Team 19R - ORIGINAL

No. 23-695

Supreme Court of the United States

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 RESPONDENT, UNITED STATES OF AMERICA

Attorneys for the Respondent

QUESTIONS PRESENTED

1. Whether a defendant can assert a reasonable expectation in mail sufficient to challenge its search under the Fourth Amendment, despite not being the listed sender or addressee and alleging this privacy expectation based on the limited usage of a false name?
2. Whether a voicemail recording qualifies as a then-existing mental statement under Federal Rule of Evidence 803(3) when the declarant had the chance to reflect on the event prior to leaving the recording?
3. Whether a prior conviction for petit larceny qualifies as a crime of dishonesty under Federal Rule of Evidence 609(a)(2) when the manner of the defendant's prior conviction rested on facts involving deceit?

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The opinion in the case of *Fenty v. United States*, issued by the United States Court of Appeals for the Fourteenth Circuit on June 15, 2023, can be found in the Record at pages 64–73.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional provision at issue on appeal from the United States Court of Appeals for the Fourteenth Circuit is below. The statutory provisions relevant on appeal are 21 U.S.C. § 841(a)(1), (b)(1)(A)(vi), and Boerum Penal Code § 155.25, 155.45. Further, Federal Rules of Evidence 609(a)(2) and 803(3) (3) are also at issue on appeal.

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

I. Statement of Facts

On December 28, 2021, defendant Franny Fenty posted on LinkedIn looking for work opportunities. (R. 6.) Angela Millwood, Fenty's high school classmate, then reached out to Fenty about ordering horse tranquilizers. (R. 43.) Fenty knew Millwood was suspended from her high school for drug possession and distribution activity. (R. 57.) Fenty alleged that Millwood told her that these horse tranquilizers—xylazine—were muscle relaxers intended to relieve pain in the horses. (R. 45.) Despite Fenty's knowledge of Millwood's prior drug activity, Fenty nevertheless

decided to get involved with Millwood's alleged plan to administer xylazine to the horses. (R. 45.) Fenty then planned to help Millwood by ordering the xylazine. (R. 45.)

On January 31, 2022, Fenty opened a P.O. Box under the fake name, "Jocelyn Meyer." (R. 31, 43) This was not the first time Fenty had used Jocelyn Meyer. (R. 42–43.) Fenty published two short stories in college—five or six years ago—under the name. (R. 16, 42.) Fenty also wrote five novels using the name Jocelyn Meyer, but they have never been published. (R. 42.) To try to get these novels published, Fenty reached out to four publishers in October 2021 under the name; however, the publishers did not respond. (R. 42–43.)

On February 12, 2022, a Joralemon resident died due to a fentanyl overdose. (R. 29.) His body was found next to an opened package from Holistic Horse Care and partially used syringes. (R. 29.) These syringes contained xylazine and fentanyl. (R. 29.) Joralemon law enforcement had been seeing an increase in fentanyl overdoses in which fentanyl was cut with horse tranquilizers (like xylazine). (R. 29.) Because of this, law enforcement told the U.S. Postal Inspection Service to watch for packages addressed from a horse veterinarian company. (R. 30.)

On February 14, 2022, the post office "received and flagged two packages sent from Holistic Horse Care." (R. 30.) These packages were addressed to Jocelyn Meyer, and the P.O. Box opened two weeks prior was under that name as well. (R. 30–31.) There were two other packages from Amazon in this P.O. Box, but they were addressed to Franny Fenty. (R. 31.) The only packages that Fenty received under the fake name were from Holistic Horse Care. (R. 55.) Law enforcement then obtained a search warrant for the Holistic Horse Care packages and tested the contents of the bottles in the packages. (R. 31.) These bottles contained a mixture of xylazine and fentanyl. (R. 32.)

Fenty received a delivery confirmation for the two packages containing xylazine on February 14, 2022. (R. 46.) When Fenty arrived at the P.O. Box to pick up those packages, she discovered that they were missing. (R. 46.) After realizing that, Fenty called Millwood and left a voicemail at 1:32 PM. (R. 40, 46.) Notably, Fenty stated, "I read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here, right?" (R. 40) and "I'm getting worried that you dragged me into something I would never want to be part of." (R. 40.) After waiting, with no response from Millwood, Fenty called her again forty-five minutes later at 2:17 PM and left another voicemail. (R. 40, 46.) In this voicemail, Fenty expressed that she was nervous and that she supposedly "thought the xylazine was just to help horses that [we]re suffering." (R. 40.) Further, Fenty stated, "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." (R. 40.)

But this was not the first time that Fenty expressed concern over this plan to order xylazine. Fenty first became suspicious of this plan when she read a local news article. (R. 46.) This was a Joralemon Times article published on February 8, 2022, regarding the combination of xylazine and fentanyl resulting in a recreational street drug. (R. 46.) After reading this article, Fenty immediately called Millwood "nervous[ly]" (R. 46) because the news story concerned her. (R. 57).

On the morning of February 15, 2022, law enforcement resealed the packages and returned them to the post office to conduct a controlled delivery. (R. 32.) Specifically, the officers left a slip for "Jocelyn Meyer" in the P.O. Box, informing her to pick up the Holistic Horse Care packages from the front counter. (R. 32.) Law enforcement observed a woman enter the building, unlock the P.O. Box at issue, read the slip, walk over to the front counter, and hand

the slip to the post office employee. (R. 32.) The employee brought her the packages—addressed to Jocelyn Meyer—and asked if they were hers; she responded, "[y]eah, they're mine." (R. 33.)

The woman took the packages and started to leave the post office but was stopped by a man she appeared to know. (R. 33.) The two talked for a few minutes, and as they departed, the man said, "[b]ye Franny!" (R. 33.) A law enforcement officer then approached the man, who told him "[t]hat was Franny Fenty." (R. 33.) Later that evening, Fenty was arrested. (R. 34.)

The government later learned of Fenty's prior criminal history. (R. 19.) Specifically, Fenty has a prior conviction for petit larceny under Section 155.25 of the Boerum Penal Code. (R. 19.) While Fenty claims that she committed this crime on a dare from a friend, she nonetheless stole from a young mother. (R. 19.) Fenty's plan was "to go unnoticed among the bustling crowd" to commit her crime. (R. 22–23.) In doing so, Fenty first picked out the victim because she seemed distracted. (R. 58–59.) Next, she walked quietly over to and snuck up on the victim and her family as they were preoccupied watching a street performer, all while Fenty tried to remain unnoticed. (R. 59.) As Fenty tried to take the bag, the victim noticed and began yelling. (R. 59.) Although a loud altercation occurred between Fenty and the victim in which Fenty threatened the victim and then grabbed the bag and fled the scene, Fenty did not bring a weapon with her. (R. 22, 59–60.)

II. Procedural History

On February 15, 2022, Fenty was indicted on one count of possession with intent to distribute 400 grams or more of fentanyl. (R. 1–2.) Prior to the trial, Fenty moved to suppress the contents of the sealed packages from Holistic Horse Care on the grounds that the search violated her Fourth Amendment rights. (R. 10–11.) The District Court denied the motion to suppress,

finding that Fenty did not have a legitimate expectation of privacy in the packages based on her use of the false name. (R. 16.)

Prior to trial, Fenty brought a motion *in limine* to exclude the evidence of her prior conviction for petit larceny for impeachment purposes under Federal Rule of Evidence 609(a)(2). (R. 18–19.) The District Court denied this motion because the facts of Fenty's prior conviction involved an element of deceit. (R. 26.) The District Court also issued a limiting instruction under Rule 105 of the Federal Rules of Evidence, which told the jury that they should only use her prior conviction to ascertain truthfulness, and not as evidence of her guilt. (R. 63.)

During the trial, the Government objected to the use and admission of the voicemails that Fenty left for Millwood as inadmissible hearsay evidence. (R. 47.) Although Fenty claimed that these statements fell under the exception in Federal Rule of Evidence 803(3) (3) as a then-existing mental state, (R. 47) the District Court disagreed, finding that the statements were not spontaneous. (R. 52).

At trial, the jury convicted Fenty of possession with intent to distribute under 21 U.S.C. § 841(a)(1) and (b)(1)(A)(vi), and the judge subsequently sentenced her to ten years in prison. (R. 66.) Fenty appealed to the U.S. Court of Appeals for the Fourteenth Circuit, which affirmed the District Court's rulings on June 15, 2023. (R. 64, 70.) On December 14, 2023, the U.S. Supreme Court granted the petition for writ of certiorari to the Fourteenth Circuit on three issues. (R. 74.)

SUMMARY OF ARGUMENT

The District Court properly denied Fenty's motion to suppress the evidence obtained by the search of the packages containing xylazine and fentanyl that were sent to Fenty's P.O. Box under the name "Jocelyn Meyer." Fenty did not have a legitimate expectation of privacy necessary to challenge the search or seizure of packages that were not addressed to her name.

Under the possessory interest approach to analyzing standing in this context, because Fenty was not the sender or addressee of the packages and she showed no other objective indicia of "ownership, possession, or control," Fenty had no legitimate expectation of privacy in them. This approach is grounded in property interests that are at the core of Fourth Amendment jurisprudence. Additionally, since Fenty was using the false name for a criminal purpose, any privacy expectation she may have in the packages is void.

The District Court properly excluded Fenty's voicemails as inadmissible hearsay because she had a chance to reflect upon the situation, after realizing that the packages may have been intercepted. Under a spontaneity approach, Federal Rule of Evidence 803(3) (3) allows hearsay statements describing a declarant's then-existing mental, emotional, or physical state to be admitted where the statement is made spontaneously. This approach best comports with the purpose of the hearsay rule, as it advances the trustworthiness and reliability of evidence. Because Fenty—upon learning that her packages were missing—had the chance to reflect and an opportunity to fabricate an innocent explanation for her involvement with Millwood, her voicemails to Millwood were not spontaneous, and thus do not properly fall under Rule 803(3)'s exception to the prohibition against hearsay.

Fenty's conviction for petit larceny was properly admitted under Federal Rule of Evidence 609(a)(2) because this prior conviction was committed using deceitful means and with deceitful intent. Because Fenty created a plan, selected the victim, and intended to remain unnoticed during the commission of the petit larceny, the way in which Fenty committed the crime involved deceit. As a result, Fenty's crime involved a dishonest act, which the trial court properly admitted under Rule 609(a)(2).

ARGUMENT

I. Fenty does not have a legitimate expectation of privacy sufficient to challenge the search or seizure of packages not addressed to her or in her name.

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure . . . against unreasonable searches and seizures." U.S. CONST. AMEND. IV. While the analysis from *Katz v. United States* provides the framework for assessing whether a Fourth Amendment violation has occurred, 389 U.S. 347 (1967), a separate question exists: whether a defendant has a reasonable expectation of privacy in the places searched or things seized sufficient to challenge that search or seizure. *Byrd v. United States*, 584 U.S. 395, 410–11 (2018). The Fourth Amendment "protects people, not places," *Katz,* 389 U.S. at 351. Therefore, this standing question asks whether the individual challenging the search "has had [their] *own* Fourth Amendment rights infringed" upon, as these rights cannot be "vicariously asserted" by a defendant because of damaging evidence introduced against them. *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)) (emphasis added).

The Supreme Court has long established that individuals have a reasonable expectation of privacy in their sealed mail and packages, *see, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 114 (1984), even while in transit. *Ex Parte Jackson*, 96 U.S. 727, 733 (1877). This protection applies to both the sender and addressee. *United States v. Van Leeuwen*, 397 U.S. 249, 251–52 (1970). The question remains whether a person has a legitimate expectation of privacy over sealed mail where they are not the listed sender or addressee. This Court should adopt a property approach to this inquiry, instead of the more indefinite approach, because it is rooted in broader Fourth Amendment jurisprudence. Under this analysis, Fenty does not have standing to challenge a search of the packages at issue because the false name that she used was not an established alias

or publicly used. Moreover, her false identity took on a criminal purpose, which renders moot any privacy expectation.

A. The Court should adopt a property-focused approach that rejects a privacy expectation claim for mail sent to a false name unless that alias is in public use.

The different Courts of Appeal diverge in how they resolve cases where a defendant claims a legitimate expectation of privacy in mail where they are not the listed sender or addressee. Several circuit courts only grant standing when the defendant shows objective indicia of ownership, possession, or control over the packages at issue. *United States v. Rose*, 3 F.4th 722, 727 (4th Cir. 2021); *United States v. Stokes,* 829 F.3d 47, 53 (1st Cir. 2016), *United States v. Lewis*, 738 F.2d 916, 919 n.2 (8th Cir. 1984). Other circuit courts have a broader approach and find standing appropriate for a defendant using a fictitious name or alias, without any required possessory or property interest. *United States v. Villareal*, 963 F.2d 770, 774–75 (5th Cir. 1992); *United States v. Pitts*, 322 F.3d 449, 457 (7th Cir. 2003); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009).

This Court should adopt the approach developed by the First, Fourth, and Eighth Circuits that rejects claims by defendants who are not the listed sender or addressee, "absent other indicia of ownership, possession, or control." *Rose*, 3 F.4th at 727–28. This approach is founded on property concerns that continue to be at the core of modern Fourth Amendment jurisprudence. Under this approach, an alias can be used to prove the requisite other indicia, so long as that alias is established and publicly used.

i. A possessory approach aligns with the roots of broader Fourth Amendment jurisprudence that considers the defendant's relationship to the property.

While the Court's decision in *Katz* overtook the trespass approach to the Fourth Amendment, 389 U.S. at 352–53, succeeding opinions indicated that the former trespass inquiry

had not been abandoned. *See, e.g.*, *Byrd*, 584 U.S. at 403. Instead, while possession is not a "proxy" for the Fourth Amendment interest, "property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated." *United States v. Salvucci*, 448 U.S. 83, 91 (1980) (citing *Rakas*, 439 U.S. at 144 n.12).

Particularly in the last fifteen years, the Supreme Court has re-engaged with property concepts in Fourth Amendment jurisprudence. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 404-05 (2012).[1] Some Justices favor a property-guided approach to the Fourth Amendment because they see the *Katz* test as too difficult to apply with regularity and as guided by inconsistent principles. *See, e.g.*, *Carpenter v. United States*, 138 S.Ct. 2206, 2268–71 (2018) (Gorsuch, J. dissenting). And for Justices preferring an originalist or historical lens, a trespass test is the logical framework for Fourth Amendment analyses because, at the time of the amendment's ratification, a trespass approach is how the amendment would have been understood. *Jones*, 565 U.S. at 404-06; *see also* Nicholas A. Kahn-Fogel, *Standing in the Shadows of the New Fourth Amendment Traditionalism*, 74 FLA. L. REV. 381, 382 (2022).

The narrow standing question here has been resolved by several circuit courts guided by principles of property law that the Court previously used in other areas of Fourth Amendment doctrine. *Rose,* 3 F.4th at 728 (describing this focus as the "other indicia" approach); *see also United States v. Sierra-Serrano,* 11 F.4th 931 (8th Cir. 2021); *Stokes*, 829 F.3d at 52–53.

The courts following this approach center their analysis around considerations of property. The First Circuit listed the relevant factors as: "ownership, possession and/or control; historical use of the property searched or the thing seized; ability to regulate access . . . ." 829 F.3d at 53 (quoting *United States v. Aguirre*, 839 F.2d 854, 856–57 (1st Cir. 1988)). In resolving

[1] In *Jones*, this Court clarified that the "*Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 409 (emphasis in the original).

the standing inquiry, *Stokes* primarily relied on these property-based factors. *Id.* The Fourth Circuit in *Rose* relied on the *Stokes* framing and said its inquiry required "evidence objectively establishing [the defendant's] ownership, possession, or control of the property at issue." 3 F.4th at 727–28. The majority in *Rose* relied on a prior Fourth Circuit decision, *id.* at 727; in that earlier case, the court discussed this Court's decision in *Jones* and found that the defendant lacked standing. *United States v. Castellanos*, 716 F.3d 828, 834 (4th Cir. 2013).

These decisions place the property at the forefront of the standing analysis, which comports with recent decisions of this Court. It is therefore the next logical step for the Supreme Court to adopt this property-centered standing analysis for the question now before it.

ii. For an alias to be used to show a legitimate expectation of privacy, a defendant must prove that the alias is established or in public use.

Under this property approach, when a defendant alleges to be the intended recipient using an alias, their alias is a key component in the analysis of their possessory interest. For an alias to be sufficient, "the defendant must provide evidence that the fictitious name is an established alias." *Rose*, 3 F.4th at 728 (citing *Castellanos*, 716 F.3d at 834). Other courts take a less stringent approach to the alias requirement and grant a defendant standing despite no one knowing them by that name. *See, e.g.*, *Pitts*, 322 F.3d at 459 *(*stating a person has "a right to use false names in sending and receiving mail") (citing *Rakas*, 439 U.S. at 143 n.12) (denying motion to suppress on other grounds).

The standing burden for defendants is at its core intended to prevent someone from asserting a legitimate expectation of privacy in evidence simply because it is powerful in a case against them. *See, e.g.*, *Rakas*, 439 U.S. at 134. A higher threshold for the usage of an alias comports with a plain meaning of alias as "an assumed or additional name that a person has used

or is known by." *Alias,* BLACK'S LAW DICTIONARY (11th ed. 2019). Without requiring a higher burden for a defendant's usage of an alias, several people could have standing for packages addressed to a single name, when it is ambiguous to whom the alias belongs. *See, e.g.*, *Villareal*, 963 F.2d at 774–75 ("It is not clear whether Roland Martin was the alter ego of Villarreal or of Gonzales . . . [despite the ambiguity,] we find that both Villareal and Gonzales had [standing]."). The result in *Villareal* was the exact concern raised in *United States v. Givens*, where the court highlighted the necessity of clearly defined standards to prevent a defendant from successfully claiming privacy expectations despite a weak and tenuous connection to the evidence. 733 F.2d 339, 342 (4th Cir. 1984).[2]

Criticisms of a stringent standard for an alias point to the risk people using pseudonyms either professionally or for safety will lose Fourth Amendment protections. *See, e.g.*, *Rose*, 3 F.4th at 738–39 (Gregory, C.J. dissenting). The "established" requirement would not prevent those using a *nom de plume* or pseudonym professionally, because in those circumstances, "[t]hey are their alter egos in a way society recognizes as legitimate." *Pitts*, 322 F.3d at 460 (Evans, J. concurring). For the judge or celebrity seeking privacy and safety for understandable reasons, "established" only requires that they show a well-founded or public connection to the alias or that others "commonly know[] them by that name." *Rose*, 3 F.4th at 730.

B. Fenty does not have a legitimate expectation of privacy in the challenged packages because she cannot meet the burden of possessory ownership and her alias was not established or publicly used.

While a defendant may claim a legitimate expectation of privacy based on their subjective interest in a package, to have standing to challenge the search, they need to

[2] The Fourth Circuit in *Givens* noted that if "any privacy interest [were] accorded beyond the clearly defined limits we set, privacy claims might be advanced all along a chain of drug distribution, like ripples in a pond, becoming more and more remote from the point at which drugs are intercepted." 733 F.2d at 342.

objectively establish a possessory interest. *See Rose*, 3 F.4th at 727 (citing *Castellanos*, 716 F.3d at 834). Here, Fenty had no ownership, possession, or control over the packages addressed to Jocelyn Meyer; furthermore, her usage of that name as an alias cannot establish a possessory interest because she did not use the name publicly and was not known to others by that name.

i. Fenty had no ownership, possession, or control over the packages sent to Jocelyn Meyer at the time of their search.

Fundamentally, the property approach asks whether the individual seeking to challenge the search has ownership, possession, or control over the mail at issue. *See Rose,* 3 F.4th at 728; *Stokes*, 829 F.3d at 52–53. This inquiry is rooted in broader jurisprudence in these circuits that applies not just to the narrow standing question before this Court. *Stokes*, 829 F.3d at 53 (citing *Aguirre*, 839 F.2d at 856–57). Crucially, it looks at the defendant's legitimate expectation of privacy *at the time of the search*. *Rose*, 3 F.4th at 729.

In *Stokes*, the First Circuit described important factors regarding the possessory interests as including: "whether anyone else had access to [the address], what the nature of the delivery receptacle was, or any other information that could shed light on the reasonableness of his privacy interest." 829 F.3d at 53. The *Stokes* court rejected the defendant's claim that the presence of letters addressed to his name in the same mailbox meant he had standing to challenge the search of letters not addressed to him. *Id.* Critically, an "address alone" cannot create the requisite privacy expectation. *Id.* at 52–53. The Eighth Circuit pointed to similar factors: the connection (or lack thereof) of the defendant to the mailbox, the mailbox's contents, and the listed address. *Lewis*, 738 F.2d at 919 n.2.

The Fourth Circuit, when denying the defendant's standing claim, cited that the packages were "addressed to a deceased individual at a residence lacking any established connection to

[the defendant]" and that, at the time of the searches, he had not taken possession of them. *Rose*, 3 F.4th at 729.[3] The court also noted that since the packages did not bear his name, the defendant could not have "exercise[ed] . . . any ownership rights or control over the packages." *Id.*

An individual's status as the intended recipient is not dispositive. *Givens*, 733 F.2d at 342; *see also United States v. Osunegbu*, 822 F.2d 472, 480 n.23 (5th Cir. 1987). Subjective claims based on being the intended recipient must be "accompanied by reasonable, *objective* indicia of a possessory interest." *Rose,* 3 F.4th at 730 (emphasis in original). Even courts adopting an alternative approach recognize that being the intended recipient is an insufficient basis for standing. *See, e.g.*, *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992).

Fenty cannot sufficiently show she exercised ownership, possession, or control over the mail at the time of the search. The packages were not addressed to her name, she was not the sender, and the delivery address for the packages was a P.O. Box also not registered in her name. (R. 65.) While Fenty later took possession of the packages during a controlled delivery (R. 32–33), the search of them already occurred (R. 31–32); as the relevant inquiry is her privacy expectation *at the time of the search*, any later possession by Fenty should not control.

While there were two Amazon packages addressed to "Franny Fenty" sent to the same P.O. Box as the packages she seeks to challenge (R. 65–66.), the *Stokes* court rejected this argument because an "address alone" is not enough. Moreover, the P.O. Box itself was also registered under a false name (R. 30–31), which weakens Fenty's connection to the address.

Furthermore, Fenty's status as the intended recipient of the packages is similarly insufficient. There is no objective indication that the packages were intended for Fenty, and all she can point to her is her own subjective expectation, which as *Rose* explained, is insufficient on

[3] "Nothing about the packages, including the sender's name, the named recipient, the address, or the phone number listed on the packages signaled in an objective sense that Rose had a protected interest . . .." *Rose,* 3 F.4th at 729.

its own. All Fenty can rely on is an allegation that she was the intended recipient of these packages and a tenuous connection to the address; neither of these is enough for Fenty to meet her burden of an objectively reasonable expectation of privacy in the packages.

ii. Fenty's alias was not established in the public use because she was not known to others by that name nor publicly using it.

For an alias to be sufficiently established to grant a person standing over packages not addressed to their legal name, it must be a name that they have used publicly such that their connection to it is established and others know them by that name. *Rose*, 3 F.4th at 730. This can be shown with evidence that others recognize them by that name, or that they use the name regularly under different circumstances. *Id.* at 730.

Judges operating within the alternative approach also recognize a heightened threshold for aliases. The concurrence in *Pitts* noted the difference between someone subjectively using a false name and those that have used one professionally, such as with a *nom de plume*. 322 F.3d at 460–61 (Evans, C.J. concurring). The Fifth Circuit in both *Richards* and *Pierce* similarly used the language of "alter ego," despite not adopting an established alias requirement. *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981); *Pierce*, 959 F.2d at 1303 n.11. Fundamentally, an alter ego is an identity that has become another version of a person or subsumed their identity.[4]

Fenty's prior public usage of the name Jocelyn Meyer was limited and attenuated in time. The short stories from college were published only twice (R. 4), five or six years before her arrest (R. 4), and there is no evidence, as is necessary, that anyone knows her by that name because of them. And while she wrote five books under the name Jocelyn Meyer (R. 42), the

[4] While *Pierce* and *Richards* do not define "alter ego," the plain meaning of the term is of "a second self or different version of oneself . . . ." *Alter ego*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/alter%20ego (last updated Jan. 22, 2024).

books were never released (R. 16) and Fenty admitted that the publishers never responded and her "career as a novelist was not taking off." (R. 42–44.) While Fenty may have sought recognition by that name, her subjective intention is irrelevant; per *Rose*, the focus is whether the use was public and others knew her by that name. Fenty can point to little evidence of either.

Even under the more malleable doctrine of the Fifth and Seventh Circuits, Fenty's usage of the name Jocelyn Meyer is insufficient. The books were all unpublished (R. 16.) and her short stories had limited publication at her college, five or six years prior (R. 16.), which would not meet the *nom de plume* level detailed by the *Pitts* concurrence. Jocelyn Meyer was also not Fenty's "alter ego" as she kept two very distinct identities. Fenty therefore cannot meet the standing burden to challenge a search of packages addressed to the name Jocelyn Meyer.

C. Even if Fenty could otherwise meet the burden for standing, her usage of the name Jocelyn Meyer for criminal purposes renders any alleged privacy expectation moot.

Despite any privacy expectation a court may be willing to find based on an individual's usage of an alias, when that alias has a criminal purpose, any potential privacy expectation is no longer reasonable. *Lewis*, 738 F.2d at 919–20 n.2; *cf. United States v. Jacobsen*, 466 U.S. at 122 n. 22. The Eighth Circuit reasoned that "a mailbox bearing a false name with a false address and used only to receive fraudulently obtained mailings" does not merit an objectively reasonable expectation of privacy. *Lewis,* 738 F.2d at 919 n.2. *See also Pitts*, 322 F.3d at 460 (Evans, C.J. concurring) (arguing that, especially regarding mail, a criminal alias should not be protected).

While some courts assert that the criminal nature of a defendant's conduct is irrelevant to the standing analysis, *see, e.g.*, *Pitts*, 322 F.3d 457-59, this Court explained in *Illinois v. Caballes* that there is a distinction between an expectation that contraband will remain hidden, or the authorities will remain unaware and the type of privacy expectation that society is prepared to accept. 543 U.S. 405, 408–09 (2005).

Fenty's usage of the name Jocelyn Meyer had, at the time of the search, a wholly criminal purpose which erases any privacy expectation she may claim. Fenty has, like the defendant in *Lewis,* a mailbox bearing a false name (R. 30–31), which she opened under a false name (R. 31-32), a few weeks after getting involved with the criminal scheme. (R. 6, 44.) She opened the P.O. Box just two weeks before the packages arrived. (R. 31.) The Amazon packages addressed to Fenty, and not Jocelyn Meyer (R. 11–12.), underscore the criminal purpose of the name Jocelyn Meyer—Fenty had one name for criminal activity (Jocelyn Meyer) and one for all other personal activity (Franny Fenty). Additionally, Fenty's prior usage of the name Jocelyn Meyer for non-criminal activity is irrelevant; at the time of the search, it only had a criminal purpose.

II. Fenty's statements are inadmissible hearsay and do not fit within the Rule 803(3) exception because the statements were not made spontaneously since Fenty had the chance to reflect prior to recording her voicemails.

Rule 802 of the Federal Rules of Evidence prohibits the admission of hearsay except where provided in "a federal statute; these rules; or other rules prescribed by the Supreme Court." FED. R. EVID. 802. Rule 803(3) (3)provides one of the exceptions to this prohibition where the statement involves 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) (3).

The hearsay prohibition and the subsequent exceptions are based on the trustworthiness of the evidence. FED. R. EVID. art. VIII advisory committee's note to 1972 proposed rules. Hearsay evidence is distinguished from other evidence because of "the absence of oath, demeanor, and cross-examination as aids in determining credibility" when the statement is made. *Id.*; 31A C.J.S. *Evidence* § 358 (2008). The hearsay scheme provided for in Article VIII of the Federal Rules of Evidence includes "some particular assurance of credibility as a condition

precedent to admitting the hearsay declaration of an unavailable declarant." FED. R. EVID. art. VIII advisory committee's note to 1972 proposed rules.

To qualify as a mental state under Rule 803(3) (3), courts disagree as to whether there is a spontaneity requirement. Most circuit courts have read a spontaneity requirement into the rule. *See Cianci v. United States*, 378 F.3d 71, 97 (1st Cir. 2004); *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001); *United States v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995); *United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir. 1992); *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005); *United States v. Faust*, 850 F.2d 575, 585 (9th Cir. 1988). But other courts have declined to consider the spontaneity or timeliness of the statement made when considering whether the statement fits within the Rule 803(3) exception. *See e.g.*, *United States v. DiMaria*, 727 F.2d 265, 271–72 (2d Cir. 1988).

This Court has not yet determined whether there is a spontaneity requirement implicit in Rule 803(3) (3). In reaching its decision, this court should follow the majority of the circuit courts and include a spontaneity requirement in Rule 803(3) because it fosters the underlying purpose of the Federal Rules of Evidence, which is to promote the trustworthiness and reliability of evidence. The Court should therefore also affirm the Fourteenth Circuit's decision determination that Fenty's statements do not fall under Rule 803(3)'s exception to the hearsay rule since the statements were not made spontaneously.

A. This Court should affirm the Fourteenth Circuit's adoption of the spontaneity requirement under Federal Rule of Evidence 803(3) because it promotes the trustworthiness and reliability of evidence.

Rule 803, providing for exceptions to the prohibition against hearsay, allows the admission of hearsay where the "statement may possess circumstantial guarantees of trustworthiness." FED. R. EVID. 803, advisory committee's note.

Legislative enactments—including the Federal Rules of Evidence—should be interpreted using the "traditional tools of statutory construction," *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). As part of its analysis, the Supreme Court has frequently considered legislative intent as a tool in interpreting the Federal Rules of Evidence. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989). For instance, in *Huddleston v. United States*, the Court considered the Advisory Committee Notes to the evidence rule at issue in that case. 485 U.S. 681, 688 (1988). The Advisory Committee Notes specifically rejected the inclusion of a "mechanical solution" under that evidentiary rule. *Id.* The Court relied on this legislative history in declining to use the "mechanical solution" in determining admissibility of evidence under that rule. *Id.*

The Advisory Committee Notes to Rule 803(3) (3) suggest there is a spontaneity requirement implicit in in the rule. Rule 803(3) is connected to the exceptions in Rules 803(1) and 803(2), which support the inclusion of a spontaneity requirement. *See* FED. R. EVID. 803 advisory committee's note. The Advisory Committee Notes to Rule 803(3) provide that this exception to the hearsay rule is "essentially a specialized application" of Rule 803(1), the present sense impression exception to the hearsay rule. *Id.* Rule 803(3) is separated from 803(1) merely "to enhance its usefulness and accessibility." *Id.* The present sense impression exception under 803(1) is grounded in the theory "that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Id.* This thus suggests that concerns over the timeliness of the statement, the declarant's potential fabrication, and spontaneity are similarly implicit in Rule 803(3).

As a result, courts have accepted the Advisory Committee Notes as support for imputing a spontaneity requirement on the grounds that statements regarding a declarant's mental state carry probative value *because* "the declarant has no chance to reflect upon and perhaps

misrepresent his situation." *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986); *see Faust*, 850 F.2d at 586 (citing *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980)) (referencing the Advisory Committee Notes to explain that the 803(1)–(3) hearsay exceptions all rely on the same theory that where there is a greater chance for misrepresentation, the declaration is less reliable); *Jackson*, 780 F.2d at 1315 (relying on the Advisory Committee Notes to state that Rule 803(3) is an "extension" of Rule 803(1)); *Naiden*, 424 F.3d at 722 (citing to the Advisory Committee Notes to explain that Rule 803(3) is "premised on the supposition that" spontaneity helps eliminate the threat of fabrication).

Without a spontaneity requirement, there is a greater risk of admitting unreliable statements because of the declarant's memory errors and the risk of misrepresentation. The length of time between the statement and the event is probative of whether it is truly providing the declarant's mental state. For instance, in *Reyes*, the court noted that the length of time between the criminal event in mid-late February and the declarant's statement at the beginning of May significantly reduces any probative value of the declarant's statement about his then-existing mental state. 239 F.3d at 743.

In *Faust*, the Ninth Circuit noted that the declarant made multiple drafts of his statement, and that he was able "to think long and hard" prior to making his statement. *Faust*, 850 F.2d at 586. Thus, the duration between the event and the declarant's statement indicated the statement was unreliable because there was "ample time" for the declarant to reflect. *Id.* As a result, this significantly reduces the statement's probative value.

Including a spontaneity requirement also avoids the risk of rewarding self-serving statements. The self-serving nature of a statement greatly reduces its probative value. For instance, in *Reyes*, the defendant suspected that his co-defendant "was cooperating with

authorities." 239 F.3d 722, 743. This made it more likely that the defendant's conversation with his co-defendant "was being monitored or recorded." *Id.* As a result, it was probable that the defendant's statement with his co-defendant was "more self-serving than [it was] candid," thus significantly decreasing its probative value. *Id.* Without the spontaneity requirement, courts can admit unreliable statements under Rule 803(3) (3) despite acknowledging the statement may be false and suspect. *See, e.g.*, *DiMaria*, 727 F.2d at 271–72.

This can be juxtaposed with *United States v. Partyka*, in which the Eighth Circuit held that statements regarding the declarant's "immediate reaction" and present state of mind were admissible under Rule 803(3). 561 F.2d 118, 125 (8th Cir. 1977). The court contrasted this type of immediate reaction to a statement about a declarant's past state of mind, noting that the latter runs the risk of being self-serving. *Id.; see Naiden*, 424 F.3d at 722.

Although juries determine credibility, statements that may mislead the jury should still be excluded. Courts have noted that the exceptions laid out in Rule 803 are based in the notion "that 'circumstantial guarantees of trustworthiness' may be found in some hearsay statements, making them as reliable as in court testimony." *Naiden*, 424 F.3d at 722 (citing FED. R. EVID. 803 advisory committee's note). Jurors may not be in the best position to make these types of credibility determinations when there are concerns over a declarant's motive to fabricate.[5] Paul Rothstein, *Comments on Swift and Slobogin: Mental State Evidence*, 38 SETON HALL L. REV. 1395, 1408 (2008). And "in contrast to a judge, jurors have little experience in the mendacity of defendants when they are caught red-handed." *Id.*

[5] Moreover, courts have "judicially imposed [a] requirement for many hearsay exceptions that there be no motive to fabricate." Paul Rothstein, *Comments on Swift and Slobogin: Mental State Evidence*, 38 SETON HALL L. REV. 1395, 1410 n.26 (2008). For instance, the Third Circuit judicially imposed a requirement for a Rule 803(2) that the statement be made before the declarant has a chance to reflect or fabricate. *United States v. Brown*, 254 F.3d 454, 458 (3d Cir. 2001). Because Rule 803(3) is connected to Rules 803(1) and (2), *see* FED. R. EVID. 803 advisory committee's notes, this supports the appropriateness of a judicially imposed requirement of spontaneity.

Requiring spontaneity before admitting a statement under Rule 803(3) is still necessary despite the existence of a Rule 403 analysis. Rule 403 provides that a "court *may* exclude relevant evidence if its probative value is substantially outweighed by a danger of" certain concerns, such as unfair prejudice and misleading the jury." FED. R. EVID. 403 (emphasis added). Significantly, while Rule 403 merely *allows* a judge to exclude evidence if its probative value is outweighed by one of the dangers listed, *see id.*, the spontaneity requirement *ensures* that a judge excludes the statement when it is not contemporaneous with the event, when the declarant had time to reflect, or when the statement is not relevant to an issue in the case, *see Jackson*, 780 F.2d at 1315. As a result, judicially imposing a spontaneity requirement into Rule 803(3) provides consistency for future courts when analyzing a statement under Rule 803(3), which cannot occur under Rule 403 since its application is on a case-by-case basis.

Because the spontaneity requirement helps negate the risks of admitting unreliable statements in which the declarant had the chance to reflect, misrepresent events, and fabricate a self-serving story, this Court should adopt the spontaneity requirement for Rule 803(3) (3) as it abides by the purpose and policy of the hearsay rule.

B. After realizing her packages were missing, Fenty had a chance to reflect on her situation prior to leaving the voicemail messages, and thus her statement was not made spontaneously.

This Court should affirm the Fourteenth Circuit's decision to exclude Fenty's voicemails because Fenty had a chance to reflect, and her statements were therefore not made spontaneously. Courts that have adopted a spontaneity requirement for Rule 803(3) (3) require three prongs to be met in order for a statement to be deemed spontaneous: (1) the statement must be contemporaneous to the alleged event, (2) the declarant must not have a chance to reflect, and (3) the statement must be relevant to the case. *Jackson*, 780 F.2d at 1315. It is not disputed that

the two voicemails that Fenty left for Millwood were contemporaneous with the event regarding the intercepted packages and were also relevant as to Fenty's awareness of the contents of the packages. Thus, the prong at issue is whether Fenty had a chance to reflect.

The length of time between the statement and the alleged event may indicate whether the declarant had a chance to reflect. Courts look at the length of time as an indication that the declarant may be "mak[ing] a deliberate misrepresentation of a former state of mind." *Naiden*, 424 F.3d at 722–23. For instance, in *Faust*, the declarant "went through several drafts" of his statement which suggested that he had "ample time to reflect upon his statements," making the statement unreliable and not admissible under Rule 803(3). *Faust*, 850 F.2d at 586. In *United States v. Carter*, the declarant made the statement "at least an hour" after the applicable event. 910 F.2d 1524, 1530–31 (7th Cir. 1990). The court found this provided the declarant with "ample opportunity to reflect upon his situation," and thus declined to admit the statement under Rule 803(3). *Id.*

A declarant has no chance to reflect where the declarant has "no time to fabricate or misrepresent his thoughts." *Neely*, 980 F.2d at 1083 (citing *Carter*, 910 F.2d at 1530). The declarant in *LeMaster* "made [his] statement the day after the interview when he knew he was under investigation" and when he was aware that the FBI had evidence of his connection with the crime at issue. F.3d 1224, 1231 (6th Cir. 1995). The court explained that the declarant likely knew that he had to fabricate "an innocent explanation" within those twenty-four hours. *Id.* at 1231–32. As a result, the court deemed the declarant's statements not spontaneous, as he had the chance to reflect and fabricate a story. *Id.*

The Sixth Circuit in *United States v. Carmichael* noted it was possible the declarant there misrepresented his thoughts "in an attempt to hedge his bet in the event that something might go

wrong later, even if [the declarant] did not know at the time that he was the target of an investigation." 232 F.3d 510, 521 (6th Cir. 2000). Although not reaching the issue, the court indicated doubts about whether his statement would be admissible under Rule 803(3). *Id.*

In this case, the length of time between Fenty's voicemails and her alleged realization that the packages had been intercepted is sufficient to show that she had the chance to reflect prior to making these statements, and thus the statements were not spontaneous. Regarding the first voicemail, although the time frame between when Fenty realized that the packages were missing and when Fenty left this voicemail were shorter than the second voicemail (R. 40, 46), Fenty still had the chance to reflect. After realizing her packages were missing, Fenty had to take time to contemplate her next steps, including deciding whether to call Millwood and what she would want to say. With the second voicemail, Fenty had forty-five minutes to reflect upon what had happened. (R. 40, 46.) This is like *Carter*, where the Seventh Circuit found that around an hour (or more) was sufficient to provide the defendant time to reflect upon his situation, and for the statement to not be deemed spontaneous under Rule 803(3) (3). Additionally, because both statements were recorded voicemails and not live conversations, the potential for fabrication is even stronger, as it allowed Fenty the time and opportunity to reflect and strategically plan out what she wanted to say.

Furthermore, Fenty had the time to fabricate or misrepresent her thoughts, indicating that these statements were not spontaneous. Fenty knew she had ordered xylazine and she was aware of the possibility and potential likelihood that xylazine could be mixed with fentanyl to produce an illicit substance. (R. 46.) This is because Fenty had read a local news article published on February 8, 2022, that discussed this, and as a result, Fenty immediately called Millwood because she was "nervous." (R. 46.) Thus, Fenty not only had time to think about the story she

wanted to tell when she realized the packages were missing (R. 46), but she had time to think about it from the moment she was made aware of the local news story regarding xylazine's use.

Given that Fenty was aware of the local news article regarding the combination of xylazine and fentanyl and the fact that the xylazine packages sent to her P.O. Box were missing (R. 46), Fenty had time to misrepresent her thoughts as to what she thought was in the packages and the extent of her involvement with Millwood. Like the declarant in *LeMaster*, Fenty may have known she was under investigation and had to come up with an innocent explanation for her involvement with Millwood. Even if Fenty did not know she was under investigation, she was still likely trying to "hedge [her] bet in the event that something might go wrong later." *Carmichael*, 232 F.3d, at 521.

Because Fenty had the time and incentive to carefully consider what she wanted to say prior to leaving the voicemail messages, she had the chance to reflect and a motive to misrepresent her thoughts, indicating that the statements were not made spontaneously, and thus do not fit within the Rule 803(3) (3) exception to hearsay.

III. Fenty's prior conviction for petty larceny was properly admitted under Rule 609(a)(2) because she committed the offense using deceitful and dishonest means.

Rule 609 of the Federal Rules of Evidence allows a party to impeach a witness, including the defendant in a criminal case, for truthfulness by evidence of their criminal conviction. FED. R. EVID. 609. The rule does not include an exclusive list of crimes that fall within its scope, FED. R. EVID. 609(a)(2), and the Court has not offered specific guidance on this issue. While courts agree on the admission of convictions for perjury, forgery, and other similar crimes, they disagree when it comes to property-based convictions. *Compare United States v. Ortega*, 561 F.2d 803 (9th Cir. 1977), *with Altobello v. Borden Confectionary Products, Inc.,* 872 F.2d 215 (7th Cir. 1989).

Because of the discretion afforded to a trial court in Rule 609(a)(2) determinations and the manner of Fenty's conviction, here, the trial court properly admitted Fenty's prior conviction for petit larceny under Rule 609(a)(2). Moreover, even if this admission was in error, the error was harmless because it did not substantially sway Fenty's conviction.

A. Admitting petit larceny under 609(a)(2) is a proper use of a trial court's discretion because petit larceny can rest on dishonest facts that bring the conviction within the intended scope of the rule.

In reviewing a trial court's determination on whether evidence of a prior conviction is properly admitted for the purposes of impeachment, an appellate court applies an abuse of discretion standard. *See, e.g.*, *United States v. Collier*, 527 F.3d 695, 699 (8th Cir. 2008) (citing *United States v. Headbird*, 461 F.3d 1074, 1078 (8th Cir. 2006)); *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998) (citing *Zinman v. Black & Decker (U.S.), Inc.*, 983 F.2d 431, 434 (2d Cir. 1993); *cf. Dean v. Trans World Airlines, Inc.,* 924 F.2d 805, 811 (9th Cir. 1991) (noting that a trial court's is denied discretion under Rule 609(a)(2) to weigh the potential prejudicial effect).

The different Circuit Courts of Appeal have vastly different approaches to the question of whether to admit a prior misdemeanor conviction for petit larceny under Rule 609(a)(2). Some circuits have *per se* excluded a petit larceny conviction under this rule. *See, e.g., United States v. Fearwell*, 595 F.2d 771, 776–77 (D.C. Cir. 1978); *Ortega*, 5 F.2d at 806. Other circuit courts, however, have affirmed the admission of petit larceny convictions under this rule. *See, e.g., Altobello*, 872 F.2d at 216–17; *Payton*, 159 F.3d at 57; *see also United States v. Mixon*, 185 F.3d 875 (Table) (10th Cir. 1999) (stating that "theft" is a crime of dishonesty under Rule 609(a)(2)). Additionally, other circuits are open to upholding the admission of a conviction under Rule 609(a)(2), so long as the trial court determines that the prior conviction rested on an act of

dishonesty or false statement. *See, e.g., United States v. Glenn*, 667 F.2d 1269, 1213 (9th Cir. 1982); *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982).

This Court should leave the discretion in the hands of the trial court to determine whether a defendant's petit larceny conviction falls within the ambit of Rule 609(a)(2) because the rule's focus is on a witness's propensity to testify truthfully, and under some circumstances a petit larceny conviction can be committed in a manner that Rule 609(a)(2) is intended to capture.

i. Allowing a case-specific analysis of a defendant's prior conviction logically furthers the purpose of 609(a)(2).

From its nascency Rule 609(a)(2) has been well understood to include crimes that are *crimen falsi, see* S. Rep. No. 93-1277, which refers originally to a crime "in the nature of perjury." *Crimen,* BLACK'S LAW DICTIONARY (11th ed. 2019). However, in recognition of crimes beyond this common law term that can still be indicative of a witness's truthfulness, the rule is not limited to *crimen falsi*, and encompasses convictions that "require[] proving – or the witness's admitting – a dishonest act or false statement." FED. R. EVID. 609(a)(2).

The rule does not include an exclusive list of qualifying offenses, FED. R. EVID. 609(a)(2), which is a reflection of the rule's original purpose: to admit prior convictions that "bear[] on the accused's propensity to testify truthfully." *Ortega*, 561 F.2d at 806 (quoting H.R. Rep. No. 93-1597 (Conf. Rep.)). If the drafters intended to only limit it to *crimen falsi* or other crimes where dishonesty or false statements were an element of the offense, the rule would have been limited in that manner. *See* FED. R. EVID. 609(a)(2). Notably, unlike under Rule 609(a)(1), the rule is not limited to felony convictions. Fed. R. Evid. 609(a)(1)–(2). Additionally, Rule 609(a)(2) is not subjected to Rule 403 balancing. *See, e.g.*, *United States v. Kiendra*, 663 F.2d 349, 355 (1st Cir. 1981). A court "*must* [admit] the prior conviction for impeachment purposes *if*

the . . . conviction involved dishonest or [a] false statement." *Fearwell*, 595 F.2d at 775 (emphasis added).

The decision by the drafters to not limit the rule to those crimes with dishonesty or false statement as an element of an offense or to felony crimes reflect that there are many offenses that could require "proving – or the witness's admitting – a dishonest act or false statement." FED. R. EVID. 609(a)(2). This is why the Advisory Committee made clear that: "[w]here the deceitful nature . . . is not apparent. . . a proponent may offer information . . . to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement . . . ." FED. R. EVID. 609 advisory committee's note to 2006 amendment. Because propensity to testify truthfully is the touchstone of 609(a)(2), this Court should apply a fact-specific inquiry here.

ii. Petty larceny is not per se *excluded from 609(a)(2) based on the purposes of the rule and reality that theft can be committed using dishonest means.*

Some circuit courts wholly except theft and petty larceny convictions from Rule 609(a)(2). They argue that Rule 609 excludes crimes "which, bad though they are, do not carry with them a tinge of falsification." *Ortega*, 561 F.2d at 806. Courts adopting this perspective distinguish between crimes using stealth and those that involve false statements. *See, e.g.*, *United States v. Hayes*, 553 F.2d 824, 827–28 (2d Cir. 1977).The weakness of this logic from both *Hayes* and *Ortega* is the focus on falsification, because it is inauthentic to the actual language of the rule as it currently stands—Rule 609(a)(2) encompasses both crimes that required proving "a dishonest act *or* a false statement." FED. R. EVID. 609(a)(2) (emphasis added).

Despite the logic of some courts, several other circuit courts recognize that there are potential facts that could bring a conviction within the scope of the rule. *See United States v. Crawford*, 613 F.2d 1045, 1052 (D.C. Cir. 1979). In *United States v. Seamster*, the Tenth Circuit

said "theft cases arising out of fraudulent and deceitful conduct [] might [be] within the ambit of Rule 609(a)(2) . . . [and] the trial court could determine the question on a case by case basis." 568 F.2d 188, 191 (10th Cir. 1978).[6] While these decisions originate prior to recent amendments to the Federal Rules of Evidence, this understanding of Rule 609(a)(2) persists in more recent decisions. *See, e.g.*, *United States v. Dunson*, 702 F.3d 886, 893–894 (6th Cir. 2012).

Moreover, in *Altobello v. Borden Confectionary Products, Inc.*, the court upheld the admission of a prior conviction for misdemeanor meter tampering. 872 F.2d at 215–17. There, the meter tampering was "*necessarily* a crime of deception; [because] the goal [was] to deceive the meter reader." *Id.* The same court a decade prior in *United States v. Papia* noted that "larceny . . . reflects adversely on the trustworthiness of a [person's] character and [their] testimonial credibility in a way that joy riding does not." 560 F.2d 827, 847 n.14 (7th Cir. 1977).

While some circuit courts have adopted a rule that *per se* excludes the admission of petit larceny convictions, a categorical rule such as that is inauthentic to the purpose of the rule, and the reality of how these convictions can be committed in a deceitful or dishonest manner.

B. Fenty's prior conviction rested on dishonest acts because she took time to plan her crime, selected the victim, intended to stay hidden, and came with no weapon.

Generally, when an offense is not automatically admissible under Rule 609(a)(2), a court inquires into the nature of the offense and whether that "particular prior conviction rested on facts warranting the dishonest or false statement conviction." *Hayes*, 553 F.2d at 827 (quoting *United States v. Smith*, 551 F.2d 348, 364 n.28 (D.C. Cir. 1976)). This holds true for petit larceny convictions: the prosecutor is directed to present evidence and demonstrate to the court that the

[6] "Shoplifting may or may not be probative of a lack of veracity, depending on the nature . . . of the case. It can range from an impulsive 'grab and run' in full view of store officials, to a discreet slipping of merchandise into a handbag, or even to an outright lie about one's identity or ownership of a credit card." *Seamster*, 568 F.2d at 191.

prior petit larceny conviction has "le[ft] room for doubt" and rested on dishonesty or falsity. *Smith*, 551 F.2d at 364 n.28; *see also Government of Virgin Islands v. Toto*, 529 F.2d 278, 281 n.3 (3rd Cir. 1976). The proponent of the prior conviction evidence bears the burden of presenting evidence to the court of these facts. *See, e.g.*, *Dunson*, 142 F.3d at 1216.

While courts are instructed to not conduct a "mini-trial" regarding the prior conviction, FED. R. EVID. 609 advisory committee's note to 2006 amendment, they can look at the circumstances of that conviction and whether "the manner in which the [defendant] committed the offense may have involved deceit." *Altobello*, 872 F.2d at 216; *cf. Smith*, 551 F.2d at 364 n.28. If offenses are within the scope of Rule 609(a)(2), they are admissible "regardless of how such crimes are specifically charged." FED. R. EVID. 609 advisory committee's note to 2006 amendment. Moreover, just because a criminal statute means that a person *could* be convicted under it without deceit or dishonesty does not inherently mean that all convictions under that statute cannot be eligible for admission under Rule 609(a)(2). *See Altobello*, 872 F.2d at 217.

For crimes to be within the scope of Rule 609(a)(2) the conduct must only be characterized "by *an element* of deceit." *Smith*, 551 F.2d at 362–63 (emphasis added). While some courts argue that stealth is wholly separate from deceit or dishonesty, *see, e.g.*, *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012), others point to stealth as evidence of both deceit and dishonesty, as "the pickpocket is both dishonest and deceitful in his dishonesty . . . a prior conviction for theft [can] reveal [] propensity for deception and evasiveness" in a way other property-based convictions do not. *Papia*, 560 F.2d at 847 n.14.

In this determination, courts frequently look to whether the crime was one of violence or force, which excludes it from Rule 609(a)(2). *See, e.g.*, *Smith* at 362–63. Under the current version of 609(a)(2), "evidence that a witness was convicted for a crime of violence, such as

murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime." FED. R. EVID. 609 advisory committee's note to 2006 amendment. Moreover, the Seventh Circuit in described theft as "an act of stealth whose furtive character" is different from armed robbery, which is "an act of violence." *Papia*, 560 F.2d at 847 n.14. One court noted how a statute differentiated theft "through deception, [or] alternatively by obtaining it through threat or force . . ." *Altobello*, 872 F.2d at 217 (citing 38 ILL. COMP. STAT. ANN. 16-1 (West 1989) (current version at 720 ILL. COMP. STAT. ANN. 5/16-1 (West 2020))).

Here, Fenty's conviction for misdemeanor petit larceny involved an element of deceit and rested on facts involving dishonesty that warrant its admission under Rule 609(a)(2). While generally, the rule is narrowly drawn, and many petit larceny convictions would not fall into the scope of the rule, Fenty's conviction falls within its ambit. The prosecutor's charging decisions are not dispositive. While Fenty was not charged under the "Theft by Deception" statute (R. 3.), prosecutors have broad discretion in their charging decisions, which are oftentimes not based on the specifics of a case but rather for reasons of efficiency or ease of conviction. Moreover, as in *Altobello*, just because a person could have committed petit larceny without deceit or dishonesty does not mean all petit larceny convictions involve no element of deceit.

Fenty took several calculated steps when she committed the petit larceny. In advance of committing the crime, with another person (R. 53), Fenty came up with a plan for how they would steal from the victim: she selected the victim out of the crowd, snuck up on her and her family, and intended to commit the crime quietly without anyone, including the victim, knowing. (R. 58–60.). As *Papia* noted, this type of stealth is distinct from other theft crimes like robbery, and Fenty's conduct is comparable to the hypothetical pickpocket in *Papia* whose evasiveness shows the deceitful means she used.

Fenty's reliance on force and violence to get away after her deceitful means failed her (R. 22) does not render her conviction a crime of violence. Crimes of violence are those which, as indicated by the Advisory Committee's reference to murder, have an act of violence as a necessary component of their commission. Petty larceny, on the other hand, can be committed wholly without violence. While Fenty shoved the victim (R. 59) and threatened to hurt her (R. 60.), that does not change the deceit she had already committed.

Additionally, the value of the items Fenty stole (R. 19, 21) are not dispositive in the determination of deceit or dishonesty. Consideration of the value of the property to decide whether there was dishonesty is illogical, as Rule 609(a)(2) focus is on whether there was a "dishonest act or false statement." Any lack of profitable criminal conduct on Fenty's part does not bear on her propensity for truthfulness, and the only question is whether it was committed in a dishonest or deceitful manner.

This is not to say that all petit larceny convictions involve dishonesty or deceitfulness, or that convictions under Boerum Penal Code Section 155.25 are automatically admissible. On balance, however, because of her deceitful plan and lack of violence, Fenty's prior conviction for petit larceny involved an act of dishonesty mandating its admission.

C. Even if the trial court erred in admitting Fenty's prior conviction, the error was harmless because the weight of the evidence was against Fenty, and the limiting instruction given to the jury was curative of any potential prejudice.

Despite the reasoning set forth above, if the trial court instead erred in admitting Fenty's prior conviction, the review of that decision is for harmless error. *See, e.g.*, *United States v. Estrada*, 430 F.3d 606, 622 (2d Cir. 2005). The question is thus whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). In analyzing this issue, if "the error did not influence

[or substantially sway] the jury, or had but a very slight effect, the verdict and the judgment should stand." *Id.* at 764. Fundamentally the analysis turns on the prosecutor's case against the defendant, the impact that prior conviction admitted in error had on the defendant's testimony, and whether their credibility was sufficiently impeached by other evidence. *Estrada*, 430 F.3d at 622 (citing *United States v. Burston*, 159 F.3d 1328, 1336 (11th Cir. 1998)).

When limiting instructions are involved, the analysis looks to (1) whether the distinction in the limiting instruction makes sense to the jury, and (2) whether the limiting instruction was phrased in a manner the jury is likely to understand. *Thompson v. United States*, 546 A.2d 414, 426 (D.C. Cir. 1988). For the first inquiry, the reviewing court analyzes whether "a direction to the jury that a prior conviction shall be considered only in connection with the defendant's credibility, and not in relation" to their guilt or innocence can be "readily understood." *Id.* Then, considering the jury's ability to understand the instructions, the D.C. Circuit discussed how the instructions should be explicit and in a manner that the average, lay person can understand the language. *Id.* at 426 n.24. *Thompson* examined limiting instructions in the context of Rule 609 and noted that, while there is some empirical evidence that limiting instructions for prior convictions are ineffective, courts must assume that "when they contain realistic rather than theoretical distinctions, and when they are clearly and understandably delivered, they will reduce, if not dissipate, the danger of unfairness and prejudice." *Id.* at 425–26.

In the case of Fenty's conviction, if the admission of her prior conviction was in error, that error likely had a very slight effect on the jury's decision making. Fenty had been seen by law enforcement physically possessing the packages containing the xylazine and fentanyl and asserting they belonged to her (R. 66), and Fenty also was associated with someone suspected of illegal drug distribution. (R. 66.) Even if her prior conviction had not been admitted the evidence

would still be against Fenty. The impact on her testimony and success of the government's impeachment of her is also questionable. Fenty was convicted of possession with intent to distribute a controlled substance (R. 66), which, because it is dissimilar compared to petit larceny, makes it less likely that the prior conviction was used to assess her guilt.

Furthermore, any impact on the jury was greatly lessened because the limiting instruction given to Fenty's jury was the exact type of limiting instruction the *Thompson* court sought—the distinction is clearly described as to what the jury can use this information for, and it uses explicit language that is not unnecessarily couched in legalese. (R. 62–63.) And while the *Thompson* court was critical of limiting instructions effectiveness in the context of prior convictions, it also acknowledged that the same evidence can be overexaggerated and "juries are more conscientious and discerning" than some suggest. 546 A.2d 425 n.20.

Therefore, any error by the trial court in admitting Fenty's conviction for petit larceny under Rule 609(a)(2) was harmless because it did not have a substantial effect on the jury's verdict and the limiting instruction given to the jury prevented any prejudicial error.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Fourteenth Circuit Court of Appeals.

Respectfully Submitted,
/s/ Team 19R
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