in sealed mail addressed to her pseudonym. A ruling in Ms. Fenty's favor would require this case to be remanded to the lower court for further consideration.

(1969)). Establishing a legitimate expectation of privacy involves a two-part inquiry: (1) did the defendant demonstrate a subjective expectation that the contents of the package would remain free from government intrusion, and (2) is the defendant's subjective expectation of privacy one "society is prepared to recognize as reasonable." *See Katz v. United States*, 389 U.S. 347, 361 (1967). The burden of proof is on the defendant. *United States v. Gordon*, 168 F.3d 1222, 1226 (10th Cir. 1999). Critically, both the sender and recipient of a package sent by mail or other carrier have a legitimate expectation of privacy in the contents of that package. *United States v. Hurley*, 182 Fed. Appx. 142, 145 (4th Cir. 2006). This is true even when an individual orders and receives a package under a pseudonym. *See United States v. Villarreal*, 936 F.2d 770, 774 (5th Cir. 1992).

Ms. Fenty, like all American citizens, has a reasonable expectation of privacy in the packages addressed to her professional pseudonym. It is undisputed that Ms. Fenty arrived at the post office on February 14, 2022 to retrieve packages from her P.O. Box. When they were missing, she came back the next day, acting in conformity with the subjective belief that the packages were hers and would be protected from government intrusion. Further, society is prepared to recognize her expectation as reasonable because there is nothing inherently wrong with a desire to remain anonymous when sending or receiving mail. *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir.). Thus, Ms. Fenty had a reasonable expectation of privacy under the Fourth Amendment in the sealed packages addressed to her pseudonym, Jocelyn Meyer.

A. This Court should adhere to its longstanding Fourth Amendment jurisprudence and apply Katz.

Under *Katz,* in order to establish a reasonable expectation of privacy, an individual must (1) manifest a subjective expectation of privacy in the object of the challenged search and (2) demonstrate that that expectation is one that society is willing to recognize as legitimate. *See*

Katz, 389 U.S. at 361. The defendant bears the burden of demonstrating her legitimate expectation of privacy in the property searched. *Id.*

1. Ms. Fenty manifested a subjective expectation of privacy through her control and possession of the packages.

First, as to the subjective inquiry, Ms. Fenty believed that the contents of the packages would be free from government intrusion. An individual has a subjective expectation of privacy when she actually believes that the evidence will not be available to the public, and acts in a way to maintain and ensure its privacy. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). On February 14, 2022, Ms. Fenty arrived at the post office to retrieve her packages from the P.O. Box she had opened under her pseudonym. R. 43. Realizing they were missing, she came back the next day to check if they had arrived. R. 40. When she saw the slip notifying her to retrieve her packages at the front counter, she did so. R. 32. Oliver Araiza, the manager of the Joralemon Post Office, handed Ms. Fenty the packages and asked if the packages belonged to her. R. 32. She answered affirmatively. R. 32. Under these facts, Ms. Fenty's subjective belief is clear. Indeed, it is completely routine to retrieve mail from a P.O. Box and to expect that your privacy will not be invaded during the process.

2. Ms. Fenty's expectation is one that society is prepared to recognize as reasonable.

Second, with respect to the objective inquiry under *Katz*, both senders and addressees of packages or other closed containers can reasonably expect that the Government will not open them. *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992); *see also United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("[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."); *Ex parte Jackson,* 96 U.S. 727, 733 (1877) (holding that "sealed packages ... are as fully guarded from

examination and inspection...as if they were retained by the parties forwarding them in their own domiciles").

These fundamental protections of the Fourth Amendment do not disappear when a citizen opts to use a pseudonym to receive their mail instead of their legal name. Indeed, courts have long recognized that individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names. *See Villarreal*, 936 F.2d at 774. That is because a recipient's intent to conceal their identity *does not* render their expectation of privacy unreasonable. *See Pitts*, 322 F.3d at 459 (emphasis added) ("there is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package, and thus the expectation of privacy for a person using a [pseudonym] in sending or receiving mail is one that society is prepared to recognize as reasonable.").

Where an individual uses a pseudonym, the court will analyze objective indicia to determine whether they are the true recipient and therefore protected by the Fourth Amendment. *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021) (citing *United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984)). Under this approach, courts consider the totality of surrounding circumstances to assess the objective reasonableness of an expectation of privacy. *United States v. Gray*, 491 F.3d 138, 150-51 (4th Cir. 2007). Factors courts consider are: (1) whether that person claims ownership or a possessory interest in the property, and (2) whether she has established a right or taken precautions to exclude others from the property. *See Byrd v. United States*, 138 S.Ct. 1518, 1527 (2018); *see also Rose*, 3 F.4th at 727; *United States v. Castellanos*, 716 F.3d 828, 833-34 (4th Cir. 2013). When considering these factors, courts analyze the individual's established connection to the property at the time the search was conducted. *Rose*, 3 F.4th at 728 (citing *See United States v. Ferebee*, 957 F.3d 406, 416 (4th Cir. 2020)).

By contrast, an expectation of privacy is objectively unreasonable where the recipient makes fraudulent use of a *third party's* identity. *See e.g., United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009) ("It is not unreasonable to use a pseudonym to receive mail unless fraud or a stolen identification is involved."); *Rose*, 3 F.4th at 730 (holding the use of a third party name– a deceased relative's name– did not create a reasonable expectation of privacy). There is a fundamental difference between merely using a pseudonym to receive a package and using another's identity. *Id.*

At the suppression hearing below, the Government did not argue that Jocelyn Meyer is a third party. Nor did it argue that Ms. Fenty perpetrated identity theft when she used the name Jocelyn Meyer to receive mail. Instead, the Government relies on the insincere argument that Ms. Fenty was not the recipient merely because the packages were not addressed to "Franny Fenty." But the objective indicia here undeniably indicate Ms. Fenty was the true addressee of the packages. First, Ms. Fenty's testimony established that she used the fictitious name Jocelyn Meyer for privacy. R. 43. In fact, she had previously used the same pseudonym to publish literary works. R. 42-43. Further, Ms. Fenty also received packages addressed to her legal name at P.O. Box 9313. R. at 32. Accordingly, Jocelyn Meyer and Ms. Fenty are effectively the same person. *See Richards v. United States*, 638 F.2d 765, 770 (5th Cir. 1981).

Moreover, Ms. Fenty's had both ownership and possessory control of the locked P.O. Box and the contents within it. *See Rose,* 3 F.4th at 727. She entered the post office to retrieve the packages from her P.O. Box registered under her pseudonym in the same manner that she retrieved her other packages. She took possession of them in the course of typical mail collection. Further, as the only one with a key, she also established a possessory right or had taken precautions to exclude others from the property. *See Givens*, 733 F.2d at 341-42. Finally,

Ms. Fenty did not abandon the package. *See United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992) (holding no reasonable expectation of privacy where defendant continually attempted to dissociate himself from the package by denying ownership and shifting blame). Instead, after discovering the packages were missing on February 14, 2022, she promptly returned the following day in an attempt to retrieve them once more. R. 32. Under these facts, Ms. Fenty satisfied her burden to show that her expectation of privacy is one society is prepared to recognize as reasonable.

Adopting the lower court's reasoning would lead to absurd results. Individuals using anything short of their government name would be stripped of their Fourth Amendment rights. Think of "William" who goes by Bill, "Robert" who goes by Bob, "John" who goes by Jack, "Elizabeth" who goes by Liz, and "Alexandra" who goes by Alex. Under the Government's rule, these individuals' privacy interests would be on shaky grounds. In sum, a rule denying an individual an expectation of privacy in their mail merely because they opt not to use their legal name is wholly unworkable and grossly undermines the intent of our Founding Fathers.

3. <u>This Court should reject the Government's "established alias" test seen nowhere before in a *Katz* analysis.</u>

In arguing that Ms. Fenty lacked standing to challenge the seizure and subsequent search of the packages, the Government urges this Court to adopt an "established alias" test under the objective prong of *Katz*. By this logic, no person could hold an objectively reasonable expectation of privacy in their pseudonym unless it was publicly "established." The Fourth Amendment contains no such a requirement. Rather, an individual receiving a package under a pseudonym, even for the first time, has the same reasonable expectation of privacy as someone who has used that pseudonym multiple times.

By protecting only formal pseudonyms—those so publicly established that the user is recognized by it—the Government's rule undermines Fourth Amendment protection as to virtually every purpose for which a person might use a pseudonym. *See Pitts*, 322 F.3d at 458 ("This is a common and unremarkable practice."). Those purposes are reasonable and encompassed within societally recognized privacy expectations. *Id*. Imagine the celebrity avoiding paparazzi; the federal judge facing heightened security risks; the internet-user ordering from strangers; the shopper of sensitive products avoiding prying eyes. In each instance, the pseudonym-user reasonably intends to send or receive their mail without revealing identifying information. To accomplish this, all would use informal pseudonyms that specifically do *not* bear a public connection to their real identity. The same is true of receiving mail at a P.O. Box, under a fictitious name, rather than to one's own residence under their legal name. Ironically, under the Government's rule, the pseudonym-user's efforts to protect their identity may end up relinquishing their privacy interests in their mail altogether.

B. Privacy expectations do not hinge on the nature of the individual's activities—innocent or criminal.[3]

The Fourth Amendment is not so weak as to yield to a post-hoc justification for an unlawful search. Indeed, most Fourth Amendment issues arise precisely because the defendant engaged in illegal activity. *Pitts*, 433 F.3d at 459. For example, the Fifth Circuit expressly rejected a claim that Fourth Amendment protection hinged on the lawfulness of the activity. *See Richards*, 638 F.2d 765 (5th Cir. 1981). In that case, the defendant used an alias to receive a package in the mail for the sole purpose of perpetrating a criminal scheme. *Id.* Even with a clear

[3] Ms. Fenty maintains her innocence and continues to deny any knowledge of the fentanyl in the packages at issue.

nefarious purpose, the court affirmed that the defendant did have standing to assert Fourth Amendment protection. *Id*. at 770.

Here, the Government contends that society is not prepared to accept as reasonable an expectation of privacy in fentanyl being sent through the United States Postal Service. But the Government did not know that the packages contained fentanyl until seizing, opening, and searching them. Assuming, but not admitting, that Ms. Fenty had knowledge of the contents of the packages, allowing the "illegal contents of the package [to] serve as an after-the-fact justification for a search turn[s] the Fourth Amendment on its head." *Pitts*, 433 F.3d at 458. While fentanyl use in Joralemon has raised public health concerns, addressing this crisis cannot come at the expense of citizens' rights. The lower court's ruling risks leaving citizens with completely legitimate reasons for remaining anonymous stripped of their constitutional right to privacy in their packages. *Pitts*, 322 F.3d at 458 (7th Cir. 2003). The Fourth Amendment "requires more." *Pitts*, 433 F.3d at 459.

Based on the foregoing, this Court should hold that Ms. Fenty had a reasonable expectation of privacy in the contents of the packages and remand to the lower court for further consideration. If, on the merits, she loses, she alone is harmed. If she prevails, so does the Fourth Amendment.

II. A petit larceny conviction is not admissible under Federal Rule of Evidence 609(a)(2) because it is not a crime of dishonesty.

This Court should reverse the Fourteenth Circuit Court of Appeals and hold that Ms. Fenty's conviction for petit larceny should have been excluded under Federal Rule of Evidence

609(a)(2).[4] Admission of a criminal conviction under Rule 609(a)(2) is limited to crimes to which "the court can readily determine that establishing the elements of the crime required proving– or the witness admitting– a dishonest act or false statement." FED. R. EVID. 609(A)(2). Because it is the only rule in the Federal Rules of Evidence that *requires* evidence to be admitted, the phrase "dishonest act" covers only a narrow class of crimes which by their nature bear directly upon the witness's propensity to tell the truth. *United States v. Kelly*, 510 F.3d 433, 438 (4th Cir. 2007) (emphasis added). Such crimes include "perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of *crimen falsi."* FED. R. EVID. 609 advisory committee's notes.

In the present case, the crime for which Ms. Fenty was convicted—petit larceny under Boerum Penal Code § 155.25—does not include an element of deceitfulness or untruthfulness. Nor did the Government offer information to show that the underlying facts of the crime required the factfinder to find an act of dishonesty to convict Ms. Fenty. Consequently, a bare conviction for petit larceny reveals little with respect to Mr. Fenty's veracity. Therefore, this Court should reverse the lower court and hold that Ms. Fenty's prior conviction falls outside the scope of Rule 609(a)(2).

A. Federal Rule of Evidence 609(a)(2) prohibits admission of a misdemeanor petit larceny conviction because the elements of the crime do not require proof or admission of a dishonest act.

This Court should hold that convictions for theft crimes where establishing the elements of the crime does not require proving a dishonest act are *per se* inadmissible under Rule

[4] As an initial matter, Petitioner has reserved this issue for appeal from the motion in limine. *See* FED. R. EVID. 103(B) ("Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

609(a)(2). The Federal Rules of Evidence provide that a witness's character for truthfulness may be attacked by evidence of a conviction "for any crime regardless of the punishment ... if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." FED. R. EVID. 609(A)(2).

The term "dishonest act" is narrowly defined to include only convictions "peculiarly probative of credibility," such as those for "perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretenses, or any other offense in the nature of *crimen falsi*." CONF. REP. NO. 93-1597, 93D CONG., 2D SESS. 9; *See also* FED. RULE EVID. 609 advisory committee's notes (defining crimes of dishonesty in the same way); *Black's Law Dictionary, 421 (5th ed. 1979)* (defining dishonesty as "deceitful behavior, a "disposition to defraud … [or] deceive," or a "[d]isposition to lie, cheat, or defraud."). Such a narrow definition serves a gatekeeping function for other crime evidence, providing "certain basic safeguards … applicable to all witnesses *but of particular significance to an accused who elects to testify*." FED. R. EVID. 609(A)(2) advisory committee's notes (emphasis added).

The legislative history supports a narrow definition of the term "dishonest act." In fact, the drafters to the rule unanimously favored a strict "elements" definition of crimes admissible under Rule 609(a)(2). Under this approach, courts simply look at the statutory definition of the prior offense to determine whether it was a crime of dishonesty. Anything broader, the drafters noted, would impose an untenable burden on trial judges, requiring courts to look beyond every conviction to the underlying facts. *See* Advisory Committee on Evidence Rules, Minutes of the Meeting 17 (Nov. 13, 2003). But the Department of Justice objected on the sole basis that obstruction of justice would not fit under a strict elements test. *See* Advisory Committee on Evidence Rules, Minutes of the Meeting 7 (April 28, 2005). And so, the drafters agreed on

language that would allow a limited inquiry behind the conviction *only* where a crime "leaves room for doubt," warranting a deeper investigation behind the conviction into the underlying facts. *Id.* at 8-9; *see also United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977) (emphasis added).

Critically, theft crimes were never contemplated in this limited expansion of the rule and should not be today. Indeed, most federal circuit courts have come to the same conclusion– that theft crimes without an element of deceit do not involve "dishonesty" within the meaning of Rule 609(a)(2). *See e.g., United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir.1982); *U.S. v. Field,* 625 F.2d 862 (9th Cir. 1980) (receiving stolen property not included); *Government of Virgin Islands v. Toto,* 529 F.2d 278 (3d Cir.1976) (petit larceny conviction not within Rule 609(a)(2)); *United States v. Fearwell*, 595 F.2d 771 (D.C. Cir. 1978) (petit larceny not included); *United States v. Washington*, 70 F.3d 886, 893 (6th Cir. 2012) (quoting *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984). Rather, theft is a "prime example of a crime of stealth, and it has been distinguished from dishonesty in most federal circuits." *See United States v. Amaechi,* 991 F.2d 374, 378 n.1 (7th Cir. 1993) *(*"A number of circuits have concluded that stealing is not a crime of dishonesty for purposes of the Rules of Evidence.").

These cases on point should end the matter. The Government's exclusive argument on appeal is that *Altobello* should be read as requiring an evidentiary inquiry into the "facts" surrounding a conviction to determine whether it involved "dishonesty." R. 70. But a rule requiring inquiry into the facts of every theft conviction would force courts to engage in the very kind of mini-trial into the facts that the drafters sought to avoid. *See* Advisory Committee on Evidence Rules, Minutes of the Meeting 8 (April 28, 2005). Moreover, theft statutes exist that specifically proscribe an intent to deceive, and the government is free to bring charges for such

conduct. For example, certain theft crimes specifically forbid knowingly *and with deceit* taking, stealing, carrying away … any personal property of another. *See* Boerum Penal Code § 155.45 (emphasis added); *see also* 18 Pa. Cons. Stat. § 4113 (embezzlement). Indeed, while some theft offenses may require establishing an element of deceit to obtain a conviction, many do not. Simply put, theft crimes without an element of dishonesty do not "leave room for doubt," warranting a deeper investigation behind the conviction into the underlying facts." *Hayes*, 553 F.2d at 827.

Applying this rule to Ms. Fenty's petit larceny conviction makes for an easy case. Establishing the elements of petit larceny under Boerum law does not "require proving—or the witness's admitting—a dishonest act." *See* FED. R. EVID. 609(A)(2). Instead, the Government was only required to prove that she knowingly took someone else's property and intended to use it as her own. *See* Boerum Penal Code § 155.25. Conspicuously absent from the statute is any reference to deception, fraud, or a false statement. *Id.* Indeed, if the prosecutors believed that Ms. Fenty had committed theft by means of deceit, they would have charged her as such. *See* Boerum Penal Code § 155.45. By admitting Ms. Fenty's prior conviction, the lower court grossly contravened the rule's stated purpose to "incorporate certain basic safeguards … applicable to all witnesses *but of particular significance to an accused who elects to testify*." FED. R. EVID. 609(A)(2) advisory committee's notes (emphasis added). For these reasons, the petit larceny conviction had no bearing on Ms. Fenty's veracity as a witness and should have been excluded at trial.

B. Even under a limited inquiry, Ms. Fenty's petit larceny conviction should have been excluded because the underlying facts did not establish dishonesty.

The trial court heard evidence outside the presence of the jury concerning the underlying facts of Ms. Fenty's conviction involving theft, and it impermissibly concluded that the

conviction involved deceitful conduct. R. 18-26. In cases where the statutory text does not clarify whether the prior offense was a *crimen falsi*, courts have "look [ed] beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty." *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998). But "the proponent of the evidence must have *ready proof* demonstrating that the conviction required the factfinder to find, or the defendant to admit, a dishonest act in order for the witness to have been convicted." *United States v. Cunningham*, 638 F.2d 696, 699 (4th Cir. 1981) (emphasis added). The inquiry should only go so far as to look at an "indictment, a statement of admitted facts, a guilty plea, or jury instructions." *See* FED. RULE EVID. 609 advisory committee's notes.

With respect to theft crimes where the deceitful nature of the crime is not apparent from the statute or the face of the judgment, most courts require the proponent to show some element of active misrepresentation to establish "dishonesty" in the underlying conduct. *See, e.g., Payton*, 159 F.3d at 56 (witness's larceny conviction involved dishonesty because she had unlawfully received food stamps after falsely stating in a sworn application that she qualified for welfare); *United States v. Jones*, 554 Fed.Appx.460, 470 (6th Cir. 2014) ("Receiving and concealing a stolen motor vehicle is more like a crime of stealth such as theft than a crime of active misrepresentation such as forgery); *United States v. Whitman*, 665 F.2d 313, 320 (10th Cir. 1981) (grand larceny conviction stemming from a land fraud scheme was a crime of dishonesty because the larceny was committed by false pretenses rather than by stealth). By contrast, courts have generally not considered the mere act of taking another's property a crime of dishonesty. *See United States v. Washington*, 702 F.3d 886, 894 (6th Cir. 2014) (excluding conviction because the facts showed that the defendant stole services through stealth, "as opposed to misrepresentation or fraud.").

At the hearing on the motion to exclude evidence of Ms. Fenty's prior conviction, the Government failed to offer an indictment, a statement of admitted facts, or jury instructions that would show the factfinder had to find a dishonest act in order for her to be convicted. R. 22-26. Simply put, the Government failed to offer ready proof of active misrepresentation because none occurred. Ms. Fenty showed up at a crowded public space, and on a dare from a former friend, attempted to steal a bag. R. 53. She had no plan for what to do if things went wrong. R. 54. Once discovered, Ms. Fenty physically fought for the bag, creating a loud scene that resulted in her arrest. R. 53-54. To the extent that the Government argues that the conduct was deceptive because it involved choosing an unsuspecting victim, courts have rejected such reasoning. *See United States v. Estrada*, 430 F.3d 606, 614-15 (2d Cir. 2005). Indeed, if that were the case, nearly every crime would fall into the lower court's overly broad reading of this intentionally narrow rule.

In a final attempt to make their case, the Government argues that Ms. Fenty's petit larceny conviction must be admitted under Rule 609(a)(2) because her guilty plea transforms the crime here to a crime involving a dishonest act. But, as discussed at length above, the offense for which Ms. Fenty was convicted does not require an element of dishonesty, nor did the underlying facts constitute a "dishonest act." It follows that a guilty plea for the crime does not amount to "the defendant admit[ting] a dishonest act." Rather, Ms. Fenty merely admitted guilt of misdemeanor petit larceny. *See e.g., Granadoes-Coreas v. Nassau County*, 2022 WL 16575725 *7 (E.D.N.Y. 2022) (excluding a conviction for murder where the defendant plead guilty even where the defendant stated that he falsely lured the murder victim to the park on the false pretense of smoking marijuana with him).

C. *Admitting the conviction for petit larceny to impeach Ms. Fenty was not a harmless error.*

An error will be deemed harmless *only if* the Government proves beyond a reasonable doubt that it did not substantially influence the jury's verdict. *See United States v. Woods,* 440 F.3d 255, 257-58 (5th Cir. 2006) (emphasis added). The Government's burden is "arduous." *United States v. Garza,* 429 F.3d 165, 170 (5th Cir. 2005). As this Court recognized in *Michelson v. United States,* evidence of other crimes is strong medicine for juries to overcome. 335 U.S. 469, 475–76 (1948). This is especially true where evidence of a prior crime is circumstantially similar to the crime charged at trial. *See United States v. Seamster*, 568 F.2d 188, 190-91 (10th Cir. 1978).

Here, the admission of Ms. Fenty's prior conviction for petit larceny substantially influenced the jury's verdict. In the petit larceny scheme, Ms. Fenty acted upon insistence from a friend, as she claimed she did at trial. R. 53. Further, Ms. Fenty was motivated by a need for cash when she stole the victim's purse, as she was when unknowingly implicated in a drug scheme. R. 25. Put simply, the jury could not escape the clear comparison that Ms. Fenty was easily manipulated to commit a crime and was merely repeating that tendency. This inference was compounded by the fact that the Government's case against Ms. Fenty depended heavily—perhaps entirely—upon the jury's assessment of her credibility as a testifying defendant. *See United States v. Harper*, 527 F.3d 396, 408 (5th Cir. 2008). And, contrary to the Government's argument, the limiting instruction was inadequate to combat this prejudice. All practicing lawyers know the naive assumption that prejudicial effects can be overcome by a limiting instruction is an "unmitigated fiction." *See Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J. concurring). As the Fifth Circuit aptly noted, "if you throw a skunk into the jury box,

you can't instruct the jury not to smell it." *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962).

Based on the foregoing, the court below erred when it held that "a calculated act aimed at capitalizing on [a] victim's distraction" brings a petit larceny conviction within the scope of Rule 609(a)(2). R. 26. Because this was not a harmless error, this Court should reverse.

III. Voicemails are admissible under Federal Rule of Evidence 803(3) when they describe the declarant's then-existing state of mind.

This Court should reverse the Fourteenth Circuit Court of Appeals and hold that Ms. Fenty's statements fall squarely within the state of mind exception hearsay exception under Rule 803(3). The plain language of the rule only requires statements to describe the declarant's present or future "motive, intent, or plan" to fall under its protection. *Id.* The statements need not be contemporaneous with the event the statements describe. FED. R. EVID. 803(3). Both of Ms. Fenty's voicemails to Millwood satisfy this requirement and, therefore, should have been admitted at trial. Moreover, any question related to the trustworthiness of the voicemails is reserved for a jury. *United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988). But, even if this Court agrees with the lower court's incorrect reading of Rule 803(3), Ms. Fenty's first voicemail to Millwood should have nonetheless been admitted because it was recorded contemporaneously. Because these errors were not harmless, this Court should reverse.

A. The plain language of Federal Rule of Evidence 803(3) does not contain a contemporaneous requirement.

The court below erred by inserting a contemporaneous requirement into Rule 803(3). FED. R. EVID. 803(3). Rule 803(3) only requires that a statement describe the "then-existing mental state" of the declarant for that statement to fall under its exception to the general prohibition against hearsay. *Id*. The text of Rule 803(3) is plain in its meaning and contains no

hidden elements. Put simply, Rule 803(3) allows a party to introduce into evidence out of court statements made by the declarant that describe how or what the declarant was feeling at the time the statement was made. FED. R. EVID. 803(3). The *only* limitation included within the rule is a ban on "statement[s] of memory or belief to prove the fact remembered or believed." *Id.*; *See also Shepard v. United States*, 290 U.S. 96, 106 (1933).

Had the drafters of the Federal Rules of Evidence intended to include an element of contemporaneousness into Rule 803(3), they would have done so. For example, immediately preceding Rule 803(3) are the "Present Sense Impressions" and "Excited Utterances" exceptions to the prohibition against hearsay. FED. R. EVID. 803(1)-(2). These exceptions cover statements made during or immediately following a startling event and contain explicit temporal requirements for admission. *See* FED. R. EVID. 803(1) (requiring a statement be made "while or immediately after the declarant perceived" a particular event); *see also* FED. R. EVID. 803(2) (requiring a statement be made "while the declarant was under the stress of excitement" caused by an exciting event). Moreover, the advisory committee notes accompanying Rule 803(3) state that although the exception is considered a "specialized application" of Rule 803(1), it is "presented *separately* to enhance its usefulness and accessibility." *See* FED. R. EVID. 803(3) advisory committee's notes (emphasis added). Conspicuously absent from the notes to Rule 803(3) is any mention of timing, contemporaneousness, or spontaneity, leaving only the plain language of Rule 803(3) to govern admissibility. *Id.*

Federal circuit courts that have read contemporaneous requirements into Rule 803(3) are wrong. Nowhere within the text of the rule does there appear a requirement of contemporaneity or spontaneity. *See* FED. R. EVID. 803(3). Rather, the plain language used by Congress in authoring the rule makes clear that it should include any statements that describe the declarant's

then-existing state of mind. This Court must follow Congress' written words. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508 (1989) ("Our task in deciding this case … is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned."); *but see United States v. Reyes*, 239 F.3d 722 (5th Cir. 2001); *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir.1986); *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980). In fact, several circuit courts have correctly admitted statements concerning the "then existing mental state" of their declarants under Rule 803(3), regardless of the length of time between the event in question and the uttering of the statement. *See Wagner v. Maricopa County*, 747 F.3d 1048, 1053-54 (9th Cir. 2013); *United States v. Duran Samaniego*, 345 F.3d 1280, 1282 (11th Cir. 2003); *United States v. Joe*, 8 F.3d 1488, 1493 (10th Cir. 1993); *United States v. Cohen*, 631 F.3d 1223, 1225 (5th Cir. 1980); *United States v. Pheaster*, 544 F.2d 353, 379-80 (9th Cir. 1976).

Perhaps the most compelling evidence that the court below erred in its application of Rule 803(3) are the minutes from the April 2021 Advisory Committee on Evidence Rules Meeting. At that meeting, the drafters expressly rejected the notion that Rule 803(3) contains a spontaneity requirement. Advisory Committee on Evidence Rules, Minutes of the Meeting 25-26 (April 30, 2021). The Committee stated, "[t]he problem with courts requiring spontaneity [under Rule 803(3)] is that . . . the rule *as written* does not contain a provision for excluding," and stated further, "[a]ll that is required under Rule 803(3) is that the statement must be of a "then-existing" state of mind[.]" *Id*. at 26 (emphasis original). Most importantly, the Committee put to rest the notion that courts can unilaterally read their own requirements into the Federal Rules of Evidence, stating bluntly, "[c]ourts are not allowed, outside the rulemaking process, to impose textual limitations on hearsay exceptions." *Id.*

In the present case, both voicemails from Ms. Fenty to Millwood satisfied the requirements of Rule 803(3) as written, and should have been admitted. In the first voicemail, Ms. Fenty stated, in relevant part:

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

R. 68. The statements made by Ms. Fenty in the voicemail describe her state of mind *at the time the voicemail was recorded* – namely her confusion surrounding why her packages were unavailable for pickup – and thus conform to the plain language of Rule 803(3). Similarly, in the second voicemail, Ms. Fenty stated, in part:

> It's me again . . . They don't know what is going on with the packages . . . Angela, I'm really getting nervous. Why aren't you getting back to me? . . 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. 68. Again, the statements contained in the second voicemail describe Ms. Fenty's growing anxiety and concern *at the time the voicemail was recorded*, and satisfy Rule 803(3). The timing of the voicemails is of no consequence. R. 68. Instead, what matters is that both voicemails describe Ms. Fenty's state of mind at the time the phone calls were placed. Because no contemporaneous requirement is included within the plain language of Rule 803(3), the lower court erred when it excluded from evidence both voicemail recordings from Ms. Fenty to Millwood.

B. The lower court usurped the vital role of the jury by excluding Ms. Fenty's voicemails because the court deemed them untrustworthy.

Determinations of the trustworthiness or credibility of a statement that otherwise satisfies Rule 803(3) must be left to a jury. *United States v. DiMaria*, 727 F.2d 265, 271 (2nd Cir. 1984). Judges may not exclude otherwise admissible evidence simply because they personally do not find it, or the witness proffering it, believable. *Peak*, 856 F.2d at 834. That is because criminal juries, not judges, are charged with determining questions of fact, including the credibility of evidence. For a judge to independently determine a piece of admissible evidence is unbelievable, and subsequently exclude it from trial, would be "altogether atypical, extraordinary." *DiMaria*, 727 F.2d at 271-72 (citations omitted); *see also* U.S. CONST. AMEND. VI. (stating accused individuals will "enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall be committed.").

Moreover, the fact that Rule 803(3) does not authorize exclusion of doubtful state of mind statements does not mean the trial court can never consider lack of sincerity when deciding whether to admit such evidence. Rather, there are stand alone mechanisms in the Federal Rules of Evidence that protect against the harm of admitting misleading evidence. Specifically, Rule 403 works to exclude such evidence if, on balance, "its probative value is *substantially outweighed* by a danger of … misleading the jury." FED. R. EVID. 403 (emphasis added).

Here, regarding Ms. Fenty's voicemails, the trial judge unilaterally concluded that Ms. Fenty had "ample time to contemplate how to frame a response," which made it "much more likely that the statement [was] fabricated and self-serving." R. 48. Subsequently, the court barred the voicemails from being admitted into evidence. R. 52. Yet, this is precisely why accused individuals enjoy the right to trial by jury, for the question of believability of evidence cannot be left to a single individual to decide. *See United States v. Lawal*, 736 F.2d 5, 8 (2nd Cir. 1984)

(overturning the district court's decision to prevent the jury from hearing defendant's "self-serving statements."). If the court believed Ms. Fenty's statements were fabricated, it should have engaged in the Rule 403 balancing test to determine whether the voicemails' probative value was substantially outpaced by the risk that they might mislead the jury. FED. R. EVID. 403. Because the trial court failed to engage in such balancing, the voicemails should have been admitted because they satisfied the requirements of Rule 803(3). Any question regarding their self-serving nature or trustworthiness should have been left to a jury. In sum, the trial court's unilateral exclusion of the voicemails usurped the sacred role of the criminal jury by preventing it from hearing the evidence and determining its veracity, as prescribed by the Constitution of the United States of America. U.S. Const. amend. VI.

C. Even under the lower court's improper reading of Rule 803(3), Ms. Fenty's first voicemail should have been admitted because it was recorded contemporaneously.

Under the incorrect interpretation of Rule 803(3) applied by the court below, statements must be made contemporaneously with the events they describe for those statements to be admissible. It was under this fabricated requirement that the Fourteenth Circuit affirmed the ruling of the district court and prohibited both voicemails left by Ms. Fenty from being admitted into evidence. R. 69. However, even applying the lower court's improper version of Rule 803(3), Ms. Fenty's first voicemail should have been admitted because it was recorded contemporaneously.

In her first voicemail, Ms. Fenty indicated that she was still at the Joralemon Post Office, stating, "Angela, I *just got to* the Post Office." R. 40 (emphasis added). She goes on to state that, "None of the packages … *are here*." *Id* (emphasis added). These statements clearly demonstrate that Ms. Fenty left the voicemail while standing in the post office and observing an empty P.O.

Box. R. 40, 68. Yet, the court below relied on the fact that the second voicemail was recorded 45 minutes later as evidence that *neither* recording was contemporaneous, and thus should be excluded from evidence. R. 68-69. However, this contemporaneous requirement could only work to exclude the *second* voicemail. Therefore, even if this Court agrees with the lower court's incorrect reading of Rule 803(3), Ms. Fenty's first voicemail should have been admitted because it was recorded contemporaneously with the event it described.

D. Excluding Ms. Fenty's voicemails from evidence was not a harmless error.

As stated above, an error is not harmless when it affects a substantial right of the defendant. FED. R. CRIM. PRO. 52(A). This Court has stated that in order to determine the harmlessness of an error, the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *See also Neder v. United States*, 527 U.S. 1, 7 (1999).

Here, the district court's decision to prevent the jury from hearing Ms. Fenty's voicemails undoubtedly affected the jury's decision to convict her. The crime charged required the prosecution to prove an individual "*knowingly* and *intentionally* [possessed] . . . a Schedule II controlled substance." R. 1 (emphasis added). Ms. Fenty argued that she had no idea the packages sent to her contained drugs. R. 50-52. To prove this, Ms. Fenty attempted to admit into evidence two voicemail recordings under Rule 803(3) in which she stated her concern that she was tricked into the illegal opioid ring. R. 40. Had the jury been permitted to hear the voicemails, it would have been in a better position to judge Ms. Fenty's defense that she was an unwitting participant in the drug scheme. Because of this, it cannot be proven beyond a reasonable doubt that the court's decision to bar Ms. Fenty's voicemails did not affect the verdict in her case and, therefore, was not a harmless error. *See Chapman*, 386 U.S. at 24; FED. R. CRIM. PRO. 52(A).

Accordingly, this Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit affirming the exclusion of Ms. Fenty's voicemails.

CONCLUSION

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

Respectfully Submitted,
/s/ Team 31P
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