No. 23-695

IN THE

Supreme Court of the United States

FRANNY FENTY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

TEAM 2
Counsel for Petitioner

QUESTIONS PRESENTED

1. Does Fenty have a reasonable expectation of privacy under the Fourth Amendment in sealed packages addressed to her alias when she has used her alias for previous writings and professional communications?

2. Does Federal Rule of Evidence 803(3), which admits statements that reflect the speaker's "then-existing state of mind . . . or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)," admit Fenty's voicemail messages expressing that she was "nervous," "concerned," and "getting worried" about her missing packages?

3. Does Federal Rule of Evidence 609(a)(2), which prohibits evidence about a witness's prior misdemeanor convictions unless the crime requires "a dishonest act or false statement," exclude Fenty's prior petit larceny conviction—a crime of stealth and not deceit?

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The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Franny Fenty v. United States of America*, No. 22-5071, was entered June 15, 2023, and is reproduced in the record at pages 64–73.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provision is the Fourth Amendment to the United States Constitution. The relevant statutory provisions include Federal Rules of Evidence 803(3) and 609(a)(2) and Boerum Penal Code §§ 155.25 and 155.45.

STATEMENT OF THE CASE

Franny Fenty, a storyteller, loves writing short stories and novels. She has published stories twice, both in the *Joralemon College Zine* in 2016 and 2017. R. at 4. Since 2017, she has continued writing, but has not yet achieved publication. R. at 42. Fenty, like many successful writers, uses an alias to identify her works. *Id.* She also uses this alias when she reaches out to publishers through her email—jocelynmeyer@gmail.com—and her signature block reads: "Sincerely, Jocelyn Meyer." R. at 5. Fenty professionally identifies as Jocelyn Meyer because she considers her work "very personal," and she "want[s] privacy." R. at 42. Because she likes privacy, Fenty also opened a P.O. Box under "Jocelyn Meyer." R. at 55.

In December 2021, Fenty was unemployed, so she announced on LinkedIn that she was "looking for a new job opportunity!" R. at 6. She hoped to find a writing-related job, but she also mentioned her past experiences in hospitality and animal care. *Id.* Angela Millwood, a horse handler at Glitzy Gallop Stables and Fenty's high-school classmate, commented on Fenty's post: "It's rough out there, but don't worry. I can help you out with that! Shoot me a message!" *Id.*

Fenty had not seen Millwood since high school, but after Fenty's LinkedIn post, they began talking occasionally. R. at 44. Fenty related to Angela because she also "grew up without much" and had endured "career and financial struggles." R. at 44, 45. Millwood's dedication inspired Fenty because Millwood was seemingly accepting little pay simply because she "truly loved what she did and had devoted herself to the care of these horses." R. at 44. Millwood confided that it "broke her heart to watch the horses suffer in pain as they got older." *Id.*

Millwood wanted to soothe the horses with a muscle relaxer, xylazine, but would lose her job if anyone found out. R. at 45. Fenty, inspired by Millwood's story, offered to help. *Id.* At the time, Fenty knew nothing about xylazine, so she did not suspect unlawful activity. R. at 56. In February 2022, Fenty read an article about Joralemon's emerging xylazine problems. R. at 46. The article slightly worried her, but Millwood reassured her that she only used the xylazine for the horses. *Id.* Law enforcement officers found a package from Holistic Horse Care when they were investigating a fentanyl-xylazine overdose, and they began targeting horse veterinarian packages. R. at 29.

DEA Special Agent Robert Raghavan asked the Joralemon Post Office to flag any packages arriving from "horse veterinarian websites" and notify the DEA. R. at 30. When the post office manager noticed two packages from Holistic Horse Care addressed to Jocelyn Meyer, he flagged them and called Raghavan. R. at 30–31. Raghavan and his partner, Special Agent Harper Jim, seized and tested the packages and found a xylazine-fentanyl mixture. R. at 32.

Because the agents seized the packages, Fenty—to her surprise—discovered an empty P.O. Box when she tried to receive her mail on February 14, 2022. R. at 40. Immediately, she left Millwood a voicemail and stated, "I'm getting worried that you dragged me into something I would never want to be a part of." *Id.* Forty-five minutes later, Fenty left a second voicemail and again expressed her anxiety about the missing packages:

> 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.

Id. Millwood fled the country that same day on a one-way flight to Jakarta. R. at 35.

The next morning, the agents and postal officers coordinated a "controlled delivery" of the resealed packages to ascertain Jocelyn Meyer's identity. R. at 32. They left a note in the P.O. Box that told Jocelyn Meyer to pick up the packages at the counter. *Id.* Fenty found the note, went to the counter, and affirmed that the packages belonged to her. R. at 33. As she left, the agents watched her talk to her college classmate, Sebastian Godsoe. *Id.* Raghavan heard Godsoe say, "Bye, Franny!" *Id.* This prompted Raghavan to ask Godsoe if he knew Jocelyn Meyer, and he responded, "You mean Franny? That was Franny Fenty." *Id.* A grand jury then indicted Fenty because it found that she "knowingly and intentionally" possessed fentanyl, and agents arrested her. R. at 1, 34.

Fenty brought two pretrial motions. R. at 66. First, she moved to suppress the evidence that the agents found in her sealed packages, alleging that the agents violated her constitutional rights. *Id.* Fenty never argued the merits of this claim because the court denied her standing and held that Fenty had no reasonable expectation of privacy in the packages. *Id.*

Second, she moved to exclude evidence about her past petit larceny conviction. *Id.* This conviction, like the charges in this case, happened when Fenty was "in a dire financial situation." R. at 20. She made "a stupid teenage mistake" in 2016 when she stole a woman's bag that contained diapers and $27. R. at 53. Fenty did not plan to steal the bag, but she did so impulsively when her friend, Susie Cahill, dared her to steal it. *Id.*

Fenty did not want to steal the bag, but she wanted to impress Cahill and get money. R. at 59. She glanced around Joralemon City Square and saw a woman watching a street performer. *Id.* When Fenty tried to take the bag, the woman began to yell. *Id.* Fenty forcibly pulled the bag away,

shoved the woman, and threatened, "Let go or I'll hurt you." R. at 60. Fenty ran with the bag, and officers caught her three blocks away. R. at 54. The State charged Fenty with petit larceny. R. at 3. Petit larceny is one of two crimes in Title 5 of the Boerum Penal Code; the second is theft by deception. *Id.* Fenty pled guilty and successfully completed her punishment: two years of community service and probation. R. at 54.

The district court denied Fenty's motion and instructed the jury to only use the past-crime evidence "to ascertain whether the defendant has a character for truthfulness" and not "as a substitute for evidence establishing that the defendant knowingly possessed illegal drugs with the intent to distribute them." R. at 63. Still, Fenty wanted to tell her story to the jury so she could explain "her shock at realizing that she was tricked into purchasing illegal drugs." R. at 19. During the trial, Fenty also argued that the court should admit her voicemails to Millwood because they satisfy the state-of-mind hearsay exception. R. at 43. The district court denied Fenty's motion and excluded the voicemails because, according to the court, Fenty had "time to reflect" between when she noticed the missing packages and when she called Millwood. R. at 47.

Fenty received a guilty verdict and ten years in prison. R. at 66. On appeal, Fenty asserted that the district court erroneously: (1) held that she had no reasonable expectation of privacy; (2) excluded her voicemails; and (3) admitted her misdemeanor conviction. R. at 65. The Fourteenth Circuit affirmed, Fenty appealed again, and this Court granted certiorari. R. at 74.

SUMMARY OF THE ARGUMENT

At Fenty's trial, she lost multiple opportunities to present a full and complete defense to the State's charges against her. Not only did she lose these opportunities, but she also lost the opportunity to challenge the government's unconstitutional actions that led to her charges in the first place. This Court should reverse the Fourteenth Circuit's decision because (1) Fenty's

reasonable expectation of privacy in packages addressed to her alias gives her standing to challenge the search; (2) Fenty's voicemails to Millwood are admissible under Rule 803(3); and (3) Rule 609(a)(2) excludes Fenty's prior petit larceny conviction.

First, Fenty has a reasonable expectation of privacy in the sealed packages addressed to her alias, Jocelyn Meyer. Individuals have a reasonable expectation of privacy in sealed packages addressed to them. When the packages are addressed to an individual's alias, however, the circuits are split as to what evidence the individual must show to establish a reasonable expectation of privacy. This Court should adopt the categorical approach that only requires individuals to show that they are the intended recipient. Fenty has a reasonable expectation of privacy in packages addressed to Jocelyn Meyer because she *is* Jocelyn Meyer, the intended recipient. But even if this Court adopts the more rigorous approach, Fenty does not lose Fourth Amendment protection solely because she used her alias. Rather, Fenty retains a reasonable expectation of privacy in the packages because she has previously used her alias for non-criminal purposes. Thus, under either approach, Fenty has standing to challenge the search of the packages addressed to her alias.

Second, the trial court erroneously excluded Fenty's voicemails because they reflect her state of mind when she left them. Rule 803(3) allows courts to admit hearsay if it reflects the speaker's "then-existing state of mind." Some circuits also require that the statement occur spontaneously with any event that it discusses. The Rules' text and structure demonstrate that Rule 803(3) should only require what its plain text demands: a statement that reflects the speaker's *contemporaneous* state of mind. This Court's precedent also demonstrates that juries—not judges—should determine a statement's truth. Here, Rule 803(3) admits Fenty's voicemails because they reflect her then-existing state of mind. Even if this Court applies a spontaneity requirement, however, Fenty's

statements are spontaneous because she left the first voicemail immediately after she discovered her packages were missing and the second shortly after.

Third, the trial court erroneously admitted evidence about Fenty's prior conviction. Rule 609(a)(2) should only admit past-crime evidence if the elements of the crime require deceit. Circuits disagree on whether courts should look at the elements of a crime or a crime's specific facts when they determine if Rule 609(a)(2) encompasses a prior criminal conviction, however, Rule 609(a)(2)'s text plainly provides that this inquiry should categorically focus on a crime's elements. Further, Rule 609(a)(2)'s legislative history and statutory purpose support narrowly interpreting dishonest to require an element of deceit. Here, Fenty's petit larceny conviction is inadmissible because petit larceny, under Boerum Penal Code § 155.25, does not contain an element of deceit. But even under a fact-specific approach, Fenty stole a woman's bag with stealth and force—not deception. These errors substantially affected Fenty's right to a fair trial, and a limiting instruction cannot cure the harm they caused.

ARGUMENT

Fundamental fairness, this Court has explained, requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Fenty's opportunity, however, was anything but meaningful. Fenty deserved an opportunity to tell her story to the jurors and let them decide her innocence or guilt beyond a reasonable doubt. Instead, the system betrayed her at every turn. It not only stole her opportunity to present a complete defense to the jury; it also deprived Fenty of her only opportunity to challenge law enforcement's unconstitutional actions. Thus, she could not even *present* her case on why the law entitled her to a remedy—suppression of evidence—for the government's actions. And now, because of these errors, Fenty faces the ultimate deprivation: a complete loss of liberty.

I. Fenty has a reasonable expectation of privacy under the Fourth Amendment in the sealed packages addressed to her alias, Jocelyn Meyer.

The Fourth Amendment protects individuals from unreasonable government searches and seizures of their "persons, houses, papers, and effects." U.S. CONST. amend. IV. Individuals may move to suppress unconstitutionally obtained evidence; however, the individual must first show that their "own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978). The term standing "can be a useful shorthand for capturing [this] idea." *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). To establish standing under the Fourth Amendment, individuals must show that they had a subjective expectation of privacy "that society is prepared to recognize as 'reasonable.'" *Minnesota v. Olson*, 495 U.S. 91, 95–96 (1980) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

Individuals have a reasonable expectation of privacy in "[l]etters and other sealed packages" sent through the mail. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984). The reasonable expectation of privacy extends to both the named senders and addressees, "even when those letters and packages are in transit." *United States v. Morta*, No. 1:21-CR-00024, 2022 WL 1447021, *6 (D. Guam May 9, 2022). For non-named individuals, however, the federal circuits are reluctant to extend a reasonable expectation of privacy in mail, "absent some showing by the [individual] of a connection." *United States v. Stokes*, 829 F.3d 47, 52 (1st Cir. 2016). Some circuits have categorically held that an individual may show a connection to the mail if it is addressed to their alias.[1] *See United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992) ("[I]ndividuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names.").

[1] Courts use various terms to reflect the practice of remaining anonymous—e.g., alias, fictious name, false name, pseudonym, *nom de plume*, and alter ego.

Other circuits acknowledge that an individual may show a connection to mail addressed to their alias but impose a more rigorous showing. *See United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021).

Here, Fenty has a reasonable expectation of privacy in the packages addressed to her alias. Using an alias to maintain privacy is a common practice that society has recognized as reasonable. Doing so while sending or receiving mail does not make this established practice unreasonable. The courts that draw lines between criminal and innocent uses of an alias, or require an "established" alias, set a dangerous precedent that undermines the core protections of the Fourth Amendment. However, even under a more rigorous approach, Fenty retains a reasonable expectation of privacy in the packages addressed to her established and non-criminal alias, Jocelyn Meyer. Thus, this Court should reverse the Fourteenth Circuit's decision and remand the case for further proceedings on the merits of her motion to suppress.

A. This Court should hold that individuals have a reasonable expectation of privacy in sealed mail addressed to their alias.

When an individual uses an alias to receive sealed mail, the individual is the addressee in all but name. Recognizing this, the Fifth, Seventh, Tenth, and Eleventh Circuits categorically recognize that an individual can retain a reasonable expectation of privacy in packages addressed to their alias. *See Villarreal*, 963 F.2d at 774; *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003); *United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009). This Court should adopt the categorical approach because society recognizes the use of an alias as reasonable. The categorical approach also maintains an appropriate balance between individuals' Fourth Amendment privacy interests and law enforcement's interest in protecting the public. Under this approach, Fenty retains an expectation of privacy in the packages addressed to her alias, Jocelyn Meyer.

1. The use of an alias is a longstanding practice that society recognizes as reasonable.

Anonymity is one of the most valued and longstanding practices in our society. At the inception of this country, our Founding Fathers published the Federalists Papers under fictitious names. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). This practice still exists today, and it is now a "common and unremarkable practice" to use an alias. *Pitts*, 322 F.3d at 458. For example, authors often use pseudonyms in their professional life for various reasons, including "fear of economic or official retaliation, out of concern for social ostracism, or merely because of a desire to preserve as much of one's privacy as possible." *Id.* Importantly, this common practice extends beyond authors to many other individuals that might want to remain private—e.g., celebrities, government officials, and business executives. *Id.*

Using an alias to send or receive mail is no different. Individuals may choose to remain anonymous when sending or receiving mail for the same reasons they do in the other recognized activities. *Rose*, 3 F.4th at 738 (Gregory, C.J., dissenting) ("Imagine the celebrity avoiding paparazzi; the federal judge facing heightened security risks; the internet-user ordering from strangers; the shopper of sensitive products avoiding prying eyes."). Society does not view this privacy expectation differently because "[t]here is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package." *Pitts*, 322 F.3d at 459. Thus, an individual's expectation of privacy in sealed mail addressed to their alias is one that society is prepared to recognize as reasonable.

2. The categorical approach maintains an appropriate balance between Fourth Amendment privacy interests and law enforcement's interest in protecting the public.

Courts that categorically recognize a reasonable expectation of privacy in an alias adequately protect Fourth Amendment privacy interests without hindering law enforcement's ability to protect

the public from dangerous contents shipped through the mail. First, the categorical approach sufficiently protects individuals' privacy interests without expanding Fourth Amendment protection beyond what is necessary. Because individuals only have Fourth Amendment standing for their *own* privacy interests, an individual cannot merely claim a privacy interest in a package addressed to a third party, without more. *See United States v. Castellanos*, 716 F.3d 828, 848 (4th Cir. 2013) (Davis, J., dissenting) ("An individual who is not the sender cannot assert an expectation of privacy in a mailing addressed to an actual third party because the privacy right, and thus any Fourth Amendment challenge, belongs to that third party."). However, an alias-user is not asserting an expectation of privacy in an interest that belongs to a third party. *See Johnson*, 854 F.3d at 1002 ("[T]here is a fundamental difference between merely using an alias to receive a package and using another's identity."). Instead, an individual retains a reasonable expectation of privacy in their alias because the alias *is* the individual. *See United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981). Thus, the categorical approach does not expand Fourth Amendment protection beyond the appropriate individual.

Next, the categorical approach sufficiently protects the privacy interests of all individuals that show they are the intended recipient of a package. In *Villarreal*, the Fifth Circuit held that the defendants had a reasonable expectation of privacy in packages addressed to an alias because the defendants were the intended recipients. 963 F.2d at 774–75. Although the defendants had never used the alias before, the defendants established that they were the intended recipients when they picked up the packages and introduced themselves as the alias. *Id.* at 773. Thus, *Villarreal* illustrates that—under the categorical approach—individuals need not prove an alias is public or commonly used to show that they are the intended recipient.

The categorical approach further supports the balance between privacy interests and law enforcement because it does not impose a "public-use" requirement. The Fourteenth Circuit misrepresented the law when it stated that "some circuit courts have held that a defendant can have a reasonable expectation of privacy in an alias if the defendant can establish public use of the alias and that the defendant was commonly known by that name." R. at. 67 (citing *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993)). The Fifth Circuit in *Daniel* said no such thing. Instead, it reasoned that the defendant, Ricky Lynn Daniel, did not have a reasonable expectation of privacy in a package addressed to "Lynn Neal" because his "theory of defense was that Ricky Lynn Daniel and Lynn Neal were different persons." *Daniel*, 982 F.2d at 149. Thus, *Daniel* illustrates that an individual must show that they were the intended recipient and cannot do so by asserting that the alias is a different person; however, it does not impose a public-use requirement.

A public-use requirement is inappropriate for two reasons. First, it strips Fourth Amendment protection from most individuals that use an alias to remain private because they use "informal aliases that specifically do *not* bear a public connection to their real identity." *Rose*, 3 F.4th at 738–39 (Gregory, CJ., dissenting). Second, it enables courts to arbitrarily decide *what* is "public enough" and *who* deserves Fourth Amendment protection. For example, the Fourteenth Circuit reasoned that Fenty's prior use of her alias in relation to her writings were either "too distant or too tenuous to create a currently existing public use alias." R. at 67. However, the Fourteenth Circuit arbitrarily imposed a temporal rule that public use of an alias five years prior is "too distant." Further, it sent a dangerous message that aspiring authors' expectations of privacy are "too tenuous" to retain the privacy rights that more successful authors enjoy. Thus, the categorical approach correctly rejects a public-use requirement and adequately protects the privacy interests of all individuals that use an alias to remain private.

Further, the categorical approach recognizes that a reasonable expectation of privacy exists even when an individual uses an alias for criminal purposes. Withholding Fourth Amendment protection—solely because an individual uses an alias for a criminal purpose—contradicts the principle that "[p]rivacy expectations do not hinge on the nature of the defendant's activities—innocent or criminal." *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997). If it did, the government could search any package sent by or addressed to an alias and use the "illegal contents of the package to serve as an after-the-fact justification for the search." *Pitts*, 322 F.3d at 458. Consequently, an innocent individual's remedy is, if they are even aware of the violation, to "bring a civil lawsuit for nominal damages for the technical violation of privacy rights." *Id.* at 459. But the Fourth Amendment requires more than an approach that "undermines the privacy of many law-abiding citizens." *Rose*, 3 F.4th at 740 (Gregory, C.J., dissenting). Thus, alias-users should retain a reasonable expectation of privacy, "even when the false names are used to distance the sender or recipient from the criminal nature of the contents of the package." *Pitts*, 322 F.3d at 457.

Last, if this Court adopts the categorical approach, its Fourth Amendment jurisprudence still provides law enforcement with ample room to protect the public from dangerous contents that are shipped through the mail. Namely, law enforcement can investigate the contents of suspicious mail after they obtain a valid search warrant. *Villarreal*, 963 F.2d at 776. Further, law enforcement has additional avenues in circumstances where obtaining a warrant is not possible. Thus, this Court should adopt the categorical approach because it maintains the appropriate balance between individuals' privacy interests and law enforcement's interest in protecting the public.

3. Under the categorical approach, Fenty has a reasonable expectation of privacy because she is Jocelyn Meyer.

Here, Fenty has a reasonable expectation of privacy in packages addressed to Jocelyn Meyer. Fenty is an author and uses her alias—Jocelyn Meyer—for her professional life because her

writing is personal, and she wants privacy. Fenty has also used her alias to open a P.O. Box and to receive packages for the same reason, privacy. Fenty's expectations of privacy in both her writing and her mail are expectations society recognizes as reasonable. Under the categorical approach it does not matter that, in this instance, the packages addressed to Fenty's alias contained fentanyl.

Further, Jocelyn Meyer is not a third party. Fenty is not attempting to claim a privacy interest in a package that belongs to someone else. Rather, the privacy interest belongs to Fenty because she is Jocelyn Meyer, the intended recipient. Like in *Villarreal*, Fenty showed she was the intended recipient when she accepted the packages from the post office manager and affirmed that the packages belonged to her. Thus, Fenty is the addressee of the packages and retains a reasonable expectation of privacy in them.

B. Even if this Court rejects the categorical approach, Fenty's previous use of her alias establishes a reasonable expectation of privacy in the packages.

The First, Fourth, and Eighth Circuits take a different approach. These circuits generally presume that an individual has no reasonable expectation of privacy in packages not addressed to them "absent other indicia of ownership, possession, or control of the package." *Rose*, 3 F.4th at 728. This approach is known as the "other indicia" approach. *Morta*, 2022 WL 1447021, at *7. Under the other indicia approach, an address or subjective anticipation of a package is not—by itself—sufficient to establish a reasonable expectation of privacy. *See Stokes*, 829 F.3d at 53 (address); *see also United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984) (subjective anticipation). However, an individual "does not automatically lose their right to privacy under the Fourth Amendment solely by using a pseudonym, alias, or *nom de plume*." *Morta*, 2022 WL 1447021, at *9 (adopting the reasoning of the First and Fourth Circuits). Thus, Fenty does not automatically lose a reasonable expectation of privacy in the packages addressed to her alias if this Court rejects the categorical approach.

1. An individual can establish indicia of ownership, control, or possession of a package addressed to their alias.

Under the other indicia approach, an individual's alias can be sufficient indicia to establish a reasonable expectation of privacy in packages. *See Castellanos*, 716 F.3d at 834. However, a few courts require an individual to show more than what is required under the categorical approach—i.e., that the individual is the intended recipient.

For example, the Fourth Circuit has explained that an individual may assert a reasonable expectation of privacy in packages addressed to a fictitious name if the defendant "provide[s] evidence that the fictitious name is an established alias." *Rose*, 3 F.4th at 728. In *Rose*, the defendant did not have a reasonable expectation of privacy in a package when he used a deceased, third-party name—Ronald West—because the defendant provided "no evidence that anyone recognized [him] by the name Ronald West, nor did any evidence show that [he] used the name Ronald West regularly under different circumstances." *Id.* at 730. Thus, the Fourth Circuit required the defendant to not only show he was the intended recipient, but to also show that someone would recognize him as the alias or that he used the alias regularly in a different circumstance.

The Fourteenth Circuit's "public-use" requirement goes beyond the Fourth Circuit's "established-alias" requirement. As mentioned above, the Fourteenth Circuit held that Fenty's prior use of her alias for her writings "are either too distant in timing or too tenuous to create a currently existing public use alias." R. at 67. However, the Fourteenth Circuit's holding is unsupported by caselaw. Namely, the Fourth Circuit is the only circuit to impose an established-alias requirement and even this more rigorous requirement does not support the Fourteenth Circuit's temporal limits. *See Rose*, 3 F.4th at 738 (Gregory, CJ., dissenting) ("None of these cases [cited by the majority] required proof of an 'established connection' to the alias."). Thus, even if

this Court adopts the Fourth Circuit's more rigorous approach, it should reject the Fourteenth Circuit's public-use requirement.

Further, some courts consider the purpose of an individual's alias. For example, a district court that adopted the Fourth Circuit's approach held that an individual loses their right to privacy when they use their alias "*solely* for criminal purposes." *Morta*, 2022 WL 1447021, at *9 (emphasis added). However, the court explained that if a defendant uses an alias for criminal and non-criminal purposes, the defendant "may have a reasonable expectation of privacy so long as it was an established pseudonym." *Id.* at *10. The court's reasoning is consistent with the Eight Circuit's holding in *United States v. Lewis* which declined to find a reasonable expectation of privacy in a mailbox "bearing a false name . . . used *only* to receive fraudulently obtained mailings." 738 F.2d 916, 919–20 n.2 (8th Cir. 1984) (emphasis added). Thus, the other indicia approach only rejects privacy interests in aliases used *only* for criminal purposes.

The Fourteenth Circuit reached a different conclusion because it stripped the context from the caselaw. First, the Fourteenth Circuit cited *Daniel* for the proposition that Fenty does not have standing in packages addressed to her alias "when the use of that alias was obviously part of [her] criminal scheme." R. at 67 (citing *Daniel*, 982 F.2d at 149). Although the Fifth Circuit stated this in dicta, it merely acknowledged *Lewis's* holding described above. *Daniel*, 982 F.2d at 149 n.3 (citing *Lewis*, 738 F.2d at 919–20 n.2). As such, the Fifth Circuit's dicta—in its context—only suggests that an individual might not have standing in packages addressed to their alias used only for criminal purposes.

Second, the Fourteenth Circuit cited a district court case to hold that, because Fenty had "opted to conceal [her] identity, [she] cannot assert a cognizable Fourth Amendment interest in the package." R. at 67 (citing *United States v. DiMaggio*, 744 F. Supp. 43, 46 (N.D.N.Y. 1990)). In

that case, however, the defendants did not have standing as the senders of packages because they sent them with fictitious names and had no way to recall them. *DiMaggio*, 744 F. Supp. at 46. As such, the defendants abandoned the packages in transit and could not claim a privacy interest in abandoned property. *Id.* Further, the defendants did not have standing as the intended recipients because the packages were sent to another individual's address. *Id.* at 44 n.2. Accordingly, the defendants could not assert a privacy interest in the contents of another individual's packages. *Id.* at 46 ("The fact that the defendants may have paid for the concealed cocaine and thus in a sense may be considered the 'owner' of the contents of the packages, however, does not without more establish a legitimate expectation of privacy."). However, under either approach, an individual cannot assert an expectation of privacy in an interest that belongs to another person. Thus, the Fourteenth Circuit erred when it held that Fenty did not have standing because she used her alias—in this instance—to allegedly receive a package for a criminal purpose.

2. Under the other indicia approach, Fenty has a reasonable expectation of privacy because Jocelyn Meyer is her established alias that she has used for non-criminal purposes.

If this Court adopts the other indicia approach, it should still hold that Fenty has standing to challenge the search of the sealed packages addressed to Jocelyn Meyer. First, Jocelyn Meyer is Fenty's established alias. In 2016 and 2017, Fenty published two short stories in her college magazine under the name Jocelyn Meyer. More recently, Fenty has written five novels under the same name. In 2021, Fenty created an email address—jocelynmeyer@gmail.com—and sent manuscripts of these novels to potential publishers. In the emails, Fenty only referred to herself as Jocelyn Meyer. As such, Fenty has used her alias "regularly under different circumstances." *Rose*, 3 F.4th at 730. Further, Fenty's college acquaintance recognized her as Jocelyn Meyer when the agents approached him at the post office. Thus, Fenty provides more than enough evidence to satisfy the Fourth Circuit's established-alias requirement.

Second, Fenty does not use her alias for solely criminal purposes. Fenty's prior use of Jocelyn Meyer for her writings shows that Fenty does not use her alias for solely criminal purposes, even if she allegedly used it to participate in criminal activity here. Thus, Fenty's alias establishes sufficient indicia of ownership, possession, or control of the sealed packages. Accordingly, this Court should reverse the Fourteenth Circuit's decision denying Fenty standing to challenge the search of the sealed packages addressed to her alias.

II. Fenty's voicemails overcome the general bar against hearsay because they reflect her state of mind when she left the voicemails.

The Federal Rules of Evidence, generally, favor admitting evidence. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595–96 (1993). They entrust parties to present their best possible case or defense, which includes exposing flaws in the other side's position and letting the jury decide which arguments prevail. *Id.* Generally, hearsay impedes this goal because a jury cannot adequately assess the credibility of secondhand testimony. *Bruton v. United States*, 391 U.S. 123, 136 n.12 (1968). Thus, the Rules prohibit hearsay, which means that out-of-court statements, when introduced to prove their own truth, are inadmissible. FED. R. EVID. 801, 802.

There are, of course, exceptions. The state-of-mind exception—Rule 803(3)—allows courts to admit hearsay when the statement reflects the speaker's "then-existing state of mind." FED. R. EVID. 803(3). Under this exception, courts uniformly require a statement to be contemporaneous with the state of mind it reflects. *See United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984). In other words, the statement cannot reflect the speaker's state of mind at a time *other* than when the speaker makes the statement. For example, "I felt sick yesterday" would not meet Rule 803(3)'s requirements because it describes a prior state of mind. "I plan to call out sick tomorrow," however, would qualify because it reflects the speaker's contemporaneous plan even though it discusses future events that may or may not occur. At least two circuits have held that a statement need *only*

meet this contemporaneous—or "then-existing"—requirement to satisfy Rule 803(3), which means the court must admit the statement if it fulfills all other admissibility requirements. *DiMaria*, 727 F.2d at 271; *United States v. Peak*, 856 F.2d 825, 833–34 (7th Cir. 1988).

Some circuits read an additional "spontaneity" requirement into Rule 803(3)'s text. *See United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980). These circuits do not always call this element a "spontaneity" requirement; they sometimes exclude "self-serving statements," "untrustworthy statements," or statements where the speaker had a "chance to reflect" or to "fabricate or mispresent his thoughts." *See United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986) (collecting cases). But they do the same thing: add an extra-textual requirement to Rule 803(3) that requires a statement to not just reflect the speaker's then-existing state of mind but to also occur at the same time—or close in time—to what the speaker is talking about.

This Court should hold that Rule 803(3) means what it says, and the Rules' structure, history, and purpose simply bolster the text's plain guidance: The state-of-mind exception only requires that a statement reflect the speaker's contemporaneous state of mind, and it need not occur spontaneously with the event it discusses. Fenty's voicemails describe the feelings she had when she sent them, but even if this Court adopts a "spontaneity" requirement, Fenty's voicemails are admissible because they occur at the same time and close in time to what she discusses—her missing packages.

A. The Rules' text and structure demonstrate that Rule 803(3) admits statements that reflect the speaker's then-existing state of mind.

Rule 803(3) unambiguously requires that to overcome the hearsay bar, a statement need only reflect "the declarant's then-existing state of mind . . . or emotional, sensory, or physical condition." FED. R. EVID. 803(3). The text and structure of the Rules suggest that no additional spontaneity requirement is necessary.

1. "Then-existing state of mind" means that the statement reflects the declarant's state of mind when the declarant spoke.

The plain text of Rule 803(3) only requires that a statement reflect the speaker's "then-existing state of mind." This Court applies general statutory interpretation principles when it interprets the Federal Rules of Evidence. *Daubert*, 509 U.S. at 587. So, as always, "when the meaning of the statute's terms is plain, [the Court's] job is at an end." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1748 (2020).

The job here is at its end. Rule 803(3) unambiguously *only* requires a statement that reflects the speaker's then-existing state of mind, even if the remark is self-serving or exculpatory. *DiMaria*, 727 F.2d at 271. In *DiMaria*, the Second Circuit recognized this when it held that Rule 803(3) required a statement that described what the defendant "was thinking in the present" to reach the jury. *Id.* It explained: "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that Rule are read to mean what they say, its truth or falsity was for the jury to determine." *Id*. Rule 803(3) plainly guides courts to admit statements that contemporaneously portray the speaker's state of mind, and the drafters would have added a spontaneity element if they wanted one to apply.

2. The Rules' drafters expressly imposed timing requirements into hearsay exceptions when they wanted them to apply.

The Rules' structure suggests that the drafters expressly incorporated all of Rule 803(3)'s requirements in its text because the Rules make it clear when a hearsay exception has a fact-specific inquiry about spontaneity or trustworthiness. A statute's overall structure helps guide courts to determine what a specific provision means, and when one portion of an act uses specific language, this Court concludes that Congress deliberately omitted that language from other sections. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353–54 (2013).

The Rules take a categorical approach to hearsay exceptions, meaning they prefer bright-line rules to fact-specific inquiries. The drafters knew a categorical approach would admit some low-value evidence; however, "this evil was doubtless thought preferable to requiring preliminary determinations of the judge with respect to trustworthiness, with attendant possibilities of delay, prejudgment and encroachment on the province of the jury." *DiMaria*, 727 F.2d at 272.

When the drafters wanted to require a fact-specific trustworthiness or spontaneity analysis before a Rule could admit a statement, they made this clear in the Rule's text.[2] In fact, the drafters did this in Rule 803(3) when they created the contemporaneity requirement. They expressly directed, in the text of the Rule, that a statement must reflect the speaker's *then-existing* state of mind. If they also wanted to require the statement to occur at the same time or close in time to an event that the statement described, then they would have done so, like they did in other Rules.

The Advisory Committee's intent to make Rule 803(3) a "specialized application" of Rule 803(1) supports this interpretation. *See* FED. R. EVID. 803 advisory committee note to paragraph (3) ("[Rule 803(3)] is essentially a specialized application of [Rule 803(1)], presented separately to enhance its usefulness and accessibility."). Rule 803(1) allows courts to admit hearsay when the speaker is "describing or explaining an event or condition, made while or immediately after the declarant perceived it." FED. R. EVID. 803(1). This Rule reflects the drafters' belief that someone who describes current or recent events does not have time to fabricate, which increases the statement's reliability. *See* FED. R. EVID. 803 advisory committee note to paragraphs (1) and (2).

[2] *See* FED. R. EVID. 803(1) ("A statement describing or explaining an event or condition, made *while or immediately after* the declarant perceived it."); FED. R. EVID. 803(2) ("A statement relating to a startling event or condition, made *while the declarant was under the stress of excitement* that it caused."); FED. R. EVID. 803(5) ("A record that . . . was made or adopted by the witness when the matter *was fresh* in the witness's memory. . ."); FED. R. EVID. 803(6) (only admitting records of a regularly conducted activity if "the opponent does not show that the source of information or the method or circumstances of preparation indicate a *lack of trustworthiness*"); FED. R. EVID. 804(b)(3) (requiring a statement against the speaker's interest to be "supported by corroborating circumstances that clearly indicate its *trustworthiness*").

This spontaneity requirement, however, necessarily means that the speaker is describing or explaining an external event—like a speaker who calls 911 to describe a burglary in progress. *See People v. Brown*, 610 N.E. 2d 369, 370 (N.Y. Ct. App. 1993).

By contrast, Rule 803(3) describes internal perceptions—not external events. So, the contemporaneous requirement under Rule 803(3) fulfills the same function that the spontaneity requirement serves for Rule 803(1): It ensures that the speaker describes the state of mind *as it occurs.* Not every statement that describes a state of mind correlates to an external event. Some describe internal, physical sensations or emotions unrelated to any external phenomenon. The drafters simply used different language to reflect the Rules' differences. Thus, the Advisory Committee's note, which some circuits rely upon to impose a spontaneity requirement into Rule 803(3), merely reinforces that Rule 803(3)'s contemporaneous requirement is a specialized application of Rule 803(1)'s spontaneity requirement, and courts must admit statements that meet Rule 803(3)'s plain text if they satisfy all other admissibility requirements, like Rules 401 and 403.

3. Rules 401 and 403 sufficiently shield juries from irrelevant, unfairly prejudicial, confusing, or misleading evidence.

Rules 401 and 403 guard against the harmful evidence that a Rule 803(3) spontaneity requirement would exclude. Rule 401 only allows courts to admit relevant evidence, and Rule 403 excludes evidence—even relevant evidence—if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 401, 403. Circuits that have imposed additional requirements into Rule 803(3) often could have excluded the same evidence under Rule 401 or 403 instead. If they used Rule 401 and 403 as designed, they would not have needed to engraft a spontaneity requirement into Rule 803(3).

Rule 803(3) need not encompass a trustworthiness or spontaneity requirement within its text because Rule 401 excludes irrelevant evidence. Sometimes, courts hold that state-of-mind evidence is inadmissible under Rule 803(3) when they should have simply excluded it under Rule 401. For example, in *United States v. Jackson*, the Seventh Circuit held that Rule 803(3) excluded evidence because the defendants had "time to fabricate or to mispresent" their states of mind, but the court noted that this evidence—which represented the defendants' states of mind two years before it mattered—was simply irrelevant. *Jackson*, 780 F.2d at 1315. If the Seventh Circuit had excluded the irrelevant evidence under Rule 401, then it would not have expanded Rule 803(3) beyond the drafters' explicit intent.

Also, Rule 803(3) need not encompass a trustworthiness or spontaneity requirement because Rule 403 sufficiently shelters the jury from harmful evidence when its danger substantially outweighs the evidence's probative value. FED. R. EVID. 403. Rule 403 ensures that the categorical approach to hearsay exceptions does not allow evidence that impairs the judicial process to slip through the cracks; however, Rule 403 was carefully drafted to strike the balance between admitting relevant evidence and excluding unnecessary or harmful evidence. *See Huddleston v. United States*, 485 U.S. 681, 687–89 (1988). Because the drafters intended that courts balance evidence's probative value against its potential dangers under Rule 403, Rule 803(3) should not contain its own trustworthiness analysis where the drafters did not expressly include it.

In *United States v. Miller*, the Ninth Circuit illustrated how Rule 403 may sufficiently catch misleading or confusing evidence that substantially outweighs the evidence's probative value even where the evidence meets Rule 803(3)'s express requirements. *See* 874 F.2d 1255, 1265–66 (9th Cir. 1989). In that case, the court analyzed a statement about the speaker's state of mind and explained that "what little probative value the tape has in showing Miller's mental state is clearly

outweighed by the danger that the jury will be confused or misled by the introduction of these statements. . . ." *Id.* This balancing should have occurred under Rule 403—not Rule 803(3). This demonstrates that the Rules, as written, allow for courts to use their discretion to exclude statements that Rule 803(3) would otherwise allow them to admit.

B. Interpreting Rule 803(3) to only require a then-existing state of mind honors this Court's precedent in *Hillmon*, which Rule 803(3) "left undisturbed."

Rule 803(3) is rooted in *Mutual Life Insurance Co. of New York v. Hillmon*, and the drafters emphasized that Rule 803(3) left *Hillmon's* rule "undisturbed". *See* 145 U.S. 285 (1892); FED. R. EVID. 803 advisory committee note to paragraph (3). In that case, the parties disputed a dead body's identity. *Hillmon*, 145 U.S. at 285–86. The insurance company argued that the dead body belonged to a man named Walters and attempted to introduce Walters's letters where he wrote about his plan to go to Crooked Creek in Kansas—where the body was found. *Id.* at 294–96. This Court admitted the letters, even though they qualified as hearsay, because the letters reflected Walters's state of mind when he wrote them. *Id.* Two rationales from *Hillmon* support construing Rule 803(3) to only require contemporaneity: (1) reliability and (2) protecting the jury's role in a criminal trial.

First, statements about the speaker's "then-existing" state of mind are more reliable than inadmissible hearsay. Most hearsay exceptions exist because they carry a higher likelihood of reliability than most out-of-court statements. *See Idaho v. Wright*, 497 U.S. 805, 815 (1990). In *Hillmon*, this Court emphasized that the only source of state-of-mind evidence is that person's outward expression about the state of mind—either in writing or orally to a third person who testifies about the statement. 145 U.S. at 295. Admitting individuals' expressions about their own states of mind sufficiently meets the heightened reliability standard that underlies hearsay exceptions because every person is the *most* reliable source of that person's state of mind. *See id.*

The contemporaneous requirement shows why Rule 803(3)—as written—supports this heightened reliability rationale. Contemporaneous statements are more credible than statements that describe a past or future state of mind because speakers will least likely misrepresent a state of mind when they are presently thinking or feeling it. *Id.* at 296. Of course, this Court knew that some people lie about what they think, plan, or feel, but it still reasoned that these statements—as a category—carry heightened reliability than most out-of-court statements. *See id.*

Second, if a statement reflects a then-existing state of mind, the jury should decide if it believes the statement. This Court explained in *Hillmon* that a jury should hear the speaker's "natural reflexes." *Id.* at 296. It emphasized that in these cases, alternative evidence about someone's state of mind rarely exists. *Id.* Thus, this Court directed lower courts to admit state-of-mind statements because "[t]heir truth or falsity is an inquiry for the jury." *Id.* Construing Rule 803(3) beyond its text contradicts *Hillmon's* permissive approach to admitting state-of-mind statements and letting the jury decide if these statements reflect the truth.

C. Because the jury is the proper entity to decide Fenty's state of mind, the district court erroneously excluded Fenty's voicemails.

Under either approach, Fenty's voicemails are admissible. Fenty's voicemails satisfy Rule 803(3)'s plain textual requirements. But even if this Court adopts a "spontaneity" or other timing requirement, Rule 803(3) still admits Fenty's statements because she leaves the first voicemail immediately when she discovered her packages were missing, and she left the second only forty-five minutes later. When Fenty stated, "I'm getting worried that you dragged me into something I would never want to be part of," she described her then-existing state of mind. Fenty's state-of-mind evidence is likely her only opportunity to explain that she did not know about Millwood's drug scheme. The jurors—not the court—should have heard the voicemails and decided, for themselves, if they believed Fenty.

On remand, the district court may need to rely on other exceptions, like the present-sense-impression exception, to admit other parts of the voicemails—for example, when Fenty states that she "just got to the Post Office." *See* FED. R. EVID. 803(1). The district court may even need to redact parts of the voicemails to only admit the statements that reflect Fenty's state of mind. But when Fenty expresses her feelings about the missing packages, her statements satisfy Rule 803(3)'s plain requirements and should be admitted.

Even if this Court engrafts a spontaneity requirement into Rule 803(3), Fenty left the voicemails spontaneously. Spontaneous statements generally occur less than an hour after any event that they discuss. *See United States v. Carter*, 910 F.2d 1524, 1530–31 (7th Cir. 1990) (one hour); *United States v. Harvey*, 959 F.2d 1371, 1375 (7th Cir. 1992) (two years); *United States v. Macey*, 8 F.3d 462, 467–68 (7th Cir. 1993) (four hours); *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (few months). Fenty left the first voicemail immediately, but she left both voicemails within forty-five minutes—well below the limits that previous cases suggest. Thus, the district court erroneously excluded Fenty's voicemails even if a spontaneity requirement applies.

The district court's error was not harmless, so this Court should reverse. Harmful error likely occurs when evidence is the primary or sole evidence available and where the contested evidence closely relates to a case's central issues. *See Gov't of V.I. v. Archibald*, 987 F.2d 180, 240–41 (3d Cir. 1993). These voicemails provide Fenty's only opportunity to back up her story—that she did not know that Millwood had illicit plans. And Fenty cannot call Millwood as a witness because she fled the country. This evidence features a core issue in this case: if Fenty knowingly possessed fentanyl. If not, the jury could not find her guilty because she would not meet the elements of the crime. The court should have empowered the jury with all the facts—not just those supporting the government's limited view of Fenty's character.

III. The past-crime evidence about Fenty's past misdemeanor is inadmissible because petit larceny is not a dishonest crime, and admitting it threatens the jury's ability to reach a just verdict.

In everyday life, we often assume people act predictably and in line with a certain "character." We assume others are "good" or "bad," "truthful" or "untruthful." *See Michelson v. United States*, 335 U.S. 469, 475–76 (1948). It is a shortcut: It simplifies our decisions on who to trust, who to avoid, and who to respect because we do not have to reset how we perceive people every time we encounter them. But this natural tendency—to judge someone based on how that person acted in the past—threatens to sabotage "the right to an impartial jury" that the Constitution guarantees. *See* U.S. CONST. amend. VI.

The Rules show that the drafters worried about this tendency and wanted to shield parties, specifically criminal defendants, from its threat. *See* FED. R. EVID. 609 advisory committee note to 1974 amendments. They knew that prejudicial harm, generally, would outweigh character evidence's probative value. *See id.* So, they barred evidence about a person's character if a party introduces it to suggest that a defendant is guilty simply because that defendant is aggressive, immoral, lawless, or some other "bad" personality trait. *See United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998).

There are exceptions. Parties may introduce certain character evidence when it suggests how likely a witness is to tell the truth or lie on the stand. FED. R. EVID. 608. Some past crimes, the drafters concluded, provide these insights. FED. R. EVID. 609(a)(1)–(2). Rule 609(a)(2), for example, creates a bright-line rule and requires courts to admit past-crime evidence against a witness "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." FED. R. EVID. 609(a)(2).

Most circuits look to the elements—not the facts—of a crime to determine if the crime required "a dishonest act." *See United States v. Lewis*, 626 F.2d 940, 946 (D.C. Cir. 1980). If the crime

"leaves room for doubt," some circuits turn to the facts of the witness's past crime to decide if the witness fraudulently or deceitfully committed the crime. *See United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). And a few courts *always* take a fact-specific approach and wholly reject considering a crime's elements. *See United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). A second circuit split exists on what crimes are dishonest crimes. Most circuits narrowly classify dishonest crimes as crimes that "bear[] on the accused's propensity to testify truthfully." *United States v. Fearwell*, 595 F.2d 771, 776–77 (D.C. Cir. 1978). But a few courts broadly define dishonesty to mean something more like general lawlessness or unfairness. *United States v. Kinslow*, 860 F.2d 963, 968 (9th Cir. 1988).

This Court should adopt both majority approaches and hold that (1) Rule 609(a)(2) turns to a crime's elements to decide if the crime is dishonest; and (2) "a dishonest act or false statement" encompasses a narrow set of crimes—those that require the government to prove that the defendant acted deceitfully or deliberately interfered with the court's truth-finding purpose. Fenty did not act deceitfully, so her prior misdemeanor should be excluded. But the Rule's text promotes an easier approach: Petit larceny—Fenty's past crime—is categorically excluded from 609(a)(2) because it does not require an element of deceit.

A. Rule 609(a)(2) expressly requires courts to look at a crime's elements—not specific facts—to decide if a crime involves dishonesty.

Rule 609(a)(2)'s text demonstrates that the drafters intended that courts take a categorical, element-based approach when they decide whether to admit evidence that relates to a witness's past crime. Rule 609(a)(2) only admits past-crime evidence "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." FED. R. EVID. 609(a)(2). This Court interprets statutory language "so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S.

303, 314 (2009). Two phrases suggest that Rule 609(a)(2) mandates an element-based analysis to determine if a crime is dishonest: "elements of the crime" and "readily determine."

First, the text expressly directs courts to look to "the elements of the crime" when they determine if past-crime evidence against a witness is admissible. FED. R. EVID. 609(a)(2). The drafters needed not explicitly refer to "elements" if they intended courts to analyze facts instead. Second, Rule 609(a)(2) only admits past-crime evidence when courts may "readily determine" that the crime at issue is a dishonest one. *Id.* Courts may more readily determine if a crime's element requires deceit than they may analyze specific facts about a witness's past crime.

Further, if a crime's elements "leave[] room for doubt" or otherwise make it unclear if the crime requires dishonesty, then the court—by definition—cannot "readily" determine if the elements of the crime fall under Rule 609(a)(2)'s reach. Thus, Rule 609(a)(2)'s text does not allow a fact-specific analysis regarding a crime's dishonest nature, and this Court should clarify that Rule 609(a)(2) admits crimes that categorically require an *element* of deceit.

B. Under Rule 609(a)(2), dishonest acts are deceitful crimes that suggest that a witness is likely to lie on the stand under oath.

Rule 609(a)(2)'s text excludes past-crime evidence unless the crime involves "a dishonest act or false statement." FED. R. EVID. 609(a)(2). As explained above, statutory interpretation starts with the text, and—when possible—it ends there too. *See Bostock*, 140 S. Ct. 1731. But statutes are not always clear, so this Court looks to additional tools to determine the drafters' intent. *Id.* at 1749. These tools include, among others, legislative history and statutory purpose. *Id.*

1. Interpreting dishonest requires analyzing sources beyond Rule 609(a)(2)'s text.

Rule 609(a)(2) does not define "dishonest." The Ninth Circuit in *United States v. Brackeen* collected various meanings of "dishonesty" and concluded that the term, in Rule 609(a)(2), is ambiguous. 969 F.2d 827, 829 (9th Cir. 1992). Some dictionaries, it explained, broadly defined the

term to mean lacking "fairness," "probity," or "integrity in principle." *Id.* By contrast, others narrowly defined dishonesty as "a disposition to lie, cheat, or defraud." *Id.* While a broad reading of dishonesty would permit Rule 609(a)(2) to admit nearly any crime that "breach[es] . . . community trust," a narrow definition limits Rule 609(a)(2)'s ability to automatically admit past-crime evidence only to crimes that closely connect to a witness's propensity to lie or tell the truth on the stand and under oath. *Id.* Because Rule 609(a)(2)'s plain text is ambiguous, this Court should turn to the Rule's legislative history and statutory purpose—both of which support narrowly interpreting dishonesty.

2. Rule 609(a)(2)'s legislative history demonstrates that the drafters intended dishonest to only encompass a small group of crimes.

In the drafters' Joint Explanatory Statement to Congress, they explained that they intended dishonest to refer to a specific, limited group of crimes. *See* H.R. Rep. No. 93-1597, at 9 (1974). They stated: "By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense or any other offense in the nature of crimen falsi . . . ." H.R. Rep. No. 93-1597, at 9 (1974). Narrowly interpreting dishonest comports with the drafters' express intent for at least two reasons: (1) the listed crimes all require an element of deceit; and (2) "crimen falsi" restricts itself to "crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." *See United States v. Smith*, 551 F.2d 348, 363 (D.C. Cir. 1976).

First, the crimes that the drafters listed all require an element of deceit—the "act of intentionally giving a false impression." *See Deceit*, BLACK'S LAW DICTIONARY (4th ed. 1968). All six of the listed crimes contain a conspicuous deceit element. *See, e.g.*, *Perjury*, BLACK'S LAW DICTIONARY (4th ed. 1968) ("The act or an instance of a person's deliberately making material false or misleading statements while under oath."). This suggests that when a crime does not

contain a deceit element, then Rule 609(a)(2) should exclude the evidence. Crimes of force—like bank robbery, murder, and assault—do not meet Rule 609(a)(2)'s dishonest element. *See Hayes*, 553 F.2d at 827. Many courts also assert that crimes of stealth—like shoplifting, petit larceny, and burglary—fall short of the requisite dishonesty. *Id.*

Second, the drafters labeled dishonest crimes under Rule 609(a)(2) as "crimen falsi." Courts have explored this term's historical meaning since it first emerged in Roman law, and each has held that "crimen falsi"—even in its "broadest sense"—only encompasses crimes "characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." *Smith*, 551 F.2d at 362–63. Thus, Rule 609(a)(2), like the drafters intended, should only apply to crimes that contain an explicit element of deceit.

3. Narrowly interpreting dishonesty to require an element of deceit supports Rule 609(a)(2)'s purpose.

Rule 609(a)(2) results from "a carefully considered legislative compromise growing out of a series of rigorous debates in committees and on the floor of both Houses of Congress." *United States v. Jackson*, 405 F. Supp. 938, 940 (E.D.N.Y. 1975). Two conflicting purposes permeated these rigorous debates: (1) protecting criminal defendants who testify; and (2) safeguarding the government's interest in presenting evidence about a witness's dishonest nature. *See* H.R. Conf. Rep. 93-1597, at 9 (1974). The drafters protected defendant-witnesses when they narrowed Rule 609(a)(2) to only admit dishonest crimes, and they protected the government's interest in truthful testimony when they immunized Rule 609(a)(2) from any judicial discretion. *Id.* They limited this discretion because they believed that dishonest crimes especially demonstrate a witness's propensity to lie on the stand.

This stark departure from the other Rules of Evidence—nearly all of which incorporate a balancing test or judicial discretion—demonstrates that only a narrow interpretation of dishonest

furthers Rule 609(a)(2)'s purpose. When courts interpret exceptions, the exception "must be read narrowly, lest it swallow the rule." *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1212–13 (10th Cir. 2006). Broadly defining dishonest would allow Rule 609(a)(2)—a carefully crafted exception—to swallow the general rule against propensity evidence because broadly, every illegal act is dishonest. If the drafters intended to admit most or all past-crime evidence, then Rule 609(a)(2) would be the rule, and Rule 404(b)'s bar against character evidence would be the narrow exception.

C. The district court erred when it admitted Fenty's past misdemeanor conviction because petit larceny does not require an element of deceit, but even under a fact-specific approach, Fenty did not act with deceit.

Rule 609(a)(2) excludes Fenty's past-crime evidence. Under the elements-based approach, Rule 609(a)(2) does not admit petit larceny convictions because they do not require dishonesty. Dishonest crimes, as explained above, involve an element of deceit, which means they require the defendant to intentionally give a false impression. And like one court succinctly concluded: "Petit larceny is just not that." *Gov't of V.I. v. Toto*, 529 F.2d 278, 281 (3d Cir. 1976). Boerum Penal Code § 155.25, which criminalizes petit larceny, contains no deceit requirement. If Fenty had committed a deceitful crime, the State could have prosecuted her under Boerum Penal Code § 155.45, which criminalizes theft by deception. That crime expressly requires that the defendant deceitfully steal someone's property. But they did not. Fenty pled guilty to petit larceny—not theft by deception.

But even if this Court looks to the crime's specific facts, Fenty did not steal the woman's bag deceitfully. Courts distinguish dishonest crimes from crimes involving stealth or force. *Estrada*, 430 F.3d at 614. In *Estrada*, the Second Circuit explained how non-deceitful petit larceny contrasts with deceitful petit larceny. *Id.* The trial court excluded Estrada's prior larceny conviction even though he took "elusive action to avoid detection." *Id.* Deceit, the court reasoned, requires more than elusive action because "much successful crime involves some quantum of stealth." *Id.* The Second Circuit thus excluded this evidence because it did not meet Rule 609(a)(2)'s dishonest

element. *Id.* But the court also explained when petit larceny *could* involve deceit under a fact-specific analysis. *Id.* (citing *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 2005)). In *Payton*, the defendant falsified a welfare application—under oath—and had illegally received food stamps. *Id.* Because she committed larceny through deceptive means, Rule 609(a)(2) admitted the past-crime evidence. *Id.*

Fenty did not steal the woman's bag through deceptive means. Fenty tried to steal with stealth, but that does not rise her conduct to Rule 609(a)(2)'s level. In the spur of the moment, Cahill dared Fenty to steal the bag, and Fenty acted. She did not plan her crime. She did not plan what to do if she was caught. She did not wish to get caught, though, so she picked a woman who appeared distracted and tried to steal the bag without the woman noticing. This is, at best, a crime of stealth.

Along with stealth, Fenty used force, which courts also distinguish from dishonest crimes under Rule 609(a)(2). This force began when the woman noticed, almost immediately, that Fenty was trying to steal her bag. Forceful crimes necessarily lack deceit because they require aggressors to clearly demonstrate their intent to use force. H.R. Rep. No. 93–1597, at 9 (1974). Fenty clearly demonstrated her intent to use force. Before Fenty grabbed the bag, the woman saw her and "a loud and public altercation broke out." During this altercation, Fenty forcibly pulled back the bag, shoved the woman, and threatened: "Let go or I'll hurt you." This is not deceit—this is force.

Fenty's past-crime evidence did not educate the jury on Fenty's propensity to testify truthfully. But it likely harmed the jury's ability to decide if Fenty met the requisite elements of the drug crime at issue solely based on the permissible evidence that the parties presented. The district court tainted the jury's impartiality because it allowed the jurors to consider impermissible character evidence, and this error unfairly prejudiced Fenty because jurors struggle to use past-crime evidence *solely* to decide a witness's propensity to lie or tell the truth under oath. *See Thompson v.*

United States, 546 A.2d 414, 425 (D.C. Ct. App. 1988). Unlike Fenty's voicemail statements, which this Court should admit, Fenty's prior larceny conviction bears little relation to her case's core issue. Thus, the district court's error was not harmless.

Further, a limiting instruction will not cure this harm. Empirical studies have revealed that limiting instructions heighten the risk of unfair prejudice because it highlights the past-crime evidence. *Thompson*, 546 A.2d at 425. This risk increases when the past crime and the crime at issue resemble each other. *Id.* Here, Fenty's petit larceny conviction resembles the drug crime at issue. Both times, Fenty was financially unstable, involved herself with the wrong person, and allowed that person to influence her conduct. When the jurors found Fenty guilty, they may have assumed that Fenty committed *this* crime simply because she committed that crime too. That is not what the Rules, or the criminal justice system, allows.

CONCLUSION

For these reasons, Fenty respectfully requests this Court to reverse the Fourteenth Circuit's decision.

Respectfully submitted,

TEAM 2P

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