No. 23–695

IN THE

SUPREME COURT OF THE UNITED STATES

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI FROM THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONERS

February 5, 2024

Team 34

QUESTIONS PRESENTED

I. Whether Defendant has a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to Defendant's alias.

II. Whether recorded voicemail statements offered by Defendant to show a then-existing mental state can be admitted as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence if Defendant had time to reflect before making the statements.

III. Whether Defendant's impeachment by evidence of her prior conviction for petit larceny was proper under Rule 609(a)(2) of the Federal Rules of Evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES……………………………………………………………………3

STATEMENT OF THE CASE…………………………………………………………………6

SUMMARY OF THE ARGUMENT…………………………………………………………… 12

ARGUMENT…………………………………………………………………………………14

I. The Fourteenth Circuit Court of Appeals erred in holding that the defendant did not have an expectation of privacy for sealed packages with her alias and therefore the contents of the package was not properly admitted at trial because the expectation of privacy exists with the use of alias and behavior in furtherance of a crime does not eliminate Fourth Amendment Protections……………………………………………………………………14

   A. Ms. Fenty had a reasonable expectation of privacy in the sealed packages delivered to her with the use of her alias………………………………………...15

   B. Ms. Fenty's expectation of privacy should not depend on whether her actions were used in furtherance of a crime……………………………………………...17

II. The District Court's Failure in Admitting Ms. Fenty's Voicemails Under Federal Rule of Evidence 803(3) is Clearly Erroneous………………………………………….……..18

   A. The Voicemail Messages Left by Ms. Fenty Were Substantially Contemporaneous with The Event at Issue……………………………………………………………..18

   B. The Failure to Admit This Evidence Invokes the Clear Error Standard of Review……………………………………………………………………………...24

III. The Fourteenth Circuit Erred in Holding that Ms. Fenty's Impeachment by Evidence of Her Prior Conviction for Petit Larceny was Proper Under Federal Rule of Evidence 609(a)(2)..24

   A. The establishing elements of the crime did not require the prosecution to prove deceit……………………………………………………………………………..24

   B. The facts of the case show Ms. Fenty's conduct was stealth conduct and not deceitful or dishonest conduct…………………………………………………...28

CONCLUSION………………………………………………………………………………32

TABLE OF AUTHORITIES

Cases

Altobello v. Borden Confectionary Products,
872 F.2d 215, 216 (7th Cir. 1989)....................29

Boyd v. United States,
116 U.S. 616 (1886)....................14

Ex parte Jackson,
96 U.S. 727 (1878)....................15

Gouled v. United States,
255 U.S. 298 (1921)....................14

Government of Virgin Islands v. Toto,
529 F.2d 278, 281-282 (3d Cir. 1976)....................28

Katz v. United States,
389 U.S. 347 (1967)....................15

Rakas v. Illinois,
439 U.S. 128, 133-34 (1978)....................14

Stone v. Powell,
428 U.S. 465, 482 (1976)....................14

United States v. 1013 Crates of Empty Old Smuggler Whiskey Bottles,
52 F.2d 49, 51 (2d Cir. 1931)....................14

United States v. Daniel,
982 F.2d 146 (5th Cir. 1993)....................16

United States v. Dorsey,
591 F.2d 922, 935 (D.C. Cir. 1978)....................29

United States v. Fearwell,
595 F.2d *771 (D.C. Cir. 1978)....................25, 28, 31

United States v. Fields,
113 F.3d 313 (2d Cir. 1997)....................17

United States v. Garcia-Bercovich,
582 F.3d 1234 (11th Cir. 2009)....................16

United States v. Hayes,
553 F.2d 824 (2d. Cir. 1977)....................25, 28

United States v. Johnson,
584 F.3d 995 (10th Cir. 2009)....................16

United States v. Payton,
159 F.3d 49 (2d Cir. 1998)....................28, 29

United States v. Pierce,
959 F.2d 1297 (5th Cir. 1992)....................15, 16

United States v. Smith,
551 F.2d *348, *363 (D.C. Cir. 1976)....................28

United States v. Taborda,
635 F.2d 131 (2d Cir. 1980)....................17

United States v. Van Leeuwen,
397 U.S. 249 (1970)....................15

United States v. Villarreal,
963 F.2d 770 (5th Cir. 1992)....................15

United States v. Jackson,
780 F.2d 1305, 1315 (7th Cir. 1986)....................18

United States v. Layton,
549 F. Supp. 903, 909 (N.D. Cal. 1982)....................18

United States v. Emmert,
829 F.2d 805, 809-10 (9th Cir. 1987)....................18

United States v. Ponticelli,
622 F.2d 985, 991 (9th Cir. 1980)....................18

Packgen v. Berry Plastics Corp.,
847 F.3d 80, 84, 91 (1st Cir. 2017)....................18

United States v. Mendez,
303 Fed. Appx. 323, 326 (6th Cir. 2008)....................19

United States v. Naiden,
424 F.3d 718, 721-23 (8th Cir. 2005)....................19

Sea Marsh Group v. SC Ventures,

1997 U.S. App. LEXIS 6739, 23 (4th Cir. 1997)...19

United States v. Newell,
315 F.3d 510, 523 (5th Cir. 2002)..19

United States v. Barraza,
576 F.3d 798, 805 (8th Cir. 2009)..19

Navarette v. California,
572, U.S. 393, 400 (2014)..19, 20

Old Chief v. United States,
519 U.S. 172, 174 (1997)...22

Sprint/United Mgmt Co. v. Mendelsohn,
552 U.S. 379, 384 (2008)...22

United States v. Owens,
165 Fed. Appx. 845 (11th Cir. 2006)..22

Anderson v. Bessemer City,
470 U.S. 564, 575 (1985)...22

Beech Aircraft Corp. v. Rainey,
488 U.S. 153, 164 (1988)...22

Federal Rules of Evidence

Fed. R. Ev. 403……………………………………………………………………………23, 25

Fed. R. Ev. 609…………………………………………………..13, 24, 25, 26, 27, 28, 29, 31, 32

Fed. R. Ev. 803(3)...9, 18, 19, 20, 22, 24, 32

United States Constitution

U.S. Const. Amend. IV……………………………………………………………………..14

Secondary Sources

Black's Law Dictionary, 6th Pocket ed. (2021)...22

STATEMENT OF THE CASE

A. Law Enforcement Searched and Seized Ms. Fenty's Sealed Mail Packages Addressed to her Alias

Franny Fenty, a resident of the city of Joralemon in the state of Boerum, is a dedicated and passionate writer. Ms. Fenty began her writing career in college where she published two short stories in her university's creative writing magazine. Since then, Ms. Fenty has continued her passion for writing after college, writing several novels. During this time, Ms. Fenty used the pen name Jocelyn Meyer for her writings.[1] Ms. Fenty used her pen name regularly, including it in her college zine publications, LinkedIn page, and in emails to publishers.[2] While Ms. Fenty has been diligently working on novels, her work has not been recently published. In October 2021, Ms. Fenty, using her pen name, reached out to four publishers inquiring about publication, but did not receive any responses from publishers.[3]

On February 14, 2022, Special Agent Raghaven and his partner Special Agent Harper Jim seized several packages shipped to P.O Box 9313, registered to Jocelyn Meyer.[4] Two packages were addressed to Jocelyn Meyer and two were addressed to Franny Fenty. The packages were flagged by U.S. postal employees because they were addressed from Holistic Horse Care. Two days prior to this incident, a resident of Jorelemon, unrelated to Ms. Fenty, was found dead from a fentanyl overdose, lying next to an open box that had been mailed from "Holistic Horse Care."[5] In early 2022, it was made public that there was an increased prevalence in Joralemon of a street drug created from a combination of a horse tranquilizer called xylazine

---

[1] Joralemon College Zine Covers, R. #4.
[2] *Id*.; Franny Fenty LinkedIn Post, R. #6; Jocelyn Meyer Email to Publisher R. #5.
[3] Jocelyn Meyer Email to Publisher, R. #5.
[4] R. #37.
[5] Transcript: Trial Testimony of Special Agent Robert Raghavan (Excerpt), R. #29.

and fentanyl.[6] The increase of the new drug led the Joralemon DEA office to heighten monitoring of the Joralemon post office for any packages connected with horse care.[7] Based on these circumstances, law enforcement searched and seized the packages addressed to Jocelyn Meyer and discovered the packages contained 800 grams of xylazine laced with 400 grams of fentanyl.[8]

The next day, on February 15, 2022, the DEA agents resealed the Holistic Horse Care packages addressed to Jocelyn Meyer and returned them to the post office manager to stage a sting operation on the owner of the packages.[9] Concurrently, the post office manager, at the direction of the DEA placed a slip inside P.O. Box 9313 notifying Jocelyn Meyer to pick up her packages from the front counter.[10] A few hours later, law enforcement observed Ms. Fenty enter the post office, unlock the P.O. Box, and then went to the front counter with the slip.[11] Ms. Fenty said the packages were hers, and went to leave the post office.[12] While leaving, Ms. Fenty had a short conversation with a college classmate, which was the first time law enforcement learned of Ms. Fenty's real name.[13] After leaving the post office, Ms. Fenty was arrested by law enforcement and later indicted with intent to distribute a controlled substance.[14]

B. Ms. Fenty was Prevented from Admitting Voicemails Left for Ms. Millwood at Trial

---

[6] Joralemon Times Article, R. #7.
[7] DOJ Press Release, R. #8.
[8] *Id.*
[9] Transcript: Trial Testimony of Special Agent Robert Raghavan (Excerpt), R. #32.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at R. #33.
[14] DOJ Press Release, R. #8.

Ms. Fenty testified that she decided to research xylazine after agreeing to help Ms. Millwood source the horse medication.[15] She stated that she read the Joralemon Time article, by Andrew Baer, and learned that xylazine was used as a recreational drug. [16] She immediately called Ms. Millwood who assured her that the xylazine was "medicine for the horses."[17] On February 14th, Ms. Fenty received confirmation that the xylazine packages were shipped to her P.O. box.[18] Upon arrival, she noticed they were missing and immediately called Ms. Millwood who did not answer.[19]

Ms. Fenty's first voicemail was left for Ms. Millwod at 1:32 pm and 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 I would never want to be part of. Plus, you still owe me the money. [20]

Ms. Millwood did not respond to the message.[21] Forty-five (45) minutes later, Ms. Fenty left another voicemail for Ms. Millwood.[22]

> 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 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.[23]

---

[15] R. #46
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] Def. Ex. 16, R. #39-40
[21] *Supra* note 15
[22] *Id*.
[23] Def. Ex. 17, R. #39-40

These voicemails were not admitted as evidence.[24] Ms. Fenty argued the messages should be admitted under Federal Rule of Evidence 803(3) because they showed a then-existing mental state.[25] The prosecution argued that the statements were not made "spontaneously," since she had "time to reflect" before making the statements.[26] The prosecution further elaborated that "[u]nlike a real-time conversation, she could think about what she planned to say before she recorded it."[27] The prosecution continued and stated that "these statements will mislead the jury into thinking that [Ms. Fenty] truly had no idea that the xylazine was laced with fentanyl."[28] They concluded that the prejudicial risk far outweighed the probative value of the statements.[29]

Ms. Fenty argued that the statements were important because they reflected her then-existing mental state.[30] Ms. Fenty argued that she engaged in a legitimate plan to help horses, that the purchase of the xylazine was legitimate, and that she had no idea that she was involved "in an illicit drug scheme."[31] Ms. Fenty then stated that "the language of Rule 803(3) plainly does not include a spontaneity requirement."[32] She finished by stating that it is the job of the jury to determine issues of credibility of the declarant's statements.[33] The court ruled that the

---

[24] R. #52
[25] R. #47
[26] *Id.*
[27] R. #48
[28] *Id.*
[29] *Id.*
[30] R. #51
[31] *Id.*
[32] *Id.*
[33] *Id.*

statements were inadmissible hearsay because they lacked spontaneity.[34] The court did not reach any of the other issues raised by Ms. Fenty on this matter.[35]

C. The Trial Court Admits Evidence of Prior Convictions

When Franny Fenty was nineteen years old, she was charged and convicted with the misdemeanor of petit larceny under Boerum Penal Code § 155.25.[36] On August 4, 2016 in Joralemon City Square, Ms. Fenty was dared by a friend to steal a bag from a tourist containing diapers and $27 in cash.[37] Ms. Fenty testified that she did not want to steal the bag at first when her friend, Susan Cahill, first dared her to do so.[38] Ms. Fenty additionally testified that she and Ms. Cahill were both "really broke" at the time of the theft and that she wanted to impress Ms. Cahill.[39]

In committing the theft, Ms. Fenty approached the women carrying the bag in Joralemon City Square with many people around watching a street performer dressed as Elmo.[40] On cross examination, Ms. Fenty confirmed that she chose this woman to steal from because she seemed distracted and did not want to get caught.[41] Ms. Fenty approached the woman and tried to quietly take her bag, but the woman noticed Ms. Fenty, yelled for Ms. Fenty to stop, and tried to grab her bag back.[42] Ms. Fenty testified that she then froze for a second as she was very scared and

---

[34] R. #52
[35] *Id.*
[36] R. 19.
[37] *Id.*
[38] *Id.* at 53.
[39] *Id.*
[40] R. 59.
[41] *Id.*
[42] *Id.*

then grabbed the bag back from the woman by "pushing her a little."[43] Ms. Fenty testified that after she pushed the woman, the woman screamed loudly and Ms. Fenty said "Let go or I'll hurt you."[44] Ms. Fenty then grabbed the bag and ran and was then apprehended by Joralemon police officers three blocks away from the City Square.[45]

Ms. Fenty was then charged and pleaded guilty to petit larceny under Boerum Penal Code § 155.25 and was sentenced to two years of community service and two years of probation.[46] Ms. Fenty has not been convicted of any other crimes besides this misdemeanor petit larceny charge.[47]

---

43 *Id.* at 59–60.
44 *Id.* at 60.
45 R. 53–4.
46 *Id.* at 54.
47 *Id.*

SUMMARY OF THE ARGUMENT

The Supreme Court should reverse and remand the Fourteenth Circuit's holding that Ms. Fenty did not have a reasonable expectation of privacy in the sealed mail packages addressed to her alias. Courts have clearly held that sealed packages are entitled to Fourth Amendment protections, including packages that use a fictitious name, such as an alias. While the same Fourth Amendment protections do not apply when an individual uses a fraudulent or stolen identity, there is no evidence to show that Ms. Fenty engaged in this type of conduct. Instead, Ms. Fenty used an alias prior to the events in question as a "pen name" for her creative writing pieces. Additionally, while the respondent may argue that Ms. Fenty gave up her expectation of privacy over the packages because her behavior was allegedly in furtherance of a crime, courts have clearly held that this is not the case. By siding with the government on this matter, the Supreme Court would jeopardize and erode the fundamental protections of the Fourth Amendment.

The Supreme Court should reverse and remand the Fourteenth Circuit's holding that Ms. Fenty's voicemails are inadmissible hearsay evidence. The lower courts failed to take into consideration the precedent of this court which clearly shows that voicemail and phone calls can be contemporaneous, and, thus, admissible hearsay. Additionally, the district court committed clear error in making its factual finding of a lack of spontaneity. The jury, as the ultimate finder of fact, must be allowed to make a credibility assessment of Ms. Fenty's voicemails, otherwise, the district court has removed a constitutionally protected right. Furthermore, the precedent of this court clearly shows that the voicemails were contemporaneous with the event at issue.

The Supreme Court should reverse and remand the Fourteenth Circuit's holding that Ms. Fenty's impeachment by evidence of her prior conviction for petit larceny was proper under the Federal Rules of Evidence 609(a)(2). The establishing elements of Ms. Fenty's prior conviction of petit larceny under Boerum Penal Code § 155.25 did not require the prosecution to prove "deceit" or "dishonesty" as required under Rule 609(a)(2) for admissibility. Additionally, the facts of the case show that Ms. Fenty conducted with stealth rather than deceit or dishonesty. Thus, the respondents have not met their burden of proof in establishing that impeachment by evidence of Ms. Fenty's prior misdemeanor petit larceny conviction was admissible under Rule 609(a)(2).

ARGUMENT

I. <u>The Fourteenth Circuit of Appeals Erred in Holding that the Defendant did not have an Expectation of Privacy for Sealed Packages with her Alias and Therefore the Contents of the Package Were Not Properly Admitted at Trial Because the Expectation of Privacy Exists with the Use of Alias and Behavior in Furtherance of a Crime Does Not Eliminate Fourth Amendment Protections</u>

The Fourth Amendment guarantees the expectation of privacy as one of our nation's most cherished protections.[48] Additionally, the Fourth Amendment protects against unreasonable government intrusion.[49] Under the Fourth Amendment, rights are personal[50] and people have to right to be secure not only on their person, but in their houses, papers, and effects against unreasonable searches and seizures in order to protect the "sanctity of a man's home and the privacies of life."[51] The Court has also reaffirmed the idea that protections for the security of "person[s] and property should be liberally construed"[52] in order to "prevent stealthy encroachment upon or 'gradual depreciation' of the rights security by them."[53]

This Court should reverse the Fourteenth Circuit's decision that the Defendant did not have an expectation of privacy in the sealed packages given her use of alias, and therefore the evidence obtained from the package was not properly admitted at trial for the following reasons: (1) the Defendant had a reasonable expectation of privacy in the sealed packages delivered to her

---

[48] United States v. 1013 Crates of Empty Old Smuggler Whiskey Bottles, 52 F.2d 49, 51 (2d Cir. 1931).

[49] *Id*. ("The Fourth Amendment … is one of the pillars of liberty so necessary to a free government that expediency in law enforcement must ever yield to the necessity for keeping the principles on which it rests inviolate").

[50] Rakas v. Illinois, 439 U.S. 128, 133-34 (1978).

[51] U.S. Const. Amend. IV; Stone v. Powell, 428 U.S. 465, 482 (1976).

[52] Boyd v. United States, 116 U.S. 616 (1886).

[53] Gouled v. United States, 255 U.S. 298 (1921).

with the use of her alias and (2) the Defendant's expectation of privacy should not depend on whether her actions were in furtherance of a crime.

A. The Defendant had a reasonable expectation of privacy in the sealed packages delivered to her with the use of her alias.

The determination of a Defendant's expectation of privacy is determined by Justice Harlan's two past test in Katz v. United States.[54] Under this test, an individual has an expectation of privacy if (1) the individual has exhibited an actual (subjective) expectation of privacy, and (2) the expectation is one that society is prepared to recognize as reasonable.[55]

This Court has made it clear that letters and parcels that are sealed and sent through the mail are "entitled to Fourth Amendment protection against warrantless searches and seizures, just as any other private area.[56] What an individual seeks to preserve as private, "even in an area accessible to the public, may be constitutionally protected.[57]

The use of a fictitious or alternative name to ship or receive a package does not inherently eliminate an individual's expectation of privacy. Courts have made clear distinctions between aliases and alter egos; while circuits have protected privacy rights for aliases, the same protections are not ensured for alter egos.[58] During the same year as *Pierce*, the 5th Circuit held in *United States v. Villarreal* that individuals may assert a reasonable expectation of privacy in packages that are addressed to them, even if under a fictitious name.[59] Similarly, the 10th Circuit has ruled that since "[i]t's not necessarily illegal to use a pseudonym to receive mail unless fraud

[54] Katz v. United States, 389 U.S. 347 (1967).
[55] *Id*.
[56] United States v. Van Leeuwen, 397 U.S. 249, 251 (1970); Ex parte Jackson, 96 U.S. 727, 722 (1878).
[57] Katz, 389 U.S. at 347.
[58] *See* United States v. Pierce, 959 F.2d 1297, 1303 (5th Cir. 1992).
[59] 963 F.2d 770, 774–75 (5th Cir. 1992).

or a stolen identification is involved" and therefore a reasonable expectation of privacy may exist when using an alias.[60] The same conclusion has been reached by the 11th Circuit as well.[61]

The Defendant, Franny Fenty, had a reasonable expectation of privacy over her mail, even though the use of her alias. Like in *Pierce*, the Defendant had a reasonable expectation of privacy with her sealed packages because the package was addressed to her, even under a fictitious name. Moreover, the distinction between "alias" and "alter ego" in this case is important because the Defendant was using the fictitious name as an alias, which has more protections under the law than the use of an alter ego. Additionally, the court in Johnson made clear that an individual has an expectation of privacy when using an alias, as long as the pseudonym to receive mail is not from fraud or stolen identification. That is the case here—there is no evidence that the Defendant engaged in any actions related to fraudulent identity.

The Fourteenth Circuit erred in their determination that the Defendant's use of the alias did not rise to the level of an expectation of privacy. The majority argued that the Defendant was not commonly known by the alias, and only used the alias at the PO Box once, and therefore could not have an expectation of privacy.[62] The Defendant started using her alias long before the events in question. The Defendant started using the pen name Jocelyn Meyer to publish writings, including in her university's creative writing magazine, and continued to use the pen name to write several novels. The Defendant continued to use this pen name to publish work and in October 2021 reached out to four publishers but did not receive any responses.

---

[60] United States v. Johnson, 584 F.3d 995, 1002 (10th Cir. 2009) Like *Pierce*, the court in *Johnson* distinguished cases in which stolen identity or fraud resulted in harm, versus when aliases were used absent any fraudulent actions. *Id*. at 1003.

[61] United States v. Garcia-Bercovich, 582 F.3d 1234, 1238 (11th Cir. 2009).

[62] *See* United States v. Daniel, 982 F.2d 146, 149 (5th Cir. 1993).

B. The Defendant's expectation of privacy should not depend on whether her actions were used in furtherance of a crime.

An individual's legitimate expectation of privacy does not depend on the "nature of [the] Defendant's activities [whether] innocent or criminal."[63] The court in *Fields* emphasizes the reason for this point is because "many Fourth Amendment issues arise precisely because the defendants were engaged in illegal activity on the premises from which they claim privacy interests."[64]

In *Fields*, the defendant pleaded guilty and was charged with conspiracy to possess more than 50 grams of cocaine base with intent to distribute.[65] During the investigation, law enforcement searched the apartment of the defendant and codefendant was cooking and preparing crack cocaine for resale. On appeal, codefendant argued that he had an expectation of privacy in the apartment and had standing to challenge the search of the premises. The government argued that since the behavior of the codefendant were in furtherance of the crime that he could not have a reasonable expectation of privacy. However, the Appeals Court rejected this argument and determined that regardless of the criminal activity, the codefendant had a reasonable expectation of privacy.

In this case, the Government should not be allowed to argue that the Defendant didn't have an expectation of privacy, on the grounds that her actions were allegedly in furtherance of a crime. Ruling in favor of the Government with this argument jeopardizes and erodes the fundamental protections of the Fourth Amendment. Specifically, ruling in favor of the

---

[63] United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997); United States v. Taborda, 635 F.2d 131, 138 n. 10 (2d Cir. 1980).
[64] *Fields*, 113 F.3d at 321.
[65] Codefendant was also convicted of possessing more than 50 grams of cocaine base with intent to distribute and conspiracy to possess more than 50 grams of cocaine base with intent to distribute.

Government in this instance would give law enforcement more power to justify unreasonable searches and seizures—making individuals more vulnerable to unreasonable government intrusion. Therefore, whether or not the Defendant's actions were in furtherance of a crime should have no bearing on her expectation of privacy of her mail.

II. The District Court's Failure in Admitting Ms. Fenty's Voicemails Under Federal Rule of Evidence 803(3) is Clearly Erroneous

A. The Voicemail Messages Left by Ms. Fenty Were Substantially Contemporaneous with the Event at Issue

Rule 803(3) of the Federal Rules of Evidence, "Rule 803(3)," stipulates that hearsay is admissible to prove state of mind if the statements made are contemporaneous with the events at issue. Generally, three elements must be met for Rule 803(3) exception to apply. It must be shown that "the statements [are] be contemporaneous with the . . . event sought to be proven;. . . that the declarant had no chance to reflect–that is, no time to fabricate or to misrepresent his thoughts. . . [and] relevant to an issue in the case."[66] As more time elapses between the declaration and the events at issue, the less reliable the declarant's statements are.[67]

The first circuit also found that statements made regarding a matter that occurred eight months before the declaration were not contemporaneous.[68] The sixth circuit found that statements made two days after the event in question, and while under police interrogation, were

---

[66] *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986) (quoting *United States v. Layton*, 549 F. Supp. 903, 909 (N.D. Cal. 1982)); *see United States v. Emmert*, 829 F.2d 805, 809-10 (9th Cir. 1987).

[67] *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980).

[68] *Packgen v. Berry Plastics Corp.*, 847 F.3d 80, 84, 91 (1st Cir. 2017) (The Court admitted statements regarding a marketing plan that occurred in 2007 in relation to a matter that occurred on April 4th, 2008. The party opposing the admission argued that the subject of the statements was not contemporaneous with the statements, but the court found that was the wrong analysis and that the statements only needed to be contemporaneous with the matter.).

not contemporaneous and not admissible under Rule 803(3).[69] The eighth circuit found that statements made by a friend a day after the defendant met the victim were not contemporaneous and presented too much time for reflection.[70]

Conversely, courts have found that statements do not need to be made as the event occurs to be admissible under Rule 803(3). The fourth circuit found that "statements made more or less contemporaneously with the genesis of the state of mind," are admissible under Rule 803(3).[71] The fifth circuit found that statements written down by the declarant while the events were "fresh in her mind" were admissible under Rule 803(3).[72] The eighth circuit found that statements written in a journal dated a day before the event are admissible.[73]

Admissibility of calls made after an event is an issue this court has dealt with before. 911 calls are never contemporaneous with the event discussed, yet they are often admitted into evidence.[74] In Navarette, the Court found that it was constitutional for an officer to rely on the veracity of an anonymous 911 call to establish reasonable suspicion for a traffic stop.[75] Since the 911 call was hearsay, the court had first to find if there was a valid exception, which they did.[76]

---

[69] *United States v. Mendez*, 303 Fed. Appx. 323, 326 (6th Cir. 2008) (The Court properly excluded statements made regarding two days after the event, a kidnapping, and under police interrogation.).

[70] *United States v. Naiden*, 424 F.3d 718, 721-23 (8th Cir. 2005) (Excluding the defendant's statement to a friend that he did not believe his online victim was fourteen because the statement was made a day after the defendant met the victim and it was, therefore, "not made as an immediate reaction to his communication with her, but after he had ample opportunity to reflect on the situation.").

[71] *Sea Marsh Group v. SC Ventures*, 1997 U.S. App. LEXIS 6739, 23 (4th Cir. 1997) (Rule 803(3) permits the introduction of only those statements made more or less contemporaneously with the genesis of the state of mind, emotion, sensation, or physical condition of which the statement is thought to be probative.).

[72] *United States v. Newell*, 315 F.3d 510, 523 (5th Cir. 2002) (Notes were deemed contemporaneous even though the declarant could not identify the specific date she wrote them, but testified that she wrote them while the events were still "fresh in her mind.").

[73] *United States v. Barraza*, 576 F.3d 798, 805 (8th Cir. 2009) (The Court found that statements written in a journal dated a day before the event at issue are contemporaneous and admissible.).

[74] *Navarette v. California*, 572, U.S. 393, 400 (2014).

[75] *Id* at 404.

[76] *Id* at 400.

The rationale behind admitting such hearsay into evidence is drawn from the advisory notes on Federal Rules of Evidence for Rule 803(1). "In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because 'substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.'"[77] Furthermore, Rule 803(3) "is essentially a specialized application of [Rule 803(1)]. . . ."[78] This underscores the fact that neither "contemporaneity" nor "spontaneity" ever appear in the rule.[79] The analysis of a then-existing mental state is similar, if not identical, to that of Rule 803(1) "substantial contemporaneity" standard.[80]

Additionally, the arguments presented by the dissent have no bearing on the possibility of 911 Calls, or other calls, being admitted under Rule 803(1), or Rule 803(3). They discussed how much of the law is unsettled, and began by pointing to some courts' requirement of proving that the alleged event did occur.[81] They added that it was unclear if an unknown declarant's "utterances. . . are ever admissible."[82] Their last point relates to the possibility of identifying a 911 caller's identity, specifically the point that a caller would have to know that this was possible for it to be relevant.[83] In these ways, much of the dissent's arguments around the admissibility of the 911 call have no weight on the case here.

The prosecution's argument that Ms. Fenty's voicemails were not substantially contemporaneous is flawed. Both of her voice messages should have been admitted. This Court's

---

[77] *Id*.
[78] Advisory Committee's Notes on Fed. R. Evid. 803(3).
[79] Fed. R. Evid. 803(3).
[80] *Id*.
[81] *Navarette* at 408.
[82] *Id*.
[83] *Id*.

finding in *Navarette* shows that her call meets the standard put forth by the majority and even the dissent. First, the event that Ms. Fenty responded to was ongoing at the time she left the voicemails. Ms. Fenty called Ms. Millwood as soon as she noticed her packages were missing. There was no reason for her to assume that the packages were missing as a result of the investigation into her. Ms. Fenty knew that some people sold xylazine for recreational use.[84] However, she was reassured that Ms. Millwood used the xylazine solely for horse care.[85] Therefore, it would be erroneous to assume that she left Ms. Millwood voice messages with the explicit knowledge that she was under investigation.

Additionally, the second voicemail states that she "talked to the postal worker," and they "[didn't] know what [was] going on with the packages," indicating that Ms. Fenty was still in the process of uncovering more information about what was going on.[86] The process of uncovering this information would itself be an event. That would make both the first and second voicemails contemporaneous with the event in question.

Despite the prosecution's argument in the district court, there is no evidence that Ms. Fenty waited and developed a false story before calling Ms. Millwood. The claim that the forty-five (45) minutes between the two voicemails forgoes the contemporaneity is purely erroneous. The prosecution's evidence is misleading as it assumes the event has already occurred. However, they do not specify what the event is. As was previously stated, the event in question is contemporaneous with the phone calls. This is because the timing of the event spanned from the moment Ms. Fenty noticed the packages were missing, to the moment she was arrested.

---

[84] R. 46:2-6; see also R. 7.

[85] R. 46:11-14.

[86] R 40:24-25.

Therefore, the voicemails are contemporaneous, and the trial court erred in failing to admit them under Rule 803(3).

B. The Failure to Admit This Evidence Invokes the Clear Error Standard of Review

When a defendant appeals an evidentiary decision, the standard of review is abuse of discretion.[87] Deference is then given to the trial court as they are, typically, in the best position to make determinations regarding evidence presented at trial.[88] However, the factual findings underlying an evidentiary ruling must be subject to a clear error review.[89] This court has found that "the term 'factual findings' should [not] be read to mean simply 'facts' (as opposed to 'opinions' or 'conclusions')."[90] A common definition of "finding of fact" is "a determination . . . of fact supported by the evidence in the record. . . ."[91] According to the advisory notes on Rule 803(3), admission of recorded voicemails is dependent on a factual finding of contemporaneity with the events in question.[92] Thus, the clear error standard of review, which states that "a finding is 'clearly erroneous' when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," must apply here.[93]

Here, the district court committed clear error. The district court was required to make a factual determination on the contemporaneity of Ms. Fenty's voicemails. The district court did

---

[87] *Old Chief v. United States*, 519 U.S. 172, 174 (1997)

[88] *Sprint/United Mgmt Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008).

[89] *United States v. Owens*, 165 Fed. Appx. 845 (11th Cir. 2006); *see also Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (Applying clear error review on credibility determinations of documents and other similar evidence, but not for witnesses.).

[90] *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988).

[91] Black's Law Dictionary, 6th Pocket ed. (2021).

[92] *Supra* note 78.

[93] *Bessemer*, at 573.

not consider the nature of the hearsay statement when making its credibility determination. Lastly, while there may be evidence to support its finding, both this court's precedent and the record must leave this court with the impression that a mistake has been committed. This mistake substantially affected Ms. Fenty's ability to fully present her argument of a lack of mens rea to the jury.

The review of the recorded voicemails is tantamount to the review of documents mentioned in Bessemer. The court of appeals had the opportunity to review the original voicemails for clear error but, instead, applied the wrong standard to its review. They reviewed the voicemails for prejudice, under a standard similar to that of Federal Rules of Evidence Rule 403. The district court itself did not rely on this form of balancing, and neither should this court. This court should, instead, consider the reproducible nature of the voicemails. Deference is typically given to trial court judges on evidentiary matters because they can see nonreproducible nuance in a witness or potential prejudice to a jury. Here, the concern was the admission of self-serving statements. On this, the judge made a credibility assessment based on the duration of time between the two voicemails. The jury is best suited to make determinations on such a question of fact (the contemporaneity of the statements). They, like the judge, can ingest the totality of the evidence, including how a witness appears on the stand. The jury also must make the final credibility determination on the ultimate issue. Therefore, it would not prejudice or mislead the jury to require it to make a credibility determination. Additionally, if the prosecution was concerned about this they could have requested that limiting instructions be given to the jury upon deliberation, which they did not.

Instead, Ms. Fenty was forced to present a much weaker defense for fear her theory might be too good. This is the prejudice the prosecution and court of appeals mention. By restricting

this evidence, the court prevented Ms. Fenty from presenting evidence on a key element of her charge–the mens rea element. If Ms. Fenty was allowed to present this evidence, the jury may have concluded that voicemails were credible and that her statement of mind does not square with the requirement for her charge. Instead, the prosecution was able to paint a picture that Ms. Fenty fully intended to source xylazine for Ms. Millwood while preventing her ability to corroborate the statements she made while on the stand.

It must be noted that if this court upholds the ruling of the district court all voicemails or recorded phone conversations would be excluded. Phone calls relating to a past event must, by the nature of time and space, occur after the event has arisen. Exclusion of such hearsay would not be consistent with the intent of Rule 803(3), which is to allow statements that show a prior-existing mental state and deny statements that only attempt to prove a belief about an event. This does not mean that phone calls or voicemails could be excluded for some other reason. They could be excluded because they are overly prejudicial, only attempt to prove a belief, or perhaps there is clear evidence that the statements are not contemporaneous with the event in question. However, none of those examples are the case here.

III. The Fourteenth Circuit Erred in Holding that Ms. Fenty's Impeachment by Evidence of Her Prior Conviction for Petit Larceny was Proper Under Federal Rule of Evidence 609(a)(2).

A. The Establishing Elements of the Crime Did Not Require the Prosecution to Prove "Deceit."

When a party intends to impeach a witness's credibility by introducing evidence of a prior conviction, Federal Rule of Evidence 609 (herein "Rule 609") governs the admissibility of

the impeachment evidence.[94] FRE 609(a)(1) governs the admissibility of impeachment evidence of convictions "punishable by death or by imprisonment for more than one year.[95] FRE 609(a)(2) governs the admissibility of "any crime regardless of punishment" when the court can "readily determine that *establishing the elements* of the crime required proving—or the witness admitting—a dishonest act or false statement."[96] While Rule 609(a)(2) does not explicitly articulate crimes that constitute crimes containing an establishing element of deceit, certain crimes such as "perjury, embezzlement, false pretense or other crimes 'in the nature of crimen falsi'" are automatically admissible under the FRE 609(a)(2).[97]

In *United States v. Fearwell,* a defendant charged with conspiracy to violate the Food Stamp Act appealed his conviction claiming that the government's attempt to impeach the defendant as a witness in his own defense by introducing evidence of a prior conviction for attempted petit larceny was inadmissible under Rule 609(a)(2).[98] The D.C. Circuit Court of Appeals held that District of Columbia Code § 2202, which defined petit larceny as "feloniously tak[ing] and carry[ing] away any property of value of less than $100" gave "no suggestion of fraud or deceit" as an establishing element of the offense and therefore "unless specified to the contrary in the controlling statue, it would seem petit larceny does *not* involve the requisite deceit to qualify for admission under Rule 609(a)(2).[99]

Here, Ms. Fenty's prior conviction of petit larceny does not fall under Rule 609(a)(2) because the establishing elements of the crime did not require the prosecution to prove that Ms.

---

[94] Fed. R. Evid. 609.

[95] Subject to certain admissibility limitations and balancing of prejudicial versus probative value of the evidence of the prior conviction subject to Rule 403. Fed. R. Evid. 609; Fed. R. Evid. 403.

[96] Fed. R. Evid. 609 (emphasis added).

[97] R. 66 (citing United States v. Hayes, 553 F.2d 824, 827 (2d. Cir. 1977).

[98] United States v. Fearwell, 595 F.2d at *773.

[99] *Id.* at *776 (emphasis added).

Fenty's crime involved "dishonesty or false statement"[100] as required by the Rule. Ms. Fenty was charged under the District of Boerum's Penal Code § 155.25 "Petit Larceny."[101] The establishing elements of petit larceny under this statute require that the individual either knowingly or plans, to "take[], steal[] carr[y] away, obtain[], or use[]" the personal property of another person with permanent or temporary intent to "(a) [d]eprive the other person of the right to benefit from his or her property; (b) [e]xercise control over the property without the owner's consent; or (c) [a]ppropriate the property as his or her own."[102] Because the charge of petit larceny is a class B misdemeanor "punishable by imprisonment in the county jail not exceeding six (6) months" Rule 609(a)(1) does not apply.[103] To convict Ms. Fenty of petit larceny, the prosecutors were only required to prove that Ms. Fenty knowingly or endeavored to take and keep the women's purse.[104] Thus, the record shows that the prosecution *did not* prove that Ms. Fenty acted with dishonesty or false statements.

In addition to the lack of proof in the record that any establishing elements of dishonest or false statements were proven by the prosecution, the record shows that the District of Boerum does have a statue which specifically requires the prosecution to prove that the accused acted with dishonest or false statements when engaging in theft under Boerum Penal Code § 155.45 ("Theft by Deception").[105] The District of Boerum prosecutors actively chose *not* to charge Ms. Fenty under this statute, instead electing to charge her with petit larceny.[106] The establishing

[100] Fed. R. Ev. 609(a)(2).
[101] R. 54.
[102] This statue also requires that the property that was stolen was valued "at less than One Thousand Dollars ($1,000). Boerum Penal Code § 155.25.
[103] Boerum Penal Code § 155.25(3); Rule 609(a)(1) requires that the crime was "punishable by death or by imprisonment for more than one year" to be admissible. Fed. R. Ev. 609(a)(1).
[104] Boerum Penal Code § 155.25.
[105] Boerum Penal Code § 155.45.
[106] R. 54.

elements for theft by deception are that the individual acts "knowingly" and "with *deceit*" when the individual takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another with intent to, either temporarily or permanently," with the intent to either " (a) [d]eprive the other person of the right to benefit from his or her property; (b) [e]xercise control of the property without the owner's consent, or; (c) [a]ppropriate the property as his or her own."[107] Because theft by deception requires the prosecution to prove that an establishing element of the crime was *deceit*, if Ms. Fenty was convicted under this statute, this prior conviction would clearly come in under Rule 609(a)(2).[108] However, the prosecution, which has full discretion to charge alleged offenders under which statute they believe relevant including charging multiple violations,[109] did not pursue the charge of theft by deception and there did not establish that Ms. Fenty acted with dishonest intent.

The respondents are likely to argue that there were a multitude of reasons that the prosecution did not charge Ms. Fenty with theft by deception. When addressing this issue at the motion in limine hearing, the Government argued that charging Ms. Fenty with only a petit larceny violation and not a theft by deception violation because the "two statutes have similar elements" and a "prosecutor is under no obligation to charge a defendant under both."[110] The Government also noted that "the Boerum criminal docket is backlogged" and because petit larceny is a "straightforward offense" the charge of petit larceny instead of theft by deception "in no way means that the crime did not involve deceit."[111] However, the record does not contain any evidence that these alleged reasonings influenced the choice of statutory violation to pursue.

---

[107] Boerum Penal Code § 155.45(1) (emphasis added).
[108] Fed. R. Ev. 609(a)(2).
[109] R. 24.
[110] *Id.*
[111] *Id.*

It is just as likely, under the record, that the prosecution considered the facts of the case and chose to charge petit larceny because the facts of the case would not support a theft by deception conviction.

B. The Facts of the Case Show Ms. Fenty's Conduct was Stealth Conduct and Not Deceitful or Dishonest Conduct

Some crimes that are not "facial deceitful"[112] can also fall under FRE 609(a)(2) when the prosecution can show "that a particular prior conviction rested on *facts* warranting the dishonesty or false statement description."[113] Multiple Circuit Courts agree[114] that Rule 609(a)(2) is to be "construed narrowly" as the rule is *not* a "Carte blanche for admission on an undifferentiated basis of all previous convictions for purposes of impeachment."[115] Instead, Rule 609(a)(2) apply to a "'narrow subset of crimes'" that "bear [d]irectly upon the accused's propensity to testify truthfully."[116] Specifically with misdemeanor theft-related crimes such as shoplifting and petit larceny, courts distinguish between crimes of "stealth" as not falling under Rule 609(a)(2) and crimes of "deceit" which do full under Rule 609(a)(2)'s purview.[117] Circuit courts have held that petit larceny does not fall under Rule 609(a)(2) as the crime of petit larceny does not "involve dishonesty or false statement"[118] and that offenses involving minor theft, such as petty larceny

---

[112] *Id.*

[113] R. 69 (citing *Hayes,* 553 F.2d at 827); *see also* United States v. Payton, 159 F.3d 49, 57 (2d Cir. 1998) (emphasis added).

[114] *Compare* United States v. Fearwell, 595 F.2d *771, *777 (D.C. Cir. 1978), *with* United States v. Hayes, 553 F.2d 824, 827 (2d Cir. 1977) ("The use of the second prong of Rule 609(a) is thus restricted to convictions that bear Directly on the likelihood that the defendant will Testify truthfully (and not merely on whether he has a propensity to commit crimes)"), *and* Government of Virgin Islands v. Toto, 529 F.2d 278, 281-282 (3d Cir. 1976) (Rule 609(a)(2) does not alter previous Third Circuit rule focusing "on the accused's propensity to testify truthfully.").

[115] United States v. Fearwell, 595 F.2d at *777; *see also* United States v. Smith, 551 F.2d *348, *363 (D.C. Cir. 1976) ("Congress clearly intended the phrase to denote a fairly narrow subset of criminal activity.").

[116] United States v. Fearwell, 595 F.2d at *777 (quoting United States v. Smith, 551 F.2d at *362).

[117] United States v. Smith, 551 F.2d at *776–7.

[118] United States v. Fearwell, 595 F.2d at *777 (citing H.R.Conf.Rep.No.93-1597, 93d Cong., 2d Sess. 9, Reprinted in (1974) U.S.Code Cong. & Ad.News, pp. 7098, 7103); *see also* United States v. Smith, 551 F.2d 348 (1976).

crimes, "involves stealth" which "is not the same as deceit."[119] In making this determination between "stealth" and "deceit," courts look "beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statements."[120] Only when "the manner in which the witness committed the offense" was shown to have involved deceit, rather than stealth, the conviction is admissible under Rule 609(a)(2)."[121]

The District of Boerum § 155.45(2) defines "deceive:"

> (2) A person deceives if he or she intentionally (a) Creates, reinforces, or leverages a false impression, (b) Prevents another from acquiring material information that would impact his or her judgment, or (c) Fails to correct a false impression that the deceiver previously created, reinforced, or influenced.[122]

Here, Ms. Fenty's prior conviction of petit larceny does not fall under Rule 609(a)(2) because this teenage mistake involved *stealth* rather than a *deceit*. On August 4, 2016, when Ms. Fenty was nineteen years old, after being dared by a friend, she attempted to steal a bag from a tourist in Joralemon City Square containing diapers and $27 in cash.[123] Ms. Fenty was walking with her friend. Susan Cahill, when they spotted a group of tourists watching a street performer dressed as Elmo.[124] Ms. Cahill then dared Ms. Fenty to go grab the bag, which Ms. Fenty did not

---

[119] United States v. Dorsey, 591 F.2d 922, 935 (D.C. Cir. 1978).

[120] United States v. Payton, 159 F.3d at 57.

[121] Altobello v. Borden Confectionary Products, 872 F.2d 215, 216 (referencing United States v. Yeo, 739 F.2d 385 (8th Cir.1984) ; United States v. Glenn, 667 F.2d 1269, 1273 (9th Cir.1982); United States v. Seamster, 568 F.2d 188, 191 (10th Cir.1978)).

[122] Boerum Penal Code § 155.45(2) (There is an exception to the term "deceive" as defined under this section laid out in § 155.45(3) in that the term "deceive" does *not* include "uttering a falsity on matters with no pecuniary significance or statements of puffery that would be unlikely to deceive a reasonable person" under Boerum Penal Code § 155.45(3)).

[123] R.19, 52.

[124] *Id.* at 59.

want to do but finally agreed to do because she wanted to impress Ms. Cahill.[125] Ms. Fenty then walked over to where the group was watching the street performer, intending to remain unnoticed, and tried to take a woman's bag.[126] The woman then noticed Ms. Fenty attempting to take her bag, yelled out for Ms. Fenty to stop, and attempted to grab her bag back.[127] As soon as the woman started yelling, the crowed group around the street performer noticed what was happening and started to stare at Ms. Fenty.[128] Ms. Fenty then grabbed the bag back and, scared and panicked, ran away from the scene.[129] As this was a completely unplanned incident done because of a dare,

Ms. Fenty had no plan for what to do after she took the bag or where to run.[130] Ms. Fenty was then apprehended by Joralemon police officers three blocks away from Jorelemon Square.[131] No one was injured in this incident.[132] Ms. Fenty then plead guilty to misdemeanor petit larceny and was sentenced to two years of community service and two years of probation.[133] Through an analysis of the facts of this incident, and in considering the District of Boerum's statutory definition for "deceit,"[134] it is clear that Ms. Fenty did not steal the woman's purse in a deceitful manner, but rather attempted to approach the crowd unnoticed to take the bag in stealth.

First, Ms. Fenty did not create, reinforce, or leverage a false impression[135] when he stole the bag. Ms. Fenty approached the women in a crowed and public place with many people

---

125 *Id.* at 53.
126 *Id.* at 59.
127 *Id.*
128 *Id.* at 53.
129 R. 53.
130 *Id.* at 54.
131 *Id.*
132 *Id.*
133 *Id.*
134 Boerum Penal Code § 155.45(2).
135 As required under Boerum Penal Code § 155.45(2)(a).

around. Because Ms. Fenty did not want to be noticed, that does not mean that she was actively engaging in a false impression. Ms. Fenty did not engage in a false impression when she was caught stealing the women's bag either as she did not try and backtrack or excuse her behavior, instead pulling the bag back to achieve what she was dared to do. Instead, Ms. Fenty doubled down on her actions, telling the women "let go or I will hurt you."[136] Even when Ms. Fenty was then apprehended by the police, the record does indicate that Ms. Fenty tried to give the police officers any false impression that the purse may have been hers or any other exculpating circumstance. Additionally, Ms. Fenty did not fail to correct any false impression that she previously "previously created, reinforced, or influenced" because there was no false impression made in the first palace.

Second, Ms. Fenty also did not attempt to prevent any third party from "acquiring material information that would impact his or her judgment"[137] in stealing the bag. Ms. Fenty did not take any steps to convince any spectators or the women herself that she was doing anything other than attempting to steal the bag. She knew that people were watching this altercation, yet did not attempt to prevent the onlookers from believing precisely what they were seeing.

Thus, it is clear that Ms. Fenty's actions did not meet the statutory requirements for "deceit" in the District of Boerum and therefore she did not act in deceit, but rather, tried, and failed, to act with stealth in committing petit larceny. Given circuit court precedent,[138] this shows that the petit larceny committed in this case does not satisfy the admissibility requirements for impeachment under Rule 609(a)(2) and therefore is inadmissible.

---

[136] R. 60.

[137] As required under Boerum Penal Code § 155.45(2)(b).

[138] United States v. Fearwell, 595 F.2d *771, *777.

CONCLUSION

For the foregoing reasons, we ask the Court to REVERSE and REMAND the ruling of the Court of Appeals and find that (1) the Fourteenth Circuit erred in holding that Ms. Fenty did not have an expectation of privacy over the packages addressed to her alias; (2) the Fourteenth Circuit erred in finding that Ms. Fenty's voicemails lacked contemporaneity under Federal Rule of Evidence 803(3); and (3) the Fourteenth Circuit erred in holding that Ms. Fenty's prior misdemeanor petit larceny conviction was admissible as impeachment evidence under Federal Rule of Evidence 609(a)(2).