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No. 25-7373

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In The  
**Supreme Court of the United States**

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ATTICUS HEMLOCK,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**BRIEF IN SUPPORT OF PETITIONER**

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Counsel of Record  
Attorneys for Petitioner

## **QUESTIONS PRESENTED**

- I. Whether law enforcement violated the Fourth Amendment under *Payton v. New York* when agents conducted a warrantless in-home arrest through coercive commands, and ordered a suspect to exit his home to arrest him outside.
  
- II. Whether a co-occupant's consent to search a residence automatically extended to closed containers, even when agents lacked a reasonable basis to believe the consentor had apparent authority over the container.
  
- III. Whether, under Federal Rule of Evidence 806, extrinsic evidence of a hearsay declarant's specific instances of conduct should have been admitted to impeach the declarant's character for untruthfulness when the declarant was unavailable to testify at trial.

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## **OPINIONS BELOW**

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 April 14, 2025, and may be found in the Record. (51–61).

### **STATUTORY AND CONSTITUTIONAL PROVISIONS**

This case is an appeal from a verdict under 18 U.S.C. § 1201(a)(5) and 1201(d). This appeal concerns alleged violations of Petitioner’s Fourth Amendment guarantee against unreasonable searches and seizures, and his Sixth Amendment right to confront the witnesses against him. U.S. CONST, amend. IV; U.S. CONST, amend VI. Additionally, this case encompasses Federal Rules of Evidence, Rules 806 and 608(b). FED. R. EVID. 806; FED. R. EVID. 608(b).

### **STATEMENT OF THE CASE AND FACTS**

#### **I. Procedural History**

On April 3, 2024, a federal grand jury indicted Atticus Hemlock (“Mr. Hemlock”) on one count of attempted kidnapping of an officer of the United States government on account of the officer’s official duties, in violation of 18 U.S.C. § 1201(a)(5) and 1201(d). (R. 1–2).

On July 29, 2024, prior to trial, Mr. Hemlock moved to suppress (1) the notebook seized from his person at the time of his arrest, arguing that the arrest violated *Payton v. New York*, and (2) the materials recovered from a closed cardboard box inside his residence, contending that Fiona Reiser (“Ms. Reiser”) lacked authority to consent to the search of the container. After conducting a suppression hearing, the United States District Court for the Northern District of Boerum denied both motions, concluding that the arrest complied with the Fourth Amendment and that the search of Mr. Hemlock’s container fell within Ms. Reiser’s apparent authority. (R. 38–39).

Mr. Hemlock’s jury trial commenced on August 5, 2024. (R. 53). During the trial, the Government introduced testimony from Theodore Kolber (“Mr. Kolber”) regarding a statement

made by Iris Copperhead (“Ms. Copperhead”) on April 2, 2024. (R. 40–50). The district court admitted the statement as an excited utterance under Federal Rule of Evidence 803(2). (R. 44). On cross-examination, Mr. Hemlock sought to impeach Ms. Copperhead’s credibility as a hearsay declarant pursuant to Federal Rule of Evidence 806 by introducing extrinsic evidence of her prior academic dishonesty and falsification of an employment application. (R. 47–48). The Government objected, and the district court sustained the objection, excluding the extrinsic impeachment evidence. (R. 47–50). The jury found Mr. Hemlock guilty of attempted kidnapping of a federal officer. (R. 54). The district court sentenced him to ten years’ imprisonment. *Id.* Mr. Hemlock timely appealed. (R. 51).

On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed. (R. 58). The court held that: (1) Mr. Hemlock’s arrest complied with the Fourth Amendment and the notebook was lawfully seized incident to arrest; (2) the searching agent reasonably believed Ms. Reiser possessed apparent authority to consent to the search of the closed container; and (3) Federal Rule of Evidence 806 does not modify the limitations imposed by Rule 608(b), even when the hearsay declarant is unavailable to testify. (R. 55–58). This Court granted certiorari. (R. 62).

## **II. Statement of the Facts**

On January 2, 2024, Ms. Copperhead attested to the Boreum Village Mayor’s Office that she was a college graduate, despite never having graduated from Court Street College. (R. 10). In Spring 2023, Court Street College precluded Ms. Copperhead from graduating after concluding she violated the institution’s Academic Integrity Policy by submitting a final research assignment containing fictitious sources, fabricated hyperlinks, and manufactured quotations generated through artificial intelligence. (R. 9).

On April 2, 2024, Mr. Kolber first encountered Ms. Copperhead in Joralemon State Park in a visibly distressed state. (R. 42). When Mr. Kolber asked if she was okay, Ms. Copperhead blurted, “I can’t believe I saw him get arrested. It’s all his fault. It was all Atticus’ idea—NOT MINE! I can’t run a business from prison!” (R. 43). Later that evening, while in jail following her arrest for the attempted kidnapping of a government official, Ms. Copperhead died of an aortic rupture. (R. 46).

That same afternoon on April 2, 2024, Mr. Hemlock was alone inside his home at 11 County Road 416 in Boerum Village, waiting for his girlfriend and other guests to arrive for dinner. (R. 11, 15). At approximately 4:00 p.m., Special Agents Herman and Simonson, of the Federal Bureau of Investigation (“FBI”), arrived at the residence to investigate him. (R. 29). The agents approached the home, peered through the closed screen door into the interior, and knocked loudly on the doorframe. (R. 21). Both agents were dressed in khakis, black long sleeve polo shirts, and large officer belts. (R. 29). The agents were equipped with firearms, tasers, batons, flashlights, and handcuffs, among other standard officer tools. (R. 25).

Mr. Hemlock stood inside his home, visible to the agents through the screen door. (R. 21). After identifying themselves as FBI agents, they repeatedly insisted that Mr. Hemlock exit the home to speak with them. (R. 11). Mr. Hemlock repeatedly stated that he did not want to speak with them and attempted to terminate the encounter. *Id.* The agents refused to explain the purpose of their visit. (R. 11–12). Despite Mr. Hemlock’s clear objections and unease, Special Agent Herman moved closer to the screen door and continued peering into the home behind him. (R. 11).

Eventually, the agents briefly retreated to their vehicle, but Mr. Hemlock remained at the doorway, even as they walked away. (R. 12). While at the vehicle, the agents agreed that they

would “get [Mr. Hemlock] to come outside and then arrest him.” *Id.* Special Agent Herman called for backup to come to the home. *Id.*

The agents returned to the front door of the home with their hands placed on their firearms. (R. 28). They began yelling and shouting for Mr. Hemlock to exit the home. (R. 12, 23). Intimidated, Mr. Hemlock stated that he would come outside. (R. 12). He crossed the threshold of his front door, walked down the porch steps, and was arrested on the gravel in front of his home. (R. 30). Special Agent Herman seized Mr. Hemlock’s notebook from his pocket and transported him for processing. (R. 12). The encounter lasted a total of twenty-two minutes. (R. 11–12).

After Mr. Hemlock had been removed from the scene, Special Agent Ristroph arrived at the home. (R. 13, 15). Although Mr. Hemlock was already secured, and Ms. Reiser was not suspected of wrongdoing, Special Agent Herman instructed Special Agent Ristroph to remain at the residence and wait for Ms. Reiser to return. (R. 13). Approximately twenty minutes after Mr. Hemlock was taken away, Ms. Reiser arrived. *Id.*

After entering the home, Ms. Reiser was informed of Mr. Hemlock’s arrest and asked for consent to search the residence. (R. 13, 15). She asked why he had been arrested and what agents were searching for, but Special Agent Ristroph declined to provide further explanation, stating only that it was “just part of an investigation.” *Id.*

Special Agent Ristroph entered the home and began searching the first-floor kitchen and living room. (R. 13, 15). He then gestured toward a small staircase leading to a loft and asked whether Ms. Reiser slept there. (R. 15). Ms. Reiser clarified that she did not sleep in the loft and that she and Mr. Hemlock slept in the back bedroom next to the kitchen. (R. 15, 17). She further explained that the loft was used exclusively by Mr. Hemlock as storage and office space and that she did not “really ever go up there.” (R. 15). She did not know what he kept in the loft. *Id.* Special

Agent Ristroph later stated that, based on Ms. Reiser's comments, he was going to confine his search to the first floor. (R. 13). Nevertheless, immediately after Ms. Reiser explained that the loft belonged to Mr. Hemlock, Special Agent Ristroph walked toward the staircase leading to the loft. (R. 13, 15).

At the base of the staircase sat a closed, plain, old cardboard box. (R. 13, 16). The box bore no identifying markings, and its top flaps were closed. (R. 13–14). Without asking Ms. Reiser any questions regarding ownership or control of the container, Special Agent Ristroph opened it. (R. 13). Inside were a rope, two black ski masks, a pair of green gloves, black zip ties, a folding knife, a roll of duct tape, and two bottles of chloroform. (R. 13–14). Ms. Reiser stated that she had never seen the items before, and indicated that the items in the container resembled outdoor gear used by Mr. Hemlock and his friend Ms. Copperhead. (R. 13, 16). Ms. Reiser later said that she figured Mr. Hemlock had left his box there to take up to the loft at a later time. (R. 16, 34). Special Agent Ristroph seized the box and its contents as evidence. (R. 13).

## SUMMARY OF THE ARGUMENT

We respectfully request that this Court reverse the Fourteenth Circuit's holding on each issue because (1) Mr. Hemlock was unlawfully seized when law enforcement constructively entered his home without a warrant, absent exigent circumstances; (2) Ms. Reiser did not have apparent authority to consent to the search of the closed container leading to Mr. Hemlocks loft; and (3) Rule 806 entitled Mr. Hemlock to impeach Ms. Copperhead with probative evidence of Ms. Copperhead's character for untruthfulness.

First, the lower court erred in holding that Mr. Hemlock's arrest did not violate the Fourth Amendment. Under *Payton v. New York*, warrantless arrests inside the home are presumptively unconstitutional absent exigent circumstances. Although the agents did not physically cross the threshold, they accomplished the functional equivalent of an in-home arrest. The agents used repeated commands, raised voices, and a sustained show of authority to compel Mr. Hemlock to exit his home. Once he submitted to that authority, he was seized within the protected confines of his home. Since the show of authority compelled Mr. Hemlock to leave his home, and no exigent circumstances justified the warrantless arrest, the seizure violated the Fourth Amendment. Accordingly, any evidence obtained incident to that arrest must be suppressed.

Secondly, the lower court erred in denying the motion to suppress the items found in the closed container because Ms. Reiser lacked both actual and apparent authority to consent to the search of Mr. Hemlock's closed container. While a co-occupant may consent to the search of shared spaces, that authority does not automatically extend to closed containers over which the consentor lacks mutual use or joint access. Ms. Reiser expressly identified the loft and its surrounding area as Mr. Hemlock's private storage and office space and disclaimed access to that area. These statements eliminated any reasonable basis for Special Agent Ristroph to believe Ms.

Reiser possessed common authority over the container located at the bottom of the stairs leading to the loft.

The circumstances created ambiguity regarding Ms. Reiser's ownership and control of the container. As a matter of law, when faced with such ambiguity, law enforcement has a duty to inquire further before proceeding with a warrantless search. Instead of clarifying ownership or obtaining a warrant, Special Agent Ristroph opened the container without resolving the uncertainty. That failure rendered reliance on apparent authority objectively unreasonable. Nevertheless, Mr. Hemlock retained a distinct and reasonable expectation of privacy in his container. Because the Government failed to meet its burden to justify this warrantless search, and no exception to the warrant requirement applies, the items seized from the container must be suppressed.

Thirdly, the lower court erred in excluding extrinsic evidence of Ms. Copperhead's prior dishonest conduct after admitting her hearsay statement through another witness. Rule 806 expressly permits a party to attack the credibility of a hearsay declarant by any means that would have been available had the declarant testified. Because Ms. Copperhead did not appear at trial, impeachment through extrinsic evidence was the only mechanism by which Mr. Hemlock could test her credibility. Rule 608(b)'s restriction on extrinsic evidence applies to live witnesses alone.

Moreover, the excluded evidence was highly probative of Ms. Copperhead's character for untruthfulness. Prior acts of deliberate dishonesty are probative when they closely relate to the reliability concerns raised by the hearsay statement at issue. By admitting Ms. Copperhead's statements while preventing meaningful impeachment, the lower court undermined the Confrontation Clause's guarantee that a defendant may expose facts bearing on a declarant's reliability.

## ARGUMENT

### **I. UNDER *PAYTON V. NEW YORK*, THE LOWER COURT ERRED IN HOLDING THAT MR. HEMLOCK’S ARREST DID NOT VIOLATE THE FOURTH AMENDMENT, WHEN MR. HEMLOCK WAS SEIZED WITHIN THE THRESHOLD OF HIS HOME AND LAW ENFORCEMENT CONSTRUCTIVELY ENTERED THE HOME.**

The sanctity of the home is afforded the most stringent Fourth Amendment protection. *See* U.S. CONST. amend. IV; *McDonald v. United States*, 335 U.S. 451, 453 (1948) (discussing that the Fourth Amendment “marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation”); *Weeks v. United States*, 232 U.S. 383, 390 (1914) (explaining that “a man’s house was his castle and not to be invaded by any general authority to search and seize his goods and papers”). The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV; *see Silverman v. United States*, 365 U.S. 505, 506 (1961) (ascribing “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion” as “the very core of the Fourth Amendment”).

This Court’s foundational ruling in *Payton v. New York* prohibits warrantless home arrests absent exigent circumstances. *Payton v. New York*, 445 U.S. 573, 590 (1980); *see Mincey v. Arizona*, 437 U.S. 385, 395 (1978) (rejecting the Arizona Supreme Court’s “murder scene exception,” holding that the seriousness of the crime does not create exigent circumstances justifying a warrantless search); *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (finding that warrantless entries that do occur must be “strictly circumscribed by the exigencies which justify [their] initiation”). *Payton* characterizes the physical entry of the home as “the chief evil against which the wording of the Fourth Amendment is directed.” *Payton*, 445 U.S. at 585. However, *Payton*

does not stand alone in the jurisprudential discourse of the Fourth Amendment. *See United States v. United States District Court for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972) (finding that the government’s warrantless intrusion into the home through surveillance can only be “reasonable” if there exists a “legitimate need of Government to safeguard domestic security”); *see United States v. Katz*, 389 U.S. 347, 353 (1967) (extending the protections of the Fourth Amendment to unreasonable surveillance and refusing to limit its protections solely into instances of actual physical trespass).

Further, circuit courts have held that a violation of the *Payton* line can occur even if law enforcement has not physically entered the home. *See Mincey*, 437 U.S. at 395; *see United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989). This doctrine of constructive entry, further extends the protections of the home beyond instances of physical trespass. *See United States v. Saari*, 272 F.3d 804, 809 (6th Cir. 2001); *see United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984) (holding that Appellee was illegally arrested when the police surrounded his home and utilized coercive tactics to induce his presence at the door). Constructive entry into a home in violation of *Payton* occurs when law enforcement officers use “coercive conduct” to force a defendant outside of the home, a tactic that is employed by law enforcement to seize individuals in the absence of a warrant. *See United States v. Allen*, 813 F.3d 76, 88 (2d Cir. 2016); *United States v. Reeves*, 524 F.3d 1161, 1171 (10th Cir. 2008); *Morgan*, 743 F.2d at 1166. Essentially, “[i]t is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. *Reeves*, 524 F.3d at 1165.

A person is “seized” within the meaning of the Fourth Amendment when in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (holding that the

respondent was not seized because law enforcement “displayed no weapons . . . [and] did not summon the respondent to their presence”). In *California v. Hodari D.*, this Court added another layer to this definition, where law enforcement displays a “show of authority” that “enjoins the accused to halt.” *California v. Hodari D.*, 499 U.S. 621, 629 (1991) (holding that Appellee was not seized because Appellee did not submit to law enforcement’s show of authority).

Here, Mr. Hemlock was seized under *Hodari D.* and *Mendenhall* when he submitted to a show of police authority and no reasonable person in his position would have felt free to leave. *See Hodari D.*, 499 U.S. at 629; *see Mendenhall*, 446 U.S. at 554. Law enforcement violated the Fourth Amendment by compelling Mr. Hemlock to leave the sanctuary of his home in order to effectuate the arrest. This tactic constituted a constructive entry into Mr. Hemlock’s home and is indistinguishable, for Fourth Amendment purposes, from a physical entry. *See Morgan*, 743 F.2d at 1166.

Since there is no dispute over exigent circumstances, this Court should find that the Government violated Mr. Hemlock’s Fourth Amendment rights by coercing him to exit his home for the purpose of arresting him without a warrant. (R. 53). Interpreting *Payton* to limit constitutional protection to physical intrusions would improperly narrow the Fourth Amendment and permit law enforcement to accomplish indirectly what the Constitution plainly forbids directly. *See Payton*, 445 U.S. at 590. The ultimate determination of reasonableness under the Fourth Amendment is a question of law reviewed de novo. *Reeves*, 524 F.3d at 1165 (citing *United States v. McKissick*, 204 F.3d 1282, 1296 (10th Cir. 2000)).

**A. Under the Totality of the Circumstances, Mr. Hemlock Was Unlawfully Seized From Inside His Home When He Submitted to a Show of Authority and Did Not Feel Free to Leave.**

A seizure under the Fourth Amendment “requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.” *Hodari D.*, 499 U.S. at 622. A person submits

to a show of authority when the surrounding circumstances would cause a reasonable person to believe that they were not free to leave. *Mendenhall*, 446 U.S. at 554. The inquiry then becomes whether a reasonable person, confronted with such circumstances, would believe that he was under arrest or otherwise compelled to leave the house. *United States v. Thomas*, 430 F.3d 274, 278 (6th Cir. 2005). This Court has determined that a reasonable person may not feel free to leave if they do not feel free to decline officers' requests or otherwise terminate the encounter. *Florida v. Bostick*, 501 U.S. 429, 439 (1991); see *Rattray v. City of New York*, 2023 U.S. Dist. LEXIS 55952 (S.D. N.Y. 2023) (looking at the language, tone, and actions the officers use to communicate that compliance might be compelled). Other examples include the display of a weapon by an officer, the threatening presence of several officers, and using coercive language to summon an individual to their presence. *Mendenhall*, 446 U.S. at 554–55.

Here, no reasonable person in Mr. Hemlock's position would have felt free to leave. See *Mendenhall*, 446 U.S. at 554; see also *Hodari D.*, 499 U.S. at 622. Special Agents Simonson and Herman continuously commanded Mr. Hemlock to exit his home a total of six times during their twenty-two minute encounter. (R. 11–12). The transcript of the arrest shows these commands were being yelled at Mr. Hemlock repeatedly, exemplifying the usage of tone “indicating that compliance with the officer's request might be compelled.” *Mendenhall*, 446 U.S. at 554; (R. 11–12). At this moment, Mr. Hemlock was seized. Had he felt free to leave, he could have closed the door on the agents, or retreated further into his home, but Mr. Hemlock remained at the door in submission even when the agents walked back to their car. (R. 12).

Additionally, the language the special agents used would compel a reasonable person to comply. *Mendenhall*, 446 U.S. at 554. For instance, Special Agent Herman shouted, “Sir! Come outside! Our investigation is important and we need answers. Now!” (R. 12). Followed by Special

Agent Simonson’s order to, “Get outside right now!” *Id.* The syntax in these commands created a sense of urgency, conveying that compliance is not merely being requested, but demanded. When the special agents re-approached Mr. Hemlock’s home, they had their hands placed on the holsters of their firearms, a warning of what could happen should Mr. Hemlock choose to not comply. (R. 26:4–17). In their totality, the special agents’ actions constituted a show of authority that left Mr. Hemlock with no reasonable alternative but to exit his home and comply with their orders. (R. 12); *see Hodari D.*, 499 U.S. at 622.

Similarly, in *United States v. Reeves*, the Tenth Circuit held that officers violated *Payton* when an unlawful, warrantless arrest resulted from law enforcement’s show of authority. *Reeves*, 524 F.3d at 1171; *see Payton*, 445 U.S. at 590. The law enforcement in *Reeves* identified themselves and repeatedly ordered Appellee out for “at least twenty minutes” until Appellee complied. *Reeves*, 524 F.3d at 1163. The Tenth Circuit reasoned that the Fourth Amendment does not permit officers to accomplish indirectly, through coercion, what they could not lawfully do by physically crossing the threshold of the home. *Id.* at 1166. As in *Reeves*, Mr. Hemlock exiting his home to speak to the agents was not a consensual exit, but was in compliance with authoritative police commands that no reasonable person would have refused. *Id.* at 1163; (R. 11–12).

However, in *Reeves*, the court still deemed Appellee seized, even though Appellee did not immediately come to the door, or otherwise acknowledge the officers’ presence until some time had passed. *Reeves*, 524 F.3d at 1164. Our case is one step further removed from the facts of *Reeves*, as Mr. Hemlock did immediately come to the door and subsequently submit to the special agents’ show of authority. *See id.* at 1171; (R. 11–12). Thus, this Court should find Mr. Hemlock’s warrantless seizure unlawful, and suppress the fruit of that arrest. *See U.S. CONST. amend. IV; Alderman v. United States*, 394 U.S. 165, 187 (1969); *Reeves*, 524 F.3d at 1171.

Setting a binding precedent that permits law enforcement to lawfully seize an individual inside the home would effectively dilute the constitutional protections that safeguard the sanctity of the home. Affirming this decision would expand police authority beyond its intended limits and elevate governmental power over the individual's fundamental rights to privacy and property. Such a shift would risk transforming a carefully-cabined exception into a de facto amendment of the Fourth Amendment's core guarantee.

Accordingly, under the totality of these circumstances, Mr. Hemlock was seized, while still within the protected confines of his home, when he submitted to the agents' unmistakable show of authority. Given the absence of exigent circumstances, the seizure was unconstitutional, and the fruits of that arrest must be suppressed. *See* U.S. CONST. amend. IV; *Alderman*, 394 U.S. at 187.

**B. Law Enforcement Violated *Payton v. New York* by Constructively Entering Mr. Hemlock's Home When They Used Coercive Tactics to Compel Him Outside for a Warrantless Arrest.**

Courts have developed the "constructive entry doctrine," to ensure that the Fourth Amendment's protection of the home cannot be evaded by law enforcement officers who exert coercive control over a suspect without physically entering the residence. *Morgan*, 743 F.2d at 1166. Whether the police action gives rise to constructive entry depends on the totality of the circumstances. *Id.* at 1163; *United States v. Raley*, 2022 U.S. Dist. LEXIS, 128634 (W.D. KY. 2022). Constructive entry occurs when a show of authority leads the defendant to reasonably believe he had no choice but to comply. *Saari*, 272 F.3d at 809. Courts have considered factors such as drawn weapons, raised voices, coercive demands, and the visible presence of multiple officers to determine whether officers effected a constructive entry. *See United States v. Grayer*, 232 Fed. Appx. 446, 450 (6th Cir. 2007).

Coercive conduct may also be established where law enforcement continually asserts authority by identifying themselves and commanding the individual to exit the home. *Saari*, 272

F.3d at 808. For example, in *Morgan*, law enforcement constructively entered the home when they surrounded it and commanded the suspect outside. *Morgan*, 743 F.2d at 1161. The court in *Morgan* held that Appellee would not have exited but for police coercion and commands to come out. *Id.* Thus, where law enforcement employs overbearing tactics that force an individual out of his home, officers effect a constructive entry sufficient to constitute a violation of *Payton*. *Thomas*, 430 F.3d at 277.

In *United States v. Saari*, the Sixth Circuit held that officers violated *Payton* when, rather than obtain an arrest warrant, they stationed themselves at the defendant's doorway and used commands and a show of force to compel him to exit his home before arresting him. *Saari*, 272 F.3d at 807. The court concluded that although the officers never physically crossed the threshold into the home, their coercive tactics were the functional equivalent of a warrantless home entry because no reasonable person would have felt free to remain inside or refuse compliance. *Id.* The court therefore treated the arrest as a constructive entry and suppressed the resulting evidence.

The same coercive conduct occurred here and therefore the same result must follow. By telling federal agents, "No way. Leave me alone! I told you I don't want to come outside," Mr. Hemlock attempted to terminate the encounter. (R. 12). The body-camera transcript further corroborates this point, as the special agents' own conversations reflect that awareness, with Special Agent Simonson remarking, "[Mr. Hemlock] clearly does not want to talk to us." (R. 12). Nonetheless, rather than disengage or seek a warrant, the federal agents remained outside the home. (R. 12). The special agents then returned to re-escalate the encounter after explicitly planning to "get [Mr. Hemlock] to come outside" and arrest him." (R. 12). The record reflects the purposeful and premeditated intent to coerce Mr. Hemlock to exit his home. (R. 12).

Further, the federal agents asserted their authority by identifying themselves as FBI and repeatedly ordering Mr. Hemlock to “come outside” and “get outside right now,” stressing the urgency of their investigation while refusing to explain its purpose. (R. 11–12, 28). Faced with two armed federal agents shouting commands at his doorway, Mr. Hemlock ultimately relented—“okay, okay, I’ll come out”—and agents immediately handcuffed him. (R. 12). Mr. Hemlock repeatedly refused to come outside and did so only after the special agents persisted with commands and coercive pressure. The special agents gave Mr. Hemlock only one reasonable choice: to walk out the front door and submit to the arrest. By compelling Mr. Hemlock across the threshold to effectuate the arrest without a warrant, the federal agents constructively entered the home which is squarely what *Payton* forbids. *See Payton*, 445 U.S. at 590.

Such a narrow reading of *Payton*, where officers must physically cross the threshold to constitute an in-home arrest, would defeat the Fourth Amendment’s protections. *See Payton*, 445 U.S. at 590. This interpretation would allow police to use coercion to compel a person to exit the home as a means of effectuating a warrantless arrest. Affirming the lower court’s decision would reward the use of tactics designed to evade *Payton*. *See Payton*, 445 U.S. at 590. Accordingly, this Court should find that the special agents violated *Payton* by constructively entering Mr. Hemlock’s home and unlawfully arresting him. *See Payton*, 445 U.S. at 590. Thus, any evidence seized incident to the arrest should be suppressed as fruit of the illegal seizure. *See U.S. CONST. amend. IV; Alderman*, 394 U.S. at 187.

**II. THE LOWER COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE MS. REISER LACKED APPARENT AUTHORITY TO CONSENT TO THE SEARCH OF MR. HEMLOCK’S CLOSED CONTAINER, AND SPECIAL AGENT RISTROPH UNREASONABLY FAILED TO INQUIRE INTO ITS OWNERSHIP.**

“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and be free from unreasonable governmental intrusion.” *United States v. Payton*, 745

F.3d 546, 552 (D.C. Cir. 2014). Therefore, “[a] warrantless search is the quintessential intrusion and is presumptively unreasonable.” *Id.* The Government may rebut that presumption only by showing a valid exception to the warrant requirement, or that law enforcement obtained consent from someone with sufficient authority. *Id.*; see also *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). “Such consent . . . may come from ‘a third party who possess[es] common authority over . . . the premises or effects sought to be inspected,’” such as a co-occupant. *Peyton*, 745 F.3d at 552 (quoting *United States v. Matlock*, 415 U.S. 164, 171 (1974)).

This Court has developed a doctrine for analyzing the authority of a third party who consents to the relevant search. See *Rodriguez*, 497 U.S. at 181. Actual authority, or “[c]ommon authority, rests . . . on mutual use of the property by persons generally having joint access or control for most purposes.” *Matlock*, 415 U.S. at 171 n.7. For example, this Court held that common authority existed when the consenting co-occupant shared joint access and control over the bedroom and closet searched, making her consent sufficient as to those shared areas. *See id.*

In the absence of common authority, an individual can still consent to a search under the doctrine of “apparent authority.” See *Rodriguez*, 497 U.S. at 187. To establish apparent authority, the officer is assessed under “an objective standard: would the facts available to the officer at the moment . . . ‘warrant a man of reasonable caution in belief’ that the consenting party had authority over the [area]?” *Id.* at 188 (citations omitted). Moreover, obtaining a co-occupants consent to search a general area “is distinguishable from consent to search an object or closed container located within that area.” See *United States v. Karo*, 468 U.S. 705, 725, 104 (1984) (O’Connor, J., concurring)). Valid consent for a separate search of a closed container must come from a reasonable belief that the consenting party (1) has common authority over the effects sought to be inspected; (2) has mutual use of the property; and (3) generally has joint access or control for most

purposes. *See United States v. Waller*, 426 F.3d 838, 845 (6th Cir. 2005). *But see United States v. Block*, 590 F.2d 535, 540 (4th Cir. 1978) (holding that a co-occupant’s general access to a shared room did not confer authority to consent to the search of a drawer reserved exclusively for the defendant’s personal use).

If law enforcement does not learn enough to verify that the container about to be searched is subject to common authority by the co-occupant giving consent, the law imposes a duty to inquire. *See United States v. Taylor*, 600 F.3d 678, 681 (6th Cir. 2010) (citing *Waller*, 426 F.3d at 846). Thus, “where the circumstances presented would cause a person of reasonable caution to question whether the third party has mutual use of the property, warrantless entry without further inquiry is unlawful.” *Waller*, 426 F.3d at 846.

In assessing any ambiguity that may arise concerning a co-occupant’s ability to consent and “mutual use or control” over a container, courts should consider several factors: (1) the type of container and whether that type “historically command[ed] a high degree of privacy;” (2) “the precautions taken by the owner to manifest his subjective expectation of privacy;” and (3) “whether the consenter disclaimed ownership” of the container. *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992). The court must also consider “(1) whether a person has exhibited a subjective expectation of privacy,” and (2) “that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Katz*, 389 U.S. at 361 (Harlan, J., concurring). “The government must therefore come forward with persuasive evidence of both shared use *and* joint access or control of a container in order to support third party consent” under ambiguous circumstances. *Salinas-Cano*, 959 F.2d. at 864. “When the government fails to demonstrate an exception to the warrant requirement, the evidence obtained through the search must be suppressed.” *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000) (citations omitted).

Here, the Government failed to meet its burden to justify this warrantless search. Ms. Reiser did not have apparent authority to consent to the search of Mr. Hemlock's closed container. The surrounding circumstances left ownership ambiguous, and Special Agent Ristroph failed to sufficiently resolve that ambiguity by making the necessary inquiries before searching. Additionally, Mr. Hemlock maintained a reasonable and independent expectation of privacy in the closed container, which, without exigency, required a warrant. This Court should therefore reverse the denial of the motion to suppress the items unlawfully recovered from the closed container. The ultimate determination of reasonableness under the Fourth Amendment is a question of law reviewable de novo. *United States v. Long*, 176 F.3d 1304, 1307 (10th Cir. 1999).

**A. Special Agent Ristroph Had No Reasonable Basis to Believe Ms. Reiser Had Apparent Authority to Consent to a Search of the Closed Container.**

A third party's mere possession of a container does not, by itself, support a reasonable belief that the third party has apparent authority to consent to a search of its contents. *See Basinski*, 226 F.3d at 834. This Court has held that the Fourth Amendment's protections belonged to the petitioner alone, not to the third party consenting, and "was a right . . . which only the petitioner could waive by word or deed . . . ." *Stoner v. California*, 376 U.S. 483, 489 (1964); *see Peyton*, 745 F.3d at 554 (explaining that apparent authority does not exist where it is uncertain whether the container is subject to mutual use).

Here, the Fourth Amendment interest implicated by the search of the closed container belonged to Mr. Hemlock, not to Ms. Reiser. *See Stoner*, 376 U.S. at 489. Ms. Reiser expressly identified the loft and its associated areas as Mr. Hemlock's exclusive storage and office, stated that she did not go there, and disclaimed knowledge of the container's contents. (R. 13, 15). Thus, Ms. Reiser's general consent to search the home could not waive Mr. Hemlock's constitutional protections in his container because Ms. Reiser lacked mutual use or control over the area it was

found in, and the container itself. (R. 13, 15). Under the totality of the circumstances, Ms. Reiser's acts eliminated any reasonable basis for presumed shared authority over the container, and thus, Special Agent Ristroph had a duty to inquire as to its ownership. Special Agent Ristroph's failure to satisfy this duty rendered the search unlawful under the Fourth Amendment.

***1. Ms. Reiser's Expressions and the Totality of the Circumstances Created Ambiguity Rendering any Belief in Mutual Use of the Container Unreasonable.***

The Court must also consider that the scope of a consent search "is generally defined by its expressed object." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). In deciding whether law enforcement acted reasonably, we consider whether "the officer's interpretation of the spoken words were reasonable in light of the contextual information that the record does contain." *United States v. Purcell*, 526 F.3d 953, 963 (6th Cir. 2008) (citations omitted). When a consenter's initial statements appear clear but later statements or surrounding circumstances introduce ambiguity about ownership or control of a particular container, any apparent authority evaporates. *See Rodriguez*, 497 U.S. at 188.

For example, "[i]n *United States v. Jaras*, the Fifth Circuit held that police officers could not reasonably believe that the defendant's friend had authority to consent to a search of the defendant's suitcase where the friend *expressly* told the officer that the suitcases belonged to the defendant." *Basinski*, 226 F.3d at 836 (citing *United States v. Jaras*, 86 F.3d 383, 389 (5th Cir.1996)) (emphasis added). "The court in *Jaras* found that a co-inhabitant's statements that a defendant stores their personal property in an area where the container is located strongly suggests that the co-inhabitant does not use the container." *Peyton*, 745 F.3d at 554. The holding in *Jaras* should be applied here as the facts of our case are analogous. *See Jaras*, 86 F.3d at 389.

When asked what was stored upstairs, Ms. Reiser explicitly told Special Agent Ristroph that “the stairs led to the loft, which Atticus [Mr. Hemlock] used as storage and an office space.” (R. 15). Ms. Reiser explained that she did not know what Mr. Hemlock kept in the loft because “[she] did not really go up there.” *Id.* Seeing that the stairs only lead to the loft, Ms. Reiser also did not have authority over the stairs. *Id.* This further narrowed the scope of her authority over Mr. Hemlock’s home and its effects. *Id.* When asked where she slept, Ms. Reiser denied sleeping in the loft, and instead, pointed towards the bedroom on the opposite side of the floor plan. (R. 15, 17). In the police report, Special Agent Ristroph claimed, “because of this comment” he “confined the search to the first floor.” (R. 13). Yet, Special Agent Ristroph made an immediate turn away from the first-floor area to reach the stairs. (R. 17).

The facts here closely parallel those of *Taylor* and *Waller*. *See Taylor*, 600 F.3d at 682–83; *Waller*, 426 F.3d at 843–44. In *Waller*, the Appellee stored a suitcase at a friend’s apartment, but the friend had never looked inside and did not know what the Appellee stored in it. *See Waller*, 426 F.3d at 844. After the Appellee’s arrest, the friend consented to a search, officers opened the suitcase, but the court suppressed the evidence because mutual use of the container by the consentor remained unclear. *See id.* Likewise in *Taylor*, the co-occupant testified that she did not have the authority to look in Appellee’s container. *Taylor*, 600 F.3d at 682–83. In both of these cases, the Sixth Circuit held that under the circumstances, the parties lacked apparent authority to authorize the searches because containers were not “subject to mutual use” by the consenting parties. *See id.*; *Waller*, 426 F.3d at 843–44. Similarly, Ms. Reiser had never looked inside Mr. Hemlock’s container, and exercised no control over it. (R. 15). Ms. Reiser’s expressions, and the container’s location on the staircase, created enough ambiguity as to the container’s ownership.

**2. Special Agent Ristroph had a Duty to Inquire Further in Order to Establish Authority Over the Container.**

Special Agent Ristroph's knowledge that the container was not subject to mutual use or joint access by Ms. Reiser triggered Special Agent Ristroph's duty to inquire. *See Taylor*, 600 F.3d at 681. When law enforcement is faced with ambiguity over the third party's mutual use or control over the container, the government cannot establish third-party consent without further inquiry. *See Peyton*, 745 F.3d at 554 (citing *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991)). Absent sufficient clarification, the warrantless search is unlawful. *See Peyton*, 745 F.3d at 554.

A number of courts have recognized the importance of an officer's duty to inquire in ambiguous situations. *See, e.g., United States v. Kimoana*, 383 F.3d 1215, 1222 (10th Cir.2004) (“[W]here an officer is presented with ambiguous facts related to authority, he or she has a duty to investigate further before relying on the consent”); *United States v. Rosario*, 962 F.2d 733, 738 (7th Cir.1992) (language from *Rodriguez* “suggests that in the absence of sufficient facts, officers have a duty to seek further information in order to determine whether they may reasonably infer that the inviter has the necessary authority to consent to an entry or search of the premises[ ]”).

*Waller*, 426 F.3d at 847. From Special Agent Ristroph's perspective, the ownership of the container was ambiguous. Under *Purcell* and *Peyton*, Special Agent Ristroph would have been obligated to clarify ownership through further inquiry or obtain a warrant before opening Mr. Hemlock's container. *See Purcell*, 526 F.3d at 963; *Peyton*, 745 F.3d at 554.

Likewise in *Taylor*, the Sixth Circuit held that the failure to ask a simple clarifying question regarding ownership of the container to be searched rendered the search unlawful. *Taylor*, 600 F.3d at 684–85. Here, as Ms. Reiser stood nearby, a single question—“does this box belong to you?”—would have resolved the ambiguity. Instead, Special Agent Ristroph unreasonably proceeded without inquiry and without a warrant.

The Government's reliance on *Melgar* does not alter that conclusion. *See United States v. Melgar*, 227 F.3d 1038, 1042 (7th Cir. 2000). The Seventh Circuit cautioned against imposing a duty to inquire in every instance, noting that such a rule could "impose an impossible burden on the police" in fast moving or public contexts. *See id.* However, the facts in *Melgar* are distinguishable, as the search took place in a hotel room and thus did not concern a container associated with a private space inside a home, as it does here in our case. *See id.* Further, it did not involve express disclaimers of access to an area by the consentor. *See id.*

Under the totality of the circumstances, a duty to inquire would not have burdened the investigation in any meaningful way. Mr. Hemlock was already secured, Ms. Reiser was cooperative and present, and there was no risk of destruction of evidence. A brief question or pause to obtain a warrant would have protected both the integrity of the investigation and most importantly, Mr. Hemlock's Fourth Amendment Rights.

Permitting officers to bypass inquiry under these circumstances would stretch third party consent far beyond its constitutional limits. It would allow general consent to search a residence to absorb the warrant requirement for closed containers, even when the consentor explicitly disclaims ownership. Where ambiguity exists, the Constitution demands restraint from law enforcement, not assumption.

**B. Mr. Hemlock Retained a Reasonable and Individual Expectation of Privacy as to the Container.**

The Fourth Amendment "protects people, not places." *Katz*, 389 U.S. at 351. Thus, "what [a person] seeks to preserve as private, even in an area accessible to [others], may be constitutionally protected." *Id.* A privacy interest in a home itself need not be coextensive with a privacy interest in the contents or movements of everything situated inside the home. *See Karo*, 468 U.S. at 725–27. As the Second Circuit explained, "when considering the legality of a search

of an object within a home, courts have properly focused on the defendant's expectation of privacy in the object apart from his expectation of privacy in the home." *United States v. Haqq*, 278 F.3d 44, 50 (2d Cir. 2002).

Consistent with these principles, courts have repeatedly held that enclosed containers retain their own discrete expectations of privacy. *See, e.g., United States v. Wilson*, 536 F.2d 883 (9th Cir. 1976) (suitcase in consenter's apartment); *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955) (cabinets in consenter's home); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (employee's desk in consenter's office suite).

*Block*, 590 F.2d at 541.

In assessing whether such an expectation exists with respect to a particular object, courts consider, "the critical circumstances indicating the presence or absence of a discrete expectation of privacy with respect to the particular object: whether it is secured, whether it is commonly used for preserving privacy, etc." *Id.* at 541. In certain circumstances, a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment. *Arizona v. Hicks*, 480 U.S. 321, 323 (1987). However, *Arizona v. Hicks* only permits warrantless searches under the plain-view doctrine when: (1) the officer is lawfully present at the location where the item is in view; (2) the incriminating character of the item is immediately apparent; and (3) the officer does not conduct an additional search or manipulation to determine the item's incriminating nature, and has lawful access. *See id.* at 323–235.

In cases where individuals retained a reasonable expectation of privacy in the container to be searched, the court found no apparent authority. *See United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998). For example, the Ninth Circuit held that the Appellee retained a reasonable expectation of privacy in his boxes, even though they were stored in a friend's garage. *Id.* In *Fultz*, the friend expressly disclaimed ownership and use and told officers the containers were the

defendant's, putting officers on notice she lacked authority to consent. *Id.* at 1106. Accordingly, the court found the warrantless search unlawful. *Id.* at 1106–07.

Here, Mr. Hemlock retained the same reasonable expectation of privacy in his container. *See id.* at 1105. The facts put any reasonable agent on notice that Mr. Hemlock retained a subjective reasonable expectation of privacy, and precedent establishes that there is an objective reasonable expectation in containers of similar nature. *See id.* at 1106–07. Special Agent Ristroph had even clearer notice than in *Fultz* pursuant to Ms. Reiser's expressions that the container was not hers to authorize. *See Fultz*, 146 F.3d at 1105. If apparent authority failed in *Fultz* despite the weaker privacy setting in Appellee's friend's garage, it necessarily fails here. *See id.* at 1106. Mr. Hemlock's expectation of privacy was at its apex while inside his own home and within an area reserved solely for him. *See id.*

Further, the Government cannot salvage the search under the plain-view doctrine. Here, Special Agent Ristroph saw only a closed, unlabeled cardboard box. (R. 13–14, 16); *see Hicks*, 480 U.S. at 322. Special Agent Ristroph conducted an additional search by manipulating the closed container, an additional intrusion *Hicks* forbids. (R. 14); *see Hicks*, 480 U.S. at 325–26. Absent a warrant or valid consent, Special Agent Ristroph lacked lawful access to the container's interior, and thus plain view does not apply as it fails to meet the required elements.

Thus, Mr. Hemlock retained a reasonable and independent expectation of privacy in the container. Special Agent Ristroph searched the container, absent valid consent, or any warrant exception, thereby violating Mr. Hemlock's Fourth Amendment rights. For the foregoing reasons, we respectfully request that this Court reverse the denial of Mr. Hemlock's motion to suppress and exclude the container's contents as fruits of that unlawful search. *See U.S. CONST. amend. IV; Alderman*, 394 U.S. at 187.

**III. THE LOWER COURT ERRED IN EXCLUDING EXTRINSIC EVIDENCE OF MS. COPPERHEAD'S SPECIFIC INSTANCES OF DISHONESTY FOR IMPEACHMENT, BECAUSE RULE 806 OF THE FEDERAL RULES OF EVIDENCE AUTHORIZES THE INTRODUCTION OF EVIDENCE ATTACKING THE CREDIBILITY OF A HEARSAY DECLARANT.**

The Federal Rules of Evidence are one of several safeguards establishing a standard, predicated by the United States Constitution, of efficiency and fairness for trials. *See Crawford v. Washington*, 541 U.S. 36, 38 (2004). Rule 806 of the Federal Rules of Evidence provides that when a hearsay statement has been admitted into 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 rule further empowers the court to “admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant has an opportunity to explain or deny it.” *Id.*

In turn, under Rule 608(b) of the Federal Rules of Evidence, specific instances of the conduct of a witness may, in the discretion of the court, and if “probative of the character for truthfulness or untruthfulness,” be inquired into on cross-examination of the witness. FED. R. EVID. 608(b). Rule 608(b)’s plain language disallows the admissibility of extrinsic evidence to prove specific instances of a *witness’s* conduct to attack the *witness’s* character. FED. R. EVID. 608(b). However, the rule does not extend the same guidelines specifically for declarants, overlooking the possibility of an unavailable declarant that would never take the stand. *See* FED. R. EVID. 608(b). Rule 806, in contrast, accounts for this possibility by allowing for the admission of evidence regardless of whether the declarant had the opportunity to explain or deny it. FED. R. EVID. 806.

In addition to the Federal Rules of Evidence, The Fourth and Sixth Amendments further codify constitutional protections to ensure a fair trial. *See* U.S. CONST. amend. IV; U.S. CONST. amend. VI. Yet, this Court has

rejected the view that (a) the confrontation clause applied of its own force to only in-court testimony, and (b) the clause’s application to out-of-court statements introduced at trial depended upon the law of evidence for the time being. [Reasoning that] [l]eaving the regulation of out-of-court statements to the law of evidence would have rendered the clause powerless to prevent even the most flagrant inquisitorial practices.

*Crawford*, 541 U.S. at 38.

In the instant case, the Government put Mr. Kolber on the stand to testify on Ms. Copperhead’s hearsay statements in order to circumvent the Constitutional protections owed to Mr. Hemlock as a criminal defendant.<sup>1</sup> (R. 40–50). Had Ms. Copperhead been alive to testify, Mr. Hemlock would have been able to question Ms. Copperhead on her character for untruthfulness. Under those conditions, Mr. Hemlock’s line of questioning would have been authorized by Rule 806, Rule 608(b), and his rights under the Confrontation Clause of the Sixth Amendment. *See* U.S. CONST. amend. VI (guaranteeing that “the accused shall enjoy the right . . . to be confronted with the witnesses against him”); FED. R. EVID. 806; FED. R. EVID. 608(b). The extrinsic evidence is simply in place of what would have been Mr. Hemlock’s right, had Ms. Copperhead lived to testify.

For these reasons, this Court should allow the admission of extrinsic evidence impeaching Ms. Copperhead, as it is probative of her character for untruthfulness. (R. 9–10). A court’s decision to exclude evidence is reviewed for abuse of discretion. *See United States v. Bari*, 750 F.2d 1169, 1178 (2d Cir. 1984).

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<sup>1</sup> Daniel J. Capra & Jessica Berch, *Evidence Circuit Splits. And What to Do About Them*, 56 U.C. DAVIS. L. REV. 127, 177 (2022).(explaining that “[w]ithout Rule 806, a party might deliberately choose not to call a declarant as a witness . . . in an effort to avoid impeachment . . . The less appealing or more flawed the declarant, the more valuable to the profferer this impeachment-avoidance technique would become.”).

**A. The Extrinsic Evidence Is Merely Meant to Supplement Ms. Copperhead's Unavailability to Take the Stand, and Rule 608(b) Does Not Bar Impeachment of Hearsay Declarants, Under Rule 806, Whose Credibility Would Otherwise Be Shielded from Scrutiny.**

As the Committee Note explains, since hearsay declarants cannot be cross-examined, Rule 806 functions to permit impeachment through alternative means. FED. R. EVID. 806 advisory committee note. This is instrumental so the jury may accurately evaluate the reliability of statements, and for the preservation of the defendant's right to a fair trial. *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988) (recognizing that Rule 806 permits impeachment of declarants who are unavailable for cross-examination); see *Adams v. Holland*, 168 F. App'x 17, 18 (6th Cir. 2005) (finding that an out-of-court statement admitted solely for the purpose of impeaching the declarant's credibility is consistent with clearly established U.S. Supreme Court precedent).

In *United States v. Zandi*, the Fourth Circuit found no violation of Rule 608(b) when, after Appellee admitted to his authorship of the false information, the government introduced corroborating extrinsic evidence to impeach. *United States v. Zandi*, 769 F.2d 229, 236 (4th Cir. 1985). The court in *Zandi* held that “[a]s to the alleged 608(b) violation, courts generally hold that when a witness admits to having performed certain acts . . . the prohibition against using extrinsic evidence is not applicable.” *Id.* Similarly, in *Carter v. Hewitt*, the court found that

the great majority of the decisions finding violations of rule 608(b) do so when the extrinsic evidence that is challenged is obtained from a witness other than the one whose credibility is under attack. When, however, the extrinsic evidence is obtained from and through examination of the very witness whose credibility is under attack . . . we must recognize that the rule's core concerns are not implicated.

*Carter v. Hewitt*, 617 F.2d 961, 969–70 (3d Cir. 1980).

Here, if Ms. Copperhead had testified, she could have been questioned regarding her false employment application and academic dishonesty, and, like in *Zandi* and *Carter*, the lower court

could have admitted corroborating extrinsic evidence. (R. 9–10); *see Zandi*, 769 F.2d at 236; *Carter*, 617 F.2d at 969–70. Ms. Copperhead’s unavailability should not be the deciding factor of whether Mr. Hemlock receives a fair trial, or not. Mr. Kolber cannot testify on Ms. Copperhead’s character either, because prior to their brief encounter, they had never met. (R. 43, 45).

Thus, while Rule 608(b) restricts the use of extrinsic evidence against live witnesses in order to avoid collateral mini-trials, that limitation does not bar impeachment of hearsay declarants under Rule 806, whose credibility would otherwise be shielded from scrutiny. *See* FED. R. EVID. 806 advisory committee note.<sup>2</sup>

**B. The Exclusion of the Extrinsic Evidence Would Violate Mr. Hemlock’s Rights Under the Confrontation Clause of the Sixth Amendment.**

“[T]he Constitution’s framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless (1) the witness was unavailable to testify, and (2) the accused had had a prior opportunity for cross-examination . . . .” *Crawford*, 541 U.S. at 38. This Court has determined that “[t]he text of the Sixth Amendment did not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.” *Id.*; *see United States v. Burton*, 937 F.2d 324, 329 (7th Cir. 1991) (“when the declarant is unavailable to testify, the defendant’s Sixth Amendment right may be compromised if the court, in contravention of Rule 806, disallows cross-examination of a witness who does testify”).

In *Vasquez v. Jones*, the Sixth Circuit held that the Confrontation Clause is violated when a defendant is denied a meaningful opportunity to expose facts from which the jury could draw inferences about the reliability of an out-of-court statement offered against him. *Vasquez v. Jones*,

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<sup>2</sup> Capra & Berch *supra* note 1, at 180–81 (proposing an amendment to Rule 806 that could read as follows: “The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. And the court may allow disclosure to the jury of specific instances of the declarant’s conduct if they are probative of the declarant’s character for untruthfulness.”).

486 F.3d 135, 150 (6th Cir. 2007). There, the court emphasized that the right of confrontation is not satisfied merely by allowing the jury to hear inculpatory statements through another witness. *Id.* Instead, the Confrontation Clause requires that the defendant be permitted to challenge the credibility of the declarant whose statements are used to establish guilt. *Id.* at 141. *Vasquez* relied heavily on the holding in *Davis v. Alaska*, namely, this Court’s finding that “the cross-examiner is not only permitted to delve into the witness’s story to test the witness’s perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.” *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *see id.* at 142. The Sixth Circuit explained that restrictions preventing the defense from presenting evidence bearing on the declarant’s credibility impermissibly distort the truth-seeking function of trial, and deprive the jury of critical tools necessary to assess reliability. *Vasquez*, 486 F.3d at 142.

Here, as in *Vasquez*, the Government relied on Ms. Copperhead’s out-of-court statement as substantive evidence of Mr. Hemlock’s guilt, while simultaneously foreclosing any meaningful opportunity to test her credibility. *See id.* The extrinsic evidence directly bore on her untruthfulness and unreliability, precisely the type of credibility information that *Vasquez* and *Davis* recognized as constitutionally significant to the jury’s evaluation of testimonial evidence. *See Davis*, 415 U.S. at 315; *Vasquez*, 486 F.3d at 142; (R. 9–10). By admitting Ms. Copperhead’s statements and excluding impeachment evidence, the lower court placed Mr. Hemlock in the same constitutional deficit identified in *Vasquez*: forced to accept the Ms. Copperhead’s accusations without the ability to expose facts undermining their reliability. *See Vasquez*, 486 F.3d at 142.

The exclusion of the evidence prevented effective confrontation and magnified the risk that the jury would credit the accusatory statement without adequate scrutiny, in direct contravention of the protections recognized by this Court. *See U.S. CONST. amend. VI; Crawford*, 541 U.S. at 38;

*Davis*, 415 U.S. at 315. The lower court allowed the Government to obtain the functional equivalent of testimony without the constitutional safeguards, thereby undermining the adversarial process the Sixth Amendment is designed to protect. *See* U.S. CONST. amend. VI; *Crawford*, 541 U.S. at 38; *Davis*, 415 U.S. at 315. This Court should reverse the suppression of extrinsic evidence.

**C. The Probative Value of The Extrinsic Evidence Against Ms. Copperhead's Character for Untruthfulness Outweighs Any Concerns about Unfair Prejudice.**

Under Rule 403 of the Federal Rules of Evidence, a court may exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* FED. R. EVID. 403; *United States v. Pace*, 10 F.3d 1106, 1115–16 (5th Cir. 1993); *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979). Evidence that directly bears on a witness's credibility, particularly where credibility is central to the disputed issue, is highly probative and ordinarily admissible. *See United States v. Abel*, 469 U.S. 45, 52 (1984) (recognizing that credibility evidence is relevant because it assists the jury in evaluating testimony); *see also United States v. Lindemann*, 85 F.3d 1232, 1245 (7th Cir. 1996) (holding that impeachment evidence bearing directly on credibility is rarely excluded under Rule 402). If the drafters of the Federal Rules of Evidence had intended to restrict a defendant's constitutional rights in the event of a hearsay declarant being unavailable to testify, the plain language of Rule 608(b) would have specifically listed *declarants*, in addition to witnesses. *See* FED. R. EVID. 608(b).

In *United States v. Friedman*, the Second Circuit explained “Rule 806 does not set forth a test of probative value but rather states generally the type of evidence that may be used to undermine hearsay declarations.” *Friedman*, 854 F.2d at 570. *Friedman* held that this determination requires comparing “the circumstances of the past conduct with those surrounding the hearsay statements admitted into evidence,” in order to assess whether the prior acts are

genuinely probative of the declarant's reliability in making the particular statement at issue. *Id.* Thus, when a declarant is making an accusatory statement, extrinsic evidence is highly probative when it relates to whether the declarant can be trusted to provide accurate and truthful information. *See id.*

Here, the excluded evidence bears directly on Ms. Copperhead's unreliability in a context relevant to her hearsay statement. *See United States v. Scott*, 48 F.3d 1389, 1397 (5th Cir. 1995) (holding that the court did not abuse its discretion by refusing to admit impeaching evidence when Appellee failed to offer any proof as to which portions were probative). Ms. Copperhead's academic dishonesty, and falsified employment application reflect deliberate misrepresentations made for personal advantage, demonstrating a willingness to provide false information when it serves her interests. (R. 9–10). Under *Friedman's* framework, Ms. Copperhead's dishonest conduct closely aligned with the credibility concerns raised by an out-of-court identification offered to establish guilt. *See Friedman*, 854 F.2d at 570.

As per *Friedman*, here the probative value of the extrinsic evidence was substantial, and its exclusion deprived the jury of information necessary to evaluate the reliability of the hearsay statement admitted for its truth. *See Friedman*, 854 F.2d at 570. Therefore, this Court should reverse the lower court's suppression of extrinsic evidence impeaching Ms. Copperhead's hearsay statement.

### **CONCLUSION**

For the foregoing reasons, Petitioner, Atticus Hemlock, respectfully requests that this Court reverse the decision of the Fourteenth Circuit Court of Appeals.

*Respectfully submitted,*

Team 1P  
Attorneys for Petitioner