Team No. 23 R

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 THE RESPONDENT

Attorneys for Respondent

QUESTIONS PRESENTED

I. Under Fourth Amendment standing doctrine, a defendant challenging an unconstitutional search must have a possessory interest in or close connection to the place searched. Petitioner Franny Fenty did not establish possession, ownership, control, or even a connection to the searched packages nor the fictitious name the packages were addressed to. Can Fenty now claim a reasonable expectation of privacy in those packages?

II. Hearsay exception Rule 803(3) of the Federal Rules of Evidence is a specialized application of Rule 803(1), which requires an element of contemporaneousness between the declarant's statement and the unfolding events. Petitioner Franny Fenty left two voicemails some time after discovering the packages missing. Given the time to reflect, can these voicemails be admitted under the Rule 803(3) hearsay exception?

III. Under 609(a)(2) of the Federal Rules of Evidence, evidence of a prior conviction can be admitted to impeach a criminal defendant if the prior crime involved a dishonest act or false statement. Petitioner Franny Fenty targeted a distracted individual and misrepresented her willingness to harm that individual. Given the court's limiting instructions, was impeachment of Fenty for this prior conviction proper?

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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 is below. The relevant statutory provisions include Boerum Penal Code § 155.25 and Boerum Penal Code § 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 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.

In addition, this case involves Rule 609(a)(2) and Rule 803(3) of the Federal Rules of Evidence.

STATEMENT OF THE FACTS

I. Under false names, drug traffickers use the United States Postal Service network to facilitate the transportation of illegal drugs.

In 2023, the United States Postal Service was viewed as the second most trusted agency, only four percentage points behind the National Park Service.[1] But "the Postal Service's reliability makes it an integral part of the nation's growing and lethal drug problem."[2] Drug traffickers often prefer the Postal Service to private carriers or other forms of distribution because of the Postal

[1] J. Baxter Oliphant & Andy Cerda, *Americans Feel Favorably About Many Federal Agencies, Especially the Park Service, Postal Service and NASA*, Pew Rsch. Ctr. (Mar. 30, 2023), https://www.pewresearch.org/short-reads/2023/03/30/americans-feel-favorably-about-many-federal-agencies-especially-the-park-service-postal-service-and-nasa/.

[2] Joe Davidson, *Postal Service—The Preferred Shipper for Drug Dealers*, The Wash. Post (Oct. 16, 2018, 5:43 PM), https://www.washingtonpost.com/politics/2018/10/16/postal-service-preferred-shipper-drug-dealers/.

Service's limited ability to open and search packages.[3] To further insulate themselves from criminal liability, drug traffickers will often list fictitious names, addresses, or other false identification information on packages.[4] In 2023, alone, the United States Postal Inspection Service seized over 16,000 pounds of narcotics—4,038 pounds of that being fentanyl.[5]

Fentanyl is a powerful, synthetic opioid. Increasingly, it is being combined with xylazine, a horse tranquilizer, to produce a potent and deadly new street drug. (R. 7.) Known as "tranq," "tranq dope," and "zombie drug," the fentanyl-xylazine combination poses a new threat to Joralemon, a city in Boerum known for its high concentration of drug-related crime. (R. 65.) *See also* (R. 7, 8, 35–36.)

On February 12, 2022, the fentanyl-xylazine mixture took Joralemon resident Liam Washburn. (R. 29.) Next to his body lay partially used syringes and an opened package sent from a company called Holistic Horse Care. (*Id.*) Expedited lab testing revealed that the syringes contained a mixture of fentanyl and xylazine. (*Id.*) Only three days after Liam's overdose, Drug Enforcement (DEA) Special Agents traced a Holistic Horse Care package containing the fentanyl-xylazine mixture to Petitioner Franny Fenty. (R. 30–35.)

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[3] Off. Of Inspector Gen. U.S. Postal Serv., SAT–AR–18–002, Audit Report: Use of Postal Service Network to Facilitate Illicit Drug Distribution at 11 (Sept. 28, 2018), https://www.oversight.gov/sites/default/files/oig-reports/SAT-AR-18-002.pdf.

[4] *See* Ryan Callihan, *Man Used False Name for Drug Delivery, Feds Say*, Bradenton Herald (Oct. 20, 2017, 4:24 PM), https://www.bradenton.com/news/local/crime/article180036396.html; Mithra Salmassi, *Louisiana Officials Say More Illegal Drugs Being Sent Through the Mail*, P'ship to End Addiction (Sept. 2013), https://drugfree.org/drug-and-alcohol-news/louisiana-officials-say-more-illegal-drugs-being-sent-through-the-mail/ ("[The packages] list disconnected phone numbers, and are addressed to fake names or businesses."); Patrick Buchnowski, *Man Charged with Getting Illegal Drugs by Mail*, The Trib.-Democrat (May 11, 2021), https://www.tribdem.com/news/man-charged-with-getting-illegal-drugs-by-mail/article_4068ab08-b277-11eb-8448-939bdee92579.htm ("Drug dealers who ship drugs through the mail often list . . . a false sender's name.").

[5] *Combating Illicit Drugs in the Mail*, United States Postal Inspection Service, https://www.uspis.gov/combating-illicit-drugs-in-the-mail (last visited Feb. 4, 2024).

II. Fenty created the Jocelyn Meyer name months after her petit larceny conviction but has only used it in a few isolated instances.

When Franny Fenty was nineteen years old, she pled guilty to a petit larceny misdemeanor. (R. 54.) On a dare from a friend, Fenty attempted to steal a diaper bag from a woman. (R. 59.) The woman was watching a Elmo street performer when Fenty walked quietly over to the woman. (*Id.*) As Fenty tried to take the bag unnoticed, the woman yelled for her to stop. (*Id.*) Instead of letting go, however, Fenty forcibly pulled the bag back, lightly pushed the woman, and threatened her, saying "Let go or I'll hurt you." (R. 59–60.) Yet, Fenty never meant to hurt the woman and only pushed her to grab the bag. (R. 60.)

Now, Fenty is an unemployed resident of Joralemon. (R.42.) A self-proclaimed writer, she has published two short stories and written five novels under the pen name Jocelyn Meyer. (R. 42.) The short stories were published in her university's creative writing magazine just a few months after her petit larceny conviction, but her novels remain unpublished, despite Fenty's several attempts to contact publishers. (R. 42.) In 2021, she emailed four publishers as Jocelyn Meyer, using the email address jocelynmeyer@gmail.com, but received no responses. (R. 42–43.) Since the emails to publishers, Fenty has not used the Meyer name in furtherance of her writing career.

III. After conspiring with a high school classmate to "help the horses," Fenty used the Meyer name to open a P.O. Box to order xylazine.

In late December 2021, Fenty created a LinkedIn post titled "Open to Work." (R. 6.) In the post, Fenty claimed that, along with having worked in the writing and service industry, she had "some experience working with animals." (*Id.*) Angela Millwood, a Horse Handler at Glitzy Gallop Stables and Fenty's high school classmate, commented on the post. (R. 6, 43.) Millwood asked Fenty to "shoot [her] a message" because she could "help [Fenty] out." (R. 6.) The two then exchanged numbers and began talking from "time to time." (R. 44.) During these conversations,

Angela and Fenty devised a plan where Fenty would help Angela get xylazine. (R. 45.) Fenty alleges that Angela planned to use the xylazine, a muscle relaxer, to help older horses at her stable who were in pain. (R. 44–45.) Angela claimed that she could not order the xylazine herself because of her job at the stable. (R. 45.) That same month, Fenty opened P.O. Box 9313 at the Joralemon Post Office under the Jocelyn Meyer pen name.[6] *See* (R. 43.)

Two weeks after she opened the 9313 P.O. Box, Fenty received the shipper's delivery confirmation for the two Holistic Horse Care packages. (R. 46.) When she arrived at the Post Office to pick them up, however, the packages were not in the P.O. Box. (R. 46.) Fenty then called Millwood—twice. (*Id.*) Because Millwood did not answer, Fenty left two voicemails, approximately forty-five minutes apart. (R. 39–40.)

In Fenty's first voicemail to Millwood, which is timestamped 1:32 PM, Fenty informed Millwood of the missing packages and expressed concern over their absence:

> Angela, I just got to the Post Office. None of the packages I was expecting are here, they're missing. I read that article that xylazine is sometimes mixed with fentanyl. That's not what's going on here, right? Call me back as soon as you can. I'm getting worried that you dragged me into something I would never want to be a part of. Plus, you still owe me the money.

(*Id.*) Fenty then called again at 2:17 PM and left a second voicemail, where she questioned Millwood and her motives. Her concern grew:

> It's me again. I talked to the postal workers. They don't know what is going on with the packages. They said I should come back tomorrow. Angela, I'm really getting nervous. Why aren't you getting back to me? I thought that xylazine was just to help horses that are suffering. Why would they want to look at that? Is there something you aren't telling me? I'm really starting to get concerned that you involved me in something I had no idea was going on. Call me back.

(*Id.*)

[6] How Fenty registered for a P.O. Box is unclear. United States Postal Service requires two current, valid forms of identification—one photo and one non-photo—to obtain keys or a combination to a P.O. Box. *See* PS Form 1093, *How to Apply for a PO Box*, United States Postal Service (Aug. 2019), https://about.usps.com/forms/ps1093.pdf.

IV. DEA Special Agents observed Fenty pick up packages containing xylazine laced with fentanyl and addressed to the Meyer name.

That same day, Joralemon's Post Office manager alerted DEA Special Agent Robert Raghavan of two packages sent from Holistic Horse Care. (R. 30.) Each package's delivery address was P.O. Box 9313, and the name listed on each was Jocelyn Meyer. (*Id.*) After Special Agent Raghavan and his partner obtained a search warrant for the Holistic Horse Care packages, they opened each package and tested its contents. (*Id.*) Each package contained one bottle with the label "Xylazine: For the Horses," but test results revealed that the bottles contained a mixture of fentanyl and xylazine. (R. 31–32.)

The next day, Special Agent Raghavan and his partner resealed the packages and returned them to the manager for assistance with a controlled delivery from the front counter. (R. 32.) At this point, neither the Agents nor the Post Office manager could identify Jocelyn Meyer or Franny Fenty. *See* (R. 33.) The manager placed a slip inside P.O. Box 9313 notifying Jocelyn Meyer to pick up her packages from the front counter. (R. 32.) About one and a half hours later, the Agents observed Fenty enter the Post Office, unlock P.O. Box 9313, and take the slip to the counter. (*Id.*) Before handing the Holistic Horse Care packages to Fenty, the Post Office manager asked if they belonged to her. (R. 33.) Fenty answered affirmatively. (*Id.*) As Fenty was leaving the office, she engaged in a brief conversation with a college classmate who referred to her as "Franny." (*Id.*) When the Agents approached the classmate to ask if he knew Jocelyn Meyer, the person the Agents believed had picked up the packages, the classmate responded, "Who? You mean Franny? That was Franny Fenty." (*Id.*)

After further investigation, Agent Raghavan discovered Fenty's connection with Millwood. (R. 34.) Although Millwood was never arrested or charged, the DEA had investigated Millwood when she was in high school. (*Id.*) Millwood had been suspended from school for drug

possession and distribution, which Fenty was aware of. (R. 55.) Now, Millwood has fled the country, and law enforcement has been unable to locate her. (R. 35.)

V. Procedural History

Fenty was formally indicted by the grand jury on February 15, 2022. (R. 1–2.) Before trial, the district court heard two evidentiary motions. (R. 10, 18.) First, Fenty moved to suppress the contents found within the packages, arguing that she had a Fourth Amendment privacy interest in the packages addressed to Jocelyn Meyer. (R. 11.) Second, Fenty brought a motion in limine to exclude evidence of her prior petit larceny conviction. (R. 19.) She argued that the misdemeanor was not a crime of deceit under Rule 609 of the Federal Rules of Evidence and asked the court to consider the prejudicial effect on the jury. (*Id.*) The district court denied both motions. (R. 17, 26.) The court, however, did provide limiting jury instruction regarding the prior conviction evidence. (R. 62–63.)

During trial, Fenty sought to admit recordings of the two voicemail messages left by Fenty on Millwood's phone. (R. 46–47.) The Government objected on the grounds that the voicemail statements were hearsay and that the statements failed to qualify as statements of a declarant's then-existing state of mind under Rule 803(3)'s hearsay exception. (R. 47–49.) The district court sustained the Government's objection, finding that the statements lacked spontaneity. (R. 52.) On September 21, 2022, a jury convicted Fenty of one count of 21 U.S.C. § 841(a)(1) for possession with intent to distribute a controlled substance, and, on November 10, 2022, she was sentenced to ten years in prison. (R. 65.)

Fenty appealed her conviction on the same grounds that were argued in the district court. (R. 65.) The United States Court of Appeals for the Fourteenth Circuit affirmed the conviction on

all three grounds, with Circuit Judge Hoag-Fordjour dissenting. (R. 70–73.) This Court then granted writ of certiorari on December 14, 2023. (R. 74.)

SUMMARY OF THE ARGUMENT

First, Fenty did not have a reasonable expectation of privacy in the package addressed to Jocelyn Meyer. Some circuit courts hold that a defendant has a reasonable expectation of privacy in a false name or alias when sending and receiving mail because "there is nothing inherently wrong with the desire to remain anonymous." This holding fundamentally misreads Fourth Amendment standing doctrine. It ignores decades of jurisprudence that require an individual asserting a Fourth Amendment claim to have a possessory interest in or connection to the place searched. Conversely, the "other indicia" approach tailors Fourth Amendment standing doctrine to fit the specific issue at hand while maintaining society's desire to remain anonymous. Under this approach, individuals can have a reasonable expectation of privacy in false names if the defendant can objectively establish ownership, possession, or control of the property at issue or provide evidence that the false name is an *established* alias. But, here, the record is void of any evidence that would connect Fenty to the package searched or the name Jocelyn Meyer.

Second, Fenty's recorded voicemail statements should not be admitted as hearsay exceptions under Rule 803(3) of the Federal Rules of Evidence. Rule 803(3) is a specialized application of the Rule 803(1) "Present Sense Impression" hearsay exception. Rule 803(1) requires the declarant to make a statement during or immediately after perceiving an event. As a result, most of the circuit courts have held that Rule 803(3) requires spontaneity, or a lack of time for the declarant to reflect, to preserve reliability. While some courts emphasize that statements should not be inadmissible exclusively due to a probability of untruthfulness and a self-serving nature, the requirement disallowing time to reflect does not bar statements on these grounds. It only

requires circumstances that are more likely to create a reliable statement, rather than one that is fabricated. Fenty had sufficient time to discover her packages were missing, conclude that they were seized by law enforcement, reflect on her course of action, and leave self-serving voicemails. As a result, these statements lack spontaneity and, thus, reliability—the rationale behind the then-existing mental state exception.

Finally, the introduction of Fenty's prior conviction for petit larceny for impeachment purposes was proper. Under Rule 609(a)(2) of the Federal Rules of Evidence, a prior conviction that requires proving or admitting a dishonest act or false statement is admissible to impeach a witness's character for truthfulness. But the circuit courts are divided on which crimes qualify as admissible under Rule 609(a)(2). While a few courts have held that petit larceny does not qualify, most of the circuits have held that the name of the convicted crime does not matter if the underlying facts show that it was carried out in a deceitful manner. While committing the crime, Fenty intentionally targeted a distracted person to try to steal the individual's bag unnoticed. Additionally, when discovered, Fenty told the victim to let go or Fenty would hurt her, even though Fenty had no desire or plan to harm the victim. Although Fenty was charged with petit larceny, these deceitful actions are sufficient to make admission of the prior conviction proper under Rule 609(a)(2). And even if the trial court erred in admitting this prior conviction, due to the differences between the crimes, the time that passed since the prior conviction, and the limiting jury instruction, any error was harmless.

ARGUMENT

I. A defendant does not have a reasonable expectation of privacy in sealed mail addressed to an alias unless that alias is an established alias.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. But there

are limits on who may assert the Amendment's protection. *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)). "Fourth Amendment rights are personal rights, which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). Only an individual whose rights were violated by the search itself can suppress the fruits of a Fourth Amendment violation. *Id*. at 171. Conversely, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by the search of a third person's premises or property has not had [her] Fourth Amendment rights infringed" and cannot benefit from the Amendment's protections. *Rakas*, 439 U.S. at 134. Before a Fourth Amendment analysis can proceed, then, a threshold question must be answered: Did the disputed search violate a particular defendant's Fourth Amendment rights? *See id*. In other words, does the individual challenging a search have standing under the Fourth Amendment?[7]

In *Katz v. United States*, a Fourth Amendment interest was defined as a subjective "expectation of privacy that society is prepared to recognize as reasonable." 389 U.S. 347, 361 (1967) (Harlan, J., concurring). An expectation of privacy is reasonable when that expectation has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Byrd v. United States*, 584 U.S. 395, 405 (2018) (citing *Rakas*, 439 U.S. at 144 n.12). Accordingly, when deciding Fourth Amendment standing issues, the Court has considered property law factors such as whether the defendant has ownership in the item or place searched; whether he has established a right to exclude others from the place searched; and whether he can exercise dominion or control over the

[7] The Court has clarified that the "concept of standing in Fourth Amendment cases . . . should not be confused with Article III standing, which is jurisdictional." Instead, "the concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search." *Byrd v. United States*, 584 U.S. 395, 410 (2018).

place searched. *See Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980); *Byrd*, 584 U.S. at 405; *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). And so, while a common law property interest is not determinative, a "property" or "possessory" interest in the place or items searched is relevant to whether one's expectations are "reasonable." *See Rakas*, 439 U.S. at 148.

Letters and other sealed packages are in the general class of effects in which the public at large has a reasonable, or "legitimate," expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984). Ordinarily, both the named senders and addressees have a legitimate expectation of privacy in those items after they have been placed in the mail. *See Ex parte Jackson*, 96 U.S. 727, 733 (1877). But a question emerges when a package is addressed to someone other than the intended recipient, specifically when the addressee is a fictitious name, alias, or alter ego. Thus, an issue that this Court must address is whether, under the Fourth Amendment, a defendant has a reasonable expectation of privacy in sealed mail addressed to the defendant's alias.

Of the circuit courts that have addressed the issue, six out of seven have found that a defendant generally does not have a reasonable expectation of privacy in mail where the defendant is neither listed as the sender nor the addressee. *See United States v. Stokes*, 829 F.3d 47, 52 (1st Cir. 2016); *United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984); *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021); *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993); *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988); *United States v. Lewis*, 738 F.2d 916, 920 n.2 (8th Cir. 1984); *United States v. Smith*, 39 F.3d 1143, 1145 (11th Cir. 1994). The Fifth, Seventh, and Eleventh Circuits, however, are engaged in an intra-circuit split. One line of cases has categorically found that a defendant does not have a reasonable expectation of privacy if she is neither the sender nor the addressee. *See Daniel*, 982 F.3d at 149; *Koenig*, 856 F.2d at 846; *Smith*, 39 F.3d at 1145. At the same time, the other line has found that an individual has a reasonable

expectation of privacy in a package addressed to a fictitious name or alter ego. *See United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981); *United States v. Villarreal*, 963 F.2d 770, 774–75 (5th Cir. 1992); *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009).

But the First and Fourth Circuits have remained consistent by developing the "other indicia" approach. *See U.S. v. Morta*, No. 1:21–CR–00024, 2022 WL 1447021, at *7 (D. Guam May 9, 2022). This approach relies on some showing by the defendant of a connection between the intended recipient and the alias, which provides the defendant some ownership, possession, or control of the package addressed to the alias. *See Stokes*, 829 F.3d at 53; *Rose*, 3 F.4th at 728–29. In this way, the "other indicia" approach is consistent with the Fourth Amendment's standing doctrine—unlike the approach adopted by the Fifth, Seventh, and Eleventh Circuits. For that reason, this Court should adopt the "other indicia" approach to find that the lower courts did not err in holding that the evidence obtained from the search of the packages was properly admitted at trial.

A. The "Other Indicia" Approach, Which Gives Rise to the Concept of an Established Alias, Reasonably Stems from Fourth Amendment Standing Doctrine While the Alternative Approach Jumps to Conclusions That Lack Fourth Amendment Support.

A brief insight into the history of the Fourth Amendment's standing doctrine shows that the defendant's possessory interest has always been relevant when considering whether that defendant has standing. The "other indicia" approach simply tailors this concept to the specific context of mail addressed to someone other than the defendant. But the alternative approach makes assumptions that lack a substantial basis in the Fourth Amendment. That is why the "other indicia" approach better aligns with Fourth Amendment standing doctrine.

1. *The development of the Fourth Amendment standing doctrine limits standing to defendants who have indicia of ownership, possession, control, or a close connection to the place searched*.

Fourth Amendment standing doctrine has expanded and sharply narrowed over the past several decades. Robert M. Bloom & Mark S. Brodin, *Criminal Procedure: The Constitution and the Police* § 7.3.1 (9th ed. 2019). Yet, throughout the doctrine's development, property rights have remained conceptually relevant to who can bring a claim when the government performs an unreasonable search. *Id.* Initially, the Supreme Court conferred standing on "anyone legitimately on the premises" where the disputed search occurs. *Jones v. United States*, 362 U.S. 257, 267 (1960) *overruled by United States v. Salvucci*, 448 U.S. 83 (1980). *Jones* also provided "automatic standing" to a defendant charged with a possessory offense. *See Rakas*, 439 U.S. at 135. Concluding that the "legitimately on the premises" standard was too broad, the *Rakas* Court abandoned the *Jones* standard and merged the question of standing with the question of whether the challenged action infringed an interest protected by the Fourth Amendment. *See id.* at 141–42. The Court then replaced the "legitimately on the premises" standard with the reasonable expectation of privacy analysis first adopted in *Katz*, which "translates into whether *this particular defendant's reasonable expectation of privacy was intruded upon*." Bloom & Brodin, *supra*, at § 7.3.1; *see also id.*

The *Rakas* Court was the first to apply this analysis, holding that an automobile's passengers' claims "must fail" because the passengers "asserted neither a property nor possessory interest in the automobile" searched. *See Rakas*, 439 U.S. at 134. Although the *Rakas* Court stated that "arcane distinctions developed in property . . . law . . . ought not to control," property concepts focused on the defendant's relationship to the place searched continued to dominate the Court's standing analysis in later cases. *Id.* at 143; Bloom & Brodin, *supra*, at § 7.3.1; *see also Rawlings*,

448 U.S. at 105 (observing that petitioner's claim of ownership of drugs in another's purse was one fact to be considered when the purse was subject to an unconstitutional search); *Olson*, 495 U.S. at 98 (holding that an overnight guest can have a reasonable expectation of privacy in another's home because the host, who has ultimate control over the house, "share[s] his house and his privacy with his guest" and the guest will have a "measure of control over the premises"); *Byrd*, 584 U.S. at 395 (holding that defendant who was the sole occupant and unauthorized driver of rental car had a reasonable expectation of privacy in the car because he had the right to exclude others from it); *cf. Carter*, 525 U.S. at 101 (Kennedy, J., concurring) (holding that defendants who were in another person's apartment for a short time, solely for the purpose of packaging cocaine, had no legitimate expectation of privacy in the apartment because they failed to "establish a meaningful connection" to the apartment). And so, Fourth Amendment standing appears limited to persons who either own, possess, control, or have some other close connection to the place searched. Bloom & Brodin, *supra*, at § 7.3.1.

2. *The First and Fourth Circuits' "other indicia" approach embodies Fourth Amendment standing's inherent possessory limits*.

When faced with the issue of a reasonable expectation of privacy in sealed mail addressed to someone other than the defendant, the First and Fourth Circuits have upheld the inherent possessory limits in the Fourth Amendment standing doctrine. In response to this question, these circuits have held that a defendant does not have a reasonable expectation of privacy in mail when that defendant is neither listed as the sender nor the recipient, *absent other indicia or connections* at the time of the search. *See Stokes*, 829 F.3d at 51; *Rose*, 3 F.4th at 728.

Like the Court in *Minnesota v. Carter*, the First Circuit has focused on the establishment of a connection between the defendant claiming Fourth Amendment protection and the place searched. *See Stokes*, 829 F.3d at 52–53; *Carter*, 525 U.S. at 101–02. In *Stokes*, the First Circuit

held that the defendant could not "shoulder his burden" of demonstrating that he had a reasonable expectation of privacy in envelopes where he was not listed as a sender or recipient. 829 F.3d at 53. The court reasoned that the defendant's "blanket assertion" that he had a privacy interest in "[his] mail coming to [him]" included mail "containing *no indication that it [was] associated with him*." *Id.* (emphasis added).

To establish that connection, the Fourth Circuit has relied on facts showing possession or control, or a lack thereof. In *Givens*, the Fourth Circuit analogized to *Rakas* and *Rawlings* when explaining that, because defendants did not have the ability to control access to or to exclude others from taking possession of a package that was not addressed to them, these defendants could not claim a reasonable expectation of privacy in the package. 733 F.2d at 341. In *Rose*, the Fourth Circuit then expanded this holding to include packages addressed to fictitious names or aliases. The *Rose* court explained that although "'[i]ndividuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names,'" "the defendant must provide evidence that the fictitious name is an *established alias*" to maintain that reasonable expectation of privacy. 3 F.4th at 728 (emphasis added). The court found that the defendant did not have a reasonable expectation of privacy in packages addressed to the defendant's alias because, at the time of the searches, "there were no *objective* indicia that [the defendant] owned, possessed, or exercised control over the packages." *Id.* at 729. ("Nothing about the packages, including the sender's name, the named recipient, the address, or the phone number listed on the packages signaled in an objective sense that Rose had a protected interest in the packages.") Like the First Circuit, the Fourth Circuit found that the alias lacked any "established connection" to the defendant. *Id.*

Thus, to claim Fourth Amendment protection under the "other indicia" approach, the defendant must be able to show objective indicia of ownership, possession, or control of the package when the defendant's true name is not listed on the package. Or, the defendant must show an established connection between the defendant and his or her alias, which in turn gives the defendant some ownership, possession, or control of the package. This is the same rule underlying the Fourth Amendment standing doctrine. *See supra* Section I.A.1 ("And so, Fourth Amendment standing appears limited to persons who either own, possess, control, or have some other close connection to the place searched.").

3. *The Fifth, Seventh, and Eleventh Circuits' approach makes hasty conclusions that lead to unreasonable consequences.*

On the other hand, the approach espoused by courts in the Fifth, Seventh, and Eleventh Circuits does away with a possessory interest, which has unreasonable consequences. *See Richards*, 638 F.2d at 770 (holding that defendant had a legitimate expectation of privacy in a package addressed to defendant's business name because the facts indicated that the contents would remain private); *Villarreal*, 963 F.2d at 774–75 (citing *Richards* in holding that the defendants could assert a reasonable expectation of privacy in packages addressed to a fictitious name); *Garcia-Bercovich*, 582 F.3d at 1238 (citing *Villarreal* in holding that defendant had standing to contest search of package addressed to fictitious business). In particular, the Seventh Circuit has stated that because "there is nothing inherently wrong with a desire to remain anonymous when sending or receiving a package . . . the expectation of privacy for a person using an alias in sending or receiving mail is one that society is prepared to recognize as reasonable." *Pitts*, 322 F.3d at 459. But this approach automatically equates innocence with reasonableness. It assumes that merely because a practice is viewed as innocent it meets the Fourth Amendment's objective prong. A legitimate reason for remaining anonymous or a desire to do so, though

innocent, does not automatically equate to Fourth Amendment standing. For instance, an individual certainly has legitimate reasons for being a passenger in another's car and a legal right to be so, but that legitimate reason or legal right does not automatically confer standing to the passenger to contest a search of the car itself. *See Rakas*, 439 U.S. at 149.

More importantly, due to its absurd consequences, this approach is probably not one that society is prepared to recognize as reasonable. Consider if Fenty had used the name of children's famous literary detective, Nancy Drew. Under the Seventh Circuit's reasoning, Fenty's use of "Nancy Drew"—regardless of whether Fenty had some sort of connection to the Drew alias—would automatically bestow Fenty with a reasonable expectation of privacy in the package. But where does this end? Could she use the alias "Minnie Mouse" and still receive Fourth Amendment protection? At that point, anyone could claim to be "Nancy Drew" or "Minnie Mouse."[8]

Although the Seventh Circuit may argue that "Minnie Mouse" would not receive Fourth Amendment protection due to its unrealistic nature, the same does not hold true for "Nancy Drew," which is a realistic name. But what sets apart the real-life Nancy Drew from the alias is that the real-life Nancy Drew has an established connection between her name and her person. People know her as Nancy Drew; presumably, she has Government-issued identification as Nancy Drew; and her school and work records list her as Nancy Drew. In essence, the real-life Nancy Drew would have a completely objective connection to her name, which would in turn give her ownership, control, or possession over things with her name on them. However, the same cannot be said for the Nancy Drew alias unless a similar connection had been established between the Drew name and the person using it to remain anonymous.

[8] Similarly, a quick Google search reveals many Jocelyn Meyers—any of whom could claim to own the packages at issue. In fact, the online Jocelyn Meyers would have a greater possessory interest in the packages because of the connection between their name and internet photos.

And while it is true that people have a desire to remain anonymous and use aliases for a variety of innocent reasons, the "other indicia" approach allows society to maintain this practice. *Morta*, 2022 WL 1447021, at *9. The "other indicia" approach is not a blanket prohibition on using aliases or fictitious names to send or receive packages. Rather, it is "more tethered to the totality of the circumstances" instead of one line of a package. *Id.* Thus, the "other indicia" approach strikes a balance between reasonableness and an individual's desire to remain anonymous. For these reasons, this Court should adopt the "other indicia" approach when determining whether a defendant has a reasonable expectation of privacy in mail addressed to an alias.

B. Fenty does not have a reasonable expectation of privacy in the packages addressed to Jocelyn Meyer because she failed to establish a property or possessory interest in the packages or an established connection to the Meyer name.

The proponent of a motion to suppress has the burden of establishing that her own Fourth Amendment rights were violated by the challenged search, and Fenty's minimal use of the Jocelyn Meyer name did not meet this burden. *See Rakas*, 439 U.S. at 129 n.1. Fenty used the Meyer name on four separate occasions. None of these occasions, however, can be used to establish an objective connection between Fenty and the Meyer name. *See Rose*, 3 F.4th at 728.

First, Fenty used the name to publish two short stories in her university's creative writing magazine. (R. 4.) Yet, no evidence exists that anyone from college would recognize Fenty under the Meyer name. In fact, the evidence suggests the contrary. When Fenty ran into a college classmate the day she obtained the contested packages, the classmate did not know her as Meyer and only seemed to know her as "Franny Fenty." (R. 33.) Second, Fenty wrote five short stories as Jocelyn Meyer, but the record contains no evidence that anyone has read or seen these stories. (R. 5.) Third, although Fenty attempted to publish her stories, she contacted those publishers

through email. (R. 5, 64.) The email address she used is jocelynmeyer@gmail.com, and she signed the emails as "Jocelyn Meyer." (R. 5.) She did not provide a phone number nor any other means of contacting or identifying Meyer. Thus, neither the publishers nor anyone else who received an email from that address would have any way of connecting Meyer with Fenty. Furthermore, Fenty did not receive any responses from the publishers, so their only avenue of establishing a connection between Meyer and Fenty was terminated (R. 42–43.)

Finally, as the Fourteenth Circuit points out, "the fact that [Fenty] collected packages addressed to Jocelyn Meyer from the P.O. Box registered under the same name, on one occasion," is alone not enough to connect Fenty with Meyer. (R. 67.) Similarly, the fact that the packages addressed to Meyer were mailed to the same P.O. Box as the Amazon packages addressed to Fenty is also insufficient to establish a connection. Packages are often delivered to the wrong address for a variety of reasons, including entering the shipping address incorrectly or failing to change an address after closing a P.O. Box. (R. 31.) Even the Post Office manager could not identify Fenty as Meyer. (R. 33.) In effect, absent breaking into Fenty's home or hacking her computer, there is no way to connect Fenty to the Meyer name.

Even if one were able to connect Fenty with the Meyer name, that connection is akin to the defendant guests' connection to the home in *Minnesota v. Carter* and, therefore, likely not enough for Fourth Amendment standing. *See* 525 U.S. 83. In *Carter*, the Court refused to confer standing on defendants who went to the apartment searched for the sole purpose of packaging cocaine. The defendants had only spent two hours there and had never been to the apartment before. *Id.* at 90. Justice Kennedy held that, although social guests generally have an expectation of privacy in a host's home, these defendant guests lacked a "meaningful connection" to the searched apartment. *Id.* at 101.

By analogy, Franny Fenty and her identity are the house, and the Meyer name is the cocaine-packaging house guest. Although the general rule confers standing in the sender and recipient of sealed mail, unestablished aliases lack the "meaningful connection" to the identities of the sender or recipient. This analogy is even more powerful when considering that houses receive stronger Fourth Amendment protection than papers or effects. *Florida v. Jardines*, 569 U.S. 1, 14 n.1 (2013) (Kagan, J., concurring). If an individual in a house, the pinnacle of Fourth Amendment protection, does not have a reasonable expectation of privacy due to a lack of connection to the home, then why should an individual receive a reasonable expectation of privacy in sealed mail when they too lack a meaningful or established connection to the mail itself? Therefore, because Fenty (1) lacks an established connection to the Meyer name and (2) has not produced objective indicia of ownership, possession, or control of the packages at the time they were searched, the evidence obtained from the packages addressed to Jocelyn Meyer was properly admitted at trial.

II. Voicemails offered to show a then-existing mental state cannot be admitted as a hearsay exception under Rule 803(3) if the declarant had time to reflect before making the statement.

A statement constitutes hearsay when it is made by a declarant not presently testifying at a trial or hearing and is being used by a party to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). Hearsay is generally not admissible for three reasons: (1) the statement was not made under oath, (2) the opposing party did not have the opportunity to cross-examine the declarant when the statement was made, and (3) the declarant's demeanor cannot be observed by the factfinder. *California v. Green*, 399 U.S. 149, 154 (1970); *see also United States v. Brown*, 411 F.2d 1134, 1138 (10th Cir. 1969) ("Broadly stated, pure hearsay is inadmissible because such testimony carries no inherent likelihood of truthfulness and denies to the damaged party the right

of cross-examination to establish the actual unreliability of the testimony."). Nevertheless, the Federal Rules of Evidence permit several exceptions to the general prohibition against hearsay. *See* Fed. R. of Evid. 803, 804. These exceptions are based on one of three principles: (1) reliability, (2) necessity, and (3) adequate foundation. Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 Fordham L. Rev. 1485, 1488 (2016). Rule 803's exceptions are based on the first principle: reliability. *See* Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules.

Rule 803 recognizes that some statements, although technically hearsay, possess a level of trustworthiness that makes their admissibility possible, regardless of whether the statement's declarant is present. *Id*. Specifically, Rule 803(1), titled "Present Sense Impression," assumes that the declarant is less likely to deliberately fabricate under contemporaneous circumstances. *United States v. Green*, 556 F.3d 151, 157 (3d Cir. 2009). "A person who describes an event as it unfolds before them lacks time to formulate a lie; the words match the events one by one." Deborah Jones Merritt & Ric Simmons, *Learning Evidence: From the Federal Rules to the Courtroom* 504 (5th ed. 2022); *see United States v. Lentz*, 282 F. Supp. 2d 399, 410 (E.D. Va. 2002), *aff'd*, 58 F. App'x 961 (4th Cir. 2003). Thus, Rule 803(1) requires the event and the statement be contemporaneous because this decreases the chances of misrepresentation. Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules. Therefore, while some time may pass, the statement should be made while the event is occurring or "immediately thereafter." *United States v. Manfre*, 368 F.3d 832, 840 (8th Cir. 2004).

Rule 803(3), titled "Then-Existing Mental, Emotional, or Physical Condition," is "essentially a specialized application" of Rule 803(1). Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules. Rule 803(3) states:

> The following [is] not excluded by the rule against hearsay . . . 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. As opposed to Rule 803(1), which creates an exception for statements describing an *exterior* condition, Rule 803(3) creates an exception for statements that are reflections of a then-existing *interior* condition. *See id*. For that reason, 803(1)'s contemporaneous, or "immediately thereafter," standard has been applied to Rule 803(3). *See United States v. Udey*, 748 F.2d 1231, 1243 (8th Cir.1984); *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980).

A. Fenty's voicemails lack spontaneity and are missing the indicia of reliability intended by Rule 803(3) and required by most circuits.

In *Ponticelli*, the Ninth Circuit pronounced a rule which included three factors to determine admissibility of hearsay under Rule 803(3): (1) contemporaneousness; (2) time to reflect, or spontaneity; and (3) relevancy to the case. 622 F.2d at 991. Since its creation, most circuits have adopted or have been influenced by the *Ponticelli* test. *See United States v. Jackson*. 780 F.2d 1305, 1315 (7th Cir. 1986) (promulgating the *Ponticelli* test when holding that defendants' statements were not admissible because they were made two years after the scheme ended); *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005) (finding that statements made after a defendant has had time to reflect are less trustworthy and more likely to be inadmissible); *United States v. Day*, 591 F.2d 861, 887 (D.C. Cir. 1978) (holding that "[f]or the exception to apply, there must be a spontaneous statement describing a contemporaneous physical condition."). *See also United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007); *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001); *United States v. Newell*, 315 F.3d 510, 522 (5th Cir. 2002); *United States v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995); *United States v. Rodriguez-Pando*, 841 F.2d 1014, 1019 (10th Cir. 1988); *United States v. Srivastava*, 411 Fed. App'x. 671, 684 (4th Cir. 2011).

And although the Second Circuit does not regard the *Ponticelli* requirements as dispositive, the court has held that statements "must relate to the declarant's state of mind *during* the various fraudulent transactions" to fall under the Rule 803(3) exception. *United States v. Netschi*, 511 F. App'x 58, 61 (2d Cir. 2013) (emphasis added). The statements in *Netschi* did not qualify because they "concerned what Netschi said or did *after* the fraudulent transactions had taken place and as the scheme itself was being discovered." *Id*. Similarly, Fenty's statements concern what she said *after* she discovered the packages missing and as the scheme was unfolding. Once she discovered the packages missing, she realized that her and Millwood's nefarious transactions were at risk of being exposed.

Additionally, unlike conversations, where someone is less likely to anticipate what will be asked, voicemails (like hand-written letters) are essentially one-sided conversations and are more likely to be a calculated response. In *United States v. Neely*, the Seventh Circuit upheld the district court's finding that a letter written when the defendant had time to reflect on his potential legal circumstances and possibly fabricate information was self-serving and, therefore, properly excluded. 980 F.2d 1074, 1083 (7th Cir. 1992). Like the defendant's letter in *Neely*, Fenty's voicemails were one-sided and self-serving. *See, e.g.*, (R. 40.) ("I'm getting worried that you dragged me into something I would never want to be a part of."). Coupled with the fact that the first voicemail was made an unknown amount of time after discovering the packages were missing and the second forty-five minutes later, the self-serving voicemails contain no circumstantial guarantees of trustworthiness. *Naiden*, 424 F.3d at 722; *see also Trustees of Univ. of Pennsylvania v. Lexington Ins. Co.*, 815 F.2d 890, 905 (3d Cir. 1987) ("The essence of the state of mind exception is that there are circumstantial guarantees of trustworthiness attendant to a statement.").

A similar result was found in *United States v. Carter*, where the Seventh Circuit held that an hour gave the defendant "ample opportunity to reflect upon his situation." 910 F.2d 1524, 1531 (7th Cir. 1990). In *Carter*, the defendant confessed to robbing a credit union. *Id.* at 1526. An hour after his confession, he stated to his mother that he only confessed so that his pregnant fiancé would not be charged as well. *Id*. at 1527. The court determined that the statement was properly excluded because an hour allowed the defendant to reflect and fabricate the confession. *Id*. at 1531.

Like the confession in *Carter*, the second voicemail, which contained the additional self-serving insight that Fenty "thought the xylazine was just to help horses that are suffering," gave Fenty forty-five minutes to reflect on her predicament and her previous voicemail. (R. 40.) According to *Carter*, this would likely be "ample time" for Fenty to reflect and fabricate, which is further supported by Fenty's reaction to the missing voicemails. Rather than concluding that the packages innocently went missing or were delivered late, Fenty immediately jumped to the conclusion that something more worrisome was occurring. (*Id.*) This indicates that she believed she was being investigated, giving her a motive to concoct the voicemails with the "ample" time she had.

B. Although it is the jury's role to determine if the evidence is reliable, the *Ponticelli* threshold helps the jury by gatekeeping statements that have no indicia of trustworthiness.

In his dissenting opinion, Judge Hoag-Fordjour correctly states that it is the jury's role to determine if evidence is reliable. (R. 71-72.) Notably, though, the *Ponticelli* test does not require that a statement be truthful for it to be admitted, only that there is *less time* to reflect and a lower chance of fabrication before the statement is made. Thus, the *Ponticelli* test establishes a threshold for statements sought to be admitted under Rule 803(3). *Neely*, 980 F.2d at 1083. The theory behind Rule 803 is that there is a level of trustworthiness that makes these particular statements

acceptable. Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules. Carried to the extreme, if there is no spontaneity threshold to augment the possibility of trustworthiness under Rule 803(3), then jurors will face an uphill battle in differentiating between many inconsistent and confusing statements. "[T]he special assurance of reliability for statements of present state of mind rests upon their spontaneity and resulting probable sincerity. The guarantee of reliability is assured principally by the requirement that the statements must relate to a condition of mind or emotion existing at the time of the statement." *United States v. Farhane*, 634 F.3d 127, 171 (2d Cir. 2011) (quoting 2 McCormick on Evidence § 274, at 267 (Kenneth S. Broun ed., 6th ed. 2006)). So, to completely discard this trustworthiness requirement is inharmonious with the intent of the "then-existing state of mind" hearsay exception. Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules.

In short, because Fenty had an undisclosed amount of time for reflection before making the first voicemail and an ample amount of time before making the other, the voicemails lack spontaneity. Furthermore, the one-sidedness and self-serving nature of the voicemails only further decrease their reliability. As a result, the voicemails lack indicia of truthfulness—the very thing that the exception is trying to protect against—and do not meet the *Ponticelli* threshold. Therefore, the lower courts did not err in excluding the voicemails as hearsay that does not qualify as an exception under Rule 803(3).

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

Evidence of prior convictions has always played a role in the judicial system, specifically those that reflect on credibility. Fed. R. Evid. 609 advisory committee's note to 1972 proposed rules. Rule 609 seeks to define which convictions are admissible for impeachment of character for truthfulness but ultimately fails to remove all ambiguity. *Id.* Specifically, Rule 609(a)(2) states that

"for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Fed. R. Evid. But this rule still raises the question of which crimes require proving or admitting a dishonest act or false statement.

Courts generally use three approaches to determine whether evidence of a prior conviction encompasses "a dishonest act or false statement." Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. Crim. L. & Criminology 1087, 1116 (2000). First, some courts find that the term "dishonest" should be disregarded because it is too broad and that only crimes that involve "dishonesty or false statements as an element of the statutory offense" should be considered. *United States v. Lewis*, 626 F.2d 940, 946 (D.C. Cir. 1980) (internal quotations omitted). Only a minority of circuit courts, however, have adopted this limited scope of admissible prior convictions.

In the second approach, courts define dishonest to include "wrongful pecuniary gain" convictions as well as those that fall within the traditional boundaries of crimen falsi. Green, *supra*, at 1118. Crimen falsi generally refers to "crimes that are in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense or *any other offense the commission of which involves some element of deceitfulness, untruthfulness,* or falsification bearing on the accused's propensity to testify truthfully." *Gov't of Virgin Islands v. Toto*, 529 F.2d 278, 281 (3d Cir. 1976) (emphasis added). The "wrongful pecuniary gain" approach recognizes that there is dishonesty involved in stealing that does not fall in crimen falsi's purview but may, nonetheless, have probative value of truthful character. *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967). This approach is also

prevalent among state courts. *See State v. Brown*, 782 P.2d 1013, 1030 (1989), *opinion corrected*, 787 P.2d 906 (Wash. 1990).

The third and final approach only admits evidence of convictions that fall within the traditional boundaries of crimen falsi. *See Toto*, 529 F.2d at 281 (holding that "a witness may be impeached by evidence of a prior conviction only if it is for a felony or a misdemeanor in the nature of crimen falsi"). Fenty's prior petit larceny conviction is admissible under the two approaches that are adopted by most of the circuit courts.

A. Fenty's prior conviction is more properly characterized as a crime of deceit, rather than a crime of violence, under the "crimen falsi" approach.

Under the "crimen falsi" approach, many courts have narrowed the scope of the "dishonest act" and "false statement" inquiry to crimen falsi. This has led courts to make a distinction between crimes of stealth, crimes of deceit, and crimes of violence. *See United States v. Ortega,* 561 F.2d 803, 806 (9th Cir.1977); *United States v. Washington,* 702 F.3d 886, 893 (6th Cir. 2012); *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005). But these decisions fail to recognize that crimes of stealth, like crimes of deceit and unlike crimes of violence, have some probative value on a witness's truthful character. This was explained by the D.C. Circuit Court in *Gordon v. United States*:

> In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity.

383 F.2d at 940.

Fenty asserts that her prior conviction was a crime of violence, not a crime of deceit or stealth, because crimes of violence are not regarded as probative of propensity for truthfulness. (R. 22.); *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977). To bolster this argument, Fenty

points out that she "threatened the victim loudly" before grabbing the bag and running away. (R. 22.) But crimes of violence rest on violent conduct, rather than stealthy or dishonest conduct. *Gordon*, 383 F.2d at 940. Just because a crime may involve, or come to involve, violence or threats of violence does not mean that the crime itself should be characterized as a crime of violence over a crime of deceit. A crime of violence is "[a] crime that has *as an element* the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another." *Crime*, Black's Law Dictionary (11th ed. 2019) (emphasis added).

Fenty was charged with petit larceny under § 155.25 of the Boerum Penal Code. Nowhere in the statute is physical force listed as an element of the crime. Boerum Code Ann. § 12–5–155.25.[9] Moreover, in her testimony at trial, she admitted that she did not want to hurt the victim but rather "just wanted it to be over." (R. 60.) In fact, Fenty did not plan to commit the crime until she was allegedly dared to—let alone harm anyone. (R. 58-60.) And even though Fenty did push the victim, by her own admission, no one was hurt. (R. 54, 60.) Accordingly, Fenty's crime is more appropriately characterized as a crime of stealth or deceit, either of which "reflects adversely on [her] honesty and integrity." *See Gordon*, 383 F.2d at 940. Therefore, her petit larceny conviction should be admitted so that the jury can evaluate this honesty and integrity.

B. Fenty's conviction is also admissible under the "wrongful pecuniary gain" approach, which focuses on the conviction's facts instead of its title.

Under the "wrongful pecuniary gain" approach, many courts have recognized that a conviction for larceny, theft, or burglary can be admissible under Rule 609(a)(2) if it was done by deceit or fraud. *United States v. Seamster*, 568 F.2d 188, 191 (10th Cir. 1978); *Altobello v. Borden Confectionary Prod., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989). In *United States v. Barnes*, the Fifth

[9] The Petitioner claims that, even though § 155.25 does not require violence, this is a violent crime. Under this same logic, then, even though the statute does not require deceit, it can be a deceitful crime.

Circuit declared that "some petty larceny offenses 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." 622 F.2d 107, 110 (5th Cir. 1980). This approach recognizes that some crimes may have probative value for honesty, regardless of whether misrepresentation is an element of the crime. Fed. R. Evid. 609 advisory committee's note to 1972 proposed rules.

Following this approach, Fenty's conviction for petit larceny would still be admissible. Apart from the name of the crime, Petit Larceny and Theft by Deception only contain one difference under the Boerum Penal Code: whether the crime was committed "knowingly and with deceit" rather than merely being committed "knowingly." *See* §§ 12–5–155.25, 155.45; (R. 3.). Additionally, Theft by Deception defines "deception," which includes in relevant part "(a) Creates, reinforces, or leverages a false impression, (b) Prevents another from acquiring material information that would impact his or her judgment." § 12–5–155.45; (R. 3.). Even though she was not convicted of Theft by Deception, the title of the ultimate conviction does not preclude the court from looking at the facts of the case. *See United States v. Papia*, 560 F.2d 827, 847–48 (7th Cir. 1977) (holding that, although a forgery charge was plea bargained down to a theft of under $100, the trial court did not err in concluding that the conviction rested on facts revealing fraud and deceit and admitting the conviction for impeachment).

Fenty prevented the theft victim from acquiring material information by singling out a distracted person and took advantage of the diversion created by the Elmo street performer. (R. 59.) This impacted the victim's judgment and prevented her from taking normal precautions that an undistracted individual would take. Also, because Fenty explicitly stated that she did not intend to harm the woman, she "creat[ed] . . . a false impression" when she threatened the victim with

violence. (R. 60.) Therefore, Fenty's prior conviction is also admissible under the "wrongful pecuniary gain" approach.

C. Even if this Court finds that a petit larceny conviction is not admissible under Rule 609(a)(2), the trial court did not abuse its discretion in admitting the conviction.

Alternatively, should this Court find that the lower court erred in admitting the prior conviction, the admission does not meet the high standard for overruling an evidentiary ruling. To appeal an evidentiary ruling, a party must show that the trial court (1) abused its discretion in admitting the evidence and that (2) the abuse of discretion affects a substantial right of the party. Fed. R. Evid. 103(a); *Sullivan v. Rowan Companies, Inc.*, 952 F.2d 141, 146 (5th Cir.1992). Conversely, an abuse of discretion that does *not* affect a substantial right of the party is a harmless error. As the Third Circuit explained in *Toto*, the standard for harmless error is "whether the error itself had substantial influence" on the judgment. 529 F.2d at 283. "If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* But "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.* In cases where the inclusion or exclusion of evidence keeps the defendant from testifying in her own defense, an error is far more likely to result in a reversable error. *Luce v. United States*, 469 U.S. 38, 42 (1984).

First, it is not obvious that the trial court abused its discretion in admitting the evidence. "A district court abuses its discretion when it issues an 'arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'" *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (citing *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir.1999)). The mere fact that some courts have indicated that petit larceny can have probative value for truthfulness demonstrates that this was not an arbitrary or manifestly unreasonable judgment. Fenty's actions in sneaking to steal from a distracted individual and then misrepresenting a willingness to harm that individual could reasonably be interpreted as dishonest.

Even if the trial court's admission was an abuse of discretion, the court's ruling was a harmless error. Fenty, who not only testified on her own behalf, was given the opportunity to explain and defend her actions during the crime. (R. 52–54.) More importantly, Fenty's conviction in the current case for possession of over one thousand dollars' worth of illegal drugs with intent to distribute does not rest on an eight-year-old conviction for stealing twenty-seven dollars. The petit larceny conviction is wholly dissimilar from that of possession with intent to distribute. The current narcotics charge does not involve theft while the petit larceny charge did not involve narcotics. *See* (R. 1, 58–60.) For that reason, the petit larceny conviction likely did not have a "substantial influence" on the jury's judgment. *See Toto*, 529 F.2d at 283.

Also, Fenty alleges that she did not know she was engaged in illicit behavior in this case, where previously she "knew [she] was doing something wrong" and was able to express this to the jury. (R. 60.) Fenty argues that the crimes are similar because both involved "insistence from a friend" and the need for money. (R. 25.) But these two "similarities" are wholly peripheral to the actual crime, and to the extent that being easily persuaded by a friend is a similarity, it undercuts Fenty's own defense. In the petit larceny case, she claims her friend encouraged her to commit a crime. (R. 53.) If this is like the present case, then it calls into question whether Fenty was actually oblivious to the illegality of the transaction between her and Millwood. Regardless, the fact that a prior offense may have some similarities does not automatically make a prior conviction inadmissible and, even less so, a harmful error that affected Fenty's substantial rights. *See Toto*, 529 F.2d at 283.

Nevertheless, in such circumstances the court should give a limiting instruction when the conviction is admitted. *Lewis*, 626 F.2d at 950. The dissent, however, calls into question the traditional and widely accepted practice of using limiting instructions. (R. 73.) For a case to be

overturned because of insufficient jury instructions, "the instructions must be, as a whole, confusing, misleading, and prejudicial [which] is an incredibly high standard." *United States v. Young*, 553 F.3d 1035, 1050 (6th Cir. 2009). "Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions." *Francis v. Franklin*, 471 U.S. 307, 324 (1985), *holding modified by Boyde v. California*, 494 U.S. 370 (1990). The jury instructions given by the trial court were not confusing, misleading, and prejudicial. (R. 63.) And even if they insufficiently guarded against prejudice, these supposed insufficiencies do not meet the high standard to overrule the circuit court.

As the D.C. Circuit Court stated, "common human experience" tells us that "stealing" is "universally regarded as conduct which reflects adversely on a man's honesty and integrity." *Gordon*, 383 F.2d at 940. Two of the three 609(a)(2) approaches recognize this. That is why a majority of the courts follow them and why this Court should too adopt either the "crimen falsi" or the "wrongful pecuniary gain" approach. Under these approaches, Fenty's prior petit larceny conviction is admissible and, thus, the lower courts did not err in admitting the prior conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Fourteenth Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

/s/ Team 23
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