Team 35P-Original

No. 23–695

IN THE
SUPREME COURT OF THE UNITED STATES

FRANNY FENTY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Team 35
Counsel for Petitioner

QUESTION PRESENTED

I. Whether the search of sealed mail addressed to Defendant's pseudonym constitutes an unreasonable search and thus, violates the Fourth Amendment.

II. Whether Defendant's recorded voicemail statements are admissible as a hearsay exception under Rule 803(3) of the Federal Rules of Evidence, irrespective of the time elapsed before the statements were made.

III. Whether evidence of Defendant's prior petit larceny conviction is admissible for purposes of impeachment, specifically as a crime of deceit under Rule 609(a)(2) of the Federal Rules of evidence.

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The transcripts of the hearings on the constitutional issues before the United States District Court for the Eastern District of Boerum appear on the record at pages 11-17, for the hearsay issue at pages 46-52, and for the impeachment issue at pages 19-26. The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Fenty v. U.S.,* 22–5071, was entered June 15 2023 and can be found in the Record on pages 64-73.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fourth Amendment provides:

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

U.S. CONST. AMEND. IV.

STATEMENTS OF CASE

Statement of Facts

In 2022, Angela Millwood ("Millwood") recruited the plaintiff, Ms. Franny Fenty (ie: Jocelyn Meyer) to unknowingly participate in drug trafficking. (R. 43-44). Ms. Fenty was a twenty-five year old facing limited career options when Millwood first contacted her. *Id*. Since attending school at Joralemon College, Ms. Fenty pursued a career as an author, writing two short stories and five novels under the pseudonym Jocelyn Meyer. (R. 42). Despite the early success of Ms. Fenty's short stories being published in Joralemon College Zine (R. 4), Ms. Fenty faced rejection when she submitted her novels to publishers under the email jocelynmeyer@gmail.com. (R. 5, 42). To make ends meet, Ms. Fenty solicited lawful

employment on LinkedIn to which Millwood responded "I can help you out with that! Shoot me a message!" (R. 6, 34, 44).

Following the LinkedIn exchange, Ms. Fenty and Millwood exchanged phone numbers to discuss career and financial struggles. (R. 44). Ms. Fenty and Millwood were old high school friends which created a trusting relationship between the two (R. 43). Unbeknownst to Ms. Fenty, the Drug Enforcement Agency had previously investigated Millwood for drug trafficking; however she was never formally charged. (R. 34). During their conversation about career challenges, Millwood shared that she had recently started working at Glitzy Gallop Stables, where Millwood devoted herself to caring for horses. (R. 44). Millwood expressed to Ms. Fenty that many of the horses were in severe pain and explained how the horses needed the drug, Xylazine, to alleviate their pain. (R. 44-45). However, due to her position at the stables, Millwood could not purchase the medicine herself as she could risk losing her job. (R. 45). Because Millwood was unable to purchase the medicine on her own, she asked Ms. Fenty to purchase Xylazine to aid in the horse's pain management. *Id*. Upon further looking into the medication, Ms. Fenty expressed anxiety about purchasing horse medication with fears that it could be used for human consumption. (R. 46). However, Millwood reassured her by guaranteeing that the medication would be exclusively administered to horses. *Id.*

In order to help her friend, Ms. Fenty ordered a shipment of Xylazine from Holistic Horse Care under her pseudonym, Jocelyn Meyer, to her P.O. Box registered under the same pseudonym. (R. 31). On February 14, 2022, Ms. Fenty received a shipper's delivery confirmation notifying her that her packages from Holistic Horse Care arrived. However, when she checked her P.O. Box, the package from Holistic Horse Care and other personal packages

from Amazon were missing. (R. 46). Immediately realizing the packages were missing, Ms. Fenty called Millwood at 1:32 p.m. and left a voicemail stating:

> "I just got to the post office. None of the packages I was expecting are here . . . 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 you dragged me into something I would never want to be a part of. Plus, you still owe me the money." (R. 40).

After Millwood's failure to return the call, Ms. Fenty made an additional call at 2: 17 p.m., and left another voicemail stating:

> "I talked to the post 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 you aren't telling me? I'm really starting to get concerned that you involve me in something I had no idea was going on." (R. 40).

Ms. Fenty never received a response from Millwood. (R. 35). According to Federal Drug Enforcement Agents, agents tried to locate Millwood but were unable to do so. *Id*. Millwood was last seen fleeing the country to Jakarta, Indonesia and her location is currently unknown. *Id*.

Unknown to Ms. Fenty, federal agents obtained a warrant to search her packages from Holistic Horse Care. (R. 31). Breaking from the procedural norm of postal officials searching mail obtained through warrant, the federal agents directly opened the packages addressed to Jocelyn Meyer. *Id*. The packages contained two bottles labeled "Xylazine: for Horses." *Id*. Despite displaying no indication that the bottles contained any other substance, the federal agents tested the chemical makeup and found each contained 400 grams of xylazine and 200 grams of fentanyl. (R. 32).

On February 15, 2022, Ms. Fenty returned to the Post Office. (R. 32). She walked directly to her P.O. Box, unlocked it with her key, and collected various Amazon packages and a slip directing her to the front desk. *Id*. When Ms. Fenty spoke with the Post Office Official, she

verbally asserted claim over the Holistic Horse Care packages and left the Post Office with her packages. (R. 33). Ms. Fenty was arrested on February 15, 2022 for possession with intent to distribute. (R. 34).

Procedural History

Ms. Fenty went before the United States District Court for the District of Boerum in the fall of 2022. (R. 8). The district court heard two pre-trial motions on evidentiary procedures. (R. 66). First, the district court suppressed evidence of Ms. Fenty's two voicemails that demonstrate Ms. Fenty did not have knowledge of a criminal scheme on the grounds that Ms. Fenty failed to meet the Rule 803(3) criteria necessary for qualifying under the hearsay exception for then-existing mental statements. (R. 58). The district court recognized that there was no question the voicemails were relevant and contemporaneous to the case at hand. (R. 68-69). Nonetheless, the court voiced reservations regarding the reliability of the voicemails due to the significant time lapse during their recording, leading to a ruling of inadmissibility. (R. 69).

Second, the district court admitted evidence regarding Ms. Fenty's prior conviction of petit larceny for purposes of impeachment under Rule 609(a)(2). (R. 63). To be convicted of petit larceny in the State of Boerum, the defendant must knowingly take someone else's property with intent to use it as their own. (R. 20). The conviction does not require a dishonest act or false statement. *Id*. Ms. Fenty's conviction related to an event that occurred on August 4, 2016. (R. 52). During a loud and public altercation, Ms. Fenty pushed and threatened a third party before fleeing with the individual's bag, which only contained a mere $27. (R. 53-54, 66). Ms. Fenty's decision to take the bag was spontaneous, influenced by both financial need and a dare from a childhood friend, rather than being part of a premeditated plan.(R. 54). While the State of Boerum had the capacity of charging Ms. Fenty with the charge of theft by deception, the State

instead charged her with a petit larceny, which does not include an element of deceit. (R. 20). Despite Rule 609(a)(2) requiring the conviction to include an element of a dishonest act or false statement, the district court admitted Ms. Fenty's prior conviction under limited instruction. (R. 62).

Based on the evidence available to the jury, Ms. Fenty was found guilty for possession with intent to distribute a controlled substance (21 U.S.C. § 841(a)(1)). (R. 8, 66). Ms. Fenty appealed the district court ruling to the United States Court of Appeals for the Fourteenth Circuit. (R. 65). On June 15 2023, the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's rulings. (R. 70).

SUMMARY OF THE ARGUMENT

In the United States, there is an innate understanding that each individual is entitled to freedom from government intrusion in their personal life, as well as, the ability to effectuate a fair and comprehensive defense through the evidence admitted at trial. The United States Court of Appeals for the Fourteenth Circuit should reverse and remand because (1) Defendant's Fourth Amendment rights were violated and any evidence resulting from the illegal search must be suppressed, (2) Defendant's recorded voicemail statements are admissible as then-existing state of mind statements under Rule 803(3), and (3) Defendant's prior petit larceny conviction is not admissible, as it does not qualify as a crime of dishonesty under Rule 609(a)(2).

First, the unreasonable search of sealed mail addressed to a pseudonym violates Ms. Fenty's Fourth Amendment right as she had a reasonable expectation of privacy over her mail, and all evidence discovered as a result of the search must be suppressed. The Fourth Amendment ensures that individuals need not fear unreasonable searches and seizures by the government of property which they have a reasonable expectation of privacy. U.S. CONST. AMEND. IV. To

establish a reasonable expectation of privacy, the defendant must demonstrate a subjective expectation of privacy and that expectation is one society would recognize as reasonable.

Ms. Fenty exhibited a subjective expectation of privacy by demonstrating possessory interest in the mail searched and that expectation of privacy is not waived simply because it was addressed to her pseudonym. In addition to the Court's long understanding that sealed mail maintains the utmost expectation of privacy from government intrusion, Ms. Fenty established possessory interest by exerting possession and control over the packages searched. Moreover, Ms. Fenty has long used the pseudonym Jocelyn Meyer in both professional and personal matters. Because the pseudonym is so intrinsically intertwined with Ms. Fenty's personhood, her privacy interests encompass any packages addressed to Jocelyn Meyer.

Further, the Fourteenth Circuit blatantly misinterpreted the Fourth Amendment to limit Ms. Fenty's Fourth Amendment protections based on the idea that the public would not find it reasonable to extend an expectation of privacy to criminal conduct. Despite Ms. Fenty not knowingly engaging in a criminal scheme, Fourth Amendment protections are not hinged on conduct, seeing as this restriction would dilute the purpose of these safeguards, opening the floodgates for government intrusion. Rather, the Fourth Amendment hinges whether the public would deem an individual's expectation of privacy reasonable. Here, society is prepared to assert an expectation of privacy over mail addressed to a pseudonym so deeply intertwined with the defendant's personhood.

Second, Ms. Fenty's recorded voicemail statements are admissible under Rule 803(3) of the Federal Rules of Evidence because the statements are relevant to the current case and demonstrate Ms. Fenty's contemporaneous state of mind, irrespective of the time lapse between the voicemails. Rule 803(3) allows the admission of a hearsay statement reflecting the

declarant's then-existing statement of mind. Federal courts typically assess admissibility under Rule 803(3) by considering contemporaneity and relevance. Some courts wrongfully include a third requirement of spontaneity to determine whether there was sufficient time to reflect and misrepresent a statement.

The District Court erred by imposing a spontaneity requirement as a prerequisite for admitting Ms. Fenty's statements because the text of Rule 803(3) does not explicitly require it. Federal courts enforcing a spontaneity requirement often do so due to a misguided reading of the Rule's text or to address concerns about the potential reliability of a statement. However, the mere possibility a statement is fabricated for self-serving motives does not render it inadmissible under Rule 803(3). Rule 803(3) explicitly states it does not require an examination into the spontaneity and timing of a statement. Moreover, any evaluation of a statement's reliability is irrelevant under Rule 803(3), as the evaluation of reliability is the jury's responsibility, not the court's. Here, Ms. Fenty's voicemail statements are admissible under Rule 803(3) as they reflect her legitimate plan to help suffering horses and her lack of knowledge about illegal drug activity. Because Rule 803(3) does not explicitly demand a spontaneity assessment, evaluating the timing of each statement is both irrelevant and an inaccurate application of the rule. Therefore, given that Ms. Fenty's statements satisfy the contemporaneous and relevance requirements, this Court should hold that the voicemails are admissible. Any apprehension about the reliability of the statements falls within the purview of the jury's responsibility for assessment, not that of the court.

Lastly, Ms. Fenty's prior petit larceny conviction is not admissible for purposes of impeachment because petit larceny is not a crime of deceit under Rule 609(a)(2) of the Federal Rules of Evidence. Rule 609(a)(2) allows challenging a witness's credibility through evidence of

a criminal conviction if the crime involved dishonest acts. The purpose of the rule is to demonstrate an individual's inclination towards dishonesty, rather than implying a propensity for general criminal behavior. For offenses not clearly covered by Rule 609(a)(2), federal courts first examine the statutory elements of a crime to establish if deceit is integral to a conviction. Next, courts assess the underlying conduct of the offense, considering factors such as deceit, violence, impulse, or carelessness. Finally, in crimes not explicitly falling under Rule 609(a)(2), courts weigh the conviction's probative value against its potential prejudicial impact on a witness before deciding on admissibility.

Here, Ms. Fenty's prior petit larceny conviction is not a crime of dishonesty as defined by Boerum Penal Code § 155.25. This offense does not necessitate demonstrating a dishonest or deceitful act for a conviction. Boerum Code Ann. § 155.25. Additionally, Ms. Fenty acquired the bag not through calculated deception but rather through impulsive and forceful behavior. Therefore, introducing Ms. Fenty's prior petit larceny conviction unfairly prejudices the jury against her, as the conviction does not indicate a propensity toward dishonesty. Thus, this Court should adopt a statutory analysis to Rule 609(a)(2) and hold that misdemeanor petit larceny is not admissible as a crime of dishonesty for impeachment purposes. Therefore, to safeguard Ms. Fenty's Fourth Amendment protections and uphold her right to a robust defense, Petitioner respectfully urges this Court to reverse and remand the Fourteenth Circuit's decision.

ARGUMENT

I. The Search Of Sealed Mail Addressed To A Pseudonym Violates Defendant's Fourth Amendment Right As She Had A Reasonable Expectation Of Privacy Over Her Mail, And All Evidence Discovered As A Result Of The Search Should Be Suppressed.

The search of Ms. Fenty's sealed mail addressed to her pseudonym constitutes an unreasonable search, violating Ms. Fenty's Fourth Amendment right, and all evidence resulting

from the search should be suppressed. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Thus, evidence that arises from an unreasonable search as defined by the Fourth Amendment is suppressed. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). To constitute a government action as an unreasonable search, the defendant must have a reasonable and legitimate expectation of privacy. *Katz v. U.S.,* 389 U.S. 347, 367 (1967). Further, a legitimate expectation of privacy is established when (1) "the individual exhibits a subjective expectation of privacy"; and (2) such expectation "is one that society is prepared to recognize as reasonable." *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

Pursuant to the Fourth Amendment, the Constitution safeguards Ms. Fenty's mail from unreasonable government searches even if the mail was addressed to her pseudonym. Courts have long understood that sealed mail and packages retain a high level of privacy that are shielded from unreasonable searches. *Ex parte Jackson*, 96 U.S. 727, 728-29 (1877). This expectation of privacy is so unfettered that unreasonable searches of mail are only permitted in narrowly tailored situations. *U.S. v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981). Utilizing a pseudonym on sealed mail does not negate an individual's innate right against unreasonable government searches and seizures, especially if that pseudonym has an established connection to the defendant. *U.S. v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992); *U.S. v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021).

Here, Ms. Fenty's pseudonym has long been associated with her identity, and thus she maintains a subjective expectation of privacy when she employs the pseudonym on her sealed mail. Further, this expectation of privacy is one society is prepared to recognize as reasonable because Fourth Amendment protections hinge on a logical expectation of privacy, not the

character of one's conduct. *U.S. v. Pitts*, 322 F.3d 449, 458 (7th Cir. 2003). Nevertheless, even if this Court considered Ms. Fenty's conduct to which she seeks to apply Fourth Amendment protection, Ms. Fenty did not have knowledge that she was furthering a criminal scheme, and, thus, did not forfeit her guaranteed protection against unreasonable searches and seizures by the government. Thus, the search of sealed mail addressed to Ms. Fenty's pseudonym violated her Fourth Amendment rights, and all evidence that arose from that search must be suppressed.

A. Sealed mail and packages addressed to a pseudonym maintain the same subjective expectation of privacy as sealed mail addressed to Defendant's birth name.

Ms. Fenty had a subjective expectation of privacy over sealed mail and packages addressed to a pseudonym because she demonstrated possessory interest over the package and had long been associated with her pseudonym. Sealed letters and packages have long been understood to uphold a legitimate expectation of privacy against reasonable searches and seizures. *Jackson*, 96 U.S. at 728-29; *see also U.S. v. Jacobsen*, 466 U.S. 109, 114 (1984) (affirming that "Letters and other sealed packages are in such a general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable"); *Rose*, 3 F.4th at 728 (stating that "sealed envelopes and packages generally enjoy a high degree of privacy, and thus, courts have long recognized that the Constitution protects from unreasonable searches and seizures of sealed mail"); *Villarreal*, 963 F.2d at 774 (affirming that [b]oth senders and addressees of packages or other closed containers can reasonably expect that the government will not open them"); *Pitts*, 322 F.3d at 455 (stating that "[t]he Supreme Court has emphasized that the significant Fourth Amendment interest in the privacy of mail").

While Fourth Amendment protections cannot be vicariously asserted, *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978), defendants may assert a "reasonable expectation of privacy in packages addressed to them under fictitious names." *Villarreal*, 963 F.2d at 774; *see also U.S. v. Richards*, 638 F.2d at 770; *U.S. v. Peirce*, 959 F.2d 1297, 1303 (5th Cir. 1992). Courts have extended these protections to fictitious names that are established aliases. *Rose*, 3 F.4th at 728. Further, when assessing whether a defendant can assert Fourth Amendment protections, courts look to whether the defendant exhibited possessory interest over the property searched by analyzing elements like possession or control. *U.S. v. Castellanos*, 716 F.3d 828, 834 (4th Cir. 2013). By utilizing an established alias and exerting possessory interest over the sealed package, Ms. Fenty satisfies both of these concerns of the court. Hence, Ms. Fenty possesses a subjective expectation of privacy over the sealed package addressed to her pseudonym.

1. Defendant's long association with her pseudonym, exerts a reasonable expectation of privacy over sealed packages addressed to her fictitious name.

Because of Ms. Fenty's long-standing use of her pseudonym, she maintains a reasonable expectation of privacy over sealed mail addressed to her fictitious name. Circuit courts generally agree that fictitious names used as aliases and pseudonyms may constitute a reasonable expectation of privacy. *Villarreal*, 963 F.2d at 774; *Castellanos*, 716 F.3d at 834; *Pitts*, 322 F.3d at 453; *Richards,* 638 F.2d at 770; *Rose*, 3 F.4th at 728; *Peirce*, 959 F.2d at 1303; *U.S. v. Stokes*, 829 F.3d 47, 53 (1st Cir. 2016); *U.S. v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009); *U.S. v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009); *U.S. v. Lewis,* 738 F.2d 916, 919-920 (8th Cir. 1984); *U.S. v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984); *U.S. v. Daniel*, 982 F.2d 146, 140 (5th Cir. 1993). To assert Fourth Amendment protections on packages addressed to a fictitious name, defendants must provide evidence that demonstrates the fictitious name is an established alias. *Rose*, 3 F.4th at 728; *see also Castellanos*, 716 F.3d at 834; *Richards,* 638 F.2d at 770. As

a result, limited use of a fictitious name as an alias may forfeit Fourth Amendment safeguards. *Rose*, 3 F.4th at 730.

Courts have been willing to extend Fourth Amendment protections to fictitious names that are associated with the defendant. *Villarreal*, 963 F.2d at 774; *Castellanos*, 716 F.3d at 834; *Pitts*, 322 F.3d at 453; *Richards,* 638 F.2d at 770; *Rose*, 3 F.4th at 728; *Peirce*, 959 F.2d at 1303; *Stokes*, 829 F.3d at 53; *Garcia-Bercovich*, 582 F.3d at 1238; *Johnson*, 584 F.3d at 1002; *Lewis,* 738 F.2d at 919-920; *Givens*, 733 F.2d at 341; *Daniel*, 982 F.2d at 140. For example, the Fifth Circuit concluded that a sealed package addressed to a fictitious name maintained a reasonable expectation of privacy and was thus protected pursuant to the Fourth Amendment. *Richards*, 638 F.2d at 770. In *Richards,* the defendant opened a P.O. Box under a fictitious name to start a new business. *Id*. at 767. The government searched a package addressed to the business, and ultimately found illegal contraband. *Id.* However, because the defendant and the fictitious name were one in the same, the package addressed to the fictitious name maintained a reasonable expectation of privacy against unreasonable government searches. *Id*. at 770.

In contrast, courts have been hesitant to assert that a defendant has an expectation of privacy over an alias used in limited circumstances and thus, have set parameters of what constitutes limited use of fictitious names. *Rose*, 3 F.4th at 728; *see also Castellanos*, 716 F.3d at 834. For example, in *Rose*, the court analyzed whether the defendant could exert Fourth Amendment protections over a package addressed to an alias that was used strictly for the criminal scheme. *Rose,* 3 F.4th at 730. The defendant utilized the name of a deceased third-party to receive packages containing drugs. *Id*. He had collected multiple packages under the third-party name, but had no other experience employing the name outside of the context of this criminal scheme. *Id*. As a result, the court determined the limited use of the alias did not warrant

Fourth Amendment protections over the package. *Id*. Similarly, when defendants fail to provide evidence that the fictitious name is a legitimate alias, courts are hesitant to extend Fourth Amendment protections to mail addressed to said alias. *See Castellanos*, 716 F.3d at 730 (holding that failure to provide evidence that demonstrates an association to an alias forfeits an expectation of privacy); *Lewis,* 738 F.2d at 920 (assumed, without deciding, that a defendant did not have a reasonable expectation of privacy when utilizing a limited use alias).

Conversely, Ms. Fenty has demonstrated a long standing use of her pseudonym to the point where the fictitious name is intrinsically intertwined with her identity. When Ms. Fenty first employed the use of the fictitious name "Jocelyn Meyer," she was a mere college student seeking to reinvent herself, a full six years before the unreasonable search. (R. 4, 8). The pseudonym had been employed in many aspects of her life including pursuing a career as an author and personal communications via electronic mail and sealed mail. (R. 4-5). In fact, Ms. Fenty utilized the pseudonym professionally on seven different authored works over the course of seven years. (R. 42). Unlike the defendants in *Rose*, and *Castellanos,* Ms. Fenty has a long-term association with the name Jocelyn Meyer that intersects in many aspects of her life. Consequently, her personal connection to her pseudonym extends Fourth Amendment protections to any mail addressed to the fictitious name.

2. Defendant demonstrated possessory interest over the package, and thus retains Fourth Amendment Protections over the package.

By exerting possession and control over the sealed package, Ms. Fenty demonstrated possessory interest over the item, and thus maintains a reasonable expectation of privacy. To assert a reasonable expectation of privacy, the defendant must demonstrate a possessory interest over the item searched. *Castellanos*, 716 F.3d at 834; *Villarreal*, 963 F.2d at 775; *Rose*, 3 F.4th

at 727; *Richards*, 638 F.2d at 770; *Peirce*, 959 F.2d at 1303; *Pitts*, 322 F.3d at 456; *U.S. v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988); *U.S. v. Smith*, 39 F.3d 1143, 1145 (11th Cir. 1994).

Courts have varied on determining what is the threshold for demonstrating possessory interest. Some courts merely require a defendant to claim ownership of the item searched. *Villarreal*, 963 F.2d at 775. For example, the Fifth Circuit held that a defendant claiming explicit ownership of a package was sufficient to demonstrate possessory interest and required no further proof of possession or control. *Id*. However, more conservative courts have considered factors like "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." *Stokes*, 829 F.3d at 53; *see also Castellanos*, 716 F.3d at 834 (holding that courts should consider factors like "whether that person claims an ownership or possessory interest in the property, and whether he has established a right or taken precautions to exclude others from the property").

Courts employing a more conservative analysis require the defendant to specifically outline their ownership or control of the items searched. For example, in *Stokes*, despite the defendant exerting claim over both mail and a P.O. Box, the court ruled that the defendant did not demonstrate enough possessory interest to assert a reasonable expectation of privacy. *Stokes* 829 F.3d at 52. Similar to the defendant in *Villarreal*, the defendant in *Stokes* verbally declared ownership over the package and the P.O. Box searched. *Id*. In regard to the P.O. Box, the defendant even introduced ownership of the key to the P.O. Box to demonstrate exclusive access. *Id*. However, while on trial, the defendant was unable to provide a description of the layout of the mailroom resulting in the court determining that an individual with true possessory interest would've known that information. *Id*. With respect to the defendant's sealed mail, the court

deemed the defendant failed to provide a connection to the name addressed on the mail for failure to address factors like "access to these [mail delivery] locations, what the nature of the delivery receptacle was, or any other information that could shed light on the reasonableness of his privacy interest." *Id*. at 53. Thus, more conservative courts require a more explicit demonstration of possessory interest.

Here, Ms. Fenty satisfies the standard to demonstrate possessory interest for even the most conservative of courts. Similar to *Villarreal* and *Stokes*, Ms. Fenty asserted an explicit claim of ownership over the property searched. (R. 33). However, unlike *Stokes*, eye-witness testimony demonstrates that Ms. Fenty knew the layout of the mailroom as she walked directly to her P.O. Box. *Id*. Further, the P.O. Box was not easily accessible to the general public as Ms. Fenty retained exclusive access via a key to the P.O. Box. *Id*. Her exclusive control over the property is further supported by the fact that Ms. Fenty opened the P.O. Box for privacy purposes. (R. 43). Additionally, Ms. Fenty's use was not limited in nature as demonstrated by the multitude of packages aside from horse medication. (R. 12-13). Under the totality of the circumstances of the unreasonable search, Ms. Fenty demonstrated possessory interest over the property searched, thus asserting a reasonable expectation of privacy.

B. Sealed mail addressed to a pseudonym is an expectation of privacy that the public is prepared to recognize as reasonable because Fourth Amendment protections hinge on a logical expectation of privacy, not on the character of one's conduct.

The public is prepared to recognize a reasonable expectation of privacy over sealed mail addressed to a pseudonym because Fourth Amendment protections center on the public's understanding of a rational expectation of privacy, not the character of one's conduct. The Founding Fathers drafted the Fourth Amendment to combat government intrusion. "'The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and

invasive acts by officers of the Government,' without regard to whether the government actor is investigating crime or performing another function." *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 755-56 (2010) (citations omitted). While some circuits are persuaded by the idea that the public would not feel comfortable extending privacy protections to individuals furthering a crime, that analysis grossly misinterprets the foundation of the Fourth Amendment and the understanding that individuals should not fear the government intruding on their private places.

As the Seventh Circuit noted, basing Fourth Amendment protections on whether an individual engaged in criminal conduct undermines the safeguards guaranteed by the Fourth Amendment. *Pitts*, 322 F.3d at 458-59. By making the Fourth Amendment conditional on the character of one's conduct, government intrusion would operate on a 'ask for forgiveness, not permission' approach. *Id*. For example,

> "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." *Id*.

Making the Fourth Amendment dependent on the character of one's conduct creates a dangerous precedent severely limiting the protections awarded by the Constitution.

Expecting the government to refrain from intruding on an individual's personal mail is one the public is prepared to deem as reasonable. Even with the use of a fictitious name, the public expects that the government will not intrude on an individual's private sealed mail without a warrant. As a result, the public is prepared to recognize Ms. Fenty's expectation of privacy over sealed mail addressed to her pseudonym as a reasonable expectation of privacy.

1. Even if the Court hinges Fourth Amendment protections on the character of one's conduct, Defendant still does not forfeit her Fourth Amendment rights because she was unaware she was furthering a criminal scheme.

Seeing as Ms. Fenty did not have knowledge that she was furthering a criminal scheme, she did not forfeit her privacy rights. The circuits that consider the character of one's conduct when determining whether the public would deem the defendant's expectation of privacy reasonable rely on the underlying reasoning that the defendant employed an alias to further the criminal scheme. For example, in *Johnson*, the Tenth Circuit held that the defendant forfeited a reasonable expectation to privacy over a storage unit rented under a stolen identity since it further the criminal scheme of fraud. *Johnson*, 584 F.3d at 1002. Additionally, the District Court of Southern District of West Virginia found that the defendant forfeited a reasonable expectation to privacy over a package addressed to a fictional name because he utilized the fictional name to traffic drugs. *U.S. v. Walker*, 20 F. Supp. 2d 971, 974 (S.D.W. Va. 1998). In the circumstances before those courts, the defendants were knowingly furthering a criminal scheme.

In contrast, Ms. Fenty did not intentionally participate in a criminal scheme. She was influenced by a friend during a moment in need. (R. 44). The record demonstrates that Ms. Fenty was not knowledgeable about veterinary medicine, the horse tranquilizer, or let alone the nuance of drug trafficking. (R. 44-46). By lacking knowledge, Ms. Fenty did not use a fictitious name in an effort to further a criminal scheme. She merely utilized a fictitious name as a means to receive mail. Because Ms. Fenty had no knowledge that she was furthering a criminal scheme, she did not forfeit her constitutionally guaranteed right to protection from unreasonable searches and seizures by the government. Thus, the search of a sealed package addressed to Ms. Fenty's pseudonym constitutes an unreasonable search, violating the Fourth Amendment, and any evidence obtained as a result of the search should be suppressed.

II. Defendant's Recorded Voicemail Statements Are Admissible Under Federal Rule Of Evidence 803(3) Because The Statements Satisfy The Hearsay Exception Requirements By Reflecting Defendant's Contemporaneous State Of Mind Without Necessitating Consideration Of Reflection Time.

The recorded voicemail statements of Defendant, Ms. Fenty, are admissible and adhere to Rule 803(3) of the Federal Rules of Evidence since the statements fulfill the hearsay exception prerequisites by accurately reflecting Ms. Fenty's contemporaneous state of mind, irrespective of the timing of when the statements were made. Under the Federal Rules of Evidence, a statement is considered hearsay and cannot be admitted if presented "to prove the truth of the matter asserted." FED.R.EVID. 801. Nonetheless, a statement, even if characterized as hearsay, may still be admissible if it falls under one of the hearsay exceptions, like Rule 803(3), which lists the requirements for a statement of a then-existing mental, emotional or physical condition. FED.R.EVID. 803(3). This exceptions allows for the admissibility of:

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

Id. For a hearsay statement to be admissible under the Rule 803(3), criteria that courts typically consider include: (1) the statement must be contemporaneous with the events that sought to be proved, and (2) it must be relevant to the present case. *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). Some courts add a third requirement of spontaneity to determine whether the defendant had an opportunity to reflect and potentially distort or misrepresent their thoughts. *Id.* Here, the only requirement at issue is whether spontaneity is a requirement under Rule 803(3).

It is essential to recognize that the text of Rule 803(3) does not explicitly state a spontaneity requirement. The notion of such a requirement is inaccurately derived from a

misinterpretation of the Rule's advisory committee notes. *U.S. v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984). While some courts incorporate the spontaneity requirement to address fears that hearsay statements concerning a then-existing state of mind might be fabricated and unreliable, *see U.S. v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980), the fact that statements may be fabricated for self-serving purposes or perceived as unreliable does not make them inadmissible under Rule 803(3), *see U.S. v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984). The assessment of reliability is irrelevant in determining the admissibility of a statement under Rule 803(3) since the responsibility to assess credibility rests with the jury, not the court. *Id*.

Here, Ms. Fenty's recorded voicemail statements are admissible under Rule 803(3) because the statements are relevant and contemporaneous with the events sought to be proved. The voicemails satisfy the contemporaneous and relevance requirements because they reflect Ms. Fenty's then-existing mental state, indicating her involvement in a legitimate plan to aid suffering horses and her lack of awareness regarding any unlawful drug scheme. Given that Rule 803(3) does not explicitly require spontaneity, the assessment of reflection time to address the potential self-serving and unreliable nature of the voicemail statements is irrelevant. Moreover, the responsibility for assessing the credibility and trustworthiness of the voicemails lies with the jury, not the courts. Attempting to address such concerns through Rule 803(3) is an inaccurate application of the rule. Therefore, this Court should reverse the Fourteenth Circuit's decision and hold that the recorded voicemail statements are admissible, as they satisfy the contemporaneity and relevance requirements of Rule 803(3).

A. This Court should adopt a textual interpretation of Rule 803(3) as it lacks a requirement for spontaneity, and the rule's drafters did not intend to include such a condition for the hearsay exception.

This Court should embrace a textual interpretation of Rule 803(3) because the rule does not necessitate spontaneity, and its authors did not intend to impose such a criterion for admissibility. Rule 803(3) explicitly lays out the requirements to admit a hearsay statement of a declarant's then-existing state of mind not "including a statement of memory or belief to prove a fact remembered or believed." Fed.R.Evid. 803(3). The Advisory Committee Notes on the Proposed Rules make a distinction between Rule 803(3) and the preceding paragraphs.[1] The notes underscore spontaneity as a key factor in analyzing Rule 803(1) present sense impressions and Rule 803(2) excited utterances; notably, the Advisory Committee explicitly excluded the spontaneity requirement from Rule 803(3). *Id.*

The Second Circuit has emphasized that courts misinterpret the guidance when they require a spontaneity element based on the Advisory Committee notes. *Harris*, 733 F.2d at 1004. The Second Circuit clarified that the interpretation of those courts misguided because when examining the Advisory Committee Notes in context, "it is apparent that the language quoted by the government is an explanation of the reasons" behind establishing separate exceptions under Rule 803(1) and Rule 803(3), rather than constituting "an additional qualification which a court is entitled to impose on a statement otherwise falling with" the terms of Rule 803(3). *Id.* at 1005.

The First and Second Circuit have held that hearsay statements are admissible under Rule 803(3) when a "statement of the declarant's then-existing state of mind" are relevant and contemporaneous with the events that give rise to the state of mind or intention. *Id.* at 1004-05; *see also Packgen v. Berry Plastics Corp.*, 847 F.3d 80, 90 (1st Cir. 2017) (holding that the

[1] *See* FED.R.EVID. 803 advisory committee's note to proposed rules.

defendant's hearsay statements met the contemporaneous requirement of Rule 803(3) and reflected a then-existing state of mind). In *Harris*, the Second Circuit held that hearsay statements crucial to the defense are admissible if the statements meet the requirement of Rule 803(3) even if there are concerns the statements are untrustworthy. *Harris*, 733 F.2d at 1005. The *Harris* court specifically stated that evidence of the "defendant's cryptic phone conversation" spanning several days and statements from a parole officer should be admissible. *Id.* at 999. The court's rationale was that the evidence met the Rule requirements and even if the court admits the hearsay statements, the jury retains the discretion to reject the evidence based on its perceived untrustworthiness. *Id.* at 1005. The court affirmed that its duty is to admit the evidence if the requirements of 803(3) are satisfied, without imposing an extra spontaneity qualification that is not stated in the rule's text or Advisory Committee notes. *Id.*

Here, like in *Harris*, Ms. Fenty's recorded voicemail statements satisfy the relevance and contemporaneous requirements of Rule 803(3) because the voicemails demonstrate her then-existing mental state that she was unaware of why the packages were intercepted and that she did not have knowledge of any illegal drug activity. (R. 50-51, 68-69). Unlike *Harris*, Ms. Fenty left two voicemails 45 minutes apart not spanning several days. (R. 40). The initial voicemail was promptly recorded upon realizing the interception of the packages, while the second voicemail followed up on her concerns, providing additional support for the contemporaneous and relevance requirements of the rule. *Id.* Therefore, since Ms. Fenty's recorded voicemail statements satisfy the plain text requirements of Rule 803(3), which does not include a spontaneity requirement, this Court should hold that the statements were admissible. Furthermore, this Court should adopt a straightforward interpretation of Rule 803(3) that does not mandate spontaneity. This approach aligns appropriately with the Rule's intended purpose,

permitting the admission of contemporaneous and relevant statements reflecting a then-existing state of mind, without introducing an additional spontaneity requirement stemming from an erroneous reading of the Advisory Committee notes.

B. Courts mandating spontaneity requirements under Rule 803(3) do so out of reliability concerns, which are immaterial in the scrutiny of then-existing statements; the responsibility to assess credibility lies with the jury, not the court.

By stipulating a spontaneity requirement under Rule 803(3) to address apprehensions regarding untrustworthy statements, courts deprive the jury of its fact-finding role, transferring it improperly to the judge. Furthermore, such concerns are irrelevant when examining hearsay statements, as the duty of assessing credibility falls within the purview of the jury, not the court. While Rule 803(3) requires that a "statement must be contemporaneous with the events that Defendant seeks out to prove," *Jackson*, 780 F.2d at 1315, it does not require courts to assess the sincerity of a statement, *see DiMaria*, 727 F.2d at 271; *U.S. v. Cardascia*, 951 F.2d 474, 487 (2d Cir. 1991); *U.S. v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988). Federal courts have stressed that courts should refrain from assessing the reliability and credibility of hearsay statements if they fall within Rule 803(3) because the determination of the truth or falsity of a statement lies with the jury, not the court. *Id.* Moreover, numerous courts have erroneously imposed a spontaneity requirement on Rule 803(3) to address credibility concerns not because the rule mandates it, but due to the belief that increased time between a statement and the events it describes diminishes its reliability. *Ponticelli*, 622 F.2d at 991; *see also Horton v. Allen*, 370 F.3d 75, 85 (1st Cir.2004); *U.S. v. Macey*, 8 F.3d 462, 462 (7th Cir. 1993); *U.S. v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005). In addition, certain courts erroneously advocate for a spontaneity requirement in Rule 803(3) to address credibility concerns, stemming from a misinterpretation and conflation of the terms contemporaneous and spontaneous. *U.S. v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir.

2007); *see also Amerisource Corp. v. RxUSA Int'l Inc.*, No. 02-CV-2514 (JMA), 2009 WL 235648 at *2 (E.D.N.Y. Jan. 30, 2009).

The Second and Seventh Circuit have asserted that precluding evidence preemptively due to potential untrustworthiness or falsehood undermines the essential function of the jury, which is to assess the credibility of admissible evidence. *Peak*, 856 F.2d at 834; *see also Cardascia*, 951 F.2d at 487. This stance endures, even if it means "admitting certain statements as hearsay exceptions that on their face appear to have a low degree of trustworthiness. *DiMaria*, 727 F.2d at 271; *see also Cardascia*, 951 F.2d at 487. In *Peak*, the Seventh Circuit rejected the lower court's decision deeming a recorded telephone conversation inadmissible due to perceived untrustworthiness. *Peak*, 856 F.2d at 834. The *Peak* court stated that it was a mistake to proactively exclude an admissible Rule 803(3) statement based on reliability concerns, emphasizing credibility determinations are the responsibility of the jury. *Id.* In *DiMaria*, the Second Circuit similarly held that a statement that falls within the words of Rule 803(3) are admissible even if it is "an absolutely classic false exculpatory statement" because the "jury's role is to determine the reliability or validity of the evidence presented, and not the judge's." *DiMaria*, 727 F.2d at 271; *see also U.S. v. Dellinger*, 472 F.2d 340, 381-82 (7th Cir. 1972) (holding that self-serving statements, "otherwise free from objection under the hearsay rule and its exceptions", do not, on their own, provide sufficient evidentiary basis for their exclusion from evidence).

Conversely, courts that have incorrectly insisted on evaluating the reliability of a statement under Rule 803(3) have done so by erroneously interpreting the contemporaneity requirement as a measure "imposed to diminish the likelihood of fabrication or deliberate misrepresentation." *Rivera-Hernandez*, 497 F.3d at 81; see also (1st Cir. 2007); *see also*

Amerisource Corp., 2009 WL 235648 at *2. In *Rivera-Hernandez*, the First Circuit asserted that Rule 803(3)'s requirement of contemporaneity is designed to diminish the likelihood of fabrication and false statements. *Rivera-Hernandez*, 497 F.3d at 81. Consequently, the court reasoned that the defendant's statement to his father was considered inadmissible because it did not occur "contemporaneously," taking place well after he had requested money in connection to the money-laundering conviction being addressed at trial. *Id.* Instead of focusing on the contemporaneous requirement of Rule 803(3) concerning the "then-existing mindset," the court erroneously concentrated on the timing to determine the trustworthiness of the statement. *Id.*

Here, like in *Peak* and *DiMaria*, Ms. Fenty's recorded voicemail statements satisfy the contemporaneous and relevance requirements of Rule 803(3) because Ms. Fenty's statements reflect her then-existing mental state that she was unaware of any unlawful criminal activity. (R. 50-51, 68-69). Like in *Rivera-Hernandez,* the district court expressed concerns regarding the trustworthiness of the recorded voicemail statements, pointing to the 45-minute time gap between the two calls and the self-serving nature of the statements. (R. 69). However, any concerns regarding the reliability and trustworthiness of the voicemail statements fall outside the purview of Rule 803(3), as the court is not tasked with conducting such an analysis. It is a long-standing common law tradition that the purpose of the jury is to determine issues of credibility; however, if the judge assumes the role of the fact finder, the right to trial by jury is significantly diminished. Hence, even if this Court is apprehensive of Ms. Fenty's statements, considering that the statements satisfy the requirements of Rule 803(3), they should be admitted, leaving it to a thorough cross-examination and the jury to determine their trustworthiness. Therefore, to preserve the jury's role in upholding a healthy democracy, this Court should uphold that Rule

803(3) does not require a spontaneity analysis to address reliability concerns, as these concerns are irrelevant for the court to assess and should be entrusted to the jury.

III. Evidence Of Defendant's Prior Petit Larceny Conviction Is Not Admissible for Purposes Of Impeachment Because Petit Larceny Does Not Qualify As A Crime of Deceit Under Rule 609(a)(2) Of The Federal Rules of Evidence.

Since petit larceny does not meet the criteria of a deceitful crime under Rule 609(a)(2) of the Federal Rules of Evidence, Ms. Fenty's misdemeanor conviction for petit larceny under Boerum Penal Code § 155.25 cannot be admitted for impeachment purposes. Under the Federal Rules of Evidence, Rule 609(a)(2) permits challenging a witness's credibility through evidence of a criminal conviction if the crime involved "a dishonest act or false statement," irrespective of the punishment. FED. R. EVID. 609(a)(2). The Advisory Committee Notes on the 1990 and 2006 Amendments to Rule 609 explain that crimes involving a dishonest act or false statement are "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Fed. R. Evid. 609 advisory committee's note to 1990 and 2006 amendment. Here, the only issue is whether a misdemeanor petit larceny offense is a crime involving a dishonest act or false statement.

The amendments to Rule 609 established a clear definition for "dishonesty or false statements" and clarified that crimes of dishonesty exclusively encompass offenses where "the ultimate criminal act was itself an act of deceit." *Id.* In offenses where there is ambiguity regarding deceitfulness, several federal circuits appropriately hold that courts should look to the explicitly statutory elements of the crime.[2] These circuits rightly contend that misdemeanor theft

[2] *See U.S. v. Pruett*, 681 F.3d 232, 247 (5th Cir. 2012); *U.S. v. Galati*, 230 F.3d 254, 261 (7th Cir. 2000); *U.S. v. Smart*, 60 F.4th 1084, 1092 (8th Cir.), cert. denied, 144 S. Ct. 176 (2023); *U.S. v. Dunson*, 142 F.3d 1213, 1215

is not inherently considered a crime of dishonesty under Rule 609(a)(2), unless it is evidently committed in a fraudulent or deceitful manner. *Id.* Thus, in determining whether petit larceny is a crime of dishonesty subject to Rule 609(a)(2), courts first evaluate the statutory elements of the crime and ascertain whether the conviction necessitated "the deceitful nature of the crime." *Pruett*, 681 F.3d at 247. Next, courts examine the underlying conduct of the crime, considering whether the actions were based on deceit, violence, impulse, or carelessness. *Dunson*, 142 F.3d at 1215; *see also U.S. v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). Finally, in cases where crimes do not distinctly fall under Rule 609(a)(2), courts hold the importance of balancing the probative value of the conviction against its prejudicial effect on a witness before determining its admissibility for purposes of impeachment. *Estrada*, 430 F.3d at 618-19.

Here, Ms. Fenty's misdemeanor conviction is not a crime of dishonesty because petit larceny under Boerum Penal Code § 155.25 does not require showing a dishonest or false statement and the prosecution did not have to prove any deceitful conduct to convict her. Boerum Code Ann. § 155.25. Moreover, Boerum District incorporates a distinct criminal offense outlined in Boerum Penal Code § 155.45 that differentiates petit larceny from theft by deception. Boerum Code Ann. § 155.45. Notably, Ms. Fenty was not charged under this particular provision. Additionally, Ms. Fenty's behavior in stealing the bag wasn't marked by calculated deception; rather, it stemmed from impulse and need. Ms. Fenty's behavior during the criminal act turned violent, leading to a crime characterized by force rather than deception. Finally, since Ms. Fenty's previous petit larceny conviction doesn't clearly fit the offenses specified in Rule 609(a)(2), its admission unfairly biases the jury. This is because theft suggests an undesirable character trait and a propensity for general criminal behavior, rather than indicating a

(10th Cir. 1998); *U.S. v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976); *U.S. v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977); *Gov't of Virgin Islands v. Toto*, 529 F.2d 278, 280 (3d Cir. 1976).

predisposition for dishonesty. Thus, this Court should establish a plain statutory analysis to Rule 609(a)(2) and hold that misdemeanor petit larceny is not admissible for purposes of impeachment.

A. Under Rule 609(a)(2), a petit larceny conviction is not admissible because the crime lacks elements of dishonesty or false statements, and proving a deceitful element is not required to obtain a conviction.

Since demonstrating a deceitful element is not a prerequisite for obtaining a conviction and the offense does not involve elements of dishonesty or false statements, a prior petit larceny conviction is inadmissible under Rule 609(a)(2). Federal Circuits agree that Rule 609(a)(2) is an inflexible rule, permitting the admissibility of narrowly defined crimes of dishonesty, such as perjury or theft by deceit, which directly affect the defendant's credibility in testifying truthfully. *U.S. v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). For crimes that do not distinctly fall within the narrowly defined list of crimes, courts have found that the accompanying notes to the 2006 Amendments to Rule 609 establish that courts should consider the "statutory elements of a crime to determine whether it is one of dishonesty." *Pruett*, 681 F.3d at 246. In cases where it is unclear from the statute whether a crime involves dishonesty, courts may examine factors such as the defendant confessing to a dishonest act and whether proving an act of dishonesty was necessary for a conviction. *Id.* Thus, several courts have held that petit larceny is not a per se admissible crime under Rule 609(a)(2) and can only be admissible if the conviction is for a misdemeanor "in the nature of [deceit]," like theft by deceit. *Toto*, 529 F.2d at 280; *see also Ortega*, 561 F.2d at 805; *U.S. v. Amaechi*, 991 F.2d 374, 379 (7th Cir. 1993) (holding that petty theft does not "in and of itself qualify as a crime of dishonesty").

In *Pruett*, the Fifth Circuit held that a past larceny conviction was not a crime of dishonesty and is not admissible under Rule 609(a)(2) because the statutory text did not have an

element of deceit. *Pruett*, 681 F.3d at 247; *see also U.S. v. Collier*, 527 F.3d 695, 698 (8th Cir. 2008) (holding that the defendant's prior conviction included the statutory element of intent to defraud, making it admissible and thus was admissible). The court also emphasized that the amendments to "Rule 609 do not warrant a departure from relying on the statutory elements" of a crime to determine admissibility. *Pruett*, 681 F.3d at 247. The *Pruett* court considered whether a witness's past larceny conviction could be admitted for impeachment purpose and the court ultimately held it was not because the deceitful nature of the crime is not apparent from the statutory elements. *Id.* at 246. The Seventh and Ninth circuits similarly held that a misdemeanor shoplifting conviction is not a crime of dishonesty and is not per se admissible unless clearly committed in a deceitful manner. *Ortega*, 561 F.2d at 805; *see also Amaechi*, 991 F.2d at 379. Additionally, the courts reasoned that the intent of Rule 609(a)(2) is limited to crimes that involve dishonest acts and false statements. *Id.* Thus, emphasizing a narrow, statutory elements approach to the interpretation of Rule 609(a)(2). *Id.*

Here, like in *Pruett*, Ms. Fenty's prior petit larceny conviction does not include any statutory elements of deceit nor was proving dishonesty a requirement to reach a conviction. (R. 3). Similarly to *Ortega* and *Amaechi*, Ms. Fenty's prior misdemeanor was used to attack her credibility even when statutory elements of the offense did not include deceit. Ms. Fenty's prior conviction only required demonstrating that she knowingly took the property of another with intent to deprive the person or exercise control over the property without the owner's consent. *Id.* The prosecution did not have to demonstrate any element of deceit nor was showing a dishonest act or false statement required to convict Ms. Fenty of petit larceny. *Id.* Moreover, the State did not charge Ms. Fenty with theft by deceit, a crime admissible under Rule 609(a)(2). (R. 21). Therefore, since the statutory elements of petit larceny did not involve dishonesty, and proving

deceit was not necessary for a conviction, this Court should adopt a statutory elements approach, holding that a prior petit larceny conviction is not admissible for purposes of impeachment. This approach aligns with both Congressional and judicial consensus, asserting that Rule 609(a)(2) should not be expansively applied and that the statutory elements of a crime serve as an indicator of its admissibility as a crime of dishonesty.

B. This Court should not readily admit evidence of petit larceny misdemeanors that do not explicitly involve deceit because theft is not inherently a crime of deception and can manifest in various forms, such as impulse, carelessness, or violence.

Given that theft does not automatically qualify as a crime of dishonesty and can occur in diverse ways, including impulsive or forceful actions, this Court should refrain from automatically admitting evidence of a petit larceny misdemeanor that does not involve deceit. Federal circuit courts have recognized that crimes can be committed through various means, excluding deceit, such as impulse, carelessness, or violence. Offenses perpetrated through means other than deceit provide limited indications of an individual's propensity for dishonesty, *see U.S. v. Crawford*, 613 F.2d 1045, 1052 (D.C. Cir. 1979), and fail to demonstrate deceptive, "calculated law-breaking" such as perjury. *Estrada*, 430 F.3d at 618. Therefore, courts emphasize that for offenses, like larceny, which may or may not be crimes of dishonesty, it is essential to look at the manner in which the offense was carried out. *Pruett*, 681 F.3d at 247; *see also Altobello v. Borden Confectionary Prod., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989). Federal courts have specifically held that prior theft or larceny convictions executed through means other than deceit are not admissible under Rule 609(a)(2). *U.S. v. Owens*, 145 F.3d 923, 927 (7th Cir. 1998); *see also Pruett*, 681 F.3d at 247; *Altobello*, 872 F.2d at 216; *Crawford*, 613 F.2d at 1052; *Amaechi*, 991 F.2d at 379.

In *Altobello*, the Seventh Circuit, drawing support from the akin perspective of the Eighth and Ninth Circuits, held that a prior misdemeanor theft conviction was admissible because the manner in which the defendant carried out the theft was unequivocally through deceit. *Altobello*, 872 F.2d at 217. The *Altobello* court highlighted that the defendant engaged in meter tampering which is a crime of deception since "the goal is always to deceive the meter reader." *Id.* In *Owens*, the Seventh Circuit maintained that shoplifting is not by itself a crime of dishonesty under Rule 609(a)(2) and held that it was proper to exclude a prior theft conviction. *Owens*, 145 F.3d at 927. The court clarified the distinction by highlighting the difference between stealing with the goal of deceit, as seen in *Altobello*, and "straight shoplifting" an item worth less than $150. *Id.; see also Dunson*, 142 F.3d at 1215 (holding that convictions for theft by deceit, encompassing instances of theft through fraud, are admissible, while straightforward shoplifting is deemed outside the scope of 609(a)(2). In *Crawford*, the DC circuit similarly held that shoplifting can manifest in various forms, including "an impulsive grab and run," which would not be classified as a deceitful offense. *Crawford*, 613 F.2d at 1052. Therefore, the court held that when the underlying behavior of the offense shows no clear evidence of deceit, courts should refrain from determining how probative a theft conviction might be on an individual's propensity for dishonesty. *Id.*

Here, unlike in *Altobello*, Ms. Fenty did not steal the bag with the primary goal of carrying out the offense through deceitful actions, nor did she deceive a person or an object. Instead, Ms. Fenty only took possession of the bag after a loud public altercation unfolded between her and the victim, during which she used force and made threats. (R. 22). Like in *Owens*, Ms. Fenty's offense was straightforward theft of a bag worth less than $150, specifically containing a mere $27. (R. 19, 66). As highlighted in *Crawford*, Ms. Fenty's actions and lapse in

judgment manifested as an impulsive "grab and run" motivated by a dare. (R. 19, 22, 54). Ms. Fenty's misdemeanor offense was not readily carried out through deceit but rather through impulse and force. *Id.* Therefore, Ms. Fenty's prior petit larceny conviction is inadmissible and does not fall under purview of Rule 609(a)(2).

C. As petit larceny is not a per se crime under Rule 609(a)(2), permitting evidence of Defendant's prior conviction unfairly prejudices the jury against her, as theft, while undesirable, does not indicate a propensity toward dishonesty.

Permitting evidence of Ms. Fenty's prior petit larceny conviction, under Rule 609(a)(2), unfairly biases the jury against her, as theft, although selfish, does not demonstrate a tendency toward dishonesty. Several federal circuit courts concur that Rule 609(a) is a narrow and inflexible rule that does not always establish a "hard line rule that crimes clearly falling on one side of the rule" are automatically deemed highly probative for credibility, regardless of prejudice.[3] Additionally, courts have held that crimes that may not precisely fit the definition of crimes of dishonesty should still undergo discretionary evaluation, taking into account the potential unfair prejudicial effect. *Estrada*, 430 F.3d at 619; *see also Smith*, 551 F.2d at 364; *Smart*, 60 F.4th at 1092. Federal courts that do not categorize petty shoplifting and theft as crimes of dishonesty assert that courts have discretion to recognize that misdemeanor offenses failing to meet the criteria of 609(a)(2) are more likely to have a greater prejudicial impact than probative value. *Galati*, 230 F.3d at 261; *see also Ortega*, 561 F.2d at 805; *Smart*, 60 F.4th at 1092; *Toto*, 529 F.2d at 280. Additionally, the courts have recognized that jurors tend to misapply "prior convictions as evidence of criminal propensity rather than evidence of lack of credibility" regardless of the limiting instruction. *Toto*, 529 F.2d 278, 280; *see also Thompson v.*

[3] *See Estrada*, 430 F.3d at 619; *Smith*, 551 F.2d at 364; *Hayes*, 553 F.2d at 827; *Smart*, 60 F.4th at 1092; *Owens*, 145 F.3d at 927; *Amaechi*, 991 F.2d at 378; *Galati*, 230 F.3d at 261.

U.S., 546 A.2d 414, 424 (D.C., 1988) (stating that the effectiveness of "a limiting instruction in the context of" evidence of prior crime has been widely challenged).

In *Galati*, the Seventh Circuit affirmed that petty shoplifting does not meet the criteria of a crime of dishonesty and that courts can exercise discretion in assessing the facts of a case to evaluate the risk of significant prejudicial effect. *Galati*, 230 F.3d at 261. The *Galati* court determined that the defendant's previous shoplifting conviction related to a cassette tape was not admissible, citing factors such as the defendant's age of nineteen at the time and the minimal probative value associated with a conviction for a crime committed twenty years ago. *Id.* In contrast, in the *Hayes* case, the Second Circuit deemed the defendant's prior narcotics conviction admissible, citing in part its occurrence two months before the trial as a factor that favored its probative value. *Hayes*, 553 F.2d at 828. In *Smart*, the Eighth Circuit reinforced that theft is generally not deemed a crime of dishonesty under Rule 609(a)(2), emphasizing that evidence of such convictions should be admitted rarely and only under exceptional circumstances where its probative value substantially outweighs its prejudicial effect. *Smart*, 60 F.4th at 1092.

Here, like in *Galati*, Ms. Fenty committed the petit larceny offense when she was a teenager almost six years before this hearing. (R. 52, 66). Unlike *Hayes*, there is limited probative value attached to a conviction for a crime committed at the age of nineteen, which resulted from impulsive and forceful, rather than deceitful behavior. (R. 19, 53). Given that Ms. Fenty's prior petit larceny conviction does not clearly fit into the scope of Rule 609(a)(2) as a crime of dishonesty, this Court should endorse the prevailing view that the rule be narrowly interpreted, and the potential prejudicial risk of admitting offenses like petit larceny should be carefully weighed. Additionally, in line with the consensus among most federal courts, it should be acknowledged that a limiting instruction has limited efficacy in mitigating unfair prejudicial

risks. Consequently, as Ms. Fenty's prior offense is not a crime of dishonesty and does not substantiate her credibility, this Court should hold that a prior petit larceny conviction is inadmissible due to the risk of unfairly prejudicing the jury against Ms. Fenty.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourteenth Circuit's decision and hold that (1) Defendant's Fourth Amendment rights were violated and any evidence arising from the illegal search must be suppressed, (2) under Rule 803(3) Defendant's recorded voicemail statements are admissible then-existing state of mind hearsay statements, and (3) impeachment by evidence of a prior petit larceny conviction is inadmissible under Rule 609(a)(2).

Respectfully Submitted,

/s/ Team Number 35
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