Team 3

Docket No. 23 – 695

IN THE

Supreme Court of the United States

FANNY 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 THE PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Under the Fourth Amendment, does an individual have a reasonable expectation of privacy in a package addressed to an alias they have used in professional settings and publications?

II. Should this Court determine that the trial court abused its discretion in deeming the voicemail messages left by Ms. Fenty as inadmissible when the voicemail messages reflected her then-existing state of mind under Rule 803(3), when dismissing the voicemail messages does not result in a harmless error, and when the judge prematurely determined credibility and infringed on the jury's role in determining credibility of evidence?

III. Should this Court reverse the admission of Franny Fenty's prior misdemeanor conviction for petit larceny for impeachment purpose under Rule 609(a)(2) when her behavior was an 19-year-old teenage mistake, followed by her compliance with legal consequences and it, involved a relatively minor punishment, occurred over seven years ago, and the limiting instructions did not sufficiently mitigate the risk of prejudice?

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hearing of the United States District Court District of Boerum on the motion in limine to exclude evidence of defendant's prior conviction appears on pages 18-26 in the record. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 64-73.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provision is provided below:

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Statement of Facts

Franny Fenty is a young and aspiring writer. R. 5. Beginning in 2016, Ms. Fenty began publishing short stories under the penname Jocelyn Meyer. R. 4. She published several short stories using this penname. R. 4. Then, in October 2021, Ms. Fenty reached out to book publishers using her penname. R. 5. She used an email address, jocelynmeyer@gmail.com, which was registered to Jocelyn Meyer. R. 5. She also signed the email as Jocelyn Meyer. R. 5. Ms. Fenty had several full-length manuscripts she hoped to publish under this penname. R. 5. The publishers never learned Ms. Fenty's true name, as she exclusively used this alias to communicate with them. R. 5.

Having failed to secure a book deal, Ms. Fenty began searching for work on the networking website LinkedIn in December 2021. R. 6. In Ms. Fenty's course of looking for work she had uploaded a LinkedIn post seeking employment and it was that same post that

reconnected her with an old-time friend, Angela Millwood. R. 6. Upon reconnecting, Ms. Fenty and Ms. Millwood discussed both their career goals and financial struggles and it was that conversation where Ms. Fenty learned of Ms. Millwood's place of employment at Glitzy Gallop Stables and learned how passionate Ms. Millwood is about her job. R. 44.

Ms. Fenty acknowledged the passion Ms. Millwood had in working with the horses and taking care of them and understood that Ms. Millwood wanted to help the horses with pain management. R. 44-45. Ms. Fenty was convinced that Ms. Millwood wanted to help the horses because she kept working at the stables even though she was not being compensated well and as a result Ms. Fenty agreed to help Ms. Millwood acquire the muscle relaxer, Xylazine, to make it possible for Ms. Millwood to treat the horses. R. 8. Ms. Fenty ordered the muscle relaxer and had it sent to her P. O. Box. R. 15. This P. O. Box was registered to her penname, Jocelyn Meyer. R. 15. The package containing the muscle relaxer was likewise addressed to this penname. R. 12.

Even though Ms. Fenty agreed to help, she was still feeling nervous to follow through given that she had never heard of Xylazine; however, she knew Ms. Millwood could get fired if she ordered them and to avoid that outcome she decided to support her. R. 45. Ms. Fenty being thorough and wanting to be certain that everything was above board began researching the drug and came across an article citing instances in which the drug and fentanyl are mixed together; Ms. Fenty clearly wanting to make sure she was not involved in any matter related to the article immediately raised her concern with Ms. Millwood to which she responded that the Xylazine was strictly for treating the horses. R. 46.

Upon receiving confirmation of the delivery of the package containing the drug, Ms. Fenty went to get it only to find out it was missing from her P.O. box. R. 47. Due to the packages missing, Ms. Fenty called Ms. Millwood twice within an hour with no response and left two

voicemails expressing her confusion as to why the packages were missing and her concern that she had been involuntarily and unwillingly involved in something she did not want. R. 40.

On February 15, Ms. Fenty was arrested by the DEA. R. 34. During the course of her subsequent criminal trial, Ms. Fenty took the stand and the prosecution introduced evidence of her prior misdemeanor conviction for impeachment purposes. R. 19, 63. At the age of 19, Ms. Fenty, influenced by peer pressure and financial difficulties, engaged in a misguided act of taking a bag from a tourist. This action, as she admits, was a "stupid teenage mistake," driven—not by a criminal intent but rather—by a dare from her then-friend, Susie Cahill, and a desire to impress her. R. 53.

Ms. Fenty, in her attempt to take the bag, did not wish to be noticed. R. 59. However, her approach to the tourist, who was preoccupied with a street performer, and her effort to take the bag were quite conspicuous, as the tourist quickly noticed her actions. R. 53, 59. She yelled and attempted to retrieve her bag from her. R. 53. Ms. Fenty said to her, "Let go or I will hurt you," and pushed her a little to grab the bag back. R. 53, 60. This caused a disturbance in the crowded area and drew the attention from bystanders. R. 53. In this situation, Ms. Fenty, a 19-year-old teenager, was scared and panicked. R. 53. She did not know what to do, as there was no preconceived plan for such a scenario. R. 53, 54, 58. When her friend Susie yelled "Run," she was unable to think clearly and simply followed her instructions, a decision she later recognized as not smart. R. 53. Her attempt to flee did not go far and she was apprehended by the Joralemon police three blocks away. R. 54.

The bag contained 27 dollars in cash and some diapers, and no one was hurt during the incident. R. 54. Ms. Fenty was charged with petit larceny, a misdemeanor, to which she pleaded

guilty. R. 54. Her sentence included two-year community service and two-year probation. R. 54. This was her only criminal conviction. R. 54.

B. Procedural History

Ms. Fenty was charged with Possession with Intent to Distribute 400 Grams or More of Fentanyl, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(A)(vii). R. 1. Prior to trial, Ms. Fenty moved to suppress evidence obtained from the DEA agents' search of the sealed Holistic Horse Care packages on the grounds that the search violated her Fourth Amendment rights, which was denied by the district court. R. 10. Ms. Fenty also brought a motion in limine to exclude evidence of her prior conviction for misdemeanor petit larceny from being used at trial for impeachment purposes on the grounds that the conviction did not qualify as a crime of deceit under Rule 609(a)(2), which was also denied, although the court did include a limiting instruction to the jury relating to the prior conviction evidence. R. 18. During the trial, the Government moved to exclude the recordings of two voicemail messages left by Ms. Fenty on Ms. Millwood's phone on the grounds that the voicemail statements were hearsay and failed to qualify as hearsay exceptions under Rule 803(3), which was sustained. R. 52.

At the conclusion of the jury trial, Ms. Fenty was convicted on one count of possession with intent to distribute a controlled substance, and was sentenced to 10 years in prison. R. 66. On June 15, 2023, Ms. Fenty appealed her conviction to the Court of Appeals for the Fourteenth Circuit. R. 64. The Fourteenth Circuit affirmed the District Court's rulings on all three issues raised on appeal by Ms. Fenty. R. 67-70. On December 14, 2023, the Supreme Court of the United States granted writ of certiorari. R. 74.

SUMMARY OF THE ARGUMENT

This Court should overturn the Fourteenth Circuit's decision on all three issues. First, the Fourteenth Circuit incorrectly ruled against Ms. Fenty on the issue of her package because Ms. Fenty had a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to her publicly used alias. Ms. Fenty had this reasonable expectation of privacy in the package because it was addressed to her publicly used alias, and this reasonable expectation of privacy in the package existed regardless of her intentions, criminal or otherwise.

Second, this Court should reverse the inadmissibility of Ms. Fenty's voicemail messages because they fall under the hearsay exception 803(3) reflecting Ms. Fenty's then existing state of mind and even if they are self-serving, excluding them infringes on the jury's purview and is not a harmless error. Ms. Fenty's voicemail messages showed her then existing state of mind and should have been admissible as a hearsay exception under Rule 803(3) because she did not have a reasonable amount of time to reflect prior to making the statements. Even if the Court is convinced that Ms. Fenty's voicemail messages are self-serving they should still be admitted because excluding them is not a harmless error. The voicemails left by Ms. Fenty should be admissible because the credibility of the statements is a matter for a trier of fact.

Finally, this Court should reverse the admission of Ms. Fenty's prior misdemeanor conviction for petit larceny because the crime does not involve "dishonesty or false statement" under Rule 609(a)(2) and the admission would mislead the jury. This Court should interpret "dishonesty or false statement" narrowly, consistent with Congress's intended denotation and adopted by the majority of courts because stealing is not the same as lying. Based on this definition, this Court should find that Ms. Fenty's prior misdemeanor conviction does not involve dishonesty or false statement because her behavior was an impulsive teenage mistake, followed by an honest acknowledgment of her actions and compliance with legal consequences.

This Court should exclude the prior conviction to avoid misleading the jury because it involved a relatively minor punishment, occurred over seven years ago, and the limiting instruction fails to sufficiently mitigate the risk of prejudice.

ARGUMENT

I. The Court of Appeals Incorrectly Ruled Against Ms. Fenty Because Ms. Fenty Had a Reasonable Expectation of Privacy Under the Fourth Amendment in Sealed Mail Addressed to her Publicly Used Alias.

This Court has long recognized that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable." *United States v. Jacobsen*, 466 U.S. 109, 104 (1984). In other words, absent some evidence that an individual did not have a reasonable expectation of privacy in a specific piece of mail for some legally recognized reason, the defendant is presumed to have a reasonable expectation of privacy in all their sealed mail. The burden of proof is therefore on the government to overcome this presumption, and, as Judge Hoag-Fordjour noted in his dissent, "the Fourth Amendment is not so fragile as to bend to every whim and caprice of law enforcement." R. 71. Here, given that the government has failed to provide any evidence that Ms. Fenty did not have a reasonable expectation of privacy in the package, this Court must overturn the Court of Appeals' decision. To rule otherwise would be to set the absurd precedent that anyone using any name other than their legal name, including long-established nicknames, has no reasonable expectation of privacy in their mail.

A. Ms. Fenty had a reasonable expectation of privacy in the package because it was addressed to her publicly used alias.

The Court of Appeals claims that there is a circuit split regarding whether defendants have a reasonable expectation of privacy in mail addressed to names other than their legal name.

R. 67. No such split exists; courts agree that all individuals have a reasonable expectation in unsealed mail addressed to them, whether the name used is their legal name, a nickname, or some other publicly used alias. *See, e.g., United States v. Stokes,* 829 F.3d 47, 52 (1st Cir. 2016) (explaining that defendant must show a "connection" to the name listed on the mail as the sender or the recipient to have a reasonable expectation of privacy in it); *United States v. Rose* 3 F.4th 722, 729 (4th Cir. 2021) (holding that individuals have a reasonable expectation in packages addressed "to them or to any established alter egos"); *United States v. Givens* 733 F.2d 339, 341 (4th Cir. 1984) (noting that defendants did not have a privacy interest in the package in question because it was addressed "neither to them nor to some entity, real or fictitious, which is their alter ego, but to actual third parties"); *United States v Pierce,* 959 F.2d 1297, 1303 (5th Cir. 1992) (holding that defendant had no reasonable expectation of privacy in the package in question because it was addressed to a real third party, not "a fictitious entity" or "alter ego" of the defendant); *United States v. Pitts* 322 F.3d 449, 454 (7th Cir. 2003) (disagreeing with the district court's ruling that "the expectation of privacy in mailing a package using fictitious names for the sender and addressee is not the sort of interest that society is willing to recognize as reasonable"). As this evidence illustrates, the circuit split mentioned in the Court of Appeals' opinion is fictitious. Using a publicly used alias does not forfeit a person's reasonable expectation of privacy in their mail. The question here is not whether an individual using a publicly used alias has a reasonable expectation of privacy in their mail, but whether Ms. Fenty's alias was sufficiently publicly used to create a reasonable expectation of privacy.

An alias is publicly used if the defendant uses it regularly or others recognize them by that name. For example, in *Rose,* the Fourth Circuit rejected the defendant's argument that the name on the package was his alias because there was "no evidence that anyone recognized" the

defendant by that name, "nor did any evidence show" that the defendant used that name "regularly under different circumstances." 3 F.4th at 730. Likewise, in *Pitts,* the Seventh Circuit listed many ways a defendant might establish an alias, including by using the name as a pseudonym for published works. 322 F.3d at 458.

An individual only forfeits their reasonable expectation of privacy in their mail if the mail is addressed to a real third party. *See, e.g., U.S. v. Pierce,* 959 F.2d at 1303. In *Givens*, the Fourth Circuit rejected the defendant's argument that they had a privacy interest in a package addressed to a third-party business. 733 F.2d at 341. While defendants do have a privacy interest in packages addressed to them or to "some entity, real or fictitious, which is their alter ego," they do not have a privacy interest in packages addressed to "actual third parties." *Id.* According to the court, arguing that a defendant has a reasonable expectation of privacy in mail addressed to a third party would be "analogous to claims that one has a legitimate expectation of privacy in the trunk of another's car . . . or in another's purse." *Id.* at 342. Similarly, in *Pierce,* the defendant argued that he had a reasonable expectation of privacy in a package addressed to another person's name because the package was intended for him. 959 F.2d at 1303. Given that the mail was addressed to another real person, the defendant was "neither the sender nor the addressee" of the package and therefore "ha[d] no privacy interest in it." *Id.*

Ms. Fenty's alias was publicly used because she used it as a pen name in several public capacities, including publishing stories under it. In *Rose,* the defendant's alias was not publicly used because no one recognized them by that name and he did not use it "regularly under different circumstances." 3 F.4th at 730. Here, the record illustrates that Ms. Fenty is recognized by the name Jocelyn Meyer and that she uses it regularly under different circumstances because she has used that name in a professional capacity for nearly a decade. R. 4-5. Indeed, Ms. Fenty

specifically uses the name Jocelyn Meyer as a pseudonym for her published works, which the Seventh Circuit notes is an acceptable way to establish an alias. 322 F.3d at 458. As this evidence illustrates, Ms. Fenty's alias is publicly used in every sense of the phrase.

Furthermore, Ms. Fenty did not forfeit her reasonable expectation of privacy in her package by using an alias because her alias was not a real third party. Courts agree that an individual has no reasonable expectation of privacy in a package addressed to a real third party. *See, e.g., U.S. v. Pierce,* 959 F.2d at 1303. In *Givens*, the Fourth Circuit Courts of Appeals noted that individuals have no reasonable expectation of privacy in packages addressed to "actual third parties;" to claim otherwise would be akin to claiming that individuals have a reasonable expectation of privacy in another's purse or car. 733 F.2d at 341-342. As discussed before, Ms. Fenty's package was addressed to her own alias, not an actual third party. R. 13. Therefore, unlike the *Givens* defendant, who had no reasonable expectation of privacy because his package was addressed to an actual third party, Ms. Fenty did have a reasonable expectation of privacy because her package was addressed to her alias, not an actual third party. Furthermore, in *Pierce,* the defendant had no reasonable expectation of privacy in the package because they were neither the sender nor the addressee" of the package. 959 F.2d at 1303. Here, Ms. Fenty was the addressee of the package; she was merely addressed using a pseudonym. Thus, unlike the *Pierce* defendant, who had no reasonable expectation of privacy because they were neither the package's sender nor addressee, Ms. Fenty did have a reasonable expectation of privacy in her package because she was the addressee.

In ruling against Ms. Fenty, not only did the Court of Appeals ignore established case law, but it also set a dangerous precedent for future cases. If an individual forfeits their reasonable expectation of privacy in their mail by using a publicly used alias, only mail

addressed to an individual's legal name is protected by the Fourth Amendment. In other words, upholding the Court of Appeals' decision would mean that individuals forfeit their reasonable expectation of privacy in their mail by using nicknames instead of their legal names. Anyone receiving a package addressed to a nickname would be unprotected by the Fourth Amendment, no matter how long or frequently they had used the nickname. Such a result would be absurd and cannot be allowed to stand.

B. Ms. Fenty had a reasonable expectation of privacy in the package regardless of her intentions, criminal or otherwise.

As Ms. Fenty noted in her trial testimony, she had no knowledge or intent to receive illegal drugs in the mail. R. 55. However, even if Ms. Fenty intended to use the mail service for criminal purposes or knew she was using the mail service in a criminal manner, she would still have a privacy interest in her sealed mail. *See U.S. v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997). Contrary to the Court of Appeals' assertion that Ms. Fenty did not have a privacy interest in her mail because it was part of her "criminal scheme," the Fourth Amendment protects the privacy rights of all people, including criminals. R. 67 (quoting *United States v. Daniel,* 982 F.2d 146, 149 (5th Cir. 1993).

Indeed, the Court of Appeals cited no binding precedent to support its conclusion that individuals forfeit their privacy rights when involved in criminal schemes. The Court of Appeals relied on the Fifth Circuit's decision in *U.S. v. Daniel,* writing that Ms. Fenty "would not have a [privacy] claim 'when the use of [her] alias was obviously part of [her] criminal scheme.'" R. 67 (quoting 982 F.2d at 149). However, the Court of Appeals neglected to highlight that this quote from *U.S. v. Daniel* was dicta. Having decided at length that the defendant did not have a privacy interest in the relevant package, the Fifth Circuit writes that hypothetically, "even if" the court did accept that the fictional name was the defendant's alias, which it explicitly did not, the court

would "still question whether [the defendant] would have Fourth Amendment 'standing' to assert the claim, particularly when the use of that alias was obviously part of his criminal scheme." *Id.* As this passage highlights, the precedent upholding the Court of Appeals' decision is no precedent at all. It is mere dicta: a thought experiment exploring what might happen if the court believed other than it truly did. Therefore, it is neither binding nor persuasive precedent and does not strongly support the court's decision.

All individuals, even criminals, have a privacy interest in their mail. *U.S. v. Fields,* 113 F.3d at 321. "Privacy expectations do not hinge on the nature of [a] defendant's activities – innocent or criminal." *Id.* (citing to *United States v. Taborda,* 635 F.2d 131, 138 (2d Cir. 1980). Indeed, as the Second Circuit highlighted in *U.S. v. Fields,* "many Fourth Amendment issues arise precisely because the defendants were engaged in illegal activity on the premises for which they claim privacy interests." *Id.* In other words, contrary to the Court of Appeals' assertion, criminals have just as strong of a privacy interest as other individuals, if not more, because the Fourth Amendment's privacy interests are meaningless if they cease to exist as soon as an individual is accused of committing a crime. Therefore, even if Ms. Fenty had criminal intentions, which she did not, the Fourth Amendment would still protect her privacy interests in her mail. As the *Fields* decision underscores, regardless of whether Ms. Fenty's actions were "innocent or criminal," the Fourth Amendment protects her privacy interests. *Id.*

To rule otherwise would be to negate the fundamental purpose of the Fourth Amendment. As Judge Hoag-Fordjour discusses in his dissent, "the Government cannot point to the discovery of illegal drugs as a post-hoc justification for intruding upon the rights of an individual who clearly desired privacy" because doing so would "erod[e] the protections established by the Fourth Amendment" and "se[t] a dangerous precedent." R. 71. In other words, the Fourth

Amendment exists precisely to stop the government from acting as it did here: searching first and finding the justification to do so second. If the government can justify infringing upon individuals' privacy rights because it finds potential evidence of criminality after infringing upon these rights, then those rights have no power because the government could search anyone at any time and justify the search by accusing the individual of a crime they did not commit, as they did to Ms. Fenty.

This Court should consider the dangerous precedent that would be set by upholding the Court of Appeals' decision. Ms. Fenty's actions, criminal or otherwise, have no bearing on her privacy rights. Returning to the issue of Ms. Fenty's Fourth Amendment rights as a whole, Ms. Fenty had a privacy interest in her mail because it was addressed to her publicly used alias, regardless of whether or not her actions were criminal in nature. To rule otherwise would allow the government to search any mail addressed to any name other than a person's legal name, including a lifelong nickname.

II. This Court should reverse the inadmissibility of Ms. Fenty's voicemail messages because they fall under the hearsay exception 803(3) reflecting Ms. Fenty's then existing state of mind and even if they are self-serving, excluding them is not a harmless error and infringes on the jury's purview.

Hearsay statements are deemed admissible if it reflects the "declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)…" Fed. R. Evid. 803(3). Circuit Courts have established three requirements that must be met to for a statement to fall under the exception: (1) the statement must be contemporaneous with the event, (2) whether the declarant had a chance to reflect and (3) statement must be relevant, *U.S. v. Jackson*, 780 F.3d 1305, 1315 (7th Cir. 1986).

While some Courts have interpreted a sense of spontaneity into Rule 803(3) given that it follows closely behind Rule 803(1) Present Sense Impression and Rule 803(2) Excited Utterance

it is not sufficient to determine whether a declarant had enough time to reflect; the Advisory Committee acknowledged this fact when it stated that in most instances "precise contemporaneity is not possible, and hence a slight lapse is allowable" under Rule 803(1) and under Rule 803(2) as it relates to time for reflection there are "no pat answers and the character of the transaction or event will largely determine the significance of the time factor". Slough, Spontaneous Statements and State of Mind, 46 Iowa L.Rev. 224, 243 (1961); McCormick §272, p. 580.

"Courts are particularly reluctant to deem error harmless where the error precludes or impairs the presentation of an accused's sole means of defense." *United States v. Carter*, 491 F.2d 625, 630 (5th Cir. 1974), (quoting *United States v. Paquet*, 484 F.2d 208, 214 (5th Cir. 1973) (concurring opinion)). Defendants have a right to present their defense even if evidence being used may seem unreliable but no court may exclude evidence on the grounds of a defendant possibly making false or unreliable claims as the "presumption of innocence… is a basic component of a fair trial under our system of criminal justice." *See Taylor v. Kentucky*, 436 U.S. 478, 479 (1978).

The rules to hearsay exceptions are structured to address this credibility assessment through predefined categories. If a statement falls within a defined category as an exception, it is deemed admissible without necessitating a preliminary determination of probable credibility by the judge. *U.S. v. DiMaria*, 727 F.2d 265, 272 (2nd Cir. 1984). The structure may exclude certain hearsay statements with a high degree of trustworthiness and admits certain statements with a low one but "this evil was 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." *Id.*

A. .Ms. Fenty's voicemail messages showed her then existing state of mind and should have been admissible as a hearsay exception under Rule 803(3) because she did not have a reasonable amount of time to reflect prior to making the statements.

The Courts having recognized that a "chance for reflection" would go against the hearsay exception under Rule 803(3) have established that the rationale for the hearsay exception Rule 803(3) is that "the declarant presumably has no chance for reflection and therefore for misrepresentation." *U.S. v. Miller*, 874 F.2d 1255, 1264 (9th Cir. 1989) citing *U.S. v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980). In *Miller*, the defendant admitted to a colleague of his involvement in a double agent scheme with an agent from the Soviet Union in which he gave the other agent classified documents from the FBI. 874 F.2d at 1263. The defendant was interviewed by two other agents following his admission for approximately two hours and was then taken home by his supervisor in which he was asked about the statement he gave to his other colleague and he explained that he did not know if the admission reflected something he had done or what the interrogators had told him he did. *Id.* at 1264. The defendant argued that his statement to his supervisor, though hearsay, should have been admitted because it reflected his then existing state of mind however the Court reasoned that Miller "had a sufficient opportunity to fabricate the explanation to [his supervisor] . . ." *Id.*

The voicemail messages made by Ms. Fenty after finding out about the missing packages should be admitted under the hearsay exception Rule 803(3) due to her not having time to reflect thus making it unlikely that it would be misrepresent any fact. We can distinguish our case from *Miller* by looking at the distinctive time gap in which Ms. Fenty left the voicemail messages after finding out about the missing packages. In our case Ms. Fenty attempted to get in contact with Ms. Millwood twice within one hour after realizing that her packages were missing and her voicemail mail messages were approximately 45 minutes apart. R. 39-40. Ms. Fenty testified that

that upon arriving to the post office and seeing the packages were missing she called Ms. Millwood to raise previous concerns she had already expressed. R. 46. Additionally, the Advisory Committee Notes states that Rule 803(3) is a specialized application of Rule 803(1) and with respect to the time element, Rule 803(1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and thus a slight lapse is allowable. Given in our case that Ms. Fenty left both voicemail messages within the hour and they were only separated by about 45 minutes, it is indicative that Ms. Fenty did not have time to reflect and admitting the statements would not be misleading.

B. Even if the Court is convinced that Ms. Fenty's voicemail messages are self-serving they should still be admitted because excluding them is not a harmless error.

While there are instances in which excluding certain evidence would not likely result in a different outcome, Circuit Courts such as the second and seventh circuit have still allowed statements that are hearsay under Rule 803(3) because they can support a defense's main theory of defense. *See U.S. v. Harris*, 733 F.2d 994, 1005 (2nd Cir. 1984). In *Harris*, a criminal informant for the DEA had been in constant contact with the defendant over the course of a few months in an attempt to get Harris to sell him heroin. 733 F.2d at 997. After a series of meetups and phone calls the DEA arrested Harris and at his trial his whole defense strategy relied on convincing the jury that he suspected he was being setup by an informant for months prior to the arrest but followed along out of fear. *Id.* at 997. Harris proffered to the Court that his probation officer could testify that Harris had conversations with him expressing his suspicions but the court found that the statements were self-serving and excluded them and in doing so severely infringed on Harris's defense given that those statements made to the witness would have supported his main theory of defense. *Id.* at 1003. While it was very possible that the jury may have rejected Harris's statements to his probation officer as untrustworthy we "cannot say, with

fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error", *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), and, therefore, "impossible to conclude that substantial rights were not affected." *Id.*

When excluded evidence is probative to the trial's central issue and lends support to the theory of the defense such determination in not admitting the evidence is not a harmless error. *See e.g., U.S. v. Detrich*, 865 F.2d 17, 21 (2nd Cir. 1988). The defendant in *Detrich* was arrested and convicted of importation of heroin found in a wedding suit in his luggage that he was intending to deliver to someone upon returning from India. 865 F.2d at 19. The individual on the receiving end of the suit wrote a statement that was excluded from trial. *Id.* Given that the sole issue at trial was whether Detrich knew the suit he was carrying contained heroin and because no other witnesses were available to corroborate his main defense, the only way he could prove he did not know about the heroin was to testify himself. *Id.* at 21. If the statements had been admitted, it may have enhanced the defendant's credibility on the issue of whether he had the intent to transport the drugs and his defense would have been more plausible especially given that the government could not directly prove the defendant's intent. *Id.* at 22. Moreover, when the government's proof relies primarily on circumstantial evidence, trial errors tend to acquire greater significance. It takes less to tip the scales. *See Rosario,* 839 F.2d at 925 (quoting *United States v. Agurs,* 427 U.S. 97, 113 (1976) ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.")).

Ms. Fenty's voicemail message directly contribute to the main theory of defense and excluding the statements is not a harmless error and will infringe on her right to fair trial. Like in

Harris where the Defendant relied on excluded statements as support for their main theory of defense Ms. Fenty's case faces the same predicament. At trial Ms. Fenty testified that she believed the drugs she bought from Holistic Horse Care were specifically to be used for the horses pain management by Ms. Millwood and because of that reliance she did not understand why her packages would have been taken from her P.O. box. R. 58. The voicemail messages left by Ms. Fenty is direct support for the main theory of her defense in that she had no knowledge that the drugs she ordered were for the purpose of mixing it with fentanyl. The voicemail messages are the only statements that would support her main theory of defense that it reflected her then existing state of mind that she was not aware of a drug scheme by stating in her first message "I'm getting worried that you dragged me into something I would never want to be a part of", and in her second message "I'm really getting nervous." R. 40. As in *Harris*, where excluding the statement effectually left the defendant without a defense, excluding the statements made by Ms. Fenty impairs her ability to the sole means of her defense infringing on her right to a defense.

Given that the voicemail messages are probative on Ms. Fenty's main trial issue the holding in *Detrich* should apply in our case as well. Like the Defendant in *Detrich*, Ms. Fenty had no witnesses to testify and so the only way to prove that she did not know of any drug scheme by Ms. Millwood was for her to take the stand and say so which she did. R. 57. Had the voicemail messages been admitted it may very well have advanced Ms. Fenty's credibility on the crucial issue raised by the government that she intended to distribute the drugs mixed with fentanyl. R. 58.

C. <u>The voicemails left by Ms. Fenty should be admissible because the credibility of the statements is a matter for a trier of fact.</u>

The responsibility of assessing the reliability or validity of presented evidence lies with the jury, not the judge and this includes the possibility of admitting statements as hearsay exceptions, even when they initially seem to lack a high level of trustworthiness. *DiMaria*, 727 F.2d at 271. In *DiMaria*, the defendant was arrested after being found in possession of a truckload of cigarettes that had been stolen and when approached by the FBI he made a statement that was later excluded at trial. 727 F.2d at 270. The government argued that the statement was "an absolutely classic false exculpatory statement" however as false as it may have been it fell within Rule 803(3) and "its truth or falsity was for the jury to determine." *Id.* at 271. In dealing with any argument that declarations of a mental state by an accused could readily be trumped up the Court emphasized that "the singular fallacy ... of taking the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proved guilty" 6 Wigmore, Evidence § 1732, at 159-62 (Chadbourn rev. 1976) directly contradicts the constitution and presumption of innocence. Even more so when the government relies on the presumption of guilty knowledge arising from a defendant's possession of the fruits of a crime there is a stronger case for admitting such statements for the jury to see and confirm its credibility. *DiMaria*, 727 F.2d at 272.

To proactively limit probative and significant evidence that could pose a risk of unreliability undermines the fundamental role of the jury, which is to evaluate the credibility of admissible evidence. *See United States v. Peak*, 856 F.2d 825 (7th Cir. 1988). In *Peak*, the defendant had a conversation with a co-defendant over the phone in which half the conversation was deemed inadmissible and excluded from the trial. *Id.* at 834. The government argued that it was not trustworthy and while certain testimony though admissible as hearsay may be unreliable the "district court, which has broad discretion in evidentiary matters, does not have discretion to

exclude testimony because the judge does not believe the witness". *Id.* Further for a judge to exclude a statement because he believes it to have no credibility is "altogether atypical [and] extraordinary". citing Chadbourn, Bentham and the Hearsay Rule-A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv.L.Rev. 932, 947 (1962).

The voicemails left by Ms. Fenty are not subject to a Court's preliminary discretion and should be admitted for a jury to establish the validity of the evidence. Ms. Fenty is facing the same dilemma as in *DiMaria* where the government claimed that the statement made was properly excluded because it was a "classic false exculpatory statement". 727 F.2d at 271. In our case the government recites the same concern that Ms. Fenty's messages are fabricated and self-serving. R. 48. However, it would be a grave error in following the government's argument in that it contradicts a defendant's presumption of innocence. Furthermore, in our case the government is relying solely on Ms. Fenty's alleged guilty knowledge claiming that she had always known of the drug scheme because she placed the order with Holistic Horse care and paid it with her own money and claims that the only way for her to recover her money was by the sale of the mixed drug with fentanyl. R. 48, 58. Like *DiMaria* the government relying on Ms. Fenty's alleged guilty knowledge makes it even more imperative for the voicemail messages to be admitted and presented to a jury to establish its validity.

The jury's providence role in assessing evidence to establish its validity was infringed when the judge proactively limited the admission of Ms. Fenty's voicemail messages. Like the defendant in *Peak* had their statement excluded merely because the judge deemed it unreliable Ms. Fenty faces the same issue. The trial judge in Ms. Fenty's case on the grounds that the statements seemed self-serving decided that the statements were inadmissible. R. 46. As indicated by the ruling in *Peak* a district court does not have discretion to exclude testimony

because the judge does not believe the witness and here in our case the statements were inadmissible because the judge himself deemed them self-serving instead of allowing for a jury to establish that fact. To allow the ruling from the trial judge excluding the statements when the statements made by Ms. Fenty fall under Rule 803(3) goes against the very nature of the scheme of the Rules in that if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge.

III. This Court Should Reverse the Admission of Ms. Fenty's Prior Misdemeanor Conviction for Petit Larceny Because the Crime Does Not Involve "Dishonesty or False Statement" Under Rule 609(a)(2) and the Admission Would Mislead the Jury.

The impeachment of prior convictions is governed by Federal Rule of Evidence 609 (a)(2). The Rule, in paragraph (a), provides that the following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

> (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

Fed. R. Evid. rule 609(a), 28 U.S.C.A. The majority of federal courts have accepted the term "dishonesty" as descriptive of crimes within a very limited scope. **Eight** circuits strictly define crimes of dishonesty and hold that theft convictions are not automatically admissible. *See*, *e.g.*, *Gov't of Virgin Islands v. Toto*, 529 F.2d 278, 281 (3d Cir. 1976) (holding that absent "special circumstances" conviction of petit larceny is not a crime of *crimen falsi*); *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984) (holding that theft is not a crime involving "dishonesty or false

statement" within the meaning of Rule 609(a)(2)); *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982) (holding that theft crimes do not involve "dishonesty or false statement" within the meaning of rule 609(a)(2) and do not "bear directly on the likelihood that the defendant will testify truthfully); *Linskey v. Hecker*, 753 F.2d 199, 202 (1st Cir. 1985) (holding that the district court balanced the probative value of the evidence against its prejudicial effect in deciding that it was admissible and thus did not abuse its discretion); *United States v. Seamster*, 568 F.2d 188, 191 (10th Cir. 1978) (holding that prior convictions of theft were not automatically admissible and that the trial court should determine the question case by case); *United States v. Hayes*, 553 F.2d 824, 827–28 (2d Cir. 1977) (holding that if the importation involved nothing more than stealth, the conviction could not be introduced); *United States v. Ashley*, 569 F.2d 975, 979 (5th Cir. 1978) (suggesting that crimes involving moral turpitude should not accordingly lead to dishonesty); *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976) (suggesting that the rule denote a fairly narrow subset of criminal activity). **Ten** circuits expressly hold that FRE 609(a)(2) excludes general theft crimes and encompasses only those crimes that include an element of deceit, untruthfulness, or false statement. *See e.g., United States v. Grandmont*, 680 F.2d 867, 871 (lst Cir. 1982) (holding that evidence of purse snatching is not admissible under FRE 609(a)(2) because there were no facts suggesting that the crimes were perpetrated by fraudulent or deceitful means); *United States v. Cunningham*, 638 F.2d 696, 699 (4th Cir. 1981) (holding that although "worthless checks" could conceivably involve forgery, false pretenses or other circumstances within the rubric of "dishonesty or false statement," there is nothing in the record to support such a conclusion and thus, it does not qualify for admission); *United States v. Hastings*, 577 F.2d 38 (8th Cir. 1978); *Ashley*, 569 F.2d 975 (5th Cir.), *cert.denied,* 439 U.S. 853

(1978); *United States v. Dunson*, 142 F.3d 1213, 1215 (10th Cir. 1998) (stating that a straight theft offense is not the type of offense involving Rule 609(a)(2)); *United States v. Hawley*, 554 F.2d 50 (2d Cir. 1977); *Smith,* 551 F.2d at 364 n.28 (stating that if an offense involved nothing more than stealth, the conviction could not be introduced under FRE 609(a)(2); if on the other hand, the offense involved false written or oral statements, the conviction would qualify for admission as a crime of "dishonesty or false statement"); *United States v. Dixon*, 547 F.2d 1079 (9th Cir. 1976); *United States v. Owens*, 145 F.3d 923, 927 (7th Cir. 1998) (excluding misdemeanor theft conviction for stealing car stereo); *Toto*, 529 F.2d 278 **(**3d Cir. 1976). Additionally, **seven** of the ten circuits hold that the trial court may inquire into the underlying facts of a prior conviction in order to determine whether it was a crime involving dishonesty or false statement. *Yeo*, 739 F.2d 385 (8th Cir. 1984); *Grandmont*, 680 F.2d 867 (1st Cir. 1982); *Glenn*, 667 F.2d 1269 (9th Cir. 1982); *Seamster*, 568 F.2d 188 (10th Cir. 1978); *Hayes*, 553 F.2d 824 (2d Cir.), *cert. denied,* 434 U.S. 867 (1977); *Smith*, 551 F.2d 348 (D.C. Cir. 1976); *Toto,* 529 F.2d at 281.

A. <u>This Court should interpret "dishonesty or false statement" narrowly, consistent with Congress's intended denotation and adopted by the majority of courts, because stealing is not the same as lying.</u>

This Court should interpret "dishonesty or false statement" narrowly because the proper test for admissibility under Rule 609(a)(2) does not measure the severity or reprehensibility of the crime, but rather focuses on the witness's propensity for falsehood, deceit, or deception. *Cree v. Hatcher*, 969 F.2d 34, 38 (3d Cir. 1992). The majority of the United States Circuit Courts of Appeals abide by an interpretation taken from the federal legislative history of FRE 609(a)(2). *See*, *e.g.*, *U.S. v. Fearwell*, 595 F.2d 771 (D.C. Cir. 1978); *Toto*, 529 F.2d 278 (3d Cir. 1976);

Glenn, 667 F.2d 1269 (9th Cir. 1982); *Linskey*, 753 F.2d 199 (1st Cir. 1985); *Seamster*, 568 F.2d 188 (10th Cir. 1978); *Hayes*, 553 F.2d 824 (2d Cir. 1977); *Hastings*, 577 F.2d 38 (8th Cir. 1978).

At the time the federal rules of evidence were being considered by Congress, the Conference Committee adopted the present wording of Rule 609(a) as a compromise between differing House and Senate versions. In its report the Conference Committee 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*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

H.R.Conf.Rep. No. 93-1597, 93d Cong., 2d Sess. 9, reprinted in 1974, *U.S.Code Cong. & Ad.News*, 7098, 7103. The report discloses precisely what is meant by "dishonesty or false statement," crimes "bearing on the accused's propensity to testify truthfully." *Toto*, 529 F.2d at 282. Because Rule 609(a) is quite inflexible, allowing no leeway for consideration of mitigating circumstances, it was inevitable that Congress would define narrowly the words "dishonesty or false statement," which, taken at their broadest, involve activities that are part of nearly all crimes. *Hayes*, 553 F.2d at 827. The legislative history shows that Congress intended the phrase to denote "a fairly narrow subset of criminal activity." *Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976).

Furthermore, together with D.C. Circuit, Second, Third, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits have in varying degrees come to the same conclusion that the crime of petit larceny does not involve dishonesty or false statement. *Fearwell*, 595 F.2d at 776; *See Hayes*, 553 F.2d at 827 ("The use of the second prong of Rule 609(a) is thus restricted to convictions that bear Directly on the likelihood that the defendant will Testify truthfully (and not merely on whether he has a propensity to commit crimes).") (emphasis in original); *Toto*, 529 F.2d at

281-282 (Rule 609(a)(2) does not alter previous Third Circuit rule focusing "on the accused's propensity to testify truthfully"); *United States v. Cavender*, 578 F.2d 528, 534 (4th Cir. 1978); *Ashley*, 569 F.2d 975, 978 (5th Cir. 1978) (shoplifting conviction not admissible under Rule 609(a)(2)); *United States v. Papia*, 560 F.2d 827, 847-848 (7th Cir. 1977) (theft convictions "rest(ing) on facts revealing fraud and deceit" admissible under Rule 609(a)(2)); *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977) (adopting Third Circuit's views in *Toto* "[a]n absence of respect for the property of others is an undesirable character trait, but it is not an indicium of a propensity toward testimonial dishonesty."); *Seamster*, 568 F.2d at 190 (Rule 609(a)(2) contemplates crimes "which would tend to show that an accused would be likely to testify untruthfully"). Because crimes involving stealth are distinct from those involving deceit. *Id*. Petit larceny, like multifarious others of a similar nature, simply has no bearing whatever on the "accused's propensity to testify truthfully." *Id*. at 777.

Simply because a defendant has committed a theft crime in the past does not mean that the defendant will lie when testifying. Theft and lying are dissimilar. Human experience does not justify an inference that a person will perjure himself from proof that he was guilty of petty theft. *Ortega*, at 806. An absence of respect for the property of others is an undesirable character trait, but it is not an indicium of a propensity toward testimonial dishonesty. *Id*. The jury could infer that the defendant should be convicted because the prior convictions demonstrate that the defendant is a "bad person" who should be incarcerated irrespective of the guilt for the crime presently charged. This would blur the moral distinction between stealing and lying and undermine the fundamental legal tenet that each charge should be considered on its own merits, independent of past transgressions. Therefore, this Court should interpret the phrase "dishonesty

or false statement" narrowly that on the merits, theft convictions should not be automatically admissible under Rule 609(a)(2).

B. Ms. Fenty's prior misdemeanor conviction does not involve dishonesty or false statements because her behavior was an impulsive 19-year-old teenage mistake, followed by an honest acknowledgment of her actions and compliance with legal consequences.

A conviction for burglary or theft may nevertheless be admissible under rule 609(a)(2) if the crime was actually committed by fraudulent or deceitful means. *Hayes*, at 827. In such a case, the Government has the burden of producing facts demonstrating that the particular conviction involved fraud or deceit. *Smith*, 551 F.2d 348, 364 n.28 (D.C.Cir. 1976). Here, the government did not meet their burden by simply asserting that stealthily taking a mere 27 dollars and some diapers was intended to go unnoticed.

Ms. Fenty's prior misdemeanor conviction does not involve deceit and thus, has no bearing on her propensity to testify truthfully. Ms. Fenty's act of taking a bag is a spontaneous, misguided decision influenced by peer pressure and financial difficulties, rather than a premeditated or deceitful act. R. 53-54. The fact that she described it as a "stupid teenage mistake" suggests a lack of criminal intent and more of an impulsive action. R. 53. There is no indication that Ms. Fenty engaged in deceitful behavior or falsification during the act. R. 53-54. Her attempt to take the bag was conspicuous and not shrouded in deceit. R. 53, 59. She did not employ any form of trickery or misrepresentation to acquire the bag;she did not concoct a premeditated plan to deceive the tourist or manipulate the situation to her advantage. R. 53, 54, 58. In contrast, she was picnicked and "froze for a second." R. 59. Her reaction further indicates a lack of planning, and her behavior seems to be more of a response to an unexpected situation rather than a calculated move to deceive.

In contrast to deceit, her prior conviction shows her sense of responsibility and honesty. Her response after the incident, including her guilty plea and acceptance of the consequences, community service and probation, demonstrates her willingness to acknowledge her mistake and comply with legal processes. R. 54. The misdemeanor being her only criminal conviction suggests that this incident was an aberration in her behavior rather than a pattern of deceitful or untruthful behavior. R. 54. The absence of deceit or false statement in her past behavior adequately supports her propensity to testify truthfully. Therefore, this Court should exclude Ms. Fenty's prior misdemeanor conviction.

C. This Court should exclude the prior conviction to avoid misleading the jury because it involved a relatively minor punishment, occurred over seven years ago, and the limiting instruction fails to sufficiently mitigate the risk of prejudice.

This Court should exclude Ms. Fenty's prior conviction because its probative value is significantly outweighed by its potential to unfairly prejudice the defendant. *United States v. Cohen*, 544 F.2d 781, 784-86 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977). In *Cohen*, the defendant had been sentenced to three years imprisonment for the crime of mail fraud and the time elapsed from the date of release was just 13 years. *Id*. at 785. The court did not admit the defendant's prior conviction when the defendant was charged with tax liability, even though the nature of his prior conviction involved dishonesty. *Id*. The court noted the nature of the prior crime, the similarity between the offense for which he was presently being tried and the offense for which he previously entered a guilty plea, and that both the events to be testified to by the defendant and the acts which constituted the crime he was currently alleged to have committed occurred within ten years of his release from confinement for the earlier crime. *Id*. These factors degraded the probative value of the defendant's prior conviction as the previous conviction becomes more remote and is less similar to the crime defendant was currently charged. *See Id*.

Ms. Fenty's previous offense happened in 2016, more than seven years earlier. R. 66. Compared to the offense in *Cohen*, even though the time elapsed less than ten years, the punishment is much less than three-year imprisonment. R. 54. Further, as "petit larceny bears little resemblance to an illegal drug trafficking charge," the resemblance between petit larceny and an illegal drug trafficking charge is far less pronounced than the similarity between mail fraud and tax liability. R. 70. Therefore, the admission would only mislead the jury.

The trial court's limiting instruction also goes against the strong judicial interest in prohibiting propensity evidence by allowing the jury to infer current guilt from past crime. Even though the purpose of admitting prior conviction evidence is to impeach the witness' credibility, studies show that admission of such evidence significantly increases the chances of a guilty verdict. *See*, *e.g.*, James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 598-600 (1985) (stating that the increased chance of a guilty verdict arising from the admission of prior conviction evidence is too prejudicial because it flies in the face of the presumption of innocence and the Anglo-American notion that we try cases rather than people); W. R. Cornish &A. P. Sealy, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208 (In an experiment, the number of jurors voting to convict a defendant rose 30%, after being exposed to the impeachment evidence of the defendant's past conviction.). The studies attributed their result to juries' tendency to perceive prior convictions as proof not only of the defendant's lack of veracity, but also of the defendant's general propensity to commit crimes. *See To Take the Stand or Not To Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 220 (1968). This combination causes the jury to believe it is more likely that the defendant committed the crime charged. Jury examinations conducted by the researchers at the University of Chicago, for

example, indicated a widespread inability or unwillingness of jurors to understand or follow the court's instruction on the use of a defendant's prior criminal record for impeachment purposes. Jurors almost universally used the defendant's prior convictions to conclude that the defendant was a bad person and therefore was more likely to be guilty of the crime charged. *See Other Crimes Evidence at Trial: Of Balancing and Other Matters,* 70 YALE L.J. 763, 777 (1961) (citing letters from Dale W. Broeder, Associate Professor, the University of Nebraska College of Law, and Harry Kalven, Jr., Professor, the University of Chicago Law School, both of whom conducted intensive jury interviews). Jurors almost universally used the defendant's prior convictions to conclude that the defendant was a bad person and therefore was more likely to be guilty of the crime charged. Because the jury is likely to misuse the admission of prior convictions to infer that the defendant has a criminal propensity rather than a propensity to lie on the stand, the admission of prior conviction and jury instruction should be carefully considered.

Moreover, the Supreme Court has consistently recognized that limiting instructions are frequently, if not always, ineffective. *See Samia v. United States*, 599 U.S. 635, 648 (2023) ("because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [defendant]'s guilt, violated [defendant]'s right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.") (examining the rule set forth in *Bruton v. United States*, 391 U.S. 123, 129 (1968) (stating that limiting instructions are intrinsically ineffective)). In addition, studies have shown that juries customarily ignore limiting instructions and use evidence of prior convictions to draw prejudicial and legally impermissible inferences. *See* Anthony N. Doob & Hershi M. Kirshenbaum*, Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon an Accused*, 15

CRIM. L.Q. 99(1972) (stating that the assumption that limiting instructions are effective is unsupported in psychological literature).

Considering the above factors, defendants like Ms. Fenty are facing a dilemma: between testifying in their own defense and facing the inherent prejudice associated with prior conviction evidence or foregoing the constitutional right to testify and allowing the jury to infer guilt from their silence. When Ms. Fenty offered to take the stand and wanted to explain to the jury, in her own words, "her shock at realizing that she was tricked into purchasing illegal drugs," she should not be punished for humanizing and defending herself. R. 19.

To fulfill the objectives of a fair jury trial, this Court should exclude Ms. Fenty's prior misdemeanor conviction.

CONCLUSION

For all of the foregoing reasons, Petitioner, Fanny Fenty, respectfully requests that this Court overturn the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

Team 3

Counsel for Petitioner