No. 23-695 **Team 27R**

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 RESPONDENT

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether individuals maintain a reasonable expectation of privacy under the Fourth Amendment in blatantly suspicious packages that are not addressed to them and are instead addressed to a fake name, when the defendant never established a public use of the fake name and there was no objective indication that the defendant owned or controlled the packages.

II. Whether voicemail statements that lack spontaneity are admissible under Federal Rule of Evidence 803(3) because the language of 803(3) implies a spontaneity requirement, the statements were made after the defendant became aware that she may be under investigation, and the defendant had time to reflect and conceive the self-serving statements.

III. Whether a prior conviction for petit larceny is admissible to prove character for truthfulness under Federal Rule of Evidence 609(a)(2) when the crime was predicated on a dishonest act, the plain text of 609(a)(2) mandates that crimes involving dishonest acts must be admissible, the Advisory Committee explicitly classified larceny as an admissible *crimen falsi*, and the district court issued an easy-to-understand limiting instruction to ensure the conviction was only used to prove character for truthfulness.

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STATEMENT OF THE CASE

A. Joralemon's Prevalent Drug Crisis.

Joralemon is inundated with fatal street drugs. (R. at 7.) According to the city police department, the city experienced a 35% increase in overdoses from 2021 to 2022. (*Id.*) Making matters worse, the U.S. Drug Enforcement Administration ("DEA") warned that drug sellers have been cutting fentanyl, a deadly narcotic, with xylazine, a dangerous horse tranquillizer. (*Id.*)

The mixture of xylazine and fentanyl is even more fatal than fentanyl alone because it is "less responsive to anti-overdose treatments." (*Id.* at 7.) Moreover, the National Library of Medicine classifies xylazine as an "emerging threat" because of its "increasing presence in fatal overdoses." Manuel Cano et al., *Xylazine in Drug Seizure Reports and Overdose Deaths in the US, 2018-2022*, National Library of Medicine (Aug. 25, 2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10473811/. Indeed, xylazine is yet another serious threat to Joralemon citizens.

Inevitably, Joralemon citizens have lost their lives to this rampant drug epidemic. (*Id.* at 8.) On February 12, 2022, Joralemon resident Liam Washburn ("Washburn") died of a fentanyl overdose. (*Id.* at 29.) Washburn's body was discovered next to used syringes and a package that was addressed from "Holistic Horse Care." (*Id.*) Notably, local DEA officials analyzed the syringes and found traces of xylazine mixed with fentanyl. (*Id.*)

In response, local DEA agents promised to "crack[] down on" the dangerous xylazine-fentanyl mixture. (*Id.*) To this end, U.S. Attorney Caplow noted that her office is "commit[ed] to ridding the streets of Joralemon of illicit narcotics" and that "citizens of Joralemon have had to live with the harmful and dangerous consequences of illegal narcotics for too long." (*Id.* at 8.) Caplow's statements reflect the reality that, if the local government and DEA agents do not intervene to protect citizens from fatal street drugs, more Joralemon citizens will be endangered.

On a similar note, DEA Agent Robert Raghavan ("Raghavan") noted that "many people . . . use the mail to send and receive drugs" and that "people have been getting creative" to sneak such packages through the mail. (*Id.*) As such, DEA agents work closely with the Joralemon post office to flag suspicious packages that may contain deadly narcotics. (*Id.*)

B. Fenty's Obvious Drug Trafficking Scheme and Failed Coverup Attempt.

In the wake of Washburn's tragic death, Raghavan notified the Joralemon post office about the suspicious package from "Holistic Horse Care" that was found near Washburn's body. (*Id.* at 29.) Raghavan speculated that drug traffickers were ordering xylazine from "Holistic Horse Care" to mix with fentanyl and instructed the U.S. Postal Inspection Service to flag packages that are shipped from horse veterinarian companies. (*Id.*)

Then, on February 14, 2022—just two days later—the post office flagged two new packages that were addressed from "Holistic Horse Care." (*Id.* at 65.) The packages were addressed to "Jocelyn Meyer" at P.O. Box 9313. (*Id.*) Upon further investigation, Raghavan discovered that P.O. Box 9313 was suspiciously opened just two weeks earlier—on January 31, 2022—under the name "Jocelyn Meyer." (*Id.* at 30-31.) Concurrently, the post office flagged two other Amazon packages that were addressed to Franny Fenty at P.O. Box. 9313. (*Id.* at 31.) Raghavan believed this was a mistake, stating that "[p]ackages are delivered to the wrong address all the time. People enter their shipping address wrong or forget to change their address after closing their P.O. Box. Or maybe they were two roommates sharing a P.O. Box." (*Id.*)

After this, Raghavan sought a warrant to search the suspicious packages that appeared to be connected to Washburn's fatal overdose just two days prior. (*Id.* at 65-66.) The warrant was granted expeditiously that same day, at which point Raghavan searched the packages at a local testing facility. (*Id.* at 66.) Raghavan found one bottle of xylazine in each package. (*Id.* at 32.) Further tests revealed that each bottle contained 400 grams of xylazine and 200 grams of

fentanyl. (*Id.*) Therefore, the packages contained a total of 400 grams of fentanyl—enough to kill 20,000 people. (*Id.*); Press Release, United States Attorney's Office for the District of Maryland, Baltimore Fentanyl Dealer Sentenced to More Than Seven Years in Federal Prison for Distributing More Than 400 Grams of Fentanyl—Enough to Kill 20,000 People (Feb. 24, 2021), https://www.justice.gov/usao-md/pr/baltimore-fentanyl-dealer-sentenced-more-seven-years-federal-prison-distributing-more-400.

Meanwhile, as Raghavan searched the packages, Fenty went to the post office to get the packages. (R. at 40.) Fenty noticed that her packages were not there and then called her friend Angela Millwood ("Millwood"). (*Id.*) Millwood didn't answer, so Fenty left a voicemail stating that the packages are missing and that she's "getting worried" that Millwood dragged her into something she "would never want to be part of." (*Id.*) Fenty also stated that she read about xylazine being mixed with fentanyl and asked, "[t]hat's not what's going on here, right?" (*Id.*) Fenty then asked post office employees about her package, but the employees told her that they didn't know what was going on with it. (*Id.*) Therefore, a distressed Fenty left another voicemail for Millwood. In the voicemail, Fenty stated "Angela, I'm really getting nervous. . . . I thought the xylazine was just to help horses . . . . 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." (*Id.*)

The next morning, Raghavan re-sealed the packages, returned them to the post office, and stayed to see who picked them up. (*Id.*) Shorty afterwards, a brown-haired woman arrived to claim them. (*Id.* at 32.) Raghavan presumed this woman was Jocelyn Meyer, but it was actually Franny Fenty. (*Id.*) Fenty then approached the service counter to claim the packages, at which point a post office employee asked Fenty if the packages belonged to her. (*Id.*) Fenty said yes.

(*Id.*) She then took the packages and began to leave. (*Id.*) On her way out, Fenty ran into a friend who said "Bye Franny" as they parted, thus revealing her identity to Raghavan. (*Id.*)

That evening, the United States District Attorney's Office filed charges against Fenty and she was arrested that evening. (*Id.*) After the arrest, Raghavan found a suspicious LinkedIn post from December 2021—just one month before Fenty opened the P.O. box—in which Fenty stated she was "looking for work." (*Id.* at 6, 34.) In response, Millwood commented that she could "help [Fenty] out with that!" (*Id.* at 6.) Raghavan then learned that Millwood was previously on the DEA's radar as a potential drug distributor. (*Id.*) Even more suspiciously, Millwood worked at a horse stable. (*Id.*) Raghavan immediately thought about the "Holistic Horse Care" packages and tried to track Millwood down but found out that she fled the country a few days earlier. (*Id.*)

Separately, Fenty insisted that she knew nothing about the criminal scheme and that she ordered the xylazine as a favor to Millwood. (*Id.* at 46.) Further, Fenty claimed that the name "Jocelyn Meyer" was her alias and that published two short stories under that name more than five ago while in college. (*Id.* at 71.) She also notes that she emailed four publishers under that pseudonym in October 2021. (*Id.* at 4-5.) However, none of the publishers responded. (*Id.* at 53.)

Notably, this was not Fenty's first arrest. She was arrested for petit larceny in August 2016 after she snuck up on a tourist and snatched her bag while the tourist was watching a street performer. (*Id.* at 59.) However, the tourist noticed and fought back while shouting. (*Id.*) Fenty then tugged at the bag, shoved the tourist, and stated "[l]et go or I'll hurt you." (*Id.*) The tourist screamed while Fenty snatched the bag and ran away. Joralemon police caught Fenty with the stolen bag three blocks away and charged her with petit larceny. (*Id.* at 54); Boerum Penal Code § 155.25. Fenty has since stated that she had no intent to harm the tourist and only shoved her "a little" to get the bag back. (*Id.*) Fenty was 19 years old at the time of this crime. (*Id.* at 66.)

C. Procedural History.

Following Fenty's arrest on February 15, 2022, she was indicted in Boerum District Court on one count of possession with intent to distribute more than 400 of fentanyl under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). (*Id.* at 43.) Then, on August 25, 2022, Fenty filed two motions: 1) a motion to suppress the contents of the packages under the *Mapp* exclusionary rule on the grounds that the government invaded her Fourth Amendment reasonable expectation of privacy; and 2) a *motion in limine* to exclude evidence of her prior larceny conviction under Federal Rule of Evidence 609(a)(2) on the grounds that this evidence would "unfairly prejudice her in the eyes of the jury." (R. at 66); *see generally Mapp v. Ohio*, 367 U.S. 643 (1961) (establishing the exclusionary rule).

The Boerum District Court denied both motions. (*Id.*) However, the court issued a limiting instruction to the jury regarding Fenty's prior conviction. (*Id.* at 66.) The limiting instruction stated that evidence of her prior conviction could only be used to prove her character for truthfulness and could not be used for any other purpose. (*Id.* at 25.)

At trial, the government objected to Fenty's attempt to admit the two voicemails she left for Millwood on the grounds that the voicemails are inadmissible hearsay and do not qualify under Federal Rule of Evidence 803(3)—the then-existing state of mind exception. (*Id.* at 56); Fed. R. Evid. 803(3). The court sustained the objection and excluded the voicemails at trial. (R. at 66.) The trial concluded in September 2022 when the jury convicted Fenty and sentenced her to 10 years in prison. (*Id.*) Following the conviction, U.S. Attorney Caplow stated that "[w]ith this conviction, we can assure Joralemon citizens that those responsible will be held accountable for their crimes." (*Id.* at 8.) Fenty was sentenced in November 2022. (*Id.* at 65.)

Fenty then appealed the district court's decision to the Fourteenth Circuit. (*Id.* at 64.) Specifically, Fenty challenged: (1) the district court's decision to deny her motion to suppress;

(2) the district court's decision to deny her motion to exclude her prior conviction; and (3) the district court's decision to exclude the voicemails. (*Id.*) The Fourteenth Circuit affirmed the district court's decision in its entirety, and Fenty now appeals the Fourteenth Circuit. (*Id.*)

SUMMARY OF THE ARGUMENT

I. Fenty had no reasonable expectation of privacy in the sealed packages because they were not addressed to her and because she used a fake name as part of an obvious criminal scheme. To start, individuals cannot have a *reasonable* expectation of privacy in packages that are not addressed to them and there is no other indication of their ownership of the package. Otherwise, criminals could assert a privacy interest in packages addressed to fake names to prevent a search or dissociate from the package when convenient to avoid getting caught.

To this end, individuals have no reasonable privacy expectations in suspicious packages addressed to fake names. When packages are observably connected to a criminal scheme—like Fenty's packages—people do not have a privacy expectation in such packages that are addressed to fake names. Recognizing any other rule would hamstring the government's ability to investigate crimes and protect citizens. Finally, Fenty's assertion that the fake name was an "established alias" is untenable because she never established a public use for the alias. Indeed, writing a few stories under that name six years ago is a far cry from establishing a public use.

II. This Court should affirm the exclusion of Fenty's voicemails because they were not spontaneous. Fenty had time to reflect when making the voicemails. 803(3) explicitly excludes statements of memory or belief, thus requiring statements to be spontaneous. Furthermore, the Advisory Committee's notes indicate that 803(3) is a "specialized application" of 803(1)." 803(1) permits present sense impressions "made while or immediately after the declarant perceived it." Therefore, there is a spontaneity requirement in 803(1). And since 803(3) is a specialized application of 803(1), 803(3) has a spontaneous requirement too. Courts across the

nation recognize this requirement because of the protection it affords. Without requiring statements to be spontaneous, criminals could make endless fabricated, self-serving statements in an attempt to exonerate themselves – leading to an end of the rule against hearsay itself.

III. Fenty's prior larceny conviction is admissible to prove her character for truthfulness because the plain text of Federal Rule of Evidence 609(a)(2) mandates it. 609(a)(2) instructs judges to admit previous crimes for impeachment purposes so long as those crimes require proof of a dishonest act to convict. The rule provides no express definition of "dishonest act," so courts must interpret the rule based on its plain text. Here, the district court properly applied 609(a)(2) because the ordinary meaning of "dishonest" includes stealing.

609(a)(2) is unambiguous: theft crimes must be admitted for impeachment purposes. Second, even if 609(a)(2)'s plain text is ambiguous—which it is not—the drafters intended for larceny to be admissible. In Committee Notes, the drafters explicitly state that *crimens falsi* are admissible and that larceny is a *crimen falsi.* Also, there was no reversible error because Fenty brought up her own conviction on direct examination. In *Ohler,* this Court held that defendants raising a conviction on direct examination waive the right to appeal a *motion in limine.* Finally, the judge employed an effective limiting instruction which this Court, in *Samia* and many other cases, held to be curative. The limiting instruction rendered any alleged error harmless.

ARGUMENT

I. FENTY HAD NO FOURTH AMENDMENT REASONABLE EXPECTATION OF PRIVACY IN THE PACKAGES BECAUSE SHE USED A FAKE NAME IN CONNECTION WITH AN OBVIOUS CRIMINAL SCHEME AND SHE NEVER ESTABLISHED A PUBLIC USE OF THE FAKE NAME.

The Court should find that Fenty lacked a Fourth Amendment standing to challenge the search of the sealed package. First, Fenty had no reasonable expectation of privacy in a package that was not addressed to her because she used a fake name as part of an obvious criminal scheme. Second, even if Fenty had *some* expectation of privacy in using a fake name—which she

did not—the Government's hefty interest in preventing criminal activity eviscerates Fenty's privacy interest in the fake name. Likewise, Fenty's assertion that people have a reasonable expectation of privacy in dangerous packages addressed to fake names is untenable and would hamstring government officers in their ability to protect society and conduct investigations. Lastly, Fenty's argument that the fake name "Jocelyn Meyer" was her established alias fails because she never established a public use of that name and there was no other objective indicia of Fenty's ownership of the packages. As a result, this Court must affirm the Fourteenth Circuit's decision and deny Fenty's motion to suppress the evidence obtained from the search.

A. Fenty Had No Reasonable Expectation Of Privacy In Packages That Were Not Addressed To Her And Were Observably Connected To A Criminal Scheme.

We start with first principles. The Fourth Amendment protects American citizens from "*unreasonable* searches" of "persons, houses, papers, and effects." U.S. Const. amend. IV (emphasis added). In other words, whether a search violates the Fourth Amendment hinges on the reasonableness of the search. *Katz v. United States*, 389 U.S. 347, 351 (1967); *see also Arizona v. Hicks*, 480 U.S. 321, 327 (1987); *Carpenter v. United States*, 138 S. Ct. 2206, 2215 n.2 (2018). To bring a claim under the Fourth Amendment, plaintiffs must have Fourth Amendment standing, which means they must have an *objectively reasonable* expectation of Fourth Amendment protection against a search.[1] *Rakas v. Illinois*, 439 U.S. 128, 138-39, (1978). Again, the operative word is *reasonable*. *See also Lange v. California*, 141 S. Ct. 2011, 2017

[1] Although this Court "dispens[ed] with the rubric of [Fourth Amendment] standing" in *Rakas v. Illinois*, courts still use the term "Fourth Amendment standing" to describe "the existence of a privacy or possessory interest sufficient to assert a Fourth Amendment claim." *United States v. Daniel*, 982 F.2d 146, 149 n.2 (5th Cir. 1993) (alterations in original) (quoting *Rakas v. Illinois*, 439 U.S. 128, 138-39, (1978)) (citing *United States v. Richards*, 638 F.2d 765, 769 (5th Cir. 1981)). In other words, because "fourth amendment rights are personal in nature," the "critical question is whether government officials violated any legitimate expectation of privacy held by [the defendant]. *United States v. Lewis*, 738 F.2d 916, 919 (8th Cir. 1984) (citing *Rakas*, 439 U.S. at 140; *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980); *United States v. Salvucci*, 448 U.S. 83, 92-93 (1980).

(2021) ("[T]he ultimate touchstone of the Fourth Amendment is reasonableness."). Here, Fenty had no *reasonable* expectation of privacy in the sealed packages because they were not addressed to her and because she used a fake name as part of an obvious criminal scheme.

To start, many circuits have held that individuals have no reasonable expectation of privacy in packages that are "addressed to a party other than the intended recipient" and there is no other "indicia of [the intended recipient's] ownership, possession, or control existing at the time of the search." *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021); *see also United States v. Stokes*, 829 F.3d 47, 53 (1st Cir. 2016); *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988); *United States v. Smith*, 39 F.3d 1143, 1145 (11th Cir. 1994).

Indeed, recognizing any other rule would bring Fourth Amendment jurisprudence into disrepute—if individuals maintain a reasonable expectation of privacy in packages that are not addressed to them, then a person could simply claim a privacy expectation in a package addressed to someone else when it's convenient and then disassociate from that same package when necessary to avoid legal consequences. *See generally United States v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984) (per curiam) (explaining that courts are "reluctant to find that a defendant holds a reasonable expectation of privacy in mail where he is listed as neither the sender nor the recipient, at least absent some showing by the defendant of a connection.").

For example, a drug trafficker who used a fake name to send packages could either: (1) claim a privacy expectation in the package to prevent a pending search; or (2) dissociate from the package and claim that it belonged to someone else if they think they might get caught. *See, e.g.*, *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992) ("At no point . . . has [the defendant] ever attempted to establish . . . any privacy interest in the package. Indeed, his '*only [admitted] interest in suppressing the package and its contents is to avoid its evidentiary force*,' an interest

not protected under the Fourth Amendment." (emphasis added) (alteration in original) (quoting *Koenig*, 856 F.2d at 846). In other words, Fenty's proposed rule would allow individuals to pick and choose when it's convenient to assert a privacy expectation in packages addressed to a fake name. Such a situation would hamstring the government's ability to investigate or prevent drug-related crimes and thus protect its citizens from fatal street drugs.

A salient example of this occurred in *United States v. Daniel*. 982 F.2d 146, 149 (5th Cir. 1993). There, a DEA agent was alerted about a "suspicious" package being shipped on an airline. *Id.* at 148. The agent noted several suspicious characteristics of the package, such as hand-written addresses, a missing zip code on the return address, an expensive courier fee for such a small package, and the fact that the package was carefully sealed shut with masking tape. *Id.* After obtaining a warrant, the DEA agent tracked the intended recipient—an individual named Ricky Lynn Daniel ("Daniel"). *Id.* However, the package was addressed to "Lynn Neal." *Id.*

At trial, Daniel argued that "Ricky Lynn Daniel" and "Lynn Daniel" were different people and thus that he was not the intended recipient of the package. *Id.* Conversely, the government argued that "Lynn Daniel" was merely Daniel's alias and that Daniel had no reasonable expectation of privacy in the package addressed to his alias because the alias was "obviously part of his criminal scheme." *Id.* at 149 (citing *United States v. Lewis*, 738 F.2d 916, 919-20 n.2 (8th Cir. 1984)). This perfectly demonstrates the chaos that would ensue if people could pick and choose when to assert a privacy interest in packages not addressed to them. *Id.*

Building on this rule, two Fourth Circuit cases clarified that a party cannot establish a reasonable expectation of privacy in packages addressed to fictitious names when there is "no objective indicia that [the defendant] owned, possessed, or exercised control over the packages." *Rose*, 3 F.4th at 729 (citing *United States v. Jacobsen*, 466 U.S. 109, 115 (1984)); *Givens*, 733

F.2d at 341-42. In both *Rose* and *Givens*, the court reasoned that the defendants lacked any privacy expectation when "[n]othing about the packages, including the sender's name, the named recipient, the address, or the phone number . . . signaled in an objective sense that [the defendant] had a protected interest in the packages." *Rose*, 3 F.4th at 729; *Givens*, 733 F.2d at 341-42. Likewise, in both *Rose* and *Givens*, the defendant had not yet taken possession of the package "at the time of the search." *Rose*, 3 F.4th at 729; *Givens*, 733 F.2d at 341-42.

Finally, the court in *Givens* explained that ownership of the *contents* of the package does not give a defendant a reasonable privacy expectation in the mail containing the package. *Givens*, 733 F.2d at 342. The court analogized this situation to *Rakas*, in which the defendant attempted to assert a privacy expectation in the trunk of someone else's car. *Id.* (quoting *Rakas*, 439 U.S. at 149); *see also Rawlings v. Kentucky*, 448 U.S. 98, 99 (1980) (noting that people have no expectation of privacy in another person's purse even if he "claimed ownership of the drugs in the purse"). Indeed, Fenty's case is just like *Daniel*, *Rose*, and *Givens*. *Daniel*, 982 F.2d at 149; *Rose*, 3 F.4th at 729; *Givens*, 733 F.2d at 341-42. Since there were no objective indicia of Fenty's ownership of the package—i.e., the package was addressed to a fake name at a recently-opened P.O. Box—Fenty had no expectation of privacy in the package. (R. at 67.)

Certainly, this rule is straightforward: people have no privacy expectation in packages that are not addressed to them when there is no objective indication of their ownership of the package. However, there is a broader rule at play here as well: when it is apparent that a person is using a fake name in connection with a criminal scheme, society is not willing to *recognize* a reasonable privacy expectation in packages addressed to that fake name. *Lewis*, 738 F.2d at 919-20 ("A mailbox bearing a fake name" that is used "to receive fraudulently obtained mailings" will not "merit an expectation of privacy that society is prepared to recognize as reasonable.").

Before going any further, consider just how blatantly conspicuous Fenty's criminal scheme was. On February 12, 2022, a Joralemon resident died of a fentanyl overdose beside a package addressed from "Holistic Horse Care." (R. at 8.) Subsequently, a local DEA official informed the post office to flag packages from the company. (*Id.*) Then, just two days later, another two packages from that same company were identified. (*Id.*) As if this were not suspicious enough, the packages were addressed to a fictitious name—Jocelyn Meyer. (*Id.*) And finally, as if *that* wasn't suspicious enough, the packages were addressed to a P.O. Box that was opened under that same fictitious name *just two weeks earlier*. (*Id.* at 54, 65.)

As a result, the DEA reasonably believed that the packages were connected to Washburn's recent overdose. (*Id.* at 29-31.) And the fact that the packages were addressed to a fake name was just icing on the cake. It is in this exact type of situation—where evidence of a criminal scheme is manifestly apparent based on the characteristics of and addresses on a package—that the use of the alias is "obviously part of [her] criminal scheme." *Daniel*, 982 F.2d at 149. Put differently, Fenty used the alias to conceal her connection to the narcotics she was ordering. (R. at 16.) Consequently, Fenty had no reasonable expectation of privacy in the package and thus no Fourth Amendment standing to challenge the search.

To this end, the Court is likely compelled to ask: what constitutes an *obvious* criminal scheme? The answer to this question requires an analysis of the totality of the circumstances. *See, e.g.*, *United States v. Pitts*, 322 F.3d 449, 459 n.1 (7th Cir. 2003) ("[T]he use of an alias is certainly a relevant factor in the 'totality of the circumstances' assessment used to determine whether . . . criminal activity is afoot."); *United States v. Ganser*, 315 F.3d 839, 843 (7th Cir. 2003) (to prove "reasonable suspicion" to justify removal of mail from "the mail stream," courts "must consider the totality of the circumstances known to authorities at the time of the . . . letter's

detention"); *United States v. Evans*, 282 F.3d 451, 455 (7th Cir. 2002) ("[C]ircumstances which appear innocent to the outside observer may suggest criminal activity to . . . law enforcement personnel."); *United States v. Ward*, 144 F.3d 1024, 1034 (7th Cir. 1998) (proving "reasonable suspicion" requires "more than an inchoate and unparticularized suspicion or hunch"). If the totality of the circumstances suggests that "criminal activity is [likely] afoot" based on the characteristics of a package, then an individual maintains no reasonable expectation of privacy in that package when using an alias. *See Pitts*, 322 F.3d at 459 n.1. Applying similar reasoning, other circuits have consistently refused to recognize a privacy interest in packages addressed to fake names when the name is used to conceal one's identity. *See, e.g.*, *United States v. DiMaggio*, 744 F. Supp. 43, 46 (N.D.N.Y. 1990) (holding that people sacrifice their privacy expectations when concealing their identity and thus hiding their ownership claim in a package).

Now this is not to suggest that using an alias automatically results in "an outright loss of Fourth Amendment rights." *Pitts*, 322 F.3d at 459 n.1. Certainly, there are specific situations where using an alias does not eviscerate an individual's privacy expectation. *See Rose*, 3 F.4th at 728 (explaining that defendants *can* have an expectation of privacy in using an alias only if they can prove "that the fictitious name is an *established alias*" (emphasis added)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995) (an author doesn't lose constitutional protection when using an alias because of "concern about social ostracism"). But this was no such situation. Fenty never created a public use for the name "Jocelyn Meyer" because writing two unpublished novels and reaching out to a few publishers using that fake name is a far cry from creating an "established alias." *Rose*, 3 F.4th at 728. Therefore, she has no privacy expectation in the alias.

Indeed, recognizing any other rule would hamstring government officers in their attempt to prevent crime. The government must be able to search suspicious packages that are addressed

to fake names. To put it bluntly, more Joralemon citizens will die if the government is unable to intervene and adequately address the xylazine-fentanyl crisis. Therefore, the government's hefty interest in preventing crime and protecting citizens from the ongoing fatal drug crisis eviscerates any privacy expectation that Fenty had in the two blatantly suspicious packages.

To further emphasize this point, consider the following hypothetical example of a package addressed from "Weapons Inc." that contains an explosive device. First, assume that a package addressed from the same company recently exploded and killed someone. Next, assume that similar explosions have occurred regularly in recent years. Further, assume that the local post office just identified another package that was shipped from "Weapons Inc." And assume that, upon inspection, the post office learns that the package was addressed to a fictitious name. Finally, assume that an individual arrives at the post office to retrieve the package.

Should this person maintain a reasonable expectation of privacy in such a blatantly suspicious package? In other words, would a government search of this package—after the issuance of a warrant—infringe on an individual's *reasonable* privacy expectation? No. Because the government must be able to search such palpably suspicious packages. And the fact that the package was addressed to a fake name only reinforces the inherently suspicious nature of the package. Accordingly, it is not only reasonable, but in fact *necessary*, for individuals to lose their reasonable expectation of privacy in packages that are addressed to a fake name and appear to be connected to the recent death of a local resident. Otherwise, criminals would be able to assert Fourth Amendment violations for searches of blatantly suspicious packages that are addressed to other people but intended for them, thereby preventing government officials from discovering

essential evidence about ongoing criminal investigations.[2] Indeed, any other rule would hamstring the government's ability to protect citizens from dangerous crimes.

At bottom, Fenty had no reasonable privacy expectation in the suspicious packages because they were not addressed to her and because she used a fake name as part of an obvious criminal scheme. Given that "the ultimate touchstone of the Fourth Amendment is *reasonableness*," and that the using a fake name as part of an obvious criminal scheme does not "merit an expectation of privacy that society . . . recognize[s] as reasonable," this Court must affirm the Fourteenth Circuit's decision and find that Fenty lacks Fourth Amendment standing to challenge the search. *Lange*, 141 S. Ct. at 2017 (emphasis added); *Lewis*, 738 F.2d at 919-20.

B. Fenty Had No Reasonable Privacy Expectation When Using The Fictitious Name "Jocelyn Meyer" Because She Never Established "Public Use" Of The Fictitious Name.

Fenty relies on the conclusory proposition that "there is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package" to assert that she had a reasonable expectation of privacy in the palpably suspicious package. *Pitts*, 322 F.3d at 459. However, this general proposition is irrelevant. Even if there is "nothing inherently wrong" with using an alias, circuit courts have consistently held that individuals do not automatically receive a reasonable privacy expectation in packages addressed to an alias. *Id.* Rather, courts have

[2] Given the highly suspicious nature of Fenty's packages and their apparent connection to an ongoing criminal scheme, the government's hefty interest in investigating the scheme indicates that this search was objectively reasonable regardless of whether Fenty maintained a privacy expectation in the packages. *See generally Daniel*, 982 F.2d at 149-52. Therefore, even if this Court were to find that Fenty maintained a privacy expectation in the packages—which she did not—Fenty's motion to suppress must be denied under both the good faith exception and the inevitable discovery doctrine exception to the exclusionary rule. Under the good faith doctrine, the contents of a search are admissible where officers—like Raghavan here—had a good faith belief that the search was lawful. *See generally Davis v. United States*, 564 U.S. 229 (2011). Likewise, under the inevitable discovery doctrine, evidence discovered through an unlawful search is still admissible if the evidence would later be discovered through a lawful search. *Nix v. Williams*, 467 U.S. 431, 431 (1984). Here, because of the Government's hefty interest in investigating the recent overdose, the search would have been reasonable even if Fenty had a privacy expectation in the packages because the Government's interest eviscerated hers. (R. at 29.) As such, the contents of the search would have been discovered through a subsequent lawful search and Fenty's motion must be denied.

repeatedly held that a person must establish a "public use" of the alias before obtaining an expectation of privacy in property addressed to the alias. *See, e.g.*, *Daniel*, 982 F.2d at 149 (explaining that a defendant must establish a public use of the alias "so that the defendant and the alias are essentially the same person" before they obtain an expectation of privacy in the alias);

Here, Fenty did not establish a public use of the alias Jocelyn Meyer. She merely wrote two short stories while in college using that same fake name and then reached out to a few publishers privately. (R. at 65.) This is not a public use. So even if Fenty had a "thoroughly justified subjective expectation of privacy" in the alias, the use of that alias as part of an obvious criminal scheme "is not one that the law recognizes as legitimate." *Lewis*, 738 F.2d at 919-20 n.2. And Fenty introduces no evidence to prove the name was in public use.

Fenty next asserts that she had a reasonable privacy expectation in using the fake name because the name used was "wholly fictitious" and *not* an "alter ego." (R. at 71.) However, this distinction is irrelevant. While Fenty is correct that alter egos don't receive privacy rights, this does not mean that fake names *automatically r*eceive privacy rights. *See Rose*, 3 F.4th at 728 (a fictitious name only receives privacy rights if it's an "established alias"). In fact, circuits have held the exact opposite. *Id.* And, "Jocelyn Meyer" was not an established alias.

Finally, Fenty asserts that the Government is asserting a "post-hoc justification" that the packages contained drugs. (R. at 70.) That's wrong. The Government asserted an ex-ante justification that the "reasonably articulable suspicion" of the package eviscerated Fenty's privacy expectation in the blatantly suspicious packages. (*Id.* at 65); *see Daniel*, 982 F.2d at 149 (noting that searches don't violate the Fourth Amendment if there is "reasonable suspicion" that they're connected to criminal schemes.) Put differently, the search would have been reasonable *even if the package did not end up containing drugs*. Indeed, the reasonableness of Fenty's

expectation of privacy did not depend on the "nature of the defendant's activities, whether innocent or criminal." *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997). Rather, it hinged on the suspicious nature of the package that was not addressed to her. *See Pitts*, 322 F.3d at 459 n.1. Raghavan's testimony confirms this. (R. at 31.) And society is unwilling to recognize a reasonable privacy expectation in packages with those characteristics. *Daniel*, 982 F.2d at 149.

In sum, Fenty did not establish a public use for "Jocelyn Meyer" and thus cannot claim a reasonable privacy expectation in that name. Therefore, she has no Fourth Amendment standing and this Court must affirm the Fourteenth Circuit's decision to deny her motion to suppress.

II. FENTY'S VOICEMAILS MUST BE EXCLUDED UNDER FEDERAL RULE OF EVIDENCE 803(3) BECAUSE THEY WERE NOT SPONTANEOUS.

This Court should affirm the Fourteenth Circuit's decision to exclude Fenty's voicemails under 803(3) because they lacked spontaneity. Fenty argues that, because a spontaneity requirement is not plainly stated within the text of 803(3), it must not exist. (R. at 51.) However, this argument ignores the very language of 803(3), the Advisory Committee's intent, and the rule's application by circuits across the country. Indeed, adopting Fenty's view would yield absurd results and turn the criminal trial process on its face. And ignoring the spontaneity requirement allows criminals to make fabricated, self-serving statements to influence juries.

A. 803(3) Requires Statements Of A Then-Existing State Of Mind To Be Spontaneous.

Exceptions to the rule against hearsay are intended to allow out-of-court statements when the context behind these statements increases their credibility and decreases the likelihood of fabrication or misrepresentation by the declarant. *See, e.g.*, *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007). Allowing statements like Fenty's voicemails into court under 803(3) would cause a myriad of issues in the criminal trial process. For example, criminals would make statements to cover their tracks and influence the jury. *See generally United States v.*

Jackson, 780 F.2d 1305, 1316 (7th Cir. 1986). As a result, disregarding the distinction between statements of memory and statements of intent would effectively eliminate the safeguards afforded by the rule against hearsay. *See Shepard v. United States*, 290 U.S. 96, 105-06 (1933).

The plain text of 803(3) explicitly excludes "statement[s]] of memory" used "to prove [a] fact remembered or believed unless it relates to the validity or terms of the declarant's will." Fed. R. Evid. 803(3). Conversely, 803(3) only allows "statement[s] of a declarant's *then-existing* state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as a mental feeling, pain, or bodily health)[.]" *Id.* (emphasis added). Forward-looking statements of intent are admissible while "backward-facing" statements of memory are not. *Id.; Shepard*, 290 U.S. at 106. As such, the text suggests that statements must be spontaneous to be admissible.

Further, the Advisory Committee's note to 803(3) discusses a spontaneity requirement. Fed. R. Evid. 803 advisory committee's note to 2014 amendment. Specifically, the note indicates that 803(3) is a "specialized application" of 803(1) regarding present sense impressions. *Id*. The note mentions that 803(3) was only separated from 803(1) to increase its usefulness. *Id.* Finally, the note explains that the theory underlying 803(1) is that "substantial contemporaneity of event and statement negat[e] the likelihood of deliberate or conscious misrepresentation." *Id.*

Under 803(1), a statement of a declarant's present sense impression is only admissible if it's made "while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). As such, the plain language of 803(1) requires that present sense impressions are either spontaneous or close in time to the declarant's perception. *Id.* And because 803(3) is a "specialized application" of 803(1), a spontaneous requirement must apply in 803(3) as well. Fed. R. Evid. 803 advisory committee's note to 2014 amendment. The plain language of 803(3), which pertains to "*then-existing* states of mind," reinforces this notion. Fed. R. Evid. 803(3) (emphasis added).

Likewise, the House Committee on the Judiciary issued a note on 803(3) to clarify that a declaration of one person's state of mind is admissible "only to prove his future conduct, not the conduct of another person." H.R. Rep. No. 93-650, Note to Rule 803(3) of Fed. R. Evid., 28 U.S.C.A. at 579 (1973). The Committee's focus on a declarant's *future* acts indicates once more that 803(3) is intended to allow forward-looking statements but not backward-looking ones. *Id.*

Recognizing a spontaneity requirement under 803(3) is nothing new. Indeed, some circuits do. *E.g.*, *United States v. Miller*, 874 F.2d 1255, 1264 (9th Cir. 1989) (excluding a non-spontaneous statement because the defendant had time to reflect). Moreover, determining whether a statement is admissible is a fact-specific inquiry. *Rivera-Hernandez*, 497 F.3d at 81. To make this determination, courts consider: (1) the contemporaneity of the statement; (2) the declarant's chance for reflection; and (3) the statement's relevance. *United States v. Ponticelli,* 622 F.2d 985, 991 (3d Cir. 1977). Accordingly, a statement must have occurred contemporaneously with the event sought to be proved to be admissible. *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (citing *Jackson*, 780 F.2d at 1315). Declarants must not have had time to reflect—and thus fabricate or misrepresent—their thoughts. *Id.* The time for reflection is critical because with time to reflect comes opportunity for misrepresentation. *United States v. Layton*, 549 F. Supp. 903, 909 (N.D. Cal. 1982).

In other words, the more time that elapses between a statement and the period which the declarant is speaking of, the less reliable a statement is. *Ponticelli*, 622 F.2d at 991. Indeed, *any* amount of time that elapses creates opportunity for misrepresentation. *United States v. Naiden*, 424 F.3d 718, 721-23 (8th Cir. 2005) (excluding defendant's statement regarding his belief about the age of his victim because the statement was made the day after he met the victim and thus was not spontaneous); *United States v. Macey*, 8 F.3d 462, 468 (7th Cir. 1993) (excluding

statement for lack of spontaneity because it was made four hours after the fraudulent conduct); *United States v. Jackson*, 780 F.2d at 1315 (excluding statements for lack of spontaneity because they were made two years after charges were brought); *Miller*, 874 F.2d at 1263 (excluding statements for lack of spontaneity when two-hour gap allowed opportunity for fabrication).

The rationale behind these decisions is that, for a statement to be admissible, it must be spontaneous to reduce the likelihood of deliberate misrepresentation. *Rivera-Hernandez*, 497 F.3d at 81. Similarly, recognizing a spontaneity requirement enhances the credibility of admissible statements by ensuring they reflect a declarant's true *then-existing* state of mind. *Id.*

Before going any further, it is important to clarify that courts do not rely *solely* on the time elapsed to determine whether a statement was spontaneous. *Reyes*, 239 F.3d at 743. Context matters. Therefore, courts look at the totality of the circumstances. *See id.* (excluding a statement because "[t]he likelihood that the conversation was being monitored or recorded ma[de] it likely that the defendant's remarks were more self-serving than candid" (citing *United States v. Schwartz*, 924 F.2d 410, 423-24 (2d Cir. 1991))); *Ponticelli*, 622 F.2d at 992 (excluding self-serving statements that were made after the defendant had been arrested).

To be sure, a statement's content impacts its admissibility. *Miller*, 874 F.2d at 1264. In *Miller*, the court excluded statements partially because they reflected the defendant's state of mind about a "past fact" rather than a present one. *Id.* Declarations about a past mental state are less likely to be reliable and trustworthy if the defendant has time to reflect on his conduct. *United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977); *Miller*, 874 F.2d at 1276. Likewise, statements of belief are excluded as well. Fed. R. Evid. 803(3); *see also United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980) (clarifying the distinction between admissible statements of condition, such as "I'm scared," and inadmissible statements of belief, such as "I'm scared

because Galkin threatened me." The court noted that 803(3) permits statements of a then-existing state of mind but not statements regarding *why* a declarant held a particular state of mind.); *United States v. Joe*, 8 F.3d 1488, 1493 (10th Cir. 1993) (excluding testimony about a "belief underlying her fear" because statements of belief are not permitted).

To this end, a statement to prove a then-existing state of mind is "generally admissible only when state of mind is in issue or when it tends to prove the doing of the act intended." *United States v. Peak*, 856 F.2d 825, 827-28 (7th Cir. 1988) (citing *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295 (1892) (a declarant's statement of intent to perform a future act is admissible as both direct and circumstantial evidence under 803(3))).

Our bearings set, we turn our attention to Fenty's statements. In the first voicemail, she stated "I'm getting worried that you dragged me into something I would never want to be part of." (R. at 40.) This is a statement of belief. As noted in *Cohen*, there is a distinction between admissible statements of *condition*, such as "I'm worried," and inadmissible statements of *belief*, like "I'm worried because you dragged me into this." *Cohen*, 631 F.2d at 1225. Fenty's statement falls into the second category. Likewise, her statement "[t]hat's not what's going on here, right?" is another statement of belief because it does not speak to her state of mind. (R. at 40.) Rather, the statement demonstrates her *belief* that she isn't participating in criminal activity. And because Fenty had time to reflect before making the statement, the statement was not spontaneous. (*Id.*)

Meanwhile, Fenty's second voicemail was even less spontaneous because she had ample time to conceive of a self-serving statement to help her case at trial. (*Id*.) As such, her statement "I'm getting really nervous" is not admissible. (*Id.*) And her statement that "I'm really starting to get concerned that you involved me in something I had no idea was going on" is inadmissible as a statement of belief per the distinction in *Cohen*. (*Id.*); *Cohen*, 631 F.2d at 1225.

Moreover, unlike in *Peak*—where the statements occurred during a real-time phone conversation—Fenty seeks to admit voicemails. (R. at 47); *Peak*, 856 F.2d at 827. Leaving a voicemail allows speakers to think about what to say before recording. Indeed, most voicemail systems permit people to erase and re-record. As such, Fenty had the opportunity to think and reflect before making the statements. (R. at 52.) And unlike the statements in *Peak*, Fenty only made the statements *after* learning she may get caught. (*Id.* at 51); *Peak*, 856 F.2d at 833-34. Put differently, the voicemails do not show Fenty's *then-existing* state of mind. (R. at 49.) Nor are they indicative of a present sense impression. (*Id.*) In fact, Fenty even admitted to knowing about the lethal xylazine-fentanyl mixture, and thus her self-serving statement that she didn't know what she was getting into is unreliable because it contradicts evidence. (*Id.* at 44.)

Finally, Fenty argues that her statements are distinguishable from the inadmissible statements in *Ponticelli* and *Jackson* because she had not been confronted by law enforcement when making the statements and thus did not have the same incentive to make self-serving statements. (R. at 50-51); *Ponticelli*, 622 F.2d at 991; *Jackson*, 780 F.2d at 1315. However, this argument is futile. At the time of the voicemails, Fenty knew her packages did not arrive as expected. (R. at 46.) She was already on alert. (*Id.*) For reference, more than seven billion packages were shipped through the U.S. Postal Service in 2022 but there were only 1,804 suspicious mail cases. *A Decade of Facts and Figures*, Postal Facts (Sept. 30, 2022), https://facts.usps.com/table-facts/; *Annual Report 2022*, United States Postal Inspection Service (last visited Feb. 2, 2024), https://www.uspis.gov/wp-content/uploads/2023/07/508_USPIS-ARFY2022-annual-report.pdf. Suffice it to say that package interceptions are not commonplace and thus that Fenty had reason for concern. As such, she had the same incentive to make self-serving statements as *Ponticelli* and *Jackson*. And her statements must be excluded just like theirs.

In sum, this Court should affirm the Fourteenth Circuit's decision to exclude Fenty's voicemails because they do not meet the 803(3) requirement of contemporaneity and spontaneity. The plain language of 803(3) requires that statements be contemporaneous to the events they pertain to. And many circuits have recognized this contemporaneous and spontaneous requirement when determining the admissibility of statements of a declarant's then-existing state of mind. Likewise, 803(3) outright excludes statements of memory or belief. Indeed, disregarding the need to exclude statements of memory or belief under this rule would effectively erase the rule against hearsay—the risk of misrepresentations by defendants to cover their tracks would confuse jurors and undermine the integrity of our criminal justice system.

B. The Trial Court Conducted A Proper 403 Inquiry When Reviewing The Voicemails Under 803(3).

There is an implicit credibility analysis in 803(3). *Ponticelli*, 622 F.2d at 991. Indeed, state of mind declarations have implicit probative value "because the declarant presumably has no chance for reflection and therefore for misrepresentation." *Id.* (first citing Advisory Committee Notes to Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 422-23 (1971); and then citing *Partyka*, 561 F.2d at 125).

Put differently, the credibility of a statement is directly tied to its spontaneity. Fed. R. Evid. 803 advisory committee's note to 2014 amendment (explaining the rationale underlying all 803 exceptions that "circumstantial guarantees of trustworthiness" may be found in some hearsay statements, thus making these statements as reliable as in-court testimony). Consequently, when a court determines that a statement is spontaneous, the court has implicitly determined that the statement has credibility as an indicator of a then-existing statement of mind. *Id.* Likewise, if a court determines that a statement is inadmissible because it was not spontaneous, the court has

implicitly determined that the statement lacks credibility because the declarant had time to reflect and misrepresent their mental state. To this end, declarations about past mental states are less likely to be reliable because of the diminished trustworthiness if a declarant has time to reflect. *Partyka*, 561 F.2d at 125; *Miller*, 874 F.2d at 1276. Thus, the district court's analysis of the voicemails was not an improper 403 analysis, but a proper 803(3) analysis. Fed. R. Evid. 403.

Moreover, allowing Fenty's statements of memory not only violates 803(3) but erases the exclusion entirely. *See Shepard v. United States*, 290 U.S. 96, 105-06 (1933). If such statements were admissible, criminals could make endless backward-looking statements to cover their tracks and confuse the jury. *See, e.g.*, *id.* (excluding a statement because the testimony was backward-facing and spoke to a past act). Indeed, ignoring the distinction between declarations of intention and declarations of memory would bring "an end or near-end to the rule against hearsay." *Id.*

C. Even If The Voicemails Were Erroneously Excluded, The Resulting Error Was Harmless.

In criminal cases, an erroneous evidentiary ruling is reversible only when it "results in actual prejudice because it 'had substantial injurious effect or influence'" on trial. Fed. R. Crim. P. 42(A); Fed. R. Evid. 103(a); *Peak,* 856 F.2d at 834 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). And for erroneously excluded evidence to substantially affect an outcome, it must affect a substantial right. *See Naiden,* 424 F.3d at 723 (an erroneous exclusion of evidence does not justify overturning a conviction if it had no more than a slight effect on a verdict).

To this end, courts consider several factors when determining whether an error was harmless, such as: 1) the weight of the evidence against the declarant; 2) "the ambiguous nature of the statement"; and 3) "the doubt that the jury would credit it." *See, e.g.*, *United States v. DiMaria*, 727 F.2d 265, 272 (2nd Cir. 1984). Here, the weight of the evidence is high compared to the probative value of the voicemails. For example, Fenty opened the P.O. box just two weeks

before the packages arrived and used a fake name on the packages. (R. at 31.) Moreover, the suspicious packages were linked to a fatal overdose that occurred just two days prior. (*Id.* at 55.) Accordingly, even if the exclusion of Fenty's voicemails was erroneous—which it was not—the weight of the evidence against Fenty is so strong that any such error was harmless.

III. FENTY'S PRIOR PETIT LARCENY CONVICTION IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 609(A)(2) BECAUSE THE PLAIN TEXT MANDATES ADMISSION OF CRIMES WHERE PROOF OF A DISHONEST ACT IS AN ELEMENT.

This Court should affirm that petit larceny is admissible for impeachment purposes because the plain text of 609(a)(2) mandates it. Fed. R. Evid. 609(a)(2). 609(a)(2) instructs that a witness's prior criminal conviction "*must* be admitted if the court can readily determine that establishing the elements of the crime require[s] proving . . . a dishonest act or false statement." *Id.* (emphasis added). To this end, a conviction for larceny requires proving a dishonest act: intent to steal. Although this Court has never explicitly defined the breadth of crimes encompassing "dishonest act" in the context of 609(a)(2), the plain text commands—and the drafters intended—that non-violent, dishonest crimes such as larceny be admissible for impeachment purposes. *Id.* Finally, even if this Court finds larceny inadmissible, Fenty's conviction should be affirmed because the limiting instruction rendered the error harmless.

A. The Plain Text Of 609(A)(2) Mandates That Fenty's Prior Petit Larceny Conviction Be Admitted Because Stealing Is A Dishonest Act.

This Court should hold that larceny is admissible *per se* based on the plain text of 609(a)(2). *Id.* 609(a)(2) limits the type of prior convictions that are admissible to those bearing directly on truthfulness. *Id.* More specifically, crimes with elements of a "dishonest act or false statement" *must* be admitted. *Id.* And crimes admissible under 609(a)(2) are not subject to Rule 403 balancing. *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504, 507 (1989); Fed. R. Evid. 403.

As an initial matter, 609(a)(2) does not provide a list of admissible crimes. As such, courts must turn to the plain text for interpretation. *United States v. Salerno*, 505 U.S. 317, 321 (1992). In doing so, courts look to the ordinary meaning of the text using historical and contemporaneous dictionaries. *Arave v. Creech*, 507 U.S. 463, 472 (1993). Further, courts use the context surrounding the text to ascertain its meaning. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). However, the "judicial inquiry is complete" if the text is unambiguous. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Here, the text of 609(a)(2) is unambiguous: any crime that requires proving a "dishonest act" must be admissible. Fed R. Evid. 609(a)(2). And the crime of larceny requires proving a dishonest act because stealing is inherently dishonest—it involves *deceit. United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976). As such, her prior conviction is admissible and the "judicial inquiry is complete." *Germain*, 503 U.S. at 254.

"Dishonest" means "breach of honesty or trust, as lying, deceiving, cheating, *stealing*, or defrauding." *Dishonest, Webster's Third New International Dictionary* (1971) (emphasis added). Indeed, the most common usage of "dishonest" is to describe a "disposition to deceive . . . or steal." *Dishonest, Oxford English Dictionary* (4th ed. 2023). Because courts must presume that drafters intended the plain meaning of their words, larceny convictions are admissible *per se* because intent to steal—a dishonest act—is an element of the crime. *See e.g.*, *United States v. Carden*, 529 F.2d 443, 446 (5th Cir. 1976) (prior larceny conviction admissible when it involved dishonesty); *McHenry v. Chadwick*, 896 F.2d 184, 188 (6th Cir. 1990) (prior "concealing stolen property" charge admissible when it involved dishonesty); *United States v. Del Toro Soto,* 676 F.2d 13, 18 (1st Cir. 1982) (prior larceny conviction admissible because it involved dishonesty)

Now that we've established the meaning of the plain text of 609(a)(2), we turn our attention to the intent behind the rule. The purpose of 609(a)(2) is to make veracity evidence

available to the jury for credibility determinations. *See generally* Fed. R. Evid. 609(a)(2). Moreover, larceny and other non-violent property crimes are often regarded as dishonest acts weighing on the veracity of the witness. *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (explaining that a prior theft conviction is admissible because it suggests lack of veracity).

In *Gordon*, Chief Justice Berger noted that stealing "reflect[s] adversely on a man's honesty and integrity." *Id.* For example, lawyers are disbarred for crimes—like stealing—that adversely impact their integrity. Employers ask applicants whether they've been convicted for stealing. And homeowners would surely be hesitant to ask a thief to housesit while they are away. At bottom, common human experience implies that a person who is willing to take from others for their own personal benefit is less trustworthy. *See Smith*, 551 F.2d at 365 (noting that larceny and similar crimes involving dishonesty bear on veracity whereas violent crimes do not).

Further, this Court should reject Fenty's narrow interpretation of 609(a)(2) because it violates interpretive canons by writing out "dishonest act[s]." This Court has explicitly held that text must not be construed in a way that implies that congress chose superfluous or meaningless words. *Bailey v. United States*, 516 U.S. 137, 146 (1995). To be sure, "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules." *Green*, 490 U.S. at 524. Fenty asks this Court to do just that by asking it to find that larceny convictions are outside the scope of 609(a)(2). (R. at 19.) Finding this would render the phrase "dishonest act" superfluous.[3]

For example, the Second Circuit reasoned that a larceny conviction for "unlawfully receiv[ing] food stamps" is admissible because it involved false statements, but a larceny

[3] The drafters were well-versed in plain text canons. 120 Cong. Rec. 237781 (daily ed. Feb. 6, 1974) (statement of Rep. Danielson) ("[T]here is no point in using both terms . . . unless they mean two different things. . . [I]t was and is my intention that the term "dishonesty" is broader than "false statement," and any offense involving moral turpitude such as stealing . . . is an offense involving dishonesty.")

conviction with no false statement is not. *Estrada v. United States*, 430 F.3d 606, 614 (2d Cir. 2005). This flawed analysis ignores the phrase "dishonest act." Fed. R. Evid. 609(a)(2). Lying to receive food stamps qualifies under both 609(a)(2) categories because it involves a dishonest act—stealing—*and* a false statement. And the rule allows either. If Congress intended to only admit false statement crimes, it would have amended 609(a)(2) from "dishonest act *or* false statement" to "dishonest act *and* false statement." Congress's use of the disjunctive "or" means that statements under *either* category are admissible. *United States v. Woods*, 571 U.S. 31, 46 (2013) (words connected by "or" are given separate meanings). Here, this Court must construe 609(a)(2) in a manner that gives meaning to every word in the rule.

In sum, Fenty's prior larceny conviction is admissible *per se* because that crime requires proof of a dishonest act for conviction. Boerum Penal Code § 155.25. Fenty admitted to knowingly stealing a purse. (R. at 54.) Thus, she intended to "deprive [an]other person of the right to benefit" from her property and "exercise control over the property without [her] consent." *Id.* In this situation—when proof of a dishonest act is an element of a prior conviction—the conviction *must* be admitted. Accordingly, this Court should affirm that Fenty's prior larceny conviction is admissible because it involved a dishonest act—stealing.

B. Legislative History Confirms That Petit Larceny Convictions Are Admissible Because Petit Larceny Is A *Crimen Falsi*—A Non-Violent, Dishonest Crime.

Even if the plain text is ambiguous—which it is not—the Committee Notes and legislative history confirm that larceny convictions are within the purview of 609(a)(2). First, Congress's explicit reference to *crimen falsi* indicates that larceny convictions are admissible. Second, congressional acknowledgement of and subsequent silence on this issue evinces acquiescence. Lastly, Amendments, Senate records, and House records explain that the phrase "dishonest act or false statement" only excludes violent crimes. Larceny is not a violent crime.

Larceny is a *crimen falsi*. The Committee stated that "dishonest act" crimes are those "in the nature of *crimen falsi,* the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity" for truthfulness. S. Rep. No. 93-1277 (1970); H. Rep. No. 93-1597 (1970). In 17th century *crimen falsi* convictions, courts prevented criminals from testifying because purportedly no truth would come from the testimony. 2 John H. Wigmore, *Evidence In Trials At Common Law* 725-26 (James Chadbourn rev. 1979). As time progressed, crimes of larceny, cheat, and forgery were deemed *crimen falsi.* Lloyd L. Weinreb, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Larceny,* 90 Yale L.J. 294 (1980). And courts cannot assume that Congress was ignorant of the common law definition of *crimen falsi*. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (courts cannot imply that "the legislature was ignorant of the meaning of the language it employed"); *Midatlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S. 494, 501 (1986) ("[I]f Congress intends . . . to change the interpretation of a judicially created concept," it must specify the change).

Congress has never refuted the presumption that larceny is admissible. And congressional silence on a known issue can be inferred as intentional if related legislation addresses the issue. *Andrus v. Allard*, 444 U.S. 51, 62 (1979). Of note, many circuits examine the facts underlying a conviction to determine whether it involves "dishonesty." *See e.g., Altobello v. Borden Confectionary Prod. Inc.*, 872 F.2d 215, 216 (7th Cir. 1989) (finding that meter tampering is admissible because the ultimate goal meter tampering is to deceive); *United States v. Cathey*, 591 F.2d 268, 276 (5th Cir. 1979) (finding that "petty larceny involve[s] dishonesty or false statement" and that courts must examine the basis of conviction to determine whether it involved dishonesty); *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977) (noting that governments must prove that a crime involves dishonesty or deceit if the "offense leaves room for doubt").

In the wake of this trend, Congress amended 609(a)(2) but refused to alter the language "even though some cases raise a concern about proper interpretation of the words 'dishonesty or false statement.'" Fed. R. Evid. 609(a) advisory committee's note to 1990 amendment. In doing so, Congress evinced its intent to classify larceny as an admissible *crimen falsi*. Moreover, the 1990 Amendment expressly states that "no amendment [to the plain text of 609(a)(2)] is necessary" even though some courts have taken "an unduly broad view of 'dishonesty'" by admitting convictions for crimes like bank robbery. *Id.* In other words, Congress remained silent on the admission of non-violent crimes involving dishonesty—like larceny—while explicitly chiding the admittance of violent crimes like bank robbery. *Id.* That silence was acquiescence.

To be sure, violent crimes are inadmissible. Fed. R. Evid. 609(a) advisory committee's note to 2006 amendment. But *crimen falsi* are crimes where the ultimate criminal act is one of untruthfulness—like larceny—as opposed to violence. *Id*. Violent crimes have little bearing on character for truthfulness and are inadmissible even if the crime was committed using dishonesty. *Id.*; *Smith*, 551 F.2d at 363. For example, a murderer who lured a victim into their home under false pretenses could not be impeached by their prior murder conviction. Indeed, the Committee acknowledged that crimes requiring force are not dishonest. *See* 120 Cong. Rec. S19913 (daily ed. Nov. 22, 1974) (statement of Senator McClellan) ("There is no deceit in armed robbery. You take a gun, walk out, and put it in a man's face . . . . [N]o deceit in that."). Thus, Congress intended three 609(a)(2) categories: 1) inadmissible violent crimes such as murder and assault; 2) admissible false statement crimes such as perjury and embezzlement; and 3) admissible dishonesty crimes involving neither force nor false statements such as larceny and burglary.

Turning our attention to Fenty's prior conviction, the facts show that the conviction was one of dishonesty, not violence. Fenty tried to conceal her presence to steal a bag. (R. at 60.)

When the victim refused to let go of the bag, Fenty lied with hopes of escaping and then pushed the victim and said "[l]et go or I'll hurt you." (*Id.*) But Fenty admits she had no intention of hurting the victim, and the victim suffered no harm. (*Id.*) Therefore, this was not a crime of violence. *See also* Boerum Penal Code § 155.25 (violence is not an element of petit larceny in Boerum). Fenty was charged with petit larceny because she intended to steal, not because she intended to harm someone. (R. at 22.) Fenty herself admits that she made a false statement to try to convince the woman to give her the bag. (*Id.* at 60.) And since Congress intended for crimes involving deceit—but not violence—to be admissible, her prior conviction must be admissible.

To this end, this Court should reject Fenty's attempt to characterize larceny as a violent crime. (R. at 22.) No precedent supports this characterization. Even circuits refusing to admit larceny under 609(a)(2) do so because they—incorrectly—find that stealing is "stealthy" rather than dishonest, not because larceny is a violent crime. *See Estrada*, 430 F.3d at 614. Likewise, this Court should reject Fenty's argument that her conviction is inadmissible because she was convicted of petit larceny rather than theft by deception. (R. at 21.) Congress stated that *crimen falsi* must be admitted even if the elements of a crime don't express referencing deceit. Fed. R. Evid. 609(a) advisory committee's note to 2006 amendment ("[E]vidence that a witness was convicted of making a false claim to a federal agent is admissible . . . regardless of whether the crime was charged under a section that expressly references deceit . . . or a section that does not."). As such, the fact that Fenty was convicted of petit larceny instead of theft by deception does not change the fact that her crime involved a dishonest act and thus must be admissible.

C. Even If Fenty's Prior Larceny Conviction Was Erroneously Admitted, The Resulting Error Was Harmless.

Fenty contends that the decision to admit her prior conviction was so erroneous that it must be reversed. (R. at 66.) In doing so, Fenty disregards the trial court's limiting instruction

and assumes it was unreliable judicial fiction. (*Id.*) Even if there was an error—which there was not—the error was harmless because of the limiting instruction.

To start, Fenty waived her right to appeal the *motion in limine* by raising her conviction on direct examination. (R. at 52-53.) Defendants cannot preemptively introduce "evidence of a prior conviction on direct" and then "claim that the admission . . . was error." *Ohler v. United States*, 529 U.S. 753, 760 (2000). Further, any possible harm flowing from the admissibility of the prior conviction is "wholly speculative" when the conviction is raised on direct. *Id.* at 759. And courts must avoid speculation when reversing *motions in limine. Luce v. United States*, 469 U.S. 38, 41 (1984). By the same token, allowing defendants to introduce evidence and then challenge its admissibility provides every defendant with a do-over. *Id.* at 42. Here, Fenty strategically raised the conviction to "remove the sting" and appear credible to the jury. *Ohler*, 529 U.S. at 758. She made her bed and now must lie in it. *Id.* (explaining that trials require both parties to make strategic decisions that can be beneficial or detrimental); *see also Salerno*, 505 U.S. at 322 (rejecting adversarial fairness as justification for interpreting the Rules of Evidence).

Alternatively, even if there was any error here—which there was not—the error was harmless because of the limiting instruction and because the government presented substantial evidence against Fenty. (R. at 25-26, 65-66.) Errors that do not depart from constitutional norms or commands of Congress are harmless even if they have a "very slight effect" on the jury's decision. *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). Here, the government presented substantial evidence of Fenty's involvement in a drug trafficking scheme, such as her order of xylazine from Holistic Horse Care, her use of a fake name, and her connection with Millwood. (*Id.* at 65-66.) Therefore, even if her prior conviction had a "slight effect" on the jury, it was not dispositive in light of the weight of the other evidence. *Kotteakos*, 328 U.S. at 765-65.

Likewise, Fenty's assertion that the limiting instruction lacked utility contradicts precedent. *See, e.g.*, *Pennsylvania Co. v. Roy*, 102 U.S. 451, 459 (1880); *Samia v. United States*, 143 S. Ct. 2004, 2013 (2023) (refusing to insinuate that jurors are "too ignorant to comprehend" clear limiting instructions). When there is a limiting instruction and other evidence with substantial probative value, an error is likely harmless even if the admissible purpose of some evidence is at issue. *United States v. Dossey*, 558 F.2d 1336, 1340 (8th Cir. 1977). While not all limiting instructions guard equally against the prejudice of other crimes, those easily understood by a layperson are effective. *Thompson v. United States*, 546 A.2d 414, 426 (D.C. Cir. 1988).

Here, the limiting instruction was straightforward and rendered any error harmless. (R. at 26.) Indeed, this Court has held that jurors are competent to follow instructions in far more complex circumstances, such as to consider mitigating evidence for one defendant but not another at a joint trial. *Kansas v. Carr*, 577 U.S. 108, 124 (2016). Or to hear a confession made in violation of *Miranda* rights. *Harris v. New York*, 401 U.S. 222, 225 (1971). Or, most recently, to consider a defendant's confession at a joint trial. *Samia*, 143 S. Ct. at 2014. In contrast, the instruction here merely asked the jury to consider a conviction for a specific purpose. (R. at 63.) Such an instruction "is . . . readily understood, if not easily followed." *Thompson*, 546 A.2d at 426. As a result, the limiting instruction was constitutional. And to disregard the rule that jurors are obedient enough to follow clear instructions would upend criminal evidence law. *Samia*, 143 S. Ct. at 2014. This Court rejected this argument mere months ago and must do so again here.

CONCLUSION

For the foregoing reasons, the Fourteenth Circuit's decision should be affirmed.

Respectfully Submitted
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