IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 23-695

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 20P
Attorneys for Petitioner

QUESTIONS PRESENTED

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

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

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

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STATUTORY AND CONSTITUTIONAL PROVISIONS

The text of the following constitutional provision and evidentiary rules are provided below:

The Fourth Amendment states:

> 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.

Federal Rules of Evidence 803(3) states:

> 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).

Federal Rules of Evidence 609(a)(2) states:

> *(a) In General.* The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
> *(2)* 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. 609(a)(2).

STATEMENT OF THE CASE

I. Factual History

In December 2021, after realizing that her writing career as a novelist was not taking off, Franny Fenty, 25, made a public post on LinkedIn announcing she was looking for a job. (R. 44). Angela, one of Franny's high school classmates, commented on her post, saying that she might have a job for Franny (R. 6). They exchanged numbers, and Angela and Franny commiserated over career and financial struggles. (R. 44). Angela explained to Franny that although she didn't make much money at her job, she truly loved devoting herself to the care of horses. (R. 44). Angela further explained that it broke her heart to watch the horses suffer in pain as they got older. (R. 44). But, she had a plan to help the horses with their pain: administering muscle relaxers, specifically Xylazine. (R. 44-45). Franny was very convinced by what Angela shared with her. (R. 44).

Franny was not familiar with the drug, nor its use on horses. (R. 45). However, she trusted Angela because she knew how much it meant to her former classmate to be financially secure, and if she was foregoing that to help these horses, Franny knew this was an important cause to Angela. (R. 45). However, Angela could not order the medicine herself because she worked at the horse stable, and she could lose her job if anyone found out she was administering the medicine to the horses. (R. 45). As such, Angela asked Franny to order the Xylazine. (R. 45). Although she felt nervous about getting involved because she had never heard of the medicine, Franny wanted to support Angela. As such, Franny agreed to order the Xylazine. (R. 45).

Franny registered a P.O. Box at the Joralemon Post Office on January 31, 2022, under the name Jocelyn Meyer, and ordered the medicine from Holistic Horse Care to her P.O. Box under her alias Jocelyn Meyer ten days later. (R. 54-55). This was not Franny's first time Franny using this alias; Franny began using the name Jocelyn Meyer in college to publish short stories in her

college magazine. (R. 13). Her work was published in the Fall 2016 and Spring 2017 issues under Jocelyn Meyer. (R. 4). She continued to use the name Jocelyn Meyer to represent her writings after college, and solely used the name Jocelyn Meyer when she reached out to publishers. (R. 13-14). Most recently, less than four months before arrest on October 19th, 2021, Franny emailed Bridgewater Books publisher Charlotte Hazeldean about her work from her Google Mail account jocelynmeyer@gmail.com. (R. 5). Thus, Franny had been publicly using the alias Jocelyn Meyer for more than five years prior to her arrest.

On February 14th, Franny received the shipper's delivery confirmation for the two Holistic Horse Care packages. (R. 46). However, when she went to the Post Office, her packages weren't there. (R. 46). Realizing this, she called Angela, who did not answer the phone. Franny mentioned that she had read an article about xylazine being mixed with fentanyl, and wanted assurance that this was not going on. (R. 40, 46).[1]

After talking to the postal workers inquiring about her package, she called Angela again forty-five minutes later, yet she did not answer. *Id.* Franny reported to Angela that she was nervous that the postal workers had told her to come back for the package tomorrow, and that Angela had not yet returned her call. *Id.*[2]

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[1] Full Text of First Voicemail:
"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 part of. Plus, you still owe me the money." (R. 40).)

[2] Full Text of Second Voicemail:
"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 the 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." (R. 40).

The next day, Franny checked her P.O. Box to find two Amazon packages addressed to Franny Fenty and a slip to collect two packages from the counter. (R. 32). She collected the packages from Holistic Horse Care addressed to Jocelyn Meyer, and went about with her day. *Id.* Later that evening, Franny was arrested and charged with 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). (R 1-2).

II. Procedural History

Prior to trial, the District Court heard two evidentiary motions. First, Franny moved to suppress evidence obtained from the DEA agents' search of the sealed Holistic Horse Care packages on the grounds that the search violated her Fourth Amendment rights. (R. 66). This motion to suppress was denied. *Id.* The court reasoned that because she used an alias, she did not have a privacy interest in the packages that were addressed to Jocelyn Meyer. (R. 67-68). Second, Franny brought a motion in limine to exclude evidence of Defendant's prior conviction for misdemeanor petit larceny from being used at trial for impeachment purposes, on the grounds that the conviction did not qualify as a crime of deceit under Rule 609(a)(2). (R. 66). Franny's motion to exclude her petit larceny conviction was denied and the Court included a limiting instruction to the jury relating to the prior conviction evidence. (R. 66).[3]

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[3] Franny testified that in committing the crime of petit larceny as a teenager, she "walk[ed] over quietly" to where the victim and her family was and that she intended to "sneak up" on them because she "didn't want to get caught." (R. 59). Franny tried to quietly take the victim's bag, but the woman noticed and yelled at Franny to stop. *Id.* Franny forcibly pulled the bag back from the victim, and pushed her, to which the victim yelled loudly in response. *Id.* Franny then threatened the victim, screaming, "let go or I'll hurt you." *Id.*
Franny was charged with Petit Larceny under Boerum Penal Code § 155.25 which is provided here:

Boerum Penal Code § 155.25 Petit Larceny
(1) A person is guilty of petit larceny when that person knowingly takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another with intent to, either temporarily or permanently:
(a) Deprive the other person of the right to benefit from his or her property, (b) Exercise control over the property without the owner's consent, or (c) Appropriate the property as his or her own; and

During trial, the Government sought to exclude the recordings of two voicemail messages left by Franny on Angela's phone on February 14, 2022, on the grounds that the voicemail statements were hearsay and failed to qualify as hearsay exceptions as statements of a declarant's then existing state of mind under Rule 803(3). *Id.* The court sustained the Government's objection, pointing to the lack of spontaneity, and the voicemail statements were excluded at trial. *Id.*

At the conclusion of the jury trial, Franny was convicted on one count of possession with intent to distribute a controlled substance and was sentenced to 10 years in prison. The District Court ruled in favor of the Government on all three issues. (R. 65). Pursuant to 18 U.S.C. § 3731, Franny filed an interlocutory appeal to the United States Court of Appeals for the Fourteenth Circuit. (R. 64). The Fourteenth Circuit granted the request for interlocutory review and affirmed

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(2) If the property stolen is valued at less than One Thousand Dollars ($1,000.00).
(3) Petit larceny is a class B misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, but more than 30 days, or by a fine not exceeding Five Thousand Dollars ($5,000.00).

Another relevant Boerum Statue is also provided here:

Boerum Penal Code § 155.45 Theft by Deception
(1) A person is guilty of theft of property by deception when that person knowingly and with deceit takes, steals, carries away, obtains, or uses, or endeavors to take, steal, carry away, obtain, or use, any personal property of another with intent to, either temporarily or permanently:
(a) Deprive the other person of the right to benefit from his or her property, (b) Exercise control over the property without the owner's consent, or
(c) Appropriate the property as his or her own.
(2) A person deceives if he or she intentionally
(a) Creates, reinforces, or leverages a false impression,
(b) Prevents another from acquiring material information that would impact his or her judgment, or
(c) Fails to correct a false impression that the deceiver previously created, reinforced, or influenced.
(3) Exception: The term "deceive" does not include uttering a falsity on matters with no pecuniary significance or statements of puffery that would be unlikely to deceive a reasonable person.
(4) If the property stolen is valued at less than One Thousand Dollars ($1,000.00), the theft by deception is a class B misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, but more than 30 days, or by a fine not exceeding Five Thousand Dollars ($5,000.00).

the District Court's ruling on both issues. *Id*. Franny then petitioned to this Court for a writ of certiorari, which was granted on December 14, 2023. (R. 74).

SUMMARY OF THE ARGUMENT

Every American citizen has the right to privacy when it comes to the contents of their mail. A person's mail is not only something which society has long recognized as a sphere in which it is reasonable for an individual to expect their privacy be respected, but mail is also undeniably the property of the person who expects to receive it. Yet this case challenges this expectation and the strength of the property rights which underlie said expectation. The Fourteenth Circuit's ruling that a person cannot assert a right of privacy to their mail simply because they addressed it using an alias favors an overbroad reach of governmental interference while denying fundamental, constitutional privacy rights.

We respectfully request that this Court reverse the Fourteenth Circuit's decision and remand this case for a new trial because the court below (A) failed to recognize Franny's 4th Amendment privacy interest in the mail she purchased and had sent to her, simply because it was addressed to her alias, (B) excluded from trial the evidence of two voicemail recordings that would have demonstrated her intent in purchasing and receiving such mail, and (C) allowed into evidence in order to impute Franny's character and truthfulness a prior conviction, even though the crime she committed as a teenager was not a crime of deceit.

I. The Fourth Amendment Protection Against Unreasonable Searches and Seizures

The Fourth Amendment guarantees citizens protection against unreasonable searches and seizures. One framework for analysis this Court has recognized and used in determining whether a search is unreasonable requires a two-part test: first, that a person express a subjective expectation of privacy, and second, that the expectation be one that society is prepared to recognize

as 'reasonable.' In this case, Franny certainly expressed a subjective expectation of privacy in her mail, and society is more than prepared to recognize such a privacy interest in mail. The only issue here is Franny's use of an alias. However, five circuit courts have found that the use of an alias where the facts would otherwise grant privacy rights does not destroy such a grant, and two have found this specifically in regard to packages.

Another framework this court has used to analyze privacy rights examines such rights through the lens of property rights, asking if an individual has a legitimate property claim through which to assert a privacy interest. Here, Franny clearly had a property interest in the packages she purchased which were sent to a PO box she registered and paid for. These packages were hers and she treated them in a consistent manner.

Under either framework, the Circuit Court erred in affirming the District Court's denial of Franny's motion to suppress evidence obtained from the DEA agents' search of the sealed Holistic Horse Care packages. Franny's expectation of privacy in her packages was one that society, joined by many of the circuit courts, is prepared to recognize, and Franny clearly has a legitimate property interest in said packages.

II. Hearsay Exceptions Under Rule 803(3)

The Federal Rules of Evidence declare, under Rule 803(3), that a statement made by a declarant that would otherwise be hearsay, and thus impermissible, can be admitted into evidence if the statement made reflects a relevant and then-existing mental state.

The purpose of the rule, as explained by both case law and commentators, is to only allow statements that are made in contemporaneous mental states with the circumstances to which they were relevant. The restrictions of the rule are thus intended simply to prevent declarants from fabricating self-serving statements, and not to allow courts to throw out every statement not made

within a rigid timeframe in reference to the circumstances they reflect. Given the continuity of mental state, the Fourteenth Circuit erred in reading into the rule a requirement for spontaneity from circumstances to statement.

Thus, the Circuit Court also erred in affirming the District Court's exclusion in the jury trial of two voicemail recordings left by Franny on the grounds that the voicemail statements were hearsay. Under FRE Rule 803(3), Franny's voicemails qualified as hearsay exceptions as statements of her then-existing state of mind as they were made in a contemporaneous mental state which Franny experienced when she opened her PO box to find her expected packages missing.

III. Exclusion of Prior Convictions under Rule 609(a)(2)

The Federal Rules of Evidence declare, under Rule 609(a)(2), that a witness's prior conviction must be admitted as evidence if the crime included an element of deceit. The purpose of this rule, as explained by its committee, is to inform the jury of a witness's propensity to testify truthfully. The rule is thus designed to allow for the demonstration of a pattern of deceit, if indeed such a pattern exists, and not to allow in evidence that a witness is a fallible human being.

Franny's crime was a mistake, but not one she committed through deception, which can be demonstrated in three ways. First, the crime for which Franny was convicted at nineteen did not require an element of deceit be proved. Second, courts have repeatedly held that crimes of stealth, such as Franny's attempt to sneakily steal a woman's purse, are not crimes of deception. And finally, courts have also repeatedly held that crimes of force, such as Franny's theft of a woman's purse through pulling, shoving, and threats, are not crimes of deception. Thus, the Circuit Court also erred in affirming the District Court's denial of Franny's motion in limine to exclude evidence of Franny's prior conviction for misdemeanor petit larceny in order to prevent it from being used at trial to cast doubt on her truthfulness.

Because of these errors of law, we respectfully request that this Court reverse the Fourteenth Circuit's ruling and remand this case for a new trial in which Franny's voicemails are submitted into evidence and evidence of her prior conviction is not.

ARGUMENT

I. Franny had a valid privacy interest in the package she ordered despite her use of an alias because: (A) society is prepared to recognize an individual's expectation of privacy in the use of an alias as reasonable; and (B) Franny had a legitimate property interest in the package even though she was not the named addressee.

The Fourth Amendment provides a safeguard for citizens against "unreasonable searches and seizures" by the government. U.S. Const. Amend. IV. Generally, pieces of sealed mail, including packages, are considered objects in which the parties sending and receiving do have a legitimate privacy interest, and so the search of such a package is typically considered a seizure covered by the safeguard of the Fourth Amendment. *See Ex parte Jackson,* 96 U.S. 727, 733 (1877).

However, while Franny placed the order for the packages and had them addressed to a PO box she had registered and paid for, she was not the addressee on packages and the name attached to the PO box. Rather, she used an alias. Whether Franny still possessed a privacy interest in a package which was addressed to her alias can be analyzed under two frameworks set forth by this court: (A) the *Katz* framework; and (B) the property rights framework.

A. Under the *Katz* "reasonable expectation of privacy" test, Franny's use of an alias did not destroy her privacy interest in the package because such an interest is one society is prepared to recognize as reasonable.

In *Katz,* Justice Harlan's concurrence to this court's opinion established a framework which has since been widely used to determine whether a search is unreasonable, and thus prohibited under the Fourth Amendment. *Katz v. United States,* 389 U.S. 347, 361 (1967). Justice Harlan's rule founded a twofold requirement, "first that a person have exhibited an actual (subjective)

expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.*

Here, Franny clearly exhibited an actual subjective expectation of privacy both in registering and paying for a private PO box in which to receive her package and in ordering a package which she knew would be shipped sealed through the mail. The only question that remains is whether society is prepared to recognize Franny's expectation of privacy in a package addressed to her alias as reasonable.

As discussed below, it is likely that such an expectation is in fact one society is prepared to recognize as reasonable because (i) five circuit courts have upheld privacy rights for individuals using aliases in other Fourth Amendment cases, and (ii) two circuit courts have held that individuals do have a reasonable expectation of privacy specifically in packages addressed to them under aliases.

i. Five circuits have determined that individuals using aliases have a reasonable expectation of privacy in the same manners in which they would if using their real names.

While the Supreme Court has not yet discussed how the use of an alias may change privacy rights under the Fourth Amendment, the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have held that an individual's expectation of privacy while using an alias is one society is prepared to recognize as reasonable. *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir.1992); *United States v. Domenech*, 623 F.3d 325, 331 (6th Cir. 2010); *United States v. Pitts,* 322 f. 3d 449, 459 (7th Cir. 2003); *United States v. Watson*, 950 F.2d 505, 507 (8th Cir. 1991); *United States v. Newbern*, 731 F.2d 744, 748 (11 Cir. 1984). In each of these cases, the court in question concluded that, since the individuals would have possessed inarguable privacy interests had they been using their real names, there was no reason for society to not acknowledge those same privacy interests

simply because the individuals in question were using aliases. *Id.*

Here, there is no question that Franny would have possessed a legitimate privacy interest in the packages in question had they been addressed to "Franny Fenty." So, under the reasoning used by the five courts above, she ought to have the same reasonable expectation of privacy in the packages here which were similarly addressed to her, but simply addressed under her alias.

ii. Both the Fifth and the Seventh Circuits have determined that society is prepared to recognize an individual's interest in privacy when sending or receiving packages addressed to them under an alias as reasonable.

In addition to upholding privacy rights generally for individuals using aliases, both the Seventh Circuit and the Fifth Circuit have held that "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; *see also Villarreal*, 963 F.2d at 774. In their analysis of this issue, the Fifth Circuit has repeatedly drawn a distinction between packages addressed to the alias of a person and those addressed to a separate and real third individual, stating that it is "clear that individuals may assert a reasonable expectation of privacy in packages addressed to them under a fictitious name." *Villarreal*, 963 F.2d at 774.

In the present case, there is no question that the packages at hand were addressed to Franny, as they were ordered by and paid for by her, delivered to a PO box she opened and paid for, and were found in the PO box along with other packages under her real name. The only confounding variable regarding these packages was the name on the front. Given the reasoning of the courts above, Franny's use of an alias should not destroy her privacy rights in the packages as her expectation of privacy in said packages is one society is prepared to recognize as reasonable.

B. Under the framework of analyzing privacy rights as related to property rights, Franny's use of an alias did not destroy her privacy rights because Franny clearly had a property interest in the packages as they were purchased by her and sent to a PO box registered and paid for by her.

This court has also analyzed the issue of whether a person has a protected Fourth Amendment privacy interest in an object or place by analyzing the property interests at play, stating that "property concepts are instructive in determining the presence or absence of the privacy interest protected." *Byrd v. United States*, 584 U.S. 395, 403 (2018) (internal quotations omitted). Lower courts, such as that of the Sixth Circuit, have followed suit in confirming that "[i]mportant considerations in the expectation of privacy equation include ownership, lawful possession or lawful control of the premises searched." *United States v. Carr*, 939 F. 2d 1442, 1446 (6th Cir. 2010). It is important to note here that the property rights framework is still a viable framework to use in this analysis as "[t]he Katz reasonable-expectations test "has been added to, not substituted for," the traditional property-based understanding of the Fourth Amendment." *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

While no court has discussed whether privacy interests as analyzed in relation to property rights change with the use of an alias, Franny certainly had a property interest in the packages as she was the one who purchased them, she was the one who registered and paid for the PO box to which they were sent, she was clearly the intended recipient, and she was the one who received them in the end. Given Franny's clear property interest in the packages at issue, her use of an alias ought not destroy her privacy interests under this framework either.

II. Franny's voicemail statements should be admitted under Federal Rule of Evidence 803(3) because (A) the Fourteenth Circuit erred in reading in a spontaneity

requirement, (B) in the alternative, at least Franny's first voicemail meets the court-inserted spontaneity requirement.

Under the Federal Rules of Evidence, hearsay is generally excluded from being admitted unless otherwise permitted by statute, rules of the Supreme Court, or another Federal Rule of Evidence. Fed. R. Evid. 802. However, Rule 803(3) provides an exception to that general prohibition which allows statements of a declarant's "then-existing state of mind . . . or emotional, sensory, or physical condition" to be admitted as evidence. Fed. R. Evid. 803(3).

In the present case, Franny's voicemail statements are an exception under Rule 803(3) and should be admitted as evidence because (A) the requirement of contemporaneity in mental state between the circumstances at hand and her statements is met, and (B) in the alternative, at least Franny's first voicemail should be admitted as it was made directly after her discovery that her packages were missing.

A. <u>The Fourteenth Circuit mistakenly read in a requirement of spontaneity for statements admissible under Rule 803(3) when rather a requirement of contemporaneity in mental state between a statement and the circumstances to which it pertains is more accurate to the drafter's intent.</u>

The Advisory Committee notes on Rule 803(3) further clarify that the rule requires a "substantial contemporaneity of event and statement," and this is the test that has been adopted by a number of circuit courts along with this court. *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007). This requirement for contemporaneity is not synonymous with a requirement of spontaneity, a distinction which was illuminated by this court when it held that a statement written by an individual was "contemporaneous with her then-existing state of mind, irrespective of whether [she] wrote it on the exact day of her departure or a few days before." *Mutual Life Ins. C. of New York v. Hillmon*, 145 U.S. 285, 294-95 (1892). Additionally, a leading commentator has been quoted by a circuit court in saying "the evidentiary effect of the statement is broadened by

the notion of the continuity of time in states of mind," demonstrating that contemporaneity of mental state can be found even in circumstances when statements are not made in the same moment as the circumstances to which they pertain. *United States v. Veltmann*, 6 F.3d 1483, 1494 (11th Cir. 1993).

The Seventh Circuit's test for the admissibility of a statement under Rule 803(3) is particularly articulate of this understanding and sets forth three requirements to be satisfied: "(1) the statement must be contemporaneous with the mental state sought to be proven; (2) it must be shown that declarant had no time to reflect, that is, no time to fabricate or misrepresent his thoughts; and (3) the declarant's state of mind must be relevant to an issue in the case." *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir.1986).

Here, there is no question that the declarant's state of mind is relevant as Franny's intent in purchasing the contents of her packages is an element of the crime under which she was charged. Given this, the only requirements that remain to be met are that the statements be contemporaneous with the mental state sought to be proven and that the declarant have no time to fabricate or misrepresent their thoughts.

Franny's first voicemail certainly meets all the requirements set forth in the Seventh Circuit's test for admissibility. The contemporaneity of mental state requirement was met as Franny sent the first voicemail right after discovering the packages she expected were missing from her P.O. Box. The second requirement was also met as her language in the first voicemail demonstrates how close in time it was made to the aforementioned discovery, so close that she could not have had time to reflect upon, let alone fabricate, what she would say in her voicemail.

Additionally, her second voicemail also meets all the requirements of the Seventh Circuit's test. The contemporaneity requirement is met as Franny's mental state did not change between her

first and second voicemails. Franny sent the second voicemail after she had spoken to the Post Office workers about her missing package, meaning that any delay in time spent was spent in the same mental state as when she first discovered her packages were missing. Additionally, any time lapse between the first and second voicemails was likely spent trying to resolve her issue by speaking to Post Office workers, giving Franny no opportunity to fabricate her thoughts in preparation for the second voicemail. The delay in time of forty-five minutes is reasonable given the circumstances.

B. In the alternative, Franny's first voicemail should be admitted under Rule 803(3) as it was made spontaneously after her discovery that her packages were missing.

As demonstrated in the analysis above, Franny's first voicemail statement was made spontaneously and directly after discovering that her packages were not in her PO box as she had expected them to be. Given this, even if the Fourteenth Circuit's read-in requirement of spontaneity is found by this court to be correct, Franny's first voicemail should be admitted into evidence.

III. Franny's prior conviction should not be admitted under Federal Rule of Evidence 609(a)(2) as (A) the statute under which she was charge does not require an element of deception be proved, and (B) in the alternative, Franny committed a crime of force which is distinguishable from crimes of deceit.

Under the Federal Rules of Evidence, evidence of prior criminal convictions of a witness may be presented in order to attack their character for truthfulness "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. 609(a)(2). The conference committee report on Rule 609(a)(2) further clarifies that the meaning of "dishonesty or false statement" was intended to be limited to crimes "the commission of which involves some element of deceit, untruthfulness, or falsification bearing upon the accused's propensity to testify truthfully." *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984). As this rule is "intended to

inform fact-finders that the witness has a propensity to lie" it is well established that crimes not related to dishonesty "have little bearing on a witness's character for truthfulness." *United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012).

Here, Franny's prior conviction of petit larceny was not a crime of deceit as (A) the statute she was charged under does not contain a required element of deception, (B) even if such a statutory element is not required, Franny intended to commit her crime through use of stealth, and courts have drawn a distinction between stealth and deceit, and (C) in the alternative, Franny's crime was a crime of force, which courts have repeatedly distinguished from crimes of deceit.

A. The statute under which Franny was charged did not require that deception be proved as an element of the crime and so it is reasonable to assume that no such element existed in Franny's conduct.

It is also important to note here that Franny was charged under Boerum's Petit Larceny statute and not its Theft by Deception statute. The statues are nearly identical with only one difference: the latter requires an element of deception. Had Franny truly committed a crime of deceit, it is likely that she would have been charged under the Theft by Deception statute. As she was not, it is reasonable to infer that her crime did not meet the singular additional element of deception necessary to charge her under the Theft by Deception statute.

B. Franny's actions in committing her crime of sneaking up on her victim were not deceptive as courts have repeatedly drawn a distinction drawn between stealth and deceit.

While this court has not addressed specifically what crimes fall under Rule 609(a)(2), "theft … has been distinguished from crimes of dishonesty in most federal circuits." *Id.* The reasoning behind this distinction is that "crimes such as theft, robbery, or shoplifting do not involve dishonesty or false statement within the meaning of Rule 609(a)(2)." *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir.1990). Additionally, most federal circuits have stated that crimes involving stealth are distinguishable from crimes of dishonesty. *Washington* 702 F.3d at 893.

In the present case, Franny's crime of petit larceny did not include an element of deceit, as reflected in the Boerum Penal Code Petit Larceny statute for Petit Larceny, but rather her crime was one of stealth. As Franny stated in her testimony, her plan in stealing a bag on a dare was to walk over quietly and take the bag unnoticed. This plan to go unnoticed was clearly one that depended upon stealth and not on deception.

C. In the alternative, even if a crime of stealth can be considered a crime of deceit, courts have repeatedly said that crimes of force cannot be crimes of deceit, and Franny's prior theft was committed through force as she shoved and threatened the victim when she was discovered.

In addition to delineating crimes of dishonesty from crimes such as theft or shoplifting, courts have also distinguished crimes involving deceit from those involving force, determining that the phrase "dishonesty and false statement" of Rule 609(a)(2) "has never been thought to comprehend robbery or other crimes involving force." *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976).

If this court determines that Franny did not commit a crime of stealth, we argue in the alternative that Franny committed a crime of force. In her testimony, Franny stated that the victim of her theft noticed her despite her attempts to stay unnoticed. When this happened, the victim grabbed the bag back and Franny responded by forcibly pulling the bag away again. She then pushed the victim and threatened her saying "Let go or I'll hurt you." The actions taken by Franny after discovery by the victim and the threats Franny made clearly demonstrate that, if this was not a crime of stealth, it was certainly a crime of force and thus could not have been a crime of deceit.

CONCLUSION

For the foregoing reasons, Petitioner, Franny Fenty, respectfully requests that this court reverse the Fourteenth Circuit's decision and remand this case to the trial court.

Respectfully submitted,
/s/ Team 20P
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