
IN THE
SUPREME COURT
OF THE UNITED STATES

No. 23 - 695

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

Team #18
Counsel for Respondent

<u>Oral Argument Requested</u>

QUESTIONS PRESENTED

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

United States Circuit Court of Appeals Cases:

United States District Court Cases:

State Supreme Court Cases

State Appellate Court Cases:

Constitutional and Statutory Authorities:

Secondary Authorities:

OPINION BELOW

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

STATUTORY AND CONSTITUTIONAL PROVISIONS

Adjudication of this case involves interpretation of the Fourth Amendment to the United States Constitution, and application of Fed. R. Evid. 803(1) and Fed. R. Evid. 803(3). The relevant texts of the Constitutional provision and statute are attached in the Appendices.

STATEMENT OF THE CASE

I. Statement of Facts

On February 12, 2022, police discovered Liam Washburn, a Joralemon resident, dead. (R. 28.) At his side were used syringes and a package from a company called Holistic Horse Care. (R. 29.) Washburn's autopsy revealed that he died of a fentanyl overdose. (R.29.) The syringes contained the killer: "tranq dope," a deadly mixture of fentanyl and xylazine, a horse tranquilizer. (R. 7.); (R. 29.)

The Drug Enforcement Agency (DEA) immediately alerted the Joralemon Post Office to be vigilant for packages sent from Holistic Horse Care. (R. 29.) Two days later, on February 14, the Post Office alerted DEA investigators of suspicious packages sent from the company. (R. 30.) These packages were addressed to one Jocelyn Meyer, and their destination was a P.O. Box that Meyer had opened just two weeks prior. (R. 31.) Inside the P.O. Box were two Amazon packages addressed to "Franny Fenty." (R. 31.) Police disregarded these latter packages, presuming the delivery to Meyer was mistaken. (R. 31.) Police obtained a search warrant for

Meyer's packages on the same day. (R. 31.) Inside were two bottles labeled "Xylazine: For the Horses." (R. 31.) Testing revealed that, in addition to xylazine, each bottle contained 200 grams of fentanyl. (R. 32.) Police had the tranq dope; now they needed Meyer.

To identify Meyer, investigators planned a controlled delivery of the packages. They left a note in Meyer's P.O. Box, telling her to pick up the packages at the post office's front desk. (R. 32.) The next day, February 15th, Meyer retrieved her packages as planned. (R. 32.) Meyer had a brief conversation with Sebastian Godsoe before leaving the post office. (R. 33.) Upon questioning, Godsoe revealed to investigators that "Jocelyn Meyer" was actually Franny Fenty. (R. 33.) (" Petitioner"). Police thereupon informed the United States Attorney's Office of Meyer's true identity. (R. 34.) In short order, a grand jury sitting in the United States District Court of Boerum ("district court") returned an indictment charging the Petitioner with possession with intent to distribute 400 grams or more of fentanyl. (R. 34.)

Opening the P.O. Box was not the first time the Petitioner had used the name "Jocelyn Meyer." In 2016 and 2017, the Petitioner published two short stories under the name in her college magazine. (R. 4.) Continuing to write under their name, in 2021, the Petitioner emailed four book publishers using the account jocelynmeyer@gmail.com, hawking her Jocelyn Meyer manuscripts. (R. 5.); (R. 42.) The Petitioner never received any responses. (R. 43.) This instance, however, was not the Petitioner's first instance with the law. In 2016, the Petitioner stole a bag of diapers and $27 in cash, pleading guilty to petit larceny in Boerum state court. (R. 19.); (R. 54.)

A subsequent investigation of the Petitioner's social media revealed a suspicious interaction between the Petitioner and Angela Millwood ("Millwood"), a once-suspected drug trafficker. (R. 8.); (R. 34.) At trial, the Petitioner testified that she and Millwood had been high-school classmates and that the two had reconnected when the Petitioner posted on her LinkedIn

account that she was looking for work. (R. 43-44.) Allegedly, Millwood sought the Petitioner's help in a scheme to administer xylazine to ailing horses at the stable where Millwood worked. (R. 45.) The Petitioner contests that she agreed to order the xylazine because she feared that stable management would fire Millwood if they knew that she was personally buying the drug. *Id*. The Petitioner expected to receive the packages on February 14, however, upon finding her P.O. Box empty, the Petitioner immediately attempted to call Millwood, leaving her two voicemail messages. (R. 46.) Millwood did not return the Petitioner's calls, as she had fled to Indonesia that same day. (R. 35.)

Law enforcement arrested the Petitioner on February 15, 2022. (R. 34.) On September 21, 2022, a federal jury found her guilty of one count of possession with the intent to distribute a controlled substance. (R. 65.) On November 10, 2022, the Petitioner was sentenced to 10 years in prison. *Id*.

II. Procedural History

On February 15, 2022, a federal grand jury indicted the Petitioner for possession with intent to distribute 400 grams or more of fentanyl and DEA agents arrested the Petitioner that same day. (R. 34.); (R. 2.) On August 25, 2022, the Petitioner argued to suppress the contents of the packages addressed to Jocelyn Meyer. (R. 11.) The Petitioner acknowledged that the Fourteenth Circuit had no governing standard regarding a defendant's ability to suppress the search of packages addressed to aliases and urged the district court to follow precedent from other circuits holding that a defendant may have standing to suppress searches of property belonging to "public-use" aliases. (R. 11-13.) In response, the Government asserted that the Petitioner lacked standing to object to the search of Jocelyn Meyer's packages. (R. 14.) Disputing the Petitioner's characterization of "Jocelyn Meyer" as a public-use alias, the Government noted that the

Petitioner used the alias in an effort to conceal her identity and that any past use of the name was too obscure and too remote to establish a reasonable expectation of privacy in the alias. (R. 15-16.) The district court denied the Petitioner's motion, holding that Jocelyn Meyer was not a public-use alias and that "the Fourth Amendment [could not] be stretched" to recognize the Petitioner's legitimate expectation of privacy in the packages addressed to Jocelyn Meyer. (R. 16.)

On August 25, 2022, the district court heard the Petitioner's motion in limine. (R. 19.) The Petitioner sought to prevent the government from impeaching her based on her 2016 conviction for petit larceny. *Id*. The Petitioner asserted that petit larceny was not a crime involving dishonesty as required to attack the Petitioner's character for truthfulness. (R. 21.); Fed .R. Evid. 609(2). Casting Petitioner's petit larceny as a crime of violence rather than deceit, Petitioner urged the district court to adhere to a narrow interpretation of Rule 609 of the Federal Rules of Evidence and suppress the conviction. (R. 20-22.); Fed. R. Evid. 609(a)(2). The Petitioner also cautioned that admitting the petit larceny conviction would unduly prejudice the jury against her. (R. 19.) The Government urged the district court to look beyond petit larceny's mere elements, and instead to look at the facts surrounding Petitioner's prior conviction. (R. 22.) The Government noted that – while the Petitioner resorted to force to complete her crime - she first attempted to commit it via stealth, evincing her dishonest intent. (R. 22-23.) The Government further argued that any prejudice to the Petitioner would be irrelevant. (R. 24.) The text of Rule 609(a)(2) states that courts *must* admit qualifying prior convictions without regard to its effect on the jury. *Id*.; Fed. R. Evid. 609(a)(2). The district denied the Petitioner's motion in limine; admitting the prior conviction subject to a limiting instruction directing the jury to consider it only to evaluate the Petitioner's character for truthfulness. (R. 26.); (R. 62-63.)

At trial, the Petitioner attempted to admit into evidence recordings of voicemails that the Petitioner left Millwood on February 14. (R. 46-47.) The Government objected on the grounds of hearsay, and the Petitioner retorted that she intended on admitting the recordings under the state of mind exception codified under Rule 803(3). (R. 47.); Fed. R. Evid 803(3). The Government asked the court to sustain its objection by following the standard of other jurisdictions in interpreting Rule 803(3) to include a spontaneity requirement. (R. 48.) The government argued that the Petitioner had too much time to reflect before calling Millwood which allowed her to fabricate the voicemail messages. (R. 49.) The Petitioner countered by pointing to the plain language of Rule 803(3), which lacks reference to spontaneity, and further asserted that the self-serving nature of the recordings should only affect the weight of the evidence, not its admissibility. (R. 51.) The district court sustained the Government's objection and refused to admit the recordings into evidence. (R. 52.)

The Petitioner was found guilty at trial and sentenced to 10 years in federal prison. The Petitioner appealed her conviction to the Fourteenth Circuit. (R. 65.) On appeal, the Petitioner argued (1) that the DEA's search of the packages' contents violated her Fourth Amendment rights; (2) that the district court erred in failing to admit the voicemail recordings as hearsay exceptions under Rule 803(3); and (3) that the district court improperly admitted her prior conviction for petit larceny under Rule 609(a)(2). *Id*. The appellate court upheld the conviction. *Id*. Regarding the Fourth Amendment contention, the court held that the Petitioner lacked a reasonable expectation of privacy in packages addressed to her alias, further finding that Jocelyn Meyer did not constitute the Petitioner's public-use alias. (R. 67-68.) Next, the appellate court accepted that statements under Rule 803(3) must be spontaneous and found that the Petitioner had too much time to fabricate her statements before calling Millwood, thus forfeiting the

necessary spontaneity and diminishing their reliability. (R. 69.) Accordingly, the appellate court found no error in the district court's decision to exclude the statements. *Id*. Finally, the appellate court considered the trial court's decision to allow evidence of the Petitioner's prior conviction for petit larceny under Rule 609(a)(2). Finding that the underlying facts of the Petitioner's past crime involved deceit and that offenses "leav[ing]" room for doubt" may qualify under Rule 609(a)(2), the appellate court found no issue with the admission of the Petitioner's prior conviction. (R. 69-70.)

Following the appellate court's decision, the Petitioner appealed to the United States Supreme Court, which granted certiorari on December 14, 2023. The Supreme Court directed the parties to address the following issues: (1) Whether Defendant has a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to Defendant's alias. (2) 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. (3) 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. (R. 74.)

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Fourteenth Circuit and hold that the Petitioner has no standing to object to the Government's search in the packages addressed to Jocelyn Meyer. Under the 'other indicia' test utilized by the First and Fourth Circuits, the Petitioner failed to establish that she had a legitimate expectation of privacy in the packages addressed to her alias. Of the two possible 'indicia' of ownership that Petitioner may forward as existing at the time of the packages' search, neither evinces an expectation of privacy that society

is prepared to accept as reasonable. Accordingly, this Court should conclude that the Petitioner has no legitimate expectation of privacy in the packages addressed to her alias and thus no standing to object to their search.

Moreover, this Court should affirm the judgment of the Fourteenth Circuit and exclude the Petitioner's voicemail messages as inadmissible hearsay under Rule 803(3). Thoughts or feelings of an individual are only admissible under Rule 803(3) when those expressions are *natural reflexes* of what it might be impossible to show by other testimony. The Petitioner's "reflexes" in the instant matter were hardly "natural" when the first voicemail message was sent *after* she noticed her packages had been intercepted and she was likely under investigation, and the second voicemail message was recorded forty-five minutes later. Moreover, if a statement of a declarant's state of mind is used to prove the culpability of another party, the statements will likewise be inadmissible under Rule 803(3). The Petitioner impermissibly shifted her culpability onto Millwood once she had reason to know that her statements would prove criminally imperative. Thus, the court properly excluded the Petitioner's voicemail messages under Rule 803(3) and the common law spontaneity requirement should be upheld to preclude further unreliable evidence from misleading juries and from encouraging partiality in United States courtrooms.

Lastly, this Court should affirm the Fourteenth Circuit's decision to admit the Petitioner's prior conviction of Petite Larceny. This Court should find that the Fourteenth Circuit's 609(a)(2) analysis controlling for determining whether a prior conviction involving dishonesty or a false statement could be introduced for impeachment purposes because this approach aligns with the legislative history surrounding 609(a)(2). Moreover, this Court should find that the Petitioner's prior conviction for petit larceny qualifies as a dishonest act under 609(a)(2) because the

Petitioner carried out her crime through deceit rather than violence. Therefore, this Court should find that the Fourteenth Circuit's decision to admit the Petitioner's prior conviction was correct.

ARGUMENT

I. THE FOURTEENTH CIRCUIT CORRECTLY FOUND THAT THE PETITIONER DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN A PACKAGE ADDRESSED TO AN ALIAS

The Petitioner did not possess Fourth Amendment standing to assume a reasonable expectation of privacy. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…" U.S. Const. amend. IV. The Fourth Amendment – as its text suggests - functions to protect "people" from unreasonable searches and seizures, not merely places or things. *Katz v. United States*, 389 U.S. 347, 353 (1967). However, being a "person" is not enough to claim the Fourth Amendment's protections. Instead, said person must possess Fourth Amendment "standing." *See, Rakas v. Illinois*, 439 U.S. 128, 133 (1978).

Fourth Amendment standing exists when an individual "has had *his own* Fourth Amendment rights infringed by the search and seizure he seeks to challenge." *Id*. (emphasis added). Determining whether a person has suffered a violation of his rights "requires examination of whether the person claiming the constitutional violation had a 'legitimate expectation of privacy in the premises [or items] searched*.'' Byrd v. United States*, 584 U.S. 395, 403 (2018) (quoting *Rakas*, 439 U.S. at 143). Courts determine whether a person has a 'legitimate expectation of privacy' by using a two-part test, which asks: (1) whether the person had a subjective expectation of privacy, and (2) whether that expectation is one that "society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J. concurring). Society is prepared to accept as reasonable that comports with everyday expectations and social customs.

See, *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). The proponent of a motion to suppress bears the burden of establishing a legitimate expectation of privacy. *Rakas*, 439 U.S. at 130 n.1.

A. The Petitioner Lacked a Reasonable Expectation Of Privacy In a Package Addressed To Her Alias

There is no dispute that "letters and sealed packages" fall into the general class of "effects in which the public at large has a legitimate expectation of privacy[.]" *United States v. Jacobsen*, 466 U.S. 109, 114 (1984). However, Circuit Courts have consistently rejected a defendant's expectation of privacy in packages addressed to a third party. *See, e.g.*, *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992); *United States v. Koening*, 856 F.2d 843,846 (7th Cir. 1988). Courts take desperate positions with respect to packages addressed to aliases, however, and despite this issue's regular recurrence, the Supreme Court has yet to lend its weight to resolving it. *United States v. Lozano*, 623 F.3d 1055, 1062 (9th Cir. 2010). Accordingly, there now exists a spectrum of decisions regarding what interest – if any - a defendant may have in packages addressed to an alias, and confusion abounds both among and within the circuits regarding the proper method for making that determination. *Id*.

Regardless of the circumstances, one may not vicariously assert Fourth Amendment rights, and thus, a defendant categorically lacks standing to challenge the package's search if she is neither listed as the sender nor the addressee on the package. *See Koening*, 856 F.2d at 846; *United States v. Smith*, 39 F.3d 1143, 1145 (11th Cir. 1994). Even the most restrictive cases hold that there is no principled distinction between packages addressed to an actual third-party and those addressed to a defendant's alias. Such cases hold as a matter of principle that a defendant may never have a legitimate expectation of privacy in a package that is not explicitly addressed to her.

The problem ailing this perspective is that it leaves no room for what society may deem reasonable. Society, for example, *is* prepared to accept Samuel Clemons' legitimate privacy interest in a package addressed to Mark Twain; nobody contends that in doing so, Clemons is vicariously asserting somebody else's rights. As far as society is concerned, Samuel Clemons and Mark Twain are the same.

On the opposite extreme stands certain dicta from the Seventh and Tenth Circuits suggesting that a person *may* have a reasonable expectation of privacy in a package addressed to an alias because it is neither illegal nor necessarily wrong to do so. *United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009); *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003). This perspective is puzzling if stretched beyond its confines. The legality and/or morality of receiving mail by an alias is relevant – if at all – only to the extent that it may indicate a defendant's *subjective* expectation of privacy. A defendant's subjective expectation of privacy says nothing about whether society is prepared to accept that expectation as reasonable. *See, Katz*, 389 U.S. at 361 (Harlan, J. concurring).

1. The "Other Indicia" Test Strikes The Proper Balance

A balanced perspective is necessary to clarify the alias question in a manner consistent with this Court's prior holdings. Fortunately, such a perspective exists. The First and Fourth Circuits have adopted the 'other indicia' test. This test holds that "when a sealed package is addressed to a party other than the intended recipient […] that recipient does not have a reasonable expectation of privacy in the package *absent other indicia of ownership, possession or control* existing at the time of the search." *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021) (emphasis added); *See, United States v. Stokes*, 829 F.3d 47, 52-3 (1st Cir. 2016).

This 'other indicia' test avoids the unduly prejudice of the *Koenig* test by expanding the court's inquiry beyond the package itself, thereby ensuring two things: (1) that a defendant possesses a reasonable opportunity to carry her burden in Fourth Amendment alias cases, and (2) that defendants with long-standing pseudonyms do not automatically lose their right to challenge unreasonable searches. Recognition that a defendant *might* have a legitimate expectation of privacy in an alias, however, is not the end of the 'other indicia' inquiry. Unlike the perspective suggested by *Johnson* and *Pitts*, this test still requires that the defendant demonstrate that her expectation was one that *society* is prepared to accept as reasonable.

Moreover, the test's searching inquiry for 'other indicia' requires courts to consider the totality of the circumstances. *Stokes*, 829 F.3d at 53. Thus, there is no need to disregard useful precedent from other circuits to adopt this test. One precedent fitting nicely under the 'other indicia' ambit is that of the Fifth and Seventh Circuits regarding so-called "public-use aliases." These circuits distinguish between legitimate, commonly known aliases (such as Mark Twain) and those unknown to the public. *See Pitts*, 322 F.3d 460-61 (Evans, J. concurring); *see also*, *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981) (defendant had a privacy interest in a package addressed to his business). Defendants may have a privacy interest in the former but not the latter. The distinction lies in the extent to which society recognizes that the person and the alias are the same. *See, Pitts*, 322 F.3d 460-61 (Evans, J. concurring). Indeed, Courts utilizing the 'other indicia' test have already incorporated this distinction into their analysis. *See*, *e.g.*, *Rose*, 3 F.4th at 728 (noting that defendants may assert a reasonable expectation of privacy in packages addressed to "established aliases").

Accordingly, the Government requests that this Court adopt the well-reasoned rationale of the First and Fourth Circuits, holding that the 'other indicia' test is properly tailored to assess

the nuanced question of what expectation of privacy a defendant may have in a package addressed to an alias.

2. Under The "Other Indicia" Test, The Petitioner Has No Reasonable Expectation Of Privacy In a Package Addressed To Her Alias

Absent showing "other indicia of ownership, possession, or control existing at the time of the search" a defendant has no reasonable expectation of privacy in a package not addressed to her. *Rose*, 3 F.4th at 727, 729. In determining whether such 'other indicia' exists, courts look to the totality of the circumstances, including the defendant's "ownership, possession and/or control" of the property; "historical use of the property searched, or the thing seized; [and her] ability to regulate access." *United States v. Aguirre*, 839 F.2d 854, 856-57 (1st Cir. 1988). Thus, to establish a reasonable expectation of privacy, the Petitioner must "identify evidence *objectively* establishing [her] ownership, possession, or control of the property at issue." *Rose*, 3 F.4th at 727 (emphasis added).

Here, the Petitioner offered no facts which could have objectively established her ownership of the package at the time of its search. The Petitioner does not dispute that police and postal inspectors knew only the following when the packages were intercepted and searched: (1) Holistic Horse Care had sent the packages; (2) they were addressed to Jocelyn Meyer at P.O. Box 9313; (3) Jocelyn Meyer had opened this P.O. Box just two weeks prior; (4) also in the P.O. Box were two Amazon packages addressed to somebody named Franny Fenty. (R. 30-31.)

The Petitioner may attempt to cast the Amazon packages addressed to her real name, Franny Fenty, as an 'indicia' demonstrating the Petitioner's possession of the P.O. Box and, thereby, the packages addressed to Meyer. However, absent from this assertion is that where 'other indicia' of ownership exist, they must *objectively* establish ownership, *i.e.*, demonstrate a privacy interest in a manner that society is prepared to accept as reasonable. *See*, *Katz*, 389 U.S.

at 516 (Harlan, J. concurring). Society is prepared to accept as reasonable that it comports with everyday expectations and social customs. *See Olson*, 495 U.S. at 98.

Society expects that senders will sometimes address a package to the wrong person; in that situation, social custom calls for actions that assume more mundane explanations than secret aliases. For example, if a hypothetical Bob Miller is picking up the mail for his friend, John Smith, and spies a package addressed to a stranger, he does not immediately conclude that John Smith must have a secret second name. Instead, he concludes that John Smith and the stranger must be different people. Social custom expects Bob Miller to segregate the mystery package from John Smith's mail and, if Bob is the considerate type, attempt to locate the package's true owner. Society does not consider Bob Miller to be stealing John Smith's mail when he does so, even if John Smith does end up being the package's true owner. As far as society is concerned, John Smith has zero interest in the package and its contents, absent evidence demonstrating otherwise. Here, investigators believed and acted according to this societal expectation, assuming that the Petitioner and Meyer were different people until facts ultimately proved them wrong. (R. 31.)

Moreover, had the presence of the Amazon packages been a sufficient indication that the Petitioner and Meyer were the same person, investigators would have been justified in pursuing a warrant for the Amazon packages as well. It is not as if one cannot buy tools of the drug trade on Amazon. Investigators, however, made no effort to discern the contents of the Amazon packages before the Petitioner's arrest, merely setting them aside. *Id*. This fact alone plainly demonstrates that the Amazon packages addressed to the Petitioner's real name were not indica objectively demonstrating the Petitioner's ownership of the packages addressed to Jocelyn Meyer.

B. "Jocelyn Meyer" Is Not The Petitioner's Public Use Alias Since The Petitioner's Use Of The Alias At The Time Of The Packages' Search Was Collectively Unnoticed

The Petitioner did not sufficiently establish a public use alias. To establish a reasonable expectation of privacy in packages addressed to her alias, the Petitioner must "identify evidence objectively establishing [her] ownership, possession, or control of the property at issue" at the time of the search. *Rose,* 3 F.4th at 727-28. In evaluating this evidence, courts must look to "the totality of the circumstances." *Id*. at 728. An alias itself may be an objective indicia of ownership, but only if that alias is a generally known "public-use" alias. *See, Id.* at 728-30. The distinction between public and non-public aliases lies in the extent to which society recognizes that a particular person and her alias are identical. *See*, *Pitts*, 322 F.3d 460-61 (Evans, J. concurring).

To establish "Jocelyn Meyer" as a public-use alias, the Petitioner will unquestionably exaggerate her past use of the name. The evidence in the record, however, reflects that no person – save the Petitioner – could have objectively known that Jocelyn Meyer and Franny Fenty were the same person. The record reflects that the Petitioner went by Jocelyn Meyer in three contexts before her packages' search. The first was approximately seven years ago when she published two short stories under this name in her college magazine. (R. 4.); (R. 13.) Continuing to write, in October 2021, the Petitioner represented herself as Jocelyn Meyer in emails sent to publishing companies. (R. 42.) Covering her tracks well, the Petitioner sent these emails using the account jocelynmeyer@gmail.com. (R. 5.) Finally, in January 2022, the Petitioner opened a P.O. Box under the name. (R. 30-31.)

An alias obscure to even personal friends is not a public-use alias. The Petitioner claims that she used the name Jocelyn Meyer to maintain her privacy. (R. 43.) While there is nothing inherently wrong with utilizing an alias for this purpose, an alias constructed to maintain privacy

is –by definition – mutually exclusive with a public use alias. By design, the name Jocelyn Meyer functioned to prevent the public from recognizing that the Petitioner and Jocelyn Meyer are the same person. Indeed, even personal friends had no idea the Petitioner occasionally went by the name Jocelyn Meyer. (R. 33.)

Regarding societal expectations, the Petitioner and Jocelyn Meyer were different people at the time of the packages' search. Thus, 'Jocelyn Meyer' is not the Petitioner's public use alias. The record contains no other facts which could constitute 'other indica' of the Petitioner's ownership of the packages addressed to Meyer. Accordingly, the Petitioner has failed to establish a legitimate expectation of privacy in the packages addressed to her alias.

II. THE FOURTEENTH CIRCUIT PROPERLY EXCLUDED THE PETITIONER'S VOICEMAIL MESSAGES AS INADMISSIBLE HEARSAY BECAUSE THE PETITIONER FAILED TO SATISFY FED. R. EVID. 803(3), RESULTING IN UNRELIABLE EVIDENCE

The Petitioner's voicemail messages are categorically excluded under this Court's well-established ancestry of the spontaneity requirement of Rule 803(3). This Court's long history of jurisprudence established that hearsay statements can be used to prove a declarant's then-existing state of mind if their intention is expressed *at the time* of the event. *Mut. Life Ins. Co. N.Y. v. Hillmon*, 145 U.S. 285, 295-96 (1892); *see Shepard v. United States*, 290 U.S. 96 (1933); *Lilly v. Virginia*, 527 U.S. 116 (1999). Under Fed. R. Evid 803(3), three requirements must be fulfilled for statements of a declarant's state of mind to be admissible: (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, meaning no time to fabricate or to misrepresent their 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 (7th Cir. 1986). Moreover, the contemporaneity requirement under Rule 803(3) can be

met only where it is supported by particularized guarantees of trustworthiness. *Lilly*, 527 U.S. at 124-125; *Hillmon*, 145 U.S. at 296.

This Court has not yet ruled on whether spontaneity is expressly required under Rule 803(3), leaving federal circuits split. *Compare*, *e.g.*, *United States v. Dierks*, 978 F.3d 585 (8th Cir. 2020) (the court found that a tweet sent 18 hours before a criminal event was not sufficiently contemporaneous, violating the circumstantial guarantee of trustworthiness); *with United States v. Torres*, 901 F.2d 205 (2d Cir. 1990) (the court found that evidence of a conversation which occurred a day later was admissible because it should be left up to the jury to decide untrustworthiness and unreliability). However, this Court should adopt the framework of the Fifth Circuit, Seventh Circuit, and Eighth Circuit and formerly adopt the spontaneity requirement which subsequent courts for the past 132 years have continued to use as its foremost legal standard. *See Lilly*, 527 U.S. at 116; *Hillmon*, 145 U.S. at 296.

Thus, a preponderance of jurisdictions has applied spontaneity prerequisites under Rule 803(3) that this Court should adopt in affirming the judgment of the Fourteenth Circuit because the Petitioner had time to reflect and fabricate her statements, resulting in unreliable, untrustworthy testimony which should remain excluded. (R. at 69.)

A. The Petitioner's Voicemail Messages Failed to Meet the Overt Timeliness Requirement Under Common Law and Were Used Inadmissibly to Prove the Culpability of Another Party

This Court ruled that the thoughts or feelings of an individual are only admissible when those expressions are "*natural reflexes* of what it might be impossible to show by other testimony." *Hillmon*, 145 U.S. at 296. (emphasis added). The Fourteenth Circuit ruled that under the requirements of Rule 803(3), the Petitioner failed to satisfy the second prong mandating that the declarant have *no time* to reflect before making a statement of their state of mind. (R. at 68-

69.); *Jackson*, 780 F.2d at 1315. The state of mind exception to hearsay is merely a specialized application of the present sense impression hearsay exception under Fed. R. Evid. 803(1), which exempts a hearsay statement only if it was made while or immediately after the declarant perceived it. Fed. R. Evid. 803(1); *See* Fed. R. Evid. 803(3) Advisory Committee's Notes.

Under the Advisory Committee's Note to Rule 803(3), a substantial contemporaneity between event and statement is unquestionably required to satisfy Rule 803(3). *United States v. Rivera-Hernandez*, 497 F.3d 71 (1st Cir. 2007) (the court found that a declarant's statement justifying his need for fraudulent invoices was not contemporaneous enough with his demand for money because it occurred well after the demand was made). Moreover, a statement is inadmissible if used to prove culpability of another party. *Shepard*, 290 U.S. at 96. Here, the Petitioner shifted her potential culpability onto Millwood in her voicemail messages to her and recorded her first voicemail only *after* her packages were intercepted at the post office and the second voicemail 45 minutes later. (R. at 40-46.) Thus, the Petitioner's statements were untrustworthy and inadmissible.

1. An Impermissible Lapse Of Time Occurred Between The Crime And The Petitioner's Voicemail Messages

This Court unambiguously set the standard for spontaneity. If an expression is a material fact, "it may be proved by *contemporaneous* oral or written declarations of the party." *Hillmon*, 145 U.S. at 295 (emphasis added). The Fifth Circuit correctly found that if a declarant had knowledge that a statement or conversation was being recorded or monitored, it instantly diminishes any reliability of the statement, demonstrating that the statements were more self-serving than candid. *United States v. Reyes*, 239 F.3d 722 (5th Cir. 2001) (the court found that the duration between the recorded conversation and the criminal act – four months – was too long to maintain any probative value). Further, the Eighth Circuit correctly concluded that

statements are considered self-serving when deliberate or conscious misrepresentation disrupts the "circumstantial guarantee of trustworthiness," leading to inadmissible evidence. *United States v. Naiden*, 424 F.3d 718 (8th Cir. 2005) (the defendant sought to introduce testimony of a conversation conducted a day before the crime, where he stated that he did not knowingly commit the crime. The court found that the statement lacked contemporaneity because it was not made as an "*immediate reaction* to his communication").

In accordance with the Fifth and Eighth Circuits, the Seventh Circuit affirmed the *Hillmon* and *Jackson* standard by maintaining that if a declarant had *any* time to reflect, they could immediately fabricate or misrepresent their thoughts, rendering the statements unreliable and inadmissible. *United States v. Macey*, 8 F.3d 462 (7th Cir. 1993) (a statement made four hours after a criminal event used to show that the declarant did not intend to commit the crime was inadmissible because four hours was enough time to fabricate a story); *United States v. Carter*, 910 F.2d 1524 (7th Cir. 1990). In *Carter*, the defendant was convicted of robbery and sought to introduce testimony from his mother of a statement she heard from a third party just *one hour* after they confessed to committing the crime. The court held that one hour "provided defendant with ample opportunity to reflect upon his situation," and was thus, inadmissible for lack of spontaneity. *Id.* at 1530-1531.

In the case at bar, the Petitioner sought to introduce evidence of two separate voicemail messages left for Millwood. (R. at 47.) The Petitioner's first voicemail message, dated February 14, 2022, at 1:32 pm, was sent *after* she noticed her packages had been intercepted and she was likely under investigation. (R. at 42-46.) It was only after this realization that the Petitioner arbitrarily told Millwood that she recalled reading an article that xylazine is occasionally mixed with Fentanyl and was concerned that the product she ordered may also be mixed. (R. at 46.)

With the sudden absence of a response from Millwood, the Petitioner produced a second voicemail message, forty-five minutes later, dated February 14, 2022, at 2:17 pm, where she repeated her concerns.

A response to a triggering event forty-five minutes after it occurred hardly qualifies as a "natural reflex" required by this Court in proving admissibility under Rule 803(3). *Hillmon*, 145 U.S. at 296. Undoubtedly, the Petitioner's voicemail messages, if admissible, would be advantageous in proving her innocence. However, *Macey* and *Carter* tell us that merely admitting testimony because it is a vital tool in exhibiting one's innocence is unacceptable under 803(3) if the plaintiff had enough time to fabricate a story, which the Petitioner did in the instant matter. *Macey*, 8 F.3d at 467-468; *Carter*, 910 F.2d at 1530-1531. Thus, the Petitioner's statements should be excluded for lack of timeliness.

2. The Petitioner's Statements Should Remain Excluded Because They Would Not Be Used To Prove Present State Of Mind But Instead To Prove The Culpability Of Another Party

If a statement of a declarant's state of mind is being used to prove that another party committed the crime, it is inadmissible under Rule 803(3). *Shepard*, 290 U.S. at 96. A declarant must only declare intentions of their current state of mind, "casting light upon the future," rather than declarations of memory or the past. *Id*. at 105-106. Moreover, contemplating about what to say or making statements for a *specific reason*, "creates the possibility that the statements are not contemporaneous, and, more likely are calculated interpretations of events rather than near simultaneous perceptions." *United States v. Woods*, 301 F.3d 556 (7th Cir. 2002) (the court found that statements that were clearly addressed to FBI agents listening in on the microphone were excluded from Rule 803(3) because they were calculated and provided for a reason).

On the other hand, in *United States v. Di Maria*, 727 F.2d 265 (2d Cir. 1984), the defendant was prosecuted for selling stolen cigarettes and sought to introduce testimony of a

conversation he had with the arresting agents, where he said: "I thought you guys were just investigating [a] white collar crime; what are you doing here? I only came here to get some cigarettes real cheap." *Id*. at 270. The court ruled that the statement was admissible despite being false and intended for the purposes of culpable relief. *Id*. However, the court still held that, although fabricated and self-serving, it fell within Rule 803(3) because credibility was not written into the rule and is ultimately for the jury to determine. *Id*.

Di Maria's indifference to intent and trustworthiness is misplaced and inapplicable to the facts in the case at bar. Instead, this Court's decision in *Shepard* is applicable. In *Shepard*, the statement "Dr. Shepard has poisoned me," was admitted against the defendant, who was charged with murder. *Shepard*, 290 U.S. at 98. Justice Cardozo ruled that such a declaration would not be used to prove the declarant's present state of mind, such as thoughts and feelings, but rather, would be used "as proof of an act committed by some one else…" *Id*. at 104. Thus, the defendant's conviction was reversed on the grounds that the state of mind exception was improperly applied. *Id*. at 106.

The case at bar is analogous to *Shepard* and easily distinguishable from *Di Maria*. In *Di Maria*, the crime at issue was a high-stake robbery where a group of individuals, including the defendant, plotted and engaged in larceny of over 700 cases of cigarettes. *Di Maria*, 727 F.2d at 268. Moreover, the defendant in *Di Maria* vocalized his statements to FBI agents as they approached him, merely responding to their body language (of walking toward him) by asking why they were on the scene and offering his innocence in the process. *Id*. at 270. This pales in comparison to the instant case where the Petitioner did not *respond* or get *approached* by investigators, but rather, *willingly* picked up her phone, called Millwood, and attempted to shift

her culpability onto her once she had reason to know that her statements would prove criminally imperative. (R. at 46.)

The Petitioner's statements were not a reflection of a present state of mind but were a calculated fabrication. *Shepard* set precedent that statements intended to relieve one's culpability to prove an act committed by someone else would not be admissible under Rule 803(3). *Shepard*, 290 U.S. at 104. As indicated by the voicemail messages below, the Petitioner intended to shift liability off herself and onto Millwood.

In the first voicemail message dated February 14, 2022, at 1:32 pm, the Petitioner stated:

> 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***.[1]

In the second voicemail message dated February 14, 2022, at 2:17 pm, the Petitioner stated:

> 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***.[2]

Since this Court prohibits statements which would be used as "proof of an act committed by someone else," the Petitioner's statements should be excluded under Rule 803(3). *Shepard*, 290 U.S. at 104. Thus, this Court should adopt the well-reasoned rationale of the Fifth Circuit, Seventh Circuit, and Eighth Circuit and cement the framework established in *Hillmon* and *Shepard* in affirming the Fourteenth Circuit's ruling.

[1] (R. at 40.) (emphasis added)
[2] *Id*. (emphasis added)

B. Affirming The Fourteenth Circuit's Ruling in Upholding The Spontaneity Requirement Of Rule 803(3) Is Essential To Maintaining An Impartial Jury By Safeguarding Against Fabricated Statements And Unreliable Evidence

The ancestry of Rule 803(3) is well-defined. This Court has long been concerned with the reliability of evidence since its ruling in *Hillmon*. *Lilly*, 527 U.S. at 124-125; *Hillmon*, 145 U.S. at 296. To "rebut the presumption of unreliability" in the admissibility of evidence, the declarant must show independent "indicia of reliability." *Lee v. Illinois*, 476 U.S. 530 (1986); *see Ohio v. Roberts*, 448 U.S. 56, 66 (1980).[3] In accordance with the principles of justice, democracy, and the foundation of adjudication in the United States, the spontaneity requirement under 803(3) is a vital tool to safeguard against unreliable and prejudicial evidence being presented to the jury. *See* Thomas A Wiseman, *Federal Rule of Evidence 803(3) and the Criminal Defendant: The Limits of the Hillmon Doctrine*, 35 Vanderbilt Law Review (1982). ("A primary function of the rules of evidence…is to withhold relevant but incompetent evidence from the jury, which consequently protects the defendant from a potentially erroneous verdict"). The foundational purpose of Rule 803(3) was that a spontaneous expression of a declarant's present condition was a "reliable indicator" of their state of mind. 2 *McCormick on Evidence* § 274 (Kenneth S. Broun ed., 6th ed. 2006) (hereinafter "the Treatise").[4] Under common law interpretations and authoritative analysis under the Treatise, the inherent intention of Rule 803(3) is clear:

> [T]he special assurance of reliability for statements of present state of mind rests upon their spontaneity and resulting probable sincerity. The guarantee of reliability is assured principally by the requirement that the statements must relate to a condition of mind or emotion existing at the time of the statement.[5]

---

[3] *Ohio v. Roberts*, 448 U.S. 56 (1990) was overruled by *Crawford v. Washington*, 541 U.S. 36, 53 (2004), which held that testimonial evidence is generally inadmissible because the Confrontation Clause safeguards against unreliable testimony. *Roberts* is persuasive in illustrating the stringent standard this Court has continuously upheld regarding reliability in the admissibility of evidence but is not used as binding precedent in the instant matter.

[4] The McCormick Treatise on Evidence provides illustrative, authoritative analysis on the Federal Rules of Evidence, including Rule 803(3).

[5] *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011) (Judge Raggi's concurrence, quoting 2 *McCormick on Evidence* § 274, at 267)

This Court and the Confrontation Clause of the Sixth Amendment to the United States Constitution have illustrated that *reliability* of evidence far transcends other related concerns since evidence without an "indicia of reliability," cannot be used to "corroborate anything." *Tofiq Nasser Awad Al Bihani v. Obama*, 662 F. Supp. 2d 9 (D.D.C. 2009). The counter assertion is that requiring spontaneity in Rule 803(3) is contrary to the rule's express terms and might invite "delay, prejudgment, and encroachment on the province of the jury," however, such an assertion is meritless. *United States v. Harris*, 733 F.2d 994 (2d Cir. 1984). Federal circuit courts have correctly rejected the Rule 803(3) interpretation illustrated in *Di Maria* and have instead adopted a trustworthiness approach to Rule 803(3) based on the timeliness and spontaneity requirement. Eleanor Swift, *GUILT VS. GUILTINESS: Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 Seton Hall L. Rev. 975. The timeliness requirement is a judicial inclination because it unquestionably serves as a valuable judicial tool used to evaluate a defendant's sincerity. *Id*. at 992.; *2 McCormick on Evidence* § 274, at 267. If a spontaneity requirement was no longer recognized under Rule 803(3), a disturbing trend could develop where the judge no longer filters what is introduced to the jury, resulting in a free flow of unrestricted, fabricated evidence that could easily acquit the most culpable of defendants. *See Swift*, 38 Seton Hall L. Rev. at 1006. Unquestionably, such an eradication would remove essential safeguards to maintaining a just trial. *See Hillmon,* 145 U.S. at 295; *Shepard*, 290 U.S. at 104; *Lee*, 476 U.S. at 530.

In the case at bar, the Petitioner deliberately misrepresented or fabricated her state of mind to persuade an eventual jury of her acquittal. Jurors typically favor a verdict before the entirety of the evidence has been presented, causing them to "distort" how they interpret subsequent evidence. Lee J Curley et al., *Cognitive and human factors in legal layperson*

decision making: Sources of bias in juror decision making, National Library of Medicine (Feb. 17, 2202) (a study conducted on jury bias found that three primary sources of bias exist: pre-trial bias; cognitive bias, and bias from external legal actors). Thus, if a jury hears evidence of the Petitioner's voicemail messages, in the absence of other corroborating evidence, acquittal may occur solely on the grounds of unreliable recordings, resulting in undue prejudice to the Respondent. (R. at 49.) Furthermore, such evidence could encourage partiality and diminish judicial justice in the instant matter, and in all courtrooms throughout the United States if the spontaneity requirement is not maintained and enforced under Rule 803(3). Thus, this Court should affirm the judgment of the Fourteenth Circuit and exclude the Petitioner's voicemail messages for improperly lacking spontaneity and reliability, violating the inherent characteristics of Rule 803(3) and the United States judiciary.

III. THE FOURTEENTH CIRCUIT CORRECTLY CONCLUDED THAT THE PETITIONER'S PRIOR CONVICTION FOR PETIT LARCENY WAS ADMISSIBLE FOR IMPEACHMENT PURPOSES BECAUSE IT WAS A DISHONEST ACT UNDER RULE 609(a)(2)

This Court should affirm the Fourteenth Circuit's decision to admit the Petitioner's petit larceny conviction for impeachment purposes under Federal Rules of Evidence 609(a)(2). "A fundamental premise of our criminal trial system is that "the jury is the lie detector." *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (citing *United States v. Barnard*, 490 F. 2d 907, 912 (9th Cir. 1974). As such, courts have long recognized that juries bear responsibility for evaluating a witness's credibility. *Glasser v. United States,* 315 U.S. 60, n.16 (1942). To give juries the necessary information to evaluate witnesses' trustworthiness, parties may introduce impeaching evidence that contests witnesses' credibility. Fed. R. Evid. 607. Federal Rule of Evidence 609(a)(2) mandates that courts admit evidence of a witness's prior convictions for purposes of impeachment upon finding that "establishing the element of the crime required

proving – or the witness's admitting – a dishonest act or false statement." Fed. R. Evid. 609. A prior conviction involving dishonesty or false statements qualifies under Rule 609(a)(2) so long as it is less than years old; thus, such convictions are automatically admissible and not subject to judicial discretion. *Walker v. Horn*, 385 F.3d 321, 333 (3d Cir. 2004) (quoting *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 523 (3d Cir. 1997).

Convictions within the confines of Rule 609(a)(2) are those that highlight the witness's propensity to lie because such convictions are "peculiarly probative of credibility." H.R. Rep. No. 1597, 93d Cong., 2d Sess. These offenses include embezzlement, criminal fraud, perjury, false pretense, and crimes that are *crimen falsi* in nature, which involve some element of deceit, untruthfulness, or falsification in their commission. Congressional Conference Report. Regarding crimes that are *crimen falsi* in nature, this Court and Congress have not provided lower courts with guidance for determining whether a particular offense rests in this category for the purposes of Rule 609(a)(2). Consequently, two 609(a)(2) analyses have emerged in the circuit courts for evaluating whether a prior conviction contains dishonesty or a false statement for impeachment purposes.

Most courts, such as the Seventh, Eighth, Ninth, and Tenth circuits, have correctly adopted a conduct-based approach in their 609(a)(2) analysis. These courts administer a fact-specific inquiry of the circumstances underlying the conviction to determine whether the conduct involved deceit, untruthfulness, or falsification in the commission of the crime. If the "manner in which the witness committed the offense *may* have involved deceit," then the prior conviction is admissible under Rule 609(a)(2). *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976). Accordingly, a crime need not be facially deceitful for it to fall within 609(a)(2)'s scope. Indeed, crimes that "leave room for doubt" can be admitted for impeachment purposes if the party

seeking to admit the conviction establishes "that a particular prior conviction rested on facts warranting the dishonesty or false statement description." *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1997). Conversely, other courts incorrectly apply an element-based approach that limits their 609(a)(2) analysis solely to the elements of the prior conviction. Under this approach, a prior conviction can only be admitted if the offense contains an element of dishonesty or a false statement. Thus, the dispositive question rests exclusively on the requisites of the offense.

This Court should find the conduct-based approach controlling for Rule 609(a)(2)'s analysis because this approach embraces the congressional intent embedded in Rule 609(a)(2) and safeguards the judicial function of the jury. This Court should also affirm the Fourteenth Circuit's decision to admit the Petitioner's petit larceny conviction for impeachment under the conduct-based analysis.

A. This Court Should Adopt a Conduct-Based Analysis When Determining Whether a Prior Conviction Involved a Dishonest Act or False Statement For Purposes of Rule 609(a)(2)

Legislative history documenting "clear evidence of congressional intent" helps clarify ambiguous statutory text. *Milner v. Dep't of the Navy*, 562 U.S. 572 (2011). Courts generally give more significant consideration to subsequent changes made to a prior statute. *United States v. Brown*, 333 U.S. 18, 25 (1948) (finding that the amendment of the provision in question was intended to expand coverage within the Act or guarantee greater coverage); *see also Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1726-1727 (2020). Indeed, the substantial weight given to amendment history may even overcome evidence of statutory meaning. *Pierce Cty. v. Guillen*, 537 U.S. 129, 145 (2003) (finding that substantive canon was inapplicable when such canon would leave the amendment of disputed provision "an exercise of futility.") Thus, this Court presumes that Congress intends its amendment to have a "real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995); *Ross v. Blake*, 578 U.S. 632, 640-641 (2016) (finding that the

contested provision was intended to have a mandatory nature after it had replaced a weaker provision).

In the case at bar, the legislative history indicates that Congress rejected an element-based Rule 609(a)(2) analysis. In 2006, Congress amended Rule 609(a)(2) with the aims of (1) limiting the automatically admissible crimes to those that are highly probative of a witness's credibility, (2) resolving a circuit split, and (3) preventing mini-trials from arising into whether or not a conviction involved dishonesty or a false statement.[6] Advisory Committee on Evidence Rules, Minutes of the Meeting 18 (Apr. 29-30, 2004). Congress explicitly considered implementing an element-based analysis when amending Rule 609(a)(2). Advisory Committee on Evidence Rules, Report of the Advisory Committee on Evidence Rules 5 (2003). Under the speculated approach, prior convictions would have only been admitted if the offense's "statutory elements necessarily involve the commission of an act of dishonesty or false statement." *Id*. at 4. However, Congress declined to adopt this approach and instead called for a more expansive analysis, stating that "evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2) regardless of how such crimes are specifically charged**.**" Advisory Committee on Evidence Rules, Minutes of the Meeting 17 (April 29-30, 2004). For illustration, Congress notes that a conviction for making a false claim to a federal agent is admissible under Rule 609(a)(2) even if the crime was not charged under a section referencing deceit. Fed. R. Rule of Evidence 609(a)(2) Committee Notes on Rules – 2006 Amendment. Thus, in the case at hand, the fact that the Petitioner was not charged with theft by deception under Boreum's criminal code is immaterial in deciding whether her prior conviction involved dishonesty. Nor is it significant that

[6] Congress's 2006 Amendment to the Federal Rule of Evidence 806 was its latest substantial amendment to the statute. In 2011, Congress amended the rule for nothing more than a stylistic change to make the rules more coherent. Congress specifically notes that it had "no intent to change any result in any ruling on evidence admissibility" when making its 2011 Amendment.

the Petitioner's prior conviction does not have statutory elements of dishonesty or a false statement. More importantly, though, Congress's rejection of the element-based approach coupled with its subsequent amendment of Rule 609(a)(2) stands contrary to adopting an element-based analysis. Therefore, permitting such an approach would eliminate a "real and substantial" effect on Congress's later amendment.

On the other hand, the conduct-based analysis does subscribe to the legislative history of Rule 609(a)(2). In its 2006 amendment, Congress specifically added that prior convictions are automatically admissible "if it can be readily determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statements by the witness." *Id*. Congress's subsequent reform signals that it wished to expand, not limit, offenses containing dishonesty or false statements under Rule 609(a)(2) by allowing prior convictions to be admitted where dishonesty or false statements necessarily lie underneath statutory elements. The conduct-based analysis ensures that dishonesty or false statements are readily determinable by requiring that such acts be present in the facts surrounding the prior conviction. This approach also prevents mini-trials from occurring because the court makes its determination based on the existing facts of the prior conviction. Further, unlike the element-based analysis, this approach allows for prior convictions to be admitted notwithstanding their statutory elements, which corresponds with Congress's refusal to adopt the element-based analysis. Therefore, the conduct-based analysis encapsulates the legislative history surrounding Rule 609(a)(2), and this holds particularly true when compared to its counterpart. Therefore, this Court should adopt the conduct-based analysis used by the lower court.

B. The Petitioner's Petite Larceny Conviction Constituted a Dishonest Act Under Rule 609(a)(2)

Moreover, the Petitioner's petit larceny conviction was a dishonest act under Rule 609(a)(2). As former Chief Justice Burger noted, "in our human experience, acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity." *State v. Miller*, 229 N.W. 2d 762, 769 (Iowa 1975) (quoting *Gordon v. United States*, 383 F. 2d 936, 940 (D.C. Cir. 1967). Theft convictions, in particular, imply dishonesty and may serve as a basis for impeaching a witness's testimony. *Scott v. Illinois*, 440 U.S. 367, 381 n.10 (1979). For instance, state courts have correctly made this determination when presiding over this issue. *State v. Page*, 449 So. 2d 813 (Fla. 1984) (finding that theft convictions can be used to impeach a criminal witness because such offenses are crimes of dishonesty); *State v. Toliver*, 33 Ohio App. 3d, 514 N.E.2d 922 (1986) (holding that theft offenses involve dishonesty); *Kennedy v. State*, 655 P.2d 563 (Okla. Crim. App 1982) (holding petit larceny is a crime of dishonesty); *State v. Gallant*, 307 Or. 152, 764 P.2d 920 (1988); *State v. Brown*, 113 Wn. 2d 520 (1989); *State v. Butler*, 626 S.W. 2d 6 (Tenn. 1981); *Commonwealth v. Bells*, 373 Pa. Super. 57, 540 A.2d 297 (1988); *Webster v. State*, 284 Ark. 206, 680 S.W.2d 906 (1984). Likewise, many federal courts have correctly found that theft crimes constitute a dishonest act per Rule 609(a)(2) if deceit was used to commit the offense. *Altobello v. Borden Confectionary Prods. Inc*, 872 F.2d 215 (7th Cir. 1989); *United States v. Yeo*, 739 F.2d 385 (8th Cir. 1984); *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982); *United States v. Seamster*, 568 F.2s 188, 191 (10th Cir. 1978); *United States v. Grandmont*, 680 F. 2d 867, 871 (1st Cir. 1982); *Government of V.I. v. Toto*, 529 F.2d 278, 281 (3rd Cir. 1976); *Smith*, 551 F.2d 348 (D.C. Cir. 1976).

Courts applying the conduct-based approach must often distinguish crimes of violence from crimes of deceit. *Altobello*, 872 F. 2d at 216. Prior convictions are dishonest if they include any act of "false pretense" with some "some element of deceit." *Smith*, 551 F. 2d at 362. An individual who commits larceny engages in dishonesty because they possess "a specific criminal intent to deprive an owner of his property permanently." *United States v. Carry*, 418 F.2d 1184, 1186 (D.C. Cir. 1989). In other words, they engage in a "dishonest transaction" by falsely acquiring "that which rightfully belongs to another" and depriving "the owner of the rights and benefits of ownership." *Morissette v. United States*, 342 U.S. 246, 266 n. 28 (1952). Such mens rea exceeds the ordinary state of mind required for "impulsive" crimes, such as "joyriding," as to reflect the wrongdoer's credibility. *Id.*; *see also Parish v. State*, 477 P.2d 1005, 1010 (Alas. 1970). For example, in *United States v. Del Toro*, the defendant was convicted of grand larceny, and before committing the offense, the defendant had introduced two individuals to carry out the offense. 676 F.2d 13, 18 (1st Cir. 1973). The court held that the prior conversation could "certainly have been introduced under 609(a)(2)" because the actions of introducing both individuals and discussing how to conduct the offense shed light on the defendant's credibility. *Id*. Thus, courts focus on the facts underlying the offense instead of the conviction itself. For illustration, in *Rodriguez*, the trial court admitted the defendant's federal narcotics conspiracy conviction even though "narcotic offenses…are not crimes that involve dishonesty or false statement." *Rodriguez v. Woodall*, 2005 U.S. Dist. LEXIS 13790 at *4-5 (N.D. Ill. 2005). In that case, the defendant, a police officer, had planted contraband on an arrestee, falsified reports, and articulated a false narrative to tell investigators. *Id*. Accordingly, "the proper test for admissibility under Rule 609(a)(2) does not measure severity or reprehensibility, but rather focuses on the witness's propensity for falsehood, deceit, or deception." *Walker*, 385 F.3d at

334.; *see also United States v. Papia*, 560 F.2d 827 (7th Cir. 1977) (upholding the trial court's decision to admit the defendant's prior conviction of misdemeanor theft of less than $100).

Here, the Petitioner's prior conviction for petit larceny constitutes a dishonest act. Like the criminal defendant in *Del Toro,* the Petitioner had planned the execution of her offense by consulting with her friend and taking precise measures to be deceptive. R. at 60-61. This is supported by the fact that the Petitioner only selected her victim because she was distracted and quietly approached the victim when attempting to steal her bag silently. R. at 61. The Petitioner also committed her crime in a large crowd to decrease the likelihood of being detected. R. at 72. Affirmative action to conceal necessarily includes "dishonest or fraudulent activity." *Itani v. Ashcroft,* 298 F.3 1213, 1216 (11th Cir. 2002); *see also Villegas-Sarabia,* 874 F.3d 871, 878-79 (5th Cir. 2017). The Petitioner's actions resembled pickpocketing, which involves dishonesty and deceitfulness because the stealth does not allow his victim to know his identity, *Papia*, 560 F.2d at 847 n.14. (7th Cir. 1977); however, her conduct was also deceptive since she chose to steal from a distracted individual as opposed to one who was alert. Thus, the Petitioner was deceitful, not impulsive, when committing her crime. Additionally, her offense cannot be characterized as violent since she only fought back after being detected, and more notably, she never intended to engage in physical means to carry out her offense. R. at 62. Instead, her offense was primarily accomplished by deceit, and her actions reflected her credibility. Therefore, this Court should find that her petit larceny conviction is admissible under 609(a)(2).

CONCLUSION

For the foregoing forgoing reasons, we ask this Court to affirm the decision of the Fourteenth Circuit.

Respectfully Submitted,

__TEAM 18__

Counsel for Respondent.

FEBRUARY TERM 2024

APPENDIX A

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. IV

> 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.