

No. 25-7373

IN THE
SUPREME COURT OF THE UNITED STATES

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

Team 18R
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STATEMENT OF ISSUES PRESENTED

- I. Whether under the holding of this Court in *Payton v. New York*, the Fourth Amendment is violated when an officer requests a suspect inside the house to step outside and conducts an arrest without a warrant.
- II. Whether the Fourth Amendment is violated when an officer conducts a warrantless search of a closed container within a shared space when a co-occupant gives consent to search the area in question.
- III. Whether Rule 806 of the Federal Rules of Evidence permits admission of extrinsic evidence of specific instances to impeach the hearsay declarant's character for truthfulness when the declarant is unavailable to testify.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fourteenth Circuit Court in this case under 28 U.S.C. § 1254(1). The Court of Appeals entered its judgment on April 14, 2025. A timely petition for rehearing was granted on December 2, 2025. The petition for writ of certiorari was filed within 90 days of that date.

OPINIONS BELOW

The transcripts of the hearings on the constitutional issues before the United States District Court for the Eastern District of Boerum appear on the record at pages 18-39 and for the Federal Rule of Evidence issue at pages 40-50. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 51-61.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions is provided below: The Fourth Amendment provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The victim, Jodie Wildrose (“Wildrose”), was employed as the Under Secretary for Rural Development with the Department of Tourism. R. at 1. As part of the “Grow Your Own Way” program, Wildrose was scheduled to travel to Boerum Village to meet with the landowners from April 8, 2024, to April 12. *Id.* at 3. Petitioner, Atticus Hemlock, was arrested after suspicion arose surrounding his activity throughout Boerum Village. *Id.* at 22.

On March 29, 2024, the Boerum Village Police received a tip from a local barista, who stated that two individuals came to the coffee shop on both the 28th and 29th between 8:30 A.M. and 12:30 P.M. *Id.* at 7. Due to previous social media interaction, he identified the two individuals as Petitioner and Iris Copperhead (“Copperhead”). *Id.* The barista informed the officers about Petitioner’s and Copperhead’s excited demeanors, as well as their statements about wanting to “hide Jodie away” or “nab [her] as soon as she pulled into the parking lot and throw her in the van.” *Id.* The barista felt alerted after hearing this conversation and called the police. *Id.*

On March 30, the police received a second call, this time from the manager of the village superstore who reported a suspicious cash purchase of zip ties, ski masks, a folding knife, black trash bags, and bear spray. *Id.* at 6. The police tied the two calls together and due to the involvement of a federal official they contacted the FBI. Thereafter, FBI agents Hugo Herman and Ava Simonson (“agents”) spoke with both the barista and the manager for further information.

On April 2, around 4:00 P.M., agents Herman and Simonson drove an unmarked vehicle to Petitioner’s property. *Id.* at 11. The property was a small cabin in a densely wooded area. *Id.* The agents approached the door with the intent to get some questions answered. *Id.* Agent Herman had no plan to arrest Petitioner upon arrival. *Id.* When the agents reached the door, the main door was already open with the screen door being shut. *Id.* at 21. They knocked subsequently stepped off the porch for their encounter. *Id.* Petitioner met and spoke with them through the screen door. *Id.* at 22. Agent Herman noticed two bottles labeled chloroform on the counter behind Petitioner that matched the store manager’s recollection. *Id.* at 11. When asked about the bottles, Petitioner moved to block the view of them. Then, Petitioner became agitated and demanded to know why the officers were there. The agents tried to calm him down and get him to come outside to talk, but Petitioner refused and asked if they were there about “Jodie.” *Id.* Thereafter, the agents returned

to their car to reconvene and decided that the bottles and the mention of “Jodie” established probable cause for his arrest. *Id.* at 12. The agents returned to the door and told Petitioner that their investigation was very important and that they needed to speak with him. *Id.* Afterwards, Petitioner voluntarily stepped outside of his home, and the agents promptly arrested him once he was at the bottom of the steps. *Id.* at 23. At this time, agent Herman seized a spiral notebook containing Petitioner’s plans to kidnap Wildrose. *Id.* at 53.

Following the arrest, agents Herman and Simonson instructed another agent, Kiernan Ristroph (“Ristroph”), to monitor the property after they had brought Petitioner into custody. *Id.* at 13. After agents Herman and Simonson departed, Ms. Fiona Reiser (“Reiser”) arrived at the residence. *Id.* Then, agent Ristroph approached the door, identified himself as an FBI agent, and informed Reiser that Petitioner had been arrested and that he was investigating the surrounding circumstances. *Id.* Agent Ristroph asked for her consent to search the property, which she agreed to. While searching the main floor living room, agent Ristroph noticed a staircase leading up to the second floor. *Id.* at 13. Upon seeing this, he asked Reiser what the second floor was used for. She responded that she and Petitioner used the loft as storage but also noted that she did not really go up there. *Id.* Agent Ristroph then noticed an unmarked cardboard box on one of the lower stairs with only the top flaps closed. *Id.* He proceeded to open the box and found one fifty-foot-long rope, two ski masks, a pair of green gloves, zip ties, a folding knife with a six-inch blade, a roll of duct tape, and two bottles of chloroform. *Id.* He then asked Reiser if she had seen these materials, and she responded that she had not. Agent Ristroph seized the box and the materials in it as part of the investigation. *Id.* at 16.

Around the time of the arrest, Copperhead attempted to return to Petitioner’s property to meet with him. *Id.* at 53. However, she witnessed his arrest and ran off. While running away,

Copperhead encountered Theodore Kolber (“Kolber”), a Boerum Village resident who was walking in Joralemon State Park. *Id.* at 41. According to Kolber, Copperhead was in a frantic state. *Id.* at 43. She screamed the following four statements: “I can’t believe I saw him get arrested.”, “It’s all his fault.”, “It was all Atticus’ idea—NOT MINE!”, and “I can’t run a business from prison!” *Id.* She then ran off, but she was arrested later that day. *Id.* She died in holding on the same day due to an acute aortic rupture. *Id.* at 46.

II. PROCEDURAL HISTORY

The trial was held in the Northern District of Boerum on August 5, 2024. R. at 53. Petitioner moved to suppress the notebook as evidence under *Payton v New York*, citing that it was the fruit of an illegal arrest. *Id.* at 53. Additionally, he moved to suppress the evidence found in the cardboard box, claiming it was found because of an illegal search. *Id.* at 54. However, the district court disagreed and denied both motions before proceedings began.

At trial, the Government called Kolber to discuss his conversation with Copperhead. Kolber testified that he did not know Copperhead until his encounter at the park. *Id.* at 44. The district court permitted the introduction of Copperhead’s hearsay statements under the excited utterances exception stated in Rule 803(2) of the Federal Rules of Evidence. *Id.* Thereafter, Petitioner attempted to impeach Copperhead’s character for truthfulness using Rule 806 of the Federal Rules of Evidence. *Id.* at 47-48. Specifically, Petitioner sought to introduce testimonies of Copperhead’s failing grade from her college due to academic dishonesty, along with her falsified job application. *Id.* The government objected on Rule 608(b) grounds arguing that this type of evidence was improper. *Id.* at 48. The district court sustained the objection. *Id.* at 50. Thereafter, the jury found Petitioner guilty of attempted kidnapping an officer of the United States Government under 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 1201(d) and was sentenced to ten years

in prison. *Id.* Petitioner then appealed the district court's evidentiary findings to the Fourteenth Circuit Court of Appeals. R. at 51.

The Fourteenth Circuit affirmed all three issues on appeal from the district court. First, the majority found that the warrantless arrest of Petitioner outside of his home did not violate his Fourth Amendment rights nor was the constructive entry doctrine implicated. Second, it held that the closed container was not improperly searched due to the agent's reasonable belief that Reiser possessed authority to consent to the search. Finally, the majority concluded that the admission of extrinsic evidence of specific instances for the purpose of attacking the hearsay declarant's truthfulness is precluded under Rule 806 in consideration of Rule 608(b). *Id.* at 51-52.

On December 2, 2025, Petitioner filed a petition for writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

This Court should affirm the Fourteenth Circuit's rulings and hold that 1) the warrantless arrest of Petitioner outside his home does not violate the Fourth Amendment; 2) the seizure of evidence does not violate the Fourth Amendment when reasonable consent to search is given; and 3) Rule 806 of the Federal Rules of Evidence bans introduction of extrinsic evidence of specific instances of conduct of a hearsay declarant to impeach the declarant's character for truthfulness.

1. This Court in *Payton v. New York* established a firm line that law enforcement may not enter the sanctity of a home without a warrant to arrest an individual. Some lower courts have attempted to extend this ruling to other matters, such as the constructive entry doctrine. However, this Court should reaffirm the bright line rule that *Payton* is only applicable to warrantless entry into the house. When an individual is voluntarily present outside of their house, a lawful arrest can be made without disturbing Fourth Amendment protections. The constructive entry doctrine attempts to

indicate that coercion is present when an individual complies with law enforcement. Nevertheless, even if this Court applies the constructive entry doctrine, the agents' activities in the present case do not constitute coercion. Therefore, the agents' actions were lawful and there are no constitutional concerns presents.

2. Under *Illinois v. Rodriguez*, law enforcement has the right to seize property when consent is given by a party. It is a legal search where an officer has a reasonable belief that the consenting party has common authority over the area in question. Here, any reasonable officer would have believed that Reiser's statements showed common authority over their shared living space. There were no statements made by her that would equate to a lack of common authority. The officer confined his search to the first floor when he asked Reiser about the second floor and she indicated that the Petitioner uses it for storage and personal use. The officer located a box that was unmarked and closer to the landing of the living area of the first floor, which Reiser consented to be searched for when the officer inquired. Upon searching, the officer found evidence. In fact, any ambiguity of the unmarked box was sufficiently addressed due to sufficient law enforcement questioning. Thus, the box was in plain view of where Reiser had consented to the officer's search.

3. Rule 806 of the Federal Rules of Evidence states that when a hearsay statement has been admitted, the credibility of a hearsay declarant may be attacked, and then supported, by any evidence that would be admissible for the purposes if the declarant had testified as a witness. In the present case, Petitioner wanted to introduce extrinsic evidence that attacked the credibility of Copperhead, an unavailable hearsay declarant. This admission is inconsistent with Rule 806 because this evidence would have been inadmissible for the purpose of impeaching Copperhead if she had testified as a witness. Allowing this admission would not place the testifying witness and the hearsay declarant on an equal playing field because extrinsic evidence in this

case would not be admissible if the declarant testified live as a witness. Permitting Petitioner to introduce Copperhead's prior records of dishonesty directly contradicts the text of Rule 806 and would invite untenable outcomes that would confound attorneys in all future cases.

Because Petitioner lacks compelling reasons for denying the district court's rulings, this Court should affirm the judgment of the Fourteenth Circuit.

ARGUMENT

I. The Fourth Amendment is Not Violated When a Suspect Voluntarily Steps Outside While Agents Remain Outside, And Then Effectuate an Arrest.

The prior ruling by the Fourteenth Circuit should be upheld because the arrest of Petitioner was lawful. The Court has consistently emphasized that "physical entry of the home" is what the Fourth Amendment was designed to protect. *Payton v. New York*, 445 U.S. 573, 585–86 (1980). Citizens are constitutionally awarded privacy and protection when they stay within the confinement of their home, highlighting the Framers' intent to guard against unconsented physical invasions. *Id.* The Fourth Amendment draws a firm line at the threshold of the home where agents may not cross, absent a warrant. *Id.* at 590.

The matter before this Court is not the one that would fall within the firm line protecting citizens' rights. Petitioner has not presented any evidence to show that there was a gross constitutional violation. The agents arrested Petitioner on public area and never crossed the boundary that *Payton* protects and therefore does not cover Petitioner's circumstances. R. at 12.

Some lower courts have attempted to extend *Payton's* protections through the "constructive entry" doctrine, which treats highly coercive external conduct as effectively an entry into the home. *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984). However, the agents' conduct here falls far short of that standard. The record contains no evidence showing that Petitioner felt pressured or that the agents acted coercively.

There was no constitutional violation that had occurred against Petitioner, and under *Payton* there was no additional protection triggered. The preceding analysis shows that the arrest occurred lawfully in a public space, without infringing any constitutional rights.

- A. *Payton* does not apply when a suspect is arrested without a warrant as there was no physical entry and the arrest occurred in public view.

In *Payton v. New York*, this Court held that the threshold of the house is a firm line that prohibits officers from entering a citizen's home without a warrant. 445 U.S. at 576. Although the Fourth Amendment protects citizens from unreasonable searches and seizures without a warrant, it does not extend that protection to conducts occurring outside the home. *New York v. Harris*, 495 U.S. 14, 18 (1990). This Court has repeatedly declined to extend *Payton* beyond the home, even where officers obtained statements inside the house in violation of the Fourth Amendment, statements made outside the house do not fall within *Payton*'s protection. *Id.*

Here, the agents neither crossed the threshold of Petitioner's house nor attempted to push any physical boundaries. R. at 15. Their conduct therefore falls well outside the category of actions that this Court sought to prohibit, such as a physical intrusion into the home. Consistent with this distinction, this Court has long recognized that officers may conduct warrantless arrests in public places when supported by probable cause. *United States v. Watson*, 423 U.S. 411, 423 (1976). Accordingly, this Court's precedent makes clear that *Payton*'s protections cannot extend beyond the threshold of the house. Because the agents never breached that threshold and conducted the arrest in a public viewing space, the arrest was lawful. R. at 12.

1. *This Court has held that Fourth Amendment protections follow a hard and firm rule that only applies to the house and cannot extend further.*

In *Payton*, New York detectives completed an investigation and gathered evidence linking the defendant to a felony offense. 445 U.S. at 576. Six officers then went to the defendant's

residence to arrest him without a warrant. *Id.* When no one answered the door, officers contacted emergency services to forcibly open the door and entered the apartment. *Id.* Once inside, officers discovered evidence of the crime, which the prosecution later introduced at trial. *Id.* at 577.

This Court stressed that the “zone of privacy” awarded by the Fourth Amendment is most “clearly defined” when within the constraints of “the unambiguous physical dimensions of an individual’s home”. *Id.* at 589. This Court emphasized that the Fourth Amendment’s core purpose is to guard against warrantless searches and seizures inside the home, which are presumptively unreasonable. *Id.* at 586. Accordingly, *Payton* established a narrow and deliberate rule designed to uphold the Framers’ intent to protect citizens from unlawful government intrusion. *Id.* at 588.

The Court was intentional to repeatedly highlight the importance of the phrase “inside a home,” emphasizing that *Payton* draws a bright-line rule limited to physical entry into a residence. *Id.* at 585. With this legal framework, the facts of the present case pale in comparison to those in *Payton*. There was no egregious breach, only two officers arrived at the scene, rather than a large presence, demonstrating neither an anticipation of resistance nor an effort to intimidate. *R.* at 21. The agents further acknowledged that upon arrival they lacked sufficient probable cause to arrest Petitioner, reinforcing that they did not intend to effectuate an arrest upon arrival. *Id.*

Instead, the agents acted within their lawful authority by asking questions as part of an ongoing investigation—conduct that does not require a warrant. *Id.* The agent remained outside Petitioner’s home and engaged him from the ground in front of his porch. *Id.* During this interaction, the agents observed bottles of chloroform in plain view that were visible from outside the residence which prompted suspicion. *Id.* at 22.

Once the agent asked about the bottles, Petitioner attempted to block the agent’s view and evade compliance and referenced the potential victim without any prompting or disclosure of

details by the agents. *Id.* at 11. Agents developed reasons to arrest Petitioner upon those facts. *Id.* at 12. The agents never physically entered Petitioner's home and instead requested that Petitioner step outside. *Id.* at 23, 26. Only after Petitioner stood in public view did agents conduct the arrest. *Id.* at 12. Therefore, under *Payton*, no constitutional violation occurred because this Court's rule applies only to "a search and seizure inside the home without a warrant." 445 U.S. at 586.

This Court clarified the limited scope of *Payton* shortly thereafter in *New York v. Harris*, underscoring that the rule applies only to physical intrusion into the home. 495 U.S. 14, 15 (1990). In *Harris*, three officers went to the defendant's home to arrest him for a felony after establishing probable cause but without a warrant. *Id.* They arrived showing guns and badges, and the defendant allowed them to enter the residence. *Id.* at 16. Once inside, the officers advised the defendant of his rights, which he acknowledged before answering questions. *Id.* The defendant admitted to the murder, after which officers arrested him and transported him to the station. *Id.* At the station, officers again advised him of his rights, and he signed a written inculpatory statement. *Id.*

The legal issue before the Court did not concern the in-home statement, which lower courts had already deemed inadmissible under *Payton*. *Id.* Rather, the issue was whether *Payton* required suppression of the written statement obtained later at the police station. *Id.* This Court declined to extend *Payton*, reaffirming that it "drew a line at the entrance of the home" because physical entry of the home is what is intended to be protected against. *Id.* at 18. The Court emphasized that the determinative factor is the officers' location at the time of the challenged conduct. *Id.*

The Court reasoned that declining to extend *Payton* did not diminish its deterrent effect because officers remain aware that violations will result in suppression of unlawfully obtained evidence. *Id.* at 20. The Court noted that little incentive exists for officers to violate *Payton* merely to obtain a statement, particularly when probable cause already exists. *Id.* at 21. Properly

understood, if *Payton* does not bar the admission of statements made at a police station following an unlawful in-home arrest, it cannot logically extend to an arrest that occurs outside the home with Petitioner consensually responding to the agent's request. R. at 23. *Payton* reinforces protections within the home, but it does not extend them beyond that boundary.

2. *The arrest of the suspect is permitted without a warrant as the agents' conduct was reasonable and the arrest was within public view.*

Payton v. New York is not triggered because there was no entry into the house. Additionally, this Court has held that the threshold of the house does not trigger a constitutional violation as it is within public view. *United States v. Santana*, 427 U.S. 38, 39 (1976).

In *Santana*, this Court addressed whether an arrest made at the threshold of a home constitutes a public arrest for Fourth Amendment purposes. *Id.* There, an undercover officer arranged to purchase narcotics from a street-level dealer and was instructed to follow the dealer to obtain the narcotics. *Id.* at 40. The officer followed the dealer to that location and waited outside. *Id.* Additional officers arrived and positioned themselves two blocks away from the defendant's residence. *Id.* When officers observed the defendant standing in the doorway holding a brown paper bag, they moved to a position closer to the house and announced their presence. *Id.* As officers approached, the defendant retreated into the vestibule. *Id.* Officers followed through the open door and apprehended the defendant in the vestibule. *Id.* During the defendant's attempt to pull away the bag she was holding, the bag tilted and exposed narcotics. *Id.* at 41.

This Court held that although the threshold of a house may be considered "private," the defendant was nevertheless in a "public" place for the Fourth Amendment purposes. *Id.* at 42. This Court found that the doorway did not constitute an area in which the defendant had a reasonable expectation of privacy. *Id.* The defendant was not only visible to the public but was functionally equivalent to standing outside (e.g., scope of view, hearing, speech, and touch). *Id.*

This Court has cautioned against extending constitutional protections beyond their intended scope. Although the threshold may ordinarily be considered private, that protection is lifted when an individual exposes himself to the public to the same degree as if he were standing outside. *Id.* Here, Petitioner stepped outside into an area that rendered him completely exposed to public view, thereby placing himself outside the realm of heightened constitutional protection. *Id.* This Court has long recognized that a warrantless felony arrest conducted in public does not violate the Fourth Amendment. *See Watson*, 423 U.S. at 423 (1976) (“[W]e decline to transform this judicial preference into a constitutional rule when the judgment . . . has for so long been to authorize warrantless public arrests on probable cause.”). Therefore, Petitioner’s arrest was lawful because it constituted a public, warrantless arrest expressly permitted under this Court’s precedent.

Lower courts have addressed the distinction between constitutionally protected private areas and areas open to the public in the context of a citizen’s home. In *United States v. Titemore*, officers approached the defendant’s residence and went to a sliding glass door on the defendant’s porch. 437 F.3d 251, 255 (2d Cir. 2006). The officer observed a firearm near the defendant and knew that the defendant had a prior felony conviction. *Id.* The officer spoke to the defendant through the screen door and asked him to step outside. *Id.* at 255. After the defendant stepped outside, the officer inquired about the firearm and then arrested the defendant on the porch. *Id.*

The defendant moved to suppress the evidence collected at the porch, arguing that the officer unlawfully entered the property in violation of the Fourth Amendment. *Id.* The district court rejected that argument, and the Second Circuit affirmed. *Id.* at 260. The court held that an officer conducting a “knock and talk” may approach any area of residence where uninvited visitors would reasonably be expected to go. *Id.* The court emphasized that the porch was visible from public streets and remained within public view. *Id.*

Here, the area accessed by the agents was equally available to any member of the public. R. at 21. The agents' conduct was reasonable because it mirrored what any private citizen may lawfully do—approach a residence and knock on the door. *Id.* See also *Kentucky v. King*, 563 U.S. 452, 469 (2011) (When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.”). The “knock and talk” investigative technique has repeatedly been upheld as a valid method of obtaining information without a warrant. See *Ewolski v. City of Brunswick*, 287 F.3d 492, 504–05 (6th Cir. 2002) (concluding that it was reasonable to approach a suspect's home to seek information through consensual questioning). As a result, agents lawfully accessed the exterior of the home because it remained within “public access and view.” *Titemore*, 437 F.3d at 259. Agents did not offend constitutional protections by approaching an area of the residence where visitors could be expected. *Id.* at 261.

Therefore, the agents neither entered the home nor arrested Petitioner within it. The arrest occurred in an area open to public access and view. *Id.* The ruling of *Payton* thus does not apply to public arrests, so no Fourth Amendment violation occurred.

B. Constructive entry is not met when an officer requests a suspect to step outside because the conduct is not coercive therefore a reasonable person would not feel compelled to exit.

Some Circuit Courts have applied the constructive entry doctrine to expand the Fourth Amendment protections beyond *Payton*'s threshold, addressing situations in which officers' external conduct effectively compels a citizen to leave the home. Under this doctrine, officers engage in coercive conduct that constitutes a show of authority, causing a reasonable person to believe they have no choice but to comply with the demands. *Morgan*, 743 at 1166.

This Court has never adopted the constructive entry doctrine as an extension of *Payton*. However, even assuming that constructive entry doctrine is applied, that doctrine does not support

Petitioner. The agents did not engage in conduct approaching the level of coercion converting an otherwise lawful arrest into a constructive entry. *Id.* This Court has consistently evaluated claims of coercion by asking whether, under the totality of the circumstances, a reasonable person would feel free to terminate the encounter. *United States v. Drayton*, 536 U.S. 194, 201 (2002).

However, because the agents' conduct lacked the coercive force necessary to compel compliance, no constructive entry occurred. R. at 23. The Court's analysis properly proceeds to a closer examination of the specific facts demonstrating the absence of coercion in this encounter.

1. *The agents did not exhibit conduct amounting in a coercion that would render a reasonable person to comply and thus would feel free to remain inside.*

Determining whether officers crossed the line of coercion requires an understanding of what constitutes a "show of authority." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) A show of authority turns on whether an individual would feel free to decline an officer's request or end the interaction. *Id.* This Court has identified several relevant factors for that determination. *Id.* Those factors include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554. Critically, an officer's mere request does not constitute a "show of authority." *Id.* at 555.

In *Drayton*, this Court examined the totality of the circumstances surrounding a police encounter, including officers' tone, any show of force, and whether officers restricted an individual's ability to leave or terminate the interaction. 536 U.S. at 201. Although officers were armed, they never removed their firearms from their holsters. *Id.* at 202. This Court concluded that no reasonable person would believe that they were required to answer the officers' questions because the officers neither brandished weapons nor blocked exits. *Id.* at 204. An officer's display

of a badge or presence in uniform does not, by itself, constitute a show of authority; rather, it serves to reassure the public. *Id.* This reasoning applies equally to an officer's possession of a holstered firearm, which the public widely understands as a routine aspect of law enforcement. *Id.* at 205. Considering all relevant factors, the Court held that the officers did not demonstrate a show of authority. *Id.* The *Drayton* holding by this Court helps with the examination to extend into the other courts that have attempted to define this concept of "constructive entry."

Lower courts have examined how police conduct could transform a consensual encounter into a coercive one. In *United States v. Thomas*, officers approached the defendant's residence and observed evidence of a crime through his truck parked outside. 430 F.3d 274, 276 (6th Cir. 2005). Officers knocked on the back door—identified as the primary entrance—and asked the defendant to step outside to speak with them. *Id.* After the defendant exited, he refused to answer questions, and officers arrested him without a warrant. *Id.* The court assessed whether the officers have crossed "a threshold in law, when they have not done so in fact". *Id.* at 276. The court held that no constructive entry occurred because officers neither entered the home nor compelled the defendant to exit through "physical force or any other conspicuous show of authority." *Id.* at 275.

In *Thomas*, the court found no basis to conclude that a reasonable person would feel compelled to leave the home simply because officers knocked. *Id.* at 277. Officers may knock on a citizen's door as part of legitimate investigative efforts. *Id.* at 275. However, officers cross a constitutional line only when they employ overbearing or coercive tactics that convert a consensual encounter into an impermissible constructive entry. *Id.* Applying *Drayton's* framework here, the agents did not exhibit a show of authority toward Petitioner. Nothing in the record suggests that officers acted beyond what the footage depicts. R. at 11-12. As widely recognized, officers may lawfully engage in routine "knock and talk" encounters to interview individuals without triggering

Fourth Amendment violations. *See United States v. Hudson*, 405 F.3d 425, 439 n.10 (6th Cir. 2005) (concluding that officers may approach and speak to an individual in a reasonable manner).

The agents identified themselves to ensure transparency and avoid confusion. R. at 11. Though they wore duty belts, they were not in full uniform, which can be seen as less authoritative and intimidating. *Id.* at 25. Even if the agents' hand hovered by their holster, they did not remove the firearms or use them to assert authority. *Id.* at 26. Additionally, the agents did not exercise physical superiority over Petitioner. *Id.* at 29. Absent these factors, it is difficult for Petitioner to make this claim that the doctrine would apply. Even when Petitioner refused to step out, the agents did not employ threatening language or actions. *Id.* at 11. Petitioner's attitude towards the agents was dismissive and did not depict someone who felt compelled to listen. *Id.* at 12.

The agents' conduct further reflected the absence of an overwhelming police presence. The agents knocked once to summon Petitioner and with their second arrival called for Petitioner once. R. at 11, 12. Courts found coercion when officers surrounded a residence, block vehicles, or persistently shout commands. *See Morgan*, 743 F.2d at 1161; *United States v. Reeves*, 524 F.3d 1161, 1169 (10th Cir. 2008) (holding that repeated knocking and yelling by several officers over twenty minutes would cause a reasonable person to feel compelled to comply). These coercive methods of police conduct are absent in the present case. Petitioner retained full autonomy to retreat into his home once officers stepped away and bore no obligation to continue the interaction yet still came outside. *Id.* at 12. By stepping outside, Petitioner voluntarily exposed himself to public view and law enforcement. *Id.* When a suspect opens the door in response to knocking, he voluntarily avails himself to the public, rendering a subsequent arrest lawful. *See United States v. Vaneaton*, 49 F.3d 1423, 1427 (9th Cir. 1995) (holding that voluntarily opening the door is not a response to lawful authority).

It would defy logic to conclude that two agents standing at a distance from the residence and asking Petitioner to “come outside” constituted an egregious show of authority. *See Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002) (“*Payton* keeps the officer’s body outside the threshold, not his voice.”). Viewed in the totality of circumstances, this was a consensual interaction that evolved lawfully based on Petitioner’s own voluntary conduct. There was no show of authority or physical entry; neither *Payton* nor Fourth Amendment was violated.

II. Law Enforcement Has the Right to Seize Property When Consent is Given to Search When There is Reasonable Belief That the Consenting Party Has Common Authority Over the Area in Question.

When a law enforcement officer does not have a warrant, they may still lawfully search with consent. There are three ways officers can gain consent to search a property. First, they may gain consent through actual authority from the individual who is in control of the property. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Second, they may gain consent through a co-inhabitant who has common authority over the premises or effects. *United States v. Matlock*, 415 U.S. 164 (1974). Finally, they may gain apparent authority, which is when law enforcement has a reasonable belief to assume the consenting individual has authority to do so. *Illinois v Rodriguez*, 497 U.S. 177, 186 (1990).

In discussing the motion to suppress, Petitioner’s counsel asserted that it disputed whether the agents had apparent authority not actual or common authority, upon being granted consent from co-occupant and partner of Petitioner, Reiser. R. at 37. This Court’s holding from *Rodriguez* provides the proper legal framework to assess the dispute.

In *Rodriguez*, this Court interpreted the standard for common authority set in *Matlock*. In addition, this Court expanded it to scenarios where there is no common authority, but the officer reasonably believes that the consenting individual has common authority. The defendant was

charged with possession of illegal narcotics after the police found narcotics in his apartment. *Id.* at 179. He and his cotenant had been living in the apartment for several months prior to the police's investigation. *Id.* When speaking with police, the cotenant continuously referred to the apartment as "our apartment." *Id.* Thus, the police followed the cotenant to the apartment where she let them use a key. *Id.* Upon entry, the officers investigated her assault claim. *Id.* However, at trial, the defendant moved to suppress the evidence found at his apartment due to an improper search and seizure of the evidence. *Id.* at 180. The trial court found that there was no Fourth Amendment violation where the police reasonably believed at the time of entry that the cotenant had common authority over the apartment. *Id.* This Court discussed the exception for reasonableness in relation to unconsented and warrantless searches. The Court further stated that the police may not accept any entry to any premises and must ask whether the invitation "warrant[s] a man of reasonable caution in the belief" that the consenting party had authority over the premises. *Id.* at 188. Therefore, the surrounding circumstances are important in determining when apparent authority authorizing a lawful search is present.

In the present case, any reasonable officer would have believed that Reiser's statements showed common authority over her shared living space. First, Reiser allowed the agent to conduct his investigation. R. at 13. The agent further explained to Reiser that the search was involved in an investigation regarding Petitioner. In allowing the agent to enter the home for an investigatory search, she consented to the first floor being searched. *Id.* The agent asked Reiser what the second floor was used for, and she told him that both herself and Petitioner used it for storage. *Id.* While searching on the first floor, the agent noticed the cardboard box on one of the bottom steps and searched it. *Id.* Much like the reasonable assumption from the officers in *Rodriguez*, the agent in this case reasonably assumed that Reiser had common authority over their living space. An officer

with “reasonable caution in the belief” can assume that an individual who answers and allows the police to come in has the authority to do so. *Rodriguez*, 497 U.S. at 188. The police followed her to the home, and the consenting party unlocked the door from the outside. *Id.* at 180. Presently, Reiser allowed the police to enter from the inside, which is a stark contrast from *Rodriguez* and illustrates the agent’s reasonable belief of authority. R. at 13. Therefore, it is reasonable for the agents in this case to assume that Reiser had common authority as compared to the circumstances in *Rodriguez*.

- A. Agent Ristroph’s belief was reasonable because he was presented with surrounding circumstances that purported to show common authority.

When dealing in cases regarding apparent authority, courts must look at the totality of the surrounding circumstances. Thus, a court must decide whether a government agent’s belief is reasonable or whether a reasonable person would doubt its truth. *Id.* at 188. This court has discussed the reasonable person standard in relation to apparent authority in both *Stoner v. California*, 376 U.S. 403 (1964), and *Chapman v. United States*, 365 U.S. 610 (1961). In *Stoner*, this Court found that a hotel clerk consenting to a search of a guest room did not have proper authority and the resulting search was thus unconstitutional. *Stoner*, 376 U.S. at 490. Similarly, in *Chapman*, this Court found that a landlord providing consent to search a tenant’s residence lacked the proper apparent authority. *Chapman*, 365 U.S. at 618. This Court discussed the reasonable standard accompanied by an individual who has access to the property, but where the authority as to the defendant in question is lacking. It is not reasonable to find that a landlord or hotel staff has common authority over a space when a guest is renting a room. This is centered on the basis that these individuals can access property without the consent of the individual and thus do not have authority to allow law enforcement that access.

This Court has also found that there is no apparent authority when an individual who has no association with the suspect consents to a search of a suspect's protected space. *Chapman*, 365 U.S. at 618. This follows the framework of what a reasonable person would believe to be valid consent. However, for Petitioner's case there is no such lack of relationship. Reiser lived in the area in question and was in a relationship with Petitioner. R. at 15. Here, she granted access to the property by answering the agent at the door and allowing him to come in. *Id.* Thus, Reiser demonstrates a reasonable showing of common authority over the property that was searched, which makes this case distinct from *Stoner* and *Chapman*.

This Court addressed the question of apparent authority in *Georgia v. Randolph*, 547 U.S. 103 (2006). In that case, the defendant's estranged ex-wife gave the police consent to search the home for drug paraphernalia while the defendant unequivocally denied requests to search. *Id.* The officers nonetheless searched the home and followed the ex-wife to the defendant's room where they found the evidence in question. This Court found that the present individual's express refusal of consent makes it unreasonable to find that the ex-wife has the proper common authority to consent to the search. *Id.* at 122.

This Court's ruling in *Randolph* emphasizes the precedent of lawful searches where officers were reasonable to believe that the consenting party had common authority of the property. *Id.* Here, Petitioner was not present and thus did not deny requests to search the property. In fact, agent Ristroph was led to the reasonable belief that Reiser had common authority because she lives at the property in question. Therefore, the agent was reasonable in conducting the search only after she consented.

In *Texas v. Brown*, this court defined the scope and applicability of the 'plain view' doctrine to evidentiary disputes. 460 U.S. 730, 733 (1983). Although that case involved evidence seized

through a routine traffic stop, the Court refined the scope of plain view. This court noted that the question of plain view evidence falls on the legality of the intrusion that leads to the search. *Id.* at 737, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). Applying this rationale to the present case, agent Ristroph acted reasonably when he entered the home to conduct a search because Reiser consented to the search. R. at 15. Thereafter, he noticed the box in plain view of the open area in which he was granted consent to search. *Id.* at 17.

B. Any ambiguity of the box was solved sufficiently through agent Ristroph's questioning of the consenting party, Reiser.

The Seventh Circuit has addressed the question of ambiguous containers in connection with apparent authority. *United States v. Melgar*, 227 F.3d 1038 (7th Cir. 2000). This case involved a grant of consent to search in a hotel room where an incriminating purse was located. The defendant reasoned that the evidence found from the search should be suppressed due to a lack of authority to search. *Id.* at 1040. Of importance, the court noted that the police could not have known that the purse did not belong to the individual that consented to the search. *Id.* at 1041. It was also of note that the purse did not have any exterior markings that would identify ownership. *Id.* Therefore, the Seventh Circuit found that the police were reasonable in their belief that the consenting party had authority over the purse in the room she gave consent to search. *Id.* at 1042. The Seventh Circuit identified that it was reasonable for government agents to believe an unmarked container fell into the consenting parties' authority. *Id.* at 1041. In *Melgar*, the police were given consent to search a hotel room and identified a purse that they believed to belong the individual who consented. *Id.*

Applying that reasoning to the box in the present case, it was completely reasonable for agent Ristroph to search the unmarked box that was partially opened. R. at 15. Additionally, the box fell within the scope of the first floor that the agents were given consent to search. *Id.* at 17. Further, based on the layout of the living space, it is reasonable to believe the box was included in

the consent given. *Id.* Much like *Melgar*, the police had reason to believe that the box belonged to Reiser. In *Melgar*, the court found that the purse lacked any distinct exterior markings as to ownership. 227 F.3d at 1042. Additionally, the court noted the consenting party had been renting the space. *Id.* The same facts are true of the unmarked box here. Given the placement and unmarked nature of the box, it was proper for the Fourteenth Circuit to conclude that agent Ristroph reasonably believed that Reiser had common authority over it.

In *United States v. Andrus*, the Tenth Circuit heard a case involving apparent authority related to a space that was not the consenting party's sole possession, but an area to which he had unlimited access. 483 F.3d 711, 713 (10th Cir. 2007). In *Andrus*, government agents were investigating the defendant who lived with his father. *Id.* at 713. The investigation pertained to criminal activity from the defendant's personal computer in his room at his father's house. *Id.* at 717. In rendering their opinion, the court found that because the father had unlimited access to the room and paid for the internet, he had apparent authority. *Id.* at 722. The court reasoned that it must look at the totality of the circumstances. *Id.* at 720.

This would mirror totality of the circumstances in the present case. Reiser had unlimited access to the second floor and especially the lower stairs leading from the first floor. R. at 13. Reiser had full ability to access the box and therefore can consent to its search. Here, Reiser consented to a search of the first floor, and the box was found on the stairs closer to the first floor than the second. *Id.* The object at issue, a plain, unlabeled, unsealed cardboard box, does not trigger the heightened privacy concern that a personal computer and its contents would raise. *Andrus*, 483 F.3d at 718. Thus, there is an assumption of reasonableness on the part of the agent.

In *United States v. Purcell*, the Sixth Circuit discusses whether the spoken words were sufficient to create a reasonable connection or whether further questions should have been asked.

526 F.3d 953 (6th Cir. 2008). In that case, the police received a tip that a prison escapee was hiding out at a hotel with his girlfriend. *Id.* at 956. The officers easily seized him after noticing him in the lobby but went to investigate his room due to worries of methamphetamine production. After no answer to the knocks from the police, they broke down the door and were met with the sound of the shower. *Id.* at 957. After some time, the girlfriend emerged from the bathroom and consented to the police's search through the room. After the police noticed suspicious objects, the police observed two duffel bags. *Id.* The police asked the girlfriend if they could do a more complete search, to which she agreed. They asked whether there was anything that could harm them, to which she answered that there was a firearm, and pointed out which bag it was in. *Id.* Upon searching the bag, the officer found marijuana, but no personal effects from the girlfriend, and only men's clothing. At that time, the officer did not ask any subsequent questions and searched other bags in the room to discover the firearm. Upon review, the court reasoned that although it was reasonable to assume that the girlfriend had ownership of the first bag, it was not reasonable to assume that she had ownership over any other bags without asking subsequent questions. *Id.* at 964. Therefore, the Sixth Circuit found that the exigent circumstances in that case did not justify the search of the second bag that revealed the handgun. *Id.* at 965. *See also United States v Cos*, 498 F.3d 1115 (10th Cir. 2007) (holding that when the relationship between the consenting individual and the object's owner is unclear, the officer has a duty to ask additional questions.)

In the present case, any ambiguity of the unmarked box was rendered obsolete due to sufficient law enforcement questioning. The surrounding circumstances in this case show that it was reasonable for the agent to search the box. Reiser let the agent in the house and said that she would allow him to conduct his investigation. R. at 15. Upon noticing a second floor, the agent asked about its usage and determined that the consenting party rarely used the storage space, so he

confined his search to the first floor. *Id.* In doing so, the agent found a box that contained the evidence for suppression. Being on the lower steps, the box was closer to the first floor than the second floor. *Id.* Unlike the officer in *Purcell*, here the agent did not first search a box revealing gear and then search another box after finding out Reiser did not know about the contents. Further, the box was in plain view of where Reiser had consented to him searching. *Id.*

In sum, this case is different from the cases where it is found that an officer unreasonably continues to search after ambiguity arises. Reiser consented to the search and agent Ristroph asked appropriate follow-up questions which led him to the box. Here, agent Ristroph acted reasonably when he stayed within the first-floor confines and found this box in plain view of that area.

III. Rule 806 of the Federal Rules of Evidence Does Not Permit Petitioner to Introduce Extrinsic Evidence of Specific Instances of Unavailable Hearsay Declarant’s Prior Conduct to Impeach the Declarant’s Character for Truthfulness.

Rule 806 of the Federal Rules of Evidence provides that when a hearsay statement has been admitted, the credibility of a hearsay declarant “may be attacked, and then supported, by any evidence that would be admissible for the purposes if the declarant had testified as a witness.” Fed. R. Evid. 806. Petitioner’s evidence, testimony about the declarant Copperhead’s past academic dishonesty and the record of her falsified job application, is inconsistent with the Rule for the plain reason that this evidence would have been inadmissible for the purposes of impeaching Copperhead “*if the declarant had testified as a witness.*” Fed. R. Evid. 806 (emphasis added). Allowing Petitioner to introduce Copperhead’s prior records of dishonesty cannot be squared with the text of Rule 806 and would invite untenable outcomes that would confound attorneys.

- A. Textual interpretation of Rule 806, in consideration of Rules 608 and 609, cannot allow extrinsic evidence of hearsay declarant’s prior conduct for the purpose of attacking the truthfulness of the hearsay declarant.

When the Court has been asked to resolve ambiguities in the Federal Rules of Evidence, the Court consistently reviewed legislatively enacted Federal Rules of Evidence as if they were any federal statute. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). The proper method for construing these rules is reviewing “the language of the Rule itself.” *Id.* The Advisory Committee’s commentary is “particularly relevant in determining the meaning of the document Congress enacted.” *Id.* at 165-66, n. 9. When the language “makes plain the drafters’ intent,” the Court should not “rely on speculation to import ambiguity into what is otherwise a clear rule.” *Bourjaily v. United States*, 483 U.S. 171, 179 n. 2 (1987).

Here, Rule 806’s text expressly states that the hearsay declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for the purposes “*if the declarant had testified as a witness.*” Fed. R. Evid. 806 (emphasis added). Thus, Rule 806 requires inferring which evidence would be admissible if the out-of-court declarant testified as a witness. The Advisory Committee’s Note also states that “credibility should in fairness be subject to impeachment and support *as though he had in fact testified.* See Rules 608 and 609.” Fed. R. Evid. 806 advisory committee’s note (emphasis added). It follows that if the attorney wishes to attack the out-of-court declarant’s credibility, the attorney will undoubtedly look at Rules 608 and 609. Rule 608(a) permits attacking or supporting the witness’s credibility by testimonies about the reputation for having a character for truthfulness or untruthfulness, or testimonies in the form of an opinion about that character. Fed. R. Evid. 608(a). Rule 608(b) limits impeachment with specific instances of conduct showing dishonesty only through cross-examination and forbids introduction of extrinsic evidence supporting the existence of specific instances of conduct. Fed. R. Evid. 608(b). Additionally, Rule 609 sets specific rules for introducing prior convictions. See Fed. R. Evid. 609. Under the straightforward interpretation of Rule 806 that treats the out-of-court

declarant as a witness, admitting extrinsic evidence showing specific instances of conduct solely for the purpose of impeaching the declarant is equivalent to inventing a new rule of evidence.

1. *Majority of lower courts have consistently understood that Rule 806 does not permit the introduction of extrinsic evidence.*

Lower courts that have addressed the language of Rule 806 have frequently adopted this straightforward interpretation. Three Circuits, the Third, Fifth, and the D.C. Circuits, have rejected admission of extrinsic evidence of specific conducts for the sole purpose of impeaching the hearsay declarant under Rule 806. *United States v. Moody*, 903 F.2d 321 (5th Cir. 1990); *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997); *United States v. Saada*, 212 F.3d 210 (3d. Cir. 2000). Only the Second Circuit held otherwise. *United States v. Friedman*, 854 F.2d 535 (2d. Cir. 1988).

The D.C. Circuit in *White* rejected the defendant's attempt to attack the credibility of out-of-court declarant, whose testimony was offered through the prosecutor's witness. In *White*, the prosecutor's witness, the police officer, testified the co-conspirator's out-of-court statements about the defendant's involvement in drug distribution with him. *White*, 116 F.3d at 910. At cross-examination, the trial court permitted the defendant's counsel to question the police officer's knowledge of the co-conspirator's drug use, drug dealing, and prior conviction. *Id.* at 920. However, it denied the attorney's attempt to question the police officer whether he knew that the co-conspirator "had ever made false statements on an employment application and whether he had ever violated any court orders." *Id.* The D.C. Circuit affirmed the trial court's management of questioning, holding that the defendant's counsel attempted to "attack [the defendant's] credibility using specific examples of misconduct, which, under Fed. R. Evid. 608(b), cannot be proved by extrinsic evidence." The court reasoned that at best, the defendant's counsel could have questioned the police officer about general knowledge of the co-conspirator's falsification on employment form or violation of court orders but could not ask specific references. *Id.* The court stressed,

however, that if the questions about knowledge of the hearsay declarant “were of little utility” in evaluating the declarant’s credibility, trial courts have the discretion to reject those questions. *Id.*

Likewise, the Third Circuit in *Saada* followed this reasoning and rejected introduction of extrinsic evidence showing the out-of-court declarant’s dishonest conduct. In *Saada*, the defendants objected to the government’s attempt to impeach the unavailable declarant’s hearsay statement by showing that he had been removed from the bench and disbarred for unethical conduct. *Saada*, 212 F.3d. at 219. The defendant there argued that extrinsic evidence of specific acts was inadmissible to attack the defendant’s credibility. *Id.* The Third Circuit agreed. In rendering its opinion, it declined the government’s argument that “using information of prior bad acts to impeach the credibility of a witness - cross-examination – is closed if the hearsay declarant cannot be called to testify.” *Id.* Rather, it held that Rule 806 allows impeachment of a hearsay declarant “only to the extent that impeachment would be permissible had the declarant testified as a witness, which, in the case of specific instances, of misconduct, is limited to cross-examination under Rule 608(b).” *Id.* at 221. In other words, the unavailability of one form of impeachment for the prosecutor’s case “does not justify overriding the plain language of the Rules of Evidence.” *See also Moody*, 903 F.2d at 328 (“We note, however, that rule 806 is not an invitation to the defense to revisit, ad nauseum, the sordid history of the hearsay declarants in order to disparage their credibility.”); *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991) (emphasizing that Rule 806 “does not obliterate the rules of evidence that govern how impeachment is to proceed.”).¹

The one Circuit Court standing at odds with the Third, Fifth, and the D.C. Circuits is the Second Circuit. In *Friedman*, the defendant sought to impeach the unavailable declarant, the

¹ Although the Seventh Circuit in *Finley* did not hold that the defendant could impeach the hearsay declarant’s verbal and video images, it held that even if he were allowed to do so, Rule 806 did not “allow the use of evidence made inadmissible by some other rule.” *Finley*, 934 F.2d at 839.

defendant's co-conspirator, who told another co-conspirator testifying on stand as a witness. *Friedman*, 854 F.2d at 569. The defendant's extrinsic evidence was the testimony of district attorney to whom the declarant lied regarding self-inflicted injuries that the declarant initially alleged as injuries from other individuals. *Id.* The district court excluded the evidence, reasoning that the evidence lacked probative value and ultimately "had nothing whatsoever to do with this case." *Id.* Although the Second Circuit affirmed the district court's holding on Rule 403, it held as a dictum that Rule 806 applies "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.* at 570, n. 8.

The critical flaw from the Second Circuit's dictum is that the phrase "the only means of presenting such evidence to the jury" or any similar phrase is blatantly absent in the text of Rule 806. Nowhere in the text of the rule authorizes district courts to entertain a situation of considering acceptable extrinsic evidence. In addition, as the Third Circuit explained, extrinsic evidence is in fact not the only means of presenting evidence of declarant's dishonesty. The Third Circuit explained that Rule 806 offers not just one, but three avenues for the opposing party to attack the declarant's credibility: Rules 608, 609, and 613. *Saada*, 212 F.3d at 221; *see also Moody*, 903 F.2d at 328-29 ("Impeachment of out-of-court declarants may be accomplished, for example, by testimony of prior convictions, reputation, or prior inconsistent statements.")

Therefore, this Court should consider the reasoning from the Third and the D.C. Circuits in application to this question. The analysis best follows the plain text of Rule 806 and avoids creating a new rule of evidence. This best reflects the proper execution of the Federal Rules of Evidence in terms of the general understanding and underlying context of the rule.

B. Permitting Petitioner to introduce extrinsic evidence will introduce unfavorable outcomes that will ultimately confound attorneys in future proceedings.

Given the clear text of Rule 806 that does not reference extrinsic evidence anywhere, Petitioner has no choice but to propose hypothetical situations where Rule 806 allegedly becomes meaningless. At trial, Petitioner stated that without the ability to introduce extrinsic evidence, Rule 806's protection from forcing acceptance of the hearsay declarant's credibility would be hollow, and that the Rule "would serve little purpose." R. at 49-50. However, Rule 806 could still act as an effective mechanism for impeaching declarant's credibility even without extrinsic evidence.

1. *Petitioner has not exhausted alternative options to attack the declarant's credibility without introducing specific conducts.*

The Third Circuit in *Saada* provides helpful guidance for proper questioning under Rule 806. When the court rejected the prosecutor's introduction of extrinsic evidence, it further reasoned that there are still opportunities to introduce prior misconduct for the purpose of impeachment. *Saada*, 212 F.3d at 221. For instance, at cross-examination, the opposing party could question the witness who purports to testify the declarant's hearsay statement about the declarant's misconduct concerning knowledge of the declarant's character for truthfulness "without reference to extrinsic evidence thereof." *Id.* Further, the opposing party could attack the declarant's credibility with "opinion and reputation evidence of character under Rule 608(a), evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613." *Id.*

Under this rule, Petitioner had several opportunities at trial to impeach Copperhead without introducing extrinsic evidence yet did not do so. Namely, he did not introduce any evidence of prior criminal convictions, nor did he introduce evidence of prior inconsistent statements.

Petitioner could have also pursued additional permissible methods for impeachment. First, Petitioner could have asked Kolber about whether he had any general knowledge of Copperhead's

violation of academic rules and submission of falsified employment application. Second, using Rule 608(a), Petitioner could have introduced reputation or opinion witnesses who could testify on Copperhead's credibility. Copperhead received a failing grade from Court Street College due to using artificial intelligence on her final assignment. R. at 9. Petitioner could have sought individuals who could be aware of this dishonest conduct, such as her colleagues. Likewise, Petitioner could have sought individuals who were aware of her falsified job records. Petitioner had the means to seek additional references to make their legal strategy known yet did not do so.

Furthermore, if Petitioner seriously wanted to introduce extrinsic evidence, he could have introduced it to show Copperhead's bias toward Petitioner. *See United States v. Abel*, 469 U.S. 45, 51 (1984) (holding that it is permissible to impeach a witness by showing bias of the witness using extrinsic evidence). The record indicates that Petitioner exhausted none of these options.

Therefore, Petitioner cannot claim that Rule 806 is ineffective without showing any attempt to achieve any of the listed, permissible options.

2. *Rule 806 does not require granting a hearsay declarant the same treatment as a testifying witness because they are not on equal footing.*

At trial, Petitioner argued that Rule 806 is meant to “place hearsay declarants on equal footing with live witnesses” and expressed concern that Rule 806 could be meaningless if there is no opportunity to cross-examine the hearsay declarant. R. at 50. Indeed, the D.C. Circuit acknowledges this situation, stating that “[h]aving known [the co-conspirator] for less than two months before his death,” the police may or may not have been able to answer general questions about the co-conspirator's prior dishonest activities. *White*, 116 F.3d at 920. The present facts reflect the concern addressed in *White*. Kolber knew Copperhead simply from running into her who screamed at Kolber “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,” and then running off. R. at 43. Kolber

does not know any of Copperhead's acquaintances nor her background. R. at 45-46. As such, Petitioner could argue that because of Kolber's bare knowledge about Copperhead, he is compelled to exhaust alternative options to attack Copperhead's credibility to properly treat Copperhead as a witness.

However, the practical limitations for cross-examining a hearsay declarant do not authorize baseless expansion of Rule 806. The phrase "if the declarant does not testify as witness" in Rule 806 does not require courts to maximize every effort to guarantee equal opportunity for impeachments. Rather, it allows impeachments only within the limitations from the other Rules.

To start, contrary to the dissent from the Fourteenth Circuit, hearsay declarant and testifying witness do not stand on "an equal playing ground." R. at 61. Hearsay rules were initially designed on the basis that unlike testifying witnesses, whose "many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion" could be attacked "by the test of cross-examination," hearsay declarants cannot be cross-examined, depriving the ability to evaluate credibility and expose inaccuracies. *Idaho v. Wright*, 497 U.S. 805, 819 (1990) (citing 5 J. Wigmore, Evidence § 1420, p. 251 (J. Chadbourn rev. 1974)). Thus, hearsay declarants have hurdles to pass through to even get near equal to the position of the testifying witness.

Here, Copperhead's statements were admitted under the excited utterance exception under Rule 803(2). Rule 803(2) carves out a narrow exception that the admissible hearsay statement must be made in circumstances where the defendant is under extreme stress. Fed. R. Evid. 803(2). The rationale for this exception, along with the present sense impression exception under Rule 803(1), was that under such circumstances, the declarant would not have opportunities to fabricate testimony. *See* Fed. R. Evid. 803 advisory committee's note to Rule 803(1)-(3) ("the theory . . . is simply that circumstances may produce a condition of excitement which temporarily stills the

capacity of reflection and produces utterances free of conscious fabrication.”). Thus, the primary safeguard for the honesty of the declarant is placed on the rules of hearsay exceptions, not on attacking credibility of declarants.

Furthermore, allowing extrinsic evidence would not place the testifying witness and the hearsay declarant on an equal playing field because the extrinsic evidence in this case would not be admissible if the declarant testified as a witness. Under Rule 608(b), on cross-examination, the opposing party could question the witness on whether the witness’s dishonest conduct in past happened or not, and even after question, the opposing party is stuck with the witness’s answer as is. Fed. R. Evid. 608(b). The opposing party cannot introduce records or additional witnesses to invalidate the witness’s answer. As such, the introduction of Copperhead’s academic advisor and the manager of employment would not have been admissible even if she testified as a witness.

Nevertheless, this matter is not one of which to create binding precedent, as it clearly falls within straightforward interpretation of Rule 806. To create exceptions that would extend past the Federal Rules of Evidence would be better left for Congress. That is how Congress specifically amended Rule 806 to include the phrase “or a statement described in Rule 801(d)(2)(C), (D), or (E)” because without this textual amendment, Rule 806 would not allow the credibility of the declarant when the declarant was a “co-conspirator, agent, or authorized spokesman.” *See* S. REP. No. 1277, 93d Cong., 2d Sess., p. 22 (1974) (Report of the Senate Committee on the Judiciary for Rule 806). Scholars have also acknowledged that any expansion of Rule 806 to permit extrinsic evidence should happen through textual amendment, not judicial interpretation. *See* Margaret M. Cordray, *Evidence Rule 806 and the Problem of Impeaching the Non-testifying Declarant*, 56 OHIO ST. L.J. 495, 530-31 (1995) (proposing amendment to include admissibility of extrinsic evidence in response to lack of clarity for admissible evidences for attacking the hearsay declarant’s

credibility). Thus, the only avenue for Petitioner to seek introducing extrinsic evidence is through Congress's amendment of Rule 806.

In sum, absent the explicit text authorizing extrinsic evidence specifically for impeaching the declarant's credibility written by Congress, Petitioner may not introduce extrinsic evidence to attack Copperhead's credibility. Doing so would directly contradict what the Federal Rules of Evidence allow and will create a nebulous opening for future proceedings.

CONCLUSION

For the foregoing reasons Respondent, The United States Government respectfully requests that this Honorable Court affirm the Fourteenth Circuit Court's prior holding as there was no constitutional violation present and Rule 806 was properly assessed.

Dated: February 8, 2026

Respectfully submitted,

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