No. 23–695

IN THE

Supreme Court of the United States

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Team 36P
Counsel for Petitioner

QUESTIONS PRESENTED

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

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

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

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The United States Court of Appeals for the Fourteenth Circuit issued its opinion on June 15, 2023, affirming the decision of the District Court. The opinion is reported at *Franny Fenty v. United States of America*, No. 22–5071 and appears in the Record at pages 64-73.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution, Federal Rule of Evidence 803(3) and 609(a)(2). The Fourth Amendment provides:

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

U.S. Const. amend. IV.

The Federal Rule of Evidence 803(3) provides:

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

Federal Rule of Evidence 803(3).

This Federal Rule of Evidence 609(a)(2) provides in relevant part:

> (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> (1) [...]
>
> (2) for any crime regardless of the punishment, the evidence must be admitted 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.

Federal Rule of Evidence 609(a)(2).

INTRODUCTION

Petitioner, FRANNY FENTY, in the matter of *Franny Fenty v. United States of America*, No. 22–5071 before the Fourteenth Circuit of The United States Court of Appeals, respectfully requests this Court to reverse the Fourteenth Circuit's decision.

STATEMENT OF THE CASE

A. Statement of Facts

Ms. Fenty is a twenty-five-year-old aspiring writer who has fallen victim to the deceitful crime of another, and as a result, has been wrongfully stripped of her constitutional rights. On December 28, 2021, Ms. Fenty posted a LinkedIn message, as Franny Fenty, publicly inquiring about new job opportunities. (R. at 6.) As an experienced writer, she was primarily interested in writing opportunities; yet was not opposed to other fields considering her experience with food, kids, and animals. (R. at 6.) In response to her post the same day, Ms. Fenty received a message from Angela Millwood, whose occupational description read "Horse Handler at Glitzy Gallop Stables." (R. at 6.) Millwood advised Ms. Fenty that she "can help out with that." (R. at 6.) Millwood was Ms. Fenty's high school classmate some years ago. (R. at 43.) Subsequently, Ms. Fenty and Millwood exchanged numbers and began to correspond with one another. (R. at 44.) The two bonded over their career and financial struggles. (R. at 44.). Millwood informed Ms. Fenty that she worked as a horse handler. (R. at 44.) Millwood further illustrated to Ms. Fenty her profound love and dedication to caring for horses and how it "broke her heart" to witness the horses suffer in pain as they grew older. (R. at 44.) Millwood confided in Ms. Fenty her desire to help the horses with their pain by administering a muscle relaxer known as "xylazine." (R. at 44.) Millwood's passion for these horses touched Ms. Fenty such that she felt compelled to support Millwood's cause. (R. at 45.) Millwood elicited Ms. Fenty's help by asking her to obtain

xylazine, as she could not obtain the drug herself due to her job at the stable. (R. at 45.) Although Ms. Fenty was not familiar with the drug and had never ordered xylazine before, she agreed to help Millwood out in her alleged endeavor. (R. at 45.) Subsequently, Ms. Fenty ordered the xylazine from Holistic Horse Care and had it shipped to her P.O. Box. (R. 46)

On January 31, 2022, Ms. Fenty registered a P.O. Box under her writer's alias "Jocelyn Meyer," to receive her online orders. (R. at 43.) Ms. Fenty has frequently used this alias in her writing pursuits, commencing in college when she published short stories under the alias "Jocelyn Meyer." (R. at 43.) More recently, in October of 2021, Ms. Fenty sent her potential novel to publishers using the alias "Jocelyn Meyer," via email "jocelynmeyer@gmail.com." (R. at 42.) Ms. Fenty's continued use of her alias "Jocelyn Meyer," is attributed to her desire to maintain her privacy. (R. at 43.)

Xylazine is a muscle relaxant commonly administered to horses. (R. at 9.) However, commencing in 2021, xylazine began being used as a recreational street drug in combination with the fatal drug, fentanyl. (R. at 9.) In 2022, the city of Joralemon began seeing a spike in overdoses from fentanyl-laced xylazine. (R. at 9.) In a local Joralemon article written on February 8, 2022, a DEA official commented on local law enforcement's intent to "crack down" by "whatever" means "it takes to stop" the drug's distribution. (R. at 9.) In their efforts, law enforcement used the city's postal office, which was commonly used in Joralemon as a means to send and receive drugs to monitor suspicious packages that may contain fentanyl-laced xylazine. (R. at 30.) Thus, law enforcement instructed postal workers to flag suspicious, oddly shaped, or large packages, sent from horse veterinarian website "Holistic Horse Care." (R. at 29.)

On February 14, 2022, a postal worker flagged two packages sent from Holistic Horse Care and subsequently notified the authorities. (R. at 30.) DEA Agent Raghavan and Agent

Harper Jim arrived to collect the packages. (R. at 30.) The two packages were addressed to "Jocelyn Meyer," and were being shipped to a P.O. Box registered under the same name (R. at 30-31.) Also being shipped to the same P.O. Box were two Amazon packages addressed to "Franny Fenty." Absent any additional inquiry into the owner of the P.O. Box and the inconsistently addressed packages, Agent Raghavan obtained a search warrant for the sealed packages addressed to "Jocelyn Meyer." (R. at 31.) After finding each package contained a bottle labeled "Xylazine: For The Horses," Agent Raghavan proceeded to test the contents of the bottle, which ended up containing both xylazine and fentanyl. (R. at 31.) The following morning, Agent Raghavan proceeded to reseal the contents of the packages and arranged for a controlled delivery. (R. at 32.) Shortly thereafter, Ms. Fenty arrived and unlocked the P.O. Box to collect both her Amazon packages and the two packages from Holistic Horse Care, wherein she was prompted to claim the packages as her own at the counter. (R. at 32.) Following the collection and upon further inquiry through an associate of Ms. Fenty, and an online search into the relationship between Ms. Fenty and "Jocelyn Meyer," local authorities later arrested Ms. Fenty. (R. at 34.)

During Ms. Fenty's trial proceedings on September 14, 2022, the Government objected to Ms. Fenty's direct testimony as to her voicemail recordings left to Millwood on February 14, 2022. (R. at 47.) The voicemail recordings were to be used in establishing Ms. Fenty's then-existing mental state under Federal Rule of Evidence 803(3) (hereinafter FRE 803(3)). (R. at 47.) After holding an evidentiary proceeding the district court sustained the Government's objection, finding the admission of the voicemail recordings to constitute hearsay. (R. at 52.) The two voicemail recordings in issue were made by Ms. Fenty on February 14, 2022, to Millwood. (R. at 40.) The first voicemail recording was made at 1:32 p.m. wherein Ms. Fenty

notified Millwood, contemporaneously to her arrival at the post office, that the packages she had ordered were missing. (R. at 40.) Ms. Fenty then proceeded to inquire as to the circumstances surrounding the packages' absence. (R. at 40.) She further comments on her mental state by saying, "I'm getting worried that you dragged me into something I would never want to be a part of." (R. at 40.) The second voicemail recording to Millwood was made shortly after Ms. Fenty spoke to the postal workers, at 2:17 p.m. (R. at 40.) There, Ms. Fenty continues to inform Millwood as to her present mental state by saying, "I'm really getting nervous . . . I thought the xylazine was just to help horses . . . I'm really starting to get concerned that you involved me in something I had no idea was going on." (R. at 40.)

On August 25, 2022, on motion to the court, Ms. Fenty brought forth a motion in limine to exclude evidence of her prior conviction for petit larceny used to impeach her current testimony. (R. at 19.) The court denied the motion on the ground that the prior conviction was admissible according to Federal Rule of Evidence 609(a)(2) (hereinafter FRE 609(a)(2)) as a misdemeanor involving a dishonest act. (R. at 26.) The court was compelled to believe Ms. Fenty committed a calculated act and aimed to capitalize on the victim's distraction. (R. at 26.)

Approximately six years prior to her indictment, Ms. Fenty at the age of 19 stole a bag containing diapers and $27 in cash. (R. at 19.) She was subsequently charged with petit larceny under Boerum Penal Code §155.25. (R. at 19.) Defense counsel argued under the statute that the petit larceny conviction required only showing that Ms. Fenty took another's property and intended to use it as her own. (R. at 20.) The conviction was based solely on the finding of Boerum Penal Code § 155.25 Petit Larceny, rather than Boerum Penal Code § 155.45 Theft by Deception. The finders of fact were neither required to rely on nor establish that Ms. Fenty committed a dishonest act or made a false statement. (R. at 20.)

Ms. Fenty during jury trial proceedings testified as to her recollection of the events that transpired when she was 19 years old. (R. at 53.) On August 4, 2016, Ms. Fenty made a rash and immature decision to follow through with a dare made by a close friend of hers to steal a woman's bag. Ms. Fenty, in dire financial crisis, was desperate for quick cash. (R. at 53.) Ms. Fenty truthfully testified that she was not sneaky when attempting to take the bag because the woman immediately noticed her and grabbed it back from her. (R. at 53.) Ms. Fenty also explained that she did not have a set plan going into this, as the dare was made on impulse, having no time to think through a deceptive plan. (R. at 54.) During the commission of the crime, Ms. Fenty walked up to the victim, while she was turned away watching a street performer, and grabbed the bag. (R. at 59-60.) The victim then turned around and tried to grab it back from her yelling, wherein Ms. Fenty then threatened her and was able to forcibly take possession of the bag. (R. at 59-60.) Ms. Fenty shoved the woman and began to run but was shortly reprimanded by police officers. (R. at 60.)

B. Procedural Posture

This case arises on appeal from the United States Court of Appeals for the Fourteenth Circuit. The United States District Court of Boerum in a grand jury trial found Ms. Franny Fenty in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(vi), for knowingly and intentionally possessing with intent to distribute 400 grams or more a drug known as fentanyl, a Schedule II controlled substance. (R. at 1.) It was subsequently set that upon conviction of the offense to Title 21, Defendant Franny Fenty shall forfeit to the United States pursuant to Title 21 United States Code, Section 853 any property derived from her charged criminal activity. (R. at 1-2.)

The District Court on August 25, 2022, heard two pretrial motions to suppress: (1) Ms. Fenty's motion to suppress the contents of her sealed packages, and (2) Ms Fenty's motion to exclude evidence of her prior conviction for petit larceny. (R. at 10, 18.) Both motions were denied. (R. at 17, 26.) The court denied the first motion based on evidence presented by both parties finding that Ms. Fenty had no reasonable expectation of privacy in the sealed packages nor any privacy interest in the P.O. Box. (R. at 17.) The court also denied the second motion on grounds that FRE 609(a)(2) permits a misdemeanor conviction for crimes involving dishonest acts or false statements. (R. at 26.)

At trial, the Government attempted to exclude the Defendant's prior voicemail recordings on February 14, 2022, to Millwood on the grounds that both statements were hearsay and did not fall under the exception of the declarant's then-existing state of mind under FRE 803(3). (R. at 47.) The government objected based on there being a lack of spontaneity in their making, providing ample time for their fabrication. (R. at 50-52.) The court sustained the Government's objection, and both voicemails were subsequently excluded at trial. (R. at 52.) The jury convicted Ms. Fenty of one count of possession with intent to distribute and sentenced her to 10 years in federal prison. (R. at 1.)

Ms. Fenty appealed her conviction challenging the three findings above. (R. at 65.) The Fourteenth Circuit affirmed all three preceding rulings in favor of the Government. (R. at 70.) This Court granted certiorari on the issues of: (1) the Defendant's motion to suppress based on the Fourth Amendment, (2) the Defendant's motion in limine to exclude her prior misdemeanor conviction based on FRE 609(a)(2), and (3) the Government's pretrial hearsay objection regarding FRE 803(3). (R. at 74.)

SUMMARY OF THE ARGUMENT

The Government's search of Ms. Fenty's sealed packages violated her rights under the Fourth Amendment. Ms. Fenty maintained a reasonable expectation of privacy in the contents of the sealed packages addressed to her commonly used alias "Jocelyn Meyer." First, Ms. Fenty's use of an alias demonstrates her subjective expectation of privacy in her online orders. Second, common law has long recognized a reasonable expectation of privacy in sealed packages in light of some indicia of association between the individual and the object to be searched. Finally, Ms. Fenty's use of her previously known alias does not absolve her privacy interest in question because Ms. Fenty is essentially the "alter ego" of her alias "Jocelyn Meyer." Therefore, in light of Ms. Fenty's ability to provide substantial evidence as to her undisputed association with her alias, "Jocelyn Meyer," this Court should reverse the circuit court's decision, and preserve the integrity and protections of the Fourth Amendment.

Both voicemails made by Ms. Fenty on February 14, 2022, upon arriving at the post office and realizing her packages had been missing, were improperly excluded from evidence at trial and may not be deemed harmless error. FRE 803(3) permits a party to admit an out-of-court hearsay statement where the statement demonstrates the declarant's then-existing state of mind. The Government improperly reads a spontaneity requirement into FRE 803(3) and conflates it with Federal Rule of Evidence 803(1) (hereinafter FRE 803(1)). Both statements made by Ms. Fenty show continuity in transpiring the event of her missing packages and her then-existing emotional state of mind. Both voicemails indicate that Ms. Fenty remained under continuing shock, confusion, and worry, while at the Post Office, and upon Millwood failing to answer the phone. The statements were thus improperly excluded and had a material effect on Ms. Fenty's ability to bring any defense.

Ms. Fenty's prior misdemeanor conviction for petit larceny is not a per se crimen falsi crime and the trial court improperly admitted the conviction under FRE 609(a)(2). The Government failed to demonstrate that the prior conviction by its elements required proving a dishonest act or false statement. The Government also failed to offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty, or a false statement in order for the witness to have been convicted. Under either theory, the Government has failed to prove the conviction for petit larceny determinative of Ms. Fenty's character for truthfulness. No facts indicate that Ms. Fenty acted in accord with a crime because she simply saw an opportunity to grab a woman's bag while she was turned away and ran. The underlying charge of petit larceny was a crime of stealth rather than deceit and is inadmissible under FRE 609(a)(2).

ARGUMENT

I. DEFENDANT HAS A REASONABLE EXPECTATION OF PRIVACY, UNDER THE FOURTH AMENDMENT, IN A SEALED PACKAGE ADDRESSED TO DEFENDANT'S PREVIOUSLY USED ALIAS.

The Fourth Amendment has historically protected "[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. Following the precedent case of *Katz v. United States*, this Court has long recognized the application of the Fourth Amendment in its protection of the person, rather than place(s) or item(s) from unreasonable searches and seizures by the government. *Katz v. United States*, 389 U.S. 347, 353 (1967). This Court has established that an individual's expectation of privacy emerges from an individual's subjective expectation to privacy. *Id.* at 361. This subjective expectation to privacy must then be measured against an objective understanding that such expectation is reasonable. *Id*.

A. Ms. Fenty Must Have A Reasonable Expectation Of Privacy In The P.O. Box And The Contents Of The Sealed Packages From "Holistic Horse Care;" In Order To Meet The Requisite Standing To Challenge The Admissibility Of Evidence On Fourth Amendment Grounds.

The Fourth Amendment extends its protection to, "only individuals who actually enjoy the reasonable expectation of privacy," and as such only those who maintain a reasonable expectation of privacy "have standing to challenge the validity of a government search." *Rakas v. Illinois*, 439 U.S. 128, 133-134 (1978). *United States v. Stokes* qualified that under the "standing" doctrine, "the defendant carries the burden of making a threshold showing that he has 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). Only then can a defendant "challenge the admissibility of evidence on fourth amendment grounds." *Id*; see also *United States v. Gomez*, 770 F.2d 251, 253 (1st Cir. 1985). The standing inquiry is predicated on "the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case," which requires a look into "the totality of the surrounding circumstances." *Id.* at 52. Considering the very issue brought before this Court is whether Ms. Fenty possessed a reasonable expectation of privacy in the packages searched, this Court should find Ms. Fenty maintained a reasonable expectation of privacy, and thus has standing to challenge the validity of the Government's search.

B. The Fourteenth Circuit Court Of Appeals Erred In Denying That Ms. Fenty Maintains A Reasonable Expectation Of Privacy In Both The P.O. Box And The Contents Of The Sealed Packages From "Holistic Horse Care."

The Fourteenth Circuit found Ms. Fenty may not possess a reasonable expectation of privacy in mailed packages which were neither sent by nor addressed to her. However, the circuit court fails to recognize that even in the absence of being the addressor or addressee of sealed mail, courts have found that a reasonable expectation of privacy can be substantiated by other

indicia of association. Courts have generally understood the following factors "as relevant," in finding a reasonable privacy interest; "ownership, possession and/or control, historical use of property searched, ability to regulate access. . . ." *Id.* at 52. Provided the defendant can demonstrate both a subjective and objectively reasonable expectation of privacy, the defendant shall be afforded protection under the Fourth Amendment. *Stokes* at 52.

1. *Ms. Fenty had a subjective expectation of privacy in both the P.O. Box and the sealed packages searched.*

Courts have opined that the inquiry into a defendant's subjective expectation of privacy is largely factual. *Katz* at 351. The determination of a Defendant's intent to create a privacy interest is generally understood from his/her surrounding conduct. In *Katz*, this Court held that by "shutting the door" of an otherwise public telephone booth, and "utter[ing] into the mouthpiece," Defendant intended to exclude "the uninvited ear." *Id.* at 352. This Court ultimately held that this constituted sufficient conduct by the Defendant to create a privacy interest in his telephone conversation held within the booth. *Id.* at 358.

Similarly, Ms. Fenty's conduct leads to an undoubted determination that she maintained an expectation of privacy in both her P.O. Box and the sealed packages. During her direct examination, Ms. Fenty testified that her use of alias "Jocelyn Meyer" was to protect her privacy interests, as her "work is very personal." This desire to maintain her privacy was what prompted her to use the alias in the registration of her P.O. Box, which she opened to receive her online orders. Ms. Fenty intended to use the P.O. Box to receive all online orders, even those which happen to be addressed to her actual name, Franny Fenty. The use of a "public" postal service, as highlighted in *Katz*, does not presume that Ms. Fenty intended to absolve any privacy interest in her online orders. Alternatively, if Ms. Fenty actually desired to maintain her online orders as "public" affairs, she would not have bothered to register for a P.O. Box at the postal office. She

could have simply shipped the packages, addressed to the general postal office. By shipping the packages to the P.O. Box, Ms. Fenty "shuts the door" to exclude others from an uninvited chance of interference. In fact, in light of the various living arrangements invited by modern society, maintaining a P.O. Box for the purposes of receiving one's mail may arguably be safer and more private, than to receive it at one's place of residence. Therefore, by registering a P.O. Box and shipping packages there, Ms. Fenty's intention to preserve her expectation of privacy in her online orders can be inferred.

2. *Ms. Fenty had an objectively reasonable expectation of privacy in the P.O. Box and the contents of the sealed package.*

In *United States v. Van Leeuwen,* this Court expressly held that "[l]etters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). In *Stokes*, the circuit court also articulated that "letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy." *United States v. Stokes*, 829 F.3d 47, 51-52 (1st Cir. 2016); see *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (holding that a parcel shipped through a private freight carrier was "unquestionably an 'effect' within the meaning of the Fourth Amendment").

In *Stokes*, the court inquired into whether Defendant possessed a reasonable expectation of privacy in a P.O. Box and mailed envelopes, which were neither sent by, nor addressed to the Defendant. *Stokes* at 50. Although the court did note that courts are "reluctant" to find a reasonable privacy interest in mail where the defendant is neither the sender nor intended recipient, lack of such evidence is not determinative in the court's inquiry. *Id.* at 52. The only evidence presented by Defendant in his connection to the P.O. Box and mailed envelopes were a

key to the box and the envelopes bearing his "personal addresses." *Id.* at 52-53. To determine whether Defendant maintained a reasonable expectation of privacy in the P.O. Box, the court outlined some factors which tend either to support or disprove the presence of such expectation; "such as the layout of the mailroom and mailboxes, the procedures for mail delivery and storage, and the agreement between commercial mail receiving agencies and their clients as to third party access of the mailboxes." *Id.* at 52. Additionally, the court was inclined to consider, as evidence of Defendant's privacy interest, the fact that Defendant possessed a key to the P.O. Box, demonstrating "his exclusive access to the box." *Id.* Similarly, the court was inclined to consider the fact that the mailed envelopes bore Defendant's "personal addresses." *Id.* at 53. However, the court ultimately declined to find Defendant maintained a privacy interest in either because he failed to present evidence of his connection to either P.O. Box or envelopes, and "without more," the Court could not reasonably infer any privacy interests. *Id.* at 52-53.

In *United States v. Koenig*, the court again denied finding Defendant possessed a privacy interest in a searched package, of which Defendant was "neither the sender nor the addressee". *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988). However, the court declined to find a privacy interest not because Defendant was neither the sender nor the addressee, but because Defendant failed "to point to any other source of a personal privacy interest," in the package. *Id.* In fact, the court explained that "a wife, for example, might have a privacy interest in an envelope containing a life insurance policy covering both husband and wife that was sent . . . addressed to the husband." *Id.* Interestingly, the court found that Defendant's "only interest in suppressing the package and its contents is to avoid its evidentiary force against him," which is an interest "plainly not protected by the Fourth Amendment." *Id.*

Similarly, in *United States v. Pierce*, the circuit court denied Defendant's contended privacy interest in the contents of the package, because "before and during trial, Pierce continually attempted to disassociate himself from the package." *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992). In fact, "at no point . . . has Pierce [the Defendant] ever attempt to establish, much less prove, any privacy interest in the package." *Id*.

Contrary to the above referenced cases; here, Ms. Fenty has not sought to dissociate with her alias "Jocelyn Meyer." Although the Government contends that Ms. Fenty's whole purpose in using the alias is to conceal her identity and thus her connection to the narcotics, such contention is unsubstantiated by the surrounding circumstances. If Ms. Fenty's intention was to dissociate from "Jocelyn Meyer," and absolve herself of any connection to the drugs, why would Ms. Fenty then ship other packages, addressed to her actual name, Franny Fenty, to the same P.O. Box as the packages containing the drugs. Furthermore, when Ms. Fenty arrived at the postal office to retrieve the packages, she was asked to affirmatively identify herself as the owner of the packages, to which Ms. Fenty replied "yeah, they're mine." Additionally, in retrieving the packages from the postal office, Ms. Fenty presumably possessed a key to the P.O. Box when she "unlocked" it. Therefore, pursuant to the factor's outlined in *Stokes*, Ms. Fenty demonstrated, contrary to the Defendant in *Stokes*, her "exclusive access to the box," and thus something "more" to indicate the relationship between Ms. Fenty and the objects searched, resulting in her reasonable privacy interest.

Furthermore, the Fourteenth Circuit, in citing *United States v. Givens,* declined to recognize any ownership interest that a defendant may have in the contents of the package itself. In *Givens*, the court declined to find a privacy interest in "C," "when A sends a package to B, the contents of which are ultimately intended for C." *United States v. Givens*, 733 F.2d 339, 342 (4th

Cir. 1984). However, in their analysis, the court pointed out that "[e]ven 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." *Id*. Analogizing the situation to the claim of privacy in the trunk of another's car, the court noted "the right to exclude others affords a significant indicator of whether one has a legitimate expectation of privacy in an area." *Id*. Here, unlike in *Givens*, Ms. Fenty has a greater ownership interest in the contents of the sealed package as it is presumed that she herself placed the order and paid for the contents of the package. Further, Ms. Fenty strengthens her privacy interest by maintaining a possessory interest over the actual package, as she possessed exclusive access to the package. Unlike in *Givens*, where the addressee of the searched package was a different person from the defendant asserting the privacy interest, here Ms. Fenty is the addressee of the package by way of her alias and is also the one rightfully asserting a privacy interest.

C. By Using An Alias, Ms. Fenty Did Not Forfeit A Reasonable Expectation Of Privacy In Either The P.O. Box Or The Contents Of The Sealed Package, But Further Evidences Ms. Fenty's Reasonable Expectation Of Privacy In Both The P.O. Box And The Sealed Packages.

Although courts have been hesitant in finding that a defendant holds a reasonable privacy interest in mail where he is neither the sender nor recipient," this reluctance is predominantly due to an absence, by the Defendants, in showing some additional connection between them and the searched mail in issue. *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992). Moreover, the Court in *Stokes* expressly declined to make a determinative finding as to "whether a defendant ever could have a reasonable expectation of privacy interest in mail where he is not listed as addressee or addressor." *Id.* Which lends itself to the understanding that given appropriate circumstances, the Fourth Amendment does not exclude from its protection an individual's reasonable expectation to privacy in the use of an alias or pseudonym.

In *United States v. Givens*, the circuit court inquired into whether Defendant possessed a privacy interest in a searched package addressed to a third party. *United States v. Givens*, 733 F. 2d 339, 341 (4th Cir. 1984). Within their consideration of potential ways a Defendant may raise a privacy interest in mail, the court included, "a privacy interest in the contents of a package addressed . . . to some entity, real or fictitious, which is their *alter ego.*" *Id.*

In *United States v. Daniel*, the circuit court affirmed the decision of the district court, finding Defendant did not possess a "legitimate expectation of privacy." *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993). At trial, Defendant's "theory of defense was that Ricky Lynn Daniel [the Defendant] and Lynn Neal [addressee and alias] were different persons." *Id.* As such, the court found Defendant lacked standing to challenge the search of a package addressed to someone other than the Defendant. *Id.* Alternatively, the court considered the Government's contention that "Lynn Neal" was Defendant's alias as a basis to establish Defendant's standing. *Id.* However, the court ultimately declined to accept Defendant's standing on the basis of his alias, "particularly when the use of that alias was obviously part of his criminal scheme," as opposed to one of "public use" such that the defendant and the alias are essentially the same person. *Id.*

Ms. Fenty's use of her alias "Jocelyn Meyer" in the registration of the P.O. Box and the addressment of the mailed packages infers no criminal intention by Ms. Fenty. Unlike *Daniel*, Ms. Fenty did not create an alias for the sole purpose of executing some criminal scheme. Ms. Fenty's alias has commonly been used in writing pursuits. She used the alias "Jocelyn Meyer" when she wrote for her college's journal and continues to use the alias today in both her professional career and day-to-day life. Ms. Fenty even maintains an email address using her alias, "jocelynmeyer@gmail.com" to send her novel to potential publishers. Aside from her own

substantial use of the alias, there is further public awareness of the relationship between Ms. Fenty and the alias "Jocelyn Meyer." When asked about the relationship between "Jocelyn Meyer" and Ms. Fenty, those acquainted with Ms. Fenty from college are aware of her use of the alias "Jocelyn Meyer." Furthermore, the Government itself concedes the public's ability to access information pertaining to the relationship between Ms. Fenty and "Jocelyn Meyer." Agent Raghavan himself testified that they conducted a preliminary "search online" of "Jocelyn Meyer" and were able to confirm her real name as Franny Fenty. Therefore, there is no indication that Ms. Fenty actively intended to conceal her connection to the alias "Jocelyn Meyer." In fact, contrary to the Government's contention Ms. Fenty's alias is essentially her "alter ego" such that they are essentially the same person.

Therefore, her use of an alias in the registration of the P.O. Box and addressment of the packages searched does not diminish her privacy interest, as Ms. Fenty is in essence "Jocelyn Meyer," and accordingly should be extended the protections of the Fourth Amendment.

II. THE FOURTEENTH CIRCUIT IMPROPERLY EXCLUDED BOTH VOICEMAIL RECORDINGS LEFT BY MS. FENTY; DEEMING THEM TO HAVE LACKED SPONTANEITY BECAUSE THE STATEMENTS WERE MADE CONTEMPORANEOUSLY WITH MS. FENTY'S ONGOING STRESS AND CONFUSION FURTHER PROVING THE STATEMENTS REFLECTED HER PRESENT THEN-EXISTING STATE OF MIND.

The Fourteenth Circuit declined to admit into evidence, under FRE 803(3) two voicemail recordings made by Ms. Fenty. The voicemail recordings, offered as evidence of Ms. Fenty's then-existing state of mind, were rejected for their lack of "spontaneity" and "chance for reflection." However, the circuit court erred in its interpretation of FRE 803(3) to the extent that it does not require the statement to be "spontaneously" made, but rather requires that the statement have been made such that it does not allow the declarant a "chance to reflect," which Ms. Fenty did not in the making of the voicemail recordings.

A. Federal Rule of Evidence 803(3) Does Not Require The Declarant's Out-Of-Court Statement To Be Spontaneously Made.

The purpose of FRE 803(3) is to provide an exception to the general hearsay rule allowing a party to introduce an out-of-court statement as evidence to depict an individual's "then-existing state of mind." In particular, it exempts from the general scheme of 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)" Fed. R. Evid. 803(3). However, FRE 803(3) expressly excludes from the exception "statement(s) of memory or belief to prove the fact remembered or believed." The advisory committee's note on FRE 803(3) states that the rule "is essentially a specialized application of Exception (1), presented separately to enhance its usefulness and accessibility." The exclusion within FRE 803(3) in conjunction with the advisory committee note has prompted some courts to misinterpret FRE 803(3) as requiring a spontaneity component. The rationale behind the inclusion of an alleged spontaneity component is to avoid the possibility of admitting into evidence self-serving statements made by the declarant. This is the same rationale brought forth by the Government's objection to the admittance of the voicemail recordings. However, contrary to the Government's contention, FRE 803(3) lacks any express requirement that out-of-court statements brought in be "spontaneously" made. If FRE 803(3) did require there be a "spontaneity" requirement between the declarant's statement and the event or condition which gives rise to the declarant's present state of mind, there would be no need for FRE 803(3) as the statement would qualify as an exception under FRE 803(1).

In *United States v. DiMaria*, the circuit court reversed the trial court's decision in denying the admission of the defendant's out-of-court statement. *United States v. DiMaria*, 727 F.2d 265, 272 (2d Cir. 1984). Defendant was convicted of possession and conspiracy. *Id.* at 267.

On appeal, Defendant challenged the trial court's exclusion of the Defendant's out-of-court statement. Defendant argued that his statement properly qualified as a hearsay exception under FRE 803(3). The court, in rejecting the Government's argument, explained that "[t]he advisory committee's notes explain that the exception to the exception was 'necessary to avoid the virtual destruction of the hearsay rule which could otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.'" *Id.* at 270-271. However, the court determined that the "truth or falsity" of out-of-court statements brought in under FRE 803(3) "was for the jury to determine." *Id.* at 271. Although, the court did find it permissible that statements of existing state of mind be excluded if "the circumstances indicate plainly a motive to deceive." *Id.* at 271. Nonetheless, the court maintained that to sustain "the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proved guilty . . . would be inconsistent with the presumption of innocence." *Id.* at 271.

In *United States v. Ponticelli*, the circuit court outlined three factors to be evaluated in order to determine the admissibility of out-of-court statements under FRE 803(3). *United States v. Ponticelli*, 622 F.2d 985, 991-992 (9th Cir. 1980). The court considered three factors: contemporaneousness, chance for reflection, and relevance in their analysis of the Defendant's proffered out-of-court statements. *Id.* at 991.

Similarly, in *United States v. Miller*, the court reiterated the "three factors bearing on the 'foundational inquiry on admissibility' under FRE 803(3): contemporaneousness, chance for reflection, and relevance." *United States v. Miller*, 874 F.2d 1255, 1264 (9th Cir. 1989). In both *Miller* and *Ponticelli*, the court recognizes "the rationale of the hearsay exception in FRE 803(3) is that "the declarant presumably has no chance for reflection and therefore for

misrepresentation." *Id.* at 1264. Although the court does require some temporal component to the admission of out-of-court statements under FRE 803(3), this requirement does not rise to the spontaneity requirement under FRE 803(1). This timing requirement is "premised on the supposition that 'substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.'" *United States v. Naiden,* 424 F.3d 718, 722 (8th Cir. 2005*).*

In *United States v. Samaniego*, the circuit court addressed the issue of whether an out-of-court apology qualified as a hearsay exception under FRE 803(3). *United States v. Samaniego*, 345 F.3d 1280, 1282 (11th Cir. 2003). In its discussion, the court explained that "the state-of-mind exception does not permit . . . the declarant's statements as to why he held the particular state of mind." *Id.* (See also *United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980). This prohibition, as explained in the committee notes, "is necessary to avoid the virtual destruction of the hearsay rule," which may result from a state-of-mind hearsay statement "to serve as the basis for an inference of the happening of the event which produced the state of mind." *Id.* at 1283.

To avoid the potential admission of self-serving statements made under the disguise of state-of-mind statements, courts have generally found that by reducing the time between the event or condition prompting the requisite state of mind, the chance of reflection and production of self-serving statements by the declarant is minimized. However, as seen in the court's language in *Miller* and *Ponticelli*, the evaluation of contemporaneousness and chance for reflection are merely factors to be considered in the overall inquiry into admissibility. Furthermore, nowhere in the courts' various discussion of FRE 803(3) includes the requirement of spontaneity in the declarant's out-of-court statement.

B. The Defendant's Statements Were Made Contemporaneously With The Ongoing Stress Of The Event, Thus The Fourteenth Circuit Improperly Excluded Both Voicemails Which Were Material To Ms. Fenty's Defense.

The Fourteenth Circuit focuses on the second prong of the court's three-part test in *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). That being the time of reflection. It is well established that "[t]he more time that elapses between the declaration and the period about which the declarant is commenting, the less reliable is [her] statement . . . ." *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980). In *United States v. Rivera-Hernandez*, the court explained that FRE 803(3) does not require spontaneity, but rather contemporaneity, in order to admit statements concerning the declarant's then-existing state of mind. *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007).

Similarly in *Hayes v. York* the Fourth Circuit held that the state of mind exception in 803(3) does not require spontaneity. *Hayes v. York*, 311 F.3d 321, 325-326 (4th Cir. 2002). The Fourth Circuit contends that the Supreme Court bases the reliability of firmly rooted hearsay exceptions like 803(3) on the "notion that each such exception has a well-established basis for reliability." *Id*. The Government here reads spontaneity into FRE 803(3) without justification, stating that too much time had lapsed, and Ms. Fenty had been provided with ample time to reflect and misrepresent the situation. This notion is untrue and fails to take into account the totality of the surrounding circumstances that led to Ms. Fenty's statements.

1. *The statements made by Ms. Fenty do not reflect intentionally misleading statements in fear of litigation because they were made on a private phone conversation in response to her present then-existing emotions.*

Several federal circuit courts have addressed contemporaneity with declarant's then-existing state of mind. The First Circuit held that FRE 803(3) requires "contemporaneity between the event that gives rise to the state of mind or intention and the declarant's expression of that state of mind or intention." *Packgen v. Berry Plastics Corp.*, 847 F.3d 80, 91 (1st Cir. 2017).

Additionally, the First Circuit in *United States v. Sabean* held that because the defendant's emails were written several years before the occurrence of the conduct underlying the charged crimes, the temporal gap was no longer made contemporaneously with the declarant's then-existing state of mind. *United States v. Sabean*, 885 F.3d 27, 41 (1st Cir. 2018). The Eighth Circuit in *United States v. Udey*, found that the defendant's statements when arrested were no longer indicative of the defendant's state of mind because the statement was made two days earlier. *United States v. Udey*, 748 F.2d 1231, 1243 (8th Cir. 1984). As time lapses, statements are deemed less reliable due to a lack of contemporaneity. *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980).

Ms. Fenty is not commenting on the event of whether the packages were intercepted. She is instead stating a mere reflection of her then-existing emotions at that very moment in time. On February 14, 2022, at 1:32 p.m., Ms. Fenty, in a voicemail to Millwood, stated the following, "Angela, I just got to the Post Office. None of the packages I was expecting are here, they're missing. [...] I'm getting worried that you dragged me into something I would never want to be part of." (R. 40). The time that lapsed between Ms. Fenty realizing her packages were missing and leaving the voicemail to Millwood was contemporaneous because she mentioned she had "just" gotten to the Post Office. (R. at 40.) The first voicemail was made immediately upon her finding out this material fact. Her statements reflect shock and confusion; she mentions the actual feeling of getting worried, reflecting her then-existing state of emotion. *Id.*

A statement under FRE 803(3) requires that the statement be contemporaneous with the declarant's then-existing state of mind. *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005); see also *United States v. Reyes*, 239 F.3d 722 (5th Cir. 2001) (holding that the defendant's then existing state of mind must have occurred contemporaneously with the event sought to be

proven). The time that lapsed between Ms. Fenty realizing her packages were missing and making the phone call to Millwood were during an ongoing event. The defense seeks to admit this statement, not to prove that the packages were missing due to them containing an illegal substance, but rather how Ms. Fenty was feeling at that very moment upon learning her packages were missing. Her words explicitly showed that she was "getting worried", a present feeling that was growing quickly. (R. at 40.) The statement further explained her existing state of mind by indicating plans to refrain from committing an act in the future. A significantly less amount of time had lapsed when compared to the two days in *Udey* and the multiple years that had lapsed in *Sabean*.

Note that hearsay statement may be admitted if it is probative of the declarant's then-existing state of mind which includes feelings of fear, knowledge, or belief, when the declarant's state of mind is at issue. 1 Weinstein's Evidence Manual § 16.04 (2023). The Eleventh Circuit has held that "evidence inextricably intertwined with the chain of events surrounding the crime charged is admissible." *United States v. Gomez*, 927 F.2d 1530, 1535 (11th Cir. 1991); See eg., *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985).[1] Courts generally admit statements that are indicative of the declarant's mental state in issue on "the assumption that states of mind have a certain degree of continuity." 1 Weinstein's Evidence Manual § 16.04 (2023). In *United States v. Gonzalez*, witness Belford sent emails describing how the defendant's acts had affected her emotional state causing fear and worry. *United States v. Gonzalez*, 905 F.3d 165, 201 (3d Cir. 2018). The court held that such statements fit "squarely" within the state

[1] The court held "that evidence pertaining to the chain of events explaining the context, motive and set-up of the crime, is admissible if linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985).

of mind exception because the emails demonstrated that Belford had experienced emotional distress due to the defendant's cyberstalking. *Id*. Although the emails were stated as a later reflection of the defendant's acts, Belford describes a continuing degree of distress given the totality of the circumstances. *Id*.

The second voicemail made by Ms. Fenty reflects a mere continuation of the emotion she had been feeling from the time she got to the post office to when she had left, similar to Belford's statements made later in an email in *Gonzalez*. See *United States v. Gonzalez*, 905 F.3d 165, 201 (3d Cir. 2018). Belford's statements demonstrated a reflection of an ongoing emotional condition in that case. *Id.* Approximately forty-five minutes after the initial phone call, at 2:17 p.m. Ms. Fenty called Millwood stating: "It's me again. I talked to the postal workers. They don't know what is going on with the packages. [...] 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. [...] I'm really starting to get concerned that you involved me in something I had no idea was going on." (R. at 40.) While forty-five minutes may seem to be sufficient time to warn concern of fabrication, the totality of the circumstances must be considered. When Ms. Fenty made the first phone call at 1:32 p.m. she had not yet spoken to a Post Office employee. (R. at 40.) After the first voicemail, Ms. Fenty then decided to go inside and speak to a Post Office employee. *Id.* Upon reaching someone to assist her, it would have taken even more time to discover and look up what had happened to the packages.

Forty-five minutes is painted as an elongated time to which Ms. Fenty was conspiring a scheme to present her innocence, but that simply was not the case. Ms. Fenty made the second phone call upon immediately understanding her packages had been intercepted. The statements reflect an exceedingly innocent amount of worry given the multiple layers of questions she had

been asking and ultimately explaining her exact feelings at that moment. *Id.* "I'm really getting nervous." *Id.* "I'm really starting to get concerned." *Id.* All demonstrate a mere reflection in the continuity of one encounter. The Fourteenth Circuit improperly excluded Ms. Fenty's statements that reflected her confusion and fear as to what was going on, which would have had a material impact on the decision of this case.

2. *The jury must determine the weight of the evidence given to the voicemail recordings to determine whether they were fabricated because the statements were reflections of Ms. Fenty's then-existing state of mind.*

The voicemails left by Ms. Fenty had a material effect on her ability to defend her claim. Without these voicemails, she was unable to prove her state of emotion when arriving at the Post Office and her lack of intent to engage in any sort of illegal activity. An erroneous evidentiary ruling in a criminal case requires reversal where "the error results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Lane*, 474 U.S. 438, 449 (1986) (quoting *United States v. Kotteakos*, 328 U.S. 750, 776 (1946)). Excluding admissible evidence is not harmless when it "precludes or impairs the presentation of an accused's sole means of defense." *United States v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984) (quoting *United States v. Carter*, 491 F.2d 625, 630 (5th Cir. 1974)). In *United States v. Peak*, 856 F.2d 825, 835 (7th Cir. 1988), the court held that the erroneously excluded evidence of the defendant tending to disprove intent for his conviction could have placed some doubt in the juror's mind and thus was material to the case. Additionally, it is the role of the jury to assess the reliability of the evidence, not the judge's, regardless of the judge's own belief as to its truthfulness. *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984).

Here, Ms. Fenty's statements were offered to explain to the jury her then-existing emotional and mental state when arriving at the Post Office. The fact that Ms. Fenty made these

truthful statements on a private phone call bears even greater weight on its reliability, showing that she did not fabricate false statements. The statements were material in proving Ms. Fenty lacked any knowledge of the planned scheme to sell drugs and was not a mere harmless error. The lower court's restriction of probative and material evidence in Ms. Fenty's case impedes upon the jury's duty to assess credibility and make determinations on the weight of the evidence.

Ultimately, this Court should reverse the Fourteenth Circuit's holding that Ms. Fenty's voicemails lacked spontaneity. Ms. Fenty's statements were made contemporaneously with the facts to be proven as a continuation of her ongoing stress; that she lacked any knowledge of the illegality in Millwood's dealings. It is and should remain the task of the jury to determine whether Ms. Fenty's statements are reliable.

III. THE FOURTEENTH CIRCUIT EXCEEDED THE SCOPE OF FEDERAL RULE OF EVIDENCE 609(a)(2) REGARDING AUTOMATIC ADMISSIBILITY OF PAST CRIMEN FALSI CONVICTIONS BY ADMITTING THE DEFENDANT'S MISDEMEANOR CONVICTION FOR PETIT LARCENY INTO EVIDENCE.

The adoption of FRE 609(a)(2) has spurred various interpretations into existence and flooded lower courts with confusion as to which convictions apply to the rule and which should be excluded. It follows that when a prior conviction exists "for any crime regardless of the punishment, the evidence must be admitted 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). From the outset, FRE 609(a)(2) enables either party to attack a witness's character for truthfulness by admitting evidence of a prior criminal conviction regardless of whether the crime was a felony or misdemeanor. *Id*. FRE 609(a)(2) implicates that if the criminal conviction is based on a dishonest or false statement, the evidence is granted automatic admission given the statute's use of the word "must". *Id,* The court is thus stripped of its discretion to take into account the amount of prejudice the prior conviction may cause either

party. See *Coursey v. Broadhurst*, 888 F.2d 338, 341-42 (5th Cir. 1989) (the statute contains "mandatory language [and] requires that a trial court admit evidence of such crimes to allow a party to impeach an adversary witness's credibility."); see also *United States v. Harper*, 527 F.3d 396, 408 (5th Cir. 2008) ("Crimes qualifying for admission under FRE 609(a)(2) are not subject to FRE 403 balancing and must be admitted.").

At common law, the term *crimen falsi* "generally refer[ed] to crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves some element of deceitfulness, untruthfulness, or falsification bearing on witness' propensity to testify truthfully." *Black's Law Dictionary* 335 (5th ed. 1979). Lower courts have similarly followed suit finding a crime admissible where by its very elements it requires proving an act of dishonesty or false statement.[2] In the alternative, other lower courts have found crimes such as larceny and theft inadmissible due to a lack of finding dishonesty, false statement, or deceit when proving the actual elements of the crime. See *United States v. Pruett*, 681 F.3d 232, 246 (5th Cir. 2012) (holding that a conviction for larceny is inadmissible because it is not a "crime of dishonesty" under FRE 609(a)(2)). [3] The evidence thus goes directly toward attacking the witness' credibility to testify truthfully based on a propensity to lie and act deceitfully. *Id*. An act of violence or other crime involving a matter of deceit or dishonesty in the commission of a crime does not automatically suscept a prior conviction to admission under FRE 609(a)(2). *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977).

[2] See, e.g., United States v. Kuecker, 740 F.2d 496, 501–502 (7th Cir. 1984) (mail fraud); United States v. Whitman, 665 F.2d 313, 320 (10th Cir. 1981) (land fraud); Wagner v. Firestone Tire & Rubber Co., 890 F.2d 652, 655 n.3, 656 (3d Cir. 1989) (convictions for bad checks that involved dishonest activity); United States v. Kelly, 510 F.3d 433, 438-439 (4th Cir. 2007) (knowledge of "worthless checks" having insufficient funds involved a dishonesty or false statement); United States v. Caudle, 48 F.3d 433, 435 (9th Cir. 1995) (perjury).

[3] See also Government of Virgin Islands v. Testamark, 528 F.2d 742, 743 (3d Cir. 1976) (holding that a conviction for petit larceny is not a crime of dishonesty or deceit); see also United States v. Glenn, 667 F.2d 1269, 1273 (9th Cir. 1982) (holding that a conviction for burglary and theft are not crimes of dishonesty).

Lower courts have consistently found that crimes of force, or crimes of stealth, such as burglary or petit larceny, do not fall within the rule. *Id*.

It follows that if the proponent fails to meet their burden in proving the prior conviction is a crimen falsi crime based on its elements, they must then prove the "particular prior conviction rested on facts warranting the dishonesty or false statement description." *United States v. Smith*, 551 F.2d 348, 364 (D.C. Cir. 1976). Admission requires more than merely containing an element of deceit, but rather the jury must rely on that finding to make a conviction. See generally *Id.* As a result, he Fourteenth Circuit misinterprets the characterization of crimen falsi crimes.

Because Congress enacted FRE 609(a)(2) based on the requisite belief that crimes involving dishonesty or deceit by their very elements are so highly probative of truthfulness exempting them from FRE 403 scrutiny, the decision of the Fourteenth Circuit should be reversed to remain consistent with the intent of Congress in adopting a very narrow exception to admissibility.

A. The Fourteenth Circuit Improperly Relies On The Court's Rule In *Altobello* Finding That The Prior Conviction Must Only Have Involved A Dishonest Act Or False Statement During The Perpetration Of The Crime Because It Predates Congress's 2006 Amendment To Rule 609(a)(2) Which Now Requires Establishing That A Dishonest Act Or False Statement By The Witness Was Necessary To Prove The Elements Of The Crime.

The debate behind Congress' intent for granting crimen falsi crimes automatic admission rather than applying FRE 403 balancing test is nuanced and contingent upon which party is requesting admission. On the one hand, those making an argument for admission will urge the court to adopt a more expansive interpretation of FRE 609(a)(2) allowing any crime that involves an act of dishonesty or deceit in the commission of the crime. On the other hand, those aiming to protect against abuse of FRE 609(a)(2) will assert that Congress intended a narrow and limited exception to admissibility, requiring that either the elements of the underlying charge prove a

dishonest act or that the jury made a determination based on proving the defendant committed a dishonest act or false statement.

When adopting FRE. 609(a)(2), Congress made clear its intent to limit the admissibility of crimen falsi crimes to those involving a dishonest or false statement by the very elements of the crime. Courts have thus interpreted the applicability of FRE 609(a)(2) to occur in one of two ways. The first is that the statutory element of the underlying charged crime must "indicate whether it is one of dishonesty or false statement." Fed. R. Evid. 609, advisory committee's note to 2006 amendments. The second demonstrates that Congress expanded the scope of the initial elemental approach by now allowing courts to admit evidence of a prior conviction "[w]here the deceitful nature of the crime is not apparent from the statute and the face of the judgment[.]" *Id*. The proponent of the prior conviction may "offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted." FRE. 609, advisory committee's note to 2006 amendments. The Fourteenth Circuit has conflated the second approach with the contention that the prior conviction must have only involved a dishonest act or false statement during the perpetration of the crime.

The Government's proposition in the Fourteenth Circuit's decision refers to a proposed rule extracted from *Altobello v. Borden Confectionary Products*, *Inc.*, 872 F.2d 215, 216 (7th Cir. 1989), stating that "where 'the manner in which the witness committed the offense may have involved deceit' the conviction is admissible." (R. at 70.) This interpretation predates the current amendment of the FRE 609(a)(2) and uses pre-2006 language needing only to have "involved dishonesty or false statement." See Fed. R. Evid. 609, advisory committee's note to 2006 amendments. Congress removed the language requiring that the prior conviction only have

"involved dishonesty or false statement." Fed. R. Evid. 609, advisory committee's note to 2006 amendments. Congress amended FRE 609(a)(2) because of various circuit splits and incorrect applications of the intended rule. *Id.* Congress found that "[m]any courts [would] look to the manner in which the crime was committed – the underlying facts." and others would apply FRE 609(a)(2) only if "establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement." Fed. R. Evid. 609, advisory committee's note to 2006 amendments.

While the most expansive approach currently held and mirrored by the advisory committee notes allows an inquiry into the underlying facts of the case if "the deceitful nature of the crime is not apparent from the statute and the face of the judgment", the finders of fact must still have relied on the dishonest act being committed or false statement being to establish an element of the prior conviction. Fed. R. Evid. 609, advisory committee's note to 2006 amendments. The prior conviction must not have merely "involved" some element of deceit as claimed by the Fourteenth Circuit. The gradual progression in developing FRE 609(a)(2) aimed to refine and narrow the application of the rule to ensure only limited prior convictions would be admitted that are probative of the witness's character for truthfulness. See *United States v. Jefferson*, 623 F.3d 227, 235 (5th Cir. 2010).

The amended rule is overly broad and acknowledges that a "large majority of criminal acts do involve some form of deception." See Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. Crim. L. & Criminology 1087, 1122-1123 (2000). Stuart Green makes an illuminating statement:

> One needs to recognize that criminal offenses are defined by their elements, not by the facts of their commission. To admit conviction evidence is to tell the jury nothing more than that the elements of the crime of which the witness was convicted were proven beyond a reasonable doubt. Undoubtedly, a large majority

> of criminal acts do involve some form of deception. [...] To allow a court to look to underlying facts in determining whether to admit a prior conviction as a crime of deceit is thus to invite a circumvention of the reasonable doubt standard itself.

Id. (footnotes omitted). While federal courts have been profoundly inconsistent in applying FRE 609, some have consistently found convictions involving violence, theft, or stealth do not "bear directly on the likelihood that the defendant will testify truthfully." *United States v. Hayes*, 553 F.2d 824, 827 (2nd Cir. 1977). The Second Circuit has indicated that petit larceny is not the proper subject matter for impeachment under FRE 609(a)(2). *Id.* The same should remain true now holding that petit larceny, a crime of theft, does not satisfy the requirements of FRE 609(a)(2).

B. Petit Larceny Does Not Involve the Requisite Deceit To Be Considered A Per Se Crimen Falsi Act; Thus The 14th Circuit's Interpretation Of *Smith* Misstates Its Application To The Case At Hand.

The Fourteenth Circuit misstates the Defendant's argument alleging that Ms. Fenty's crime was an act of violence and thus should not be admitted. The defense's argument instead relies on the fact that petit larceny is not a per se crimen falsi crime, nor does it require the finders of fact to prove a dishonest act or false statement during the commission of the crime. In *United States v. Fearwell*, the court explicitly held that a prior conviction for petit larceny may not be admitted because it does not "involve the requisite deceit to qualify for admission." *United States v. Fearwell*, 595 F.2d 771, 776 (DC Cir. 1978). The court held that "no matter how 'dishonest'. . . thieves may be, those crimes, and . . . other kinds of crimes that involve elements of dishonesty are excluded from the definition of FRE 609(a)(2). *Id*. 777. In addition, the court explains that shoplifting offenses like crimes of petty larceny involve stealth rather than deceit "which *Smith* makes clear is not the same as deceit". *Id.* Similarly, in *United States v. Estrada*, the court held that larceny is a crime of stealth rather than deceit or false statements even when

looking at the underlying facts of the charged crime. *United States v. Estrada,* 430 F.3d 606, 614 (2nd Cir. 1998). Thus the Second Circuit has clearly indicated that petit larceny fails to meet the requirements of FRE 609(a)(2). *Id*. See also *United States v. Hayes*, 553 F.2d 824, 827 (2nd Cir. 1977) (holding that petit larceny is not a per se crimen falsi crime). The approach was not that of merely "involving" some dishonest statement, but the conviction must have rested upon facts establishing dishonesty or false statements. *Id.*

In the present case, Ms. Fenty's prior conviction for petit larceny should similarly be construed as a crime of stealth. Ms. Fenty attempted to steal a diaper bag from a woman containing $27 while the woman was distracted by a street performer. Ms. Fenty acted stealthily by taking advantage of the situation and seizing her opportunity to steal. Ms. Fenty did not orchestrate the distraction by making a false statement on which the victim there relied, nor did she commit a deceitful act by claiming the bag to be her own. Instead, she attempted to grab the bag, and when she was caught, she physically and verbally threatened the victim by stating she would inflict harm on the victim if she did not release the bag and shoving her. The facts presented in the preceding trial indicate that Ms. Fenty's actions were of stealth rather than deceit or false statement providing it insufficient to be considered a crimen falsi crime under FRE 609(a)(2).

C. The Record Fails To Make Readily Apparent That The Fact Finder Juror Relied On The Witness Committing A Dishonest Act Or False Statement To Be Convicted With Petit Larceny.

The Second Circuit, in *United States v. Payton,* has enabled courts to look beyond the elements of a crime and determine "whether the conviction rested upon facts establishing dishonesty or false statement." *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998). Note that the rule does not require that the charged crime merely "involve" a dishonest statement as

provided by the Fourteenth Circuit when the elements are deemed unavailing. (R. 70). The court *Payton* dealt with a narrow set of circumstances under the issue of larceny where the defendant was intentionally making false statements to receive food stamps. *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998). The court relied on the jury establishing that the actual statements were false in order to convict the defendant. *Id*.

In the present case, the record does not reflect that the jurors relied on finding the defendant acted dishonestly or made a false statement while attempting to steal the woman's diaper bag. Again, while most crimes innately hold some form of dishonesty, it is insufficient to say stealing from a woman while she is looking away involves a planned scheme of dishonesty or deceit. The Defendant did not orchestrate a distraction to deceive the woman, nor make a dishonest statement during the attempt to steal the bag. Here, Ms. Fenty made no false statements during the commission of the crime; instead, she acted violently by physically grabbing the victim's bag from her person and threatened to harm the victim if she proceeded to fight.

In charging the Defendant with petit larceny, there is also no reason to believe the jurors relied on instructions to find that acted dishonestly, nor was a false statement made in court alluding to her guilt. Thus, even if this Court were to "look beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statement" as established in *Payton,* 159 F.3d at 57, the record does not reflect that the jury's findings rested on the Defendants false or dishonesty statements. Concurrently, the charged crime itself was brought under petit larceny rather than theft by deception. The jury again had no inclination toward finding that the defendant stole through means of deception, nor were they instructed to find that the defendant had made a dishonest statement based on the requirements of §155.25.

The majority unequivocally sets their own trap by relying on the sole contention that this is a crime of deception rather than force. They admittedly abide by the holding in *United States v. Ortega* whereby petit larceny is not per se admissible under FRE 609(a)(2). *United States v. Ortega,* 561 F.2d 803, 806 (9th Cir. 1977). By alleging that this is a fact-specific inquiry, the Government limits its argument to solely fall on an unfounded claim that this was an act of deceit rather than violence. The only facts supporting the Government's argument that Ms. Fenty deceitfully is that she quietly snuck up to the victim while perpetrating her crime. The record and testimony of Ms. Fenty reflects that she had no prior scheme to commit this crime aside from a dare from her teenage best friend made on impulse. The Government's broad generalization that this crime "at the very least" has an element of deceit was not relied upon by the jury in her preceding trial as required by FRE 609(a)(2), nor does it conform with Federal Court decisions finding that larceny is not a per se crimen falsi act. See *United States v. Ortega,* 561 F.2d 803, 806 (9th Cir. 1977). The Fourteenth Circuit decision should be reversed because there was no element of deceit in the underlying charge, and the jury did not rely on the defendant making a false statement or dishonest act to charge her with petit larceny.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the judgment of the lower court.

Respectfully submitted,
/s/ Team 36P
Counsel for Petitioner