Team 24P

No. 23 – 695

IN THE

SUPREME COURT OF THE UNITED STATES

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Team 24P
Counsel for Petitioner

QUESTIONS PRESENTED

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 a hearsay exception under Rule 803(3) of the Federal Rules of Evidence if the declaration and the associated mental state occurred after the prohibited conduct.
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, which permits impeachment evidence only for crimes of deceit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Cases

Other Authorities

OPINION BELOW

The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Franny Fenty v. United States* No. 22-5071, was decided on June 15, 2023, and may be found in the Record. R. 64–73. The District Court's oral rulings on the Motion to Suppress and Motion in Limine are unpublished but are reproduced in the Record. R. at 10–17**,** 18–26.

CONSTITUTIONAL AND STATUTORY PROVISION

The text of the relevant constitutional provision appears below. The relevant statutory provisions are 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vi), and 21 U.S.C. § 853. The relevant Boerum Penal Code provisions are §§ 155.25 and 155.45. Additionally, this case involves Federal Rules of Evidence Rules 803 and 609.

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Factual Background

In December 2021, Franny Fenty, an experienced creative writer, began seeking new employment opportunities. R. at 6. For many years, Ms. Fenty has written novels and stories under the pseudonym Jocelyn Meyer to protect her privacy. R. at 4–5, 42–43. In seeking new opportunities, Ms. Fenty published a post regarding her job search on the employment-focused social media platform LinkedIn. R. at 6. An acquaintance of Ms. Fenty, Angela Millwood, whom Ms. Fenty had attended high school with, replied to the post and reached out to Ms. Fenty. R. at 6,

43–44. Ms. Millwood worked as a horse handler at Glitzy Gallop Stables and asked Ms. Fenty to assist her with helping the horses. R. at 44. Unfortunately for Ms. Fenty, she was unaware of the entire plan Ms. Millwood had created. R. at 45. Ms. Millwood asked Ms. Fenty to order a muscle relaxer named xylazine from a veterinarian pharmaceutical company called Holistic Horse Care. *Id.* Ms. Fenty was not familiar with the drug nor with horses. *Id.*

Ms. Fenty and Ms. Millwood both resided in Joralemon, where the alleged criminal activity occurred. R. at 8. Joralemon has experienced an increase in incidents related to xylazine being combined with other drugs. R. at 7. In February 2022, a Joralemon resident overdosed from a fentanyl and xylazine mixture. R. at 8. At the scene, there was a xylazine package from the veterinarian pharmaceutical company Holistic Horse Care. *Id.* Fearing Holistic Horse Care was selling substances laced with fentanyl, the Drug Enforcement Agency worked with the United States Postal Inspection Service and the Joralemon Post Office to look into packages coming from the company. *Id.*

On February 14, 2022, DEA Agent Raghavan received a call from Oliver Araiza who worked at the post office stating that there were two packages received from Holistic Horse Care. R. at 30. The packages were addressed to Jocelyn Meyer and the P.O. Box address was registered to Jocelyn Meyer as well. R. at 30–31. There were two other packages addressed to that P.O. Box with an addressee named Franny Fenty. R. at 31. Ms. Fenty had arrived at the postal office to retrieve all her mail and was told to come back the next day to retrieve her Holistic Horse Care Packages. R. at 40. Due to the delay, Ms. Fenty began to feel nervous that Ms. Millwood had lied to her and involved her in a criminal endeavor, so she called and left a voicemail. R. at 46, 39. Ms. Fenty then spoke to post office employees for 45 minutes and became even more concerned. *Id.*

Ms. Fenty then left Ms. Millwood a second voicemail expressing her fear that she had been unwittingly implicated in criminal behavior. *Id*.

Agent Raghavan and another DEA agent obtained a search warrant for the Holistic Horse Care packages and tested the contents of the packages. R. at 31. The packages were labeled "Xylazine: For The Horses" but contained 400 grams of xylazine and 200 grams of fentanyl. R. at 31–32. The DEA Agents returned the packages to the postal office for a controlled delivery to observe Franny Fenty picking up the packages. R. at 33. The DEA agents proceeded to investigate Ms. Fenty. *Id.* They learned that she used the pseudonym Jocelyn Meyer for her career as a writer. *Id*. The agents also searched social media and discovered Ms. Fenty's LinkedIn post and her connection to Ms. Millwood. R. at 34.

Before trial, a motion in limine was brought to exclude the evidence of Ms. Fenty's prior conviction for petit larceny. R. at 18–26. Nearly ten years ago, Ms. Fenty received a misdemeanor conviction for petit larceny. R. at 52–53. Ms. Fenty was 19 years old at the time and stole a stranger's bag on a dare from a former friend. R. at 53. Ms. Fenty clumsily attempted to sneak up to the distracted victim but was quickly noticed. *Id.* Upon being noticed, Ms. Fenty relied on force and verbal threats of violence to steal the victim's bag. R. at 59–60. Since Ms. Fenty stole this bag on a dare and did not plan how to get away, she was only able to run three blocks before she was caught by the Boerum Police. R. at 54. Ms. Fenty received two years of community service and two years of probation as punishment for her misdemeanor offense. *Id.* This was Ms. Fenty's first, and only offense. *Id.* The prior conviction was admitted under Federal Rule 609(a)(2) despite Ms. Fenty's argument that it was not a crime of deceit. R. at 26.

II. Procedural History

On February 15, 2022, Ms. Fenty was indicted on a charge of possession with intent to distribute 400 grams or more of fentanyl, in violation of §§ 21 U.S.C. 841(a)(1) and (b)(1)(A)(vi).

R. at 1–2. A motion to suppress was filed to exclude evidence relating to the contents of packages that Ms. Fenty received on the grounds that the packages were unlawfully searched and seized by DEA agents. R. at 10–11. A motion in limine was brought to exclude a prior misdemeanor conviction for petit larceny, since it is not a crime of deceit as required by Federal Rule of Evidence 609(a)(2). R. at 18–19. The United States District Court for the District of Boerum denied both motions. R. at 66.

At trial, the Government argued that voicemail messages left by Ms. Fenty should be excluded on the grounds that the voicemails were hearsay that did not meet a hearsay exception. *Id.* The District Court held that (1) the Government's search of contents of the packages addressed to Ms. Fenty's alias did not violate the Fourth Amendment, (2) Ms. Fenty's recorded voicemail statements should be excluded as not qualifying as a hearsay exception under Rule 803(3) of the Federal Rules of Evidence, and (3) impeachment of Ms. Fenty by evidence of her prior conviction for petit larceny is permissible under 609(a)(2) of the Federal Rules of Evidence. R. at 16–17, 46–52, 63. Ms. Fenty was convicted and sentenced to 10 years in prison. R. at 66.

Ms. Fenty appealed the District Court's findings to the United States Court of Appeals for the Fourteenth Circuit. R. at 64. The Fourteenth Circuit affirmed the District Court's rulings. R. at 70. This Court granted writ of certiorari on December 14, 2023. R. at 74.

SUMMARY OF THE ARGUMENT

American citizens have a Constitutional expectation of privacy under the Fourth Amendment, prohibiting the government from conducting unreasonable searches and seizures. Defendants have the right to offer exculpatory evidence of their state of mind regarding their lack of knowledge of the crime as an exception to typical hearsay prohibition. Finally, witnesses may not be impeached with evidence of prior misdemeanor convictions that have no bearing on the

witness's propensity to testify truthfully due to the resulting unfair prejudice. The Fourteenth Circuit violated Ms. Fenty's Constitutional right to privacy, creating a situation in which alternative explanations for the crimes she was accused of were not able to be introduced as testimony or adequately considered by the jury due to their erroneous application of the Federal Rules of Evidence.

We respectfully request that this Court reverse the Fourteenth Circuit and remand this case for a new trial because the court below (A) violated Ms. Fenty's reasonable expectation of privacy under the Fourth Amendment, (B) did not allow Ms. Fenty to admit evidence showing her mental state at the time of the alleged offense, violating Rule 803(3) of the Federal Rules of Evidence, and (C) allowed the prosecution to use evidence of Ms. Fenty's prior larceny convictions to impeach her, despite no evidence of deceit or false statements being made as required by 609(a)(2) of of the Federal Rules of Evidence.

A. Reasonable Expectation of Privacy Under the Fourth Amendment

The Fourteenth Circuit erred in finding that the Government's search of the sealed mail addressed to Ms. Fenty's alias did not violate the Fourth Amendment. Individuals who use an alias in sending and receiving mail maintain a reasonable expectation of privacy in those packages. The addressee of the packages and the P.O. Box was, in effect, Ms. Fenty. The packages shipped to Ms. Fenty were received under her pseudonym Jocelyn Meyer which she has used for many years. The privacy rights of those who use a fictitious name are not defunct based on the innocent or criminal nature of the activities an individual is engaged in; rather a reasonable expectation of privacy exists for those who use an alias or fictitious name regardless of the intent or nature of the activities. Therefore, the search of Ms. Fenty's packages and P.O. Box violated her reasonable expectation of privacy under the Fourth Amendment.

B. Mental State Hearsay Exception Under Fed. R. Evid. 803(3)

Ms. Fenty's motion to admit the voicemail messages she had left for Ms. Millwood as evidence of her confusion when she discovered her packages were being investigated under FRE 803(3) was erroneously denied. This rule admits evidence of a declarant's then-existing mental and emotional states as a hearsay exception. There is a strong presumption of admitting this kind of evidence in cases the absence of guilty knowledge is a defense. Her voicemails were reflective of her then-existing mental and emotional state, contemporaneous, and relevant. This error was harmful, because her actual knowledge of the crime is a point of controversy, and this evidence tends to prove that Ms. Fenty was not aware that she was purchasing fentanyl. Ms. Fenty was not able to adequately introduce this evidence or make her argument because of the lower court's erroneous interpretation of FRE 803(3). The Court must reverse the lower courts' rulings and remand this case in order to protect Ms. Fenty from undue prejudice and secure a fair trial.

C. Prior Conviction Admissibility Under Fed. R. Evid. 609(a)(2)

Ms. Fenty's prior petit larceny conviction was erroneously admitted for the purposes of impeachment under Federal Rule of Evidence 609(a)(2). This rule allows prior convictions of crimes committed by deceit or false statements to be admitted. The lower courts allowed the prosecution to admit evidence of Ms. Fenty's prior conviction even though it was not committed through deceitful means, going against Congress's stated intent of the rule. The error was harmful as it created substantial unfair prejudice that limiting instructions are insufficient to correct.

Accordingly, this Court must reverse the Fourteenth Circuit's ruling and find that Ms. Fenty's Fourth Amendment expectation of privacy was infringed upon, the voicemail statements were admissible at trial under the Federal Rules of Evidence 803(3) hearsay exception, and impeachment by her prior conviction was improper under the Federal Rule of Evidence 609(a)(2).

ARGUMENT

I. Ms. Fenty's reasonable expectation of privacy under the Fourth Amendment was violated when DEA agents searched the sealed packages found in her P.O. Box addressed to her pseudonym, Jocelyn Meyer.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. To establish a reasonable expectation of privacy there must be "an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967). This Court has recognized that there is a legitimate expectation of privacy in letters and sealed packages sent by mail or common carrier. *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). Both senders and recipients of a package have a legitimate expectation of privacy in the contents of the package. *United States v. Jacobsen*, 446 U.S. 109, 114 (1984). An individual has a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to a public alias and the alleged criminal utilization of the alias does not change the nature of the expectation.

A. Ms. Fenty's usage of an alias in purchasing and receiving mail or packages does not eviscerate her reasonable expectation of privacy in those packages or the P.O. Box to which the mail was sent.

The Fourteenth Circuit erred in its finding that Ms. Fenty did not have a reasonable expectation of privacy in the sealed mail that was addressed to Ms. Fenty's alias. The Fifth and Seventh Circuits have correctly recognized that an individual using an alias when receiving mail or packages retains a reasonable expectation of privacy. In *United States v. Richards*, the Fifth Circuit held that a defendant may have a reasonable expectation of privacy in a package even if the addressee is not the defendant's legal name, if the defendant can establish a connection between him or herself and the addressee. 638 F.2d 765, 767, 770 (5th Cir. 1981). Similarly, the Seventh Circuit has recognized that there can be a legitimate interest in retaining anonymity in receiving

packages and "the expectation of privacy for a person using an alias in sending or receiving mail is one that the society is prepared to recognize as reasonable." *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003).

Here, there is a sufficient connection as Ms. Fenty is the same individual as Jocelyn Meyer. Ms. Fenty has been using the name Jocelyn Meyer in her writing career for multiple years, spanning from her college writing experiences to writing her novels as an adult. R. at 15–16. Additionally, the packages were sent to the P.O. Box which Ms. Fenty paid for and had access to. R. at 11–13. There were four packages delivered to the post office on February 14, 2022. R. at 30–34. In retrieving the packages at the post office, Ms. Fenty collected both packages addressed to her given name and her pseudonym. R. at 32. When asked by Mr. Araiza if the Holistic Horse Care packages belonged to Ms. Fenty, she responded, affirming her identity as Jocelyn Meyer. R. at 32–33. The connection between Ms. Fenty and her usage of the pseudonym Jocelyn Meyer is sufficiently related, establishing an expectation of privacy in the packages.

Not only did Ms. Fenty have an expectation of privacy in the packages, but she also had an expectation of privacy in the P.O. Box. Regardless of whose name the P.O. Box was registered to, Ms. Fenty demonstrated sufficient dominion or control over the space to establish an expectation of privacy.

Finding that an individual who utilizes an alias in relation to a space, while demonstrating a sufficient connection or control over the space, maintains a legitimate expectation of privacy is consistent with both this Court's precedent and decisions from the Eighth and Eleventh Circuits. This Court held in *Jones*, that the defendant had an expectation of privacy in an apartment that was not his own dwelling. *Jones v. United States*, 362 U.S. 257 (1960). Jones had a key to the apartment of a friend and was staying in the apartment when the police executed a search warrant and seized

narcotics found during the search. *Id.* Although his friend, who rented the apartment, also had access to the apartment, Jones had a key and personal possessions in the dwelling. *Id.* at 259. Jones could exercise control over the apartment and had a legitimate expectation of privacy in the apartment. *Id.* at 258. In *Katz*, the defendant had an expectation of privacy in a telephone booth. *Katz v. United States*, 389 U.S. 347 (1967) The defendant shut the door behind him and the ability to exclude the outside world demonstrated control over the access to the space. *Id*. at 348. The Eighth Circuit has held that an individual who rented a home under a fictitious name had an expectation of privacy in the home due to the dominion or control over the space. *United States v. Watson* 950 F.2d 505, 507 (8th Cir. 1991). The Eleventh Circuit held that a defendant had an expectation of privacy in a hotel room rented under an alias. *United States v. Newbern*, 731 F.2d 744, 748 (11th Cir. 1984).

Here, the P.O. Box was registered under Jocelyn Meyer, the fictitious name used by Ms. Fenty. R. at 15. P.O. Boxes are locked, requiring either a key or combination to access. Ms. Fenty is the only individual, other than postal workers, who has access to her P.O. Box and was in control of the box along with its contents. By opening a P.O. Box, Ms. Fenty is able to retain her anonymity and ensure that other individuals do not have access to her information or packages. R. at 43. Despite the P.O. Box being registered to Jocelyn Meyer, Ms. Fenty had multiple shipments delivered to the P.O. Box, some addressed to her legal name and others to her alias. R. at 30–31. Ms. Fenty had the ability to assert control over the space and a reasonable expectation of privacy as to both the P.O. Box and its contents.

B. Ms. Fenty has a reasonable expectation of privacy in the alias Jocelyn Meyer because it was an alias of public use.

The Fifth Circuit provides a standard this Court should adopt in determining a reasonable expectation of privacy in an alias. A reasonable expectation of privacy in an alias can be

established if the alias is one of public use. *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993). Black's Law Dictionary defines an alias as "An assumed or additional name that a person has used or is known by. — Also termed assumed name; fictitious name." *Alias*, Black's Law Dictionary (11th ed. 2019). The Fifth Circuit has distinguished between fictitious names and alter egos providing privacy rights to fictitious names. *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992).

The usage of the fictitious name Jocelyn Meyer by Ms. Fenty is historically well-established. From 2016 through 2022, Ms. Fenty has continued to use the alias, Jocelyn Meyer. R. at 4, 37. In college, Ms. Fenty published her short stories in the college magazine during the 2016 and 2017 academic years under the name Jocelyn Meyer. R. at 4, 13–14. In 2021, Ms. Fenty reached out to a publisher regarding her latest novel and four other novels. R. at 5. In both the body of the email to the publisher and the novels themselves, Ms. Fenty used the fictitious name Jocelyn Meyer. *Id.* Additionally, Ms. Fenty used the email address "jocelynmeyer@gmail.com." *Id.* An individual often uses an email address for various purposes. Ms. Fenty could be presenting herself as Jocelyn Meyer to more individuals than just the publishers by utilizing that email address and fictitious name to communicate. At trial, Ms. Fenty stated that she had used the fictitious name and email on at least four occasions in October 2021 when emailing publishers about her novels that were written under the same fictitious name. R. at 42. In January 2022, Ms. Fenty opened a P.O. Box with the name Jocelyn Meyer. R. at 43. Ms. Fenty testified at trial that she opened the P.O. Box with the fictitious name to receive online orders because she values her privacy. *Id.* The continuity of usage and public knowledge of the fictitious name through publication lends itself to protection under the Fourth Amendment because it is an alias of public use.

C. The nature of Ms. Fenty's actions and alleged knowledge of the apparent criminal scheme does not permit the erosion of a reasonable expectation of privacy under the Fourth Amendment.

The nature of Ms. Fenty's packages and activities do not rid her of the reasonable expectation of privacy in those packages. As pointed out by the majority in the Fourteenth Circuit, *Daniel* raised the concern about whether a defendant would have standing "when the use of that alias was obviously part of [her] criminal scheme." R. 67 at (citing *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993)). However, this concern was *dicta* and is not controlling. *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993). Prior precedent from the Fifth Circuit established that the exterior of a container being indicative of the contents does not mean that there is no reasonable expectation of privacy of said contents. *United States v. Villarreal*, 963 F.2d 770, 776 (5th Cir. 1992). Further, the Seventh Circuit has stated that "individuals have a reasonable expectation of privacy in packages addressed to them under fictitious names even when the false names are used to distance the sender or recipient from the criminal nature of the contents of the package." *United States v. Pitts*, 322 F.3d 449, 457 (7th Cir. 2003). The Second Circuit has also concluded that an expectation of privacy does not hinge on the "nature of Defendant's activities [whether] innocent or criminal." *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997).

Special Agent Raghavan told the postal service to notify him of any packages that were oddly shaped, large, or shipped from a horse veterinarian website or company. R. at 30. On February 14, Mr. Araiza called Mr. Raghavan to notify him of two packages from Holistic Horse Care that were addressed to Jocelyn Meyer. *Id.* The outside of the packages or the label stating that the packages were shipped from Holistic Horse Care is not indicative of criminal activity. Once the agents obtained a warrant, the packages were opened showing bottles of xylazine. R. at 31. The contents of the bottles were tested, showing 400 grams of xylazine and 200 grams of fentanyl per bottle. R. at 32.

When Ms. Fenty had originally come to collect her packages on February 14, the packages were not there for pickup, and she was advised by the postal workers to come back the following day. R. at 40. When there was difficulty in acquiring the packages from the P.O. Box, Ms. Fenty called Ms. Millwood but was unable to reach her. R. at 46. The agents then returned the packages the following day to do a controlled delivery of the packages. *Id.* When Ms. Fenty came to pick up the packages, she claimed the packages under her alias. R. at 33.

Ms. Fenty was unaware of her involvement in the apparent criminal scheme. R. at 40. Ms. Fenty was under the impression that she was helping horses that were suffering. *Id*. At trial, Ms. Fenty explained her relationship with her classmate Ms. Millwood and that Ms. Millwood reached out to her about ordering xylazine for horses. R. at 43. Ms. Millwood worked at Glitzy Gallop Stables and told Ms. Fenty that the horses were elderly and suffering in pain. R. at 44. Ms. Millwood had convinced Ms. Fenty that she was helping the horses by purchasing muscle relaxers for Ms. Millwood to administer to the horses. R. at 45. During the trial, Ms. Fenty explicitly stated that she was unfamiliar with xylazine and horses generally. *Id.* Ms. Fenty believed that she had to order the xylazine instead of Ms. Millwood because Ms. Millwood could not risk losing her job. *Id.* When Ms. Fenty decided to research xylazine she came across a concerning article but was reassured by Ms. Millwood that the medicine was for the horses. R. at 46. Further, Ms. Fenty stated that she was completely unaware of the contents of the xylazine packages. R. at 55. Ms. Fenty did not have the requisite knowledge of the alleged criminal activity, and her trust was betrayed when she was taken advantage of by Ms. Millwood in ordering the Holistic Horse Care packages. Ms. Fenty was not using her alias to further criminal activity. Even if the nature of Ms. Fenty's activities were criminal, she had a legitimate expectation of privacy in the packages and their contents.

II. Ms. Fenty's voicemail messages to Ms. Millwood fulfill all criteria for admission under Federal Rule of Evidence 803(3) and excluding the evidence was a harmful error.

Ms. Fenty's voicemails are admissible under FRE 803(3). Ms. Fenty's voicemails are being offered as evidence towards a mental state, not for the accuracy of any facts asserted. R. at 50. Federal Rule of Evidence 803(3) should be interpreted broadly, to allow the jury to weigh the reliability and strength of the evidence, particularly in cases where the accused's mental state is an issue in controversy. *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984). Ms. Fenty's voicemails fulfill the contemporaneousness, chance for reflection, and relevance requirements that courts have read into FRE Rule 803(3). *United States v. Emmert*, 829 F.2d 805, 809–10 (9th Cir. 1987). This error was harmful because the admission of this evidence could have swayed a reasonable juror. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946).

A. Ms. Fenty's voicemails to Ms. Millwood are admissible under the categorical and broad Fed. R. Evid. 803(3) hearsay exception.

Ms. Fenty's voicemails to Ms. Millwood are admissible as a hearsay exception under FRE 803(3) because they reflect a then-existing emotional or mental state. FRE R 803(3). Rule 803(3) is a categorical exception, and there is a presumption for allowing jurors to evaluate the credibility of these statements, especially when the guilty knowledge element of a crime is a point of controversy. *United States v. DiMaria*, 727 F.2d 265, 271(2d Cir. 1984). These voicemails fulfill the contemporaneousness, chance for reflection, and relevance requirements that courts have read into FRE Rule 803(3). *United States v. Emmert,* 829 F.2d 805, 809–10 (9th Cir. 1987). Ms. Fenty's voicemails fall within the scope of Federal Rule of Evidence 803(3) admissibility.

1. Ms. Fenty's voicemails reflect a then-existing mental or emotional state.

Ms. Fenty's voicemails to Ms. Millwood are admissible as a hearsay exception under Federal Rule of Evidence 803(3) as evidence tending to prove Ms. Fenty's emotional and mental

state at the time she left the voicemails and the probative value of these statements outweighs any risk that the jury may be misled. These voicemails reflect her emotional state at the post office, and her continued emotional state 45 minutes later, after her conversation with the post office employees. Federal Rule of Evidence 803(3) categorically allows the admission of statements reflective of a then-existing mental or emotional state.

Federal Rule of Evidence 803(3) provides a broad hearsay exception for statements of "the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." FRE R 803(3). The distinction between statements admissible under Federal Rule of Evidence 803(3) and inadmissible hearsay relies primarily on whether the statement is being offered to prove the emotional or mental state of the declarant at the moment of declaration or to prove the accuracy of a memory being discussed. *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007).

Ms. Fenty's statements are being offered as evidence of her mental and emotional state while she was at the post office. R. at 51. These statements reflect the confusion and concern that she was feeling after finding her packages seized, and then speaking to the post office employees. R. at 40. In the voicemail transcript, Ms. Fenty repeatedly states that she is "nervous" and "worried" which are clear expressions of a mental and emotional state. R. 39. The voicemails contain very few factual assertions and are not being offered to prove the accuracy of her recollections or assertions about Ms. Millwood. R. at 51. The District Court erred in excluding these statements based on the fear that they may be taken as evidence to prove the accuracy of her memory. *Id.* The voicemails must be admitted as evidence of a then-existing mental or emotional state.

2. *FRE Rule 803(3) is a broad, categorical exception and is not reliant on a judge's assessment of a statement's reliability. In cases where guilty knowledge is a point of controversy, there is a strong presumption of allowing evidence of mental states.*

FRE 803(3) is a broad, category-based exception. The Second Circuit found that "the scheme of the [Federal] Rules [of Evidence] is to determine that issue by categories; if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge." *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984). The court found that this broad analysis of FRE 803(3) is particularly vital "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." *Id.* In these cases, where the suspect's guilty knowledge is the issue in controversy, there is an even stronger presumption that evidence offered to prove the declarant's then-existing state of mind should be admitted under the FRE 803(3) hearsay exception. *Id*.

In 1984, the Second Circuit found that a defendant, who was accused of having knowingly purchased stolen cigarettes, had the right to admit a statement that he had made after he had purchased the cigarettes. *United States v. DiMaria*, 727 F.2d 265, 270 (2d Cir. 1984). This statement was offered by the defendant to prove that he did not believe the cigarettes were stolen after he had bought them. *Id.* The trial court denied his motion to include this evidence, arguing that because this statement was made to FBI agents after the prohibited conduct had taken place, it was likely to have been a false exculpatory statement. *Id.* The Second Circuit summarily rejected this argument, stating that ignoring the plain text of the FRE and excluding declarations of mental state on the premise that they may be false is a fallacy that "[takes] the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proved guilty" and "is inconsistent with the presumption of innocence." *Id.* (*quoting* 6 Wigmore, Evidence § 1732, at

159–62 (Chadbourn rev. 1976)). The Federal Rules of Evidence 803(3) hearsay exception is a broad, categorical exception that is not dependent on the perceived reliability of the statements. *Id.*

Ms. Fenty's voicemails fit within the broad category of 803(3) hearsay exceptions. As stated in *DiMaria*, the judge's perception of the reliability of these statements is not relevant to this analysis. *DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984). The Fourteenth Circuit erred in accepting the argument that the voicemails should be excluded on the grounds that they may have been fabricated evidence of a false mental state. R. at 48. Determining the reliability and weight of a piece of evidence that is categorically admissible is the role of the jury, not the judge. Ms. Fenty's voicemails must be admitted in order to maintain the integrity of the judicial system.

3. *Ms. Fenty's voicemails fulfill the contemporaneousness, chance for reflection, and relevance requirements that courts have read into FRE Rule 803(3).*

Ms. Fenty's voicemails fulfill the "contemporaneity" and "absence of time to reflect" requirements because these voicemails were recorded while Ms. Fenty was in an emotional state. Federal Rule of Evidence 803(3) does not require statements to be made to another witness in real-time in order to be admitted. These statements are being offered as evidence tending to prove Ms. Fenty's emotional state while calling Ms. Millwood, rather than the emotional state she may have been in at an earlier time. R. 40. This makes these messages admissible as a hearsay exception.

Some appellate courts have "identified three factors bearing on the 'foundational inquiry on admissibility' under Rule 803(3): contemporaneousness, chance for reflection, and relevance." *United States v. Emmert,* 829 F.2d 805, 809–10 (9th Cir. 1987). Fulfilling the contemporaneity requirement of Federal Rule of Evidence 803(3) does not require a statement to be made at the time that the prohibited act occurred. *Wagner v. Cnty. of Maricopa*, 747 F.3d 1048, 1053 (9th Cir. 2013). Statements can be introduced to prove the emotional state of a declarant at the time of declaration, even if the declaration was made significantly later than the prohibited act. *Id*.

Recorded statements created by the defendant alone may fulfill the 803(3) hearsay exception requirements, as long as they are reflective of the mental or emotional state of the defendant at the time they created the statement. *State v. John L.,* 856 A.2d 1032, 1040 (Conn. Ct. App. 2004). The Appellate Court of Connecticut found that a letter created by a defendant in a sexual assault case, which discussed his emotional state, was admissible under Conn. Code Evid. § 8–3(4), which mirrors Federal Rule of Evidence 803(3). *Id*. at 1040. That court found that, while these letters were not written while the crime was occurring, they were clearly reflective of his emotional state while writing, and could be introduced for that purpose. *Id*. The court did not take issue with the lack of real-time responsiveness and did not find that the introduction of these letters violated the "chance for reflection" prong of the 803(3) admissibility test, even though they were written by the defendant when he was alone, and under no time pressure to react or write immediately. *Id.* These letters were admitted to show the defendant's state of mind while he was writing, rather than while the crime was occurring. *Id*.

Statements offered as hearsay exceptions under Federal Rule of Evidence 803(3) do not have to be made while the prohibited conduct was occurring to be admissible, as long as these statements are offered to prove the declarant's state of mind while they were making the statement, rather than for the truth of any matters asserted. *Wagner v. Cnty. of Maricopa*, 747 F.3d 1048, 1053 (9th Cir. 2013). The "contemporaneous" prong of the 803(3) admissibility test requires only that any statements admitted by the declarant are not being offered to prove "the fact remembered or believed" but the "mental feeling" of the declarant at the time that they are speaking. *Id.* The Ninth Circuit found that the sister of the plaintiff in a police brutality case was allowed to testify as to conversations she had with the plaintiff days and weeks after the alleged brutality occurred, as evidence of his emotional state following the event. *Id.* The court found that her "statements

were offered to show his state of mind at the time of the conversation, thus satisfying any contemporaneity requirement." *Id*.

Conversely, the Ninth Circuit found that an 803(3) hearsay exception did not apply to a case where a defendant had been fully aware he was under investigation and had consulted with a lawyer before making the statements he seeked to introduce. *United States v. Ponticelli*, 622 F.2d 985, 992 (9th Cir. 1980). Here, the court found that the statements offered by the defendant did not qualify as hearsay exemptions because the defendant's consultations with a lawyer made it appear extremely likely that the defendant "was considering the legal significance of his declarations at the time he made [the statements]." *Id*. The court focused primarily on the type of reflection the defendant had made, and his deep understanding of the charges against him, rather than the amount of time that had elapsed. *Id.*

Ms. Fenty's recorded voicemails are admissible under FRE Rule 803(3), despite being recorded by the defendant alone. The District Court erred in adopting the argument that FRE rule 803(3) only admits statements that occurred in real-time conversation. R. at 48. Statements, like letters or voicemails, that have been recorded by the declarant may be admissible as a hearsay exception, without any real-time conversation requirement, as long as they are reflective of a "then-existing mental or emotional state." *State v. John L.,* 856 A.2d 1032, 1040 (Conn. Ct. App. 2004). Ms. Fenty immediately called Ms. Millwood when she arrived at the post office and found that her packages were missing. R. at 40. She then called Ms. Millwood a second time, soon after she had finished talking to the postal workers. *Id.* As in *Wagner,* the contemporaneity requirement is fulfilled since these statements are being offered as evidence of Ms. Fenty's emotional or mental state while she was at the post office, rather than while she was ordering the medication or at any other point. *Wagner v. Cnty. of Maricopa*, 747 F.3d 1048, 1053 (9th Cir.

2013). This case can be distinguished from the ruling in *United States v. Ponticelli*, as Ms. Fenty was not even aware of the specific charges against her at the time she had made these statements, and there is no evidence she had begun to construct or consider any legal defenses. *United States. v. Ponticelli*, 622 F.2d 985, 992 (9th Cir. 1980).

Ms. Fenty's voicemail messages to Ms. Millwood fulfill the contemporaneity requirement of an FRE 803(3) hearsay exception. These statements were reflective of her emotional state at the time she made these calls, and there is no indication that FRE 803(3) exceptions must be real-time conversations.

B. Refusing to admit Ms. Fenty's voicemail messages to Ms. Millwood was an abuse of discretion that resulted in a harmful and prejudicial error.

Ms. Fenty suffered prejudice because these voicemails were excluded from the record. The test to determine whether a non-constitutional error is harmless is "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). This can be determined by evaluating the weight of other evidence against the defendant, and the efficacy of alternative means of communicating this information. *Id.*

The Second Circuit found that improperly denying a defendant's motion to admit evidence of a then-existing mental or emotional state was a harmful error. *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984). The court reasoned that because the evidence the defendant was seeking to admit was being offered to prove that he was not knowingly purchasing stolen goods, and the "evidence [offered by the government] with respect to guilty knowledge, while entirely sufficient, was not overpowering," a reasonable juror could have potentially been swayed by the admission of the defendant's evidence. *Id.* Additionally, the court found that the defendant's testimony or counsel's arguments were not sufficient replacements for the then-existing mental

state evidence, and the defendant had been prejudiced by this lack of admission. *Id.* The court reversed and remanded the lower court's decision on this premise. *Id.*

The state has not offered the type of overwhelming evidence of Ms. Fenty's knowledge of fentanyl in the packages that would make this piece of evidence unlikely to change a juror's mind. The voicemails serve as evidence that she did not have the requisite guilty knowledge of this crime while she was at the post office. R. at 40. Additionally, Ms. Fenty does not have an alternative method of conveying this information that would be equally convincing. Her statements at trial alone do not carry the same probative value as allowing the jury to hear her emotional reaction while she was at the post office. A reasonable juror's opinion could be impacted by these pieces of evidence.

Ms. Fenty has been prejudiced by the denial of her motion to admit the voicemails into evidence. The government has not offered overwhelming evidence of her guilty knowledge, so the admission of these voicemails could have reasonably changed the jury's decision. She did not have any other adequately probative methods of making this argument to the judge. This Court must reverse the lower courts' decisions in order to correct this harmful error.

III. The defendant's prior conviction for petit larceny was improperly admitted under Federal Rule of Evidence 609(a)(2) causing unfair prejudice that was harmful.

The lower courts' broad interpretations of what constitutes a dishonest crime does not fall within the narrow scope as given by Congress when Federal Rules of Evidence Rule 609 was enacted. This Court in *Green v. Bock Laundry Machine Co.* explained that since the language of FRE 609 is ambiguous, the Court must "then seek guidance from legislative history and from the Rules' overall structure." 490 U.S. 504, 509 (1989). The legislative history surrounding Federal Rule of Evidence 609 charges courts to interpret the 609 exceptions narrowly, to only allow "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 bearing on the accused's propensity to testify truthfully." H.R. Conf. Rep. No.93-1597, 93d Cong., 2d Sess. 9 (1974), *as reprinted in* 1974 U.S.C.C.A.N., 7098, 7103.

The Fourteenth Circuit's decision erroneously characterized Ms. Fenty's petit larceny conviction as a crime of dishonesty. R. at 70. They went against the stated purpose of Federal Rule of Evidence 609, allowing evidence that does not involve deception or a false statement to be admitted under this Rule. This was a harmful error that substantially prejudiced the jury. Accordingly, this Court must reverse the Fourteenth Circuit's decision and hold that petit larceny is not a crime of deceit to effectuate Congress's purpose of Federal Rule of Evidence 609.

A. Ms. Fenty's prior larceny conviction did not involve dishonesty or a false statement as required by Fed. R. Evid. 609(a)(2).

Since Ms. Fenty's crime was not a felony, it must be one of dishonesty or false statement to be admitted. Boerum Penal Code § 155.25; *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982). The language of Federal Rule of Evidence 609(a)(2) only covers convictions that "involve some element of misrepresentation or other indicium of a propensity to lie". *United States v. Foster*, 227 F.3d 1096, 1100 (9th Cir. 2000) (quoting *United States. v. Ortega,* 561 F.2d 803, 806 (9th Cir. 1977)). Evidence of prior convictions can only be used to show that the defendant is more likely to lie on stand, not to commit any subsequent crime. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). Since the result of Federal Rule of Evidence 609(a)(2) is an automatic admittance of evidence of a prior conviction, regardless of its unfair prejudice, it has been applied very narrowly. *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). The Fourteenth Circuit's understanding of this rule was erroneous and will result in nearly every crime being deemed one of deceit and admissible for impeachment purposes. *Hayes*, 553 F.2d 824, 827 (2d

Cir. 1977). Therefore, this Court must reverse and hold that Ms. Fenty's petit larceny conviction arising from a teenage dare is not a crime of deceit and that it may not be admitted into evidence.

1. Ms. Fenty's past larceny conviction did not involve dishonesty or a false statement.

Ms. Fenty's past larceny conviction did not involve dishonesty or a false statement that would suggest that Ms. Fenty would be dishonest as a witness. There must be "some element of active misrepresentation" for a prior conviction to be a crime of deceit for the purposes of Federal Rule of Evidence 609(a)(2). *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012). Larceny typically does not fall under this, and therefore, the "government has the burden of producing facts demonstrating that the particular conviction involved fraud or deceit." *United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984) (citing *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982)). The government could not produce such facts; thus, the District Court erred in allowing Ms. Fenty's impeachment with evidence of her past conviction.

The D.C. Circuit explained that "petit larceny does not involve the requisite deceit to qualify for admission under Rule 609(a)(2)." *United States. v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978). The court explained that petit larceny "simply has no bearing whatever on the 'accused's propensity to testify truthfully.'" *Id.* The D.C. Circuit's holding is in line with most other circuits, holding that crimes such as theft, larceny, and burglary are not those that involve dishonesty or a false statement. For example, the Second Circuit held that a witness's "larceny convictions did not involve falsity or deceit such as to fall within the ambit of Rule 609(a)(2)." *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). Padilla, the witness, "had several larceny convictions for shoplifting" and "had taken elusive action to avoid detection." *Id.* at 614. The court concluded that "[w]hile much successful crime 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.* Therefore, Padilla's past larceny convictions were not admissible under Federal Rule of Evidence 609(a)(2). *Id.* at 615.

This understanding has not been limited to cases of larceny. The Ninth Circuit held that past convictions of bank robberies were "not per se crime[s] of dishonesty" for the purposes of Federal Rule of Evidence 609(a)(2). *United States v. Brackeen*, 969 F.2d 827, 828 (9th Cir. 1992). Likewise, the court held that past convictions for burglary and theft were not crimes of deceit. *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982). The majority of circuits agree that crimes like larceny, theft, and burglary do not typically have the requisite deceit or false statement that Federal Rule of Evidence 609(a)(2) requires.

In contrast, the Second Circuit held that a defendant's prior larceny conviction can fall under Federal Rule of Evidence 609(a)(2) if it involves deceit or a false statement. *United States v. Payton*, 159 F.3d 49 (2d Cir. 1998). However, the facts of this case differ from those above. The defendant in *Payton* unlawfully received food stamps, acquiring them in a "deceitful manner." *Id.* at 57. Ms. Payton received these food stamps after making a false statement, claiming that she applied for welfare on a sworn application when she knew that she did not. *Id.* The Second Circuit stressed that this case fell under Federal Rule of Evidence 609(a)(2), unlike other larceny and food stamp convictions, because the defendant's "conduct [arose] out of the making of a false statement." *Id.* In this case the court determined that the facts of the prior conviction bore heavily on the defendant's credibility and propensity to testify truthfully. *Id.*

The facts of Ms. Fenty's prior larceny conviction are not in line with those of a crime of deceit. The Boerum Penal Code asserts that a person deceives if he or she "intentionally (a) Creates, reinforces, or leverages a false impression, (b) Prevents another from acquiring material information that would impact his or her judgment, or (c) Fails to correct a false impression that

the deceiver previously created, reinforced, or influenced." § 155.45. Ms. Fenty did not employ any of these tactics when stealing a bag from a woman in public. R. at 52. Instead, Ms. Fenty approached a woman chosen at random based on a dare from a former friend and resorted to force and threats when she was noticed. R. at 52–53. The crime did not involve any deception or false statements. While Ms. Fenty did make a threat of violence, this is more similar to "puffery" that was "unlikely to deceive a reasonable person," falling under the exception in Boerum Penal Code § 155.45(3). Instead, Ms. Fenty attempted to be stealthy and resorted to force and threats of violence when she failed. R. at 52–53. Finding that Ms. Fenty's prior conviction of petit larceny was a crime of deceit would result in nearly all crimes being automatically admissible under Federal Rule of Evidence 609(a)(2). *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977).

Since Ms. Fenty's prior larceny conviction did not involve a false statement and was not conducted in a deceitful manner, it may not be used to impeach Ms. Fenty at trial. This Court should follow the majority of circuits in holding that a prior conviction of petit larceny, such as Ms. Fenty's conviction is not admissible under Federal Rule of Evidence 609(a)(2).

2. *Larceny is a crime of stealth, not a crime of deceit as required by FRE 609(a)(2).*

Ms. Fenty's past larceny conviction is better characterized as a crime of stealth, rather than one of deceit. Crimes of stealth have been distinguished from crimes of dishonesty or deceit in most circuits, resulting in crimes such as petit larceny to not be covered by Federal Rule of Evidence 609(a)(2). *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012). The Second Circuit explained that "crimes of stealth, such as burglary, or petit larceny, do not come within" the scope of Federal Rule of Evidence 609(a)(2). *United States v. Hayes*, 553 F.2d 824, 827 (1977) (citations omitted). Since larceny is a crime of stealth, rather than a crime of deceit, it is not one that has bearing on Ms. Fenty's "propensity to testify truthfully" and is therefore not permitted to

be used to damage Ms. Fenty's credibility as a witness. *Id.* (quoting H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9 (1974), *as reprinted in* 1974 U.S.C.C.A.N., 7098, 7103).

The Second Circuit in *United States v. Hayes* correctly reasoned that petit larceny is better defined as a crime of stealth, rather than a crime of deception that falls under FRE 609(a)(2). 553 F.2d 824, 827 (2d Cir. 1977). The court explained that the burden is on the government to "produce specific facts relating to dishonest or false statement" and that if the crime "involved nothing more than stealth, the conviction could not be introduced under the second prong." *Id.* at 827. The Sixth Circuit recently furthered this reasoning, holding that theft, and other similar types of convictions, are "a prime example of a crime of stealth." *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012). The Eighth Circuit has also held that "[t]heft, which involves stealth and demonstrates a lack of respect for the persons or property of others, is not 'characterized by an element of deceit or deliberate interference with a court's ascertainment of truth.'" *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984) (quoting *United States v. Smith*, 551 F.2d 348, 363 (D.C. Cir. 1976)).

Additionally, the government's choice to convict a defendant under a larceny statute containing no reference to deception or false statements, rather than specifically enumerated crimes of deception indicates that this is not the type of crime covered by Federal Rule of Evidence 609(a)(2). *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978). The D.C. Circuit reasoned that because the language of the statute the defendant was tried under for their past conviction did not require the element of deceit, it is more in line with a crime of stealth. *Id.* The court explained that unless the controlling statute specified the use of deception or false statements, "it would seem that petit larceny does not involve the requisite deceit to qualify for admission under Rule 609(a)(2)." *Id.*

In committing the petit larceny, Ms. Fenty tried to steal the victim's bag without being noticed. R. at 52. Ms. Fenty was attempting to be stealthy in committing this crime. *Id.* Ms. Fenty resorted to force and threats of violence when she was caught. R. at 53. There was no indication that Ms. Fenty tried to be deceitful or made a false statement to steal the bag. *Id.* As shown by the facts in her case, Ms. Fenty's prior larceny conviction is a "prime example of a crime of stealth" rather than a crime of deceit. *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012).

In accordance with the facts of her crime, the prosecutor chose to charge Ms. Fenty under § 155.25 of the Boerum Penal Code, which covers petit larceny. The statute does not involve any mention of deception, unlike Boerum's statute detailing theft by deception under § 155.45. While the government claimed that Ms. Fenty was only charged for petit larceny rather than theft by deception in sake of efficiency, this shows that petit larceny is the best characterization of her crime. R. at 24. If Ms. Fenty's conduct had truly involved deceit, the government should have charged her for theft by deception. The government conceded that larceny was the best fit for her crime by charging her under Boerum's petit larceny statute, rather than charging her with theft by deception. *Id.* Since § 155.25 does not specify the use of deception or false statements, Ms. Fenty's prior petit larceny conviction "does not involve the requisite deceit to qualify for admission under Rule 609(a)(2)." *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978). Because the crime of larceny and the facts of Ms. Fenty's conviction involve stealth—and not deception— it should not be considered a crime of deceit for the purposes of Federal Rule of Evidence 609(a)(2).

3. The Fourteenth Circuit's decision to admit evidence of a prior conviction goes against the stated Congressional intent for FRE 609(a)(2) to be applied narrowly.

Public policy supports the narrow construction taken by most circuits and disfavors holding that petit larceny with no factual elements of deceit fall under the exception in Federal Rule of Evidence 609(a)(2), like the Fourteenth Circuit erroneously did below. Due to the inflexible nature

of FRE 609(a)(2), "it was inevitable that Congress would define narrowly the words 'dishonesty or false statement.'" *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). The court stated that its "task in deciding this case, however, is not to fashion the rule [they] deem desirable but to identify the rule that Congress fashioned." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508 (1989). Therefore, Congress's stated intent should be honored by excluding Ms. Fenty's prior larceny conviction from being used as evidence against her.

Congress stated its intention very clearly when drafting this statute. Federal Rule of Evidence 609(a)(2) is only intended to cover crimen falsi convictions. H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9 (1974), *as reprinted in* 1974 U.S.C.C.A.N., 7098, 7103. Crimen falsi crimes only include crimes that "involve some element of deceit, untruthfulness, or falsification bearing upon the accused's propensity to tell the truth." *Id.* Courts have overwhelmingly supported Congress in this stated purpose, defining dishonesty and false statement narrowly. *See United States v. Brackeen*, 969 F.2d 827, 830–31 (9th Cir. 1992) (collecting cases). Courts only admit prior convictions if they suggest that the witness may be untruthful on the stand because the past crime itself was committed using deceit. *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012). The Ninth Circuit reasoned that "Congress intended Federal Rule of Evidence 609(a)(2) to apply only to those crimes that factually or by definition entail some element of misrepresentation or deceit." *Brackeen*, 969 F.2d 827, 831 (9th Cir. 1992). Courts have not allowed FRE 609(a)(2) to include crimes that "do not carry with them a tinge of falsification" regardless of how serious the crimes may be. *Id.*

Ms. Fenty's prior petit larceny conviction did not involve any deception or misrepresentation and should therefore not be admitted under Federal Rule of Evidence 609(a)(2) to effectuate Congress's stated purpose. The crimes envisioned by Congress involve an element of

deception that would indicate that the witness would not be able to testify truthfully. *United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9 (1974), *as reprinted in* 1974 U.S.C.C.A.N., 7098, 7103. Nothing regarding Ms. Fenty's past crime suggests that she would be unable to do so. Larceny is not a crimen falsi crime that involves deception, untruthfulness, or falsification. Therefore, holding that Ms. Fenty's prior conviction may be admitted under Federal Rule of Evidence 609(a)(2) goes against Congress's intent and must be overturned by this Court to follow the rule that Congress fashioned. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508 (1989).

B. Admitting evidence of Ms. Fenty's prior conviction was a harmful error.

The Fourteenth Circuit committed a harmful error that had a substantial and injurious influence on the jury. *United States v. Ginsberg*, 971 F.3d 689, 698 (7th Cir. 2020). While the District Court judge attempted to cure the unfair prejudice through limiting instructions, these instructions were insufficient to prevents such prejudice. R. at 25–26; *Thompson v. United States* 546 A.2d 414, 424–25 (D.C. Cir. 1988). The injurious influence on the jury prevented jurors from considering plausible alternative explanations, unfairly prejudicing Ms. Fenty's case. *United States. v. Foster*, 227 F.3d 1096, 1101 (9th Cir. 2000). This harmful error must be reversed so Ms. Fenty's case and testimony can be fairly considered by an impartial jury.

1. The error had a substantial and injurious effect on the jury's verdict.

The error was harmful because it was unfairly prejudicial to Ms. Fenty's case. To be a harmful error, it must have had a "substantial and injurious effect or influence on the jury's verdict." *United States v. Ginsberg*, 971 F.3d 689, 698 (7th Cir. 2020). Allowing the government to impeach Ms. Fenty was a harmful error that had a substantial and injurious influence on the jury's verdict and must therefore be corrected.

For example, the Ninth Circuit held that the erroneous admission of a prior conviction was a harmful error. *United States v. Foster*, 227 F.3d 1096, 1100–01 (9th Cir. 2000). The court reasoned that "[t]he admission of evidence of a prior conviction may be considered harmless only if the government can show that it is more likely than not that there is a 'fair assurance' that the error did not substantially sway the verdict." *Id.* The defendant had a plausible alternative story to the one that the government put forward, explaining that his actions were innocent. *Id.* at 1101. Due to the nature of the defendant's arguments, his credibility and testimony were "of upmost importance." *Id.* Therefore, the court held that the government did not provide "fair assurance" that the impeaching evidence did not damage the defendant's credibility enough to cause unfair injurious influence on the jury's verdict. *Id.*

As evidenced through Ms. Fenty's testimony, there was an adequate alternative explanation to the commission of the crime Ms. Fenty is accused of. R. at 44–46. Ms. Fenty's explanation that she bought the xylazine based on Ms. Millwood's statements that it is a muscle relaxer that was going to be administered to elderly horses in pain is a plausible alternative theory that the jury was unable to adequately consider. *Id.* Additionally, Ms. Fenty's prior conviction was for a misdemeanor committed at the age of 19, nearly a decade ago. R. at 52–53. This conviction has very limited probative value that is substantially outweighed by the unfair prejudice it produced against Ms. Fenty. Due to the introduction of Ms. Fenty's past conviction, her testimony and alternative explanations were not able to be fully considered by the jury, resulting in a harmful error. *United States v. Foster*, 227 F.3d 1096, 1100–01 (9th Cir. 2000). Therefore, this court must overturn the Fourteenth Circuit's holding that Ms. Fenty's petit larceny conviction may be used to impeach her to cure this error.

2. *The unfair prejudice was not adequately avoided with the limiting instructions given by the District Court.*

The District Court's limiting instructions were not sufficient to cure the harm caused by erroneously introducing evidence of Ms. Fenty's prior conviction. Limiting instructions given to juries regarding how to treat evidence of prior convictions tend to have little to no effect and there is a high "likelihood that juries will draw from other crimes evidence an improper inference of criminal predisposition." *Thompson v. United States*, 546 A.2d 414, 424 (D.C. Cir. 1988). Limiting instructions are not sufficient to overcome the incredible unfair prejudice caused by the introduction of evidence of a past conviction. *Id.*

The court in *Thompson v. United States* explained that limiting instructions in the context of informing jurors how to consider evidence of prior convictions are especially ineffective. 546 A.2d 414, 424–25 (D.C. Cir. 1988). The D.C. Circuit cited empirical evidence suggesting that "when a defendant's criminal record is known and the prosecution's case has contradictions, the defendant's chances of acquittal are 38% compared with 68% otherwise." *Id.* at 425 (citing KALVIN AND ZEISEL, THE AMERICAN JURY, 160 (1966)). Jurors are "almost universally unable or unwilling to understand or follow the court's instruction to consider prior convictions only for impeachment purposes, and almost invariably used a defendant's record to conclude that he was a bad man and hence more probably guilty of the crime for which he was standing trial." *Id.* (citing LEMPERT AND SALTZBURG, A MODERN APPROACH TO EVIDENCE, 220 n. 54 (1982)). Therefore, there is reason to be skeptical about the efficacy of limiting instructions in avoiding unfair prejudice, especially when they are in the context of evidence of prior convictions. *Id.*

The limiting instructions given by the District Court were insufficient to protect Ms. Fenty from the incredible amount of unfair prejudice created by allowing evidence of her past convictions

to be introduced. The instructions given simply tell the jury "that the purpose of the prior conviction evidence is to determine the likelihood that the defendant is testifying truthfully and not for any other purpose." R. at 25. These instructions are unlikely to protect Ms. Fenty from unfair prejudice. As the Fifth Circuit colorfully explained, "if you throw a skunk into the jury box, you can't instruct the jury to not smell it." *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962). In Ms. Fenty's case, the prosecutors were permitted to throw a skunk into the jury box, knowing that their instructions would not be sufficient to overcome the stench produced by the erroneous admission of Ms. Fenty's prior larceny conviction. R. at 25. Therefore, this Court should hold that limiting instructions were not sufficient to overcome the unfair prejudice produced by the improper admittance of Ms. Fenty's prior larceny conviction under Federal Rule of Evidence 609(a)(2).

CONCLUSION

This Court should reverse the Fourteenth Circuit's decision by holding (1) that Ms. Fenty has a reasonable expectation of privacy for sealed mail addressed to an alias under the Fourth Amendment, (2) that recorded voicemail statements offered by Ms. Fenty revealing her state of mind at the time of the declaration must be admitted under FRE Rule 803(3), and (3) that admitting evidence of Ms. Fenty's prior petit larceny conviction for the purpose of impeachment is not proper under Federal Rule of Evidence 609(a)(2).

Respectfully Submitted,
/s/ Team 24P
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