Team T29 - P

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

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# BRIEF FOR PETITIONER

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Team T29
Counsel for Petitioner

## QUESTIONS PRESENTED

I. Whether the Fourth Amendment is violated under *Payton v. New York* when officers, who remain outside, command a suspect inside his home to submit to their authority and exit the home so that they can arrest him without a warrant or exigent circumstances.

II. Whether the Fourth Amendment is violated when officers, while conducting a warrantless search of a private residence authorized by a co-occupant's consent, search a closed, unmarked container without determining ownership of the container or the scope of the third party's consent.

III. Whether, under Federal Rule of Evidence 806, extrinsic evidence necessary to challenge the credibility of a hearsay declarant may be admitted when that declarant is unable to testify at trial.

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## OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Hemlock v. United States of America*, No. 24-1833, was entered on April 14, 2025, and may be found in the Record at 51-61.

## CONSTITUTIONAL PROVISIONS

U.S. Constitution Amend. IV provides:

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

U.S. Constitution Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Constitution Amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### I. Summary of Facts

A few days before April 2, 2024, local police relayed tips from members of the Boerum Village community to the FBI. R. at 20. The tips indicated that two individuals in the community were making plans to kidnap a federal agent. *Id*. Agents interviewed the tipsters, a store manager and a barista, on April 2, 2024. *Id.* The store manager told the agents that she saw two

individuals purchase zip ties, masks, and a knife. R. at 6. The barista told the agents that he saw two individuals meet twice at his shop, occupying a large table with "papers, posters, notebooks, binders, and backpacks" spread atop the surface. R. at 7. He also overheard the pair discussing a plan to kidnap a woman named Jodie, the phrase "hiding Jodie away," and a reference to her as a "federal government official." R. at 8. The barista said that he used social media to identify the individuals as Atticus Hemlock and Iris Copperhead. R. at 7.

Based on these interviews, FBI Agents Herman and Simonson decided to speak to Atticus Hemlock at his residence that afternoon. R. at 20. The agents claim they did not plan to arrest Hemlock at the time but approached his home wearing belts containing holstered weapons, handcuffs, a taser, and a baton among other items. R. at 20, 25. Agent Herman admitted that the sight of two officers would have been "pretty intimidating" for a layperson like Hemlock. R. at 26. The agents spoke to Hemlock through a screen door, through which one agent saw two bottles labeled "chloroform." R. at 21, 22. The agents claim Hemlock brought up "Jodie" unprompted during their conversation and that he was resistant when they requested him to exit the house. R. at 22. The agents subsequently returned to their car, where they determined that they then had probable cause to arrest Hemlock and decided to "try to get [Hemlock] to come outside" of his home so they could arrest him. R. at 22, 23. The agents re-approached and "shouted" at Hemlock to exit the home with their hands on their weapons. R. at 23. Hemlock submitted to their commands, exited his home, and was arrested at the bottom of the front steps. R. at 26. The agents found an opened spiral notebook in Hemlock's pocket pursuant to this arrest. R. at 23. The visible page of the notebook contained a detailed explanation of a kidnapping plot and suggested personal animus between Hemlock and Jodie Wildrose. R. at 24.

After Hemlock's arrest, Agent Ristroph stayed near the home to wait for Hemlock's girlfriend, Fiona Reiser, to return from work. R. at 13. Agent Ristroph approached the home, told Reiser that Hemlock had been arrested, and asked to enter the residence. *Id.* Reiser let him into the residence. *Id.* Agent Ristroph noticed a flight of stairs and inquired about the second floor. R. at 13. According to Agent Ristroph's report, Reiser responded that she and Hemlock used the space for storage and as an office. *Id.* This comment led him to confine his search to the first floor. *Id.* As he did so, he "walked toward" the stairs where he "noticed" an unmarked cardboard box. R. at 13. According to Reiser's declaration, she told the agent that the upstairs room was used exclusively by Hemlock for storage and that she did not know what was stored upstairs because she never used the upstairs. R. at 15. Agent Ristroph asked Reiser what Hemlock stored upstairs and she responded that she did not know because she rarely went up there. *Id.* Reiser claims that Agent Ristroph then "walked straight over to the stairs" and that she believed he was going to "go up to the loft" but stopped when he saw the box on the stairs. R. at 16.

According to both accounts, Agent Ristroph opened the closed, unmarked box without inquiring as to its ownership. He searched the box and seized its contents: one 50-feet long length of rope, two black skimasks, one pair of green gloves, 48 black zip ties, one folding knife with 6-inch blade, one roll of duct tape, and two bottles of chloroform. R. at 13, 16.

On April 2, 2024, Theodore Klober was out walking when he encountered a flustered woman he had never seen before. R. at 42. The woman was "out of breath, her face was white as ghost, and she had tears streaming down her face." *Id.* Klober heard her scream "I can't believe I saw him get arrested. It's all his fault. It was all Atticus' idea—NOT MINE!" before running off. R. at 43-44. He was able to identify the woman as Iris Copperhead from her mugshot in the

paper the next morning. R. at 45. Copperhead was arrested later that evening and died of an aortic rupture that night in jail. R. at 46.

### II. Procedural History

A grand jury formally indicted Atticus Hemlock with one count of Attempted Kidnapping of a United States Government Officer in violation of 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 1201(d) on April 3, 2024. R. at 1. Hemlock moved before the District Court to suppress both the notebook seized from his person during the arrest and the contents of the cardboard box seized from his home. R. at 18, 27, 32. The District Court ruled against Hemlock on both issues. R. at 31, 38. At trial, Hemlock attempted to introduce extrinsic evidence and testimony to challenge the credibility of a hearsay declarant whose statement linked him to the charge. R. at 47, 48. The Government objected on the grounds that Rule 806 is not a workaround to rule 608(b), and the District Court agreed. R. at 49, 50. Hemlock was convicted of Attempted Kidnapping of a Federal Agent on August 12, 2024 and sentenced to ten years in prison. R. at 51. Hemlock appealed, and the Fourteenth Circuit affirmed on all three grounds. *Id.* Hemlock then petitioned to this Court, and certiorari was granted on December 2, 2025. R. at 62.

## SUMMARY OF ARGUMENT

Special Agents Simonson and Herman violated Atticus Hemlock's Fourth Amendment rights as interpreted by *Payton v. New York* when they coerced him into stepping outside of his home to arrest him without a warrant. Hemlock submitted to the agents' coercive show of authority while he was still inside his home, so the arrest was effectuated inside the home. Thus, *Payton* was violated even though the agents did not physically step foot inside. Even if Hemlock was not arrested until he stepped outside, the agents still used coercive tactics to compel him to do so. This Court should recognize that *Payton* protects more than just physical intrusions and

hold that the agents' behavior constituted an unreasonable seizure. The notebook obtained pursuant to that unlawful arrest thus should have been excluded.

Special Agent Ristroph violated Hemlock's Fourth Amendment rights when he conducted a warrantless search of his cardboard box in his home, without him present, absent valid third-party consent. Fiona Reiser's grant of consent was too ambiguous for Agent Ristroph to assume it extended to the box. Even if it was reasonable for Agent Ristroph to think that Reiser's consent extended to the box, it was unreasonable for him to think that she had authority to consent to the search. The evidence obtained pursuant to that unreasonable search should thus have been excluded.

The lower court erred when it denied Hemlock's attempt to use extrinsic evidence to impeach the credibility of a hearsay declarant who was not available to testify at trial. The district court narrowly interpreted Rule 608(b) to bar extrinsic evidence introduced under Rule 806, rendering Rule 806 useless and unfairly prejudicing the defendant. Hemlock should have been allowed to admit extrinsic evidence of Copperhead's past conduct to impeach her character for truthfulness since she was unavailable to testify at trial.

## ARGUMENT

### I. The agents violated Hemlock's Fourth Amendment rights when they used coercive techniques to elicit him to exit his home to arrest him without a warrant.

#### a. Warrantless arrests inside the home are per se unreasonable.

Because Atticus Hemlock was inside of his home at the moment he was seized, his arrest was unlawful, and the notebook obtained pursuant to that unconstitutional arrest should be excluded. In *Payton v. New York*, this Court drew a "firm line at the entrance to the house," beyond which warrantless arrests are per se unreasonable. 445 U.S. 573, 602 (1980) ("Absent

exigent circumstances, that threshold may not reasonably be crossed without a warrant."). It is immaterial whether this line is crossed by physical or nonphysical techniques. Whether the agents stepped into the house and physically arrested Hemlock or used coercive techniques to compel him to submit to arrest while still in the house, the same effect is achieved: Hemlock was arrested within the sanctity of his own home. Many courts have recognized this fact, adopting what some have called a "constructive entry" doctrine.

Constructive entry is nothing more than a recognition of the fact that the sanctity of one's home may be invaded by forces other than the physical. The nomenclature might suggest that this idea is a sort of clever legal fiction used to work around the "firm line" *Payton* drew at the threshold of the home. *See Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002) (reasoning that *Payton* is not technically violated when an officer coerces an individual to exit their home to arrest them outside because "[i]n that situation, the officer never crosses 'the firm line at the entrance to the house'"). This view misses the point of *Payton* and needlessly limits its application. In reality, a recognition of constructive entry is a more faithful application of *Payton*'s test. To ignore the fact that one's liberty may be constrained in more ways than the physical is to shut one's eyes both to reality and to the spirit of *Payton*. *See United States v. Allen*, 813 F.3d 76, 89 (2d Cir. 2016) (expressing distaste toward the "constructive entry" terminology but recognizing that "*Payton* is violated regardless of whether the officers physically cross the threshold"). The nomenclature is irrelevant. When law enforcement officers command a suspect inside the home to step outside and arrest the suspect outside the home without a warrant, the Fourth Amendment is violated regardless of whether the officers physically stepped foot in the home.

b. **The district court erred when it concluded that Hemlock was arrested outside of his house because Hemlock submitted to the agents' authority while he was still inside the house.**

An arrest is not effectuated by the words, "you are now under arrest." *California v. Hodari D.*, 499 U.S. 621, 626 n.2 (1991) (noting that an attempted but incomplete or unsuccessful seizure is not an arrest). An arrest occurs at the moment a person has been "seized" within the meaning of the Fourth Amendment. *See Torres v. Madrid*, 592 U.S. 306, 312 (2021) (noting that an arrest has referred to the seizure of the person since the founding); U.S. Const. amend. IV. But this Court has recognized that a person may be restrained by something other than physical force. *Hodari D.*, 499 U.S. at 626 ("An arrest requires *either* physical force … *or*, where that is absent, *submission* to the assertion of authority."). So, a person may be seized in two ways: by force or control. *Torres*, 592 U.S. at 311 (noting that "the 'seizure' of a 'person' can take the form of 'physical force' or a 'show of authority' that '*in some way* restrain[s] the liberty' of the person" (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968))) (emphasis added). This Court's precedent makes clear that a seizure by control requires (1) a show of authority and (2) submission. *Id.*

The District Court ruled that Atticus Hemlock was arrested when Agent Simonson used physical force to handcuff him outside of his home. R. at 12. If that was the end of the inquiry, the ruling might survive review. No one contests that the officers had probable cause to arrest. R. at 27. And warrantless arrests in public areas based on probable cause are constitutional. *United States v. Watson*, 423 U.S. 411, 423-24 (1976). The problem is that Agents Herman and Simonson did not happen upon Hemlock during a stroll through the park. When the Agents Simonson and Hemlock decided to arrest Hemlock, he was inside his house. R. at 12. In fact, he was "glaring at [the agents] through the screen door," having just informed Agents Simonson

and Herman in no uncertain terms that he had no interest in speaking with them. R. at 11 ("Leave me alone! I told you I don't want to come outside!"). Yet he exited the house and was promptly arrested near his front steps. R. at 23. Something happened between point A and point B. Under the government's version of events, Hemlock had a change of heart and decided to voluntarily comply with the agents' second attempt to get Hemlock to come outside. Common-sense dictates otherwise.

The District Court's ruling was erroneous because Atticus Hemlock had *already been arrested* before he was handcuffed—both requirements for a seizure by control materialized while he was still in the house. The agents displayed authority by using coercive techniques to compel Hemlock to involuntarily exit his home, which was a submission to that authority. The words of the encounter bear repeating. When Agents Herman and Simonson briskly re-approached the house, the exchange went like this:

> **Agent Herman:** "Sir! Come outside! Our investigation is important and we need answers. Now!"
>
> **Agent Simonson:** "Get outside right now!"
>
> **Hemlock:** "Oh god, uh, okay, okay. I'll come out."

R. at 12, 26. Both Agents portrayed a sense of urgency, and both issued direct orders at a citizen. While the Agents' imperatives already facially suggest authority, the words were not alone. In considering whether his exit of the house was in submission to authority, the totality of the circumstances must be considered. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (holding that the test for whether a person has been seized is to be determined by considering "all of the circumstances"). The Agents "yelled" these orders, and they did so with their hands on the holsters of their guns. R. at 23, 26. Officer Herman admitted that the sight of two officers would

have been "pretty intimidating" for a layperson like Hemlock. R. at 26. These imperative commands, coupled with the manner in which they were given, clearly constitute a show of authority. Under *Hodari D.*, if Hemlock submitted to that authority, he was "seized" at the moment of that submission. 499 U.S. at 629 (holding that a show of authority does not effectuate an arrest until the person submits to that authority).

That moment of submission is the point in time when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554.[1] When someone is in a confined space like a bus (or a house), "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 2387, 115 L. Ed. 2d 389 (1991). This inquiry must take into account all of the circumstances surrounding the encounter. *Id.*

An examination into all of the circumstances surrounding the encounter leads to the unmistakable conclusion that a reasonable person in Hemlock's position would not have felt free to ignore the agents' commands. They issued him direct orders to step outside, in an elevated tone of voice, conveying a sense of urgency, with their hands on their guns. R. at 23, 26. This Court has encouraged compliance with police orders before, suggesting that compliance is "almost invariably … the responsible course." *Hodari D.*, 499 U.S. at 627. That advice, offered in the context of police stops on the street, is equally applicable here. The scenery does not change the nature of the police encounter—there is still a power imbalance, and a reasonable

[1] This Court included several helpful examples to illustrate what sort of evidence might indicate that a seizure has taken place, even when a person has not attempted to leave (because he "did not feel free" to do so). *Mendenhall*, 446 U.S. at 554. These examples include: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* While not dispositive, the tone and words of Agents Harman and Simonson suggest that their actions fall within that last category.

person faced with an urgent and direct order from two federal agents would feel obliged to comply.

In addition to the inherent authority that comes with a badge and gun, the agents used coercive tactics to control his behavior. The contrast between the first and second encounters is telling. During their first conversation through the screen door, the agents repeatedly refused to answer his questions about the nature of the investigation they were conducting. R. at 11. The agents' deliberate refusal to inform Hemlock what their "very important" investigation was about would have made any reasonable person ill-at-ease. *Id.* The agents did not issue any commands during the first encounter; they merely requested politely that Hemlock come outside to speak with them. R. at 11-12. But after they had retreated, concluded they had probable cause, and made their plan to "get him to come outside" to arrest him, Agents Simonson and Herman adopted an entirely different demeanor. R. at 12.

During their second approach, the interaction was infused with a concocted sense of urgency. The agents yelled direct orders at him while approaching the house with their hands on their holsters, emphasizing the urgency of their "important" investigation and ordering that he come outside "right now!" *Id.* This newfound urgency, coupled with a citizen's obligation to obey direct orders issued from the people with the badges and the guns, realistically left Hemlock with no choice. *Cf. United States v. Jerez*, 108 F.3d 684, 692 (7th Cir.1997) (finding that, when officers' persistent knocking destroyed any possibility that the occupants could return to sleep and ignore the officers, the act of opening the door constituted a seizure).

Whether Hemlock's actions were voluntary or coerced is admittedly a difficult determination, but it can be clarified by an objective assessment of what the agents' behavior would have conveyed to a reasonable person in Hemlock's position. Voices alone have the

potential to coerce, but any legal standard would admittedly prove unworkable if orders alone could constitute coercive tactics. Voluntary compliance would be nearly indistinguishable with coercion-induced submission—especially for the sort of ex ante analysis that is required in Fourth Amendment jurisprudence. However, Hemlock was confronted with more than voices. The *totality* of the circumstances consisted of the officers' words (orders), tone of voice (shouting), demeanor (urgent and vastly different from the first encounter), appearance (wearing "large" and "unmistakable" officer duty belts), and actions (flashing badges, rapidly approaching, and hands placed on guns). R. at 22-25. A reasonable person would note the stark differences in the agents' manner as compared to the first encounter and likely be frightened into compliance for fear of unknown consequences. It is unrealistic to contend that anyone faced with similar circumstance would have felt free to "ignore" the agents' commands.

It is true that some cases recognizing coercive conduct do so with extravagant facts, but the degree of coercion should not matter. *See, e.g.*, *United States v. AL-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985) (holding defendant was seized inside his home when officers surrounded his trailer and shouted orders through a bullhorn). The standard is whether a reasonable person would feel free to ignore—this does not require terror or bullhorns or floodlights; it requires the impression that compliance is required. There are easy cases involving SWAT teams, but those easy calls do not mean that other types of behavior, while perhaps less flashy than others, are not equally coercive. An intimidating display of police authority may convey that compliance is required, resulting in actions that are just as involuntary as that which is in response to more extravagant techniques. *See United States v. Conner*, 127 F.3d 663 (8th Cir.1997) (holding that officers unconstitutionally intruded into defendant's zone of privacy because defendant's act of opening the door in response to several minutes of knocking was involuntary); *see also United*

*States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008) ("Opening the door to one's home is not voluntary if ordered to do so under color of authority.").

One faced with federal agents who first knock on the door with a series of inquiries yet refuse to explain the grounds of their investigation, and who subsequently accost him in an entirely different and more urgent manner, would understandably feel that he has no choice but to comply first, and complain later.[2] In light of all of these circumstances,[3] it is clear that Hemlock opened the door and stepped outside because "a reasonable person" would not have felt "free to decline the [agents'] requests." *Bostick*, 501 U.S. at 436.[4] The moment of submission effectuated the arrest of his person—Hemlock no longer had autonomy over his movements when he reasonably felt compelled to step outside of his home due to the agents' coercive conduct. Because Hemlock was standing inside of his home at the moment he submitted to the agents' authority, the arrest was effectuated inside of his home. This result is the exact evil which *Payton* aimed to prevent.

**c. Regardless of where the arrest was effectuated, the agents' coercive techniques constructively entered his home in violation of the Fourth Amendment as interpreted by *Payton*.**

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[2] *See* National Police Association, *The National Police Association Announces New TV PSA Campaign to Address Use of Force*, PR Newswire (Jul 02, 2021), https://www.prnewswire.com/news-releases/the-national-police-association-announces-new-tv-psa-campaign-to-address-use-of-force-301324678.html?tc=eml_cleartime (introducing "comply now, complain later" campaign encouraging compliance with police orders to reduce harmful use-of-force encounters).

[3] The fact that Agents Herman and Simonson are smaller in stature than Hemlock, which the government attempted to highlight at R. at 29, is largely irrelevant. We do not contend that Hemlock felt compelled to comply with the agents' demands because he was intimidated by their physical size—he felt compelled to comply with the agents' demands because of the power imbalance between citizen and officer. A reasonable person affronted with two agents, hands on guns, yelling at her to do something "now" will clearly feel compelled to do what the agents command. Relative size is not one of the factors listed in *Mendenhall*. *See supra* note 1. Badges, coupled with urgent tones and guns, can establish a threatening (and thus coercive) presence well enough alone.

[4] While not dispositive in light of the objective standard, Hemlock's reaction is striking. "Oh, god, uh, okay. I'll come out" is more accurately described as a gut reaction of fear-based compliance than a rational and voluntary choice to abandon the safety of one's home. R. at 12.

*Payton*'s expansive interpretation of the Fourth Amendment's protections of the home would be undermined if its own words are read too narrowly. When a person's liberty is affected by law enforcement while he is inside the sanctity of his own home, *Payton* has been violated. Common sense tells us that this scenario is no less unconstitutional if the officer who caused the arrest managed to do so from outside the front door.

Despite the arbitrary results that follow, some courts refuse to recognize constructive entry when the law enforcement officer does not physically step foot into the home. They do so because this ostensibly comports with a "literal" reading of *Payton*. *See, e.g.*, *Gaddis v. DeMattei*, 30 F.4th 625, 633 (7th Cir. 2022) (noting that its circuit has previously employed a "narrow reading of *Payton* requiring actual entry into the home for a violation"). This approach reads into *Payton* a limitation that appears nowhere in the text. *Payton* creates a presumption of unreasonableness for "warrantless entry" into the home absent exigent circumstances (which are not alleged here). 445 U.S. at 583. While the facts of the consolidated cases in *Payton* both involve the usual case of officers physically stepping into the home to effectuate the arrest, nothing in *Payton*'s language suggests that it is intended to exclude the other type of arrest. Nowhere does the opinion say that warrantless arrests *where the officer enters the home and physically seizes the person* are per se unreasonable; it says warrantless intrusions inside the home are per se unreasonable. *Id.* at 590. It is difficult to contend that the home has not been intruded when law enforcement officers have coerced its occupant into exiting.

Such a narrow approach also ignores this Court's message from *Hodari* and *Torres*: it is possible to constrain one's liberty using methods other than physical force. *Torres*, 592 U.S. at 311 ("[T]he seizure of a 'person' can take the form of 'physical force' or a 'show of authority'). Hemlock's liberty was constrained when he was coerced into submitting to the officer's

authority; the arrest took place before either agent laid a hand on him. It is arbitrary to contend that the legal status of that arrest should turn on whether the officers were standing outside of the house or with one toe across the threshold while they portrayed the show of authority that effectuated the arrest. So long as Hemlock submitted to that authority while he was inside his home, the sanctity that *Payton* sought to protect has been violated.

Constructive entry is also mandated by two core principles of Fourth Amendment jurisprudence. First, this Court has recognized before that "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). While *Katz* is a seminal search case, those principles are just as—if not more—integral to the Fourth Amendment's protections regarding seizures of the person. *See United States v. Drayton*, 536 U.S. 194, 206 (2002) ("[W]here the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts.") And, when it comes to the Fourth Amendment, the place of arrest should be determined by the location of the person, not the officer. *See United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989) (holding that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home" (agreeing with the Ninth Circuit in *AL-Azzawy*, 784 F.2d at 893)). So, the fact that Hemlock submitted to authority while still inside of his home should vastly outweigh the technicality that the agents coerced that submission without physically crossing the threshold.

Second, this Court has previously expressed disinterest in bright-line, categorical rules in this area. *See Drayton*, 536 U.S. at 201 (noting that "for the most part per se rules are inappropriate in the Fourth Amendment context" (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). An arbitrary commitment to a "firm," *physical* line ignores the overarching principles of

*Payton*—it sought to draw a "firm line" to protect individuals from government intrusion into their homes. 445 U.S. at 590. Limiting that intrusion to only the physical would undermine the Fourth Amendment's protections as interpreted in *Payton* by allowing other types of coercive, nonphysical intrusion to penetrate the sanctity of the home. If the government officials are allowed to coerce behavior from across the threshold of the home, *Payton*'s firm line is eroded. *See United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984) ("A contrary rule would undermine the constitutional precepts emphasized in *Payton*.").

Interestingly, some courts who decline to recognize the constructive entry doctrine take care to note that their cases do not concern *coercive* police tactics. In the same opinion that the Eleventh Circuit penned the much-cited phrase "*Payton* keeps the officer's body outside the threshold, not his voice," the court was careful to note that its case did *not* involve "coercive tactics used by police" to get the arrestee to exit the home. *Knight v. Jacobson*, 300 F.3d 1272, 1278 n.5 (11th Cir. 2002) (distinguishing its facts from a case where officers did use "coercive tactics" like spotlights and a bullhorn by noting that "[t]here were no such tactics in this case, just a simple direction by one officer that Knight step outside"). Likewise, the Second Circuit disregarded the doctrine because of its nomenclature but acknowledged its spirit: that *Payton* can be violated without physically stepping into the home. *United States v. Allen*, 813 F.3d 76, 89 (2d Cir. 2016) (calling the doctrine "conceptually muddled" yet proceeding to "embrace the rule" that "*Payton* is violated regardless of whether the officers physically cross the threshold"); *see also Gaddis*, 30 F.4th at 633 (declining to revisit its previous literal reading of *Payton* yet noting that "our failure to reach the issue should in no way be read as sanctioning the use of threats or deception to 'encourage' a suspect to step out of his home").

Discomfort with the terminology is understandable, but courts' hesitancy to completely disregard the possibility of officers violating the *Payton*'s construal of the Fourth Amendment without physically crossing the threshold is telling. It suggests that even courts who purport to reject the constructive entry terminology are nevertheless uncomfortable with permitting law enforcement officers to use coercive tactics to compel individuals to leave their homes in order to arrest them. That discomfort exists because the officers' conduct in these cases—compelling someone to exit the sanctity of their own home—violates one of our most sacred constitutional protections.

**d. A recognition of constructive entry is consistent with and mandated by a true reading of *Payton* and the Fourth Amendment.**

As a practical matter, there was no reason why the agents could not have gotten an arrest warrant. Any sense of imminence was a product of their own design. The agents decided to arrest Hemlock while fully aware that he was "glaring at [them] through the screen door" *of his house*. R. at 12. Knowing this, and knowing that they were constitutionally prohibited from coming inside of the house to arrest him, the officers devised a plan to "get him to come outside" of his home to circumvent *Payton*'s Fourth Amendment protections. *Id.* A planned arrest is not an exigent circumstance, and Hemlock only stepped outside because of the coercive nature of the agents' statements and conduct. "[I]f police go to a person's home to arrest him, and have reason to believe they *may* have to enter the home to make the arrest, they should obtain a warrant." *United States v. Berkowitz*, 927 F.2d 1376, 1388 (7th Cir.1991) (emphasis added).

A desire to avoid the inconvenience of going through the constitutional procedural protections mandated by this Court is "never [a] very convincing reason" and, here, is "certainly … not enough to bypass the constitutional requirement." *Johnson v. United States*, 333 U.S. 10, 15 (1948). Agents Simonson and Herman bypassed the constitutional prohibition of warrantless

arrests inside the home by devising a way to effectuate the same result without physical entry. To ignore the practical reality of this constructive entry is to ignore "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton*, 445 U.S. at 601.

The Fourth Amendment protects against more than mere physical intrusion or physical restraint. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the warrantless use of thermal imaging from outside a home to detect heat waves emitting from inside the home is an unconstitutional search); *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (holding that the warrantless use of a drug dog's sniff test to detect smells coming from inside the home is an unconstitutional search); *California v. Hodari D.*, 499 U.S. 621, 626 (1991) ("An arrest requires *either* physical force … *or*, where that is absent, *submission* to the assertion of authority."). A small gain in clarity is not worth the cost of imposing bright-line rules into a constitutional area plainly not suited for them. *United States v. Drayton*, 536 U.S. 194, 207 (2002) ("[T]he totality of the circumstances must control."). It is easy to lose sight of overarching goals when obsessing over nomenclature or narrow interpretations. Reading *Payton* too literally strays one away from its purpose: to protect the sanctity of the home from government intrusion.

We end by echoing a warning. A classic admonition issued by this court over a century ago rings particularly true today:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

*Boyd v. United States*, 116 U.S. 616, 635 (1886). Coupled with this Court's insistence that "when it comes to the Fourth Amendment, the home is first among equals," the implication is clear. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). A true commitment to upholding the Constitution's protections for the "sanctity of the home" requires one to recognize the reality of constructive entry. If even the "King of England" and "all his forces dare not" cross the threshold of the home, should we avert our eyes when law enforcement officers employ coercive tactics to exert control over those inside merely because the officers managed to do so without ever stepping over the threshold? *Payton*, 445 U.S. at 601 n.54 (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)). Ignoring the practical realities of constructive entry will enable government actors to simply circumvent *Payton*'s goal and violate the sanctity of the home, so long as they can manage to engage in coercive techniques without physically crossing the threshold. *Boyd*'s timeless warning foretells the consequences of allowing even the smallest encroachment upon the intimacies most closely guarded by the Fourth Amendment. If officers may constrain the liberty of one standing inside his own home so long as they do not step over the threshold of the door, the door will open to subsequent constitutional encroachments. A respect for *Payton*'s noble goal demands a recognition that a law enforcement officer violates the "firm line" when he coerces a suspect out of his own home to arrest him.

## II. The officers violated defendant's Fourth Amendment rights when they conducted a warrantless search of a closed container in a shared residence after obtaining a co-occupant's consent to search the residence without specifically inquiring into the ownership of the container.

The evidence obtained from Special Agent Ristroph's warrantless search of the cardboard box found at the defendant's residence should have been suppressed because the agent violated the defendant's Fourth Amendment rights by searching the box without valid consent.

The Fourth Amendment protects the people "against unreasonable searches and seizures". U.S. Const. amend. IV. This includes searches of a home without a warrant. *Payton v. New York,* 445 U.S. 573, 590 (1980) (holding that warrantless arrests are per se unreasonable). This rule is foundational to privacy rights and as such is subject to only a few exceptions, one of which is voluntary consent. *See Katz v. United States*, 389 U.S. 347, 358 n.22 (1967) ("A search to which an individual consents meets Fourth Amendment requirements" (citing *Zap v. United States*, 328 U.S. 624 (1946)). This consent need not necessarily come from the subject of the search but can be given by a third party "who possesses common authority over the premises" that are being searched. *United States v. Matlock,* 415 U.S. 164, 171 (1974). This exception has been expanded to include third parties whom the police reasonably believed to possess common authority over the premises at the time the consent was given, even if that belief is in fact mistaken. *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) ("The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises.").

For an officer to act on this "apparent authority," the facts available to the officer must be such that "a man of reasonable caution" would believe that the third party had authority over the premises. *Rodriguez* 497 U.S. at 188. The State bears the burden of proving that common or apparent authority are present in any instance of a warrantless search. *Rodriguez* 487 U.S. at 181 ("The burden of establishing that common authority rests upon the State."). Furthermore, consent is not all-encompassing, and the words and actions of the consenter can widen or narrow the scope of their consent. *See United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002) (holding that Lemmons expanded his grant of consent by aiding the officer in his search). When confronted with ambiguity regarding the extent of a party's authority or consent, it should be the

responsibility of the officer to ascertain their limits and to avoid searches that go beyond their reasonable scope. *See United States v. Whitfield* 939 F.2d 1071, 1075 (D.C. Cir. 1991) (holding that the government has the burden of clarifying situations where authority is ambiguous); *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (holding that the scope of a suspect's consent is based on an officer's reasonable beliefs based on the situation).

As *Illinois v. Rodriguez* makes clear, the most important factor in an officer's warrantless search based on apparent authority is "reasonableness". *Rodriguez* 497 U.S. at 183-84. To determine whether a search was reasonable, it is necessary to examine the facts available to the officer. *Id.* at 185. At the time SA Ristroph decided to search the cardboard box he was in possession of four facts:

1. Ms. Reiser was a co-inhabitant of the small cabin she shared with the defendant. R. at 13.
2. Ms. Reiser and the defendant slept in a downstairs bedroom. R. at 13.
3. The upstairs room was used by the defendant exclusively, Ms. Reiser visited it so infrequently she did not know what was stored in it. R. at 15.
4. The stairs led only to the upstairs room. R. at 13.

Cohabitation is sufficient to prove common authority, so these facts suffice to establish that Hemlock and Reiser enjoyed common authority over the *common areas* of the home. *See Matlock* 415 U.S. at 169-70. They also lead to the equally clear conclusion that Reiser's common authority does not extend to the upstairs room. When the agent asked Reiser about the upstairs area, she informed him that the room was exclusively used by Hemlock. R. at 15. At this point, it no longer became reasonable for the agent to assume she possessed the authority to consent to a search of the upstairs room. The agent's report suggests he understood this to be the case, as he wrote that it was "because of this comment" that he "confined the search to the first floor." R. at

13.[5] But Agent Ristroph also affirmatively knew that the defendant used the upstairs room for storage. R. at 13. Yet the agent proceeded to search a closed box that was sitting on a flight of stairs whose only destination was this room. R. at 13.

Common authority applies to both premises and the effects within them. *United States v. Taylor*, 600 F.3d 678, 680 (6th Cir. 2010) ("searches are constitutionally permissible if the government can 'show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the ... effects sought to be inspected.'" (quoting *Matlock* 415 U.S. at 171-72)). So, for this search to be legitimate, the agent must have reasonably believed that Reiser's grant of consent extended to this box. *Matlock* 415 U.S. at 171; *Jimeno* 500 U.S. at 252. He must also have reasonably believed that Reiser possessed the authority to consent to a search of the box. *Rodriguez* 497 U.S. at 181. Yet when the facts available to Agent Ristroph are considered, it is impossible to imagine he reasonably believed that either of these conditions were met. Agent Ristroph violated the defendant's Fourth Amendment rights when he searched a closed container located in an area under the defendant's sole control with enough factual evidence available to him to suggest that the third party whose consent purportedly authorized the search did not have actual or apparent authority over the container.

**a. The Special Agent could not reasonably believe that the scope of Reiser's consent extended to the cardboard box because of its ambiguous nature which was in part created by the Special Agent's actions.**

[5] It is interesting to note that Agent Ristroph's report suggests that Reiser's comment informed him that the upstairs was used by both Hemlock and Reiser. This is inconsistent with Reiser's statement that she told the agent the upstairs was used exclusively by Hemlock, which the lower courts seem to follow on this issue. If the agent's report is correct, it is hard to understand why Reiser's statement would have led him to confine his search to the first floor. This and other inconsistencies between Reiser's statement and the agent's report may suggest that the agent was aware of the tenuous footing his search was on, and retroactively attempted to strengthen the legitimacy of the search in his report.

Reiser's grant of consent was neither all-encompassing nor affirmatively given. R. at 15. In fact, the only indication of consent she affirmatively gave was the act of letting the agent inside. R. at 15. According to her sworn testimony, she "let Special Agent Ristroph in, and he started looking around". R. at 15. A grant of consent—let alone an indirect one—is not in and of itself comprehensive. Consent to search the part does not automatically equate to consent to search the whole, and vice versa. *Florida v. Jimeno,* 500 U.S. 248, 251-52 (1991) ("It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk). The consenter by their words or actions can broaden or narrow the scope of their consent. *See United States v. Lemmons,* 282 F.3d 920, 924 (7th Cir. 2002). Scope is determined by a reasonableness test. *United States v. Long*, 425 F.3d 482 (7th Cir. 2005) ("In determining the scope of a defendant's consent, we apply an objective standard: 'what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" (quoting *United States v. Raney*, 342 F.3d 551 (7th Cir. 2003))). The consenter need not explicitly limit the scope of the officer's search, as the scope only encompasses what the officer could reasonably believe the consenter meant to include. *Jimeno* 500 U.S. at 251). ("The scope of a search is generally defined by its expressed object.").

Reiser did not affirmatively authorize the officer to search anything. R. at 15. She did not say he could search any specific rooms, nor did she authorize him to look for any specific thing. R. at 15. In each of the aforementioned cases, officers either specified the object of their search or requested that the suspect consent to searches of specific items or places. *Jimeno* 500 U.S. at 251; *Long* 425 F.3d at 554; *Lemmons* 282 F.3d at 922. These suspects' consent was explicitly granted with knowledge of what the officers were looking for and thus reasonably included any

containers or locations where the officer was likely to find the object of their search. *Jimeno* 500 U.S. at 251. Here, Reiser's grant of consent was ambiguous and Agent Ristroph had no reasonable basis for believing that it extended to any and all objects found within the house. Agent Ristroph provided Reiser with no details about the object of his search, and actively avoided answering her questions about the purpose and object of the search. R. at 15. In doing so, he conveniently created ambiguity regarding its scope. He cannot then use that ambiguity to provide himself with an expansive license to search any and all containers within the home, including an unmarked cardboard box. Allowing officers to create ambiguity and then use it to justify expansive searches creates perverse incentives to keep suspects and third parties in the dark. The facts that were available to Agent Ristroph do not support a reasonable assumption that Reiser's consent extended to the cardboard box.

**b. Special Agent Ristroph could not have reasonably believed that Reiser possessed apparent authority to consent to a search of the cardboard box because the facts available suggested that she had no control over the box.**

Even if Reiser's consent could reasonably have been understood to encompass the cardboard box, Agent Ristroph was not in a position to reasonably assume that Reiser had the *authority* to consent to that search. As has been established, Reiser had the authority to consent to a search of the common areas of the house. R. at 13. And the agent's report suggests he reasonably believed that this authority did not extend to the upstairs room, given that it was used solely by the defendant. R. at 13. ("Because of this comment, I confined the search to the first floor"). The box was located on a flight of stairs that connected the living room, a common area, to the upstairs room, Hemlocks's private space. R. at 13. It is thus necessary to determine whether the stairs are considered part of the common area or part of the Defendant's private space. R. at 60.

The box was sitting on "one of the bottom steps" of a flight of stairs that led only to Hemlock's office. R. at 13. Agent Ristroph noted in his report that the stairs were in an "alcove;" this implies at least some separation from the central living room. R. at 13. The stairs were tucked away in a corner, and their only destination was a room that the agent knew was solely in control of the defendant. R. at 13, 17. Considering the stairs' primary and potentially only use was a means of getting to the upper level, it is reasonable to assume that Reiser (who, by her own admission, never went to the upper level) exercised no control over them and that they are therefore more properly considered part of Hemlock's private space. R. at 15. They are an extension of the upstairs room, whose status is inextricably tied their destination. R. at 17. There is no reason to believe Reiser ever used the stairs, seeing as she never went to the only place they lead, and therefore it is not reasonable to assume that she possessed authority over them. R. at 13.

Even if the box was in fact located in the common area, Reiser's actual authority would not extend to it if she did not use it. *See United States v. Waller* 426 F.3d 838 (6th Cir. 2005) ("common authority rests 'on *mutual use* of the property by persons generally having joint access or control for most purposes'" (quoting *Matlock* 415 U.S. at 171 n.7)). Likewise, her apparent authority would not cover it if it was unreasonable to believe that she had control over the box in some capacity. *See United States v. Taylor*, 600 F.3d 678, 685 (6th Cir. 2010) (suppressing evidence found in a shoebox during a warrantless search because facts available to officers suggested the third party did not have common authority over the box).

When Agent Ristroph opened the box, he was aware of several facts which would lead to the reasonable assumption that the box was in the sole possession of the defendant. R. at 15. The first is its location: the bottom of a flight of stairs whose destination was the defendant's storage

room. R. at 13. The second is the nature of the container itself. A cardboard box is almost synonymous with storage of personal items, and as such, it commands a high degree of privacy. *Taylor* 600 F.3d at 683 (comparing a shoebox to luggage as a storage container, creating an assumption of privacy).[6] A reasonable observer would assume that a box, an item typically used for storage, placed on a staircase leading up to a storage room, was naturally destined for that storage room. Further, Agent Ristroph knew that the defendant was the only one who stored items in said storage room. R. at 13. It was not reasonable to assume the box contained any of Reiser's possessions, seeing as she never used the storage room herself. R. 13. So, when Agent Ristroph encountered a container typically used for storage at the foot of a flight of stairs leading to a room he knew was used for storage exclusively by Hemlock, his natural assumption should have been that the box contained items Hemlock was planning to store in the upstairs room. R. at 13. And as the agent noted in his report, he was avoiding searching the upstairs room because Reiser was not in a position to consent to a search of items that Hemlock stores. Therefore, it was unreasonable for Agent Ristroph to assume that Reiser had the necessary apparent authority to consent to the search of the box.

Even if ownership of the box was ambiguous, this level of ambiguity should require further questioning on the part of the officer. When conducting warrantless searches, the onus should be on the officer to clarify ambiguous situations, so long as doing so would not impose an undue burden on them. The Seventh Circuit articulated a standard that best comports with the principles underlying the Fourth Amendment:

> It is the government's burden to establish that a third party had authority to consent to a search. *Rodriguez,* 110 S.Ct. at 2797. The burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances

[6] *See also United States v. Salinas-Cano*, 959 F.2d 861 (10th Cir. 1992) (holding that whether the type of container was one that "historically command[ed] a high degree of privacy" was part of the reasonableness inquiry).

> make it unclear whether the property about to be searched is subject to "mutual use" by the person giving consent, "then warrantless entry is unlawful *without further inquiry*."

*United States v. Whitfield*, 939 F. 2d 1071, 1075 (D.C. Cir. 1991) (quoting *Rodriguez,* 110 S.Ct. at 2801 (emphasis added)). The lower court erroneously declined to adopt the *Whitfield* standard because it wanted to avoid imposing "an impossible burden on the police" R. at 56 (citing *Melgar*). This was mistaken because the situation Agent Ristroph faced was much more straightforward than the one confronted by the officers in *Melgar*. *United States v. Melgar*, 227 F.3d 1038 (7th Cir. 2000). There were only two occupants of the home and one closed container; whereas, in *Melgar*, there were multiple of each. *Melgar* 227 F.3d 1039-40; R. at 15. It would have been no burden at all for the agent to clarify ownership of the box, as he did when he clarified the use of the upstairs room. R. at 15.. One question would have resolved the box's ownership status and alleviated any constitutional concerns.

Even if the status of the box was ambiguous, any ambiguity existed because of the agent's own refusal to ask simple clarificatory questions in the face of overwhelming indications that they are necessary. Government actors should not be permitted to create ambiguity during a search through their own action or inaction and then use that ambiguity to shroud a Fourth Amendment violation in fabricated reasonableness. When it comes to consent searches, the Fourth Amendment's constitutional protections against unreasonable searches and seizures will be undermined if law enforcement officers are permitted to use ambiguity of their own making to justify the existence and extend the bounds of what was already a tenuous grant of third-party consent.

Agent Ristroph could not have reasonably believed that Reiser had consented to the search of the cardboard box, nor could he have reasonably believed she had the authority to

consent to the search. He therefore violated Hemlock's Fourth Amendment rights by searching his box without a warrant and without proper consent from a party with apparent control over the closed container.

## III. When a hearsay declarant is unavailable to testify at trial, Rule 806 allows the admission of extrinsic evidence containing information that would have been admitted during cross-examination to challenge the declarant's character for truthfulness.

### a. The jury would have heard testimony regarding the specific instances of past conduct that Hemlock seeks to introduce if Copperhead had been available to be cross-examined at trial.

The lower court's narrow interpretation of Rule 608(b)'s operation within the hypothetical created by Rule 806 subverts the purpose of Rule 806 itself, misconstrues the interplay between the Rules, and results in an outcome that deprives a defendant of his right to challenge his accuser. Rule 806 purports to allow a party to challenge a hearsay declarant's credibility by introducing evidence that would have been admissible if the declarant had testified as a witness. Fed. R. Evid. 806. In this case, the jury would have heard testimony about an academic dishonesty report and a falsified job application during the declarant's cross-examination. R. at 54. Even though the jury would have been exposed to those instances of conduct that show her dishonest character in Rule 806's hypothetical, the lower court reads Rule 608(b) to nevertheless bar Hemlock from introducing evidence containing that same information. R. at 38.

The inequitable outcome resulting from a mechanical application of the Rules is unacceptable—an overview of the events that proceeded in this case makes the inequity clear. The government's case against Hemlock relied in large part on the statement of a deceased hearsay declarant. R. at 57. Copperhead's hearsay statement was admitted into evidence, and the jury learned damaging information about Hemlock. R. at 50. The Federal Rules of Evidence

advise, and basic principles of equity concur, that "[her] credibility should in fairness be subject to impeachment and support as though [she] had in fact testified." Fed. R. Evid. 806, Advisory Committee Notes, 1972 Proposed Rules. But Hemlock had no such opportunity. The court accepted the government's narrow reading of Rule 806. R. at 50. They were allowed to introduce hearsay statements tying him to the crime, and Hemlock was forced to accept those statements. He was left with no avenue to challenge the declarant's credibility—solely because the declarant was deceased at the time of trial and thus was not able to be cross-examined. A strict reading of the Rules in the unique circumstances of this case, wherein the declarant was deceased at the time of trial and the witness who provided the statement had no knowledge regarding the declarant's character, leads one to the unacceptable scenario where the character of a hearsay declarant is completely shielded from being challenged.

This result is not unavoidable. The Rules instruct that fairness requires an opportunity to challenge, and Rule 806 provides that opportunity. Entering the hypothetical world that Rule 806 requires us to conjure, we consider what would have happened "if [Copperhead] had testified as a witness." If she had done so, Hemlock's counsel would have had the opportunity to cross-examine her regarding the academic dishonesty report and fraudulent job application because they are probative of her character for truthfulness. The jury would have heard Copperhead's answers regarding those specific instances, and her testimony regarding those past instances would have been admitted into the evidentiary record. Since Rule 806 provides that whatever evidence "would have been admissible" in this hypothetical world may be admitted to challenge the credibility of a hearsay declarant in the real world, the information revealed in Copperhead's hypothetical cross-examination regarding those specific instances *deserves to be admitted*. Fed.

R. Evid. 806. The extrinsic evidence offered by Hemlock in these unfortunate circumstances was the best approximation to that information. R. at 50.

Faced with a choice between allowing Hemlock no way to challenge the damaging testimony and an imperfect way to do so, the district court erroneously chose the former. In doing so, it chopped Rule 608(b) in half and applied only part of a full rule. Rule 608(b)'s prohibition on extrinsic evidence about specific instances is predicated on the possibility that the opposing side will be able to question the witness about those instances on cross examination. Rule 608(b) does not prohibit extrinsic evidence of specific instances, full stop—it prevents extrinsic evidence *and then allows an exception for cross examination*. Fed. R. Evid. 608(b). One cannot be had without the other, and so it is not clear that the language of 608(b) requires the complete and absolute bar of any extrinsic evidence for this purpose. The Rule needs to be read and understood in its totality. Evidence that may have been largely barred by the extrinsic evidence ban but substantively allowed through cross examination deserves to be considered under a holistic view of the Rule. Since this evidence would have come to light under 608(b) during the hypothetical cross examination imagined in 806, it deserves to be admitted.

b. **Allowing the extrinsic evidence to be admitted under Rule 806 does not contradict the plain reading or enlarge the scope of Rule 608(b).**

Despite the lower court's ruling, the defendant's attempt to introduce this evidence does not violate the plain text of Rule 608(b). The defendant is not introducing extrinsic evidence to "attack or support the *witness's* character for truthfulness;" he is introducing evidence to attack the credibility of a *hearsay declarant*. Fed. R. Evid. 608(b) (emphasis added). Additionally, Rule 806 governs "any evidence" intended to attack a declarant's credibility; 608(b) governs solely "extrinsic evidence." These Rules' scopes might overlap, but by no means are they identical.

The lower court's concern that allowing this evidence to be introduced creates an end run around the requirements of Rule 608(b) misses the critical point that what the defendant is attempting to do does not contradict Rule 608(b) at all. The defendant is impeaching the character of a deceased hearsay declarant, not an actual witness. Rule 608(b) is only implicated in the hypothetical created by Rule 806. But, in reality, none of Rule 608(b)'s provisions are being violated. The extrinsic evidence is a last resort, offered as the only avenue through which Hemlock can introduce the information that Rule 806 *does* allow: information the jury would have heard during cross examination regarding Copperhead's academic dishonesty report and fraudulent job application. The scope of 608(b) is not being enlarged because the defendant's actions fall outside its purview.

**c. A contrary holding in this scenario would render Rule 806 effectively pointless.**

If Rules 806 and 608(b) work together like the lower court interprets them as applied to this particular scenario, Rule 806 serves no purpose. Rule 806 purports to provide a chance for Hemlock to challenge the credibility of a hearsay declarant whose statement was used against him. The lower court read Rule 806(b) narrowly and barred Hemlock from introducing extrinsic evidence for that purpose because it would not have been admissible had the declarant testified as a witness at trial, per Rule 608's hypothetical. Not only does this interpretation erroneously silo the two sentences in Rule 608(b), it leaves Hemlock with no avenue to impeach the declarant's credibility with specific instances of past misconduct. Copperhead was dead and thus unable to be cross-examined at trial, and Kolber knew nothing about Copperhead's character or the specific instances of conduct Hemlock sought to expose to the jury. R. at 46. Given these unique circumstances, Hemlock's only remaining opportunity to exercise his right to challenge

declarant's character was to resort to extrinsic evidence containing the very information he would have been able to elicit had the declarant testified at trial.

At a high level of generality, Rule 806 exists for the very purpose of allowing defendants to expose the jury to facts pertaining to a hearsay declarant's character that they would have been able to hear if the declarant had testified as a witness. If the declarant was deceased at the time of trial (and thus unavailable to be cross-examined about specific events pertaining to the declarant's character), and if the witness who offered the hearsay statement knows nothing about the declarant (and thus cannot offer testimony regarding specific events pertaining to the declarant's character), then extrinsic evidence is the only way the defendant is able to expose the jury to specific events pertaining to the declarant's character. To interpret Rule 608(b) as barring the defendant from introducing the only evidence available pertaining to those specific events is, in this specific circumstance, to render Rule 806 useless. *See United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988) ("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.").

**d. The lower court's ruling deprived Hemlock of his only opportunity to confront his accuser, resulting in an inequitable outcome that was contrary to the purpose of Rule 806 and had no real bearing on Rule 608(b).**

Rule 806 exists to disallow a hearsay declarant's credibility to go unimpeached, though that unfortunate effect is exactly what happened as a result of the lower court's strict interpretation of Rule 608(b). The fact which led the court to conclude that the evidence was inadmissible—Copperhead was dead—is precisely the same reason why Hemlock was forced to begin under Rule 806. He is left with no avenue to challenge hearsay testimony against him merely because the declarant happened to be dead at the time of the trial and the witness who

testified as to the statement happened to be a stranger. One is led to believe that the interplay between Rules 806 and 608(b) might not function as seamlessly as envisioned in such a unique scenario. *See United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000) (noting that Rules 806 and 608(b) are "imperfectly meshed" when hearsay declarants are unable to testify).

This inequity is made even more apparent upon consideration of the importance of cross-examination. The Sixth Amendment right to due process at trial encompasses the right to defend oneself against the government's accusations. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."); U.S. Const. amend. VI; U.S. Const. amend. XIV. This necessarily entails the right to cross-examine someone who has offered testimony against him. *Id.* ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

Hemlock was deprived of this opportunity because of the lower court's insistence that Rule 608(b) bars him from introducing evidence that Rule 806 intends to allow to be introduced. This insistence ignores the exception for cross examination contained in Rule 608(b) and reads the rule to operate as a blanket prohibition on any possible way Hemlock could have offered evidence pertaining to these specific instances at trial. The jury was exposed to a hearsay statement with no challenge to its truthfulness. They were not able to judge for themselves the demeanor of the hearsay declarant as they would have been able to if the declarant had testified herself and been subject to cross-examination. *See United States v. Hamilton*, 107 F.3d 499, 503 (7th Cir. 1997) (noting that "face-to-face confrontation ensures the reliability of the evidence by allowing the trier of fact to observe the demeanor, nervousness, expressions, and other body language of the witness."). These safeguards are lost when information is introduced through the

medium of hearsay instead of testimony, and Rule 806 exists to provide defendants with some way to approximate their right to confront their accuser in these unideal scenarios.

When the declarant was deceased at the time of trial and when the witness offering the hearsay statement has no knowledge regarding the declarant's character, extrinsic evidence of specific instances of the declarant's conduct should be able to be admitted to impeach the declarant's character for truthfulness. This result is equitable, comports with the purpose of Rule 806, and does not expand the scope of Rule 608(b) since any violation is merely hypothetical. Barring him from introducing evidence to be able to attack the character of a hearsay declarant who is not a witness at trial solely because of a Rule that he is not in fact violating is an absurd result that is not required by the plain language of 806 and 608(b).

## CONCLUSION

For the foregoing reasons, Petitioner, Atticus Hemlock, respectfully requests that this Court reverse the Fourteenth Circuit Court of Appeals on all three questions presented.

*Respectfully submitted,*

Team T29

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