

No. 25 – 7373

**IN THE
SUPREME COURT OF THE UNITED STATES**

ATTICUS HEMLOCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT, THE UNITED STATES OF AMERICA

Attorneys for the Respondent

QUESTIONS PRESENTED

- I. Whether officers can conduct a lawful warrantless arrest under the Fourth Amendment interpretation in *Payton v. New York*, when the officers remain outside the home and arrest suspect outside the home after requesting that he speak with them.

- II. Whether an officer's search of an unmarked cardboard box, without inquiring into the ownership of the box, is a reasonable search under the Fourth Amendment, when the officer received consent to search the area from a co-tenant of the shared residence.

- III. Whether Rule 806 of the Federal Rules of Evidence circumvents Rule 608(b) by allowing the introduction of extrinsic evidence to prove specific instances of conduct for the purpose of impeaching an absent declarant's character for truthfulness.

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The transcripts of the hearing on the motion to suppress before the United States District Court for the Northern District of Boerum appears in the Record at pages 18-39 and the trial testimony at pages 40-50. The judgment of the United States Court of Appeals for the Fourteenth Circuit appears in the Record at pages 51-61.

CONSTITUTIONAL PROVISION

The Fourth Amendment states:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Statement of the Facts

In February 2024, the United States Department of Tourism (“Department”) launched a program where it would purchase farmland and plant public gardens to promote tourism and economic development. (R. 3). The Department announced a kickoff event set to occur the week of April 8, 2024, in Boerum Village, led by Jodie Wildrose (“Wildrose”), the Under Secretary for Rural Development. (R. 4).

At the end of March, two community members – Tina Caplow (“Caplow”) and Elvis Hoag (“Hoag”) – voiced their concerns and suspicions about two customers who had recently visited their respective businesses to the Boerum Village Police Department. (R. 6-8). Local barista Hoag reported overhearing a plan to kidnap a federal official, and so both tips about the two customers were referred to the FBI’s Boerum City field office. (R. 8.).

FBI Special Agents Hugo Herman (“Agent Herman”) and Ava Simonson (“Agent

Simonson”) interviewed Caplow the morning of April 2, 2024. (R. 6). Caplow said the customers purchased zip ties, two ski masks, a folding knife, black trash bags, and bear spray, all paid with cash. (R. 6). Later, in Hoag’s interview, he identified the two individuals he observed as Atticus Hemlock (“Petitioner”) and Iris Copperhead (“Copperhead”), whom he recognized because he followed Petitioner on Instagram, and Petitioner posted photos of himself with Copperhead. (R. 7). Hoag overheard Petitioner and Copperhead discussing “nabbing Jodie as soon as she pulled into the parking lot and throwing her in a van,” referring to Jodie as a corrupt federal government official, and Copperhead strategizing that “the parking lot [is] good place to grab Jodie, rather than the busy airport.” (R. 7).

Later that day at approximately 4:00 PM, the agents visited the Petitioner’s home to ask about his activities at the coffee shop and superstore. (R. 11, 21). Petitioner’s cabin is in a wooded area near a walking path in Joralemon State Park, about three-quarters of a mile away from the nearest home, belonging to Petitioner’s landlord. (R. 20, 42). Petitioner has rented and lived in this cabin with his girlfriend, Fiona Reiser (“Reiser”), since May 2023. (R. 15). The agents arrived at the cabin on a calm, sunny afternoon, outfitted in casual uniforms and tool belts – each containing a gun and standard tools. (R. 25).

Upon arrival, Agent Simonson walked up the front steps and firmly knocked on Petitioner’s door three times, in accordance with FBI training. (R. 21, 25). She came back down the steps to stand with Agent Herman about four feet from the bottom stair. (R. 21). Petitioner emerged and stood behind a screen door. (R. 12). He was physically imposing, standing six feet, two inches tall and weighing 210 pounds, especially compared to Agents Herman and Simonson, who stood five feet eleven inches and five feet five inches tall and weighed 185 and 145 pounds, respectively. (R. 23, 29). Agent Herman politely greeted Petitioner, asking him about his day. (R. 11). Agent

Simonson informed Petitioner that they were Special Agents with the FBI conducting an investigation. (R. 11). She stated they believed Petitioner might have useful information and asked him to step outside so they could have a chat. (R. 11). Petitioner refused. (R. 11). At this point, Agent Herman noticed two bottles on a counter labeled "Chloroform" and asked Petitioner what the bottles were for. (R. 11, 22). Petitioner shifted and blocked Agent Herman's view of the bottles, responding, "Don't worry about those." (R. 11, 22). Petitioner became visibly agitated and asked unprompted, "Does this have to do with Jodie?" (R. 11, 22). Agent Herman offered to come back later if it worked better for Petitioner. (R. 12). Petitioner responded by asserting, "I don't want anything to do with you or to talk anything about that bitch." (R. 12).

Agents Herman and Simonson returned to their car and agreed they had probable cause to arrest Petitioner because of the presence of chloroform, his movement to block the agents' view of the chloroform, and his "unprompted question about Jodie." (R. 12, 22-23). The agents radioed Special Agent Kiernan Ristroph ("Agent Ristroph") for backup and returned to stand in front of Petitioner's steps, both raising their voices and instructing him to come outside. (R. 12, 23). The agents stood still and calmly rested their hands on their holsters. (R. 26). Petitioner stated, "I'll come out," and voluntarily walked down the stairs onto the grass, where Agent Simonson arrested him. (R. 12, 23). Agent Herman conducted a search of Petitioner's person and found a notebook in a pocket of his cargo pants, open to a page that contained detailed and explicit plans to kidnap Wildrose and Petitioner's hatred for her. (R. 12, 23-24).

As the agents interacted with Petitioner, Copperhead approached the cabin and witnessed Petitioner's arrest. (R. 53). She ran from the scene and burst out of the woods onto a path in front of Theodore Kolber ("Kolber"), a local resident. (R. 41, 42). Copperhead was shaking, had tears streaming down her face, was cut up from branches and thorns, and was breathing heavily in a

frenzy. (R. 42). Kolber was able to get a good look at her for about thirty seconds, during which she screamed, “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!” before running off. (R. 43). Copperhead was arrested that evening and passed away in jail the same night from an aortic rupture. (R. 46).

Around 4:30 PM that same day, Agent Ristroph arrived at the cabin and was instructed by Agent Herman to wait for Reiser. (R. 13). After Reiser entered the cabin, Agent Ristroph knocked, identified himself as an FBI agent, informed her of Petitioner’s arrest, and asked to look around as part of an investigation. (R. 13). Reiser voluntarily gave consent for Agent Ristroph to enter the house. (R. 13). Agent Ristroph entered the house through the front door into the living room, looked around the kitchen, the living room, and then noticed a staircase leading to the second floor. (R. 13). Agent Ristroph declared that he asked Reiser what was on the second floor, and she responded by stating that she and Petitioner used it for storage and office space. (R. 13). Reiser, on the other hand, alleged that Agent Ristroph asked her if she slept on the second floor, and she responded no and pointed to a bedroom on the first floor. (R. 15). Reiser contended that Agent Ristroph asked what Petitioner kept in the loft, and she stated she did not know. (R. 15). Agent Ristroph then walked to the bottom steps of the staircase and noticed a closed cardboard box with no identifying information on the outside. (R. 13, 15). Agent Ristroph opened the box and found a length of rope, two black ski masks, one pair of green gloves, zip ties, one folding knife, one roll of duct tape, and two bottles of chloroform. (R. 13).

II. Procedural History

Petitioner was indicted under 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 1201(d) for the attempted kidnapping of Jodie Wildrose, a federal officer of the United States, on account of the performance of official duties. (R. 1, 2). Prior to trial, Petitioner moved to suppress the notebook

seized during his arrest and the materials found in the cardboard box during the search of his cabin. (R. 19, 31). The United States District Court for the Northern District of Boerum (“District Court”) denied the first motion, finding the constructive entry argument unpersuasive, and holding that the agents did not violate *Payton v. New York* because they stayed outside Petitioner’s home and did not use coercive tactics. (R. 31). The District Court also denied the second motion, finding that Agent Ristroph’s search was reasonable because Reiser had apparent authority to consent to the search of the cardboard box. (R. 38-39).

Petitioner’s trial began on August 5, 2024. (R. 53). At trial, Kolber testified regarding his interaction with Copperhead and introduced a statement made by Copperhead. (R. 43). Petitioner objected to the statement as hearsay and the District Court overruled the objection, admitting it under Rule 803(2) – the excited utterance exception – of the Federal Rules of Evidence (FRE). (R. 43-44). Petitioner attempted to impeach Copperhead’s character for truthfulness, pursuant to FRE Rule 806, using extrinsic evidence. (R. 47-48). The extrinsic evidence was a report informing Copperhead of an academic violation, a falsified job application, and testimony from witnesses who could authenticate the documents. (R. 9-10, 47-49). The Government objected to the extrinsic evidence, arguing FRE Rule 608(b) barred its introduction. (R. 54). The District Court sustained the government’s objection and refused admission of extrinsic evidence used to impeach Copperhead’s character for truthfulness. (R. 50).

After a jury trial, Petitioner was found guilty of attempted kidnapping of an officer of the United States government under 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 1201(d) and sentenced to ten years in prison. Petitioner appealed to the Fourteenth Circuit raising three issues: (1) the Petitioner's arrest violated his Fourth Amendment rights and a notebook seized incident to the arrest was improperly admitted; (2) evidence seized from a cardboard box in Petitioner’s cabin

was improperly admitted; and (3) extrinsic evidence of Copperhead’s prior academic violation and falsified job application was improperly excluded at trial. (R. 51-52). On April 14, 2025, the Fourteenth Circuit affirmed the rulings and judgment of the District Court. (R. 51-52). Petitioner’s petition for writ of certiorari to this Court was granted on December 2, 2025. (R. 62).

SUMMARY OF THE ARGUMENT

This case requires the Court to strike a careful balance between judicial efficiency and effective law enforcement, on the one hand, and an individual’s limited interest in their privacy rights, on the other, without permitting collateral disputes that distract juries and inflate the cost and length of trials. The Fourteenth Circuit and the District Court effectively managed this balancing exercise: both courts rejected the “constructive entry doctrine,” declined to impose an unreasonable standard on officers that would require them to clarify ownership of ambiguous items in common areas during a consent search, and refused admission of extrinsic evidence offered to prove specific instances of conduct to impeach a declarant’s character for truthfulness. We respectfully request that this Court affirm the holdings and judgments of the Fourteenth Circuit and the District Court.

The Fourth Amendment, protecting an individual’s right to be secure against unreasonable searches and seizures, is primarily concerned with warrantless entries *into* the home. The Fourth Amendment warrant requirement should not extend to arrests where officers do not cross the threshold of the home, as occurred here. A broad interpretation of *Payton v. New York* which would require a warrant in the case of a constructive entry, even when no physical entry has occurred, is contrary to the text and history of the Fourth Amendment. The narrow, literal interpretation of *Payton* appropriately adopts the Framers’ vision of protections for individual privacy rights. Accordingly, the Court should join the Seventh, Eleventh, and Fourteenth Circuits and read *Payton*

narrowly, holding that a warrantless arrest violates the Fourth Amendment only when officers physically enter the home.

The same reasonableness principle that counsels a narrow reading of *Payton* also necessitates finding a search of a shared cabin on the basis of a co-resident's consent to be a lawful search. Once an officer has lawfully obtained consent to search a space, it is unreasonable to require separate consent for each item within that area. Such a policy would unnecessarily slow investigations, hinder effective law enforcement, and compel officers to disregard potentially incriminating evidence in plain view. When an officer obtains consent to search an area from an individual who reasonably appears to have common authority over that space, a search of a closed box in that area without any further inquiry to confirm its ownership is a reasonable search.

Principles of judicial efficiency require the Court to exclude extrinsic evidence offered to prove specific instances of conduct to impeach a declarant's character for truthfulness. The Federal Rules of Evidence consistently balance the search for truth against the need for fair and efficient trials, and the Advisory Committee deliberately drew that balance in Rule 608(b) by barring such evidence. Reading Rule 806 to permit what Rule 608(b) expressly prohibits would undermine the structure and purpose of the Rules by inviting collateral mini trials against absent declarants unable to defend themselves. The Court should therefore adhere to the Rules' plain meaning and refuse to allow Rule 806 to serve as a backdoor for otherwise inadmissible extrinsic evidence.

ARGUMENT

I. The Warrantless Arrest Outside of Petitioner's Home Is Not a Literal Violation of *Payton v. New York*, and Even If the Court Recognizes the Constructive Entry Doctrine, Petitioner Willingly Waived His Fourth Amendment Protections When He Voluntarily Exited His Home.

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. This Court in *Payton v. New York* held that, even where probable cause exists, an agent may not enter an individual's home without consent to make a warrantless arrest, absent exigent circumstances. 445 U.S. 573, 576 (1980). While *Payton* struck down the New York statutes that allowed "warrantless invasions of the privacy of the home," this Court has not yet ruled on whether an officer must physically cross the threshold into the home to constitute a violation, or whether a "constructive entry" would suffice. *Id.* Given this gap, a circuit split has emerged between those courts maintaining a narrow, literal interpretation of *Payton* and courts recognizing the "constructive entry" doctrine. Compare *Gaddis v. DeMattei*, 30 F.4th 625, 633 (7th Cir. 2022) ("[O]ur circuit has to date limited *Payton* to its literal holding that non-exigent warrantless arrests *inside the home* violate the Fourth Amendment.") and *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002) (same) with *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984) (finding, in the absence of direct police entry, that the constructive entry "accomplished the same thing, namely, the arrest of [defendant]") and *United States v. Maez*, 872 F.2d 1444, (10th Cir. 1989) ("[L]ack of physical entry alone is not dispositive.").

A district court's denial of a motion to suppress is reviewed under a mixed standard. Findings of facts are reviewed for clear error, while the district court's conclusion regarding the constitutionality of law enforcement action is reviewed de novo. See *United States v. Reeves*, 524 F.3d 1161, 1165 (10th Cir. 2008).

A. The Court Should Adopt a Literal Reading of *Payton v. New York*, Under Which a Warrantless Arrest Where Agents Did Not Enter the Home Does Not Constitute a Fourth Amendment Violation.

The Court in *Payton* emphasized that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." 445 U.S. at 585 (citing *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). *Payton* upholds the well-settled

distinction between a warrantless seizure in a public place versus a private property, maintaining that a “greater burden is placed . . . on officials who enter a home of dwelling without consent.” 445 U.S. at 587 (citing *Dorman v. United States*, 435 F.2d 385, 389 (1970)). The *Payton* decision is consistent with *United States v. Watson*, decided a few years prior, which held that police may arrest a person in a public place without a warrant when they have probable cause. See 423 U.S. at 423-24. *United States v. Santana* extended *Watson*’s warrantless arrest principle when it found that the doorway of a house was a “public place” under the Fourth Amendment, making warrantless arrests in this area of the home proper. See 427 U.S. 38, 40-42 (1976).

i. The literal interpretation of Payton, supported by the history and text of the Fourth Amendment, protects privacy rights as intended by the Framers.

The decision in *Payton* was an extension of the principle this Court has long maintained that “the warrant procedure minimizes the danger of needless intrusions [into the home].” 445 U.S. at 586. This understanding of Fourth Amendment protections stems from common law tradition that not only allowed, but favored warrantless, public arrests. See *Watson*, 423 U.S. at 418-23; 423 U.S. at 430 (Powell, J., concurring) (“The historical momentum for acceptance of warrantless arrests, already strong at the adoption of the Fourth Amendment, has gained strength during the ensuing two centuries.”). The warrant requirement is meant to protect and “respect [] 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 text of the Fourth Amendment makes apparent that the protections against unreasonable searches and seizures grew out of opposition to the overly broad general warrants, not warrantless public arrests themselves. See *id.* at 610-11 (White, J., dissenting) (“[T]he Amendment preserved common-law rules of arrest.”).

The literal reading of *Payton*, as employed by the Seventh and Eleventh Circuit, should be adopted, because it is supported by the text and history of the Fourth Amendment. *Id.* at 611 (White,

J., dissenting). *Payton* should be read narrowly and literally to trigger *Payton* protections only when there is a physical entry into the home. *See Gaddis*, 30 F.4th at 633. Conversely, the Sixth and Tenth Circuits recognized and adopted the constructive entry doctrine out of concern that a literal reading of *Payton* would allow law enforcement to circumvent the warrant requirement by compelling individuals to step outside their homes in order to effectuate an arrest without a warrant. *See Morgan*, 743 F.2d at 1166; *Reeves*, 524 F.3d at 1167.

The Seventh Circuit effectively responds to this concern: “When the police assert from outside the home their authority to arrest a person, they have not breached the person’s privacy interest in the home. If the person recognizes and submits to that authority, the arrestee, in effect, has forfeited the privacy of his home to a certain extent.” *United States v. Berkowitz*, 927 F.2d 1376, 1387 (7th Cir. 1991). The warrant requirement was intended only to protect the sanctity of the home from intrusion, preserving the common-law rule of warrantless public arrests. *See Watson*, 423 U.S. at 423. The circuits recognizing the constructive entry doctrine failed to consider that adoption of the literal reading of *Payton* protects individual privacy interests within the home with the rigor and scope intended by the Fourth Amendment.

ii. Because the agents never crossed the threshold into the home, they were within the bounds of the Fourth Amendment under Payton.

The Court in *Payton* unequivocally established that “the Fourth Amendment has drawn a firm line at the entrance to the house,” and in the absence of exigent circumstances, a warrant is required to enter the home. 445 U.S. at 590. Several circuits interpreted *Payton* to only apply when officers cross the physical threshold of the entrance to the home. *See United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987) (finding no *Payton* violation when police arrested defendant within his hotel room with guns raised, without crossing threshold); *see also McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984) (stating that absence of a warrant is not critical when officers

did not cross threshold of defendant’s apartment). While maintaining strict warrant protections inside the home, this Court has simultaneously recognized that the implicit license that allows visitors to “approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave” is extended to police officers as well. *Florida v. Jardines*, 569 U.S. 1, 8 (2013).

The actions of the Special Agents outside of Petitioner’s home were all undertaken in accordance with Fourth Amendment protections. *See Jardines*, 569 U.S. at 8. Throughout the 14-minute interaction, from the initial knock on the door to Petitioner’s arrest, the agents remained outside the home. (R. 11-12). Not just outside the door, the agents remained “three or four feet away from the bottom stair,” several feet away from committing a literal *Payton* violation. (R. 21); *see Gaddis*, 30 F.4th at 631. Petitioner does not allege a physical entry of his home by the officers, as conceded by his counsel. (R. 28). *Payton* draws a firm line at the entrance of the house, which the agents did not cross, thus their conduct lawfully remained within the bounds of the Fourth Amendment. *See Payton*, 445 U.S. at 590; *Gaddis*, 30 F.4th at 31.

iii. The arrest was effectuated only once Petitioner was outside his house, in accordance with the law governing warrantless arrests in public places.

A seizure occurs when there is either physical force or a show of authority such that a reasonable person would not feel free to leave and submits. *See California v. Hodari D.*, 499 U.S. 621, 626-27 (1991). The subjective intention of officers is irrelevant to a seizure analysis; the focus is on the officer’s objective behavior. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980). What constitutes a lawful seizure varies depending on the location of the arrest. *Contrast Knight*, 300 F.3d at 1277 (“[A] warrantless arrest inside the home of a suspect is presumptively unreasonable”) *with United States v. Allen*, 813 F.3d 76, 78 (2d Cir. 2016) (“[I]f [defendant] had come out of the apartment into the street and been arrested there, no warrant would be

required.”). Once an individual is outside their doorway, they no longer have the protection of the warrant requirement because there is no protectible expectation of privacy. *Cf. Santana*, 427 U.S. at 38 (holding that an arrest in doorway of a house occurred in a public place because defendant was “exposed to public view . . . as if she had been standing completely outside her house”).

The Fourteenth Circuit correctly agreed with the District Court’s finding that Petitioner was arrested outside the home. (R. 55). The agents remained outside the home while Petitioner voluntarily exited his cabin. (R. 12). Only once outside did the agents announce and effectuate Petitioner’s arrest. *See Hodari D.*, 499 U.S. at 628 (“[T]est is . . . not whether the citizen perceived that he was being ordered to restrict his movement, but whether officer’s words and actions would have conveyed that to a reasonable person.”); (R. 12, 55). The agents’ intentions to wait to arrest Petitioner until he was outside do not affect the analysis of when the arrest occurred, as the shift in their intentions from investigation to arresting was not evident in their objective actions. *See Mendenhall*, 446 U.S. at 554. The agents repeated their request to Petitioner to speak with them outside for their investigation, until he stepped outside. (R. 12).

The area outside of Petitioner’s home, where the arrest occurred, constitutes a public place, with this Court explaining that a “public place” can intrude into the home as far as an open doorway. *Santana*, 427 U.S. at 38. Thus, when the agents, who Petitioner concedes had probable cause to arrest him, did in fact do so, they carried out a warrantless arrest in a public place and did not violate the Fourth Amendment. *See Watson*, 423 U.S. at 423; *Gaddis*, 30 F.4th at 631 (“Because it is undisputed that [defendant] opened his front door and walked out onto the porch before he was officially placed under arrest, he cannot establish a literal violation of *Payton*.”).

B. Even Accepting the Premise of the Constructive Entry Doctrine, Petitioner Voluntarily Stepped Outside and Acting in the Absence of Coercion, Relinquished His 4th Amendment Protections.

Constructive entry occurs when police, while not physically in the home, “deploy overbearing tactics that essentially force the individual out of the home.” *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005); *see Maez*, 872 F.2d at 1451. The critical factor in determining whether a permissible encounter has devolved into a constructive entry is the show of force exhibited by officers. *See Thomas*, 430 F.3d at 277. When an individual is deemed to have “willingly and voluntarily acquiesce[d] to noncoercive police requests to leave the protection of the house, then, absent a show of force that would provide a basis for a reasonable person to believe he was compelled to leave the house, a subsequent outside-the-home seizure does not offend *Payton*.” *United States v. Grayer*, 232 Fed.Appx. 446, 450 (6th Cir. 2007).

i. A reasonable person would feel free to terminate the encounter with the agents, therefore, no seizure occurred inside the home.

Circuits that follow the constructive entry doctrine have determined that “it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home.” *Maez*, 872 F.2d at 1451 (citing *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1986)). To ascertain the moment an arrest has occurred, this Court has long considered the following *Mendenhall* circumstances: threatening presence of several officers, display of a weapon by an officer, physical contact with person, and language or tone of voice indicating compulsion. *Mendenhall*, 446 U.S. at 554. Given the nature of a constructive entry and the absence of physical contact, the critical inquiry is “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” *Reeves*, 524 F.3d at 1167 (citing *Florida v. Bostick*, 501 U.S. 429, 436 (1991)).

Petitioner suggests that he was under arrest while the agents stood outside his house and spoke with him, yet the circumstances surrounding the arrest provide no basis for concluding that a reasonable person would believe that he was compelled to leave the house. Going through the *Mendenhall* factors, Petitioner was greeted on a sunny afternoon by two officers in casual uniform, both of whom were smaller in stature than him. (R. 29). This interaction resembles one of a knock-and-talk and hardly lends credence to Petitioner's belief that he was under arrest while inside his house. *See Grayer*, 232 Fed.Appx 446 at 450 (holding that four officers knocking on the door and asking defendant to step outside was a noncoercive affair); *Reeves*, 524 F.3d at 1169 (finding the officers' arrival at 2:30 A.M. to be relevant to the coercion analysis).

As for weapons, the Court must consider the manner in which the weapon is handled, not simply the presence of a weapon. *See Mendenhall*, 446 U.S. at 555. The agents' weapons were tucked away in their duty belt throughout the entire interaction and never drawn. (R. 26). While Petitioner's counsel raises the possibility that Petitioner saw the agents' hands on their holsters, this prospect differs significantly from the agents displaying their weapons as a show of force. *See United States v. Saari*, 272 F.3d 804, 812 (6th Cir. 2001); (R. 26). Further, no physical contact is alleged while Petitioner was within the home. Since the officers remained outside the home, any physical contact could have occurred only once Petitioner was outside his home, establishing that it was reasonable for him to conclude he was not free to leave only once officers began to seize him outside. *See Hodari D.*, 499 U.S. at 628.

As for the last *Mendenhall* factor, the officers firmly repeated their request for Petitioner to come outside but did not use any coercive language, nor threaten Petitioner with repercussions for not complying. (R. 12). Petitioner's proposition that he was arrested while in the home is further negated by the actions he took to terminate the encounter prior to voluntarily exiting the house. (R.

12) (“Hell no. I don’t want anything to do with you or to talk anything about that b**ch.”). The Fourteenth Circuit correctly affirmed, “There was simply no coercion here.” (R. 55).

The circumstances here closely resemble those in *United States v. Thomas*, where the Sixth Circuit found that defendant’s “respon[se] to a simple knock and request, not an order to emerge or the threat of firearms . . . has given us no basis for concluding that a reasonable person . . . would believe without more that he was [] under arrest.” 430 F.3d at 278. The Sixth Circuit was one of the earliest courts to adopt the constructive entry doctrine, making this statement especially persuasive since the court has drawn a line determining that the request for a defendant to come outside does not violate the Fourth Amendment. A reasonable person would feel free to terminate the encounter with the agents under these circumstances.

ii. The agents’ negligible show of force did not rise to the level of a constructive entry.

The Sixth Circuit lists the following as the “hallmarks” of constructive entry: “(1) drawn weapons; (2) raised voices; (3) coercive demands; or (4) a large number of officers in plain sight.” *Grayer*, 232 Fed.Appx. at 450. A constructive entry turns on the presence of these factors, which amount to a coercive show of force by the police. *See Thomas*, 430 F.3d at 278 (holding that no constructive entry occurred where these factors were not present). *Contrast United States v. Von Marschner*, 849 F.2d 1477, 2 (9th Cir. 1988) (finding no constructive entry where seven officers invited defendant to step outside without use of weapons) *with Morgan*, 743 F.2d at 1161-64 (finding constructive entry when ten officers surrounded suspect’s house, blocked his car, flooded his house with spotlights, and summoned suspect with a bullhorn).

The facts presented here are similar to those in two Sixth Circuit cases where the court did not find a constructive entry when officers knocked on defendant’s door without their weapons drawn and asked him to step outside. *See Grayer*, 232 Fed.Appx. at 450; *Thomas*, 430 F.3d at 278.

The agents acted in accordance with their training throughout their exchange with Petitioner. (R. 25). Never drawing their weapons, the agents strategically placed their hands on top of their holsters to ensure their safety while approaching an increasingly agitated Petitioner, who they had probable cause to believe had tried to kidnap Wildrose. (R. 26). *See Saari*, 272 F.3d at 812. The agents' actions are far from the behaviors of officers in situations that have constituted a constructive entry, where "the use of weapons [] greatly extend the 'reach' of the arresting officers" into the home. *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980) (two weapons drawn at the door); *see Saari*, 272 F.3d at 806-07 (shotgun and three service weapons were drawn); *Maez*, 872 F.2d at 1450 (multiple rifles pointed at the home).

As for the second factor of raised voices, upon re-approaching Petitioner, the agents "yelled" and "shouted," but this does not amount to the level of coercion sufficient to constitute a constructive entry. (R. 23); *Knight*, 300 F.3d at 1277 ("*Payton* keeps the officer's body outside the threshold, not his voice."). Where circuits have found constructive entry, the officers projected their voices into the home using technology, which when coupled with the other hallmarks creates "frightening circumstances" under which "a reasonable person would've believed he had to come out of the home and submit to the show of authority." *Maez*, 872 F.2d at 1450 (loudspeakers); *see Al-Azzawy*, 784 F.2d at 892 (bullhorn); *Morgan*, 743 F.2d at 1161 (bullhorn).

The record provides no evidence of coercive demands, with circuits who have adopted the constructive entry doctrine finding similar requests to exit the home as an insufficient showing of coercion. *See Hart v. Parks*, 450 F.3d 1059, 1065 (9th Cir. 2006); *Thomas*, 430 F.3d at 276. Fourth Amendment jurisprudence "does not prevent a law enforcement officer from telling a suspect to step outside his home and then arresting him without a warrant," which is precisely what occurred here. *Knight*, 300 F.3d at 1277.

Turning to the last factor, the two agents at Petitioner's house were far from constituting a "force upon his doorway [that was] spilling over into the shadows, questioning him as to his identity." *Von Marschner*, 849 F.2d at 2 (recounting defendant's description of his arrest by seven officers which failed to persuade the court to find a constructive entry). Instead, the two agents are akin to the officers in *Thomas* and *Grayer*, whereby there was no coercive effect due to the mere sight of officers outside the home. None of the hallmarks of constructive entry were present in Petitioner's arrest, making his decision to step outside the home a voluntary action, rather than a submission to a show of authority.

iii. Petitioner voluntarily stepped out of his home into an area where he had no expectation of privacy.

The Court has established that Fourth Amendment protections involving the home have limitations. *See Santana*, 427 U.S. at 42 ("What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."). After *Santana*, the law is exceedingly clear that an individual's protectible expectation of privacy stops at the open doorway of their home. *Id.* Once voluntarily exposed to public view, an individual loses their reasonable expectation of privacy and could be subject to a warrantless arrest at their home. *See United States v. Gori*, 230 F.3d 44, 52 (2d Cir. 2000).

As correctly determined by the District Court of the Northern District of Boerum, Petitioner voluntarily stepped outside his home, relinquishing the Fourth Amendment protections granted to the sanctity of his home. *See Gori*, 230 F.3d at 52; (R. 31). Regardless of the location of Petitioner's cabin in a densely wooded area, his subjective expectation of privacy does not guarantee him protection when he exposes himself to public view. *Id.* Given the position of the officers outside his home, Petitioner waived his Fourth Amendment protections when he stepped outside to meet them and subjected himself to public view.

II. Agent Ristroph’s Reasonable Belief that Reiser Had the Apparent Authority to Consent to a Search Was Sufficient to Conduct a Constitutional Search of the Cardboard Box, In the Absence of Any Obvious Evidence to the Contrary.

“The touchstone of the Fourth Amendment is reasonableness.” *Katz v. United States*, 389 U.S. 347, 360 (1967). It is well-established that in the absence of a warrant, a search conducted pursuant to consent given by a third-party who possesses common authority is a reasonable search. *See United States v. Matlock*, 415 U.S. 164, 171 (1974). “Even if a third party does not possess actual common authority over the area that was searched, there is no Fourth Amendment violation when the police rely in good faith on a third party's apparent authority to consent to the search.” *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990). Accordingly, there is no Fourth Amendment violation when police search a container on the basis of an objectively reasonable belief that the scope of the consent, given by someone with apparent authority, extends to containers within the area to be searched. *See United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000).

A district court’s denial of a motion to suppress is reviewed for clear error. *United States v. Saadeh*, 61 F.3d 510 (7th Cir. 1995) (granting particular deference to district courts because of the opportunity to observe witnesses and hear testimony on the issue).

A. Even If Reiser Did Not Have Common Authority Over the Loft Stairs, Agent Ristroph Reasonably Relied on Her Apparent Authority to Consent to a Search of the Area.

Family members and spouses are typically deemed to have common authority over all rooms within the home, unless a family member has “clearly manifested an expectation of exclusivity.” *United States v. Clutter*, 914 F.2d 775, 777-78 (6th Cir. 1990) (family members); *see also United States v. Amratiel*, 622 F.3d 914, 916 (8th Cir. 2010) (spouses). In sharing a home with someone, co-tenants have long been considered to “assume[] the risk that the third party might permit access to others, including government agents,” due to the third party’s exercise of actual

or *apparent* authority over the property. *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000) (citing *Matlock*, 415 U.S. at 171 n.7). The determination of apparent authority “turns on the government’s knowledge of the third party’s use of, control over, and access to the container to be searched,” requiring a fact-specific analysis. *Id.* at 834. Since the government relies on consent to carry out the warrantless search, the government bears the burden of proving by a preponderance of the evidence that the consent was voluntary. *See United States v. Isiofia*, 370 F.3d 226, 230 (2d Cir. 2004).

Knowing that Reiser was Petitioner’s girlfriend and a resident of the cabin, any reasonable agent would have believed Reiser had common authority over the loft stairs. During his interaction with the Agents, Petitioner informed them that his girlfriend would be back soon to host their friend for dinner, indicating that they live together and that Reiser exercises some authority within the home. (R. 11). *See Amratiel*, 622 F.3d at 916. Agent Ristroph was not only informed of this when he arrived at the cabin but was able to verify Reiser’s authority for himself when he watched her enter the home with groceries while Petitioner was not present. (R. 12, 13). *See United States v. Groves*, 530 F.3d 506, 509-10 (7th Cir. 2008) (finding factors such as an individual performing household chores and enjoying access to the home in the absence of the owner as facts that can inform a determination of actual or apparent authority).

After obtaining voluntary consent,¹ Agent Ristroph searched the house. Reiser never specifically informed Agent Ristroph that she had authority over the kitchen and living room, but it was a reasonable assumption that she maintained authority over these rooms, as informed by societal expectations in common areas of a home and her placement of groceries on the kitchen

¹ The District Court of the Northern District of Boerum determined that this element of consent is not in dispute, as “Defendant does not seem to challenge the validity of Ms. Reiser’s consent itself, but rather its scope.” (R. 36).

counter. *See Clutter*, 914 F.2d at 777; (R. 15). Even accepting Reiser’s conflicting claim that she told Agent Ristroph that the second story space was used only by Petitioner, which would effectively exclude the loft from Ristroph’s search, the stairs leading up to the loft are visible and accessible from the shared living room and do not present a “manifest[ation of] an expectation of exclusivity.” *Id.* (R. 15, 17). As there is no evidence of any measures taken to veil the staircase and Reiser did not disclaim use of the stairs, it was reasonable for Agent Ristroph to believe that Reiser had authority over the staircase, especially the lower stairs closer to the living room.

B. The Scope of Reiser’s Consent Encompassed a Search of the Unmarked, Cardboard Box.

The scope of a search is typically defined by its expressed object, therefore, consent to search an area can be reasonably understood to “include[] consent to search containers within that space.” *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). The consenting party can limit the scope, “[b]ut if his consent would be reasonably understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more specific authorization.” *Id.* at 252.

- i. *This Court should find searches of a closed container permissible without further inquiry once consent to search an area is granted, to maintain the investigative value of consent searches.***

“[T]he Fourth Amendment does not require officers to be correct in their assessment of the facts; it only requires that they be reasonable.” *United States v. Marshall*, 348 F.3d 281, 288 (2003) (citing *Rodriguez*, 497 U.S. at 184). Despite the emphasis on reasonableness, the Sixth, Ninth, and Tenth Circuits have recognized a duty of additional inquiry, requiring officers to inquire to determine the ownership of an ambiguous item during a consent search. *See United States v. Taylor*, 600 F.3d 678, 679 (6th Cir. 2010); *United States v. Arreguin*, 735 F.3d 1168, 1177 (9th Cir. 2013); *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992). Finding that standard to “impose an impossible burden on the police,” the Second, Seventh, and Fourteenth Circuits have

rejected imposing this duty, instead finding closed container searches permissible if there is no evidence the container is owned by someone other than the consentor. *Melgar*, 227 F.3d at 1042; see *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006); (R. 56).

Consent searches are an invaluable investigative tool, whose success relies on the cooperation of property owners. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973); 3 Wayne R. LaFare, *Search and Seizure* § 8.3 at 62 (1993 Supp.). This Court should follow the Second, Seventh, and Fourteenth Circuits in refusing to impose a heightened duty on officers that will effectively hinder their investigations. (R. 56). If the Court were to hold otherwise, imposing a duty of inquiry incentivizes individuals to hide evidence of crimes in shared homes or in the homes of others. Criminals should not be permitted to use their co-tenants as shields for their wrongdoings. Here, Petitioner stored evidence of his kidnapping attempt in a single cardboard box located in a shared area of his home. (R. 13). If this Court were to adopt a duty to inquire, Agent Ristroph would have been precluded from searching the box because Reiser's answers made clear that she did not exercise authority over it. (R. 13). Reiser's voluntary compliance with Agent Ristroph's investigation should not be thwarted by imposing such a heightened duty.

Refusing to impose a duty to inquire would allow for consensual searches of items found within a residence except for those that obviously belong to another person, which is "logically grounded in the concept of privacy underlying [the Fourth] Amendment." *Georgia v. Randolph*, 547 U.S. 103, 137 (2006) (Roberts, C.J., dissenting); see *Matlock*, 415 U.S. at 171 n.7. By placing items in shared living spaces, individuals necessarily assume a reduced expectation of privacy. *Randolph*, 547 U.S. at 137 (Roberts, C.J., dissenting). It would be unreasonable to require officers who have obtained consent to search common areas to determine ownership of each item before proceeding. *Id.* Fourth Amendment protections are diminished when individuals voluntarily

expose belongings to co-tenants in shared spaces, thereby conferring authority to consent to searches of items located in those areas. *Id.*

ii. Agent Ristroph's factual beliefs that consent extended to the search of the cardboard box were objectively reasonable.

The Court has established that a lawful search permits officers to search all areas where the target of the search may be found, even if doing so requires “separate acts of entry or opening.” *United States v. Ross*, 456 U.S. 798, 820-21 (1982). However, the Court has also warned that consent to search a home “is not necessarily consent to search a closed object within the home.” *United State v. Karo*, 468 U.S. 705, 725-26 (1984). To determine the scope of a warrantless consent search, courts have applied an objective standard: “what would the typical reasonable person have understood by the exchange between the officer and the [consenter]?” *Jimeno*, 500 U.S. 251. Consequently, courts examine more than the wording of the consent; they consider the broader context, including the officers’ statements and conduct at the time. *See United States v. Turner*, 169 F.3d 84, 87 (1st Cir. 1999).

First, looking at the language of the consent, Reiser was informed that the search was part of an investigation into her recently arrested boyfriend prior to consenting. (R. 13). Her consent to search the small 750 square feet cabin could reasonably be construed to include the search of objects and containers that may contain evidence relevant to the investigation. *See Marshall*, 348 F.3d at 288 (“[R]easonable observer would conclude that the search could extend beyond the mere items stolen so long as they were reasonably calculated to produce evidence linking [defendant] to the recent burglary.”); *Melgar*, 227 F.3d at 1041-42 (concluding that scope of renter’s consent to search a hotel room encompassed a search of an unmarked, closed purse); (R. 17). In stating that Petitioner uses the loft as his storage and office space, Reiser did effectively limit the scope of her consent to exclude a search of this area. (R. 15). However, her redirection of Agent Ristroph

when he first asked about the “nook where the stairs were” did not put any express limitation on the scope of her consent as to the stairs. (R. 15). This is made evident when considering her response to Agent Ristroph’s actions at the time of the search.

Looking past the language of the consent, Reiser recollected in her declaration that “Agent Ristroph walked straight over to the stairs,” yet she did not vocalize any opposition when he did so. (R. 16). If Reiser’s redirection towards the bedroom was intended to exclude the stairs from the search, she had this opportunity to clarify the scope of her consent. But Reiser didn’t oppose Agent Ristroph’s movement towards the stairs. (R. 16). In fact, Reiser did not even object to the search of the cardboard box. (R. 16). Rather, she provided Agent Ristroph with additional information to aid his investigation after the box was opened, indicating that it was Petitioner’s box. (R. 16). The absence of any challenge to Agent Ristroph’s search “undercuts a defendant’s later challenge to a third party’s authority to consent.” *Ross*, 456 U.S. at 518-519; *see also United States v. Martel-Martines*, 988 F.2d 855, 858 (8th Cir. 1993) (finding that officer’s search of a truck compartment when given consent to search the truck was objectively reasonable in the absence of objection). Both the language and context in which Reiser consented provided Agent Ristroph with a reasonable basis to conclude that the search of the cardboard box was included in her consent to search the home.

iii. *There was nothing to indicate that the cardboard box “obviously” belonged to someone other than Reiser.*

To challenge the *presumptive* reasonableness of a consent search, the challenging party needs “credible evidence demonstrating that [the items searched] were obviously and exclusively his.” *Snype*, 441 F.3d 119, 136 (2d Cir. 2006). Courts consider several factors to assess any ambiguity concerning the consenter’s control over a container, including the following: (1) appearance of container and other items around it; (2) type of container; (3) any manifestation of

an expectation of privacy in the container; and (4) whether the consenting party disclaimed ownership of the container. *See Salinas-Cano*, 959 F.2d at 861, 862; *see also Basinski*, 226 F.3d at 834-35. When courts have suppressed evidence, they “have found there was some fact that made it unreasonable for the officer to believe that the third-party had authority over the containers.” *United States v. Ruiz*, 428 F.3d 877, 882 (9th Cir. 2005); *see Basinski*, 226 F.3d at 835.

Agent Ristroph had no reason to know that the unmarked cardboard box on the loft stairs did not belong to Reiser. First, the old cardboard box contained no markings, no description, and no identifying information on the outside. (R. 13). *Contrast Melgar*, 227 F.3d at 1041-42 (finding that a purse with no exterior markings was encompassed in the scope of consent to search a hotel room) *with United States v. Rodriguez*, 888 F.2d 519, 523-35 (7th Cir. 1989) (remanding to determine whether wife had apparent authority to consent to search of briefcase marked with defendant’s name). Additionally, the top flaps of the cardboard box were closed, denying Agent Ristroph any further identifying information from the contents of the box. (R. 12).

Next, looking towards the type of container and Petitioner’s expectation of privacy, the cardboard box was placed on the second stair from the bottom, unsealed. (R. 17). The stairs off to one side of the living room, an indisputable common area of the house, are also visible from the doorway of the home. (R. 13, 17). The location of the box in a common area and placement towards the bottom of the staircase, several steps away from the exclusive loft-space, demonstrate a lessened expectation of privacy. *See Marshall*, 348 F.3d at 289 (finding that defendant had a lessened expectation of privacy in videotapes because they were not kept in a separate area where his girlfriend lacked access to them). The nature of the container as a cardboard box also indicates a lessened expectation of privacy, as it is not the type of container that “historically command[s] a high degree of privacy.” *Salinas-Cano*, 959 F.2d at 864 (listing valises, suitcases, footlockers, etc.

as objects that enjoy high privacy expectations).

Further, as Reiser did not disclaim ownership over the box, it was objectively reasonable to consider it within the scope of her consent as it was stored on the stairs where she had regular access to it. *See Marshall*, 348 F.3d at 288-289. Agent Ristroph had no reason to believe that Reiser did not own the box prior to opening it, as Reiser resided in the home and had only distinguished the loft as an area she didn't use. (R. 13).

III. Petitioner Mischaracterizes Rules 806 and 608(b) of the Federal Rules of Evidence: Extrinsic Evidence of Specific Acts Remains Inadmissible to Impeach Copperhead's Character for Truthfulness

The District Court permitted Kolber to introduce a hearsay statement made by Copperhead under the excited utterance exception of the Federal Rules of Evidence (FRE). *See Fed. R. Evid. 803(2)*; (R. 43-44). The court admitted the statement after finding that Copperhead was "under the stress of excitement" when she made it and was unavailable to testify because she passed away prior to trial. *See Fed. R. Evid. 803(2)*; (R. 44, 46). Copperhead's death precluded Petitioner from impeaching her through cross-examination, prompting Petitioner to impeach her through the introduction of extrinsic evidence. (R. 47-48). This Court should affirm the Fourteenth Circuit's holding that the trial court properly applied Rule 608(b) in excluding extrinsic evidence of specific instances of conduct offered under Rule 806 to impeach Copperhead's character for truthfulness. *See Fed. R. Evid. 608(b)*; (R. 51-52).

The Fourteenth Circuit's decision is afforded plenary review because it was an evidentiary ruling based on an interpretation of Rules 608(b) and 806 of the FRE. *See United States v. Saada*, 212 F.3d 219, 220 (3d Cir. 2000). Rules 608(b) and 806 address overlapping issues and give rise to a doctrinal tension that this Court has not yet addressed. The Third, Fourteenth, and D.C. Circuits all held that Rule 806 does not circumvent Rule 608(b), while the Second Circuit indicated through dicta that opponents of hearsay may introduce extrinsic evidence to impeach an absent

declarant. *See Saada*, 212 F.3d at 222; *accord United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997); *contra United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988); (R. 51-52). An analysis of the plain language of Rules 608(b) and 806, the intentions of the Advisory Committee, the policy upholding the FRE, and the alternative impeachment avenues available, demonstrate that Rule 806 does not modify Rule 608(b)'s ban on the use of extrinsic evidence.

A. The Court Should Find That the Text and Structure of the FRE Indicate That Rule 806 Incorporates, Rather Than Supersedes, Rule 608(b)'s Extrinsic Evidence Limitation.

The plain language of Rules 608(b) and 806 is unambiguous and should control the Court's interpretation of the issue in dispute. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Rule 608(b) allows impeachment of a witness's character for truthfulness through inquiry on cross-examination but prohibits the use of extrinsic evidence of specific instances of conduct offered for the same purpose. *See Fed. R. Evid. 608(b)*. Rule 806 permits impeachment of hearsay declarants using evidence that would be admissible "if the declarant had testified as a witness." Fed. R. Evid. 806. Simply put, hearsay declarants are subject to the same impeachment rules as testifying witnesses. Consequently, Rule 806 demands that impeachment of hearsay declarants like Copperhead be governed by Rule 608(b), which bars the use of specific instances of conduct to impeach character for truthfulness. *See Fed. R. Evid. 608(b)*; Fed. R. Evid. 806.

The outcome supported by Petitioner contradicts the plain meaning of the rules and would enable Rule 806 to swallow Rule 608(b) by creating a backdoor for parties to introduce extrinsic evidence to impeach a witness's character for truthfulness. *See United States v. Andrade*, No. 20-CR-00249, 2025 WL 670456, at *5 (N.D. Cal. Mar. 3, 2025). Rule 806 was designed to offset the absence of cross-examination for hearsay declarants, "but does not obliterate the rules of evidence that govern how impeachment is to proceed. It says the opposite – that counsel may use any evidence which would be admissible . . . if declarant had testified as a witness." *United States v.*

Finley, 934 F.2d 837, 839 (7th Cir. 1991). Petitioner’s interpretation of Rule 806 would create an avenue for impeachment entirely unintended by the drafters of the FRE.

This avenue does not exist because Rule 608(b) presents barriers for attorneys impeaching a live witness’s truthfulness. Attorneys may be permitted to inquire about specific acts of misconduct on cross-examination, but they are required to “take the answer of the witness.” *United States v. Abel*, 469 U.S. 45, 52 (1984) (citing *McCormick on Evidence*, *supra*, § 40, at 89; Hale, *Bias as Affecting Credibility*, 1 *Hastings L.J.* 1 (1949)). Had Copperhead testified, opposing counsel could have inquired into her academic violation and falsified job application on cross-examination. (R. 57). However, opposing counsel would be barred from proving these acts using extrinsic evidence. (R. 57). Petitioner’s reading of Rule 806 would contradict the plain meaning of the FRE by allowing attorneys to circumvent Rule 608(b)’s protections and prove the allegations against Copperhead simply because she is absent. (R. 57-58).

B. The Advisory Committee Notes and Purposes Behind Rules 806 and 608(b) Support Exclusion of Evidence of Copperhead’s Specific Instances of Conduct.

The Court has recognized the Advisory Committee Notes as a respected source of guidance for interpreting the FRE. *See Tome v. United States*, 513 U.S. 150, 160 (1995) (“We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules.”). The Advisory Committee Notes’ silence on the use of extrinsic evidence to prove specific instances of conduct indicates that Rule 806 was not intended to override Rule 608(b). The silence is especially compelling in this instance because the Advisory Committee Notes for Rule 806 discuss and resolve the conflict Rule 806 creates with another rule – Rule 613. *See* (R. 58) (finding that Rule 806’s treatment of Rule 613 “underscores that the omission was deliberate”).

The Advisory Committee Note for Rule 806 states that some aspects of impeaching a hearsay declarant “require consideration,” and these “special aspects center upon impeachment by

inconsistent statement.” Fed. R. Evid. 806 advisory committee’s note (1975). Rule 613 governs inconsistent statements and prohibits admission of extrinsic evidence “until after the witness is given an opportunity to explain or deny the statement.” Fed. R. Evid. 613. Hearsay declarants plainly cannot explain or deny a statement since they are absent. The Advisory Committee cured this issue by stating, “Rule (806) dispenses with the requirement in all hearsay situations.” Fed. R. Evid. 806 advisory committee’s note to 1972 proposed rules. This treatment of Rule 613 demonstrates that intentional exceptions will be made explicit. The decision to not create a parallel accommodation for the absence of a hearsay declarant in the context of Rule 608(b) “indicates that the latter’s ban on extrinsic evidence applies with equal force in the context of hearsay declarants.” *Saada*, 212 F.3d at 222. Accordingly, the Advisory Committee intended for Rule 806 to incorporate Rule 608(b)’s prohibition on extrinsic evidence.

C. Allowing Extrinsic Evidence of Specific Instances of Conduct Against Copperhead Would Undermine Trial Fairness and Judicial Economy, the Policy Foundations of the FRE.

Prohibiting the use of extrinsic evidence to impeach witnesses’ character for truthfulness is essential for maintaining structural alignment with Rule 102 – the purpose of the FRE. Rule 102 provides “[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.” Fed. R. Evid. 102. These tenets are reflected by the Advisory Committee in their note for Rule 608, stating that the purpose of the rule is “to sharpen relevancy, to reduce surprise, waste of time, and confusion.” Fed. R. Evid. 608 advisory committee’s note (1975). It follows that allowing Rule 806 to override Rule 608(b) is fundamentally inconsistent with the purpose of the FRE, as stated by Rule 102.

Allowing unrestricted impeachment of hearsay declarants does not eliminate unfair advantages. Instead of the proponent gaining a slight advantage from the opponent’s inability to

impeach the declarant using specific instances of conduct, the opponent can redirect the focus of the entire trial by impeaching the declarant with impunity. The Third Circuit found that barring the admission of extrinsic evidence was necessary “to prevent unfair surprise arising from false allegations of improper conduct.” *Saada*, 212 F.3d at 222. Petitioner advocates for an outcome that would enable hearsay opponents to go on fishing expeditions and drag absent declarants’ reputation through the dirt without providing the declarant any opportunity to defend themselves.

The problems arising from Petitioner’s preferred outcome are apparent in the present case. The two pieces of evidence Petitioner seeks to admit would be presented out of context, in a biased manner to fit his narrative. Copperhead could have several plausible explanations for using artificial intelligence on a paper and stating that she graduated from college on a job application, including necessity or misunderstanding; however, Petitioner would weaponize these isolated instances to discredit Copperhead’s character and portray her as dishonest. A system that allows attorneys to berate the character of defenseless individuals cannot claim to be a system which revolves around fairness and justice. Rather than strengthening protections for such witnesses, Petitioner seeks to undermine the fairness of judicial proceedings by creating an anomalous impeachment method against absent declarants that would violate the purpose of the FRE.

Eliminating the protections offered by Rule 608(b) would injure vulnerable witnesses, but more importantly for the judicial system, it would cause substantial delay and expense by encouraging trials within trials as parties fight over the character of their declarants. *See Carter v. Hewitt*, 617 F.2d 961, 970 (3d Cir. 1980) (“[I]f refutation of the witness’s denial were permitted through extrinsic evidence, these collateral matters would assume a prominence at trial out of proportion to their significance.”); *accord United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992); *Foster v. United States*, 282 F.2d 222, 223 (10th Cir. 1960). The rationale upholding Rule

608(b) is that “the witness is not on trial, his character is not in issue and extrinsic testimony in respect thereto tends to confuse the issues.” *Foster*, 282 F.2d at 222, 223.

If Petitioner can bring specific instances of conduct to impeach Copperhead, then the Government will be motivated to do the same to rehabilitate Copperhead’s character. *See Attorney-General v. Hitchcock*, 1 Exch. 91, 103 (1847) (holding that counsel must take answer of witness, otherwise both parties would be compelled to present evidence on witness’s character which would result in “endless collateral issues.”). The jury would forget the issues as the focus of the trial turns to whether Copperhead was an honest woman. Both parties would be incentivized to locate peripheral witnesses and spend countless hours searching for specific-act evidence, increasing trial length and cost. *See R. v. Watson*, 2 Stark. 116, 149-152 (1817). The trial must focus on whether Petitioner attempted to kidnap a federal officer, not whether Copperhead was an honest person.

D. Maintaining Rule 608(b)’s Protections Does Not Leave Petitioner Without Impeachment Tools.

Misinterpreting Rule 608(b) to remove the bar against extrinsic evidence for hearsay declarants not only has substantial consequences on individual rights and judicial efficacy, it is also unnecessary. Rule 608(b) does not bar impeachment against hearsay declarants like Copperhead. There are multiple alternative avenues for impeaching hearsay declarants: opinion and reputation evidence, evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613. *See Saada*, 212 F.3d at 222.

Copperhead’s character could have been impeached using opinion evidence from Dr. Joshi – a member of the Board of Academic Integrity at Court Street College – or from Svetlana Ressler – the Boerum Village Human Resources officer who reviewed Copperhead’s job application. (R. 48). The two individuals could not testify about specific instances of conduct, but they could provide their opinion on whether Copperhead was a truthful person. Copperhead could also be

impeached through Rule 613. Copperhead’s statement that “It was all Atticus’ idea – NOT MINE!” is inconsistent with her statement – overheard by Hoag – that the “parking lot was a good place to grab Jodie, rather than the airport.” (R. 8, 43). Hoag’s testimony is already in the record and could be used to show that Copperhead was not telling the truth in parts of the statement she made to Kolber. (R. 8). The availability of numerous alternative means for impeaching Copperhead shows that the costs of preserving Rule 608(b)’s protections are low, while the costs of removing them would be felt in courtrooms across the United States.

E. Petitioner’s Reliance on Second Circuit Dicta is Misplaced.

Persuaded by the plain language of the FRE and prior policy analysis, the Fourteenth Circuit aligned with the Third and D.C. Circuits in holding that Rule 806 does not modify Rule 608(b). *See Saada*, 212 F.3d at 222; *accord White*, 116 F.3d at 920. Fourteenth Circuit Judge Kim dissented and asserted that the Second Circuit has held that Rule 806 overrides Rule 608(b)’s bar. (R. 61). Judge Kim’s statement is misleading, however, considering the referenced “holding” was made in footnote eight of the court’s opinion. *Friedman*, 854 F.2d at 570 n.8.

Footnote eight in *Friedman* does not warrant Judge Kim’s conclusion that the Second Circuit intended to create a binding rule on this issue. While it is possible for a footnote to be a part of a court holding, the footnote must be necessary to the court’s disposition of the case for it to be anything more than dicta. *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, (1935) (“Expressions of court which are beyond point involved in opinion do not come within rule of stare decisis”). The Second Circuit in footnote eight specifically states that the government does not make the argument that extrinsic evidence is inadmissible because of Rule 608(b), meaning it was not a part of the court’s disposition. *See Friedman*, 854 F.2d at 570 n.8. Consequently, Judge Kim and Petitioner’s reliance on *Friedman* is misplaced.

Petitioner asks the Court to override Congress, the FRE, three circuit courts, and over 50 years of practice by dismantling the foundation of Rule 608(b), because Petitioner was limited in his use of one tool to impeach a hearsay declarant in select circumstances. The Third Circuit, the D.C. Circuit, and the Fourteenth Circuit were “unpersuaded by this rationale” and refused similar admission of extrinsic evidence. *See Saada*, 212 F.3d at 222; *White*, 116 F.3d at 903; (R. 57). The Court should settle this question by joining the Third Circuit, the D.C. Circuit, and the Fourteenth Circuit in finding that hearsay declarants’ character for truthfulness cannot be impeached using extrinsic evidence of specific instances of conduct.

F. Even If Rule 806 Could Be Read to Permit Extrinsic Evidence in Limited Circumstances, the Court Should Find That Rejection of the Extrinsic Evidence Was Harmless Error in This Instance.

Although the Court could depart from the FRE’s plain language, it should nevertheless conclude that the District Court’s exclusion of extrinsic evidence was harmless error. There is a high standard for reversal of an evidentiary ruling, occurring “only if the complaining party’s substantial rights were affected.” *Proctor v. Fluor Enters., Inc.*, 494 F.3d 1337, 1352 (11th Cir. 2007) (citing *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1316 (11th Cir. 2005)). Petitioner bears the burden of proving that his substantial rights were affected and that the error “probably had a substantial influence on the jury’s verdict.” *See Proctor*, 494 F.3d at 1352 (quoting *United States v. Stephens*, 365 F.3d 967, 977 (11th Cir. 2004)).

Petitioner failed to meet his burden of proving that the exclusion of extrinsic evidence had a substantial impact on the jury’s verdict. Copperhead’s character was already impeached by Reiser’s declaration and the testimony provided by Hoag. (R. 8, 16). Reiser’s declaration revealed Copperhead’s involvement in the crime by stating that the suspicious tools found in Petitioner’s box appeared to belong to both Petitioner and Copperhead. (R. 16). Hoag’s testimony, discussing his observance of Copperhead and Petitioner planning to kidnap Wildrose, clearly implicated

Copperhead in the attempted kidnapping. (R. 8). As a result, Petitioner established for the jury that Copperhead's character for truthfulness was highly suspect.

The probative value of the extrinsic evidence was decreased since Petitioner already impeached Copperhead's character through statements from Hoag and Reiser. (R. 8, 16). Given the considerable risk that introducing evidence of Copperhead's alleged use of artificial intelligence and a rejected job application would confuse the issues, mislead the jury, and cause undue delay, the extrinsic evidence should also be excluded under Rule 403. *See* Fed. R. Evid. 403. Even if the Court were to find that Rule 403 would not exclude the evidence, its probative value is not high enough to find that its exclusion "had a substantial influence on the jury's verdict." *Proctor*, 494 F.3d at 1352. The Court should hold that Rule 806 does not override Rule 608(b); alternatively, it should find that the exclusion of extrinsic evidence was harmless error in this instance and affirm the Fourteenth Circuit and the district court's decisions.

CONCLUSION

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

Respectfully submitted,

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