Team 4P - Original

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 23–695

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 4P
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether Defendant has a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to the Defendant's alias that she uses for professional endeavors and the P.O. box is registered under her fictitious business name.

II. Whether recorded voicemail statements offered by a Defendant to show a then-existing mental state can be admitted as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence where the statements were recorded voicemails the Defendant made expressing her distress concurrent with her discovery and search for her missing packages.

III. Whether Defendant's impeachment by evidence of her years-old prior conviction for petit larceny was proper under Rule 609(a)(2) of the Federal Rules of Evidence where the charging statute does not include express language of deceit and where the Defendant's behavior was not premeditated and was committed using force and aggressive language.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Constitutional Provisions

Other Authorities

OPINIONS BELOW

The transcript of the hearing on the motion to suppress heard by the United States District Court for the District of Boerum appear in the Record at pages 10–17. The transcript regarding the motion in *limine* to exclude prior conviction impeachment evidence appear in the Record at pages 18–26. The transcript of the trial record and bench ruling on the hearsay issue appear in the Record at pages 47–52. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the Record at pages 64–73.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment states:

> 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 FACTS

Franny Fenty (hereinafter "Ms. Fenty") is an experienced writer and novelist. (R. 5–6). Successfully publishing magazines under her business name, "Jocelyn Meyer," Ms. Fenty has consistently sought to grow her public audience by selling her latest novels to publishers. (R. 4–5). While continuing her work as an active author, Ms. Fenty simultaneously looked for work to stay afloat. (R. 6). After reaching out to her network through a LinkedIn post on December 28, 2021, Angela Millwood, a former friend from high school who worked at a horse stable as a handler, offered Ms. Fenty a job opportunity. *Id.*

Ms. Millwood instructed Ms. Fenty to purchase horse tranquilizers that Ms. Millwood would in turn provide to ailing horses in pain (R. 45). Believing this was a legitimate business opportunity, Ms. Fenty paid to register a P.O. box under her business name, "Jocelyn Meyer." (R. 31). She then ordered the horse medication from Holistic Horse Care and had it shipped to

her P.O. box. (R. 43, 45). In addition to using the P.O. box for her professional endeavors, Ms. Fenty also had personal items from Amazon shipped to the P.O. box under her legal name, Franny Fenty. (R. 38, 43).

Ms. Fenty believed she was distributing harmless horse tranquilizers for veterinary use. (R. 7). At the time, she was unfamiliar with the drug xylazine and only knew that it could be used on horses. (R. 45). Ms. Fenty believed her friend was a dedicated animal lover who "planned to administer muscle relaxers to the horses to help with their pain." (R. 44, 45). When Ms. Fenty read local reporting on xylazine–fentanyl mixtures, she contacted her friend and received assurances that she was not involved in anything illegal. (R. 46).

1. The Government's Seizure of Ms. Fenty's Packages

Like many other towns, Joralemon has been impacted by the opioid epidemic. (R. 7). In 2021, federal agents were eager to curb drug use in Joralemon. (R. 36). In early 2022, an unauthorized federal agent speaking on the xylazine–fentanyl national epidemic told the Joralemon press, "If you are selling this dangerous drug, we will find you and do whatever it takes to stop you." (R. 7, 65).

Acting solely on the knowledge of a single overdose involving xylazine–fentanyl mixture, on February 14, 2022, Drug Enforcement Administration Special Agent Raghavan began working with the Joralemon Post Office in an attempt to find drugs shipped through the mail. (R. 29–30). He flagged Ms. Fenty's packages and sought a warrant based only on the fact that the sender was a horse health company. (R. 31, 37–38). No other information led Agent Raghavan to believe Ms. Fenty's packages contained drugs. (R. 37). Agents then seized Ms. Fenty's parcels and intercepted them at the post office. (R. 31).

Ms. Fenty received a delivery confirmation on February 15, 2022. (R. 46). She quickly

went to retrieve her packages, but when she arrived, she found all of her packages missing. (R. 40, 46). Inside her P.O. box was a slip to pick her packages up from the front counter. (R. 66). Ms. Fenty called her friend right away saying she "just got to the Post Office," and "none of packages [she] was expecting are here." (R.40). She wanted to ensure nothing was wrong with the transaction. *Id.* She went on to express that she was "getting worried [Ms. Millwood] dragged [her] into something," and she wanted to make sure that she had not been involved in any illegal activity questioning, "that's not what's going on here, right?" *Id*. Continuing to work with the postal workers who "[didn't] know what was going on" to sort through the mystery of the missing packages, Ms. Fenty again called her friend forty-five minutes later to express that "[she was really starting to get concerned that [Ms. Millwood] involved [her] in something" and that she was "really getting nervous." *Id.*

2. Ms. Fenty's Prior Conviction of Petit Larceny

In 2016, Ms. Fenty was convicted of petit larceny under Boerum Penal Code (hereinafter "BPC") § 155.25 as a nineteen-year-old for stealing a woman's diaper bag and twenty-seven dollars cash; Ms. Fenty is naturally nervous of being pulled into illicit behavior. (R. 19, 52). Ms. Fenty acted thoughtlessly on a dare and did not engage in any planning before the attempt, nor did she make any efforts to hide her theft. (R. 54). Her crime consisted of walking up and attempting to grab the victim's bag. (R. 23). When that failed, she threatened the victim loudly and forcefully grabbed the bag. *Id*. This prior theft is years distant from the current case and amounted to a spontaneous, "not very sneaky," "stupid teenage mistake." (R. 53).

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)(vi) on February 14, 2022. (R. 1). In the District Court, Ms. Fenty moved to suppress the contents of the packages seized from her

P.O. box. (R. 10–17). She moved to exclude evidence of her prior petit larceny conviction under Federal Rules of Evidence (hereinafter "Rule") 609(a)(2). (R. 18–26). She also moved to admit the voicemail statements she left Ms. Millwood upon discovering her parcels were missing under Rule 803(3) (then-existing mental state hearsay exception). (R. 43–52). The District Court denied all of these motions. (R. 66). Ms. Fenty was convicted on September 21, 2022, and a sentence was entered on November 10, 2022. (R. 64). Following the conviction, Ms. Fenty appealed all three of the District Court's rulings to the United States Court of Appeals for the Fourteenth Circuit. *Id.* The Fourteenth Circuit affirmed all of the District Court's rulings with Circuit Judge Hoag-Fordjour dissenting. (R. 65–73). The Court granted writ of certiorari on December 14, 2023. (R. 74).

SUMMARY OF ARGUMENT

The Court should reverse the Fourteenth Circuit's decision because (1) Ms. Fenty had Fourth Amendment standing to challenge the seizure of parcels from her P.O. box because she had a reasonable expectation of privacy at the time of the seizure, (2) Ms. Fenty's voicemail messages are admissible because they meet Rule 803(3)'s contemporaneousness requirement, and (3) Ms. Fenty's prior petit larceny conviction is inadmissible because it was not a crime of deceit as required by Rule 609(a)(2).

First, parcels shipped through the mail receive the highest level of privacy and protection from unlawful searches and seizures under the Fourth Amendment. These privacy guarantees are granted where a defendant has both a subjective and an objectively reasonable expectation of privacy. The Court has never addressed whether a person shipping packages possesses an objectively reasonable expectation of privacy, and consequently a split exists among the circuits. The majority of circuits that have reached the issue adopt a broad rule aligned with the

fundamental rights to privacy granted by the Fourth Amendment. These circuits hold that a person has a reasonable expectation of privacy when shipping parcels even under a fictitious name. Only the First and Fourth Circuits look beyond this and require a defendant using a fictitious name to establish other indicia of connection to a parcel.

The Fourteenth Circuit erroneously adopted the most restrictive test, from the Fourth Circuit, which asks courts to first establish if a fictitious name is a "public use alias" and then to examine other connections to a parcel. The Court adopting this approach to determine a defendant's reasonable expectation of privacy would expand the Government's ability to search first and justify searches after the fact. The discord created by a circuit split that interprets privacy rights differently across a national mail system makes inevitable disparate treatment based solely on the circuit a defendant's mail traverses. The Court should clarify the test for the lower courts and instead adopt the clear rule applied by the majority of circuits.

Second, Ms. Fenty's voicemails must be admitted under Rule 803(3) because her declarations reflect her contemporaneous state of mind while at the post office, she had no time to reflect, and the voicemails are relevant to establishing her lack of criminal intent to distribute the fentanyl contained in her packages. Rule 803(3) does not require spontaneity for a declaration to be admitted, allowing lapses of time. Ms. Fenty had no opportunity to fabricate her statements because she could not have anticipated having to leave a voicemail. Moreover, her statements were not self-serving because she did not make her statements to law enforcement and had no reason to believe she was under investigation. The District Court's failure to admit her voicemails under Rule 803(3) is a harmful error because the voicemails are critical to her defense, showing she possessed no intent to distribute fentanyl. Thus, the Court should reverse and hold that Ms. Fenty's voicemails are admissible under Rule 803(3) and remand for retrial.

Finally, Ms. Fenty's prior conviction for petit larceny is inadmissible under Rule 609(a)(2). Ms. Fenty committed a crime of force, not a *crimen falsi*–one involving dishonesty or false statement. At most, she only engaged in a "quantum of stealth" while shoplifting, so her actions do not rise to the requisite level of deceit for a *crimen falsi*. Moreover, Boerum's petit larceny statute does not include any reference to deceit, unlike Boerum's theft by deception statute, BPC § 155.45, which requires deceit expressly. Even when considering the underlying basis of her conviction, Ms. Fenty's behavior displayed no communicative or expressive dishonesty. Failure to exclude Ms. Fenty's conviction from the jury's consideration constituted harmful error because the evidence significantly diminished her credibility and contributed to her ultimate conviction. The Court should hold the District Court's error is harmful, reverse Ms. Fenty's conviction, and remand for retrial.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MS. FENTY'S MOTION TO SUPPRESS PACKAGES SEIZED FROM HER P.O. BOX BECAUSE MS. FENTY POSSESSED A REASONABLE EXPECTATION OF PRIVACY FOR PACKAGES MAILED TO HER FICTITIOUS NAME.

The Fourth Amendment establishes the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. To determine if a defendant has standing to suppress evidence based on a Fourth Amendment violation, Fourth Amendment rights must be asserted by the party aggrieved by the search or seizure and may not be "vicariously asserted." *Alderman v. United States,* 394 U.S. 165, 174 (1969). The individual challenging a search's legality has the obligation to demonstrate that "he himself was the victim of an invasion of privacy." *United States v. Salvucci*, 448 U.S. 83, 85 (1980). The issue of standing is intertwined with an inquiry into a particular defendant's Fourth Amendment rights, because standing is established when "the disputed search and seizure has

infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 139–40 (1978). Thus, the proper analysis of a particular defendant's Fourth Amendment standing requires a substantive determination of whether that defendant possessed a Fourth Amendment right rather than a bifurcated inquiry that addresses standing as an independent threshold question. *Id.*

A substantive determination of Fourth Amendment rights focuses on the protection of "people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Although courts often reference a "place" when discussing a violation, the inquiry centers on a twofold requirement relating to an individual's expectation of privacy; first, that a person has exhibited an "actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J. concurring). The Court has firmly established that letters and sealed packages in the mail are "fully guarded from examination and inspection." *Ex parte Jackson*, 96 U.S. 727, 733 (1877). And so, individuals have long been understood to possess a reasonable expectation of privacy for items sent through the postal service. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984). Here, the lower court erred because it determined that Ms. Fenty's lacked a reasonable expectation of privacy in the shipment of her packages due to her use of a fictitious name and therefore had no standing to mount a Fourth Amendment challenge.

The Court has not adopted a uniform test to decide if a defendant possesses an objective reasonable expectation of privacy where a fictitious name is used in the shipping of sealed packages through the mail. Now, the Court can and should adopt the broad bright line rule used by the majority of circuits that grants a reasonable expectation of privacy to packages shipped under a fictitious name. Accordingly, the Court should reverse the Fourteenth Circuit and hold

that Ms. Fenty has standing to challenge the seizure of her packages.

A. The Court Should Adopt the Majority Rule That All Packages are Entitled to a Reasonable Expectation of Privacy Regardless of the Use of a Fictitious Name.

Ms. Fenty possessed a reasonable expectation of privacy in packages mailed to her alias, Jocelyn Meyer. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law," and as such the Court should apply the broadest and clearest rule when determining whether a defendant possessed a reasonable expectation of privacy. *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

Six circuits have reached the issue of Fourth Amendment standing where an aggrieved party has used a fictitious name. The Eighth Circuit reached the issue of Fourth Amendment standing in *United States v. Lewis* but declined to address the merits of the standing challenge as the "district court did not squarely face th[e] question." 738 F.2d 916, 919 (8th Cir. 1984). The Tenth Circuit has yet to address the merits of the standing issue because when it was raised the defendant's use of stolen identification constituted fraud, and the court found the use of another's identity "fundamentally different" than "merely using an alias." *United States v. Johnson*, 584 F.3d 995, 1001 (10th Cir. 2009). The First and Fourth Circuits apply similar versions of a balancing test addressed at length below. *United States v. Aguirre*, 839 F.2d 854, 857 (1st Cir. 1988), *United States v. Rose*, 3 F.4th 722, 28 (4th Cir. 2021).

The remaining majority of Circuits – the Fifth, Seventh and Eleventh Circuits that have reached the merits of the Fourth Amendment Standing issue apply the clear rule established in the Fifth Circuit by *United States v. Villareal*. 963 F.2d 770, 773–74 (5th Cir. 1992). *See United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009); *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003). In *Villareal*, the court held that where a defendant has not "denied

their possessory interest" in a package, a defendant "may assert a reasonable expectation of privacy in packages addressed to them under fictitious names." 963 F.2d at 773-74 (holding that the use of a fictitious name does not constitute a disavowal of a package, and no connection to the fictitious name is necessary to assert the privilege); s*ee also United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981) (holding that a defendant possessed a reasonable expectation of privacy in a sealed package addressed to a fictitious business to which he had no connection).

The Eleventh Circuit also applied *Villareal* and established that a defendant using a fictitious name has Fourth Amendment standing to challenge the results of a search. *Garcia-Bercovich*, 582 F.3d at 1236–38 (holding that the district court erred in denying a motion to suppress where a defendant admitted he was the recipient of thirteen boxes shipped to a fictitious business).

The use of a fictitious name is not "inherently wrong" and does not deprive a sender or recipient of the reasonable expectation of privacy. *Pitts,* 322 F.3d at 459. The Seventh Circuit relied upon *Villareal* in holding, "the expectation of privacy for a person using an alias in sending or receiving mail is one that society recognizes as reasonable." *Id.* (holding that defendants lacked standing because they expressly disavowed ownership of the package and refused to accept delivery of the parcel). The court reasoned that if the existence of a criminal nexus allowed searches of packages sent under fictitious names, it would lead to the illegal contents of packages "serv[ing] as an after-the-fact justification of a search." *Id.* at 458. According to the court, this possibility stretched beyond the outer limits of the Fourth Amendment because a legitimate expectation of privacy does not "depend on a defendant's activities whether innocent or criminal." *Id.* (citing *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997)).

Notably, the Seventh Circuit in *Pitts* painstakingly repudiated the flawed reasoning of the lower court that resulted in a finding that the defendant lacked standing. This incorrect finding in the lower court relied upon *United States v. DiMaggio*, 744 F. Supp. 43 (N.D.N.Y. 1990) and the dicta in *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993) to "f[ind] as a matter of public policy that society is not prepared to recognize as reasonable an expectation of privacy in the use of an alias as part of a criminal scheme." *Pitts*, 322 F.3d at 453. The Fourteenth Circuit relied upon the same holding in *DiMaggio* and erroneous dicta in *Daniel* to find that Ms. Fenty had constructively abandoned her parcels by using of a fictitious name. (R. 67). Just as this erroneous conclusion was reached in *Pitts*, it was erroneously reached in the Fourteenth Circuit.

There is no indication that Ms. Fenty abandoned her parcels in any manner; unlike in *Pitts*, she did not refuse delivery, lose access to the packages, or claim that the packages did not belong to her. (R. 32–33). She was readily able to retrieve the packages from her locker and never disavowed ownership. (R. 43, 46). Absent the abandonment of her parcels, under the majority rule, there is no basis for the denial of Ms. Fenty's reasonable expectation of privacy in the contents of her sealed packages.

As the privacy interest in sealed packages sent through the mail has been firmly established since *Ex parte Jackson*, electing not to apply the majority bright line rule poses a substantial privacy risk to any person who chooses to send mail using a nickname, alias, or professional name. A reasonable expectation of privacy cannot be revoked retroactively based on the nature of a party's activities; anything less than a bright line rule upholding the reasonable expectation of privacy whatever name is used risks permitting any search and seizure of a parcel to be later justified by the illegality of the contents of the parcel. The Court should reverse the Fourteenth Circuit's holding that Ms. Fenty lacked standing as it is based on erroneous reasoning

that has been explicitly overturned in the Fifth Circuit. Instead, the Court should adopt the majority bright line test to hold that Ms. Fenty does have standing to challenge the seizure of her sealed parcels addressed to her alias.

B. Even if the Court Elects to Adopt the Balancing Test Applied by the First Circuit, the Packages Seized from Ms. Fenty's P.O. Box Should be Suppressed.

The First Circuit applies a narrower test than the bright line rule of *Villareal.* Instead, the First Circuit looks initially to whether the defendant thought subjectively "of the place . . . as a private one and treated it as such." *Aguirre*, 839 F.2d at 857. If this inquiry is satisfied, the court then looks holistically at "whether or not the individual's expectation of confidentiality was justifiable under the attendant circumstances." *Id.* The inquiry is not limited to one set of factors; any factors that shed light on the circumstances "may be weighed in the balance." *Id.*

These factors can include "ownership, possession, and/or control; historical use of the property searched, or the thing seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case." *Id.* at 856–57. As a distinct factor, the First Circuit considers the defendant's subjective anticipation of privacy. *Id.* This balancing test does not specifically address the use of a fictitious name; rather, the name and the address of the recipient are considered as part of the totality of the circumstances. *United States v. Stokes*, 829 F.3d 47, 53 (1st Cir. 2016) (holding that an address alone is not sufficient to establish a reasonable expectation of privacy where a defendant provided no other information about the nature of the addresses or any other information that would "shed light on the reasonableness of his privacy interest").

No single factor determines whether an individual has a reasonable expectation of privacy under the Fourth Amendment. *United States v. Bates*, 100 F. Supp. 3d 77, 83 (D. Mass.

2015). If the owner of a package is not the named recipient, a court is still free to determine under the totality of the circumstances that the owner retained their reasonable expectation of privacy. *Bates*, 100 F. Supp. 3d at 84. In *Bates,* the owner of the packages, Bates, addressed them to an associate, Carlozzi. *Id.* He then informed Carlozzi to pick up the packages and deliver them to Bates in exchange for payment. *Id.* at 82. While the packages were in transit from Hong Kong to the United States, Bates tracked their status online and instructed Carlozzi to pick up the packages when they arrived. *Id.* The court decided that Bates' actions under the totality of the circumstances were sufficient to establish that he regarded the packages as private and treated them as such. *Id.* at 84.

Additionally, there is an objectively reasonable expectation of privacy for items sent through the mail. *United States v. Allen*, 741 F. Supp. 15, 18 (D. Me. 1990) (holding that a defendant possessed a reasonable expectation of privacy under the totality of the circumstances where no one else asserted ownership, federal law precluded others from accessing the contents of the package, the defendant maintained a check on delivery, and the defendant had arranged a bailment with the recipient of the packages who was named on the shipping documents). The *Allen* court did not place emphasis on the named recipient of the package, rather the inquiry focuses on the defendant's connection to the package itself.

Here, the factors of the First Circuit balancing test weigh in favor of Ms. Fenty's reasonable expectation of privacy for the sealed packages sent to her alias, Jocelyn Meyer. First, just as in *Bates,* Ms. Fenty paid for her package and no one other than Ms. Fenty asserted ownership or control of the packages. (R. 45). Second, like the defendant in *Allen,* federal law barred others from accessing Ms. Fenty's sealed packages, granting her–the *sole* owner of the P.O. box–the *sole* ability to regulate access. Third, she had previously received other mail and

packages to her P.O. box and had successfully retrieved them demonstrating a historical use of the delivery mechanism. (R. 31). Fourth, she attempted to retrieve her expected packages as soon as she received a delivery notification indicating her connection to the packages like the defendants in both *Bates* and *Allen* under a totality of the circumstances. (R. 32, 46). Fifth, she paid for her packages, was waiting on them, and was alarmed when they did not arrive, indicating she had a subjective anticipation of privacy. (R. 46). Finally, her expectation of privacy was reasonable due to federal law prohibiting the accessing of sealed packages except in very limited circumstances. All these factors weigh in favor of a holding that Ms. Fenty had a reasonable expectation of privacy in the contents of her sealed package. Just as the *Allen* court gave substantial weight to the defendant's subjective expectation of privacy and considered that within the totality of the circumstances, so should the Court. Because these factors weigh in favor of a holding that Ms. Fenty possessed an objectively reasonable expectation of privacy, if the Court elects to apply the First Circuit balancing test, they should reverse the Fourteenth Circuit and grant Ms. Fenty standing to challenge the search and seizure of her parcels.

C. Even Under the Fourth Circuit's Restrictive Established Alias Test, Ms. Fenty has Standing to Challenge the Seizure of her Parcels.

The Fourth Circuit applies a similar balancing test to the First Circuit–which the Fourteenth Circuit relied upon below–and considers factors such as, "whether [a] person claims an ownership or possessory interest in the property, and whether he has established a right or taken precautions to exclude others from the property." *United States v. Castellanos*, 716 F.3d 828, 34 (4th Cir. 2013). The consideration of these factors is a fact-specific inquiry based on the defendant's "established connection to the property at the time the search was conducted." *Rose*, 3 F.4th at 28 (4th Cir. 2021).

The use of a fictitious name does not negate a recipient's reasonable expectation of

privacy. *Rose*, 3 F.4th at 28. However, under this balancing test, if the defendant has used a name other than their own, the Fourth Circuit looks to "other indicia of ownership, possession, or control" to determine the existence of an objectively reasonable expectation of privacy. *Id.* Nonetheless, an individual may still assert a reasonable expectation of privacy "in packages addressed to them under fictitious names." *Castellanos*, 716 F.3d at 834 (relying on *Villareal*, holding that the defendant retained no possessory interest where he claimed he and the named recipient of the package were two distinct individuals engaged in a commercial relationship and that the recipient of the package was not his alias).

The Fourth Circuit, in *Rose*, characterizes an additional threshold determination to the indicia test; if a sealed package is sent to a "party other than the intended recipient… that recipient does not have a legitimate expectation of privacy absent other indicia of ownership, possession or control existing at the time of the search." *Rose*, 3 F.4th at 728 (holding that the defendant, Rose, lacked standing where he shipped packages to the address of Donald Ray West under the name of West's deceased brother, Ronald West, and the defendant had no means of accessing the packages under that name at the federal facility where they were transported).

Rose, however, misapplies the Fifth Circuit's holding in *Castellanos* by stating that when an individual asserts a reasonable expectation of privacy addressed to them under fictitious names, "the defendants must prove evidence that the fictitious name is an established alias." *Id.* at 728. The *Castellanos* court did not create a requirement to establish the use of an alias. Instead, it denied the defendant standing on the basis that he did not demonstrate that the addressed name "was simply an alias. Instead, [his position] was that [they] were two separate individuals." *Castellanos*, 716 F.3d at 834. The holding was not based on the defendant's lack of an established alias but on his assertion of abandonment of the package, which negated his

subjective expectation of privacy. *Castellanos*, 716 F.3d at 834.

The *Castellanos* court in turn based its reasoning upon the Fourth Circuit's holding in *Givens*. 716 F.3d at 834. In *Givens*, the defendants received packages addressed to a third-party business and individual, both of whom were real rather than fictitious entities. *United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984). The *Givens* court held that the defendants' status as "intended recipients of the cocaine conferred upon them no legitimate interest of privacy in the contents of the package *addressed to another*," and relied heavily on the fact that the package was addressed "neither to them or some entity, real or fictitious which is their alter ego, but to actual third parties." *Id.* at 341, 342 (emphasis added).

Neither *Castellanos* nor *Givens* stands for the proposition that a person must establish an alias, but instead considers the totality of the circumstances in determining the defendant's connection to the property at the time of the search. In *Castellanos*, the defendant outright denied connection to the package, eliminating his subjective expectation of privacy. 716 F.3d at 834. In *Givens*, the packages were addressed to real individuals who retained both the subjective and objective expectation of privacy rather than the defendants. 733 F.2d at 341–42. The *Rose* court breaks with every other circuit that has addressed the issue by holding that the use of an alias requires an investigation into the establishment of that alias. 3 F.4th at 728. The Fourth Circuit is an outlier in Fourth Amendment standing jurisprudence, and the Court should not adopt this needlessly complicated and restrictive test.

Regardless of this divergence, the *Rose* court indicated that the defendant, Rose, had not established Ronald West as an alias because he was not commonly known by that name, there was no evidence that anyone recognized him by that name, he did not use that name under different circumstances, and Ronald West was a deceased person. Ms. Fenty, in contrast,

regularly used her alias "Jocelyn Meyer." (R. 4–5, 42). She even used the name under several circumstances to establish it as her professional alias. (R. 4–5, 42). She sent out emails for her business endeavors using her alias, shipped other packages to herself with that name, and published two essays years prior attributed to that name. *Id*. Further, Rose had no ability to access the packages at the facility they passed through while Ms. Fenty had full access to the P.O. box where her parcels were sent. (R. 32– 3). If the Court does elect to adopt the Fourth Circuit's test, Ms. Fenty has taken sufficiently more steps to establish her alias than the defendant in *Rose*. Therefore, Ms. Fenty has standing to challenge the search because her connection to her alias plainly establishes that she possessed a reasonable expectation of privacy in sealed packages addressed to "Jocelyn Meyer."

II. MS. FENTY'S RECORDED VOICEMAIL STATEMENTS ARE ADMISSIBLE PURSUANT TO RULE 803(3) BECAUSE THE STATE-OF-MIND DECLARATIONS WERE MADE CONTEMPORANEOUSLY WITH THE EVENTS IN QUESTION.

The Court should reverse the Fourteenth Circuit and hold that the District Court erred when it determined Ms. Fenty's voicemails were inadmissible under Rule 803(3). Rule 803(3) establishes an exception to the hearsay rule for statements reflecting a declarant's then-existing state-of-mind, excluding statements of memory or belief:

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

Rule 803(3).

When determining whether a statement falls under Rule 803(3), the rule requires that the statement refers to a then-existing state-of-mind, not a past memory or belief. *United States v. Cardascia*, 951 F.2d 474, 487 (2d Cir. 1991). Consequently, a finding of admissible hearsay

under Rule 803(3) involves a fact-intensive analysis to determine the declarant's "state-of-mind" at the time of the statement. *United States v. Cianci*, 378 F.3d 71, 105 (1st Cir. 2004). This analysis considers three factors: (1) contemporaneousness, (2) chance for reflection, and (3) relevance. *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980), *cert. denied*, 449 U.S. 1016 (9th Cir. 1984). These factors safeguard against admission of "*deliberate* or *conscious* misrepresentation." *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007) (emphasis added). Additionally, the Court has not previously held that spontaneity is the basis of reliability for Rule 803(3) declarations. *Hayes v. York*, 311 F.3d 321, 325 (4th Cir. 2002).

In sum, Ms. Fenty made the statements contemporaneously, she had no chance to reflect or deliberate before leaving the voicemails, and the statements are relevant and central to her defense. So, her statements were reliable and trustworthy and should be admitted under Rule 803(3). Further, failing to admit Ms. Fenty's statements constitutes harmful error. *United States v. Veltmann*, 6 F.3d 1483, 1501 (11th Cir. 1993).

A. Ms. Fenty's Voicemails Were Made Contemporaneously with Her Ongoing Mental Process.

Even before Rule 803(3)'s codification, the common law recognized the basis for the admissibility of state-of-mind declarations. *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 295 (1892). In *Hillmon*, the Court held that a letter written and sent by the witness was admissible because, though hearsay, the letter should have been admitted as it demonstrated "evidence of his intention." *Id*. The *Hillmon* doctrine has since been formalized into Rule 803(3) and, in addition, "the exception exists in every jurisdiction in the country, whether by statute, court rule, or common law tradition." *Hayes*, 311 F.3d at 325.

Statements admitted under Rule 803(3) are presumed to possess a level of trustworthiness because they reflect a then-existing state-of-mind. *United States v. Rodriguez–Pando*, 841 F.2d

1014, 1019 (10th Cir. 1988). This presumption is provided circumstantially by Rule 803(3) through its requirement that a "statement be *contemporaneous* with the declarant's 'then-existing' state-of-mind, emotion, sensation, or physical condition." *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005) (emphasis added). Hearsay reflecting a declarant's then-existing state-of-mind is not barred, and such statements are considered reliable because they are made contemporaneous with an event or condition. *Cardascia*, 951 F.2d at 487.

Statements made with "substantial contemporaneity" have an even lower likelihood of deliberate or conscious misrepresentation. *United States v. Woods*, 301 F.3d 556, 562 (7th Cir. 2002). The First Circuit has been helpful in identifying which statements are considered contemporaneous. *Colasanto v. Life Ins. Co. of N. Am.*, 100 F.3d 203, 212 (1st Cir. 2004) (holding that letters sent before and after a couple had a fight were not admissible because the "significant intervening events" of a fight and breakup "could reasonably be thought to disrupt the contemporaneity" requirement). The contemporaneity inquiry zeroes in on "proximity in time," and considers statements contemporaneous so long as the declarant was "in the same condition existing at the material time." *Id.* When a declarant's mental condition no longer reflects the condition the statements exhibit, the statements cease to be contemporaneous. *Rivera-Hernandez*, 497 F.3d at 81 (applying *Colasanoto* to hold that the defendant's statement was not contemporaneous because the defendant's requests for invoices occurred months after his initial demand for money).

A declarant's statements are contemporaneous and satisfy Rule 803(3) when they express conditions such as fear, hunger, and exhaustion. *United States v. Alzanki*, 54 F.3d 994, 1008 (1st Cir. 1995). Statements that establish the declarant's mental feelings that still exist satisfy any contemporaneity requirement, even after significant time passes, as long as those statements do

not purport to prove a fact remembered or believed. *Wagner v. County of Maricopa*, 747 F. 3d 1048, 1053 (9th Cir. 2013) (holding that a victim's statements to his sister about his state of mind following a disturbing event were permissible under Rule 803(3) to establish his state of mind at the time of the conversation). Courts across circuits interpret Rule 803(3) admissibility to extend to contemporaneous expressions of a declarant's continuous state of mind. *See United States v. Joe*, 8 F.3d 1488, 1493 (10th Cir. 1993) (following a traumatic event, a victim continued to be "afraid sometimes"); *Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1038 (N.D. Cal. 2006) (holding that a declarant's statement she was "extremely upset" was admissible under Rule 803(3) even though it was not spontaneous under 803(2)); *United States v. Angleton*, 269 F. Supp. 2d 878, 889 n.5 (S.D. Tex. 2003) (a declarant's statement that he was scared is admissible under Rule 803(3)); *State v. Damper*, 223 Ariz. 572, 574 (Ct. App. Div. 1 2010) (holding admissible a declarant's statement that she and the defendant "are fighting").

Ms. Fenty's voicemails should be admitted under Rule 803(3) because they were contemporaneous. When Ms. Fenty left the first voicemail message, she had just discovered her package missing and described that "none of her packages [were there]." (R. 40). Just as in *Damper*, where the declarant reflected on an ongoing fight, Ms. Fenty was describing what she was observing and experiencing in the moment. She went on to say that she was "getting worried." *Id.* This statement reflected her mental and emotional state just as when declarants in *Boyd* and *Angleton* described that they were upset and scared. Further, in *Boyd*, the statement was contemporaneous with the declarant's mental state at the time of speaking even though that declaration was not considered spontaneous.

The second voicemail, left forty-five minutes later, remained contemporaneous with the events Ms. Fenty was experiencing. She remained at the post office and was working with postal

workers to locate her packages when she called again and said the postal workers "don't know what's going on . . . I'm getting really nervous. . . . I'm really starting to get concerned that you involved me in something . . ." (R. 40). Just as in *Wagner*, where a victim's admissible statements were about their mental state in the days following a disturbing event, Ms. Fenty was describing her emotional state and concerns as they were happening in the moments after opening her P.O. box. Unlike in *Colasanto*, where the out-of-court statements were sharply interrupted by a fight and subsequent breakup, here, Ms. Fenty's voicemails were sent in the midst of working with postal workers to find her packages. Because both voicemails describe Ms. Fenty's mental and emotional state *at the time she left the messages*, the Court should hold that the voicemails satisfy the Rule 803(3) contemporaneous requirement.

B. The Court has Never Required Spontaneity for Rule 803(3) Admissibility.

Understanding Rule 803(3) requires interpreting its neighboring subsections, Rules 803(1) and 803(2). *Ponticelli*, 622 F.2d at 991. The admissibility inquiry for all three rules evaluates the same three factors: (1) contemporaneity, (2) time for reflection, and (3) relevance. *Id.* However, according to the drafters of the Federal Rules of Evidence, the main difference between 803(1) (present-sense impressions) and 803(2) (excited utterances) is a temporal requirement; where Rule 803(1) allows for a slight lapse and recognizes exact spontaneity is impossible, but 803(2) requires spontaneity. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 423 (2003).

The drafters intended for Rule 803(3) to be interpreted similarly to Rule 803(1). 51 F.R.D. at 423. Based on notes from the advisory committee, Rule 803(3) serves as a specialized variant of Rule 803(1). *United States v. Udey*, 748 F.2d 1231, 1243 (8th Cir. 1984). Rule 803(1) admits hearsay broadly when statements concerning a declarant's present state-of-mind are made while or "immediately" after being perceived. *Id.* Courts interpret the immediacy requirement of

Rule 803(1) to permit statements that offer little time to reflect. *Naiden*, 424 F.3d at 721-23. Because "spontaneity" is not required for Rule 803(1), by incorporation, Rule 803(3) does not include a spontaneity requirement. 51 F.R.D. at 423. Therefore, a slight time lapse is allowable when admitting statements of then-existing mental states. *United States v. Harris*, 733 F.2d 994, 1004 (2d Cir. 1984).

"The Court has never said that spontaneity is the basis for the reliability of state-of-mind declarations." *Hayes*, 311 F.3d at 326. The absence of an explicit temporal requirement should not be interpreted as an invitation to read spontaneity into Rule 803(3). *Id.* The Court should not apply a spontaneity requirement to Rule 803(3) where one does not exist and should instead be satisfied that statements of then-existing mental states are contemporaneous with the declarant's condition at the time of speaking.

C. Ms. Fenty's Statements are Reliable Because she had no Chance for Reflection While at the Post Office and There is no Indication the Statements Were Self-Serving.

Hearsay prohibitions exist to exclude unreliable statements and courts are largely concerned with whether "the passage of time may prompt someone to make a deliberate misrepresentation of a former state-of-mind." *Naiden*, 423 F.3d at 722 (holding that the defendant's statement to a friend that he did not believe the person he conversed with online the previous day was a minor was not admissible because the intervening day was sufficient time to allow for reflection). When a declarant has "ample opportunity to reflect on the situation," the statement is no longer permissible under Rule 803(3). *United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977) (noting the distinction between "self-serving declarations about a past attitude or state-of-mind" and "manifestations of [declarant's] present state-of-mind" to an event). When substantial time has passed, courts become wary of statements that may be intentionally constructed to serve the interests of declarants rather than contemporaneous

statements about their current mental state. *Partyka*, 561 F.2d at 125.

Courts decline to admit evidence when the declarant possesses both an unquestionable opportunity for reflection and an incentive to misrepresent the truth. *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986) (holding that statements were inadmissible under Rule 803(3) because the defendants had "two years to reflect upon their actions" after charges were brought against them which dramatically increased the likelihood that the statements indicating their lack of criminal intent were deliberate misrepresentations). When a statement is a declarant's immediate reaction, enough time has not passed to provide an opportunity to reflect. *Partyka*, 561 F.2d at 125 (holding that statements in response to an undercover government informant's attempt to sell MDA were admissible because they were made as immediate responses to the informant's proposal).

Without an unquestionable opportunity for reflection, the likelihood that a statement is self-serving "does not create an additional qualification to the admissibility of state of mind hearsay statements." *Cardascia*, 951 F.2d at 487. Meaning, the risk that a statement could be self-serving should not alone result in its inadmissibility. *Id.* Instead, the statement should be weighed by the jury at the conclusion of the trial. *Id*. However, statements made by defendants when they know they are part of a criminal investigation are generally inadmissible under Rule 803(3). *United States v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995) (holding that a defendant's statements about the reason he accepted payment from a third party were inadmissible because he had ample time and incentive to fabricate a self-serving reason for the transaction in the twenty-four hours after being interviewed by the FBI and shown a recording of him accepting the funds). Statements are generally considered to be self-serving when the declarant is aware there is a risk of prosecution. *Id*.; *see also United States v. Neely*, 980 F.2d

1074, 1083 (7th Cir. 1992) (holding that a defendant's statement was inadmissible under Rule 803(3) where he had more than two weeks after becoming aware he was involved in a criminal prosecution to draft letters denying his involvement in the criminal scheme).

Here, Ms. Fenty's voicemails were made with no time to reflect. Like in *Partyka,* where the statements were made in real-time conversation with the government informant, here, Ms. Fenty had no chance to fabricate her statements before leaving her voicemails. (R. 40, 46). Leaving a voicemail is not the intended result of a phone call; Ms. Fenty could not have predicted her friend was not going to answer, and she could not have anticipated having to leave a voicemail. Unlike in *Jackson,* where the defendant's statements were made months after the event in question, Ms. Fenty recorded her messages seconds and minutes after realizing that her parcels were missing. *Id.* Moreover, Ms. Fenty had no reason to believe she was being monitored or was part of a criminal investigation, unlike in *LeMaster* and *Neely* where defendants had been notified by law enforcement that they were under investigation. In *LeMaster*, the defendant was even formally interviewed by the FBI before making the statements deemed self-serving by the court. Ms. Fenty had no such notice, nor was she under investigation; all she knew was that her parcels had not arrived. (R. 30–31, 46). In sum, the Court should hold that Ms. Fenty's limited time for reflection and the lack of a criminal prosecution gave her no reason nor opportunity to fabricate her voicemails. Consequently, the Court should reverse and hold that the statements satisfy Rule 803(3) factors for reliability.

D. Ms. Fenty's Voicemails are Particularly Relevant Because They are Critical to Establishing her Lack of Criminal Intent to Distribute Fentanyl.

"Unless a district court's determination of relevance is arbitrary or irrational, it will not be overturned." *United States v. Schultz,* 333 F.3d 393, 415 (2d Cir. 2003). In Ms. Fenty's case, the relevance of the voicemails cannot be reasonably disputed. The District Court held "the

statements are relevant to determining Ms. Fenty's then-existing mental state and if she had any awareness as to the actual content of the packages." (R. 68).

Even if the Court disagrees with established precedent of affirming a district court's determination of relevance absent abuse of discretion, Rule 803(3) evidence remains relevant when it relates to an essential element of the crime. *United States v. Tokars*, 95 F.3d 1520, 1535 (11th Cir. 1996) (evidence of motive is relevant to a murder case); *Joe*, 8 F.3d at 1496 (rape statement is relevant to a sexual violence charge); *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988) (polygraph evidence is relevant to immigrant's deportability). Thus, the Court should affirm the lower court's finding that Ms. Fenty's voicemail statements are relevant.

E. Failing to Admit Ms. Fenty's Voicemails Constitutes Harmful Error Because the Voicemails Speak Directly to Whether Ms. Fenty had Intent to Distribute, Preventing Her from Defending Herself.

Not every hearsay error in a criminal case amounts to a harmless constitutional violation, but "error cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense." *United States v. Bishop*, 291 F.3d 1100, 1108 (9th Cir. 2002).

Harmful error is constituted when a defendant is denied an opportunity to present exculpatory evidence and "the properly admitted evidence of guilt is less than overwhelming." *Veltmann*, 6 F.3d at 1501 (holding that a husband's video deposition establishing the victim's prior threats of suicide should have been admitted under Rule 803(3) to prove the husband's innocence on the charge of murdering his wife). On the other hand, it is only prejudicial, not harmful error to exclude statements under Rule 803(3) when other relevant evidence is admitted on a particular issue. *Prather v. Prather*, 650 F.2d 88, 90-91 (5th Cir. 1981) (holding that the trial court committed harmless error when it failed to admit statements an employee made to third parties regarding his oral employment contract because the statements were not helpful to establishing the terms of the contract–the only remaining controversy in the case).

In Ms. Fenty's case, the voicemails are the only evidence capable of establishing her lack of criminal intent to distribute a controlled substance. As soon as she reached the post office to find the packages missing, Ms. Fenty called her friend to ask, "That's not what's going on here, right?" (R. 68). She went on to state, "I'm getting worried," reflecting her state-of-mind of increasing anxiety and nervousness that she was unintendedly involved in criminal behavior. *Id.* The prejudicial effect is much more harmful than that in *Prather* where the statements were unhelpful to a central issue of the case–the terms of the oral contract–but only helped establish that there was a contract which was not at dispute. Here, without the voicemails, Ms. Fenty's ability to prove her lack of criminal intent is practically negligible. By failing to admit the evidence, the trial court allowed for Ms. Fenty's conviction based upon the remaining evidence. That evidence was "less than overwhelming" like in *Veltmann*, where the unallowed video deposition could have established the husband's innocence. Ms. Fenty's voicemails showcase her surprise and confusion to the situation surrounding the missing packages, which is central to establishing her lack of *intent* (an essential element of the *intent* to distribute charge). So, the Court should hold that the failure to admit the voicemails under Rule 803(3) is harmful error.

III. MS. FENTY'S PRIOR CONVICTION FOR PETIT LARCENY IS INADMISSIBLE AS IMPEACHMENT EVIDENCE PURSUANT TO RULE 609(a)(2) BECAUSE THE CRIME DID NOT INVOLVE UNDERLYING DISHONESTY OR MISREPRESENTATION.

The Fourteenth Circuit incorrectly upheld the district court's admission of Ms. Fenty's prior conviction of petit larceny under BPC § 155.25. Rule 609(a)(2) only allows automatic admission of prior criminal convictions when "the court can readily determine that establishing the elements of a crime requires proving–or the witness's admitting–a dishonest act or false statement." Given the "automatic" nature of admissibility under Rule 609(a)(2), courts use a narrow standard to carefully interpret whether a prior conviction is a *crimen falsi*–one involving

dishonesty or false statement. *Hayes*, 553 F.2d at 827. Thus, reviewing courts utilize a fact–intensive approach to determine whether the underlying circumstances warrant admissibility. *United States v. Montrose*, 15 F. App'x 89, 90 (4th Cir. 2001). Given that Ms. Fenty's prior conviction is not a *crimen falsi*, the Court must reverse.

Petit larceny is a crime of force or stealth, entirely distinct from a crime of deceit. *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990). Rule 609 does not extend automatic admission to prior convictions involving force or "nothing more than stealth." *Hayes*, 553 F.2d at 827. Therefore, the distinction between crimes of deceit and crimes of force or stealth is dispositive of Rule 609(a)(2)'s applicability. *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978). Petit larceny does not equate to a *crimen falsi* unless the defendant's behavior showed "communicative or expressive dishonesty." *Walker v. Horn*, 385 F.3d 321, 334 (3d Cir. 2004). When the behavior only entails a "quantum of stealth," Rule 609 is an inappropriate vehicle to admit impeachment evidence. *United States v. Estrada*, 430 F.3d 606, 615 (2d Cir. 2005).

The subset of prior convictions allowed under Rule 609(a)(2) is purposefully narrow to limit admissibility to those that bear on the witness's "propensity to testify truthfully." *Fearwell*, 595 F.2d at 775–6. Indeed, Congress reserved automatic admission of impeachment evidence under Rule 609 for *crimen falsi*. *Hayes*, 553 F.2d at 826. The legislature intended for Rule 609(a)(2) to only admit prior convictions that are probative of credibility. *Estrada*, 430 F.3d at 614. Unlike crimes of violence or force, *crimen falsi* necessarily put the veracity of the witness's testimony at issue. *Walker*, 385 F.3d at 334.

Additionally, admission of Ms. Fenty's prior conviction of petit larceny constitutes reversible error. Where evidence of a prior conviction is admitted erroneously and likely

influenced the jury, the error is harmful. *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963). Because admission of Ms. Fenty's prior shoplifting conviction produced a harmful error the Court should reverse the holding of admissibility and remand to the lower courts for retrial.

A. Ms. Fenty's petit larceny conviction is not a crime of deceit.

There are two methods to determine whether a conviction of petit larceny is a crime of deceit: (1) whether the charging statue expressly includes "deceit" as an element of the crime, or (2) a rigorous fact–based approach to "look beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statement." *United States v. Collier*, 527 F.3d 695, 699 (8th Cir. 2008). Because Ms. Fenty's underlying petit larceny conviction fails to satisfy either method of establishing deceit, the Court should reverse the Fourteenth Circuit's holding and find that the trial court erred in applying Rule 609(a)(2) to admit Ms. Fenty's prior conviction for impeachment purposes.

The Court should rely on the express language of Boerum's petit larceny statute to find Ms. Fenty's prior conviction is inadmissible as impeachment evidence under Rule 609(a)(2) because the charging statute lacks any mention of deceit:

> A person is guilty of petit larceny when that person knowingly takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another. . . .

BPC § 155.25.

Where the statute is unambiguous, the Court looks no further. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). The Court first interprets statutes by their plain meaning. *Kawashima v. Holder*, 565 U.S. 478, 483 (2012) (holding an immigrant could not be deported because a plain reading of the deportation statute at issue required the elements of the offense to establish the immigrant committed fraud or deceit).

The absence of "deceit" in the statute suggests the conviction does not satisfy Rule

609(a)(2). *Collier*, 527 F.3d at 699 ("sale or receipt of an access card to defraud . . . included the statutory element of intent to defraud," thus satisfying Rule 609(a)(2)). Unlike in *Collier*, the BPC petit larceny statute is clear in its exclusion of the word "deceit." BPC § 155.25. Because any mention of deceit, dishonesty, or a false statement is absent from the petit larceny statute at issue, the Court should not automatically admit Ms. Fenty's petit larceny conviction. *Id.* Ms. Fenty's conviction is inadmissible under Rule 609(a)(2) unless "the underlying circumstances demonstrate dishonesty or false statement." *Artis v. Lyon Shipyard, Inc.*, No. 2:17–CV–595, 2019 WL 13295537, at *1 (E.D. Va. Mar. 28, 2019) ("Petit larceny is just not that," referring to *crimen falsi*); *See also Gov't of Virgin Islands v. Toto*, 529 F.2d 278, 280 (3d Cir. 1976) (defendant's prior conviction of petit larceny was no more than "ordinary stealing").

Theft, alone, is insufficient to demonstrate dishonesty or false statement. *Fearwell*, 595 F.2d at 776 (holding that Rule 609(a)(2) was not satisfied because stealing food stamps in the past has "no bearing whatever" on the witness's propensity to testify truthfully). Though petit larceny is typically inadmissible under Rule 609(a)(2), some courts conduct a fact-intensive analysis of the basis of conviction. *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998) (In a case involving shoplifting, the court held "we will look beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statement." *See also United States v. Cathey*, 591 F.2d 268, 276 n.16 (5th Cir. 1976) (noting that "shoplifting" is not a conviction involving dishonesty or false statement within the meaning of Rule 609(a)). For example, the Fifth Circuit recognizes that "some petty larceny offenses may involve dishonesty or false statement and some may not, and therefore it is necessary to look at the basis of conviction to determine whether the crime embraced dishonesty." *United States v. Barnes*, 622 F.2d 107, 109 (5th Cir. 1980) (holding that Rule 609(a)(2) was satisfied because the

defendant had a multiple instances of petty larceny and attempted to deny her prior convictions).

In contrast, "crimes of *force*, such as armed robbery or assault, or crimes of *stealth*, such as burglary or petit larceny, do not come within" Rule 609(a)(2) because they lack an element of deceit. *Hayes*, 553 F.2d at 827 (emphasis added). This logic is widely accepted across the federal judiciary. In the Second Circuit, a defendant's petit larceny only involved "elusive action," not dishonesty. *Estrada*, 430 F.3d at 614 (holding that the defendant's prior shoplifting convictions do not fall under Rule 609(a)(2) because there was no deceit). Recognizing that even crimes of force and violence may involve some "quantum of stealth," courts have made it clear that "stealth" does not constitute dishonesty or false statement for purposes of Rule 609(a)(2). *Id*; s*ee also United States v. Bowen*, 511 F. Supp. 3d 441, 451 (S.D.N.Y. 2021) (petit larceny was inadmissible because "it was a crime of stealth, and did not otherwise involve use of dishonesty"). In the Fourth Circuit, the court considered the underlying basis of conviction and found the witness's prior petit larceny, based on his conduct, had insufficient evidence of dishonesty or false statement. *Montrose*, 15 F. App'x at 90. The Eleventh Circuit similarly held that petit larceny does not involve dishonesty or false statement. *Sellers*, 906 F.2d at 603 (theft). In the Third Circuit, a conviction for theft does not equate to dishonesty and fails to satisfy Rule 609(a)(2). *Walker v. Horn*, 385 F.3d 321, 334 (3d Cir. 2004) (defendant's conduct in robbery did not entail any "communicative or expressive dishonesty").

Based on her underlying conduct in the commission of petit larceny, Ms. Fenty's prior conviction is inadmissible for two reasons: (1) she committed a crime of force, and (2) her conduct displayed no communicative or expressive dishonesty.

First, Ms. Fenty committed a crime of force which is inadmissible under Rule 609(a)(2). By intentionally targeting a victim and engaging in a forceful struggle over a bag and threatening

violence, like in *Estrada* where the defendant's shoplifting only engaged in a "quantum of stealth," here, Ms. Fenty merely plotted to steal the bag without getting caught. (R. 53). Her actions do not rise to a level of deceit necessary for a crime to be admitted under Rule 609(a)(2). Ms. Fenty committed at most, a crime of stealth, not deceit. Thus, the prior conviction fails to satisfy the deception requirement of Rule 609(a)(2), and the Court should reverse and hold that the petit larceny is inadmissible for impeachment purposes.

Second, Ms. Fenty's prior conviction is inadmissible because her conduct in the commission of petit larceny displayed no communicative or expressive dishonesty. Ms. Fenty attempted to steal the other woman's diaper bag and made verbal threats after an altercation began. (R. 53). Here, the circumstances leading to Ms. Fenty's aggressive statements were driven by thoughtless decision making, not premeditated acts of deceit. (R. 54). Indeed, Ms. Fenty admitted she succumbed to peer pressure and engaged in an impulsive act of violence–"a stupid teenage mistake." (R. 53). The absence of a premeditated plan, the lack of consideration for potential consequences, and the spontaneous nature of the act suggest that deceit was not a calculated component of Ms. Fenty's actions.

Furthermore, the bag owner's immediate reaction to the attempted theft underlines Ms. Fenty's lack of stealth or cunning behavior typically associated with acts of deceit admissible under Rule 609. *United States v. Brackeen*, 969 F.2d 827, 829–30 (9th Cir. 1992) (narrow meaning of dishonesty under Rule 609(a)(2) as a "disposition to deceive"). Ms. Fenty's admission that she was not "very sneaky" further reinforces the notion that the act lacked the strategic and deceptive elements often associated with crimes of deceit. (R. 53). Consequently, a fact-intensive analysis of the basis of her petit larceny conviction underscores that deceit was not a central component of Ms. Fenty's action. Thus, there is no justification for automatic admission

under Rule 609(a)(2) of her prior conviction.

B. Applying the Surplusage and Absurdity Canons of Statutory Construction, the Court Should Not Have Admitted Ms. Fenty's Conviction of the Boerum Petit Larceny Statute Under Rule 609(a)(2).

The plain language of Boerum law answers the question for the Court–petit larceny is not a crime of deceit. BPC § 155.25. To avoid surplusage, the petit larceny statute must be limited to the act of taking property because the theft by deception statute incorporates an additional element of deceit in the commission of the crime. BPC § 155.45. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 392 (2013) (statutory interpretations should not "render superfluous another part of the statutory scheme"). The term "deceit" in the theft by deception statute differentiates it from petit larceny by requiring a specific, different form of criminal conduct: intentional "deception" in the acquisition or use of personal property. *Fearwell*, 595 F.2d at 776 (establishing a "requisite" level of deceit to qualify for Rule 609(a)(2) admission). Therefore, petit larceny lacks the necessary deceit element to meet the criteria for admissibility under Rule 609(a)(2). BPC § 155.45.

The surplusage canon ensures that each statute serves a unique purpose. *Marx*, 568 U.S. at 371. In this case, theft by deception addresses a subset of cases within the broader category of property crimes, where deceit is a key factor. While covering similar actions to Boerum's theft by deception statute, the petit larceny statute lacks the explicit requirement of deceit. The Court should give weight to Boerum's deliberate choice to pursue charges against Ms. Fenty under Boerum's petit larceny statute, rather than the State's theft by deception statute. In sum, the Court should defer to the jurisdiction's expectation that different statutes mean different things and hold that Ms. Fenty did not commit a crime of deception.

C. Allowing the Jury to Consider Ms. Fenty's Prior Conviction of Petit Larceny Constitutes Harmful Error.

To determine if an error is harmless the Court asks if there is a "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy,* 375 U.S. at 86–87. This question requires the defendant to show that the evidence in question merely increased the likelihood of the conviction, which is a markedly lower threshold than requiring a showing that the conviction would have failed absent the erroneously admitted evidence. *Id*. at 87–88 (holding that there was harmful error where evidence of a paintbrush and paint were unlawfully seized and admitted at a defendant's trial for painting hate symbols on a synagogue even though the state introduced evidence corroborating the defendant's presence at the crime scene). The Government's evidence against appellant is "ambiguous at best with respect to intention to distribute," use of a prior shoplifting conviction for impeachment purposes "cannot qualify as harmless." *Fearwell,* 595 F.2d at 778 (holding that heroin charges would have to be retried because of the trial court failed to hold the prior conviction of shoplifting was inadmissible under Rule 609(a)). An error in a Rule 609 determination of admissibility is only considered harmless if cumulative evidence has already been introduced for similar purposes. *Montrose,* 15 F. App'x at 90 (holding that added evidence of a probation violation for petit larceny would have been minimal to impeach a witness where the witness had already testified he was on probation for six breaking and entering convictions and had pled guilty to bank robbery and carrying a firearm in a crime of violence).

In Ms. Fenty's case, the introduction of her prior conviction of petit larceny is the Government's only evidence that impeaches her credibility as a witness. Unlike in *Montrose* where the error was rendered harmless because the prosecution had already presented substantial evidence of a witness' multitude of crimes, the sole evidence to challenge Ms. Fenty's credibility

is an erroneously admitted years-old shoplifting offense. That evidence had no bearing on her veracity, and it certainly was not cumulative.

Ms. Fenty's defense relied upon her statements that she was unaware that her activities were illegal. (R. 57). As in *Fearwell*, where the error in introducing the defendant's prior conviction of shoplifting was a harmful error that required retrial, the introduction of the petit larceny conviction could reasonably have influenced the jury's interpretation of the voicemails Ms. Fenty left to her friend. The Government introduced evidence of a connection to the xylazine just as the defendant was linked to the crime scene in *Fahy*, but just as the improperly admitted evidence constituted harmful error despite some corroboration in *Fahy*, so should it in Ms. Fenty's case. Because the introduction of Ms. Fenty's prior conviction as impeachment evidence may have diminished her credibility in the eyes of the jury and thus her defense, it may have led to her conviction. Applying the *Fahy* standard, the Court should hold that the district court's error is harmful, reverse Ms. Fenty's conviction, and remand for retrial.

CONCLUSION

For the foregoing reasons, the judgment of the Fourteenth Circuit Court of Appeals should be reversed and remanded for retrial to the District Court.

Respectfully submitted,
/s/ Team 4P
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