Team 14R – Original

No. 23-695

IN THE

SUPREME COURT OF THE UNITED STATES

FRANNY FENTY,

Petitioner,

--against--

UNITED STATES OF AMERICA

Respondent.

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

BRIEF FOR RESPONDENT

Team 14R
Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the defendant has a reasonable expectation of privacy from a search and seizure of a sealed package under the Fourth Amendment, when the package was sent through certified mail containing illegal narcotics and was addressed to an alias.
2. Whether the defendant should be permitted to admit recorded voicemail statements under Federal Rule of Evidence 803(3) where they had an adequate time to reflect, diminishing the likelihood that the hearsay statements were an accurate reflection of their true mental state.
3. Whether the prosecution may present impeachment evidence of a defendant's prior conviction for petit larceny as a crime of deceit under Federal Rule of Evidence 609(a)(2) when the defendant intentionally targeted the victim because they were distracted.

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OPINION BELOW

The transcripts of the hearings on the Fourth Amendment issue before the United States District Court for the Eastern District of Boerum appear on the record at pages 10-17, for the impeachment issue at pages 18-26, and the hearsay issue at 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 text of the following relevant constitutional provisions is provided below. The relevant statutory provisions include 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(vi), 853 and Boerum Penal Code §§ 155.25, 155.45.

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 "Defendant") and Angela Millwood (hereinafter "Millwood") are co-actors in an illegal narcotics distribution operation. Following a reconnection via LinkedIn communications on December 28, 2021, the two began working together to distribute a fentanyl-xylazine mixture that had been creating deadly consequences in the streets of Joralemon. (R. 6-8.)

I. The Drug Enforcement Agency intercepted a package addressed to "Jocelyn Meyer" in the course of their investigation.

In late 2021 and early 2022, investigators with the Drug Enforcement Agency (hereinafter "DEA") investigated the increasing prevalence of street drug activity in Joralemon involving the fentanyl-xylazine mixture. (R. 8.) As a result of an overdose on February 12, 2022

caused by the deadly combination of these drugs, DEA investigator Special Agent Robert Raghavan (hereinafter "SA Raghavan") uncovered a crucial detail that led them to the defendant, Franny Fenty. (R. 8, 29.)

The package containing the drugs that caused the overdose came from a purported veterinary pharmaceutical company called "Holistic Horse Care." (R. 8, 29.) Upon discovery of this fact, DEA investigators worked closely with United States Postal Inspection Services and the Joralemon Post Office to prevent future incidents. (R. 8, 29.) SA Raghavan reached out to contacts in the U.S. Attorney's Office and the Joralemon Post Office and advised them that the culprits may be using the mail to order drugs, in particular from a horse veterinary website. (R. 29-30.) Together, these agencies intercepted additional packages from Holistic Horse Care addressed to a post office box (hereinafter "P.O. Box") at the Joralemon Post Office. (R. 30.) SA Raghavan advised the U.S. Postal Inspection Service (hereinafter "postal service") to sequester packages suspected of carrying narcotics or being shipped from a horse veterinarian website. (R. 30.) Having cause to do so, as per SA Raghavan's instructions, the postal service set aside two packages from Holistic Horse Care addressed to Jocelyn Meyer. (R. 30.)

On February 14, 2022, just two days after a resident of Joralemon had overdosed from exposure to narcotics ordered via the Holistic Horse Care website, the manager of the Joralemon Post Office, Oliver Araiza (hereinafter "Araiza"), called and notified SA Raghavan that they had flagged two packages sent from the Holistic Horse Care website. (R. 30.) SA Raghavan obtained a search warrant for the Holistic Horse Care packages before bringing them to the local DEA testing facility (R. 31.) There, along with Special Agent Harper Jim (hereinafter "SA Jim"), they opened the packages and found each one obtained a bottle labeled "Xylazine: For the Horses,"

which both, in actuality, contained mixtures of 400 grams of xylazine and 200 grams of fentanyl. (R. 31-32.)

The packages were then resealed and returned to the post office on February 15, 2022, where SA Raghavan and SA Jim organized a controlled delivery of the packages from the front counter. (R. 32.) From there, SA Raghavan and SA Jim sat in the employee backroom to monitor the security cameras to see who retrieved the drugs. (R. 32.) The packages were addressed to Jocelyn Meyer and the delivery address was P.O. Box 9313, which was registered under the same name. (R. 30-31). This P.O. Box was registered on January 31, 2022, just two weeks prior to the interception of the packages from Holistic Horse Care. (R. 31.) Defendant came to retrieve the packages approximately an hour and a half after SA Raghavan and SA Jim arrived. (R. 32.) It was at this time that SA Raghavan learned that Defendant's real name was Franny Fenty, and that Jocelyn Meyer was an alias she used to publish short stories while in college. (R. 33.)

Upon further investigation of Defendant, SA Raghavan discovered that she had recently been in contact with Angela Millwood who had been investigated by the DEA for drug dealing while she was in high school. (R. 34). At the time of Defendant and Millwood's contact, Millwood was employed at a horse stable, raising suspicions. (R. 34.) When SA Raghavan tried to locate Millwood, however, it was discovered that she had boarded a one-way flight to Jakarta, Indonesia on February 14, 2022, the same day the packages containing drugs were intercepted. (R. 35.)

II. After discovering that her packages were moved, Defendant left two voicemails for Millwood.

On February 14, 2022, after receiving a confirmation notification that her packages from Holistic Horse Care were delivered, Defendant went to the Joralemon Post Office to retrieve them from her P.O. Box. (R. 46.) Thereafter, in discovering her packages were missing,

Defendant inquired with a postal worker and was told to return the next day. (R. 40.) Defendant then called and left a voicemail for her partner, Millwood. (R. 46.) When she did not receive a phone call back, she left a second voicemail forty-five minutes later. (R. 46.)

The following day, Araiza placed a slip, as per SA Raghavan's instruction, within the P.O. Box to notify the recipient of the package, Jocelyn Meyers, that she must pick up the Holistic Horse Care packages from the counter. (R. 32.) Upon arrival to her P.O. Box, Defendant read the slip and proceeded to walk to the counter and hand the slip over to Araiza. (R. 32.) Araiza confirmed that the packages belonged to Defendant before handing them to her. (R. 33.) Araiza then witnessed Defendant talking with a man who, following the conversation, confirmed that Defendant's name was "Franny Fenty." (R. 33.)

III. Defendant has a prior conviction for petit larceny.

In 2016, Defendant was charged with petit larceny under Section 155.25 of the Boerum Penal Code. (R. 19.) Defendant arrived at the scene of the crime intending to target a victim and remain unnoticed to steal from them. (R. 22, 59.) The victim, a young mother, was watching a street performer who was dancing in an Elmo costume. (R. 59.) Defendant noticed the victim's distraction, walked over quietly amongst the crowd of people, and grabbed her bag. (R. 22-23, 59.) After the victim noticed Defendant's presence, she yelled for her to stop. (R. 59.) Instead, Defendant was forced to abandon her plan to remain silent, yelling "let go or I'll hurt you," pushing the victim, successfully obtaining the bag, and subsequently running away. (R.53, 59, 62.) Once charged, Defendant admitted her wrongdoing and entered a guilty plea. (R.19, 54.)

STATEMENT OF THE CASE

Defendant was formally indicted by a grand jury on February 15, 2022. (R. 1-2.) Thereafter, Defendant filed a motion to suppress the evidence found from Defendant's sealed packages. (R. 10.) The district court judge heard oral arguments on August 25, 2022 and denied

the motion to suppress. (R. 17). The trial court also heard both parties regarding the defense's motion in limine to exclude evidence of Defendant's prior conviction for petit larceny. (R. 19.) Ultimately, the trial court ruled in favor of the prosecution, holding that Defendant's prior conviction fell within the scope of Rule 609(a)(2). (R. 26.) At the close of trial, the jury was given instructions that Defendant's prior conviction was intended only to ascertain whether she possessed a character for truthfulness and that the evidence could not be used as propensity for her to commit the present crime. (R. 63.)

At trial, Defendant moved to admit two voicemail recordings made by Defendant under Federal Rule of Evidence 803(3) and was denied. (R. 47, 52.) On September 21, 2022, in the United States District Court for the District of Boerum, Defendant was convicted, and a sentence entered on November 10, 2022 under 21 U.S.C. Section 841(a)(1) for possession with intent to distribute a controlled substance. (R. 65.) On appeal to the Fourteenth Circuit Court of Appeals, she challenged her conviction and sentence on three grounds; (1) that the Government's search of contents found within sealed packages addressed to her alias was impermissible under the Fourth Amendment; (2) that her recorded voicemail statements fall under Rule 803(3) as an exception to the hearsay rule, and; (3) that the impeachment evidence of her prior conviction for petit larceny was improperly admitted under Rule 609(a)(2). Ultimately, the Fourteenth Circuit affirmed the trial court's ruling on all three issues. (R. 70.) Defendant now appeals to this Court and was granted certiorari on all three issues on December 14, 2023. (R. 74.)

SUMMARY OF THE ARGUMENT

Defendant's packages containing a xylazine-fentanyl mixture were properly searched and seized. Pursuant to the Fourth Amendment, individuals enjoy a reasonable expectation of privacy in their personal effects, but the defendant forfeited this right through the use of an alias. The

alias in use, as alleged by Defendant, afforded her a reasonable expectation of privacy under the Fourth Amendment, but this is not adequately supported by the record since the use of the pseudonym "Jocelyn Meyer" was used to publish only a few short stories while the defendant was in college, and does not rise to the level of familiarity or recognition in the public arena.

Defendant's recorded voicemail statements were properly excluded from trial as inadmissible hearsay. Federal Rule of Evidence 803(3) only admits hearsay statements of the declarant's state of mind when the statements are contemporaneous, the declarant had no chance to reflect, and the statements are relevant to an issue in the case. The recorded voicemail statements clearly indicate that Defendant had a chance for reflection and the potential to misrepresent her role in a scheme to distribute illegal narcotics.

Defendant's prior conviction for petit larceny was properly admitted at trial as impeachment evidence. The trial judge considered the underlying facts of the conviction to render it a crime of deceit, falling within the scope of Federal Rule of Evidence 609(a)(2) and provided the jury with limiting instructions to mitigate any prejudicial effect to Defendant. Defendant's petit larceny conviction rested on facts establishing dishonesty and deceit and thus, admission was proper.

ARGUMENT

I. Defendant's Fourth Amendment right was not violated when the Drug Enforcement Agency opened a sealed package addressed and sent to Defendant's P.O. Box, despite there being a search and seizure, because it was registered to a fictitious name.

The Fourth Amendment prohibits "unreasonable searches" of "persons, houses, papers, and effects." U.S. Const. Amend. IV. A two-step analysis is used to determine whether the Fourth Amendment has been violated: "first, has there been a search or a seizure, and second, was it

reasonable?" *United States v. Correa*, 908 F.3d 208, 217 (7th Cir. 2018) (citing *Carpenter v. United States*, 138 S. Ct. 2206, 2215 n.2 (2018); *Arizona v. Hicks*, 480 U.S. 321, 327 (1987)).

A search can occur in one of two ways: (1) a physical trespass to property or (2) the invasion of a space where a person has both a subjective and objectively reasonable expectation of privacy. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). A physical trespass occurs when the government "engage[s] in physical intrusion of a constitutionally protected area in order to obtain information." *United States v. Jones*, 565 U.S. 400, 407 (2012).

In all cases, "the ultimate touchstone of the Fourth Amendment is reasonableness." *Lange v. California*, 141 S. Ct. 2011, 2017 (2021). In assessing reasonableness, "the need for the particular search" must be balanced against "the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). This court has held that the search of effects is a much lesser invasion and more likely to be reasonable without a warrant. *See Jardines*, 569 U.S. at 5-6, 14 n.1 (Kagan, J., concurring). Even more relevant is the fact that lower courts have held that in similar situations where "the intended recipient has opted to conceal his identity, he cannot assert a cognizable Fourth Amendment interest in the package while it is in transit because he has chosen not to announce to society that he has a legitimate claim to the sealed contents of the package." *United States v. DiMaggio*, 744 F. Supp. 43, 46 (N.Y.N.D. 1990).

In the instant case, a search did occur. By seizing a package en route in the mail, SA Raghavan did trespass upon Defendant's personal effects in an attempt to gain information. But this search and seizure was not *unreasonable*. The intercepted package was mailed from a suspected drug operation, Holistic Horse Care, addressed to Jocelyn Meyer, which the DEA had reasonably suspected was the source of the narcotics entering Joralemon. While the package was seized by the DEA while out for delivery, the package itself was not opened until after

enforcement officials received a warrant. Furthermore, the use of the alias Jocelyn Meyer, whom the package was addressed to, removes any reasonable expectation of privacy under the Fourth Amendment. Because the intrusion into Defendant's privacy was so minimal, and the drug enforcement's need to confirm ownership was so substantial, this Court should affirm the Fourteenth Circuit's ruling that there was no Fourth Amendment violation.

A. The manner in which the search and seizure of Defendant's packages was conducted was reasonable because at the time the investigation was conducted the defendant had no possessory interest in the packages and the invasion of privacy was minimal.

The cornerstone in determining whether a search and seizure under the Fourth Amendment is viable hinges upon "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy." *United States v. Stokes*, 829 F.3d 47, 51 (1st Cir. 2016) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). Where a defendant believes that they had a legitimate expectation of privacy, they have the burden of demonstrating a "reasonable expectation of privacy in the area searched and in relation to the items seized." *United States v. Aguirre*, 839 F.2d 854, 856 (1st Cir. 1988).

The First Circuit has highlighted the following factors as pertinent to the analysis: "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 the case." *Aguirre*, 839 F.2d at 856-57. In other words, the manner in which the search was conducted must be evaluated such that the items seized, the area of the search, and the relation between the two is reasonable in light of the circumstances.

Turning to the first factor outlined in *Aguirre*, the "ownership, possession, and/or control" over the object subjected to a search, Defendant had no possessory interest in the packages at the time the search was conducted. In *United States v. Fontanez*, the defendant, Diaz

Fontanez, moved to suppress the fruits of a seizure of a priority mail package that contained fentanyl. *United States v. Fontanez*, No. 19-cr-10421-DJC, 2023 U.S. Dist. LEXIS 141256, *2 (D. Mass. August 14, 2023). While it is true that sealed envelopes and packages generally enjoy a high degree of privacy, courts have long recognized that the Constitution protects against unreasonable searches and seizures of sealed mail, this is not absolute. *United States v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984) (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878)). Additionally, as several cases have made clear, the ultimate question of whether a given set of facts gives rise to a reasonable expectation of privacy is a legal question. *United States v. Ferebee,* 957 F.3d 416, 416 (4th Cir. 2020) (citing *United States v. Stevenson*, 396 F.3d 538, 545 (4th Cir. 2005); *United States v. Ramapuram*, 632 F.2d 1149, 1155 (4th Cir. 1980)). The extent to which Diaz Fontanez claimed a brief possessory interest in the package seized by the Post Office upon his acceptance of its delivery is moot. *Fontanez*, slip op. at *22. When the package was removed from the mail stream for examination the defendant did not yet have a possessory interest in the package itself. *Id.* at *22. When considering this *Aguirre* factor, it is imperative to focus on the "defendant's established connection to the property at the time the search was conducted." *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021) (citing *United States v. Ferebee,* 957 F.3d 406, 416 (4th Cir. 2020)). Seeing that the search took place on February 14th, 2022, and Defendant did not have physical possession of the package until the following day, there is no reasonable expectation of privacy in those packages given they had never exercised control over the effects in question. (R. 30, 32.)

An analysis of the totality of the surrounding circumstances is crucial to any search and seizure conducted per the Fourth Amendment to determine whether there was a reasonable

explanation to violate Defendant's privacy interest.[1] Here, the context in which the necessity for a search arose makes it clear that the search and seizure of Defendant's package was not only reasonable, but imperative. This Court has noted that "[T]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that the invasion occurred." *United States v. Jacobsen*, 466 U.S. 109, 115 (1984). Looking to the facts, Joralemon is a predominantly low-income, high crime area, and as a result of these conditions, the area has long suffered from an illicit drug problem, and in recent years has seen a substantial spike in fentanyl overdoses. (R. 28-29.) On February 12th, 2022, a Joralemon resident named Liam Washburn overdosed on fentanyl, and his body was discovered next to partially used syringes and an opened package addressed from Holistic Horse Care. (R. 29.) SA Raghavan, the DEA agent assigned to investigate this case, contacted the Joralemon Post Office and instructed them to flag any packages that were sent through the mail from a horse veterinary website or company as a result of this incident. (R. 30.) Given the surrounding circumstances, the government, not only having the ability to regulate and control the movement of the mail, has a substantial interest in protecting the public from pervasive narcotic distribution.

B. Because Defendant registered her P.O. Box under an alias, assuming the title of a public figure, she possessed no reasonable expectation of privacy in the package sent under the Fourth Amendment.

The Fourteenth Circuit recognized that while some circuit courts have allowed defendants to claim a reasonable expectation in an alias if the defendant can establish public use of said alias, and they were commonly known by that name such that the defendant and the alias

[1] "In this case, the totality of the circumstances filled the government's probable cause cup to the brim… These facts alone, under an objective standard, were enough -- especially in a case like this one, where the affidavit contained sufficient reason to believe that the informants possessed the requisite indicia of dependability and where there was independent corroboration for much of their data." *Aguirre*, 839 F.2d 854, 858 (1st Cir. 1988). (Demonstrating that in this case, much like the instant case, the factual underpinnings of the investigation are pertinent to determining whether or not the government had probable cause to search the packages in question. This analysis is heavily fact dependent and subjective as a result such that it necessitates a case by case analysis.)

are perceived by the general public as one in the same, that they may be afforded the same Fourth Amendment protections. *See United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993).

While it is true that both senders and recipients of letters and other sealed packages "ordinarily have a legitimate expectation of privacy in those items even after they have been placed in the mail," this protection only extends to those whom the package is actually addressed to, meaning that the addressee of the package, and the recipient, are actually the same. *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970) (citing *Jackson*, 96 U.S. at 733); *see also Stokes*, 829 F.3d at 52. The Supreme Court considered, and rejected, a proposed rule that would have extended Fourth Amendment standing to "any criminal defendant at whom a search was 'directed.'" *Rakas*, 439 U.S. at 132-33. In rejecting this so-called "target theory," the Supreme Court emphasized that "[c]onferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trial," which in turn "exacts a substantial social cost by excluding" [r]elevant and reliable evidence . . . from the trier of fact." *Id.* at 137.

Several Circuit Courts have concluded that where a defendant is neither the sender or addressee of the package they do not have a legitimate expectation of privacy in any effects sent through the mail. The Fifth Circuit ruled that a defendant had no legitimate expectation of privacy in a box of narcotics, sent through certified mail, that was not addressed to him. *Daniel*, 982 F.2d at 149. In yet another analogous case in the Seventh Circuit, where the defendants were neither the sender or the addressee of a package sent through certified mail containing cocaine, the court concluded that the defendants had no privacy right in the package. *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988). In the instant case, Defendant's real name is Franny Fenty, but the packages containing fentanyl were addressed to Jocelyn Meyer. Applying the rules

set forth by several Circuits, the analysis would conclude here as it is apparent Defendant has no reasonable expectation of privacy in a package addressed to her under a fictitious name.

Assuming that the use of an alias here substantially alters this analysis, Defendant cannot possibly justify that the alias used was well known within the public domain such that it rises to the level of Fourth Amendment protections. The Fourth Circuit has stated that "individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names," but in order to do so they must allege, and provide sufficient evidence, that said fictitious name is a well-established alias. *Rose*, 3 F.4th at 728 (citing *United States v. Castellanos*, 716 F.3d, 828, 834; *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992)).

The fact that Defendant once used the alias Jocelyn Meyer to publish a few short stories many years ago while a student in college hardly proves that this is an established alias. Even though Defendant may have been the intended recipient of the package containing fentanyl, this is exactly analogous to the case in *Givens* where the defendants tried to challenge a search on their packages containing cocaine. In *Givens*, the package was not addressed to a single one of the defendants, nor was it addressed to any established alter ego. *See generally Givens*, 733 F.2d. The package was addressed to "Debbie Starks" rather than one of the defendants, "Debbie Givens," a third party wholly unrelated to the case living in a separate state. *Id.* Only after the package was searched and seized did Debbie Givens claim that Debbie Starks was an alter ego. *Id.* The court held that because the defendants did not have the ability to control access to the packages, or exclude others from taking possession of it, as well as their inability to demonstrate objective ownership or possession of the package, they lacked any legitimate grounds to challenge the search. *Id.* at 341-342.

Once more, the Seventh Circuit found that, as a matter of public policy, "society is not prepared to accept as reasonable an expectation of privacy in a package when the sender and the recipient have used aliases for the purpose of hiding their criminal connection to the package." *United States v. Pitts*, 322 F.3d 449, 454 (7th Cir. 2003). In this case, both the sender and the recipient used aliases to conceal their identities, and the court reasoned as a result of this that when both are concealed "the expectation of privacy vanishes and the package has effectively been abandoned." *Id*. The same could be said in the instant case. Not only does Defendant use an alias to conceal her identity as the recipient, the Holistic Horse Care website that distributes xylazine laced with fentanyl could easily be characterized as a front to conceal illegal activities, such as the distribution of dangerous narcotics. (R. 13, 29.) If both the sender and recipient in the instant case are masking their identities to conduct criminal activities, then any reasonable expectation of privacy ought to vanish on these grounds. This includes the Fourteenth Circuit, who already held previously that the use of an alias eviscerates Defendant's reasonable expectation of privacy, and that her alias hardly rises to the level of notoriety within the public domain to afford her such protections.

II. Defendant's recorded voicemail statements are not admissible pursuant to Federal Rule of Evidence 803(3) because she had a chance to reflect.

This Court should affirm the Fourteenth Circuit's holding that the district court did not abuse its discretion in properly excluding the recorded voicemail hearsay statements for not qualifying as a then-existing mental state under Federal Rule of Evidence 803(3) (hereinafter "Rule 803(3)"). (R. 69.); Fed. R. Evid. 803(3). The primary purpose of Federal Rule of Evidence 802 is to prohibit the use of hearsay statements at trial unless it is permitted by a federal statute, rules prescribed by the Supreme Court, or other rules within the Federal Rules of Evidence. Fed. R. Evid. 802. An exception to the rule, Rule 803(3), permits the admission of hearsay statements

where a declarant's statement is demonstrative of their then-existing state of mind or emotional, sensory, or physical condition. Fed. R. Evid. 803(3).

Following the 1980 *United States v. Ponticelli* decision, the majority of circuit courts adopted this factored test as a safeguard against the admission of post-crime hearsay statements whose purpose was solely to act self-serving or as a fabrication of events. *See* Eleanor Swift*, Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay,* 38 Seton Hall L. Rev. 975, 992 (2008) (citing cases from the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits); *see also United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980). The test follows that hearsay statements are admissible under the state of mind exception when: (1) the statements are contemporaneous; (2) its shown that the declarant had no chance to reflect, and; (3) the statements are "'shown to be relevant to an issue in the case.'" *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986) (citing *United States v. Layton*, 549 F.Supp. 903, 909 (N.D.Cal. 1982)).

The Government agrees that the first and third prongs of *Ponticelli* were satisfied. (R. 68-69.) The statements were made at the events that Defendant sought to prove, that she was unaware of why the packages were intercepted, and the statements are relevant to whether Defendant had actual awareness of the packages' contents. (R. 68-69.) Therefore, the only issue before this Court is whether the statements allowed time for Defendant to reflect, and thereby lack spontaneity. (R. 69.)

Although this Court has not yet addressed whether "spontaneity" is an explicit requirement within Rule 803(3), *Cianci v. United States*, 546 U.S. 935, 935 (2005), *cert. denied*., the majority of circuit courts have adopted a "trustworthiness" approach such that post-crime hearsay statements cannot be admitted where the declarant had the time to fabricate or

misrepresent their thoughts about the alleged crime. *See e.g.*, *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005); *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001); *United States v. Carmichael*, 232 F.3d 510, 521 (6th Cir. 2000); *United States v. Macey*, 8 F.3d 462, 467-68 (7th Cir. 1993); *United States v. Faust*, 850 F.2d 575, 585-86 (9th Cir. 1988); *Jackson*, 780 F.2d at 1315; *Ponticelli*, 622 F.2d at 991; *United States v. Rivera-Hernandez*, 497 F.3d 71, 81-82 (1st Cir. 2007). The Second Circuit has opted to apply a categorical approach to Rule 803(3), neglecting the underlying theory for trustworthiness, thereby allowing criminal defendant's manipulative statements to be admitted before the jury. *See United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984); *United States v. Lawal*, 736 F.2d 5, 8 (2d Cir. 1984).

This Court should adopt the *Ponticelli* factors, based on the language in the Advisory Committee Note Federal Rules of Evidence 803(3), and require "spontaneity" to admit hearsay statements under Rule 803(3). Furthermore, Defendant's admitted awareness of the schemes surrounding xylazine show her likely intent to evade culpability. (R. 45-46). Therefore, this Court should affirm the Fourteenth Circuit's holding that Defendant's recorded voicemail statements were inadmissible hearsay. (R. 69).

A. Hearsay statements are only admissible under Federal Rule of Evidence 803(3) when the declarant's statements are contemporaneous, demonstrate no chance to reflect, and are relevant to an issue in the case.

Under Rule 803, its numerous hearsay exceptions are predicated on the concept that, under circumstances specified in each exception, a hearsay statement is inherently untrustworthy. *See* Fed. R. Evid. 803 advisory committee's note to 1972 amendment. A statement that falls under the "state of mind" Rule 803(3) exception, acting as a "specialized application" of the present sense impression exception in Rule 803(1), would then be considered as inherently trustworthy on the theory that "substantial contemporaneity of event and statement negate the

likelihood of deliberate or conscious misrepresentation." *See* Fed. R. Evid. 803 advisory committee's note to 1972 amendment; *see also Ponticelli*, 622 F.2d at 991. Courts have held, in accordance with this theory, that when a declarant has "had an opportunity to reflect and possibly fabricate or misrepresent his thoughts," a statement would then not be qualified under the "state of mind" exception. *United States v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995); *see also Reyes*, 239 F.3d at 743.

This Court, in *Mutual Life Insurance Co. v. Hilmon*, articulated that hearsay statements of an individual's mental or bodily feelings are admissible as evidence where it is relevant to an issue in the case, as codified in Rule 803(3). *Mutual Life Insurance Co. v. Hilmon*, 145 U.S. 285, 296 (1892) (quoting *Insurance Co. v. Mosley*, 75 U.S. 397, 404 (1869)). Notably, while the Court reasoned that the truthfulness of such a statement is a matter that should be left to the jury, the Court never addressed whether circumstances may arise where the uttered statement would be so far removed from a "natural reflex" as to act as a fabrication or manipulation of event. *Id*. Furthermore, *Hilmon* does little to elucidate when such circumstances may arise that a declarant's statement would not fall under the "state of mind" exception.

The plain language of Rule 803(3), alone, leaves no room for judicial discretion; however, the Advisory Committee Note to Rule 803(3) adds to the exception, in declaring that it is a "specialized application" of Federal Rule of Evidence 803(1). Fed. R. Evid. 803(3) advisory committee's note to 1972 amendment. Following this, the courts were permitted to add the additional safeguarding factors in *Ponticelli*: "contemporaneousness, chance for reflection, and relevance" to be admissible. *Ponticelli*, 622 F.2d at 991; Fed. R. Evid. 803(3) advisory committee's note to 1972 amendment. Henceforth, courts evaluating whether a declarant's statement falls under the purview of the state of mind exception will utilize the *Ponticelli* factors

to screen statements that act to deliberately or consciously misrepresent the event. *See, e.g., Reyes,* 239 F.3d at 743; *Carmichael*, 232 F.3d at 521; *Rivera-Hernandez*, 497 F.3d at 82.

The perceived circuit split is a misleading notion. The cases cited most often in opposition to the adoption of the spontaneity requirement to the Rule 803(3) exception, *DiMaria,* 727 F.2d at 271; *Lawal,* 736 at 8; *United States v. Peak,* 856 F.2d 825, 833-34 (7th Cir. 1988); prefer to admit a criminal defendant's self-serving statements whose credibility is left to the jury, in favor of a categorical viewpoint. *See DiMaria,* 727 F.2d at 271; *Lawal,* 736 F.2d at 8. Yet, they neglect to realize that the categorical approach and the addition of the *Ponticelli* factors may coexist. In *Peak*, the Seventh Circuit admitted the defendant's exculpatory statements despite the declarant having ample amount of time to fabricate his state of mind. *Peak,* 856 F.2d at 833-34. However, in later cases, the Seventh Circuit held that a court may consider whether the declarant had a chance to fabricate prior to admitting hearsay statements under Rule 803(3). *See United States v. Harvey*, 959 F.2d 1371, 1375 (7th Cir. 1992); *Macey*, 8 F.3d at 467-68. The "split" has been reduced to a single circuit who follows a categorical approach, neglecting the root of all hearsay exceptions, that there must be "sufficient reliability to permit a factfinder to forego the law's preferred means for testing evidence: cross-examination." *United States v. Farhane*, 643 F.3d 127, 171 (2d Cir. 2011) (Raggi, J., concurring). It bears noting that lower courts, including those under the purview of the Second Circuit, currently utilize their discretionary power to uphold the *Ponticelli* factors when admitting hearsay statements, making the circuit split all the more illusory. *See United States v. Davidson*, 308 F. Supp. 2d 461, 480 (S.D.N.Y. 2004) (citing *United States v. Cardascia*, 951 F.2d 474, 488 (2d Cir. 1991) ("The state of mind exception focuses on the contemporaneity of the statements with the allegedly criminal acts and the unlikelihood of deliberate or conscious misrepresentation")).

Ultimately, courts have remained steadfast in their adherence to the *Ponticelli's* factors that admits hearsay statements where the declarant had no time to reflect, the statements were contemporaneous, and relevant to an issue in the case. This includes the Fourteenth Circuit, who correctly applied the "spontaneity" requirement in this case.

B. Because Defendant had a chance to reflect prior to the creation of the voicemails, her statements are inadmissible under Federal Rule of Evidence 803(3).

Under Rule 803(3), hearsay statements are inadmissible where a Defendant had a chance to reflect. Defendant here, had a chance to reflect prior to making the recorded voicemail statements and thus, they were properly excluded from trial.

Courts' concerns with trustworthiness for whether Rule 803(3) hearsay statements should be admissible permits trial courts to consider the timeliness of the statement. *See generally United States v. Partyka*, 561 F.2d 118 (8th Cir. 1977); *see generally Ponticelli*, 622 F.2d. Courts consider whether the declarant made the hearsay statements with "no time to [reflect and possibly] fabricate or misrepresent . . . thoughts" about the alleged crime. *Reyes*, 239 F.3d at 743 (citing *Jackson*, 780 F.2d at 1315). The "time to reflect" refers to any lapse of time between the declarant making the hearsay statement and the alleged crime. *Naiden*, 424 F.3d at 722-23 ("[T]he passage of time may prompt someone to make a deliberate misrepresentation of a former state of mind… [T]he requirement [ensures] that hearsay evidence be reliable in order for it to be admissible under Rule 803(3)."); *see also Horton v. Allen*, 370 F.3d 75, 85 (1st Cir. 2004) (citations and quotations omitted) ("The premise for admitting hearsay statements evidencing state-of-mind is that such statements are reliable because of their 'spontaneity and [the] resulting probable sincerity."); *see also Reyes*, 239 F.3d at 743 (holding a statement inadmissible because the "remarks were more self-serving than they were candid[.]") Additionally, since disputes on whether a declarant's statement falls under the state of mind exception is fact sensitive, "the trial

court is in the best position to resolve them." *Colasanto v. Life Ins. Co. of N. Am.*, 100 F.3d 203, 212 (1st Cir. 1996); *see United States v. Cianci*, 378 F.3d 71, 106 (1st Cir. 2004).

The district court did not abuse its discretion by denying Defendant's voicemails to be admitted under Rule 803(3). An error in a district court's admission occurs where "no reasonable person could take the view adopted by the trial court." *United States v. Fulford*, 980 F.2d 1110, 1114 (7th Cir. 1992) (quoting *United States v. Manos*, 848 F.2d 1427, 1429 (7th Cir. 1988)). No abuse of discretion is found where "reasonable persons could differ[.]" *Id.*

In the instant case, the district court reasonably concluded that Defendant had time to fabricate a story once they had realized that the packages, containing illegal substances they purchased, were intercepted. (R. 52.) Similar to *Rivera-Hernandez*, where the court denied the defendant's request to admit his statements to his father on why he was receiving certain payments solely to show a lack of fraudulent intent, Defendant made recorded statements to demonstrate a lack of culpability in their illegal activity. *Rivera-Hernandez*, 497 F.3d at 80-82; *see also United States v. Feng*, 25 F. App'x. 635, 642 (9th Cir. 2002) (excluding statement by the defendant to his sister on boat smuggling illegal aliens after he discovered the human cargo, offered solely to show he did not knowingly or voluntarily act in furtherance of the conspiracy); *United States v. Giles*, 246 F.3d 966, 974 (7th Cir. 2001) (excluding defendant's recorded exculpatory statements offered solely to prove the defendant did not knowingly accept a bribe). It is also reasonable to conclude that Defendant had more time to reflect and further their fabrication of events during the 45-minute interval between the first and second call to Millwood. (R. 40, 46.) Like *Macey*, where the defendant's statement was properly excluded because he "had time to fabricate a story in the four hours between his fraud and his statement to [the employee,]" Defendant's second phone call was made methodically after reflecting on her

suspicion that she was being investigated. *Macey*, 8 F.3d at 467-68; *see also Naiden*, 424 F.3d at 721-23 (excluding a statement made by the defendant to a friend the day after meeting his online victim claiming not to believe that she was fourteen because it was "not made as an immediate reaction to his communication with her, but after he had had ample opportunity to reflect on the situation."). As good reason existed, the district court did not abuse its discretion by precluding Defendant's hearsay statements.

Furthermore, even assuming, *arguendo*, that Defendant's statements were improperly excluded, any error in failing to admit the recorded voicemail statements were harmless. The overwhelming amount of evidence establishing Defendant's numerous attempts to conceal her identity when obtaining the illegal narcotics act as sufficient reasoning to the jury. (R. 15.) Even if Defendant was not initially aware of the illegal narcotics distribution scheme, she had sufficient basis for suspicion as she was asked to obtain narcotics of which she had no authority to purchase, she conducted her own research on the use of Xylazine, there were various news items on the adding of Fentanyl to the drug, and she had prior knowledge of Millwood's character. (R. 43, 45-46, 55-57.)

This Court should affirm the Fourteenth Circuit holding that Defendant's recorded voicemails were inadmissible hearsay statements. Rule 803(3) requires that hearsay statements be contemporaneous, relevant, and there have been no time to reflect. Defendant's voicemail statements were "self-serving," prepared solely to escape culpability and manipulate the fact-finder. Therefore, the statements were properly excluded from trial.

III. Because Defendant's prior conviction for petit larceny was committed in a deceitful manner, the decision to admit it as impeachment evidence under Rule 609(a)(2) should be affirmed.

It is urged that this Court affirm the Fourteenth Circuit's holding that Defendant's prior conviction for petit larceny is admissible as impeachment evidence. Federal Rule of Evidence

609(a) (hereinafter "Rule 609(a)") provides that evidence of a witness' prior conviction may be admitted for impeachment purposes if: (1) it is a felony conviction and its probative value is not substantially outweighed by the danger of unfair prejudice, or (2) if it is a conviction for a crime involving dishonesty or false statement. Fed. R. Evid. 609(a). Under Subsection (2), the evidence of the prior conviction *must* be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness admitting – a dishonest act or false statement. Fed. R. Evid. 609(a)(2). Because of the lack of discretion for the trial judge to admit prior convictions that fall within the provisions of Rule 609(a)(2), federal courts have consistently interpreted the scope of included crimes narrowly. Roger C. Park, *Impeachment with Evidence of Prior Convictions*, 36 Sw. U. L. Rev. 793, 800 (2008). Nevertheless, courts have held admissible past convictions for crimes in which the commission involved an element of deceit, untruthfulness, or falsification. *Id.* at 801.

A. In interpreting which crimes fall within the scope of Rule 609(a)(2), to determine whether admission of a prior conviction is proper, courts look to the underlying facts and distinguish between crimes of deceit and crimes of violence.

Under Rule 609(a)(2), evidence of a prior conviction for a crime involving "dishonesty or false statement" *must* be admitted. Fed. R. Evid. 609(a)(2). Therefore, because the trial court lacks complete discretion, it is restricted to convictions bearing directly on the witness's credibility to testify truthfully. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). It is undisputed that crimes considered *crimen falsi*, i.e., directly containing an element of dishonesty or deceit, such as perjury, false statement, criminal fraud, embezzlement or false pretense, are *per se* admissible under Rule 609(a)(2). *Id.*; *see also United States v. Brackeen*, 969 F.2d 827, 830 (9th Cir. 1992). However, seemingly "dishonest" crimes, such as theft, robbery, or shoplifting, are not *per se* admissible, *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977), rather, courts have held that the trial court may look beyond elements of the offense to determine

whether the conviction was based on facts establishing dishonesty or false statements. *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005); *United States v. Mejia-Alarcon*, 995 F.2d 982, 989-990 (10th Cir. 1993). In such a case, it is the prosecution's burden to prove that the prior conviction rested upon facts involving deceit or dishonesty. *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982).

When amending Rule 609 to include the requirement that a court admit a prior conviction if it can "readily determine (or the witness admits) that the crime involved a dishonest act or false statement", the Advisory Committee on the Federal Rules of Evidence provided that even where a crime does not expressly reference deceit or dishonesty, the proponent may offer information to show that the conviction rested upon acts of dishonesty or false statement. Fed. R. Evid. 609 advisory committee's note to 2006 amendment. In *United States v. Smith*, the court noted the Conference Committee's discussion of impeachment by prior conviction which subsequently impacted the 1976 amendment to the rule. *See generally United States v. Smith*, 551 F.2d 348 (D.C. Cir. 1976). Notably, one senator discussed the difference between crimes of violence and crimes of deceit and their respective bearings on credibility. *Id.* at 363:

> There is no deceit in armed robbery. You take a gun, walk out, and put it in a man's face and say, "Give me your money," or walk up to the counter of the cashier and say, "this is a holdup; give me your money." There is no deceit in that. They are not lying. They mean business. They will murder you if you do not do it.

Furthermore, Congressman Hogan pointed out that the very definition of *crimen falsi* has been understood to include petit larceny, *inter alia*. *Id.* at 367.

The language used in Rule 609(a)(2) leaves no discretion to the trial judge in determining whether to admit crimes involving dishonesty or false statements to challenge a witness's credibility. The rule provides that evidence of a prior conviction "*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. 609(a)(2) (emphasis added). Consequently, when the court finds that the conviction rested on facts involving deceit or dishonesty, the judge lacks the discretion to exclude the evidence if proffered. *United States v. Washington*, 702 F.3d 886, 892 (6th Cir. 2012). Therefore, by looking at the underlying facts of the conviction in question, if the trial judge finds that it rested upon facts exhibiting dishonesty or deceit, they do not possess the discretion to determine whether the evidence may be used to impeach the witness and it must be admitted. *See id.*; *Estrada*, 430 F.3d at 614; *Mejia-Alarcon*, 995 F.2d at 989-990.

The fact that a crime may be committed in a manner which does not involve deception or dishonesty does not automatically render that conviction inadmissible for purposes of Rule 609(a)(2). *Altobello v. Borden Confectionary Products, Inc.*, 872 F.2d 215, 217 (7th Cir. 1989). Offenses that are not *per se* crimes of dishonesty but nonetheless may be committed in a deceitful manner may fall into the scope of Rule 609(a)(2) when the prosecution demonstrates to the court that the prior conviction's factual basis involved dishonesty or false statement. *Hayes*, 553 F.2d at 827. In an opinion penned by Justice Sotomayor during her time on the Second Circuit, the court held that crimes that are not facially dishonest or deceitful may still be admissible under Rule 609 if, when the trial judge looks to the basis for the conviction, he or she finds that the facts established exhibited dishonesty or false statement. *Estrada*, 430 F.3d at 614. The Tenth Circuit utilized the same standard in *Mejia-Alarcon*, holding that, in looking to the underlying facts of the defendant's prior conviction, the trial court improperly admitted the prior conviction because there was a lack of evidence establishing that the crime was committed through dishonesty or deceit. *Mejia-Alarcon*, 995 F.2d at 990.

While there are certainly cases that have rendered theft or larceny convictions inadmissible under Rule 609(a)(2), there are unequivocally cases that, by looking to the facts rested upon for the prior convictions, find them admissible. With reference to crimes of theft, the Seventh Circuit, in *Altobello* suggested that "greed or *pleonexia* (wanting more than your fair share) is more highly correlated with willingness or propensity to lie under oath than wrath or passion is." *Altobello*, 872 F.2d at 216. Furthermore, the court noted that there is a higher probability that a person who used deceit to commit a crime in the past will not testify truthfully on the witness stand as opposed to other types of criminals or law-abiding persons, especially when they are party to the suit in which they are testifying. *Id.* For example, in *United States v. Glenn*, while the Ninth Circuit ultimately held that the defendant's prior convictions for theft were improperly admitted under the standard set forth by precedent interpreting Rule 609(a)(2), the court nevertheless noted that theft convictions may be admissible if the crime is actually committed by deceitful or dishonest means. *Glenn*, 667 F.2d at 1273.

Recently, in 2022, the District Court for the Northern District of New York held that "larceny is a crime of theft which bears on credibility." *Diggs v. Guynup*, 621 F.Supp. 3d 315, 321 (N.D.N.Y 2022). Moreover, the First Circuit noted in *United States v. Brown* that petit larceny has "a definite bearing on honesty which is directly related to credibility" and that "acts of deceit, fraud, cheating, or stealing are universally regarded as conduct which reflects adversely on a man's honesty and integrity." *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979).

B. In the instant case, because the trial court was able to readily determine Defendant's prior conviction to be a crime of deceit by looking to the underlying facts, the court should affirm the decision of the Fourteenth Circuit.

Under Rule 609(a)(2), the evidence of a prior conviction *must* be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness

admitting – a dishonest act or false statement. Fed. R. Evid. 609(a)(2). To admit a prior conviction when the crime is not a facially dishonest one, the trial judge may look at the underlying facts considered to establish the conviction in determining whether the crime was committed through dishonesty or deceit. *Estrada* 430 F.3d at 614; *Mejia-Alarcon*, 995 F.2d at 989-990. Under this standard, Defendant's prior conviction for petit larceny was properly admitted at trial as impeachment evidence. The trial judge considered the underlying facts of the conviction to render it a crime of deceit falling within the scope of Rule 609(a)(2) and provided the jury with limiting instructions to mitigate any prejudicial effect to Defendant. Because Defendant's petit larceny conviction rested on facts establishing dishonesty and deceit, admission was proper.

Based on the evidence presented by both parties during the hearing regarding Defendant's motion in limine to exclude evidence of her prior conviction, the district court rendered the prior conviction admissible based on the underlying facts showing a level of deceit that falls within the meaning of Rule 609(a)(2). (R.26.) The district court was able to readily determine that Defendant's petit larceny conviction was committed through deception hence, the judge lacked the discretion to exclude the evidence and was *required* to admit it. Fed. R. Evid. 609(a)(2); *Washington*, 702 F.3d at 892. It is undisputed that Defendant plead guilty to the petit larceny charge. (R.54.) During her cross examination at trial for the present matter, Defendant admitted her intention to remain unnoticed by the victim and her awareness of her wrongdoing during the commission of the crime. (R.59-60.) Given Defendant's guilty plea and transparency regarding the circumstances of the prior conviction, it is plausible that the trial court was easily able to determine that the underlying facts established dishonesty by Defendant during her commission of the crime.

While Defendant's prior conviction for petit larceny is not *per se* admissible under Rule 609(a)(2), *Ortega*, 561 F.2d at 806, the prosecution may nevertheless introduce evidence of the underlying facts of the conviction to render its admissibility for impeachment. *Estrada*, 430 F.3d at 614; *Mejia-Alarcon*, 995 F.2d at 989-990. Defendant's credibility is adversely affected because of the underlying facts of her prior conviction for petit larceny. Despite Section 155.25 of the Boerum Penal Code making no mention of deceit, dishonesty, or false statements[2] (R.19.), the conviction should be admissible because the facts used to establish it bear on Defendant's character for untruthfulness. In committing this crime, Defendant intended to target a victim who was distracted and would not notice her presence to successfully obtain the victim's belongings, which she has admitted. (R.22, 59.) Upon noticing Defendant's presence, the victim yelled, bringing the crowd's attention to the scheme. (R.22-23, 59.) Only then did Defendant become forceful, compelling her to abandon her original plan to deceive the victim in order to obtain her belongings. (R.23.) Unlike cases that have found prior convictions involving theft inadmissible, the facts utilized to convict Defendant of petit larceny fall squarely within the meaning of deception. Having awareness of her wrongdoing, Defendant abused the victim's state of vulnerability in being distracted to ensure that her presence remained unnoticed. (R. 59-60.) Courts have often distinguished between crimes of deceit and crimes of violence in determining whether a prior conviction is admissible impeachment evidence holding that simply because a crime may be committed in a forceful manner rather than a deceitful one does not automatically

[2] **Boerum Penal Code § 155.25 Petit Larceny.** (1) A person is guilty of petit larceny when that person knowingly takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another with intent to, either temporarily or permanently: (a) Deprive the other person of the right to benefit from his or her property, (b) Exercise control over the property without the owner's consent, or (c) Appropriate the property as his or her own; and (2) If the property stolen is valued at less than One Thousand Dollars ($1,000.00). (3) Petit larceny is a class B misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, but more than 30 days, or by a fine not exceeding Five Thousand Dollars ($5,000.00).

render it inadmissible. *Smith*, 551 F.2d at 362-363; *Altobello*, 872 F.2d at 217. Indeed, merely because Defendant subsequently used force to bring her plan to fruition does not dilute the fact she had planned to steal the victim's belongings through deception. Thus, the crime committed by Defendant falls into the purview of Rule 609(a)(2) because it was intended to be executed through dishonest, rather than, violent means. *See Smith*, 551 F.2d at 362-363; *see also Altobello*, 872 F.2d at 217.

It bears noting that setting forth a blanket rule of inadmissibility for theft charges, such as petit larceny, may prevent highly pertinent evidence for purposes of assessing credibility from being admissible. *See* Fed. R. Evid. 609 advisory committee's note to 2006 amendment. Utilizing an approach that differentiates between prior convictions by looking to the underlying facts where the crime is not facially dishonest to determine admissibility ensures that crimes having a significant bearing on a witness's credibility are admitted, while crimes that are more likely to be used improperly as propensity evidence are not. *See Smith*, 551 F.2d at 362-363; *Altobello*, 872 F.2d at 217; *Estrada*, 430 F.3d at 614; *Mejia-Alarcon*, 995 F.2d at 989-990.

Petitioners have reasonably argued that limited jury instructions fail to protect Defendant from the prejudicial effect that introduction of a prior conviction to the jury could have on rendering a valid verdict for the present matter. (R.25-26.) To address that concern, it is plainly within Federal Rule of Evidence 105 that where evidence is admissible against a party for one purpose but not another, here, for impeachment not propensity, the court must restrict the evidence to its proper scope and instruct the jury accordingly. Fed. R. Evid. 105. It has been consistently held that instructing the jury to use prior convictions for the sole purpose of assessing a defendant witness's credibility is an effective method of avoiding any prejudice to the defendant. *See e.g., Old Chief v. United States*, 519 U.S. 172, 196 (1997) (noting that limiting

instruction properly mitigates any potential harm to the defendant and holding that the District Court's instructions to the jury that it was not to "'consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial" were sufficient); *United States v. Broadwater*, 65 Fed. Appx. 571, 574 (7th Cir. 2003) (holding that limiting instructions with regard to impeachment evidence curtails the possibility that the evidence will have a prejudicial effect); *United States v. Hodge*, 354 F.3d 305, 312 (4th Cir. 2004) ("Limiting jury instructions explaining the purpose for admitting prior bad acts evidence and advance notice of the intent to introduce such evidence provide additional protection to defendants."); *United States v. Fineday*, No. 23-cr-224, 2023 U.S. Dist. LEXIS 233568, *15 (D. Minn. December 19, 2023) (holding that absent reason to believe a jury is unable to properly compartmentalize substantive evidence from impeachment evidence, limiting jury instructions are appropriate); *United States v. Myrick*, No. 3:22-cr-148-HEH, 2023 U.S. Dist. LEXIS 48108, at *19 (E.D. Va. March 21, 2023) (noting that limiting jury instructions explaining the purpose of admitting a prior conviction provides additional protection to defendants). At the close of trial in this matter, the court provided the jury with instructions to consider Defendant's prior conviction for the sole purpose of addressing her character for truthfulness rather than as having a general predisposition to commit crimes. (R.63.)

For the reasons stated, it is urged that this Court adopt the standard allowing judges to consider not only the elements of the prior conviction but also the underlying facts of the conviction to determine whether to admit it as impeachment evidence under Rule 609(a)(2).

CONCLUSION

For the foregoing reasons, the judgment of the Fourteenth Circuit Court of Appeals ought to be affirmed.

Respectfully Submitted,
/s/ Team 14R
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