Team 7P

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 23–695

FRANNY FENTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER, FRANNY FENTY

Attorneys for the Petitioner

QUESTIONS PRESENTED

I. Whether the Fourth Amendment protects an individual's right to send and receive mail under a fictitious name.

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 prior conviction for petit larceny was properly admissible as impeachment evidence under Federal Rule of Evidence 609(a)(2).

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STATEMENT OF THE FACTS

I. Ms. Fenty's use of the alias "Jocelyn Meyer."

Ms. Franny Fenty is a Joralemon resident and an experienced writer. (R. 6). From the years 2016 to 2017, Ms. Fenty published two short stories for her college magazine, Joralemon College Zine, under the name "Jocelyn Meyer." (R. 42). Since college, Ms. Fenty has written a total of five novels as Jocelyn Meyer—moreover, in October 2021, she reached out to four publishers in hopes of getting one of her manuscripts published. (R. 5). She sent the emails "as Jocelyn Meyer, the author's name on all the manuscripts, using the email address jocelynmeyer@gmail.com." (R. 42). Additionally, Ms. Fenty also uses the name "Jocelyn Meyer" to receive online orders. (R. 43).

On February 14, 2022, Special Agent Raghavan received a call from the manager of the Joralemon Post Office informing him that the post office had flagged two packages. (R. 30). The flagged packages were sent from "Holistic Horse Care," an online veterinary supply store. (R. 30). Special Agent Raghavan had specifically asked the post office to flag any packages from Holistic Health Care because fentanyl was being cut with horse tranquilizers. (R. 30). That same day, Special Agent Raghavan and his partner went to the Joralemon Post Office and picked up the packages. (R. 30). The packages were addressed to Jocelyn Meyer and were delivered to a P.O. Box. (R. 30). Special Agent Raghavan then asked the post office manager to search whose name the P.O. Box was registered under, which showed that it was under the name Jocelyn Meyer. (R. 30). Notably, there were two other packages in the P.O. Box: two Amazon packages addressed to "Franny Fenty." (R. 31). At this point, Special Agent Raghavan and his partner obtained a search warrant for the Holistic Horse Care packages. (R. 31). The contents of the package were confirmed to contain fentanyl. (R. 32).

After resealing and returning the packages, the agents returned to the Joralemon Post Office for a controlled delivery. (R. 32). Special Agent Raghavan asked the manager to leave a slip for Jocelyn Meyer in the P.O. Box notifying her to pick up her package from the counter during business hours. (R. 32). A short time later, a woman comes into the Post Office, walked over to the P.O. Box, unlocked it, retrieved the two Amazon packages as well as the slip, read the slip, and then went to the counter. (R. 32). The woman gave the manager the slip. (R. 32). The manager came back with the Holistic Horse Care packages, and asked "Are these your packages?" (R. 33). The woman confirmed, "yeah, they're mine." (R. 33). The woman took the Holistic Horse Care Packages was began to leave. (R. 33). The woman turned out to be Ms. Fenty, and as she was talking out of the post office and a man approached her and said "Bye Franny!" (R. 33). Special Agent Raghavan asked the man if he knew Jocelyn Meyer, to which the man said that the woman he just spoke to was "Franny Fenty," and that they knew each other from college. (R. 33) Importantly, the man said he knew that Ms. Fenty had used the name Jocelyn Meyer "a few times" to get short stories published in their college magazine. (R. 33). Later that evening, a grand jury returned an indictment, Franny was arrested. (R. 33).

II. Ms. Fenty's recorded voicemails under the state of mind exception to hearsay.

At trial, Ms. Fenty sought to introduce two voicemail recordings under the state of mind exception to hearsay to show that she did not know why the packages were being intercepted when she attempted to pick them up from her P.O. Box.

On February 14, Ms. Fenty went to her P.O. Box to pick up the Holistic Horse Care packages, after receiving the shipper's delivery confirmation. (R. 46). When she realized that the packages were missing from her P.O. Box, the Defendant called Angela Millwood ("Millwood") from the Post Office at 1:32 p.m. (R. 46). When Millwood did not answer, Ms. Fenty left her a

voicemail saying, “None of the packages I was expecting are here, they’re missing.” (R. 40). After not hearing from Millwood, Ms. Fenty called again at 2:17 p.m. (R. 40). Once again, Millwood did not pick up, so Ms. Fenty left a second voicemail, regarding what she believed were missing horse medicine packages, and asked, “Why would they want to look at that?” (R. 40).

Finding that the statements did not reflect Ms. Fenty’s then-existing mental state, the district court did not admit the evidence under Rule 803(3). (R. 52). On appeal, the Fourteenth Circuit affirmed the lower court’s exclusion of the recorded voicemail statements. (R. 65). The court concluded that Ms. Fenty’s voicemails were clearly contemporaneous to her finding out that the packages were missing, and necessarily relevant because they called into question her awareness as to the illicit drug scheme. (R. 68). The majority accordingly noted that it only had to determine whether Ms. Fenty had a chance to reflect before making the statements. (R. 69).

After concluding that Ms. Fenty had a chance to reflect before leaving the voicemails, the court found that the statements were not admissible under Rule 803(3). (R. 69).

III. Ms. Fenty’s prior misdemeanor conviction for petit larceny.

As a teenager, Ms. Fenty was convicted of misdemeanor petit larceny under Boreum Penal Code § 155.25. (R. 54). Boreum Penal Code § 155.25, unlike § 155.45, does not require deceit or false statement as an element to establish the offense—only that Ms. Fenty “knowingly took someone else’s property and intended to use it as her own.” (R. 3, 20, 21).

The facts surrounding the prior offense are as follows. Ms. Fenty, on a dare from a former friend, attempted to steal a bag on a dare. (R. 53, 54). The target was a female tourist in a crowded area. (R. 53). Once Ms. Fenty took the bag (which contained no valuables—solely a diaper and twenty-seven dollars in cash), the woman immediately noticed, yelled loudly and

tried to pull the bag back towards her. (R. 19, 54). At that moment, Ms. Fenty "physically fought for the bag, creating a loud scene that resulted in her arrest." (R. 53, 73). Specifically, Ms. Fenty "forcibly pull[ed] the bag," shoved the victim and told her "Let go or I'll hurt you" and then ran. (R. 59, 60). During cross-examination, Ms. Fenty admitted that she did not plan to steal the bag from the female tourist: she did not "spend time learning how to steal a diaper bag." (R. 54, 73). She also did not plan what would happen if she was caught. (R. 54) ("No we didn't make a plan. It was a dare. I didn't think it through.").

The trial court admitted evidence of Ms. Fenty's prior misdemeanor offense under Federal Rule of Evidence 609(a)(2) and the Fourteenth Circuit affirmed on the basis that her prior conviction was admissible for purposes of impeachment. (R. 58, 59, 60, 69, 70). Specifically, the court determined that it reflected adversely on her character for truthfulness in her current trial involving a separate narcotics offense. (R. 69, 70).

SUMMARY OF THE ARGUMENT

I. Ms. Fenty had a reasonable protection of privacy under the Fourth Amendment.

The district court improperly admitted the evidence obtained from the packages sent to Ms. Fenty under her alias Jocelyn Meyer. This Court should therefore reverse the Fourteenth Circuit's decision that the evidence obtained from the packages was properly admitted.

Ms. Fenty had a reasonable expectation of privacy in packages addressed to her under an alias. There is a growing circuit split as to whether an individual has a reasonable expectation of privacy in a package addressed to them under a fictitious name. The various viewpoints can be summarized as such: (1) the Fifth and Seventh Circuit have held that individuals have a reasonable expectation of privacy in packages addressed to them under a fictitious names; (2) the Fourth, Fifth, Seventh, and Tenth, have found that when a package is addressed to a third-

party—that is, when a package is not addressed to a fictitious name or alter ego, but another person entirely—there is no legitimate expectation of privacy; (3) the Eighth Circuit and two concurring opinions from the Seventh and Tenth Circuit have found that there is no reasonable expectation of privacy when the alias was used solely in a criminal scheme.

However, a closer examination of the case law reveals the circuits are much less split on this issue. In the overwhelming majority of the circuits, there is a clear throughline. This Court has the opportunity to clarify and adopt the correct standard, which can be stated as follows: individuals have a reasonable expectation of privacy in packages addressed to them under a fictitious name but cannot claim a privacy interest in a package addressed to an actual third-party. Under this standard, Ms. Fenty has a reasonable expectation of privacy in mail addressed to her alias.

In addition, this Court should reject the "criminal purpose" test, as well as the "commonly known" alias test.

II. Ms. Fenty's recorded voicemails should have been admitted as a state of mind exception to hearsay under Federal Rule of Evidence 803(3).

The district court improperly excluded Ms. Fenty's recorded voicemail statements, which she sought to admit under Federal Rule of Evidence 803(3), for several reasons.

First, after concluding that the first and third requirements to admit evidence under Rule 803(3) were met, the Fourteenth Circuit erred in finding issue with the second requirement when it concluded that Ms. Fenty had the chance to reflect before leaving both voicemails. Three requirements must be met for a statement to be admitted under Rule 803(3): (1) the statement must be contemporaneous with the event that the defendant seeks to prove; (2) the declarant must not have had a chance to reflect; (3) the statement must be relevant to an issue in the case at hand. To meet the second requirement, courts must find that a declarant did not have time to

fabricate or misrepresent their thoughts. In doing so, courts consider how much time has elapsed between the event the defendant seeks to prove and the declarant's statement. Ms. Fenty left the first voicemail right after realizing that the packages were missing, and the second, forty-five minutes later. She did not have time to fabricate or misrepresent her thoughts, therefore, she did not have time to reflect. Accordingly, the second requirement of Rule 803(3) is met.

Second, Rule 803(3) does not have a spontaneity requirement, and this Court should not read one in just because the two preceding rules have one. Just like it did with Rule 803(1) and Rule 803(2), Congress would have included such a requirement if it intended for the rule to have one. Third, the Fourteenth Circuit mistakenly reasoned that Ms. Fenty's statements should be excluded because they appeared to be self-serving. But even if her statements appear to be self-serving, that is a question for the jury, not a judge. Therefore, this Court should reverse the Fourteenth Circuit and admit Ms. Fenty's recorded voicemail statements as a state of mind exception to hearsay under Rule 803(3).

III. Ms. Fenty's prior conviction was not properly admissible impeachment evidence under Federal Rule of Evidence 609(a)(2).

The district court erred in admitting evidence of Defendant's prior conviction for misdemeanor petit theft under Rule 609(a)(2) of the Federal Rules of Evidence for the following three reasons.

First, theft convictions, including petit larceny, are not covered by Rule 609(a)(2) because they do not reflect adversely on a witness's credibility. A plain reading of Rule 609(a)(2) demonstrates that Congress intended to limit admissibility of prior convictions to a narrow class of offenses: crimes of "dishonesty or false statement." And courts have interpreted

"dishonesty or false statement" to exclude stealing-type offenses such as theft, robbery, shop-lifting, and *petit larceny*.

Second, even if Congress intended petit larceny to be the type of offense admissible under Rule 609(a)(2), there is no factual finding that Defendant accomplished her prior offense through deceitful means. Therefore, Defendant's petit larceny conviction is factually distinguishable from the petit larceny offense in *Altobello v. Borden Confectionary Products, Inc.* Instead, Defendant's prior offense was accomplished through force (not deceit) and therefore is excluded from admissibility under Rule 609(a)(2).

Third, to allow the admission of Defendant's prior misdemeanor conviction and attempt to mitigate its effect on the fact-finder would be futile. Jurors often rely on prior conviction evidence to infer criminal propensity. (R. 73). And the court cannot unring the bell once jurors have heard damaging evidence of Defendant's prior criminal offense. Public policy therefore favors interpreting Rule 609(a)(2) narrowly (as Congress intended) and cautiously limiting admissibility of prior offenses to only those involving deceit or false statement—neither of which is present in Ms. Fenty's case. Thus, this Court should reverse the Fourteenth Circuit's holding and conclude that evidence of Defendant's conviction for petit larceny was not properly admissible for impeachment purposes under Rule 609(a)(2).

ARGUMENT

I. Under the Fourth Amendment, Ms. Fenty has a reasonable expectation of privacy in her sealed mail, and the use of an alias does not diminish that right.

The "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Although this Court has, on several occasions, stated that there is "no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable," *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality); *Oliver v. United States*, 466 U.S. 170, 177 (1984) ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion."), it has explained that "[l]egitimation of expectations of privacy must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143 n.12.

Nearly 150 years ago, this Court held that "[l]etters 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. Jacobsen*, 466 U.S. 109, 114 (1984) (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878)). Nevertheless, there appears to be a growing circuit split as to whether an individual has a reasonable expectation of privacy in a package addressed to them under a fictitious name. However, a closer examination of the circuit split reveals a clear throughline—individuals have a reasonable expectation of privacy in packages addressed to them under a fictitious name but cannot claim a privacy interest in a package addressed to an actual third-party. This Court should reverse the Fourteenth Circuit and find that Ms. Fenty has a reasonable expectation of privacy in her sealed mail and her P.O. Box because one's "Fourth Amendment rights do not rise and fall"

are not contingent on the use of an alias. *United States v. Jones*, 565 U.S. 400, 405 (2012). Moreover, this Court should reject the Fourteenth Circuit's adoption of the "commonly known alias" test, as well as the "criminal purpose" test.

A. The *Villarreal* standard and its progeny.

The reasonable expectation of privacy test is, as one Fourth Amendment scholar described it, the "central mystery of Fourth Amendment law." Orin Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007). To understand the reasonable expectation of privacy test, one must understand the history of the Fourth Amendment. The Fourth Amendment's protection against unreasonable searches and seizures is deeply rooted in ideas of private property. Indeed, until the latter half of the twentieth century, this Court's Fourth Amendment jurisprudence focused on the protection of property rights against government intrusion. *Jones*, 565 U.S. at 404–06. However, in *Katz v. United States*, 389 U.S. 347, 351 (1967), this Court redefined the scope of the Amendment's protection by recognizing that "the Fourth Amendment protects people, not places." Whereas the majority opinion in *Katz* articulated the rationale, it was Justice Harlan's concurrence which articulated the rule: a Fourth Amendment violation occurs when the State violates an individual's "reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). Under the *Katz* formulation, an individual has a reasonable expectation of privacy when (1) the individual exhibited a *subjective* expectation of privacy, and (2) that expectation is one society is prepared to recognize as *reasonable*. *Id.* at 361 (Harlan, J., concurring) (emphasis added).

Following *Katz*, this Court consistently held that an individual "need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it." *Byrd v. United States*, 584 U.S. 395, 404 (2018). Notwithstanding

this rule, recent cases have clarified that the *Katz* formulation "supplements, rather than displaces, the 'traditional property-based understanding of the Fourth Amendment.'" *Id.* at 403 (citing *Florida v. Jardines*, 569 U.S. 1, 11 (2013)); *Jones*, 565 U.S. at 405. Put differently, they are dual, not competing, standards.

This begs the question: what is a "reasonable" expectation of privacy? With regard to whether an individual has a reasonable expectation of privacy in a package addressed to them under a fictitious name, the federal circuits have struggled to articulate a clear rule. However, the differing viewpoints among the circuits can be summarized as the following: (1) individuals have a reasonable expectation of privacy in packages addressed to them under a fictitious name; (2) when a package is addressed to a third-party—that is, when a package is not addressed to a fictitious name or alter ego, but another person entirely—there is no legitimate expectation of privacy;[1] (3) there is no reasonable expectation of privacy when the alias was used solely in a criminal scheme.

Villarreal is the leading authority cited for the proposition that "individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names." *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992). The package at issue was addressed to a person by the name of "Roland Martin," however, "Roland Martin" was merely a "fictitious name used to ship the [package]" to ensure that "no one could be connected to the marijuana in case anything went wrong." *Id.* at 773. Of course, the intended recipients of the package were the

[1] As a subcategory of this viewpoint, the Fourth and Fifth Circuit have found that a defendant may not assert a reasonable expectation of privacy in a package addressed to a fake name when "[a]t trial, [defendant]'s theory of defense was that [the defendant] and [the alias] were different persons." *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993). *United States v. Pierce*, 959 F.2d 1297, 1303 n.11 (5th Cir. 1992); *United States v. Castellanos*, 716 F.3d 828, 834 (4th Cir. 2013). The "theory of defense" rule, however, is only relevant to determine whether the first prong of the *Katz* formulation was met—that is, whether the individual had a *subjective* expectation of privacy. Thus, if at trial the defendant continually disassociated themselves from the package, either by denying ownership or claiming the alias is actually a third party, then the defendant has failed to exhibit a subjective expectation of privacy.

defendants. *Id.* The defendants argued that the search violated their Fourth Amendment rights, and the Fifth Circuit agreed—finding that the defendants had a reasonable expectation of privacy in the parcel. *Id.* At the crux of its reasoning, the Fifth Circuit found that what ultimately mattered was the fact that the defendants were both the "immediate" and "intended" recipients of the package, and therefore it was irrelevant that the defendants "used fictitious names in an effort to escape detection." *Id.* at 773–75.

The Fourth, Fifth, Seventh, and Tenth Circuit have all held, in some variation, that an individual "who is neither the sender nor the addressee of a package has no privacy interest in it." *United States v. Pierce*, 959 F.2d 1297, 1303 n.11 (5th Cir. 1992); *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988); *United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009); *United States v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984) (per curiam). Thus, the central inquiry is whether the parcel was addressed to "an actual third party," or, alternatively, whether it was addressed to a "fictitious name or alter ego" of the defendant. *Givens*, 733 F.2d at 341.[2] If it is the former, then there is no legitimate expectation of privacy. The *Givens* standard is a logical extension, not rejection, of the *Villarreal* standard. This can be seen when one considers the underlying rationale of each standard: the core principle of *Villarreal* was best expressed by the Seventh Circuit, which stated "[t]here is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package." *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003). Moreover, the epitome of the *Givens* standard was best described by the Tenth Circuit, which explained, "there is a fundamental difference between merely using an alias to receive a package and using another's identity." *Johnson*, 584 F.3d at 1002. In sum, *Villarreal*

[2] Unlike *Villarreal*, *Givens* is not necessarily the leading or only authority cited for this proposition. However, as *Givens* was the first in these line of cases that have found an individual does not have a reasonable expectation of privacy in mail addressed to a third-party, it will be referred to as the *Givens* standard.

and *Givens* work together, not against one another—just as the *Katz* formulation and traditional property-based understanding of the Fourth Amendment do.

That leaves the third viewpoint among the circuits—which states that is no reasonable expectation of privacy in mail addressed to an individual's alias when the alias was "used solely in a criminal scheme." *United States v. Lozano*, 623 F.3d 1055, 1064 (9th Cir. 2010) (O'Scannlain, C.J., concurring).[3] *Lewis* is the leading authority cited for this view—in a footnote, the Eighth Circuit stated that a "mailbox bearing a false name with a false address and used only to receive fraudulently obtained mailings does not merit an expectation of privacy that society is prepared to recognize as reasonable." *United States v. Lewis*, 738 F.2d 916, 920 n.2 (8th Cir. 1984). This proposition has been cited by two concurrences. *Lozano*, 623 F.3d at 1064 (O'Scannlain, C.J., concurring) ("I would hold that a defendant does not have a legitimate expectation of privacy in a package not addressed to him, even if it listed his street address and even if the addressee was his criminal alias."); *Pitts*, 322 F.3d at 459 (Evans, J., concurring). This Court should abandon this test for several reasons.

In *Pitts*, the concurrence stated that "it would be better in today's case to ground our decision on a more solid basis and hold that using phony names, while using the postal system . . . does not" give rise to a Fourth Amendment privacy claim. *Pitts*, 322 F.3d at 459 (Evans, J., concurring). Moreover, the concurrence asked: "[w]hy should such an obviously guilty defendant, who uses the United States Postal System to further a criminal enterprise, escape his due?" *Id.* (Evans, J., concurring). The answer to that (albeit, rhetorical) question is simple—an

[3] It is worth noting that although *Lewis* is the leading authority cited for this proposition, the oft-quoted line—that there is no reasonable expectation of privacy when the alias was used "solely in a criminal scheme"—originates from *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993) ("[W]e still question whether Daniel would have Fourth Amendment 'standing' to assert the claim, particularly when the use of that alias was obviously part of his criminal scheme."). However, the most accurate reading of *Daniel*, as previously mentioned, is that it stands for the "theory of defense" rule because, as a threshold matter, the court found that Daniel did not have a subjective expectation of privacy. *Id.* Thus, Daniel failed to meet the first prong of the *Katz* formulation.

individual's legitimate expectation of privacy does not depend on the "nature of the Defendant's activities [whether] innocent or criminal." *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997). Under this view, "the illegal contents of the package serve as an after-the-fact justification for a search." *Pitts*, 322 F.3d at 458. This, in effect, is no different from the general writs of assistance that empowered "customs officers, in their discretion, to search suspected places for smuggled goods." *Boyd v. United States*, 116 U.S. 616, 625 (1886). In a five-hour speech arguing before the Massachusetts Superior Court, James Otis argued that this "instrument of arbitrary power" placed "the liberty of every man in the hands of every petty officer." *Id.* John Adams, who was sitting in the audience witnessing the debate, later wrote that "then and there, the child Independence was born." *Id.*

The final view to address comes from the Fourth Circuit—the "objective indica" test. The Fourteenth Circuit cites *Rose* for the objective indica test. There, the Fourth Circuit stated that to establish a reasonable expectation of privacy, the defendant must "provide evidence that the fictitious name is an established alias." *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021). That is, the defendant must establish "objective indica of ownership, possession, or control over the package." *Rose*, 3 F.4th at 727. In *Rose*, the Fourth Circuit found that the defendant failed to present facts establishing an objective indica of ownership over the package because "[t]he packages were addressed to a deceased individual at a residence lacking any established connection to Rose" and because "Rose had not taken possession of the packages." *Id.* at 729. Thus, Rose "would not have been able to exercise at the FedEx facility any ownership rights or control over the packages." *Id.* Thus, "[b]ecause the two packages bore another person's name and lacked objective indica connecting Rose to the packages as the intended recipient, he would

not have been able to exercise at the FedEx facility any ownership rights or control over the packages." *Id.*

The majority's reasoning fundamentally misunderstands the law. As Chief Judge Gregory noted in his dissent, rejecting an individual's "status as the recipient [of the package] due to insufficient evidence of property rights improperly makes a property-based interest a necessary condition." *Id.* at 735 (Gregory, C.J., dissenting). It is well established that property concepts are "instructive in determining the presence or absence of privacy interests" protected by the Fourth Amendment—not necessary. *Byrd*, 584 U.S. at 403. Moreover, the *Rose* court and the Fourteenth Circuit imply that an individual's privacy interest in a package depends on whether the Post Office *subjectively* believes an individual is the owner of a package. In other words, according to the shipping facility, can the individual exercise any ownership rights or control over the package. *Id.* at 729. As Chief Judge Gregory noted in his dissent, there "is no legal basis for this requirement." *Id.* at 736 (Gregory, C.J., dissenting). If anything, there is precedent to the contrary. In *Richards*, the defendant was able to pick up a package that was addressed under a fictitious name, and although the defendant "had no identification showing a connection with [the fictitious name], the package was given to him." *United States v. Richards*, 638 F.2d 765, 768 (5th Cir. 1981).

It is axiomatic to say that "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. The Fourteenth Circuit, however, completely shifts the focus from who the Fourth Amendment was meant to protect, to who the Fourth Amendment guaranteed protection from—it gives unfettered deference to law enforcement so long as they can find *some* after-the-fact justification and places an incredibly high burden on the individual. Ms. Fenty, like many other individuals, utilized her alias because she wanted privacy. (R. 43). Yet, according to the

Fourteenth Circuit, those who seek privacy the most will be afforded the least. This Court should refuse to adopt such an interpretation of the Fourth Amendment.

B. Under the *Villarreal* and *Givens* standard, Ms. Fenty had a reasonable expectation of privacy.

Taken together, the central inquiry of the *Villarreal* and *Givens* cases is whether the package is addressed to the individual claiming a privacy interest, or if it is addressed to an "actual" third party. Put differently, the question of whether the package was addressed to a "fictitious name" or an "alter ego" is a distinction without a difference. In *Villarreal* and *Pitts,* the name at issue was entirely fictitious, and thus there was no "potential harm to innocent third parties." *Johnson*, 584 F.3d at 1002. However, "when A sends a package to B, the contents of which are ultimately intended for C," C is not entitled to claim a privacy interest in the package. *Givens*, 733 F.2d at 342. This Court has the opportunity to clarify and adopt the correct standard, which can be stated as follows: an individual has a reasonable expectation of privacy in packages addressed to them under a fictitious name but does *not* have reasonable expectation of privacy in packages addressed to third parties. For this reasonable expectation of privacy analysis, the central question should be who was the package *ultimately* intended for? To answer that question, this Court should look to the business transaction as a whole. Before there was a "sender" and a "recipient," there was a buyer and a seller. And the buyer is the ultimate recipient of the package, regardless of what name is on the label. In other words, it shifts the analysis one step backwards.

Consider the facts of *Rose*—Rose "developed a scheme to receive packages with illegal contents" whereby Rose paid his friend to allow him to ship packages to his house. *Rose*, 3 F.4th at 725. Additionally, Rose was allowed to ship his packages under the name "Ronald West," which was the friend's deceased brother. *Id.* Applying the rule, Rose would have a reasonable

expectation of privacy. First, the proposed rule does not differentiate between a "fictitious name" or an "alter ego." When assessing whether an individual has a Fourth Amendment privacy interest, whether or not that name was "fictitious" or an "alter ego" obfuscates the point—"Fourth Amendment are personal," a defendant may only claim a privacy interest "if his own Fourth Amendment rights have in fact been violated." *Johnson*, 584 F.3d at 999 (citing *United States v. Jarvi*, 537 F.3d 1256, 1259 (10th Cir. 2008)). Thus, the question is whether the package is for the defendant, or alternatively, whether it is for third-party. Moreover, whether a name is "fictitious" or an "alter ego" is a distinction without a difference—alter egos are, unquestionably, fake names. Second, it is irrelevant whether the package was addressed to a friend's house, whether an intermediary picked up the package initially and then delivered it to the defendant as in *Villarreal*, or the individual is walking out of the post office in physical possession of the package as was the case with Ms. Fenty. (R. 33). An individual's "Fourth Amendment rights do not rise and fall" based on where the package is delivered—whether it be a P.O. Box registered under an alias, or the front porch of someone's home. *United States v. Jones*, 565 U.S. 400, 405 (2012).

Likewise, Ms. Fenty was the ultimate recipient of the package. The package addressed to "Jocelyn Meyer," and delivered to Ms. Fenty's P.O. Box registered under "Jocelyn Meyer." (R. 30). Moreover, when retrieving the packages at the post office, when the manager asked if the packages addressed to "Jocelyn Meyer" were hers, she said "yeah, they're mine." (R. 33).

Yet, the Fourteenth Circuit denies Ms. Fenty the constitutional protection of the Fourth Amendment due to what amounts to nothing more than a technicality. The Fourteenth Circuit incorrectly held that "a defendant can have a reasonable expectation of privacy in an alias if the defendant can establish *public use* of the alias and that the defendant was commonly known by

that name." (R. 67). The Fourteenth Circuit goes as far to state that the defendant must prove that "the defendant and the alias are essentially the same person." (R. 67). First, there "is no legal basis for this requirement." *Id.* at 736 (Gregory, C.J., dissenting). Second, to say that an individual must be "commonly known" by their alias misunderstands how aliases work. "By protecting only formal pseudonyms—aliases so 'established' that the user is 'recognized' by it or uses it 'regularly'—the rule undermines Fourth Amendment protection as to virtually every purpose for which a person might use an alias." *Id.* at 738 (Gregory, C.J., dissenting). Most importantly, whether an individual was commonly known by their alias is a question for the jury, not the judge.

When Ms. Fenty looks to the Fourth Amendment for protection by asserting a privacy interest in a package addressed to Jocelyn Meyer, the Government claims "[o]ur defendant is not Jocelyn Meyer . . . . Our defendant is Franny Fenty." (R. 14). But that is exactly the point. According to the Government, when it comes to who should be held responsible for the contents of the package addressed to Jocelyn Meyer, there is no question that, for all intents and purposes, Ms. Fenty *is* Jocelyn Meyer. "It is not Jocelyn Meyer who is going to trial," it is Ms. Fenty. (R. 14).

II. Voicemail statements offered by Defendant to show a then-existing mental state should be admitted as hearsay exceptions under Rule 803(3) because she did not have time to reflect before making the statements, and therefore, all three requirements to admit the statements are met.

Ms. Fenty's recorded voicemail statements should have been admitted under the state of mind exception to the hearsay rule, Rule 803(3), because they reflect her then-existing state of mind on the afternoon of February 14, 2022, when she went to the post office and found that her packages were unavailable for pickup.

Pursuant to Federal Rule of Evidence 803(3), a statement of the declarant's then-existing state of mind is not excluded by the rule against hearsay. Fed. R. Evid. 803(3). Courts must evaluate and find that three requirements are met for statements to be admitted under Rule 803(3). *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980); *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). First, the statement must be contemporaneous with the event that the defendant seeks to prove. *Id.* Second, the declarant must not have had a chance to reflect. *Id.* Third, the statement must be relevant to an issue in the case at hand. *Id.* Ms. Fenty's voicemails are admissible under Rule 803(3) because all three requirements are met.

A. Mere minutes do not amount to what is considered a chance to reflect and therefore, the second requirement is met.

The Fourteenth Circuit concluded that the first and third requirements here are met, explaining that Ms. Fenty's voicemails were contemporaneous with the event she sought to prove—that she was unaware as to why the packages were intercepted—and that the voicemails were relevant to the issue at hand because they called into question her awareness of the illicit drug scheme. (R. 68). But, the Fourteenth Circuit erred in concluding that the second requirement of Rule 803(3) was not met because Ms. Fenty had a chance to reflect.

The first two requirements needed to admit a statement under Rule 803(3) tend to intersect with each other because their evaluation shares a dispositive factor—time. In determining if the first requirement is met, whether a statement is contemporaneous with an event, courts consider how much time has elapsed between the event and the statement that a defendant seeks to admit. *Ponticelli*, 622 F.2d at 991. In the same vein, to meet the second requirement, courts must find that a declarant did not have time to fabricate or misrepresent their thoughts. *Jackson*, 780 F.2d at 1315. Such statements have a probative value because the declarant did not have a chance to reflect or misrepresent the situation. *Id.* Consequently, this

query centers on how much time has passed between the event the defendant seeks to prove and the declarant's statement because a declarant presumably has no chance to reflect or misrepresent when the statement is contemporaneous to the event, and therefore, is a true state of mind declaration. *Ponticelli*, 622 F.2d at 991.

In *United States v. Dierks*, the Eighth Circuit affirmed the denial of evidence under Rule 803(3), finding that a defendant's statement was not contemporaneous to the event that led to his conviction. 973 F.3d 585, 593 (8th Cir. 2020). The defendant was convicted of transmitting a threatening communication in interstate commerce after directing several tweets at a United States Senator. *Id.* The defendant attempted to introduce a tweet that alluded to his comedic nature to reflect his then-existing state of mind, which he posted approximately eighteen hours before the series of tweets he was convicted for. *Id.* The court held that the tweet he wished to admit into evidence was not contemporaneous enough with the charged tweets that had been posted almost a day later because the defendant had about eighteen hours to reflect on his situation. *Id.*

The Ninth Circuit in *United States v. Dougan* held that the trial court properly refused to admit an email under Rule 803(3) which a defendant sent to the IRS around seventeen months after having learned that he was being audited. 839 F. App'x. 81, 84 (9th Cir. 2020). The court found that the defendant's email was not sent contemporaneously with the IRS's document requests and therefore, could not show the defendant's then-existing state of mind because he had had months to reflect on the requested documents, the audit, and his response. *Id.* at 85.

In *United States v. Reyes*, a defendant convicted of conspiracy to commit bribery sought to admit a recorded conversation between himself and a co-defendant, using Rule 803(3). 239 F.3d 722, 743 (5th Cir. 2001). The recording was made after the defendant had been approached

by law enforcement and agreed to cooperate with their investigation, over two months after his last criminal act. *Id.* The Fifth Circuit concluded that the recording had little to no probative value as to the defendant's then-existing mental state because the defendant's last criminal act had occurred on February 20 and the recording was made over two months later, on May 4. *Id.* Accordingly, the court affirmed the lower court's decision, holding that the defendant's recorded conversation was not a statement of his then-existing mental state because he had a chance to reflect on his conduct and the statement was not contemporaneous to the event he sought to prove. *Id.*

Similarly, in *United States v. Jackson*, statements by defendants were deemed inadmissible under Rule 803(3) because they were not contemporaneous with the event sought to be proven and the defendants had significant time to reflect before making them. 780 F.2d at 1315. Defendants wanted to introduce their statements, which had been secretly recorded by a former colleague working with the FBI, to show their lack of criminal intent after being convicted of possession of stolen fuel. *Id.* at 1313. However, the defendants' statements were made two years after their "fuel-stealing scheme" had ended. *Id.* at 1315. Because the defendants had two years to reflect upon their actions, the Seventh Circuit found that there was potential for the defendants to deliberately misrepresent the truth in their conversation. *Id.* Moreover, the court did not find that the defendants' state of mind at the time their conversations were recorded, was relevant to their state of mind two years earlier, when they committed the crime. *Id.* Accordingly, the court held that the statements constituted inadmissible hearsay. *Id.*

Unlike the defendants in *Dierks*, *Dougan*, *Reyes*, and *Jackson*, Ms. Fenty did not reflect for half a day, months, or years before making her statements. The holdings in the aforementioned cases cannot apply to the case at hand because in each of those cases it was clear

that the declarants had a chance (or a lot more) to reflect, leaving the second requirement without being met. Contrastingly, Ms. Fenty could not have had the time to fabricate or misrepresent her thoughts in either voicemail she left Millwood because the voicemails were contemporaneous to the event that she sought to prove and the Fourteenth Circuit explicitly said so. (R. 68). Ms. Fenty called Millwood on February 14th, right after learning that the packages were missing. (R. 40). In fact, Ms. Fenty was still at the Post Office when she left the first voicemail at 1:32 p.m. (R. 47). Just *forty-five minutes* later, Ms. Fenty left Millwood a second voicemail at 2:17 p.m. (R. 47). Knowing that the statements were contemporaneous to the event that Ms. Fenty seeks to prove, it only follows that she did not have time to reflect and therefore, the second requirement to admit evidence under Rule 803(3) is met.

B. Rule 803(3) does not have a spontaneity requirement, and this Court should not read one in because Congress would have included it if it intended the rule to have such a requirement.

The Government is misguided in interpreting Rule 803(3) to require a spontaneity element *in addition* to the three established requirements that must be met for evidence to be admitted as a state of mind exception to hearsay. The Government contends that courts have read in such a requirement because Federal Rules of Evidence 803(1) and 803(2) explicitly require evidence to be spontaneous in order to be admitted under the exceptions to hearsay. (R. 49); Fed. R. Evid. 803(1),(2). But if Congress intended for Rule 803(3) to require a spontaneity requirement as the two preceding rules do, it would have made that evident and would have included it.

In the majority opinion, the Fourteenth Circuit conflates Rule 803(3)'s second requirement—the declarant must not have had a chance to reflect—with the "requirement" read in by the Government—spontaneity. ("For both voicemail messages, that leaves the issue of

prong two, determining whether the statements allowed time for the declarant to *reflect*, and therefore lack *spontaneity*."). (R. 69) (emphasis added). The court cites *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980), to support its finding, but *Ponticelli* makes no mention of spontaneity. (R. 72). Rather, the *Ponticelli* court considers the Rule's three factors: contemporaneousness, chance for reflection, and relevance. *Ponticelli*, 622 F.2d at 991. The court reasoned that it was not error to exclude the statements under the state of mind exception because the defendant had a chance to reflect and misrepresent before making the statements. *Id.* at 992. Thus, the evidence in *Ponticelli* was excluded because the second requirement was not met, not because the statement was not spontaneous. *Id.*

This Court should follow the plain language of Rule 803(3) and should not read in a spontaneity requirement into it simply because the two preceding rules have one. The fact that Rule 803(1) and Rule 803(2) have a spontaneity requirement, but Rule 803(3) does not, is a clear indication of what Congress intended for the state of mind exception to hearsay rule.

C. Even if Ms. Fenty's statements appear to be self-serving, it is a question for the jury, not a judge.

In affirming the district court's exclusion of Ms. Fenty's statements under Rule 803(3), the Fourteenth Circuit stated that, "[the] Defendant should not be rewarded for making self-serving statements that may mislead the finders of fact." (R. 69). But the truth or falsity of a statement admissible under Rule 803(3) is for the jury to determine, not the courts. *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984). In *United States v. DiMaria*, a defendant sought to admit a statement he made to FBI agents, explaining that he wanted "to get some cigarettes real cheap." *Id.* at 270. The defendant, who was charged with unlawful possession of stolen cigarettes, argued that the statement disproved the state of mind that was required for such a conviction because it showed that his state of mind was to possess "bootleg" cigarettes, not

stolen ones. *Id.* The Government argued that the defendant's statement was "an absolutely classic false exculpatory statement," but the Second Circuit reversed the lower court's exclusion of the statement, holding that the statement's interpretation and credibility, *no matter how suspect,* was a question for the jury. *Id.* at 272. After all, it is the jury's essential purpose to assess the credibility of admissible evidence. *See generally United States v. Peak*, 856 F.2d 825 (7th Cir. 1988).

Moreover, a declaration that comes within a category defined as an exception to hearsay is admissible without a preliminary finding of probable credibility by the judge. *United States v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984). In *Harris*, the Second Circuit held that it was error to exclude a defendant's declaration under Rule 803(3). *Id.* In reaching its decision, the court considered the *DiMaria* judge who noted that a declaration that comes within a category defined as an exception to hearsay is admissible without a preliminary finding of probable credibility by the judge. *Id.* The *DiMaria* judge said that, while still acknowledging that the exceptions under Rule 803 "rest on a belief that declarations of the sort there described have 'some particular assurance of credibility.'" *DiMaria*, 727 F.2d at 272.

Likewise, in *United States v. Cardascia*, the Second Circuit concluded that a declarant's self-serving statement should be considered at the end of the trial when the jury weighs the evidence. 951 F.2d 474, 487 (2d Cir. 1991). While the *Cardascia* court upheld the exclusion of evidence under Rule 803(3), it explicitly stated that it would have been improper to exclude a defendant's letter "merely because the trial court doubted its trustworthiness and found that its lack of contemporaneousness to the conduct to which it related created a probability that the statement was deliberately fabricated." *Id.* at 488. Rather, the court found that the exclusion of

the letter was proper because the defendant was making a statement of memory or belief, and because the letter was written with regard to conduct that had occurred eight months earlier. *Id.*

This Court should apply the reasoning used by the Second Circuit in *Cardascia* to find that it would be improper to exclude statements under Rule 803(3) solely because they might have been self-serving. Furthermore, even if this Court finds that Ms. Fenty's statements could have been suspect or self-serving, this Court should leave the question of interpretation and credibility of the voicemails for the jury to decide as that is its essential purpose.

D. Alternatively, this Court should admit the parts of Ms. Fenty's statements which clearly reveal her confusion.

It is important to note that Rule 803(3) excludes statements of memory or belief to prove the fact remembered or believed. Fed. R. Evid. 803(3). This means that a declarant's statement may be admissible under Rule 803(3) to reflect their then-existing mental or emotional condition, but not to explain why they held that state of mind. *United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980); *see United States v. Cardascia*, 951 F.2d 474, 488 (2d Cir. 1991); *United States v. Pacilio*, 85 F.4th 450, 467 (7th Cir. 2023). In *United States v. Cohen*, the Fifth Circuit admitted just one part of the defendant's hearsay statement under Rule 803(3). 631 F.2d at 1225. The defendant sought to admit the statement—"I'm scared because Galkin threatened me"—as evidence to show that he acted under duress. *Id.* at 1224. The court explained that it could only admit the part of the statement—"I'm scared"—that showed the defendant's mental state because Rule 803(3) excludes admitting the belief or the basis for the mental state, which in this case was that the defendant was threatened by someone. *Id.* at 1225.

Under that same logic, if this Court decides that it cannot admit the entirety of Ms. Fenty's statements, part of the statements are admissible under Rule 803(3) to show her confused state of mind when she could not find the packages at the Post Office. *See Air Turbine Tech., Inc.*

v. Atlas Copco AB, 295 F. Supp. 2d 1334, 1345 (S.D. Fla. 2003) ("[W]hile the state of mind may be admissible, i.e. confusion, dissatisfaction, or even deception, the reason or belief behind this state of mind is inadmissible hearsay."). For example, in the first voicemail, Ms. Fenty states, "[n]one of the packages I was expecting are here, they're missing." (R. 40). Then, in the second voicemail she states, "[w]hy would they want to look at that?" (R. 40). Both of these statements reveal Ms. Fenty's confusion surrounding the missing packages and why they might have been flagged or inspected by the postal workers. These statements are not an attempt by Ms. Fenty to prove a fact remembered or a belief, but rather to admit as evidence that she did not understand why the packages were missing, and the Fourteenth Circuit acknowledged as much. (R. 68). As such, these statements should be admitted under Rule 803(3).

III. Defendant's impeachment by evidence of her petit theft conviction was not a crime of deceit and therefore not properly admissible under Federal Rule of Evidence 609(a)(2).

This Court should reverse the Fourteenth Circuit's holding and find the district court erred in admitting evidence of Defendant's previous conviction for impeachment because (1) theft convictions, such as petit larceny, are not covered by Rule 609(a)(2); and (2) even if they are covered, there is no factual determination that Defendant's conduct involved a dishonest act within the meaning of Rule 609(a)(2). Finally, (3) limiting instructions of Defendant's petit larceny conviction would be futile and go against public policy.

Evidence of an accused's prior offense may be admitted to impeach—or challenge and undermine the witness's credibility before the factfinder—if the prior offense involves "dishonesty or false statement." Fed. R. Evid. 609(a)(2). Impeachment therefore depends upon the *nature* of the prior offense as opposed to the *grade* or level of punishment. *Id.*; *cf.* Fed. R. Evid. 609(a)(1). 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" then the prior offense is admitted into evidence. Fed. R. Evid. 609(a)(2). The reason for admitting prior-conviction evidence is because crimes of a *dishonest* or *false nature* bear on a defendant's propensity to testify truthfully. *See United States v. Hayes*, 553 F.2d 824, 826 (2d Cir. 1977).

A. Theft offenses, including petit larceny convictions, are not crimes intended to be covered by Rule 609(a)(2) because they do not reflect adversely on a witness' credibility.

The Federal Rules of Evidence "sharply restrict admission of an accused defendant's prior convictions." *United States v. Thomas*, 933 F.3d 685, 690 (7th Cir. 2019); *see e.g.*, Fed. R. Evid. 404, 609. The purpose of restricting such convictions is "to ensure that a defendant is convicted based on the evidence relevant to the charged offenses, not a supposed propensity to commit crimes based on evidence of prior convictions." *Thomas*, 933 F.3d at 690; *see United States v. Gomez*, 763 F.3d 845, 855–56 (7th Cir. 2014) (en banc); *United States v. Beck*, 625 F.3d 410, 416 (7th Cir. 2010). As such, courts of review often caution trial "courts to consider carefully the introduction of previous convictions." *Beck*, 625 F.3d at 416 (citing *United States v. Taylor*, 522 F.3d 731, 732–33 (7th Cir. 2008)).

To protect defendants from the harm of improperly admitting prior convictions, Congress imposed a "rigid standard" and limited admissibility of these offenses to ones only involving "dishonesty or false statement" under Rule 609(a)(2). The phrase "dishonesty or false statement" under Rule 609(a)(2) and outlined by Congress is meant to include crimes such as "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." H.R. REP. NO. 93–1597 (1974) (Conf. Rep.); *United States v. Toney*, 615 F.2d 277, 280 (5th Cir.

1980) (mail fraud admissible); *United States v. Byrd*, 771 F.2d 215, 219 (7th Cir. 1985) (forgery crimes admissible).

As such, not only did Congress create a heightened standard for prior conviction evidence to be admitted, but it also intended "to denote a fairly narrow subset of criminal activity" for Rule 609(a)(2). (R. 72, 73); *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976). Notably, the Court of Appeals in *Ortega* considered the drafter's intent of Rule 609 and found that "dishonesty and false statement" is limited to crimes involving "some element of misrepresentation of other indi[cia] of a propensity to lie, and exclud[ed] those crimes which . . . d[id] not carry with them a tinge of falsification." *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977).

Interpreting Rule 609(a)(2), many circuit courts have held that convictions involving theft, robbery, and shoplifting do not involve "dishonesty or false statement" within the meaning of Rule 609(a)(2). *See e.g.*, *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990); *Smith*, 551 F.2d at 362–63 (robbery); *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978), *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005), *Ortega*, 561 F.2d at 806; *Byrd*, 771 F.2d at 219 ("Theft is arguably not a crime involving dishonesty or false statement.").

In fact, the D.C. Circuit has gone so far as to declare that petit larceny offenses as a category are not admissible to impeach a witness's credibility. *Fearwell*, 595 F.2d at 776. (explaining how petit larceny crimes do not involve dishonesty or false statement and "simply ha[ve] no bearing whatever on the 'accused's propensity to testify truthfully"); *see also Estrada*, 430 F.3d at 614 (finding larceny offense not a crime of deceit).

Courts have also separated between different types of crimes admissible under Rule 609(a)(2): crimes of violence from dishonesty, and crimes of stealth from *crimen falsi*. *See e.g.*,

Hayes, 553 F.2d at 827; *Smith*, 551 F.2d at 364–65. First, crimes involving violence have been held inadmissible under Rule 609(a)(2). *Hayes*, 553 F.2d at 827; *Smith*, 551 F.2d at 364. This is consistent with Congress's narrow restriction of the phrase combined with historical reading that "the expression has never been thought to comprehend robbery or other crimes involving force." *Id.* 362–63 ("There is no deceit in armed robbery. You take a gun, walk out, and put it in a man's face and say, 'Give me your money,' or walk up to the counter of the casher and say, 'this is a holdup; give me your money.' There is no deceit in that. They are not lying. They mean business."). Second, courts have also distinguished between "crimes of stealth" such as burglary or petit larceny, *Hayes*, 553 F.2d at 827, from *crimen falsi* crimes which require false statements under Rule 609(a)(2). *See Smith*, 551 F.2d at 362 ("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."). These distinctions shed further light on Congress's intent to keep crimes of violence and stealth (or stealing-type offenses) outside the scope of Rule 609(a)(2).

Although historically, stealing was characterized as "conduct which reflects adversely on a man's honesty and integrity," *Gordon v. United States*, 383 F.2d 936, 941 (D.C. Cir. 1967), prior offenses are no longer analyzed under this standard, otherwise virtually every crime would reflect poorly on a defendant's character. (R.73); *Ortega*, 561 F.2d at 806 ("Human experience does not justify an inference that a person will perjure himself from proof that he was guilty of petty shoplifting" and "[a]n absence of respect for the property of others . . . [while] an undesirable character trait . . . is not an indic[ation] of a propensity toward testimonial dishonesty."). The mere fact that an offense "may have some on credibility does not make it admissible under Rule 609(a)(2)." *United States v. Mehrmanesh*, 689 F.2d 822, 834 (9th Cir. 1982) (smuggling conviction).

B. There is no factual finding Defendant accomplished her prior theft offense through deceitful means and therefore, the theft does not shed light on her ability to testify truthfully.

A prior misdemeanor conviction is admissible only if the trial court can readily determine that "the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement." Fed. R. Evid. 609(a)(2). To determine if a prior offense was accomplished through means of deceit is a factual finding. (R. 72); *see Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216–17 (7th Cir. 1989) (explaining that a determination of whether a defendant's previous conviction involved "dishonesty or false statement" is "fact-specific").

Under Boerum's statute for petit larceny (§ 155.25), there is no requirement of a dishonest act or false statement. (R. 3, 20). Instead, the statute only requires proof that Ms. Fenty "knowingly took someone else's property and intended to use it as her own." (R. 3, 20). As such, deceit or false statement *is not* an element of her petit larceny conviction. Boreum Penal Code, however, does have a separate statute § 155.45 titled "Theft by Deception" where deceit *is* an element of the crime—but Ms. Fenty was not charged under this statute (but the former). This further shows the state legislature's intent to separate between different types of theft. (R. 21).

Next, the Government is misguided in its reliance on *Altobello* for the principle that "misdemeanor theft . . . can be committed by obtaining property through deception." *Altobello,* 872 F.2d at 217. In *Altobello*, the court reasoned the defendant's prior offense—which involved altering and tampering with electric meters in the city for the goal of helping restaurants reduce their electric bills—fell within the scope of Rule 609(a)(2) and was properly admissible. *Id.* at 217. Notably, the court explained that "[m]eter tampering is *necessarily* a crime of deception, the goal is *always* to deceive the meter reader." *Id.*

In contrast, planning and executing a goal-oriented plan to tamper with electric meters throughout a city is factually distinguishable from Defendant's isolated and spontaneous decision to steal a bag on a dare as a teenager. (R. 54). Ms. Fenty, on a dare from her friend, tried to take a bag from a female tourist in a crowded area when she was nineteen years old. (R. 52, 53). Once Defendant took the bag, the woman immediately noticed, yelled, and tried to grab the bag back from the Defendant. (R. 53). The woman let go of the bag and Ms. Fenty panicked and ran off, and was caught and convicted for petit larceny. (R. 53).

Unlike the defendant in *Altobello*, Ms. Fenty did not engage in any planning for the goal to carry out a deception: she did not "spend time learning how to steal a diaper bag." (R. 73). Nor did she plan what would happen if she got caught. (R. 54) ("No, we didn't make a plan. It was a dare. I didn't think it through."). Ms. Fenty simply appeared at a "crowded public space, and on a dare from a former friend, attempted to steal a bag." (R. 53, 73). Once things went wrong and she was discovered, Defendant "physically fought for the bag, creating a loud scene that resulted in her arrest." (R. 53, 73). The fact that Defendant engaged in a crime that involved selecting "a distracted target," avoiding the police when things went wrong, and used "poor judgment" to commit the petit theft—does not mean the nature of the crime is one of deceit. (R. 73). This would be an overbroad interpretation of the rule (and not a narrow one as Congress intended) where almost all crimes would fall within the scope of Rule 609(a)(2). (R. 73).

Rather, Defendant's petit theft offense involved the use of force (not deceit) and therefore squarely removed it from the scope of Rule 609(a)(2). *See Altobello*, 872 F.2d at 217. ("[M]isdemeanor theft . . . can be committed by obtaining property through deception, but *alternatively* by obtaining it through threat or force, or by receiving stolen property") (emphasis added); *see supra* III.A (discussing how Congress did not intend crimes of robbery and other

crimes involving force to be admissible under Rule 609(a)(2)). Here, Defendant grabbed the woman's bag and when she noticed, the woman yelled and tried to grab the bag back—at which point the Defendant "forcibly pull[ed] the bag," shoved the victim, and told her "Let go or I'll hurt you" and then ran. (R. 59, 60). Thus, Defendant committed the misdemeanor theft by using a threat and engaging in force, rather than through deception.

C. Limiting the effect of impeachment evidence through juror instructions is insufficient in this case and would go against public policy.

Public policy favors a narrow interpretation of misdemeanor crimes of deceit under Rule 609(a)(2). *See Fearwell,* 595 F.2d at 777. Even if the trial court provides limiting instructions, jurors routinely disregard such instructions and "regularly use evidence of a witness's prior conviction to infer criminal propensity." (R. 73); *Thompson v. United States*, 546 A.2d 414, 424–25 (1988) (cautioning how "one cannot unring a bell" and explaining how "the utility of a limiting instruction in the context of other crimes evidence has been widely questioned"). Empirical evidence illustrates how jurors often "lend excessive weight to a record of misdeed and crime." *Thompson,* 546 A.2d at 425. So when a criminal defendant has elected to testify (as is the case here), there is a strong public policy interest to ensure the defendant is being tried for her current crime and not prior offenses. *Id.* at 424–25. Otherwise, this would go against the defendant's constitutional right to a fair trial. *Id.* at 419. As a result, courts should construe crimes of deceit under Rule 609(a)(2) narrowly. *See Fearwell*, 595 F.2d at 777.

In sum, this Court should conclude that evidence of Defendant's conviction for petit larceny was not properly admissible for impeachment purposes under Rule 609(a)(2). Defendant's petit larceny offense had no bearing on her propensity to testify truthfully because

the previous offense was not committed by fraudulent or deceitful means—but instead accomplished by using a threat and force.

CONCLUSION

For the foregoing reasons, the judgment for the Fourteenth Circuit should be reversed on all three issues.

Respectfully Submitted
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