**No. 23-695**

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# IN THE SUPREME COURT OF THE UNITED STATES

Franny Fenty,

*Petitioner*,

v.

United States of America,

*Respondent*.

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*ON WRIT OF CERTIORARI TO THE*

*UNITED STATES COURT OF APPEALS*

*FOR THE FOURTEENTH CIRCUIT*

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BRIEF FOR PETITIONER

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TEAM 7

*Counsel for the Petitioner*

## QUESTION PRESENTED

**I. Is there a reasonable expectation of privacy in mail ordered by oneself to oneself under a long-standing pen name?**

**II. Does a court err in excluding evidence otherwise admissible under Fed. R. Evid. 803(3), when it adds additional requirements not found in the rule's plain language?**

**III. Is a crime admissible under Fed. R. Evid. 609(a)(2) when the elements of the crime do not involve deceit, dishonesty, or false statement?**

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## STATEMENT OF THE FACTS

Franny Fenty (Fenty) attended college in Joralemon, where she began her writing career. (R. 5, 42.) Two of Fenty's short stories were published in the Joralemon College Zine under her pen name "Jocelyn Meyer." (R. 5.) To preserve privacy, Fenty continued to use her pen name after college when authoring five novels. (R. 42.) In October 2021, Fenty shared manuscripts from a Gmail account associated with her pen name—jocelynmeyer@gmail.com–with four publishers. (R. 42.) Like the beginning of many author's careers, Fenty's efforts in contacting publishers and sending manuscripts went unanswered. (R. 42.)

On February 15, 2022, Fenty was indicted by a grand jury under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi) for allegedly knowingly and intentionally possessing with intent to distribute 400 grams or more of fentanyl. (R. 1.) She was subsequently convicted by a jury.

How did we get here?

### I. Angela Millwood's involvement of Franny Fenty in the xylazine-fentanyl scheme

On December 28, 2021, Fenty made a LinkedIn post looking for a new job opportunity. (R. 6.) Fenty is an experienced writer, having previously written for her college magazine. (R. 5.) She remained throughout her life trouble-free, with her only brush with law enforcement coming when 19 years old, Fenty, on a dare, stole a diaper bag containing $27. (R. 19.) Fenty was charged with petit larceny. See Boerum Penal Code § 155.25; (R. 3, 19.) Now 25, she sought a job where she could utilize her writing skills. (R. 6.) Desperate for work, she was open to other opportunities, posting that she had some experience with animals. (R. 6.)

The same day, Angela Millwood (Millwood) commented "it's rough out there, but don't worry. I can help you out with that! Shoot me a message!" (R. 6.) Millwood's LinkedIn account portrayed her as a horse handler at Glitzy Gallop Stables. (R. 6.) Millwood was not a stranger to

Fenty but instead was a former high school classmate. (R. 43.) After Millwood made this comment, the two became reacquainted and began to talk. (R. 44.) The two had conversations where each would commiserate about career and financial struggles. (R. 44.) Some conversations, however, were more specific. Millwood shared with Fenty that while she enjoyed her job, seeing horses in pain bothered her. (R. 44.) Millwood shared with Fenty her plan to help horses in pain, leaving Fenty convinced and trusting of Millwood. (R. 44, 45.)

Millwood informed Fenty that because of her affiliation with Glitzy Gallop Stables, she could not order the horse tranquilizer, xylazine. (R. 45.) Unfamiliar with xylazine but trusting Millwood, Fenty offered to order it on Millwood's behalf. (R. 45.) Still, Fenty felt nervous because she knew that Millwood would lose her job if people found out that Millwood was administering xylazine. (R. 45.)

Fenty placed an order for xylazine from Holistic Horse Care with the package addressed to Fenty's pen name. (R. 65.) Fenty set up a P.O. Box in January 2022 to receive the xylazine registered under the same pen name she previously used for her writing career. (R. 65.) In February 2022, while the package was in transit, Fenty began researching the horse tranquilizer. (R. 46.) Fenty became suspicious after reading an article in the Joralemon Times by Andrew Baer, published on February 8, 2022. (R. 46.) She called Millwood in response to her distress regarding an article from the Joralemon Times. (R. 46.) Millwood reassured Fenty that the xylazine was for horses. (R. 46.)

Fenty tracked the package and received delivery confirmation. (R. 46.) She arrived at the Post Office on February 14, 2022. (R. 40). To her surprise, the package was not there. (R. 46). Fenty immediately called Millwood at 1:32 PM and left a message stating that the packages were missing. (R. 40.) She voiced concern that Millwood had unknowingly dragged Fenty into

something. (R. 40.) When Millwood did not return the first call, Fenty then made a second call forty-five minutes later, voicing more concern.

Fenty never heard from Millwood again. (R. 35.)

## II. DEA investigation and search

Special Agent Raghavan (Raghavan) works for the Drug Enforcement Agency (DEA) and primarily conducts investigations in narcotics cases. (R. 28.) Joralemon is a high-crime, low-income area, and Raghavan has overseen 100-200 cases targeting the Post Office. (R. 28, 36.)

On February 12, 2022, Raghavan discovered a box from Holistic Horse Care and unused drug paraphernalia while investigating the death of a Joralemon resident. (R. 29.) Lab testing showed the box contained a mixture of xylazine and fentanyl. (R. 29.) Joralemon had been battling an increase in fentanyl overdoses, with more cases involving cutting fentanyl with horse tranquilizers. (R. 29.)

Raghavan contacted Oliver Araiza (Araiza), a Post Office employee, and requested that they let Raghavan know if they saw any suspicious, oddly-shaped, or large packages, and additionally requested the same for packages sent from a horse veterinarian website or company. (R. 30.) On February 14, 2022, Araiza called Raghavan, informing him that the post office had flagged packages from Holistic Horse Care addressed to Jocelyn Meyer at P.O. Box 9313. (R. 30.)

Raghavan determined that the P.O. Box was registered to Jocelyn Meyer but also held packages addressed to Fenty. (R. 31.) A warrant was obtained, and the contents of the Holistic Horse Care packages were tested. (R. 31.) Results showed that the packages contained a mixture of xylazine and fentanyl. (R. 31.)

An arranged pickup was coordinated, and the DEA would monitor who came to pick up the package. (R. 32.) While monitoring, Raghavan observed an interaction between the individual

retrieving the packages and another customer and determined that the person picking up the packages was Fenty. (R. 33.) Raghavan discovered that Fenty and Meyer were the same person. (R. 33.) Further, Raghavan discovered Fenty's LinkedIn post suggesting a connection between Fenty and Millwood. (R. 34.)

## STATEMENT OF THE CASE

Fenty was indicted by a grand jury on February 15, 2022, for possession with intent to distribute 400 grams of more of fentanyl under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). (R. 1-2.) The case proceeded to trial in front of the District Court for Boerum. (R. 10.) Fenty filed a motion to suppress evidence found from the search of packages addressed to Fenty's alias, asserting the search violated her Fourth Amendment rights. (R. 10.) The district court denied the motion on the grounds that the use of an alias destroyed "any expectation of privacy" in the packages. (R. 17.)

Fenty also sought to admit voicemail recordings left by Fenty on Millwood's phone on February 14, 2022, under Federal Rules of Evidence 803(3). (R. 46-47.) The district court excluded the voicemails for lack of spontaneity. (R. 52.)

The state sought to introduce evidence of Fenty's prior conviction under 609(a)(2). In response, Fenty filed a motion in limine to exclude evidence of her prior conviction for petit larceny. (R. 18.) The district court denied the motion on the grounds that the facts of Fenty's prior conviction showed a level of deceit, bringing it within the scope of 609(a)(2). (R. 26.)

Fenty was convicted on September 21, 2022, and a judgment was entered by the United States District Court for the District of Boerum on November 10, 2022. (R. 65.) Fenty appealed the sentencing on three grounds before the Court of Appeals for the Fourteenth Circuit. (R. 65.)

The Fourteenth Circuit affirmed the district court on all three issues. (R. 70.) The court held there was no reasonable expectation of privacy because the packages were not addressed to Fenty's official name. (R. 69.) The Fourteenth Circuit next reasoned that the voicemails contained self-serving hearsay and did not meet the 803(3) exception. (R. 69.) The court wrote 803(3) contained a spontaneity requirement and, further, that admitting the evidence would mislead the jury. (R. 68-68.) The court reasoned that a crime is committed through violence or dishonesty, and while petit larceny is not admissible *per se*, the facts of the crime involved deception, which falls under 609(a)(2). (R. 68-70.)

All three issues are currently before this Court. (R. 74.)

## SUMMARY OF THE ARGUMENT

Fenty had a reasonable expectation of privacy in sealed mail addressed to her pen name and destined for the P.O. Box, which she also registered under the same pen name. Fenty created this name, used it in college, and has used it over a span of years. The use of a pen name does not create a new identity separate from the person who created and used it. A pen name creates privacy for the individual who is using it. It is wrong to say that Meyer's Fourth Amendment claim is vicariously asserted by Fenty. Their identities are coextensive. Just as literary works published under the name Meyer belong to Fenty, mail addressed to Meyer also belongs to Fenty. The illegality or innocence of an act has no bearing on the reasonableness of a Fourth Amendment claim. Fenty, just like all residents in Joralemon, has been constitutionally afforded Fourth Amendment rights that prohibit the exact type of government intrusion to which Fenty was subjected by the DEA.

Despite the relatively simple language of Federal Rule of Evidence 803(3), the Fourteenth Circuit sought to overcomplicate the issue. Exception 3 does not require spontaneity. The lower

court's exclusion of Fenty's out-of-court statements was based on incorrect conclusions of law. Furthermore, the Fourteenth Circuit added 403 balancing tests where none exist. No court has ever suggested that 803(3) requires balancing the prejudicial effect on the jury. Courts are not the prosecutor nor the jury. The state's failure to object on 403 grounds is not a reason for the court to insert 403 requirements now. It is the role of the jury, not the Fourteenth Circuit, to determine the credibility of the evidence.

The expansive reading of 609(a)(2) by the Fourteenth Circuit and other circuits is counter to the intent of Congress. The intent of Congress was to limit the usage of prior convictions due to their prejudicial effect on juries. Despite this, the court found that a misdemeanor crime without a fraudulent or deceitful element could permissibly be used to impeach Fenty. That is not the law. Fenty's conviction is not within the reach of 609(a)(2). The Fourteenth Circuit gave Fenty a false dichotomy, suggesting that a crime is committed only by violence or dishonesty. Fenty was prejudiced in her defense by this impeachment evidence.

This Court should reverse.

## ARGUMENT

### I. An Expectation Of Privacy In Packages Personally Ordered And Addressed To One's Established Pen Name Is Not Just Objectively Reasonable; It Is A Fourth Amendment Protection That Society Expects

The Fourth Amendment protects against unreasonable government intrusion where an individual holds a reasonable expectation of privacy. U.S. Const. amend IV. Absent a warrant, the government will violate the Fourth Amendment if the place or object searched is something where society expects to have privacy. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Fourth Amendment protection in sealed mail is reasonable to society but is a fact-specific inquiry. *United*

*States v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984) (holding that while sealed mail enjoys Fourth Amendment protections, these protections are not absolute).

Sending or receiving mail under a pseudonym lessens but does not remove Fourth Amendment Protections. *United States v. Rose*, 3 F.4th 722, 727 (4th Cir. 2021); *Givens*, 733 F.2d at 341. Courts rely upon numerous factors to (i) determine if there is Fourth Amendment standing and (ii), if so, analyze whether an expectation of privacy was objectively reasonable. *Rakas v. Illinois*, 439 U.S. 128, 133 (1978); *Rose*, 3 F.4th at 729. Standing depends upon personal rights being asserted. *Rakas*, 439 U.S. at 133. Factors for reasonableness include the sender and recipient names and the strength of the possessory interest in the package. *Rose*, 3 F.4th at 729, 731. *See also United States v. Castellanos*, 716 F.3d 828, 834 (4th Cir. 2013) (holding that an expectation to privacy in the contents of a vehicle the defendant denied ownership of to be unreasonable).

Fenty's package from Holistic Horse Care was addressed to her other name. (R. 13.) The use of this pen name does not create two identities. Meyer and Fenty are one and the same. They have coextensive Fourth Amendment rights. Fenty is not asserting rights vicariously but is asserting personal rights. By tracking, delivering, and accepting it to her secure P.O. Box, Fenty showed her ownership interest. The Court should reverse the Fourteenth Circuit's ruling that there was no reasonable expectation of privacy in a package ordered by Fenty under and addressed to her long-standing pen name.

### A. Fourth Amendment rights cannot be asserted by one person on behalf of another; mail to and from an established pen name is not "another."

Fourth Amendment rights are personal and cannot be asserted by one party on behalf of another party. *Rakas*, 439 U.S. at 132. In *Rakas*, two defendants, a passenger and a driver, were convicted of armed robbery. *Id.* at 130. When police searched the vehicle the defendants were in, they found a sawed-off shotgun, thereby incriminating them. *Id.* At trial, the passenger defendant

asserted their Fourth Amendment rights had been violated when the driver's car was searched. *Id*. at 130-31. In discussing whether the passenger had Fourth Amendment standing, the Court reasoned the personal nature of Fourth Amendment rights should be interpreted to mean personal rights belonging to the "victim of the seizure." *Id*. at 133; *see also Alderman v. United States*, 394 U.S. 165, 174 (1969) (Stating that Fourth Amendment rights are personal, and a valid claim must be brought by the victim on their own behalf). The *Rakas* Court held the victim was the owner and driver of the car, not the passenger, who instead was affected by the search of another's property. *Rakas*, 439 U.S. at 132; *see also Jones v. United States*, 362 U.S. 257, 261 (1960) (FRANKFURTER, J.) (defining a broad Fourth Amendment standing based on an individual being (i) subject to a search targeting them and (ii) victimized as a result, which has now been narrowed by *United States v. Salvucci* 448 U.S. 83, 87 (1980) to incorporate personal elements into the search).

This case is not about asserting rights vicariously; it is about personal rights. A pen name does not assert rights vicariously. Using a pen name or established alias for privacy neither creates a new person nor adds a third party to the litigation. *Squire v. Stringer*, 820 Fed.Appx. 429, 434 (6th Cir. 2020). In *Stringer*, the Sixth Circuit heard an appeal from a bankruptcy proceeding wherein an insolvent author-debtor did not disclose select pen names when filing for bankruptcy. *Id*. at 433. Stringer, the defendant, had authored twelve novels under multiple pen names over seventeen years. *Id*. at 431. The issue before the court was whether creditors could collect royalties from undisclosed pen names even though the author's bankruptcy filing afforded an automatic stay on their assets. *Id*. Creditors argued that pursuing royalties from a person's trade name, or pen name in this instance, was separate from the assets of the pen name's owner. *Id*. The Sixth Circuit held that doing business under another name, such as a pen name, does not create entities distinct

from the author. *Id*. at 434. Therefore, creditors were prohibited from pursuing royalties from the undisclosed aliases because they shared a common identity with the author. *Id*. at 434.

While a pen name fails to create an identity distinct from its creator and user, using a third party's name does remove Fourth Amendment standing because it removes indicia of possessory interest. *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003). In *Pitts*, a defendant mailed drugs to a co-defendant. *Id*. at 451. The package was not only given a false return address but was sent to a third party's address under an alias not unique to either the sender or addressee. *Id*. The co-defendant was informed where and to whom the package was sent and how to retrieve it. *Id*. The package was searched during transit, and at trial, Defendants filed a motion to suppress on Fourth Amendment grounds. *Id*. at 453. The Seventh Circuit held that there was no Fourth Amendment standing and largely based its reasoning on property law. *Id*. at 456. In sending a package with a (i) false return address to (ii) a fictitious name at (iii) the address of a third party, the sender and recipient had abandoned their property and Fourth Amendment standing along with it. *Id*; s*ee also United States v. DiMaggio*, 744 F.Supp 43, 44-45 (N.D.N.Y. 1990) (holding that packages intended for defendants but bearing fictitious sender names and addresses removed a possessory interest in the parcel and Fourth Amendment standing).

A Fourth Amendment claim asserted by Fenty for the contents of a package addressed to her established pen name is not vicarious as interpreted by the Court in *Rakas* and *Alderman*. 439 U.S. at 132; 394 U.S. at 174. In *Rakas* and *Alderman*, the Court held that an accused cannot vicariously assert a Fourth Amendment claim. 439 U.S. at 132; 394 U.S. at 174. The defendant in *Rakas* asserted a Fourth Amendment claim when a car they were in, but which belonged to another, was searched. 439 U.S. at 132. Fourth Amendment rights are not being asserted vicariously as Fenty is not asserting the rights of a third party but rather asserting her own rights pertaining to a

package ordered by herself and addressed to her established pen name. (R. 42, 43.) Fenty is an author whose works are personal and are published under the pen name Meyer to provide privacy. (R. 42.) Fenty has used the pen name since college, where she published two short stories in the *Joralemon College Zine*. (R. 42.) Here, the distinction present in *Rakas* and *Alderman* where property belonged to another and not oneself is absent. This distinction would be present if Millwood was asserting a Fourth Amendment claim that Millwood's rights had been violated upon a search of Fenty, a/k/a Meyer. There is no such individual Meyer; Fenty is Meyer.

Fenty's Fourth Amendment standing is furthered by the fact that she, not Meyer, was (i) the target of a search and (ii) subsequently victimized as a result of the government searching personal property. Fourth Amendment standing is not vicariously asserted when (i) the person bringing the claim was the target of the search and (ii) was subsequently victimized by the search of property rightfully belonging to them. *Rakas*, 439 U.S. at 134. Fenty ordered the package from Holistic Horse Care. (R. 45, 46.) The package was destined for the P.O. Box registered by Fenty under that same pen name and accessible to Fenty herself. (R. 42, 45.) The facts before the Court are distinguishable from those before the Court in *Rakas*, where it was held that a defendant on the property of another did have Fourth Amendment standing. 439 U.S. at 142. Unlike the defendant in *Rakas*, Fenty is not asserting a claim regarding another person's Fourth Amendment rights. There is no vicarious aspect, and Fenty's claim to her own property squarely fits within the narrowed Fourth Amendment standing doctrine, which looks to property ownership. The individual targeted and victimized by the DEA search was Fenty, as she is Meyer. More importantly, what is ordered under Meyer is the property of Fenty.

The Sixth Circuit has emphasized the inseparability of pen names from their creators and users in bankruptcy proceedings. *Stringer*, 820 Fed.Appx. at 431. Just as the debtor in *Stringer* had

their true name reasoned to be coextensive with pen names, Fenty and Meyer are no different. Pen names do not create an alias distinct from the person who has adopted it for their use. *Stringer*, 820 Fed.Appx. at 431. Further, there is no expectation that doing business under a trade name will create a distinct identity. *Id.* The creation of a distinct identity would resemble mail fraud or identity theft. Fenty instead did exactly what *Stringer* did—authored works under a pen name for anonymity—not create a separate, untraceable individual for purposes of concealment. Whereas *Stringer* used multiple pen names for various works, Fenty has only used one for her works, strengthening her connection to the name Meyer. *Id.* The Sixth Circuit's analysis of the treatment of pen names during bankruptcy proceedings should apply before this Court—a pen name in of itself is a non-entity.

Fenty had a level of possessory interest in the package, which was absent from the Seventh Circuit in *Pitts*. 322 F.3d at 459. The strength of the possessory interest was even known to DEA agent Raghavan prior to the arrest of Fenty. (R. 33.) After observing an interaction at the Post Office, Raghavan discovered that the person receiving the package was "both" Fenty and Meyer. (R. 33.) The co-extensive identity of these names was also supported by Raghavan's discovery that P.O. Box 9313 contained packages addressed to Fenty and Meyer. (R. 37.) Meyer is just the name Fenty has selected to go by over the years when seeking an added level of privacy.

Fenty does have Fourth Amendment standing because she is not vicariously asserting Fourth Amendment rights. A package addressed to Fenty's established pen name has one effective recipient: Fenty herself. A search targeting and victimizing Meyer targets and victimizes Fenty because what is personal to Meyer is personal to Fenty.

### B. Fenty's desire to remain anonymous by using her pen name shows an expectation of privacy that society would accept as reasonable.

Fourth Amendment protections extend to letters and packages. *United States v. Villarreal*, 963 F.2d. 770, 773-74 (5th Cir. 1982). There is nothing wrong or unreasonable with wishing to remain anonymous. *Villarrea*l, 963 F.2d at 774; *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). In *Villarreal*, the defendants shipped containers and mailed them under fictitious names. 963 F.2d at 772-73. The Fifth Circuit held senders and addressees can reasonably expect that the government will not open their packages. *Id*. at 774. In reasoning that the defendants did have a legitimate expectation of privacy, the Fifth Circuit noted the difference between an alter ego and individuals other than the defendant. *Id*. at 777; *see also United States v. Thompson*, WL 6325818 (E.D.L.A. 2017) (extending *Villarreal* to afford a reasonable expectation of privacy to a defendant who sent mail containing drugs under an alias belonging to that defendant).

Suppose a sender or recipient uses an alias, and the defendant at trial argues that the alias is distinct from the defendant's identity. In that case, there is no reasonable expectation of privacy. *Castellanos*, 716 F.3d at 834. In *Castellanos*, the police searched the defendant's vehicle while it was being transported on a car carrier. *Id*. The defendant, Castellanos, registered the vehicle under the fictitious name "Wilmer Castenada." *Id*. at 830. The court reasoned that the defendant had no reasonable expectation of privacy because no evidence was presented that Castenada was an alias used by Castellanos. *Id*. at 834. Castellanos went even further to argue that Castenada was a separate individual. *Id*. The Fourth Circuit reasoned that separating oneself from an alias removes reasonability from an expectation of privacy because that makes the Fourth Amendment standing vicarious. *See also United States v. Lozano*, 623 F.3d 1055, 1062 (9th Cir. 2010) (O'SCANNALAIN, J., CONCURRING) (stating that there is no reasonable expectation of privacy because the defendant's argument separated the defendant from the alias).

Using an alias is not what terminates Fourth Amendment rights; rather, abandonment of a package does. *Pitts*, 322 F.3d at 459; *see also Givens*, 733 F.3d. at 342 (stating that mailing a package addressed "neither to the defendants nor to some entity real or fictitious, which is their alter ego" equates to relinquishing control and Fourth Amendment rights). In *Pitts*, the Seventh Circuit stated, "there was nothing inherently wrong with a desire to remain anonymous when sending or receiving a package." *Pitts*, 322 F.3d at 459. The Seventh Circuit stated that society is prepared to recognize as reasonable one's expectation of privacy in mail intended for themselves but addressed to their alias. *Id*. In *Pitts*, the defendant addressed a package to an alias destined for a third party's residence. *Id*. at 451. The defendant went a step further and provided a completely fictitious return address for the package. *Id*. at 452. In holding that the defendant was not entitled to make a Fourth Amendment claim, the Seventh Circuit looked at the property ownership. *Id*. at 459. The Court reasoned it was not the desire to remain anonymous that eviscerated a reasonable expectation of privacy but rather the effect that complete anonymity had on ownership of the package. *Id*. By providing fictitious sender and addressee names, the package was essentially abandoned. *Id*.

A legitimate expectation of privacy does not depend on whether activities are innocent or criminal. *United States v. Fields,* 113 F.3d 313, 321 (2d Cir. 1997). In *Fields*, the Second Circuit expressly rejected the government's argument that, because a defendant's activities were illegal, they lacked Fourth Amendment rights. *Id*. The court emphasized that because a defendant was utilizing premises for drug trafficking, it did not preclude the defendant from asserting privacy interests. *Id*; *see also Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765) (holding that private effects and spheres of lives should be free from government intrusion).

Using a name other than one's own does not automatically remove the reasonability of the expectation for privacy. There are distinct factual reasons why an expectation of privacy was no longer reasonable in cases involving the search of mail not addressed in the defendant's name. Fenty's use of an alias for the package did not lessen the reasonableness of her Fourth Amendment rights. These distinct factual reasons are absent in Fenty's case, which makes the case before the Court distinguishable from *Castellanos*. 716 F.3d at 834.

In *Villarreal*, the defendants had a reasonable expectation of privacy because they used a name they asserted belonged to them—that name, however, was a pseudonym. 963 F.2d. at 770. Fenty's use of Meyer aligns with the defendant's use of a pseudonym in *Villarreal* and, in many respects, is even stronger.

In Fenty's case, using Meyer in her professional works affords a reasonable expectation of privacy. Extending this pen name to a P.O. box and mail orders holds the same reasonable expectation of privacy. An added layer of privacy surrounding online orders is reasonable to society and consistent with the Fourth Amendment. Fenty's established pen name affords privacy in literary works and online orders; it is not an effort to conceal.

Fenty never made an argument that Fenty and Meyer are separate individuals. On the contrary, Fenty provided numerous instances of how Fenty is Meyer. (R. 4-5, 28.) Fenty used P.O. Box 9313 to receive orders addressed to her—whether in true name or pseudonym. (R. 12, 43.) The P.O. Box contained orders from Amazon addressed to Fenty, along with her orders under the name Meyer. (R. 12.) While providing an enhanced level of anonymity, Fenty's use of Meyer is not completely unknown to others. (R. 33.)

Fenty's showing of ownership in this package is strengthened by the fact that this package was never abandoned, unlike in *Pitts* and *Givens*. 322 F.3d at 459; 733 F.3d. at 342. Both the

Seventh and Fourth Circuits looked to property baselines when assessing whether a defendant had a reasonable expectation of privacy in mail addressed to a name other than their official name. *Pitts*, 322 F.3d at 451-52. Taken together, a package is abandoned or relinquished when anonymity rises to the extent that the Post Office cannot reasonably assess who the recipient or sender is.

Here, Fenty used her established pen name to order the Holistic Horse Care Package to a P.O. box that Fenty opened and registered under the same name. (R. 43.) Fenty's actions show steps taken to achieve a heightened level of privacy when receiving online orders placed by Fenty herself. Fenty tracked this package and went to the P.O. box intending to retrieve it. (R. 40, 46.) These actions do not show steps taken to conceal true identities to the extent that the true recipient of the package is unknown. In *Givens*, the Fourth Circuit noted that failure to use a fictitious name that had a connection to the defendant was indicative of relinquishing possessory interests. 733 F.3d. at 342. Fenty's actions in using an established pen name were exactly what the Fourth and Seventh Circuits were looking for but unable to find when holding Fourth Amendment protection could not apply. Fenty's possession of this package makes her expectation of privacy reasonable.

The contents of the package are irrelevant in determining privacy expectations. *Fields*, 113 F.3d at 313. Fourth Amendment protections are constitutionally afforded—they are broad and pertain to areas where society views reasonable an expectation of privacy. Society views it reasonable that Fourth Amendment protections extend to sealed packages and mailed letters. *Pitts*, 322 F.3d at 459. Society also views it as reasonable that there are instances where one prefers to remain anonymous in an effort to further their privacy interests. Allowing the ends of a search to justify the means is contrary to the purpose of the Fourth Amendment. Fenty's expectation of privacy in a sealed package she ordered, albeit in her established pen name, is an act to which the Fourth Amendment should extend.

A ruling for the Government runs contrary to centuries of American and English common law on search and seizure. *Entick,* 95 Eng. Rep. 807. Special Agent Raghavan's testimony on cross-examination shows that Government use of the postal service is broad—having relied on searching packages 100 to 200 times. (R. 28, 36.) In the eyes of the Raghavan, Joralemon is (i) a high-crime and (ii) low-income and is "targeted" by the DEA as a result. (R. 28, 36.) Tolerating Fourth Amendment intrusion for Fenty equates to accepting a lowered Fourth Amendment threshold for residents of Joralemon.

Fenty used an established pen name to achieve an added layer of privacy, not conceal her actions. Use of a pen name and ample showing of possessory rights over this package leaves Fenty with an expectation of privacy that society is prepared to view as reasonable—an expectation that packages ordered by oneself, to oneself, will not be subject to an unreasonable search.

## II. 803(3) Doesn't Exclude Fenty's Voicemails

803(3)'s plain language is simple; a defendant's hearsay statement is admissible to prove a then-existing state of mind. Fed. R. Evid. 803(3). Exception (3) permits "a statement of what [the declarant] was thinking in the present." *United States v. Lawal*, 736 F.2d 5, 8 (2d Cir. 1984) (quoting *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984)). The Fourteenth Circuit thought differently. Instead, the court saw it necessary to include requirements and language not present in the rules of evidence. In a bid to overcomplicate the issue before this Court, the Fourteenth Circuit added a spontaneity requirement into 803(3)'s plain language. The Fourteenth Circuit wasn't alone. Other courts have taken it upon themselves to supplant the Advisory Committee and draft their preferred version of the rules of evidence. *See United States v. Ponticelli*, 622 F.2d 985, 991-992 (9th Cir. 1980) *overruled on other grounds by United States v. De Bright*, 730 F.2d 1255, 1259 (9th Cir.1984) (en banc); *Horton v. Allen*, 370 F.3d 75, 85 (1st Cir. 2004)

("The premise for admitting hearsay statements evidencing state-of-mind is that such statements are reliable because of their spontaneity and [the] resulting probable sincerity" (internal quotes omitted)). These courts are incorrect. Exception (3) does not require spontaneity; adding a requirement is impermissible in judicial rulemaking.

But the Fourteenth Circuit did not stop there. The court continued its conquest to reshape 803(3) by adding the language and tests from 403(3). Leading the charge, the Fourteenth Circuit cited no other court for these added requirements, nor any language within the rules itself. Rule 403 should not be cast aside so easily. Rules exist for a reason. This Court cannot permit the Fourteenth Circuit or the District Court to invent requirements or substitute the prosecution's failure to object under 403. Fenty was forced to defend herself from not only the prosecutors but the judge as well.

This is not justice.

### A. The Fourteenth Circuit replaced the plain language of 803(3).

By their second year, law students learn that hearsay is complicated; hearsay is a statement admitted for the truth of the matter asserted. Fed. R. Evid. 801(c). Some never learn what this means. What isn't complicated is Rule 803(3) of the Federal Rules of Evidence. The rule permits hearsay "statement[s] 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[.]" Fed. R. Evid. 803(3).

The Advisory Committee's notes are "particularly relevant in determining the meaning of the document[.]" *Tome v. United States*, 513 U.S. 150, 160 (1995). The Committee notes that Exception (3) is a "specialized application of Exception (1) . . . ." *See* Fed. R. Evid. 803(3) *advisory*

*committee's note*. Exception (1) applies to statements "describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). Without a doubt, Exception (1) contains a contemporaneous element. *See, e.g., Ponticelli*, 622 F.2d at 991. But spontaneous and contemporaneous are two distinct factors. Spontaneous requires that the statement must be made due to a startling event. *See Carrizosa v. Chiquita Brands International, Inc.*, 47 F.4th 1278, 1313 (11th Cir. 2022). Contemporaneous, on the other hand, refers to the time element between an event and the statement made. *See Bemis v. Edwards*, 45 F.3d 1369, 1373 n. 1 (9th Cir. 1995).

The Committee recognizes that a statement may still be contemporaneous even if it is made after the event. *See* Advisory Committee Notes to Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 424 (1971). Courts are split on the time allowed regarding Exception (1). For example, the Seventh Circuit held that a statement made 23 minutes after the event was admissible. *See United States v. Blakey*, 607 F.2d 779, 786 (7th Cir. 1979). However, the D.C. Circuit found statements made between 15 and 45 minutes after the event were not admissible. *See Hilyer v. Howat Concrete Co., Inc.*, 578 F.2d 422, 426 n. 7 (D.C. Cir. 1978).

Lower courts have clarified that Exception (1) does not impose a spontaneity requirement. *See generally Gainer v. Wal-Mart Stores East, L.P.*, 933 F.Supp.2d 920, 926-27 (E.D. Mich. 2013). Unlike Exception (2), courts require a statement to be spontaneous but not contemporary. *See, e.g., Chiquita Brands Int'l*, 47 F.4th at 1313. This Court isn't considering exceptions (1) or (2). But if Exception (3) is a specialized application of Exception (1), it logically follows that Exception (3) shouldn't require spontaneity when Exception (1) doesn't.

It begs the question: how did the Fourteenth Circuit arrive at a different conclusion? One reason is the Fourteenth Circuit's misguided reliance on *Ponticelli*. In *Ponticelli*, the defendant appealed, arguing, in part, that the trial court erred in excluding the out-of-court statement by his former attorney. 622 F.2d at 991. The Ninth Circuit found that the defendant had not preserved the argument for appeal. *Id.* Nevertheless, the court concluded the trial court did not err. *Id.* The court drew from the Advisory Committee's "specialized application" language. *Id*. The court then followed, asserting a significant overlap between Exception (1) and Exception (2). *Id.*

But the Fourteenth Circuit was wrong. The Ninth Circuit never suggested Exception (3) requires spontaneity. For good reason. The Advisory Committee made clear that Exception (1) and (2) differ "in the time lapse allowed between event and statement." *See* Fed. R. Evid. 803(2) *advisory committee note*. This is why courts have admitted statements, under Exception (1), made long after the event has ended. *See, e.g., Blakey*, 607 F.2d at 786. The Ninth Circuit's opinion rejects the Fourteenth Circuit's conclusion: "[T]he court must evaluate three factors: contemporaneousness, chance for reflection, and relevance." *Ponticelli*, 622 F.2d at 991.

Even still, the Fourteenth Circuit ignored the Advisory Committee in another way. Exception (3) is "presented separately to enhance its usefulness and accessibility." *See* Fed. R. Evid. 803(3) *advisory committee notes*. Subjecting Exception (3) to the same requirements as Exception (1) and (2) does not "enhance its usefulness" nor its "accessibility." It defies the clear language and intent of the Committee and Congress.

**B. One error was not enough.**

Judge Hoag-Fordjour has it right. Judges "should not read in such a requirement where it does not exist." (R. 72.) Yet the Fourteenth Circuit majority does exactly that. Unhappy with excluding Fenty's statement for failing to meet the false spontaneity requirement, the court also

fashions a 403 probative value test into Exception (3). (R. 69; 72.) Rule 403's purpose, in the relevant part, is to exclude evidence that, although relevant, would tend to mislead the jury. *See* Fed. R. Evid. 403; *United States v. Shehadeh*, 848 Fed. Appx. 271, 273 (9th Cir. 2021). Exception (3)'s plain language does not permit excluding evidence because it may mislead the jury. That is the duty of Rule 403. Despite that, the Fourteenth Circuit capped their reasoning with "Defendant should not be rewarded for making self-serving statements that may mislead the finders of fact." (R. 69.) Judge Hoag-Fordjour highlighted the majority's line of reasoning as "infusing a water-downed [403] balancing test into 803(3)." (R. 72.)

### C. Fenty's voicemails are admissible, and Fenty requires a new trial.

Exception (3) is not a sufficient basis for excluding Fenty's voicemails. The exception does not require a statement to be spontaneous for it to be admissible. *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007) (finding that 803(3) only required contemporaneity). While the exception requires the statement to be contemporaneous with the event the declarant is speaking about, courts are split on the appropriate length after the event in question. Fenty's conversation with the post office employee starts the clock. The conversation is when Fenty learns her packages have not arrived and is the event she speaks about in her voicemails. Fenty's first voicemail was made at 1:32 PM on February 14, 2022 (R. 39.) In the relevant part, Fenty states, "I just got to the Post Office[.]" (R. 40.) The plain reading of Fenty's statement makes clear, her first voicemail was contemporaneous with the event. Her statement was made mere minutes after the event. The first voicemail should not have been excluded under Exception (3). *United States v. Barraza*, 576 F.3d 798, 805 (8th Cir. 2009); *United States v. DeLeon*, 418 F. Supp. 3d 682 (D.N.M. 2019).

Fenty's second voicemail was made at 2:17 pm on February 14, 2022 (R. 39), approximately 45 minutes after her first message. This Court has not stated for purposes of Exception (3) how long is too long. However, the concern for courts is the reliability and trustworthiness of the statement. *See Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 232 (2nd Cir. 1999). Context is important. Here, Fenty's second voicemail is consistent with her first. She expands on her then-existing state of mind. She does not change or counter it. The first voicemail meets Exception (3), and subsequently, the voicemail bolsters the reliability of the second voicemail. In isolation, a court could reasonably exclude the second voicemail, given the time between the event and when the statement was made. *See Hilyer v. Howat Concrete Co., Inc.*, 578 F.2d 422, 426 n. 7 (D.C. Cir. 1978) (statements made 45 minutes after the event were not contemporaneous with the event). But in light of the first voicemail, it is unreasonable to exclude the second.

**D. Rule 803(3) is not a substitute for Rule 403.**

Even accepting that 803(3) included a 403-esque balancing test, Fenty's voicemails should not have been excluded. "It is the jury's role to determine the reliability or validity of the evidence presented and not the judge's[.]" (R. 72 (Hoag-Fordjour, J. dissenting) (citing *DiMaria*, 727 F.2d at 271)).

This Court has provided lower courts a test for balancing the probative weight of evidence versus the prejudicial effect it may have. *See Old Chief v. United States*, 519 U.S. 172, 183 (1997). The state did not object under 403 here. The Fourteenth Circuit infringed on Fenty's right to a fair and impartial judge. The court permitted the trial court to assume the role of the prosecutor and

*sua sponte* exclude evidence where the prosecutor failed to properly object. Both courts inserted 403's language and tests into 803(3), where it does not exist.

This Court should not do the same.

## III. Fenty's Crime Did Not Involve Dishonesty

Rule 404(a) bars evidence of a person's character in order to prove that the individual "acted in accordance with the character or trait." Fed. R. Evid. 404(a). The long-standing purpose of the rule is to, among other things, prevent prejudice against the witness, confuse the jury, or misuse the evidence. *See e.g.*, *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466, 467–68 (1930) (Cardozo, C.J.). This general ban can be overridden. Rule 609(a)(2) permits the impeachment of a witness for any crime if the crime requires proving a dishonest act or false statement. Fed. R. Evid. 609(a)(2). The concern for Congress in drafting the Rules of Evidence was whether the past conviction would indicate "that a person may be more likely to commit perjury." *United States v. Amaechi*, 991 F.2d 374, 378 (7th Cir. 1993). Among the contemplated crimes are "perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*[.]" Fed. R. Evid. 609 *advisory committee notes* (2006 amendments).

### A. Similar crimes are not admissible under 609(a)(2).

Petty larceny and petty shoplifting are alike. So much so that in some jurisdictions, shoplifting was a subset of petit larceny. *See, e.g., United States v. Lopez-Pastrana*, 244 F.3d 1025, 1031 (9th Cir. 2001) (discussing Reno Municipal Code § 8.10.045 (1998); Cal. Penal Code § 459.5 (2014). Nine circuits reject shoplifting as a crime that falls under 609(a)(2). *See Amaechi*, 991 F.2d at 379 ("[W]e agree with nine other circuits that to include shoplifting as a crime of dishonesty

would swallow the rule and allow any past crime to be admitted for impeachment purposes."). Like shoplifting, petit larceny does not fall within 609(a)(2) because "crimes such as theft, robbery, or shoplifting do not involve 'dishonesty or false statement' within the meaning of Rule 609(a)(2)." *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990); *United States v. Entrekin*, 624 F.2d 597, 598–99 (5th Cir.1980), *cert. denied*, 451 U.S. 971, 101 S.Ct. 2049 (1981) (shoplifting); *United States v. Preston*, 608 F.2d 626, 638 n. 15 (5th Cir.1979), *cert. denied*, 446 U.S. 940 (1980) (bank robbery); *see also Howard v. Gonzales*, 658 F.2d 352, 358–59 (5th Cir. Unit A 1981) (theft).

Even when courts have held that shoplifting may be used under 609(a)(2), they have required that the items shoplifted must be of "significant value." *See United States v. Galati*, 230 F.3d 254, 261 (7th Cir. 2000) (citing *Amaechi*, 991 F.2d at 378). In *Galati*, the court rejected admitting a previous conviction because the value of the stolen items was approximately $35.00. *Id.* Fenty's petit larceny conviction was valued at $27. (R. at 25.) Like in *Galati*, this does not amount to the "significant value" the Seventh Circuit contemplated. *Galati*, 230 F.3d at 378.

Moreover, as the Tenth Circuit noted, "the adoption of Rule 609 was the culmination of a trend in judicial decisions toward restricting the use of prior convictions for impeachment purposes." *United States v. Mejia-Alarcon*, 995 F.2d 982, 989 (10th Cir. 1993) (citing *United States v. Wolf*, 561 F.2d 1376, 1380 (10th Cir.1977)). Unlike Rule 803(3)'s purpose to expand use, Rule 609 is intended to limit usage by courts. *Id.* The expansive reading by the Fourteenth Circuit and other circuits is counter to the intent of Congress.

### B. Fenty's petit larceny conviction does not indicate a willingness to lie.

Fenty's conviction is not within 609(a)(2)'s reach. The Fourteenth Circuit gave Fenty a false dichotomy, arguing that a crime is committed only by violence or dishonesty. (R. at 69-70). That is not the law. The correct categories are "(1) [g]eneral felonies, and (2) those involving

dishonesty and false statement." *United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978). Neither Congress nor this Court has ever contemplated a distinction of violence or dishonesty.

Further, Boerum's law rejects this false dichotomy and the Fourteenth Circuit's conclusion. Boerum distinguishes between petit larceny and theft by deception. (R. at 3.) Once again, it is judicial overreach to supplant the state. Boerum chose not to charge Fenty with theft by deception. The clear language of Boerum's laws demonstrates they did not consider petit larceny as involving an element of theft. Further, the state did not conclude Fenty's crime involved dishonesty; Boerum chose not to prosecute her for Theft by Deception. *Cf. United States v. Owens*, 23 Fed. Appx. 550 (7th Cir. 2001) (defendant's prior conviction of forgery was admissible because forgery involved untruthfulness or falsification).

Her conviction does not indicate any willingness to lie on the stand. The Fourteenth Circuit and trial court retried Fenty *sua sponte*. "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." *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977). Boerum did not consider Fenty a liar.

Neither should this Court.

## CONCLUSION

This Court should reverse on all three grounds.

Respectfully Submitted,
/s/ Team 7P
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