Team 13P - Original

No. 23-695

IN THE

SUPREME COURT OF THE UNITED STATES

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

Team 13P
Counsel for Petitioner

QUESTIONS PRESENTED

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISONS

The text of the relevant constitutional provision appears below.

The Fourth Amendment to the United States Constitution provides in relevant part:

> 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 relevant statutory provisions include Boerum Penal Codes §§ 155.25 and 155.45, which can be found on page three of the record.

STATEMENT OF THE CASE

I. Statement of Facts

Franny Fenty ("Fenty"), known by her *nome de plume*, Jocelyn Meyer ("Meyer"), published one of her first short stories, "Once More Fall," in the *Joralemon College Zine* in the fall of 2016. (R. 4.) Meyer then published another short story, "A Rose By Any Other Name" in the same magazine in the spring of 2017. (R. 4.) Fenty continued her literary pursuits under the alias of Meyer, writing manuscripts for five novels under this pseudonym. (R. 5.) In the fall of 2021, Meyer contacted Bridgewater Books to discuss a publishing contract for her thriller *The Twisted Violin*. (R. 5.) In December of 2021, Fenty began looking for new opportunities and was contacted by Angela Millwood ("Millwood"), an old high school friend, on LinkedIn. (R. 6, 46.) Millwood, who knew of Fenty's financial vulnerability, explained that she currently worked

at Glitzy Gallop Stables where "it broke her heart to watch the horses suffer in pain as they got older." (R. 43–44.) Millwood explained that she planned to help ease their pain by medicating them with the legal muscle relaxant, xylazine. (R. 44–45.) Because of her job at the stable, Millwood would not order the medicine herself and asked Fenty to order the xylazine instead. (R. 45.) Fenty was nervous, as she had not heard of xylazine before, but was assuaged by Millwood's reassurances that it would only be used to treat the horses. (R. 45–46.) Fenty then opened P.O. Box 9313 at the Joralemon Post Office under the name Meyer, the alias she had consistently been using since 2016. (R. 32, 54.) Fenty used this P.O. Box to receive both personal items addressed to Fenty herself, including face cream, as well as two packages of xylazine delivered on February 14, 2022, which were mailed from Holistic Horse Care and addressed to Meyer, on Millwood's behalf. (R. 12, 30.)

On February 12, 2022, Joralemon resident Liam Washburn died from a fentanyl overdose. (R. 29.) His body was discovered next to partially used syringes and an open package also addressed from Holistic Horse Care. (R. 29.) An autopsy revealed he died of fentanyl overdose and lab testing of the syringes indicated they contained a mixture of fentanyl and xylazine. (R. 29.) This incident led the Joralemon DEA office, led by Supervisory Special Agent Robert Raghavan ("Raghavan"), to heighten monitoring of the Joralemon Post Office and to put post office employees on high alert for suspicious packages connected with horse veterinary websites. (R. 30.) On February 14, 2022, the Post Office flagged two packages sent from Holistic Horse Care to a P.O. Box registered to Meyer. (R. 30–31.) Raghavan and Special Agent Harper proceeded to pick up the packages (R. 30.) The agents then obtained a search warrant and opened the packages to reveal a bottle labeled "Xylazine: For The Horses" in each one; upon testing, it was found that each bottle contained a mixture of 400 grams of xylazine and 200

grams of fentanyl. (R. 31–32.) That same day, Fenty arrived at the post office, only to find the packages were missing. (R. 40.) She proceeded to leave Millwood two concerned voicemails, both of which underscore her fear that Angela entrapped her into some form of illegal activity unknowingly. (R. 40.) However, Millwood did not answer or thereafter return the calls. (R. 40.)

The next day, the agents effectuated a controlled delivery at the post office, leaving a slip for Meyer in P.O. Box 9313 notifying her to pick up the Holistic Horse Care packages from the counter. (R. 32.) A woman, later identified as Fenty, arrived at the post office that day to pick up the packages. (R. 46.) Fenty was indicted and arrested later that same day. (R. 34.) Millwood was unreachable, as she fled to Jakarta on a one way ticket the day prior, the same day that the packages were seized and Fenty left her multiple concerning voicemails. (R. 35)

II. Procedural History

Fenty was formally indicted on February 15, 2022 for Possession with Intent to Distribute 400 Grams or More of Fentanyl under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). (R. 1.) Fenty filed a motion to suppress the contents of the sealed packages and the District Court denied the motion on August 25, 2022. (R. 10, 17.) Fenty also filed a motion in limine to exclude evidence of her prior petit larceny conviction to prevent her impeachment during trial. (R. 18.) When Fenty was nineteen, on a dare from a friend, she stole a woman's bag that contained $27 and some diapers. (R. 53–54.)[1] The District Court denied this motion, finding her prior conviction admissible under Federal Rule of Evidence 609(a)(2) as a crime of deceit. (R. 26.) During trial, defense counsel also sought to introduce two voicemail messages left by Fenty on Millwood's phone, arguing they spoke to Fenty's then-existing mental state. (R. 46–47.) The Court determined the recordings were inadmissible under Rule 803(3) because they lacked spontaneity.

[1] Additional details regarding certain facts pertinent to Fenty's prior petit larceny conviction are recited in the argument as appropriate and can be found in the Record on pages 19–26 and 52–54.

(R. 52.) Fenty was convicted on September 21, 2022 and sentenced to ten years in federal prison on November 10, 2022. (R. 65–66.)

Fenty then appealed her conviction and the Court of Appeals for the Fourteenth Circuit affirmed each of the trial court's conclusions, holding: (1) that Fenty did not have a reasonable expectation of privacy in the sealed packages because the packages were not addressed to her; (2) the exclusion of the voicemails was proper because the statements lacked spontaneity and were self-serving; (3) the admission of Fenty's petit larceny conviction was proper under Rule 609(a)(2) as a crime of deceit. (R. 67–69.) On December 14, 2023, this Court granted Fenty's writ of certiorari. (R. 74.)

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the Court of Appeals below and hold: (1) that Fenty had a legitimate expectation of privacy under the Fourth Amendment in sealed mailed addressed to her alias; (2) that voicemails statements offered to show Fenty's then-existing mental state should have been admitted under Rule 803(3); (3) that Fenty could not be impeached with her prior petit larceny conviction under Rule 609(a)(2).

First, this Court must endorse the "other indicia" approach to Fourth Amendment standing inquiries, which, regardless of whether an individual is the sender or addressee of sealed mail, grants protection when the individual can show other connections to the mail which lead society to recognize an expectation of privacy as reasonable. The "other indicia" test is: (1) a flexible case by case, rather than rigid and legalistic, approach which better aligns with the second step of the Fourth Amendment inquiry (asking whether a defendant's expectation of privacy is one that society is prepared to recognize as reasonable); (2) allows the court to consider the privacy right associated with the "important societal practice of using a pseudonym,

alias, or *nom de plume*;" and (3) evaluates Fourth Amendment standing independent of the nature of an individual's alleged conduct and after-the-fact justifications of otherwise illegal searches. In applying the "other indicia" test, it becomes obvious that Fenty's sufficiently established alias as Meyer, sole control over the packages and P.O. Box, separate personal use of the P.O. Box, and subjective anticipation of privacy, in totality clearly establish an expectation of privacy that society must be willing to recognize as reasonable.

Second, the voicemail statements should have been admissible under Rule 803(3) as demonstrating Fenty's then-existing mental state. The voicemail statements are vital to Fenty's defense, as they negate the mens rea elements required by the fentanyl charges under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). While some courts have read a spontaneity requirement into Rule 803(3) to limit against the admission of manufactured self-serving statements, other circuits have emphasized that "the likelihood that the declarant is misrepresenting [their] state of mind is not an additional qualification to the admissibility of state of mind hearsay exceptions." *United States v. Cardascia*, 951 F.2d 474, 487 (2d Cir. 1991). Questions of misrepresentation equate to questions of witness credibility, a determination clearly within the province of the jury, not the judge. Further, the text of Rule 803(3), when compared to other hearsay exceptions, shows a clear lack of indicators pointing to a spontaneity (a.k.a truthfulness) requirement. Finally, even if a court were to impose a spontaneity requirement, Fenty's voicemails would still be admissible. First, the event to which Fenty was responding, the *ongoing* interception of her packages, had not yet concluded, leaving no time for reflection to even begin. Second, there is no precedent for finding that 45 minutes (at a maximum) is enough time to formulate a plan to manufacture self-serving statements for litigation. Finally, the manufacturing of self-serving

statements is even more unlikely considering Fenty was unaware of law enforcement involvement at the time of the voicemails, in stark contrast to many 803(3) precedents.

Third, impeaching Fenty with her prior petit larceny conviction rested on an improper expansion of Rule 609(a)(2). Rule 609(a)(2) requires the court to admit a previous conviction 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). Given the lack of discretion afforded to the trial court, most courts understand that Rule 609(a)(2) was intended to narrowly define the class of admissible crimes and does not include simple theft. Allowing crimes of stealth, such as theft, to fall within the ambit of the rule would necessarily allow for the impeachment of defendants with almost any criminal conviction, since most crimes involve at least *some* element of deceit. Additionally, Fenty's conviction does not fall within the rule because she did not take active steps to deceive her victim, and crimes of dishonesty or false statement involve some element of active misrepresentation.

ARGUMENT

I. Standard of Review

A. Motion to suppress contents of sealed packages.

In reviewing a district court's denial of a motion to suppress, findings of fact will be reviewed for clear error and conclusions of law will be reviewed *de novo*. *See United States v. Weidul*, 325 F.3d 50, 51 (1st Cir. 2003). The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV. To determine if an individual has a valid basis for challenging a search, the individual bears the burden of showing a reasonable expectation of privacy in the property searched. *See United States v. Gray*, 491 F.3d 138, 144 (4th Cir. 2007) (citation omitted). Ultimately, a search is

deemed unreasonable if it infringes on "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984).

B. Motion in limine and admissibility of prior conviction.

A district court's evidentiary rulings, including the denial of a motion in limine, are typically reviewed for abuse of discretion. *See United States v. Collier,* 527 F.3d 695, 699 (8th Cir. 2008). A district court abuses its discretion when it "relies on clearly erroneous findings of fact, when it improperly applies the law, or when it employs an erroneous legal standard." *United States v. Gunter,* 551 F.3d 472, 483 (6th Cir. 2009). Moreover, reviewing courts will reverse a conviction if an improper evidentiary ruling has affected substantial rights or has had more than a slight effect on the verdict. *See United States v. Ballew,* 40 F.3d 936, 941 (8th Cir.1994).

II. Appellant has a reasonable expectation of privacy in the sealed mail addressed to Jocelyn Meyer, Appellant's alias.

A. Circuits are divided regarding whether an individual has an expectation of privacy when they were neither the sender nor addressee of the mailed items in question.

To determine whether an individual has a legitimate expectation of privacy, courts have come to apply a two-step inquiry. The first step asks whether "the individual, by [their] own conduct, has exhibited an actual (subjective) expectation of privacy." *Smith v. Maryland,* 442 U.S. 735, 740 (1979) (citations omitted). The second asks "whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* (citations omitted). There is no question that Fenty subjectively expected the contents of her packages from Holistic Horse Care to remain private, and used her alias in accord with this expectation. (R. 43.) Thus, the Court must focus its inquiry on whether Fenty's expectation of privacy in the sealed mail addressed to her alias is an expectation that society should recognize as reasonable.

It has long been held that mail is accorded full Fourth Amendment protection. *See United States v. Jacobsen,* 466 U.S. 109, 114 (1984). "Individuals do not surrender their expectation of

privacy in closed containers when they send them by mail or common carrier." *United States v. Villarreal*, 963 F.2d 770, 773–74 (5th Cir. 1992). Despite this, courts are split, both across and within circuits, on whether an individual should have a reasonable expectation of privacy in mail on which they are neither expressly the sender nor the addressee, particularly when that individual is using an alias.

Several circuit courts have adopted a categorical approach, holding that one does not have a reasonable expectation of privacy in mail where one is not the sender or recipient. *See e.g.*, *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988). Other circuit courts have adopted the "other indicia" test, which assesses whether there are any "other indicia or connections" between the defendant and the mailed item which might lead the court to find a defendant has a reasonable expectation of privacy despite being neither the sender or addressee. *United States v. Morta*, No. 1:21-CR-00024, 2022 WL 1447021, at *7 (D. Guam May 9, 2022) (discussing *United States v. Stokes*, 829 F.3d 47, 52 (1st Cir. 2016) and *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021)). Still, many circuit courts are split within these two positions. *Compare United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993) *and Koenig*, 856 F.2d at 846, *with United States v. Pierce*, 959 F.2d 1297, 1303 n.11 (5th Cir. 1992) *and United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003). Overall, the line of cases addressing an individual's reasonable expectation of privacy with respect to mail for which they are neither the sender nor recipient represent an unclear landscape of varying and inconsistent paths taken by the courts.

However, even in cases in which the defendant is neither the sender nor recipient, several courts have nonetheless established that "[i]ndividuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names." *Villarreal*, 963 F.2d at 774. These courts have distinguished that "there is a fundamental difference 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). Similarly, some courts have questioned whether the use of an alias should extend a privacy right "when the use of that alias was obviously part of [the defendant's] criminal scheme." *Daniel*, 982 F.2d at 149.

B. This Court should adopt the other indicia approach in assessing a defendant's privacy rights, and resultantly protect the reasonable expectation of privacy that one holds in mail addressed to their alias.

Courts most recently assessing the privacy expectations of individuals who are neither the sender nor addressee of mail have moved away from the categorical approach. In 2016 and 2021, the First and Fourth Circuits, respectively, adopted the "other indicia" approach. *See Stokes*, 829 F.3d at 52 (holding that the court was unwilling to recognize a privacy interest where defendant was not the sender or recipient "absent some showing by the defendant of a connection"); *Rose*, 3 F.4th at 728 (holding that "absent other indicia of ownership, possession, or control existing at the time of the search" privacy interests are presumptively weak); *see also United States v. Morta*, 2022 WL 1447021, at *8 (recently relying on the *Stokes* and *Rose* opinions in adopting the "other indicia" approach). This trajectory by the courts is underpinned by various policy arguments, which explain why, in-line with the second step of the Fourth Amendment standing inquiry, a privacy interest supported by the "other indicia" approach is one that society should be prepared to recognize as reasonable.

First, the categorical approach is "a legalistic approach that focuses on one line of a package (the sender or addressee) to the exclusion of the line directly underneath (the physical address)." *Morta*, 2022 WL 1447021, at *8. In comparison, the "other indicia" test allows courts to approach Fourth Amendment standing with a much more fact-intensive inquiry that accounts for the circumstances at hand. Such a flexible approach more closely fits with the Fourth

Amendment inquiry, evaluating whether society is prepared to recognize an individual's subjective expectation of privacy on a case by case basis. For example, if someone received a piece of mail in which the letter inside was addressed to them but the envelope merely erred in excluding their name, the categorical approach would find the individual had no expectation of privacy, while the more supple "other indicia" approach would appropriately find otherwise.

Second, the "other indicia" approach allows the courts to "maintain the important societal practice of using a pseudonym, alias, or *nom de plume*." *Id.* Under a categorical approach, individuals would have to choose between using an alias and losing their Fourth Amendment rights, or not using an alias in order to maintain their Fourth Amendment rights and subsequently ironically relinquishing their privacy interest from the public and in their mail all together. *Id*; *see also Rose*, 3. F.4th at 739 (Gregory, C.J. dissenting). However, "[t]here is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package." *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003). There are many logical reasons why one might want to use an alias to send or receive mail. "Authors and journalists… employ a pseudonym in their professional life…. a celebrity may wish to avoid harassment or intrusion; a government official may have security concerns in using her real name… a business executive in merger talks might worry about potential investors misusing the information gained through the mail…" *Id.* "[T]hus the expectation of privacy for a person using an alias in sending or receiving mail is one that society is prepared to recognize as reasonable." *Id*. The Supreme Court has held that an author's decision to remain anonymous "is not a sufficient reason to exclude literary works or political advocacy from the protections of the First Amendment." *Id.* at 458 (discussing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–43, (1995)). If anonymity is afforded protection under one

constitutional amendment, the courts and society should be even more apt to extend such a protection under the Fourth Amendment as well.

The "other indicia" test would allow for a practical approach while not opening the floodgates to claims of Fourth Amendment standing from individuals with no relation to mailed items. First, even if a court were to adopt the "other indicia" test, the burden of proof on showing a reasonable expectation of privacy in the property searched would still remain with the defendant. *See United States v. Gray*, 491 F.3d 138, 144 (4th Cir. 2007). Second, while the "other indicia" test's flexible assessment of various factors would not strip away important Fourth Amendment protections, it also has a legitimate stopping point.[2] As compared to a theory that allows individuals to assert privacy rights in packages addressed to any third party, "other indicia" can limit the reach to only well established aliases. *See United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984) (articulating worries about a theory that might "lack[ ] any principled stopping point" and allow privacy claims to advance along long chains of distribution). Further, the "other indicia" test would not go so far as allowing privacy protections when an individual uses a stolen identity or is involved in fraudulent activity. *See Johnson*, 584 F.3d at 1002 (finding "it is not necessarily illegal to use a pseudonym to receive mail unless fraud or a stolen identification is involved"); *see also Pierce*, 959 F.2d at 1303 n.11 (distinguishing between fictitious names, like aliases, and alter egos, which may involve use of someone else's identity). Overall, the "other indicia" approach not only allows the courts to "maintain an established societal practice, but simultaneously afford[s] citizens privacy from the government and from the public." *Morta*, 2022 WL 1447021, at *9.

[2] The various factors to be assessed include "ownership, possession and/or control; historical use of the property searched or the thing seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case." *Rose*, 3 F.4th at 727–28.

Finally, the "other indicia" approach evaluates an individual's Fourth Amendment right to privacy independent of the nature of the alleged conduct. Some courts have questioned whether defendants should have Fourth Amendment standing "when the use of [their] alias was obviously part of [a] criminal scheme." *Daniel*, 982 F.2d at 149. However, "[p]rivacy expectations do not hinge on the nature of [the] defendant's activities—innocent or criminal." *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997) (in fact, "many Fourth Amendment issues arise precisely because the defendants were engaged in illegal activity on the premises for which they claim privacy interests."). If the courts allowed the illegal nature of a defendant's conduct to dictate their corresponding Fourth Amendment privacy right, it would both materially weaken an individual's rights and allow police to justify unconstitutional searches that revealed illegal activity after the fact. Were the Fourth Amendment to allow for post-hoc justifications, "then the police could enter private homes without warrants, and if they find drugs, justify the search by citing the rule that society is not prepared to accept as reasonable an expectation of privacy in crack cocaine kept in private homes." *Pitts*, 322 F.3d at 458–59. In contrast, "if no narcotics are found…the owner of the home would be able to bring a civil lawsuit for nominal damages for the technical violation of privacy rights." *Id.* at 459. The Framers could not have intended such a fundamental constitutional protection to hold an escape hatch for ex post justifications.

C. Applying the "other indicia" test to the case at hand, Fenty maintains a legitimate and expectation of privacy that society should be prepared to recognize as reasonable.

In applying the "other indicia" test, it is evident that the Fourteenth Circuit erred in finding that Fenty did not have a reasonable expectation of privacy in the packages "given her use of an alias" and "because the packages were not addressed to [Fenty]." (R. 67.) As the Fourteenth Circuit indicated, "[t]here is no reasonable expectation of privacy in packages that are not addressed to a defendant '*absent other indicia of ownership, possession, or control of the*

package.'" (R. 67 (citing *Rose*, 3. F.4th at 728) (emphasis added).). However, here there are *many* "other indicia" present which together reveal Fenty's reasonable expectation of privacy.

Other indicia factors include: "ownership, possession and/or control; historical use of the property searched or the thing seized; the ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts…" *Rose*, 3 F.4th at 727–28. Fenty opened a P.O. Box with the Joralemon Post Office in January 2022 under her alias Meyer, and has maintained sole control and regulated access of the P.O. Box ever since. (R. 54.) Fenty's "use of the property searched" was not only to receive the packages from Holistic Horse Care addressed to Meyer, but also to receive personal items addressed to Fenty, such as face cream. (R. 38.) Subjectively, Fenty anticipated an expectation of privacy on all sealed mail sent to her P.O. Box "from the moment she paid for their contents and arranged for their shipment," and used her alias for the very purpose of preserving this privacy. (R. 12, 43.)

Fenty maintained a reasonable expectation of privacy for any package which she ordered to her P.O. Box, whether the addressee of that package read Franny Fenty or Jocelyn Meyer. Fenty used her alias, Meyer, throughout 2016-2017 to publish short stories while attending Joralemon College. (R. 4.) In late 2021, Fenty reached out to publishers regarding five novels, each of which she had written under Meyer, even using the email jocelynmeyer@gmail.com. (R. 5, 42.) Just a few months later, in January 2022, Fenty opened a P.O. Box under her alias and began to receive packages under said alias. (R. 54.) While the government attempts to paint Fenty's use of her alias as intermittent and aged, she has instead consistently and continuously publicly used her alias for the last six years. It would make little sense for a writer attempting to publish books under an alias to also plan to perpetrate crimes

under it, as this would sully its good name. Further, as noted *supra*, there is nothing wrong with a desire to remain anonymous when receiving a package. In fact, there are many logical reasons from avoiding harassment to security concerns that make the practice one society condones. *Pitts*, 322 F.3d at 459. It seems at odds to allow the Government to charge Fenty with an alleged crime addressed to her alias, and yet not recognize her privacy interest in mail addressed to that same alias. Thus, evaluating the totality of the circumstances, as prescribed by the "other indicia" test, indicates that Fenty's use of her sufficient established alias, regulated and sole control of her P.O. Box, historical use of her P.O. Box to receive personal items, and subjective anticipation of privacy together show adequate ownership, possession, and control to manifest a reasonable privacy interest.

Comparing Fenty's circumstances to the other cases which similarly evaluated an individual's Fourth Amendment standing with respect to sealed mail for which they were neither the sender nor addressee under the "other indicia" approach reveals an even stronger case for Fenty's privacy interest. While a large portion of the case law examines defendants who used a third party name to receive packages for which they asserted Fourth Amendment rights, Fenty used her own established alias to receive the packages in question. *See Rose*, 3 F.4th at 729 (noting that "the packages were addressed to a deceased individual at a residence lacking any established connection to [the defendant]"); *Givens*, 733 F.2d at 341 (finding that "[d]efendants here are claiming a privacy interest in the contents of a package addressed neither to them nor to some entity, real or fictitious, which is their alter ego, but to actual third parties" and "[t]o overcome this obstacle, [defendants] argue that a privacy interest arises from their status as intended recipients"); *Stokes*, 829 F.3d at 49 (noting that each fraudulent invoice received by defendant was addressed to legitimate trade associations, but that defendant was listed neither as

recipient not sender). Fenty is not claiming to be the "intended recipient" through some third party, she is instead the actual recipient via her own well established alias.

Second, while some defendants in this line of cases have been shown to only use the relevant address to commit the alleged crimes, Fenty utilized her P.O. Box for personal needs as well. *See United States v. Lewis*, 738 F.2d 916, 919 n.2 (8th Cir. 1984) (noting that "a mailbox… used *only* to receive fraudulently obtained mailings does not merit an expectation of privacy that society is prepared to recognize as reasonable"). Fenty herself noted that she did not open this P.O. Box to cover up criminal activity, but rather just for privacy, a perfectly acceptable and reasonable societal interest. (R. 55.) Finally, many defendants in Fourth Amendment cases fail to shoulder their burden of conveying that society should recognize their reasonable expectation of privacy in the property searched. *See Rose*, 3 F.4th at 730 (noting that "[t]he record contains no evidence that anyone recognized [defendant] by the name Ronald West, nor did any evidence show that [defendant] used the name Ronald West regularly under different circumstances."); *Stokes*, 829 F.3d at 53 (finding that defendant "provide[d] little support for his contention that an address alone can create a reasonable expectation of privacy in a parcel."). Fenty, however, has put forward a variety of evidence that demonstrates her reasonable expectation of privacy, including sufficiently establishing both her personal use of the mailbox and that she is in fact one and the same with her well established alias, Jocelyn Meyer.

III. Appellant's recorded voicemail statements can be offered to show then-existing mental state under hearsay exception Rule 803(3).

Rule 803(3) allows for the admission of out-of-court statements regarding a declarant's then-existing mental, emotional, or physical condition as evidence of the declarant's state of mind at the time the statement was made. Fed. R. Evid. 803(3). The rule, in full, reads:

> "A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily

> health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."

Fed. R. Evid. 803(3). State of mind statements "are generally admissible only when state of mind is in issue or when it tends to prove the doing of the act intended." *United States v. Peak,* 856 F.2d 825, 833 (7th Cir. 1988).

Pursuant to 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi), the charges against Fenty require proving that "the defendant … did knowingly and intentionally possess with the intent to distribute 400 grams or more of a mixture and substance containing… fentanyl." 21 U.S.C. § 841(a)(1); 21 U.S.C. § (b)(1)(A)(vi). The voicemails relay messages left by a confused Fenty on Millwood's phone as she learns that the xylazine packages have been intercepted and are not in her P.O. Box as expected. (R. 39–40.) The recordings are a vital piece of Fenty's defense, further revealing that Fenty was merely helping her friend, Millwood, manage the pain of older horses at the stable where she worked and was unaware that the xylazine purchased was laced with fentanyl. (R. 40.) Thus, the statements are offered "to show that [Fenty] lacked the requisite state of mind for conviction" as permitted under Rule 803(3). *Peak,* 865 F.2d at 833.

A. Rule 803(3) does not include a spontaneity requirement.

i. Rule 803(3) is a categorical rule that requires only contemporaneity and relevance to state of mind.

All Rule 803 exceptions, including Rule 803(3), are considered to have "circumstantial guarantees of trustworthiness" which make said statements reliable, despite their out-of-court nature. Fed. R. Evid. 803 advisory committee notes. The reliability of Rule 803(3) statements stem from "the contemporaneity of the statement[s] and the unlikelihood of deliberate or conscious misrepresentation." *United States v. Cardascia,* 951 F.2d 474, 487 (2d Cir. 1991). As written, however, Rule 803(3) requires only that statements be made contemporaneously with the event at issue and reflect a declarant's then-existing feelings or conditions. Fed. R. Evid. 803(3).

Despite the text, several circuit courts have read in an extraneous "spontaneity requirement," holding that "it must be shown that the declarant had no chance to reflect - that is, no time to fabricate or to misrepresent [their] thoughts." *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). A spontaneity requirement is meant to protect against the admission of manufactured self-serving statements as "[t]he more time that elapses between the declaration and the period about which the declarant is commenting, the less reliable is his statement." *United States v. Ponticelli*, 622 F. 2d 985, 991 (9th Cir. 1980); *see also United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (justifying the exclusion of statements which due to a lack of spontaneity the court found "more self-serving than they were candid.").

While a spontaneity rule might increase the reliability of statements admitted under 803(3), it is plainly not required by the text. Several circuit courts have held that "the likelihood that the declarant is misrepresenting [their] state of mind is not an additional qualification to the admissibility of state of mind hearsay exceptions." *Cardascia*, 951 F.2d. at 487; *see also Peak*, 856 F.2d at 834. Hearsay exceptions are categorical rules which leave no room for credibility determinations. *United States v. DiMaria*, 727 F.2d 265, 272 (2d Cir. 1984) (holding that "if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of credibility by the judge"). Said otherwise, any "relevant declarations which fall within the parameters of Rule 803(3) are categorically admissible, even if they are self-serving and made under circumstances which undermine their trustworthiness." *United States v. Lawal*, 736 F.2d 5, 8 (2d Cir. 1984).

ii. A spontaneity requirement is at its heart a credibility requirement.

The key concern of courts who require spontaneity is the declarant's opportunity to reflect and thereafter fabricate a self-serving statement. Inherent in assessing whether a statement has been fabricated, is assessing whether the declarant is a credible witness. But a

credibility determination by the court would be an "intrusion into the jury's province." *Cardascia,* 951 F.2d at 487. "[T]ruth or falsity [is] for the jury to determine," not the court. *DiMaria*, 727 F.2d at 271. Rule 803(3) allows statements which may indeed have questionable integrity to be admitted so long as the statement meets the rule's other requirements, as "the self-serving nature of a statement is considered when the jury weighs the evidence at the conclusion of the trial." *Cardascia,* 951 F.2d at 487; *see also Lawal,* 736 F.2d at 8 (noting that credibility determinations "goes only to [a statement's] weight.)

The Seventh Circuit, two years after reading in a spontaneity requirement to Rule 803(3) in *Jackson,* as noted *supra*, contradictorily went on to hold that credibility determinations are not within the purview of the court. *Peak*, 856 F.2d at 834 (citing *DiMaria*, 727 F.2d at 272). In *Peak*, the government argued that the lower court properly excluded a statement from being admitted under the state of mind exception to the hearsay rule because the statement was not trustworthy. *Id.* However the court noted that this "argument [was] based on the impression that [the witness] was not a credible witness rather than on the degree of reliability inherent in the statement." *Id.* The Seventh Circuit went on to hold that it was an error to exclude said statement because "the district court…**does not have discretion to exclude testimony because the judge does not believe the witness.**" *Id.* (emphasis added). A judge assessing whether or not a statement was fabricated, as the spontaneity requirement obliges, is tantamount to a judge assessing whether or not they believe the witness. Such a rule would violate the separation in duties of judge and jury that is so fundamental to the United States justice system.

iii. Rule 803(3) lacks further indicators of a spontaneity requirement.

Rule 803(3) is a specialized application of the 803(1) present sense impression and 803(2) excited utterance exceptions. *Cardascia*, 951 F.2d at 487. However, each of 803(1) and 803(2) includes text that specifically speaks to instantaneousness associated with an event. Rule

803(1), Present Sense Impressions, requires the statement be "made *while or immediately after* the declarant perceived it" and Rule 803(2), Excited Utterance, requires the statement be "made *while the declarant was under the stress of excitement* that caused it." Fed. R. Evid. 803(1); 803(2) (emphasis added). The language of Rule 803(3) lacks this strong call for immediacy and merely requires the state of mind be "then-existing." Further, the advisory committee notes that for 803(1) and 803(2), "[s]pontaniety is the key factor in each instance," while making no such statement with respect to 803(3). Fed. R. Evid. advisory committee notes 803(1)-(3).

Further, while in general hearsay exceptions are categorical rules which do not allow for credibility determinations, the rules do explicitly include a few exceptions in which the court is permitted to assess trustworthiness. Rules 803(6) Records of Regularly Conducted Activity, 803(7) Absence of a Record of Regularly Conducted Activity, and 803(8) Public Records, all subclauses of the very same Rule as 803(3), include language which permits the opponent of a statement to show "that the possible source of the information or other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(6)-(8). Rule 807, the Residual Exception, similarly specifically requires that statements are "supported by sufficient guarantees of trustworthiness." Fed. R. Evid. 807. Subject to these few notable deviations, hearsay exceptions categorically do not require findings of credibility. *See DiMaria*, 727 F.2d at 272 ("[I]f a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the 'catch-all' exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6)."[3] As Rule 803(3) does not include an explicit "trustworthiness clause," this Court should not require any differently.

[3] *DiMaria* was decided in 1984, before the amendment replacing Rules 803(24) and 804(b)(5) with Rule 807.

If Congress and the Supreme Court wanted to update Rule 803(3) to either have language compelling spontaneity, rather than just contemporaneity, or to add a "trustworthiness clause" that allows for a credibility assessment as do a few notable hearsay exceptions, they could. However, despite twenty plus years of dispute on this topic, no changes have been made to Rule 803(3). In fact the Supreme Court has even denied certiorari "in a case raising the issue whether Rule 803(3) authorizes the trial judge to exclude state of mind statements that are doubtful or insincere." Daniel J. Capra & Jessica Berch, *Evidence Circuit Splits, and What to Do About Them*, 56 U.C. DAVIS L. REV. 127, 163 (2022) (discussing *United States v. Cianci*, 378 F.3d 71, 106 (1st Cir. 2004), cert. denied 546 U.S. 935 (2005)).

For all of these reasons, this Court should not read in a "spontaneity requirement" to Rule 803(3). The Fourteenth Circuit correctly found that the voicemail recordings were both "contemporaneous with the events that Defendant seeks to prove, namely that she was unaware of why the packages were being intercepted" and "relevant because they call into question Defendant's awareness of an illicit drug scheme." (R. 68–69.) Rule 803(3) requires no more. Because of the categorical text of Rule 803(3), precedent in multiple circuit courts discussing the fundamental role of the judge, and the language of Rule 803(3) as compared to other hearsay exceptions, this Court need not go any further, and erroneously find, as the Fourteenth Circuit did, that the voicemail recordings are "self-serving statements that may mislead the finders of fact." (R. 69.) Trustworthiness decisions rest with the jury alone, subject to a contra indication from Congress or the Supreme Court.

B. Even with an additional spontaneity requirement, Fenty's voicemail recording would still qualify for an 803(3) hearsay exception.

While the Court should not read in an extraneous spontaneity requirement that assesses witness credibility to 803(3), even if they were to, the voicemail recordings of Fenty's calls to

Millwood should still qualify under 803(3). If "[t]he more time that elapses between the declaration and the period about which the declarant is commenting, the less reliable is [their] statement," then any assessment of reliability would require first deciding the duration of the so-called "***period about which the declarant is commenting***." *Ponticelli,* 622 F. 2d at 991 (emphasis added). According to the Fourteenth Circuit, the period or event to which Fenty must be contemporaneously and spontaneously responding is the interception of the xylazine packages, and the state of mind is Fenty's alleged lack of awareness as to the illicit drug scheme (or lack of intent to participate therein). (R. 69.) However, at the time of the recorded voicemails, this period on which Fenty is commenting has not concluded. Over the course of the phone calls, the packages remained intercepted, and Fenty's confusion was no less pertinent.

Reflection (or lack of spontaneity) requires an event first end, but Fenty at the time of these voicemails is very much still living through the event and has not yet had time to contemplate. Said otherwise, her state of mind during the phone calls remains "then-existing." In fact, in the second voicemail Fenty herself says "I talked to the postal workers. They don't know what is going on with the packages," indicating that during both phone calls Fenty is without possession of her packages and expressing anxiety regarding the ongoing interception of said packages. Fenty is not making "self-serving declarations about a past attitude or state of mind," which are not permissible per 803(3). *United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977), cert. denied, 434 U.S. 1037 (1978). Rather, Fenty is making "manifestations of [her] present state of mind, [her] immediate reaction" to the ongoing event, which is permissible under 803(3)). *Id.* At the very minimum, the Court should differentiate between the initial call made immediately after Fenty found her packages were not in her P.O. Box as expected, and the second call, made merely forty-five minutes later after speaking with the postal workers. There

is no question that the initial call was made without time for reflection, as Fenty had not even taken the time to inquire with the staff at the post office regarding the packages, let alone predict a future litigation and manufacture a plan to fabricate self-serving statements. (R. 40.)

Moreover, Fenty's case is distinguishable from all of the circuit court precedent in which a spontaneity requirement was read into Rule 803(3) and used to exclude evidence. In *Jackson*, "the defendants' statements were made ***two years*** after the [alleged crime] ***had ended***" giving the defendants "***two years*** to reflect upon their actions and potentially an incentive to misrepresent the truth" in the statements at issue. 780 F.2d at 1315 (emphasis added). In *Reyes*, the court found that the "duration between the recorded conversation [May 5th] and [the defendant]'s last criminal act (February 20th) is large enough for the district court to rightly conclude that the remarks had little or no probative value with respect to the [defendant]'s then-existing mental estate." 239 F.3d at 743. Even if the Court finds the event Fenty was commenting on had ended just before the initial voicemail, there is no precedent for holding that forty-five minutes, at a maximum (given the first call was placed even sooner), is long enough to conclude that Fenty's statements are untrustworthy. Forty-five minutes since an alleged crime is incomparable to the two years or two-and-half months of reflection as seen in *Jackson* and *Reyes*.

Further, in *Reyes*, the defendant, at the time of making the statements in question, had already been confronted by law enforcement. *Id*. The court noted that "[t]he likelihood that the conversation was being monitored or recorded makes it probable that Reyes's recorded remarks were more self-serving than they were candid, and therefore their probative value is greatly diminished." *Id.* In *Ponticelli*, the court noted that the statements in question "came after [defendant's] arrest; thus, he was aware that he was under investigation and that anything he said could be used against him." 622 F.2d at 992. Further, the defendant "made the statement while

consulting an attorney…. [Which] implies that the defendant was considering the legal significance of his declarations at the time he made them." *Id.* Fenty, on the other hand, was unaware of any law enforcement involvement at the time of the voicemail recordings. She places these calls in a confused state as she learns that her packages were not in her P.O. Box as expected and that the postal workers have no additional information. (R. 40, 46.)

If anything, Fenty's circumstances are most similar to those in *Lawal*. In *Lawal*, the defendant was similarly charged with an intent to distribute narcotics and countered that he did not know that the packages he carried contained narcotics. *Lawal*, 736 F.2d at 7. The Second Circuit found that the lower court erred in not allowing the defendant's statement made shortly after being detained upon entering the United States which showed that he "appeared to be, or perhaps said he was, angry at the person who had given him the packages when it was suggested to him they might contain narcotics" to be admitted pursuant to 803(3). *Id.* at 9.[4] The *Lawal* Court specifically noted that "circumstantial proof can be particularly important in cases in which the government relies on the presumption of guilty knowledge arising from a defendant's possession of the fruits of a crime recently after its commission." *Id.* (citing *DiMaria*, 727 F.2d at 272). These circumstances, which led the *Lawal* court to find that defendant's statements should have been admissible, are extremely analogous to those of Fenty's, in which the government similarly relied on her possession of the xylazine packages to prove intent, despite the alternative and plausible defense negating intent which her 803(3) statements support.

C. Fenty's voicemail recordings remain subject to 403 balancing.

Even after being admissible pursuant to hearsay exception 803(3), Fenty's voicemail recordings would be subject to Rule 403 balancing on remand to consider whether the probative

[4] However, the court did go on to find that exclusion of this evidence was harmless error. *Lawal*, 736 F.2d at 9.

value of the voicemail statements is substantially outweighed by any prejudicial effect on the jury. Fed. R. Evid. 403; *United States v. Miller*, 874 F.2d 1255, 1265 (9th Cir. 1989) ("[I]t was within the trial court's discretion to conclude that whatever additional probative value [the statement in question] may have had was outweighed by the danger that the jury would be exposed to a statement that, if considered for its content, would be inadmissible hearsay"). However, while 403 would give a judge the discretion to weigh the probative value of the statement against the risk of prejudice, it still does not give the judge the power to consider the defendant's trustworthiness or reliability.

In applying 403, the probative value of the voicemails clearly outweigh any risk of prejudice. The voicemails occurred contemporaneously with the event in question, are consistent with Fenty's testimony, and are one Fenty's main forms of proving her defense. Not only is the probative value of the voicemail recordings high, but given that the only other individual available to corroborate has fled the country, a lack of alternative evidence makes submitting the voice recordings that much more vital, even in light of any prejudice they may (but don't) carry. *See Old Chief v. United States*, 519 U.S. 172, 183 (1997) (noting that judges can "reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point."). Finally, there is a very low risk that the jury would be confused by the 803(3) statements or read them for their truth, particularly if given a limiting instruction on how to consider them in order to infer Fenty's state of mind.

D. <u>The exclusion of Fenty's voicemail recordings was not harmless error.</u>

The District Court's error in excluding Fenty's statement was far from "harmless." An error is deemed harmless when "it is highly probable that the error did not contribute to the verdict." *Lawal*, 736 F.2d at 9 (citations omitted). However, the Court must be "particularly reluctant to deem error harmless where the error precludes or impairs the presentation of an

accused's sole means of defense." *United States v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984) (citations omitted). These exact circumstances are at issue here. The voicemail recordings are a vital component of Fenty's sole defense: that she lacked the requisite mental state for the crime for which she has been accused. Further, the voicemail recordings were not merely "cumulative to and corroborative of [existing] testimony." *Partyka*, 561 F.2d at 125. Rather, given the disappearance of the only other individual involved in placing the xylazine orders, these voicemails recordings are a crucial element of evidence in support of Fenty's defense. All in all, "[w]hile the jury might very well have rejected [Fenty]'s statements … as untrustworthy, we 'cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the record.'" *Harris*, 733 F.2d at 1005 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

IV. The trial court should not have admitted Appellant's petit larceny conviction under Rule 609(a)(2).

Rule 609(a)(2), which applies when a party seeks to impeach a witness with a prior criminal conviction, states that "for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Fed. R. Evid. 609(a)(2). The court below held that Defendant's impeachment with evidence of her prior conviction for petit larceny was proper under Rule 609(a)(2). (R. 65.) However, this Court should reverse the Fourteenth Circuit because Rule 609(a)(2) does not allow for the categorical admission of theft based convictions and Fenty's conviction for petit larceny was not committed with any element of deceit.

A. Theft based convictions are not categorically admissible as crimes of dishonesty or deceit.

Rule 609(a)(2) does not explicitly define what crimes fall under the rule, only that they must include a dishonest act or a false statement. *See* Fed. R. Evid. 609(a)(2). Consequently, some courts have held, without in-depth factual analysis or further explanation, that theft is a crime of deceit. *See, e.g., United States v. Gunter*, 551 F.3d 472, 483 (6th Cir. 2009); *United States v. Mixon*, 185 F.3d 875 (Table) (10th Cir. 1999) (unpublished opinion). However, most courts understand that the drafters of the rule intended "a more nuanced, less inclusive approach," and find that theft-based convictions are not automatically admissible under Rule 609(a)(2)." Daniel J. Capra & Jessica Berch, *It's A Code: Amending the Federal Rules of Evidence to Achieve Uniform Results*, 58 WAKE FOREST L. REV. 549, 556 (2023).[5] These courts look beyond the textual ambiguity of the rule and analyze the rule's legislative history and policy underpinnings that demonstrate a clear distinction between *crimen falsi* and other crimes. *See* Capra & Berch, *supra*, at 556.

For example, there was considerable debate in Congress over the intended meaning of "dishonesty or false statement" in Rule 609(a)(2), with Congress settling on a narrow interpretation of the terms. *See United States v. Papia*, 560 F.2d 827, 846 (7th Cir. 1977). The conference committee report states that by the phrase "dishonesty and false statement" the committee meant crimes such as "perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense" or any other crime "in the nature of crimen falsi, the

[5] The following circuits find theft based convictions are not automatically admissible under Rule 609(a)(2): *United States v. Amaechi*, 991 F.2d 374, 378 (7th Cir. 1993); *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir.1982); *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir.1977), *certiorari denied*, 434 U.S. 867, 98 S.Ct. 204, 54 L.Ed.2d 143; *Government of Virgin Islands v. Testamark*, 528 F.2d 742, 743 (3d Cir.1976); *United States v. Ashley*, 569 F.2d 975, 979 (5th Cir.1978), *certiorari denied*, 439 U.S. 853, 99 S.Ct. 163, 58 L.Ed.2d 159; *McHenry v. Chadwick*, 896 F.2d 184, 188 (6th Cir.1990); *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir.1984); *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir.1977); *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir.1990); *United States v. Fearwell*, 595 F.2d 771, 776 (D.C.Cir.1978).

commission of which involves some element of deceit, untruthfulness, or falsification" that bears on "the accused's propensity to testify truthfully." *Id.* (citation omitted). While the government may argue that crimes of theft fall under "any other crimes in the nature of *crimen falsi*," application of the contextual canon *ejusdem generis* to "any other crime" implies that this language only applies to crime like perjury, embezzlement, or fraud that require an explicit material misrepresentation or violation of fiduciary duty. *See generally,* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012) (ejusdem generis signifies "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned").

Furthermore, the definition of *crimen falsi* speaks to more than simple theft. In its "most limited technical sense" *crimen falsi* refers "only to crimes of fraud and deceit that adversely affect the administration of justice." *Papia*, 560 at 846 n.12 (7th Cir. 1977) (citing *United States v. Smith*, 551 F.2d 348, 362–63 & n.26 (D.C. Cir. 1976)). However, it has also been used to refer to any crime perpetrated by means of fraud or deceit. *Id.* at 846 n.12 (citing *United States v. Dixon*, 547 F.2d 1079, 1083 n.3 (9th Cir. 1976)). Because the crime of theft was not clearly enumerated in the rule and committee notes, and does not fall within the ambit of *crimen falsi*, one can infer that Congress intended the term "dishonesty" in 609(a)(2) to mean "more than a man's propensity to steal what does not belong to him." *Id.* at 846.

In addition to the text and legislative history of the rule, policy necessarily justifies denying the categorical admission of theft based convictions. Congress emphasized that Rule 609(a)(2) was meant to refer to convictions that are "peculiarly probative of credibility," the commission of which involves "some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *United States v. Hayes*, 553 F.2d 824, 827 (2d

Cir. 1977). Rule 609(a)(2) is thus restricted to convictions that bear directly on the likelihood that the defendant will testify truthfully and not on whether the defendant has a propensity to commit crimes. *Id*. Crimes of simple theft do not fall within this ambit, even though they involve stealth, because they are not "characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir.1984) (citing *United States v. Smith*, 551 F.2d 348, 363 (D.C.Cir.1976)). Simply stated by the Ninth Circuit in *United States v. Ortega*, crimes like theft, "bad though they are, do not carry with them a tinge of falsification" that allows them to fall within 609(a)(2). 561 F.2d 803, 806 (9th Cir. 1977). The court further highlighted that "human experience" does not justify inferring that a person will perjure themselves because of an earlier shoplifting conviction, as this conviction does not speak to testimonial dishonesty. *Id.* Therefore, given the low probative value that simple theft convictions carry in determining whether a witness will testify truthfully, they should not be categorically admissible.

B. Rule 609(a)(2) should be interpreted narrowly.

Expanding the scope of Rule 609(a)(2) to admit all crimes that include some deceitful behavior, rather than just those involving dishonest acts or of false statements, would necessarily allow for impeachment with almost any past criminal conviction, since most crimes involve at least *some* element of deceit. As Professor Daniel Capra–the reporter to the Judicial Conference Advisory Committee on Evidence Rules–notes, including these crimes under 609(a)(2) would destroy the rule and open the door to impeachment for essentially any crime:

> But most crimes involve at least some deceitful behavior…. almost every theft-based crime involves deceit—stealing property or lying about intent to return it. Even shoplifters usually take items when they think no one is looking and often hide items in their clothing, both of which can be described as deceitful acts….If these expansive views of what constitutes crimen falsi were accepted, then pretty much every criminal conviction would be automatically admissible under Rule

> 609(a)(2). That was not the intent of the rule or else the drafters would have written this rule: "a witness's criminal convictions must be admitted."

Capra & Berch, *supra*, at 554–55; *see also Hayes*, 553 F.2d at 827 ("...it was inevitable that Congress would define narrowly the words "dishonesty or false statement," which, taken at their broadest, involve activities that are part of nearly all crimes.").

Congress's intent to create a narrow rule is further demonstrated by a key difference between Rules 609(a)(1) and 609(a)(2). Rule 609(a)(1) covers the introduction of crimes that are punishable "by death or by imprisonment for over one year" for the purposes of impeaching a witness. Fed. R. Evid. 609(a)(1). These crimes "must be admitted, *subject to Rule 403*, in a civil case or in a criminal case in which the witness is not a defendant" and "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1) (emphasis added). For these crimes, the court has the discretion and authority to balance the probative value and prejudicial nature of introducing the conviction for impeachment purposes. *See* Fed. R. Evid. 609(a)(1). However, the admission of prior convictions involving dishonesty or false statements under 609(a)(2) gives the court no such discretion. *See Ortega*, 561 F.2d at 806. Given this lack of discretion, it is "inevitable" that Congress would "define narrowly the words 'dishonesty or false statement,' which, taken at their broadest, involve activities that are part of nearly all crimes." *Hayes*, 553 F.2d at 827; *see* also Capra & Berch, *supra,* at 556 n.40 ("[I]t seems unlikely Congress intended such a broad construction in light of the fact subdivision (a)(2) leaves the court no discretion to weigh probative value against prejudice.") (citation omitted). Critically, Rule 609(a)(2) is the only rule in the Federal Rules of Evidence that limits such judicial discretion, underscoring it must be construed narrowly. *See* Capra & Berch, *supra,* at

557 n.44 (“But only Rule 609(a)(2) specifically overrides a trial judge's discretion to exclude unfairly prejudicial evidence.”).

C. Even if some convictions for theft are admissible, Fenty’s previous conviction was not committed with an element of deceit and should not be admissible.

In addition to crimes that are facially deceitful, offenses that “leave[s] room for doubt” can come under Rule 609(a)(2)’s scope where the prosecution can “demonstrate to the court ‘that a particular prior conviction rested on facts warranting the dishonesty or false statement description.’” *Hayes*, 553 F.2d at 827. The court below reasoned that “in determining whether an offense that ‘leaves room for doubt’ comes within the scope of 609(a)(2), courts have distinguished a crime committed by violence from a crime committed by deceitful or dishonest acts. *See, e.g.*, *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989). Dishonest acts include “crimens falsi,” which include *any* acts of “false pretense” with “*some element of deceit*.” *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir., 1976) (emphasis added). The court then looked at the facts underlying Fenty’s prior conviction and determined that the crime was one of deceit rather than one of violence. (R. 70.) The court emphasized that Fenty “intentionally targeted a victim who was distracted” and that “Defendant plotted to steal this bag quietly to avoid getting caught.” (R. 70.) Even though Fenty then grabbed the bag and threatened the woman, the court ruled that the crime was not transformed into a crime of violence falling outside the rule. (R. 70.)

However, the court below erred by confusing a crime of “deceit” with a crime of “stealth.” *See United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978) (“At worst, this type of shoplifting…like many petty larceny crimes, involves stealth, which…is not the same as deceit.”) (quoting *United States v. Dorsey*, 591 F.2d 922, 935 (D.C. Cir. 1978); *see also United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012) (“[609(a)(2)] is intended to inform fact-

finders that the witness has a propensity to lie, and, as morally repugnant as some crimes may be, crimes of violence or stealth have little bearing on a witness's character for truthfulness."). Critically, a crime of dishonesty or false statement involves some element of active misrepresentation. *See Washington*, 702 F.3d at 893. In this case, Fenty took no active steps to deceive the victim of her potential larceny. She walked up to a distracted pedestrian, and unsuccessfully attempted to grab a bag sitting on the ground without being noticed. (R. 22, 25.) She did not trick the woman, attempt to trick the woman, actively distract the woman, lie to the woman, or attempt to deceive her in any way. Her conviction involves no more deceit than the typical theft or shoplifting conviction in which the perpetrator aims to avoid detection but does not take active steps to deceive the victim. *See United States v. Dunson*, 142 F.3d 1213, 1215 (10th Cir. 1998) ("A straight theft offense is not the type of offense involving Rule 609(a)(2), dishonesty or false statement contemplated by that rule."). Adopting an approach that infers elements of deceit in a typical theft conviction would, as stated previously, open the floodgates to the admission of almost all previous convictions of any kind, since many crimes involve *some* impulse to avoid detection. *See Hayes, 553 F.2d at 827.*

Reinforcing that Fenty's prior conviction did not include any element of deceit is the fact that prosecutors failed to charge her with "Theft by Deception" under Section 155.45 of the Boerum Penal Code. The Boerum penal code distinguishes between different types of theft. (R. 3.) Boerum Penal Code Section 155.25 states that a person shall be guilty of Petit Larceny when that person "knowingly takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another." Boerum Penal Code § 155.25. Meanwhile, Boerum Penal Code Section 155.45, Theft by Deception, applies when a "person knowingly and *with deceit* takes, steals, carries away, obtains, or uses, or endeavors to take, steal,

carry away, obtain, or use, any personal property of another." Boerum Penal Code § 155.45 (emphasis added). Under Section 155.45, a person "deceives" if he intentionally "(a) Creates, reinforces, or leverages a false impression, (b) Prevents another from acquiring material information… or (c) Fails to correct a false impression that the deceiver previously created, reinforced, or influenced." *Id.* Prosecutors could have charged Fenty with theft by deception in addition to petit larceny, but chose not to, likely because she did not meet the elements of the statute and implying that proving deceit under the statute would have been challenging given the facts of her conduct.

The fact that prosecutors failed to charge Fenty with Theft by Deception represents a key factor in why her prosecution should not have been introduced to impeach her testimony. Rule 609 was substantially amended in 2006, with the advisory committee notes accompanying these amendments directing courts to consider the "statutory elements of the crime" to determine whether it is "one of dishonesty or false statement." *United States v. Pruett*, 681 F.3d 232, 246 (5th Cir. 2012). Furthermore, the circuit cases holding that theft offenses fall under Rule 609(a)(2) "generally pre-date the 2006 amendments." Capra & Berch, *supra*, at 558.

D. A limiting instruction is not adequate to remedy prejudice caused by the introduction of the petit larceny conviction.

The district court also erred in admitting the conviction for impeachment purposes because, even though 609(a)(2) is not subject to 403 balancing, its introduction was highly prejudicial and not particularly probative. The offense occurred seven years ago, when Fenty was nineteen years old, and subject to external pressure from a friend. (R. 19.). However, as more recent convictions have a higher probative value, a seven year old conviction for a minor crime speaks little towards a defendant's current propensity for truthfulness. *See Hayes* 553 F.2d at 828 (stating that more recent convictions have more probative value). In this case, Fenty was

also pressured by a friend into receiving packages that, unbeknownst to her, contained illicit narcotics. This similarity between the prior conviction and her current case could influence the jury to infer that Fenty is predisposed to committing a similar crime, rather than using the information to assess her credibility as a witness. The addition of a limiting instruction was insufficient to cure this prejudice, given that jurors regularly use evidence of a witness's prior conviction to infer criminal propensity. *See Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J. concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction."). Simply put, "a drop of ink cannot be removed from a glass of milk." *Gov't of Virgin Islands v. Toto*, 529 F.2d 278, 282 (3d Cir. 1976). Introducing the conviction, even with a limiting instruction, was an error that unfairly prejudiced Fenty at trial.

Lastly, the error in allowing the introduction of her conviction was not harmless. Under the standard enunciated by the Supreme Court, an error in an evidentiary ruling is not harmless if it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Circuit courts find a district court's application of Rule 609 to be harmless "if the witness' credibility was sufficiently impeached by other evidence." *United States v. Estrada*, 430 F.3d 606, 622 (2d Cir. 2005). In this case, Fenty could only have been impeached with her misdemeanor petit larceny conviction under 609(a)(2), as she had no previous criminal convictions that would have been admissible under 609(a)(1).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed in its entirely.