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No. 25-7373

In the
Supreme Court of the United States

ATTICUS HEMLOCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. WHETHER: The United States Court of Appeals for the Fourteenth Circuit correctly determined that, under *Payton v. New York*, the Fourth Amendment is not violated when law enforcement officers, who remain outside, command a suspect inside the home to step outside and arrest the suspect outside the home without a warrant.

2. WHETHER: The United States Court of Appeals for the Fourteenth Circuit correctly determined that the Fourth Amendment is not violated when law enforcement conducts a warrantless search of a closed container located in a shared residence after obtaining a co-occupant's consent to search the residence, without specifically inquiring into ownership of the container.

3. WHETHER: The United States Court of Appeals for the Fourteenth Circuit correctly determined that under Rule 806 of the Federal Rules of Evidence, extrinsic evidence of specific instances of conduct of a hearsay declarant may not be admitted to impeach the declarant's character for truthfulness when the declarant is unavailable to testify at trial.

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The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Atticus Hemlock v. United States of America*, No. 25-7373, was entered on April 14, 2025, and may be found in the Record. (R. 51–61). The exhibits offered at trial may be found in the Record on pages 3-17. Transcripts of the motion to suppress and trial proceeds may be found in the Record on pages 18-50.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provision 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.

STATEMENT OF THE CASE

This case is about how swift police work ensured the safety of an innocent, unknowing victim. The exceptions to the Fourth Amendment of the United States Constitution and the limitations of the Federal Rules of Evidence prevented the devastating kidnapping of Jodie Wildrose, United States Department of Tourism's Under Secretary for Rural Development.

STATEMENT OF FACTS

On March 29, 2024, Elvis Hoag ("Hoag"), a barista at a local Boerum coffee shop, placed a call to the Boerum Village Police Department. R. at 54. Hoag called to report a concerning conversation he overheard. R. at 52. He stated that the conversation appeared to involve a plan to kidnap a federal official identified as "Jodie." *Id*. On March 30, 2024, Boerum Village Police Department received a call from the manager of a superstore, Tina Caplow ("Caplow"). *Id*. Caplow reported two individuals for suspicious behavior based on the items they purchased with cash: ski masks, zip ties, black trash bags, bear spray, and a folding knife. *Id*.

These two calls, in combination with an upcoming visit by the United States Department of Tourism's Under Secretary for Rural Development, Jodie Wildrose ("Wildrose"), put the police on alert. R. at 52. The police knew Wildrose was scheduled to visit Boerum Village during the week of April 8 and alerted the FBI because the situation involved a federal official. *Id*.

FBI Special Agents Hugo Herman ("Herman") and Ava Simonson ("Simonson") spoke with Hoag and Caplow on April 2, 2024. R. at 52. Hoag identified the two individuals on social media: Iris Copperhead ("Copperhead") and Appellant Atticus Hemlock (hereinafter "Appellant" or "Hemlock"). *Id*. The gravity of the situation required the FBI to investigate further, so Special Agents Herman and Simonson drove to Appellant's home in an unmarked car around 4:00 p.m. that same day. *Id*. Appellant shared a small cabin with his girlfriend, Fiona Reiser ("Reiser"), since May of 2023. *Id*. Special Agents Herman and Simonson intended to speak with Appellant about his activities at the coffee shop and superstore to further investigate the matter. *Id*. At this time, Herman and Simonson knew they did not have probable cause to arrest Appellant. R. at 21. Herman and Simonson noted that they would consider an arrest if they discovered additional evidence that Appellant intended to carry out the kidnapping. *Id*.

Simonson knocked on the door, left the porch, and identified herself and Herman as FBI Special Agents. R. at 52. She asked Appellant to come outside to speak; Appellant refused to do so but spoke with the Special Agents through the screen door. *Id*. During the conversation, Special Agent Herman noticed two bottles labeled "chloroform" and asked Appellant about them. R. at 11. Appellant not only refused to tell the Special Agents why he had two bottles of chloroform but also moved in an attempt to block the Agents' view. *Id*. Appellant then brought up Jodie Wildrose without prompt from the Special Agents. *Id*.

Special Agents Herman and Simonson then privately determined they had probable cause based on the presence of chloroform, Appellant's movement to block it from view, and the unprompted comment about Jodie Wildrose. R. at 22-23. They called another Special Agent, Kiernan Ristroph ("Ristroph"), to the scene for backup. R. at 52-53. The Special Agents did not have an arrest warrant, so they knew they could not enter Appellant's home to arrest him. *Id.* at 23. Appellant eventually complied with the Special Agents' orders to come outside. *Id*. Once Appellant was fully outside his home and off the porch, Special Agent Simonson arrested him for attempted kidnapping of a federal officer and read him his Miranda rights. *Id*. While Special Agent Simonson arrested Appellant, Special Agent Herman conducted a search incident to lawful arrest. *Id*. In the pocket of Appellant's cargo pants, Special Agent Herman found a spiral bound notebook which was open to a diary entry in which Appellant outlined his plans to kidnap Jodie Wildrose. R. at 23-24. Appellant was then brought into the police station where he was booked, and the notebook was vouchered. R. at 24.

Around the time of the arrest, Appellant's accomplice, Copperhead, came to the cabin and witnessed Appellant's arrest. R. at 53. She fled the scene into Joralemon State Park. *Id*. As she was fleeing, she encountered Boerum resident Theodore Kolber ("Kolber"). *Id*. Kolber

noticed she was shaking and appeared disheveled and upset. *Id*. He attempted to ask if she was okay, but 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!" *Id*. She then ran away in a frenzy. *Id*. Kolber called law enforcement on the morning of April 3 to report what he saw and heard after he learned from the Boerum Village Voice about Copperhead and Appellant's arrests. R. at 44. Kolber later learned that Copperhead died on the night of her arrest. R. at 46.

Special Agent Ristroph arrived at Appellant's cabin at approximately 4:30 p.m. on April 2, just as Special Agents Herman and Simonson were preparing to take Appellant away. R. at 53. Special Agent Herman directed Special Agent Ristroph to wait at the cabin for Reiser to arrive so he could ask for consent to search the home. R. at 12. When Reiser arrived, approximately twenty minutes later, Special Agent Ristroph knocked on her door, identified himself, notified Reiser that Appellant had been arrested, and asked to search the residence as an investigation was in progress. R. at 13. Reiser consented to a search of the cabin she shared with Appellant. *Id*.

Special Agent Ristroph entered through the front door and looked around the living room and kitchen. R. at 13. In the living room, he noticed a set of stairs leading to the second floor and asked Reiser if her bedroom was upstairs. *Id*. Accounts differ on the content of Reiser's response. Special Agent Ristroph's resident investigation report claimed that Reiser told him the loft space was used by both Reiser and Appellant, whereas Reiser's witness declaration indicated that she and Appellant used the downstairs bedroom, and the upstairs loft area was used only by Appellant for storage and as an office. R. at 13-15. Ristroph proceeded with caution and did not climb the stairs into the loft. R. at 53. Ristroph did search the stairwell, as it was a common shared space connected to the shared living room. R. at 13. On the bottom of the stairs, Ristroph noticed a box with the flaps closed and no further identifying markers. R. at 14. Ristroph opened

the box and found fifty feet of rope, two ski masks, a pair of gloves, zip ties, a folding knife with a six-inch blade, a roll of duct tape, and two bottles of chloroform. *Id*. Reiser said nothing as Ristroph searched the box. R. at 16. Only after Ristroph had opened the box, Reiser told Special Agent Ristroph that she had never seen the contents inside the box. *Id*. Special Agent Ristroph then took photographs of the evidence, concluded the search, and took the box with him as he left the cabin. R. at 13.

PROCEDURAL HISTORY

Appellant was arrested in connection with the attempted kidnapping of Jodie Wildrose, Under Secretary for Rural Development with the Department of Tourism, on April 2, 2024. R. at 13. At trial, the Government called Kolber to the stand to testify about Copperhead's hearsay statement on the day of the arrest. R. at 54. The hearsay statement was admitted under the excited utterance exception in Rule 803(2) of the Federal Rules of Evidence. Appellant sought to impeach Copperhead's credibility for truthfulness pursuant to Rule 806 using extrinsic evidence of Copperhead's record of academic dishonesty and her job application that misrepresented her academic record. *Id.* The District Court did not allow the extrinsic evidence to be entered, finding it was in violation of Rule 608(b). *Id.* Appellant was subsequently convicted of attempted kidnapping of an officer of the United States government on account of the officer's official duties after a jury trial in the United States District Court for the Northern District of Boerum on August 12, 2024. R. at 51. Appellant was sentenced to ten years in prison on October 17, 2024. *Id*.

Appellant appealed his conviction to the United States Court of Appeals for the Fourteenth Circuit. R. at 51. On appeal, Appellant raised three issues. *Id*. First, Appellant argued Special Agents Hugo Herman and Ava Simonson violated the Fourth Amendment by conducting a warrantless arrest because Appellant was coerced outside his home, therefore the evidence

seized during his arrest should have been suppressed at trial. *Id.* Second, Appellant argued Special Agent Ristroph did violate the Fourth Amendment by searching the stairwell and the cardboard box, therefore the evidence seized from the closed container should have been suppressed at trial. *Id.* Third, Appellant argued that extrinsic evidence of Copperhead's prior academic violation and falsified job application, offered to impeach her credibility/character for truthfulness, were improperly excluded at trial. R. at 51-52. The United States Court of Appeals for the Fourteenth Circuit affirmed the District Court's rulings and judgment, upholding Appellant's conviction. R. at 58.

Appellant petitioned The Supreme Court of the United States for writ of certiorari to review the ruling of the United States Court of Appeals for the Fourteenth Circuit. R. at 62. On December 2, 2025, The Supreme Court of the United States granted certiorari to Appellant. *Id*. Appellant raises all three issues as decided by the United States Court of Appeals for the Fourteenth Circuit. *Id*.

SUMMARY OF THE ARGUMENT

First, this Honorable Court should uphold the Fourteenth Circuit's decision that Special Agents Herman and Simonson did not violate the Fourth Amendment by arresting Appellant outside his home. Appellant's reliance on *Payton v. New York* is misplaced because law enforcement officers did not violate the Fourth Amendment by conducting a warrantless arrest in public. 445 U.S. 573, 590 (1980). Appellant contends that the constructive entry doctrine extends *Payton's* boundary when law enforcement acts in coercive or overbearing ways. However, this Honorable Court has not recognized constructive entry as a valid Fourth Amendment doctrine. Even if this Honorable Court did, the Special Agents did not act in a coercive manner when

asking Appellant outside of his home. Since the Appellant's arrest did not violate the Fourth Amendment, the evidence seized during his arrest was properly admitted at trial.

Second, this Honorable Court should uphold the decision of the Fourteenth Circuit because the search of the stairwell and the cardboard box were constitutionally permissible. The circuit courts are split over whether the searching officer or a consenting third party bears the responsibility of clarifying any ambiguity regarding the third party's ability to consent to a search. The majority of the circuits require the consenting party to clarify any ambiguity. *United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000); *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006). Only a minority of the circuits require searching officers to clarify any ambiguity. *United States v. Moran,* 944 F.3d 1, 9 (1st Cir. 2019); *United States v. Taylor,* 600 F.3d 678, 681 (6th Cir. 2010). Whether this Honorable Court adopts the majority approach or the minority approach, Special Agent Ristroph's search of the stairwell and the cardboard box was constitutionally permissible. Under the majority approach, Ristroph could reasonably rely on the understanding that Reiser used the entire cabin and thus could consent to a search of all areas of the cabin and any containers found within the cabin. Even under the minority rule, Ristroph's search was constitutionally permissible as he only searched the stairwell, a common area that Reiser shared with Appellant. Reiser remained silent throughout the search, never clearly communicating any limitations to the search. This Honorable Court should adopt the majority approach and affirm the decision of the Fourteenth Circuit.

Third, this Honorable Court should uphold the Fourteenth Circuit's decision to exclude extrinsic evidence of Copperhead's prior academic violation and falsified job application to impeach her character for truthfulness. The plain meaning of Rules 806 and 608(b) of the Federal Rules of Evidence prohibits the use of extrinsic evidence to prove specific instances of conduct

to impeach a witness' character for truthfulness. The majority of circuits have held that Rule 806 does not modify or override the prohibition against extrinsic evidence in Rule 608(b). *United States v. White,* 116 F.3d 903, 920 (1997); *United States v. Saada,* 212 F.3d 210, 221 (3d Cir. 2000). The minority interpretation relies on dicta from one case, which does not represent the law. *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988). Appellant's attempt to impeach Copperhead, an unavailable hearsay declarant, using extrinsic evidence of her prior specific instances of misconduct is precisely what Rule 608(b) prohibits.

Furthermore, even though the Appellant is unable to use extrinsic evidence of specific instances of Copperhead's misconduct, other avenues of impeachment for unavailable witnesses remain available. The circuits that have addressed this issue have held that impeachment of out-of-court hearsay declarants can be achieved by testimony of the declarant's reputation in the form of an opinion, prior criminal convictions, and prior inconsistent statements. *Saada*, 212 F.3d at 221; *United States v. Moody*, 903 F.2d 321, 328-29 (5th Cir. 1990); *White*, 116 F.3d at 920. Appellant had other avenues of impeachment at his disposal but did not explore them. For these reasons, the extrinsic evidence of specific instances of Copperhead's misconduct was properly excluded from trial.

I. The United States Court of Appeals for the Fourteenth Circuit Correctly Held That The Notebook Seized Incident to Appellant's Arrest Was Properly Admitted at Trial.

The Fourth Amendment of the United States Constitution exists to uphold an important ideal: citizens should be protected from unreasonable searches and seizures. U.S. CONST. amend. IV. A person's right to privacy is paramount in Fourth Amendment precedent. *Payton v. New York* draws a firm, unambiguous line at the entrance of a house, or threshold, due to the sacred belief of a right to privacy in one's home. 445 U.S. at 590. However, courts simultaneously

recognize the importance of allowing law enforcement officers to take reasonable action to ensure public safety, officer safety, and to prevent the destruction of evidence. *United States v. Watson,* 423 U.S. 411, 419, 435 (1976). As such, law enforcement officers do not need a warrant to seize evidence when an arrest based on probable cause occurs in public. *Payton,* 445 U.S. at 590*; see also, United States v. Johnson,* 626 F.2d 753, 757 (1980) (holding "[t]he location of the arrested person is the most important consideration when determining if *Payton* was violated").

Some courts have recognized the doctrine of constructive entry, which applies *Payton's* principles to an arrestee who was coerced outside of their home to be arrested. However, constructive entry is not a well-established doctrine, so ordering a suspect to come outside to effectuate an arrest does not per se violate the Fourth Amendment's protections against unreasonable searches and seizures. *Gaddis v. Demattei*, 30 F.4th 625, 632-633 (7th Cir. 2022); *United States v. Allen*, 813 F.3d 76, 81 (2d Cir. 2016). In jurisdictions that recognize the constructive entry doctrine, constructive entry can only be established by overbearing, forceful, or coercive tactics and therefore turns on a show of force displayed by law enforcement officers. *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005).

This Honorable Court should uphold the ruling of the Fourteenth Circuit. Appellant's reliance on *Payton* is inapplicable because he was not inside the home when he was arrested. This Court has not yet extended *Payton* to apply to instances where law enforcement asks a suspect to withdraw from the privacy of their home. This Honorable Court has remained steadfast in keeping *Payton's* holding narrow and should continue to do so because it provides officers with a clear, bright line rule that has guided police work for decades. However, even if this Court decides to recognize constructive entry as a valid Fourth Amendment doctrine, this Honorable Court should uphold the Fourteenth Circuit's holding that Appellant was not coerced

outside because the Special Agents did not use overbearing force. As such, Appellant's Fourth Amendment rights were not violated by the warrantless arrest outside his home, and the notebook seized was properly admitted into evidence.

a. The evidence obtained during Hemlock's arrest was properly admitted at trial because the Special Agents did not cross the threshold of Appellant's home to arrest him, and constructive entry is not a well-founded doctrine under the Fourth Amendment.

Law enforcement officers do not need a warrant to seize evidence when an arrest based on probable cause happens in public. *Payton,* 445 U.S. at 590. The Fourth Amendment draws a firm, unambiguous line at the entrance, or threshold, of a house. *Id.* In *Payton*, the Supreme Court of the United States determined whether an illegal search occurs when law enforcement searches a home and seizes evidence without a warrant or exigent circumstances. *Id.* at 574-75. This case arose after two instances of police officers entering the home of a suspect without a warrant. In the first case, law enforcement had probable cause to believe that the defendant had murdered the manager of a gas station. *Id.* at 576. The officers went to his apartment to arrest him without a warrant. *Id*. When no one responded to the officers knocking on the door, they used crowbars to break it open and enter the apartment. *Id*. The officers found a .30 caliber shell casting in plain view, seized it, and admitted it into evidence at the defendant's trial. *Id.* at 576-77. In the second case, officers knocked on the door of the defendant's apartment based on probable cause that he had committed two armed robberies. When the defendant's son answered the door, the officers saw the defendant in the living room and entered the apartment without a warrant to arrest him. *Id.* at 578. They immediately conducted a search which resulted in weapons and narcotics being seized and entered into evidence. *Id.*

In both cases, the Supreme Court of the United States determined that the seizures violated the Fourth Amendment. *Id.* at 590. The Court issued a narrow holding which applied

only to seizures which occur inside the home without a warrant because the Fourth Amendment protects privacy within the home more than any other area. *Id.* at 586-87. The Court reasoned that while seizures inside the home without a warrant are presumptively unreasonable, seizures which occur in public do not involve an invasion of privacy and therefore do not require a warrant. *Id*. *Payton* draws a clear boundary at the entrance of the home, and this Honorable Court has not yet extended that boundary.

Circuits are split on whether the doctrine of constructive entry is implicated when officers use coercive or intimidating tactics to bring a suspect outside of their home for an arrest. *Gaddis*, 30 F.4th at 632-33; *Allen*, 813 F.3d at 81; *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984). Constructive entry is not a well-established doctrine, so ordering a suspect to come outside to effectuate an arrest does not per se violate the Fourth Amendment's protections against unreasonable searches and seizures. *Gaddis*, 30 F.4th at 632-33; *Allen*, 813 F.3d at 81; *Morgan*, 743 F.2d at 1166. In *United States v. Morgan*, the United States Court of Appeals for the Sixth Circuit acknowledged the doctrine of constructive entry when ten police officers surrounded the house of the defendant and ordered him outside with weapons drawn, where he was then arrested. 743 F.2d at 1161. The Sixth Circuit held that, although the police did not enter the defendant's home, constructive entry "accomplished the same thing." *Id.* at 1166.

However, more recent decisions from other circuits have declined to recognize constructive entry. In *Gaddis,* a police officer on the defendant's porch told him to step outside, and another officer stated if the defendant did not comply, he would be arrested for resisting arrest. 30 F.4th at 632. The defendant left his home voluntarily and was arrested. *Id*. The defendant alleged that he was coerced into coming outside, which evoked the constructive entry doctrine. *Id*. The United States Court of Appeals for the Seventh Circuit expressly limited *Payton*

to its most narrow holding: that "non-exigent warrantless arrests *inside the home* violate the Fourth Amendment," and declined to recognize the doctrine of constructive entry. *Id.* at 633.

Similarly, in *United States v. Allen*, the defendant was asked to come speak with the police, which the defendant complied with while staying inside the threshold of his home while the officers remained on the sidewalk. 813 F.3d at 79. After the defendant was told he was going to be taken to the police station, he voluntarily let the police into his home, then followed them outside, where he was then placed under arrest. *Id*. The defendant later claimed that his privacy was violated by the officers' constructive entry, making his arrest, and any evidence seized because of it, unlawful. *Id*. at 80-81. The United States Court of Appeals for the Second Circuit rejected that argument, calling constructive entry a "legal fiction." *Id*. at 81. The above cases illustrate the conflict between the circuits on whether constructive entry is a recognized Fourth Amendment doctrine, with the most recent decisions declining to extend *Payton* any further than the threshold of the home.

In this case, unlike *Payton*, Special Agents Herman and Simonson did not cross the threshold of Appellant's home. R. at 24. Special Agent Simonson briefly spent time on the front porch in order to knock on Appellant's door. *Id*. After the initial knock, Special Agent Simonson removed herself from the porch and went to stand next to Special Agent Herman, who was about four feet away from the stairs to the porch. R. at 21. When Appellant came to the door, the Special Agents remained where they were and talked to him through the screen door. R. at 23. As the conversation progressed, the Special Agents determined they had probable cause to arrest him. R. at 22. However, without an arrest warrant, they knew they had to arrest Appellant outside his home. R. at 23. The Special Agents called twice for Appellant to come outside and arrested him only when he was on the ground and off the steps of the porch. *Id*. Appellant's reliance on

Payton is unfounded under these circumstances. *Payton* concerned two instances of law enforcement officers entering the home of a suspect and placing them under arrest within the home without an arrest warrant; whereas the Special Agents never stepped over the threshold of Appellant's home.

Here, the warrantless arrest only occurred when Appellant was outside, off the porch, and on the ground. R. at 23. This Court has not yet extended *Payton* to apply to warrantless arrests outside of the home. In fact, this Court explicitly stated in *Payton*, "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." 445 U.S. at 589. Extending that boundary beyond the "firm line" at the entry of the house would make it more difficult for an officer to determine where and under what circumstances they are allowed to effectuate an arrest in public.

By determining that the Special Agents did not cross the threshold of Appellant's home to place him under arrest, a court can determine that no *Payton* violation occurred and end its analysis. *Payton* applies to warrantless arrests inside the home—Appellant was not arrested inside his home. However, Appellant attempts to argue that constructive entry allows for the extension of *Payton's* boundary when police "coerce" a suspect outside of their home. This was a matter of first impression for the Fourteenth Circuit just as it is for this Honorable Court. The Fourteenth Circuit cited *Allen*, pointing out that practical problems would arise if they were to recognize constructive entry. R. at 55. There would be no bright line rule that notifies law enforcement what does and does not rise to the level of coercion necessary to establish constructive entry. Circuit courts that have recognized constructive entry have not proposed a test to establish whether an officer's actions are coercive. Without a test, officers would struggle to make common sense, in-the-moment judgments on how to proceed with an arrest for suspects

who are ordered to come outside. Making fast, common-sense judgements is a necessary law enforcement function that is not made unlawful by the Fourth Amendment. Because the application of such a doctrine would raise practical problems in police work and recent decisions from the circuit courts have declined to recognize constructive entry, this Honorable Court should follow those courts and hold that constructive entry is not a recognized or necessary Fourth Amendment doctrine.

b. The evidence obtained during Hemlock's arrest was properly admitted at trial because, even if the Supreme Court decided to recognize the doctrine of constructive entry, the Special Agents' actions were not coercive and therefore did not establish constructive entry.

In jurisdictions that follow the constructive entry doctrine, constructive entry can only be established by overbearing coercive tactics and therefore turn on the show of force displayed by the officers. *Thomas*, 430 F.3d at 277. In *United States v. Thomas*, a group of five police officers arrived at the house of a man suspected of stealing a chemical widely known for its use in making methamphetamine. *Id.* at 276. Four patrol cars were present at the address; two officers knocked on the defendant's back door, two officers were at the front door, and one officer remained in a patrol car. *Id*. When the defendant came to the back door, the officers told him they were conducting an investigation and wanted to speak. *Id*. The officers then asked the defendant to step outside, and the defendant complied. *Id*. Once he was outside the home, he refused to speak to the officers and was placed under arrest. *Id*. The officers then searched the defendant and discovered evidence which was used against him during trial. *Id*. The Sixth Circuit held that the difference between a permissible consensual encounter and an impermissible constructive entry turns on the show of force exhibited by the police. *Id.* at 277. Factors to consider include whether weapons were drawn, voices were raised, or coercive demands were made. *Id.* at 278. The Sixth Circuit provided examples of what would constitute coercive police behavior, such as

a SWAT team surrounding a building with rifles drawn or knocking forcefully on a door with a shotgun in a ready position. *Id.*, (citing *United States v. Maez*, 872 F.2d 1444, 1450 (10th Cir. 1989); *United States v. Saari*, 272 F.3d 804, 806 (6th Cir. 2001)). The Court determined that the facts of the case did not rise to the overbearing nature of coercive police behavior merely by having multiple police officers on the scene or knocking on the door. *Thomas*, 430 F.3d at 278.

In this case, the Fourteenth Circuit correctly held that Special Agents Herman and Simonson did not engage in coercive behavior to get Appellant out of his house. R. at 55. Once the Special Agents determined they had probable cause to arrest Appellant, they calmly approached the house. R. at 55. The *Thomas* Court declined to hold that merely the number of police officers on the scene is determinative of coercive behavior but held that five officers was not necessarily enough. *Thomas,* 430 F.3d at 279. Here, only Special Agents Herman and Simonson were on the scene. R. at 52. The Special Agents did not use coercive tactics to get Appellant outside; each Special Agent only asked Appellant to come outside once and did not tell Appellant that if he did not comply, he would be arrested. R. at 12. Unlike in *Maez*, where a SWAT team surrounded the building with rifles drawn, neither Special Agent drew their weapons or pointed them at Appellant. R. at 26. The dissent argues that by using firm voices to order Appellant outside, the Special Agents constructively entered Appellant's home, but this is simply untrue. R. at 59. The Fourth Amendment does not require officers to "maintain a cheery and relaxed disposition at all times." R. at 55, (citing *Knight v. Jacobson,* 300 F.3d 1272, 1277 (11th Cir. 2002)). Even if this Honorable Court determines the Fourth Amendment's protections against unreasonable searches and seizures would be better upheld by the use of the constructive entry doctrine, it is clear in this case that Special Agents Herman and Simonson did not engage in coercive behavior that would trigger the use of the doctrine.

As such, this Honorable Court should hold that *Payton* is inapplicable under the facts of this case. The Special Agents never crossed the threshold of Appellant's house to arrest him. Constructive entry is not a recognized Fourth Amendment doctrine, so *Payton's* firm boundary should remain in place. Without constructive entry, the Special Agents' public arrest of Appellant is lawful, and the notebook seized during the search incident to that arrest was properly admitted into evidence. Even if this Honorable Court were to recognize the constructive entry doctrine, the facts of this case do not show coercive police behavior. The facts show Special Agents Herman and Simonson taking necessary, lawful steps to protect an innocent victim from being kidnapped. Appellee, the United States of America, thereby requests this Honorable Court uphold the decision of the Fourteenth Circuit on the first issue.

II. The United States Court of Appeals for the Fourteenth Circuit Correctly Held That the Warrantless Search of a Container in a Shared Residence was Constitutional After Obtaining Consent from a Resident.

The Supreme Court of the United States has long held that a third party may consent to a search of a shared residence. *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973). A third party typically needs actual authority, or to enjoy joint use or control over an area or an item, to consent to its search. *United States v. Matlock*, 415 U.S. 164, 171 (1974). However, a third party can have *apparent* authority to consent to a search if an officer reasonably, but mistakenly, believes based on the information available to him at the time that the third party has actual authority to consent to the search. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). A law enforcement officer "need not always be correct" that a third party has authority to consent but must "be reasonable." *Id*. at 85.

The Supreme Court of the United States has never directly addressed if apparent authority to consent extends to the search of a container; however, the circuit courts provide

guidance. Containers generally do not need additional consent by a third party so long as the third party had authority to consent to the search of the area where the container was found. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). Containers that are more traditionally associated with privacy, such as suitcases and lockboxes, enjoy a higher degree of privacy. *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992). However, containers such as boxes, buckets, plastic bags, or other containers with no distinguishing marking do not receive the same heightened consideration. *Id*.

When a third party's authority to consent to a search is ambiguous, the circuit courts are split on if officers or the third party bears the duty to clarify the ambiguity. The majority of circuit courts including the Second, Third, Fifth, Seventh, Ninth, and Eleventh Circuit only require that an officer's search be reasonable, even if the third party's authority to consent is ambiguous. *Snype*, 441 F.3d at 136; *United States v. Walker,* 529 F. App'x 256, 263 (3d Cir. 2013); *United States v. Jaras*, 86 F.3d 383, 389 (5th Cir. 1996); *Melgar*, 227 F.3d at 1041; *United States v. Ruiz*, 428 F.3d 877, 881 (9th Cir. 2005); *United States v. Barber,* 777 F.3d 1303, 1306 (11th Cir. 2015). Each of these circuits holds that officers have no additional duty to inquire into a third party's ability to consent so long as the search is reasonable. In each of these circuits, the third party has an obligation to alert the officer to the fact that they do not own or control the property in question. Only a minority of the circuits – the First, Sixth, Tenth and the DC Circuit – require officers to further inquire if the third party's authority to consent is ambiguous. *Moran,* 944 F.3d at 9; *Taylor,* 600 F.3d at 681; *Salinas-Cano*, 959 F.2d at 864; *United States v. Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014).

Lastly, any party consenting to a search can limit the scope of their consent through clear communication such that a searching officer would reasonably understand the third party limited

their consent. *Jimeno*, 500 U.S. at 252; *United States v. Long*, 425 F.3d 482, 486 (7th Cir. 2005). A warrantless search is constitutional so long as it is objectively reasonable for an officer to believe a party has consented to a search. *Jimeno*, 500 U.S. at 249.

a. The contents of the cardboard box were properly admitted at trial because Ms. Reiser had apparent authority to consent to the search of the stairwell and the cardboard box because it was reasonable for Officer Ristroph to conclude that Ms. Reiser had authority over the stairwell and the box.

The majority of circuit courts only require that an officer's search be based on a reasonable belief that a third party had actual authority to consent to a search in order to establish apparent authority. The United States Court of Appeals for the Ninth Circuit ruled that apparent authority is established when a law enforcement officer reasonably relies on an untrue fact that leads the officer to believe the third party had actual authority to consent. *Ruiz*, 428 F.3d at 881. In *Ruiz*, a third party consented to a search of a gun case within his residence. *Id*. at 879. He did not inform the officer that the gun case belonged to another party. *Id*. The defendant challenged the search on the grounds that the third party did not have the actual authority to consent. *Id*. at 888. The Court ruled that an officer could establish apparent authority if the officer reasonably believed an untrue fact and that untrue fact, if true, would give the third party actual authority to consent. *Id*. The Court did not impose a duty for the searching officer to ask questions if the ownership of the container was ambiguous. *Id*.

The Seventh Circuit holds similarly highlighting that it is reasonable for officers to believe containers with no identifying marks belong to the consenting party. *Melgar*, 227 F.3d at 1041. In *Melgar*, a third party consented to a search of a hotel room that the third party and the defendant were sharing with several other people. *Id*. at 1039. Law enforcement searched the defendant's purse, which had no defining markers. *Id*. at 1040. The Court found that the warrantless search of the defendant's purse was constitutional because it was reasonable for the

officers to conclude the purse may belong to the consenting third party because of the lack of identifying markers. *Id*. at 1041. The Court noted that requiring officers to be absolutely certain about the authority of a consenting third party would impose an "impossible burden" on law enforcement. *Id*. at 1042; *see also*, *Walker*, 529 F. App'x at 263 (ruling that a man could consent to the search of a woman's purse without requiring the officer to ask clarifying questions as it was reasonable for the officer to believe the purse could be the man's property); *see also*, *Snype*, 441 F.3d at 136 (holding that defendants must show the searched property "obviously and exclusively belonged to someone other than the consenting third party); *see also, United States v. Zapata-Tomallo,* 833 F.2d 25, 27 (2d Cir. 1987) (holding that though law enforcement watched a man carry a duffel bag into an apartment there was not enough evidence to conclude the duffel bag obviously and exclusively belonged to the man).

The United States Court of Appeals for the Fifth Circuit adopted a similar rule and emphasized the importance of the timeliness in which clarifying information is given. *Jaras*, 86 F.3d at 389. In *Jaras*, a consenting third party provided law enforcement with explicit information that the property searched did not belong to the third party before the officer searched the container. *Id*. at 386. The Court found that the third party did not have apparent authority because the officer knew with certainty that the third party did not have actual authority. *Id*. at 389. Compare with *United States v. Freeman*, where the third party only informed the officer that a container did not belong to herself, the third party, *after* the officer had already searched the container. 482 F.3d 829, 834 (5th Cir. 2007). The Court ruled that the "individual knowing the contents of the [searched area] has the responsibility to limit the scope of the consent." *Id*. at 833; *see also*, *Barber,* 777 F.3d at 1306 (holding a third party could

consent to the search of the defendant's bag because no one "told the officer the bag belonged to [the defendant]").

Only a minority of courts require that law enforcement ask additional questions when the third party's authority to consent is ambiguous. In *United States v. Peyton*, the United States Court of Appeals for the D.C. Circuit found that an officer violated the Fourth Amendment when the officer did not ask clarifying questions when faced with an ambiguous situation regarding the authority of a third party's consent. 745 F.3d at 554. In *Peyton*, a defendant kept a shoebox near his bed in a shared living space. *Id*. at 549. It was unclear if the shoebox belonged to the defendant or the consenting third party. *Id*. The Court held that law enforcement had a duty to ask clarifying questions regarding if the shoebox was subject to "mutual use." *Id*. at 559. Only three other circuits impose a similar standard – the First, Sixth, and Tenth. *Moran,* 944 F.3d at 9; *Taylor,* 600 F.3d at 681; *Salinas-Canto,* 959 F.2d at 864.

This Honorable Court should adopt the majority rule that officers need only reasonably believe that a third party has the actual authority to consent to a search to establish apparent authority. Adopting the minority rule would impose an impossible burden on law enforcement and put both citizens and law enforcement at risk. In the present case, it was objectively reasonable for Special Agent Ristroph to believe Reiser had the actual authority to consent to a search of the stairwell and the unmarked box. Like the officer in *Ruiz*, Ristroph mistakenly believed that Reiser had the ability to consent to the search of the cardboard box. R. at 13. The record indicates conflicting accounts of what exactly Reiser told Ristroph. In Reiser's affidavit, she indicates that she told Ristroph that only Appellant used the upstairs area. R. at 15. However, Ristroph's investigation report indicated that Reiser told him "REISER and HEMLOCK used [the area] for storage and an office space." R. at 13. Whether to believe Reiser or Ristroph is an

issue of credibility for the District Court to determine. The United States District Court for the Northern District of Boerum determined that it was reasonable for Ristroph to search the area. R. at 39. Even if the upstairs was exclusively used by Appellant, Reiser was never locked out or forbidden to access the stairwell. It was objectively reasonable for Ristroph to consider the stairwell a common area since Reiser could easily access and use that area or stand in the doorway and call up to Appellant.

Like the shared hotel room and unidentified purse in *Melgar*, it was reasonable for Ristroph to assume that Reiser could consent to the search of an unmarked cardboard box in the stairwell, a shared space. R. at 13. Similarly, like *Walker,* where it was reasonable for law enforcement to believe a man had actual authority to consent to a woman's purse, it was reasonable for Ristroph to believe that Reiser had authority to consent to a search of an unmarked cardboard box. The cardboard box had even fewer identifying marks than the woman's purse in *Walker*. R. at 14. Like *Snype* and *Zapata-Tomallo,* where each defendant failed to prove that the property "obviously and exclusively" belonged to an unpresented party, the cardboard box did not obviously and exclusively belong to Appellant as it had no identifying markings. R. at 14.

Unlike the defendant in *Jaras* who told the searching officer that they did not own the property prior to the officer's search, Reiser said nothing even as Ristroph searched the box. R. at 16. It was objectively reasonable for Ristroph to believe that Reiser, not voicing an objection, had the authority to consent to the search. The present case is more like *Freeman*, where Ristroph only could have discovered the box belonged to Appellant *after* the search. *Id*.

Even if this Court chooses to adopt the minority approach and require law enforcement officers to make an inquiry into a third party's ability to consent, the search of the stairwell and

the cardboard box would still be constitutional because Ristroph was not faced with an ambiguous situation. As previously discussed, Ristroph's account of events indicated that Reiser told him that both she and Appellant used the upstairs area for storage. R. at 13. Under that account, there is no ambiguity if Reiser had access and control over the box. This Honorable Court should adopt the majority approach as not to impose an impossible standard on law enforcement. However, even if this Honorable Court chooses to adopt the minority approach, it must still uphold the decision of the Fourteenth Circuit as Ristroph's belief that Reiser could consent to the search was reasonable.

b. The admission of the evidence obtained from the cardboard box was constitutional because Ms. Reiser did not limit the scope of the search by pointing to the bedroom because it was objectively reasonable for Special Agent Ristroph to believe she did not place any limitations on the search.

Without an explicit limitation from the third party, a law enforcement officer can search anywhere a reasonable person would understand the consent extended. *Jimeno*, 500 U.S. at 253. In *Jimeno*, a defendant consented to the search of his car. *Id*. at 249. The Supreme Court of the United States held that it was reasonable for the officer to search any containers within the car as it was objectively reasonable that the officer understood the consent to include any containers. *Id.* at 253. The Court held that, "the Fourth Amendment provides no grounds for requiring a more explicit authorization," and that courts must analyze the totality of the circumstances in order to determine if a party limited the scope of a search. *Id*.; *see also Long*, 425 F.3d at 486 (holding that a court must analyze the totality of the circumstances when limiting the scope of a search to determine what an objectively reasonable person would understand).

A third party who merely answers a searching officer's questions about an area searched does not effectively limit the scope of their consent. *Rookwood Auto Parts v. Monroe Cnty.*, 155 F.4th 557, 569 (6th Cir. 2025). In *Rookwood Auto Parts*, a third party told an officer searching

for a stolen vehicle that the cars in the parking lot the officer searched were the property of the business. *Id*. at 563. The defendant challenged the search, arguing that the third party limited the scope of the search by telling the officer only company cars were in the parking lot. *Id*. The Sixth Circuit held the third party's statement did not effectively limit the scope of the search. *Id*. at 569.

The scope of consent can be expanded or limited depending on the consenting party's actions. *United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002). In *Lemmons,* officers initially informed the defendant that they were searching for particular items. *Id*. at 924. When law enforcement encountered the defendant's computer, the defendant turned on the computer for law enforcement. *Id*. at 922. In doing so, the court found that law enforcement did not exceed the scope of the defendant's consent by searching through the computer as the defendant extended the scope of the search. *Id*. at 924.

In the present case, Reiser did not limit the scope of her consent. Under the totality of the circumstances, it was objectively reasonable for Ristroph to believe he had permission to search the entire cabin. Reiser made no statements to Officer Ristroph indicating she did not consent to him entering or searching a particular area of the cabin. R. at 15-16. When asked where the couple slept, Reiser pointed in the direction of the bedroom she shared with Appellant R. at 15. Like *Rookwood Auto Parts*, answering Ristroph's question did not limit the scope of consent. Reiser pointing to the bedroom, did not clarify where Ristroph could and could not search. *Id*. Unlike *Lemmons*, Reiser did not lead Ristroph to the area to be searched. However, none of Reiser's actions indicate a limitation on the scope of her consent either. She did not object to the search of the stairwell or box and made no attempt to stop Ristroph from searching. R. at 15-16.

Because Reiser did not limit the scope of her consent, Ristroph's search was constitutionally permissible, and this Honorable Court should uphold the decision of the Fourteenth Circuit.

III. The United States Court of Appeals for the Fourteenth Circuit Correctly Excluded Extrinsic Evidence of Ms. Copperhead's Prior Academic Violation and Falsified Job Application to Impeach Her Character for Truthfulness.

Under Rule 806 of the Federal Rules of Evidence, "[w]hen a hearsay statement…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. The Notes of the Advisory Committee on Proposed Rules of Evidence provide justification for this rule. "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His 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. While all of the Rules of Evidence should be read in harmony with one another, this is especially the case for Rules 806 and 608. Under Rule 608(b) of the Federal Rules of Evidence, "[e]xcept 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." FED. R. EVID. 608(b).

The plain language of the Federal Rules of Evidence is clear on the inadmissibility of extrinsic evidence to prove specific instances of conduct for impeachment of all witnesses. However, at issue on appeal is whether extrinsic evidence is admissible to prove specific instances of conduct for impeaching unavailable non-testifying hearsay declarants. The few circuits that have taken on this issue are split on the admissibility of extrinsic evidence to impeach unavailable hearsay declarants by specific instances of misconduct. The majority approach adopts the view that extrinsic evidence is not admissible to impeach unavailable

non-testifying hearsay declarants. *See United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000); *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991); *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997); *see also United States v. Little,* No. CR 08-0244 SBA, 2012 U.S. Dist. LEXIS 90812, at *11-12 (N.D. Cal. June 18, 2012) (persuaded by the reasoning in *White* and *Saada*, the court held that a person seeking to impeach an unavailable hearsay declarant cannot rely on extrinsic evidence to impeach). These courts reason that Rule 806 is not meant to negate the outright prohibition on extrinsic evidence as enumerated in Rule 608(b). *Id.* The minority approach adopts the view that extrinsic evidence of specific instances of misconduct of an unavailable hearsay declarant is the only way to impeach the declarant due to their unavailability. *See United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988); *United States v. Uvino*, 590 F. Supp. 2d 372, 374 (E.D.N.Y. 2008). Rule 806 applies when the declarant has not testified, and therefore there has been no cross-examination. *Friedman*, 854 F.2d at 570 n.8. Therefore, extrinsic evidence is the only way for the evidence to be presented to the jury. *Id*.

This Honorable Court should uphold the ruling of the United States Court of Appeals for the Fourteenth Circuit. This Court should hold that extrinsic evidence of specific instances of conduct of an unavailable hearsay declarant is not admissible to impeach the declarant's character for truthfulness. Under the majority interpretation of Rules 806 and 608(b) of the Federal Rules of Evidence, extrinsic evidence of specific instances of conduct is always inadmissible for impeaching an unavailable hearsay declarant. Furthermore, if this court adopts the majority rule, other avenues of impeachment for unavailable witnesses remain available.

a. The plain meaning of Rules 806 and 608(b) of the Federal Rules of Evidence prohibits the use of extrinsic evidence to prove specific instances of conduct to impeach a witness' character for truthfulness.

Rules 806 and 608(b) of the Federal Rules of Evidence unambiguously state that extrinsic evidence is never admissible to prove specific instances of conduct. FED. R. EVID. 806, 608(b). Although the circuits are divided on the interpretation of these rules and how the prohibitions of Rule 608(b) apply to Rule 806, a clear majority interpretation prevails. Case law from the D.C. Circuit and the Third Circuit is instructive on this issue.

The D.C. Circuit was one of the first circuits to adopt the majority interpretation on this issue in *United States v. White* in 1997. 116 F.3d at 920. In *White*, the D.C. Circuit held that Rule 806 does not override Rule 608(b)'s absolute prohibition on extrinsic evidence of specific instances of misconduct, even when the hearsay declarant is unavailable at trial. *Id*. A confidential informant, Williams, offered his help to the Assistant United States' Attorney's Office in investigating a drug-selling gang. *Id.* at 909. Before the case went to trial, Williams was killed by the defendants, presumably for his involvement with investigators. *Id.* The prosecution filed a motion to allow the out-of-court statements made by Williams, arguing they were admissible since the defendants procured Williams' unavailability at trial, eliminating their rights under the Confrontation Clause. *Id.* at 910. The Court found that the defendants had procured Williams' unavailability and therefore forwent their Confrontation Clause rights. *Id*. One of the defendants' lawyers sought to impeach Williams' credibility, claiming he made intentionally false statements on an employment application and violated court orders. *Id.* at 920. The *White* Court held that although counsel could have asked the testifying Sergeant whether he had knowledge of Williams' false statements on the employment application and the violation of the court orders, counsel could not prove this using extrinsic evidence in violation of Rule 608(b) of

the Federal Rules of Evidence. *Id*. The *White* Court further held that attacking a witness's credibility could not be proved by extrinsic evidence. *Id.*

The Third Circuit adopted the majority interpretation on this issue as well. In *United States v. Saada*, the Third Circuit held that Rule 608(b)'s general prohibition against the use of extrinsic evidence to prove specific instances of conduct is not modified by Rule 806, even when the hearsay declarant is unavailable to testify at trial. *Saada,* 212 F.3d at 221; *see also United States v. Andrade*, No. 20-cr-00249-RS-1, 2025 LX 168543, at *14 (N.D. Cal. Mar. 3, 2025) (holding that "Rule 806 does not then allow the defense to end-run around Rule 608(b), simply because [the declarant] is absent"). In *Saada,* appellants introduced a hearsay statement from a deceased declarant. *Id.* at 218. As such, appellees sought to impeach the declarant's credibility using extrinsic evidence of two New Jersey Supreme Court decisions ordering his removal from the judicial bench and disbarment in connection with a specific instance of unethical conduct. *Id.* at 219. The Third Circuit acknowledged the circuit split on the issue of admissibility of extrinsic evidence to impeach unavailable hearsay declarants. *Id.* at 220. Compelled by the D.C. Circuit's reasoning in *White*, and in following the plain language of Rules 806 and 608(b), the *Saada* Court held that Rule 806 does not modify the general prohibition against the use of extrinsic evidence of specific instances of misconduct to impeach a non-testifying hearsay declarant. *Id.* at 221.

Like in *White* and *Saada,* Appellant seeks to impeach Copperhead's credibility by introducing extrinsic evidence of specific instances of misconduct. R. at 54. Specifically, Appellant seeks to impermissibly admit extrinsic evidence of Copperhead's prior academic violation and falsified job application to impeach Copperhead's character for truthfulness. *Id*. Appellant's attempt to admit extrinsic evidence is in blatant contrast with the Federal Rules of

Evidence. *White* and *Saada* reflect the majority interpretation in this circuit split, and this Court should follow suit. Failing to read Rules 806 and 608(b) for their plain meaning, going against the holdings in *White* and *Saada*, and overturning the Court of Appeals for the Fourteenth Circuit's findings further muddles this legal issue, and eliminates any chance for judicial consistency on this issue.

The minority approach, instead of focusing on the plain meaning of the Rules, argues that this issue is a matter of fairness. As the Notes of the Advisory Committee on Proposed Rules of Evidence states, "[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in *fairness* be subject to impeachment and support as though he had in fact testified." (emphasis added). FED. R. EVID. 806 advisory committee's note. Proponents of the minority approach look to *United States v. Friedman* from the Second Circuit. 854 F.2d at 570, n.8. Dicta in footnote 8 reads, "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*. While potentially persuasive authority, this is merely dicta, not binding law. Furthermore, of the few circuits that have taken up this issue, the Second Circuit is the only circuit to adopt this interpretation. Some of the other courts that adopt this interpretation include the United States District Court for the Eastern District of New York, the Supreme Court of Appeals of West Virginia, and the United States District Court for the Northern District of Alabama. *United States v. Uvino,* 590 F. Supp. 2d 372 (E.D.N.Y. 2008); *State v. Martisko*, 566 S.E.2d 274 (2002); *Mitchell v. Mod. Woodmen of Am.*, No. 2:10-CV-00965-JEO, 2015 WL 13637160 (N.D. Ala. June 8, 2015). However, these cases are merely persuasive; not binding on this Court.

b. Other avenues of impeachment exist for the Appellant to achieve a similar outcome.

Specific instances of conduct may never be proven by extrinsic evidence under Rule 608(b) of the Federal Rules of Evidence. FED. R. EVID. 608(b). As discussed above, Rule 806 does not override the prohibition set forth in Rule 608(b). Even in the event of an unavailable hearsay declarant, as exists here, there are other ways to successfully impeach the declarant without the use of extrinsic evidence. Specifically, the Appellant is permitted to attack Copperhead's credibility and character for untruthfulness by admitting character testimony, as permitted by Rule 608(a) of the Federal Rules of Evidence. FED. R. EVID. 608(a). Under Rule 608(a), "[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." *Id*. The case law is instructive in this area, further promoting that the unavailability of one avenue of impeachment does not justify overriding the prohibitions in the rules of evidence.

The Third Circuit touched on this issue in their analysis in *Saada*. 212 F.3d at 221. The *Saada* Court recognized that extrinsic evidence is not the only avenue for impeachment of an unavailable declarant. *Id*. A hearsay declarant can be impeached 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*. The court summed up this issue by stating that, "[t]he unavailability of one form of impeachment, under a specific set of circumstances, does not justify overriding the plain language of the Rules of Evidence." *Id*.

The Fifth Circuit's reasoning in *United States v. Moody* is consistent with the aforementioned cases. *Moody*, 903 F.2d at 328-29. In *Moody*, the government relied on inculpatory hearsay remarks of non-testifying declarants to prove their case. *Id.* at 327. The

defendant sought to introduce extrinsic evidence to impeach the non-testifying hearsay declarants, but his attempt was blocked by the lower court. *Id.* at 327. The Fifth Circuit, reversing the holding of the lower court, held that impeachment of out-of-court hearsay declarants can be achieved by testimony of the declarant's reputation in the form of an opinion, prior criminal convictions, and prior inconsistent statements. *Id.* at 328-29. The Court delineated a limit to the scope of impeachment, stating that, "rule 806 is not an invitation to the defense to revisit, ad nauseam, the sordid history of the hearsay declarants in order to disparage their credibility." *Id.* at 329. The Court noted that the scope of impeachment available for non-testifying hearsay declarants mirrored the scope of impeachment available for testifying hearsay declarants or witnesses. *Id*. Thus, the Court held, Moody was permitted to introduce opinion testimony from testifying witnesses regarding the poor character for truthfulness of the non-testifying hearsay declarants. *Id*.

The D.C. Circuit, consistent with the Third and Fifth Circuits, held that a non-testifying hearsay declarant's credibility could be impeached in the form of opinion testimony from a testifying witness. *White*, 116 F.3d at 920. In *White*, the D.C. Circuit held that the defendant was permitted to impeach the non-testifying hearsay declarant by eliciting opinion testimony from the testifying Sergeant regarding whether the declarant had ever lied on an employment form or violated any court orders. *Id.* However, the defendant was strictly prohibited from referencing any extrinsic evidence that would prove whether the declarant had ever lied or violated a court order. *Id.*

Like in *Saada, Moody,* and *White*, Appellant had other available impeachment avenues besides admitting extrinsic evidence of specific instances of misconduct. Specifically, Appellant was permitted to elicit opinion testimony from other witnesses regarding Copperhead's alleged

bad character for truthfulness. Appellant could have called any number of witnesses to testify to Copperhead's bad character for truthfulness. Ms. Reiser, Appellant's girlfriend who knew Copperhead well, could have been called to testify. R. at 16. Professor Nikolas Christopher, or anyone on the Board of Academic Integrity at Court Street College, could have been called to testify. R. at 9. However, Appellant failed to consider other avenues of impeachment that would have achieved the same result as introducing extrinsic evidence. Because Appellant failed to exhaust any other options, and because the plain meaning of the text of Rule 608(b) explicitly prohibits the use of extrinsic evidence to impeach a declarant, this Honorable Court should affirm the holding of the United States Court of Appeals for the Fourteenth Circuit, and hold that Appellant is prohibited from introducing extrinsic evidence of specific instances of misconduct to impeach the unavailable hearsay declarant, Iris Copperhead.

In the interest of judicial consistency, this Honorable Court should adopt the interpretation of the majority of appellate circuits, including the United States Court of Appeals for the Fourteenth Circuit, and hold that the use of extrinsic evidence to prove specific instances of misconduct to impeach a hearsay declarant is always impermissible, even when the declarant or witness is unavailable to testify at trial. The plain meaning of Rules 608(b) and 806 is clear that Rule 806 is not meant to override the provisions in Rule 608(b); specifically, the prohibition against using extrinsic evidence to prove specific instances of misconduct to impeach an unavailable hearsay declarant/witness. Additionally, in this case, Appellant did not exhaust other options to impeach the declarant, which would allow him to achieve the same outcome as using extrinsic evidence to impeach the declarant.

CONCLUSION

This Honorable Court should affirm the holding of the United States Court of Appeals for the Fourteenth Circuit on all issues presented. First, Special Agents Hugo Herman and Ava Simonson did not violate the Fourth Amendment by conducting a warrantless arrest because Appellant was located outside his home, therefore the evidence seized during his arrest was properly admitted at trial. Second, Special Agent Ristroph did not violate the Fourth Amendment by conducting a warrantless search of the cardboard box because Special Agent Ristroph reasonably believed Reiser had the authority to consent to the search. Thus, the evidence seized during the search was properly admitted at trial. Third, under Rules 806 and 608(b) of the Federal Rules of Evidence, extrinsic evidence of hearsay declarant Iris Copperhead's prior academic violation and falsified job application are not admissible to impeach her character for truthfulness. Appellee, the United States of America, respectfully requests this Honorable Court uphold the decision of the Fourteenth Circuit Court of Appeals on all three issues.