Team 5 – Original

No. 23-695

IN THE 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

QUESTIONS PRESENTED

I. Whether Defendant has a reasonable expectation of privacy under the Fourth Amendment in sealed mail addressed to Defendant's alias.

II. Whether recorded voicemail statements offered by Defendant to show a then-existing mental state can be admitted as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence if Defendant had time to reflect before making the statements.

III. Whether Defendant's impeachment by evidence of her prior conviction for petit larceny was proper under Rule 609(a)(2) of the Federal Rules of Evidence.

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The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Franny Fenty v. United States of America*, No. 22-5071, was entered June 15, 2023, and may be found in the Record. (R. 64-73.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional provision appears below. The relevant statutory provisions include Boerum Penal Code § 155.25, 155.45.

The Fourth Amendment to the United States Constitution 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 Warrant 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 FACTS

During the time of the pertinent events, Petitioner Franny Fenty ("Fenty" or "Petitioner"), was an unpublished novelist not currently working a regular job. (R. 42.)[1] Approximately five or six years prior to the incident, Fenty published two short stories in her college magazine, the Joralemon College Zine, using the pseudonym, Jocelyn Meyer. (R. 4, 42.) More recently, she has written five novels that remain unpublished, also authored under the name Jocelyn Meyer. (R. 42.) Under the same pseudonym, Fenty approached only four publishers to get her book published, but her efforts were unsuccessful as she received no responses. (R. 5, 42.)

[1] ("R.") refers to the Record on appeal.

Realizing her career as a novelist was not taking off, Fenty made a public post on LinkedIn stating she was "open to work." (R. 6, 44.) Angela Millwood ("Millwood"), who had been investigated by the DEA in high school for drug dealing, reached out to Fenty and explained she worked as a handler at Glitzy Gallop Stables. (R. 34, 44.) Millwood proposed compensating Fenty for acquiring Xylazine, a horse muscle relaxer, as part of her strategy to alleviate the horses' pain. (R. 44-45.) Fenty agreed to purchase the medication on behalf of Millwood. (R. 45.)

After agreeing to Millwood's request, Fenty grew suspicious about ordering xylazine and began investigating the drug. (R. 45-46.) Upon her research, Fenty came across an article in the "Joralemon Times" discussing the combination of xylazine and fentanyl being used as a recreational street drug. (R. 7, 46.) Subsequently, Fenty contacted Millwood to discuss the information she had discovered about xylazine, and Millwood reassured her that the medicine was intended for treating horses. (R. 46.)

Following these events, on January 31, 2022, Fenty registered a P.O. box at the Joralemon Post Office ("Post Office") under the name Jocelyn Meyer. (R. 31, 54.) Ten days after, Fenty placed the order from Holistic Horse Care, listing Jocelyn Meyer as the addressee. (R. 30, 55.)

I. Special Agent Robert Raghavan and Special Agent Harper Jim searched the sealed package pursuant to a valid warrant.

Special Agent Robert Raghavan ("Agent Raghavan") is employed by the U.S. Drug Enforcement Administration as a special agent in the Joralemon office, located in the state of Boerum. (R. 28.) On February 12, 2022, Liam Washburn ("Washburn"), a Joralemon resident, died from a fentanyl overdose. (R. 29.) His body was discovered next to partially used syringes

and an opened package addressed from Holistic Horse Care. (*Id.*) An autopsy was performed and revealed that Washburn had fatal amounts of fentanyl in his body at the time of his death. (*Id.*) An expedited lab testing showed that the syringes contained a mixture of fentanyl and the horse tranquilizer xylazine. (*Id.*)

Due to high a number of cases involving sellers cutting fentanyl with horse tranquilizers, Agent Raghavan contacted Janice Herman ("AUSA Herman"), an Assistant U.S Attorney. (*Id.*) He expressed his suspicion of fentanyl culprits ordering the drugs from the Holistic Horse Care website. (*Id.*) Agent Raghavan also alerted Oliver Araiza ("Mr. Araiza"), an employee at the Post Office, about his suspicions and told Mr. Araiza to let him know if the Post Office received any packages being shipped from a horse veterinarian website or company. (R. 29-30.)

Following the request, on February 14, Agent Raghavan received a call from Mr. Araiza, a post office employee, reporting that the post office had received and flagged two packages sent from Holistic Horse Care. (R. 30.) Agent Raghavan, accompanied by his partner, Special Agent Harper Jim ("Special Agent Jim"), then drove to the Post Office and collected the packages. (*Id.*) The packages that Agent Raghavan collected were addressed to Jocelyn Meyer and set to be delivered to P.O. Box 9313, which was registered under Jocelyn Meyer. (R. 30-31.) In the same P.O. box was two Amazon packages addressed to Franny Fenty. (R. 31.)

Following retrieval of the packages, Agent Raghavan obtained a search warrant for the Holistic Horse Care packages. (*Id.*) Special Agent Jim and Agent Raghavan then took the packages to their local testing facility for opening and examination. (*Id.*) Within each package, was a bottle with the label "Xylazine: For the Horses" on it. (*Id.*) The contents of each bottle were then tested and revealed 400 grams of xylazine and 200 grams of Fentanyl. (R. 32.)

The following morning, the packages were dropped off at the post office to Mr. Araiza with a slip for Jocelyn Meyer to pick up the Holistic Horse Care packages from the counter during normal business hours. (*Id.*) Mr. Araiza then took Special Agent Jim and Agent Raghavan to the employee backroom so they could monitor the security cameras and see who would come pick up the drugs. (*Id.*)

Approximately thirty minutes after the packages were dropped off and the Special Agents had relocated to the employee backroom, the security cameras captured a white woman with short brown hair, appearing to be no older than thirty, entering the Post Office. (*Id.*) She walked over to the counter after retrieving the slip from P.O. Box 9313. (*Id.*) Mr. Araiza then brought the Holistic Horse Care packages out from behind the counter and showed them to the woman. (R. 33.) Mr. Araiza asked the woman if those were her packages to which she responded that they were. (*Id.*) The woman then took the packages and began to leave. (*Id.*) A man, who appeared to know the woman, then approached her revealing her true identity, calling her "Franny." (*Id.*) The man later revealed he was Sebastian Godsoe, a former college student along with Fenty. (*Id.*)

Agent Raghavan conducted a further investigation by running a search on all social media platforms to see if Fenty's name was further connected to the trafficking of illegal drugs. (R. 34.) The search generated the LinkedIn post Fenty made indicating she was looking for work, along with Millwood's comment on the post. (*Id.*) Upon realizing Millwood's comment, Agent Raghavan's suspicions were raised as he was aware of the DEA's investigation of her for drug dealing during her time in high school. (*Id.*) Agent Raghavan then visited Millwood's LinkedIn profile and saw that she recently started a new job at a horse stable. (*Id.*)

Such information further intensified Agent Raghavan's doubts causing him to attempt to locate Millwood. (R. 34, 35.) The location search rendered a one-way flight to Jakarta that

Millwood took on February 14, 2022. (R. 35.) February 14, 2022 was the day Agent Raghavan and Special Agent Jim seized the packages from the P.O. box. (*Id.*)

Upon obtaining this information, Agent Raghavan and Special Agent Jim promptly presented it to AUSA Herman on the same day, February 15. (*Id.*) A grand jury was empaneled and returned an indictment to which was followed by Fenty's arrest later that same evening. (*Id.*)

II. Voicemail messages left by Franny Fenty on Angela Millwood's phone.

Prior to her arrest, on February 14, 2022, at 1:32 p.m. and again at 2:17 p.m., Fenty left two voicemails for Millwood. (R. 40.) Fenty left these voicemails after realizing the packages she ordered from Holistic Horse Care and received delivery confirmation for, were missing. (R. 45-46.)

Further, Fenty admitted to being suspicious that the packages contained illicit drugs. (R. 46.) In the first voicemail, Fenty expressed her concern about the missing packages and the potential involvement in illegal activities, while also mentioning the debt Millwood owed to her. (R. 40.) About forty-five minutes, at 2:17 p.m., Fenty left another voicemail to Millwood expressing the same concerns. (*Id.*)

III. Franny Fenty's prior conviction for Petit Larceny.

On August 4, 2016, motivated by a dare from a friend, Fenty tried to steal a bag from a tourist but was caught in the act. (R. 52.) Intending to go unnoticed, Fenty walked over quietly and snuck up behind the woman who owned the bag which contained $27 in cash and diapers. (R. 59.) The woman, who was distracted watching a street performer dressed at Elmo, noticed Fenty attempting to steal her bag and quickly grabbed it when Fenty already had possession of it. (*Id.*) The woman yelled for Fenty to stop and forcibly pulled the bag back, but to no avail. (*Id.*)

Fenty did not stop and, instead, shoved the victim causing her to scream very loudly. (R. 59-60.) Fenty proceeded to threaten the victim by saying: "Let go or I'll hurt you." (R. 60.) Fenty then gained complete possession of the bag and ran off. (*Id.*)

Accordingly, Fenty was caught by the police and convicted of the crime of petit larceny, a misdemeanor, under § 155.25 of the Boerum Penal Code. (R. 19,63.)

STATEMENT OF THE CASE

Fenty was formally indicted by grand jury on February 14, 2022. (R. 1-2.) Fenty later filed a motion to suppress the evidence found in the sealed packages on the grounds that the search violated her Fourth Amendment rights. (R. 10.) Fenty argued that she had a reasonable expectation of privacy in the contents of the sealed packages addressed to her alleged alias, Jocelyn Meyer. (R. 11.) District Court Judge Ava Brakman Reiser held oral arguments on August 25, 2022, and denied the motion to suppress in its entirety. (R. 10, 17.)

Fenty filed a second motion on August 25, 2022, to exclude evidence of her prior misdemeanor petit larceny crime. (R. 18.) Fenty argued that the prior conviction should not be admissible for impeachment purposes, pursuant to Rule 609(a)(2) of the Federal Rules of Evidence, as she claimed it was a momentary lapse of judgement when she was 19 years old. (R. 19.) Judge Reiser again denied Fenty's motion. (R. 26.)

After the pretrial motions were completed, Fenty was tried before a jury. (R. 41.) During the jury trial proceedings, Fenty testified regarding voicemails she left for Millwood. (R. 46.) The Government objected to this testimony on hearsay grounds and arguments ensued outside the jury's presence. (R. 47.) The Government argued that Fenty's voicemail statements do not fall under Rule 803(3) of the Federal Rules of Evidence because they lack spontaneity and will

mislead the jury. (R. 48.) Fenty argued that there was no spontaneity requirement under Rule 803(3) and the statements should be admitted. (R. 51.) Ultimately, the court properly sustained the Government's objection, finding that the statements do not fall within the hearsay exception set forth in Rule 803(3). (R. 52.)

Thereafter, Fenty was found guilty on September 21, 2022, on one count of possession with intent to distribute a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(vi). (R. 7-8.) Fenty was sentenced to 10 years in prison. (R. 8, 26, 66.)

Fenty appealed her conviction to the Fourteenth Circuit on the same grounds that were argued at the trial court. (R. 65.) The Fourteenth Circuit affirmed the conviction on all grounds on June 15, 2023. (R. 70.) Fenty then appealed to this Court and was granted certiorari on all three issues on December 14 of 2023. (R. 74.)

SUMMARY OF ARGUMENT

Petitioner lacks proper Fourth Amendment standing as she does not have a reasonable expectation of privacy in the sealed packages addressed to her alleged alias. The Fourth Amendment's protection against unreasonable searches and seizures hinges on demonstrating an objectively reasonable expectation of privacy. A legitimate expectation of privacy is based on factors like ownership, control, and public association with the property, which Petitioner cannot establish.

Moreover, even if this Court were to accept the alias as Petitioner's, her standing still fails as it was used in furtherance of illegal activity. This misuse of an alias for criminal purposes invalidates any reasonable expectation of privacy under the Fourth Amendment, as its protection does not extend to actions intended to conceal illegal behavior. Therefore, Petitioner's

involvement in criminal activity utilizing the alias undermines her claim to Fourth Amendment protections for the sealed package.

Petitioner's voicemails were properly excluded at trial as hearsay and do not fall within Rule 803(3). Under Rule 803(3), hearsay is only admissible if it is a statement of the declarant's then existing state of mind. The rationale behind Rule 803(3) is that these statements are more reliable and less likely to be fabricated. Having time to reflect prior to making a statement significantly heightens the risk of deliberate misrepresentation and untruthfulness. This leads to the creation of self-serving statements which have little probative value. Consequently, the essence of Rule 803(3) hinges on the principle of spontaneity, ensuring the reliability of the evidence presented.

The introduction of evidence regarding Petitioner's prior petit larceny conviction for impeachment purposes aligns with the stipulations of Rule 609(a)(2). This rule permits the inclusion of prior convictions involving dishonesty for impeaching a witness's credibility. The Petitioner's method of executing the petit larceny, characterized by calculated planning and exploitation of an unsuspecting victim, distinctly categorizes it within the ambit of deceitful acts as contemplated by Rule 609(a)(2). Therefore, because Petitioner's prior conviction of petit larceny was committed through use of deception, it must be admitted as per the provisions of Rule 609(a)(2).

ARGUMENT

I. PETITIONER FAILS TO MEET THE PROPER FOURTH AMENDMENT STANDING REQUIREMENTS BECAUSE SHE DOES NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE SEALED PACKAGE.

The Fourth Amendment to the United States Constitution safeguards individuals from unreasonable searches and seizures conducted by the government. It guarantees: "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The Amendment shields persons against unreasonable searches of "their persons [and] houses," thereby signifying that the Fourth Amendment represents a personal right that must be asserted by an individual. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places.").

The Fourth Amendment establishes a straightforward standard, which has historically been the sole foundation of its protections: "[w]hen 'the Government obtains information by physically intruding' on persons, house, paper, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (quoting *United States v. Jones*, 565 U.S. 400, 431 n.3 (2012)). "It has long been held that first-class mail such as letters and sealed packages . . . is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment." *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). "Whilst in mail, . . . [sealed packages] can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized." *Ex Parte Jackson*, 96 U.S. 727, 733 (1877).

'Standing' is commonly used to identify who can raise a certain Fourth Amendment claim. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978). To establish Fourth Amendment standing, "[t]he question is whether the challenged search or seizure violated the Fourth

Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." *Id.* at 140. This inquiry "requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.*

Here, Petitioner fails to assert proper Fourth Amendment standing as she lacks a reasonable expectation of privacy in the sealed packages. The packages were not addressed to her, but instead, to an alleged alias. Additionally, the packages were destined for a P.O. box not registered to Petitioner, indicating a generally accepted lower expectation of privacy in sealed packages under such circumstances. As such, Petitioner cannot indicate any indicia of ownership, control, or possession in the package. However, even if this Court were to find Petitioner bears a reasonable expectation of privacy in packages addressed to an alias, because the alias was used for the purpose of furthering a criminal scheme, Petitioner cannot raise a Fourth Amendment standing claim. Therefore, the search conducted by the government, justified by a valid warrant, is incontestable on Fourth Amendment grounds.

A. Petitioner lacks an individualized expectation of privacy that is objectively reasonable in her alleged alias.

In every instance, "the ultimate touchstone of the Fourth Amendment is reasonableness." *Lange v. California*, 141 S. Ct. 2011, 2017 (2021). Inquiry into reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Regarding the search of effects, it typically constitutes a less intrusive action compared to searching curtilage, for example, and is more often deemed reasonable even without a warrant. *See Jardines*, 569 U.S. at 14 n.1 (Kagan, J., concurring) ([W]e have held, over and over again, that people's expectations of privacy are much lower in their cars than in their homes.").

The Fourth Circuit has notably held that analysis into "whether a defendant has a valid basis for challenging a search, [courts] must decide whether [the defendant] had an individualized expectation of privacy that was 'objectively reasonable.'" *United States v. Rose*, 3 F.4th 722, 727 (4th Cir. 2021) (quoting *United States v. Castellanos*, 716 F.3d 828, 832 & n.3 (4th Cir. 2013)). Without such an "objectively reasonable expectation of privacy in the items searched, an individual cannot claim protection under the Fourth Amendment." *Id.* (citing *United States v. Bullard*, 645 F.3d 237, 242 (4th Cir. 2011)).

In determining whether a defendant bears such an objectively reasonable expectation of privacy in property not under his or her control at the time of the search, the Fourth Circuit "consider[ed] such factors as 'whether that person claims an ownership or possessory interest in the property, and whether he has established a right or taken precautions to exclude others from the property.'" *Castellanos*, 716 F.3d at 834 (quoting *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992)). Deriving inspiration from the First Circuit, the Fourth Circuit simplified such inquiry and clarified a defendant "must identify evidence *objectively* establishing his ownership, possession, or control of the property at issue." *Rose*, 3 F.4th at 727 (emphasis added) (citing *United States v. Stokes*, 829 F.3d 47, 53 (1st Cir. 2016)).

The First Circuit's interpretation of the inquiry required to suffice a reasonable expectation of privacy includes factors such as:

> ownership, possession and/or control; historical use of the property searched or thing being seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case.

Stokes, 829 F.3d at 53 (quoting *United States v. Aguirre*, 839 F.2d 854, 856-57 (1st Cir. 1988)). When reviewing such factors, attention should be directed "on the defendant's established

connection to the property at the time the search was conducted." *Rose*, 3 F.4th at 728 (citing *United States v. Ferebee*, 957 F.3d 406, 416 (4th Cir. 2020)).

Here, Petitioner does not have a reasonable expectation of privacy in the contents of the sealed packages not addressed to her. Petitioner is unable to establish a sufficient connection to the package, as there are no established links tying her to the sealed packages beyond her own assertion that they were hers. Additionally, due to the lack of adequate associations between the Petitioner and her alleged alias, she cannot legitimately claim a reasonable expectation of privacy associated with that name. Therefore, Petitioner's allegations are devoid of any indicia of ownership, possession, or control of the sealed package at any point prior to the search.

i. Sealed package addressed to fictitious name absent other indicia of ownership, possession, or control.

Petitioner lacks a reasonable expectation of privacy in the sealed package not addressed to her as she is unable to demonstrate any indicia of ownership, possession, or control over the package. The addressee and intended recipient of the package was Jocelyn Meyer, which is not Petitioner's name. (R. 30.) At no point prior to the search was there an established connection of ownership to Petitioner and the sealed package.

The First, Fourth, Fifth, Seventh, and Eleventh Circuit have individually established in their respective manners that "[w]hen a sealed package is addressed to a party other than the intended recipient, . . . that recipient does not have a legitimate expectation of privacy in the package, absent other indicia of ownership, possession, or control existing at the time of the search." *Id.* *See Stokes*, 829 F.3d at 52 (noting that courts are "reluctant to find that a defendant holds a reasonable expectation of privacy in mail where he is listed as neither the sender nor the recipient, at least absent some showing by the defendant of a connection."); *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993) (concluding that a defendant did not have a legitimate

expectation of privacy in the contents of an envelope when he was not the sender or addressee); *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988) (explaining that a defendant had no privacy right in a package when he was neither the sender nor the addressee of the package); *United States v. Smith*, 39 F.3d 1143, 1145 (11th Cir. 1994) (concluding that the defendant did not have a protected privacy interest in the contents of an envelope when he was not the sender or addressee).

Merely demonstrating a subjective interest as the intended recipient of a sealed package does not alone warrant Fourth Amendment protection. *See Rose*, 3 F.4th at 730. Rather, an individual's subjective interest in a sealed package "must be accompanied by reasonable, *objective* indicia of possessory interest." *Id.* (emphasis in original). Such a possessory interest "does not require ownership; instead, there can be other evidence establishing possession and control." *Id.* (citing *Castellanos*, 716 F.3d at 834).

When evaluating this interest, an important factor to consider is whether the individual claiming a privacy right has "established a right or taken precautions to exclude others from the property." *Rusher*, 966 F.2d at 875 (citing *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980)). As such, a future possessory interest in a sealed package is insufficient to warrant a legitimate possessory interest. *See Rose*, 3 F.4th at 730. Ultimately, "[a]bsent any ability to exercise ownership, possession, or control of . . . packages at the time of the search," an individual bears no greater privacy interest than any bystander. *Id.*

As aforementioned, in order for an individual to bear a reasonable expectation of privacy in a sealed package not addressed to them, their subjective interest must be accompanied by a reasonable, objective indicia of a possessory interest. *See id.* In this case, Petitioner has failed to demonstrate any interest beyond a subjective interest in the sealed package. The arrangement of

having the package sent to a P.O. box, rather than to Petitioner's abode, inherently diminishes her possessory interest. (R. 55)

Typically, a defendant "has no reasonable expectation of privacy in the outside of mail that is sorted or stored" in a public area like a post office. *United States v. Burnette*, 375 F.3d 10, 16–17 (1st Cir. 2004). In *Stokes*, the First Circuit examined "whether a defendant can hold a reasonable expectation of privacy in a rented mailbox . . . ." 829 F.3d at 52. Between 2008 and 2012, the defendant issued thousands of fraudulent invoices to numerous businesses. *Id.* Each invoice was designed to look as if it came from a genuine trade association, instructing the businesses to forward membership dues to one of three Massachusetts addresses. *Id.* Unbeknownst to these businesses, these addresses were where the defendant collected mail. *Id.* Postal inspectors managed to intercept the mailings to these addresses. *Id.* The First Circuit affirmed the denial of the defendant's motion to suppress, holding that the defendant did not have "a legitimate expectation of privacy in the . . . P.O. Box." *Id.*

The First Circuit based its reasoning on the Fifth Circuit's interpretation in *States v. Osunegbu*, 822 F.2d 472, 474 (5th Cir. 1987), where they upheld a warrantless search of a private post office box by a postal inspector. This decision was predicated on the understanding that postal employees routinely handle and move mail, leading to a minimal expectation of privacy regarding the contents of a mailbox. *See id.*

As the courts in *Osunegbu* and *Stokes* highlighted, an individual's expectation of privacy in P.O. boxes is lessened due to the nature of P.O. box deliveries involving multiple intermediaries at the post office. In a post office, packages are handled, organized, and sorted through by the postal employees, introducing a level of external control. Additionally, the public setting of a post office means that other individuals with registered P.O. boxes at that post office could

potentially observe packages, along with their origin. Aware of this relinquishment of control, Petitioner nonetheless arranged to have the package delivered to the P.O. box. (R. 55.)

Petitioner's privacy interest is further weakened by the fact that she never truly had actual control or possession of the package prior to the search. The package was sent directly to the P.O. box and remained within the Post Office's domain, managed and accessible primarily by postal employees prior to the search. (R. 30–31.) Such an absence of actual, physical control is crucial in determining whether Petitioner's subjective interest was coupled with reasonable and objective indicia of a possessory interest.

Although the transitory nature of a package does not diminish an individual's expectation of privacy in a package, when assessing whether an objective possessory interest exists in a sealed package not addressed to the individual asserting the privacy interest, such aforementioned facts are relevant. Therefore, given that Petitioner arranged for the packages to be sent to a P.O. box—a public area where privacy expectations are reduced—her expectation of privacy was affected. Since she never had actual possession or control of the packages that were not addressed to her, she cannot demonstrate a reasonable, objective indicia of ownership, possession, or control over the package. Consequently, she cannot assert a reasonable expectation of privacy in the package.

ii. Lack of established connections between Petitioner's alleged alias and the public.

Petitioner cannot claim a reasonable expectation of privacy in the name Jocelyn Meyer, as there is no significant public association linking her to that name. Arguably, an individual "who is neither the sender nor the addressee of a package has no privacy interest in it, and, accordingly, no standing to assert Fourth Amendment objections to its search." *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992) (citing *Koenig*, 856 F.2d at 846). Regardless, individuals do reserve the right to assert a reasonable expectation of privacy in packages directed and addressed

to them under a fictitious name. *See Castellanos*, 716 F.3d at 834; *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992). However, in such "alleged circumstance, to demonstrate a reasonable expectation of privacy, 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).

To demonstrate a fictitious name as an "established alias," a defendant must provide sufficient evidence to signify that the name serves as an alter ego, or a name that the public readily identifies with the defendant. *See Castellanos*, 716 F.3d at 834. In essence, a defendant must establish such a close connection to the fictitious name that when asserting a possessory interest in a sealed package addressed to this name, it would be essentially the same as if they had addressed the package to their true, legal name. *See id.*

Here, Petitioner's use of the name Jocelyn Meyer is insufficient to establish that Jocelyn Meyer was Petitioner's public use alias. The mere fact that Petitioner retrieved the package addressed to Jocelyn Meyer from the P.O. box registered under that same name on only a single occasion, falls significantly short of proving that Petitioner was widely recognized as Jocelyn Meyer. (R. 32.)

Furthermore, Petitioner's previous use of the name Jocelyn Meyer fails to substantiate a presently recognized alias. Using the name Jocelyn Meyer during college for writing in the college magazine is too far removed in time to establish a presently existing public use alias. (R. 4, 42.) The transient nature of these college publications means that any recognition the fictitious name might have garnered would be limited and short-lived, confined to a small, specific audience and time period. Also, the passage of time since these writings diminishes any ongoing association between the Petitioner and Jocelyn Meyer, severing the continuous link necessary for the name to be considered a present public use alias.

Moreover, writing books under the same fictitious name, Jocelyn Meyer, does not suffice to establish that name as Petitioner's alter ego, particularly when these books have never been published. (R. 42.) The primary reason for this is the lack of public recognition and association Petitioner has with the name. An alter ego, in this sense, implies a degree of public identification and acknowledgment. Here, since the books were not published, they remained inaccessible to the public, making it impossible for any kind of recognition or association to develop between Jocelyn Meyer and Petitioner. (R. 5, 42.) Without public awareness or interaction with the fictitious name, it remains a private and unknown identity, lacking the essential elements of an alter ego, which fundamentally hinges on recognition. Therefore, Petitioner's use of an unpublished pseudonym in writing her books does not meet the necessary criteria to be an established public use alias.

The necessity for a demonstrable public association with a fictitious name in asserting Fourth Amendment privacy rights is pivotal for two key reasons. Firstly, it is crucial for public safety. Allowing individuals to claim privacy rights under any alias without a verified public connection could open doors to misuse, enabling the concealment of unlawful activities behind a veil of anonymity. Such a loophole could be exploited, compromising the safety of the public. Secondly, this requirement is vital for upholding the integrity and consistent application of Fourth Amendment protections.

By mandating solid evidence of a connection to an alias, the law would ensure that privacy rights are not misapplied or abused. This principle best upholds the balance between an individual's right to privacy and the necessity for effective law enforcement. In essence, the demand for a clear public connection to an alias in privacy rights not only guards against

potential misuse but also reinforces the legal jurisprudence surrounding Fourth Amendment rights.

B. Even if this Court were to accept Petitioner's assertion that Jocelyn Meyer was her alias, Petitioner would still lack Fourth Amendment standing to raise this claim because that alias was used in furtherance of a criminal scheme.

Even if this Court were to recognize Petitioner's use of the alias as permissible, Petitioner's claim still fails to assert proper Fourth Amendment standing because "the use of that alias was obviously part of [her] criminal scheme." *Daniels*, 982 F.2d at 149 (citing *United States v. Lewis*, 738 F.2d 916, 919–20 n.2 (8th Cir. 1984)). Rather, because Petitioner "has opted to conceal [her] identity, [she] cannot assert a cognizable Fourth Amendment interest in the package . . . because [she] has chosen not to announce to society that [she] has a legitimate claim in the sealed contents of the package." *United States v. DiMaggio*, 744 F. Supp. 43, 46 (N.D.N.Y. 1990).

In *Lewis*, the defendant acquired a mailbox under the name of "David Woods" to receive merchandise he purchased with fraudulently acquired credit card numbers. A police officer seized from the mailbox a property tax bill addressed to "David Woods" and later arrested the defendant when the police discovered that he has set up the mailbox. *See id.* The *Lewis* court did not address the standing issue but resolved the validity of the challenged search on other grounds. The court noted: "[w]e have no difficulty in concluding that Lewis lacked a legitimate expectation of privacy in the mail box and its contents and, accordingly, that he would have no standing to raise the issue concerning evidence flowing from the mail box search." *Id.* at n.2. The court further established that "[a] mailbox bearing a false name with a false address and used . . . to receive fraudulently received mailings does not merit an expectation of privacy that society is prepared to recognize as reasonable." *Id.*

Here, Petitioner's Fourth Amendment standing claim is fundamentally undermined by her use of the alias to further her criminal scheme, specifically trafficking fentanyl. The strategic registration of the P.O. box under the fictitious name was a calculated move to dissociate Petitioner's true identity from the illegal activity. (R. 31, 52.) This was not an innocent attempt to protect privacy or assert a legitimate alter ego, but rather a deliberate effort to evade legal accountability. The use of the alias in this context is indicative of a conscious decision to operate outside the boundaries of lawful conduct, thereby waiving any reasonable expectation of privacy typically afforded by the Fourth Amendment. The essence of Fourth Amendment protections is to safeguard against unreasonable searches and seizures, but these protections do not extend so far as to legitimize actions taken with the explicit intent to conceal criminal behavior.

Moreover, Petitioner addressing the sealed package in question to the alias aligns with the same pattern of deliberate obfuscation found in *Lewis*. In both instances, it was not a mere exercise of privacy rights but, rather, part of a strategy to keep these illicit activities concealed. By doing so, Petitioner has essentially forfeited any claim to privacy concerns that might ordinarily be raised under the Fourth Amendment.

The use of an alias in this manner cannot create an ironclad shield against legal scrutiny. If this were the case, any expectation of privacy would not only be unreasonable, but also in direct conflict with the principles the Fourth Amendment seeks to uphold. Therefore, Petitioner's reliance on the alias as part of her criminal scheme effectively dissipates her standing to raise Fourth Amendment protections for her activities connected to the P.O. box and the addressed packages.

Additionally, in light of the case presented, this Court faces the critical task of upholding the balance between Fourth Amendment protections and the necessity to safeguard the public from

the dangers of drug trafficking. Petitioner's use of an alias in this context, specifically for trafficking fentanyl, is not an innocent exercise of privacy rights but a deliberate strategy to dissociate from illegal activities and evade legal responsibility. Recognizing Petitioner's use of an alias for such purposes would not only undermine the Fourth Amendment's intent but also open the floodgates to rampant drug trafficking, as it allows individuals to circumvent legal repercussions. Endorsing such a practice to stand unchallenged would directly conflict with the Fourth Amendment's purpose and facilitate a blatant misuse of its protections. It is, therefore, imperative that this Court deny both Petitioner, and further criminal defendants, Fourth Amendment standing in cases where aliases are used as part of criminal schemes, thereby preserving the essential balance between constitutional rights and public safety.

II. PETITIONER'S RECORDED VOICEMAIL STATEMENTS ARE NOT ADMISSIBLE PURSUANT TO RULE 803(3) OF THE FEDERAL RULES OF EVIDENCE BECAUSE PETITIONER HAD AMPLE TIME TO REFLECT BEFORE MAKING THE STATEMENTS.

Under the Federal Rules of Evidence, an out of court statement offered for the truth of its assertion is considered hearsay and inadmissible in court. *See* Fed. R. Evid. 801(c). However, hearsay is admissible if it is "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . ." Fed. R. Evid. 803(3).

This argument hinges on whether a spontaneity criterion is integral to Rule 803(3) for assessing admissibility. Numerous circuit courts have correctly applied a spontaneity requirement reflected in the second prong of the following three-part test:

> (1) 'the statements must be contemporaneous with the . . . event sought to be proven;' (2) 'it must be shown that the declarant had no chance to reflect–that is, no time to fabricate or to misrepresent his thoughts;' and (3) 'the statements must be shown to be relevant to an issue in the case.'

United States v. Jackson, 780 F.2d 1305, 1315 (7th Cir. 1986) (quoting *States v. Layton*, 549 F. Supp. 903, 909 (N.D. Cal. 1982)). Regardless of whether the statements in question were contemporaneous and relevant, they crucially fail to satisfy the vital principle of spontaneity. The consistent rulings of numerous circuit courts emphasize the significant weight placed on the opportunity for reflection in hearsay admissibility. *See, e.g.*, *United States v. Ponticelli*, 622 F.3d 965, 991 (9th Cir. 1980) (focusing solely on the time to reflect element to determine admissibility). Time and again, these courts have concluded that statements made with ample time for reflection, lacking the spontaneous nature required by the rule, should be categorically excluded from evidence. *See id.*

Accordingly, Petitioner's voicemails fail to meet the requirements set forth in the three-prong test and should be excluded under Rule 803(3) because she had time to reflect. Specifically, Petitioner's statements lack spontaneity because she was aware the packages were missing before making her statements, the statements were self-serving, and the probative value is greatly outweighed by misleading the jury. As the Fourteenth Circuit correctly concluded, time to reflect is fundamental in assessing whether evidence is properly trustworthy to warrant admissibility. Therefore, this Court should affirm the Fourteenth Circuit's holding that Petitioner's statements are inadmissible.

A. The rationale behind Rule 803(3) is to promote trustworthy evidence.

The spontaneity requirement under Rule 803(3) is deeply rooted in the theory shaping hearsay exceptions. Courts often refer to the Advisory Committee's Notes for a deeper understanding and interpretation of this theory. *See Jackson*, 780 F.2d at 1305 (relying heavily on

the Advisory Committee's Note to Rule 803(3) in order to understand the meaning behind the rule); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) (using the Advisory Committee's Notes to further the analysis and understanding of Rule 702). The Advisory Committee notes are essential for understanding and applying these exceptions. Given the Committee's significant role in studying, revising, and elucidating the rules, their guidance is invaluable for interpreting the complex mechanisms of hearsay admissibility.

Significantly, the Advisory Committee notes that central to the hearsay exceptions provided under Rule 803 is the concept that certain statements inherently possess a circumstantial guarantee of trustworthiness. *See* Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules; *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005). This guarantee stems from the specific conditions under which these statements are made, which are believed to enhance their reliability. Rule 803(3) highlights this logic because it requires the statement to be contemporaneous with the declarant's then existing state of mind and under a circumstance of spontaneity. *See* Fed. R. Evid. 803.

Further, the advisory committee emphasizes that Rule 803(3) is essentially a specialized version of Rule 803(1), which permits admission of present sense impressions. Fed. R. Evid. 803(3) advisory committee's note to 1972 proposed rules. Underlying Rule 803(1) is the theory "that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Fed. R. Evid. 803(1) advisory committee's note to 1972 proposed rules. At the heart of Rule 803(1) is the notion that statements with a high probability of misrepresentation and fabrication should be excluded from evidence. Rule 803(3) echoes this principle. *See Ponticelli*, 622 F. 3d at 991 ("The greater the circumstances for misrepresentation,

the less reliable is the declaration."); *Jackson*, 780 F.2d at 1315 (noting that an important feature of Rule 803(3) is the principle against misrepresentation).

Moreover, courts frequently extend the analysis of Rule 803(2), concerning the admittance of excited utterances, to the interpretation and application of Rule 803(3). *See United States. v. Cardascia*, 951 F.2d 474, 487 (2d Cir. 1991) (recognizing that the Rule 803(3) exception stems from the present sense impression and excited utterance exceptions preceding it); *United States v. Faust*, 850 F.2d 575, 586 (9th Cir. 1988) ("Rule 803(3) is related to the exceptions created by Rules 803(1) and (2), which allow statements of present sense impression and excited utterances."). The theory behind Rule 803(2) "is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Fed. R. Evid. 803(2) advisory committee's note to 1972 proposed rules. The key factor is spontaneity. *Id.* Reinforcing the objectives of Rule 803(1), Rule 803(2) also focuses on preventing misrepresentation and bolstering the reliability of evidence.

This goal is clearly reflected in Rule 803(3). Multiple circuit courts have discussed the importance of contemporaneous and spontaneous statements under Rule 803(3) in order to avoid misrepresentation and fabrication. *See United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) ("Rule 803(3) permits admission of such statements where, among other things, the statements occurred contemporaneous with the event sought to be proved and the defendant did not have a chance to reflect (i.e., the defendant had no time to fabricate or misrepresent his thoughts)."); *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."); *Naiden*, 424 F.3d at 722 (noting that trustworthiness is the touchstone of admissibility under Rule 803(3)).

Given the effectiveness of the principles underlying Rules 803(1) and 803(2) in ensuring the reliability of evidence, it is imperative to apply these same principles when evaluating the admissibility of statements under Rule 803(3). This approach would not only maintain consistency across these rules but also significantly enhance the trustworthiness of the evidence considered in court. Reliable evidence fosters confidence in the legal system, both for those directly involved and for society at large. Therefore, the rationales used for Rule 803(1) and Rule 803(2) should be adopted when determining the admissibility of a statement under Rule 803(3).

B. Time to reflect is inherently untrustworthy as it greatly increases the probability of misrepresentation.

Applying the rationale behind Rule 803(3), it is evident that Petitioner's statements do not warrant admissibility due to the opportunity for reflection. This is reinforced by multiple circuit courts, which have consistently held that "[t]he more time that elapses between the declaration and the period about which the declarant is commenting, the less reliable is his statement . . . ." *Ponticelli*, 622 F.2d at 991. *See Jackson*, 780 F.2d at 1315 (noting that two years to reflect after actions increases the incentive to misrepresent the truth); *Faust*, 850 F.2d at 586 (finding that the defendant had ample time to draft letters therefore the statements were less reliable); *United States v. Macey*, 8 F.3d 462, 467 (7th Cir. 1993) (finding that four hours between defendants fraud and statements were enough to fabricate a story); *Packgen v. Berry Plastics Corp.*, 847 F.3d 80, 91 (1st Cir. 2017) (holding that a statement "must be timely such that the declarant had no time to fabricate."); 5 J. Weinstein and M. Berger, Weinstein's Evidence § 803.05[2][a] (2024) ("There must be no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his or her thoughts.").

Furthermore, "[t]he state of mind declaration also has probative value, because the declarant presumably has no chance for reflection and therefore for misrepresentation." *Ponticelli*, 622 F.2d at 991 (citing *United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977)). Courts frequently use this probative value analysis as it is inherent in most rules. For example, in *United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir. 1992), the court emphasized that statements that fall under Rule 803(3) "have probative value because the declarant has no chance to reflect upon (and perhaps misrepresent) his thoughts . . . ." There, the defendant made self-serving statements in his letter after he had time to consider them, and with an eye toward the pending investigation. *Id.* The court determined that this letter allowed enough time for the defendant to fabricate or misrepresent his thoughts, thus not fitting within the Rule 803(3) exception. *Id.* Therefore, the court held that the statements were properly refused admittance. *Id.* This reasoning highlights a common analysis in which statements that are self-serving in nature have very little probative value.

Notably in *Reyes*, the court found that the defendant's statements were inadmissible due to the self-serving nature of the statements. 239 F.3d at 743. There, the statements were made after the defendant was already suspicious that his partner was cooperating with the authorities. *Id.* The court noted the likelihood of defendant's call being recorded signifies that his statements "were more self-serving than they were candid, and therefore their probative value is greatly diminished." *Id.*

Mirroring the aforementioned logic, it is apparent that Petitioner's voicemail statements had no probative value due to the high likelihood of misrepresentation and the self-serving nature of the statements. Upon learning her packages were missing at the Post Office, the Petitioner left two voicemails for Millwood, expressing concern and suspicion about being unwittingly involved

in something illicit. (R. 40.) These voicemails, spaced forty-five minutes apart, exhibit a crafted narrative of innocence, likely aimed at distancing herself from potential criminal involvement. *See* (R. 40.) The Petitioner's own admission of feeling nervous about the packages, coupled with her prior knowledge, further underscores the self-serving nature of these voicemails. *See* (R. 46.) In line with legal precedents, these statements should be deemed untrustworthy and inadmissible, reflecting a calculated attempt at self-exoneration rather than spontaneous, credible testimony.

Additionally, such statements, made with time to reflect, appear self-serving and could potentially mislead the jury if admitted as evidence. Pursuant to Rule 104 of the Federal Rules of Evidence, it is the trial judge's role to determine the admissibility of evidence. *See* Fed. R. Evid. 104. A judge’s role is pivotal in this determination, especially given the complexity of legal issues involved. Consequently, the judge's expertise is crucial in assessing whether a statement fits within the hearsay exception for then-existing mental states, as outlined in Rule 803(3). This rule requires careful consideration of the statement's contemporaneity and spontaneity, areas where the judge's legal knowledge is essential. Unlike the jury, whose role is to weigh the evidence, the judge must make preliminary determinations about what evidence is permissible for consideration. *See id*. This distinction is important for upholding the integrity of the trial process and ensuring that evidence meets legal standards for reliability and relevance.

Petitioner's voicemails, which are self-serving and reflect ample time for contemplation, exemplify the statements that courts often exclude due to their potential to mislead juries and lack of trustworthiness. This aligns with the stringent principles of Rule 803(3), which prioritizes the spontaneity and contemporaneity of statements to prevent misrepresentation in legal proceedings. The emphasis on these criteria by various circuit courts, as well as the overarching skepticism of the hearsay rule towards out-of-court statements, underscores the commitment to ensuring

fairness, reliability, and the integrity of evidence in the judicial system. These principles not only comply with legal standards but also uphold the fundamental values of justice and impartiality.

The Rule 803 hearsay exceptions were designed as precise, narrowly tailored instruments, not as broad gateways for admitting substantial evidence. Their purpose is to serve as specific carve-outs in situations where evidence would typically be excluded due to the hearsay rule. This rule itself embodies a foundational skepticism about the reliability of out-of-court statements, recognizing the inherent challenges in verifying such declarations. Thus, it is implausible to interpret Rule 803, including 803(3), as excessively permissive when its very existence is rooted in safeguarding against the potential unreliability of hearsay. This perspective aligns with the principle of judicial caution and the intent to uphold the integrity and credibility of the evidence presented in court.

In summary, Rule 803(3) embodies a requirement for spontaneity. The time Petitioner had to reflect on her statements significantly undermines their trustworthiness and increases the chance for fabrication. Therefore, the Fourteenth Circuit's finding that Petitioner's voicemails are inadmissible due to the untrustworthy nature of statements made post reflection should be affirmed.

III. PETITIONER'S IMPEACHMENT BY EVIDENCE OF HER PRIOR CONVICTION FOR PETIT LARCENY WAS PROPER UNDER RULE 609(A)(2) OF THE FEDERAL RULES OF EVIDENCE BECAUSE HER CONVICTION WAS OF DECEITFUL NATURE.

Pursuant to the Federal Rules of Evidence, a party may attack a witness's character for truthfulness through evidence of a prior criminal conviction. *See* Fed. R. Evid. 609. This principle is based on the understanding that while not all crimes indicate a witness's lack of

credibility, such as those committed in passion, many crimes involving a degree of dishonesty or false statements could render a perpetrator's testimony is less than entirely credible.

Therefore, for impeachment purposes, the rule allows admission of crimes "punishable by death or by imprisonment for more than one year," or, for any crime, "regardless of the punishment" that requires an element of "a dishonest act or false statement." Fed. R. Evid. Rule 609(a). Evidence of such prior convictions admissible under Rule 609(a)(2) is vital in the adjudication process as it serves as "proof of the commission of the underlying criminal act." Fed. R. Evid. 609 advisory committee's notes to 1972 proposed rules.

A. Prior convictions subject to admission pursuant to FRE Rule 609(a)(2).

A distinct characteristic of crimes involving dishonesty, which sets them apart from felonious crimes covered by Rule 609(a)(1), is that they "*must* be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness admitting – a dishonest act or false statement." Fed. R. Evid. 609(a)(2) (emphasis added). Congress intended to differentiate between these two categories of convictions, "according greater value to convictions involving dishonesty." *United States v. Toney*, 615 F.2d 277, 283 (5th Cir. 1980) (Tuttle, J., dissenting).

As per the provisions of Rule 609(a)(2), admission of felonious crimes rests on the court's determination of whether "the probative value of admitting [such] evidence outweighs its prejudicial effect to the defendant." Fed. R. Evid. 609(a). This requires a judge to use a balancing test when considering felony convictions, weighing their probative value against any potential prejudicial impact. *Id.* However, this balancing test is not applied to convictions involving dishonesty because Congress intended these convictions to be particularly indicative of a defendant's credibility. *Id.* Therefore, Rule 609(a)(2) uniquely restricts federal judges from

having the discretion to reject certain evidence on the grounds that its admission would be more prejudicial than probative. *See* Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1551-52 (2013).

Consequently, in determining whether a prior conviction falls within Rule 609(a)(2), the only considerable factor for admission is if the prior conviction "involv[es] some element of deceit, untruthfulness or falsification which would tend to show that an accused would be likely to testify untruthfully." *United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978). Ultimately, "[t]o come within Rule 609(a)(2) the convictions must have some bearing on the credibility of the witness." *Id.* However, this inquiry has led to considerable confusion across numerous circuit courts because the nature of the commission of crimes varies distinctly from one to another. *Compare United States v. Fearwell*, 595 F.2d 771 (D.C. Cir. 1978) (establishing that a crime of petit larceny does not fall within the scope of Rule 609(a)(2) as it does not involve the required deceit), *with United States v. Barnes*, 622 F.2d 107 (5th Cir. 1980) (holding that petit larceny could be admissible under Rule 609(a)(2) if the facts underlying the commission of the crime indicated falsity or deceit).

The scope of Rule 609(a)(2) is tied to the category of *crimen falsi*, which expands beyond the core crimes of deceit. *See* Fed. R. Evid. 609(a)(2) advisory committee's note to 2006 amendment. Within this scope, "[a]cts of 'deceit, fraud, cheating, or stealing' have been considered as universally reflective of poor character and diminished honesty and integrity." *United States v. Carr*, 418 F.2d 1184, 1186 (D.C. Cir. 1969) (quoting *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)).

Beyond such crimes, however, there has recently been little agreement as to the scope of *crimen falsi*. *See United States v. Smith*, 551 F.2d 348, 363 (D.C. Cir. 1976). Ultimately,

however, courts have unanimously agreed to pinpoint the scope to "encompass[] only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." *Id.* Hence, crimes beyond the fundamental deceit offenses, which inherently imply deceitfulness, should also be encompassed within the ambit of rule 609(a)(2).

Generally, "theft crimes . . . do not involve 'dishonesty or false statement' within the meaning of rule 609(a)(2)." *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982). Instead, "such crimes may indicate a lack of respect for the persons or property of others, . . . they do not 'bear directly on the likelihood that the defend will testify truthfully.'" *Id.* (quoting *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977)). However, "[a] conviction for burglary or theft may nevertheless by admissible under rule 609(a)(2) if the crime was actually committed by fraudulent or deceitful means." *Id.* (citing *United States v. Papia*, 560 F.2d 827, 847–48 (7th Cir. 1977)). Under such circumstances, "the Government has the burden of producing facts demonstrating that the particular conviction involved fraud or deceit." *Id.* (citing *Smith*, 551 F.2d at 364).

Thus, any offense that "leaves room for doubt" can be used for impeachment purposes as per rule 609(a)(2)'s scope as long as the Government can "demonstrate to the court 'that a prior conviction rested on facts warranting the dishonesty or false statement description.'" *Hayes*, 553 F.2d at 827 (quoting *Smith*, 551 F.2d at 364 n.28). Evidently, such an understanding would not implicate such a comprehensive reading of a "dishonest act or false statement," as that would result in encompassing nearly every type of criminal offense. *Id.* (indicating that words of "'dishonesty or false statement,' which, taken at their broadest, involve activities that are part of nearly all crimes."). For example, in determining whether a conviction falls within the scope of rule 609(a)(2), courts have distinguished between crimes committed through acts of violence

versus crimes committed by acts of deceit or dishonesty. *See, e.g.*, *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989).

Looking towards offenses of petit larceny, such convictions may not be *per se* admissible under Rule 609(a)(2). *See United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977). However, such convictions still "may involve dishonesty or false statement and some may not, and therefore it is necessary to look at the basis of the conviction to determine whether the crime embraced dishonesty." *Barnes*, 622 F.2d at 110 (citing *United States v. Cathey*, 591 F.2d 268, 276 n.16 (5th Cir. 1979)). To ascertain whether a petit larceny conviction falls within the scope of Rule 609(a)(2) would be to analyze "the manner in which the witness committed the offense" and assess if it "may have involved deceit." *Altobello*, 872 F.2d at 216.

B. Petitioner prior conviction for petit larceny falls within the scope of Rule 609(a)(2).

Petitioner's prior conviction of petit larceny is encompassed by Rule 609(a)(2), given that an examination of the specific circumstances surrounding the theft reveals at least some element of deceit. The underlying details of Petitioner's petit larceny conviction indicate that the crime was executed through deceitful means rather than by violence or force. Petitioner and her accomplice chose a victim who was preoccupied and distracted by a street performer in a busy area, demonstrating a strategic, non-violent approach of theft. (R. 52, 59.) This method contrasts with crime "of force, such as armed robbery or assault," which are outside the purview of Rule 609(a)(2). *Hayes,* 553 F.2d at 827.

Petitioner's intent was to stealthily commit the theft. (R. 59.) She deliberately chose a victim preoccupied by distraction, intending to execute the theft without being detected, thereby, engaging in a deceptive act against the victim. The occurrence of the subsequent physical struggle between Petitioner and the victim does not fundamentally alter the nature of the crime

from deceit to force. (R. 59–60.) The act remains, at its core, a theft executed through deception, rather than through an initial intent of physical aggression or forceful coercion. This distinction is crucial in accurately categorizing the crime under the appropriate legal framework and in understanding Petitioner's underlying criminal intent.

Furthermore, when analyzing Boerum Penal Code § 155.25 and § 155.45, the actions of Petitioner align with the statute's definition of theft by deception. *See* (R. 3.) Petitioner's deliberate approach, choosing a distracted tourist, and the intent to quietly take possession of the bag without the owner's consent embodies the essence of deceit as per subsections (1) and (2) of the code. *See* Boerum Penal Code § 155.45; (R. 3.) The act was not one of opportunistic theft but a calculated move to exploit the victim's lack of attention, creating a false impression of the environment's safety. Although the crime escalated to physical confrontation, it started as a wholly deceptive act, which fulfills the statute's criteria for theft by deception. It is crucial to note that the Government is not advocating for a reclassification of the conviction; rather; that the nature of Petitioner's actions fits the theft by deception statute flawlessly, demonstrating that the crime was of the deceptive nature to fall within the scope of Rule 609(a)(2).

Admission of deceitful convictions, such as Petitioner's petit larceny conviction, is essential to underscore the integrity of the judicial process. Rule 609(a)(2)'s focus on crime involving deceit or dishonesty reinforces the court's efforts to gauge the credibility of witnesses accurately. Admitting evidence of prior deceitful behavior is a critical tool for assessing a witness's propensity for truthfulness, thereby aiding in the pursuit of justice. This Court's ruling in favor of such admission would not only uphold the established legal framework but would also serve the broader interest of ensuring truthful testimonies within the legal system. It ensures

that the jury has access to crucial information that could influence the credibility of testimony, which is fundamental to further the truthfulness of our country's judicial system.

Petitioner's commission of the petit larceny crime clearly indicates deceitful behavior. Therefore, Petitioner's prior conviction of petit larceny should be found to fall within the domain of Rule 609(a)(2), as it exemplifies dishonesty and deceitfulness in her character, thereby discrediting her veracity as a witness.

CONCLUSION

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

Respectfully Submitted,
/s/ Team 5
Attorneys for Respondent