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NO. 23-695

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

Franny FENTY,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR RESPONDENT

TEAM 6

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the Government's search of contents from the sealed packages addressed to Petitioner's alias was constitutional under the Fourth Amendment and not intrusive of a reasonable expectation of privacy when a warrant was properly acquired?

II. Whether Petitioner's recorded voicemails were properly excluded as an unqualified hearsay exception under Rule 803(3) of the Federal Rules of Evidence to show a then-existing mental state when Petitioner had ample time to reflect and motivation to fabricate the statements?

III. Whether Petitioner's impeachment by evidence of her prior petit larceny conviction was proper under Rule 609(a)(2) of the Federal Rules of Evidence when deceit, rather than violence, was used?

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OPINIONS BELOW

The opinion and order of the United States District Court for the District of Boerum are unreported and not included in the record.[1] The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 64–73.

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the following constitutional provision is provided below:

The Fourth Amendment states:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Franny Fenty ("Fenty") is an unemployed, self-proclaimed writer and resident of Joralemon, Boerum. (R. at 8, 42.) Joralemon is infamous for its high concentration of narcotic-related crime. (R. at 65.) To crack down on suspected drug activity, the Drug Enforcement Agency (the "DEA") partners with local law enforcement and the U.S. Postal Inspection Service as the Joralemon postal service is routinely exploited for drug trafficking. (R. at 30.) Fenty used the alias, Jocelyn Meyer ("Meyer"), to register a PO Box and to order and receive narcotics. (R. at 15.) Meanwhile, she initially used the alias for her literature as she considers her writing to be "private." (R. at 43.)

[1] The transcripts of the hearings on the motion to suppress appear in the record at pages 10–17 and for the motion in limine at pages 18–26. Transcript excerpts of trial testimony appear in the record at pages 27–38 and pages 41–61. The transcripts of the voicemail recordings appear in the record at page 39 and for the jury instructions at pages 62–63.

Approximately six to seven years ago, two of Meyer's short stories were published in her college magazine. (R. at 4.) Since then, Fenty wrote five novels continuing to use the same alias. (R. at 16). Hoping to get her novels published, she emailed four publishers in October 2021 from the email address jocelynmeyer@gmail.com and used the name Meyer. (R. at 42.) However, she never received any responses, nor were the novels ever published. (R. at 16, 42–43.)

In dire need of financial stability, Fenty published a LinkedIn post saying she was looking for a new job opportunity under her actual name despite identifying herself as an experienced writer. (R. at 6.) Meanwhile, Fenty also mentioned she was open to other job fields. (R. at 6.) She stated she had experience as a server and barista, is great with kids, and had *some* experience working with animals. (R. at 6.) That same day, Angela Millwood ("Millwood"), a horse handler at Glitzy Gallop Stables, commented saying she could help. (R. at 6.) Although Fenty and Millwood went to Joralemon High School together, they were not friends and had not been in contact for years. (R. at 43–45.) But Fenty was fully aware that Millwood was suspended for drug possession and distribution activity. (R. at 55.) Nonetheless, the two exchanged phone numbers and talked about their career and financial hardships. (R. at 44.) Even though Millwood did not make much money, she claimed to be so passionate about her *new* job that she devoted herself to "the care of these horses." (R. at 34, 44.) Supposedly heartbroken by watching the horses suffer as they got older, Millwood planned to allegedly administer a drug to the horses to help with their pain. (R. at 44–45.) Even though Fenty had no knowledge of the particular drug or its use on horses, she agreed to order it for Millwood. (R. at 45.)

A. Suspicious of about her agreement with Millwood, Fenty registered the PO Box and ordered the deadly narcotics using her alias for purposes of maintaining "privacy."

On January 31, 2022, Fenty opened a PO Box to receive the order under the Meyer alias for the same reason she always alleged—wanting privacy. (R. at 54–55.) About ten days later, she placed the order from a purported veterinary pharmaceutical company called "Holistic Horse Care" ("HHC"). (R. at 8, 55.) Although she used the PO Box for other mail, the only packages she received under the name "Jocelyn Meyer" were the packages containing illicit, deadly drugs. (R. at 55.) As a matter of fact, the same day that the illegal packages were delivered, two Amazon packages containing face cream addressed to "Franny Fenty" were also delivered to Meyer's PO Box. (R. at 12.)

Before placing the HHC order, Fenty felt nervous and suspicious about the agreement, so she began researching the drug Millwood requested—"xylazine." (R. at 45–46.) One of the first things she read was a local news article discussing the deadly combination of xylazine and fentanyl being used as a recreational street drug. (R. at 46.) The article stated: "Until now, xylazine was considered a harmless horse tranquilizer. It was not on the radar of federal law enforcement as a drug that had potential for illicit use." (R. at 7.) Fenty's gut feelings and concerns were instantaneously validated. (R. at 46.) Nonetheless, she placed the order from HHC with $1,200 of her own money, knowing that the only way to recover the money was by selling the fentanyl-xylazine mixture to Millwood. (R. at 58.)

B. Fenty's HHC packages were intercepted and searched pursuant to a search warrant because of their connection to Washburn's fatal overdose.

Joralemon has a reputation of being a predominantly low-income, dangerously high crime area plagued with prevalent drug activity. (R. at 28, 35.) Joralemon officials finally acknowledged

that its citizens have suffered from illegal narcotics' harmful and dangerous consequences for far too long. (R. at 8.) As a result, the city essentially became targeted by the DEA and police officers who came to Joralemon to put an end to the epidemic. (R. at 36.) Law enforcement officials reported that there were 35 percent more deadly overdoses in Joralemon in early 2022 compared to early 2021. (R. at 7.) Although fentanyl was always a problem in Joralemon, investigators with the DEA began targeting the increasing pervasiveness of street drug activity involving the new deadly fentanyl-xylazine mixture in late 2021. (R. at 7–8.) Despite law enforcement's strenuous efforts, Joralemon's first fatal overdose involving the fentanyl-xylazine combination occurred on February 12, 2022. (R. at 29.) Liam Washburn's ("Washburn") lifeless body was discovered next to an opened HHC package and used syringes containing the mixture of fentanyl-xylazine. (R. at 29.)

That same day, DEA Supervisory Special Agent Robert Raghavan ("Agent Raghavan") instructed the Joralemon Post Office to look out for any suspicious, oddly shaped, large packages or packages being shipped from a horse veterinarian company. (R. at 28, 30.) Just two days later, Agent Raghavan was notified that two packages sent from HHC and addressed to Jocelyn Meyer's PO Box were flagged. (R. at 30.) After Agent Raghavan and his partner obtained a search warrant, the packages were taken to a local testing facility. (R. at 31.) It was revealed that the packages contained a total of 400 grams of fentanyl mixed with 800 grams of xylazine. (R. at 32.)

When Fenty received the shipper's delivery confirmation and realized that the HHC packages were not in her PO Box, she called Millwood and left two voicemails. (R. at 46.) On the first voicemail, Fenty said:

> 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.

(R. at 40.) When Millwood had still not returned Fenty's first phone call 45 minutes later, Fenty called again and left another voicemail saying:

> 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.

(R. at 40.)

After testing the contents, Agent Raghavan and his partner resealed the packages and returned to the post office to do a controlled delivery. (R. at 32.) The post office manager left a slip in Meyer's PO Box notifying her to retrieve the HHC packages from the front counter and the Amazon packages were placed in the PO Box. (R. at 29, 32.) Meanwhile, Agent Raghavan and his partner went to the employee room to monitor the security cameras and see who claimed the HHC packages. (R. at 32.) Shortly thereafter, Fenty claimed the packages addressed to Meyer as her own. (R. at 33.) On her way out, a man named Sebastian Godsoe ("Godsoe") came to the counter and appeared to know Fenty, but not as "Jocelyn Meyer." (R. at 33.) The two chatted, hugged, and as Fenty left, the man said, "Bye Franny!" (R. at 33.) Agent Raghavan approached Godsoe, asked him if he knew Meyer, and Godsoe said "Who? You mean Franny? That was Franny Fenty[,]" explaining he went to college with her. (R. at 33.) That was the moment Agent Raghavan realized that Franny Fenty and Jocelyn Meyer were the same person. (R. at 33.) Agent Raghavan investigated further, confirmed Fenty's use of the Meyer alias for her short stories, and found the LinkedIn post Millwood commented on. (R. at 33–34.) Recalling Millwood's reputation back in high school, Agent Raghavan visited Millwood's LinkedIn. (R. at 34.) Unlike Fenty, Agent

Raghavan's suspicions were immediately raised the moment he saw Millwood's job title. (R. at 35.)

Later that same evening, the empaneled grand jury returned an indictment and Fenty was arrested. (R. at 34.) Upon trying to locate Millwood, the DEA discovered she had taken a one-way flight out of the country the day the packages were seized. (R. at 35.) Millwood's whereabouts are still unknown. (R. at 35.) Fenty was charged with one count of possession with intent to distribute 400 grams or more of fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). (R. at 1.) Although Fenty's only prior conviction was a petit larceny misdemeanor charge that occurred when she was nineteen years old,[2] she faces a minimum sentence of ten years, and a maximum sentence of life in prison for the current charge. (R. at 8, 53–54.)

II. PROCEDURAL HISTORY

Pre-Trial Motions. After Fenty was formally indicted by the federal grand jury on February 15, 2022, she filed a motion to suppress the illicit contents of the sealed packages and a motion in limine to exclude the evidence of her prior conviction. (R. at 10, 18.) District Court Judge Ava Brakman Reiser ("Judge Reiser") held oral arguments for the pre-trial two motions on August 25, 2022. (R. at 10, 18.) Both motions were denied. (R. at 17, 26.)

The motion to suppress was argued based on Fenty's Fourth Amendment protections being allegedly violated as she had privacy rights in the HHC packages addressed to a fictitious name. (R. at 11.) Fenty's argument that her use of an alias falls within the scope of being a "public use" was rejected. (R. at 13.) Judge Reiser acknowledged that while some circuits recognize a privacy

[2] Dared by a friend and broke at the time, Fenty stole a distracted young mother's belongings. (R. at 53, 59.) Although she intended to go unnoticed, the woman caught her and tried to grab her bag back from Fenty. (R. at 59.) After Fenty successfully regained control of the bag and fled the scene, Joralemon police arrested her three blocks away. (R. at 54.) The bag contained 27 dollars in cash and diapers. (R. at 54.)

interest in wishing to remain anonymous, the Fourth Amendment cannot be stretched that far. (R. at 16.) Therefore, Judge Reiser concluded that Fenty had no privacy interest in the PO Box or its contents. (R. at 16–17.) The motion in limine was argued based on Fenty's conviction's supposedly prejudicial effect. (R. at 19.) Fenty argued that the court should not admit evidence of her prior conviction for impeachment purposes because it was not a crime of deceit; rather, it was a crime of violence. (R. at 19, 22.) Also rejecting that argument, Judge Reiser reasoned that Fenty's past crime involved a calculated act aimed at capitalizing on the victim's distraction and thus shows a level of deceit that comes within the meaning of Rule 609(a)(2) of the Federal Rules of Evidence ("Rule 609(a)(2)"). (R. at 26.) Fenty also argued that jurors regularly misuse such evidence to infer criminal propensity when the circumstances of the prior crime are similar to the crime at hand. (R. at 22, 25.) Judge Reiser addressed Fenty's concern by including a limiting instruction to the jury explaining the purpose of the prior conviction evidence. (R. at 25.)

Exclusion of Voicemail Recordings. During trial, the Government sought to exclude the recordings of two voicemail messages left by Fenty on Millwood's phone on February 14, 2022. (R. at 46–47.) Fenty argued that the recordings show her then-existing mental state under Rule 803(3) of the Federal Rules of Evidence ("Rule 803(3)"). (R. at 47.) She alleges that they reflect her then-existing state of mind that she was confused why the packages would be intercepted and that she was unaware that the xylazine was laced. (R. at 51.) Judge Reiser ruled that the recordings are inadmissible hearsay and fail to qualify as hearsay exceptions as statements of Fenty's then-existing mental state. (R. at 52.) Judge Reiser reasoned that they lack spontaneity because of the time that passed between Fenty's knowledge of the packages' interception and when the voicemail messages were left. (R. at 52.) Thus, the court sustained the Government's objection, and the recordings were excluded at trial. (R. at 66.)

Court of Appeals. On September 21, 2022, the jury returned a guilty verdict and Fenty was convicted on one count of possession with intent to distribute a controlled substance. (R. at 65–66.) On November 10, 2022, Fenty was sentenced to ten years in federal prison by the United States District Court for the District of Boerum. (R. at 65–66.) Fenty appealed from the judgment of conviction and sentence to the United States Court of Appeals for the Fourteenth Circuit on the same grounds that were argued at the district court. (R. at 65.) The Fourteenth Circuit affirmed the ruling of the district court on all three grounds on June 15, 2023. (R. at 64, 70.) Fenty then appealed to this Court and was granted certiorari on all three issues on December 14, 2023. (R. at 74.)

SUMMARY OF THE ARGUMENT

Fenty's expectation of privacy in the HHC packages addressed to Meyer and the PO Box registered under Meyer is not one society is willing to recognize as reasonable. The placement of names and addresses on packages waives all Fourth Amendment privacy interests in that information because it is foreseeably accessible to postal workers observing the mail's exterior. HHC being listed as the sender of the fentanyl-xylazine packages, just like the ones found next to Washburn's body, is what triggered the search. Fenty's expectation of privacy is illegitimate because Congress regards the pursuit of privately possessing narcotics as an illegitimate interest. Even if Fenty's expectation was legitimate, the Government's search was reasonable because the public holds a compelling interest in using all legal methods to identify individuals engaged in the personal profit-driven trafficking of illicit drugs.

The recorded voicemails to Millwood do not qualify as a hearsay exception under Rule 803(3) of the Federal Rules of Evidence because they do not reflect Fenty's then-existing state of mind. Rule 803 establishes that a narrow facet of out-of-court statements are trustworthy, but *only if* they were made in spontaneous circumstances eliminating the possibility of fabrication. When

Fenty realized the drugs were intercepted, she recorded the voicemails accordingly to cover her tracks. If the declarant is aware of being under investigation at the time the statements were made, the statements do not qualify for the state of mind exception to the Hearsay Rule. Not only did she fail the spontaneity element required by the majority of courts, but she also clearly had motive to fabricate the self-serving statements.

Because Fenty's prior petit larceny conviction was committed by deceit, rather than violence, her impeachment was proper under Rule 609(a)(2) of the Federal Rules of Evidence. When a prior conviction is statutorily characterized by an element of deceit, it is automatically admissible with the court having no discretion. However, that procedure still applies if the prior conviction is *not* characterized by an element of deceit, *but* prosecution proves to the court that it was nonetheless committed by deceitful means. The prosecution successfully met that burden of proof here as it pointed out that Fenty never intended to get caught in the act which is why she premeditatedly selected a victim that appeared distracted. Nonetheless, Fenty would have been charged with theft *by deception* if she had otherwise successfully met that alternative offense's minimum monetary value. As a Hail Mary, Fenty argued the prejudicial effect of her prior conviction's admission and the limiting instruction's failure to mitigate it—misapplying Rule 609.

ARGUMENT AND AUTHORITIES

Standard of Review. This Court reviews claims involving the interpretation of the Fourth Amendment's Unreasonable Searches and Seizures Clause de novo. *Ornelas v. United States*, 517 U.S. 690, 691 (1996). This Court reviews a lower court's evidentiary rulings under an abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997).

I. THE GOVERNMENT'S SEARCH OF THE CONTENTS FROM THE SEALED PACKAGES ADDRESSED TO PETITIONER'S ALIAS WAS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT AND NOT INTRUSIVE OF A REASONABLE EXPECTATION OF PRIVACY WHEN A WARRANT WAS PROPERLY ACQUIRED.

Fenty argues that the evidence of the contents found within the HHC packages addressed to her alias should be suppressed under the Fourth Amendment's privacy protections. But the Fourth Amendment only "protects people from *unreasonable* government intrusions into their *legitimate* expectations of privacy." *United States v. Place*, 462 U.S. 696, 706–07 (1983) (emphasis added). Fenty did not have a legitimate expectation of privacy in the PO Box or the HHC packages. Even if she was able to establish such expectation, the Government's intrusion was far from unreasonable.

The Fourth Amendment guarantees "[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. Suppression of evidence implicates the Fourth Amendment's standing doctrine and exclusionary rule. *Alderman v. United States*, 394 U.S. 165, 171 (1969). The exclusionary rule holds that "any evidence seized from the defendant in violation of his Fourth Amendment rights" will be excluded from a criminal trial. *Id.* at 171–72. But the exclusion of evidence obtained unconstitutionally may only be claimed "by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* Under the standing doctrine, the claimant must demonstrate "a reasonable expectation of privacy in the area searched and in relation to the items seized." *United States v. Stokes*, 829 F.3d 47, 51 (1st Cir. 2016) (quoting *United States v. Aguirre*, 839 F.2d 854, 856 (1st Cir. 1988)). Only then can evidence be suppressed. *Id.*

A. Fenty's Subjective Expectation of Privacy in Using an Alias to Receive Fentanyl Is Not One That Society Is Willing to Recognize as Objectively Legitimate.

Fenty bears the burden of establishing a legitimate expectation of privacy in the PO Box, registered under Meyer, and the HHC packages, addressed to Meyer. *United States v. Rose*, 3 F.4th 722, 727 (4th Cir. 2021). This Court articulated a two-prong inquiry to determine such expectation of privacy: "(1) the individual must manifest a subjective expectation of privacy in the object of the challenged search, and (2) society must be willing to recognize that expectation as legitimate." *United States v. Smith*, 39 F.3d 1143, 1144 (11th Cir. 1994) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). While the first prong is *subjective*, the second prong is entirely *objective* and dictates the determination. In the absence of an expectation of privacy society could recognize as objectively reasonable, the individual cannot claim the Fourth Amendment's protection. *Rose*, 3 F.4th at 727.

It is undisputed that Fenty, through her actions in opening a PO Box and receiving packages under an alias, exhibited a subjective expectation of privacy in their contents. After all, Fenty testified the purpose of using her alias in these instances was for that exact reason—privacy. Nonetheless, her expectation of privacy in the PO Box is objectively unreasonable. As held in *Stokes*, there is "no reasonable expectation of privacy in the outside of mail that is sorted or stored in a public area." 829 F.3d at 52 (internal quotation marks omitted). Before packages are placed in PO Boxes, post office employees receive and sort them. The placement of names and addresses on packages waives any privacy interest in that information because it is "foreseeably available to postal employees and others looking at the outside of the mail." *United States v. Choate*, 576 F.2d 165, 177 (9th Cir. 1978).

The question is whether Fenty's subjective expectation of privacy in the HHC packages is one that society is prepared to recognize as reasonable. It also is not. Sealed packages are undoubtedly within the Fourth Amendment's protected class of "effects," but usually only senders and *addressees* have a legitimate expectation of privacy in. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *United States v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984). The sealed packages were addressed to Jocelyn Meyer, not Franny Fenty. Courts are "reluctant to find that a defendant holds a reasonable expectation of privacy in mail where he is listed as neither the sender nor the recipient, at least absent some showing by the defendant of a connection." *Stokes*, 829 F.3d at 52.

When sealed packages are addressed to someone other than their intended recipient, that recipient does not enjoy a legitimate expectation of privacy in the packages "absent other indicia of ownership, possession, or control existing at the time of the search." *Rose*, 3 F.4th at 728. Fenty was not in control of nor in possession of the sealed packages at the time of the search. Even though she paid for the xylazine shipment with her own money, possibly establishing ownership of the contents of the package, the package itself was addressed to Meyer. *Givens*, 733 F.2d at 342 ("Even assuming that defendants had some possessory interest in the cocaine, for which they had apparently not yet paid, that interest did not broaden to encompass the mailing envelope and cassette.") Thus, there was no indication that Fenty, instead of her alias, had ownership of the package or its contents at the time of the search.

Nevertheless, the intended recipient can claim a reasonable expectation of privacy in the packages addressed to them under a fictitious name but only if the recipient can prove that "the fictitious name is an established alias." *Rose*, 3 F.4th at 728. In *Rose*, the defendant previously collected several packages containing narcotics under the fictitious name of Ronald West and at another's residence, *but* law enforcement was unaware of the prior deliveries during the search at

issue. *Id.* at 725. The court concluded that nothing about the packages, the sender's name, the named recipient, or the address listed on the packages signaled an established connection to the defendant's *true* identity. *Id.* at 729.

Although Fenty used the Meyer alias since college, nothing in the record leads to the conclusion that it was "established" at the time the search was conducted. *Id.* at 728 ("When considering these factors, we focus on the defendant's established connection to the property at the time the search was conducted.") Although she wrote several literary pieces, the only ones actually published were in the Joralemon College Zine in Fall 2016 and Spring 2017—approximately six to seven years ago. Even Godsoe, a friend from college, did not know her as Jocelyn Meyer from college when she used her alias the most publicly. Even when Agent Raghavan picked up the HHC packages sent to the same PO Box as the Amazon packages addressed to Franny Fenty, he did not assume Fenty and Meyer were the same person. Although Fenty did email four publishers using the Meyer alias, this does not establish the fictitious name as an established alias because the emails were private and additionally, never responded to. All in all, there was nothing to objectively connect Fenty to her Meyer alias at the time of the search. As a matter of fact, Fenty's alias was only established with Agent Raghavan after the controlled delivery when he spoke to Godsoe.

There is an irreconcilable split in the circuits regarding what protections an established alias enjoys. The Eighth Circuit holds that "a mailbox bearing a false name with a false address and used only to receive fraudulently obtained mailings does not merit an expectation of privacy that society is prepared to recognize as reasonable." *United States v. Lewis*, 738 F.2d 916, 920 n.2 (8th Cir. 1984). In the same vein, the Fifth Circuit holds that those who use aliases do not have Fourth Amendment standing when the use was part of a criminal scheme. *United States v. Daniel*, 982

F.2d 146, 149 (5th Cir. 1993) ("[E]ven if we accept the Government's assertion that "Lynn Neal" was Daniel's alias, we still question whether Daniel would have Fourth Amendment 'standing' to assert the claim, particularly when the use of that alias was obviously part of his criminal scheme."). Contrarily, the Fifth Circuit has also held there is a reasonable expectation of privacy in packages addressed to people under aliases even when the aliases are used to distance the sender or recipient from the illegal contents of the package. *See United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992); *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981).

In *United States v. Pitts*, we even see a drastic split between the Seventh Circuit's majority and concurrence. The majority notes that in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341–43 (1995), this Court held an author's anonymity is "*not a sufficient reason* to exclude literary works or political advocacy from the protections of the First Amendment[,]" *United States v. Pitts*, 322 F.3d 449, 458 (7th Cir. 2003) (emphasis added). This Court reasoned that employing an alias out of fear of retaliation, social ostracism, or simply to preserve as much privacy as possible is *not a sufficient reason* to waive someone's First Amendment rights. *McIntyre*, 514 U.S. at 341–42. The *Pitts* majority incorrectly analogized this Court's reasoning regarding First Amendment protections to Fourth Amendment protections in packages addressed to alias and containing narcotics. It held that "the legitimate expectation of privacy does not depend on the nature of the defendant's activities, whether innocent or criminal." *Pitts*, 322 F.3d at 458. On the other hand, the *Pitts* concurrence said the First Amendment analysis cannot be applied in invoking Fourth Amendment protections when "an obviously guilty defendant . . . uses the United States Postal System to further a criminal enterprise . . . " *Id.* at 459–60. The *Pitts* concurrence validly concludes that the defendants' expectation of privacy is *not* one that society is prepared to recognize as reasonable. *Id.* at 459.

B. The Government's Search of the HHC Packages' Contents Was Constitutional Under the Fourth Amendment Because an Uncontested Warrant Was Properly Obtained.

Whether one has standing to invoke the exclusionary rule is a question of "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). Congress treats the interest of "privately" possessing narcotics as illegitimate. *Jacobsen*, 466 U.S. at 123. Therefore, governmental conduct that can uncover whether a substance is narcotic, "and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* Circumstances that are facially innocuous may nonetheless suggest "suggest criminal activity to experienced law enforcement officers, and they may assess these circumstances in light of their experiences in determining whether reasonable suspicion exists." *Pitts*, 322 F.3d at 459 n.1.

Nevertheless, courts still regularly err in ruling on the legitimacy of interests by misconstruing what the Fourth Amendment was designed to protect. In November 2022, a district court was guilty of exactly that, finding the defendant had standing in a case very similar to the one at hand. Because of the package's drug trafficking characteristics, a search warrant was obtained, and 1,250 grams of fentanyl were found inside the parcel addressed to an alias. *United States v. McCarley-Connin*, 638 F. Supp. 3d 804, 806 (N.D. Ohio 2022), *vacated*, No. 3:21-CR-00374-JGC, 2023 WL 3763590 (N.D. Ohio June 1, 2023). Agent Raghavan, having 15 years of experience, knows Joralemon citizens routinely use the mail to send and receive drugs. After the first fatal fentanyl-xylazine overdose, he alerted the Joralemon Post Office to keep an eye out for any packages sent from a horse veterinarian company—like the one found next to Washburn's body. The *McCarley-Connin* court held: "To withhold standing here simply because the defendant used a partial alias to avoid detection when using the mail to pay for (and, in time, receive) Fentanyl

would ignore the Fourth Amendment's protections." *Id.* at 810. Nonetheless, that holding was validly vacated.

Even if this Court finds that Fenty did have a legitimate expectation of privacy in the packages addressed to her alias, it was not unreasonably invaded by the Government's action for another reason. The evidence relating to the contents of the HHC packages was obtained pursuant to a search warrant. When a warrant is obtained prior to the search and seizure, suppression of the evidence resulting from it is permissible only in a few circumstances: "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Leon*, 468 U.S. 897, 926 (1984). Fenty never raised such allegation regarding the magistrate's abandonment of his role. Moreover, there is no evidence in the record to suggest that Agent Raghavan was dishonest or reckless in preparing an affidavit. Most importantly, Agent Raghavan undoubtedly harbored an objectively reasonable belief in the existence of probable cause.

"The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that the invasion occurred." *Jacobsen*, 466 U.S. at 115. Both lower courts acknowledged the legitimate concern that Government agents might search potentially innocent items, and try to justify this after-the-fact if they happen to find evidence of illegal narcotics. However, the legitimacy of that concern is not validated in the instant case. It is true Agent Raghavan did not know if Fenty or Meyer had any connection to fentanyl trafficking. But because the overdose involving the HHC packages happened only two days before, Agent Raghavan testified that "[s]topping the delivery of deadly narcotics justified the immediate search." Not only were the packages from a horse veterinary company, but they were also from

the exact same company that sent the packages next to Washburn's body. At the time the invasion occurred, HHC was a suspected source for the narcotics at issue. *See Rose*, 3 F.4th at 725 ("Sender's location "was a known 'source city' for narcotics."); *Pitts*, 322 F.3d at 451–52 ("Packages were 'sent from known source areas for narcotics.'") Probable cause only requires "a showing of the probability of criminal activity." *Daniel*, 982 F.2d at 151. It was highly probable the HHC packages contained the same narcotics that killed Washburn—establishing probable cause. But the argument Fenty would assert implies that probable cause requires proof beyond a reasonable doubt. That never has been nor ever will be the case.

Suppressing the constitutionally and reasonably obtained evidence pursuant to an uncontested warrant obtained by showing probable cause is against public policy—especially, in this case. As the record reflects, Joralemon citizens have suffered the effects of street drug activity for far too long feeling failed by law enforcement. Justice Powell stated that "the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit." *Florida v. Royer*, 460 U.S. 491, 508 (1983) (Powell, J., concurring). Fenty claims that her wish to remain anonymous, in order to remain free from "unfettered government intrusion," is a desire our nation's Founder's surely would have endorsed. To the contrary, Congress criminalized particular objects being sent and received via the mail not to interfere with the rights of the people, "but to refuse its facilities for the distribution of matter deemed injurious to the public morals." *Ex parte Jackson*, 96 U.S. 727, 736 (1877).

Fenty's Fourth Amendment privacy protections were not violated. Thus, the evidence relating to the illegal contents of the packages Fenty received from HHC were properly included as evidence at trial. Her subjective expectation of privacy is objectively illegitimate and anything but one that society is prepared to recognize as reasonable. The basis of legitimacy is "not whether

the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *California v. Ciraolo*, 476 U.S. 207, 212 (1986). This Court has always been resistant in applying the exclusionary rule, fully aware that "it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Givens*, 733 F.2d at 342–43 (quoting *Rakas*, 439 U.S. at 137).

II. PETITIONER'S RECORDED VOICEMAILS WERE PROPERLY EXCLUDED AS AN UNQUALIFIED HEARSAY EXCEPTION UNDER RULE 803(3) OF THE FEDERAL RULES OF EVIDENCE TO SHOW A THEN-EXISTING MENTAL STATE WHEN PETITIONER HAD AMPLE TIME TO REFLECT AND MOTIVATION TO FABRICATE THE STATEMENTS.

Next, Fenty argues that the recorded voicemail statements should be admitted to show her then-existing mental state. But these statements cannot be admitted as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence for several reasons. First, the voicemails fail to satisfy the spontaneity requirement as she had time to reflect before making the self-serving statements. Second, the record indicates that Fenty had motive to fabricate her statements. Third, the admission of the voicemail recordings would more likely than not have affected the verdict.

Justice requires that a case's outcome "be based upon reliable and truthful testimony capable of validation." Sydney Beckman, Susan Crump, & Fred Galves, *Evidence: A Contemporary Approach* 263 (4th ed., West Acad. Publ'g 2020). Hearsay's inherent risks are classified into four basic categories: "perception (or misperception); recollection (or faulty memory); narration (or ambiguity in the statements); and sincerity (or insincerity on the part of the speaker)." *Id.* To serve the interests of justice, Rule 803 carves out specific exceptions to the general rule against hearsay. These exceptions pertain to out-of-court statements deemed to be intrinsically reliable and are admissible as evidence, despite technically being hearsay. Fed. R. Evid. 803 advisory committee's

note. Rule 803 is founded on the notion that certain statements are trustworthy, but *only if* they were made in circumstances that eliminate the probability of fabrication. Fed. R. Evid. 803 advisory committee's note.

The hearsay exceptions are not phrased in affirmative terms of admissibility, only in terms of the general hearsay rule's nonapplication. Fed. R. Evid. 803 advisory committee's note. At issue here is the hearsay rule's nonapplication to recorded voicemail statements pursuant to Rule 803(3) regarding the Fenty's then-existing state of mind. Fed. R. Evid. 803(3). Regardless of the declarant's availability as a witness, the literal text of Rule 803(3) says the following is to be excepted from the general rule against hearsay: "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 . . . " Fed. R. Evid. 803(3). Although Rule 803(3) is this analysis' central focus, Rule 803(1) is implicated as it impacts the scope of the former's analysis.

For statements regarding a declarant's state of mind to be admissible under Rule 803(3), a test has been articulated which requires three elements to be satisfied:

> (1) the statements must be contemporaneous with the . . . event sought to be proven;
> (2) it must be shown that the declarant had no chance to reflect—that is, no time to fabricate or to misrepresent his thoughts; and (3) the statements must be shown to be relevant to an issue in the case.

United States v. Jackson, 780 F.2d 1305, 1315 (7th Cir. 1986) (internal quotation marks omitted). While the literal text of Rule 803(3) does not explicitly state the requirement of these elements, it cannot be understood outside of the context in which it was written and adopted. *See United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980). As the Advisory Committee stated, this hearsay exception is simply "a specialized application" of Rule 803(1)'s present sense impression exception regarding "[a] statement describing or explaining an event or condition, made while or

immediately after the declarant perceived it." Fed. R. Evid. 803 advisory committee's note; Fed. R. Evid. 803(1). Rule 803(1) is premised upon the theory "that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Fed. R. Evid. 803(1) advisory committee's note. While Rule 803(3) is merely a specialized application of Rule 803(1), it is presented separately solely to "enhance its usefulness and accessibility." Fed. R. Evid. 803 advisory committee's note. Thus, Rule 803(1)'s requirement that the statement be "made while or immediately after the declarant perceived" the event or condition fully extends to Rule 803(3)'s application. Fed. R. Evid. 803(1).

Nonetheless, the circuits are split over whether Rule 803(3) requires the statements to be spontaneous in order to guarantee they are not fabricated or self-serving. The Second and Seventh Circuits tend to strictly follow the rule as it was written and therefore, do not require "an affirmative showing of spontaneity." Daniel J. Capra & Jessica Berch, *Evidence Circuit Splits, and What to Do About Them*, 56 U. Cal. Davis L. Rev. 127, 161 (2022). But the majority approach *does* require such a showing. *Id.*

A. Fenty's Recorded Voicemails Fail to Satisfy the Majority Approach's Rule 803(3) Requirement of Spontaneity.

Applying the majority approach, the voicemail recordings appear to satisfy elements (1) and (3), of the then-existing state of mind test, regarding their contemporaneous and relevant nature, respectively. But the statements blatantly fail element (2)'s requirement of spontaneity. Regarding element (1), the voicemails were left in relation to Fenty's belief that the HHC packages were intercepted by law enforcement. These statements were contemporaneous with the events Fenty seeks to prove—that she was confused why the packages would be intercepted and her lack of awareness regarding their contents. This is evidenced by specific portions of both voicemail recordings. Particularly, "I read that article that xylazine is sometimes mixed with fentanyl. That's

not what's going on here, right?" in the first, and "I thought the xylazine was just to help horses that are suffering. Why would they want to look at that?" in the second. Regarding element (3), the voicemails are relevant to an issue in the case—namely, whether Fenty "did knowingly and intentionally possess with intent to distribute 400 grams or more of a mixture and substance containing . . . fentanyl." 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). In addition to the specific portions of both voicemail recordings already mentioned, this is evidenced by "I'm really starting to get concerned that you involved me in something I had no idea was going on." in the second voicemail.

But fatal to Fenty's claim is the failure to satisfy element (2). In *United States v. Naiden*, the Eighth Circuit demonstrated the majority approach requiring an affirmative showing of spontaneity. The court excluded the defendant's statement that he did not believe his online acquaintance was a minor which was offered to show that he did not intend to have sex with a minor. *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005). The court reasoned that his statement "was not made as an immediate reaction to his communication with [the minor], but after he had had ample opportunity to reflect on the situation." *Id.*

Just like the defendant in *Naiden*, Fenty offered the statements to negate her intent in committing the accused crime. Unlike *Naiden*, the record here does not reflect whether the first voicemail's statements were made as an immediate reaction to Fenty's realization that the HHC packages were missing from her PO Box. Although Fenty said she called Millwood when she discovered the packages were missing, it is unclear how much time passed between this realization and the first voicemail. When exactly how much time elapsed between the event and statements made is undisclosed, courts are entitled to conclude the declarant had sufficient time to reflect upon and fabricate the statement making it inadmissible. *United States v. Ponticelli*, 622 F.2d 985,

992 (9th Cir. 1980). On the other hand, the record reflects that the second voicemail was left 45 minutes after the first one—clearly not "an immediate reaction" to the event, rather an "ample opportunity to reflect on the situation." *Naiden*, 424 F.3d at 722. Because statements relating to state of mind "have probative value mainly because the declarant has no chance to reflect upon and perhaps the misrepresent his situation," both voicemail recordings were properly excluded for the foregoing reasons. *Jackson*, 780 F.2d at 1315.

B. Because Fenty Knew the Packages Were Intercepted Rather Than Missing, She Was Motivated to Fabricate the Self-Serving Statements.

In addition to the timeliness factor of spontaneity, the existence of "suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his or her thoughts" is also heavily considered. *United States v. Srivastava*, 411 F. App'x 671, 684 (4th Cir. 2011) (unpublished). When the declarant is aware of being under investigation at the time the statements were made, the statements do "not fall within the state of mind exception to the Hearsay Rule." *United States v. Mosby*, No. 22-CR-00007-LKG, 2024 WL 96349, at *14 (D. Md. Jan. 9, 2024). The Fourth Circuit refused to admit the defendant's audiotaped conversation demonstrating "his lack of willfulness in committing the offenses at issue," in which "he told his employee to 'tell the truth' to the IRS." *United States v. Secor*, 73 F. App'x 554, 566 (4th Cir. 2003) (unpublished). The court reasoned that the defendant "was aware that he was under investigation by the IRS," he had the opportunity to reflect and fabricate the self-serving statements. *Id.* The moment Fenty received the shipper's delivery confirmation of the HHC packages and saw they were missing from her PO Box, Fenty knew she was being investigated for importing fentanyl. This is the epitome of a suspicious circumstance suggesting a motive to fabricate her thoughts, which she acted on by sending voicemails to her accomplice pledging her innocence. When Fenty realized the drugs had been intercepted, she recorded the voicemails accordingly to cover her tracks.

C. Even if This Court Found the Recorded Voicemails Qualified as a Hearsay Exception, Fenty's Conviction Would Not Be Reversed Because the Rule 803(3) Ruling Did Not Affect Her Rights or Influence the Verdict.

Fenty argues the lower courts erred in excluding the voicemail recordings statements as inadmissible hearsay. They did not. Fenty alleges she never intended to distribute fentanyl. Instead, she claims she believed she was engaged in a legitimate plan to help horses, the xylazine purchase was legitimate, and she had no idea she was involved in an illicit drug scheme. As the Fourteenth Circuit's majority validly held, Fenty "should not be rewarded for making self-serving statements that may mislead the finders of fact." On the other hand, the Fourteenth Circuit's dissent held that had the voicemail recordings been properly admitted under Rule 803(3), "it would have had a material difference on her ability to make a case for her exoneration."

Court decisions to exclude evidence are reviewed only for an abuse of discretion. *Naiden*, 424 F.3d at 722. Convictions are reversed only when the inappropriate evidentiary ruling "affected substantial rights or had more than a slight effect on the verdict." *Id.* When there is substantial evidence showing the defendant was "worried about the danger of being apprehended" for the accused crime, the offered statements "would not introduce reasonable doubt in light of all of the contrary evidence admitted at trial." *Id.* at 723. The record includes substantial evidence showing Fenty was worried about the danger of being apprehended for possession with intent to distribute fentanyl. Fenty repeatedly testified that she was nervous about ordering the drugs. Initially, because she had never ordered the medicines before. Then, because she came across the local news article detailing the recent trend of cutting fentanyl with horse tranquilizers and the DEA's commitment to finding those selling the dangerous drug. Despite being "certain" the xylazine she was ordering was for treating horses, she testified that she does not know why the article concerned her, "it just did." Fenty was worried about being apprehended for the crime because she was well

aware of the illicit drug scheme the entire time. To register the PO Box and receive the HHC deliveries, Fenty used her alias for the sole purpose of concealing her identity and connection to the xylazine-fentanyl mixture she ordered.

Given the abundance of additional evidence discrediting Fenty's alleged innocence, the admission of the voicemail recordings under Rule 803(3) would not have "had more than a slight effect on the verdict." *Id.* at 722. After all, the admission of the recorded statements would have been duplicative of Fenty's trial testimony. *See* Fed. R. Evid. 403 (explaining certain evidence may be excluded when its probative value is substantially outweighed by considerations of "misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence").[3] Fenty already planned to take the stand to explain her shock in realizing she was allegedly manipulated into purchasing narcotics. Thus, the district court properly refused to admit the statements and no abuse of discretion occurred. *Secor*, 73 F. App'x at 566. The admission of the voicemail recordings would not have led to Fenty's exoneration or even a reduction in her sentence. After all, Fenty faced a minimum sentence of 10 years, and a maximum sentence of life in prison. At the conclusion of the jury trial, Fenty was sentenced to the bare minimum. The evidence presented at trial would allow any reasonable jury to infer Fenty's obvious guilt.

Despite the Fourteenth Circuit dissent's contention, the voicemails would *not* "have had a material difference on her ability to make a case for her exoneration." Fenty claimed she was really impressed by Millwood's dedication to the care of these horses despite the fact that her LinkedIn profile showed she *just recently* started working at the stable. While this raised Agent Raghavan's suspicions, it conveniently enough did not raise Fenty's. Also conveniently enough, it did not raise any red flags for Fenty when someone she had no contact with for years, was not close with, and

[3] Dissent incorrectly claimed that the Government did not raise a Rule 403 issue. (*See* R. at 48.)

was previously investigated for drug involvement asked her to obtain xylazine. Fenty agreed to do this without ever seeing the horses that the drugs were allegedly intended for and without having any prior knowledge of the drugs. No innocent and reasonable person, especially someone with the intelligence of a novelist, would feel comfortable under the circumstances. Fenty knew of the scheme, and she agreed to facilitate it. After reading a local news article discussing the combination of xylazine and fentanyl being used as a recreational street drug, she ordered the drugs two days later. Fenty claims that she would have never agreed to participate had she been aware of the illicit substances mixed in the xylazine, but *at the very least* she was well-aware of the possibility. Even after knowing the packages had been intercepted and not hearing back from Millwood, who she claimed to be doing this for, she claimed the packages as her own. Due to her failing career as a novelist and financial struggles, the risk was worth the reward of the financial stability she sought.

The recorded voicemails were properly excluded as an unqualified hearsay exception under Rule 803(3). Fenty's statements within the voicemails fail to establish a then-existing mental state as she had ample time to reflect and motivation to fabricate the self-serving statements. Even if this Court disagrees and were to find that the district court erred in excluding the voicemail recordings, the abuse of discretion had no outcome on the case's verdict as it was a harmless error.

III. PETITIONER'S IMPEACHMENT BY EVIDENCE OF HER PRIOR PETIT LARCENY CONVICTION WAS PROPER UNDER RULE 609(a)(2) OF THE FEDERAL RULES OF EVIDENCE WHEN DECEIT, RATHER THAN VIOLENCE, WAS USED.

Lastly, Fenty argues that the lower courts erred in ruling that her prior petit larceny conviction under Boerum Penal Code § 155.25 was admissible as a crime of deceit under Rule 609(a)(2) of the Federal Rules of Evidence. However, to give Fenty's arguments the merit she alleges they have would be to rob the courts of the logic they asserted. Fenty's prior conviction is

admissible under Rule 609(a)(2) for three reasons. First, the absence of a codified deceit element under §155.25 is not determinative of the prior conviction's admissibility. Second, the petit larceny was not committed by violence and therefore, does not push it outside of Rule 609(a)(2)'s scope. Third, the purported failure of the limiting instruction to effectively counteract potential prejudice represents a clear misapplication of Rule 609.

Rule 609 dictates the impeachment of a witness by evidence of a prior criminal conviction. Fed. R. Evid. 609. For impeachment purposes, two types of prior criminal convictions are admissible: "(1) A prior conviction where the potential punishment is imprisonment for more than one year, generally noted as 'felony' offenses; and (2) A prior conviction where the elements of the criminal offense involve dishonesty or false statement, commonly referred to as crimen 'falsi' offenses." *United States v. Gillard*, No. 23-CR-00026, 2024 WL 247054, at *5 (E.D. Pa. Jan. 23, 2024). Admitting these prior convictions is justified by providing the trier of fact with the evidence necessary to accurately gauge the credibility of a witness "who might otherwise misleadingly appear to have led a blameless life." 28 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 6132 (2d ed. 1987) (Apr. 2023 Update).

A. Prosecution Sufficiently Demonstrated Fenty's Prior Petit Larceny Conviction Was a Crime of Deceit Thus Bearing on Her Propensity to Testify Truthfully.

For crimen falsi offenses under Rule 609(a)(2), prior convictions are automatically admissible when the statutory offense of which the witness was convicted requires proof of deceit as a requisite element of the crime. *United States v. Papia*, 560 F.2d 827, 847 (7th Cir. 1977). But when there is no such requisite element, the prior conviction will still be admitted if the evidence's proponent shows that the conviction "rested on facts warranting the dishonesty or false statement description." *United States v. Smith*, 551 F.2d 348, 364 n.28 (D.C. Cir. 1976). In the former

scenario, "the trial court enjoys no discretion." *Id.* at 365. In the latter scenario, the trial court virtually still has no discretion if the proponent meets its burden in proving the prior crime was committed under circumstances warranting the dishonesty description. When "nothing more than the bare fact of conviction" was before the Second Circuit, it concluded that "the prosecution has failed to carry its burden of justifying the admission of appellant's conviction" under Rule 609(a)(2). *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977). In the instant case, the prosecution is not guilty of such failure.

When the specific offense "leaves room for doubt" under Rule 609(a)(2), prosecution must demonstrate the conviction was deceitful in nature "bearing on the accused's propensity to testify truthfully" to "take advantage of automatic admission of a conviction." *Id.* at 827. Congress emphasized that Rule 609(a)(2) was intended to apply to convictions "peculiarly probative of credibility." H.R. Rep. No. 93-1597 (Conviction of "any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.") The circuits are split on whether theft, and offenses of the like, are inherently deceitful in nature. But even when taking the view unfavorable to Respondent's argument for admissibility, Fenty's prior conviction must still be admitted.

While petit larceny is "not ordinarily a crime involving dishonesty or false statement," "the fact that the same type of offense can be committed in a manner not involving deceit does not make the conviction inadmissible." *Smith*, 551 F.2d at 364; *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 217 (7th Cir. 1989); *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)

Although Fenty's prior conviction of petit larceny "was not characterized by an element of fraud or deceit, it nonetheless was committed by such means." *United States v. Fearwell*, 595 F.2d

771, 776 n.8 (D.C. Cir. 1978) (quoting *United States v. Dorsey*, 591 F.2d 922 (D.C. Cir. 1978)). Just as Respondent emphasized: "[t]he prosecutor's choice to charge defendant only with petit larceny in no way means that the crime did not involve deceit." If prosecution can demonstrate this to the court, as it successfully did here, admissibility under Rule 609(a)(2) is triggered. In *Fearwell*, the statutory offense at issue was also petit larceny defined as "tak[ing] and carry[ing] away any property of value of less than $100." *Id.* at 776. The court ruled that the prior conviction did not fall within Rule 609(a)(2)'s scope because "unless specified to the contrary in the controlling statute," it lacks the "requisite deceit to qualify for admission." *Id.* However, the facts underlying Fenty's prior conviction change the analysis and thus, the outcome of admissibility under the rule.

B. But for Fenty's Theft Failing to Meet the Alternative Offense's Monetary Value Minimum, She Would Have Been Convicted for Theft by Deception.

While Fenty was convicted of petit larceny, she could have and would have been convicted of theft by deception if a single circumstance of the crime was different. Theft by deception under Boerum Penal Code § 155.45 explicitly implicates petit larceny under Boerum Penal Code § 155.25. Boerum Penal Code § 155.45(4). Even if a perpetrator satisfies all elements of deceit under the theft by deception statute, they will be convicted for petit larceny "[i]f the property stolen is valued at less than One Thousand Dollars ($1,000.00), the theft by deception is a class B misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, but more than 30 days, or by a fine not exceeding Five Thousand Dollars ($5,000.00)." Boerum Penal Code § 155.45(4). Because the property Fenty stole was a young mother's bag containing diapers and $27 dollars, well under $1,000, she was charged with petit larceny—"a class B misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, but more than 30 days, or by a fine not exceeding Five Thousand Dollars ($5,000.00)." Boerum Penal Code

§ 155.25(3). As Respondent pointed out, the fact that "she managed to steal a small sum rather than a larger sum has no bearing on a 609(a)(2) analysis."

Grasping at straws, Fenty attempted to establish that her prior conviction was one of violence, rather than one of deceit. After all, a murderer is:

> violent and lawless, but not necessarily dishonest as that word is normally understood, and there may be less reason to expect him to lie on the stand in a suit unrelated to his crime than to expect a lesser criminal, but one who has a history of seeking to enrich himself at others' expense, to lie on the stand.

Altobello, 872 F.2d at 216. Fenty's meritless violence argument was undoubtedly motivated by the fact that "crimes of violence generally have limited probative value concerning the witness's credibility and that theft crimes have greater impeachment value." *United States v. Estrada*, 430 F.3d 606, 618 (2d Cir. 2005) (internal quotation marks omitted). But as the Fourteenth Circuit's majority concluded, we cannot give Fenty the "'benefit' of claiming she committed a crime involving force, just because the victim tried to stop the theft from occurring."

Fenty argued that this was a crime of violence because she did not steal the bag until an altercation broke out between her and the victim who caught Fenty in the act. At that point, Fenty forcibly pulled the bag back and said "Let go or I'll hurt you"—namely, the basis of her crime of violence argument. However, the threat itself was deceitful which is proven by her testimony that she "didn't want to hurt her." This drastically differs from armed robbery—a crime of violence and force, involving no deceit. *Smith*, 551 F.2d at 363. As Senator McClellan frankly put it, "You take a gun, walk out, and put it in a man's face and say, 'Give me your money,' or walk up to the counter of the cashier and say, 'this is a holdup; give me your money.' There is no deceit in that. *They are not lying*. They mean business. *They will murder you if you do not do it*." 120 Cong. Rec. S19913 (daily ed. Nov. 22, 1974) (emphasis added). Not only did Fenty arrive at the crowded scene of the crime with no weapon and the intention of going unnoticed by targeting a distracted

victim, but she was also *lying*. Unlike an armed robber, her threats were empty. Fenty testified under oath (for whatever that is worth) that she was *not* going to hurt her if she did *not* let go. The threat itself was deceitful and if the stolen bag happened to be valued at more than $1,000, she would have been charged with theft by deception. "A person is guilty of theft of property by deception" if she intentionally "[c]reates, reinforces, or leverages a false impression"—exactly what Fenty did. Boerum Penal Code § 155.45.

C. The Limiting Instruction's Alleged Failure to Mitigate Potential Prejudice Blatantly Misapplies Rule 609.

Fenty argues that the use of her prior conviction as impeachment evidence poses an acute danger of prejudice claiming that jurors regularly use such evidence to infer criminal propensity. But prior convictions found to involve dishonesty must be admitted, "with the trial court having no discretion, regardless of the seriousness of the offense or its prejudice to the defendant." *Hayes*, 553 F.2d at 827. In *Altobello*, the defendant argued that his prior conviction should be excluded under Rule 403 of the Federal Rules of Evidence, "which directs the exclusion of evidence the prejudicial effects of which substantially outweigh its probative value." 872 F.2d at 216. However, it was already established that "Rule 403 is inapplicable to Rule 609(a)(2)." *Id.* Fenty plainly misinterprets Rule 609 because unlike (a)(1), (a)(2) does not require balancing the prior conviction's probative value against prejudice under Rule 403. *Hayes*, 553 F.2d at 827. Instead, Rule 609(a)(2) is deliberately restricted to convictions that "bear directly on the likelihood that the defendant will testify truthfully." *Id.*

Fenty argues that the prejudice arises from the similarity of the prior conviction's circumstances to the current conviction's circumstances. Namely, Fenty acting upon a friend's insistence and her motivation for money. Even though weighing prejudice is not a procedure that applies under Rule 609(a)(2), courts acknowledge that problems do arise "when the prior

conviction is for the same or substantially the same conduct for which the accused is on trial." *Gordon*, 383 F.2d at 940. These problems are magnified when several convictions of varying kinds are admitted, but there is no threat of those problems posed here. *Id.* First, petit larceny, a class B misdemeanor under state law, is very different from possession with intent to distribute a controlled substance, a felony under federal law. *See Hayes*, 553 F.2d at 828 ("[C]onviction was for a crime substantially different from the instant prosecution, so that there was not here the prejudice to appellant that inevitably results from the introduction of a conviction for the same crime as that for which he is on trial."). Second, a jury is unlikely to infer criminal propensity from the prior conviction as she owned the prior by pleading guilty, and it is her only prior conviction. Because she testified to both of those facts during trial, her concerns of prejudice are unjustified.

Nonetheless, to address Fenty's unrelenting concern, a limiting instruction was provided specifying the true purpose of the prior conviction evidence: "deciding whether or not to believe the defendant," "how much weight to give to the testimony of the defendant," and "whether the defendant has a character for truthfulness." Based on *unproven* studies, Fenty speculates that limiting instructions actually have the opposite effect causing jurors to consider evidence for exactly what the instructions tells them not to. In *Thompson v. United States*, the D.C. Court of Appeals addressed the concern the theory that:

> jurors were almost universally unable or unwilling to understand or follow the court's instruction to consider prior convictions only for impeachment purposes, and almost invariably used a defendant's record to conclude that he was a bad man and hence more probably guilty of the crime for which he was standing trial.

546 A.2d 414, 425 (D.C. 1988). The court held that when limiting instructions are "clearly and understandably delivered, they will reduce, if not dissipate, the danger of unfairness and prejudice." *Id.* at 426. Because the limiting instruction in Fenty's trial was clearly and

understandably delivered, Fenty should rest assured that they were "at least readily understood, if not easily followed." *Id.*

While the admissibility of proof of other criminal acts is the most "consistently and violently litigated" part of evidence law, the admissibility of Fenty's prior conviction is clear cut. *Id.* at 415. Fenty's petit larceny conviction was committed by means of deceit, rather than means of violence like in the instance of armed robbery. Unlike an armed robber who "at least has the 'decency' to let his victim know what he is about," Fenty never intended to get caught which is why she deliberately chose a victim that seemed distracted. *Papia*, 560 F.2d at 847 n.14. Nonetheless, Fenty would have been charged with theft by deception had she satisfied that offense's monetary value minimum. Even if this Court were to find that the lower courts erred in ruling that Fenty's prior could be used for impeachment purposes, the error was harmless as evidenced by her meritless claim of prejudice.

CONCLUSION

For the foregoing reasons, the judgment of the Fourteenth Circuit should be AFFIRMED.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT