
IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 25 – 7373

ATTICUS HEMLOCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Attorneys for the Respondent

QUESTIONS PRESENTED

- I. Does *Payton v. New York* prohibit a warrantless arrest of an individual when officers do not enter a residence and effectuate the arrest only after the suspect voluntarily steps outside in response to verbal requests?

- II. Is the Fourth Amendment violated when an officer reasonably relies on a co-occupant's apparent authority to consent to the search of a closed container found in a shared area of a residence?

- III. Under the Federal Rules of Evidence, does Rule 806 authorize extrinsic character impeachment of a hearsay declarant notwithstanding Rule 608(b)'s prohibition on such impeachment of testifying witnesses?

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OPINION BELOW

The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Atticus Hemlock v. United States of America*, No. 24-1883, was entered April 14, 2025, and may be found in the Record. (R. 51-61.)

STATUTORY AND CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions is 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 608 states:

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Fed. R. Evid. 608.

Federal Rules of Evidence 806 states:

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against

whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Fed. R. Evid. 806.

STATEMENT OF THE CASE

In March 2024, authorities began investigating a suspected plot to kidnap a federal official, Jodie Wildrose (“Jodie”), in Boerum Village, Boerum. (R. 52.) The investigation arose after local law enforcement received two independent reports concerning suspicious conduct by Atticus Hemlock (“Petitioner”) and Iris Copperhead (“Copperhead”). (*Id.*) On March 29, 2024, Elvis Hoag (“Hoag”), a barista at a Boerum Village coffee shop, reported overhearing conversations that appeared to describe a kidnapping plan involving Jodie. (R. 8.) The following day, March 30, 2024, Tina Caplow (“Caplow”), the manager of a local superstore, contacted police to report that Petitioner and Copperhead had purchased zip ties, ski masks, a folding knife, black trash bags, and bear spray with cash under circumstances she found suspicious. (R. 6, 52.)

These reports were referred from the Boerum Village Police Department to the Federal Bureau of Investigation (“FBI”) because the alleged target was a federal official. (R. 52.) On the morning of April 2, 2024, FBI Special Agents Hugo Herman (“Agent Herman”) and Ava Simonson (“Agent Simonson”) (collectively, “the Agents”) interviewed both Hoag and Caplow, during which Hoag identified the suspicious individuals as Petitioner and Copperhead. (*Id.*)

Later that day, the Agents went to Petitioner’s residence, at 11 County Road 416 in Boerum Village, Boerum (the “Residence”), which Petitioner shared with his girlfriend, Fiona Reiser (“Reiser”). (R. 15.) The Agents did not possess an arrest warrant and initially approached the Residence to question the Petitioner as part of their investigation. (R. 22.) After identifying themselves as FBI agents and requesting that the Petitioner come outside to speak with them, he refused. (*Id.*) While speaking through the screen door, Agent Herman observed two bottles labeled

“chloroform” on the counter behind. (*Id.*) When questioned, the Petitioner attempted to block the Agents’ view and made unsolicited statements referencing Jodie, who was scheduled to visit Boerum Village the following week. (*Id.*) Based on these observations, the Agents determined that probable cause existed to arrest Petitioner. (*Id.*)

After determining that probable cause existed, the Agents radioed Agent Kiernan Ristroph (“Agent Ristroph”) for backup and returned to the Residence to effectuate the arrest outside. (R. 23.) The Agents walked towards the Residence and called out to Petitioner from outside. (*Id.*) Petitioner voluntarily exited the Residence and walked down the steps. (*Id.*) Once Petitioner reached the ground level outside the Residence, Agent Simonson placed him in handcuffs, informed him that he was under arrest for attempted kidnapping of a federal official, and advised him of his Miranda rights while Agent Herman conducted a search of his person. (*Id.*) During that search, Agent Herman discovered an open spiral-bound notebook in one of Petitioner’s pockets, which revealed handwritten entries describing Petitioner’s plans involving Jodie. (R. 5, 24.)

At the time of the arrest, Copperhead was headed to Petitioner’s Residence, though the Agents were unaware of this. (R. 53.) Shortly thereafter, Boerum Village resident Theodore Kolber (“Kolber”) was walking in Joralemon State Park when he heard a commotion and rustling in the woods nearby. (R. 42.) Suddenly, Copperhead busted out of the woods, and Kolber described her as visibly shaken, with tears streaming down her face. (R. 42, 53.) Kolber asked Copperhead if she was okay, and in response Copperhead yelled, “I can’t believe I saw him get arrested. It’s all his fault. It was all Atticus’ idea—NOT MINE! I can’t run a business from prison!” (R. 43.) On the evening of April 2, 2024, Copperhead was arrested and passed away later that same night. (R. 53.)

Following the arrest of Petitioner, Agent Ristroph remained at the Residence to speak with Reiser about what had occurred with Petitioner. (R. 15, 53.) Agent Ristroph informed Reiser that

Petitioner had been arrested, and he requested Reiser's consent to look around the cabin. (*Id.*) Reiser allowed Agent Ristroph inside to look around the cabin. (*Id.*) As Agent Ristroph conducted his search, he inquired about the layout of the cabin, to which Reiser told him that she and Petitioner shared a bedroom on the first floor and that the loft on the second floor was used primarily as Petitioner's storage space. (R. 36.) Agent Ristroph limited his search to the common areas of the Residence and did not enter the loft at any point. (*Id.*)

During the search, Agent Ristroph observed a cardboard box at the bottom of the loft stairs, which were directly connected to the living room, an area over which Reiser undoubtedly exercised control. (*Id.*) The box was plain, not labeled, and contained no exterior details. (R. 37.) Upon opening the box, Ristroph found "a length of rope, a folding knife, a collection of zip ties, a roll of duct tape, two black ski masks, one pair of gloves, and two bottles of chloroform." (R. 14, 53.) The contents were subsequently seized as evidence. (*Id.*)

Petitioner was formally indicted by a grand jury on April 3, 2024. (*Id.*) Petitioner later filed a motion to suppress the notebook found during his arrest, as he argued the arrest violated *Payton v. New York*, and, as such, the notebook was the fruit of an illegal arrest. (R. 53.) Petitioner also moved to suppress the materials seized from the cardboard box during the search of the Residence on the ground that Reiser lacked authority to consent to its search. (R. 53-54.) The District Court held oral argument on July 20, 2024, and denied each of Petitioner's motions to suppress. (R. 31, 39.)

During the trial, the Government presented Kolber as a witness to recount statements Copperhead made on April 2, 2024. (R. 41.) The District Court admitted those statements under Federal Rule of Evidence 803(2), concluding they qualified as excited utterances. (R. 44.) Petitioner then sought to impeach Copperhead's credibility as a hearsay declarant under Rule 806

by offering extrinsic evidence. (R. 47-48.) Specifically, Petitioner attempted to admit a report describing an instance of academic misconduct and a job application in which Copperhead allegedly misrepresented his academic qualifications, along with testimony to authenticate and explain those documents. (R. 47-49.) The parties contested whether Rule 608(b) precluded admission of extrinsic evidence of specific conduct. (R. 49-50.) The District Court sustained the Government's objection, precluding Petitioner from introducing any extrinsic evidence. (R. 50.)

Following the trial, the jury convicted Petitioner of attempted kidnapping of a federal officer under 18 U.S.C. § 1201(a)(5) and (d), and he was sentenced to ten years' imprisonment. (R. 54.) Petitioner appealed his conviction to the Fourteenth Circuit, raising the same arguments presented before the trial court. The Fourteenth Circuit affirmed the District Court's decision in full. (R. 58.) Petitioner appealed to this Court and was granted certiorari on all three issues. (R. 62.)

SUMMARY OF THE ARGUMENT

We respectfully request that this Court affirm the decision of the Fourteenth Circuit because the court below properly (A) concluded that law enforcement officers did not violate the Fourth Amendment under *Payton v. New York*, where they remained outside the home and effectuated the arrest only after the Defendant voluntarily exited; (B) properly determined that Agent Ristroph reasonably relied on Reiser's apparent authority to search the cardboard box based on the objective facts available to him; and (C) correctly applied Federal Rules of Evidence 806 and 608(b) to prohibit extrinsic impeachment of a hearsay declarant offered solely to attack Copperhead's character for truthfulness.

A. No Fourth Amendment Violation Occurs Absent Physical or Constructive Entry

The Fourth Amendment draws a firm line at the entrance of a home, but that protection is not triggered when officers remain outside, and the suspect voluntarily exits the residence. This

Court has held a constitutional deprivation occurs only when law enforcement crosses the threshold of a home to effectuate an arrest. Where officers do not enter the home, physically or constructively, the warrant requirement imposed by *Payton* does not apply.

In this case, the Agents did not enter the cabin, cross the threshold, or physically intrude into the Residence. Instead, Petitioner chose to step outside in response to lawful police commands and was arrested. Because the arrest occurred outside the home and did not involve a constructive or physical entry, this falls outside the scope of *Payton's* warrant requirement. Accordingly, the Fourteenth Circuit correctly held that the arrest was constitutional under the Fourth Amendment.

B. Agent Ristroph Reasonably Relied on Reiser's Apparent Authority

The Fourteenth Circuit correctly held that a warrantless search of a cardboard box was constitutionally reasonable because Agent Ristroph relied on Reiser's apparent authority to consent. Where circumstances reasonably indicate shared access or control, an officer may rely on consent even if ownership is uncertain. Because nothing known to Agent Ristroph negated Reiser's apparent authority over the loft stairs or the cardboard box searched, the search fell within a well-established exception to the Fourth Amendment.

In this case, the facts made available to Agent Ristroph on April 2, 2024, reasonably indicated that Reiser had control over the Residence. The only set of facts made available to Agent Ristroph was that the second-floor loft was primarily used by Petitioner for storage. The facts communicated to Agent Ristroph did not negate Reiser's apparent authority over a shared area of the home or over a cardboard box located on the bottom of the loft stairs. Thus, the warrantless search was objectively reasonable and fell squarely within the apparent-authority exception to the Fourth Amendment's warrant requirement.

C. Impeachment of Hearsay Declarants Under Rule 806

Federal Rule of Evidence 806 permits impeachment of a hearsay declarant only by evidence that would be admissible if the declarant had testified. The Fourteenth Circuit correctly rejected Petitioner's effort to expand Rule 806 to allow extrinsic impeachment through specific instances of prior conduct. Rule 806 was designed to prevent hearsay declarants from evading credibility scrutiny, not to authorize broader impeachment than the Federal Rules permit. Rule 608(b) expressly bars extrinsic evidence offered to attack a witness's character for truthfulness, and Rule 806 creates no exception to that prohibition.

In this case, Petitioner conceded that the proffered evidence was offered solely for character impeachment and, as such, it would have been inadmissible had Copperhead testified. Rule 806 does not permit a different result merely because the statement was admitted through hearsay.

ARGUMENT

I. Agents Herman and Simonson did not violate the Fourth Amendment because they remained outside the residence and effectuated Petitioner's arrest only after he voluntarily exited.

The Fourth Amendment protects individuals against unreasonable searches and seizures by drawing constitutional boundaries around the most private areas of life. U.S. Const. amend. IV. Its text secures "the right of the people to be secure in their persons, houses, papers, and effects," and conditions the issuance of warrants on "probable cause, oath or affirmation, and particularity."¹ *Id.* By expressly enumerating the home among the interests entitled to protection, the Amendment reflects a core principle of American law: that the home occupies a unique constitutional status,

¹ Petitioner does not contest that the Agents had probable cause to arrest him. (R. 27.)

safeguarded against unjustified *physical* intrusion. *Id.*; see *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984); see also *Payton v. New York*, 445 U.S. 573, 573 (1980).

It is equally clear that the level of protection provided by the Fourth Amendment in a particular situation depends upon a careful analysis of the nature of the individual's interests at stake. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Fourth Amendment ordinarily safeguards the privacy a person maintains in their home and effects by requiring law enforcement to secure a warrant. *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986) (explaining that privacy expectations are most heightened in an individual's home). Unless exigent circumstances or another recognized exception is present, law enforcement must secure a warrant before entering a home to search or otherwise invade a person's legitimate expectation of privacy. *Katz v. United States*, 389 U.S. 347, 357 (1967) (warrantless searches "are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions").

On the other hand, when only a person's liberty interest or possessory interest is implicated, courts have held that the Fourth Amendment's warrant requirement does not apply, and that police conduct is judged solely by its reasonableness. *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (reasoning that immediate action based on an officer's on-scene observations cannot realistically be subjected to the warrant process); *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) ("touchstone" of Court's analysis under the Fourth Amendment "is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security").

Absent entry to the home, the Fourth Amendment permits law enforcement officers to make a warrantless felony arrest in a public place when supported by probable cause. *United States v. Watson*, 423 U.S. 411, 415 (1976); *Florida v. White*, 526 U.S. 559, 565 (1999). An arrest in a

public place constitutes a seizure that must be reasonable, but reasonableness is satisfied where probable cause exists. *Watson*, 423 U.S. at 415; *see also Beck v. Ohio*, 379 U.S. 89, 96 (1964) (“an arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause”). Likewise, officers may seize items without a warrant when those items are in plain view and there is probable cause to believe they constitute evidence of a crime. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (emphasis added). This principle reflects the distinction between searches and seizures under the Fourth Amendment: a search implicates an individual’s privacy interest, while a seizure affects dominion over property. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Where an article is already exposed in plain view, neither its observation nor its seizure intrudes upon a protected privacy interest. *Id.* Against this legal background, Petitioner’s argument under *Payton v. New York* fails.

A. No *Payton* violation occurred because the Agents never physically entered Petitioner’s home.

The Fourth Amendment affords heightened protection to the home, but that protection is triggered only when law enforcement officers physically intrude into the residence. *Payton*, 445 U.S. at 573 (“physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed”). Absent consent or exigent circumstances, law enforcement officers may not cross the threshold of a home to conduct a warrantless arrest. *Id.*; *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002). Courts have drawn a “firm line at the entrance of the house,” identifying physical entry rather than verbal interaction as the constitutional violation. *Payton*, 445 U.S. at 573; *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972). A warrantless arrest violates the Fourth Amendment only when officers cross the threshold of the home or engage in conduct that functions as a physical entry to effectuate the seizure. *Payton*, 445 U.S. at 573.

Outside the home, an arrest supported by probable cause is constitutionally reasonable without a warrant. *Watson*, 423 U.S. at 415. This rule reflects a longstanding judgment that warrantless public arrests based on probable cause are reasonable and should not be encumbered by endless litigation over whether a warrant could have been obtained. *Id.* The concept of a “public place” extends beyond traditional open areas and includes locations where a suspect is exposed to public view, speech, hearing, or touch and therefore lacks a reasonable expectation of privacy.² *United States v. Santana*, 427 U.S. 38, 42 (1976); *Hester v. United States*, 265 U.S. 57, 59 (1924); *Katz*, 389 U.S. at 351.

By contrast, the rule under *Payton* is limited to arrests effectuated inside the home. *Payton*, 445 U.S. at 573. The constitutional distinction turns on whether officers effectuate an arrest in a space that is genuinely public or instead intrude physically or functionally into the home. *Kyllo v. United States*, 533 U.S. 27, 40 (2001). Where officers remain outside the residence and arrest a suspect in a public or exposed area without entering the home, the arrest is constitutionally reasonable under established Fourth Amendment caselaw. *Watson*, 423 U.S. at 415; *Santana*, 427 U.S. at 42.

This Court’s precedent draws a clear distinction between warrantless arrests accomplished through physical entry into the home and arrests initiated from locations exposed to public view. In *Payton*, officers forcibly entered private residences to conduct routine felony arrests, including breaking down the door of one suspect’s home and arresting another inside his bedroom. 445 U.S. at 576. Since the arrests were accomplished through physical entry into the home, the Fourth Amendment’s core protection of residential privacy was violated. *Id.* at 602-03. Distinguishably,

² A person has a constitutionally protected reasonable expectation of privacy when they have (1) manifested an actual (subjective) expectation of privacy and (2) that expectation is one that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 360 (Harlan, J., concurring); *Ciraolo*, 476 U.S. at 211.

in *Santana*, the defendant was standing in the doorway of her home when law enforcement officers approached to make an arrest. 427 U.S. at 38. When the officers identified themselves, the defendant retreated into the vestibule of her home, but the officers caught and arrested her. *Id.* at 40. The defendant lacked a reasonable expectation of privacy at that location because she was exposed to public view, speech, and hearing. *Id.* at 42. Since the encounter began in what this Court deemed a “public” place, the arrest did not implicate the Fourth Amendment’s heightened protection of the home. *Id.*

Courts applying *Payton* have held that warrantless arrests are constitutionally permissible when officers do not cross the threshold, and the suspect exits the home in response to verbal direction. In *Knight v. Jacobson*, law enforcement officers went to the defendant’s residence, knocked on the door, and instructed the defendant to step outside. *Knight v. Jacobson*, 300 F.3d 1272, 1274 (11th Cir. 2002). The defendant complied and exited the home, at which point he was arrested outside without a warrant. *Id.* At no point during the arrest did the officer cross the threshold of the residence or enter the home to effectuate an arrest. *Id.* at 1277. The Fourth Amendment was not implicated because *Payton* draws a firm constitutional line at the entrance to the home, and that line is crossed only when officers physically enter the residence to make an arrest. *Id.* The court reasoned that an officer’s use of voice to request that a suspect step outside does not constitute a physical entry into the home. *Id.*

Comparatively, in *McKinney v. George*, police officers went to the defendant’s apartment, knocked on the door, and instructed him to come with them. *McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984). At no point did the officers cross the threshold of the apartment or enter the residence to effectuate the arrest. *Id.* Since the arrest occurred only after the defendant exited the

home and without a physical intrusion into the residence, the privacy of the home was not invaded. *Id.*

Here, the Agents approached Petitioner's home, observed that the main door was open, but the screen door was closed, and remained several feet away from the bottom of the front steps while speaking with the Petitioner. (R. 21.) Petitioner remained inside the residence behind the closed screen door, and the agents did not enter the home, position themselves in the doorway, or cross the established threshold at any point. (R. 24.) This encounter parallels situations where suspects are exposed to "view, speech, and hearing" and accessible to law enforcement without any physical intrusion of the home.

Unlike *Payton*, where the officers forcibly entered the residence and arrested suspects inside protected areas of their home, 445 U.S. at 576, here the physical boundary of the home was preserved throughout the duration of the encounter. Analogously to the officers in *Knight* and *McKinney*, the agents limited their conduct to knocking, speaking from the outside, and maintaining distance from the entrance while Petitioner remained inside. (R. 21-24.) Petitioner remained in full control of the boundary of the home throughout the encounter by remaining behind the closed screen door and choosing when to open and exit the residence.

Moreover, Petitioner only exited the residence following verbal requests from the Agents, without any physical entry, threats, or use of force. (R. 23.) In *Knight* and *McKinney*, officers instructed the defendants to step outside, and the arrests occurred only after the defendants complied without any physical intrusion into the residence. *Knight*, 300 F.3d at 1274; *McKinney*, 726 F.2d at 1188. Similarly, here, the Agents remained outside, did not draw weapons, and did not enter the home before Petitioner exited and descended the steps. (R. 23.) The arrest was completed only after Petitioner reached the ground level outside the Residence. (*Id.*) As in *Knight* and

McKinney, the Agent's use of their voice to request that Petitioner step outside cannot constitute an entry into the home and therefore does not implicate *Payton*'s warrant requirement where the arrest itself occurs outside.

In light of these facts, *Payton* does not govern this case for two reasons. First, the privacy of the home was not invaded, as Petitioner voluntarily appeared at the doorway and was visible to the Agents from outside, eliminating any reasonable expectation of privacy against observation from a public vantage point through an open doorway. Second, *Payton*'s protection is triggered only by a physical entry into the home, and no such entry occurred here. An officer's verbal request from outside the residence, without crossing the threshold, does not implicate the heightened constitutional safeguards *Payton* affords to in-home arrests.

- B. Even if this Court adopts the constructive entry doctrine, suppression will remain unwarranted because *Payton* is violated only when officers, while remaining outside the home, exercise coercive domination equivalent to physical intrusion and nothing approaching that occurred here.

The law has long permitted officers to engage in consensual encounters with suspects without violating the Fourth Amendment. *See e.g., Bennett v. City of Eastpointe*, 410 F.3d 810, 821 (6th Cir. 2005) (“A purely consensual encounter between a police officer and a citizen does not implicate the Fourth Amendment.”); *see also United States v. Hudson*, 405 F.3d 425, 439 n. 10 (6th Cir. 2005) (“The police were of course free to approach Hudson and talk with him so long as they did not do so in a manner that would lead a reasonable person to feel that he was not free to leave.”). Thus, constructive entry only applies when police, while remaining outside a home, use coercive tactics that essentially force a person to exit the residence, thereby circumventing *Payton*'s warrant requirement. *See United States v. Morgan*, 743 F. 2d 1158, 1161 (6th Cir. 1984) (identifying constructive entry where officers surrounded the residence, flooded it with spotlights, and summoned occupants with bullhorns). The rule requires “such a show of authority that the

defendant reasonably believed he had no choice but to comply.” See *United States v. Thomas*, 430 F.3d 274, 278 (6th Cir. 2005).

Notwithstanding those limitations, courts that have accepted the constructive entry doctrine look to the totality of circumstances and focus on coercive attributes: (1) drawn weapons; (2) raised voices; (3) coercive demands; or (4) a large number of officers in plain sight. See *United States v. Grayer*, 232 Fed.Appx. 446, 450 (6th Cir. 2007). This doctrine originated from the concern that officers could achieve the same result as physical entry “by remaining outside the doorway and controlling the movements of suspects within through *the use of weapons* that greatly extend the ‘reach’ of the arresting officers.” *Morgan*, 743 F.2d at 1166 (emphasis added); *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff’d*, 457 U.S. 537 (1982).

The primary focus is on whether the police conduct can be properly seen as coercive. See *Morgan*, 743 F.2d at 1166; see also *Johnson*, 626 F.2d at 757. Courts have routinely found no constructive entry where officers simply knocked on doors, identified themselves, and requested that suspects come outside without weapons drawn or coercive commands, even with multiple officers present. *United States v. Thomas*, 430 F.3d 274, 278 (6th Cir. 2005); *Nash v. United States*, 2004 WL 2912796, at *1 (6th Cir. Dec. 16, 2004) (noting that this court has “explicitly upheld the legitimacy of doorstep investigatory interviews”). The Fourth Amendment requires an objective assessment of whether a reasonable person would have felt compelled under the circumstances. See *Kentucky v. King*, 563 U.S. 452, 469 (2011). Officers are permitted to identify themselves, request cooperation, and maintain officer safety during investigative encounters. See *Florida v. Royer*, 460 U.S. 491 (1983) (holding that officers may approach individuals and make inquiries as part of legitimate investigative functions.)

Courts have consistently rejected constructive entry claims where officers remain outside the home, and a suspect voluntarily exits in response to noncoercive police conduct. In *Grayer*, officers approached the defendant's residence, knocked on the door, and asked him to step outside. 232 Fed.Appx. at 450. The defendant complied and exited the home, where he was arrested without a warrant. *Id.* Although additional officers and police vehicles were present nearby, the court emphasized that only two officers approached the door, neither had weapons drawn, and no threats, commands, or raised voices were used. *Id.* The officers did not enter the home, block the doorway, or otherwise force the defendant outside. *Id.* Because the defendant voluntarily exited the residence and the arrest occurred outside the home without physical entry or coercive domination, the court rejected the constructive entry argument. *Id.*

Cases that find constructive entry turn on coercive police conduct that deprived the suspect of any meaningful choice to remain inside the home. In *Johnson*, federal agents went to the defendant's residence and induced him to open the door by misrepresenting their identities. 626 F.2d at 757. When the defendant opened the door, the agents remained outside but immediately asserted control by brandishing weapons while Johnson stood inside the home. *Id.* The agents did not physically cross the threshold, but the Ninth Circuit explained that the arrest occurred within the home because Johnson had not voluntarily exposed himself to public view and was effectively seized while still inside his residence. *Id.*

Similarly, in *United States v. Al-Azzawy*, law enforcement officers completely surrounded the defendant's trailer, positioned themselves around the residence, and ordered the defendant to exit using a bullhorn while their weapons were drawn. *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985). The defendant was not free to leave, and his movement was entirely controlled by the officers' overwhelming show of force and authority. *Id.* The court reasoned that he did not

voluntarily expose himself to the public view or step outside on his own initiative but instead emerged only in response to coercive demands. *Id.* Under these circumstances, the arrest was deemed to have occurred inside the residence since the officers effectively seized him through force. *Id.*

The facts here align with cases rejecting constructive entry and are materially distinct from those finding *Payton* violations based on coercion. The circumstances of this arrest closely resemble those in *Grayer*, where the court rejected a constructive entry theory because the officers' conduct lacked coercive force. 232 Fed.Appx. at 450. In *Grayer*, only a limited number of officers approached the residence, no weapons were drawn, and the defendant was asked to step outside without threats or commands. *Id.* The court in *Grayer* found no *Payton* violation despite the presence of additional officers and police vehicles, emphasizing that the defendant voluntarily exited the residence and was arrested outside. *Id.* Here, the facts are even less suggestive of coercion, as only the Agents were present, and there were no surrounding officers, police vehicles, or displays of authority. (R. 22.) The Agents never physically entered the residence, blocked any exits, raised their voices, or overtly displayed their authority, thus placing this case within the category of encounters where courts have declined to find constructive entry. (R. 21-24.)

By contrast, the arrests in *Johnson* and *Al-Azzawy* involved coercive tactics that effectively seized the defendants while they remained inside their homes. In *Johnson*, agents misrepresented their identities to induce the defendant to open the door and immediately asserted control by brandishing weapons while he stood inside, leaving him no meaningful choice and transforming the encounter into an in-home seizure. 626 F.2d at 757. In *Al-Azzawy*, officers completely surrounded the residence with weapons drawn and ordered the defendant to exit through a bullhorn, exerting total control over his movement before he ever left the home. 784 F.2d at 893.

Here, none of those coercive circumstances were present. Agents Herman and Simonson remained several feet from the entrance, did not draw their weapons, did not block the doorway, and used no threats or commands beyond verbal requests to speak. (R. 21-24.) The Defendant remained behind a closed screen door during the exchange and exited only after the agents withdrew to confer and later returned, with the arrest occurring only once he reached ground level outside the Residence. (R. 22-23.) The absence of deception, drawn weapons, surrounding officers, or overwhelming displays of authority distinguishes this case from *Johnson* and *Al-Azzawy* and confirms that no constructive entry occurred.

For these reasons, the constructive entry doctrine has no application here. Constructive entry is reserved for situations in which law enforcement, while remaining physically outside the home, employs coercive or dominating tactics that effectively force a suspect to exit and submit to arrest. That did not occur in this case. Only two agents were present at the front of the residence, no weapons were drawn, no threats or deceptive tactics were used, and the doorway was not blocked. (R. 21-24). The Petitioner was not surrounded, commanded, or compelled by an overwhelming show of authority but instead exited the residence without physical or psychological coercion. (*Id.*) Because the arrest followed a voluntary exit and was effectuated entirely outside the home, the seizure did not amount to a constructive in-home arrest, and *Payton's* warrant requirement was not triggered. Therefore, the decision of the Fourteenth Circuit should be affirmed.

II. The Fourteenth Circuit correctly denied the motion to suppress because Agent Ristroph reasonably relied on Reiser's apparent authority to consent to the search of the cardboard box.

The Fourteenth Circuit correctly held that Agent Ristroph reasonably believed that Reiser possessed apparent authority to consent to the search of the cardboard box. Fourth Amendment

issues are governed by an objective reasonableness standard, under which courts assess whether, based on the totality of the circumstances, the officers' actions were reasonable from the perspective of a prudent officer at the time. *Terry*, 392 U.S. 1, 27.

The Fourth Amendment protects the right of private persons to be free from unreasonable government intrusions into areas where they have a legitimate expectation of privacy. U.S. Const. amend. IV. A legitimate expectation of privacy generally prohibits a warrantless search of a person's home. *Katz*, 389 U.S. at 360. This Court recognizes limited exceptions to a warrantless search where the search is conducted pursuant to voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973); *see also United States v. Duran*, 957 F.2d 499, 501 (7th Cir. 1992) ("The Fourth Amendment permits police to conduct a warrantless search without probable cause if an authorized individual voluntarily consents to the search").

Voluntary consent may be given by: (1) the individual whose property is searched, *Schneckloth*, 412 U.S. at 248; (2) a third party who possesses common authority over the premises or effects, *United States v. Matlock*, 415 U.S. 164, 171 (1974); or (3) a third party who possesses apparent authority over the premises or effects, *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). In each circumstance, the government bears the burden of establishing both the voluntariness of the consent and the authority of the person who provided it. *Rodriguez*, 497 U.S. at 181.

This case turns on the third exception. Here, Respondent concedes that Agent Ristroph's search was without a warrant. (R. 36.) The only remaining question, therefore, is whether Agent Ristroph reasonably believed that Reiser possessed apparent authority over the cardboard box.

- A. The apparent authority exception to the Fourth Amendment is applicable here because the Petitioner could not demonstrate that Agent Ristroph possessed reliable information negating Reiser's authority.

Under the Fourth Amendment, a warrantless search is constitutionally permissible where an officer reasonably relies on a third party's apparent authority over the premises or effects searched. *Rodriguez*, 497 U.S. 177 (1990). Apparent authority exists where "the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Id.* at 188 (quoting *Terry*, 392 U.S. at 21-22). Once valid consent is obtained, closed-container searches are permissible unless officers possess reliable information that the container falls outside the consenting party's control. *See United States v. Snow*, 44 F.3d 133, 135 (2d Cir. 1995); *see also United States v. Melgar*, 227 F.3d 1038, 1041-42 (7th Cir. 2000).

This Court should find that the apparent authority exception applies for two reasons: (i) because no set of facts were communicated to Agent Ristroph to negate Reiser's authority to consent to a search of the loft's staircase, and (ii) because the Petitioner's cardboard box was unmarked and located in a shared area of the Residence.

- i. No facts were communicated to Agent Ristroph to negate Reiser's apparent authority, rendering the search consistent with the Fourth Amendment.*

Actual authority to consent to a search is not required if the third party has apparent authority to consent. *Rodriguez*, 497 U.S. at 186. A third party has apparent authority to consent when an officer, based on the facts available to them in the moment, has an objectively reasonable belief that the third party has joint access to or control over the property, even if it turns out they do not have this level of access or control. *Id.* at 198 (citing *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

Rodriguez makes clear that apparent authority turns on what officers knew at the time, not on post hoc determinations of ownership or control. 497 U.S. at 180. This Court emphasized that the

Fourth Amendment does not demand certainty but rather permits reasonable reliance unless officers possess information that would render that belief unreasonable. *Id.* at 185-86. Thus, where officers lack reliable information negating authority, they are entitled to rely on consent. *Id.* at 188-89.

Federal courts have consistently applied this principle, holding that apparent authority is defeated only when officers are presented with facts that clearly undermine the consenting party's authority. The Seventh Circuit has repeatedly rejected the argument that officers must investigate or clarify ownership before acting. *See Melgar*, 227 F.3d at 1041. In *Melgar*, the court held that officers are "not required to conduct a detailed inquiry into property rights" before relying on consent, explaining that Fourth Amendment reasonableness does not turn on technical ownership. *Id.* Similarly, in *United States v. Groves*, the court upheld a consent search where circumstances reasonably suggested shared access, notwithstanding uncertainty over ownership. *United States v. Groves*, 530 F.3d 506, 509-10 (7th Cir. 2008). In *Groves*, officers reasonably relied on the defendant's girlfriend's consent where she had a key and unlimited access to the premises. *Id.* at 510. When evaluating her authority to consent, the court weighed several factors, including "(1) possession of a key to the premises; (2) a person's admission that she lives at the residence in question; . . . (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the home when the owner is not present." *Id.* at 510.

Petitioner argued before the Fourteenth Circuit that officers are required to make further inquiry when faced with ambiguous situations regarding a third party's ability to consent. *See United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991) ("The burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry."). In *Whitfield*, the DC Circuit found a Fourth Amendment violation existed because the officers

knew only that the consenting parent owned the home and that her son's room was unlocked. *Id.* at 1073. The facts known to the officers at the time were insufficient to establish mutual use or apparent authority over the defendant's bedroom. However, *Whitfield* makes clear that this duty only arises in situations where the facts fail to support a reasonable belief in mutual use or control. *Id.* Moreover, *Whitfield* reaffirms that officers may rely upon "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 1075 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

Applied here, nothing communicated to Agent Ristroph negated Reiser's apparent authority over the area searched at the Residence or the cardboard box itself. Since May 2023, Reiser has rented the property together with her boyfriend, Petitioner. (R. 28, 52.) Unlike *Whitfield*, Agent Ristroph watched Reiser enter the Residence on April 2, 2024. (R. 13.) Following the arrest of Petitioner on April 2, 2024, Reiser voluntarily consented to the search, allowing Agent Ristroph into the Residence. (R. 13, 15.) During the search, Reiser indicated that the upstairs loft was primarily used for storage by Petitioner and that she "did not really ever go up there." (R. 15, 17.) Reiser further disclosed to Agent Ristroph that she slept in the back room of the Residence. (R. 15.) The facts made available to Agent Ristroph indicated that Reiser possessed apparent authority over the first floor. *Rodriguez*, 497 U.S. at 188. Reiser placed no further restrictions or confinements on Agent Ristroph's search. (R. 13, 15-16.) Analogously to *Melgar* and *Groves*, Agent Ristroph was not required to conduct a detailed inquiry of every item within the Residence. *Melgar*, 227 F.3d 1038; *Groves*, 530 F.3d 506. Instead, Agent Ristroph reasonably relied on objective indicators of Reiser's apparent authority, including her admission of him into the residence, her statement that she slept in the back room, and her presence in the home with Agent Ristroph after Petitioner was arrested. (R. 15.) Because Agent Ristroph possessed no information

negating Reiser's authority at the time of the search, his reliance on her consent was objectively reasonable under the Fourth Amendment reasonableness standard.

ii. The cardboard box recovered possessed no indicia of Petitioner's exclusive ownership and was located in a shared area of the Residence.

The Fourth Amendment's consent doctrine turns on objective reasonableness. Where officers act on the consent of a co-occupant, the Constitution permits reasonable reliance on shared access and outward indicia of authority, rather than requiring officers to resolve private property questions in the field. *See Melgar*, 227 F.3d at 1041.

Consistent with that principle, courts have repeatedly recognized that areas used for common access and movement within a residence are shared spaces carrying a diminished expectation of privacy. *See United States v. Villegas*, 495 F.3d 761, 766 (9th Cir. 2007). In *Villegas*, the Ninth Circuit held a defendant possessed "no legitimate expectation of privacy in the duplex's common hallway" and that "Officer Lutz's warrantless entry into that area did not violate the Fourth Amendment." *Id.* at 766. The same reasoning applies here. The staircase appears to be a mutually accessible area over which Reiser possessed joint access and control. Although Reiser stated that she "did not really go up there," her expression reflects a matter of personal habit rather than a limitation on her access to the loft. (R. 15.). She did not indicate that the stairs were restricted or otherwise designated as exclusively under Petitioner's use and control. *Id.* Absent such indicia of exclusivity, Agent Ristroph could reasonably conclude that the staircase constituted a shared area of the Residence for purposes of apparent authority.

Within such shared space, the scope of consent reasonably extends to containers found there unless officers are presented with objective indicators of exclusive ownership or limitations. *Florida v. Jimeno*, 500 U.S. 248 (1991). Under *Jimeno*, a general consent to search encompasses containers that a reasonable officer would understand to fall within the scope of that consent. *Id.*

at 251. In *Jimeno*, this Court held it was objectively reasonable for the police to conclude that the general consent to search respondents' car included the consent to search containers that might bear drugs. *Id.* The Second Circuit has applied this principle to hold that when an individual consents to the search of a space, he should reasonably expect that readily opened, closed containers discovered within that space will be opened and examined, absent an express limitation on consent. *See Snow*, 44 F.3d at 135 (holding that when a defendant consented to a search of his car, he should have reasonably expected that readily opened, closed containers discovered inside the car would be opened and examined).

Comparatively, in *United States v. Taylor*, the Sixth Circuit considered whether officers could rely on a third party's written consent to search a container clearly associated with another individual. *United States v. Taylor*, 600 F.3d 678, 685 (6th Cir. 2010). During the search, officers found a closed shoebox hidden inside a closet, with men's clothing covering the top of the box that contained two handguns. *Id.* at 680. The court held that the girlfriend lacked apparent authority to consent because the circumstances indicated the shoebox was reserved solely for the defendant's use, explaining that "the police would likely not have opened the closed shoebox if they believed it belonged to Arnett. Rather, they opened the shoebox precisely because they believed it likely belonged to Taylor." *Id.* at 682; *see also United States v. Rodriguez*, 888 F.2d 519, 524-25 (7th Cir. 1989) (holding that a defendant's wife did not have apparent authority to consent to the search of a briefcase and file box labeled "Mike" because it was an objective indicator of exclusive ownership).

Here, because the cardboard box recovered bore no name or identifying markings and was easily accessible within the cabin, this search complies with established Fourth Amendment caselaw. (R. 14.) Unlike in *Taylor* and *Rodriguez*, where the courts found the third party's apparent

authority to consent was negated because the shoebox and briefcase indicated exclusive ownership, the cardboard box searched at the Residence had no such markings or identifications. *Taylor*, 600 F.3d at 685; *Rodriguez*, 888 F.2d at 524-25. Instead, Agent Ristroph respected the limits of Reiser’s consent by refraining from entering the loft after being told that it was used primarily by the Petitioner for storage and office space. (R. 13.) Because of this limitation, Agent Ristroph confined his search to the first floor and to areas reasonably understood to be shared, demonstrating adherence to the scope of consent articulated by Reiser. Analogously to *Villegas* and *Jimeno*, after Agent Ristroph obtained Reiser’s general consent to search the Residence, his discovery and subsequent search of the cardboard box in a mutually shared area of the Residence was permissible.

B. The Petitioner’s rule would impose an impossible burden inconsistent with Fourth Amendment reasonableness.

The Fourth Amendment does not require law enforcement officers to resolve ambiguity surrounding ownership or control before relying on consent. *Brinegar*, 338 U.S. at 176. Rather, it permits officers to act on an objectively reasonable beliefs in authority based on the facts available at the time of the search. *Rodriguez*, 497 U.S. at 186.

This Court has repeatedly emphasized that the Fourth Amendment “does not demand that the government be factually correct” but instead tolerates reasonable mistakes made during ambiguous and rapidly evolving situations. *Id.* at 184; *see also Brinegar*, 338 U.S. at 176 (“[R]oom must be allowed for some mistakes on their part.”); *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006) (explaining that the Fourth Amendment permits officers to act on objectively reasonable beliefs even where those beliefs later prove mistaken). The Fourth Amendment requires “reasonable caution”, not certainty. *Brinegar*, 338 U.S. at 175-76 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Requiring officers to conclusively determine ownership of containers

located in shared areas before relying on consent would impose precisely the sort of perfection the Fourth Amendment rejects.

Consistent with these principles, this Court has made clear that apparent authority turns on what officers reasonably believe at the specific moment in time. In *Rodriguez*, the Court expressly rejected a rule that would require officers to “be factually correct” in their assessment of authority, explaining that such a requirement would be “unrealistic” and incompatible with Fourth Amendment reasonableness. 497 U.S. at 184, 187 (quoting *Stoner v. California*, 376 U.S. 483, 488 (1964)).

Federal appellate courts have consistently applied this framework to reject the Petitioner’s proposed rule. The Seventh Circuit has repeatedly held that officers may rely on consent where circumstances reasonably suggest shared access or control, even in situations where ownership is uncertain. *See, e.g., Melgar*, 227 F.3d at 1041 (holding that officers are “not required to conduct a detailed inquiry into property rights” because it would “impose an impossible burden on the police.”); *Groves*, 530 F.3d at 506 (upholding consent to search based on objective indicators of apparent authority despite ambiguity over ownership). Other circuits have reached similar conclusions. *See Taylor*, 600 F.3d at 685 (“The Fourth Amendment does not require officers to engage in further inquiry when the facts reasonably indicate common authority.”); *accord United States v. Andrus*, 483 F.3d 711 (10th Cir. 2007) (finding that officers were not required to ask clarifying questions or investigate ownership of a computer where the totality of the circumstances reasonably indicated apparent authority).

The Petitioner’s proposed rule would override this settled doctrine by requiring officers to obtain a warrant whenever container ownership is unclear, ultimately collapsing the apparent-authority doctrine into actual authority and imposing a near “impossible burden” upon officers.

Melgar, 227 F.3d at 1041. Constitutional reasonableness is assessed based on “the facts known to the officer at the time,” not on rightful determinations of property ownership. *Brinegar*, 338 U.S. at 175-76; *Rodriguez*, 497 U.S. at 188.

Here, the circumstances reasonably indicated that Reiser exercised joint access or control over the loft stairs and the cardboard box stored on the second-to-last step. (R. 13, 53.) The fact that the loft was described as primarily used for Petitioner’s storage did not negate Reiser’s apparent authority over a cardboard box located in a shared space of the jointly occupied residence. (R. 13, 15.) The Fourth Amendment does not require officers to assume exclusivity based on informal household arrangements, nor does it require them to resolve private storage practices before relying on consent. *See Matlock*, 415 U.S. at 171; *Snype*, 441 F.3d at 136-37.

Agent Ristroph’s reliance on Reiser’s apparent authority rendered the search of the cardboard box constitutionally reasonable. The Petitioner cannot establish that Agent Ristroph possessed reliable information negating Reiser’s authority over the area searched or the box itself. Because apparent authority turns on objective reasonableness rather than certainty, Agent Ristroph’s reliance was constitutionally reasonable. Therefore, the decision of the Fourteenth Circuit should be affirmed because the warrantless search of the cardboard box complied with the apparent authority exception to the Fourth Amendment.

III. Federal Rule of Evidence 806 prohibits extrinsic impeachment of hearsay declarants and preserves the limits imposed by Rule 608(b).

This Court should affirm the decision of the Fourteenth Circuit and maintain a faithful reading of Federal Rule of Evidence 806 that preserves the long-standing prohibition of extrinsic evidence of specific instances of conduct to attack a declarant’s character for truthfulness. Properly understood, Rule 806 places hearsay declarants on the same footing as testifying witnesses, allowing their credibility to be challenged only through the same evidentiary limits that apply to

live testimony. Further, this Court should affirm the Fourteenth Circuit’s decision because, although Copperhead’s statement is central to the case, expanding Rule 806 to permit extrinsic impeachment would undermine Rule 608(b) and distort the careful balance the Federal Rules strike between probative value and risk of prejudice.

A. This Court should adopt a faithful reading of Rule 806 that treats hearsay declarants and live witnesses equally.

Rule 806 states that “When a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.” Fed. R. Evid. 806. Additionally, “the court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.” Fed. R. Evid. 806.

Accordingly, a hearsay declarant’s credibility may be impeached through the same recognized avenues available for a testifying witness. Those include evidence of bias, interest, coercion, or corruption; prior criminal convictions under Rule 609; character and conduct bearing on truthfulness under Rule 608; and prior inconsistent statements under Rule 613. Fed. R. Evid. 806; Fed. R. Evid. 608(a); Fed. R. Evid. 609; Fed. R. Evid. 613(b). Once attacked, the declarant’s credibility may also be rehabilitated to the same extent and subject to the same limitations that would apply if the declarant had testified as a witness at trial. Fed. R. Evid. 806; *United States v. Cotton*, 823 F.3d 430, 436-37 (8th Cir. 2016) (explaining that evidence may be admitted under Rule 806 for the purpose of supporting the credibility of the declarant, whose credibility has been attacked by the defendant).

The legislative history of Rule 806 makes clear that the core purpose of the Rule was to ensure that hearsay declarants do not escape credibility scrutiny simply because they are not

testifying live in court. *See* Fed. R. Evid. 806, Advisory Committee Notes; *see also United States v. Graham*, 858 F.2d 986, 990 (5th Cir. 1988). Rule 806 was designed specifically to permit the impeachment of declarants and coconspirators, particularly through the use of prior inconsistent statements. *See* Fed. R. Evid. 806. Rule 806 places declarants on equal footing with testifying witnesses by allowing their credibility to be attacked through the same admissible means and subject to the very same constraints. *Graham*, 858 F.2d at 990. In doing so, Rule 806 prevents hearsay from becoming insulated from impeachment, but it does not authorize broader or more invasive credibility attacks than the Federal Rules permit when a witness takes the stand. *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000); *but see United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988). Rule 806 thus operates as a parity mechanism rather than an expansion of impeachment authority. Fed. R. Evid. 806, Advisory Committee Notes. The fact that a particular avenue of impeachment is unavailable in certain circumstances does not permit courts to depart from the clear text of the Federal Rules of Evidence. *Cf. United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991) (“Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed”); *Saada*, 212 F.3d at 221.

Further, the language of Rule 806 implicitly rejects any expansion permitting extrinsic impeachment of a declarant. *Saada*, 212 F.3d at 221. Rule 613 mandates that witnesses be given an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of that statement may be introduced. Fed. R. Evid. 613(b). If a hearsay declarant does not testify, this requirement will generally not be met because they are not present to explain or deny the statement. However, Rule 806 expressly provides that, in the context of impeachment by prior inconsistent

statements, the declarant need not have been afforded an opportunity to explain or deny the statement before it is admitted. Fed. R. Evid. 806.

The fact that Rule 806 explicitly makes an allowance in the context of impeachment by prior inconsistent statements but does not “provide a comparable allowance for the unavailability of a hearsay declarant in the context of Rule 608(b)'s ban on extrinsic evidence indicates that the latter's ban on extrinsic evidence applies with *equal force* in the context of hearsay declarants.” *Saada*, 212 F.3d at 222 (emphasis added). Accordingly, where Rule 806 expressly carves out a limited exception for prior inconsistent statements but remains silent as to extrinsic impeachment under Rule 608(b), that silence confirms that no such expansion was ever intended.

B. Rule 806 cannot be read to override Rule 608(b)'s settled prohibition on extrinsic impeachment to admit Copperhead's statement.

Rule 608(b) expressly provides that “extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness.” Fed. R. Evid. 608(b). Rule 608(b) permits limited inquiry into specific instances of conduct on cross-examination, but it draws a firm line against proving those acts through the use of extrinsic evidence. *Id.* That limitation reflects Rule 608(b)'s function as a clear evidentiary boundary on extrinsic impeachment. *See* Fed. R. Evid. 608, Advisory Committee Notes. The Rule was intended to regulate the use of specific instances of conduct offered to prove that a witness is generally untruthful or a “bad” person who should not be believed, rather than to foreclose meaningful credibility testing altogether. *United States v. James*, 609 F.2d 36, 46 (2d Cir. 1979); *Carter v. Hewitt*, 617 F.2d 961, 969 (3d Cir. 1980). Consistent with that purpose, the restriction on extrinsic evidence is intended to prevent the proceedings from devolving into mini trials over *collateral matters* that tend to distract and confuse the jury. *Carter*, 617 F.2d at 971 (emphasis added).

Importantly, Rule 608(b) does not limit the subjects on which a witness's credibility may be tested but instead regulates the *means* by which character impeachment may be proven. Fed. R. Evid. 608(b). The Rule permits inquiry into specific conduct during cross-examination, allowing the factfinder to assess credibility directly through the witness's responses. *Id.* That reference to cross-examination describes the permissible *method* of inquiry when a witness testifies; it does not create an alternative entitlement to extrinsic proof when such inquiry is unavailable. *Saada*, 212 F.3d at 221. What Rule 608(b) forbids is the introduction of independent proof of specific acts when offered to establish a witness's character for truthfulness, a restriction that applies regardless of the perceived probative force of the evidence. Fed. R. Evid. 608, Advisory Committee Note to 2003 Amendment; *United States v. DeLeon*, 428 F. Supp. 3d 841, 1150 (D.N.M. 2019) (explaining that Rule 608 was amended to make clear that extrinsic evidence is absolutely prohibited when offered to attack or support a witness's character for truthfulness).

Rule 806's admissibility standard confirms that Rule 608(b)'s prohibition on extrinsic character impeachment remains in force even in the context of hearsay declarants. *See Saada*, 212 F.3d at 222; *see also United States v. Moskowitz*, 215 F.3d 265, 270 (2d Cir. 2000), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004). Rule 806 permits a declarant's credibility to be attacked only by evidence that "would be admissible" for that purpose if the declarant had testified as a witness. Fed. R. Evid. 806. This conditional language effectively incorporates not only the permissible avenues of impeachment but also the evidentiary limits that govern them. *Saada*, 212 F.3d at 221; *Cf. United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991) (holding that Rule 806 permits impeachment of a hearsay declarant but does not override the evidentiary rules that govern how impeachment may be conducted).

Although Rule 806 has been applied and construed for decades, the only authority that the Petitioner can rely on that supports the proposition that Rule 806 does not mean what it explicitly says is dicta in a single Second Circuit decision. *Friedman*, 854 F.2d at 570 n.8. In *Friedman*, the Second Circuit explained, in dicta, that Rule 806 would allow for extrinsic impeachment of a hearsay declarant so long as the evidence is probative of truthfulness. *Id.* In doing so, the Second Circuit reasoned that “Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury.” *Id.* This precedent is unpersuasive and blatantly ignores the plain language of Rule 806.

Several circuits have recognized that Rule 806 does not authorize the admission of impeachment evidence that is otherwise barred by the Federal Rules of Evidence. *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997); *Saada*, 212 F.3d at 221; *Finley*, 934 F.2d at 839; *United States v. Moody*, 903 F.2d 321, 329 (5th Cir. 1990); *United States v. Little*, No. CR 08-0244, 2012 WL 2563796, at *4 (N.D. Cal. June 28, 2012). In *White*, the district court was permitted to cross-examine a police officer about a hearsay declarant’s drug use, drug dealing, and prior convictions but barred questioning about the declarant’s prior false statements and disobedience of a court order. 116 F.3d at 920. The declarant was unavailable. *Id.* at 911. The District of Columbia Circuit held that defense counsel should have been able to be allowed to cross-examine the officer about the declarant’s false statements and disobedience, but in doing so the court explained that there could be no reference to any extrinsic proof of those acts. *Id.* at 920.

Comparatively, in *Saada*, the Third Circuit held that Rule 806 bars hearsay declarants from being impeached with extrinsic evidence, even if the declarant is not available to testify. 212 F.3d at 221. Relying on the plain language of Rule 806, the court explained that a hearsay declarant

may be impeached, but it is subject to the same limitations that would apply if the declarant were testifying as a witness. *Id.* The court rejected unavailability as a basis for departing from Rule 608(b)'s prohibition on extrinsic impeachment, emphasizing that numerous other permissible methods of impeachment remain available. *Id.*

Here, Petitioner sought to impeach Copperhead's credibility through extrinsic evidence consisting of the Court Street College letter, Copperhead's job application, and testimony from Dr. Andrea Joshi and Svetlana Ressler. (R. 47-50.) The Court Street College stated that Copperhead violated the Academic Integrity Policy by using artificial intelligence on an exam, resulting in a failing grade for academic dishonesty. (R. 47.) Dr. Joshi, a member of the Board of Academic Integrity, participated in the finding of Copperhead's guilt, and as such, Petitioner sought to have her testify about that incident. (R. 48.) Furthermore, Petitioner sought to introduce evidence that Copperhead falsified a job application to the Mayor's office, including the application itself and testimony from Svetlana Ressler, the Mayor's Chief of Human Resources, who reviewed Copperhead's application (R. 48-49.)

Petitioner admitted that this evidence was offered to attack Copperhead's character for truthfulness. (R. 48.) Rule 608(b) expressly prohibits the admission of such extrinsic evidence for character impeachment. That prohibition would have applied with full force had Copperhead testified at trial. Accordingly, this evidence must be excluded because Rule 806 does not permit a different result simply because Copperhead's statement was admitted as hearsay. The plain language of Rule 806 limits impeachment to evidence that would be admissible if the declarant were testifying as a witness. *White*, 116 F.3d at 920; *Saada*, 212 F.3d at 221.

Petitioner argues that because Copperhead cannot be cross-examined, they should be permitted to bypass Rule 608(b)'s prohibition on extrinsic impeachment. (R. 50.) They further

reason that not allowing for this extrinsic impeachment would force defendants “to accept damaging hearsay testimony without any way to undermine or test the credibility of its source, [which] is precisely the unfairness Rule 806 was designed to prevent.” (R. 50.) This argument is flawed and entirely mischaracterizes the true purpose of 806, which is to ensure hearsay declarants do not escape credibility scrutiny simply because they are not testifying in court. Its purpose was not to expand the methods of impeachment but to permit otherwise allowable impeachment in the context of hearsay declarants. Petitioner is not left without recourse here, as it may challenge Copperhead’s credibility through either reputation or opinion testimony, both of which are permissible methods of impeachment.

Ultimately, this Court should affirm the Fourteenth Circuit’s holding that Copperhead could not be extrinsically impeached. Rule 806 requires courts to assess admissibility by reference to the evidentiary limits that would apply if the declarant had testified as a witness. Because Rule 608(b) categorically prohibits the use of extrinsic evidence to attack a witness’s character for truthfulness, that limitation applies with equal force here. Accordingly, the Fourteenth Circuit correctly concluded that Petitioner’s proposed impeachment evidence was properly excluded.

CONCLUSION

For the foregoing reasons, Respondent, United States of America, respectfully requests this Court affirm the decision of the Fourteenth Circuit Court of Appeals.

Respectfully Submitted,
/s/ Team T8
Attorneys for Respondent