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

Team 29P
Attorneys for the Petitioner

QUESTIONS PRESENTED

I. Whether Franny Fenty had a reasonable expectation of privacy under the 4th Amendment in a sealed package addressed to Fenty's personal alias and delivered to her P.O. Box registered to that same alias.

II. Whether recorded voicemail statements offered by Franny Fenty should be admitted under Federal Rule of Evidence 803(3) when the statements show her then-existing mental state even though she had a short time to reflect before making the statements.

III. Whether the admission of Franny Fenty's prior conviction for petit larceny was proper under Federal Rule of Evidence 609(a)(2) when her previous conviction did not require proving a dishonest act or a false statement.

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STATUTORY PROVISIONS

The following provision of the Boerem Penal Code is relevant to this case: Boerem Penal Code §155.25. This provision is reproduced in Appendix A.

RULES PROVISIONS

The following provisions of the Federal Rules of Evidence are relevant to this case: Fed. R. Evid. 401; Fed. R. Evid. 609(a)(2); Fed. R. Evid. 803(1); Fed. R. Evid. 803(3). These provisions are reproduced in Appendix B.

CONSTITUTIONAL PROVISIONS

The following provision of the United States Constitution is relevant to this case: U.S. Const. amend. IV. This provision is reproduced in Appendix C.

STATEMENT OF THE FACTS

In late 2021 and early 2022, Drug Enforcement Administration (DEA) agents began investigating an increase in drug activity in Joralemon. R. at 8. Specifically, agents were investigating the increasing presence of fentanyl laced with xylazine, a known horse tranquilizer used by veterinarians. R. at 8. This deadly combination became a larger concern when a citizen of Joralemon died from a fentanyl overdose on February 12, 2022. R. at 8, 29.

I. Postal workers seized Franny Fenty's sealed packages from Holistic Horse Care.

During the overdose investigation, officers discovered a package and a partially used syringe near the victim's body. R. at 29. The package was addressed to a company called Holistic Horse Care, a veterinary pharmaceutical company for horses. R. at 8. Subsequent tests revealed that the syringes contained a combination of fentanyl and xylazine. R. at 29. As a result, DEA Agent Robert Raghavan informed the Joralemon Post Office to keep an eye out for any suspicious packages, including any packages sent from horse veterinarian websites. R. at 30.

On February 14, 2022, post office employees seized two packages sent from Holistic Horse Care and subsequently alerted DEA agents. R. at 30. The packages were addressed to Jocelyn Meyer, which is the personal alias used by Franny Fenty. R. at 30, 43. Fenty used the alias to write and publish short stories in college. R. at 42. Additionally, since college, Fenty wrote five novels under the alias and used an email associated with it to communicate with publishers. R. at 42. The delivery address on the packages was P.O. Box 9313, which was also registered to Jocelyn Meyer. R. at 30–31. The agents seized the Holistic Horse Care packages and tested the contents, which revealed one bottle of xylazine containing 200 grams of fentanyl in each package. R. at 31–32. In addition to the packages from Holistic Horse Care, there were two Amazon packages seized that

were addressed to Franny Fenty. R. at 31. However, a later search of the two Amazon packages showed that those packages did not contain contraband, but rather just a face cream. R. at 38.

The agents subsequently resealed the packages and arranged a controlled delivery from the post office. R. at 32. The agents instructed a postal worker to leave a slip for Jocelyn Meyer in P.O. Box 9313 notifying her to pick up her packages from the front counter. R. at 32. Sometime later, Franny Fenty entered the post office and used her key to unlock P.O. Box 9313, where she then retrieved the two Amazon packages and the slip instructing her to see the front desk to obtain the other packages. R. at 32. After showing the slip to the post office manager, Fenty stated that the packages belonged to her, and the manager handed them over. R. at 32–33.

II. Franny Fenty left voicemail messages to Angela Millwood.

While at the post office, Fenty left two voicemail messages for Millwood. R. at 40, 47. Fenty left the first message at 1:32 p.m., stating that she had just arrived at the post office. R. at 40. She informed Millwood that the packages she was expecting, including deliveries from both Amazon and Holistic Horse Care, were missing. R. at 31, 40, 46. She expressed to Millwood her worry that she was being dragged into something she would never want to be a part of. R. at 40.

Only forty-five minutes after leaving the first voicemail, at 2:17 p.m., Fenty left the second voicemail telling Millwood that she had talked to the postal workers and they did not know what was going on with the packages. R. at 40, 46. Fenty stated that the postal workers told her she should return the next day. R. at 40. In the voicemail, she questioned why the postal workers would want to look at all of the packages. R. at 40. Again, Fenty communicated how concerned she was that Millwood had involved her in something that she did not know was occurring. R. at 40.

III. Franny Fenty was previously convicted of petit larceny.

When she was nineteen years old, on a dare from a friend, Franny Fenty got caught taking a bag from a tourist. R. at 52–53. Fenty admitted she didn't want to do it but did anyway because her and her friend were both really broke at the time and she wanted to impress her. R. at 53. Fenty walked over to the tourist quietly, trying to remain unnoticed, but when she tried to grab the bag, the tourist noticed her and began yelling, trying to get the bag back. R. at 53, 59. Fenty made very honest threats against the tourist trying to get ahold of the bag. R. at 22. The two made a loud scene in the crowded area, but then the tourist let go of the bag and Fenty ran off with it. R. at 53.

Fenty was convicted of petit larceny under §155.25 of the Boerum Penal Code. R. at 19. Under Boerum law, the elements of petit larceny contain no express mention of an element of deceit or dishonesty. *See* R. at 3. Rather, generally, a person is guilty of petit larceny in Boerum when they knowingly or intentionally take or steal the personal property of another. R. at 3.

STATEMENT OF THE CASE

District of Boerum. Prior to trial, the United States District Court for the District of Boerum heard two evidentiary motions. R. at 10–26. First, the court heard arguments on the Defendant's Motion to Suppress Contents of Sealed Packages. R. at 10–17. Fenty claimed that the evidence obtained from the search of the sealed packages from Holistic Horse Care violated her Fourth Amendment rights. R. at 66. The motion was denied. R. at 17. The court reasoned that Fenty held no expectation of privacy in the packages because she used an alias. R. at 16. The court also heard the Defendant's Motion in Limine to Exclude Evidence of Defendant's Prior Conviction. R. at 18–26. Fenty argued her prior conviction for misdemeanor petit larceny did not qualify for admission under Federal Rule of Evidence 609(a)(2) because it was not a crime of deceit. R. at 66. This

motion was also denied, R. at 26, but the court issued a limiting instruction, directing the jury to only consider the evidence of the prior conviction in determining Fenty's credibility. R. at 63.

At trial, the Government objected to the admission of the two voicemail messages that Fenty left on Millwood's phone on February 14, 2022. R. at 47. The trial court judge sustained the objection on the grounds that the recordings did not qualify as an exception to hearsay because they did not represent the declarant's then-existing state of mind as required by Federal Rule of Evidence 803(3). R. at 52. At the conclusion of her trial, Fenty was "convicted on one count of possession with intent to distribute a controlled substance, and was sentenced to [ten] years in prison." R. at 66.

Fourteenth Circuit. Fenty appealed the district court's denial of her motion to suppress regarding the contents of the sealed packages, her motion in limine regarding her prior conviction, and the court's refusal to admit the voicemails into evidence. R. at 65. The Fourteenth Circuit affirmed on all issues. R. at 65. The court held that the district court properly determined that Fenty did not have a reasonable expectation of privacy in the packages because they were addressed to an alias. R. at 67. Additionally, the court held that the district court did not err in excluding the voicemails as inadmissible hearsay because it determined the statements did not meet the requirements under Rule 803(3). R. at 69. Finally, the court held that evidence of Fenty's prior petit larceny conviction required admission under Rule 609(a)(2) because it found that her conviction had, at the very least, an underlying element of deceit. R. at 70. Additionally, the court held that the limiting instruction was sufficient to mitigate any risk of prejudice posed by the evidence. R. at 70.

Judge Hoag-Fordjour dissented, arguing first that the majority erred in holding that Fenty lacked an expectation of privacy because the use of an alias or a fictious name is afforded

protection by the Fourth Amendment. R. at 71. Moreover, the dissent argued that the majority improperly concluded that the hearsay exception did not apply because the voicemail messages clearly reflected Fenty's confused state of mind while at the post office. R. at 71–72. Further, the dissenting judge disagreed with the majority's decision to admit the conviction for petit larceny to impeach Fenty's credibility under Rule 609(a)(2) because it was not a crime of deceit and had no bearing on the likelihood that Fenty would lie on the witness stand. R. at 72–73.

SUMMARY OF THE ARGUMENT

Franny Fenty had a reasonable expectation of privacy in the packages addressed to her alias. The United States Court of Appeals for the Fourteenth Circuit erred in denying Fenty's Motion to Suppress on the basis that she did not have a reasonable expectation of privacy in the packages addressed to her alias. An individual has a reasonable expectation of privacy when (1) the individual manifests a subjective expectation of privacy in the place or object searched, and (2) when that expectation of privacy is one that society is prepared to recognize as reasonable. This Court should reverse the Fourteenth Circuit's denial of the motion to suppress because Fenty had a reasonable expectation of privacy in the packages addressed to her alias.

Generally, an individual does not forfeit an expectation of privacy in an item sent or received by mail when the individual uses an alias, as opposed to the name of a third-party. Here, the packages were addressed to Franny Fenty's established alias, not an alter ego or third-party, thus maintaining Fenty's expectation of privacy. Additionally, when the recipient is neither the sender nor the addressee, the recipient must exercise possession or control over the package to have an expectation of privacy. Here, Fenty exercised control over the packages when she used the slip from her P.O. Box to obtain the packages from the front counter of the post office.

Society currently recognizes the use of an alias as reasonable in many other contexts, such as an author's use of a pseudonym. Here, Fenty's use of the alias Jocelyn Meyer is no different than a published author's use of a fictitious name that is well accepted by society. Additionally, an individual's expectation of privacy is not dependent on the nature of the activity, even if it is criminal in nature. Here, Fenty testified that she had no knowledge of any criminal activity or of anything illegal in the package when she ordered the horse medication. Further, an individual must show an established use of an alias to claim a reasonable expectation of privacy in that alias. Notwithstanding Fenty's knowledge of the criminal nature of her activities, she still maintained an expectation of privacy because she provided sufficient evidence showing her use of the alias.

Finally, the evidence obtained from the search should be suppressed because Franny Fenty held a reasonable expectation of privacy in the P.O. Box because she demonstrated that both her personal name and alias were associated with it. Therefore, because Franny Fenty held a reasonable expectation of privacy in the packages addressed to her personal alias, the evidence obtained as a result of the search should be suppressed.

The recorded voicemail messages should be admitted as evidence of Franny Fenty's then-existing state of mind. The Fourteenth Circuit abused its discretion in holding that the voicemail statements were inadmissible hearsay. Under Federal Rule of Evidence 803(3), hearsay statements can be admitted to show the declarant's then-existing state of mind. A hearsay statement is admissible when it is contemporaneous with the declarant's then-existing state of mind, meaning it is reasonably likely that the state of mind represented in the statement is the same as the state of mind the declarant had at the time of the material events. This Court should reverse the decision to exclude the voicemail evidence because the messages are admissible under Rule 803(3).

When a hearsay statement is made immediately after a declarant receives new information, the statement is admissible under Rule 803(3). Here, both of the voicemail statements were made in response to Fenty gaining new information about her packages. She recorded the first message after discovering the packages were missing from her P.O. Box and recorded the second voicemail after learning that the postal workers were holding the packages. Both messages were recorded after gaining new knowledge about the situation and reflected what Fenty's state of mind was as she learned the new information.

Additionally, a hearsay statement reflecting a declarant's then-existing state of mind can only be excluded if the declarant had sufficient time to misrepresent their thoughts during or after the material event. Circuit courts have held that time frames from four hours to two years are sufficient time for the declarant to misrepresent their state of mind. Here, Fenty left her first voicemail message mere minutes after arriving at the post office. She left the second message only forty-five minutes later, and she spent the time in between the two messages speaking to the postal workers. Given the miniscule amount of time she had to actually reflect, there simply was not enough time for her to misrepresent her state of mind. Although, if the declarant's statement regards a belief about a past action, there was sufficient time for a declarant to fabricate their statement. Here, Fenty was not relaying any thoughts she had about previous events because when she left the voicemails she was speaking about events that were presently occurring. Thus, Fenty did not have sufficient time to fabricate her statements.

Finally, when a declarant has not spent time reflecting on the legal consequences of their statements, their statements can be trusted under the Rule 803(3) exception. When she left the messages, Fenty was unaware the authorities were already involved. Therefore, her statements are trustworthy because she did not have any time to reflect on whether they would have legal

ramifications. Furthermore, even if this Court finds that Fenty was aware the authorities were involved, it cannot exclude the voicemails under the premise that they may not be true statements. It is the responsibility of a jury to determine the credibility of a statement. Thus, the voicemail statements showing Franny Fenty's then-existing state of mind are admissible under Rule 803(3).

Franny Fenty's prior conviction for petit larceny was improperly admitted as impeachment evidence. The Fourteenth Circuit abused its discretion in holding that the admission of Franny Fenty's prior conviction for petit larceny was proper for impeachment purposes. Under Federal Rule of Evidence 609(a)(2), evidence of a prior criminal conviction is automatically admissible, but only if establishing the elements of the previous crime required proving a dishonest act or false statement. The application of Rule 609(a)(2) is restricted to those convictions that are directly connected to the defendant's likelihood to testify truthfully. This Court should reverse the decision to admit Fenty's prior conviction for petit larceny and remand the case for further proceedings because her previous criminal act does not bear on her ability to testify truthfully.

A previous conviction that does not involve dishonesty cannot be admitted because it has no bearing on the truthfulness of an accused's testimony. Dishonesty or false statements can be indicated from a prior conviction if listed as elements of the offense. However, if there is no element of deceit listed in the statute, there must be a showing that the underlying facts of the offense involved dishonesty. Here, under the Boerum Penal Code, the elements of petit larceny do not include any express mention of deceit or dishonesty. Also, Fenty's petit larceny offense did not include any dishonest conduct because while she did sneak up on the tourist, she did not attempt to deceive her; Fenty made genuine threats to the tourist and used force to obtain the bag.

Furthermore, when a crime involves mostly stealth, rather than dishonesty, it is not admissible under Rule 609(a)(2). Many circuit courts have clarified that petit larceny involves

nothing more than stealth, which is not the same as deceit. In committing her previous crime, Fenty was trying to avoid detection, but her actions did not involve anything beyond stealth. Also, to admit a previous conviction under Rule 609(a)(2) based on underlying conduct, deceit must have been the goal of the previous crime. Here, Fenty's goal was not to deceive the tourist she stole from. Her objective was to steal the bag to impress her friend because she dared her to do it and to bring them some money because they were both broke at the time.

Finally, the admission of Fenty's prior conviction must be reversed, and the case remanded, because this Court cannot provide fair assurance that the improper admission caused a harmless error. The likelihood that juries make improper inferences from the admission of evidence of a previous conviction is very high. When a court cannot say with fair assurance that the misapplication of Rule 609(a)(2) caused harmless error, the case must be remanded. Moreover, given that studies show juries are consistently unable to consider prior convictions only for impeachment purposes, this Court cannot rely on the limiting instruction because it did not *meaningfully* reduce the risk that the jury would be misled. Therefore, this Court should reverse the decision of the Fourteenth Circuit and remand the case for further proceedings.

ARGUMENT AND AUTHORITIES

An appellate court reviews a district court's denial of a motion to suppress under a mixed standard. *See United States v. Rose*, 3 F.4th 722, 727 (4th Cir. 2021); *see also United States v. Stokes*, 829 F.3d 47, 50 (1st Cir. 2016). Any conclusions of law are reviewed de novo and any factual findings made by the court are reviewed under the clearly erroneous standard. *Id.* When reviewing a denial of a motion to suppress, the appellate court views the "evidence in the light most favorable to the government." *United States v. Khami*, 362 F. App'x 501, 504 (6th Cir. 2010) (citing *United States v. Long,* 464 F.3d 569, 572 (6th Cir. 2006). A court should reverse the denial

of a motion to suppress if it is "unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, based on the entire record, it's clear a mistake was made." *United States v. Romero*, No. 22-1105, 2022 U.S. App. LEXIS 28276, at *5 (8th Cir. Oct. 12, 2022) (quoting *United States v. Perez*, 29 F.4th 975, 983 (8th Cir. 2022)).

Generally, evidentiary decisions are reviewed under the abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). Specifically, the decision to admit evidence of a previous conviction for impeachment purposes under Rule 609(a)(2) and the decision to exclude evidence under Rule 803(3) are both reviewed under the abuse of discretion standard. *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998); *see United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986). A court abuses its discretion when it makes an error of law or draws erroneous legal conclusions. *Koon v. United States*, 518 U.S. 81, 100 (1996).

I. This Court should reverse the motion to suppress because Franny Fenty held a reasonable expectation of privacy in the sealed packages under the Fourth Amendment.

The United States Court of Appeals for the Fourteenth Circuit erred in denying Fenty's motion to suppress because she had a reasonable expectation of privacy in the packages addressed to her alias. Even viewing the evidence in the light most favorable to the Government, the applicable law and facts presented in the record do not support the denial of the motion to suppress.

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. The Fourth Amendment protects the things an individual "seeks to preserve as private, even in an area accessible to the public." *Katz v. United States*, 389 U.S. 347, 351 (1967) (citing *Rios v. United States*, 364 U.S. 253, 260–62 (1960)). To have standing under the Fourth Amendment, a person must show that they had a "legitimate expectation of privacy" in

the place or item searched. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz*, 389 U.S. at 353). A person's expectation of privacy is determined using a two-part inquiry: an individual must first "manifes[t] a subjective expectation of privacy in the object of the challenged search," *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz*, 389 U.S. at 361 (1967)), and the expectation must be one "society is willing to recognize as 'reasonable.'" *Id.* (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979))

Because this is a novel issue, this Court must look to the guidance of other jurisdictions to determine whether Franny Fenty had a reasonable expectation of privacy in the packages addressed to her alias. This Court should adopt the reasoning of numerous jurisdictions that would hold Franny Fenty had a reasonable expectation of privacy in the packages addressed to her alias.

A. Franny Fenty manifested a subjective expectation of privacy because she exercised control over the packages addressed to her personal alias.

The Supreme Court has longstanding precedent that packages and letters are "papers" under the Fourth Amendment and thus are subject to its protections. *See Ex parte Jackson*, 96 U.S. 727, 733 (1877). An individual manifests a subjective expectation of privacy in an item by "placing [it] in [a] closed, opaque containe[r] that conceal[s] [its] contents from plain view." *United States v. Villarreal*, 963 F.2d 770, 773 (5th Cr. 1992) (citing *United States v. Ross*, 456 U.S. 798, 823–24 (1982)). Therefore, an individual does not "surrender their expectations of privacy in closed containers when they send them by mail. . . ." *Id.* at 773–74.

Additionally, courts have held that an individual can have an expectation of privacy in a package addressed to an alias. *See United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003); *see also United States v. Castellanos*, 716 F.3d 828, 834 (4th Cir. 2013) (quoting *Villarreal*, 963 F.2d at 774). Thus, placing a package addressed to an alias in the mail does not preclude a reasonable expectation of privacy in that package. *See Villarreal*, 963 F.2d at 773–74; *see also Pitts*, 322 F.3d

at 459. However, when the addressee is someone other than the intended recipient, the recipient must show some "indicia of ownership, possession, or control. . ." over the package to have an expectation of privacy. *See Rose*, 3 F.4th at 728.

1. Franny Fenty used a fictitious name as her alias, and not an alter ego or third-party identity.

When determining an expectation of privacy in a package addressed to an alias, courts have distinguished between the use of an alter ego, a fictitious name, and the identity of a third party. *See United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992); *see also Rose*, 3 F.4th at 738 (Gregory, C.J., dissenting) (quoting *United States v. Givens*, 733 F.2d 339, 341 n.2 (4th Cir. 1984)). As the dissenting opinion in the Fourteenth Circuit noted, a fictitious name is "a wholly new name, one not used by any person," while an alter ego involves using a real person's name already in existence. R. at 71. Courts have held that using a fictitious name as an alias to send or receive mail does not affect an individual's expectation of privacy. *See Rose*, 3 F.4th at 736 (Davis, J., dissenting) (quoting *Castellanos*, 716 F.3d at 848). However, the use of an alter ego or third-party identity when sending or receiving mail does not provide any Fourth Amendment protection for a person who is neither the sender nor the addressee of the package. *See id.* ("An individual who is not the sender cannot assert an expectation of privacy in a mailing addressed to an actual third party. . . ."). Thus, while the Constitution does not protect the use of an alter ego, the use of a fictitious name is protected under the Fourth Amendment. *See id.*; *see also* R. at 71.

In *United States v. Givens*, the Fourth Circuit Court of Appeals held that the defendants did not have a reasonable expectation of privacy in a package addressed to a third-party intermediary. *Givens*, 733 F.2d at 340–342. There, the defendants challenged the search of a package containing a controlled substance that the defendants prearranged to be delivered to a third party, instead of to them personally. *Id.* at 340. The court reasoned that the defendants had no expectation of privacy

in a package "addressed neither to them nor to some entity, real or fictitious, . . . but to actual third parties. . . ." *Id.* at 341. The court further reasoned that even though the defendants were the intended recipients, they failed to present facts showing any objective indicia of ownership over the package that was not addressed to either defendant. *Id.* at 341–42.

Here, Fenty retained her expectation of privacy in the packages because they were addressed to her established alias, and not to a separate third party. Unlike in *Givens*, the packages were addressed to Jocelyn Meyer, Fenty's personal alias, and not to a third-party intermediary. R. at 30, 65–66. Fenty used the fictitious name as an alias multiple times to publish short stories, write novels, and communicate with publishers as recent as October 2021. R. at 42, 65–66. Thus, because the packages were addressed to a fictitious name openly used by Fenty, and not to a third-party, Fenty had a reasonable expectation of privacy in the packages.

2. Franny Fenty exercised control over the packages.

To establish a reasonable expectation of privacy, an individual must provide "evidence objectively establishing his ownership, possession, or control of the property at issue." *See Rose*, 3 F.4th at 727 (quoting *Castellanos*, 716 F.3d at 834). Courts use several factors when determining expectations of privacy, including "'ownership, possession, and/or control, . . . the existence or nonexistence of a subjective anticipation of privacy[,] and the objective reasonableness of such an expectancy under the facts of a given case.'" *Id.* at 727–28 (quoting *Stokes*, 829 F.3d at 53).

In *United States v. Rose*, the Fourth Circuit Court of Appeals held that a defendant did not have a reasonable expectation of privacy in packages addressed to a separate third party. *Id.* at 725. There, the defendant developed a plan to receive packages containing illegal drugs by addressing them to a deceased third party and having them delivered to a North Carolina address. *Id.* at 725–26. The court reasoned that because the packages were labeled with another person's name and

had no established connection to the defendant, he would not have been able to exercise control or ownership over the packages at the FedEx facility. *Id.* at 729. Moreover, the court stated that "absent any ability to exercise ownership . . . or control of the packages at the time of the searches, the defendant had no greater privacy interest in the packages than an airport bystander." *Id.* at 730.

Fenty had a reasonable expectation of privacy in the packages because she exercised ownership and control over them at the post office. Although the packages were addressed to Jocelyn Meyer, Fenty demonstrated her use of the alias and showed that she herself was the intended recipient by taking the slip placed in her P.O. Box to the front counter to retrieve the packages. R. at 32, 66. Unlike *Rose*, Fenty demonstrated a greater privacy interest in the packages than a "mere airport bystander." *See Rose*, 3 F.4th at 729–30. Fenty was the only person able to retrieve the packages, which shows that she had control. R. at 33, 66.

B. Franny Fenty's expectation of privacy is one that society would recognize as reasonable because it is well established that items addressed to an alias maintain an expectation of privacy.

To be legitimate, the subjective expectation of privacy must be "one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citing *Katz*, 389 U.S. at 361). Society will recognize an expectation of privacy as reasonable when there is "a source outside of the Fourth Amendment, either by reference to real or personal property law or understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas*, 439 U.S. at 143–44). This determination is made on a case-by-case basis and turns on society's understanding of what "deserves 'protection from government invasion.'" *United States v. Smith*, 978 F.2d 171, 177 (5th Cir. 1992) (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)).

Courts have held that an individual can have a reasonable expectation of privacy in a package addressed to them under a fictitious name. *Castellanos*, 716 F.3d at 834 (quoting *Villarreal*, 963 F.2d at 774). The Seventh Circuit Court of Appeals stated that society is prepared to recognize a reasonable expectation of privacy held by "a person using an alias in sending or receiving a mail." *Pitts*, 322 F.2d at 459. Further, the court held that an individual's reasonable expectation of privacy is not based on the "nature of the defendant's activities. . ." and cannot be based on an after-the-fact justification of the search. *Id.* at 458–59.

1. Society recognizes a reasonable expectation of privacy when using a fictitious name in other contexts.

Franny Fenty had a reasonable expectation of privacy in the packages because society already recognizes legitimate reasons to use an alias when sending or receiving mail. A person using an alias when sending or receiving mail has an expectation of privacy that society is prepared to recognize as reasonable. *Id.* at 459. In *Pitts*, the Seventh Circuit held that the defendants did not have a reasonable expectation of privacy because the package was addressed to a fictitious name and was abandoned by the defendants. *Id.* at 456. The court stated that "[t]here is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package." *Id.* at 459. The concurrence, agreeing with the majority that the defendants had no expectation of privacy in the packages, reasoned that, unlike an author's use of a pseudonym, which is an "alter eg[o] in a way society recognizes as legitimate," there was no way to connect the defendants in this case to the fictitious names in the same way as an author. *Id.* at 461 (Evans, J., concurring).

Here, Franny Fenty held a reasonable expectation of privacy because there was a clear connection between Fenty and her personal alias. Like an author's use of a fictitious name, Fenty previously used the name Jocelyn Meyer when publishing short stories and later to communicate with publishers regarding publication of novels written under that name. R. at 32, 42, 65.

Moreover, the packages were addressed to P.O. Box 9313, which was registered under the name Jocelyn Meyer, and is also where Fenty found the slip she used to retrieve her packages from the front desk. R. at 42, 65–66. Like the connection between an author's name and chosen pseudonym, there was an established connection between Fenty and her alias, Jocelyn Meyer. Therefore, unlike *Pitts*, Fenty held a reasonable expectation of privacy in the packages addressed to Jocelyn Meyer.

Additionally, this Court has held that an author's wish to remain anonymous is an insufficient reason for excluding constitutional protections. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995). In *McIntyre*, this Court stated that an author may wish to remain anonymous for multiple reasons, including the "desire to preserve as much of one's privacy as possible." *Id.* Thus, this Court held that anonymity was an insufficient reason to exclude written works from First Amendment protection. *Id.* In *Pitts*, relying on *McIntyre*, the Seventh Circuit stated that the desire to remain anonymous when sending or receiving mail should be provided the same protection as anonymity in literary works under the First Amendment. *Pitts*, 322 F.3d at 458. There, the court reasoned that the use of a fictitious name is both "a common and unremarkable practice," and that celebrities or business or government officials may wish to use a fictitious name to avoid harassment, protect their personal safety, or simply to preserve personal privacy. *Id.* Here, Fenty registered P.O. Box 9313 under the name Jocelyn Meyer to retain as much personal privacy as possible. R. at 43. Thus, as with First Amendment protections, Fenty's desire to remain anonymous is an insufficient reason to exclude her from Fourth Amendment protections.

Furthermore, other courts have followed the reasoning from *Pitts* and have upheld a reasonable expectation of privacy in items addressed to an alias. *See United States v. Williams*, No. 10-cr-20357-STA/tmp, 2012 U.S. Dist. LEXIS 185177, at *14 (W.D. Tenn. Dec. 3, 2012) (citing *Pitts*, 322 F.3d at 458–59) (agreeing with the Seventh Circuit's reasoning in *Pitts* and stating

that an "expectation of privacy [is] not forfeited . . . simply because [the defendant] used fictious names and addresses); *see also United States v. Yodprasit*, No. CR19-4088-LTS, 2020 U.S. Dist. LEXIS 39316, at *22–23 (N.D. Iowa March 6, 2020) (relying on *Pitts* and holding that the defendant had a reasonable expectation of privacy in a package sent using a fictitious name). Here, Fenty's desire was simply to preserve her personal privacy and thus, she did not forfeit her expectation of privacy in the packages by using a fictitious name.

2. A reasonable expectation of privacy is not dependent on the nature of the activity.

The nature or character of an individual's activities, no matter their legality, does not determine a reasonable expectation of privacy. *Pitts*, 322 F.3d at 458 (citing *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997)). Moreover, an illegal search cannot be justified after the fact once the criminal nature of an activity is discovered. *Id.* For instance, in *United States v. Fields*, the Second Circuit Court of Appeals held that the defendant had a reasonable expectation of privacy notwithstanding the illegal nature of the activities. *Id.* at 320–21. There, the defendants challenged the search of a residence they used to conduct drug operations, but in which neither of them resided. *Id.* at 317–18. The court reasoned that because many Fourth Amendment claims arise specifically out of the criminal nature of a defendant's activities, an expectation of privacy does "not hinge on the nature of [a] defendant's activities—innocent or criminal." *Id.* at 321 (citing *United States v. Taborda*, 635 F.2d. 131, 138 n.10 (2d Cir. 1980)). Thus, the court rejected the government's contention that because the defendants were engaged in criminal activity, an expectation of privacy in the searched premises was unreasonable. *Id.*

Here, Franny Fenty's expectation of privacy is not forfeited based on the nature of her activities. Unlike *Fields*, Fenty testified that she was unaware of the illegal nature of the package's contents. *See* R. at 45, 55. Rather, she believed she was helping her friend Angela Millwood obtain

horse medication. R. at 45. Fenty stated that she chose to register the P.O. box under her alias to ensure privacy because she didn't want Millwood to lose her job. R. at 45. Moreover, when Fenty became concerned about the combination of fentanyl and xylazine, she was reassured by Millwood that she was only obtaining medicine for horses, and not for any illegal activity. R. at 45–46. When Fenty discovered her packages were missing, she immediately called Millwood because she did not want to be involved in anything illegal. R. 40, 46. Thus, even if she knew of the illegality of her activities, her expectation of privacy in the packages would be untouched.

3. The facts show that Franny Fenty demonstrated an established use of her alias.

To assert a reasonable expectation of privacy in an alias, an individual must provide evidence demonstrating the established use of the alias. *Rose*, 3 F.4th at 728 (citing *Castellanos*, 716 F.3d at 834). Thus, a defendant must provide evidence of an established connection between their personal identity and the use of the alias. *See id.* For example, in *Castellanos*, the Fourth Circuit Court of Appeals held that because the defendant provided no evidence establishing a connection between his personal identity and the alias, he had no reasonable expectation of privacy. *Castellanos*, 716 F.3d at 834–35. There, a vehicle was searched while being transported by a commercial carrier and the defendant claimed an expectation of privacy in that vehicle, whose shipping documents indicated it belonged to a person named "William Castenada." *Id.* at 830–31. The court reasoned that because the defendant provided no evidence showing that "William Castenda" was simply an alias, he lacked standing to challenge the search. *Id.* at 834–35.

Here, Fenty provided sufficient evidence to establish the use of the alias Jocelyn Meyer and retained her expectation of privacy in packages addressed to that alias. Fenty routinely used the pseudonym Jocelyn Meyer when doing work as an author and published multiple short stories in her college magazine under that name. R. at 4, 33, 42. Fenty has also written numerous novels

under the alias and has even used it as recent as October 2021 to contact publishers regarding potential publication. R. at 42. Further, Fenty sent emails to publishers as Jocelyn Meyer using the email address jocelynmeyer@gmail.com. R. at 42. Moreover, DEA Agent Raghavan, who conducted the search of the packages, stated that Fenty was "apparently both" Franny Fenty and Jocelyn Meyer. R. at 33. Thus, unlike *Castellanos*, there are facts establishing Fenty's use of the alias; therefore, she retained her expectation of privacy in the packages addressed to that name.

C. Franny Fenty retained an expectation of privacy in the P.O. Box because it was registered to her established alias.

Fourth Amendment rights are inherently personal, *United States v. Lewis*, 738 F.2d 916, 919 (8th Cir. 1984) (citing *Rakas*, 439 U.S. at 140), and the critical inquiry is whether there was a violation of a "legitimate expectation of privacy held by the person asserting the rights." *Id.* at 919 (citing *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980)). As noted by the Fourteenth Circuit, the court in *Lewis* stated that a person "'lacks[s] a legitimate expectation of privacy in a mailbox and its contents' if 'no one by that name' reside[s] at the address." *Id.* at 919 n.2; R. at 67. There, the defendant claimed an expectation of privacy in an unlocked mailbox, located in a publicly accessible rural area, and that did not bear the defendant's name or any name associated with that address. *Lewis*, 738 F.2d at 918. Although the court found it unnecessary to address standing, the court reasoned that "[a] mailbox bearing a false name with a false address and used only to receive fraudulently obtained mailings" is not an expectation of privacy society would recognize as reasonable. *Id.* at 919 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 n.22 (1984)).

Similarly, the Fifth Circuit held that a defendant had a "minimal expectation of privacy" in a post office box and its contents. *United States v. Osunegbu*, 822 F.2d 472, 474 (5th Cir. 1987). There, the defendants rented a post office box using a false name and used it to fraudulently obtain mail addressed to and intended for others. *Id.* 474–75. Although the court ultimately held that the

manager's consent to search the box was valid, the court also reasoned that, although minimal, the defendants still maintained an expectation of privacy in the box's contents. *See id.* at 479–80.

Here, Franny Fenty held an expectation of privacy in the P.O. box registered to her alias because it was not associated with a false name or false address. Unlike *Lewis*, both the name and address associated with the P.O. Box bore an established connection to Fenty herself. *See* R. at 30–33. The P.O. Box was registered to Jocelyn Meyer, Fenty's established personal alias, and Fenty used the box for more than just the Holistic Horse Care packages. R. at 30–31. In contrast to the facts of *Lewis* and *Osunegbu*, Fenty did not use the P.O. Box to obtain any packages fraudulently or illegally, but rather to receive her personal mail, addressed to both her personal name and her alias. R. at 31. Thus, Fenty demonstrated that both the alias and her personal name were associated with the P.O. Box and maintained a reasonable expectation of privacy.

II. This Court should reverse the decision to exclude the voicemail messages and admit the evidence because the messages show Franny Fenty's then-existing state of mind throughout the events at the post office.

The United States Court of Appeals for the Fourteenth Circuit abused its discretion in holding that the voicemail statements were inadmissible hearsay. Under Federal Rule of Evidence 803(3) (Rule 803(3)), hearsay statements can be admitted to show the declarant's then-existing state of mind. Fed. R. Evid. 803(3). Courts have established that to admit a hearsay statement relating to a declarant's state of mind the statement must be relevant to the case and contemporaneous to the events, and the declarant must have had no time to misrepresent their thoughts. *Jackson*, 780 F.2d at 1315 (quoting *United States v. Layton*, 549 F. Supp. 903, 909 (N.D. Cal. 1982)). The voicemails are clearly relevant because they tend to make Franny Fenty's awareness of the drug scheme more or less probable. *See* Fed. R. Evid. 401. Thus, the primary question is whether the voicemails are contemporaneous to the events at the post office, meaning

Fenty did not have adequate time to misrepresent her thoughts. This Court should answer in the affirmative, reversing the decision of the Fourteenth Circuit.

A foundational characteristic of the Rule 803 exceptions is that certain hearsay statements can be relied upon because they have a "circumstantial guarantee of trustworthiness." *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005) (quoting Fed. R. Evid. 803 advisory committee's note). Trustworthiness is guaranteed under Rule 803(3) because it requires that the admitted statement be "contemporaneous with the declarant's 'then-existing' state of mind [or] emotion." *Id.* Rule 803(3) is considered a specialized application of Federal Rule of Evidence 803(1), *see* Fed. R. Evid. 803(1), because in both rules contemporaneousness between the statement and the event negates the likelihood of any conscious misrepresentation. *Id.* (quoting Fed. R. Evid. 803(1) advisory committee's note). The contemporaneous requirement is met when it is reasonably likely that the state of mind represented in the statement is the same as the state of mind the declarant had at the time of the event. *See Colasanto v. Life Ins. Co. of N. Am.*, 100 F.3d 203, 212 (1st Cir. 1996) (quoting 2 John W. Strong, *McCormick on Evidence* § 274 (4th ed. 1992)).

A. The voicemail statements are contemporaneous with Franny Fenty's state of mind while at the post office because the messages were recorded immediately in response to the information she gathered there.

When a hearsay statement is made in response to new information, it is admissible under Rule 803(3). *United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988). For example, in *United States v. Peak*, the Seventh Circuit Court of Appeals held that the lower court erred in excluding hearsay evidence because it fit squarely within the Rule 803(3) exception. *Id.* There, the criminal defendant was convicted of conspiring to possess with intent to distribute drugs. *Id.* at 827. His main defense was that he was cooperating with his co-conspirators in order to help "capture" the man his brother had bailed out of jail. *Id.* at 828. The defendant attempted to introduce evidence

of a phone conversation where he stated he was willing to cooperate in the capture plan. *Id.* at 833. The Seventh Circuit reasoned that the phone conversation was admissible because it showed the defendant's state of mind in response to the new information about the capture plan. *See id.*; *but see Naiden*, 424 F.3d at 722–23 (holding that a statement was inadmissible hearsay because it was not made as an immediate reaction to the events, but rather was a statement about the declarant's *previous* state of mind).

Here, both of Fenty's voicemail statements are admissible because they were made in response to her gaining new information about the packages. Fenty's first message indicates that she had just discovered none of the packages she was expecting were in the mailbox—including deliveries from both Amazon and Holistic Horse Care. R. at 31, 40, 46. Her second message reflects her fresh knowledge that the postal office workers were taking a look at all of the packages. R. at 40. Like *Peak*, both messages Fenty left Millwood were in response to the new information she had gathered at the post office. R. at 40, 46. It is reasonably likely that the voicemail messages reflect what her current state of mind was as she learned the new information. *See* R. at 40.

B. The voicemail statements are contemporaneous with Franny Fenty's then-existing state of mind because she did not have sufficient reflection time to misrepresent her thoughts.

When a declarant has time for reflection before making a statement about an event, the statement can only be excluded if the declarant had enough time to misrepresent their true state of mind during or after the event. *See United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980); *see United States v. Hughes*, 970 F.2d 227, 233 (7th Cir. 1992) (citing *United States v. Harvey,* 959 F.2d 1371, 1375 (7th Cir. 1992)). For instance, in *United States v. Jackson*, the Seventh Circuit Court of Appeals affirmed the lower court's decision refusing to admit hearsay statements under Rule 803(3) because the statements were made *two years* after the criminal incident in question

occurred. *Jackson*, 780 F.2d at 1315–16. There, two criminal defendants were convicted of several crimes, *Id.* at 1307, and they demanded a new trial because the lower court did not admit recorded conversations between the defendants and an FBI agent. *Id.* at 1313, 1315. The court reasoned that because the statements were made two years after the incidents occurred, they were not contemporaneous, and therefore the defendants potentially misrepresented their state of mind. *Id.* at 1315; *see also United States v. Macey*, 8 F.3d 462, 467–68 (7th Cir. 1993) (holding a hearsay statement was inadmissible because there was a *four-hour* gap between the incident and the statement).

Here, the voicemail statements cannot be excluded because the period of time between Fenty's realizations and the voicemails was neither substantial nor adequate enough for her to misrepresent her true state of mind. *See* R. at 40. When Fenty realized all of her packages were missing from the P.O. Box, she called Millwood within minutes and left her first voicemail. R. at 46. Unlike *Jackson* or *Macey*, mere minutes had passed between her realization and the statements she made in the voicemail. R. at 40, 46. Similarly, the second voicemail was left only forty-five minutes later, and in between the first and second voicemails Fenty was speaking to the postal workers. R. at 40. She spent the time in between gaining information about her packages, not reflecting on any consequences of the fact that her packages were missing. *See* R. at 40. Between the miniscule amount of time she had to actually reflect and the time she spent talking to the postal workers, there simply was not enough time for her to misrepresent her state of mind. *See* R. at 40.

To be sure, if a declarant's statement regards a belief about a *past* action, then there was sufficient time for them to fabricate their statement. *See United States v. Miller*, 874 F.2d 1255, 1264 (9th Cir. 1989). For instance, in *United States v. Miller*, the Ninth Circuit Court of Appeals held that a statement did not fall under Rule 803(3) because it reflected the defendant's state of

mind in a *previous* instance rather than his present state of mind. *Id.* There, an FBI agent charged with various crimes relating to espionage underwent extensive interrogation and eventually admitted guilt to one of the accused allegations. *Id.* at 1258, 1263. Two hours later, while his supervisor was driving him home, the FBI agent essentially made a statement that he was unsure whether he let the interrogators convince him to admit he was guilty. *See id.* at 1263. The agent argued this statement was admissible because it showed that he had an exhausted and confused state of mind during the interrogation, and it explained why he admitted guilt. *Id.* The court reasoned that the statement concerned the agent's belief about his initial admission that had taken place hours earlier. *Id.* at 1264. It concluded there was sufficient time for the agent to reflect on the consequences of his statements and to fabricate his explanation of *previous* events. *Id.* Therefore, it reflected his state of mind as it related to a past fact, not a present one. *Id.*

Here, there was not sufficient time for Fenty to fabricate her statements because the voicemails represent her present state of mind, not her belief in a past fact. In the first message, Fenty states "I just got to the post office," indicating it had only been moments since she discovered the packages were missing. R. at 40. Unlike *Miller*, Fenty was expressing the thoughts she had in that moment; she was not making statements regarding any events that happened in the past. *See* R. at 40. Furthermore, in the second message Fenty stated she had just talked to the postal workers and that she was getting nervous and concerned. R. at 40. Again, Fenty was stating her emotions as they were coming to her in that moment. *See* R. at 40. She was not relaying any beliefs that she had in previous events because the conversation with the postal workers had just occurred. *See* R. at 40. Therefore, it is reasonably likely Fenty did not have sufficient time to fabricate her statement.

C. Franny Fenty's statements are trustworthy because she left the voicemails before she was aware law enforcement was involved.

When the declarant has not spent time reflecting on the legal consequences of their

statements, the hearsay can be reliably admitted under Rule 803(3). *See Ponticelli*, 622 F.2d at 992. To illustrate, in *United States v. Ponticelli*, the Ninth Circuit Court of Appeals held that statements a criminal defendant made while consulting his attorney post-arrest were inadmissible hearsay because the defendant was aware anything he said could be used against him. *Id.* There, the defendant's declarations occurred after he was arrested and while he was aware he was under investigation. *Id.* The court reasoned that the defendant likely misrepresented his state of mind because he made the statements while consulting his attorney, implying that he had considered the legal consequences of his statements. *Id.* Similarly, in *United States v. Reyes*, the Fifth Circuit Court of Appeals held that a conversation recording was inadmissible hearsay because the declarant likely knew the conversation was being monitored by law enforcement. *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001). In that case, a city councilman, among others, was found guilty of multiple conspiracy, bribery, and fraud charges. *Id.* at 732. The councilman argued that the recording of a conversation he had with a co-conspirator was admissible under Rule 803(3) and showed that his intention was to "scam the scammers." *Id.* at 743. The lower court excluded the evidence and the Fifth Circuit affirmed, reasoning that the councilman's knowledge that his co-conspirator was likely cooperating with authorities made the recorded conversation untrustworthy. *See id.*

Here, the hearsay exception under Rule 803(3) is applicable because Fenty's reflection time was not spent thinking about any legal consequences. In fact, Fenty was unaware law enforcement was even involved. *See* R. at 40. When leaving the voicemails, she was only suspicious that Millwood may have involved her in something she did not know was occurring. R. at 40. Unlike *Ponticelli*, no legal action had been taken against Fenty at the time of her statements. *See* R. at 40, 66. Therefore, she had no time to reflect on how her statements could have legal

implications. Additionally, unlike *Reyes*, Fenty had barely become suspicious that Millwood involved her in something she would not want to be a part of. R. at 40. Thus, Fenty's statements are trustworthy because, even in the very short amount of time she had to reflect, she was not reflecting on any of the legal implications that would arise.

Furthermore, even if this Court finds Fenty was aware that authorities were involved, the Court cannot exclude the voicemails under the premise that they may not be true statements. *See United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984). In *DiMaria*, the Second Circuit held that while a statement may or may not be false, it can still be admitted under Rule 803(3); it is the jury's responsibility to determine a statement's credibility. *Id.*

Thus, under Rule 803(3) the voicemail statements showing Franny Fenty's then-existing state of mind are admissible. Therefore, this Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit and admit the voicemail statements.

III. This Court should reverse the decision to admit Franny Fenty's prior conviction for petit larceny and remand the case for further proceedings because this previous criminal act does not bear on her ability to testify truthfully.

The Fourteenth Circuit abused its discretion in holding that the admission of Fenty's prior conviction for petit larceny was proper for impeachment purposes because it does not bear on her ability to testify truthfully. Under Federal Rule of Evidence 609(a)(2) (Rule 609(a)(2)), evidence of a prior criminal conviction is automatically admissible, but only "if the court can readily determine that establishing the elements of the crime required proving . . . a dishonest act or false statement." Fed. R. Evid. 609(a)(2). The application of Rule 609(a)(2) is restricted to those convictions that are connected to the defendant's likelihood to testify truthfully. *United States v. Hayes*, 553 F.2d 824, 827 (2d. Cir. 1977).

A. Fenty's prior petit larceny conviction does not bear on her ability to testify truthfully because it was not a crime involving a dishonest act or false statement.

The Fourteenth Circuit erred in holding that Fenty's prior conviction was admissible as impeachment evidence under Rule 609(a)(2) because her petit larceny conviction did not require proving a dishonest act or false statement. A previous conviction that does not involve proving an element of dishonesty cannot be automatically admitted because it has no bearing on the truthfulness of an accused's testimony. *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978) (quoting H.R. Rep. No. 93-1597, at 7103 (1974) (Conf. Rep.)).

1. The statutory elements and underlying conduct required to prove Fenty's petit larceny offense did not involve dishonest actions or false statements.

When the applicable statute expressly mentions deceit or dishonesty as an element of the offense, there is an indication that the previous conviction involved a dishonest act or false statement. *See United States v. Jefferson*, 623 F.3d 227, 234 (5th Cir. 2010) (quoting Fed. R. Evid. 609 advisory committee's note to 2006 amendments). Under §155.25 of the Boerum Penal Code,

> A person is guilty of petit larceny when that person knowingly takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another, [valued at less than one thousand dollars], with intent to, either temporarily or permanently: (a) [d]eprive the other person of the right to benefit from his or her property, (b) [e]xercise control over the property without the owner's consent, or (c) [a]ppropriate the property as his or her own.

R. at 3. Here, the statutory elements of petit larceny do not expressly mention deceit or dishonesty. *See* R. at 3. Thus, there is no indication from the elements of Fenty's previous offense that her conduct involved a dishonest act or false statement. *See* R. at 3.

Also, when deceit is not a listed element of the previous offense, the conviction cannot be admitted without a showing that dishonesty was involved in the underlying conduct. *See Hayes*, 553 F.2d at 827 (quoting *United States v. Smith*, 551 F.2d 348, 364 n.28 (D.C. Cir. 1976)). For example, in *United States v. Hayes*, the Second Circuit Court of Appeals held that because a

previous conviction for importation of cocaine was not a crime of deceit by statute and there were no facts presented showing dishonest conduct, it was inadmissible under Rule 609(a)(2). *Id.* at 827–28; *see also Fearwell*, 595 F.2d at 776 (holding that a previous petit larceny conviction could not be admitted under Rule 609(a)(2) because the jurisdiction's statute did not suggest deceit as an element and the underlying conduct of the offense did not involve any dishonesty or false statements). In contrast, in *United States v. Payton*, the Second Circuit held that a previous larceny conviction was admissible for impeachment purposes because in the previous conviction the criminal defendant had falsified documents to obtain food stamps. *Payton*, 159 F.3d at 57. The court reasoned that this previous crime fell under the scope of Rule 609(a)(2) because the defendant's conduct arose out of the making of a false statement. *Id.*

Here, Fenty's prior conviction should not have been admitted because dishonesty was not involved in her behavior underlying the conviction. On the date of the previous offense, Fenty snuck up on the tourist and grabbed her bag. R. at 53. Then, when she was caught, she made honest threats to the tourist and used force to obtain the bag. R. at 22. There was a loud scene, the tourist let go of the bag, and Fenty ran off with it. R. at 53. Like *Hayes* and *Fearwell*, the facts show Fenty's petit larceny conviction did not involve any false statements or dishonesty. *See* R. at 22, 53. Unlike *Payton*, there was no point during the course of the crime that Fenty was making false statements to the tourist. *See* R. at 22, 53. Thus, Fenty's previous conviction should not have been admitted for impeachment purposes because, as a crime that did not involve any dishonesty, evidence of it does not have any effect on her credibility.

2. Fenty's petit larceny conviction involved nothing more than stealth.

When a crime involves mostly stealth, but not dishonesty, it does not fit into the narrow category of convictions admissible under Rule 609(a)(2). *United States v. Estrada*, 430 F.3d 606,

614 (2d Cir. 2005); *Fearwell*, 595 F.2d at 776. For example, in *United States v. Estrada*, the Second Circuit Court of Appeals affirmed that prior convictions of shoplifting were not admissible under Rule 609(a)(2) because it was a crime of stealth, not dishonesty. *Estrada*, 430 F.3d at 614. There, counsel established that the criminal defendant had taken great action to avoid being detected in each instance of shoplifting. *Id.* However, the court concluded that when looking at the circumstances underlying the convictions, they did not involve the deceit required to qualify for admission under Rule 609(a)(2). *Id.* The court reasoned that while most crimes involve a level of stealth, the conduct does not always involve dishonesty or false statement, which is required to admit the conviction under Rule 609(a)(2). *Id.*; *see also United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977) ("An absence of respect for the property of others is an undesirable character trait, but it is not an indicium of a propensity toward testimonial dishonesty."). Additionally, numerous circuit courts have made it clear that petit larceny involves nothing more than stealth, which is not the same as deceit. *Fearwell*, 595 F.2d at 776; *see United States v. Seamster*, 568 F.2d 188, 191 (10th Cir. 1977) (quoting *United States v. Papia*, 560 F.2d 827, 846 (7th Cir. 1977)); *see also Hayes*, 553 F.2d at 827 (characterizing petit larceny as a crime of stealth).

Here, Fenty's petit larceny conviction is not admissible under Rule 609(a)(2) because the circumstances of the crime involved only stealth, not dishonesty. Although Fenty did attempt to grab the bag undetected, she did not attempt to deceive the tourist. R at 22, 53. In fact, she fought to take the bag and then ran away with it. R. at 53. Like *Estrada*, Fenty tried to avoid detection at first, but once she was caught, did not attempt to deceive anyone. R. at 22, 53. Moreover, Fenty was convicted of petit larceny, which is clarified in multiple circuit courts as a crime of stealth. *See* R. at 19; *see Fearwell*, 595 F.2d at 776; *see Hayes*, 553 F.2d at 827. Therefore, it was an error

to admit Fenty's prior conviction because it did not involve the dishonesty required by Rule 609(a)(2), and thus does not bear on her ability to testify truthfully.

3. The goal of Fenty's previous crime was not deception.

To admit a previous conviction under Rule 609(a)(2), deceit must have been the goal of the previous crime. *See Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 217 (7th Cir. 1989). For example, in *Altobello v. Borden Confectionary Products, Inc.*, the Seventh Circuit Court of Appeals held that meter tampering was a crime of dishonesty. *Id.* There, an employee brought suit against his employer claiming he had been fired because of his age. *Id.* at 215. The employee was previously convicted of tampering with electric meters. *Id.* at 217. The court reasoned that meter tampering is a crime of deception because the *goal* of tampering with meters is to deceive the meter reader. *Id.* Therefore, under Rule 609(a)(2), the lower court did not err when it allowed the opposing party to impeach the employee using his previous conviction. *Id.*

Here, Fenty's previous conviction cannot be admitted because the goal of her actions was not to deceive the woman she stole from. Fenty was dared by a friend to steal a bag off of a tourist. R. at 52–53. She admitted she did not really want to do it, but her and her friend were both broke at the time and Fenty wanted to impress her friend. R. at 53. Unlike *Altobello*, Fenty's goal was not to deceive the tourist. *See* R. at 22, 53. Rather, her objective was to steal the bag to impress her friend and bring them both some money while in a dire financial situation. R. at 53. Therefore, it was improper to admit Fenty's prior conviction under Rule 609(a)(2).

B. The admission of Franny Fenty's prior conviction must be reversed because this Court cannot provide fair assurance that the improper admission did not harm Fenty's case.

This Court must reverse the decision of the Fourteenth Circuit and exclude the evidence on remand because there is no assurance that the error was harmless. The likelihood that juries make

improper inferences from the admission of evidence of a previous conviction is very high. *Drew v. United States*, 331 F.2d 85, 89 (D.C. Cir. 1964). This Court maintains that the only time a conviction can stand when there has been an error is when the court can ensure that the error did not influence the jury, or the error had only a very slight effect. *United States v. Smith*, 551 F.2d 348, 366 (D.C. Cir. 1976) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946)).

When a court cannot say "with fair assurance" that a misapplication of Rule 609(a) constituted harmless error, the case must be remanded. *See United States v. Smith*, 551 F.2d 348, 357, 366 (D.C. Cir. 1976). To illustrate, in *United States v. Smith*, the D.C. Circuit Court of Appeals remanded the case because it was unsure whether the admission of the criminal defendant's previous conviction constituted harmless error. *Id.* at 357. There, the court determined the lower court erred by admitting the defendant's previous armed robbery conviction as impeachment evidence. *See id.* at 350, 357. The court reasoned that it had to remand the case because it could not say "with fair assurance" that the error did not substantially sway the judgment. *Id.* at 366 (quoting *Kotteakos*, 328 U.S. at 764–65). Furthermore, courts should consider whether the risk of the jury being misled was *meaningfully* reduced by limiting instructions. *See Thompson v. United States*, 546 A.2d 414, 426 (D.C. 1988). As noted in *Thompson v. United States*, the effectiveness of a limiting instruction involving the admission of evidence of other crimes has been widely questioned. *Id.* at 424. To illustrate, studies have shown that jurors are consistently unable to consider prior convictions only for impeachment purposes. *Id.* at 425 (citing Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 220 n. 54 (1982)).

Here, the case must be remanded because this Court cannot say with fair assurance that the misapplication of Rule 609(a)(2) was a harmless error in Fenty's case. The jury was likely highly influenced by the admission of her previous conviction because it had similar circumstances to the

crime she was on trial for. R. at 25. Fenty committed the previous offense on insistence from a friend, just like Millwood insisted she help with ordering the horse medication. *See* R. at 25, 53. In both situations, Fenty was also motivated by a need for money. *See* R. at 25, 53. Like *Smith*, this Court cannot conclude with fair assurance that the jury was not swayed by the improperly admitted evidence. Additionally, because of the extremely high likelihood that the jury was unable to only consider the prior conviction for credibility purposes, the risk of prejudice was not *meaningfully* reduced by the limiting instruction.

Therefore, this Court should reverse the decision to admit Franny Fenty's previous conviction and remand the case for further proceedings. The evidence does not fall under the scope of Rule 609(a)(2) and the limiting instruction did not meaningfully reduce the risk of misleading the jury, which caused harm to Fenty's case.

CONCLUSION

In conclusion, Franny Fenty held a reasonable expectation of privacy in the packages addressed to her alias because she manifested a subjective expectation of privacy that society is prepared to recognize as reasonable. Additionally, Fenty's voicemail statements are admissible under Federal Rule of Evidence 803(3) because they represent her then-existing state of mind during the events at the post office. Finally, Fenty's prior conviction for petit larceny was improperly admitted because it is not a crime of dishonesty as required by Federal Rule of Evidence 609(a)(2). It is for these reasons that this Court should reverse the decisions of the Court of Appeals for the Fourteenth Circuit and remand the case to the United States District Court for the District of Boerum for further proceedings.

Respectfully submitted,
/s/ Team 29
Attorneys for Petitioner

APPENDIX A

Statutory Provisions

Boerum Penal Code § 155.25 Petit Larceny

(1) A person is guilty of petit larceny when that person knowingly takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of the right to benefit from his or her property,

(b) Exercise control over the property without the owner's consent, or

(c) Appropriate the property as his or her own; and

(2) If the property stolen is valued at less than One Thousand Dollars ($1,000.00).

(3) Petit larceny is a class B misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, but more than 30 days, or by a fine not exceeding Five Thousand Dollars ($5,000.00).

APPENDIX B

Rules Provisions

Fed. R. Evid. 401. Test for Relevant Evidence.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Fed. R. Evid. 609(a)(2). Impeachment by Evidence of a Criminal Conviction.

(a) The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

Fed. R. Evid. 803(1), (3). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression*. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(3) *Then Existing Mental, Emotional, or Physical Condition*. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a

statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

APPENDIX C

Constitutional Provisions

U.S. Const. Amend. IV

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.