No. 23–695

Supreme Court of the United States

FRANNY FENTY,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

Brief for the Petitioner.

QUESTIONS PRESENTED

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

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

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

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CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS

U.S. CONST. AMEND. IV

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

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A)In the case of a violation of subsection (a) of this section involving—

[…]

(vi)400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable

amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propenamide.

Boerum Penal Code § 155.25 Petit Larceny

(1) A person is guilty of petit larceny when that person knowingly takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of the right to benefit from his or her property,

(b) Exercise control over the property without the owner's consent, or

(c) Appropriate the property as his or her own; and

(2) If the property stolen is valued at less than One Thousand Dollars ($1,000.00).

(3) Petit larceny is a class B misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, but more than 30 days, or by a fine not exceeding Five Thousand Dollars ($5,000.00).

Boerum Penal Code § 155.45 Theft by Deception

(1) A person is guilty of theft of property by deception when that person knowingly and with deceit takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of the right to benefit from his or her property,

(b) Exercise control over the property without the owner's consent, or

(c) Appropriate the property as his or her own.

(2) 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.

(3) Exception: The term "deceive" does not include uttering a falsity on matters with no pecuniary significance or statements of puffery that would be unlikely to deceive a reasonable person.

(4) If the property stolen is valued at less than One Thousand Dollars ($1,000.00), the theft by deception is a class B misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, but more than 30 days, or by a fine not exceeding Five Thousand Dollars ($5,000.00).

Federal Rule of Evidence 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

Federal Rule of Evidence 803(3)

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

[…]

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

CITATION TO THE OPINION BELOW

Franny Fenty, Petitioner-Defendant, appeals the judgement of the United States Court of Appeals for the Fourteenth Circuit, entered on June 15, 2023.

APPLICABLE STANDARDS OF REVIEW

The first certified question presents a mixed question of law and fact. Thus, the appropriate standard of review is a de novo review. *See Ornelas v. United States*, 517 U.S. 690, 696-97 (1996). The Court review's district court rulings for the admissibility of evidence under an abuse of discretion standard of review. *United States v. Carter*, 910 F.2d 1524, 1530 (7th Cir. 1990); *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003). A district court commits an abuse of discretion when it "applies an incorrect legal standard or makes findings of fact that are clearly erroneous." *United States v. Wilk*, 572 F.3d 1229, 1234 (11th Cir. 2009).

STATEMENT OF THE CASE

Factual History

Franny Fenty ("Ms. Fenty" or "Petitioner") is a twenty-five-year-old resident of Joralemon. R. at 8. Ms. Fenty attended Joralemon High School and went on to attend Joralemon College. R. at 43, 42. An aspiring writer, Ms. Fenty began publishing her short stories as early as 2016 through her college's literary magazine. R. at 42. She continued to pursue her career as a novelist after she graduated, publishing five full-length novels by 2021. R. at 42. Ms. Fenty describes her creative work as "very personal." R. at 43. To protect her privacy, Ms. Fenty began using a pen name—Jocelyn Meyer—under which she published her short stories in the *Joralemon College Zine* in 2016-17 and later used to reach out to publishers for her novels. R. at 4-5. In addition to using her pen name for her creative endeavors, Ms. Fenty uses the name to protect her privacy more generally. For example, Ms. Fenty opened a post office box in January 2022 at the Joralemon Post Office under the name of Joceyln Meyer, where she receives packages under both her pen name and her given name. R. at 43.

Despite her efforts to secure a publisher, Ms. Fenty was unsuccessful and, by late 2021, was unemployed. R. at 6. Reaching out to her network via a LinkedIn post on December 28, 2021, Ms. Fenty requested help finding a job and was contacted by a former high school classmate, Angela Millwood ("Ms. Millwood"). R. at 6. Ms. Fenty explained that she had lost touch with Ms. Millwood after graduating high school, but after Ms. Millwood responded to the LinkedIn post, the two young women exchanged phone numbers and established a rapport, commiserating about their respective careers and financial struggles. R. at 44.

Both Ms. Fenty and Ms. Millwood "grew up without much." R. at 45. Ms. Fenty admitted that she had been dared by a friend to steal a woman's bag during a street performance. R. at 19. Ms. Fenty made this teenage mistake when she was nineteen years old because she was egged on by a friend whom she wanted to impress, and the girls were both in a dire financial situation. R.

at 21, 53. However, Ms. Fenty recalled that the woman quickly noticed Ms. Fenty trying to grab the bag, and the woman yelled. R. at 53. Ms. Fenty had not made any plans about how to steal it without notice, so she threatened the woman while both parties forcibly pulled at the bag, then shoved the woman and ran with the bag containing diapers and twenty-seven dollars. *See* R. at 53, 59-60. Ms. Fenty was charged with Petit Larceny, a misdemeanor, under Section 155.25 of the Boerum Penal Code, and she has had no other criminal charges since. R. at 54.

During her conversations with Ms. Millwood, Ms. Fenty learned that Ms. Millwood had recently started a job as a horse handler at Glitzy Gallop Stables. R. at 44. When Ms. Millwood expressed a desire to help older horses who were suffering from chronic pain, Ms. Fenty believed Ms. Millwood's intentions were noble. R. at 44. Ms. Fenty stated that Ms. Millwood told her that Ms. Millwood wanted to administer xylazine, a veterinary muscle relaxer, to the older horses at Glitzy Gallop, but, because of her employment, needed someone else to order the medication. R. at 45. Ms. Fenty explained that she believed Ms. Millwood because she "knew how much it meant to [Ms. Millwood] to make money and be financially secure. So if she was foregoing that, it must have been an important cause to her." R. at 45. However, Ms. Fenty's common sense did not completely abandon her: she began to research xylazine "just to know what [she] was ordering and what would be administered to the horses." R. at 46. Ms. Fenty read an article from the *Joralemon Times* published online on February 8, 2022, discussing the rise of xylazine and fentanyl being used as a recreational drug. R. at 46. After reading the article, Ms. Fenty "immediately" contacted Ms. Millwood and expressed her concerns. R. at 46. According to Ms. Fenty, Ms. Millwood "assured" her that Ms. Millwood planned to only administer the medication to the older horses at Glitzy Gallop. R. at 46. Thoroughly convinced that Ms. Millwood only wanted to help the suffering animals, Ms. Fenty agreed to place an order for xylazine. R. at 45-46.

Ms. Fenty received a delivery confirmation from the shipper, Holistic Horse Care, and arrived at the Joralemon Post Office on February 14, 2022, to collect her packages. R. at 40. However, when she arrived, she found that her packages were missing. R. at 40. Concerned and confused, Ms. Fenty called Ms. Millwood and left her a voicemail:

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

Ms. Fenty spoke to the post office clerk, who was unable to tell her what had become of her packages. R. at 40. Confused, Ms. Fenty called Ms. Millwood again and left another voicemail:

> "It's me again. I talked to the postal workers. They don't know what is going on with the packages. They said I should come back tomorrow. Angela, I'm really getting nervous. Why aren't you getting back to me? I thought the xylazine was just to help horses that are suffering. Why would they want to look at that? Is there something you aren't telling me? I'm really starting to get concerned that you involved me in something I had no idea was going on. Call me back."
> R. at 40.

Unbeknownst to Ms. Fenty, her packages had been flagged as suspicious by the Post Office and seized, searched, and detained by the Drug Enforcement Agency (DEA) Special Agent Robert Raghavan ("Agent Raghavan"). R. at 30. Agent Raghavan described Joralemon as a "low-income, high-crime" area, and admitted that the DEA and local police "target" Joralemon. R. at 28, 35-36. After a Joralemon resident had been found dead, purportedly from a combination of fentanyl and xylazine, the DEA directed the local post office to flag any packages sent from horse or veterinary care companies. R. at 30. The Joralemon resident who overdosed on February 12, 2022, had been found with an opened package from Holistic Horse Care, and, though this was the only overdose in Joralemon with a link to xylazine ordered from a horse care company, Agent Raghavan directed the post office manager, Oliver Araiza ("Mr. Araiza"), to alert him if any packages arrived from horse care companies. R. at 29. Thus, on February 14, 2022, Mr. Araiza flagged Ms. Fenty's two

packages from Holistic Horse Care and alerted Agent Raghavan. R. at 30. The packages were addressed to Jocelyn Meyer, though two Amazon packages in the P.O. Box were addressed to Ms. Fenty, which Mr. Araiza had also detained. R. at 31.

With no more information than the recent overdose and the sender of the packages, Agent Raghavan applied for and obtained a search warrant for the two Holistic Horse Care packages. R. at 31. In a break from typical protocol—where U.S. Postal Inspectors open packages suspected of containing narcotics—Agent Raghavan and his partner, DEA Agent Harper Jim, opened the packages themselves. R. at 37. After opening the packages, the agents discovered that the packages each contained one bottle, labeled "Xylazine: For The Horses." R. at 31. The agents then tested the contents of each bottle, which revealed that each bottle contained 400 grams of xylazine and 200 grams of fentanyl, and returned the packages to the post office. R. at 32. When Ms. Fenty approached the counter on February 15, 2022, she handed the slip to Mr. Araiza. R. at 33. On her way out of the post office with her packages, Ms. Fenty briefly spoke to a college friend, Sebastian Godsoe ("Mr. Godsoe"), who had entered the post office. R. at 33. Agent Raghavan heard Mr. Godsoe address Ms. Fenty as "Franny." R. at 33. Only after questioning Mr. Godsoe did Agent Raghavan conduct any investigation into either the identity of Ms. Fenty or Joceyln Meyer. R. at 34. In addition to Mr. Godsoe's explanation, Agent Raghavan was able to find references to Ms. Fenty's use of Jocelyn Meyer as a pen name online through Joralemon College. R. at 33. Agent Raghavan then took this information to Assistant U.S. Attorney Janice Herman, presented the information to a grand jury which returned an indictment, and arrested Ms. Fenty that same day. R. at 34.

Procedural History

Ms. Fenty was arrested on February 15, 2022, with Possession with Intent to Distribute 400 Grams or More of Fentanyl under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi)). On August 25, 2022,

the trial judge heard arguments on Ms. Fenty's motion to suppress the contents of the two Holistic Horse Care packages. R. at 10-11. The court denied Ms. Fenty's motion. R. at 17. The trial judge also heard arguments on Ms. Fenty's motion in limine to exclude evidence of Ms. Fenty's prior conviction of petit larceny, which the trial judge also denied. R. at 18, 26. At trial on September 14, 2022, Ms. Fenty moved to admit the transcripts of her two February 14, 2022, voicemails into evidence as hearsay exceptions under Federal Rule of Evidence 803(3). R. at 47. The trial court sustained the government's objection, and the transcripts were not entered into evidence. R. at 52. Before the jury began deliberations, the trial judge issued a limiting instruction to the jury regarding Ms. Fenty's prior conviction. R. at 63.

The jury returned a verdict of guilty on September 21, 2022, and Ms. Fenty was sentenced on November 10, 2022. R. at 65. Ms. Fenty appealed to the United States Court of Appeals for the Fourteenth Circuit, challenging the denial of her motion to suppress, the admission of her prior conviction, and the exclusion of her two voicemails. R. at 65. On June 15, 2023, the Fourteenth Circuit upheld the trial court's decision on all three points. R. at 64-65. Ms. Fenty petitioned the United States Supreme Court for writ of certiorari, which the Supreme Court granted on December 14, 2023. R. at 74.

SUMMARY OF THE ARGUMENT

Ms. Fenty had standing to challenge the insurance of the warrant because she had a reasonable expectation of privacy in her sealed mail addressed to her fictitious name under the Fourth Amendment. The Fourth Amendment protects a citizen's right to privacy, including in mailed materials. Ms. Fenty's use of a fictitious name does not eviscerate her reasonable expectation of privacy and the use of a fictitious name was sufficient to establish public use.

Next, the District Court erred in finding that Ms. Fenty's voicemail statements were inadmissible hearsay because the statements fall squarely under Rule 803(3)'s textual requirements

and should have been included to show her then-existing mental condition. Further, excluding these voicemails created extreme prejudice against Ms. Fenty that a limiting instruction to the jury would have solved, and the exclusion of the evidence was an irreversible error against Ms. Fenty that requires a new trial.

Finally, the District Court erred in admitting Ms. Fenty's prior misdemeanor conviction for petit larceny to impeach under Rule 609(a)(2) because Rule 609(a)(2) is narrowly construed to include only crimes that speak to an individual's propensity to testify truthfully. Ms. Fenty's conviction does not speak to her propensity to lie because the statute she was charged with does not involve an element of deception for conviction, Ms. Fenty's acts do not support a propensity to lie, and prosecutors at the time could have charged Ms. Fenty with theft by deception if they felt Ms. Fenty's actions involved deception, and they decided not to do so. Further, including Ms. Fenty's prior conviction to impeach her testimony constituted harmful error and limiting instructions were not enough to guard against prejudice.

ARGUMENT

I. Ms. Fenty's Expectation of Privacy in Sealed Mail Addressed to Her Fictitious Name Was Reasonable Under the Fourth Amendment, and, Thus, She Has Standing to Challenge the Issuance of the Warrant.

A. The Fourth Amendment protects a citizen's right to privacy, including in mailed materials.

The Fourth Amendment protects citizens from "unreasonable searches and seizures" and establishes the right for all citizens to be "secure in their persons, houses, papers, and effects." U.S. Const. Amend. IV. Originally rooted in property law concepts, the Supreme Court's Fourth Amendment jurisprudence has evolved into the idea that the Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Building on *Katz*, the Supreme Court has now recognized that, in order to challenge a search under the Fourth Amendment, citizens must show that they have a reasonable expectation of privacy in the area to be searched. *See Rakas v. Illinois*, 439 U.S. 128, 138-39 (1978). The citizen challenging the search must both have a subjective expectation of privacy, and the expectation of privacy must be objectively reasonable—in other words, something that society as a whole is prepared to recognize as reasonable. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Privacy in the mail has long been recognized as an interest protected by the Fourth Amendment. In 1877, the Supreme Court stated that:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household." *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

Though law enforcement concerns about drugs sent through the postal service are real and serious, the expectation of privacy in packages and letters one sends is equally real and serious.

B. Ms. Fenty's use of a fictitious name does not eviscerate her reasonable expectation of privacy.

A citizen's reasonable expectation of privacy in the packages or letters they send or receive using the mail should not be diminished by their use of a fictitious name. The Seventh Circuit stated that "[t]here is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package." *United States v. Pitts*, 322 F.3d 449, 458 (7th Cir. 2003). In *Pitts*, the Seventh Circuit affirmed the district court's denial of the defendants' motion to suppress evidence used to convict them of conspiracy to possess with intent to distribute heroin and crack cocaine. *Id*. at 451. Pitts had sent a package containing the drugs to Alexander, using fictitious names for both the defendants, as well as a false return address. *Id*. Postal inspectors intercepted the parcel and, after a slight delay, contacted Alexander who refused delivery of the package. *Id.* at 452-53. The postal inspector then applied for a warrant, and, once the warrant was granted, opened the package and discovered the drugs. *Id.* at 453. In denying the defendants' motion to suppress the drugs, the district court in part relied on the fact that both defendants had used fictitious names and a return address belonging to another person, holding that the defendants "did not have a reasonable expectation of privacy in the contents of the package because they concealed their identities by using aliases for the mailing." *Id.* The Seventh Circuit affirmed denial of the defendants' motion to suppress the drugs, but on the grounds that the defendants had abandoned the package by refusing to accept delivery and that they had failed to show a defect in the warrant obtained by the postal inspector. *Id.* at 454.

The Seventh Circuit in *Pitts* addressed the issue of fictitious names, refusing to adopt a rule that would limit Fourth Amendment rights of a sender who uses a fictitious name. *Id.* at 458. On the one hand, if use of a fictitious name for criminal purposes justified the suspension of Fourth Amendment protection for anyone using a fictitious name, even for a legitimate purpose, it would

effectively assume that criminals could "forfeit the privacy interests of all persons by using a confidential domain for nefarious ends." *Id.* Otherwise, creating a rule that only criminals forfeit their Fourth Amendment rights when using a fictitious name would create after-the-fact justification for searches, even those not founded properly upon probable cause. *Id.* As the Seventh Circuit noted, "[b]oth constructions turn the Fourth Amendment on its head." *Id.*

The Fifth Circuit has also addressed the question of whether a defendant surrenders a reasonable expectation of privacy in packages sent with a fictitious name in *United States v. Villarreal*, 963 F.2d 770, 773 (5th Cir. 1992). There, defendants challenged a warrantless search of a 55-gallon drum that contained marijuana. *Id.* The district court granted the defendants' motion to suppress the drugs, and the Fifth Circuit affirmed. *Id.* The Fifth Circuit noted the longstanding principle that citizens do not lose their privacy interest in a container simply by placing the container in the mail. *Id.* at 77-74. The court went on to state that the fictitious name used by the defendants was an alter-ego, and that the defendants had a reasonable expectation of privacy in mail addressed to that alter ego. *Id.* at 774.

In contrast, the Eighth Circuit stated in a footnote that "[a] mailbox bearing a false name with a false address and used only to receive fraudulently obtained mailings does not merit an expectation of privacy that society is prepared to recognize as reasonable." *United States v. Lewis*, 738 F.2d 916, 919 n.2 (8th Cir. 1984). There, the defendant had engaged in a far-reaching credit card fraud scheme using a false name and address. *Id.* at 918. The court found that Lewis had no expectation of privacy because his use of the fictitious name was purely to further his criminal activities. *Id.* at 919-20.

Though Ms. Fenty used a fictitious name in opening her post office box and in receiving the packages from Holistic Horse Care, she still retains a reasonable expectation of privacy. First,

unlike the defendants in *Pitts*, she accepted delivery of the packages under the name Joceyln Meyer. This shows an ownership interest and a continued expectation of privacy in the package that was lacking in *Pitts*. Moreover, in opening her P.O. Box, though she used a fictitious name, she still had to fill out an application—presumably with other identifying information and payment. She also received packages under her given name at the P.O. Box. Whereas the defendant in *Pitts* used a false name and an address belonging to another person, Ms. Fenty was the only person with access to the P.O. Box.

Unlike the defendant in *Lewis*, Ms. Fenty also used her fictitious name for innocent purposes. Assuming momentarily that Ms. Fenty intended to order xylazine laced with fentanyl under the name Jocelyn Meyer (which she denies), Ms. Fenty's use of the fictitious name was not only—or even primarily—to obtain drugs through the mail. She used the fictitious name to publish short stories and solicit publishers for her novels. Also, unlike the defendant in *Lewis*, Ms. Fenty's use of her P.O. Box was not solely for illegal purposes. She received Amazon packages under her given name at the P.O. Box, independent of the alleged mail-order drug scheme. The defendant in *Lewis*, on the other hand, used his fictitious names and false address only to perpetuate his credit card fraud scheme. Ms. Fenty thus clearly had an expectation that she would have privacy in the mail she received.

C. Ms. Fenty's use of a fictitious name was Ssufficient to establish public use.

Some courts have established a distinction between a fictitious name or an alter-ego and a name which belongs to someone else. Whereas a mail sent using a fictitious name retains Fourth Amendment protections, a citizen loses their reasonable expectation of privacy in mail sent using another's name. For example, in *United States v. Pierce*, the Fifth Circuit found that a defendant lacked standing under the Fourth Amendment to challenge the search of a package sent by and addressed to other individuals. 959 F.2d 1297, 1303 (5th Cir. 1992). The Court stated that "a

defendant who is neither the sender nor the addressee of a package has no privacy interest in it, and, accordingly, no standing to assert Fourth Amendment objections to its search." *Id*. Since the package was mailed by the defendant's sister-in-law and addressed to a co-conspirator, and that the defendant had tried to "disassociate himself" from the package at trial, the Fifth Circuit found that the defendant had no reasonable expectation of privacy in the package and, thus, lacked standing to challenge the search. *Id.*

In contrast, the *Villarreal* court found that defendants had a reasonable expectation of privacy in packages addressed to fictitious names. *See United States v. Villarreal*, 963 F.2d 770, 773 (5th Cir. 1992). In *Villarreal*, the Fifth Circuit noted that, even though it was not clear which of the two defendants the alter-ego was meant to refer to, both defendants had a reasonable expectation of privacy in the marijuana containing drums. *Id.* at 774-75. According to the Fifth Circuit, "Villarreal was in possession of the receipt for the drums that bore the name Roland Martin. [A third party] apparently indicated, however, that [the second defendant] had been identified to him as Roland Martin." *Id.* at 774. This was enough for the court to find that both defendants had sufficiently established the fictitious name to reasonably expect privacy in packages and containers addressed to that name.

Here, Ms. Fenty has publicly established her use of Joceyln Meyer as a fictitious name sufficient to invoke her Fourth Amendment rights. Joceyln Meyer is not a real person. Unlike the defendant in *Pierce*, who attempted to assert Fourth Amendment standing based on a package sent by his sister-in-law and addressed to a co-conspirator, Ms. Fenty has not attempted to assert Fourth Amendment standing regarding someone else's mail. Nor has she committed any sort of identity theft or mail fraud like the defendant in *Lewis*. Instead, Ms. Fenty's use of her Jocelyn Meyer identity is more akin to the defendants' use of an alias in *Villarreal*. There, one of the defendants

possessed a receipt for the drums that bore the fictitious name, and a third party had been introduced to the other defendant under that same fictitious name. In fact, Ms. Fenty's use of Joceyln Meyer goes further than the defendants in *Villarreal*. She established her use of Joceyln Meyer publicly long before this case in 2016 when she began publishing short stories as Jocelyn Meyer in the *Joralemon College Zine*. Furthermore, she reached out to publishers using the name and was known to use the name for her creative work by friends, such as Mr. Godsoe. Where the defendants in *Villarreal* arguably only used their alias for the distribution of marijuana, Ms. Fenty has long established her fictitious name in connection with her creative work and her desire to retain privacy in her personal life. Thus, Franny Fenty and Joceyln Meyer are essentially the same for purposes of Fourth Amendment standing, and Ms. Fenty has a legitimate and reasonable expectation of privacy in mail addressed to Joceylen Meyer.

For the foregoing reasons, Ms. Fenty respectfully requests this Court to reverse the District Court's determination that Ms. Fenty did not have a privacy interest in the Holistic Horse Care packages and that she lacked Fourth Amendment standing to challenge the warrant.

II. The District Court Erred in Finding that Ms. Fenty's Voicemail Statements Were Inadmissible Hearsay Because the Statements Fall Squarely Under Textual Requirements for Rule 803(3)'S Hearsay Exception, the Voicemails Were Spontaneous, and the District Court's Error In Excluding The Voicemails Was Not Harmless Error.

Hearsay is an out-of-court statement that is offered for the truth of the matter asserted. Fed. R. Evid. 801(c). Though hearsay is generally not admissible, hearsay is admissible as a hearsay exception if it shows a then-existing mental, emotional, or physical condition. 803(3). Under Rule 803(3), a statement of the declarant's then-existing state of mind or emotional condition is admissible if it is not a statement of memory or belief to prove the fact remembered. The purpose of Rule 803(3) is that some statements have "circumstantial guarantees of trustworthiness" when they are made substantially contemporaneously with the event because it "negate[s] the likelihood

of deliberate or conscious misrepresentation" and so such statements are reliable. Fed. R. Evid. 803(3) Advisory Comm. Notes; *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005).

A. The court erred in excluding Ms. Fenty's voicemails because Ms. Fenty's voicemails fall squarely under Rule 803(3)'s textual requirements and should have been included to show her then-existing mental condition.

To be admissible under Rule 803(3) as a then-existing mental, emotional, or physical condition, (1) the statement must be "contemporaneous with the mental state sought to be proven," (2) the statement must show that the declarant did not have time to reflect in order to fabricate or misrepresent her thoughts, and (3) the declarant's state of mind must be relevant to an issue in the case. *United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir. 1990); *Carter,* 910 F.2d at 1530 (citing *United States v. Jackson,* 780 F.2d 1305, 1315 (7th Cir. 1986). The statement must also not be a statement of memory or belief to prove the fact remembered. 803(3) .

i. Both voicemails were contemporaneous with the mental state sought to be proven because the language shows that the statements were part of Ms. Fenty's continuous mental process.

For a statement to be admissible under Rule 803(3), the statement must be contemporaneous to the incident in question. *Jackson*, 780 F.2d at 1315. To be contemporaneous to the incident in question, the statement does not need to be said at the exact moment of the incident but rather it must be "part of a continuous mental process." *United States v. Cardascia*, 951 F.2d 474, 488 (2d Cir. 1991); *Mutual Life Ins. of N.Y. v. Hillmon*, 145 U.S. 285, 295 (1892).

Here, Ms. Fenty's voicemails demonstrate that they are part of her continuous mental process upon finding out her packages were intercepted by the post office. Ms. Fenty left her first voicemail immediately after opening her post office box and discovering her Holistic Horse Care packages were not in the box when she was expecting them to be there. R. at 40. She left this first voicemail exactly at the moment she discovered the packages were missing, as seen in the language

she used to describe where she was and what she was feeling. *See* R. at 40. She expressed that she "just" got to the post office and none of the packages "are here." R. at 40. Based on her present tense language describing how none of the packages "are here," it shows that she was at the post office at the time she left the voicemail because she describes the packages as not being "here," as in at the post office where she was leaving the voicemail from. It also shows that she had very recently discovered that the packages were not there because she uses the word "just" to describe when she arrived at the post office and made the discovery. R. at 40. A person does not describe that they "just" got anywhere unless it was immediately preceding the statement.

Ms. Fenty's second voicemail demonstrates the same contemporaneous nature of her statements. After discovering that the Holistic Horse Care packages were intercepted by the post office, she brought the package slip she found in her post office box to the counter and talked to postal workers. R. at 66. She discovered that the packages had in fact been intercepted, and, once she was done talking to postal workers, she immediately left a second voicemail for Ms. Millwood. R. at 40, 66. The language in the second voicemail demonstrates that the statements were made contemporaneously with the incident in question because Ms. Fenty affirmed that her packages were intercepted by the postal workers and that the packages had been potentially inspected or opened by postal workers. R. at 66. Ms. Fenty made statements such as she was "getting really nervous," and she was "really starting" to get concerned. R. at 40. Ms. Fenty's use of present continuous form of verbs shows that her statements are part of a continuing mental process that began when she first opened her post office box to discover her packages were missing and continued in the same stream of activity as she got new information from the postal workers that they did intercept the packages. A person uses present continuous verbs when they are describing an action that is currently occurring as they are making the statement. *Present*

Continuous, EF Education First, https://www.ef.edu/english-resources/english-grammar/present-continuous/ (last visited Jan. 30, 2024). By Ms. Fenty using present continuous verbs, it shows that she was leaving the voicemails as she was currently experiencing what was happening at the post office and her anxiety around what she was experiencing. Thus, Ms. Fenty's use of verb form indicates that the statements were contemporaneous with the mental state that the defense seeks to prove, namely Ms. Fenty's state of mind when she first discovered that her packages were missing and that she had no idea she was part of a scheme involving illicit drugs.

ii. Both voicemails demonstrate that Ms. Fenty did not have time to fabricate or misrepresent her thoughts because both voicemails were left at the post office as events were transpiring.

For a statement to be included under Rule 803(3), there must have been no opportunity for the declarant to "fabricate" or "misrepresent" their thoughts. *Jackson*, 780 F.2d at 1315 (reasoning that a person's state of mind has "probative value mainly because the declarant has no chance to reflect upon and perhaps misrepresent his situation.").

Here, Ms. Fenty's statements in both voicemails show that she did not have time to fabricate or misrepresent her thoughts. She left the voicemails while she was at the post office, leaving her first voicemail immediately after discovering her packages were intercepted by postal workers and the second voicemail immediately after she went to the post office counter, talked to postal workers, and confirmed that her packages were intercepted by postal workers. *See* R. at 40. She did not wait until she got home and did not wait until hours, which would have given her time to reflect on what happened at the post office; she called from the post office as the events were transpiring. The timing of her voicemails, while still at the post office, shows that she did not have time to misrepresent her situation because she was in the thick of the action and was trying to figure out what was happening from the one person who might know, Ms. Millwood.

iii. Ms. Fenty's state of mind is relevant to an issue in the case because the government is required to prove her mens rea as part of their case.

An out-of-court statement that shows a witness's state of mind at the time the statement was made falls within Rule 803(3) as long as the witness's mental condition is a relevant issue to the case. *United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972).

Ms. Fenty has been charged under 21 U.S.C. §§ 841(a)(1) with one count of possession with intent to distribute 400 grams or more of fentanyl. Under this charge, the government must prove that she knowingly and intentionally possessed fentanyl with the intent to distribute. 21 U.S.C. §§ 841(a)(1). Because the government is required to prove Ms. Fenty's state of mind, specifically that she knowingly and intentionally possessed fentanyl, Ms. Fenty's state of mind is relevant to an issue in this case, and, therefore, the third factor required under Rule 803(3) is satisfied.

iv. Ms. Fenty's statements were not statements of memory or belief to prove the fact remembered but were statements to show Ms. Fenty's state of mind at the time.

For a statement to be admissible under Rule 803(3), the statement "should not look backward or describe a declarant's past memory or belief about another's conduct." *United States v. Lentz*, 282 F. Supp. 2d 399, 410-411 (E.D. Va. 2002). Instead, the statement is limited to showing the declarant's state of mind. *See United States v. Joe,* 8 F.3d 1488, 1492 (10th Cir. 1993). Ms. Fenty's voicemails were made at the post office after she first discovered her packages were held by the post office and while events were transpiring at the post office; the statements were not made in reference to past events or describing past events. Additionally, Ms. Fenty's voicemails were not intended to prove a fact remembered but were limited to showing Ms. Fenty's state of mind at the time she left the voicemails. She did not understand what was happening when she was at the post office or why her packages were intercepted. *See* R. at 40. Her Amazon packages had been delivered as normal in her P.O. Box, and she was nervous that something was happening

with the other packages. *See* R. at 32. She testified that she had recently read an article about animal sedatives being mixed with fentanyl in the Joralemon community, and, once she discovered her packages were missing, it was likely that she first connected the dots that something might be off with what she was doing for Ms. Millwood. R. at 46. It was in this state of mind that she left the two voicemails for Ms. Millwood, first upon discovering the packages were missing from the rest of her mail and, second, immediately after talking to postal workers who asked her if the packages were hers and then told her to come back the next day. R. at 40, 68. Having these packages withheld by postal workers but not her Amazon packages likely immediately set off warning signals that something was astray. These voicemails were not statements looking backwards but were left showing Ms. Fenty's present state of mind.

Therefore, both voicemails fall squarely under Rule 803(3) and should have been included because both voicemails were contemporaneous, both voicemails show that Ms. Fenty did not have time to fabricate or misrepresent her thoughts, Ms. Fenty's state of mind is relevant to the case, and both voicemails did not include statements of memory or belief.

B. Spontaneity is not a requirement under Rule 803(3), but even if this court finds that spontaneity is required for statements to be admissible under the Rule 803(3), both voicemails were spontaneous and not self-serving.

Spontaneity is not required by the Rules even if other similar hearsay exceptions require spontaneity. Rule 803(3) is a "specialized application" of the present sense impression hearsay exception under Rule 803(1) with the underlying theory that there is a low likelihood of "deliberate" and "conscious misrepresentation" when there is contemporaneity of the statement. Fed. R. Evid. Advisory Comm. Notes on the Rules; *Cardascia*, 951 F.2d at 487. Even though Rule 803(3) has some similarities and overlap with two other hearsay exceptions, present sense impression under Rule 803(1) and excited utterance under Rule 803(2), Rule 803(3) was presented as its own exception to "enhance its usefulness and accessibility." Fed. R. Evid. 803(3)

Advisory Comm. Notes. Ultimately, the purpose of requiring contemporaneity of the event and the statement is that these contemporaneous statements are reliable because of "their spontaneity" and the "resulting probable sincerity." Fed. R. Evid. 803(1) Advisory Comm. Notes; *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007). When the statement is reasonably close in time proximity to the event, then the statement is reasonably likely to mirror the state of mind when the event happened. *Rivera-Hernandez*, 497 F.3d at 81.

i. Even if a statement's spontaneity is required under Rule 803(3), there is no definite time frame for spontaneity and Ms. Fenty's statements were left well within the time frame that courts interpret as spontaneous.

The Fourteenth Circuit postulated that if a statement allows time for a declarant to reflect, then the statements lack spontaneity. While, generally, the more time that elapses between the statement and the event, the less reliable the statement is, there is no definite time frame that preserves or eliminates spontaneity as dictated by precedent. *See United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980); *see United States v. Dierks*, 978 F.3d 585, 593 (8th Cir. 2020).

In this case, Ms. Fenty made both voicemails within moments after the event in question. For her first voicemail, Ms. Fenty left the voicemail moments after she opened her post office box and discovered her packages were intercepted. Ms. Fenty's statements qualify under Rule 803(3) because, as the record indicates, mere seconds passed between the event and the statements.

For Ms. Fenty's second voicemail, Ms. Fenty also left the voicemail moments after the new event in question. After she found out her packages got intercepted, Ms. Fenty approached the post office counter and inquired about her packages. R. at 32. Now, the postal workers provided new information that increased Ms. Fenty's anxiety that something was wrong: they first asked her to confirm that the packages belonged to her and then they asked Ms. Fenty to come back to the post office the next day. R. at 66, 68. Both questions are abnormal when someone brings a slip to claim their package at a post office, but the postal workers asking her to come back the next

day created a new situation for purposes of Rule 803(3) because it altered the situation from the post office holding her packages to the post office flagging her as suspicious to come back the next day. Based on both voicemails having been left moments after the events triggering them, both voicemails should meet any requirements this Court may want to impose under Rule 803(3).

Further, even if the second voicemail is judged as having been in response to Ms. Fenty first arriving at the post office, her second voicemail should be included under Rule 803(3) because forty-five minutes is still well within the spontaneity time frame. Precedent cases illuminate that hours, days, weeks, or years after the event are too long of a time frame between the event in question and the statement to allow for inclusion based on spontaneity. *Dierks*, 978 F.3d at 593 (reasoning that the defendant had time to reflect with an eighteen hour difference between the event and the sent tweets); *Naiden*, 424 F.3d at 722 (reasoning that the defendant had "ample opportunity to reflect" where the event happened the day before he made the statement); *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (reasoning that two weeks between the event and the statement was large enough that the statements had little or no probative value to the then-existing mental state); *United States v. Harvey*, 959 F.2d 1371, 1375-76 (7th Cir. 1992) (reasoning that two years between the event and the statement was "ample time" to fabricate a reason).

Based on the lack of a definite time frame required to show spontaneity, less than an hour between the event and the statement qualifies as spontaneous based on precedent. In *United States v. Newell*, the court admitted written notes under Rule 803(3) even though the author could not remember the exact time frame between when the event transpired and when she wrote the notes. 315 F.3d 510, 523 (5th Cir. 2002). The author testified that she wrote the notes when the events were "still fresh in her mind." *Id.* Here, it was clear that the event was still fresh on Ms. Fenty's mind. She was still at the post office, still finding out new information about her packages

and why they were intercepted, and she still did not know what was going on because Ms. Millwood was not picking up her phone.

ii. Ms. Fenty's statements were not fabricated and self-serving, but even if they were, that is an issue for a jury to decide.

The district court improperly concluded that Ms. Fenty's statements were self-serving, and this conclusion led the court in ruling that Ms. Fenty's voicemails lacked spontaneity. R. at 51-52. Under 803(3), the court must determine whether state of mind is a relevant issue, but it is improper for the court to determine what Ms. Fenty's state of mind actually is; that job is for the jury to determine. *Prather v. Prather*, 650 F.2d 88, 90 (5th Cir. 1981). Because credibility is a matter for the jury, whether a statement is self-serving or not is not a basis for excluding the statement. *Cardascia*, 951 F.2d at 487; *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972) (excluding statements just because they are self-serving detracts from relevant information that the jury should have access to). Though courts could exclude self-serving statements when they are so self-serving to raise suspicion that they are fabricated, that is not the case here. *United States v. Mandel*, 437 F. Supp. 262 (D. Md. 1977). Ms. Fenty left her two voicemails while at the post office after finding out her packages were intercepted. *See* R. at 40. She did not make comments to Ms. Millwood that were, on their face, so self-serving as to raise suspicions. Instead, her comments seemed to indicate that she was scared and confused about what was happening. Based on the timing when she made the statements after arriving at the post office, there is nothing on the face of the voicemails to suggest they were so self-serving that the court should exclude the evidence from the jury to make a final determination. Therefore, though spontaneity is not required under Rule 803(3), this Court should find that both voicemails were spontaneous and not self-serving.

C. Excluding these voicemails created extreme prejudice against Ms. Fenty that a limiting instruction to the jury would have solved, and the exclusion of the evidence was an irreversible error against Ms. Fenty that requires a new trial.

Under the abuse of discretion standard for an evidentiary ruling, Ms. Fenty has to establish that the court's ruling was not harmless. Fed. R. Crim. P. 52(a). For an error to be harmless, it must not have had any substantial influence on the outcome of the case. *United States v. Barton*, 909 F.3d 1323, 1331 (11th Cir. 2018). Additionally, if there is sufficient evidence that supports the verdict, then it is a means to show that the outcome was uninfected by error." *Id.*

Here, the court's ruling was harmful to Ms. Fenty and substantially influenced the outcome of the case because Ms. Fenty's state of mind is an element that the government had to prove as part of its case-in-chief, and Ms. Fenty was unable to include important evidence that illuminated her state of mind at the moment she found out there might be more to the horse tranquilizers than Ms. Millwood led her to believe. Additionally, the court's ruling was harmful because there is not sufficient evidence for Ms. Fenty to present a defense where Ms. Millwood left the country, and the government has been unable to find Ms. Millwood. Ms. Fenty's case involves herself and Ms. Millwood with no other individuals involved or who could corroborate Ms. Fenty's testimony of her then-existing mental state. What Ms. Fenty knew and intended at the time she started interacting with Ms. Millwood to order medication for Ms. Millwood's horses is critically important to this case, and it critically important for Ms. Fenty to be able to present a defense by using evidence that could speak to her mental state at the time. Because Ms. Fenty's mental state is so important to the case, the district court's error in excluding the voicemails played a huge role and was likely to affect the outcome where there was little evidence of Ms. Fenty's mental state other than her own testimony. Therefore, there was not sufficient evidence to support the verdict, and it was certain that the jury's decision was impacted.

An error is not harmless when it creates a significant risk of convicting an innocent person. *United States v. Green*, 786 F.2d 247, 252 (7th Cir. 1986). Here, the inclusion of Ms. Fenty's voicemails would have established that she thought she engaged in a legitimate plan to help Ms. Millwood's horses and that she had no idea she was involved in an illicit drug scheme. Without the evidence, the district court created extreme prejudice against Ms. Fenty and was likely a significant reason why Ms. Fenty was convicted where she did not have other means to show she inadvertently ended up getting involved in Ms. Millwood's scheme.

Therefore, this Court should reverse the District Court's decision and remand Ms. Fenty's case for a new trial because Ms. Fenty's voicemails meet all Rule 803(3)'s textual requirements, the voicemails were spontaneous, and the error was not harmless error.

III. The District Court Erred in Admitting Ms. Fenty's Prior Misdemeanor Conviction for Petit Larceny to Impeach Ms. Fenty's Credibility Under Rule 609(a)(2) Because Rule 609(a)(2) Is a Narrowly Construed to Include Only Crimes That Speak to an Individual's Propensity to Testify Truthfully, Ms. Fenty's Actions and Conviction Do Not Speak to Propensity to Lie, and Including Ms. Fenty's Prior Conviction Constituted Harmful Error.

Evidence of a person's character is not admissible to prove that the person acted in accordance with that character on a particular occasion. Fed. R. Evid. 404. There are exceptions to this overarching rule, including Rule 609 that allows impeachment by evidence of a criminal conviction under limited circumstances. Under Rule 609(a)(2), the prosecution can attack a witness's character for truthfulness by evidence of any criminal conviction regardless of punishment only "if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement."

A. Rule 609(a)(2) is a rule that is narrowly construed to include only crimes that speak to an individual's propensity to testify truthfully as seen by the Rule language, the Rule's legislative history, and circuit courts' interpretation of the Rule to not include theft under the Rule's meaning.

i. Rule 609(a)(2) language shows that the Rule is meant to only include crimes that require the government to prove a dishonest act or a false statement and was not meant to allow any crime to be introduced.

Under Rule 609(a)(2), evidence of a prior conviction must be included no matter the punishment if the past conviction has an element of a dishonest act or false statement that the government had to prove to convict the individual. This means that if the government, as part of its case, had the burden of proving an element that involved either a dishonest act or a false statement based on the language of the charging statute, then those convictions can always be used to impeach a defendant if the government decides to use the conviction against the defendant. Fed. R. Evid. 609 Advisory Comm. Notes. The purpose of Rule 609(a)(2) is not to allow any and all crimes to impeach a witness but only to allow crimes that directly speak to an individual's propensity to testify truthfully. *Id.* Every crime could be seen as having an element of deception because it can be argued that any willful violation of the law shows a disregard for legal duties. *United States v. Smith*, 551 F.2d 348, 363 (D.C. Cir. 1976). However, if Congress intended to allow all prior convictions to impeach a defendant, they could have drafted the Rule language to be all encompassing, but they chose to limit prior convictions to circumstances where "the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement." 609(a)(2). Thus, the Rule language shows that the Rule was meant to include a narrow range of crimes and not all crimes.

ii. Rule 609(a)(2)'s legislative history shows that the Rule is narrowly construed to include only crimes that speak to an individual's propensity to testify truthfully, and it is not meant to include all crimes.

Rule 609(a)(2)'s legislative history shows that Rule 609(a)(2) was not meant to automatically allow any conviction to be used as character evidence against a witness. Fed. R. Evid. 609 Advisory Comm. Notes. The Advisory Committee Notes list out specific crimes that speak to the type of dishonesty and false statement Congress intended when they drafted the Rule. *Id.* These crimes include "perjury, 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 [witness's] propensity to testify truthfully." *Id.* Additionally, the Advisory Committee Notes clarify that Congress did not intend to include a crime of violence under the Rule even if a witness acted deceitfully while committing the crime, and the Notes include an example: "even if the witness acted deceitfully in the course of committing" murder, the conviction is not admissible under Rule 609(a)(2).

The legislative history further clarifies that convictions that could be included to impeach a witness under Rule 609(a)(2) are offenses that are classified as crimina falsi. Crimes classified as crimina falsi are crimes where the "ultimate criminal act was itself an act of deceit." *Id.* Crimen falsi are "crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves some element of deceitfulness, untruthfulness, or falsification bearing on witness' propensity to testify truthfully." *Crimen Falsi*, *Black's Law Dictionary* (5th ed. 1979). The focus on crimina falsi shows that the legislature meant for a narrow reading to include crimes that have some element of deceitfulness. *United States v. Brackeen*, 969 F.2d 827, 830 (9th Cir. 1992); Fed. R. Evid. 609 Advisory Comm. Notes.

The legislative history also clarifies that the Rule allows prior convictions that have a nature of crimina falsi to be included even if an individual was not specifically charged under such a statute, but the Rule requires that the proponent have proof that the conviction "required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement." Fed. R. Evid. 609 Advisory Comm. Notes. Under this standard, the legislature allows a proponent to offer information "such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted." *Id.* Thus, Rule 609(a)(2)'s legislative history shows that the legislature intended to create a narrow Rule that allowed certain crimes with a crimina

falsi nature to be included, but it intended to limit the sphere of crimes eligible because, "as morally repugnant as some crimes may be, crimes of violence or stealth have little bearing on a witness's character for truthfulness." *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012).

iii. Circuit courts have interpreted Rule 609(a)(2) to only include crimes that speak to an individual's propensity to testify truthfully, and many circuit courts do not include theft as one of those crimes.

Many circuit courts have interpreted Rule 609(a)(2) to include a narrow subset of crimes that speak directly to an individual's propensity to testify truthfully. *United States v. Fearwell*, 595 F.2d 771, 776-77 (DC Cir. 1978). For example, the Seventh Circuit concluded that crimes where the goal is always to deceive speak directly to an individual's propensity to testify truthfully as opposed to crimes that do not always have that goal of deception. *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 217 (7th Cir. 1989). The court in *Altobello* distinguished theft by meter tampering from petty theft crimes, such as jimmying coins from a vending machine or a pay telephone. *Id.* The court stated that meter tampering is necessarily a crime of deception because it involves a person altering the meter so the record shows that the user is using less than they actually are using, and this means "the goal is always to deceive." *Id.*

Other circuit courts consistently focus on a propensity to testify truthfully while weighing whether a prior conviction should be included. The Tenth Circuit focuses on crimes "which would tend to show that an accused would be likely to testify untruthfully." *See United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978). The Third and the Ninth Circuits focus on "propensity toward testimonial dishonesty." *Government of Virgin Islands v. Toto*, 529 F.2d 278, 281-282 (3d Cir. 1976); *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977).

Theft is a crime that circuit courts have consistently held falls under the category of a crime of stealth as opposed to a crime of dishonesty under Rule 609(a)(2) and would not show a propensity to testify truthfully. The Fifth Circuit, Sixth Circuit, Eighth Circuit, and Eleventh Circuit have all

distinguished crimes of stealth from crimes of dishonesty. *Washington*, 702 F.3d at 893 (reasoning that theft does not involve dishonest or false statements within the meaning of Rule 609(a)(2)); *United States v. Entrekin*, 624 F.2d 597, 598-99 (5th Cir. 1980) (reasoning that theft like shoplifting does not involve dishonesty or false statement under Rule 609(a)(2)); *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984) (reasoning that involves a "lack of respect for the persons or property of others" rather than involving "deceit or deliberate interference with a court's ascertainment of truth"); *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990) (reasoning that theft, robbery, or shoplifting do not involve dishonesty or false statement' within the meaning of Rule 609(a)(2).). The D.C. Court, in particular, has consistently distinguished theft from crimes of deceit under the meaning of Rule 609(a)(2). *Smith*, 551 F.2d at 363 (holding that a prior conviction for armed robbery is not admissible under Rule 609(a)(2)); *United States v. Lipscomb*, 702 F.2d 1049, 1057 nn.32-33 (D.C. Cir. 1983) (holding that a prior larceny conviction is not admissible under Rule 609(a)(2)); *Fearwell*, 595 F.2d at 776 (holding that a prior petit larceny conviction should not be admitted under Rule 609(a)(2)).

By circuit courts consistently interpreting Rule 609(a)(2) to include only a narrow range of crimes that bear directly on an individual's propensity to testify truthfully, circuit courts have clarified what crimes are eligible to be used for impeachment purposes under Rule 609(a)(2) and have concluded that theft is not a crime eligible to be used because crimes of stealth do not speak to an individual's propensity to testify truthfully. Therefore, this Court should also hold that theft is a crime that should not be eligible to be used for impeachment purposes under Rule 609(a)(2).

B. Ms. Fenty's conviction does not speak to her propensity to lie because the statute she was charged with does not involve an element of deception for conviction, Ms. Fenty's acts do not support a propensity to lie, and prosecutors at the time could have charged Ms. Fenty with theft by deception if they felt Ms. Fenty's actions involved deception, and they decided not to do so.

i. Ms. Fenty was charged with a statute that did not have an element of fraud or deception.

Ms. Fenty was charged with petit larceny under Boerum Penal Code § 155.25 and that statute involves a person knowingly taking personal property of another with the intent to deprive the other person of their property. For a crime to be eligible for attacking a witness's character for truthfulness under Rule 609(a)(2), an element of the crime must include a "dishonest act or false statement." 609(a)(2). Courts have distinguished what it means to have an element of deceit as opposed to an element of stealth. *Fearwell*, 595 F.2d at 776. In *Fearwell*, the court distinguished between stealth and deception by reasoning that stealth is what many petty larceny crimes involve, and these stealth crimes "simply [have] no bearing whatever" on an accused individual's propensity to testify truthfully because they do not involve dishonest or false statements. *Id.* In contrast, deception involves crimes with an element that directly addresses fraud or deception through dishonest or false statements, and Rule 609(a)(2) is a "rigid standard" that is to be construed narrowly to only include crimes with an element of fraud or deception. *Id.* Because the statute Ms. Fenty was charged and convicted under does not directly address fraud or deception, Ms. Fenty's prior conviction would not fall under the narrowly constructed rule and should not have been used to impeach her.

ii. Ms. Fenty's actions that led to her prior conviction do not support a propensity to lie.

Courts have considered facts from prior convictions when evaluating whether the conviction is appropriate to impeach under Rule 609(a)(2), but courts cannot and should not act as fact finders for purposes of Rule 609(a)(2). Fed. R. Evid. 609 Advisory Comm. Notes (clarifying that proponents may offer information that the factfinder had to find or the accused had to admit an act of dishonest or false statement in order to be convicted, but Rule 609(a)(2) does not purport to put the accused on a "mini-trial" where the court is forced to examine the previous charge's record to determine whether the crime had a crimen falsi nature).

Here, Ms. Fenty was nineteen years old when she was dared by a friend to grab a bag. R. at 66. A friend of Ms. Fenty's noticed a person in the crowded public space and dared Ms. Fenty to grab the person's bag and run with it. R. at 19, 70. Ms. Fenty took the bag after she threatened the person who was holding it and then ran away with it. R. at 19, 22. On the face of the charge, this is a crime of force and a crime of violence rather than a crime of deception. This Court would be required to sift through the previous charge's record to speculate ways in which Ms. Fenty's crime of theft would become a crime of deceit, putting Ms. Fenty on a mini-trial to figure out if there are facts that support the crime was deceptive in nature because Ms. Fenty's prior conviction did not have a nature of crimina falsi on its face and the government did not offer any information to show that that the factfinder in the previous case had to find, or Ms. Fenty had to admit, an act of dishonesty or false statement to be convicted. *See* R. at 20-28.

Even if this Court decides to hunt for facts that support the crime was deceptive in nature, the facts do not support Ms. Fenty's conviction was theft by deception because she was dared by a friend to grab a bag moments before she attempted to take the bag. *See* R. at 19. She did not hatch a plan to steal the bag using lies and deception, and she did not employ verbal tactics to trick the person holding the bag. Ms. Fenty simply went up to the person, grabbed the bag as quietly as she could, and then took the bag by force when the person noticed. R. at 22. Though this crime was not a wise decision on Ms. Fenty's part, it should not be used to impeach her testimony in the current case because it does not qualify as a crime that speaks to Ms. Fenty's propensity to lie in court, and it was improper for the district court to allow Ms. Fenty to be impeached.

iii. Prosecutors could have charged Ms. Fenty with theft by deception if they felt Ms. Fenty's actions in her prior conviction involved deception, and they decided not to do so.

If deceit was involved in Ms. Fenty's actions, the State of Boerum would have charged her with Boerum Penal Code § 155.45 Theft by Deception, and the state either decided not to charge Ms. Fenty with this statute or could not prove the element of deception. Two penal codes address crimes similar to circumstances from Ms. Fenty's prior conviction: § 155.25 Petit Larceny and § 155.45 Theft by Deception. One is theft in general; one is theft by deception. The two Boerum larceny codes are nearly identical except the theft by deception statute requires that the prosecution prove that the accused deceived by intentionally creating a false impression. § 155.45.

Prosecutors pursue the appropriate charge when a crime has been committed. Here, prosecutors could have charged Ms. Fenty with a very similar statute to what she was charged with. It is highly likely that prosecutors did not have facts to support a conviction under theft by deception otherwise they would have charged and convicted her under theft by deception. To say that Ms. Fenty's petit larceny charge involves deception now when the statute does not involve any element of deception and prosecutors had an appropriate statute available to them that would have directly addressed deception within a different larceny statute is forcing this Court to create an alternate reality from what is true: Ms. Fenty's conviction did not involve any element of deception.

Therefore, Ms. Fenty's act does not speak to her propensity to lie because the statute she was charged with does not involve any element of deception for conviction, Ms. Fenty's acts do not support a propensity to lie, and prosecutors at the time could have charged Ms. Fenty with theft by deception if they felt Ms. Fenty's actions involved deception and they decided not to do so.

C. Including Ms. Fenty's prior conviction to impeach her testimony constituted harmful error because the government did not have a strong case to convict Ms. Fenty, Ms. Fenty has had no other brushes with the law, Ms. Fenty's credibility was pivotal to her defense, and limiting instructions were not enough to guard against prejudice.

Evidentiary rulings are subject to the harmless error analysis when there has been an error with the district court's ruling. *United States v. Scisney*, 885 F.2d 325, 326 (6th Cir. 1989). Under Federal Rule of Criminal Procedure 52(a), an error is harmful when the error impacts an accused's substantial rights. Factors courts consider to determine whether an accused's substantial rights were impacted are whether there was other evidence presented that the defendant had brushes with the law, how prosecution used the conviction in question, and whether there was a strong case against the defendant even without introducing the conviction for impeachment purposes. *Scisney*, 885 F.2d at 326-27. It is the government's burden to show that an accused's substantial rights have not been affected. *United States v. Small*, 423 F.3d 1164, 1191 n.15 (10th Cir. 2005).

i. It was harmful error because the government did not have a strong case to convict Ms. Fenty, Ms. Fenty has had no other brushes with the law, and Ms. Fenty's credibility was pivotal to her defense.

The court in *Scisney* held that it was harmless error when the government introduced a prior conviction for impeachment purposes because the government's case was strong against the defendant even without introducing the conviction for impeachment purposes and the government only briefly referenced the prior conviction. *Scisney*, 885 F.2d at 327. In contrast, the government here did not have a strong case against Ms. Fenty. The government did not find Ms. Millwood. The government also only presented Officer Raghaven to testify, and the officer could only speak to how he discovered the packages, not for any mens rea Ms. Fenty may or may not have had. Further, the government did not just briefly reference Ms. Fenty's prior conviction for impeachment purposes—-it focused heavily on it, directing its entire cross-examination of twenty questions on the specifics of Ms. Fenty's prior conviction rather than focusing on the case at hand. Therefore, the government did not have a strong case to convict Ms. Fenty, and the case pivoted on Ms. Fenty's ability to testify and be unprejudiced by her prior conviction.

Additionally, Ms. Fenty has no other brushes with the law so the prosecution's use of her sole prior conviction to impeach her testimony had a major impact. Another factor the court in *Scisney* considered to determine harmless error was whether there was other evidence that a defendant had brushes with the law beyond the prior conviction for impeachment purposes. *Id.* Ms. Fenty has no other brushes with the law. Ms. Fenty's conviction happened seven years prior when she was nineteen years old. R. at 19. She had no convictions before this incident, and she had no other brushes with the law until the current case. *See* R. at 19. By allowing Ms. Fenty's prior conviction to impeach her testimony, the court influenced the jury by encouraging the presumption that Ms. Fenty is a hardened criminal with many run-ins with the law when Ms. Fenty made one stupid mistake on a dare from a friend when she was a teenager.

Further, Ms. Fenty's credibility and character are central to her defense. The only other person who could testify to Ms. Fenty's innocence fled the country. There is limited physical evidence that can be introduced, so all Ms. Fenty can do to defend herself is testify. Past convictions have a prejudicial effect on an accused in particular because juries can generalize the accused's earlier bad act and decide that, because they did it before, they did it again in the current case. *Old Chief v. United States*, 519 U.S. 172, 180 (1997); *United States v. Holland*, 41 F. Supp. 3d 82, 94 (D.D.C. 2014). Ms. Fenty was willing to testify because she had nothing to hide, but with the government introducing Ms. Fenty's past conviction to impeach her testimony, the government extinguished Ms. Fenty's credibility where the prior conviction had no bearing on her propensity to testify truthfully. Thus, allowing the government to introduce Ms. Fenty's prior conviction was a harmful error because there was a strong likelihood that the case would have turned out differently if Ms. Fenty could have testified untethered to her prior conviction.

Therefore, allowing Ms. Fenty's prior conviction to be introduced was harmful error because the government did not have a strong case to convict Ms. Fenty, Ms. Fenty has had no other brushes with the law, and Ms. Fenty's credibility was pivotal to her defense.

ii. Limiting instructions were not sufficient to correct the district court's error in including Ms. Fenty's prior conviction because limiting instructions draw attention to the prior conviction rather than remove prejudice against a defendant and limiting instructions are not sufficient because circumstances were very similar in the prior conviction to the current case.

Limiting instructions are not sufficient to correct the district court's error because they draw attention to the prior conviction rather than ensure a defendant is not prejudiced by the court error. It is assumed that a jury can take a court's limiting instructions and perfectly execute the desired result: that they can forget about what they heard or only use damning evidence for a very narrow purpose. It is rarely effective in limiting a jury to the narrow purpose of using evidence for assessing credibility alone. Anna Roberts, *Impeachment By Unreliable Conviction*, 55 B.C. L. Rev. 563, 578 (2014). Even though limiting instructions are written for lay people, the instructions are often convoluted and misunderstood. *Id.* Additionally, it is unrealistic to hope that limiting instructions will prevent the jury from using the evidence in "forbidden ways," such as using it to decide that the defendant was convicted before so the individual is likely to be guilty now. Roberts, *supra*. Many courts have recognized that limiting instructions for a prior conviction have an especially harmful effect when used against a defendant because the jury hears the defendant is a criminal for a second time. Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L. Rev. 1, 49 (1999). Finally, limiting instructions often increase the weight that the jury gives to the evidence. Roberts, *supra*. This is likely because they are hearing the evidence more than once, and the judge is placing an emphasis on it. *See e.g.*, *Holland*, 41 F. Supp. 3d at 94-95 (acknowledging that limiting instructions might not be effective where the jury is told that they

can only consider a conviction for credibility alone and not for guilt because it forces the jury "to perform a mental gymnastic which is beyond, not only their powers, but anybody else's.").

Limiting instructions in Ms. Fenty's case were not sufficient because the circumstances from Ms. Fenty's prior conviction were very similar to the current case. When a prior offense is similar to the charge for which the defendant is on trial, the potential for prejudice is greatly enhanced. *See e.g.*, *United States v. Puco*, 453 F.2d 539, 542 (2d Cir. 1971). Ms. Fenty's prior conviction involved a friend who dared her to steal a bag. R. at 21. The crime happened at a time when Ms. Fenty was in a dire financial situation, and she was not able to think through the implications of the situation before acting on the dare. *See* R. at 53. Here, Ms. Fenty was struggling financially and looking for new job opportunities. R. at 8. She only ordered the horse tranquilizers after she reconnected with an old friend, and the friend pleaded with Ms. Fenty to help her horses. R. at 44. Ms. Fenty was again prompted by a friend to act, but this time she had no idea that the scheme was fraudulent. R. at 56. Unfortunately, because the circumstances were so similar with Ms. Fenty interacting with a friend, being prompted to act by the friend, and having the underlying motivation by financial need, a jury would likely judge Ms. Fenty guilty by similar circumstances alone and not based on evidence from the current case. Therefore, limiting instructions were not sufficient to eliminate likely prejudice against Ms. Fenty based on the circumstances being so similar, and this Court should remand as a remedy.

CONCLUSION

For the foregoing reasons, Ms. Fenty respectfully requests this Court to reverse the District Court's decision on all counts and remand Ms. Fenty's case for a new trial.

Respectfully submitted,
Counsel for the Petitioner