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 PETITIONER**

Team 32P
*Counsel for Petitioner*

## QUESTIONS PRESENTED

**I.** Whether a defendant has a reasonable expectation of privacy in packages addressed to a fictitious name and therefore has the required standing to bring a claim under the Fourth Amendment in response to a governmental search or seizure.

**II.** Whether Defendant's voicemail statements concerning her missing packages are admissible as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence when Defendant made the statements with only 46 minutes to reflect upon discovering the missing packages.

**III.** Whether Defendant's prior conviction for misdemeanor petit larceny for stealing $27 and diapers from a tourist when she was a teenager is so indicative of Defendant's propensity to lie that it must be used to impeach her character before the jury under Rule 609(a)(2) of the Federal Rules of Evidence.

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## CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

#### A. Angela Millwood deceives Franny Fenty into ordering xylazine, a horse tranquilizer, to help care for horses at Glitzy Gallop Stables.

Petitioner Franny Fenty ("Ms. Fenty") is the victim of a scheme organized by Angela Millwood ("Ms. Millwood") to smuggle illicit drugs into the City of Joralemon. Ms. Fenty first met Ms. Millwood when they were high school classmates. (R. 43.) After high school, Ms. Fenty attended Joralemon College, where she first began using the pseudonym "Jocelyn Meyer" to

publish short stories in the Joralemon Zine, the campus newspaper. (R. 13.) Ms. Fenty has continued to use the alias including in correspondence to publishing agencies as recently as October 2021, and when setting up her P.O. Box in January 2022. (R. 5.) Ms. Fenty enjoys the privacy that using an alias affords her. (R. 55.) Ms. Fenty was reconnected with Ms. Millwood after posting a message on LinkedIn in December 2021, in which she was looking for leads on a new job opportunity. (R. 6.) Ms. Millwood commented on the post that she could help Ms. Fenty's job search, and the two of them connected. (R. 6.)

Ms. Millwood alleged to Ms. Fenty that she was a horse handler at Glitzy Gallop Stables. (R. 44.) She described how the horses at the stable suffered from pain as they aged and convinced Ms. Fenty that this could only be helped by administering a muscle relaxer to them. (R. 45.) Ms. Fenty was so convinced by Ms. Millwood's story that she agreed to order the horse tranquilizer xylazine for Ms. Millwood, which she believed would be administered to older horses to help ease their pain symptoms (R. 26). Unbeknownst to Ms. Millwood, xylazine, the veterinary tranquilizer that she ordered, is commonly mixed with the narcotic fentanyl which, when combined with xylazine, can cause deadly overdoses.

Franny first became suspicious of her arrangement with Angela to order xylazine after she began researching the drug online and came across a local news article that described how xylazine is combined with fentanyl to form a recreational drug. (R. 46.) Immediately after learning this information, Ms. Fenty called Ms. Millwood, who assured her that she would only be administering the xylazine as a pain medication for the horses. (R. 46.) Later, Ms. Fenty received a notification that her packages containing the xylazine she ordered from Holistic Horse Care were delivered to her P.O. Box. (R. 46.) When she got to the post office on February 14, 2022, to pick up the packages, Ms. Fenty realized that the packages from Holistic Horse Care

were missing, and immediately made two calls to Ms. Millwood. (R. 46.) Ms. Millwood did not answer either call, so Ms. Fenty left two voicemail messages in which she expressed her concern that Ms. Millwood might have been ordering the xylazine for illicit purposes. (R. 46.) After hearing nothing back from Ms. Millwood, Ms. Fenty left the post office, planning to return the next day for her packages. Unbeknownst to Ms. Fenty, Ms. Millwood earlier that day took a one-way flight to Jakarta. (R. 35.)

### B. Ms. Fenty is targeted by the U.S. Drug Enforcement Agency for suspected drug activity solely because of the packages shipped to her P.O. Box by Holistic Horse Care, despite not having any prior knowledge as to the content of the packages.

The U.S. Drug Enforcement Agency ("DEA") first became involved in this case on or about February 12, 2022, through Special Agent Robert Raghavan ("Raghavan"), who is charged with conducting investigations in federal narcotics cases. (R. 28.) On February 12, 2022, Liam Washburn died from a drug overdose in Joralemon. (R. 29.) Washburn's body was found near packages addressed to Holistic Horse Care and partially used syringes, which were later determined to contain a mixture of fentanyl and xylazine. (R. 29.) An autopsy determined that Washburn had a fatal amount of fentanyl in his body at the time of his death. (R. 29.) Raghavan provided testimony that prior to this incident, he had *never* seen an overdose involving horse drugs in his fifteen years on the job. (R. 29.)

After Washburn's overdose, Raghavan contacted Assistant U.S. Attorney Janice Herman to alert her that people might be buying the fentanyl and xylazine mixture from the Holistic Horse Care website. (R. 29.) Raghavan then contacted the Joralemon Post Office and asked that they alert him to any "suspicious, oddly-shaped, or large" packages, or any packages shipped from horse veterinarian websites. (R. 30.)

Acting on these instructions, the manager of the Joralemon Post Office flagged two packages sent by Holistic Horse Care that were addressed to Jocelyn Meyer, P.O. Box 9313. (R. 30.) Two other packages sent from Amazon and addressed to Franny Fenty were delivered to the same P.O. Box (R. 30.). The P.O. Box was opened on January 31, 2022, and was registered to Jocelyn Meyer. (R. 31.)

The typical procedure for when a package is flagged, is that U.S. Postal Inspectors are authorized open them; however, on this occasion, Raghavan took it upon himself to search the packages without any U.S. Postal Inspectors present. (R. 37.) Raghavan obtained a search warrant for the packages and, along with Special Agent Harper Jim ("Jim"), took the packages to a testing facility, where he opened the packages and tested the contents. (R. 31). Inside each package was a bottle labeled "Xylazine: For the Horses" which, when tested, was determined to contain a mixture of xylazine and fentanyl. (R. 31.)

The following day, Raghavan set up a "controlled delivery" of the packages, wherein the Joralemon Postmaster left a slip for Jocelyn Meyer in her P.O. Box, alerting her to pick up her packages from Holistic Horse Care from the front desk. (R. 32.) Raghavan and Jim monitored the Post Office's security cameras from the back room of the Post Office. (R. 32.) When Ms. Fenty arrived at the Post Office for the second time, she read the slip and asked the Postmaster for her packages. (R. 32.) Before the Postmaster handed over the packages, Ms. Fenty confirmed that they belonged to her. (R. 33.) Soon after, Raghavan took the information to AUSA Herman, who obtained a jury indictment for Ms. Fenty, who was arrested for possession with intent to deliver 400 grams or more of a mixture of xylazine and fentanyl. (R. 34.)

After Ms. Fenty's arrest, Raghavan searched her online presence and came across her LinkedIn profile, taking note of a post that Ms. Fenty wrote on December 28, 2021, that Ms.

Millwood commented on. (R. 34.) Raghavan immediately recognized Ms. Millwood's name because the DEA had investigated her in the past for participating in drug dealing. (R. 34.) Despite Raghavan and Jim attempts to contact Ms. Millwood, they were unable to contact her after she fled the country, leaving Ms. Fenty solely on the hook for the drugs delivered to her P.O. Box. (R. 35.)

## II. PROCEDURAL HISTORY

Based upon the foregoing facts, Ms. Fenty was indicted on one count of possession with intent to distribute 400 grams or more of Fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi) on February 15, 2022. (R. 2.)

At trial counsel for Ms. Fenty filed a motion to suppress evidence related to the sealed packages addressed to Ms. Fenty's alias, Jocelyn Meyer, that were seized by the DEA. (R. 10.) A hearing on the motion to suppress was held on August 25, 2022, before Judge Ava Brakman Reiser. (R.10.) The lower court held that Franny's use of her alias destroyed the expectation of privacy she had in the packages, and therefore her motion to suppress the contents of the sealed packages was denied. (R. 17.)

Counsel for Ms. Fenty also filed a motion in limine to exclude evidence of Ms. Fenty's prior misdemeanor petit larceny conviction. (R. 18.) Ms. Fenty pled guilty to a misdemeanor petit larceny charge for stealing a bag from a tourist in Joralemon City Square which contained diapers and 27 dollars in cash. At the time Ms. Fenty was a teenager and was acting on a dare from a friend. (R. 19.) The prosecution argued that the prior conviction was admissible under Federal Rule of Evidence 609(a)(2) because the misdemeanor constituted a dishonest act. (R. 20.) Counsel for Ms. Fenty argued that petit larceny was not admissible as evidence under Rule 609(a)(2), unlike a conviction of theft by deception, which requires the defendant to steal

through deceit. Ultimately, the trial court admitted Ms. Fenty's prior conviction of misdemeanor larceny into evidence, and denied Franny's motion in limine, and the court provided the jury with a limiting instruction relating to the appropriate use of the prior conviction evidence. (R. 66.)

Further, at trial, the prosecution sought to exclude the voicemail messages Ms. Fenty left for Ms. Millwood explaining her confusion over the missing packages. (R. 47.) Counsel for Ms. Fenty argued that the transcripts should be admitted under Rule 803(3) because they constituted Ms. Fenty's "then-existing" state of mind, which showed that she neither knew nor intended to possess with the intent to deliver 400 grams of fentanyl. (R. 48.) However, the district court concluded that the statements were inadmissible under Rule 803(3) because she had time to reflect before recording the voicemails. Ms. Fenty was therefore unable to introduce the voicemail transcripts at trial and was prevented from fully articulating her side of the argument. (R. 52.)

Following the conclusion of trial, Ms. Fenty was convicted on one count of possession with intent to distribute a controlled substance and was sentenced to 10 years in prison. (R. 10.)

Ms. Fenty appealed to the Fourteenth Circuit Court of Appeals, raising three issues challenging her conviction and sentence. First, that she had a standing to raise a challenge to the search of her packages addressed to her alias under the Fourth Amendment. Second, that the recorded voicemail statements should have qualified as hearsay exceptions under Rule 803(3). Third, that the introduction of her prior conviction of misdemeanor petit larceny was improper under Rule 609(a)(2). The Fourteenth Circuit held arguments on April 6, 2023, and affirmed her conviction on June 15, 2023. (R. 64.) Ms. Fenty petitioned for a writ of certiorari which was granted by this Court on December 14, 2023. (R. 74.)

## SUMMARY OF THE ARGUMENT

First, Ms. Fenty has a legitimate expectation of privacy in sealed packages addressed to her alias, Jocelyn Meyer, and therefore has standing to bring a challenge to the government's search of her packages. The Supreme Court has clearly held that individuals can reasonably expect that mail addressed to them will remain private and unopened by the government. Ms. Fenty's use of the alias "Jocelyn Meyer" does not eviscerate her expectation of privacy in the packages addressed to her. Further, Ms. Fenty has sufficiently established "public use" of her alias by using it to publish short stories in college, write novels, and communicate with publishing agencies through the alias Jocelyn Meyer. Taken together, Ms. Fenty has standing to bring a challenge to the constitutionality of the government's search of packages addressed to her alias because she has a legitimate expectation of privacy in the packages, and because she established public use of the alias Jocelyn Meyer. Therefore, evidence sustained from the search should have been suppressed.

Next, Ms. Fenty's voicemail statements should have been admitted as hearsay exceptions under Rule 803(3). Both statements clearly reflect Ms. Fenty's then state of mind, which, if properly admitted, would have made a material difference to her ability to fully present her side of the story. The Fourteenth Circuit improperly inserted a "spontaneity" requirement into the Rule, despite there not being any such express requirement. Even if there was such a spontaneity requirement, Ms. Fenty left the voicemail messages as soon as she became aware that her packages were missing from her P.O. Box. She had no knowledge that the government was investigating her, nor did she have access to counsel, who could have provided her with assistance in framing her statements at the time. Further the total time between her discovering that the packages were missing and when she left the second voicemail was no more than 46 minutes. The recordings reveal Ms. Fenty's confusion as to why the packages were missing and

are relevant to show that she did not have the intent or knowledge to commit a crime under 21 U.S.C. § 841(a)(1). Therefore, even with a spontaneity requirement, the transcripts of the voicemails should have been admitted into evidence under Rule 803(3).

Finally, it was improper to admit evidence of Ms. Fenty's prior petit larceny conviction under Rule 609(a)(2) because her conviction does not bear on the likelihood that she will testify truthfully. Congress created Rule 609 to assist juries in assessing the credibility of witnesses that testify at trial. As such, for criminal defendants, Rule 609(a)(2) is limited to crimes that bear directly on the likelihood that the defendant will testify truthfully and not merely on whether he has a propensity to commit crimes. Generally, crimes of force such as burglary or petit larceny do not bear on a defendant's propensity to testify truthfully, and therefore should not be admitted into evidence. Here, Ms. Fenty's prior petit larceny conviction did not require proving a dishonest act or false statement, the elements of the crime only required proving that she knowingly took the property of another with the intent to use the property as her own. Moreover, Ms. Fenty used force and the threat of force to steal the tourist's bag here, another indication that her prior conviction was not based upon a false statement or dishonest act.

Further, this Court should not expand the scope of Rule 609(a)(2) because it will unfairly prejudice the jury against the defendant in this case and future cases. Studies have shown that juries improperly use prior conviction evidence to determine defendant's guilt or innocence, and that limiting instructions are not followed by juries who in turn convict defendants at much higher rates when prior convictions are entered into the record. Rule 609(a)(2) provides courts with no discretion on whether to admit evidence of past convictions, even when admission of the prior conviction is substantially detrimental to defendants. As such this Court should not expand

the scope of Rule 609(a)(2) and should reverse the decision of the Fourteenth Circuit to admit Ms. Fenty's prior conviction of petit larceny.

## ARGUMENT

### I. MS. FENTY HAS A REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT IN SEALED MAIL ADDRESSED TO HER ALIAS, AND THEREFORE HAS MET THE STANDING REQUIREMENT NECESSARY TO RAISE A CHALLENGE TO THE DEA'S SEARCH OF HER PACKAGES.

The Fourth Amendment protects an individual from "unreasonable searches and seizures" of "persons, houses, papers, and effects" by the government. U.S. Const. Amend. IV. There is inherent tension under the Fourth Amendment between balancing law enforcement's need to protect public safety with safeguarding an individual's liberty interests. One way that the government is restrained from infringing on an individual's liberty is through the exclusionary rule, which declares that evidence is inadmissible if it is secured through unconstitutional searches and seizures. *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court also places limits on an individual's ability to challenge a search by requiring that the individual establish *standing* to bring a challenge to a search or seizure. The rationale behind this limitation is that the protections afforded under the Fourth Amendment are "personal rights which... may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). It is therefore "entirely proper to require of one who seeks to challenge the validity of the search... that he himself was the victim of an invasion of privacy." *Jones v. United States*, 362 U.S. 257, 261 (1960).

To establish standing under the Fourth Amendment, a defendant must satisfy a two-part test articulated by Justice Harlan's concurring opinion in *Katz v. United States.* First, the defendant must establish that he or she had a *subjective* expectation of privacy that the place or

thing would not be searched or seized by the government. *Katz v. United States*, 389 U.S. 347, 361 (1967). Second, the defendant must demonstrate that their subjective expectation of privacy is one that society is prepared to recognize as reasonable. *Id.* Although "not determinative of an expectation of privacy" an individual's property rights "remain conceptually relevant to whether one's expectations are legitimate or reasonable." *United States v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984). It is the defendant's burden to prove that they had a legitimate expectation of privacy in the thing being searched. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

### A. Ms. Fenty has standing to bring a challenge to this search under the Fourth Amendment because she had both a subjective expectation of privacy in the sealed package addressed to her alias, and because the expectation of privacy is one that society is prepared to recognize as reasonable.

#### *1. Ms. Fenty has a subjective expectation of privacy in packages addressed to her alias Jocelyn Meyer.*

Ms. Fenty has a subjective expectation of privacy that packages addressed to her alias would not be searched by the government. Although a "subjective expectation" might seem at first blush to require an inquiry into the defendant's state of mind, the Court is really looking at the "exhibition of an actual expectation of privacy." *United States v. Taborda*, 635 F.2d 131, 137 (2d Cir. 1980). Accordingly, to determine a defendant's subjective intention, the court looks to whether "the defendant acted in such a way that it would have been reasonable for him to expect that he would not be observed." *Id.*

Here, Ms. Fenty's actions clearly demonstrated her subjective expectation that her packages would not be searched. Ms. Fenty opened her P.O. Box at the Joralemon Post Office under the name "Jocelyn Meyer" and soon thereafter had packages shipped to her P.O. Box from Holistic Horse Care and Amazon. There is nothing in the record that indicates Ms. Fenty would have had any reason to suspect that her packages would be searched. In fact, Ms. Fenty was

surprised to learn that her packages had been held by the Post Office instead of automatically being delivered into her P.O. Box. If Ms. Fenty considered that using her alias would be cause for the government to search her packages, she probably would have had them addressed to her given name instead. Ms. Fenty easily satisfied the first prong of the *Katz* test by demonstrating her subjective expectation that her packages would not be searched, because her actions clearly indicate that she did not expect that a search would take place.

### *2. Ms. Fenty's expectation of privacy is one that society is prepared to recognize as reasonable.*

It is a novel issue in the Fourteenth Circuit Court of Appeals as to whether a defendant's use of a fictitious name when receiving sealed mail eviscerates the individual's right to privacy under the Fourth Amendment. There is a split in authority between circuit courts that have addressed this issue.

When addressing a defendant's privacy interest in sealed mail, the Court has long held that sealed packages are fully protected from examination, comparable to as if the packages were being kept by the sender in their own home. *Ex. parte Jackson*, 96 U.S. 727, 733 (1877). The Fifth and Seventh Circuit Courts of Appeals have explicitly articulated that individuals can assert a reasonable expectation of privacy in packages that are addressed to their fictitious name. *United States v. Villarreal*, 963 F.2d 770 (5th Cir. 1992). There are many acceptable reasons why an individual would choose to send and receive packages using a fictitious name, and the use of a pseudonym is a "common and unremarkable" practice in professional life. *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003). Individuals, therefore, have a justifiable right to employ an alias because "there is nothing inherently wrong with the desire to remain anonymous when sending and receiving mail." *Id*.

The Fifth Circuit was clear to distinguish a fictitious name from an alter ego, which would not be entitled to privacy rights under the Fourth Amendment. *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992). Likewise, the Fourth Circuit has held that an individual cannot successfully claim a privacy interest in the contents of a package addressed to actual third parties. *Givens*, 733 F.2d at 341. Crucially, the Second Circuit Court of Appeals has consistently held that the illegal nature of the defendant's activity *does not* make their expectation of privacy unreasonable. *United States v. Fields*, 113 F.3d 313 (2d Cir. 1997), and *Taborda*, 635 F.2d at 138. The policy behind this is that the Court does not want to encourage unconstitutional searches by justifying the searches after the fact if illicit substances happen to be found.

Other appellate courts have not been willing to extend the expectation of privacy to those receiving packages under a fictitious name. The Fourth Circuit Court of Appeals has found that, for packages *not* addressed to the defendant, "absent other indicia of ownership, possession, or control of the package" there is no reasonable expectation of privacy. *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021).

The Fourteenth Circuit Court of Appeals cites two cases which support its conclusion that the defendant would not have a privacy interest if their alias was part of a criminal scheme. In *United States v. DiMaggio*, the court relied on the theory that the defendant in that case abandoned the package and could not assert a cognizable Fourth Amendment claim in it. 744 F. Supp. 43, 46 (N.D.N.Y. 1990). In *United States v. Daniel*, the defendant "disavowed the package in question" by "consistently claiming he was not the addressee." *United States v. Pitts*, 322 F.3d at 457 (distinguishing *Daniel* from *Pitts)*. This argument is an understandable one: if a defendant is going to great lengths to distance themselves from a crime by refusing to acknowledge that

they own a package, then it is reasonable that a court would not find a meaningful privacy interest in the same package that they are attempting to disassociate themselves from.

However, both cases conflict with settled law in the Fifth Circuit that a defendant has a privacy interest in packages addressed to their alias. Further, *DiMaggio* and *Daniel* are distinguishable from the present case because Ms. Fenty neither abandoned her packages nor claimed that she was not the owner of them. In fact, Ms. Fenty affirmatively asserted her ownership interest by first claiming the packages from the Post Office and then verbally affirming to the Postmaster that the packages belonged to her.

In this case at bar, the Court should follow well-established precedent in the Fifth and Seventh Circuit Courts to find that Ms. Fenty's expectation of privacy in packages mailed to her alias was one that society is prepared to recognize as reasonable. Ms. Fenty, along with many others, uses her alias for privacy purposes in both her professional and personal life. "Jocelyn Meyer" was neither an alter-ego nor a third party, which, as established above, appellate courts have declined to extend an expectation of privacy. *Pierce*, 959 F.2d at 1303, and *Givens* 733 F.2d at 341. Appellate courts have supported the principle that the Fourth Amendment unequivocally protects the privacy of sealed mail and packages from invasion by the government. Ms. Fenty's use of her alias to accept mail should not diminish her expectation of privacy because using an alias is a generally acceptable practice that should not determine whether an individual will be subject to a governmental search and seizure.

The prosecution argues that Ms. Fenty's expectation of privacy is not one that the court should recognize as reasonable because, they allege, she used her alias solely for the purpose of covering up her receipt of illicit narcotics. However, the analysis does not turn on whether Ms. Fenty's activities were "innocent or criminal." *Fields*, 113 F.3d at 321. In other words, this Court

should follow well-established precedent which directs the Court to set aside the nature of the defendant's activities. Regardless of whether Ms. Fenty's activities were illegal, the Court should recognize her privacy interest in sealed mail addressed to her alias.

### B. Even if this Court does not recognize a categorical privacy interest in Ms. Fenty's use of her alias, Ms. Fenty sufficiently established "public use" of her alias, which some courts have recognized a privacy interest in.

Even in courts that have not recognized a privacy interest in an individual's use of an alias, the majority of those courts have found that the defendant may still have a privacy interest if they establish "public use" of the alias, or in other words that the individual was commonly known by that name; effectively that the defendant and their alias are essentially the same person. *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993). The rationale behind this exception is that if an individual is representing to society that they are "one and the same" as their alias, the privacy interest should extend to the alias that they are representing themselves to be as well.

Here, Ms. Fenty clearly established public use of the alias "Jocelyn Meyer." She began using the alias in college, years prior to this incident, to publish stories in her college magazine. Post-college, she continued to use the alias when writing novels, and sent drafts to multiple publishing agencies exclusively under her alias. Notably, she communicated with no less than five publishing agencies exclusively under the alias Jocelyn Meyer, indicating that she wanted them to know her only by that name.

The government contends that the only reason that Ms. Fenty used her alias was to conceal her identity, and thus destroy the connection between herself and the narcotics that she was ordering, which, they argue, does not constitute an expectation of privacy that society is prepared to recognize as reasonable. However, the expectation of privacy does not turn on the

activities of the defendant, whether innocent or criminal. Further, this is a flawed assumption because the record illustrates that Ms. Fenty employed her alias time and again, which demonstrates that Ms. Fenty took steps to establish public use of her alias. Therefore, even if this Court does not categorically recognize a privacy interest in defendants who use an alias, the Court should still find that Ms. Fenty had a reasonable expectation of privacy because she sufficiently established public use of her alias.

Thus, Ms. Fenty has standing to bring a claim under the Fourth Amendment because she has both a subjective expectation of privacy in sealed packages addressed to her alias, and the expectation of privacy is one that society is prepared to recognize as reasonable. Moreover, Ms. Fenty sufficiently established "public use of her alias" which is adequate to establish a privacy interest even in jurisdictions which do not categorically recognize a privacy interest in the use of a fictitious name.

## II. MS. FENTY'S RECORDED VOICEMAIL STATEMENTS WHICH SHOW SHE PURCHASED XYLAZINE TO HELP HORSES SHOULD BE ADMITTED UNDER RULE 803(3) BECAUSE THEY MEET THE EXPRESS REQUIREMENTS OF RULE 803(3) AND WERE MADE WITHIN ONE HOUR OF DISCOVERING THAT THE PACKAGES WERE INTERCEPTED.

### A. Ms. Fenty's recorded voicemail statements meet the express requirements of Rule 803(3) because they reflect her "then-existing" mental state and were not made as a statement of memory or belief.

An out-of-court statement expressing the declarant's "then-existing" state of mind may be admissible in court so long as the statement complies with the provisions of Federal Rule of Evidence 803(3). The rule reads as follows:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
> * * *
> **(3) Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or

> emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Fed. R. Evid. 803(3). On its face, Rule 803(3) only requires an out of court statement show the "then-existing" state of mind of the declarant. *Id.* There is one exception included within the express provisions of the rule, and that exception does not allow statements of memory or belief to prove the fact remembered to be introduced. *Id.* This exception is "necessary to avoid the virtual destruction of the hearsay rule which could otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." *United States v. DiMaria*, 727 F.2d 265, 270-71 (2d Cir. 1984) (quoting Advisory Committee notes to Rule 803(3)). Here, the Fourteenth Circuit Court of Appeals found that the voicemail statements were relevant to the case at hand, holding "the statements are necessarily relevant because they call into question Defendant's awareness of an illicit drug scheme." (R. 68.) The statements point not to the truth of the matter but as to Ms. Fenty's state of mind that she did not "*knowingly* or *intentionally* . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, [fentanyl]. . . ." *See* 21 U.S.C. § 841(a)(1) (emphasis added). Therefore, the exception to the exception does not apply here.

Despite meeting the express requirements of Rule 803(3), the Fourteenth Circuit Court of Appeals refused to admit the voicemail statements because "Defendant should not be rewarded for making self-serving statements that may mislead the finders of fact." (R. 69.) The court, on its own initiative, read into Rule 803(3) an additional requirement that the statements be made spontaneously. (R. 68.) This decision was based upon the premise that "[t]he more time that elapses between the declaration and the period about which the declarant is commenting, the less

reliable is [her] statement. . . ." (R. 69.) (quoting *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980)). However, "[t]here is, of course, no authority for adding an additional 'trustworthiness' requirement to Rule 803(3)." 30B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 6834 (2023 ed.).

The judicial appraisal of the "trustworthiness" of a declarant's statement on the basis of there being an "ample opportunity to reflect on the situation" has no backing within the requirements of Rule 803(3). *Id.* Such an appraisal actually interferes with the jury's role to determine the reliability or validity of evidence presented. *See DiMaria*, 727 F.2d at 271 (dismissing an Assistant United States Attorney's objection to remarks that were "an absolutely classic false exculpatory statement" and admitting said remarks because it "fell within Rule 803(3)" and "its truth or falsity were for the jury to determine"). Further, a judicial predetermination on the truthfulness of the remarks is contrary to the presumption of innocence given to every defendant charged in a criminal case by withholding such a determination from the jury.

As such, "statements are inadmissible under Rule 803(3) not because they are 'less likely to be reliable,' but rather because the text of Rule 803(3) requires statements of a 'then-existing' state of mind." 30B Wright & Miller, *supra*, § 6834. It is on this basis that the Fourteenth Circuit Court of Appeals erred when it granted the government's motion to exclude the transcripts of Ms. Fenty's voicemails to Angela Millwood because they meet the "then-existing" requirement of Rule 803(3).

In *United States v. DiMaria*, the Second Circuit Court of Appeals allowed a defendant's statements that he believed the cigarettes he purchased cheap were bootlegged cigarettes when they were actually stolen from a truck by associates of the defendant several days previously.

727 F.2d at 267-68. There, as in the present case, the government sought to exclude evidence of the defendant's statement relevant to his "then-existing" state of mind because "it was an absolutely classic false exculpatory statement." *Id.* at 271. Compare with the argument made by the Assistant United States Attorney before the trial court in this case: "Here, the defendant had time to reflect. . . . mak[ing] it much more likely that the statement is fabricated and self-serving. Such a statement should not be admissible because it does not reflect a *true* then-existing mental state." (R. 48.) (emphasis added). Judge Friendly, writing for the *DiMaria* court, dismissed the government's argument in that case because the defendant's statement at the time of his arrest that he had bought cheap cigarettes showed his "then-existing" belief that the cigarettes were only bootlegged cigarettes and was therefore sufficient to be admitted under Rule 803(3) regardless of how false the statement may appear. 727 F.2d at 271. This Court should hold the same and find that Ms. Fenty's statements to Angela Millwood indicating that she purchased the xylazine for the horses because they show her "then-existing" state of mind and whether, at first blush, the statement may seem to lack credibility has no role in deciding whether evidence is admissible under Rule 803(3).

Moreover, this Court should recognize that the expressed concerns by the government that the introduction of the transcripts of Ms. Fenty's voicemails to Angella Millwood will "mislead the jury into thinking that the defendant truly had no idea that the xylazine was laced with fentanyl"[1] can be remedied through the proper use of Federal Rule of Evidence 403. Under the Rule, "[t]he court may exclude relevant evidence if its probative value is substantially

[1] It is important to note that Ms. Fenty's entire defense has been established on the basis that she purchased xylazine solely for the purpose of helping care for horses at a local horse stable and was entirely unaware of Ms. Millwood's illicit drug schemes. The government's concern that Ms. Fenty's evidence will persuade the jury into believing Ms. Fenty over the narrative created by the prosecution is in direct conflict with the basic principles of an adversarial system of justice where the fact finder is presented with two separate narratives and must, based on all the evidence presented, make a factual determination.

outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. As such, through the use of Rule 403, the prosecution can seek that the court exclude evidence, admitted under Rule 803(3), which may cause "unfair prejudice" or might "mislead the jury." *Id.* Such an analysis must be conducted in adherence to the caselaw applying Rule 403, not under a lower standard created by reading a spontaneity requirement into Rule 803(3).

### B. Ms. Fenty's voicemail statements are admissible under the Fourteenth Circuit's three-prong test because the voicemails are relevant to her state of mind, were made contemporaneously with the events at issue, and she only had less than an hour to reflect.

In upholding the government's motion to exclude the voicemail transcripts from the record under Rule 803(3), the Fourteenth Circuit Court of Appeals adopted the test outlined by the Seventh Circuit Court of Appeals in *United States v. Jackson*. (R. 68.) Under the *Jackson* test, three elements must be met to allow hearsay statements be admitted into evidence under Rule 803(3): first, the statement must be contemporaneous with the events that defendant seeks to prove; second, the statement must not have allowed the defendant time to reflect (i.e., be spontaneous); and third, the statement must be relevant to the case at hand. 780 F.2d 1305, 1315 (7th Cir. 1986). Both the District Court for the District of Joralemon and the Fourteenth Circuit Court of Appeals concluded that the first and third elements of the *Jackson* rule were met. (R. 52, 68.) There is no dispute here that the voicemail statements were contemporaneous because they seek to show that Ms. Fenty was unaware of why her packages were intercepted at the time she discovered they were not in her P.O. box, and there is also no dispute that the voicemail statements are relevant because they directly address her state of mind as it regards to her knowledge of and intent to participate in an illicit drug scheme. *See* 21 U.S.C. § 841(a)(1)

(requiring a knowing or intentional act). As such, the issue on appeal is contained solely to the second element of the *Jackson* test: the spontaneity requirement.

The spontaneity requirement is based on the premise that "[t]he more time that elapses between the declaration and the period about which the declarant is commenting, the less reliable is [her] statement. . . ." *Ponticelli*, 622 F.2d at 991. As such, courts which have added the spontaneity requirement to Rule 803(3) hold that "Rule 803(3) permits admission of such statements where, among other things, the statements have occurred contemporaneous with the event sought to be proved and Defendant did not have a chance to reflect (*i.e.*, Defendant had no time to fabricate or misrepresent [Defendant's] thoughts)." *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001). Under such a scheme, a statement is only admissible when the court determines that the declarant did not have opportunity to fabricate a false statement in her favor.

In *United States v. Jackson*, the Seventh Circuit Court of Appeals refused to admit into evidence under Rule 803(3) statements recorded by an associate of the defendant wearing a hidden microphone. 780 F.2d at 1313. The Seventh Circuit held that the statements were not admissible because there was time for the defendant to reflect and make self-serving statements which did not represent the truth of the matter. *Id.* at 1314. The statements were made two years after the events that were at issue, and the defendant knew that a grand jury had already subpoenaed records related to the matter. *Id.*

The Ninth Circuit Court of Appeals in *United States v. Ponticelli* did not allow a hearsay statement to be admitted under Rule 803(3) because of the spontaneity requirement. 622 F.2d at 992. In that case, the defendant made the statement after he was arrested and aware that he was being investigated. *Id.* at 991. As well, he already acquired legal representation by the time he made the statement sought to be entered into evidence under Rule 803(3). *Id.*

Further, in *United States v. Reyes*, the Fifth Circuit Court of Appeals also excluded the introduction of evidence under Rule 803(3) on the ground that the spontaneity requirement was not met. 239 F.3d at 743. The statement made in *Reyes* was a recording made at a point in time where the informant, who made the recording and had been approached by law enforcement and agreed to cooperate, was already suspected by the defendant to have agreed to cooperate with the authorities. *Id.* And the statement made by the defendant and recorded by the informant took place more than four months following the conduct at issue. *Id.*

Distilling the reasoning and the facts used by the *Jackson*, *Ponticelli*, and *Reyes* courts to determine that certain hearsay statements were not admissible under Rule 803(3) because they were not made spontaneously, we can come up with three factors the courts considered: (1) the time between the statement and the period at issue; (2) the degree to which the declarant was aware that law enforcement was involved when making the statement; and (3) whether the declarant had obtained legal representation at the time the statement was made. In the case of Ms. Fenty's voicemails, the facts are so distinguishable from the facts of *Jackson*, *Ponticelli*, and *Reyes* that it clearly follows that none of the factors are met here.

On February 14, 2023, after receiving confirmation that her packages from Holistic Horse Care were delivered, Ms. Fenty went to the Joralemon Post Office to pick up the packages but found the P.O. Box empty. (R. 46.) Upon this discovery, Ms. Fenty called Angela Millwood who failed to pick up the phone and as a result Ms. Fenty left her first voicemail message indicating her confusion as to what was happening. (R. 46.) Ms. Fenty then waited forty-five minutes for Ms. Millwood to call her back before trying to reach her a second time. (R. 46.) During that same period, Ms. Fenty inquired with postal workers as to the status of her packages and she was informed to come back the next day because they were not sure of their status. (R.

40.) With no call back from Ms. Millwood, Ms. Fenty made one last attempt to reach her to no success, and Ms. Fenty left one last voicemail. (R. 46.) It is clear from the facts that there was little time if any for Ms. Fenty to fabricate her first voicemail to Ms. Millwood and barely forty-six minutes to consider what to say during the second. Moreover, it was not Ms. Fenty's intention to leave voicemails, her purpose was to speak with Ms. Millwood. Forty-six minutes is significantly shorter in duration to the two-year difference or the four-month lapse in time between the statements made in *Jackson* and *Reyes*, respectively.

When Ms. Fenty discovered that her packages were missing and recorded the two voicemails, she had no knowledge that she was currently being investigated by law enforcement. Ms. Fenty was concerned about Ms. Millwood's intent and use of the xylazine; however, this fear was based off of a recent article she had read that commented on the illicit use of xylazine by mixing it with fentanyl. (R. 45-6.) Comparatively, in *Jackson* the defendant was aware he was being investigated because by the time he made his statements a grand jury had already subpoenaed documents from his company; in *Ponticelli* the defendant's statement was made *after* he was arrested; and in *Reyes* the defendant had suspicions that his acquaintance was serving as an informant for the government at the time he made his statements.

Lastly, and the easier factor to prove as unmet, was whether Ms. Fenty had taken on legal counsel by the time she left her two voicemails with Ms. Millwood. The simple fact of the matter was that Ms. Fenty went to the post office when she was notified the packages had been delivered to her P.O. Box. She had no legal representation until she was charged with a crime under 21 U.S.C. § 841(a)(1) which could result in ten years imprisonment.

For the foregoing reasons, it is clear that there was not sufficient time, knowledge that she was being investigated, or access to legal representation to assist her when recording her

voicemails to indicate that these statements were anything but spontaneous. The Fourteenth Circuit erred both by applying the *Jackson* test's spontaneity requirement (an additional bar added to the express provisions of Rule 803(3) by the courts) and further compounded upon that error by failing to apply the spontaneity element's three factors as they were applied by the *Jackson*, *Ponticelli*, and *Reyes* courts before it. As such, this Court should reverse the Fourteenth Circuit Court of Appeals' decision to exclude the transcripts of Ms. Fenty's two voicemails to Ms. Millwood because such a construction of the rule will limit nearly any kind of hearsay statements to be admitted unless they meet exacting and unreasonable spontaneity standards.

## III. IT WAS NOT PROPER TO ADMIT THE PRIOR PETIT LARCENY CONVICTION UNDER RULE 609(A)(2) BECAUSE THE CONVICTION DID NOT BEAR ON THE LIKELIHOOD THAT MS. FENTY WILL TESTIFY TRUTHFULLY AND IT WILL UNDULY PREJUDICE THE JURY.

Federal Rule of Evidence 609 allows the use of prior criminal convictions to attack a testifying witness's character for truthfulness. Fed. R. Evid. 609. For defendant witnesses in criminal cases, the rule requires a defendant's prior conviction be admitted into evidence when the nature of the conviction falls into one of two categories: (1) any crime that was punishable by death or by imprisonment for more than one year when the probative value of the conviction outweighs its prejudicial effect to that defendant or (2) any crime which required proving a "dishonest act or false statement" to establish the elements of the crime. *Id.*

As defined by the Congressional conference committee which drafted the final version of Rule 609, the phrase "dishonest act or false statement" means crimes "in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992) (quoting H.R. Rep. No. 93-1597, at 9 (1974) (Conf. Rep.)). The second prong of Rule

609 has thus been restricted to convictions that "bear directly on the likelihood that the defendant will testify truthfully (and not merely on whether he has a propensity to commit crimes)." *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977).

Here, the statutory elements of Ms. Fenty's prior conviction of petit larceny did not require proving a "dishonest act or false statement" for her to be convicted of the crime of petit larceny nor did Ms. Fenty commit the theft through the use of deceit, instead she engaged in a crime of stealth that resulted in the use of force and the threat of force, activities which do not constitute a dishonest act. This Court should reverse the holding of the Fourteenth Circuit Court of Appeals because the introduction of Ms. Fenty's prior conviction into the record does not serve any probative value as to her character for truthfulness and because the introduction of the prior conviction will unduly prejudice the jury against Ms. Fenty.

### A. **Ms. Fenty's petit larceny conviction does not bear on the likelihood that she will testify truthfully because the conviction did not require a showing of a dishonest act or false statement and Ms. Fenty committed the theft as a crime of force and stealth.**

There is no question to the admissibility of crimes such as perjury, false statement, criminal fraud, embezzlement, or false pretense under Rule 609(a)(2) because they were among those crimes Congress had in mind for convictions which bear directly on the likelihood that a defendant will testify truthfully. *Cree*, 969 F.2d at 37 (quoting H.R. Rep. 93-1597, at 9 (1974) (Conf. Rep.)). And, on the other end of the spectrum, courts have generally held that crimes of force—such as armed robbery—or crimes of stealth—such as burglary or petit larceny—do not bear on the defendant's propensity to testify truthfully and therefore do not come within the clause of Rule 609(a)(2). *See Hayes*, 553 F.2d at 827 (citing *United States v. Smith*, 551 F.2d 348, 362-65 (D.C. Cir. 1976) and *Virgin Islands v. Testamark*, 428 F.2d 742, 743 (3d Cir. 1976));

*see also United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977) (holding a prior conviction for petit larceny is not *per se* admissible under Rule 609(a)(2)).

***1.*** **Ms. Fenty's misdemeanor petit larceny conviction under the Boreum Penal Code did not require a showing of a dishonest act or false statement but only (1) that she knowingly took the property of another and (2) with the intent to use the property as her own.**

The express language of Federal Rule of Evidence 609(a)(2) requires a court to admit evidence of a prior conviction when "the court can readily determine that *establishing the elements* of the crime required proving . . . a dishonest act or false statement." Fed. R. Evid. 609(a)(2) (emphasis added). Adhering to the command of the text of Rule 609 and the intent of the draftsmen, certain circuit courts of appeals have held that theft crimes, such as petit larceny, are *per se* not admissible under Rule 609(a)(2). *See Ortega*, 561 F.2d at 806; *Testamark*, 528 F.2d at 743.

Following the textual analysis of the Ninth and Third Circuit Courts of Appeal, it is clear that petit larceny under the Boerum Penal Code did not require the prosecution to prove beyond a reasonable doubt that Ms. Fenty committed a dishonest act or a false statement. "A person is guilty of petit larceny when that person knowingly takes, steals, carries away, obtains, or uses. . . any personal property of another with intent to. . . [a]ppropriate the property as his or her own. . . ." Boerum Penal Code § 155.25. The text of the statue requires the proof of a certain act (take, steal, carry away, obtain, or use) of the property of another person and that there was intent to appropriate the property as her own. Completely absent from the statute is an element requiring that a person perform a dishonest act or a false statement to be convicted of petit larceny.

Further emphasizing the complete absence of a false statement or dishonest act in the nature of Ms. Fenty's conduct back in 2016 was the opportunity for prosecutors to charge her with theft by deception instead of petit larceny. Under the Boerum theft by deception statute, a "person is guilty of theft of property by deception when that person knowingly *and with deceit* takes, steals, carries away, obtains, or uses. . . any personal property of another with intent to. . . [a]ppropriate the property as his or her own. . . ." Boerum Penal Code § 155.45 (emphasis added). Here, unlike the statute for petit larceny, it would have been a requirement for conviction of theft by deception for the prosecution to have proved beyond a reasonable doubt that a defendant acted with deceit. The statute establishes that a person deceives if he intentionally: "leverages a false impression," "[p]revents another from obtaining material information that would impact his or her judgment," or "[f]ails to correct a false impression that the deceiver previously created. . . ." *Id.* Such a conviction would then serve as a reasonable basis to provide the jury with probative information as to the credibility of a defendant because the acts that constitute deception under the statute are all indicative of a willingness to defraud. In the end, however, Ms. Fenty was not charged with theft by deception but petit larceny – a misdemeanor crime that courts have found to be *per se* inadmissible under Rule 609(a)(2). *See Ortega*, 561 F.2d at 806; *Testamark*, 528 F.2d at 743.

***2. In broad daylight and out in public, Ms. Fenty used physical force and the threat of force to take a bag containing $27 and a couple diapers, resulting in a misdemeanor conviction for petit larceny.***

Even when the nature and essential elements of a crime do not require proof of a dishonest act or false statement, some courts have allowed such crimes to be entered into evidence when the manner in which the defendant committed the crime involved deceit. *See Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989). As such, when

considering whether a prior conviction may be admissible under Rule 609(a)(2), courts may "look beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statement." *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998).

Such an analysis that looks beyond the elements of the offence must be conducted with care. Unlike for crimes that may be admitted when the sentence is imprisonment for more than a year or death, Rule 609(a)(2) provides the trial court with no discretion as to whether it may or may not admit the prior conviction for a crime that involves a dishonest act or false statement. Fed. R. Evid. 609(a)(2). "Because [609(a)(2)] is quite inflexible, allowing no leeway for consideration of mitigating circumstances, it was inevitable that Congress would define narrowly the words 'dishonest[ act] or false statement,' which, taken at their broadest, involve activities that are part of nearly all crimes." *Hayes*, 553 F.2d at 827. The focus must be to find facts which are probative of a witness's character for truthfulness "(and not merely on whether he has a propensity to commit crimes)." *Id.*

When the title and elements of an offense leaves room for doubt whether that crime will bear directly on the likelihood that the defendant will testify truthfully, it is the burden of the prosecutor seeking to use automatic admission of a prior conviction to demonstrate to the court "that a particular prior conviction rested on facts warranting the dishonesty or false statement description." *Id.* (quoting *Smith*, 551 F.2d at 364, n.28.). Thus, when a prosecutor fails his burden to demonstrate that the facts upon which the crime was committed involved a dishonest act or false statement, the crime is not admissible under Rule 609(a)(2).

In *United States v. Hayes*, the Second Circuit Court of Appeals considered whether a prior conviction for the importation of cocaine was automatically admissible under the second

prong of Rule 609. The court reasoned that "[i]f this importation involved *nothing more than stealth*, the conviction could not be introduced under the second prong. If, on the other hand, the importation involved false written or oral statements, for example on customs forms, the conviction would be automatically admissible." *Id.* at 827-28 (emphasis added). Because the court had no other facts beyond the fact of the conviction itself, the court held that the prosecution failed in its burden to show facts upon which the crime was committed that involved a dishonest act or false statement.[2] *Id.* at 828.

In *Altobello v. Borden Confectionary Prods., Inc.*, the Seventh Circuit Court of Appeals considered whether a prior conviction for misdemeanor theft constituted a crime involving a dishonest act or false statement. The facts from the record show that the theft conviction resulted from the tampering of electric meters recording the usage of electricity at several McDonald's franchises in the Chicago area in order to reduce their electric bills. *Altobello*, 872 F.2d at 217. Here, the Court found that the theft was committed through deception. "An electric meter is not like a vending machine or a pay telephone, which you can jimmy to get out the coins. Tampering with an electric meter means altering the meter so that it records less use than the user is actually making of it." *Id.* As such, the prior conviction of misdemeanor theft, committed through meter tampering, was admitted under Rule 609(a)(2).

Ms. Fenty pled guilty to misdemeanor petit larceny in 2016 after she stole a bag containing $27 in cash and diapers from the hands of a tourist. (R. 54.) Her attempt at theft was prompted by an impromptu dare from a friend made in the heat of the moment while the two teenagers were spending time in Joralemon City Square. (R. 52, 54.) As such, Ms. Fenty made an attempt to grab a bag from a tourist in the square but was immediately caught. (R. 52.) When

[2] The Second Circuit did admit the prior conviction for importation of cocaine under Rule 609(a)(1) holding that the probative value did was not seriously outweighed by any undue prejudice to the defendant. *Hayes*, 553 F.2d at 828.

the tourist refused to let go of her bag and started screaming, Ms. Fenty became scared and pushed the tourist back and threatened to harm her which resulted in her letting go of the bag. (R. 53.) Ms. Fenty ran off with the bag and was caught by the police a couple blocks away. (R. 54.) At no point did Ms. Fenty attempt to deceive the tourist into willingly giving up her bag. The facts of this case are entirely different from those of *Altobello* where a prior conviction for misdemeanor theft was admitted. Here, unlike in *Altobello*, the theft was committed by force not through a systemic effort to deceive and provide false information to a meter reader as to what was stolen.

Despite the clear forceful nature of the petit larceny committed by Ms. Fenty eight years ago, the government would like the Court to believe that this was really an act of deception. Their narrative fails. And it fails for the simple fact that what they attempt to portray as being an act of deceit is truly an act of stealth. In *United States v. Estrada*, the Second Circuit Court of Appeals recognized a clear distinction between crimes of stealth and crimes that involved dishonesty. *Estrada* concerned prior convictions for larceny that resulted from shoplifting and the government sought to include the conviction under Rule 609(a)(2). *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). The Second Circuit did not find that the evidence was admissible under Rule 609(a)(2) noting that the shoplifter did not commit a dishonest act simply because he took evasive action to avoid being caught. *Id.* "While much successful crime involves some quantum of stealth, all such conduct does not, as a result, constitute crime of dishonesty or false statement for purposes of Rule 609(a)(2)." *Id.*

Here, the government attempts to portray Ms. Fenty's conduct as deceitful because she took elusive action to avoid being caught. The government points out that Ms. Fenty quietly walked up to the tourist while she was watching an Elmo performer in the city square, and that

Ms. Fenty hoped the tourist would not notice that her bag was taken. However, just as the shoplifter in *Estrada* took elusive action to avoid being caught, both his and Ms. Fenty's actions were appropriately categorized as crimes of stealth. The Fourteenth Circuit Court of Appeals erred in holding that this elusive behavior bears on Ms. Fenty's character for truthfulness, and this Court should reverse and hold in accordance with *Estrada* that the prior petit larceny conviction is not admissible under Rule 609(a)(2).

### B. <u>This Court should not expand the reach of Federal Rule of Evidence 609(a)(2) because such an act will unduly prejudice juries against defendants who will invariably be viewed as having a proclivity to commit crimes upon the admittance of a prior conviction with very little probative value at to the defendant's character for truthfulness.</u>

The government argues that a Rule 105 limiting instruction would cure any unfair prejudice suffered by admitting into evidence an eight-year-old misdemeanor conviction for petit larceny that Ms. Fenty pled guilty to after she took a bag containing $27 and diapers. (R. 25.) However, this argument must assume that Rule 105 limiting instructions are followed by juries to prevent misuse of evidence admitted into the record for purposes other than determining guilt.

Rule 105 provides that "[i]f the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly." Fed. R. Evid. 105. Rule 105 is intended to prevent the misuse of evidence for a purpose outside of its proper scope, but to achieve the rule's purpose there must be a presumption that both the court will limit the evidence to its proper scope *and* jurors will follow the court's limiting instructions on the use of the evidence. Considering the use of a Rule 105 instruction in cases where evidence of a defendant's prior conviction is admitted under Rule 609, we must presume that the jury will actually limit its use of the knowledge of the prior conviction and abstain from

weighing defendant's guilt on the basis of defendant's prior conviction. This presumption is not warranted on the basis of any legal standard requiring such a presumption nor is the presumption supported by professional studies on jury behavior and adherence to limiting instructions.

This Court, in *Bruton v. United States*, 391 U.S. 123 (1968), has already disposed of the rule of unfailing belief that the jury will always follow the court's instructions. To highlight this shift, prior to *Bruton*, the Court had reasoned that "[u]nless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957). The *Bruton* Court recognized that such an absolute rule could not be justified when great prejudice can be done by juries who fail to follow court instructions. "Nevertheless . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 393 U.S. at 135. Following *Bruton*, there is no longer an absolute presumption that court instructions, such as a Rule 105 limiting instruction, will always be followed by the jury.

Further, the effectiveness of curative instructions for juries confronted with prior conviction impeachment evidence of a testifying defendant has been scrutinized both by legal researchers and practitioners alike, with some legal articles even calling for the suspension of Rule 609 practice of using impeachment evidence against defendant witnesses. *See* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L. Rev. 1 (1999).

In 1975, Professor Valerie Hans and Professor Anthony Doob studied the effectiveness of curative instructions given by the court and intended to be followed by the jury.[3] The study was conducted by having thirty simulated juries read the description of a burglary and the evidence in the case. Dodson, *supra*, at 35. Fifteen groups were informed that the defendant had a prior burglary conviction and given a limiting instruction to only use the burglary conviction to assess the credibility of the defendant and not to infer that because he previously committed burglary that he must have committed the burglary he is charged with currently. *Id.* at 35-36. The remaining groups were not informed about any prior convictions. *Id.* at 36. Each of the fifteen groups that did not hear of the prior conviction for burglary acquitted the defendant of the charge, however, six of the groups that did hear of the prior charge found him guilty of burglary. *Id.* Moreover, recordings of the simulated jury deliberations for those juries that had knowledge of the prior conviction showed that they used the evidence of the prior conviction not to determine his credibility but to determine his guilt or innocence. *Id.* Professors Hans and Doob concluded:

> The present research leaves little doubt that knowledge of a previous conviction biases a case against the defendant. The likelihood that a jury will convict the defendant is significantly higher if the defendant's record is made known to the jury. The fact that the defendant has a record permeates the entire discussion of the case, and appears to affect the juror's perception and interpretation of the evidence in the case.[4]

The government argues that the harms studied by Professor Hans and Doob are not present in this case because Ms. Fenty's prior conviction for petit larceny is unrelated to her present charge for intentional possession with intent to distribute 400 grams of fentanyl. However, further research has shown that unrelated prior convictions still bias the jury against

[3] *See* Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim. L. Q. 235 (1975).
[4] *Id.* at 251.

defendants. A study conducted by Roselle Wissler and Saks resulted in findings that show convictions for unrelated offenses increased the likelihood that the jury would find a defendant guilty of an unrelated crime.[5] The result was that juries found the defendant guilty seventy-five percent of the time when the prior conviction was for a similar offense, sixty percent of the time when the defendant was previously found guilty of perjury, 52.5% of the time when the defendant was found guilty of a dissimilar crime, and only 42.5% of the time when no prior conviction was presented to the jury. Dodson, *supra*, at 38.

It is clear from the numerous studies conducted on the matter that prior conviction evidence constitutes real harm to the defendant including much higher rates of conviction even when limiting instructions are provided by the court. As such, this Court should not expand the scope and reach of Rule 609(a)(2) to include offenses with little probative value as to the defendant's character for truthfulness because courts will hereafter be required to admit such crimes to the great detriment of criminal defendants.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourteenth Circuit should be reversed.

Respectfully submitted,

s/o Team 32P
*Counsel for Petitioner*

[5] *See* Roselle L. Wissler & Michael J. Saks, *On the Inefficiency of Limiting Instructions When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 L. & Hum. Behav. 37 (1985).