No. 23 – 695

In The Supreme Court of the United States

FRANNY FENTY,
Petitioner,
v.

UNITED STATES OF AMERICA.
Respondent.

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

BRIEF FOR PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether an individual has a legitimate expectation of privacy in sealed mail addressed to their public use alias under the Fourth Amendment when they can establish public use of the alias and the ability to control and possess mail addressed to the alias.

II. Whether the district court erred in excluding the recorded voicemail statements conveying Ms. Fenty's then-existing mental states under Rule 803(3) of the Federal Rules of Evidence because they lacked spontaneity when the rule does not contain a spontaneity requirement.

III. Whether the district court erred in admitting evidence of Ms. Fenty's prior conviction for petit larceny under Rule 609(a)(2) of the Federal Rules of Evidence when neither dishonesty nor false statements are elements of petit larceny, and the underlying facts demonstrate the crime was not committed in a manner involving dishonesty, false statements, or deceit.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourteenth Circuit, *Franny Fenty v. United States of America*, No. 22-5071 was entered on June 15, 2023, and may be found in the Record. (R. 64-73).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. IV

Fed. R. Evid. 609(a)(2)

Fed. R. Evid. 803(3)

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

A. Ms. Franny Fenty A.K.A. Jocelyn Meyer

Ms. Franny Fenty ("Ms. Fenty") is a 25-year-old resident of Joralemon, Boerum. R. p. 8. For the last several years, Ms. Fenty has been making efforts to kickstart a career as an author. *Id.* at 42–43. When Ms. Fenty began publishing her writings in the fall of 2016, she, like many other authors, elected to publish her works under an alias to preserve her privacy. *Id.* at 43. Ms. Fenty published using the name "Jocelyn Meyer," and used this name in all communications with publishers. *Id.* Ms. Fenty actively maintains an email address under this name (jocelynmeyer@gmail.com) and signed "Jocelyn Meyer" on correspondence as recently as October 19, 2021. *Id.* at 5, 42, 65. Recently, Ms. Fenty began using this alias to maintain privacy in other aspects of her life, even registering a P.O. Box under "Jocelyn Meyer" in 2022. *Id.* at 43.

B. Ms. Fenty's Efforts to Find Stable Employment

In search of more stable employment, Ms. Fenty posted on LinkedIn on December 28, 2021, asking her professional network to keep her in mind for potential employment opportunities. *See id.* at 6. That same day, Ms. Angela Millwood ("Ms. Millwood"), a "Horse Handler at Glitzy

Gallop Stables" and Ms. Fenty's high school classmate, commented on Ms. Fenty's "open to work" post, indicating that she might have an employment opportunity for Ms. Fenty. *Id*.

They exchanged phone numbers, and after some conversation, Ms. Millwood told Ms. Fenty of her job at Glitzy Gallop Stables. *Id.* at 44. She claimed to work with horses and explained that the most difficult part of the job was seeing the horses in pain as they aged. *Id.* She said she wanted to begin administering a muscle relaxer, xylazine, to ease the horses' pain. *Id*. at 44–45. Ms. Fenty was unfamiliar with the drug but offered to help Ms. Millwood obtain xylazine because Ms. Millwood's position prevented her from being able to order it. *Id*. at 45. Prior to placing the order, Ms. Fenty confirmed that the xylazine was to be used exclusively for horses. *Id*. at 45–46.

C. February 14, 2022: The DEA's Seizure of Ms. Fenty's Package

Following the overdose of a Joralemon resident on February 12, 2022, officials from the United States Drug Enforcement Administration (DEA) asked Joralemon Post Office employees to alert them of any packages shipped from any horse veterinarian website or company. *Id*. at 29–30. According to the DEA, the decedent from the February 12 overdose was discovered next to partially used syringes and an opened package addressed from "Holistic Horse Care." *Id*. at 29.

On February 14, 2022, a Joralemon Post Office employee notified the DEA of two packages sent from "Holistic Horse Care" to a P.O. Box registered to "Jocelyn Meyer" and seized them per the DEA's request. *Id*. at 30. Unsure of the contents, the DEA obtained a search warrant, searched the packages, and found two bottles labeled "Xylazine: For the Horses." *Id*. at 31, 37. Apart from the recent overdose, the DEA agents had no reason to believe the packages, addressed and sent to a P.O. Box registered to Jocelyn Meyer, contained illicit drugs. *Id*. at 31, 37. However, further testing determined the bottles contained a combination of xylazine and fentanyl. *Id*. at 32.

Following testing, the DEA returned the packages to the Post Office and instructed them to hold the packages at the counter until they were picked up by the addressee. *Id*. at 32. The other packages, which were addressed to Ms. Fenty, were returned to the P.O. Box *Id*. at 31.

Later that day, Ms. Fenty arrived at the Joralemon Post Office to retrieve her packages. Realizing her Holistic Horse Care packages were missing, Ms. Fenty immediately called Ms. Millwood and left a voicemail at 1:32 p.m. expressing her concern over the packages' absence and her intent to only be involved in ordering xylazine for aging horses. *Id*. at 47. Still concerned after speaking with postal service workers in efforts to locate her packages, Ms. Fenty called Ms. Millwood again at 2:17 p.m. and left a second voicemail. *Id*. In both messages, Ms. Fenty expressed concern and confusion regarding the missing packages. *See id.* at 40. At the direction of post office employees, Ms. Fenty returned the next day and retrieved the "missing" packages from the front counter, confirming to an employee that they belonged to her. *Id*. at 33.

When Ms. Fenty was leaving the Post Office, she encountered a college friend who identified her as "Franny Fenty." *Id*. at 33. At that point, the DEA agents, who were observing the interaction through surveillance cameras, determined that the Holistic Horse Care Packages addressed to "Jocelyn Meyer" which contained a combination of xylazine and fentanyl actually belonged to Ms. Fenty. *Id*. at 33, 66. A subsequent social media search by DEA agents revealed Ms. Fenty's "open to work" LinkedIn post, connecting her to Ms. Millwood. *Id*. at 34. This sparked suspicion, as DEA agents had previously investigated Ms. Millwood for drug dealing, although she was never charged. *Id*. at 34. Ms. Fenty was subsequently arrested. *Id.* at 34.

D. Ms. Fenty's Prior Larceny Conviction

Unrelated to the present case, Ms. Fenty was convicted of petit larceny six years ago when she accepted a dare from a friend to take the bag of a nearby stranger. *Id*. at 52–54. When the

victim was distracted by sources completely unrelated to Ms. Fenty or her actions, Ms. Fenty approached the woman to silently take her bag. *Id*. at 59. When this failed, Ms. Fenty resorted to force and was able to gain possession of the bag. *Id*. at 53–54. She ran off but was immediately apprehended by police. *Id*. At trial, she pled guilty to the misdemeanor of petit larceny in violation of Boerum Penal Code § 155.25. *Id.* at 54

II. PROCEDURAL HISTORY

Ms. Fenty was indicted on February 15, 2022, by the United States District Court for the District of Boerum on one count of possession with intent to distribute fentanyl. *Id*. at 1. On August 25, 2022, the district court heard arguments on Ms. Fenty's Motion to Suppress the contents of the sealed packages addressed to her alias, Jocelyn Meyer. *Id.* at 10. While the district court recognized a "legitimate concern that government agents might search potentially innocent items, and then try to justify this after-the fact," the court ultimately denied Ms. Fenty's Motion to Suppress, holding she did not have a reasonable expectation of privacy in mail addressed an alias. *Id*. at 17.

At a separate pre-trial hearing, the district court denied Ms. Fenty's Motion in Limine to exclude evidence of her prior conviction. *Id.* at 26. The court held the prior conviction was admissible under Rule 609(a)(2) of the Federal Rules of Evidence because it would assist the jury in determining Ms. Fenty's character for truthfulness despite petit larceny being an inappropriate indicator of a person's veracity. *See id.* at 26.

At trial, Ms. Fenty attempted to introduce the transcripts of the voicemail recordings into evidence. *Id.* at 46–47. The court agreed with the government's argument that, even though there is not a spontaneity requirement within the text of Rule 803(3) of the Federal Rules of Evidence, such a requirement should be read into it. Thus, the court excluded the recordings for a want of

spontaneity. *Id*. at 26, 61. Therefore, the voicemails could be used for impeachment purposes. Ms. Fenty was ultimately found guilty and convicted before filing a timely appeal. *Id.* at 65

On June 15, 2023, the United States Court of Appeals for the Fourteenth Circuit affirmed the District Court's decisions. *Id*. at 70. Ms. Fenty timely filed her appeal. *Id*. at 74.

SUMMARY OF THE ARGUMENT

First, Ms. Fenty argues that the lower courts erred in holding that she does not have a legitimate expectation of privacy in sealed mail addressed to her alias, Jocelyn Meyer, prohibiting her from challenging the original seizure of her packages. This Court has long held that individuals have a legitimate privacy expectation in sealed mail. The use of an established, public alias should not change this reality. Here, Ms. Fenty exhibited a subjective expectation of privacy in her packages. Further, this expectation is one which society is prepared to recognize as reasonable. It is not illegal to send mail to an alias, and holding that a reasonable privacy expectation does not exist in sealed mail sent to an alias would contradict longstanding Fourth Amendment precedent. Namely, that an individual has a reasonable privacy expectation in an item if they can establish ownership, possession, and control of the item. Additionally, an individual's legal name need not be listed on an ownership document to have a reasonable expectation of privacy in that item. Therefore, because Ms. Fenty has Fourth Amendment standing, this Court should remand this case to determine the validity of the original seizure of her packages.

Next, Ms. Fenty argues the district court abused its discretion by excluding the voicemail statements under Rule 803(3) of the Federal Rules of Evidence because they were not spontaneous. In support, Ms. Fenty argues the district court applied an erroneous legal premise. Namely, the court concluded that Rule 803(3) contains a spontaneity requirement. Thus, because the evidence demonstrates that Rule 803(3) does not contain a spontaneity requirement, exclusion on these

grounds constitutes an abuse of discretion. Alternatively, Ms. Fenty argues the district court relied on erroneous factual premises. Namely, that the voicemail statements were not spontaneous. Even if Rule 803(3) contains a spontaneity requirement, because the evidence demonstrates the voicemail statements were spontaneous, exclusion for a want of spontaneity constitutes an abuse of discretion. Further, the exclusion of this evidence significantly prejudiced Ms. Fenty, providing grounds for the district court's verdict to be vacated, or the case remanded.

Finally, Ms. Fenty argues the district court abused its discretion by admitting evidence of her prior conviction for petit larceny under Rule 609(a)(2) of the Federal Rules of Evidence. In support, Ms. Fenty argues the district court applied an erroneous legal premise. Namely, that petit larceny is a type of crime that is admissible under Rule 609(a)(2). However, because petit larceny does not involve elements of dishonesty or false statements, admission of the conviction constitutes an abuse of discretion. Alternatively, Ms. Fenty argues the district court relied on erroneous factual premises. Namely that dishonesty, false statements, or deceit were employed in the crime's commission. However, no evidence contained within the record supports this conclusion. Further, admission of these convictions poses a significant threat of prejudice against Ms. Fenty because of the factual similarities underlying her prior petit larceny conviction and the present case, providing grounds for the district court's verdict to be vacated, or the case remanded.

ARGUMENT

I. MS. FENTY HAS A LEGITIMATE EXPECTATION OF PRIVACY IN SEALED MAIL ADDRESSED TO HER PUBLIC USE ALIAS, JOCELYN MEYER.

An individual has standing to challenge an alleged Fourth Amendment violation when they have a legitimate expectation of privacy in an invaded item or place. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). To have a legitimate expectation of privacy, one must have a subjective expectation and an objective expectation which society is prepared to

recognize as reasonable. *Bond v. United States*, 529 U.S. 334 (2000). If a defendant has Fourth Amendment standing to challenge the search or seizure of an item, they can urge suppression of any evidence produced from the violation. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Here, Ms. Fenty has a legitimate expectation of privacy in sealed mail addressed to her alias because she exhibited a subjective privacy expectation in the seized packages and because such an expectation is one which society is prepared to recognize as reasonable. Therefore, this Court should remand this case to determine the validity of the seizure of Ms. Fenty's packages and ultimately, whether the evidence produced from it should be suppressed.

A. Standard of Review

A court reviews a defendant's standing to challenge a Fourth Amendment search de novo. *United States v. Smith*, 263 F.3d 571, 581 (6th Cir. 2001). In an appeal from a denial of a motion to suppress, a court reviews factual findings for clear error and legal conclusions de novo. *United States v. Davis*, 943 F.3d 1129, 1132 (8th Cir. 2019).

B. Ms. Fenty Has a Subjective Expectation of Privacy in Sealed Mail Addressed to Her Alias.

Ms. Fenty has a subjective expectation of privacy in sealed packages addressed to her alias because she actually believed mail sent to her public use alias would remain private. Relevant for this consideration is not whether Ms. Fenty actually possessed or controlled the item, which she did, but whether she intended to possess or control it. *See United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009) (acknowledging a defendant had standing to challenge the search of a mailed package containing marijuana not addressed to his legal name where he was the intended recipient of the package).

In *United States v. Richards*, customs agents opened and inspected the defendant's package addressed to "Mehling Arts & Crafts" without a warrant and instructed postal inspectors to put a

notice of arrival on it. 639 F.2d 765, 766-68 (5th Cir. 1981) P.O. Box where it was sent was registered to "Mehling Arts & Crafts" but was opened by the defendant, Raymond Richards. *Id*. at 767. When Richards picked up the package, DEA agents observed him walking out of the building and arrested him because the package contained narcotics. *Id*. Richards, unaware of the contents of the package, indicated that someone else asked him to pick it up and promised to pay him for doing so. *Id*. He was eventually charged with possession of heroin with the intent to distribute. *Id*. The Fifth Circuit held that Richards had a reasonable expectation of privacy in the package because he lawfully possessed it, and because the name listed on it was, "in effect," him. *Id*. at 770.

Just as in *Richards*, Ms. Fenty maintained a P.O. Box under an alias, actually possessed the package at issue, and was the intended recipient of it. R. p. 33. For purposes of Fourth Amendment standing, Ms. Fenty was, "in effect," Jocelyn Meyer. Unlike Richards, Ms. Fenty publicly and actively identifies with the name Jocelyn Meyer, supporting the existence of a subjective privacy interest. Further, Ms. Fenty actually indicated she expected privacy in mail sent to her P.O. Box, registered to Jocelyn Meyer. R. p. 43. In sum, Ms. Fenty has a subjective expectation of privacy in the package because she intended to possess, and did in fact possess, the packages at issue.

C. Ms. Fenty Has an Objective Expectation of Privacy in Sealed Mail Addressed to Her Alias.

In addition to her individual desire to remain private via her mail and otherwise, Ms. Fenty also has an objective expectation of privacy in the packages addressed to her public use alias. A person has an objective expectation of privacy when that expectation is one which society is prepared to recognize as reasonable. *Katz* 389 U.S. at 361 (Harlan, J., concurring). Further, an individual has an objective expectation of privacy in mail addressed to an alias if they own, possess, or control the mail sent to that alias. *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021).

Ms. Fenty's use of a public alias to receive mail is a privacy interest which society is prepared to recognize as reasonable. Further, she has a reasonable expectation of privacy in packages addressed to her alias because she uses her alias publicly, indicating ownership of packages sent to that alias and because she had both possession and control of the packages.

1. The expectation of privacy in mail addressed to a public use alias is one society is prepared to recognize as reasonable.

Caselaw demonstrates that a privacy expectation in mail addressed to an alias is one society recognizes as reasonable. It is not illegal to send or receive mail through an alias, and holding that a privacy expectation does not exist in mail addressed to aliases would extinguish Fourth Amendment protections to *everyone*, including law-abiding citizens, who wish to remain anonymous through the mail.

The Supreme Court has long held that people have an objective expectation of privacy in letters and sealed packages. *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878)); *see also United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable."). The use of a public alias to receive mail or sealed packages does not negate or delegitimize this recognized expectation of privacy. *See United States v. Morta*, 2022 U.S. Dist. LEXIS 84353 (D.C. Guam), *27–28 (holding a Fourth Amendment right to privacy is not lost if a package is addressed to a pseudonym or alias that is not used *solely* for criminal purposes).

Indeed, as the Tenth Circuit has recognized, "it is not necessarily illegal to use a pseudonym to receive mail unless fraud or a stolen identification is involved." *United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009). Further, "there is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package . . . ." *United States v. Pitts*, 322 F.3d 449, 459

(7th Cir. 2003). In *Pitts*, the Seventh Circuit recognized that "the expectation of privacy for a person using an alias in sending or receiving mail is one that society is prepared to recognize as reasonable . . . ." *Id.* In that case, however, the defendant ultimately lost his reasonable expectation of privacy because he, unlike Ms. Fenty, abandoned control of the property. *Id.*

If society were not prepared to recognize as reasonable a privacy expectation in mail addressed to an alias, *every person* would lose their ability to remain anonymous via the mail. *Id*. at 458 (emphasis added). If this were true, "only criminals could forfeit their Fourth Amendment rights," since "[t]he illegal contents of [a] package [could] serve as an after-the-fact justification for a search." *Id*. As the Seventh Circuit explained:

> If this were the case, then the police could enter private homes without warrants, and if they find drugs, justify the search by citing the rule that society is not prepared to accept as reasonable an expectation of privacy in crack cocaine kept in private homes. Presumably if no narcotics are found . . . the owner of the home would be able to bring a civil lawsuit for nominal damages for the technical violation of privacy rights. The Fourth Amendment requires more than this.

Id. at 458–59.

This Court need not determine whether packages addressed to an alias used exclusively for criminal purposes are subject to Fourth Amendment protection. This Court must only address whether an individual has Fourth Amendment protection in mail addressed to their public use alias. Because Ms. Fenty uses her alias, "Jocelyn Meyer," professionally and has done so openly for years, she has a privacy expectation which society is prepared to recognize as reasonable in mail addressed to that name.

2. Ms. Fenty has an established public use alias, indicating ownership of mail addressed to that alias.

Further, Ms. Fenty uses her established alias – "Jocelyn Meyer" – for non-criminal purposes, demonstrating her objective ownership interest in the packages at issue. Importantly, an individual may have a reasonable expectation of privacy in mail addressed to their alias if they

openly use that alias. *See United States v. Villarreal*, 963, F.2d 770, 774 (5th Cir. 1992) ("[A]n individual may assert a reasonable expectation of privacy in packages addressed to them under fictitious names."); *United States v. Hurley,* 182 Fed. Appx. 142, 143–45 (4th Cir. 2006) (holding defendant did not have Fourth Amendment standing because they had never previously used the false name on the label); *United States v. Givens*, 733 F.2nd 339, 341 (4th Cir. 1984) (holding defendants had no reasonable expectation of privacy in packages because they were addressed to third parties – not to "them or some other entity, real or fictitious, which is their *alter ego* . . .").

Here, there is evidence that Ms. Fenty used her alias, Jocelyn Meyer, publicly. In fact, Ms. Fenty began using the name "Jocelyn Meyer" in college in 2016 to write and publish short stories. R. p. 4. She continued using the alias when writing novels after college, and she actively maintained an email address under this alias (jocelynmeyer@gmail.com). R. at pp. 4, 5, 13, 65. As recently as October 19, 2021 – just four months before her packages were seized – Ms. Fenty introduced herself to a publishing company as "Jocelyn Meyer" and signed her email using that name. *Id*. Of course, none of these actions were in furtherance of a criminal scheme. They were simply the manner in which Ms. Fenty presented herself professionally to the world.

Further, while the government points to the fact that Ms. Fenty's manuscripts were never published under "Jocelyn Meyer," a defendant's professional success under an alias is not dispositive (or relevant) in determining whether an individual has a privacy expectation in mail addressed to that alias. R. p. 16.

The preceding facts demonstrate that Ms. Fenty actively and publicly employs an alias, illustrating that she has an ownership interest in packages addressed to that alias. Ms. Fenty has utilized the alias "Jocelyn Meyer" for years outside of any criminal context and as recently as four

months before the seizure of her packages. Therefore, Ms. Fenty has an objective expectation of privacy in packages addressed to her public use alias, Jocelyn Meyer.

3. There is evidence that Ms. Fenty had possession and control of the packages.

Further, Ms. Fenty possessed and controlled the packages at the time of the search – further demonstrating her reasonable expectation of privacy in the items. *See, e.g.*, *Rose*, 3 F.4th at 729 (holding defendant did not have reasonable expectation in package addressed to someone else in part because they did not possess it); *see also Givens*, 733 F.2d at 341 (holding defendants did not have reasonable expectation of privacy addressed to another individual because they could not control access to the package or exclude others from taking possession of it); *Villarreal*, 963 F.2d at 774–75 (holding defendant had a reasonable privacy expectation in a mailed container holding marijuana and addressed to a fictitious name because they were the "immediate recipients" of the package and possessed the receipt for the package); *United States v. Lewis*, 738 F.2nd 916, 919 n.2 (8th Cir. 1984) (holding the defendant lacked a legitimate expectation of privacy in a mailbox and its contents based on his lack of connection to the mailbox and address).

Ms. Fenty had the ability to both control and possess the packages at issue. Ms. Fenty acknowledged that the packages were hers when she picked them up from the Post Office. R. p. 33. Additionally, Ms. Fenty received packages addressed to her legal name at the same P.O. Box, further supporting her ability to control the P.O. Box and its contents. R. p. 12. She also complied with all postal service rules, paid relevant fees, and included an address for the shipped package – all indications that Ms. Fenty had the ability to legally possess and control the packages. *Id*.

Finally, unlike the defendant in *Pitts*, at no point did Ms. Fenty abandon or "disavow" the packages. *Pitts*, 322 F.3d at 454, R. p. 33. Rather, when a post office employee asked if the packages were hers, Ms. Fenty affirmatively responded, "Yeah, they're mine." R. p. 33.

Accordingly, because Ms. Fenty established the ability to possess and control both the P.O. Box and the packages sent to it, she has a reasonable expectation of privacy in sealed packages, even though they were addressed to her public use alias, Jocelyn Meyer.

D. A Defendant Need Not Actually Own or Have Title to Property to Have a Reasonable Expectation of Privacy in It.

While some courts, including the Fourteenth Circuit, have held that a defendant only has a reasonable expectation of privacy in mail where they are listed as a recipient or addressee, such a narrow interpretation contradicts long-standing Fourth Amendment precedent. An individual need not have title to or actual possession of an item to have a reasonable expectation of privacy in it. *See* R. at p. 67 ("A defendant 'lack[s] a legitimate expectation of privacy in a mailbox and its contents' if 'no one by that name' reside[s] at the address.") (citing *Lewis*, 738 F.2d at 919 n.2); *but see Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018) ("[I]t is by now well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it.").

Fourth Amendment precedent is not so narrow as to only grant standing to those whose legal name is on a title or ownership document. For instance, in the same way that an individual need not have actual title to a home to have a reasonable expectation of privacy in it, an individual's name need be listed on a piece of mail to have a reasonable expectation in its contents. *See Rose*, 3 F.4th at 722 (Gregory J., dissenting) (compiling cases holding that the Fourth Amendment shields more than titled owners of a house, including boarders, tenants, co-owners, roommates, and guests).

Further, this Court recently held that an individual whose name is not listed on a rental car agreement may still have a reasonable expectation of privacy in the vehicle if they lawfully possess and control the vehicle. *See Byrd*, 138 S. Ct. at 1529. Similar to its view here, in *Byrd*, the government argued that those not listed on rental agreements *always* lack a reasonable expectation

of privacy in a rental car. *Id*. at 405. This Court rejected that argument, noting that such a view was "too restrictive a view of the Fourth Amendment protections." *Id*.

Finally, it is worth noting that the government's reliance on *United States v. DiMaggio* is misplaced. 744 F. Supp. 43, 46 (N.D.N.Y. 1990) There, the United States District Court for the Northern District of New York held that a defendant did not have a reasonable expectation of privacy in a package of heroin addressed to an "unidentified sender" because the defendant "repudiated any connection or interest in the item." *Id*. The court held that the defendant's conduct "reflect[ed] a conscious desire on their part to avoid public disclosure of their subjective expectations for purposes of violating the law." *Id*. Ms. Fenty's case is readily distinguishable, as she publicly acknowledged her subjective intent that the package was in fact hers. R. p. 33, 43.

While some courts advocate for a restrictive reading of the Fourth Amendment which would only give individuals standing to challenge a search or seizure of a package if their legal name were listed on it, this is far too narrow a view. In the same way that an individual's legal name need not be listed on a title or lease to have a reasonable expectation of privacy in a car or house, a legal name need not be listed on a package to have a reasonable expectation of privacy in its contents. This is especially true if, like here, an individual can demonstrate some type of connection to the package through a public use alias, or the ability to possess or control the package.

E. This Court Should Remand This Case to Determine the Validity of the Original Seizure.

Because Ms. Fenty has a legitimate expectation of privacy in sealed mail addressed to her alias, this Court should remand this case for a determination on whether the original seizure of her packages violated her Fourth Amendment rights. To challenge a search or seizure under the Fourth Amendment, an individual must demonstrate that they have a reasonable expectation of privacy in the item subject to the unreasonable search or seizure. *Byrd*, 138 S. Ct. at 1526. Ms. Fenty has

demonstrated that she does. Importantly, if an individual can ultimately demonstrate a Fourth Amendment violation via an unlawful search or seizure, they can urge the suppression of all evidence obtained from that search or seizure. *Mapp* 367 U.S. 643. Further, "mail cannot be seized and retained, nor opened and searched, without the authority of a search warrant." *Lustiger v. United States*, 386 F.2d 132, 139 (9th Cir. 1967).

While DEA agents obtained a warrant to search Ms. Fenty's packages, they did not obtain a warrant to initially seize the packages. R. p. 31. However, because the district court held that Ms. Fenty did not have a reasonable expectation of privacy in the sealed packages addressed to her alias (barring a Fourth Amendment challenge), they did not reach the ultimate issue of whether the exclusionary rule barred admission of evidence obtained from the search and seizure.

That being said, because the only Fourth Amendment issue before this Court is whether Ms. Fenty has standing to challenge the unreasonable search or seizure of her packages, Ms. Fenty respectfully requests that this Court remand this case for a determination of whether the original seizure of her packages violated her Fourth Amendment rights.

II. MS. FENTY'S VOICEMAIL STATEMENTS SHOULD HAVE BEEN ADMITTED UNDER RULE 803(3) OF THE FEDERAL RULES OF EVIDENCE BECAUSE THEIR EXCLUSION FOR A WANT OF SPONTANEITY CONSTITUTES AN ABUSE OF DISCRETION.

The district court abused its discretion when it found that Ms. Fenty's voicemail statements were inadmissible under Rule 803(3) of the Federal Rules of Evidence ("Rule 803(3)") because they lacked spontaneity. In finding Ms. Fenty's voicemail statements inadmissible, the district court relied on erroneous legal and factual conclusions. The exclusion of the statements caused a substantial and injurious effect on Ms. Fenty's case, resulting in unfair prejudice. *See United States v. Peak*, 856 F.2d 825 (7th Cir. 1988). Therefore, the district court's verdict must be set aside, or the case be remanded to allow for the admission of the voicemail statements.

A. Standard of Review

Decisions regarding the admissibility of evidence are reviewed for an abuse of discretion. *GE v. Joiner*, 522 U.S. 136, 141 (1997). A court abuses its discretion if it makes determinations on the admissibility of evidence based on an "erroneous view of the law" or an "erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). An erroneous evidentiary ruling will provide a basis for vacating a verdict or remanding for a new trial when the abuse of discretion results in a ruling that is "manifestly erroneous" and violative of a defendant's substantial rights. *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879).

B. The Exclusion of the Voicemail Statements was Based on the Erroneous Legal Premise that Statements Must be Spontaneous Under Rule 803(3).

The district court's exclusion of the voicemail statements under Rule 803(3) was predicated on an erroneous legal conclusion. The court's error stems from erroneous legal premise that a statement must be spontaneous, or made without time for reflection, to be admissible under Rule 803(3). *See* R. p. 52, 68; *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). The exclusion of the voicemail statements is inconsistent with the text of Rule 803(3), its regulatory scheme, and the Advisory Committee Note. *See infra* Argument Part II.B.1, Part II.B.2.

1. Rule 803(3) does not require statements be spontaneous to be admissible.

Noticeably absent from Rule 803(3) is a requirement of spontaneity. *See* Fed. R. Evid. 803(3). Rule 803(3) operates to allow statements that would otherwise be inadmissible as hearsay to be admitted as evidence of a then-existing mental state, such as is conveyed by Ms. Fenty's statements in the voicemail recordings. *See id.* To exclude a statement under Rule 803(3) because it lacked spontaneity would be to exclude admissible evidence based on an erroneous legal premise. Therefore, the voicemail statements should have been admitted.

a. The plain and unambiguous text of Rule 803(3) does not support a spontaneity requirement.

The text of Rule 803(3) contains no spontaneity requirement. Under this Rule, a statement is admissible if it conveys a "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 . . . ." Fed. R. Evid. 803(3). The blatant absence of a spontaneity requirement demonstrates that no such requirement must be satisfied for a statement to be admissible under this Rule. This conclusion is supported by a well-recognized maxim of statutory construction.

The starting point for any matter of statutory construction is the plain meaning of the words used. *See Watt v. Alaska*, 451 U.S. 259, 265 (1981). If the text is plain and unambiguous, it must be enforced according to the words' plain meanings. *King v. Burwell*, 576 U.S. 473, 486 (2015). In the case of Rule 803(3), the text is plain and unambiguous in that it clearly establishes the exact requirements that must be satisfied for a statement to be admissible. *See* Fed. R. Evid. 803(3).

The text demonstrates that the Rule contains only two requirements. First, the statement must pertain to the declarant's then-existing state of mind. *Id.* Second, the statement must not pertain to a memory or belief to prove a fact remembered or believed. *Id.* Courts have read an additional requirement, for practical purposes, into all Rule 803 hearsay exceptions requiring statements be relevant to be admissible. *See, e.g.*, *United States v. Press*, 336 F.2d 1003,1011 (2d Cir. 1964) ("[Rule 803 hearsay exceptions] may be admitted if the fact of the assertion is in itself relevant irrespective of its truth.").

The Rule does not contain any technical definitions or ambiguities requiring this Court to move beyond the text to understand the Rule's application. The Rule is well articulated and written in plain terms that can be understood by applying the chosen languages' common, everyday

meanings. Therefore, because Rule 803(3) is facially clear and unambiguous, this Court must enforce the Rule in accordance with the text's plain meaning.

b. If the drafters intended to include a spontaneity requirement, they would have explicitly done so, as they did in other Rule 803 hearsay exceptions.

Analyzing other hearsay exceptions within the same statutory scheme confirms the plain meaning interpretation of Rule 803(3) is accurate and appropriate. The text of Rules 803(1) and 803(2) both explicitly contain a spontaneity requirement. *See* Fed. R. Evid. 803(1), Fed. R. Evid. 803(2). Rule 803(1) only applies if a statement is "made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). Rule 803(2) similarly only applies to statements "made while the declarant was under the stress or excitement" of a "startling event or condition." Fed. R. Evid. 803(2).

The explicit inclusion of a spontaneity requirement in Rules 803(1) and 803(2) demonstrates that, if the drafters had intended to include such a requirement in Rule 803(3), they would have. The absence of a spontaneity requirement in Rule 803(3), when the two preceding rules contain such a requirement, demonstrates that Rule 803(3) statements need not be spontaneous to be admissible.

2. The Advisory Note to Rule 803(3) and case law support the position that the Rule does not require spontaneity.

A full reading of the Advisory Committee Note on Rule 803(3) further suggests that the Rule does not a spontaneity requirement. At trial, the government argued that Rule 803(3) contains a spontaneity requirement based on a very narrow reading of the Advisory Committee Note. R. p. 49. To support this position, the government argued that because Rule 803(3) follows Rules 803(1) and 803(2), those rules' spontaneity requirements should be imputed into Rule 803(3). *Id.* at 49. The government cited a portion of the Advisory Committee Note on Rule 803(3) that, when taken

out of context, suggests that Rules 803(1) and 803(3) operate identically. *See id.* at 49–50; Adv. Comm. Note to Fed. R. Evid. 803(3) ("Exception (3) is essentially a specialized application of Exception (1) . . . .").

The government made a similar argument in *United States v. Harris*, objecting to the introduction of statements tending to show a defendant's then-existing mental state on grounds that the statements lacked spontaneity by attempting to equate Rules 803(1) and 803(3). 733 F.2d 994, 1001, 1004 (2d Cir. 1984). In support of this argument, the government cited the above-mentioned Advisory Committee Note. *Id.*; *see also* Adv. Comm. Note to Fed. R. Evid. 803(3).

The court rejected this attempt to read a spontaneity factor into Rule 803(3) as "disingenuous" and unpersuasive. *Harris*, 733 F.2d at 1004. The court stated that when the Advisory Note was read in full, the cited language constitutes an "explanation of the reasons for having created exceptions (1) and (3), rather than an additional qualification which a court is entitled to impose on a statement otherwise falling within their terms." *Id.* at 1005. In articulating this position, the court continued, "if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge . . . ." *Id.* (*citing United States v. DiMaria*, 727 F.2d 265, 272 (2d Cir. 1984). To determine admissibility on other grounds would be to apply an erroneous legal premise.

Harris and *DiMaria* support the conclusion that while there are some parallels, Rules 803(1), 803(2), and 803(3) are unique rules enacted for different purposes. Further, it is inappropriate to impute requirements of one rule onto another. *See Harris*, 733 F.2d at 1004; *DiMaria*, 727 F.2d at 272. Therefore, each of these hearsay exceptions were enacted for a unique purpose and have unique requirements pertaining to admissibility of statements under them. Thus, imputing the requirements of one rule onto another would create an erroneous legal premises.

The Advisory Committee Note pertaining to Rule 803(3) demonstrates that this rule serves a unique function and has unique requirements. Therefore, when the district court excluded Ms. Fenty's voicemail statements because they lacked spontaneity, they based that exclusion on an erroneous legal premise, thus abusing the discretion afforded them.

3. Ms. Fenty's recorded voicemail statements conform with the plain meaning and requirements of Rule 803(3).

Turning to the application of Rule 803(3) to Ms. Fenty's voicemail statements, the preceding analysis demonstrates that her statements conform exactly to the Rule's plain meaning and requirements. To be admissible, the voicemail statements must: 1) pertain to Ms. Fenty's then-existing state of mind; 2) not pertain to a memory or belief to prove a fact remembered or believed; and 3) be relevant to the case. *See* Fed. R. Evid. 803(3).

First, it is undisputed that Ms. Fenty's statements were contemporaneous with the events she seeks to prove and pertain to her then-existing mental states when uttered. R. p. 68. Ms. Fenty left two voicemails. *See id.* at 40. The first voicemail was left immediately after Ms. Fenty realized her packages were missing. *See id.* at 40, 46. In that recording, Ms. Fenty expressed a then-existing mental condition demonstrating her intent to only be involved in the plan to obtain xylazine for the treatment of aging horses. *Id.* at 40. In the recording, she stated:

> Angela, I just got to the Post Office. None of the packages I was expecting are here, they're missing. I read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here, right? Call me back as soon as you can. I'm getting worried that you dragged me into something that I would never want to be part of. Plus, you still owe me money.

Id. Her statements clearly express her then-existing emotional conditions of worry, anxiety, and fear. *Id.*

In the second recording, which was made a mere 45 minutes later, after she had inquired as to her packages' whereabouts with postal workers, Ms. Fenty similarly expressed a then-existing mental state and emotional condition. *Id.* In the voicemail, Ms. Fenty stated:

> It's me again, I talked to the postal workers. They don't know what is going on with the packages. They said I should come back tomorrow. Angela, I'm really getting nervous. Why aren't you getting back to me? I thought the xylazine was just to help horses that are suffering. Why would they want to look at that? Is there something that you aren't telling me? I'm really starting to get concerned that you involved me in something I had no idea was going on. Call me back.

Id. In this second message, she clearly expresses her intent to not be involved in any illicit activities as well as her growing concern and anxiety. *Id.* Both voicemails clearly convey Ms. Fenty's then-existing mental states and satisfy the first requirement of Rule 803(3).

Next, Ms. Fenty's statements satisfy the second requirement of Rule 803(3) because they do not pertain to a memory or belief used to prove a fact remembered or believed. Ms. Fenty's statements merely expressed her then-existing emotional condition upon discovering she could not find her packages and her then-existing mental state regarding her intent to only be involved in the capacity her and Ms. Millwood had discussed. *Id.* Her statements do not operate to prove any fact, they merely express her intent and emotional states. Had Ms. Fenty asserted in the voicemail that Ms. Millwood had involved her in an illicit scheme, that statement would likely be inadmissible. *See Moorer v. Jackson,* 2008 U.S. Dist. LEXIS 20445, 14 (E.D. Mich. 2008). However, such was not the case, as her statement was limited to her emotional state and intent. R. p. 40.

Finally, Ms. Fenty's statements were relevant to the case at hand. This fact is undisputed and was acknowledged by the Fourteenth Circuit. *See id.* at 49–50. The statements pertain to the matter before the court, namely, whether Ms. Fenty possessed the requisite intent to be convicted of the charge she is accused of.

Therefore, Ms. Fenty's voicemail statements satisfy all three requirements established by the plain text of Rule 803(3). Subsequently, her statements should have been admitted. However, the district court erroneously expanded the requirements of Rule 803(3) to include a spontaneity requirement that exists elsewhere amongst Rule 803 hearsay exceptions. By adding this requirement, the district court applied an erroneous rule of law. The application of this erroneous rule of law led to the exclusion of evidence that is central to Ms. Fenty's defense.

C. The District Court's Verdict Should be Vacated or the Case Remanded for an Abuse of Discretion That Negatively Affected Ms. Fenty's Substantial Rights.

The district court's application of an erroneous legal premise negatively affected Ms. Fenty's substantial rights. "An erroneous evidentiary ruling in a criminal case is reversible . . . if it affects a party's substantial rights." *United States v.* Peak, 856 F.2d 825, 834 (7th Cir. 1988) (citing Fed. R. Crim. P. 52(a); Fed. R. Evid. 103(a)). This requires that the "error results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Peak*, 856 F.2d at 834 (citing *United States v. Lane*, 474 U.S. 438, 439 (1986). Courts have interpreted this requirement to mean that the exclusion of evidence will only not be grounds for reversal if the exclusion constituted a harmless error. *Peak*, 856 F.2d at 834. Further, courts have generally been cautioned against finding the exclusion of evidence to be harmless because "it is always perilous to speculate on what the effect of evidence improperly excluded would have been." *Id.*; *see also United States v. Cerro*, 775 F.2d 908, 915–16 (7th Cir. 1985).

The concept of harmless error and substantial rights has been fleshed out by numerous courts. When a "defendant [is not] able to present other evidence to support his theory of the case, the error would not have been harmless." *Id.*; *Harris*, 733 F.2d at 1005; *United States v. Carter*, 491 F.2d 625, 630 (5th Cir. 1974). Here, because Ms. Fenty was denied the opportunity to present evidence to support her case, the abuse of discretion by the district court necessarily constitutes a

violation of her substantial rights. Therefore, Ms. Fenty's conviction must be reversed, or her case remanded because of the abuse of discretion and violation of her substantial rights.

D. The District Court's Decision to Exclude the Voicemail Statements Was Based on an Erroneous Factual Premise.

Even if the district court did not abuse its discretion by applying an erroneous legal premise, it still abused its power by excluding the voicemail statements based on an erroneous factual premise. Namely, the district court found that the facts demonstrate that Ms. Fenty's statements were made in a manner that allowed time for reflection, making them not spontaneous. R. p. 52. However, an analysis of the facts of the case demonstrates that Ms. Fenty's statements were spontaneous. Therefore, the voicemail statements should have been admitted under Rule 803(3).

1. The first voicemail statements left by Ms. Fenty was spontaneous.

Even if Rule 803(3) does contain a spontaneity requirement and the district court did not apply an erroneous legal premise, the facts demonstrate that Ms. Fenty's voicemail statements were made without time for reflection. Therefore, the district court's decision to exclude the voicemail statements was based on an erroneous factual premise. *See James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993).

The record indicates that Ms. Fenty made this call immediately after becoming aware that her packages were missing, leaving no time for reflection. *Id.* at 46. In response to being asked what she did when she realized her packages were missing, Ms. Fenty replied, "I called Angela . . . ." *Id.* The record is devoid of any indication suggesting a lapse of time between realizing her packages were missing and calling and leaving the first voicemail.

These facts demonstrate that there was no time for Ms. Fenty to reflect on her statements before their utterance. Effectively no time had passed between the events to which the statement relates and the utterance of the statement itself. The Advisory Committee Note on Rule 803(1),

which contains a spontaneity requirement, explains that "[w]ith respect to the time element . . . precise contemporaneity is not possible and hence a slight lapse is allowable." *United States v. Green*, 556 F.3d 151, 156 (3d Cir. 2009) (citing Adv. Comm. Notes (1975)). Thus, the first voicemail was sufficiently close enough temporally to satisfy the spontaneity requirement of Rule 803(1), which is the same requirement the government argues should be imputed to Rule 803(3).

2. The second voicemail statement left by Ms. Fenty was spontaneous.

Forty-five minutes after the initial voicemail, Ms. Fenty left a second voicemail. R. p. 40. In excluding this statement, the district court failed to consider the ongoing nature of Ms. Fenty's panic and confusion relating to her missing packages. *Id.* The district court erroneously concluded that because 45 minutes had passed between voicemails, Ms. Fenty must have had time to reflect on the situation. *Id.* at 52. However, the transcript of the second voicemail illustrates that, between the two calls, Ms. Fenty was frantically attempting to track down her packages. *Id.* at 40.

In deciding whether a declaration is spontaneous, the temporal question is not determinative. *See United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980). To find a declaration spontaneous, "it must appear that the declarant's condition at the time was such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation." *Id.* Here, Ms. Fenty's statements were impulsive rather than the product of reflection and deliberation. She expressed panic and concern relating to the missing packages while she was still attempting to locate them. *See* R. p. 40. Thus, she did not have time to reflect or focus on anything else.

Rules 803(1) and 803(2), which contain spontaneity requirements, recognize that events invoking present sense impressions or excited utterances may occur over a period of time. *See, e.g.*, *United States v. Blakey*, 607 F.2d 779, 785 (7th Cir. 1979) (recognizing that 23 minutes does not render a statement inadmissible under the spontaneity requirement of 803(1) when the situation was developing). Therefore, because of the ongoing nature of the event to which Ms. Fenty's

statements relate and the evidence in the record of her continual efforts to resolve the situation, it is wholly appropriate to conclude that Ms. Fenty's statements were uttered without the opportunity for review. Thus, the second voicemail was left while the situation was still developing, and Ms. Fenty was actively trying to remedy it, suggesting that it was spontaneous for the purposes of the Rule 803 hearsay exceptions.

These facts suggest that the probative value of Ms. Fenty's statements was not decreased by the short passage of time. Ms. Fenty did not have the opportunity to reflect on her statements because she was too busy trying to figure out where her packages were and why they were missing. Therefore, when the district court excluded the voicemail statements, they did so pursuant to an erroneous factual premise, constituting an abuse of discretion.

For the forgoing reasons, Ms. Fenty requests this Court find that the district court abused its discretion when it excluded the voicemail statements under Rule 803(3) because they were not spontaneous. The exclusion was rooted in an erroneous legal premise that a statement must be spontaneous to be admissible. Further, even if this Court finds that the district court did not apply an erroneous legal premise when excluding the voicemail statements, the evidence at hand demonstrates that erroneous factual premises led the court to conclude that the statements were not admissible. Because the district court's abuse of discretion negatively impacted Ms. Fenty's substantial rights and the error was not harmless, Ms. Fenty requests this Court vacate the district court's verdict or, alternatively, remand the case with instructions to admit the voicemail statements.

III. ADMITTING EVIDENCE OF MS. FENTY'S PRIOR CONVICTION FOR PETIT LARCENY UNDER RULE 609(a)(2) OF THE FEDERAL RULES OF EVIDENCE FOR IMPEACHMENT PURPOSES CONSTITUTES AN ABUSE OF DISCRETION.

The district court abused its discretion when it found that evidence of Ms. Fenty's prior conviction for petit larceny was admissible for impeachment purposes because it would help the

jury determine Ms. Fenty's character for truthfulness. Evidence of her prior conviction was admitted based on an inappropriate legal application of Rule 609(a)(2) of the Federal Rules of Evidence ("Rule 609(a)(2)"). The admission of this evidence resulted in unfair prejudice against Ms. Fenty. *See Peak*, 856 F.2d at 825. Therefore, the district court's verdict must be set aside, or the case be remanded with instruction to exclude evidence of Ms. Fenty's prior conviction.

A. Standard of Review

As an evidentiary matter, Issue III applies the same abuse of discretion standard of review as Issue II. *See supra* Argument Part II.A.

B. A Conviction for Petit Larceny is Not Admissible Under the Text of Rule 609(a)(2) of the Federal Rules of Evidence.

Petit larceny does not require the showing of a dishonest act or a false statement to sustain a conviction. For this reason, the admission of a conviction for petit larceny does not help a jury determine the credibility of a person's testimony. Therefore, a conviction for petit larceny is not admissible under the plain text of Rule 609(a)(2).

1. Petit larceny does not involve a dishonest act or false statement.

For a conviction to be admissible under Rule 609(a)(2), the court must be able to 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). The phrase "dishonest act or false statement" has been construed very narrowly because of this Rule's automatic admission requirement. The Second Circuit, in an effort to determine the applicability of Rule 609(a)(2), explained that crimes that involve dishonest acts or false statements:

> [R]efer to convictions "peculiarly probative of credibility," such as those for "perjury or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."

United States v. Hayes, 553 F.2d 824, 827 (2d Cir. 1977) (citing Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7098, 7103). Thus, Rule 609(a)(2) is intended to only admit convictions that "bear directly on the likelihood that the defendant will testify truthfully . . . ." *Hayes*, 553 F.2d at 827.

Petit larceny under Boerum Penal Code § 155.25 does not require proving any dishonest act or false statement. *See* Boerum Penal Code § 155.25; R. p. 3. This crime merely requires proving that a person knowingly took, stole, carried away, obtained, used, or endeavored to do any of the preceding acts with the intent to deprive, exercise control, or appropriate as their own, the property of another. *See* § 155.25. The complete absence of a dishonest act or false statement requirement in Boerum's petit larceny statute sufficiently demonstrates that a conviction for this crime does not come within the purview of Rule 609(a)(2). *See* Fed. R. Evid. 609(a)(2).

2. Other courts have found petit larceny inadmissible under Rule 609(a)(2).

The inapplicability of Rule 609(a)(2) to convictions for petit larceny is further supported by case law. In *Hayes*, the Second Circuit opined that "crimes of stealth, such as . . . petit larceny . . . do not come within [Rule 609(a)(2)]." *Hayes*, 553 F.2d at 827; *see also United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). Numerous other courts agree with the Second Circuit's finding that this Rule is inapplicable to petit larceny convictions. *See, e.g.*, *Virgin Islands v. Testamark*, 528 F.2d 742, 743 (3d Cir. 1976); *United States v. Ortega*, 561 F.2d 803 (9th Cir. 1977) (adopting the view that petit larceny is not a crime which reflects on a witness's veracity because such a position "accords with the expressed intent of the draftsmen of Rule 609"); *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978) (holding "evidence of a prior conviction for petit larceny may not be admitted" to attack a witness's credibility).

In arriving at this conclusion, courts have reasoned that the absence of trickery from petit larceny statutes overwhelmingly suggests that this is not the sort of crime which is admissible at trial pursuant to Rule 609(a)(2). *Fearwell*, 595 F.2d at 776. The absence of any correlation between such a conviction and "a court's ascertainment of truth" provides evidence of this. *Id.*

3. Petit larceny is fundamentally different than theft by deception.

In addition to support from the text of Rule 609 and various courts' conclusions, the mere existence of Boerum Penal Code § 155.45 – theft by deception – demonstrates that petit larceny is completely unique from theft that involves dishonest acts or false statements. *See* Boerum Penal Code § 155.45; R. p. 3. A conviction under § 155.45 requires proving the same elements as petit larceny under § 155.25, with one addition – deception. *See* § 155.45; R. p. 3. Section 155.45 adds the element of deception, defining it as creating false impressions, preventing the learning of material information that would impact judgment, or not correcting previous false impressions. *Id.*

Ms. Fenty concedes that Rule 609(a)(2) would encompass a conviction for theft by deception under § 155.45. The mere existence of this Rule provides even further evidence that petit larceny is not a crime which involves dishonest acts or false statements. This strongly supports the conclusion that petit larceny is not admissible under Rule 609(a)(2).

Therefore, petit larceny is clearly not a crime that involves dishonesty or false statements within the meaning of Rule 609(a)(2). As such, petit larceny convictions have no value in helping juries determine the credibility or truthfulness of a witness. Thus, the district court abused its discretion when it found that petit larceny is admissible under Rule 609(a)(2) because a petit larceny conviction does not require proving the existence of dishonest acts or false statements.

C. The Underlying Facts of Ms. Fenty's Petit Larceny Conviction Leave No "Room for Doubt" That Her Crime Did Not Involve Dishonesty or False Statements.

Even if the Court finds that there was room for doubt regarding whether Rule 609(a)(2) encompasses the type of crime Ms. Fenty was convicted of, the facts of her conviction for petit larceny clearly demonstrate that her crime did not involve dishonesty or false statements.

Some circuits have held that if a criminal conviction does not warrant automatic admission under Rule 609(a)(2) but "the title of the offense leaves room for doubt" as to its admissibility, the conviction may be admitted if the prosecutor can demonstrate that the "conviction rested on facts warranting the dishonesty or false statement description." *Hayes*, 553 F.2d at 827; *see United States v. Smith*, 551 F.2d 348, 364 (D.C. Ct. App. 1976)). Convictions involving "false written or oral statements" would fall into this caveat of Rule 609(a)(2) and be admissible. *Hayes*, 553 F.2d at 828–29. However, if the conviction merely involved "stealth," it would not be captured by this caveat and, subsequently, would be inadmissible. *Id.*

The facts of Ms. Fenty's conviction show that her crime was not one which involved dishonesty or false statements. Rather, her crime was one involving stealth and, ultimately, force. A 19-year-old Ms. Fenty was dared by a friend to take the bag of a random stranger. R. pp. 52–53. In her youthful ignorance, Ms. Fenty accepted the dare. *Id.* The victim of Ms. Fenty's crime was a young woman who was distracted by a street performer, not by any action or inaction of Ms. Fenty. *Id.* at 59. Ms. Fenty attempted to approach the woman unnoticed. *Id.* This attempt failed, and a physical altercation ensued in which both parties attempted to overpower the other. *Id.* at 59–60. Ms. Fenty ultimately gained possession of the bag only through her use of force. *Id.* at 53–54. Afterwards, she ran off only to be apprehended by police a few blocks away. *Id.* at 53–54.

At trial, Ms. Fenty pled guilty. *Id.* at 54. She did not lie or perjure herself. *See id.* Rather, she took responsibility for her actions and accepted her punishment of two years of community service and two years of probation. *Id.* These facts demonstrate that Ms. Fenty's crime was not one

that involved any dishonesty or false statements. The facts clearly indicate the crime committed by an ignorant 19-year-old has absolutely no bearing on Ms. Fenty's likelihood to tell the truth in the present case. If anything, Ms. Fenty's conviction for petit larceny tends to suggest her character for truthfulness because she pled guilty and took responsibility for her actions.

The government argues that because Ms. Fenty's victim was distracted, her crime was one that involved deceit. However, the government omits from its argument that the victim's attention had been drawn elsewhere by no act of Ms. Fenty. *See id.* at 52–53, 59.

Rule 609(a)(2) is intended to help juries determine a witness's credibility. *See* Fed. R. Evid. 609(a)(2). Nothing in the facts of Ms. Fenty's conviction suggests a predisposition to untruthfulness. In the commission of her crime, Ms. Fenty merely attempted to approach a woman unnoticed. R. p. 59. She did not speak or interact with the woman in any capacity. *Id.* at 58–60. When Ms. Fenty was noticed, she did not resort to dishonesty or false statements, she resorted to force. *Id.* at 59–60. Ultimately, she told the truth in court and accepted her guilt. *Id.* at 54.

Therefore, the underlying facts of Ms. Fenty's conviction demonstrate her crime did not involve dishonesty or false statements and her conviction does not fit within the caveat to Rule 609(a)(2) for crimes that "leave room doubt" as to their admissibility. Contrary to the government's position, Ms. Fenty's prior conviction suggests she is likely to tell the truth. In admitting her prior conviction, the district court abused its discretion by exceeding the clear limits of Rule 609(a)(2).

D. The Prejudicial Effect of Admitting Ms. Fenty's Prior Conviction Substantially Outweighs Its Probative Value.

Ms. Fenty was significantly prejudiced by the admission of her prior conviction. Beyond the aforementioned caveat to Rule 609(a)(2), some circuits allow judicial discretion to decide the admissibility of convictions that do not plainly fit under the text of the rule if they conform with the requirements of 609(a)(1). *See Hayes*, 553 F.2d at 828; *see also Smith*, 551 F.2d at 357. To be

admissible, a court must find that the probative value of admitting the conviction outweighs any potential prejudicial effect. *Hayes*, 553 F.2d at 828. This requires the exclusion of evidence which has "only limited probative value with respect to credibility." *Smith*, 551 F.2d at 359.

Further, the prosecution bears the burden of establishing that the probative value exceeds the prejudicial effect. *Id.*; *Hayes*, 553 F.2d at 828. In arriving at this conclusion, circuits that allow for such judicial discretion consider several factors, including how recent the prior conviction was, the conviction's relationship to one's veracity, the witness's testimony at the prior trial, and the relationship between the prior conviction and present case. *Hayes*, 553 F.2d at 828.

1. Ms. Fenty's prior conviction has little probative value because it occurred six years prior.

First, courts have explained that the closer in time a conviction is to the present case, the greater its probative value. *Hayes*, 553 F.2d at 828. In *Hayes*, the court found that a conviction from two months prior was highly probative when prosecutors sought to admit it for impeachment purposes. *Id.* Conversely, when discussing this temporal element to Rule 609, members of the House Judiciary Committee stated that "if [a defendant] slugged somebody in a bar 10 years ago . . . it has no connection to his credibility at all and it should not be inquired about . . . ." *Smith*, 551 F.2d at 367–68. In the present case, Ms. Fenty's prior conviction occurred six years before the facts at issue. *See* R. pp. 52–53. This significant temporal distance suggests that her prior conviction carries little probative value in the present case.

2. A petit larceny conviction suggests little on a person's tendency for truthfulness.

Second, courts have explained that convictions for certain crimes increase the likelihood a witnesses will be untruthful on the stand. *United States v. De Angelis*, 490 F.2d 1004, 1009 (2d Cir. 1974). In *Hayes*, the court explained that a person convicted of narcotics smuggling is more likely to lie than a person convicted of mere possession. *Hayes*, 553 F.2d at 828. Here, Ms. Fenty was

only convicted of petit larceny, a crime for which there is no element of dishonesty, false statements, untruthfulness, or deceit. *See* § 155.25. While undoubtedly a crime, petit larceny is one of the lowest tiers of theft. It is a crime that is about nothing more than taking another's property of relatively low value. *Id.* Thus, a petit larceny conviction has little probative value.

3. Ms. Fenty testified truthfully at trial when accused of petit larceny.

Third, whether and how a defendant testified at the trial resulting in the previous conviction can is informative of the conviction's probative value. In *Hayes*, the defendant testified as to his innocence, but was ultimately convicted. *Hayes*, 553 F.2d at 828. The court found "a de facto finding that the accused did not tell the truth when sworn to do so." *Id.* (citing *United States v. Gordon*, 383 F.2d 936, 940 n.8 (D.C. Ct. App. 1967). In the case preceding her prior conviction, Ms. Fenty did not testify as to her innocence. *See* Record Page 54. Instead, she admitted her guilt by pleading guilty. *Hayes*, 553 F.2d at 828. This fact strongly suggests that Ms. Fenty is truthful in nature. This supports the assertion that admitting her prior conviction has little probative value.

4. The facts of Ms. Fenty's petit larceny conviction are nearly identical to the facts of the case at issue, increasing the likelihood of prejudice.

Finally, courts will consider the similarities between the previous conviction and the accused crime. *Hayes*, 553 F.2d at 828. The more similar the facts of the prior conviction and the alleged crime, the greater the likelihood of prejudice. *Id.* In the present case, the factual circumstances of Ms. Fenty's petit larceny conviction and the accused crime are strikingly similar. In both cases, Ms. Fenty was struggling financially and acted upon insistence from a friend. R. p. 25. These similarities increase the likelihood of a jury conflating the situations and imputing Ms. Fenty's prior guilt to the present case. Thus, the risk of prejudice is significantly high.

5. The government did not satisfy its burden of proof.

In addition, the record is generally devoid of any evidence put forth by the government as to the probative value outweighing the prejudicial threat. This demonstrates that the government failed to meet its burden. Therefore, because the government did not meet its burden of proof under Rule 609(a)(1), the district court abused its discretion in admitting this evidence.

For the foregoing reasons, the district court abused its discretion in finding that Ms. Fenty's prior convictions were admissible under Rules 609(a)(2) or 609(a)(1). A petit larceny conviction is not a crime of the type contemplated by drafters when Rule 609 was enacted. The underlying facts of her conviction demonstrate that her crime did not involve dishonesty, dishonest acts, false statements, or deception. Lastly, the probative value of admitting these convictions is dwarfed by the prejudicial effect, which may have played a substantial role in her ultimate conviction. Thus, this case should be remanded with instructions to exclude evidence of Ms. Fenty's prior conviction.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourteenth Circuit's decision finding that 1) a Fourth Amendment legitimate expectation of privacy exists in sealed packages addressed to a public use alias, 2) the district court abused its discretion by excluding Ms. Fenty's voicemail statements under Rule 803(3), and 3) the district court abused its discretion in admitting evidence of Ms. Fenty's prior conviction for petit larceny.

Respectfully Submitted,

/s/ Team 25P

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