Team 1P – Original

No. 23 – 695

IN THE SUPREME COURT OF THE UNITED STATES

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER, FRANNY FENTY

QUESTIONS PRESENTED

I. Under the Fourth Amendment, are a defendant's rights implicated where law enforcement searches the defendant's sealed mail addressed to their established alias?

II. Under Federal Rule of Evidence 803(3), can recorded voicemail statements offered by a defendant to show a then-existing mental state be admitted as hearsay exceptions where the statements were not spontaneous in nature?

III. Under Federal Rule of Evidence 609(a)(2), can evidence of a defendant's prior conviction for misdemeanor petit larceny be admitted for impeachment purposes where the conviction did not involve a dishonest act or false statement?

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OPINION BELOW

The transcripts for motions and testimony at trial before the United States District Court for the Eastern District of Boerum appear in the record at pages 10–63. The opinion 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 appears in the record at pages 64–73.

CONSITUTIONAL PROVISION

The text of the following constitutional provision is provided below:

The Fourth Amendment states:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

Franny Fenty ("Ms. Fenty"), is a writer and resident of the city of Joralemon in the state of Boerum. (R. 42, 65.) When she was in college, Ms. Fenty published two short stories under the alias Jocelyn Meyer in her university's creative writing magazine. (R. 4, 13, 65.) Her reason for employing the alias was because her work was personal, and she wanted privacy. (R. 43.) Since college, Ms. Fenty has written multiple novels and attempted to have them published under the name Jocelyn Meyer. (R. 42.) Despite being unsuccessful, Ms. Fenty has utilized the email "jocelynmeyer@gmail.com" to reach out to publishers. (R. 5.)

The prior conviction. Ms. Fenty was convicted of misdemeanor petit larceny on August 4, 2016. (R. 52.) At 19 years old, Ms. Fenty attempted to take a bag from a tourist on a dare from a friend. (R. 53.) After taking the bag, the tourist noticed Ms. Fenty and forcefully tried to take it back. (R. 53.) After creating a loud scene, Ms. Fenty ran away because she was scared and did

not have an escape plan. (R. 53–54.) Joralemon police apprehended Ms. Fenty three blocks away and retrieved the bag containing twenty-seven dollars in cash and diapers. (R. 54.) Ms. Fenty plead guilty and served two years of community service and two years of probation. (R. 54.)

The xylazine order. After struggling with her writing career, Ms. Fenty made a post on LinkedIn stating she was "open to work." (R. 6, 44.) Angela Millwood ("Ms. Millwood"), a high school classmate, commented and messaged asking for assistance with ordering a horse tranquilizer, xylazine, for her job at Glitzy Gallop Stables. (R. 44.) Believing she was doing the right thing by helping horses, Ms. Fenty paid for the xylazine. (R. 45.) Ms. Fenty ordered the xylazine to a P.O. box she registered under the alias Jocelyn Meyer in January 2022. (R. 43.)

The investigation. In January 2022, the Joralemon Times began highlighting increased prevalence of a street drug created from a combination of xylazine and fentanyl. (R. 7.) On February 12, 2022, Liam Washburn, a Joralemon resident, overdosed in his apartment. (R. 29.) Mr. Washburn was found beside partially used syringes containing a mixture of fentanyl and xylazine and an open box mailed from "Holistic Horse Care." (R. 7, 29.) As a result of his overdose, the Joralemon branch of the DEA, led by Supervising Special Agent Robert Raghavan, began heightened monitoring of the Joralemon Post Office and informed employees to be on high alert for suspicious packages. (R. 29–30.)

On February 14, 2022, Special Agent Raghavan and his partner Special Agent Harper Jim seized two packages addressed to Jocelyn Meyer at P.O. box 9313 at the Joralemon Main Post Office. (R. 31–32.) This P.O. box was specifically registered to Jocelyn Meyer. (R. 31.) Both packages were initially flagged by postal employees solely because they were shipped from Holistic Horse Care. (R. 30.) Two other packages addressed to Ms. Fenty at P.O. box 9313 were also set aside. (R. 31.) These packages contained face cream but were not tested by the DEA. (R.

31, 38.) After seizing the packages pursuant to a warrant, the DEA agents opened the two Holistic Horse Care packages, and after testing their contents, discovered the packages contained 400 grams of xylazine laced with 200 grams of fentanyl each. (R. 31–32.) The next day, on February 15, 2022, the DEA agents resealed the Holistic Horse Care packages and returned them to the post office manager, Oliver Araiza ("Mr. Araiza") for a controlled delivery. (R. 32.) At the direction of Special Agent Raghavan, Mr. Araiza placed a slip inside P.O. box 9313 notifying Jocelyn Meyer to pick up the packages at the front counter. (R. 32.) A few hours later, the DEA agents observed Ms. Fenty enter the post office, unlock P.O. Box 9313, retrieve the face cream packages addressed to Franny Fenty, and bring the slip addressed to Jocelyn Meyer to the counter. (R. 32.) When asked if the Holistic Horse Care packages were hers, Ms. Fenty responded affirmatively, "Yeah, they're mine." (R. 33.) After retrieving the packages addressed to Jocelyn Meyer, Ms. Fenty ran into a college classmate, Sebastian Godsoe, who thereafter confirmed to Special Agent Raghavan that she was indeed Franny Fenty. (R. 33.)

The voicemails. Prior to retrieving her packages, Ms. Fenty made two calls to Ms. Millwood. (R. 46.) In the first voicemail, at 1:32 p.m., Ms. Fenty contacted Ms. Millwood, stating the expected packages were not there. (R. 40.) In the voicemail, Ms. Fenty expressed concern about the recent article discussing that xylazine is sometimes mixed with fentanyl. (R. 7, 40.) Ms. Fenty stated that she was worried Ms. Millwood dragged her into something she didn't want to be a part of, and that Ms. Millwood owed her money. (R. 40.) In the second voicemail, at 2:17 p.m., Ms. Fenty called Ms. Millwood again, stating that the postal workers told her she should come back the following day because they didn't know what was going on with the packages. (R. 40.) Ms. Fenty said that she was nervous about Ms. Millwood not answering and was getting concerned that she was involved in something she had no idea was going on. (R. 40.)

Procedural matters. Ms. Fenty was subsequently arrested and indicted by a grand jury on one count of possession with intent to distribute a controlled substance under 21 U.S.C. section 841(a)(1) and (b)(1)(A)(vi). (R. 1.) After the arrest, Special Agent Raghavan discovered the December 28th LinkedIn message from Ms. Millwood and obtained an arrest warrant for Ms. Millwood. (R. 66.) It was subsequently discovered that Ms. Millwood had left the country on February 14, 2022, and has yet to be located. (R. 35.)

The district court heard two evidentiary motions prior to trial. (R. 10, 18.) First, Ms. Fenty moved to suppress the evidence obtained from the DEA agents' search of the sealed packages from Holistic Horse Care on the grounds that the search violated her Fourth Amendment rights. The motion was denied, however, because Ms. Fenty had no expectation of privacy to challenge the search of the packages mailed to her alias. (R. 11, 16.) Second, Ms. Fenty brought a motion in limine to exclude evidence of her prior conviction for misdemeanor petit larceny from being used at trial for impeachment purposes, arguing that the conviction did not constitute a crime of deceit under Rule 609(a)(2). (R. 19.) Ms. Fenty argued that even with a limiting instruction, evidence of the petit larceny prior conviction would unfairly prejudice her in the eyes of the jury. (R. 25–26.) The motion was denied, and the district court admitted the misdemeanor for impeachment purposes with a limiting instruction. (R. 26, 63.)

During trial, the government sought to exclude the two voicemail messages left by Ms. Fenty to Ms. Millwood's phone, on hearsay grounds that they failed to qualify as a statement of her then-existing state of mind under Rule 803(3). (R. 48–49.) The district court sustained the government's objection, and the voicemail statements were excluded at trial because they lacked spontaneity. (R. 52.) The jury returned a guilty verdict, leading to Ms. Fenty's conviction on one count of possession with intent to distribute a controlled substance and a ten-year prison

sentence. (R. 8–9.) The Fourteenth Circuit affirmed the district court's rulings, and this Court granted Ms. Fenty's writ of certiorari on December 14, 2023. (R. 70, 74.)

SUMMARY OF ARGUMENT

The search of Ms. Fenty's packages addressed to her alias Jocelyn Meyer implicated her Fourth Amendment rights. Ms. Fenty exhibited a subjective expectation of privacy in her sealed mail by using an alias to protect her privacy, and society is prepared to recognize this use as reasonable because of the many lawful reasons to conceal one's identity. Particularly, such use is reasonable where the alias and the individual are the same person. Ms. Fenty also established public use of her alias by consistently employing the name since 2016. Thus, this Court should recognize Ms. Fenty's right of privacy in her mail to allow her to challenge the DEA's search because it is immaterial that she was unknowingly involved in a criminal scheme.

The exclusion of Ms. Fenty's recorded voicemail messages was unjustified and prejudicial. Although they are hearsay, the messages should have been admitted under Rule 803(3) as evidence of her then-existing mental state because they satisfy the textual requirements of the rule and would have made a material difference on the jury's verdict. Thus, this Court should hold that the Fourteenth Circuit erred in altering the requirements of Rule 803(3) because nowhere in the text, intent, or purpose does it note that the statements must be spontaneous.

Ms. Fenty's prior conviction should not have been admitted under Rule 609(a)(2) because it did not involve dishonesty or falsity. The elements of petit larceny do not require deceit, thus rendering it unsuitable for impeachment purposes. Additionally, the facts of Ms. Fenty's conviction do not show a level of deceit that comes within Rule 609(a)(2). Because the Fourteenth Circuit's application of Rule 609(a)(2) was overly broad, this Court should exclude evidence of the prior conviction to protect Ms. Fenty from unfair prejudice from the jury.

ARGUMENT

I. Ms. Fenty's Fourth Amendment rights were implicated by the search of the packages addressed to Jocelyn Meyer because she established a reasonable expectation of privacy in her alias through public use of the name.

The Fourth Amendment guarantees individuals the "right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Fourth Amendment rights are personal rights which may only be enforced by persons whose *own* protections under the Amendment have been violated. *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978). In order to have "standing"[1] to challenge a search under the Fourth Amendment, a defendant must have a legitimate expectation of privacy in the objects searched or items seized. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). A reasonable expectation of privacy exists where (1) an individual has manifested an actual, subjective expectation of privacy, and (2) society is willing to recognize that expectation as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

When it comes to mail, packages are entitled to protection as an "effect" under the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984). Particularly, when an intended recipient of a package holds themselves out and accepts the delivery themselves, that individual may challenge a search under the Fourth Amendment. *United States v. Villareal*, 963 F.2d 770, 773–74 (5th Cir. 1992); *United States v. Pitts*, 322 F.3d 449, 459 n.1 (7th Cir. 2003).

Here, a search pursuant to a warrant occurred. Ms. Fenty, however, was unable to challenge the search or the warrant acquired because the district court and the Fourteenth Circuit

[1] "Fourth [A]mendment standing is quite different, however, from 'case or controversy' determinations of article III standing. Rather, it is a matter of substantive [F]ourth [A]mendment law . . . It is with this understanding that we use 'standing' as a shorthand term." *United States v. Taketa*, 923 F.2d 665, 669 (9th Cir. 1991) (citing *Rakas*, 439 U.S. at 139–40 (1978)).

held that she had no reasonable expectation of privacy in packages addressed to her alias[2] name, "Jocelyn Meyer." (R. 16, 67.) Ms. Fenty had a reasonable expectation of privacy in the packages addressed to her alias because (1) she maintained a subjective expectation of privacy, and (2) society is prepared to recognize the use of an alias as reasonable—as numerous circuits have already held. This Court should *reverse* the Fourteenth Circuit's ruling because Ms. Fenty's Fourth Amendment rights were implicated due to the public use of her alias.

A. Society Is Prepared to Recognize Ms. Fenty's Subjective Expectation of Privacy in the Packages Shipped to Her Alias Because of the Numerous Innocent Reasons to Conceal One's Identity.

Ms. Fenty satisfies both prongs of the *Katz* reasonable expectation of privacy test because she exhibited a subjective expectation of privacy in her packages by employing her alias Jocelyn Meyer, and society is prepared to recognize such use as reasonable. *See Katz*, 389 U.S. at 353. Therefore, the Fourteenth Circuit erroneously held that Special Agent Raghavan's search did not implicate Ms. Fenty's Fourth Amendment rights.

A touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Id.* at 360. An individual's objective expectation "must be justifiable under the circumstances." *Smith*, 442 U.S. at 740–41 (quoting *Katz*, 389 U.S. at 383). While there is no talismanic test to determine what society is prepared to accept as reasonable, *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987), the Fourth Amendment looks to the "everyday expectations" that society shares. *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).

Sealed packages are in the general class of effects which the public at large has a legitimate expectation of privacy. *Jacobsen*, 466 U.S. at 114. Individuals do not surrender their

[2] An alias is defined as "an assumed or additional name that a person sometimes uses," *Alias*, MERRIAM-WEBSTER.COM, http://merriam-webster.com/dictionary/alias (Jan. 20, 2024).

expectations of privacy in sealed containers when sent by mail or common carrier. *Villarreal*, 963 F.2d at 773–74. Specifically, "[i]t has long been established that an *addressee* has both a possessory and a privacy interest in a mailed package." *United States v. Hernandez*, 313 F.3d 1206, 1209 (9th Cir. 2002) (emphasis added). Here, Ms. Fenty's packages from Holistic Horse Care fall within her reasonable expectation of privacy because this Court has already laid a foundation for Fourth Amendment protections in fictitious names used to protect privacy.

1. *Ms. Fenty had a subjective expectation of privacy in the packages addressed to the alias and the contents therein because she took active steps to maintain privacy in her identity.*

Use of an alias satisfied the subjective prong of *Katz* because in doing so, Ms. Fenty attempted to preserve her privacy. When addressing "standing" to challenge a search, the first question a court must ask is whether the individual has exhibited an actual (subjective) expectation of privacy. *Smith*, 442 U.S. at 740. In analyzing the subjective prong, courts look to an individual's affirmative steps to conceal and keep private whatever item is the subject of a search. *Id*. By registering her P.O. box and mailing packages under an alias, Ms. Fenty took affirmative steps to conceal and keep private the items within the packages.

At no point did Ms. Fenty ever renounce her subjective expectation of privacy. When an individual disclaims interest in a package, they often relinquish that expectation of privacy. *See, e.g.*, *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992) (disclaiming any connection to the package's addressee); *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993) (same); *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988) (same); *but see United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981) (holding that the defendant had "standing" under the Fourth Amendment despite denying ownership of the package since he was in possession of it).

Here, Ms. Fenty never relinquished interest in the packages from Holistic Horse Care. She walked into the Joralemon Main Post Office to retrieve both packages addressed to Jocelyn

Meyer and Franny Fenty, read the slip in the P.O. box directing her to retrieve the packages from the front desk, and collected her remaining packages. (R. 32.) When asked by Mr. Araiza if the packages were for her, Ms. Fenty responded affirmatively, "Yeah, they're mine." (R. 33.) Even at the trial stage, Ms. Fenty never denied the packages as hers. *See* (R. 46.) Thus, Ms. Fenty's actions demonstrate that she never relinquished her subjective privacy interest in the contents of her packages because she took affirmative steps to conceal and maintain her privacy. (R. 43.)

2. *Ms. Fenty's expectation of privacy in her established alias is objectively reasonable because Jocelyn Meyer and her are the same person.*

Viewed objectively, Ms. Fenty's use of her alias Jocelyn Meyer to maintain privacy was reasonable in the eyes of society's shared expectations. The second question a court must ask in assessing expectations of privacy is whether the individual's subjective expectation is one that society is prepared to recognize as reasonable. *Smith*, 442 U.S. at 740. An expectation of privacy is reasonable when it is consistent with "widely shared social expectations." *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). Addressing mail to an alias to safeguard privacy is the kind of interest that society is willing to recognize as reasonable because the Fourth Amendment mainly seeks to protect "the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886).

Ms. Fenty's use of the alias Jocelyn Meyer did not strip her of Fourth Amendment protections. The use of an alias or a fictitious name does not eviscerate an individual's reasonable expectation of privacy in sealed mail. *Villarreal,* 963 F.2d at 774 (fictitious human names); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009) (fictitious company name). Rather, the use of an alias or a fictitious name is a lawful way of protecting privacy commonly employed by individuals, including authors.[3] *Villarreal*, 963 F.2d at 774;

[3] For example, J.K. Rowling (author of the Harry Potter book series) wrote under the pseudonym Robert Galbraith when publishing her crime novels. *J.K. Rowling on her nom de plume Robert Galbraith*, NPR (2015), https://www.npr.org (last visited Jan 13, 2024).

cf. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–43 (1995) (holding that an author's anonymity does not exclude their literary works from First Amendment protections).

Using a fictitious name to send and receive mail is a "legal right" granted to citizens. *Pitts*, 322 F.3d at 459. This is because there are numerous innocent reasons[4] that an individual may wish to keep their name private. *Id.* As a result, there is nothing "inherently wrong with a desire to remain anonymous when sending or receiving a package." *Pitts*, 322 F.3d at 459. Similarly, courts have recognized the right to use an alias to rent property. *See, e.g.*, *United States v. Watson*, 950 F.2d 505, 507 (8th Cir. 1991) (home); *United States v. Newbern*, 731 F.2d 744, 748 (11th Cir. 1984) (hotel room); *United States v. Thomas*, 65 F.4th 922, 923–24 (7th Cir. 2023) (leased condominium). Thus, employing an alias to safeguard privacy is both "a *common* and *unremarkable* practice." *Pitts*, 322 F.3d at 458 (emphasis added). Because of this, society is prepared to recognize the use of an alias in sending or receiving mail as reasonable.

Safeguarding privacy is why Ms. Fenty created the alias Jocelyn Meyer in the first place. (R.43.) She began using the alias in the Fall of 2016, where she published short stories in her college magazine, Joralemon College Zine. (R. 42.) She has also created and utilized the email address "jocelynmeyer@gmail.com" to communicate with publishers. (R. 5, 42–43.) Her reason for using this alias is simply because she "likes having privacy." (R. 43.) Ms. Fenty also used her alias in registering P.O. Box 9313 for the *same reason*; she "likes having privacy." (R. 43.) Due to the objectively justifiable nature of using an alias to protect privacy, society is prepared to recognize Ms. Fenty's use of the alias to receive packages and register her P.O. box.

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[4] "A celebrity may check into a hotel under an assumed name to protect herself from the insistent demands of adoring fans. Similarly, a man might order Viagra under a false name if his packages are delivered to a common area of his apartment building." *United States v. Goldsmith*, 432 F. Supp. 2d 161, 173 (D. Mass. 2006).

The split amongst circuit courts on the issue of using non-government names draws a line between using an alias to protect one's privacy in mail, and using a distinct, third party's name as an addressee. *See generally United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009). The use of an alias differs from the use of a third party's name because with the latter, an individual surrenders their Fourth Amendment rights to that existing third party, despite being the intended recipient. *See United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984) (rejecting an expectation of privacy in a package addressed "neither to the defendants nor to some entity, real or fictitious, which is their *alter ego,* but to actual third parties . . . ."); *Daniel*, 982 F.2d at 149 (rejecting an expectation of privacy where the defendant's theory was that the alias and himself were two different persons); *Koenig*, 856 F.2d at 846 (rejecting an expectation of privacy in a package addressed to a co-defendant).

The distinction also lies in potential harm to third parties. *Johnson*, 584 F.3d at 1002. While it's not illegal to use an alias to receive mail, *Pitts*, 322 F.3d at 459, it becomes illegal when fraud or stolen identification become involved. *Johnson*, 584 F.3d at 1002. For example, the Tenth Circuit in *Johnson* distinguished between the use of an existing third party's name with that of an alias and held that there was no reasonable expectation of privacy in a storage unit rented with another person's identity. *Id.* at 1001. Because of the potential harm to innocent third parties, there is a fundamental difference between using an alias to receive a package—where the alias and individual are one in the same—and using another person's existing identity. *Id.*

Here, Ms. Fenty was not involved in a scheme to defraud a third-party, nor did she address her packages to anyone else because she *is* Jocelyn Meyer. Ms. Fenty was the intended recipient of the packages, as evidenced by her testimony. (R. 45) ("I told [Angela] that *I* would get xylazine for her") (emphasis added). Had Ms. Fenty listed Ms. Millwood's name as the

addressee of the packages, Ms. Fenty likely would have forfeited her Fourth Amendment interests. *See Givens*, 733 F.2d at 342; *Pierce*, 959 F.2d at 1303 (noting that society is not prepared to recognize the use of a third party's name to receive sealed mail as reasonable). This, however, was not the case at bar.

Not only did she use her alias to order the packages, but Ms. Fenty—and only Ms. Fenty—received the confirmation for the packages. (R. 46.) Additionally, when she discovered that the packages were missing from her P.O. box, Ms. Fenty approached the front desk of the Post Office, and when asked if the packages were hers, responded "Yeah they're mine," took the packages, and began to leave. (R. 32–33.) Ms. Fenty took all proper steps and provided sufficient evidence to demonstrate that she was the *only* intended recipient of the packages, despite using her alias. Accordingly, because there was no harm to a third party and Ms. Fenty is Jocelyn Meyer, the Fourth Amendment and society are prepared to recognize as reasonable Ms. Fenty's wish to remain private. *See* (R. 43) ("My work is very personal. I wanted privacy.").

In sum, the use of an alias in receiving sealed mail is sufficient to establish a reasonable expectation of privacy that society is prepared to recognize, where the individual states their reason for doing so is to preserve their privacy. Ms. Fenty set out to do just that with her packages arriving from Holistic Horse Care. Because she utilized her alias on multiple prior occasions, her expectation of privacy should be recognized under the Fourth Amendment.

B. Ms. Fenty Provided Sufficient Evidence to Establish a Connection to the Alias by Demonstrating Public Use of the Name Jocelyn Meyer in Her Writing Career.

1. *Taking numerous active steps to establish public use of an alias is sufficient to warrant Fourth Amendment protection because these steps demonstrate a history of using the name.*

Ms. Fenty established public use of her alias dating back years, providing an ample connection between Ms. Fenty and Jocelyn Meyer as the same person. Courts have recognized a

reasonable expectation of privacy in an alias, where a defendant can assert "public use" of the alias, so that the defendant and the alias are essentially the same person. *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021); *see also United States v. Stokes*, 829 F.3d 47, 52 (1st Cir. 2016); *Daniel*, 982 F.2d at 149; *United States v. Terriques*, 211 F. Supp. 2d 1137, 1144 (D. Neb. 2002), *aff'd*, 319 F.3d 1051 (8th Cir. 2003) (despite the defendant identifying himself under a different name, because the evidence established that they were the same person, he therefore had "standing" to challenge the package addressed to the fictitious name).

While an address alone does not create a privacy interest in a package, demonstrating a connection to the address is sufficient to create a reasonable expectation of privacy. *Stokes*, 829 F.3d at 52. In *United States v. Stokes*, the defendant relied solely on the fact that packages were addressed to his personal addresses to justify his expectation of privacy in their contents. 829 F.3d at 53. The First Circuit denied an expectation of privacy in the defendant's mail because there was no indication it was associated with him, and because the court did not know whether "anyone else had access to these locations, what the nature of the delivery receptacle was, or any other information that could shed light on the reasonableness of his privacy interest." *Id.* In *United States v. Richards,* however, the Fifth Circuit allowed a defendant to assert his Fourth Amendment rights to challenge a search of a package addressed to the company "Mehling Arts & Crafts," which the defendant owned. 638 F.2d at 770. Because the defendant was an agent of the company, the company was "in effect" the defendant, since the two were one in the same. *Id.*

Here, the Fourteenth Circuit erred in equating the holding of *Stokes* with the present case. Ms. Fenty did not rely solely on her possession of the P.O. box to establish an expectation of privacy in her packages. Ms. Fenty demonstrated "other indicia" to establish the connection that Jocelyn Meyer and herself were the same person. When asked who was observed at the post

office, Special Agent Raghavan admitted in his testimony that Ms. Fenty and Jocelyn Meyer were the same person. (R. 33.) In the same testimony, Special Agent Raghavan explained that Ms. Fenty used the name Jocelyn Meyer to "get short stories published in [her] college magazine." (R. 33.) To confirm this information, Special Agent Raghavan and Special Agent Jim conducted a search online and confirmed that Ms. Fenty used the pseudonym, Jocelyn Meyer. (R. 33.) The fact that the agents could locate Ms. Fenty's alias online and make the connection that they are the same person indicates that she established public use of the name Jocelyn Meyer. Anyone—law enforcement or otherwise—could have retrieved this information.

Moreover, Ms. Fenty did not rely on her alias *only* in college; she currently uses the name to write novels and reach out to publishers. The mere fact that Ms. Fenty's stories have not been published does not extinguish public use of her alias. *See* (R. 16.) This logic would result in the Fourth Amendment only applying to those who have achieved merit—which the Fourth Amendment does not distinguish between. Ms. Fenty took affirmative steps to utilize the alias by creating an email address under the name. (R. 5, 42.) This, taken in conjunction with the fact that she identified herself as Jocelyn Meyer to Mr. Araiza, demonstrates that she established public use so that her alias and herself are the same person. (R. 33); *see also United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991) ("Ownership creates . . . an expectation of privacy 'that society is prepared to recognize as reasonable.'") (citation omitted). Requiring the general public to recognize an individual by their alias in order to challenge a search would result in the Fourth Amendment applying only to select groups of citizens.

The Fourteenth Circuit erred in requiring a high bar to establish public use of an alias because such a burden is inconsistent with the Fourth Amendment and the interpretations of lower courts. In *United States v. Villareal*, the Fifth Circuit held that two defendants had an

expectation of privacy as the "intended recipients" of two drums concealing a shipment of marijuana, despite the use of an unrelated fictitious name. 963 F.2d at 773. The defendants purposefully used a fictitious name to avoid any connection to the marijuana "in case anything went wrong." *Id.* The only connection the two had to the fictitious name was that one defendant possessed a receipt which bore the name, and the other defendant was identified as the fictitious name by a third-party. *See id.* at 774. The Fifth Circuit held that because the defendants were the intended recipients of the drums, they had both a reasonable expectation of privacy to implicate the Fourth Amendment, despite no previous use of the fictitious name, a criminal purpose for using the name, and ambiguity as to who possessed the name. *Id.* at 774–75.

Here, unlike *Villareal*, Ms. Fenty demonstrated significantly more evidence to indicate "public use" between herself and the alias Jocelyn Meyer. *Villareal* recognized a reasonable expectation of privacy in a fictitious name that had never been used before and was created solely for a criminal purpose. Ms. Fenty has established continuous use of her alias going back to the Fall of 2016 where she wrote short stories in her college magazine. (R. 4.) Ms. Fenty's use of her alias in the email address, "jocelynmeyer@gmail.com," her repeated use of the name in writing novels, her act of registering P.O. box 9313 in her alias, and her affirmative identification as the alias in picking up her packages are all sufficient to establish public use. (R. 4, 5, 33, 42.) Because Ms. Fenty placed the order to Holistic Horse Care herself, she was the sole party intended to receive the packages. Thus, there is no evidence to indicate anyone but Ms. Fenty should have Fourth Amendment "standing" to challenge the search of the packages.

2. *The Fourteenth Circuit's reliance on the nature of Ms. Fenty's participation in a criminal scheme runs counter to the purpose of the Fourth Amendment because all individuals are equally protected.*

The Fourteenth Circuit erred in relying on the criminal nature of Ms. Fenty's activities to retroactively justify the denial of her Fourth Amendment rights. The Fourth Amendment

guarantees protection to *both* the innocent and guilty alike. *McDonald v. United States*, 335 U.S. 451, 453 (1948); *United States v. Washington*, 573 F.3d 279, 284 (6th Cir. 2009) ("A criminal may assert a violation of the Fourth Amendment just as well as a saint."); *see also Olson*, 495 U.S. at 93–94, 100 (holding that a criminal defendant had a reasonable expectation of privacy in the home where he was hiding because he was an overnight guest). The use of an alias does not weaken Fourth Amendment protections because an individual's expectation of privacy does not hinge on the "nature of [a] defendant's activities—[whether] innocent or criminal." *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997); *see also Villarreal*, 963 F.2d at 774 (holding that the defendants had "standing" despite using fictitious names to escape criminal detection).

Indeed, courts recognize that many Fourth Amendment issues arise precisely because defendants engage in illegal activity in an object or area for which they claim privacy interests. *Fields*, 113 F.3d at 321; *see also Minnesota v. Carter*, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting) ("If the illegality of the activity made constitutional an otherwise unconstitutional search, such Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty".).

The Seventh Circuit in *Pitts* laid out two fundamental flaws in the reasoning of denying an expectation of privacy in the use of an alias to further a crime through mail. 322 F.3d at 458. First, because some people employ an alias and use the mail illegally, everyone with a legitimate reason to remain anonymous should lose their expectation of privacy. *Id.* Or second, only people using an alias for legitimate reasons may retain an expectation of privacy in their mail while those who employ an alias for illicit purposes may not. *Id.* Both interpretations relied upon by the Fourteenth Circuit turn the Fourth Amendment on its head. As the Seventh Circuit cautioned, both erode Fourth Amendment protections and set a dangerous precedent for all individuals. *Id.*

Denying Ms. Fenty a reasonable expectation of privacy based on the retroactive justification that she was unknowingly involved in a criminal scheme would result in a grave miscarriage of justice. In doing so, this Court runs the risk of blurring and weakening Fourth Amendment protections, allowing law enforcement to utilize unlawful means of investigation, knowing these means can be later justified by uncovering evidence of criminal activity.

Thus, because of the plethora of legitimate reasons for concealing one's identity, Ms. Fenty's Fourth Amendment rights were implicated, and she should be able to challenge the search of her packages. This Court should *reverse* the Fourteenth Circuit's decision and hold that Special Agent Raghavan's search of Ms. Fenty's packages, implicated Ms. Fenty's Fourth Amendment rights because the connection of Jocelyn Meyer to Ms. Fenty was sufficient.

II. The Recorded Voicemail Statements Offered by Ms. Fenty Should Have Been Admitted as an Exception to the Rule Against Hearsay Because They Show Her Then-Existing Mental State.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Generally, witnesses are prohibited from testifying about hearsay statements. Fed. R. Evid. 802. An exception to this general rule permits admission of a statement of the declarant's then-existing state of mind or emotional condition. Fed. R. Evid. 803(3); *see Mut. Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 296 (1892). This exception does not include "a statement of memory or belief to prove the fact remembered or believed." Fed. R. Evid. 803(3).

The determination of whether a statement qualifies for admission under the state of mind exception involves a fact-specific inquiry. *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007). If a statement qualifies, it is admissible without any preliminary finding of credibility because all hearsay exceptions rest on a belief that the statement has some assurance of credibility. *United States v. DiMaria*, 727 F.2d 265, 272 (2d Cir. 1984). Further, it is the jury's role to assess the credibility of admissible evidence. *Id.* Thus, evidentiary rulings are reviewed

for abuse of discretion and will be "reverse[d] if the exercise of discretion [was] both erroneous and prejudicial." *Wagner v. Cnty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013).

Here, Ms. Fenty's recorded voicemail messages left for Ms. Millwood are hearsay. (R. 40.) Both statements, however, reflect her then-existing state of mind that she was confused about why her packages were unavailable and unaware that the xylazine was laced with illicit substances. (R. 40, 51.) Accordingly, this Court should *reverse* the decision of the Fourteenth Circuit and hold that the hearsay statements are admissible under the then-existing state of mind exception because: (1) both statements fall within the text, intent, and purpose of Rule 803(3) and (2) admission of the statements would have made a material difference on the jury's verdict.

A. Courts Cannot Interpret Rule 803(3) of the Federal Rules of Evidence to Require a Spontaneous Statement Because Such a Requirement Does Not Appear in the Text, Intent, or Purpose of the Rule.

When interpreting the Federal Rules of Evidence ("FREs"), courts must apply the traditional tools of statutory construction. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (noting that courts must begin with the text and only turn to the legislative history if the plain meaning of the rule is unclear). This application originates from Rule 402, which provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Fed. R. Evid. 402. That list contains no mention of case, common, or decisional law and therefore precludes courts from creating their own requirements that exclude relevant evidence. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587–88 (1993). Instead, courts are bound by the text of the FREs and the intent of the drafters. *Beech Aircraft Corp.*, 488 U.S. at 163–64.

Here, Ms. Fenty's exculpatory statements are relevant to prove that she had an innocent mental state at the time of the crime. (R. 40, 51.) Upon interpretation of the applicable hearsay

exception—Rule 803(3)—it becomes apparent that the language of the rule does not require that the statements be spontaneous. *See* Fed. R. Evid. 803(3). Further, the legislative history does not provide any evidence that the drafters' intended to include such a requirement. Fed. R. Evid. 803(3) advisory committee's note to proposed rules. Thus, the Fourteenth Circuit erred by imposing its own spontaneity requirement that excluded the relevant voicemail messages.

1. *The plain meaning of Federal Rule of Evidence 803(3) does not require the statement to have been spontaneous.*

Interpretation of Rule 803(3) must begin with the language of the rule itself, and absent a clearly expressed legislative intention to the contrary, that language is regarded as conclusive. *Bread Pol. Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 580 (1982). When the drafters of the FREs implemented the restriction on admitting hearsay in Rule 802, they included twenty-four exceptions in Rule 803 and an additional five in Rule 804. *United States v. Salerno*, 505 U.S. 317, 322 (1992) (interpreting Rule 804(b)(1)). This suggests that they made a deliberate assessment regarding which hearsay statements could be admitted as evidence and which could not. *Id.* To honor that decision, courts must uphold the specific language of each exception. *Id.*

This Court first applied the plain-meaning standard in *Bourjaily v. United States* and held that "[i]t would be extraordinary to require legislative history to *confirm* the plain meaning" of the FREs. 483 U.S. 171, 178 (1987) (holding that the plain meaning of Rule 104(a) prevails over both evidentiary history and legislative silence). Shortly after this initial application, this Court utilized the plain-meaning standard in *United States v. Owens* to interpret Rule 801(d)(1)(C), a hearsay exemption for a declarant-witness's prior statement. 484 U.S. 554, 561–62 (1988). There, this Court held that as long as the evidence meets the plain, facial requirements of the rule, it is admissible. *Id.* at 562. It reasoned that "Rule 801(d)(1)(C), which specifies that the cross-examination need only 'concer[n] the statement,' does not on its face require more." *Id.*

Here, this Court must similarly apply the plain-meaning standard when interpreting Rule 803(3). Looking at the exact language, Rule 803(3) does not require the statement to be spontaneous. *See, e.g.*, *Daubert*, 509 U.S. at 588 (noting that since the text of Rule 702 does not contain a "general acceptance" requirement, it does not exist). Instead, the only requirement is that the statement reflects "the declarant's then-existing state of mind." Fed. R. Evid. 803(3). The voicemail messages being offered here fall squarely within that requirement because they reflect Ms. Fenty's then-existing state of mind that "(1) she was engaged in a legitimate plan to help horses, (2) the purchase of the xylazine was legitimate, and (3) Ms. Fenty had no idea that she was involved in an illicit drug scheme." (R. 51.)

The first statement was made immediately after Ms. Fenty arrived at the Post Office and discovered her packages were missing. (R. 40) ("Angela, I just got to the Post Office."). And although the second statement was made forty-five minutes after the first one, that is a reasonable amount of time for Ms. Fenty to have a conversation with the postal worker about the whereabouts of her packages. (R. 40) ("It's me again. I talked to the postal workers."). These statements are not being offered to prove that the packages did not contain illicit drugs but rather to reflect how Ms. Fenty was feeling in the present moment when she discovered that her packages were missing and then intercepted. (R. 40); *see also DiMaria*, 727 F.2d at 271 (holding that the statements were admissible under Rule 803(3) because they were not offered to prove that the items were stolen but only to show that the defendant did not think they were).

The only limiting language of Rule 803(3) bars statements as to why the declarant held a particular state of mind or what they might have believed to induce that state of mind. *Wagner*, 747 F.3d at 1052–53 ("The bar only applies when the statements are offered to prove the truth of the fact underlying the memory or belief."). Thus, the actual text of Rule 803(3) is conclusive,

and this Court does not need to look beyond the plain-meaning. *See Bread Pol. Action Comm.*, 455 U.S. at 580. By adding a spontaneity requirement to Rule 803(3), the lower courts erred in assessing the reliability[5] of the voicemail messages. (R. 52, 69.) Because these messages come within the textual requirements of a category[6] defined as a hearsay exception, they are admissible without any preliminary questions regarding credibility. *DiMaria*, 727 F.2d at 272 (noting that if a declaration fell within the text of Rule 803(3), "its truth or falsity was for the jury to determine."). Allowing courts to alter evidentiary rules and mandate anything more than what is required in the text would go against the drafters' intent and this Court's precedent. *See Salerno*, 505 U.S. at 322; *see also Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 401, 421 (1983) (stating that courts should not impute onto Congress a purpose to paralyze with one hand what it sought to promote through an explicit exception with the other).

2. *The legislative history of Federal Rule of Evidence 803(3) does not indicate an intent for there to be a spontaneity requirement.*

If this Court were to find that the plain meaning of Rule 803(3) was unclear, it will need to look at the drafters' intent to determine if statements need to be spontaneous to be admissible. *See Beech Aircraft Corp.*, 488 U.S. at 163. To uncover this intent, courts can compare the FREs to one another and look at the legislative history. *See Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 856 (4th Cir. 1980) (noting that the policies behind the rules can be examined to fill in gaps in

[5] "There is a peculiarly strong case for admitting statements like DiMaria's, however suspect, 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." *DiMaria*, 727 F.2d at 272. Similarly, here, there is a strong case for admitting Ms. Fenty's statements because (1) credibility is a matter for the jury and (2) Respondent is relying on the presumption of guilty knowledge arising from her connection with the packages. (R. 1.)

[6] *See* Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975, 976 (2008) (discussing the categorical approach to the state of mind hearsay exception under FRE 803(3), which requires courts to admit a hearsay statement when it falls within the exception's category of admissible statements).

the FREs). More specifically, the Advisory Committee Notes contain insight to which judges and lawyers may refer to understand the rule. Stephen Saltzburg & Kenneth Redden, *Federal Rules of Evidence Manual* at xlii (4th ed. 1986) (The advisory notes are "the beginning of a 'legislative' history that is all important in understanding how the final draft came into being.").

Here, Rule 803(3) not having a spontaneity requirement becomes even more compelling when it is compared with its preceding rules. Rule 803(1) creates an exception for present sense impressions and provides that a statement describing an event is admissible if "made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). Similarly, Rule 803(2) creates an exception for excited utterances and provides that a statement relating to a startling event is admissible if "made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2). By clarifying when the statement needs to be made, both Rule 803(1) and Rule 803(2) *explicitly* contain a spontaneity requirement in the text. *See* Fed. R. Evid. 803(1)–(2). Aware of this spontaneity requirement in the first two Rule 803 hearsay exceptions, the drafters intentionally chose to exclude the requirement from the remaining twenty-two exceptions. *See Owens*, 484 U.S. at 562 (noting that lack of language in one rule that appears in another is illustrative of the drafters' intent); *Salerno*, 505 U.S. at 322 (emphasizing that each of the twenty-four exceptions to Rule 803 were intentionally drafted with careful judgement). If Rule 803(3) was meant to include a spontaneity requirement, the drafters would certainly have written it into the rule like they did for Rule 803(1) and Rule 803(2). (R. 51.)

Additionally, the Advisory Committee's note on Rule 803(3) further supports the interpretation that it does not require the statement to be spontaneous in nature. *Owens*, 484 U.S. at 562 (stating that the reason the drafters chose not to include a similar requirement from another FRE was made apparent by the advisory committee notes). The premise for Rule 803(3)

was to be a specialized application of Rule 80(3)(1), "presented separately *to enhance its* usefulness and *accessibility*." Fed. R. Evid. 803(3) advisory committee's note to proposed rules. (emphasis added). This shows that the drafters' intent was for Rule 803(3) to be different than 803(1). It was specifically created to be applicable to more statements by eliminating the narrow spontaneity requirement. *See also Owens*, 484 U.S. at 562 (noting that the Advisory Committee indicated that the use of Rule 801(d)(1)(C) was "to be fostered rather than discouraged.").

Whether this Court adheres to the plain-meaning standard or looks to the legislative history behind Rule 803(3), there is no requirement that the statement be spontaneous. *See* Fed. R. Evid. 803(3). Further, courts cannot alter evidentiary rules. *Salerno*, 505 U.S. at 322. If the spontaneity requirement were to be injected into Rule 803(3) as a bright line requirement, it must be done through the formal mechanism of amending the FREs and not left to the hands of individual courts.[7] Accordingly, this Court should hold that the Fourteenth Circuit's interpretation of Rule 803(3) was erroneous.

B. The Exclusion of the Voicemail Messages Was Prejudicial to Ms. Fenty Because They Would Have Made a Material Difference on the Jury's Verdict.

Under Rule 403(3) "court[s] may exclude relevant evidence if its probative value is substantially outweighed by a danger." Fed. R. Evid, 403(3). In determining the probative value of evidence, courts look at whether it has a tendency "to establish the proposition that it is offered to prove." Robert P. Mosteller Et Al., *McCormick on Evidence* § 185, at 436 (8th Ed. 2020). The concept behind probative value is that a judge can evaluate evidence on its face.[8] A judge may not, however, attempt to go beyond the face of the evidence to consider its credibility.

[7] Swift, *supra* note 6, at1434.

[8] *See* Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 887 (1988).

United States v. Thompson, 615 F.2d 329, 333 (5th Cir. 1980) ("Rule 403 does not permit exclusion of evidence because the judge does not find it credible."). This is because credibility goes to "the quality or power of inspiring belief," *Credibility*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/credibility (Jan. 30, 2024), and is a function reserved for the jury. *See United States v. Abel*, 469 U.S. 45, 52 (1984).

If a court erroneously usurps the role of the jury and evaluates evidence based on an assessment of credibility, a claim of error may be preserved under Rule 103. *See* Fed. R. Evid. 103. This Court has interpreted Rule 103 to require reversal if the error "results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Lane*, 474 U.S. 438, 449 (1986) (citation omitted). Erroneously excluded evidence is deemed to have had a substantial effect on the jury if it would have been the primary evidence in support of or in opposition to a claim or defense. *United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988). Because "[i]t is always perilous to speculate on what the effect of evidence improperly excluded would have been," courts need to be wary about invoking the doctrine of harmless error with regard to evidentiary rulings in jury cases. *United States v. Cerro*, 775 F.2d 908, 915–16 (7th Cir. 1985).

Here, the district court abused its discretion when it conflated the Rule 803(3) admissibility analysis with a credibility analysis. (R. 51.) By considering the self-serving nature of Ms. Fenty's statements, the district court went beyond its designated power in Rule 403 and usurped the role of the jury. (R. 51); *United States v. Wright*, 783 F.2d 1091, 1099 (D.C. Cir. 1986) (stating that judges cannot exclude evidence simply because it is self-serving). Even if Ms. Fenty's statements appeared to be self-serving or fabricated, Rule 803(3) does not bar admission because it is up to the jury to determine their credibility. (R. 51); *see DiMaria*, 727 F.2d at 271.

Additionally, the Fourteenth Circuit erred in "infusing a watered-down balancing test into Rule 803(3)" in order to conduct a less-exacting Rule 403 analysis. (R. 69, 72.) Rule 403 must be interpreted narrowly to remain consistent with the statutory scheme of the FREs and not undermine the rules that govern preliminary fact-finding procedures—Rules 104, 602, and 901.[9] If interpreted broadly, these other rules and the "substantially outweighed" language of Rule 403 would become meaningless because courts would be empowered to conflate probative value with credibility to protect the jury from being misled. *Id.* at 888.

Here, the abuse of discretion and misapplication of the FREs was both erroneous and prejudicial. The jury was unable to properly assess Ms. Fenty's then-existing state of mind to determine if she had the required knowledge and intent necessary for a conviction under 21 U.S.C. section 841(a)(1) and (b)(1)(A)(vi). (R. 1.) These voicemail messages were the primary evidence in support of Ms. Fenty's defense that "she never would have agreed to participate [in Ms. Millwood's scheme] had she been aware of the illicit substances mixed in the xylazine." (R. 50.) By excluding evidence that would have carried great weight with the jury, Ms. Fenty was precluded from defending herself against the government's argument that "[s]he was aware of the scheme the entire time." (R. 48); *see Cerro*, 775 F.2d at 916 (noting that if the defendant were precluded from defending themselves, their conviction would need to be reversed). Accordingly, this Court should *reverse* the Fourteenth Circuit's decision and hold that both voicemail messages are admissible under Rule 803(3).

[9] *See* Imwinkelried, *supra* note 8, at 887.

III. Franny Fenty's Impeachment Was Improper Because Her Prior Misdemeanor Conviction Is Not Admissible Under Federal Rule of Evidence 609(a)(2) as a Crime of Deceit or Dishonesty.

Federal Rule of Evidence 609 governs the admissibility of prior convictions for impeachment purposes. Fed. R. Evid. 609. More specifically, Rule 609(a)(2) states that for the purposes of attacking the credibility of a witness's character for truthfulness, evidence of any crime must be admitted if it involved "a dishonest act or false statement," regardless of the punishment. Fed. R. Evid. 609(a)(2). The phrase dishonest act or false statement means "crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense, in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification." Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment. Such crimes are always admissible because they are considered to affect a witness's credibility and "[R]ule 609(a)(2) grants no judicial discretion for their exclusion." *United States v. Field*, 625 F.2d 862, 871 (9th Cir. 1980). Thus, Rule 609 (a)(2) is restricted to only prior convictions that go towards a witness's likelihood of telling the truth to diminish prejudicial effects on criminal defendants who wish to testify. Fed. R. Evid. 609(a)(2).

Here, Ms. Fenty's prior conviction for petit larceny should not have been admitted under Rule 609(a)(2). (R. 19.) She was charged under Boerum Penal Code section 155.25 which only requires that the person knowingly take someone else's property and intend to use it as their own. (R. 3.) Nowhere does this statute require, nor do Ms. Fenty's actions show, a dishonest act or false statement. Further, both lower courts erred in their broad interpretations of "deceit" because the purpose of Rule 609(a)(2) is to help the jury assess a witness's propensity to testify truthfully, thus only permitting convictions of crimes that involve some type of lie. (R. 21, 26, 70); *see also* Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment. Accordingly, this Court should *reverse* the Fourteenth Circuit's decision and hold that Ms.

Fenty's prior conviction is not admissible because: (1) her crime did not involve an element of deceit; and (2) an overly broad definition of "deceit" goes against the intent of Rule 609(a)(2).

A. Ms. Fenty's Prior Conviction for Petit Larceny Is Not Admissible Under Rule 609(a)(2) Because It Did Not Involve Falsity or Deceit.

Rule 609 was one of the most hotly contested provisions in the FREs, thereby making the current language of the rule the product of careful deliberation. *United States v. Smith*, 551 F.2d 348, 360 (D.C. Cir. 1976). To avoid misinterpretation, the Advisory Committee described what kind of crimes the phrase "dishonest act or false statement" referred to. Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment. It also gave courts guidance on how to approach a Rule 609 analysis by stating that "[o]rdinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement." *Id.* Only where the deceitful nature of the crime is not apparent from the statute may courts turn to the facts of the conviction. *Id.*

Here, the statutory elements of Ms. Fenty's prior conviction indicate that the crime is not one of dishonesty or falsity because it does not require that the person act with deceit. (R. 3.) Even if this Court looks beyond the statutory elements, however, her conviction did not involve any facts establishing deceit or dishonesty. (R. 52–54.) Thus, the Fourteenth Circuit erred in denying Ms. Fenty's motion to exclude evidence of her prior conviction. (R. 19, 26.)

1. *The elements of Ms. Fenty's prior conviction do not satisfy the requirements of Rule 609(a)(2).*

While robbery, burglary, and theft are ordinarily considered to be dishonest acts, Rule 609(a)(2) is more restricted in its application. *United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978). The language of Rule 609(a)(2)—"dishonest act or false statements"—denotes a narrow subset of crimes and only encompasses those "characterized by an *element of deceit*." *Smith*, 551 F.2d at 362 (emphasis added). Because the meaning of "deceit" can vary, courts are

split[10] on the question of whether prior convictions for crimes involving stealing, without more, are admissible for impeachment. *United States v. Papia*, 560 F.2d 827, 846 (7th Cir. 1977). Attempting to alleviate this split, the Advisory Committee noted that courts should look at the statutory elements of the crime since they "will indicate whether it is one of dishonesty or false statement." Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment.

The majority of courts agree that crimes such as petit larceny do not come within Rule 609(a)(2) because the elements necessary for conviction do not bear directly on the defendant's credibility. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). For example, the D.C. Circuit held that petit larceny is outside the scope of Rule 609(a)(2) because it has no bearing on the defendant's propensity to testify truthfully. *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978). There, the District of Columbia Code defined petit larceny as "'feloniously tak(ing) and carry(ing) away any property of value of less than $100.'" *Id.* (citation omitted). Because there is no suggestion of dishonesty or falsity as an element, the D.C. Circuit held that petit larceny does not involve the requisite deceit to qualify for admission under Rule 609(a)(2). *Id*; *see also Smith*, 551 F.2d at 363 (noting that the prior convictions were not admissible under Rule 609(a)(2) because "[a]n intent to deceive or defraud is not an element of either offense.")

Here, not only was Ms. Fenty's prior conviction for petit larceny—which courts have held as not *per se* admissible under Rule 609(a)(2)[11]—the elements of her prior crime did not require a dishonest act or false statement. (R. 3, 20); *see Hayes*, 553 F.2d at 827 (noting that a court may only consider the underlying facts of the prior conviction if the title of the offense

[10] *See Fearwell*, 595 F.2d at 776 (noting that its decision that petit larceny is not admissible under Rule 609(a)(2) is similarly held by the Second, Third, Fourth, Seventh, Ninth, and Tenth Circuits).

[11] *See, e.g.*, *Gov't of Virgin Is. v. Testamark*, 528 F.2d 742, 639 (3d Cir. 1976); *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977).

leaves room for doubt). Under Boerum Penal Code section 155.25, a conviction for petit larceny only requires that a person knowingly take the personal property of another and intend to deprive the other person of it. (R. 3.) Nowhere in section 155.25 does it require a showing of a dishonest act or false statement. Because there is no suggestion of fraud or deceit as an element, petit larceny does not qualify for admission under Rule 609(a)(2).

Further, the Boerum Penal Code distinguishes between different types of theft and has separate statutes for petit larceny and theft by deception. (R. 3.) The statute criminalizing theft by deception—Boerum Penal Code section 155.45—explicitly requires that that person act with deceit. (R. 3.) A person deceives if they intentionally (a) create a false impression, (b) prevent another from acquiring material information that would impact their judgment, or (c) fail to correct a false impression. (R. 3.) Of note, the deception element is the *only* difference between the petit larceny statute and theft by deception statute. (R. 3.)

This difference highlights that the state of Boerum could have charged Ms. Fenty under both petit larceny and theft by deception if she could satisfy the necessary element of deceit. (R. 3, 21.) Ms. Fenty's actions, however, failed to satisfy the statutory elements of theft by deception because she was not deceiving anyone and meant exactly what she said in the moment. (R. 3, 22.) Therefore, the admission of Ms. Fenty's prior conviction of petit larceny is contingent on its statutory elements. *See* Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment. Since the petit larceny statute does not involve the requisite deceit element to fall under of Rule 609(a)(2), this Court should hold that evidence of Ms. Fenty's prior conviction is inadmissible.

2. The underlying facts of Ms. Fenty's prior conviction do not show a level of deceit that comes within the meaning of Rule 609(a)(2).

Where the deceitful nature of the crime is not apparent from the statute, the Advisory Committee notes that information may be offered to show that the underlying conduct of the

prior conviction involved an act of dishonesty or false statement. Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment. This has led some courts to adopt a rule that, when the prior conviction did not require proof of deceit as an essential element of the crime, it may be admitted under Rule 609(a)(2) if the conviction rested on facts involving dishonesty or falsity. *Papia*, 560 F.2d at 847. In such cases, the proponent of the evidence bears the burden. *Id.*

In *United States v. Payton*, the Second Circuit analyzed whether a prior conviction for third degree larceny may be admitted under Rule 609(a)(2). 159 F.3d 49, 57 (2d Cir. 1998). In its analysis, the court "look[ed] beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statement." *Id.* There, the court found that the witness's conviction qualified as a crime involving dishonesty or false statement because she had unlawfully received food stamps after falsely stating in a sworn application that she qualified for welfare. *Id.* Because she acquired the food stamps in a deceitful manner, the court held that evidence of her prior conviction was admissible under Rule 609(a)(2). *Id.*

Following *Payton*, the Second Circuit applied the same analysis and came to a different conclusion in *United States v. Estrada*. 430 F.3d 606, 614 (2d Cir. 2005). There, the witness had several larceny convictions for shoplifting in which he had taken elusive action to avoid detection. *Id.* Looking beyond the elements of the crime to those underlying facts, the court held that the witness's larceny convictions did not involve falsity or deceit and were therefore inadmissible under Rule 609(a)(2). *Id.* It went on to state that "[w]hile much successful crimes involves some quantum of stealth, all such conduct does not, as a result, constitute crime of dishonesty or false statement for purposes of Rule 609(a)(2)." *Id.* (creating a distinction between crimes of stealth, such as petit larceny, and crimes that require false statements).

Here, the facts of Ms. Fenty's prior conviction indicate that it was not a crime of fraud or deceit. (R. 52–54.) Unlike *Payton*, Ms. Fenty never made false statements. (R. 52–54.) In fact, Ms. Fenty only said one thing during the theft: "Let go or I'll hurt you." (R. 60.) Although Ms. Fenty testifies that she didn't want to hurt the woman, this does not indicate that her statement was a lie and that she was never going to hurt her. (R. 60.) Further, in *Payton*, the larceny conviction arose out of the false statement whereas here, Ms. Fenty's larceny conviction did not arise out of nor rely on her singular statement. (R. 53) (stating that Ms. Fenty acted on a dare).

Contrary to the lower courts' decisions, Ms. Fenty's conduct was not "calculated" nor "plotted." (R. 26, 70.) As evidenced by her testimony, she acted upon a spur of the moment dare from a friend. (R. 53.) She did not have a plan of attack. (R. 53.) She did not have a plan for what to do if she got caught. (R. 53.) She wasn't even thinking. (R. 53.) Additionally, she didn't even try to act sneaky. (R. 53.) But, even if she did, that is not enough to categorize her actions as dishonest or deceitful because as stated in *Estrada*, "elusive action to avoid detection . . . [does] not involve falsity or deceit." 430 F.3d at 614; *see also Hayes*, 553 F.2d at 827 (noting that a crime involving nothing more than stealth does not qualify under Rule 609(a)(2)). While the absence of respect for the property of others is an undesirable trait, "it is not an indicium of a propensity toward testimonial dishonesty." *Ortega*, 561 F.2d at 806. Thus, this Court should hold that evidence of Ms. Fenty's prior conviction is inadmissible for impeachment purposes because the elements of her crime and the underlying facts do not fall within the scope of Rule 609(a)(2).

B. The Fourteenth Circuit's Overly Broad Interpretation of Rule 609(a)(2) Goes Against the Legislative Intent and Is Prejudicial to Criminal Defendants.

The first step in interpreting FREs is to consider the plain meaning of the rule in question. *Bourjaily*, 483 U.S. at 178. Usually, this will be the end of the analysis because the words of the rule allow one interpretation. *United States v. Brackeen*, 969 F.2d 827, 829 (9th Cir. 1992). With

Rule 609(a)(2), however, the term "dishonesty" can have more than one meaning. *Id.* When the text is ambiguous, this Court has sought guidance from legislative history. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508–09 (1989). The legislative history of Rule 609(a)(2) illustrates that the term "dishonesty" was intended to be used in the narrow sense. Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment (noting that Rule 609(a)(2) only applies to crimes involving "some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."). Further, the purpose behind the rule was to embody "the policy of encouraging defendants to testify by protecting them against unfair prejudice and the policy of protecting the government's case against unfair misrepresentation of an accused's non-criminality." *United States v. Jackson*, 405 F. Supp. 938, 942 (E.D.N.Y. 1975) (stating that the rule is a carefully considered legislative compromise formed out of a series of debates).

Here, the Fourteenth Circuit incorrectly characterized the intent behind Rule 609(a)(2) by distinguishing between theft by deceit and theft by violence. (R. 70.) Simply because an individual hopes to get away with a crime does not automatically render it one of deceit. *See* (R. 73.) If this were the case, Rule 609(a)(2) would encompass nearly all crimes. *Hayes*, 553 F.2d at 827. This broad application is directly averse to the intent of a narrow application and increases the prejudicial effects on criminal defendants who wish to testify, such as Ms. Fenty. *Id.*

Since the underlying circumstances of Ms. Fenty's petit larceny charge and her current illegal drug trafficking charge are similar, there is a high likelihood that the jury will draw an improper inference of criminal predisposition from the evidence of her prior conviction. (R. 25); *see Green*, 490 U.S. at 510 ("Evidence that a litigant . . . is a convicted felon tends to shift a jury's focus from the worthiness of the litigant's position to the moral worth of the litigant himself."). Thus, by adopting such a broad application, the lower courts forced Ms. Fenty to

choose between: (1) explaining to the jury, in her own words, her side of the story; or (2) avoiding the likelihood that the jury will use the evidence of her prior conviction improperly. And although the district court issued a limiting instruction to avoid an improper inference, studies suggest that jurors often do not follow them. (R. 62–63); *see, e.g.*, *Thompson v. United States*, 546 A.2d 414, 424 (D.C. Cir. 1988) (noting that when a criminal defendant's prior conviction is admitted, their chances of acquittal decrease from 68% to 38%).

As the Fifth Circuit famously articulated, "one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962). Because courts cannot control how the jury will use evidence of prior convictions, courts must uphold the legislative intent to apply Rule 609(a)(2) narrowly. Accordingly, this Court should *reverse* the Fourteenth Circuit's overbroad application and hold that Ms. Fenty's prior conviction for petit larceny is inadmissible for impeachment purposes.

CONCLUSION

Petitioner respectfully requests that this Court *reverse* the Fourteenth Circuit Court of Appeal's decision and hold that (1) Ms. Fenty's Fourth Amendment rights were implicated, (2) the voicemails should have been admitted as an exception to the rule against hearsay, and (3) the evidence of her prior conviction should have been inadmissible for impeachment purposes.

Respectfully Submitted,
/s/ Team 1P
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