THIRTY-NINTH ANNUAL

DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 23–695

SUPREME COURT OF THE UNITED STATES

FRANNY FENTY,

Petitioner, --against--

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

QUESTIONS PRESENTED

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

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

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

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STATEMENT

A. Legal Background

1. Without any aggravating factors, a person found guilty of possession with intent to distribute 400 grams or more of fentanyl may be sentenced to life in prison, and faces a statutory minimum sentence of 10 years in prison. 21 U.S.C. § 841(b)(1)(A)(vi). A person found guilty of the same crime under identical circumstances except that the amount of fentanyl present was less than 400 grams but more than 40 grams may not be sentenced to more than 40 years in prison, and faces a statutory minimum sentence of only five years in prison. 21 U.S.C. § 841(b)(1)(B)(vi).

B. Factual and Procedural Background

1. In February 2022, Petitioner Franny Fenty was indicted by a federal grand jury and arrested in Joralemon, in the state of Boerum, on charges of possession with intent to distribute Fentanyl, a Schedule II controlled substance. 21 U.S.C. §§ 841(a)(1); 841(b)(1)(A)(vi).

2. At the time of her arrest, Petitioner was 25 years old and an aspiring journalist and author. In college, Petitioner had published two short stories in the *Joralemon College Zine*, using the pen name "Jocelyn Meyer".

Petitioner also wrote five novels under the same pen name, although they have not been published. R. at 42. In October 2021, Petitioner reached out to four different publishers using the name "Jocelyn Meyer" and the email "jocelynmeyer@gmail.com", pitching her books for publication and offering to send manuscripts to interested publishers. *Id.* The manuscripts sent to publishers listed "Jocelyn Meyer" as the author. However, petitioner did not receive any responses to her inquiries, and her novels remain unpublished. In January 2022, Petitioner opened a P.O. box at the Joralemon Post Office using the name "Jocelyn Meyer". R. at 43.

Petitioner testified that she opened the P.O. box in order to receive online orders of packages, and that she used an alias because she values having privacy with respect to her mail. *Id.*

In 2016, six years before the events in this case and when Petitioner was 19 years old, Petitioner was convicted of misdemeanor petit larceny for stealing a bag with $27 inside from a woman in Joralemon City Square. Petitioner testified that she stole the bag because of a dare from a friend, and that the bag's owner immediately noticed what petitioner had done. R. at 53.

3. The city of Joralemon is a predominantly low-income community, that has suffered under the scourge of drug addiction in recent years, due in part to the illicit trafficking of narcotics like fentanyl into the community. R. at 7, 28. Joralemon has a heavy police presence. R. at 35-6. Special Agent Raghavan testified that Joralemon is "targeted" by law enforcement, and that he knows many local police officers who "wanted to come to Joralemon to stop the crime." R. at 36.

In recent years, local and federal law enforcement have focused on detecting and stopping illicit drug trafficking in Joralemon. R. at 7. Law enforcement have targeted their efforts on detecting trafficking in fentanyl, in particular, and most recently have placed special emphasis on detecting trafficking of the fentanyl and xylazine mixture known as "tranq". *Id;* R. at 8. On February 8, 2022 an unnamed Drug Enforcement Administration ("DEA") officer told *The Joralemon Times* that "if you are selling this dangerous drug, we will find you and do whatever it takes to stop you." R. at 7.

4. On February 12, 2022, a Joralemon resident was found deceased in his residence from a fatal overdose of fentanyl. R. at 29. Several syringes containing a mixture of fentanyl and xylazine were found near the deceased's body in the apartment. R. at 29. Xylazine is a substance normally used as a legal horse tranquilizer. Recently, it has been found illegally laced into

fentanyl. This was the first instance of a drug overdose in Joralemon where xylazine was found at the scene. R. at 29. In addition to the syringes, police discovered an open box in the deceased's apartment that had been sent from "Holistic Horse Care", a company that sells horse veterinary products to trainers and veterinarians through its website. *Id*.

5. After the discovery of the fatal overdose on February 12, Special Agent Raghavan instructed employees at the Joralemon Post Office to inform him of any packages addressed from packages shipped from any horse veterinarian website or company, in addition to any "suspicious, oddly-shaped, or large packages." R. at 30.

Local and federal law enforcement in Joralemon work closely with the Postal Service to detect illegal drug trafficking. R. at 36. Special Agent Raghavan testified at trial that he routinely "targets" the post office as a way of detecting illicit drug trafficking, and that he has worked on about 200 cases of suspected drug trafficking with the Post Office. *Id.*

6. On February 14, 2022, Special Agent Robert Raghavan and Special Agent Harper Jim seized, without a warrant, two packages addressed from "Holistic Horse Care" and addressed to "Jocelyn Meyer" and a P.O. box registered under the same name. R. at 30. On the same day, postal authorities also set aside two Amazon packages addressed to the same P.O. box but addressed to "Franny Fenty". It was later discovered that these two packages contained face cream.

7. Special Agents Raghavan and Jim obtained a search warrant to open the two seized packages. Although the Postal Inspection Service typically searches suspicious packages for narcotics, Special Agent Raghavan decided to seek a search warrant for the packages because "[he] wanted to take matters into [his] own hands." R. at 37.

Raghavan and Jim opened the packages at a Drug Enforcement Agency testing facility. They discovered a bottle in each package labeled "Xylazine: For the Horses". R. at 31. After opening each of the bottles and removing samples for testing, Raghavan and Jim discovered that each bottle contained a mixture of 400 grams of Xylazine and 200 grams of fentanyl. Together, the two packages contained exactly 400 grams of fentanyl.

8. On February 15, Special Agents Raghavan and Jim resealed the two packages with the bottles of xylazine-fentanyl mixture inside, and directed postal service employees to conduct a "controlled delivery" of the packages. A postal service employee placed a slip inside the P.O. box that the packages had been addressed to, instructing the recipient to retrieve their packages at the front counter. Using the post office's surveillance cameras, Agents Raghavan and Jim were able to observe Petitioner as she entered the post office, opened the P.O. box, brought the slip to the front counter, and accepted delivery of the packages from "Holistic Horse Care".

As Petitioner was accepting delivery of the packages from the counter, a postal service employee asked Petitioner whether the packages belonged to her. Petitioner answered affirmatively. As she was leaving the post office, Petitioner stopped to converse with a college classmate, and during this conversation Petitioner revealed that her real name is "Franny Fenty". Later that same day, Petitioner was indicted and arrested by a federal grand jury in the District of Boerum on one count of felony possession with intent to distribute 400 grams or more of fentanyl. 21 U.S.C. § 841(b)(1)(A)(vi).

9. At trial, Petitioner testified that she had ordered the packages from "Holistic Horse Care" on behalf of a woman named Angela Millwood. R. at 45. Petitioner met Millwood through the professional networking website LinkedIn, and the two women started to converse periodically. R. at 44. Millwood worked as a horse handler at Glitzy Gallop Stables. Millwood

told Petitioner that it "broke her heart" to watch the horses at the Stables suffer in pain as they grow old. Millwood told Petitioner that she had a plan to administer xylazine to the horses as a way to ease their pain, but that Millwood could lose her job if anyone were to find out that she was administering xylazine to the horses. R. at 44-5. Petitioner agreed to help Millwood obtain xylazine by ordering the medicine through the mail. R. at 45.

Petitioner later became suspicious of Millwood's scheme to obtain xylazine, and called Millwood to leave a voicemail saying, "Angela, I just got to the Post Office. None of the packages I was expecting are here, they're missing. I read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here, right? Call me back as soon as you can. I'm getting worried that you dragged me into something I would never want to be part of. Plus, you still owe me the money." R. at 40, 46.

Later the same day, Petitioner left another voicemail for Millwood, saying: "It's me again. I talked to the postal workers. They don't know what is going on with the packages. They said I should come back tomorrow. Angela, I'm really getting nervous. Why aren't you getting back to me? I thought the xylazine was just to help horses that are suffering. Why would they want to look at that? Is there something you aren't telling me? I'm really starting to get concerned that you involved me in something I had no idea was going on. Call me back."

10. At trial, the district court denied Petitioner's motion to suppress evidence from the search and seizure of the packages addressed from "Holistic Horse Care" on Fourth Amendment grounds, and denied Petitioner's motion in limine to exclude evidence of Petitioner's prior conviction for misdemeanor Petit Larceny from being introduced to impeach Petitioner at trial, on the grounds that Petit Larceny is not a crime of deceit under Rule 609(a)(2). The district court sustained the government's objection to introducing as evidence the two voicemail messages that

Petitioner had left for Angela Millwood on February 14, on the grounds that the messages were hearsay and did not qualify for a hearsay exception under Rule 803(3).

11. On September 21, 2022, Petitioner was convicted by a federal grand jury in the District of Boerum on one count of felony possession with intent to distribute fentanyl. On November 10, Petitioner was sentenced to ten years in prison. For the rest of her life, Petitioner will carry the stigma of a federal felony drug trafficking conviction.

Petitioner then appealed to the Fourteenth Circuit Court of Appeals, challenging the district court's evidentiary rulings allowing admission into evidence the results of the DEA agents' search of the "Holistic Horse Care" packages and of Petitioner's prior conviction for Petit Larceny, and challenging the district courts exclusion from evidence of the two voicemail recordings left by Petitioner for Angela Millwood. On June 15, 2023, the Fourteenth Circuit issued an opinion affirming the district court's rulings on all three questions, with one judge on the three judge panel dissenting on all questions.

SUMMARY OF ARGUMENT

I. Question I

Petitioner had a privacy interest in the contents of the sealed packages addressed to her P.O. Box and bearing her alias because she had a reasonable expectation that the contents of those packages would remain private. Therefore, Petitioner is entitled to challenge the pre-warrant seizure, and post-warrant search of her packages.

This Court has always recognized a reasonable expectation of privacy in the contents of sealed mail, and of any sealed and opaque container, and warrantless searches of such items are

presumed to be unreasonable. Moreover, this Court has never made the reasonableness of these expectations contingent on the names displayed on a letter or package, and it should not do so now. The fact that an individual sent, received, ordered, or was the addressee of a sealed package is enough under this Court's precedents to establish a reasonable expectation of privacy.

The fact that Petitioner used an alias to order the relevant packages does not diminish her reasonable expectation of privacy. Petitioner's alias was neither fraudulent nor stolen, and it is neither illegal nor inherently wrong to use an alias to send and receive mail. With respect to the mail and to sealed containers generally, this court has never suggested that the Fourth Amendment's protections are conditioned on having one's name labeled or listed on the parcel or container. The fact that Petitioner ordered the packages at issue–and they were addressed to her P.O. Box–is enough to establish a reasonable expectation of privacy.

This Court must not heed Respondent's request to carve out an "alias exception" to the Fourth Amendment's protection. Such an exception would shrink the Fourth Amendment's protections, and if its logic were subsequently extended by lower courts to other fact patterns, this Court's Fourth Amendment jurisprudence could be turned on its head. Specifically, defendants could be required in many situations to affirmatively lay claim to their papers and effects with a label, address or other evidence of ownership, before they can enjoy the Fourth Amendment's protections. Bizarrely, individuals who go to the greatest lengths to preserve their privacy by using an alias would surrender more of their privacy protection under the Fourth Amendment, even if they broke no laws in doing so. Instead, this Court should reaffirm its longstanding rule that individuals always have a reasonable expectation of privacy in their sealed letters and packages in the mail, wherever they may be.

In the alternative, even if this Court were to hold that Petitioner's use of an alias could somehow destroy her privacy interest in her sealed packages, Petitioner's reasonable expectations of privacy are preserved by the fact of Petitioner's repeated public use of her alias.

II. Question II

The Fourteenth Circuit's finding that Petitioner's voicemail statements are not exceptions to the hearsay rule under Federal Rule of Evidence 803(3) must be reversed. At both the trial court and circuit court levels, the courts relied on a spontaneity requirement that is not found in the plain language of Rule 803(3). While other hearsay exceptions, like Rules 803(1) and 803(2) do require that a statement be spontaneous, Rule 803(3) only requires that the statement be a reflection of the declarant's then-existing mental state. In this case, Petitioner's voicemail messages are a reflection of her mental state upon finding the packages missing from her mailbox – they reflect her confusion and lack of knowledge that there was anything illicit in the packages.

Reading a spontaneity requirement into Rule 803(3) where it does not exist creates the danger of a trial court judge being allowed to invade the province of the jury as the finder of fact. Many courts have associated the need for spontaneity with the requirement that the statement at issue be truthful – that there be no change the statement could have been fabricated. The truthfulness of statements admitted under the hearsay rule is a matter of weight and not admissibility that the jury must decide in their deliberations. The injection of a spontaneity requirement raises the bar for admissibility under Rule 803(3) beyond requiring that only the state of mind and the declarations be contemporaneous, adding the statement must be contemporaneous with the commission of the crime as well.

Even if this Court does find that there is a spontaneity requirement in 803(3), there is a strong case that the statements have an element of spontaneity due to their nature as voicemail messages, which are made seconds after the realization that there will be no phone conversation. Petitioner left the first voicemail from the post office after realizing her packages were gone. Petitioner also made these declarations not to police or any official, but to her alleged co-conspirator to whom she had no reason to lie. Therefore the Court should reverse the lower court's ruling and find that Petitioner's voicemail messages are admissible under Rule 803(3).

III. Question III

The Fourteenth circuit's finding that Petitioner's prior conviction was admissible under Rule 609(a)(2) must be reversed. In holding that Petitioner's prior petit larceny conviction was a crime of deceit, the circuit court radically expanded the convictions admissible under Rule 609(a)(2) beyond what the legislature intended. Rule 609(a) allows the admission of conviction for the purpose of attacking the witness's propensity to testify truthfully. Rule 609(a)(2) narrows the prior convictions admissible to those that 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). Therefore, only crimes that have an element of deceit should be admissible under the rule like crimes of perjury, embezzlement, or false pretense. Courts have not limited admissible crimes to whose statutes explicitly mention deceit. Rather, the courts may investigate the underlying facts of the prior convictions for the element of deceit. Though the court must be careful to not spend too much time and judicial resources into their investigation. The legislature wished that the court would "*readily*" determine if the crime was admissible under Rule 609(a)(2). Fed. R. Evid. 609(a)(2) (emphasis added).

The factual circumstances of Petitioner's prior conviction do not indicate an element of deceit. When Petitioner was nineteen, she was convicted of petit larceny for stealing a bag with twenty-seven dollars in it after she was dared to do so by her friend. Petit larceny under the Boerum Penal Code does not require proving deception. The circuit court claims that the element of deceit in Petitioner's prior conviction was that she attempted to take the bag quietly and without getting caught. Even though Petitioner was not successful in her stealth, the circuit court claims that her willingness to be stealthy is sufficient to find that it was a crime of deceit. But stealth is not deceit. If the court adopts such a broad reading of what deception is, then any criminal who attempts not to get caught would be considered deceptive. Almost every prior conviction would be admissible. A defendant's prior assault conviction, where the defendant attempted not to get caught, would be admissible. This would go against the purpose of Rule 609(a). The conviction must bear on the witness propensity to tell the truth and crimes of stealth do not provide probative evidence to do so.

The circuit court's ruling is harmful and cannot be remedied by a limiting instruction. Petitioner's defense is that she was tricked by the insistence of her co-worker into purchasing the illicit drugs for her. Petitioner's prior conviction involved her friend daring her to commit a crime. Respondents are attempting to show a propensity for Petitioner to be a pushover. This is improper character evidence, and the respondents are attempting to backdoor this bad character trait by claiming Petitioner's conviction is deceitful. The circuit court reasoned that a limiting instruction cures any such worries. However, the value of such limiting instruction for prior crimes have been widely questioned and the instruction itself draws the juror's attention to the prejudicial value of the conviction. Thus, the circuit court's finding that Petitioner's prior conviction was admissible under Rule 609(a)(2) was harmful and should be reversed.

ARGUMENT

I. Petitioner had a reasonable expectation of privacy in her sealed packages, despite her attempt to remain anonymous through the use of an alias.

This Court has repeatedly recognized that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy", and that "warrantless searches of such effects are presumptively unreasonable." *United States. v. Jacobson*, 466 U.S. 109, 114 (1984). Time-and-again, this Court has reaffirmed a twin guarantee against unreasonable searches of the mail, and of sealed packages and containers, wherever they may be. A search of a sealed package may occasionally be reasonable under the circumstances—or it may be authorized by an adequate warrant—but authorities may not open it "except in the manner provided by the Fourth Amendment. *Van Leeuwen*, 397 U.S. at 251. The Fourth Amendment may have permitted the pre-warrant seizure or post-warrant search of Petitioner's packages—although we concede neither and the district court has not ruled on either—but the Searches and Seizures clause controls. Because the packages were actually Petitioner's—she ordered them and they were addressed to her P.O. Box—Petitioner had a reasonable expectation of privacy in the contents of her sealed packages, and she may challenge their seizure and search according to the Fourth Amendment.

A. The Fourth Amendment prohibits warrantless searches of sealed mail in the custody of the Postal Service, with very few exceptions

This Court has long recognized that "first-class mail such as letters and sealed packages […] is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment." *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). In fact, the Fourth Amendment's guarantee of privacy is stronger as applied to the mail than perhaps any other

realm outside of the home. Ever since this Court's decision in *Ex parte Jackson*, this Court has reaffirmed the Fourth Amendment's near ironclad protection of the mail:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household."

Ex parte Jackson, 96 U.S. 727, 733 (1877). With these values in mind, this Court has maintained that sealed mail is always protected from unreasonable government searches, whether it be in a private mailbox or in transit, in the custody of the postal service or any other courier. The government may not open a sealed letter or package without a warrant—save for very limited instances—and this Court has never made the Fourth Amendment's protection of the mail contingent on the name or address listed on a letter or package. Under this framework, Petitioner's privacy interest in her packages is not ambiguous, and her expectation of privacy in the contents of those packages was reasonable because "[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." *Jacobson*, 466 U.S. at 114.

B. The Fourth Amendment prohibits warrantless searches of sealed and opaque containers, with very few exceptions

This Court has consistently emphasized that individuals have a reasonable expectation of privacy in the contents of sealed and opaque containers, those contents being shielded from plain view. *See Robbins v. California*, 453 U.S. 420, 427 (1981) ("unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment"). Time and again, this Court has found a reasonable expectation of privacy implicating the Fourth Amendment in searches of closed and opaque containers of all types. *See e.g. Bond v. United States*, 529 U.S. 334, 338-9 (2000) (duffel-like suitcase); *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (locked footlocker); *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979) (unlocked suitcase); *Robbins v. California*, 453 U.S. at 422 (a tote bag and packages wrapped in opaque plastic).

Although police may sometimes open a sealed container without a warrant, they may only do so to the extent that the Fourth Amendment permits. This Court has always found a reasonable expectation of privacy in the contents of sealed and opaque containers, so long as its contents are otherwise unknown and unknowable to officers. Therefore, this Court should follow its precedents in *Chadwick, Robbins* and *Bond* and recognize Petitioner's reasonable expectation of privacy in the contents of the sealed packages bearing her alias.

C. The use of an alias to remain anonymous when shipping and receiving packages does not disturb reasonable expectations of privacy absent identity fraud or theft

The use of an alias to remain anonymous when shipping, receiving or labeling a package does not diminish reasonable expectations of privacy, at least so long as the use of the alias is not illegal and does not constitute identity fraud or theft. *See United States v. Pitts*, 322 F.3d 449, 459

(7th Cir. 2003) ("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"); *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992) (defendants had reasonable expectations of privacy in sealed five-gallon drums delivered to them under fictitious names); *United States v. Newbern*, 731 F.2d 744, 748 (11th Cir. 1984) (defendant had reasonable expectation of privacy in his hotel room although it was booked under an alias).

In the mail context, this Court has never centered its inquiry into reasonable expectations of privacy on the names listed on the letter or package. Likewise, in the context of sealed containers, there has never been a requirement that the container must be labeled with the person's name in order to establish a reasonable expectation of privacy. Absent identity fraud, identity theft, or illegal impersonation, there is no reason why this Court should rule that the legal use of an alias somehow eviscerates an individual's reasonable expectation of privacy in their mail. To do so would turn this Court's prior doctrine on its head by pronouncing that individuals are presumed to have no reasonable expectation of privacy in their letters and packages in the mail, unless their actual name be listed on the parcel. Such a ruling would contradict this Court's own precedents and would harm the purpose and objectives of the Searches and Seizures Clause.

If this Court chooses to follow the Fourteenth Circuit's holding that a defendant somehow has no reasonable expectation of privacy in their mail if their actual name does not appear as the sender or the addressee, it would amount to carving out a large exception to the Fourth Amendment's protections. An 'alias exception' or 'addressee doctrine' would have indeterminate boundaries and would probably be destined to widen in the coming years. Would a person maintain a reasonable expectation of privacy in their bag left at the coat check at a theater or

restaurant, even if their name appeared nowhere on it? What if it bore the name of a friend who had lent it to them or of a previous owner? What if they had labeled their bag with a nickname known only to a few close friends? Or with some purely and obviously fictional name chosen in a fit of silliness? Would the police be emboldened to conduct warrantless searches of private social media accounts so long as the username is fictitious?

Rather than carving out a new exception to the Fourth Amendment's protections against unreasonable searches of the mail, this Court should instead reaffirm its simple and longstanding rule that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy" *United States. v. Jacobson*, 466 U.S. at 114, and that sealed letters and packages in the mail cannot be searched "except in the manner provided by the Fourth Amendment." *United States v. Van Leeuwen*, 397 U.S. at 251. Therefore, expectations that the contents of one's mail will remain private are presumptively reasonable, and anyone who ships, orders, receives, or is the intended recipient of a package holds a reasonable expectation of privacy in that package.

D. Alternatively, Petitioner's repeated public use of her alias preserves her reasonable expectation of privacy in the packages

Even if this Court were to affirm the Fourteenth Circuit's holding that the use of an alias can somehow destroy a reasonable expectation of privacy in sealed packages, Petitioner's use of an alias in this case does not do so. Because Petitioner has repeatedly used the alias "Jocelyn Meyer" in public, her privacy interest is preserved as if her actual name were on the packages. *See United States v. Daniel*, 982 F.2d 146 (5th Cir. 1993).

The Fourteenth Circuit further reasoned that Petitioner was somehow stripped of any privacy interest in the packages that her alias or other facts might confer because "the use of that

alias was obviously part of [her] criminal scheme." R. at 67 (*quoting Daniel*, 982 F.2d at 149). However, it was far from obvious that Petitioner's alias was being used in any "criminal scheme" before the search was conducted, and the government cannot use the results of an invasive search as a *post-Hoc* justification for an otherwise unreasonable search. If courts were to adopt the logic that "defendant had no reasonable expectation of privacy because defendant was engaged in criminal activity", then hardly any defendant would ever be able to challenge on appeal the admission of evidence at trial, no matter how arbitrary or invasive the search. In practice, the result would be surrendering almost total control of this Court's entire Searches and Seizures doctrine to individual trial judges, whose evidentiary rulings could not be questioned on appeal if the defendant were found guilty at trial.

II. The plain language of Rule 803(3) lacks the spontaneity requirement on which the Court depended to exclude Petitioner's voicemails.

As part of her defense Fenty sought to include two voicemails recorded on the day she went to retrieve the packages at issue and found them missing from her P.O. box. R. 47. The voicemails detail Petitioner's confusion regarding the whereabouts of the packages, and she expresses a lack of knowledge that they contain illicit drugs. R. 39-40. Following a hearsay objection, Petitioner's counsel responded that the statements in the voicemail were admissible under Federal Rule of Evidence 803(3) as evidence of Petitioner's then-existing mental state. R. 47. In the process of hearing arguments on the objection, the trial court judge expressed concern that there was a lack of truthfulness in the statements because they were not "spontaneous." Ultimately, the judge sustained the hearsay objection, excluding the voicemail recordings from evidence. R. 52.

Contrary to the arguments at trial, there is no spontaneity requirement to be found in Rule 803(3). Rule 803(3)'s express terms require contemporaneity only between the declarant's then existing state of mind and their statement: "[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). Many courts, like the trial court in this case, have employed a trustworthiness approach that is based on a requirement of timeliness not found within the text of Rule 803(3). These courts have recognized three requirements for a statement to qualify for the Rule 803(3) hearsay exception: 1) the statements must be contemporaneous with the event sought to be proven;" (2) it must be shown that the declarant had no chance to reflect—that is, no time to fabricate or to misrepresent his thoughts; and (3) the statements must be shown to be relevant to an issue in the case. *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). The injection of a spontaneity requirement raises the bar for admissibility under Rule 803(3) from requiring contemporaneity between the declarant's mental state and their statement to contemporaneity among the defendant's alleged crime, the defendant's state of mind, and the defendant's statement.

If there was meant to be a spontaneity requirement in Rule 803(3), it would have been written into the Rule as it was for Rules 803(1) and 803(2) which require statements to be made "while or immediately after" a declarant perceives an event or "while" under stress or excitement caused by an event. Fed. R. Evid. 803(1); Fed. R. Evid. 803(2). If, as the State's attorney argued at trial, the spontaneity requirements in Rules 803(1) and 803(2) imply that the same applies to Rule 803(3), why deliberately include it in the two prior rules? Why not simply write the

requirement into Rule 803(1) and stop there? Each rule in the Federal Rules of Evidence is crafted for a specific purpose and their language reflects that purpose. In this case, the timeliness requirements of Rule 803(3) are clear in the inclusion of the phrase "then-existing." Fed. R. Evid. 803(3).

Despite the Rule's language, courts have held that there is a timeliness or spontaneity requirement within Rule 803(3). In *Jackson*, 780 F.2d 1305, 1315 the statements at issue were made by the defendant two years after the crime. Among other things, the Court cited "… the absence of contemporaneousness, [and] the potential for deliberate misrepresentation" as factors in upholding the trial court's ruling on the inadmissibility of the statements. *Id*. at 1315. Even statements much closer in time to the crime at issue than *Jackson*'s two-year mark have fallen short of these requirements. *Id*. An example can be found in *United States v. Naiden*, 424 F.3d 718 (8th Cir. 2005). In *Naiden*, the defendant's statement that he believed a new acquaintance to be older than fourteen was made only one day after their meeting. *Id*. at 722. The Court dismissed the admissibility of the statements for lack of timeliness, noting in part, "our court has focused on whether the declarant's statement is "trustworthy" when it has had occasion to analyze the admissibility of hearsay evidence under the Rule 803(3) exception." *Id*. at 722. Other courts have held that statements made after arrest are less likely to be truthful and therefore do not fall under the hearsay exception of Rule 803(3). *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980), cert. denied, 449 U.S. 1016, 101 S.Ct. 578, 66 L.Ed.2d 476 (1980), rev'd on other grounds in United States v. DeBright, 730 F.2d 1255, 1259 (9th Cir.1984) (en banc). In *Ponticelli*, the defendant's declarations came after his arrest, thus, according to the court, "he was aware that he was under investigation and that anything he said could be used against him." *Id*. at 992.

Cases like *Jackson*, *Naiden* and *Ponticelli* exemplify the perception that the statements of criminal defendants are untrustworthy because of a motive to fabricate or because of the assumption that they are self-serving. However, the possibility that a hearsay statement could be self-serving is not grounds for exclusion under any exception under the Federal Rules, except for those exceptions that contain an explicit mandate to the court to consider the trustworthiness issue on a case-by-case basis, such as Rule 803(6). Fed. R. Evid. 803(6) ("the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness"). It is certainly not grounds for exclusion under the text of Rule 803(3).

A much more clear-cut understanding of Rule 803(3) can be found in *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984), which is more analogous to the case at hand than *Jackson*, *Ponticelli*, or *Naiden*. Eight days after a truckload of cigarettes had been stolen, DiMaria was seen at his social club walking and talking with men who the FBI knew had custody of the stolen truckload. *Id*. at 267. The stolen cigarettes were transferred into a series of trailers which were finally stored and guarded in a truck yard. *Id*. at 268. On the afternoon of DiMaria's arrest, he arrived at the yard and helped unload the cigarettes from the trailers into a van. *Id*. This is DiMaria's only observed incriminating act before he drove out of the yard with the half-case of cigarettes in his trunk and was immediately arrested. *Id*. Before he was arrested, DiMaria said: "I thought you guys were just investigating white collar crime; what are you doing here? I only came here to get some cigarettes real cheap." *Id*. at 270.

The Second Circuit found that DiMaria's statement was a reflection of what he was thinking in the present and, as such, it fell within the Rule 803(3) exception. *Id*. Addressing the possibility that the statement could be false and self-serving, the Court noted, "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that Rule are read to

mean what they say, its truth or falsity was for the jury to determine." *Id*. at 271. This understanding of Rule 803(3) is in line with the plain text of the rule and reflects a more accurate understanding of the Rule's requirements. The same understanding of the Rule should be applied in Petitioner's case.

In *DiMaria*, the defendant's statement was not offered to prove that the cigarettes were not stolen but only to show that DiMaria did not think they were at the time. *Id.* Similarly, Petitioner's voicemail messages were used to prove that, as far as she knew, there was nothing illicit in the packages at the time. Additionally, in *DiMaria*, the crime was still ongoing when the defendant's statement was made to police – he was currently in possession of the stolen cigarettes. *Id.* at 271. Similarly, Petitioner was still expecting or waiting for the return of the package containing fentanyl laced xylazine when the voicemails were recorded.

At the trial court level, Petitioner's voicemail statements were characterized as possibly self-serving and therefore inherently untrustworthy. In *DiMaria*, the defendant made statements that, like Petitioner's, seem on their face to be self-serving. *Id*. at 270. The Second Circuit, however, found that the possibility that the statements could be self-serving or untruthful made no difference in the consideration of whether the statements qualified for admission under Rule 803(3). *Id*. at 271. Most relevant to our consideration in the case at hand, the Court noted that the case for admission of statements, "when the Government is relying on the presumption of guilty knowledge arising from a defendant's possession of the fruits of a crime recently after its commission" are particularly strong. *Id*. In this case, like in *DiMaria*, the Government is operating under the presumption that Petitioner knew she was receiving illegal goods when the fentanyl laced xylazine entered her mailbox. *Id*. The voicemails left by Petitioner can help the jury come to a determination on that essential question, and may, as is their right, choose not to

give much weight to the voicemails because they deem them to be untrustworthy. In the Second Circuit's understanding, "instead [of a threshold finding of credibility or reliability by the judge], the self-serving nature of a statement [under Rule 803(3)] is considered when the jury weighs the evidence at the conclusion of the trial." *United States v. Lawal,* 736 F.2d 5, 8-9 (2d Cir. 1984).

The understanding of the division between the jury and judge's roles at trial is a crucial one when it comes to the issue of Rule 803(3). In using a determination of the trustworthiness of the voicemails to reach a conclusion about their admissibility under Rule 803(3), the province of the jury was invaded at the trial court level. The plain text of Rule 803(3) illustrates that it was never intended to serve a function of establishing the truth or trustworthiness of a statement. Fed. R. Evid. 803(3). It is the jury's role to determine the reliability or validity of the evidence presented, even if this means admitting certain statements as hearsay exceptions that on their face appear to have a low degree of trustworthiness. *DiMaria*, 727 F.2d 265, 271. The jury's essential purpose is to assess the credibility of admissible evidence and when the court preemptively restricts probative material evidence because it may carry a risk of untrustworthiness, it encroaches on that purpose. *United States v. Peak*, 856 F.2d 825 (7th Cir. 1988).

The Court does not need to rely on Rule 803(3) as the ultimate gatekeeper of truth at the trial court level. There are other Rules that can serve that function, which can work in tandem with Rule 803(3). Each Rule of Evidence does not stand on its own but is part of a larger whole intended to serve different categorical functions. While Rule 803(3) is not intended to combat what may be false or self-serving statements in the eyes of the court, Rule 403 does serve that purpose. The exclusion of evidence that evinces a prior motive to fabricate is rooted in Rule 403 rather than in other rules of the Federal Rules of Evidence. *United States v. Miller*, 874 F.2d

1255, 1272 (9th Cir. 1989). Federal Rule of Evidence 403 allows judges to weigh the probative value of a piece of evidence against countervailing factors such as misleadingness, time consumption, prejudice, and the like. Fed. R. Evid. 403. The existence of this rule does away with the need for a trustworthiness requirement to be read into Rule 803(3) where it does not exist. At the trial court level counsel raised arguments that without the spontaneity requirement Rule 803(3) would become overly permissive. (R. 50.) However, Rule 803(3) has safeguards embedded in the text of the Rule to protect against making it overly permissive. The Rule cannot permit any declaration of mental state from any time. More specifically, it excludes statements of "memory or belief to prove the fact remembered or believed." Fed. R. Evid. 803(3). This closes the door to simply any declaration of mental state being admitted.

Even if this Court does find that there is a spontaneity element required for admission of hearsay under Rule 803(3), there are strong arguments that Petitioner's statement meets those requirements and should have been admitted in trial. It is clear that the statements made in the voicemails were contemporaneous with the events being described. Petitioner left the voicemails as the events being discussed were ongoing – she was at the post office and describing what happened there in the first message and the packages were still being held when the second package was being sent. This satisfies the first requirement, as the lower court recognized.

The main objection from the lower court and at the trial level was the ability of Petitioner to reflect before making her statements. However, there are multiple factors going toward the lack of reflection before Petitioner left her messages. For one, there is a timing consideration. The first voicemail was left at 1:32 p.m. on February 14, 2022 from the post office. R. 18-19. While the police did possess the packages, Petitioner had yet to retrieve the illicit substance and thus her part of the plan was not yet complete. This is crucial because many cases have suggested

that once the alleged scheme has ended, statements regarding a declarant's beliefs or thoughts on the events lack spontaneity. In *Jackson*, for example, the statements at issue were made *two years* after the completion of the crime that the declarants were charged with. *Jackson*, 780 F.2d at 1315. In the face of a two-year gap between the alleged criminal acts and the statements at issue, it is no surprise that the judge ruled that the statements did not qualify for the hearsay exception – the declarant had two years to formulate a response to any questioning of his behavior. *Id*. Similarly, in *Ponticelli*, 622 F.2d 985, 991, the crime had been committed by the time Ponticelli's declaration were made – they occurred after his arrest. *Id*. at 922. Finally, in *United States v. Netschi*, 511 Fed.Appx. 58 (2d Cir. 2013) the court noted that, "…the excluded statements in this case concerned what Netschi said or did *after* the fraudulent transactions had taken place and as the scheme itself was being discovered." Id at 61.

What distinguishes this case from the likes of *Jackson*, *Ponticelli* and *Netschi* is the fact that the crime Petitioner was charged with, possession with intent to distribute 400 grams or more of fentanyl, was, to Petitioner, still in progress when Petitioner's statements were made. Petitioner was not in custody, nor did she have confirmation that she was being investigated by the police. While the Ninth Circuit held in *Ponticelli* that the probative value of a statement diminishes as time passes, the time that passed in this case was incredibly short – Petitioner had not even left the post office when she made the first phone call. *Ponticelli,* 622 F.2d at 991. In her first voicemail Petitioner notes, "I just got to the post office." R. 40. We also know from Petitioner's testimony that when she realized her packages were missing the first thing she did was call Millwood. R. 46.

In fact, Petitioner's case for truthfulness, under the regime of Courts like *Jackson* and *Naiden*, is even greater because she did not make the statements to police, but to an accomplice

with whom she had no reason to lie. R. 39-40. Additionally, the nature of the recordings being voicemail messages adds to, not detracts from the notion that they were spontaneous statements. When she called Millwood, Petitioner was not intending to leave a message but instead to have a conversation with Millwood over the phone. She could not have predicted that Millwood would be unreachable. Once it became clear that Millwood would not answer the call, Petitioner would have had mere seconds to craft a message to leave after the tone.

There is no spontaneity requirement to be found in the plain language of Rule 803(3). To read in a requirement of trustworthiness under the guise of a timeliness requirement encroaches not only on the power of the other Rules of Evidence, but more importantly, on the duties of the jury. Even if there were a spontaneity requirement within Rule 803(3), the circumstances of Petitioner's recorded statements tend to show their spontaneity. The judgement of the lower court should be reversed.

III. The circuit court erred in finding that Fenty's prior petit larceny conviction is admissible under Rule 609(a)(2) of the Federal Rules of Evidence

Prior to trial, petitioner, Franny Fenty, motioned to exclude her petit larceny conviction from trial on the grounds that it was not admissible under Rule 609(a)(2). (R. 66.) The court denied the motion to exclude the petit larceny conviction, holding it was a crime of deceit, and supplied a limiting instruction to the jury. (R. 66.) The court erred in their motion to exclude because petitioner's petit larceny conviction was a crime of stealth. Stealth is not deceit. The court's limiting instruction is not sufficient to ensure that this error was harmless. This court should reverse the denial of the motion to exclude and remand for a new trial.

At trial, Petitioner took the stand to provide a defense to her drug possession charge. She explained how she was tricked into purchasing illegal drugs. (R. 19.) To undermine her

testimony, respondent wished to enter into the record Petitioner's petit larceny conviction to show a propensity for untruthfulness. (R. 22.) Petitioner, a nineteen-year-old at the time, was dared by her friend to grab a woman's bag (R. 53.) Petitioner's friend pointed to a woman who was distracted by a street show. (R. 53.) While distracted, Petitioner approached the woman and grabbed the bag. (R. 53.) The woman immediately noticed Petitioner and began yelling at her. (R. 53.) A small altercation broke out as the woman and Petitioner tussled over the bag for control (R. 60). While tussling, Petitioner said "let go or I'll hurt you." (R. 60.) In response, the woman let go of her bag and Petitioner ran away. (R. 60.) The bag contained twenty-seven dollars. (R. 19.)

While Petitioner's prior conviction did not involve false statements or deceptive acts, the court held that the conviction was admissible under Rule 609(a)(2). (R. 69.) Rule 609(a)(2) requires that evidence of prior convictions "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 denies an interpretation of Rule 609(a)(2) that only includes crimes like perjury or false pretense where its elements require proving deception. (R. 69.) The court states that the rule "leaves room for doubt" for convictions where the factual circumstances might indicate dishonest acts or false statements. (R. 69.) Dishonest acts for the circuit court include "any act with some element of deceit." (R. 69.) The court found an element of deceit in the actions of Petitioner (R. 69.) The court held that Petitioner's attempt to steal the bag quietly and avoid getting caught was sufficient to make Petitioner's petit larceny conviction a crime of deceit and admissible. (R. 70.)

The court's interpretation of Rule 609(a)(2) to include a crime of stealth like Petitioner's petit larceny conviction, goes against a plain reading of the rule. Stealth is not deceit. Rule 609(a) allows counsel to attack a "witness's character for truthfulness by evidence of a criminal conviction." Fed. R. Evid. 609(a). The purpose of the rule is to "bear on the witness's propensity to testify truthfully". *United States v. Johnson*, 388 F.3d 96, 100 (3d Cir. 2004). Rule 609(a)(2) specifies that a prior conviction can only be used for attacking the untruthful character of the witness when 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). Crimes, therefore, containing elements of deceit like embezzlement, false pretense, or perjury are automatically admissible. *United States v. Brackeen*, 969 F.2d 827, 830 (9th Cir. 1992). Courts have labelled these "crimen falsi" or crimes of fraud and deceit that adversely affect the administration of justice. *United States v. Smith*, 551 F.2d 348, 362-63 (D.C. Cir. 1976). Most courts have separated crimes of deceit from crimes of violence for the purpose of Rule 609(a)(2). *United States v. Harvey*, 588 F.2d 1201, 1203 (8th Cir. 1978) (An assault conviction is not admissible under Rule 609(a)(2) because it is a crime of violence). A violent crime likely does not provide evidence of a character for being untruthful. Even if it did, the elements of a violent crime do not require proving dishonest acts and those acts may not be found on a defendant's record.

The ambiguity of the term "dishonest", however, has made determining the admissibility of crimes like theft or petit larceny more difficult. *United States v. Papia*, 560 F.2d 827, 846 (7th Cir. 1977). Dishonesty has multiple definitions. A broad definition of dishonesty is simply a "breach of trust." *United States v. Brackeen*, 969 F.2d 827, 829 (9th Cir. 1992). Under such a

broad definition, crimes like petit larceny could constitute dishonest acts because it breaches the community's trust. *Id.* A narrower definition of dishonest is a "disposition to lie, cheat, or defraud." *Id.* (quoting Black's Law Dictionary). Under the narrow definition, crimes of theft may not necessarily be dishonest because it is not necessary to lie, cheat, or defraud to steal. This is why courts have long held that theft is not per se a crime of deceit. *See United States v. Pruett*, 681 F.3d 232, 246 (5th Cir. 2012) (We…do not warrant a departure from this court's precedent that the crime of larceny is not admissible under Rule 609(a)(2)); *See United States v. Farmer*, 923 F.2d 1557, 1567 (11th Cir.1991) ("It is established in this Circuit ... that crimes such as theft, robbery, or shoplifting do not involve 'dishonesty or false statement' within the meaning of Rule 609(a)(2)"); *McHenry v. Chadwick*, 896 F.2d 184, 188 (6th Cir.1990) ("shoplifting does not fall into th[e] category" described by Rule 609(a)(2)); *United States v. Yeo*, 739 F.2d 385, 388 (8th Cir.1984) ("we believe that the better view is that theft is not a crime of 'dishonesty or false statement' as that term is used in Rule 609(a)(2)"); *United States v. Lipscomb*, 702 F.2d 1049, 1057 nn. 32–33 (D.C.Cir.1983) (prior conviction for larceny not admissible under Rule 609(a)(2)); *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir.1982) ("the robberies were not admissible under 609(a)(2)").

Some theft crimes are more akin to crimes of violence. *United States v. Brackeen*, 969 F.2d 827, 831 (9th Cir. 1992) (a bank robbery is a crime of violence not deceit when the robber passes a threatening note to the teller). Other theft crimes may be more indicative of a propensity to steal than propensity for untruthfulness. *United States v. Papia*, 560 F.2d 827, 846 (7th Cir. 1977). The D.C. Circuit ruled as such by holding that "evidence of prior conviction of petit larceny may not be admitted" under Rule 609(a)(2). The D.C. Circuit reasoned that the language

of Rule 609(a)(2) denoted a fairly "narrow subset of criminal activity" which must be characterized with an "element of deceit". *United States v. Fearwell*, 595 F.2d 771, 775-76 (D.C. Cir. 1978). Similarly, the Tenth Circuit reasoned that while theft is "ordinarily considered to be dishonest… the term as used in Rule 609(a)(2) is more restricted… to prior convictions involving some element of deceit, untruthfulness or falsification which would tend to show that an accused would be likely to testify untruthfully." *United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978).

The narrower definition of dishonest is endorsed by the drafters of Rule 609(a)(2). Prior to December first Rule 609(a)(2) stated:

> "General Rule. For the purpose of attacking the credibility of a witness. . .(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment."

United States v. Johnson, 388 F.3d 96, 100 (3d Cir. 2004) (quoting Fed. R. Evid. 609(a)). The current 609(a)(2) rule states:

> "In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction. . . (2) 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). Since 2006, the biggest change was the inclusion that convictions should only be included when the elements of the crime required proving a dishonesty or a false statement. Responding to a circuit split around what were crimes of deceit, the committee's

changes are a clear indication of committee's rejection of circuit rulings where theft is per se crime of dishonesty. As the Fifth Circuit interprets the change, courts must 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) (quoting Fed.R.Evid. 609, advisory committee's note). In essence, the Committee excludes "those crimes which, bad though they are, do not carry with them a tinge of falsification." *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012) (quoting *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir.1977)). The change, however, does not seem to suggest a strict elemental approach to what crimes are admitted. The language of the statute is that the "court can *readily* determine that establishing the elements…" rather than *automatically* determine. Fed. R. Evid. 609(a)(2) (emphasis added). The distinction is important because it suggests that the Committee intended courts to delve into the facts of certain convictions and not strictly adhere to the elements of the charge. This is shown to be the case in the 2006 Advisory Committee note:

> evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. 1503, Obstruction of Justice).

Thus, in cases where deceit is not apparent at face value from the statute, "a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in

order for the witness to have been convicted." *United States v. Pruett*, 681 F.3d 232, 246 (5th Cir. 2012).

Indeed, for theft convictions or petit larceny convictions the court investigates the underlying facts and circumstances of the convictions. *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). When engaging in this factual analysis, courts have distinguished "*crimen falsi*" from "crimes of stealth." *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012). The court held that crimes of stealth have little bearing on a witness's character for truthfulness. *Id*. In *United States v. Washington*, the defendant was convicted of misdemeanor theft of services "after he had a friend, who worked for a utility company, surreptitiously hook services up to his home." 702 F.3d 886, 890 (6th Cir. 2012). Merely because the defendant attempted to avoid getting caught was insufficient for a presumption of a character trait for untruthfulness. Most criminals attempt to avoid getting caught. Are they all deceitful for the purposes of Rule 609(a)(2)? Are all their crimes *crimen falsi*? Clearly, the legislature did not intend it to be so. Yet, the lower court explicitly uses the fact that Petitioner tried not to get caught as the reason for her theft crime being deceitful. (R. 70.)

The Fourteenth Circuit primarily relies on the *Altobello v. Borden Confectionary Prods., Inc.* decision to conclude that a misdemeanor theft can be a crime of deceit. 872 F.2d 215, 217 (7th Cir. 1989). The defendant's prior conviction in *Altobello* was for tampering with electric meters. *Id.* The court held that meter tampering is necessarily a crime of deception because the goal is to always deceive the meter reader. *Id. Altobello* does not mention stealth being deceitful rather the manner of the tampering was the impetus for the admitting the conviction. *Id.* The Seventh Circuit reasons that while there are some crimes that are admissible because their

statutory elements require proving deceit, a second category of crimes may or may not be deceitful depending on the circumstances. *Id.* at 216. For misdemeanor theft, "it can be committed by obtaining property through deception, but alternatively by obtaining it through threat or force, or by receiving stolen property." *Id.* at 217. The Seventh Circuit instructs trial judges to admit these circumstantial convictions when the "the deceitful nature of the crime is admitted or is plain on the face of the indictment of other official record." *Id.* However, the Seventh Circuit warns that "the trial judge must not allow himself to be sidetracked into the details of the earlier conviction…" *Id.* In Petitioner's case, the court has failed to heed the Seventh Circuit's warning.

The factual circumstances of Petitioner's case are distinguishable from *Altobello*. While tampering with electric meters is inherently deceptive, stealing a handbag with twenty-seven dollars is not. The plain face of the indictment does not show deceit. The unlawful taking occurred through Petitioner's threat of violence, "let go or I'll hurt you" rather than deceptive means. (R. 60.) Furthermore, the prosecutors who charged Petitioner could have explicitly acknowledged the crime was deceitful. The Boerum Penal Code distinguishes between petit larceny and theft by deception. (R. at 3.) Petit larceny is a crime that requires proving that Petitioner knowingly took someone else's property and intended to use it as her own. (R. at 3.) Theft by deception requires proving that the defendant "deceives." (R at 3.) The prosecutors did not charge Petitioner with theft by deception because stealth is not deceit.

A narrow reading of dishonesty that does not include crimes of stealth promotes judicial efficiency by reducing judicial resource expenditure. Currently, the ambiguity of the dishonesty is creating mini trials during pre-trial motions that requires the trial judge to delve into the

criminal records of the defendants. This practice is against the intent of the legislature because they meant for judges to determine the admissibility of these crimes "readily." Fed.R.Evid. 609(a)(2). A narrow definition will prevent attorneys from attempting to admit crimes that are not clearly deceitful. It will prevent prior convictions that are not relevant to a witness's propensity for being truthful to be excluded.

The district court's error in admission of Petitioner's prior conviction is harmful and cannot be remedied by a limiting instruction. The Petitioner's theory of the case is that her friend tricked her to obtain illegal drugs and thus did so unknowingly. Regardless of if she was tricked or not, the respondent must agree that the illegal drugs were ordered for her friend not for personal use. (R. 40.) The factual situation of Petitioner's prior conviction is similar because it involved Petitioner being dared by her friend to commit a crime. By characterizing Petitioner's prior conviction as a crime of deceit, the respondent attempts to backdoor in otherwise inadmissible character evidence that the petitioner is a pushover. Respondents are arguing that Petitioner is highly influenced by her personal relationships and would commit a crime for her friend. The court believes that any prejudice that arises from the similarity of the factual circumstances of both crimes is harmless because of a limiting instruction. (R. 70.) However, the reliability of limiting instructions on crimes evidence has been widely questioned. *Thompson v. United States*, 546 A.2d 414, 424 (D.C., 1988). The limiting instruction, even when supplied properly, draws the juror's attention to the prejudicial value of the conviction. *See United States v. Jones*, 16 F.3d 487, 492-93 (2d Cir. 1994) ("In the course of giving this limiting instruction, the judge reminded the jurors repeatedly that Jones was a convicted felon as he simultaneously asked them to put this consideration out of their minds when deciding if the bank employees had

identified the right man."). Thus, juries are highly likely to draw from other crimes "an improper inference of criminal predisposition. . ." *Thompson v. United States*, 546 A.2d 414, 424 (D.C., 1988). Even if the juror did adhere to the limiting instruction from the judge, the evidence should not have been admitted because the petitioner's stealth is not a dishonest act.

Stealth is not deceit. The court admitting Petitioner's prior conviction of petit larceny as a crime of deceit was an error. The error was harmful because the jurors may have drawn other character propensities like a criminal disposition or a character trait of being a pushover. The court must remedy this error by finding for the petitioner and remanding the case for a new trial.

CONCLUSION

For the reasons stated herein, Petitioner asks that the Court reverse the Fourteenth Circuit's affirmation of the district court's rulings on all three questions, and remand to the district court for further proceedings.