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IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 22-5071

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER, FRANNY FENTY

Attorneys for the Petitioner

QUESTIONS PRESENTED

(1) Under the Fourth Amendment, does a person have a legitimate expectation of privacy in sealed mail where the mail is addressed to the person's publicly-used alias and P.O. box he or she exclusively owns and controls?

Suggested answer: Yes

(2) Under Federal Rule of Evidence 803(c), are recorded voicemail statements admissible to show a then-existing mental state if there was less than an hour to reflect before making the statements and they demonstrate the speaker's palpable distress, confusion, and fear?

Suggested answer: Yes

(3) Under Federal Rule of Evidence 609(a)(2), is a prior conviction for petit larceny inadmissible for impeachment purposes when the elements of the statute do not include deception and the underlying facts involve aggressive instead of elusive behavior?

Suggested answer: Yes

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

STATUTORY AND CONSTITUTIONAL PROVISIONS

This case is an appeal from a verdict under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). This appeal concerns alleged violations of the Defendant's Fourth Amendment right against unreasonable searches. U.S. Const. amend IV. Additionally, this case involves the Federal Rules of Evidence, Rules 609(a)(2) and 803(3).

STATEMENT OF THE CASE

I. Statement of Facts

Franny Fenty, a graduate of Joralemon College and a writer for the school's magazine, is an aspiring author with a creative mind. R. 42, 65. But even she could not have imagined that her innocent attempt to help out an old high school classmate would lead to ten years in prison for possession with intent to distribute fentanyl. R. 66.

When Fenty was only 19, her ex-friend dared her to grab a woman's bag. R. 53. Feeling peer pressure, Fenty did so without a plan. R. 54. She characterized it as "a stupid teenage mistake." R. 53. She was not sneaky, as the woman "quickly" noticed. *Id.* Fenty threatened the woman and ran off with the bag. R. 60. It contained $27 and diapers. R. 54. She pleaded guilty to misdemeanor petit larceny and served two years of community service and two years of probation. *Id.* She was convicted of no other crime until the conviction underlying this appeal. R. 54, 66. Fenty admitted the error of her ways and paid her debt to society. R. 54, 60.

Fenty focused on her writing and academic career. R. 42. Due to the "very personal" nature of her work, Fenty created the pen name "Jocelyn Meyer." R. 43. She published two short stories under the alias in 2016 and 2017 while at college. R. 4. These were available to public online. R. 33. Fenty, a private person, continued to use her alias in both her professional and personal life. R. 43. She completed five manuscripts under it, actively seeking as recently as October 2021 to publish them as novels. R. 5, 42. To do so, she created a Gmail account under the name. *Id.*

Having no luck, she made an "Open to Work" post on LinkedIn. R. 6. She cited her interest in editing, copywriting, and teaching, past experience as a barista and server, and how great she is with children and animals. *Id.* That same day, Angela Millwood reached out to her. *Id.* She was an old high school classmate. R. 43. They commiserated about their respective financial struggles and careers. R. 44. Millwood mentioned that she loved her job as a horse handler, but it was heartbreaking to see how much pain the horses endured as they aged. *Id*. In these conversations, Millwood told Fenty of her plan to administer the muscle relaxant xylazine to the horses to help ease their pain. R. 45. Millwood then took advantage of Fenty's generosity and willingness to help by convincing her to order the xylazine on her behalf. *Id*. It was only after Fenty placed the order that she researched xylazine. R. 46. She found the Joralemon Times article discussing it as a popular new street drug when mixed with fentanyl. R. 7, 46. Millwood assured her the xylazine was only to help horses. R. 46. Fenty mistakenly trusted her. R. 57.

On January 31, 2022, Fenty legally opened a P.O. box under her alias to receive online orders with privacy. R. 12, 31, 43. Solely she rented the box. R. 31. She ordered xylazine from Holistic Horse Care under her alias. R. 31, 43, 55. She also ordered face cream from Amazon to the P.O. box. R. 38. They both arrived on February 14, 2022. R. 12, 30. The post office flagged

the Holistic Horse Care packages as suspicious and notified police. R. 30. Special Agent Robert Raghavan reported. R. 31. Raghavan frequently "target[s]" post offices and private mail for investigation. R. 36. He saw the packages were addressed to the P.O. box. R. 30. He did not question the Amazon boxes having Fenty's name, as roommates often share P.O. boxes. R. 31.

Motivated by the increase in drug crimes in Joralemon and a recent overdose involving xylazine, Raghavan "wanted to take matters into [his] own hands." R. 28, 37. He obtained a warrant based solely on packages saying Holistic Horse Care and the rise in crime. R. 30, 37. He and the postal workers did not know the packages contained drugs. R. 37. He also knew of no connection between drug trafficking and the names Franny Fenty or Jocelyn Meyer. R. 38. Even though postal workers normally open suspicious packages, Raghavan did so himself. R. 37. Lab testing revealed the contents to contain a mixture of xylazine and fentanyl. R. 32. Raghavan admitted some previous searches of mail pursuant to warrants did not turn up drugs. R. 37.

That same day, Fenty went to the post office. R. 40. She was surprised when the Holistic Horse Care packages she expected were not there. R. 46. Fenty called Millwood twice and left voicemails. R. 39-40. There were forty-five minutes between the voicemails. R. 40. She stated she asked for the packages but was told her they were missing. *Id.* She said she "read that article that fentanyl is sometimes mixed with xylazine" and that she "thought the xylazine was just to help horses." *Id.* She stated, "I'm getting worried that you dragged me into something I would never want to be a part of." *Id.* She then said, "Angela, I'm really getting nervous. Why aren't you getting back to me?" and "I'm really starting to get concerned that you involved me in something I had no idea was going on." *Id.*

On February 15, 2022, agents resealed the packages and instructed postal workers to leave a slip for Fenty in her P.O. box asking her to report to the counter. R. 32. Fenty appeared,

picked up the Amazon boxes, and handed in the slip. R. 32. Fenty confirmed that the Holistic Horse Care packages were hers. R. 33. She took the packages before running into her old college friend, Sebastian Godsoe. R. 33. They talked and she left. R. 33. Godsoe knew Fenty by her legal name and her pen name from her college writing. R. 33. That same day, a grand jury returned an indictment against Fenty and she was arrested in the evening. R. 8, 34.

II. Procedural History

Prior to trial, Fenty filed two evidentiary motions: (1) one to suppress evidence of the contents of the Holistic Horse Care packages on grounds that the search violated her Fourth Amendment rights; and (2) one to exclude evidence of her prior conviction for petit larceny from being used at trial for impeachment purposes. R. 11, 19. The trial court denied both motions. R. 16, 26. For the former, it held that her subjective expectation of privacy was not reasonable because the packages were addressed to her alias. R. 12-13, 16. The court also found she had no privacy interest in the P.O. box registered to her alias. R. 16.

For the latter, the court noted misdemeanor convictions can be admissible for this purpose where they involve a "dishonest act." R. 19. Fenty argued that admitting the evidence would unfairly prejudice her, as the jury would infer criminal propensity. R. 22. A limiting instruction would not rectify this and could have the opposite effect as shown by studies. R. 25. The prosecution claimed Fenty's credibility was affected by the conviction as Fenty had planned to deceive her target. R. 22-24. The prosecution cited policy arguments instead of the Federal Rules of Evidence's text. R. 24. The trial court found Fenty's actions "aimed at capitalizing on the victim's distraction" and denied the motion. R. 26. The court provided a limiting instruction to the jury. R. 63.

At trial, the Government moved to exclude Fenty's voicemails to Angela as hearsay not qualifying under the Rule 803(3) exception. R. 47. The trial court sustained the objection finding that they did not meet the spontaneity requirement. R. 52. The Fourteenth Circuit affirmed all of the trial court's rulings, holding: (1) the opening of the packages did not implicate Fenty's Fourth Amendment rights; (2) the voicemail statements did not meet the requirements of Rule 803(3); and (3) Fenty's petit larceny conviction fell within Rule 609(a)(2)'s limits. R. 67-70. On December 14, 2023, this Court granted Fenty's petition for writ of certiorari. R. 74.

SUMMARY OF THE ARGUMENT

This case is about nothing more than the government trying to manipulate the rules of evidence to railroad the accused and strip her of her constitutional right to defend herself. This Court should overrule the Fourteenth Circuit on all three issues and order a new trial.

First, the Fourteenth Circuit improperly affirmed the district court's denial of Fenty's motion to suppress the contents of the Holistic Horse Care packages. Fenty had standing under the Fourth Amendment to challenge the admission of the packages' contents into evidence. She possessed a reasonable expectation of privacy in the packages as her online purchase of them using an alias was objectively reasonable. Society recognizes the legitimacy of maintaining anonymity via an alias in various contexts for privacy and protection. Further, Fourth Amendment protections do not disappear because a defendant ships mail for a criminal purpose. A bright line rule presuming privacy rights in mail using an alias is easily administered, constitutionally sound, and best accords with societal values. Should this Court require showing public use of an alias, Fenty's extended and widespread use of her pen name meets this burden. Alternatively, should this Court adopt the other indicia test, the totality of the circumstances establishes Fenty's privacy interest was objectively reasonable.

Second, Franny Fenty's recorded voicemail statements are admissible hearsay under Federal Rule of Evidence 803(3). The recorded voicemail statements express Fenty's then-existing mental and emotional condition. The unambiguous text of Rule 803(3) admits hearsay statements relating to the declarant's then-existing mental, emotional, physical, or sensory condition. Her palpable distress, confusion, and fear demand admissibility under this exception. Further, the lack of spontaneity within Fenty's recorded voicemail statements is inconsequential to this analysis. A statement's spontaneity is a consideration that should be weighed by the jury alone. A lack of spontaneity is not controlling in regard to the admissibility under Rule 803(3).

Third, allowing Fenty's impeachment through a conviction that had no bearing on her truthfulness unjustly and irreparably undermined her credibility. First, Federal Rule of Evidence 609(a)(2) must be construed using tools of statutory interpretation. These require it be read narrowly. The admission of Fenty's conviction for petit larceny as defined by Boerum Penal Code § 155.25 was inconsistent with Rule 609(a)(2). As this crime's elements do not include committing a dishonest act, uttering a false statement, or admitting to either, it is not necessary to look further into the details of her prior conviction. Second, even if this Court investigates the underlying facts, it will find Fenty did not act in a deceptive fashion. Her conviction's circumstances are similar to cases where convictions for petit larceny have been excluded for impeachment purposes since they do not bear on a witness's credibility like other *crimen falsi* The trial court's limiting instruction did not correct this unjust prejudice.

ARGUMENT

I. The circuit court should be overruled because Fenty had standing to challenge the search warrant.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. Evidence obtained from an unreasonable search is inadmissible. *Mapp v. Ohio*, 367 U.S. 643, 649 (1961). Searches are unreasonable when they invade a legitimate expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Using the two-prong *Katz* test, an expectation of privacy is found legitimate when: (1) an individual has a subjective expectation of privacy and (2) that expectation is objectively reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Legitimacy of privacy interests derive from societal norms or property interests. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). A defendant carries the burden of demonstrating a right to privacy. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

This Court has long recognized that sealed postage is a "general class of effects in which the public at large has a legitimate expectation of privacy." *Jacobsen*, 466 U.S. at 114; *accord Ex Parte Jackson*, 96 U.S. 727, 733 (1877). Mail being in transit does not diminish this expectation. *See Walter v. United States*, 447 U.S. 649, 658 n.12 (1980); *see also* 18 U.S.C. § 1702 (criminalizing opening someone else's mail "before it has been delivered"). However, this Court has yet to rule on the narrower issue of whether mail addressed to an alias is included in this "general class." *See United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021).[1] This silence has birthed an intra- and inter-circuit split. *United States v. Lozano*, 623 F.3d 1055, 1064 (9th Cir. 2010) (O'Scannlain, J., specially concurring) (per curiam).

Several circuits accept the legitimacy of using non-legal names to send or receive mail. The Tenth Circuit reasoned in dicta that expectations of privacy can exist if use of the alias itself is not illegal. *United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009). The Fifth, Seventh,

[1] This Court in *Walter* dividedly held 5-4 that a warrantless search of mail addressed to and from fictitious names was an unreasonable invasion of privacy. 447 U.S. at 658-60; *id.* at 663 (Blackmun J., dissenting). Justice Marshall only concurred in the judgment though, so the reasoning behind the plurality opinion is persuasive. *Id.* at 660.

and Eleventh Circuits are less consistent. However, the modern trend recognizes that society views expectations of privacy in mail containing an alias as reasonable. *See United States v. Villarreal*, 963 F.2d 770, 774-775 (5th Cir. 1992); *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009). These circuits require defendants to show a connection to the alias to varying degrees. *Compare Villarreal*, 963 F.2d at 774 (defendant went by alias), *with Pitts*, 322 F.3d at 459 (requiring no established connection to name on mail).[2] Expectations of privacy are only unreasonable when defendants (1) are not the actual sender or intended recipient, *see, e.g.*, *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988), or (2) disassociate themselves from or abandon a package. *See, e.g.*, *United States v. Peirce*, 959 F.2d 1297, 1303 (5th Cir. 1992); *Pitts*, 322 F.3d at 456.

Conversely, the First, Fourth, and Eighth Circuits require defendants to show other indicia of possession, ownership, or control of mail that is not addressed to or sent from their legal names. *United States v. Stokes*, 829 F.3d 47, 52 (1st Cir. 2016); *Rose*, 3 F.4th at 728; *United States v. Lewis*, 738 F.2d 916, 919 (8th Cir. 1984). The circuits require this showing even if the defendant is the intended recipient. *See Rose*, 3 F.4th at 729-30; *United States v. Givens*, 733 F.2d 339, 341-42 (4th Cir. 1984). These other indicia are less related to the name on the package than the totality of the circumstances. *See Stokes*, 829 F.3d at 52-53.

Here, Franny Fenty moved to suppress the contents of the Holistic Horse Care packages seized by law enforcement. R. 11, 66. The district court denied this motion. R. 16. Indisputably, Fenty subjectively expected that sealed mail delivered to her exclusive P.O. box would remain private. R. 12-13, 43. But the court found this expectation illegitimate since Fenty addressed the

[2] Precedent attaches different meanings to the terms "fictitious name," "alias," and "alter ego." Used here, "fictitious name" and "alias" both interchangeably mean any non-legal name. They imply no level of public use or criminal connotation. "Alter ego" means a clearly established name that is a second personality or form of a person, such as a pen name (e.g. Dear Abby), artist name (e.g. Lady Gaga), or business entity representing a person.

packages to her alias. R. 16. It also found no valid privacy interest in the P.O. box as it was registered under the alias. R. 16. The Fourteenth Circuit affirmed the trial court's decision and appeared to adopt the other indicia test. R. 67-68.

Before this Court is the opportunity to clarify the lower court conflict. This Court should adopt a bright line rule—expectations of privacy in sealed mail addressed to a fictitious name are presumptively legitimate when the person claiming the privacy interest is the intended recipient. Such a rule is easily administered, accords with societal norms, and protects critical Fourth Amendment rights. Even should this Court require a defendant to show "public use" of an alias, Fenty's long-term, open use of the name Jocelyn Meyer clears this threshold. Alternatively, should this Court adopt the other indicia test, Fenty should still prevail on this appeal. The totality of the circumstances establishes her possessory interest in both the packages and P.O. box.

A. Fenty had standing to challenge the search warrant because she was the intended recipient of the packages addressed to her alias.

Fenty had standing to challenge the search warrant because she is Jocelyn Meyer. A majority of circuits recognize that an addressee's alias alone can establish a reasonable expectation of privacy. *See Pitts*, 322 F.3d at 459; *Garcia-Bercovich*, 582 F.3d at 1238; *Johnson*, 584 F.3d at 1002; *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981) (quoting *United States v. Chadwick*, 433 U.S. 1, 11 (1977)) ("[The defendant's connection to an alias] alone indicate[s] 'an expectation that the contents would remain free from public examination.'"). This logic is sound. Expectations of privacy need not stem from common law property rights. *See Rakas*, 439 U.S. at 143 n.12. And names best communicate who is <u>not</u> an intended recipient. For example, roommates receive mail at the same address and often share P.O. boxes. R. 31. People in such situations know what mail not to open based solely on the addressee's name.

A bright line presumption that privacy expectations are legitimate in mail addressed to an alias best matches societal ideals. It also avoids arbitrary cutoffs in determining public use. The test must incorporate limitations derived from precedent to prevent frivolous or undeserved privacy claims. The presumption should bow where the privacy interest claimant fraudulently obtains the alias, is not the intended recipient, or abandons the package.

1. Fenty's legal use of an alias is objectively reasonable to society.

As the packages listed Fenty's alias, she had a valid privacy interest. "Society is prepared to recognize as reasonable" one's privacy interest in mail sent to their alias. *Pitts*, 322 F.3d at 459; *accord Villarreal*, 963 F.2d at 774-75; *Garcia-Bercovich*, 582 F.3d at 1238. This is because there are abundant legitimate reasons for using an alias. *Pitts*, 322 F.3d at 457-58.

A chief justification among these is privacy. At its core, using an alias preserves as much privacy as possible. *Pitts*, 322 F.3d at 458. The Founders constitutionalized this fundamental human desire, protecting against unfettered government intrusion. U.S. Const. amend IV. But in modern society, it is private and corporate actors that limitlessly intrude upon seclusion. *See* Daniel J. Solove, *The Limitations of Privacy Rights*, 98 Notre Dame L. Rev. 975, 986-87 (2023) (profiling strangers' ability to locate a man's home from only a photo and Google Maps); *id.* at 1021 (Big Data companies have created "gigantic databases" of citizens' personal information). Using an alias to create online accounts or purchase mail-order items merely takes back a shred of the privacy rights lost over the decades.

Anonymity can also be critical for safety. Victims of harassment or stalking may rely on aliases to survive. *See Pitts*, 322 F.3d at 458 (citing *United States v. Evans*, No. IP 00-99-CR-01H/F, 2001 WL 243287, at *5 (S.D. Ind. Jan. 31, 2001), *aff'd*, 282 F.3d 451 (7th Cir. 2002)). Thieves may target high-profile figures to steal sensitive or personal documents. *See id.* Others may fear economic retaliation or social repercussions from unpopular purchases or subscriptions.

See id. (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995). Complete disassociation of one's legal name from her alias is an absolute necessity for any real protection of privacy or person.[3]

Conditioning constitutional rights on non-anonymity is also generally incongruous with this Court's precedent. In *McIntyre*, this Court recognized that First Amendment protections extend to anonymous authors of political leaflets. 514 U.S. at 341-42. This is so even if the political message is unpopular. *See id.* This Court similarly recognized anonymity as necessary to protect the right to association. *See Nat'l Ass'n for Advancement of Colored People v. Alabama* ex rel. *Patterson*, 357 U.S. 449, 460, 466 (1958) (under the Fourteenth Amendment); *see also Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2385 (2021) (under the First Amendment and despite countervailing interest in detecting fraud). Together, these holdings buttress the idea that constitutional protections are not automatically lost through anonymity.

Relatedly, lower courts have extended Fourth Amendment protections to those anonymously registering for hotel rooms. *See United States v. Newbern*, 731 F.2d 744, 748 (11th Cir. 1984) (defendants had expectation of privacy where they registered under alias and were only ones possessing keys); *Moberg v. State*, 810 S.W.2d 190, 194 (Tex. Crim. App. 1991) (en banc); *cf. United States v. Watson*, 950 F.2d 505, 507 (8th Cir. 1991) (defendant had expectation of privacy in home purchased under alias). This is because registering as such is commonplace

[3] It is worth highlighting a class possessing a critical relationship with legal names and "aliases": transgender people. Publication of name changes often leads to cyberbullying and violence. Hannah Schoenbaum et al., *Bills Would Let Transgender People Seal Name-Change Requests*, Assoc. Press (Feb. 25, 2023), https://apnews.com/article/district-of-columbia-washington-california-health-gender-c1c8a24a01c5d307bdc2e9037c1b0fd0. For those unable to change their name due to fear, lack of time, or statutory bars, requiring widespread public use to claim a privacy interest is egregious—it requires transgender people to put a target on their backs. *See Krebs v. Graveley*, 861 F. App'x 671, 671-72 (7th Cir. 2021).

and objectively reasonable in American society.[4] Courts and practitioners alike consider the practice unexceptional. *See United States v. McConnell*, 903 F.2d 566, 569 (8th Cir. 1990) (applying Fourth Amendment analysis despite room being registered to false name); *United States v. Watson*, 783 F. Supp. 258, 259, 262-63 (E.D. Va. 1992) (same); 68 Am. Jur. 2d *Searches and Seizures* § 73 (2010). The parallel circumstance of using an alias to receive mail is entitled to the same protection.

The bright line is test is also ideal as it limits judicial subjectivity in determining a public use threshold. Courts employing the public use, or "alter ego," test have varied widely. *Compare Richards*, 638 F.2d at 768, 770 (5th Cir. 1981) (company addressee was "in effect" defendant because defendant owned company), *with Villarreal*, 963 F.2d at 774-75 (finding defendant had standing despite "ambiguity" where he used alias to introduce himself to courier). Assessing the fame of a name is an impossible task.[5] The outcome will change depending upon the geographic, temporal, and social parameters considered. Underground artists or transgender people who recently adopted their names should not lose constitutional protections because of evidentiary difficulties. Nor should mothers receiving letters addressed to "Mom" or a paramour receiving one labeled "Immortal Beloved." The bright line test best incorporates societal ideals and sets boundaries for investigating officers. It should be adopted.

Under this test, Fenty unquestionably has standing to challenge the search warrant. Like many, she desired to have more privacy in her life. R. 43. Using a pen name gave Fenty free license to write without being associated with her "very personal" material. R. 43. She merely

[4] *See* Jason C. Miller, *Do Not Disturb: Fourth Amendment Expectations of Privacy in Hotel Rooms*, 7 Seton Hall Cir. Rev. 269, 277 (2011) (collecting popular and historical examples of those checking in under an alias, including celebrities like Matt Damon, characters in movies evading criminals, and slaves escaping to northern states).
[5] *Cf.* Suneal Bedi & Mike Schuster, *Towards an Objective Measure of Trademark Fame*, 54 UC Davis L. Rev. 431, 431 (2020) (assessing the fame of a trademark is a "historically difficult question for courts").

carried these privacy needs over from her professional life to her personal life. She opened a P.O box solely under her pen name to receive online orders. R. 43. This is understandable behavior that "society is prepared to consider as objectively reasonable." *Pitts*, 322 F.3d at 459.

Considering the reasonableness of the bright line test, objections to it are unconvincing. Detractors primarily claim the bright line test enables criminals. *See, e.g., United States v. Daniel*, 982 F.2d 146, 149 (5th Cir.1993) (questioning defendant's standing where alias was "obviously part of his criminal scheme"). Necessary carveouts to the presumption of legitimacy negate these objections' power and reconcile intra-circuit conflict.

First, a presumption of legitimacy cannot extend in cases where a privacy claimant fraudulently obtains a name. *Johnson*, 584 F.3d at 1002 ("[T]here is a fundamental difference between merely using an alias . . . and using another's identity."). Providing an alias for a business contract may also be sufficient disqualifying conduct depending upon governing state law. *See id.* (holding so for rental of storage unit). This accords with this Court's analogy of a burglar in *Rakas*. 439 U.S. at 143 n.12. Just as one who is wrongfully present in a home cannot claim privacy, neither can one who wrongfully obtained a name. *See id.*

Second, frivolous claims of an alias cannot stand where it is obvious that the claimant is not the intended recipient. *See Peirce*, 959 F.2d at 1303 (quoting *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 704 (5th Cir.1991)) ("Standing 'is a personal right that cannot be asserted vicariously.'"). This is demonstrable where a package is addressed to another person who actually exists and that person receives it. *Id.*

Third, defendants that abandon or dissociate themselves from packages should lose their right to privacy. *See Peirce*, 959 F.2d at 1303; *Pitts*, 322 F.3d at 456. These are natural actions for one aiming to escape culpability. For example, the defendant in *Peirce* denied ownership of a

package during police investigation, stating it belonged to his co-defendant (to whom it was addressed). 959 F.2d at 1303. During trial, he stated his name was not "anywhere on that package." *Id.* The court noted the defendant's only admitted interest in the package was suppressing its evidentiary value against him. *Id.* This was an unprotected interest. *Id.* Relatedly, where a preponderance of evidence objectively shows mail is abandoned, the abandoning party relinquishes any property interest. *Pitts*, 322 F.3d at 456 (citing *United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000)). Defendants who refuse ownership or make it impossible to retrieve mail thus abandon privacy interests. *See id*. (evidence demonstrated defendant would need valid identification to retrieve mail since he falsified address).

Applying all of these reasonable carveouts, Fenty's privacy claim remains unscathed. First, she created Jocelyn Meyer as a pen name six years prior to opening the P.O. box. R. 4, 42-43. She thus rightfully possessed the name unlike the defendant in *Johnson*. *See* 584 F.3d at 1002. Second, she was the intended recipient of the Holistic Horse Care packages. She shipped them to herself. R. 55. Unlike in *Peirce*, no Jocelyn Meyer exists outside of Fenty. 959 F.2d at 1303. Third, from February 14, 2022, to now, Fenty has never disclaimed her alias or the packages to post office personnel or police. R. 33, 40, 43. Distinguishing both *Peirce* and *Pitts*, she maintained a property interest in the packages and never abandoned them. *See* 959 F.2d at 1303; 322 F.3d at 456. As she legally and appropriately opened the P.O. box under her alias, she could certainly retrieve her packages from it. R. 12, 43. And she did. R. 33. Fenty's privacy interest was reasonable.

Carveouts aside, expectations of privacy are not conditional on a defendant's criminal actions. The Fourth Amendment does not permit post-hoc rationalization of warrantless searches through the discovery of a crime. *Pitts*, 322 F.3d at 458-59; *United States v. Fields*, 113 F.3d

313, 321 (2d Cir. 1997). Protections in mail thus "do not depend on the nature of the defendant's activities" barring the aforementioned fraud exception. *Pitts*, 322 F.3d at 458; *see Johnson*, 584 F.3d at 1002. As such, there is no need to justify Fenty's actions, yet the record evinces her use of her alias as legitimate. She created her pen name to write. R. 43. She courted publishers with it. R. 5. She legally opened a P.O. box under it. R. 12. She received Amazon shipments of face cream to the P.O. box the same day the Holistic Horse Care packages came. R. 12, 38. Such extended use for legitimate reasons is a far cry from an alias integral to a "criminal scheme." *See Daniel*, 982 F.2d at 149.

Lastly, adopting the bright line test will not needlessly impede police investigations. Drug crimes are indeed increasing in Joralemon R. 28. But there is a "strong preference for searches conducted pursuant to a warrant." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). Police can obtain search warrants for mail addressed to an alias just like all other packages. And they did so in this case. R. 31. The use of an alias can actually make obtaining a search warrant easier. *See United States v. Van Leeuwen*, 397 U.S. 249, 252 (1970); *Pitts*, 322 F.3d at 459 n.1 (use of alias is relevant factor in police's totality of the circumstances assessment). Given this and all the tools at law enforcement's disposal, there is no justification for denying defendants the standing to challenge search warrants. Fenty and the rest of society deserve a presumption of privacy when using an alias to send to receive mail as doing so is objectively reasonable.

2. Fenty established a sufficient nexus to her alias to claim privacy rights.

Even if this Court adopts an alter ego requirement, Fenty meets this evidentiary burden. A defendant may claim privacy rights in an alias when it is established enough to function as an alter ego. *See Richards*, 638 F.2d at 770; *Villarreal*, 963 F.2d at 774. The alias and person essentially become the same entity. *See Daniel*, 982 F.2d at 149. Alter egos can include stage

names, pen names, and business entities. *See Pitts*, 322 F.3d at 460-61 (Evans, J., concurring); *Richards*, 638 F.2d at 770.

Due to the inherently subjective nature of determining a name's level of establishment, this Court should adopt a low-threshold evidentiary burden to find that a defendant was known by an alias. *Villarreal*, 963 F.2d at 774 (at least one person other than addressor knew defendant as alias). This would prevent giving privacy rights to only successful artists or authors. *See Pitts*, 322 F.3d at 458 (citing the extremely popular Ann Landers). Many never make it to this level but are still well-known with their cult fan base. Furthermore, for safety purposes, people using non-legal names may only be known make this known to small circles that they can trust. *See* Schoenbaum et al. (transgender people face harassment and violence when living openly). Presenting physical evidence like a column published under a pen name or testimonial evidence that others knew a person as their alias should suffice for privacy rights. *Pitts*, 322 F.3d at 458; *Villarreal*, 963 F.2d at 774.

Here, Fenty sufficiently established her identity as Jocelyn Meyer to gain privacy rights. Just like Ann Landers, she used her pen name to publicly publish short stories in college. R. 4, 33); *Pitts*, 322 F.3d at 458. She continued to use it professionally, contacting publishers as recently as October 2021. R. 5. Her pen name was also established in people's eyes. Her classmate, Sebastian Godsoe, remembered the alias and informed police that she went by it on February 15, 2022. R. 30, 32-33. Just like the defendant in *Villarreal*, a witness corroborated that she was known by the name. 963 F.2d at 774. Under the proposed test, this would be sufficient to find standing. But Fenty surpassed this threshold.

Fenty used her alias not only in a professional context, but in a personal one. She opened a Gmail account as Meyer. R. 5. This conveyed and established her alternate identity with a

corporate entity. But more importantly, she legally opened a P.O. box solely under her alias. R. 12, 30-31. This legitimately established her alias with a government entity. That she was even able to open the P.O. box implies that she sufficiently demonstrated a nexus between Meyer and herself. Fenty's long-term, pervasive use of her alias establishes it as a valid alter ego.

Summarily, this Court should adopt either of the aforementioned name-focused approaches instead of the other indicia test. This test creates a presumption that mail addressed to an alias is not entitled to an expectation of privacy. *See Stokes*, 829 F.3d at 52; *Rose*, 3 F.4th at 728. This irreparably vitiates Fourth Amendment rights, contradicts society's understanding of privacy, and needlessly victimizes citizens using aliases for legitimate purposes. To allow unjustified intrusions is an absurd result and contrary to Fourth Amendment's spirit. Adopting a name-focused approach like the majority of the federal circuits avoids this detrimental outcome.

B. Under the other indicia test, Fenty demonstrated a sufficient property interest in the packages to have a legitimate expectation of privacy.

Even if this Court adopts the other indicia test, the totality of the circumstances demonstrates Fenty's property interest in the packages. As such, her privacy interest in both was objectively reasonable. Relevant factors in determining a property interest include the rights to possess, control, and exclude and the defendant's "subjective anticipation of privacy." *See Stokes*, 829 F.3d at 53 (quoting *United States v. Aguirre*, 839 F.2d 854, 856-57 (1st Cir. 1988)). In the context of mail, courts consider the defendant's connection to the mailing address, access of others to the mailing address, the delivery receptable's nature, and any other information to determining the reasonableness of the privacy interest. *Id.*

While an "address alone" cannot create a reasonable expectation of privacy, Fenty's addressing of the packages to her P.O. box is strong evidence of her property interest. *Stokes*, 829 F.3d at 53; *Rose*, 3 F.4th at 729; R. 30-31). In *Stokes*, the court held the defendant's "blanket

assertion" that he had an interest in all mail coming to him was overbroad. 829 F.3d at 53. But here, Fenty had a direct interest in the Holistic Horse Care packages. She created a P.O. box explicitly for online purchases a month before their delivery. R. 43. She purchased the packages from Holistic Horse Care under the alias. R. 31. She shipped them to the proper mailing address. R. 30. Unlike the defendant in *Stokes*, she also expected these specific packages as she herself ordered them. *Stokes*, 829 F.3d at 53; R. 45. This strong subjective expectation of privacy is affirmed by Fenty calling Angela Millwood to inform her that the packages were not in the box. R. 39-40.

The nature of the P.O. box and Fenty's control of it is further evidence of Fenty's property interest in the packages. While she registered this box to her alias, she legally did so. R. 12. She also did so with an alias established for legitimate purposes. R. 5, 43. Unlike the defendants in *Rose* and *Pitts* who could not retrieve their packages from shipping facilities, Fenty identified herself as her alias to postal workers, successfully accessed her box, and picked up her mail. *See* 3 F.4th at 729; 322 F.3d at 456; R. 33. Fenty also was the sole owner of this P.O. box and could exclude all non-post office workers from it. *See* R. 31. This is unlike the defendant in *Stokes*, who gave no evidence of who had access to the house to which he addressed his mail or what delivery receptacles were present. 829 F.3d at 53. P.O. boxes are innately secure receptacles. No one besides Fenty and postal workers could access the packages. *See* R. 31.

Considering Fenty's anticipatory expectation of privacy in the Holistic Horse Care packages and indicia showing her property interest in the packages and P.O. box, her privacy expectation was reasonable. She should have standing to challenge the admission of the packages' contents.

II. Fenty's recorded voicemail statements are admissible pursuant to Federal Rule of Evidence 803(3) because each shows her then-existing distress, confusion, and fear.

As a broad category, hearsay statements are inadmissible under the Federal Rules of Evidence. *See* Fed. R. Evid. 802. However, Rule 803(3) of the Federal Rules of Evidence offers an exception for statements relating to the declarant's then-existing mental, emotional, sensory, or physical condition. Fed. R. Evid. 803(3). Federal courts have inferred additional requirements for admissibility under this rule. In those jurisdictions, admissibility depends on the statement being relevant, contemporaneous, and so spontaneous that there is no opportunity for reflection. *See United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). Here, Fenty's recorded voicemail statements are categorically admissible under the plain text of Rule 803(3), rendering the short time Fenty may have had to reflect on those statements inconsequential.

A. The plain text of Rule 803(3) demands that Fenty's recorded voicemail statements be admitted into evidence.

The text of Rule 803(3) establishes an admissible category of hearsay statements that relate to a then-existing condition. *See* Fed. R. Evid. 803(3). In contrast, this same unambiguous text also bans hearsay statements that relate to a fact remembered or believed. *See* Fed. R. Evid 803(3); *Shepard v. United States*, 290 U.S. 96, 104-06 (1933). This creates one category of future-facing statements that are admissible and another category of backward-facing statements that are inadmissible. *See United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977); *United States v. Di Maria*, 727 F.2d 265, 271 (2d Cir. 1984).

1. The recorded voicemail statements express Fenty's then-existing distress, confusion, and fear.

Fenty's recorded voicemail statements qualify for categorical admission under Rule 803(3) because both establish her then-existing emotional condition. This is like in *Partyka*,

where the court found a statement from the defendant's wife regarding her husband's then-existing mental state to be categorically admissible. 561 F.2d at 125. This portion of the wife's testimony was deemed admissible under Rule 803(3) as it did not advance statements of belief or fact. *Id.* Another example is *Di Maria*, where the Second Circuit deemed a defendant's statement admissible under Rule 803(3). 727 F.2d at 270-72. In this instance, the defendant stated he was looking for cheap cigarettes at the site of a truck filled with stolen goods. *Id.* at 270. The court held that this statement met the literal requirements for admission under Rule 803(3) because the defendant was articulating his present condition. *Id.* at 271; *see also United States v. Torres*, 901 F.2d 205, 240 (2d Cir. 1990) (excluding a categorically admissible statement is improper).

Likewise, Fenty's statements were keyed into her present emotion and included forward-looking sentiments sufficient for admission under Rule 803(3). R. 40; *see also United States v. Mohamud*, 666 F. App'x 591, 596 (9th Cir. 2016) (overturning trial court's exclusion of defendant's statements relating to his then-existing state of mind because statements met the plain text of Rule 803(3)). In these voicemails, Fenty stated "I'm getting worried that you dragged me into something I would never want to be a part of." R. 40. She then stated, "Angela, I'm really getting nervous. Why aren't you getting back to me?" and "I'm really starting to get concerned that you involved me in something I had no idea was going on." R. 40. These statements showcase Fenty's then-existing mental and emotional condition falling squarely into the admissible category established by Rule 803(3).

Furthermore, the category of hearsay banned by the plain text of Rule 803(3) does not encompass Fenty's recorded voicemail statements. For example, in *Shephard*, this Court excluded a statement made by the defendant's wife accusing him of poisoning her. 290 U.S. at 102. In excluding that statement, Justice Cardozo emphasized its backward-facing nature as the

statement "spoke to a past act, and more than that, to an act by someone not the speaker." *Id.* at 106; *see also United States v. Shah*, 84 F.4th 190, 235-36 (5th Cir. 2023) (excluding recorded statements without emotion was proper), *petition for cert. filed*.

Fenty's recorded voicemail statements differ from *Shepard*, where the wife's statement showcased her belief that her husband poisoned her. 290 U.S. at 106. Fenty's recorded voicemail statements include assertions that she "read that article that fentanyl is sometimes mixed with xylazine" and that she "thought the xylazine was just to help horses." R. 40. However, these did not constitute statements of belief nor of fact because each was offered to establish Fenty's then-existing confusion, fear, and overall mental condition. R. 50; *see also United States v. Green*, 680 F.2d 520, 523 (7th Cir. 1982) (affirming admittance of a victim's statement that the defendant was still "bothering her" because it reflected state of mind during the kidnapping, not her beliefs). During the phone calls, Fenty stood alone, scared, and confused in a post office hoping for clarity. R. 40. She sought to communicate her concerns to Angela Millwood, someone she thought to be trustworthy at the time, by leaving her two voicemails. R. 40, 57. Neither voicemail looks backward by establishing a belief or fact. Therefore, Fenty's recorded voicemail statements do not fit into the category of hearsay banned by the literal reading of Rule 803(3).

2. Advisory Committee Notes do not control the application Federal Rule of Evidence 803(3)

The Advisory Committee Notes to Federal Rule of Evidence 803(3) do not foreclose the admission of Fenty's recorded voicemail statements. Advisory Committee Notes are, at best, an interpretative tool and are not binding authority. *See Tome v. United States*, 513 U.S. 150, 168 (1995) (Scalia, J., concurring) (stating that Advisory Committee Notes represent "the thoughts of the body initiating the recommendations" but that these thoughts do not control the meaning of the Rule). An Advisory Committee Note to Rule 803(3) explains that it is a specialized

application of Rule 803(1) Fed. R. Evid. 803(3) advisory committee's note to 1975 amendment. For a hearsay statement to be admitted under Rule 803(1), a statement must describe something as it happens or immediately thereafter. *See* Fed. R. Evid. 803(1). However, Congress never incorporated this sentiment into the text of Rule 803(3) despite opportunities to do so in 1975, 1987, 1997, 2000, 2013, 2014, and 2017.

The proper interpretation of the Advisory Committee Note to Rule 803(3) is that it contextualizes one rule alongside the other; it does not impose additional requirements on the rule's application. As articulated by the court in *United States v. Harris*, 733 F.2d 994, 1004-05 (2d Cir. 1984), this Note does not broaden the scope of Rule 803(3). There the court found that the admissibility of a statement depends on the text of the rule, not the Advisory Committee Notes or other policy considerations. *See also Di Maria*, 727 F.2d at 272 (explaining that the Federal Rules of Evidence were purposefully drafted as a system of categorical exceptions); *United States v. Lea*, 131 Fed. App'x. 320, 321 (2d Cir. 2005) (finding statement made immediately before crime was admissible because it met the plain text requirements of Rule 803(3)). Here, the plain text of Rule 803(3) controls. Fenty's recorded voicemail statements satisfy the base requirements for admissibility.

B. Even if just under an hour passed between each voicemail, Fenty's recorded voicemail statements remain admissible under Rule 803(3) of the Federal Rules of Evidence.

Some federal circuits demand that hearsay statements admitted under Rule 803(3) be spontaneous in addition to the rule's textual requirements. These courts measure spontaneity by the time that elapses between the declarant's statement and the condition the statement seeks to convey. *See Ponticelli v. United States*, 622 F.2d 985, 991 (9th Cir. 1980); *United States v. DeBright*, 730 F.2d 1255, 1284 (9th Cir. 1983). However, the presence of exculpatory statements

and the statement's overall compliance with the textual requirements of Rule 803(3) can overcome a lack of spontaneity. *See United States v. Lawal*, 736 F.2d 5, 8-9 (2d Cir. 1984); *United States v. Peak*, 856 F.2d 825, 833-34 (7th Cir. 1988); *United States v. Giles*, 246 F.3d 966, 974 (7th Cir. 2001).

A lack of spontaneity or reliability is not a permissible reason to exclude a hearsay statement under the plain text of Rule 803(3). This was seen in *Lawal*, where the defendant's statements were admissible under Rule 803(3) despite his opportunity to prepare them for Customs agents during his international flight. 736 F.2d at 6. His statement to agents that he felt angry because he was found in possession of illegal narcotics was admissible because they related to his then-existing emotions. *Id.* at 9. This Court should rule similarly.

Here, Fenty arrived at the post office and left a voicemail for her former classmate, Millwood, upon realizing something was wrong. R. 43. She then waited 45 minutes before trying to reach Millwood again to no avail. R. 40. In *Lawal*, the court was not concerned with any potential for untruthfulness because that defendant's statement fell into the admissible category under Rule 803(3). 736 F.2d at 9. Likewise, Fenty's recorded voicemail statements fall into the same admissible category because Fenty indicated that her state-of-mind was both "concerned" and "nervous." R. 40; *see also Ponticelli*, 622 F.2d at 991 (explaining that an individual "presumably knows what his thoughts and emotions are at the time of his declarations"); *United States v. Cosentino*, 581 F. Supp. 600, 602 (E.D.N.Y. 1984) (finding a person's state-of-mind can be a "stream of consciousness").

This sentiment has been echoed in *Peak*, where the Seventh Circuit found that the defendant's statements fell into the admissible category of Rule 803(3) because each centered around emotions. 856 F.2d at 833. In this case, the court found that the defendant's comments to

a co-conspirator about a proposed drug scheme being "crazy" were admissible under Rule 803(3). *Id*. The court disposed of concerns that the defendant's statements were not trustworthy because reliability issues are insufficient to exclude a qualifying statement under Rule 803(3). *Id*. at 834; *see also DiMaria*, 727 F.2d at 271 ("False it may well have been but if it fell within Rule 803(3), as it clearly did, if the words of that Rule are read to mean what they say, its truth or falsity was for the jury to determine"). Holding instead that it was permissible to admit the statements to show the defendant may lack the requisite state of mind for conviction. *Id.* Analogous facts are at play here concerning Fenty's recorded voicemail statements as both express a then-existing state of mind that calls into question if she had the requisite state of mind. R. 40.; *see also* Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendant's Post-Crime State of Mind Hearsay*, 38 Seton Hall L. Rev. 975, 994 (2008) (excluding statements due to lack of spontaneity or reliability risks Rule 803(3) becoming a per se exclusion of all post-crime statements).

Moreover, it is improper to exclude statements relating to a defendant's state-of-mind when those statements may be exculpatory. This was in *Giles*, where the court determined that the defendant's recorded statement should have been admitted at trial. 246 F.3d at 974. While acknowledging that the defendant did have the opportunity to reflect beforehand the court emphasized that for close evidentiary questions it is best to err on the side of inclusion. *Id.* In *Giles*, a three-week gap between recorded statements was a "close evidentiary call" while the gap in this case is even closer at under an hour. *Id*. A mere forty-five minutes bridged the gap between each statement while Fenty was experiencing an ongoing stress. R. 40; *see also United States v. Hanna*, 353 Fed. App'x. 806, 809 (4th Cir. 2009) (admitting statements characterizing

state of mind as probative of general fear and distress). As such, the best practice for Fenty's recorded voicemail statements here is to err on the side of inclusion.

Furthermore, denying the jury the opportunity to hear exculpatory evidence erodes the presumption of innocence and impedes the overall adversarial process. *See also United States v. Naiden*, 424 F.3d 718, 726 (8th Cir. 2005) (Bye, J., concurring) (excluding the defendant's statements "reverses the presumption of innocence at trial to a presumption of guilt"). The purpose of the jury is to determine the validity of statements and the arguments presented alongside them. Exclusion of hearsay statements based on credibility is a dangerous and problematic policy. The jury must have access to as much information as possible to fairly weigh competing narratives. *See Old Chief v. United States*, 519 U.S. 172, 183 (1997) (emphasizing "narrative integrity" and "evidentiary richness" throughout the jury trial process).

Outside the jury, the precise drafters of the Federal Rules of Evidence created safeguards to resolve most reliability concerns. For example, a court may balance the weight of a statement's probative value against its potential prejudicial effect prior to admittance. Fed R. Evid. 403. Even after admitting such a statement, the court may instruct the jury on how to view it in order to have a balanced, adversarial process. Fed. R. Evid. 105. Exclusion of Fenty's recorded voicemail statements goes against the unambiguous text of Rule 803(3) and damages the integrity of the jury trial process. For the foregoing reasons, this Court should reverse the Fourteenth Circuit's decision and find Defendant's recorded voicemail statements admissible Federal Rule of Evidence Rule 803(3).

III. Neither a statutory analysis of Rule 609(a)(2) nor an investigation of the underlying facts demonstrates Fenty's prior conviction bears on her credibility as a witness.

Classifying a conviction for petit larceny as a truth crime like perjury is contrary to well-established principles of statutory interpretation and near-unanimous precedent among the

circuits. This Court should find evidence of Franny Fenty's prior conviction of petit larceny improperly admitted and reverse the decision of the court below. Federal Rule of Evidence 609(a)(2) eliminates judicial discretion in admitting evidence of "any crime regardless of the punishment . . . if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." It should thus be interpreted narrowly to exclude crimes that have no bearing on the defendant's veracity. Fed. R. Evid. 609(a)(2).

A. Reading Rule 609 (a)(2) narrowly in accordance with principles of statutory interpretation, bars admission of Fenty's prior conviction.

Courts use traditional tools of statutory interpretation, like a statute's language, legislative history, and structure, to determine its meaning. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). This Court held in *Beech Aircraft Corp. v. Rainey* that the Federal Rules of Evidence are a "legislative enactment" and should be construed using "traditional tools of statutory construction." 488 U.S. 153, 163 (1988). An application of each of these tools on Rule 609(a)(2) points in favor of a narrow reading that excludes evidence of Fenty's prior conviction.

This Court has applied the plain meaning standard to the Federal Rules of Evidence before, and it should do so again here. It should exclude the conviction of petit larceny, as its Boerum Penal Code definition is inconsistent with the language of Rule 609(a)(2). *See Bourjaily v. United States*, 483 U.S. 171, 178-79 (1987). This Court has consistently held that the plain meaning of a Rules of Evidence's language controls unless extrinsic evidence explicitly states an alternative meaning intended by Congress. *See Bourjaily*, 483 U.S. at 178-79; *Huddleston v. United States*, 485 U.S. 681, 687-88 (1988); *United States v. Owens*, 484 U.S. 554, 561-62 (1988); *see also* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 Tex. L. Rev. 745, 746 (1990).

Here, the Rule states that a court must admit "any crime regardless of the punishment . . . if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Fed. R. Evid. 609(a)(2) (emphasis added). Both the term "readily" and a clear requirement for a dishonest act, false statement, or admission of either to be considered a truth crime under Rule 609(a)(2) indicates this rule was meant to have a simple application vis-à-vis the statute governing the prior conviction. The Boreum Penal Code states in relevant part the following elements of petit larceny: "A person is guilty of petit larceny when that person knowingly . . . steals . . . or endeavors to . . . steal . . . any personal property of another with intent to . . . [a]ppropriate the property as his or her own . . . ." § 155.25 Petit Larceny; R. 3. None of the elements of petit larceny, the crime with which Fenty was convicted, remotely suggests she committed a "dishonest act." R. 19.

Notably, officers could have charged her with theft by deception which includes the following definition for deceit. Boerum Penal Code § 155.45 Theft by Deception. "A person deceives if he or she intentionally (a) [c]reates, reinforces, or leverages a false impression, (b) [p]revents [others] from acquiring material information that would impact [their] judgment, or (c) [f]ails to correct a false impression that the deceiver previously created, reinforced, or influenced." *Id.*; R. 3. A conviction under this statute would indisputably be admissible under Rule 609(a)(2). The element of deceit is a required element of the statute.

Courts have used legislative history specifically in cases where it is unclear whether the prior conviction falls under the umbrella of Rule 609(a)(2). *See United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977); *Virgin Islands v. Toto*, 529 F.2d 278, 282 (3d Cir. 1976); *United States v. Ashley*, 569 F.2d 975, 979 (5th Cir. 1978); *McHenry v. Chadwick*, 896 F.2d 184, 188 (6th Cir.

1990). Each of these cases cite the Conference Committee's record wherein they list crimes such as "perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." H.R. Rep. No. 93–1597, 93d Cong., 2d Sess. 9-10 (1974). The Third Circuit in *Toto* declared "[p]etit larceny is just not that." 529 F.2d at 282.

This Court should interpret Rule 609(a)(2) in harmony with its legislative history and reverse the decision of the Fourteenth Circuit to admit Fenty's prior conviction. The conviction does not fall under any of the crimes described by Congress, nor does it bear on her credibility as a witness. Fenty was nineteen when she committed this misdemeanor, stealing $27 and a few diapers that happened to be in the bag. R. 53-54. She served two years of community service and two years of probation. R. 54. She has never been convicted of another crime, let alone one that indicates she has a propensity to lie. *Id*.

The structure of Rule 609(a)(2) and its context within the broader statutory framework of the Federal Rules of Evidence further cements the exclusion of petit larceny as defined by § 155.25. In *United States v. Hayes*, the Second Circuit adjudicated whether a prior conviction for illicit narcotics was improperly admitted. 553 F.2d at 827. It held that while it was admissible under Rule 609(a)(1), it would not be under Rule 609(a)(2) because the Rule is "quite inflexible, allowing no leeway for consideration of mitigating circumstances." *Id*. Further, "it was inevitable that Congress would define narrowly the words 'dishonesty' or 'false statement,' which, taken at their broadest, involve activities that are part of nearly all crimes." *Id*.

Both Rules 609(a)(1) and 609(b), the rules immediately preceding and following Rule 609(a)(2), include Rule 403's balancing test or a modification thereof. Fed. R. Evid. 609. Since

Rule 609(a)(2) makes no such reference, it eliminates judicial discretion in determining whether the conviction may be admitted. It should thus be interpreted narrowly because of the underlying assumption that such crimes are probative of truthfulness. The D.C. Circuit also held that "evidence of a prior conviction for petit larceny may not be admitted" to attack a witness's credibility. *United States v. Fearwell,* 595 F.2d 771, 776-77 (D.C. Cir. 1978). Since courts "must" admit truth crimes, Rule 609(a)(2) imposes a "rigid standard" that "denote[s] a fairly narrow subset of criminal activity." *Id*. at 775-76. To meet this rigid standard, a prior conviction must involve "crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." *Id*. at 776.

In the instant case, the prosecution claims Fenty's prior conviction is admissible to impeach her testimony since the underlying actions bear on her credibility as a witness. R. 23-24. But the *Hayes* court determined "[i]f the title of an offense leaves room for doubt, a prosecutor desiring to take advantage of automatic admission of a conviction . . . must demonstrate . . . 'that a particular prior conviction rested on facts warranting the dishonesty or false statement description.'" 553 F.2d at 827. First, the title of petit larceny under the Boerum Penal Code does not leave room for doubt. None of its elements implicate Rule 609(a)(2). *See* Boerum Penal Code § 155.25 Petit Larceny; R. 3. Second, the prosecution failed to explain how the facts warrant such a designation, citing only to broad policy arguments instead of showing how Fenty's prior conviction impacts her credibility as a witness. R. 24. This Court should consider the structure of the Boerum Penal Code since its drafters distinguished the crime of petit larceny from theft by deception. The latter includes a definition for what counts as deceit, suggesting that convictions under the former should be per se inadmissible for impeachment purposes. Boerum Penal Code § 155.45 Theft by Deception; R. 3.

B. Fenty's prior conviction for petit larceny is not admissible under Rule 609(a)(2) because the circumstances of the crime do not suggest she has a propensity to lie.

The circumstances of Fenty's theft do not suggest a propensity to lie. Many of the circuit courts have permitted investigations into the factual circumstances surrounding a prior conviction to determine its admissibility under Rule 609(a)(2). The vast majority have found that crimes of theft, including petit larceny, do not automatically constitute truth crimes that bear upon a witness's propensity to lie. *United States v. Smith*, 551 F.2d 348, 365 (D.C. Cir. 1976); *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005); *Gov't of V.I. v. Testamark*, 528 F.2d 742, 743 (3d Cir. 1976); *United States v. Entrekin*, 624 F.2d 597, 598-99 (5th Cir. 1980); *Chadwick*, 896 F.2d at 188; *United States v. Papia*, 560 F.2d 827, 848 (7th Cir. 1977); *United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984); *United States v. Foster*, 227 F.3d 1096, 1100 (9th Cir. 2000); *United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978); *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990).

In *United States v. Estrada*, the Second Circuit analyzed a prior conviction and held that even when criminals behave elusively in an effort to avoid detection, this behavior does not fall within the ambit of Rule 609(a)(2). 430 F.3d at 614. Instead, the court designated it among "crimes of stealth," distinct from crimes that require false statements. *Id.* "While much successful crime involves some quantum of stealth, all such conduct does not, as a result, constitute [a] crime of dishonesty or false statement." *Id*. To qualify as a truth crime under Rule 609(a)(2), the conviction cannot just reflect a "lack of integrity or principles," it must be "dispositive of dishonesty" *Id*.

The prosecution claims Fenty's conviction involved an element of deceit, arguing she arrived at the shopping center with a plan to deceive her target. R. 22. However, Fenty testified that she did not have a plan and was dared by her friend at the time to commit the crime. R. 54.

This directly counters the narrative of her premeditated, deceptive plan. *Id.* Fenty does not deny that she tried to go unnoticed to steal the bag until the victim "quickly" noticed. R. 53. In her own words, it was "a really dumb mistake." *Id*. "I didn't want to do it at first but we were both really broke at the time." *Id*. This aligns much more closely with the definition for a crime of stealth than a crime of deceit as defined by the *Estrada* court. *See* 430 F.3d at 614. Categorizing crimes of stealth as crimes of deceit would result in an overbroad application of Rule 609(a)(2). This would allow unjustified impeachment of countless witnesses and deter them from providing invaluable testimony for a jury to consider during deliberations.

By contrast, the Second Circuit held that an additional element of dishonesty and false statement under a petit larceny conviction can bring the crime within the scope of Rule 609(a)(2). *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998). In *Payton*, the court found that the witness's larceny conviction qualified as a Rule 609(a)(2) crime since she unlawfully received food stamps after falsely stating in a sworn application that she qualified for welfare. *Id*. Petit larceny involving forgery has also served as an extenuating circumstance that brought a prior conviction under Rule 609(a)(2). *See Papia*, 560 F.2d at 848. The key distinction between the defendants in *Payton* and *Papia* and Fenty is that the former two affirmatively engaged in misrepresentation whereas Fenty threatened the victim with physical violence when confronted. 159 F.3d at 57; 560 F.2d at 848; R. 60. Fenty did not lie by claiming the bag as her own, nor deny that she stole it from the victim. R. 60. The facts underlying Fenty's prior conviction are more akin to the crime of shoplifting. Both require trying to take an item undetected in a shopping center, and shoplifting has been found not to be a Rule 609(a)(2) conviction. *See Entrekin*, 624 F.2d at 598-99; *see also Ashley*, 569 F.2d at 979 (shoplifting does not involve moral turpitude and dishonesty).

The First Circuit relied on a now-overturned decision from the D.C. Circuit in deciding *United States v. Brown*, where it held petit larceny has a bearing on honesty. 603 F.2d 1022, 1029 (1st Cir. 1979). But that case is distinguishable from the present by the criminal record of the defendants. In *Brown*, any argument of the defendant's character for truthfulness improving was negated by his recent criminal activity. *Id*. Here, Fenty differs significantly from *Brown*. In addition to not using deception in her petit larceny conviction, she had no criminal record until the conviction underlying this case. R. 54.

Finally, the jury instruction regarding Fenty's prior conviction was an ineffective solution. A juror cannot be expected to view a prior conviction with only one lens, ignoring its use for Fenty's propensity to lie. *See Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) ("'[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it."). And studies have shown limiting instructions may actually increase prejudice towards criminal defendants by inviting a criminal propensity inference. R. 22. The limiting instruction did not remedy the damage to Fenty.

In closing we ask this Court to recognize that permitting evidence of Fenty's prior conviction for impeachment purposes was in error. Adopting a rule allowing as such would depart from established precedent in nine of the twelve circuit courts. It would also unnecessarily expand the scope of the rule to include, in Fenty's own words, "a stupid teenage mistake." R. 53. The Fourteenth Circuit should be overruled.

CONCLUSION

For the foregoing reasons, Franny Fenty respectfully submits that the opinion of the Fourteenth Circuit Court of Appeals should be overturned and she should be granted a new trial.