Team 33P- Original

NO. 23 – 695

In the Supreme Court of the United States

FRANNY FENTY,

Petitioner,

v.

UNITES STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. **Fourth Amendment Standing.** Does an individual have a reasonable expectation of privacy in packages addressed to their creative alias, affording them standing to challenge the search of the packages?

II. **Federal Rules of Evidence Rule 803.** Can Petitioner's recorded voicemail statements offered to show a then-existing mental state be admitted as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence, even if she had time to reflect before making those statements?

III. **Federal Rules of Evidence Rule 609.** Under the Federal Rules of Evidence Rule 609, can evidence of a defendant-witness's prior misdemeanor conviction for petit larceny be admitted into evidence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

OPINIONS BELOW

The District Court's ruling and transcript for the Motion to Suppress appear in the record on pages 10-17. The transcript and ruling on the inadmissibility of evidence under The Federal Rules of Evidence Rule 803(3) appear on pages 47-52 of the record. The District Court's ruling and transcript for the hearing on the Motion in Limine regarding the admission of impeachment evidence under The Federal Rules of Evidence Rule 609(a)(2) appear in the record on pages 18-26. The Opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record on pages 64-73.

CONSTITUTIONAL AND STATUTORY PROVISIONS

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.

STATEMENT OF THE CASE

This case arises from the petitioner Franny Fenty ("Fenty") engaging in the well-accepted practice of operating under a professional alias. On January 31, 2022, she opened a P.O. box under her pseudonym, Jocelyn Meyer, at the Joralemon Post Office. (R. 54.) Fenty, a writer, published literary works and maintained other professional communications under this name. (R. 42.) Like many creative professionals, she enjoyed the privacy that operating under a "pen name" provided her. *Id.*

Fenty ordered a shipment of xylazine, a muscle relaxant for horses, to her P.O. box the following month. (R. 46.) She addressed the shipment to her alias after agreeing to help an old friend, Angela Millwood ("Millwood"), care for elderly horses. (R. 55, 57-8.) On

February 12, 2022, an agent from the U.S. Drug Enforcement Administration ("DEA") instructed Joralemon post office workers to flag any packages sent from veterinary businesses as a part of an investigation into the fentanyl drug trade. (R. 30.) Officers had no information that Fenty was connected to any such scheme. (R. 38.) A postal worker contacted the agency when two sealed packages addressed to Jocelyn Meyer from "Holistic Horse Care" were delivered. (R. 31.) The employee also flagged two packages addressed to "Franny Fenty" at the P.O. box registered under the name Jocelyn Meyer. *Id.* After obtaining a warrant to search the packages addressed to Jocelyn Meyer, officers discovered they contained xylazine laced with fentanyl. *Id.*

Fenty received the shipper's delivery confirmation for the two Holistic Horse Care packages on February 14th. (R. 46.) When she didn't see the packages in her P.O. box, she called Millwood at 1:32 p.m. (R. 68.) When Millwood didn't answer, Fenty left her a voicemail, expressing her confusion and worry over the missing packages.[1] (R.40.) Approximately 45 minutes later at 2:17 p.m., Fenty called Millwood again and left a second message, restating her confusion, worry, and fear that Angela had misled her about the purpose and contents of the xylazine order.[2] *Id.*

Fenty returned to the post office the next morning and learned that her packages were being kept at the counter. (R. 32.) There, she claimed the packages addressed to Jocelyn Meyer and left the post office during a "controlled delivery" staged by the FBI. *Id.* Through a quick internet search, officers discovered the connection between Fenty and Jocelyn

[1] "Angela, I just got to the Post Office. None of the packages I was expecting are here, they're missing. I read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here, right? Call me back as soon as you can. I'm getting worried that you dragged me into something I would never want to be a part of…." (R. 40.)

[2] "I talked to the postal workers. They don't know what's going on with the packages… Angela, I'm getting really nervous. Why aren't you getting back to me? I thought the xylazine was just to help horses that are suffering. Why would they want to look at that? Is there something you aren't telling me? I'm really starting to get concerned that you involved me in something I had no idea was going on. Call me back." *Id.*

Meyer after overhearing someone address Fenty as "Franny Fenty" in the post office. (R. 33.) They learned Fenty used the pseudonym to publish literary works in a "zine." *Id*. Fenty was indicted and arrested for Possession with Intent to Distribute 400 Grams or More of Fentanyl under (21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi)) that day. (R. 1, 34.)

Fenty moved to suppress the contents of the sealed packages on August 25, 2022. The trial judge denied the motion, finding she did "not have an expectation of privacy in the sealed packages given her use of the alias." (R. 16.)

At trial, Fenty planned to serve as a witness in her case, as the only other potential witness to her actions and intent was Millwood, who was unavailable to testify. (R. 19.) Accordingly, her counsel filed a Motion in Limine to exclude the admission of impeachment evidence surrounding her sole prior conviction. (R. 22, 53.) This conviction refers to when, as a struggling 19-year-old, Fenty stole a bag that contained diapers and $27. (R. 22, 53.) She threatened the victim before running away with the bag. (R. 22, 53.) She was subsequently convicted of petit larceny, a misdemeanor, under Boerum Penal Code § 155.25 and completed two years of community service and probation. (R. 54.) Petit larceny does not require a dishonest act or a false statement under Boerum Penal Code § 155.25. Fenty was *not* charged with or convicted of theft by deception, which is structured similarly but contains an additional requirement that the guilty person uses *deceit* in the taking of another's property. Boerum Penal Code § 155.45.

The District Court admitted Fenty's petit larceny conviction as impeachment evidence, finding that because the victim was distracted at the time of the offense, the petit larceny conviction demonstrated the deceit required by Rule 609(a)(2). ("Rule 609(a)(2)"). (R. 26.) The court issued a brief limiting instruction, telling jurors to only consider Fenty's prior conviction in their assessment of her truthfulness. (R. 63.)

Further, the trial court sustained the Government's objection precluding the voicemails Fenty left for Millwood from being admitted to evidence under the hearsay exception provided by Rule 803(3) of the Federal Rules of Evidence. ("Rule 803(3)"). The trail court reasoned that because the statements allowed Fenty time to reflect, it was more likely the voicemails were fabricated. (R. 69.) Fenty was then convicted of possession with intent to distribute a controlled substance and sentenced to ten years of incarceration. (R. 65.)

Post-conviction, Fenty timely appealed the District Court's judgment. *Id*. The Fourteenth Circuit affirmed the decision that 1) the Government's search of contents found within sealed packages addressed to Fenty's alias did not violate the Fourth Amendment, 2) the recorded voicemail statements were properly excluded from evidence as they did not qualify as hearsay exceptions under Rule 803(3), and 3) Petitioner's impeachment by evidence of her prior conviction for petit larceny was proper under Rule 609(a)(2). (R. 67-70.) Fenty timely filed a petition for writ of certiorari to this Court, which was granted on December 14, 2023. (R. 74.)

SUMMARY OF THE ARGUMENT

This case is about protecting people's privacy. The Fourth Amendment does just this by forbidding unreasonable government intrusion. This protection cannot be stripped from people who wish to maintain privacy from the public by using an alias.

Fenty had a reasonable expectation of privacy in the packages addressed to her alias because she was their rightful owner, and she had the ability to exclude others from their contents. These factors far outweigh the fact that a name, other than her legal name, was written on the package.

Though Fourth Amendment standing cannot be asserted vicariously between different individuals, this rule does not apply where the accused merely used an alias. Ordering and

addressing a package to one's alias is distinct from sending a package to an actual third party who could bear on one's ability to control—and otherwise maintain—a privacy interest in a package. Further, Fenty had a strong nexus to her alias that law enforcement themselves were able to verify within minutes. This further bolsters her reasonable expectation of privacy in the packages under the totality of the circumstances.

Whether a reasonable expectation of privacy exists hinges heavily on what society is prepared to recognize as reasonable. The use of an alias or a pen name is an unremarkable practice employed by many for an array of reasons, chief among them to maintain a sense of privacy from the public. As such, it is objectively reasonable for people who engage in such a practice, regardless of the underlying reasons to use an alias, to maintain privacy interests in places and objects associated with that alias. Fourth Amendment protections cannot be reneged under the guise that society is not prepared to recognize a privacy interest in what a search has revealed.

Accordingly, Fenty has standing to challenge the warrant that the FBI obtained to search her packages addressed to Jocelyn Meyer.

Further, this case is about the trial court's unfounded and preemptive restriction of material evidence through their inappropriate application of Rule 803(3). At trial, the court misinterpreted Rule 803(3) by excluding the two voicemails Fenty left for Millwood from evidence on the basis that their lack of spontaneity inherently suggested their self-serving nature. Fenty's voicemails were spontaneous expressions of her state of confusion, as she called Millwood soon after finding out her packages were missing. Further, the court presumed without discussion that Fenty fabricated her state of mind to be self-serving, reading a new standard into Rule 803(3) and encroaching on the jury's essential purpose: to weigh all relevant evidence. Her confusion presented evidence with immense probative

value given her intent was relevant to the charges she faced; this mistake could change the outcome of the jury's verdict. The Fourteenth Circuit's interpretation of Rule 803(3) would set a dangerous precedent that prevents virtually all exceptions under Rule 803(3) from being admitted.

Finally, this case is about preventing needless and discriminatory prejudice against defendants who testify on their own behalf. The plain language and purpose of Rule 609(a)(2) clearly intend a narrow interpretation of the rule: to only admit evidence of a prior crime to impeach a defendant-witness when that prior conviction required a dishonest act or a false statement.

Fenty's prior conviction of petit larceny was erroneously admitted into evidence. Under Rule 609(a)(2), misdemeanor convictions are only admissible as impeachment evidence when that conviction required an element of a dishonest act or false statement. A conviction of petit larceny does not require such an element, and thus the District Court's admission of Fenty's prior conviction went against the plain language and purpose of Rule 609(a)(2). The limiting instruction issued by the District Court did not mitigate the prejudice caused by this error. The Fourteenth Circuit's ruling would result in jurors using evidence of the defendant-witness's prior crime as evidence of their propensity for criminality, unfairly prejudicing defendants and destroying the presumption of innocence. Additionally, the implementation of the Fourteenth Circuit's ruling would disproportionately impact low-income defendants, who are more likely to commit larceny, and marginalized communities, who face racial bias from the jury and rely on their testimony to subvert that bias.

Due to these errors of law, we respectfully request that this Court reverse the Fourteenth Circuit's ruling and remand the case for a new trial.

ARGUMENT

Because these are questions of the District Court's interpretations of the law, they are reviewed *de novo*. *See United States v. Sanchez–Robles*, 927 F.2d 1070, 1077 (9th Cir.1991).

I. Fenty has a reasonable expectation of privacy in the sealed packages addressed to her creative alias, Jocelyn Meyer.

This Court should vacate the Fourteenth Circuit's finding that Fenty does not have a reasonable expectation of privacy in the packages addressed to her alias. The totality of circumstances—not the name listed on a package—is controlling for whether its recipient may challenge a search. Fenty alone was able to exclude others from the packages' contents and she was their lawful owner. Further, the use of an alias is a common practice that society recognizes as reasonable. The contents of Fenty's packages cannot serve as a post-hoc justification for whether she has standing to challenge the search. She therefore had the requisite reasonable expectation of privacy to invoke the Fourth Amendment.

The Fourth Amendment protects against "unreasonable searches and seizures" of ones "persons, houses, papers, and effects." U.S. Const. Amend. 4. Evidence obtained under an unconstitutional search must be excluded from the government's case-in-chief. *Mapp v. Ohio,* 367 U.S. 643, 657 (1961). Fourth Amendment protections extend to "people, not places," so the exclusionary rule only applies to individuals whose rights have been violated, and such protections cannot be claimed vicariously. *Rakas v. Illinois*, 439 U.S. 128, 133 (1978). One's legitimate possession of an object or presence in the place searched alone are not enough to guarantee standing to invoke the Fourth Amendment: there is no "automatic standing." *United States v. Salvucci*, 448 U.S. 83, 92 (1980). Rather, a person must exhibit a subjective expectation of privacy in the place or object to be searched, and

the expectation must be one society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Courts are guided by "concepts of real or personal property law or [by] understandings that are recognized and permitted by society" when determining whether an expectation of privacy is reasonable, though property rights alone "are neither the beginning nor the end of [the court's] inquiry." *Rakas*, 439 U.S. at 143 n.12; *Salvucci,* 448 U.S. at 9. Specifically, courts consider factors including: "ownership, possession and/or control, historical use of the property searched, or the thing seized, [and the] ability to regulate access." *United States v. Colon-Solis*, 508 F. Supp. 2d 186, 192 (D.P.R. 2007). Whether a reasonable expectation of privacy exists is a fact-intensive inquiry that ultimately relies on the totality of circumstances. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

This Court has found "a person can have a legally sufficient [privacy] interest in a place other than his own home" where he had permission to occupy, a key for access, and stored some of his belongings. *Rakas*, 439 U.S. at 142, citing *Jones v. United States*, 362 U.S. 257, 263 (1960). *Cf. Rawlings*, a person who places their property into the bag of another does not have a reasonable expectation of privacy in the bag without other indicia of ownership or control. 448 U.S. at 105. Additionally, "wrongful presence at the scene of a search would not enable a defendant to object to the legality of the search." *Rakas*, 439 U.S. at n.12. The defendant bears the burden of establishing such a privacy interest in the place of the search at the time of the search. *Salvucci,* 448 U.S. at 92.

It is unquestionable that packages sent in the mail fall within the "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); *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). This includes while packages are in transit: "The constitutional guaranty of the right

of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." *Id., quoting Ex parte Jackson*, 96 U.S. 727, 733 (1877).

A. The use of her alias cannot *per se* diminish Fenty's privacy interest in her packages.

The record demonstrates that Fenty had a subjective privacy interest in the packages she ordered using her alias because she testified that she believed using an alias provided her with privacy in personal and professional matters. (R. 43.) The only question remaining is whether that expectation was objectively reasonable. Fenty's packages were seized and searched by law enforcement at the post office before she was able to retrieve them. (R. 30.) However, Fenty's constructive control over the packages, their sealed nature, and that she claimed the packages at the post office desk far outweigh the fact that they were addressed to her alias, rather than her legal name.

One's reasonable expectation of privacy in a package does not depend solely on the line indicating the sender or addressee but on the totality of circumstances. In *Byrd v. United States*, this Court unanimously rejected the idea that a defendant's ability to invoke Fourth Amendment protections against the warrantless search of a rental car depended on whether his name was listed on the rental agreement. 584 U.S. 395, 407 (2018). Rather, this Court focused on the defendant's "dominion and control" over the car as well as his lawful possession of the vehicle at the time of the search.[3] *Id*. This analysis logically follows from this Court's decision in *Rakas v. Illinois*, holding the defendant, who was a passenger in a car, did not have standing to challenge the search of the car, *absent some additional possessory interest in the vehicle*, because passengers do not possess the same amount of

[3] The defendant had permission from the party on the rental contract to drive the car. *Byrd,* 584 U.S. at 400.

control over a vehicle as drivers. 439 U.S. at 148.

In the context of packages sent in the mail, this Court has already held that an individual who shipped a package and addressed it to a fictitious entity retained a reasonable expectation of privacy in the package in *Walter v. United States*, 447 U.S. 649 (1980). Crucially, the analysis noted that even though "there was no *Leggs, Inc.,*" (the name of the fictitious business) by viewing the films within the package without a warrant, the government infringed on the "owner's constitutionally protected interest in privacy." *Id.* at n1., 654. The owner's privacy expectation in the package hinged on its condition at the time it was searched, not by the name to which the package was addressed. *Id*. at 658-9. *Cf. United States v. Jacobsen*, where the defendant lacked a privacy interest in an *unsealed* package whose contents were made available to the government by a private party. 466 U.S. at 114-115.

Numerous circuit courts have followed the logic of *Walter* and *Byrd* and correctly held that privacy interests are not *per se* diminished when a package is addressed to someone or something other than the defendant's legal name. In *United States v. Richards*, the Fifth Circuit agreed the defendant had a privacy interest in a package addressed to "Mehling Arts and Crafts" sent to a P.O. box that he had opened under a fictitious name. 638 F.2d 765, 770 (5th Cir. 1981) "The package was sealed and addressed to Mehling, which, in effect, *was* [the defendant]." *Id.* (emphasis added). These facts alone indicated a reasonable "expectation that the contents would remain free from public examination." *Id*.[4]

The Fourteenth Circuit erroneously relied on circuit decisions that made the important distinction between when the intended recipient of a package is someone using a

[4] The Eleventh Circuit agreed that an individual has a reasonable expectation of privacy in a package even when it is addressed to a fictitious entity. *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009), quoting *United States v. Villareal,* 963 F.2d 770, 774 (5th Cir. 1992).

pseudonym, and when they are an actual third party, to decline Fenty had a reasonable expectation of privacy in her packages. The logic of those cases is misapplied to Fenty because her packages were addressed to her alias, and not to a "middleman."

The Fourth and Fifth Circuits made this distinction in *United States v. Givens* and *United States v. Pierce.* 733 F.2d 339, 342 (4th Cir. 1984); 959 F.2d 1297, 1303 (5th Cir. 1992). In these cases, though the defendants were ultimately the intended recipients of the packages, they were addressed to someone else entirely. Consequently, the defendants' *eventual* ownership interests were not sufficient to establish a reasonable expectation of privacy in the packages at the time they were searched. *Id*. This is analogous to this Court's holding in *Rawlings*, because addressing a package to a middleman is akin to placing one's belongings in the purse of another, thereby relinquishing the ability to control and exclude necessary to maintain a reasonable expectation of privacy. *Givens*, 733 F.2d at 342.

Fenty did not relinquish her expectation of privacy when she ordered sealed packages using her pen name to her private P.O. box. Much like the authorized driver of the car in *Byrd*, Fenty was the rightful owner of the packages and the name listed on the packages was immaterial to her ability to exclude others from their contents. Nor did the use of her alias subtract from the reasonable expectation that the packages would remain sealed and free from government intrusion, as this Court recognized in *Walter* was the most significant factor for whether an owner's objective privacy interest existed in a package. Here, there was no third-party interference with the sealed nature of the packages while in transit to justify the government's search, unlike in *Jacobsen*. Fenty claimed the packages at the post office desk when they were not delivered to her P.O. box. (R. 33.) This is because, like in *Richards*, Fenty *is* Jocelyn Meyer. She exerted the same ability to control the packages under the name Jocelyn Meyer as she would have if they were addressed to her legal name.

The Court must apply the same logic it did in *Byrd* and hold that a *per se* rule that one's legal name must be on a package to have standing to challenge its search "rests on too restrictive a view of the Fourth Amendment's protections." 584 U.S. at 405.

Finally, Fenty did not address her package to an actual third party who could have interfered with the ability to keep her packages private. She was the sole intended recipient of the packages. She is not asserting the Fourth Amendment "vicariously" by challenging the search of packages addressed to Jocelyn Meyer and therefore has standing to challenge the search.

B. Fenty's alias need not be used publicly to retain her privacy interest in the packages addressed to Jocelyn Meyer. Even still, Fenty's use of her alias was public.

While this Court has not ruled on the issue, some circuits have suggested that in cases where a defendant wishes to assert a privacy interest in a package addressed to an alias, it must be an alias that is "established" and known to the public. *United States v. Rose,* 3 F.4th 722, 728 (4th Cir. 2021). The Fourteenth Circuit relied on *United States v. Daniel,* where the court doubted the defendant had standing to challenge the search of a package addressed to his alias because even though his utility bill was registered under that name, his theory of defense was that he and his alias were two different people. 982 F.2d 146, 149 (5th Cir. 1993).[5] In other words, when the defendant uses an alias, the court may require some verifiable nexus to the defendant to assert Fourth Amendment protections in the packages addressed to that alias.

But specifically requiring that an alias be used publicly for the accused to retain a privacy interest in items associated with their alias is problematic. Such a rule forces people

[5] *See also United States v. Castellanos*, the defendant had no reasonable privacy expectation in a car where there was testimony that he claimed he and the name on the car title were separate people. 716 F.3d 828, 834 (4th Cir. 2013).

to choose between losing their privacy from the public or from the government. *United States v. Morta*, No. 1:21-CR-00024, 2022 WL 1447021, at *9 (D. Guam May 9, 2022).

The use of an alias is an "important societal practice." *Id*. "[A] government official may have security concerns in using her real name or home address to receive mail; a business executive in merger talks might worry about potential investors misusing the information gained through the mail to manipulate the securities markets." *United States v. Pitts*, 322 F.3d 449, 458 (7th Cir. 2003). Further, this Court has recognized the right to publish literature anonymously as protected by the First Amendment. *Id.* (citing *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995)).

Given the common practice of individuals using aliases for legitimate privacy concerns, the "public use" requirement runs counter to the well-accepted reason people choose to operate under pseudonyms.[6] This rule would extend a right to privacy to Mark Twain for packages addressed to him under this name later in his career but deny him the same protections before publishing *The Innocents Abroad*. A better approach understands that the nexus between a defendant and their alias is but one factor, under the totality of circumstances, that the court may consider during the Fourth Amendment standing inquiry.[7]

However, even if this Court were to adopt a "public use" rule and require more than societal recognition of Fenty's right to use her "nom de plume," the record demonstrates Fenty's "public use" of her alias. Fenty published multiple literary works under the name Jocelyn Meyer and contacted numerous publishers using her alias. (R. 4, 5.) During the

[6] Nor do the circuits address what constitutes public use. How many people must know the defendant by their alias until they can invoke the Fourth Amendment? How recent must the "public use" of an alias be?

[7] There was no "public use" requirement in *United States v. Villareal*, where the court liberally found both defendants had a privacy interest in the package because they were its immediate recipient. The court acknowledged there was some ambiguous testimony that the defendant had been previously identified as the fictitious name to whom the package was addressed. 963 F.2d at 775.

controlled delivery of the packages at the post office, Fenty claimed the packages addressed to Jocelyn Meyer, stating "yea, they're mine" when the post office worker asked if they were hers, rather than disassociating with the name like the defendant did in *Daniel*. (R. 33.) Most importantly, law enforcement was able to find the connection between Fenty and Jocelyn Meyer through a simple internet search with ease. *Id*. If law enforcement could do this so quickly, surely the public could. And so could a judge at a suppression hearing. This weighs in favor of finding Fenty has a reasonable privacy interest in the packages addressed to Jocelyn Meyer. The Fourth Amendment must therefore extend to Fenty for the search of these packages because there is a sufficiently verifiable nexus between Fenty and Jocelyn Meyer.

C. Fenty's Fourth Amendment protections do not hinge on what the search of the packages addressed to her alias revealed.

Important in the analysis for whether an expectation of privacy is reasonable is whether society recognizes that right, which often overlaps with understandings of property. *Katz* 389 U.S. at 361 (1967). This is evident in this Court's decision in *Byrd*, holding "no matter the degree of possession and control, [a] car thief would not have a reasonable expectation of privacy in a stolen car." 584 U.S. at 409. Further, a burglar's expectation of privacy when stealing from a summer cabin in the off-season is not "one that society is prepared to recognize as reasonable despite their subjective expectation of not being discovered." *Rakas*, 439 U.S. at n.12.

This analogy is akin to the search of a package in the mail where the package is addressed to a victim of identity fraud. *United States v. Johnson,* 584 F.3d 995, 1002 (10th Cir. 2009) (explaining "because of the potential harm to innocent third parties, there is a fundamental difference between merely using an alias to receive a package and using another's identity.") This makes sense because a right to privacy is found based on the

accused's relationship to the place or object searched, whether it be a car, a vacation home, or a package, and not based on what the search itself revealed. *See Katz,* 389 U.S. (1967) (recognizing a privacy interest in a phone call in a public phone booth and rejecting the narrow premise that privacy interests only come from concepts of property law.) Importantly, this inquiry isn't what society thinks is acceptable behavior, but what society accepts as a reasonable place (or object) for one to have a privacy interest. *Id.*

Therefore, a burglar would be denied the ability to challenge the search of a home in which he is wrongfully present based on his relationship to the home. *Rakas*, 439 U.S. at 143 n.12. Similarly, a party relinquishes privacy rights to mail addressed to a stolen identity because society does not recognize the relationship between an identity thief and mail addressed under the stolen name, irrespective of what the contents of the mail reveal.[8]

Some courts have held a defendant *per se* loses Fourth Amendment standing when their alias is used solely for a criminal scheme. *Daniel*, 982 F.2d at 149; *United States v. Lewis*, 738 F.2d 916 (8th Cir. 1984). However, using an alias for criminal purposes (excluding cases of identity theft where a package is addressed to a stolen identity) is distinct from the burglar in a summer cabin hypothetical, because the purpose of the alias can only be discovered *after* the search. *Pitts*, 322 F.3d at 458.

In *United States v. Fields*, the Second Circuit held one defendant had a reasonable expectation of privacy in an apartment, while the other defendant did not when law enforcement saw them both bagging cocaine through the window. 113 F.3d 313, 321 (2d Cir. 1997). This is because the first defendant had a key to the apartment and paid to use the space, while the second was more like a transient visitor who lacked the ability to exclude

[8] Of course, law enforcement cannot investigate all cases of identity fraud without a warrant. However, if law enforcement discovered Jocelyn Meyer was in fact a real person whose identity Fenty stole, Fenty would not have standing to challenge the search of the packages addressed to Jocelyn Meyer.

others from the space. *Id.* The analysis did not "depend on the nature of the defendant's activities, whether innocent or criminal." *Id*. Rather, it was based on the totality of circumstances relating to the accused's relationship with the place searched. *Id.* To hold otherwise "would allow the police [to] enter private homes without warrants, and if they find drugs, justify the search by citing the rule that society is not prepared to accept as reasonable an expectation of privacy…" in packages containing contraband. *Pitts*, 322 F.3d at 458. This is especially harmful in the context of mail, where the many individuals who use an alias for legitimate purposes stand to lose their Fourth Amendment protections without knowing so.[9]

First, Fenty did not solely use her alias for criminal purposes. The record clearly shows she published works and communicated with publishers representing herself as Jocelyn Meyer, using an email address under the name Jocelyn Meyer only a few months before she opened the P.O. box. (R. 5.) The government will point to the fact that Amazon packages addressed to "Franny Fenty" were also found in Fenty's P.O. box that did not contain contraband, but this is immaterial to whether she had a reasonable expectation of privacy in the packages addressed to Jocelyn Meyer. (R. 31.) What the search revealed in the packages addressed to Jocelyn Meyer cannot dictate Fenty's ability to challenge the search. Like society recognized a privacy interest in a conversation in an enclosed phone booth in *Katz*, society recognizes Fenty's privacy interests in packages mailed to her alias because there is nothing inherently wrong with the relationship between someone and packages they ordered using an alias, unlike a burglar in someone else's home, or a car thief in someone else's car.

[9] "Overall, everyone who sent a package using an alias would lose their privacy rights. Due to the nature of mail, this is an especially dangerous precedent because this infringement would occur behind closed doors in the Post Office, unbeknownst to the victims of the Fourth Amendment violation. Because of this, the victims could not seek any sort of vindication." Katherine Steward, *The Fourth Amendment, Dark Web Drug Dealers, and the Opioid Crisis Crisis*, 70 Fla. L. Rev. 1097 (2019).

Pitts, 322 F.3d at 458. Like the first defendant in *Fields*, Fenty has a privacy interest in the packages because she had a possessory interest in them– the fruits of the search can never serve as a post-hoc rationale to diminish this interest.

Fenty had standing to challenge the search of the packages she addressed to her creative alias. Her Fourth Amendment protections cannot *per se* vanish because of something as inconsequential as using an alias, rather than her legal name to maintain a sense of personal privacy. Rather, Fenty retained the requisite possessory interest and control over the packages at the time they were searched. Her Fourth Amendment standing does not depend on what the search revealed. This Court must vacate her conviction and remand these proceedings for a new suppression hearing on whether the warrant to search the sealed packages addressed to Jocelyn Meyer was sufficiently based on probable cause.

II. Fenty's statements are admissible hearsay exceptions under Federal Rule of Evidence 803(3).

This court should reverse the Fourteenth Circuit's holding that the statements in Fenty's voicemails did not meet the hearsay exception requirements under Rule 803(3). Her statements satisfy the requirements set forth by the text of Rule 803(3) and align with the intent of the Federal Rules of Evidence. Further, evaluating the trustworthiness statements is the role of the jury, not the prosecutor or judge.

Generally, for a jury to evaluate the reliability and trustworthiness of a statement, the witness must be present at trial, testify under oath, and be subject to cross-examination. Fed. R. Evid. 801(c), 802. Since hearsay evidence circumvents these requirements, it is generally not admissible. *Id.* However, not all hearsay is inadmissible at trial. *Id*. Rule 803(3) outlines one instance of hearsay evidence's admissibility for 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). Under Rule 803(3), hearsay evidence is admissible if it bears on the state of mind of the declarant and the state of mind is an issue in the case. *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976); *United States v. Olushoga*, 803 F.2d 722 (6th Cir. 1986); *Cincinnati Fluid Power, Inc. v. Rexnord, Inc.*, 797 F.2d 1386, 1395 (6th Cir., 1986); *United States v. Cardascia*, 951 F.2d 474 (2d Cir. 1991).

Because Rule 803(3) is an extension of Rule 803(1), the present sense impression hearsay exception, the Ninth Circuit applied the same test for a hearsay exception under Rules 803(1) and 803(3) in *United States v. Ponticelli,* evaluating the contemporaneousness, chance for reflection, and relevance of statements disclosing the declarant's state of mind. 622 F.2d 985, 991 (9th Cir. 1980). These elements ensure the declarant has an accurate memory of the event and limited time to fabricate a statement. *Id*. However, the Second Circuit in *United States v. Cardascia* noted that state of mind hearsay exceptions can reflect "a continuous mental process," because an expression of a state of mind on one occasion may be relevant to the state of mind at a later time. 951 F.2d 474, 488 (2d Cir. 1991). The duration of an emotion or state of mind varies, so courts may require a "reasonable indication" that in light of all circumstances, the state of mind at a later time was the same as at the time of the event invoking the state of mind in question. John William Strong et. al., *McCormick on Evidence* § 274 at 219-220 (5th ed. 1999).

The likelihood that a defendant is misrepresenting their state of mind in a statement they offer under an exception to the hearsay rule is not relevant to the determination of the statement's admissibility. *Cardascia*, 951 F.2d at 474. Any self-serving nature of the statement is considered when the jury weighs the evidence at trial. *Id.* Rule 403 only excludes evidence when its probative value is "substantially outweighed" by a risk of unfair prejudice, misleading the jury, or "needlessly presents cumulative evidence." Fed. R. Evid.

403. Otherwise, self-serving statements are admissible, and jurors are trusted to weigh the evidence appropriately. *United States v. Miller*, 874 .2d 1255, 1272 (9th Cir. 1989).

The Fourteenth Circuit applied the test outlined in *Ponticelli* and found that the first and second voicemails Fenty left for Millwood satisfied the elements of contemporaneousness and relevance for state of mind hearsay exceptions under Rule 803(3) but did not satisfy the spontaneity element. (R. 72.) The Fourteenth Circuit erred when it held that Fenty's voicemails did not satisfy the hearsay exception requirements of Rule 803(3) because 1) the statements are spontaneous and 2) the perceived sincerity of the statements does not affect the probative value of a state of mind declaration, especially when the declarant's state of mind is at issue in the case.

A. Fenty's voicemails were sufficiently spontaneous to satisfy the elements set forth in *Ponticelli*, and therefore admissible under Rule 803(3).

The Fourteenth Circuit erred in narrowly interpreting spontaneity to exclude Fenty's statements made immediately after she discovered her packages had gone missing. Further, the second voicemail left 45 minutes after the first, still conveyed her initial confusion and should be admissible as evidence of her continuous mental process. The Federal Rules of Evidence Advisory Committee Notes on Rule 803(3) and judicial interpretation of the rule offer no support for the Fourteenth Circuit's narrow interpretation of the spontaneity element.

The Advisory Committee's commentary is especially relevant in determining the meaning of the Federal Rules of Evidence where Congress has not amended the Advisory Committee's draft in any way. *Tome v. United States*, 513 U.S. 150 (1995). The Advisory Committee only states that Rule 803(3) is an extension of Rule 803(1), which permits the admission of present sense impressions based upon the theory that "substantial contemporaneity of the event and statement negate the likelihood of deliberate or conscious

misrepresentation." Fed. R. Evid. 803(3) advisory committee's note to 1972 proposed rules. However, concerning the spontaneity element, Rule 803(1) recognizes that, in most instances, "precise contemporaneity is not possible" and a slight lapse in time is permissible. *Id.* The Second, Fourth, Seventh, and Ninth circuits have used the Advisory Committee's notes on Rule 803(1) when interpreting Rule 803(3), and subsequently, have required the elements of contemporaneousness and spontaneity. *United States v. Johns*, 15 F.3d 740 (2d Cir. 1994); *United States v. Barile*, 286 F.3d 749 (4th Cir. 2002); *United States v. Sokolow*, 91 F.3d 396 (7th Cir. 1996); *United States v. Mendoza*, 574 F.3d 1204 (9th Cir. 2009).

Spontaneity does not have such strict requirements as to exclude statements about the declarant's present state of mind shortly after the event. In *United States v. Giles*, the trial court first held that a tape made three weeks after a crime disclosing the defendant's then-existing mental state left too much time for reflection and potential fabrication of a present sense impression. 246 F.3d 966, 974 (7th Cir. 2001). However, on appeal, the Seventh Circuit held that the tape should have been admitted under Rule 803(3), on the basis that, for a close evidentiary call, "it's best to err on the side of inclusion." *Id. Cf. United States. v. Faust* 850 F.2d 575, 586 (9th Cir. 1988) (holding the defendant's letter was inadmissible under Rule 803(3) because he had the time to write multiple drafts, demonstrating his time for reflection and deliberate fabrication.)

Here, the Fourteenth Circuit suggested that Fenty had time to reflect, and therefore, misrepresented her situation when she left two voicemails for Millwood. (R. 68.) However, the record does not indicate any time for reflection between Fenty's realization that the packages were missing and her first call to Millwood. (R. 68-9.) Thus, if Fenty's first voicemail is inadmissible because of the mere possibility of time for reflection, then

virtually no evidence can be admitted under Rule 803(3), subverting the rule altogether. In the second voicemail, made 45 minutes after the first, Fenty expressed the same emotions of confusion and worry as in her initial voicemail. (R. 68.) Fenty made these calls *at most* an hour or two after discovering the packages were missing, a period much shorter than the three weeks permitted in *Giles* (R. 69.)

Fenty's consistent state of distress provided a "reasonable indication" that her state of mind was the same during the second voicemail as it was in the first. In both voicemails, Fenty expressed worry and confusion as a part of a "continuous mental process." (R. 40.) John William Strong et. al., *McCormick on Evidence* § 274 at 219-220 (5th ed. 1999); *Cardascia*, 951 F.2d 474. Especially noting that Millwood was not present with her, calling was the most instantaneous form of expression Fenty could have pursued. Unlike the multiple drafts of a letter in *Faust*, the nature of a voicemail requires spontaneous expression. Barring the time Fenty was presumably waiting for the call to go to voicemail, she had no time to reflect.

Many statements are not admissible under Rule 803(3) because they occur after an arrest; courts have held defendants were aware of the potential legal ramifications of these statements and therefore those statements are not considered spontaneous. In *Ponticelli*, the present sense impression statements came after the defendant's arrest, and therefore, he was aware that he was under investigation and that anything he said could be used against him, barring the admission of his statements under Rule 803(3). 622 F.2d at 991. *See also United States v. Ponce-Galvan*, 586 F. Supp. 3d 1019 (S.D. Cal. 2022). In *United States. v. DiMaria*, the Second Circuit remanded the proceedings when the declarant's statement, conveying his confusion about why FBI agents were approaching him after purchasing

bootleg cigarettes before any arrest occurred, were not admitted at trial. 727 F.2d 265, 270 (2d Cir. 1984).

Here, Fenty was only aware that her packages were missing because she received a delivery notification, and her packages were not at the post office when she arrived. (R. 46). Unlike an arrest, no law enforcement officer read Fenty her rights and prompted her to be aware of the legal ramifications of her statements. Even if Fenty assumed the FBI intercepted her packages, her awareness would be analogous to the declarant's in *DiMaria*, as he saw FBI agents approaching before making his statement.

Fenty's first voicemail satisfies the spontaneity requirement set forth in *Ponticelli*, as she called Millwood immediately after discovering her packages were missing. Her second voicemail constitutes a state of mind that reflects a "continuous mental process" as permitted in *Cardascia*. Neither of her statements were made with the awareness of any possible legal ramifications as though there had been an arrest. Even if this Court were to adopt the rule applied by the Fourteenth Circuit, the Fourteenth Circuit erred in holding that the voicemails were not spontaneous. Therefore, Fenty's statements are admissible under Rule 803(3).

B. This Court should not consider whether a statement is self-serving when determining the admissibility of evidence under Rule 803(3).

The Fourteenth Circuit erred in affirming the trial court's exclusion of statements they believed could have been fabricated under Rule 803(3), as it is the role of the jury to weigh the truth of evidence. The perceived sincerity of the statements does not affect the probative value of a state of mind declaration, especially when the declarant's state of mind is at issue in the case. Evidence disclosing the declarant's state of mind offers unique value to the trial process, serving as a primary source when the declarant's state of mind is at issue in the

trial, regardless of the truth of the statement. John William Strong et. al., *McCormick on Evidence* § 274 at 219-220 (5th ed. 1999).

Here, Fenty's voicemails serve as this primary source, showcasing her immediate feelings of confusion and worry when the packages were missing. (R. 68.) Because she was charged with possession with intent to distribute a controlled substance, her knowledge of the existence of fentanyl mixed with the xylazine is integral to the jury. The voicemails offer evidence speaking to her intent and therefore hold immense probative value. If the Government wanted to exclude the voicemail evidence based on its probative value against the potential risk of unfair prejudice or confusing the jury, the Government should have raised a Rule 403 issue at trial. (R. 72.)

The possibility that a defendant is misrepresenting their state of mind is not relevant to a statement's admissibility into evidence. *Cardascia*, 951 F.2d at 487. As the dissent in the Fourteenth Circuit highlighted, to preemptively restrict material evidence because the prosecution believes it may be untrustworthy "encroaches on the jury's essential purpose, which is to assess the credibility of admissible evidence." *United States v. Peak*, 856 F.2d 834 (7th Cir. 1988). For this reason, the Second Circuit reversed the trial court's decision in *DiMaria* to exclude evidence under Rule 803(3) because of the assumed unreliability of the statements. 727 F.2d at 271. The statements were admissible as hearsay exceptions, despite the risk of admitting certain statements that appear to have a low degree of trustworthiness. *Id.*

Even if Fenty used her little time to reflect to misrepresent her state of confusion, it is the jury's role to interpret the evidence. One criticism of strict applications of Rule 803(3)'s spontaneity factor is that courts assume without discussion that defendants have compelling motives to fabricate and make untrustworthy "self-serving" statements. Eleanor Swift,

Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay, 38 Seton Hall L. Rev. 975, 993 (2008). Assuming fabrication is not supported by the text of Rule 803(3) and encroaches on the role of the jury to determine the guilt of a defendant. If this Court is concerned there is some risk of misguiding the jury, on remand, the trial court may issue a limiting instruction to ensure that the jury only considers the voicemails when evaluating Fenty's state of mind. *United States. v. Brown*, 490 F.2d 758 (D.C. Cir. 1973). The jury may use their discretion as to the statements' truthfulness. *Id.* The Court may also redact fact-laden statements to only reflect Fenty's state of confusion and worry. *United States v. Joe,* 8 F.3d 1488 (10th Cir. 1993).

This Court therefore should find that Fenty's voicemails are admissible as a state of mind declaration under Rule 803(3).

III. Fenty's prior conviction is not admissible for impeachment purposes under Federal Rule of Evidence 609(a)(2) because her offense of petit larceny did not involve a dishonest act or false statement.

This court should reverse the Fourteenth Circuit's holding that Fenty's prior conviction for petit larceny was admissible as impeachment evidence. Rule 609 of the Federal Rules of Evidence permits the admission of certain prior convictions to impeach a witness. Fed. R. Evid. 609. Prior convictions are presumed inadmissible as impeachment evidence, and thus the attorney intending to impeach the witness bears the burden to demonstrate otherwise. *Thompson v. United States*, 546 A.2d 414, 419 (D.C. 1988). When the witness at risk of impeachment is the defendant in a criminal case, felony convictions are admissible if the probative value of that evidence exceeds the risk of prejudice towards the defendant (subject to additional considerations). Fed. R. Evid. 609. In contrast, misdemeanor convictions are only admissible for impeachment if proving the elements of that conviction required proof or the witness's admission of "a dishonest act or false statement." Fed. R. Evid. 609(a)(2).

Congress specified that Rule 609(a)(2) was intended to admit crimes of perjury, fraud, or others involving, "some element of deceit, untruthfulness, or falsification" (referred to as *crimen falsi*) which speaks to the witness's propensity to testify honestly. H.R. Conf. Rep. No. 93-1597, at 7103 (1974).

Originally, there was disagreement within the federal circuits as to whether courts should look at only the nature of the criminal charges themselves (in an element-based approach) or look through all the facts of the offense to determine admission under Rule 609(a)(2); however, the 2006 amendment to Rule 609 and the Advisory Committee's accompanying notes clarified this issue by explaining that a conviction is only admissible under Rule 609(a)(2) when the conviction required proof (or an admission as part of a guilty plea) of dishonesty or a false statement; no other misdemeanor conviction is admissible under Rule 609(a)(2), "irrespective of whether the witness exhibited dishonesty or made a false statement in the process" of the offense. Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment. This Court has not yet ruled on whether an element-based approach or facts-based approach is correct in determining whether a conviction is admissible under Rule 609(a)(2). However, this Court denied certiorari when the Fifth Circuit utilized the element-based approach to find that shoplifting is not an admissible conviction under the rule. *See United States v. Ashley*, 569 F.2d 975, 979 (5th Cir. 1978), *cert. denied*, 439 U.S. 853, (1978).

Here, the prosecution sought to admit Fenty's prior conviction of petit larceny to impeach her testimony but was unable to demonstrate an element of dishonesty or a false statement within the statutory language of petit larceny, or Fenty's guilty plea to that offense, as required by Rule 609(a)(2). Boerum Penal Code § 155.25. (R. 22-27.) Nonetheless, they argued that the minute facts of Fenty's prior offense demonstrated deceit

sufficient to satisfy the admissibility requirements of Rule 609(a)(2). The Fourteenth Circuit erred when it upheld the trial court's decision to admit this evidence. Fenty's petit larceny conviction did not involve an element of dishonesty and was entirely inadmissible under 609(a)(2).

This Court should utilize the element-based approach to find that Fenty's prior conviction of petit larceny is inadmissible. This approach correctly follows the statutory language of petit larceny & the intent of Rule 609(a)(2). If this Court relies on an inaccurate, fact-based approach, Fenty's petit larceny conviction remains inadmissible, but such a ruling would exacerbate significant policy concerns surrounding the ineffectiveness of limiting instructions regarding jurors' use of prior convictions as evidence of a propensity for criminality.

A. Fenty's conviction of petit larceny does not meet the requirement of a dishonest act or false statement under Rule 609(a)(2) based on the statutory language of petit larceny and the purpose of Rule 609.

When enacting Rule 609(a)(2), Congress instructed courts to interpret the rule narrowly because once an element of dishonesty or false statement is identified, that conviction becomes automatically admissible, even if the risk of unfair prejudice to the defendant testifying outweighs the probative value of the conviction as impeachment evidence. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). Since Rule 609(a)(2) does not allow for discretion,[10] Congress listed out the specific types of convictions that contain an element of dishonesty or a false statement (such as embezzlement, perjury, or fraud) to limit the convictions admissible under the rule. *Id.* Only convictions that directly show the witness's propensity to testify untruthfully are admissible under Rule 609(a)(2). *United States v.*

[10] Unlike Rule 609(a)(1) and Rule 403, which allow for discretion based on the probative value and risk of prejudice. Fed. R. Evid. 403, 609.

Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978).

In *Fearwell,* the D.C. Circuit stated that "the crime of petit larceny does not involve dishonesty or false statement," so the defendant's prior conviction for shoplifting failed to demonstrate a propensity for dishonest testimony. *Fearwell* 595 F.2d at 776. Therefore, admission of the petit larceny conviction would go against the intent of Congress to restrict Rule 609(a)(2) admission to a very narrow subset of convictions. *Id*. at 777. Further, in *United States v. Newman*, the Fifth Circuit ruled that the defendant's convictions for theft-forgery and theft by deception were admissible for impeachment, but his theft and larceny convictions were not because they lacked a requirement of dishonesty or a false statement within their statutes. 849 F.2d 156, 163 (5th Cir. 1988). Similarly, the Ninth Circuit in *United States v. Ortega* found that the defendant's conviction for petit larceny did not require the prosecution to prove dishonesty or a false statement, and thus did not show a propensity to lie, so admission of the petit larceny conviction would frustrate the purpose of Rule 609(a)(2). 561 F.2d 803, 806 (9th Cir. 1977). The Fifth Circuit took a slightly broader approach in *United States v. Jefferson* and used the language of the indictment to show that an act of dishonesty or false statement was required for the defendant's conviction for obstruction of justice but refrained from conducting an inquiry into whether the specific facts of the offense involved deceit. 623 F.3d 227, 234 (5th Cir. 2010).

The statute under which Fenty was convicted of petit larceny did not contain any element of a dishonest act or false statement and is entirely inadmissible under Rule 609(a)(2), as opposed to a conviction for theft by deception which does. Boerum Penal Code § 155.45. Under the rationale of the Third, Fifth, Ninth, and D.C. Circuits, a prior conviction is only admissible under Rule 609(a)(2) when a finding of a dishonest act or false statement is required for that conviction. *E.g.,* Mod. Crim. Jury Instr. 3rd Cir. 2.25 (2023);

Newman, 849 F.2d at 163; *Ortega*, 561 F.2d at 806; *Fearwell*, 595 F.2d at 777. Fenty's prior conviction did not involve any such requirement.

Additionally, even if this Court adopted the approach in *Jefferson* and looked to the indictment language to see if a dishonest act was required for Fenty to have been convicted, there is no such indictment here that would demonstrate an element of dishonesty or false statement on Fenty's part. The government bears the burden of proof to show an element of deceit and has failed to submit any indictment language or jury instruction that would indicate the jury was required to find that Fenty committed a dishonest act or false statement to convict her of petit larceny. *Thompson*, 546 A.2d at 419.

Fenty's prior conviction of petit larceny does not demonstrate a propensity for untruthful testimony and is not admissible under Rule 609(a)(2).

B. Even if this Court adopts a facts-based approach, Fenty's prior conviction is not admissible under Rule 609(a)(2) because the facts of the offense did not involve dishonesty or a false statement.

The Fourteenth Circuit erred when it held that a fact-based analysis is appropriate to determine whether Fenty's prior conviction is admissible under Rule 609(a)(2); however, even if this Court uses a fact-based approach, Fenty's prior conviction is inadmissible because the facts (at most) show stealth, not dishonesty.

Before the 2006 Amendment, which clarified that a fact-based approach was inappropriate in determining a prior conviction's admissibility under Rule 609(a)(2), several circuit courts looked to the minute facts of a witness's prior offense to determine if said conviction involved deceit. *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005); *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998). Facts demonstrating stealth, however, are not sufficient to admit a prior conviction under this rule, as most crimes involve some aspect of stealth. *Estrada*, 430 F.3d at 614 (citing *Hayes*, 553 F.2d at 827). In

United States v. Payton, the Second Circuit held that a defendant's prior conviction for larceny was admissible under Rule 609(a)(2) because a fact-based analysis determined that the defendant committed larceny by making a false statement on a welfare application. 159 F.3d at 57. The same circuit conducted a similar analysis in *Estrada* to find that a witness's prior larceny conviction was not admissible because attempts at stealth to elude discovery did not demonstrate the dishonesty required by Rule 609(a)(2). 430 F.3d at 614.

Like the witness in *Estrada,* Fenty's petit larceny conviction involved only stealth, not deceit. In her testimony, Fenty admits that she snuck through the crowd and waited until the woman with the purse was not paying attention. (R. 53.) But she did not lie make a false statement or attempt to deceive the woman with the purse, unlike the defendant in *Payton*. The Fourteenth Circuit held that Fenty's stealth met the requirement of dishonesty or a false statement under Rule 609(a)(2), but this overly broad interpretation would make nearly every crime admissible under this rule because most crimes involve some aspect of stealth. Any crime occurring at night, in a desolate place, or while the homeowner is away at work would all be admissible under the Fourteenth Circuit's inaccurate interpretation of Rule 609(a)(2). This frustrates the purpose of Rule 609(a)(2) which is to scrutinize a witness's ability to tell the truth at trial, not interrogate every bad act they have ever done.

Fenty's prior conviction may have involved stealth, but the government did not show any dishonest act or false statement within the offense. Therefore, even under a fact-based approach, Fenty's prior conviction of petit larceny is not admissible under Rule 609(a)(2).

C. Limiting instructions do not mitigate the harm to Fenty and other defendant-witnesses with prior convictions.

If this Court upholds the Fourteenth Circuit's inaccurate interpretation of Rule 609(a)(2), it will result in significant prejudice against defendants who wish to testify on

their own behalf (hereafter "defendant-witnesses"), including Fenty. This prejudice cannot be cured by a limiting instruction to the jury, and thus the erroneous admission of evidence of a prior conviction requires the present conviction be reversed and the case remanded. The Advisory Committee Notes on Rule 609 acknowledge the risk of unfair prejudice is much higher when the defendant testifies, because the jury may be prejudiced as to the defendant's guilt or innocence. Fed. R. Evid. 609 advisory committee's note to 1974 enactment. Numerous studies show that limiting instructions directing jurors to only consider evidence of prior convictions in evaluating the defendant-witness's testimonial honesty are either ignored or misunderstood by jurors, leading jurors to infer a propensity for criminal activity. Robert D. Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 23 N.C. Cent. L.J. 14, 40 (1998). Juror knowledge of a defendant's prior conviction leads to an increased chance of conviction and likely contributes to wrongful convictions. *Thompson,* 546 A.2d at 419. Theodore Eisenberg, Valerie P. Hans, *Taking A Stand on Taking the Stand: The Effect of A Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1399 (2009). Then, when defendants do not testify on their own behalf, jurors react negatively. Dodson, *supra*, at 53. As a result, many defendants are effectively barred from exercising their right to testify in their own defense, compromising the courts' core value that one is innocent until proven guilty. *Id.* at 52. Eisenberg & Hans, *supra*, at 1388.

In *Gov't of Virgin Islands v. Toto*, the Third Circuit held the defendant's prior conviction of petit larceny was erroneously admitted under Rule 609(a)(2), as petit larceny did not qualify as *crimen falsi* (a crime of deceit). 529 F.2d 278, 280-81 (3d Cir. 1976). They also held the trial court's limiting instruction did not cure this error, and the resulting

prejudice required that the conviction be reversed, and the case remanded. *Id.* at 283.[11] The error had "substantial influence (on the minds of the jury)" and was therefore not a harmless error. *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)[12]). Even if the court is unsure and left in "grave doubt," the conviction must be reversed. *Toto*, 529 F.2d at 283.

Similarly, the trial court's admission of Fenty's prior conviction of petit larceny constituted a grave error that significantly prejudiced Fenty, greatly increasing the risk she would be found guilty at trial. When Fenty testified on her own behalf, she was impeached with evidence of her prior conviction of petit larceny. (R. 25-6.) Although the trial court did issue limiting instructions, these were not sufficient to remove the prejudice created by the jury's knowledge of the prior conviction. (R. 63.) The erroneous admission of Fenty's prior conviction was not a harmless error but had a substantial influence on the jury, just as in *Toto*, because jurors use evidence of a defendant-witness's prior conviction as evidence of their propensity to commit crimes. *Id*. Dodson, *supra*, at 40. Eisenberg & Hans, *supra*, at 1388. Therefore, her conviction must be reversed, and the case remanded.

If this Court upholds the District Court's incorrect interpretation of Rule 609(a)(2) which admitted Fenty's prior conviction for petit larceny, low-income defendants will be unduly prejudiced by the ruling. People who commit larceny (and other non-violent property crimes) are far more likely to be indigent than those who commit assault or robbery. Alex Durante, *Examining the Relationship between Income Inequality and Varieties of Crime in the United States* (Spring 2012) (Economics thesis, The College of

[11] "When such evidence inadvertently reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk." *Toto,* 529 F.2d at 283.

[12] In *Kotteakos v. United States*, this Court found the appellate court erred when they upheld the defendant's conviction, because it was" highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776.

New Jersey) (on file with The College of New Jersey Library system); Kelly, Morgan. *Inequality and Crime*, 82 Rev. Econ. & Stat. 4, 530, 535 (2000). Many are unhoused or in low-income housing, struggling to make ends meet. Rosa Goldensohn, *New York's Most Desperate Caught Up in 'Crimes of Poverty'*, The City (Oct. 14, 2019), https://www.thecity.nyc/2019/10/14/new-york-s-most-desperate-caught-up-in-crimes-of-poverty. Fenty herself was struggling financially when she committed petit larceny; after growing up without financial stability, she made the bad decision to steal $27 and some diapers. (R. 25.) Upholding the District Court's erroneous interpretation of Rule 609(a)(2), in combination with the prejudice attached to prior convictions, would disproportionately affect indigent defendants. As discussed above, limiting instructions would not mitigate this prejudice.

Additionally, upholding the District Court's erroneous interpretation of Rule 609(a)(2) would further the implicit bias against Black and brown defendants. The right to testify in one's own defense is particularly critical for Black and brown defendants because jurors use race to "make predictive character judgments" of defendants. Montre D. Carodine, *The Mis-Characterization of the Negro: A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L. J. 521, 526 (2009). Black and brown defendants must then overcome these implicit biases, which is frequently done through their testimony. Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835, 873 (2016). One study found that race-based stereotypes among listeners disappeared after just twelve minutes of listening to a Black person speak, and the listeners then relied on the speaker's behavior to evaluate them, rather than their race. *Id.* at 876. While the right to testify in one's own defense is key for all defendants, that ability is imperative for Black and brown defendants. The

distressingly wide net cast by the District of Boerum through their incorrect interpretation of Rule 609(a)(2) would cause many defendants of color to refrain from testifying to avoid impeachment by prior conviction, preventing them from using their testimony to decrease the impact of jurors' racial stereotypes.

This Court should follow Congress' intention to construe Rule 609(a)(2) narrowly and adopt the element-based approach as instructed by the Advisory Committee and followed by the Third, Fifth, Ninth, and D.C. Circuits, rather than the broad and fact-based approach erroneously adopted by the Fourteenth Circuit. Under the element-based approach, Fenty's petit larceny conviction is not admissible under Rule 609(a)(2); however, even if this Court applies an incorrect fact-based approach, Fenty's conviction remains inadmissible because she merely used stealth and did not engage in a dishonest act or a make a false statement. The trial court's error in admitting this evidence was not mitigated by the limiting instruction to the jury, and that error was not harmless but substantially prejudiced the jury against Fenty. Fenty's present conviction must be reversed, and the case remanded for a new trial.

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

/s/ Team 33

Attorneys for the Petitioner