No. 25-7373

Team 24P – Original

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 PETITIONER

Team 24P
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the Fourth Amendment is violated, under *Payton v. New York*, when law enforcement officers do not cross the threshold of the home but command a suspect inside the home to step outside and then arrest the suspect outside the home without a warrant.

II. Whether the Fourth Amendment is violated when law enforcement officers conduct a warrantless search of a closed container located in a shared residence after obtaining a co-occupant's consent to search the residence, but do not specifically inquire into ownership of the container.

III. Whether Rule 806 of the Federal Rules of Evidence permits extrinsic evidence of specific instances of conduct to impeach an unavailable hearsay declarant's character for truthfulness.

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CONSTITUTIONAL PROVISIONS

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

Jodie Wildrose, the Under Secretary for Rural Development with the Department of Tourism, was scheduled to visit Boerum Village from April 8 to April 12, 2024, for a program kickoff event. R. 4. In the weeks prior to Wildrose's visit, the Boerum Village Police Department received two reports from residents regarding behavior they found unusual. R. 6-8. On April 2, 2024, the Federal Bureau of Investigation conducted follow-up interviews regarding these reports. R. 6, 7.

In the first interview, a manager at a local superstore stated that on March 30, 2024, a male and a female she did not recognize purchased zip ties, ski masks, a knife, trash bags, and bear spray. R. 6. In the second interview, a barista reported that on both March 28 and 29, 2024, two individuals he recognized from social media as Atticus Hemlock and Iris Copperhead, spent approximately four hours each day at a table reviewing papers and posters, including what looked like maps and a timeline. R. 7. The barista described an animated conversation between

the two in which they repeatedly referred to someone named Jodie and discussed "hiding Jodie away." R. 8.

That same afternoon, at around 4:08 pm, Special Agent Hugo Herman and Special Agent Ava Simonson arrived at Atticus Hemlock's home. R. 11. Agent Simonson ascended the stairs, knocked loudly on the door frame several times, and then she and her colleague positioned themselves at the foot of the stairs, outside the home's only entrance. R. 17, 21, 25. Mr. Hemlock approached the screen door but did not open it. R. 11. Agent Simonson asked Mr. Hemlock to step outside, but Mr. Hemlock immediately expressed unease and repeatedly refused. R. 11.

During the exchange, Agent Simonson noticed bottles of chloroform on the counter behind Mr. Hemlock and asked about them. R. 11. Mr. Hemlock declined to discuss the bottles; however, the agents persisted in asking Mr. Hemlock to step outside, increasingly raising their voices. R. 11. Mr. Hemlock explicitly told the officers to "[l]eave me alone!" R. 11. Mr. Hemlock then asked the agents what they were there for and if it had to do with Jodie, as they had not yet explained their presence. R. 11. The agents responded that they could come back at another time if that was better, and Mr. Hemlock indicated that it would not be. R. 12.

The agents then briefly returned to their car and admitted that Mr. Hemlock "clearly" did not want to speak to them and that he looked "pissed." R. 12. Nonetheless, Agent Herman stated, "Let's go back. We'll get him to come outside and then we'll arrest him." R. 12. Agent Herman also called for backup at this time. R. 12, 23. The agents then got out of the car, and both started yelling at Mr. Hemlock to come outside, adding the word "now!" to their demands. R. 12. Both officers had their hands visibly holstered on their guns and possessed additional visible weapons, such as a taser and a baton. R. 25. Agent Herman acknowledged that two officers touching their holstered guns could be intimidating to a layperson. R. 26.

Mr. Hemlock complied and exited the home. R. 12. At the bottom of the stairs, he was handcuffed and arrested for attempting to kidnap a federal official. R. 12, 22. During the arrest, Agent Herman found an open notebook in Mr. Hemlock's pants pocket, which Agent Herman described as a diary entry containing what appeared to be plans to kidnap Jodie. R. 12, 23. Before Mr. Hemlock was taken to the station, Agent Kiernan Ristroph arrived for backup and was instructed to wait for Mr. Hemlock's girlfriend, Fiona Reiser. R. 12. Agent Herman and Agent Simonson then took Mr. Hemlock to the station, where he was booked, and the notebook was vouchered R. 24.

At around 4:50 pm, Reiser arrived home, and shortly thereafter, Agent Ristroph knocked on the door. R. 13. When Reiser answered, Agent Ristroph informed Reiser that Mr. Hemlock had been arrested and that he was there to conduct an investigation. R. 13. Agent Ristroph asked if he could look around, and Reiser agreed. R. 13. Agent Ristroph began his search on the first floor and, upon noticing a set of stairs, asked Reiser if she slept "up there." R. 15. Reiser stated that she did not, that they both slept in the first-floor bedroom, and that the stairs led only to a loft Mr. Hemlock used as storage and office space. R. 15. When asked what Mr. Hemlock kept up there, Reiser stated that she did not know, as she rarely went up there. R. 15.

Despite Reiser's statement, Agent Ristroph picked up a closed cardboard box with no identifying markings that was sitting on the stairs and immediately opened it. R. 13. The box contained a rope, black ski masks, gloves, zip ties, a knife, a roll of tape, and two bottles of chloroform. R. 13. Reiser informed Agent Ristroph that she had never seen the items, but they appeared to be items Mr. Hemlock and Copperhead would use for outdoor excursions. R. 16. In a later statement, Reiser indicated that she believed Mr. Hemlock had left the box there, intending

to later bring it upstairs. R. 16. Agent Ristroph photographed the residence, the box, and its contents before removing the box from the home. R. 13-14.

That same day, around 4 pm, a teacher was walking in a nearby park when a woman emerged from the woods onto the path in front of him. R. 41-42. The teacher stated that the woman 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!" R. 43. The next morning, the teacher called the FBI tipline after noticing the woman's mugshot in a local publication and learning her name was Iris Copperhead. R. 44-45. He stated that he did not know anything about her personal life or what her neighbors, friends, or teachers thought of her, although he did note that on April 10, 2024, he discovered, in the same local publication, that she had passed away in jail. R. 46.

On July 29, 2024, the District Court held a hearing on two motions to suppress filed by Mr. Hemlock, both of which were denied. R. 19-39. At trial, Mr. Hemlock attempted to call Dr. Andrea Joshi to the stand, a member of the Court Street College's Board of Integrity, to authenticate a report detailing Iris Copperhead's violation of course policies for the use of artificial intelligence on an assignment, to impeach her credibility. R. 9, 47. Mr. Hemlock also sought to introduce evidence of Iris Copperhead's falsified job application to the mayor's office, which the Chief Human Resources Officer was to testify about. R. 10, 48. The United States objected to the admissibility of the extrinsic evidence, and the objection was sustained. R. 46, 50.

Post-conviction, Mr. Hemlock appealed the District Court's decision to the United States Court of Appeals for the Fourteenth Circuit. R. 51. The Fourteenth Circuit affirmed the District Court's decision on all three issues. R. 58. Mr. Hemlock then appealed the decision to this Court and was granted certiorari on all three issues. R. 62.

SUMMARY OF THE ARGUMENT

The Government's arrest of Mr. Hemlock was an unreasonable seizure, as he was coerced out of his home. The Fourth Amendment protects against unreasonable searches and seizures, and this Court has a duty to uphold this constitutional principle. Throughout history, this Court has recognized that the protection afforded to homes is greater than the protection afforded to other locations. This notion applies to the rules regarding lawful arrests. In *Payton v. New York*, this Court held the Fourth Amendment requires a warrant to arrest a person in his home, absent exigent circumstances. *Payton v. New York*, 445 U.S. 573, 590 (1980). However, circuit courts have failed to uniformly interpret this holding. A narrow interpretation, requiring physical entry, has enabled law enforcement to employ tactical measures to coerce suspects out of their homes for arrest, rather than properly obtaining a warrant. Instead, the proper interpretation, in line with the precedent of this Court and the spirit of the Fourth Amendment, holds that when law enforcement coerces a suspect to step outside of their home to arrest them without a warrant, the Fourth Amendment is violated.

The Government's search of Mr. Hemlock's cardboard box was an unreasonable search. When searching a shared residence, law enforcement can rely on the apparent authority a third party may possess over the premises or effects. The apparent authority doctrine permits an officer to conduct a search of a location or item if a reasonable officer would believe the person who consented to the search had the authority to do so. However, the burden is on the government to prove that the belief was reasonable. This doctrine has become difficult to apply in situations involving closed container searches. Here, a reasonable officer would have found the circumstances surrounding mutual control ambiguous. Reiser limited her consent to the downstairs common areas and bedroom, and the stairs to the loft were not included. She even emphasized that Mr. Hemlock used the loft for storage, which would lead a reasonable officer to

believe the closed cardboard box may be his. The proper application of the apparent authority doctrine imposes an affirmative duty on law enforcement to inquire into the ownership of a container when the circumstances are ambiguous. This rule is in line with this Court's prior rulings regarding Fourth Amendment protections in the home, is responsive to societal norms, and prevents law enforcement from abusing consent to avoid obtaining a warrant.

Extrinsic evidence of specific instances of Iris Copperhead's conduct was improperly excluded. Rule 806's counterfactual language anticipates and therefore permits necessary procedural adaptations to preserve meaningful impeachment. Rule 608(b)'s impeachment mechanism presupposes a live witness, and when the hearsay declarant is unavailable, extrinsic evidence is required to give Rule 806 practical effect and to subject the hearsay declarant to impeachment as though they had testified. This interpretation is consistent with the purposes of Rule 806, 608(b), and the Federal Rules of Evidence more broadly, and avoids creating unnecessary asymmetry between parties. Finally, this approach does not invite unlimited evidentiary expansion, as procedural adaptations are only permitted in narrow circumstances and remain subject to Rule 403's independent safeguards.

ARGUMENT

I. Under *Payton v. New York*, the Fourth Amendment is violated when law enforcement officers, who remain outside, command a suspect inside the home to step outside and arrest the suspect outside the home without a warrant.

The Fourteenth Circuit erred by applying an overly narrow interpretation of *Payton v. New York*, thereby depriving Mr. Hemlock of his liberties afforded by the Fourth Amendment. 445 U.S. at 590. In *Payton*, this Court held the Fourth Amendment prohibits law enforcement officials from making a warrantless entry into a suspect's home without consent to effectuate an arrest, absent exigent circumstances. *Id.* A constructive entry occurs when law enforcement officers use coercive tactics to force a suspect out of their home to effectuate a warrantless arrest.

By declining to recognize the constructive entry doctrine as a legitimate justification for an expanded view of *Payton's* protections, the Fourteenth Circuit contravened the work of this Court's longstanding precedents and the spirit of the Fourth Amendment. This Court has continually emphasized the home as the pinnacle of privacy, deserving of the most stringent legal protections. Recognizing the constructive entry doctrine prevents law enforcement from using coercive tactics to circumvent the warrant requirement and undermine the purpose of *Payton*. This Court should reverse the Fourteenth Circuit and hold that the Fourth Amendment is violated when law enforcement officers command a suspect outside of their home to arrest them—without a warrant—in order to preserve the sanctity of the home enshrined in the Fourth Amendment and this Court's jurisprudence.

A. This Court's Fourth Amendment jurisprudence regarding the sanctity of the home and a reasonable expectation of privacy supports the constructive entry doctrine as a protection against unreasonable search and seizures under *Payton v. New York*.

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. Only one specific protected place is mentioned in the text of the Fourth Amendment, the home. Decades of this Court's decisions reiterate the utmost importance of the right of the people to be secure in their houses. Justice Scalia clearly conveys this sentiment in *Florida v. Jardines*, declaring, "[W]hen it comes to the Fourth Amendment, the home is first among equals." 569 U.S. 1, 6 (2013). Again, this Court in *Payton* emphasized the "very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." 445 U.S. at 589-590 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

This Court, in accordance with the Constitution, has placed the home above other places such as cars, barns, and offices. *See Carroll v. United States*, 267 U.S. 132, 153 (1925)

(automobile exception); *United States v. Dunn*, 480 U.S. 294, 305 (1987) (a barn is not protected as the home for Fourth Amendment purposes); *O'Connor v. Ortega*, 480 U.S. 709, 715-17 (1987) (Fourth Amendment protections for an office). Mr. Hemlock was denied his right to be free from unreasonable governmental intrusion in his home when, after he repeatedly told the officers he did not wish to speak to them or come out of his home, they continually pressured him and demanded that he come out. R. 11, 12. Because of the officer's strategic coercion, Mr. Hemlock was unable to effectively "retreat into his own home." *Silverman*, 365 U.S. at 511. There have been very few exceptions to the standard in cases from this Court supporting the heightened protection of the home. One case that stands out amid the litany of cases protecting the home and its curtilage is *Santana v. United States*. 427 U.S. 38, 42 (1976). In *Santana*, this Court held that a person standing in the doorway of her home was legally in a public place. *Id.* However, this case predates *Payton* and would likely not withstand scrutiny in the modern court.

As this Court has recognized, physical intrusion is not always the appropriate place to draw the line for a Fourth Amendment violation. It is true that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed…." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). But this Court's decision in *Katz v. United States* refused to lock the Fourth Amendment into instances of actual physical trespass. *See* 389 U.S. 347, 353 (1967). *Katz* established the "reasonable expectation of privacy" test to determine when the government has intruded on a person's privacy without a physical intrusion. *Id*. at 352. Justice Harlan, in his concurrence, set out a widely adopted two-part test: (1) whether the person exhibited a subjective expectation of privacy (subjective test) and (2) whether the expectation of privacy is one that society is prepared to accept as reasonable (objective test). *Id*. at 361. Recognizing that *Payton* not only condemns physical intrusions into the home as

unconstitutional, but also coercive efforts that effectively intrude into the privacy of the home, is aligned with *Katz's* broadened definition of what constitutes a search under the Fourth Amendment. *Id.* at 352. A person maintains a reasonable expectation of privacy in their home, including the right to remain in their home and exclude others. Here, Mr. Hemlock was denied this reasonable expectation of privacy when he was coerced out by the officers who would not listen to his denials.

B. When government actors coerce a suspect out of the home to effectuate a warrantless arrest, they violate *Payton v. New York* under the constructive entry doctrine.

This Court should put an end to law enforcement's effective workaround to the warrant requirement because it is unconstitutional and at odds with this Court's precedents. *Payton* establishes that an in-home arrest is proper with a valid warrant or under exigent circumstances. 445 U.S. at 590. Adopting the constructive entry doctrine maintains the power of the Fourth Amendment warrant requirement that the Framers intended. Law enforcement officials are capitalizing on a supposed gap in the interpretation of *Payton*. The officers in this case even admitted their intent to convince Mr. Hemlock to exit his house, after his multiple refusals, to arrest him. R. 12. The officers provided no reason for failing to obtain a warrant prior to arresting Mr. Hemlock. The government also conceded there was no exigency to constitute an exception to the warrant requirement. R. 59. Because of massive technological advances, this Court has emphasized that applying for a warrant has never been more accessible or efficient. *See Riley v. California*, 573 U.S. 373, 401 (2014). Law enforcement officers should follow proper protocols, and this Court should adopt a rule that encourages this behavior.

In *Payton*, this Court noted its desire to refrain from disregarding the "respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." 445 U.S. at 601. Allowing police to continue this practice not only disregards the sanctity

afforded to homes but also systematically destroys it. The government provides no justification for allowing law enforcement to continue encroaching on the people's right to privacy in their homes. This Court should uphold the constitutional preference for a warrant by adopting the constructive entry doctrine and putting law enforcement on notice that coercing a suspect out of their home to arrest them is unacceptable.

1. *The majority of circuits that have addressed this issue adhere to the constructive entry doctrine, which faithfully applies the Fourth Amendment.*

The majority of circuit courts that have addressed this issue have adopted the constructive entry doctrine, effectively protecting residents in their jurisdictions from unconstitutional intrusions by limiting law enforcement's deceptive tactics to evade the warrant requirement. The Sixth Circuit first affirmed the constructive entry doctrine in *United States v. Morgan*, holding that when law enforcement officials use coercive conduct to compel a suspect to exit their home, such as surrounding a home and demanding the suspect exit, *Payton* protections are triggered. 743 F.2d 1158, 1166 (6th Cir. 1984). The Sixth Circuit emphasized that when officers engage in coercive actions in this way, they effectively accomplish the same thing as an actual entry. *Id*. Almost twenty years later, the Sixth Circuit reaffirmed its adoption of constructive entry in *United States v. Saari*. 272 F.3d 804, 806-08, 810-11 (6th Cir. 2001). The court reasoned that when officers are positioned at the only exit of a suspect's residence with weapons drawn and instruct the suspect to come out, that constitutes an in-home arrest, and thus the Fourth Amendment is violated. *Id*. at 812.

Similarly, the Tenth Circuit has issued multiple holdings adopting the constructive entry doctrine. In *United States v. Maez*, the Tenth Circuit determined that the *Payton* protections apply even without physical entry if police use a show of force, such as surrounding a home and demanding the suspect exit. 872 F.2d 1444, 1450, 1453-56 (10th Cir. 1989). The court equated

such levels of coercion, forcing a suspect to leave his home, to physical intrusion. *Id.* In *United States v. Reeves*, the Tenth Circuit reiterated that coercive police conduct, even without physical intrusion, can rise to violate *Payton* if it forces a suspect to leave their home. 524 F.3d 1161, 1167 (10th Cir. 2008). The court in *Reeves* explained it plainly, saying, "[o]pening the door to one's home is not voluntary if ordered to do so under color of authority." *Id.*

A year after the Sixth Circuit affirmed the constructive entry doctrine in *Morgan*, the Ninth Circuit followed suit. In *United States v. Al-Azzawy*, officers surrounded a home with weapons drawn and used a bullhorn to demand the suspect exit. 784 F.2d 890, 893-95 (9th Cir. 1985). The Ninth Circuit held the officers' actions amounted to a coerced exit or constructive entry that violated *Payton*. *Id.* at 893. In *Fisher v. City of San Jose*, the court again recognized the constructive entry doctrine; however, in this case, exigency excused the warrantless arrest. 558 F.3d 1069, 1074-75 (9th Cir. 2009). In *Fisher*, the police conceded that the suspect was technically taken into custody inside his apartment when armed officers surrounded his apartment and tried to convince the suspect to leave his home during the stand-off. *Id.* Therefore, the government had to prove that exigent circumstances required the *Payton* violation. *Id.* at 1074.

The Fifth, Seventh, and Eleventh Circuits have issued rulings in line with a narrow interpretation, holding that an actual physical intrusion into the home is required to amount to an unconstitutional warrantless arrest under *Payton*. *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987); *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991); *Gaddis v. DeMattei*, 30 F.4th 625, 633 (7th Cir. 2022); *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002). These circuits have incorrectly applied *Payton*, allowing law enforcement to systematically circumvent the warrant requirement and coerce a suspect out of his home to

effectuate an arrest. However, despite the reluctance to adopt the constructive entry doctrine to prevent such unconstitutional practices, the Seventh Circuit put a disclaimer in *Gaddis* stating, "Although we note 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." 30 F.4th at 633. This Court should recognize this disclaimer as exposing the unfavorable police practices that are encouraged by an improper, narrow interpretation of *Payton*.

2. *An arrest or seizure may take place upon submission to the assertion of authority if, under the circumstances, "a reasonable person would have believed that he was not free to leave" under* United States v. Mendenhall.

Some Circuits have not explicitly adopted the constructive entry doctrine by name but have recognized a broader interpretation of *Payton* through the tests this Court has established for whether an arrest has occurred. This Court set out the standard and factors to consider clearly in *United States v. Mendenhall*:

> We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be 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.
> 446 U.S. 544, 554 (1980).

The Second, Third, and Eleventh Circuits have all issued rulings acknowledging that *Payton* can be violated without physical intrusion by officers when a reasonable person, still within their home, would have believed they were not free to leave or they had submitted to a show of authority. *Sharrar v. Felsing*, 128 F.3d 810, 819-20 (3d Cir. 1997); *United States v. Allen*, 813 F.3d 76, 86 (2d Cir. 2016); *United States v. Edmonson*, 791 F.2d 1512, 1515-16 (11th Cir. 1986). The Ninth Circuit also issued a ruling in *United States v. Johnson*, recognizing a broader interpretation of *Payton* under this standard for seizure, but then subsequently, in *Al-Azzawy* and

Fisher, adopted the constructive entry doctrine more explicitly. *Johnson*, 626 F.2d 753, 757 (9th Cir.1980); *Al-Azzawy* 784 F.2d at 893; *Fisher*, 558 F.3d at 1074. A broad interpretation of *Payton* is aligned with the standard set in *Mendenhall*. 446 U.S. at 554. This Court should adhere to its prior decisions outlining when a seizure has occurred and find that if law enforcement's coercive actions are such that a reasonable person would not feel free to leave while still inside their home, then they were effectively subjected to an in-home arrest.

In *Sharrar*, the Third Circuit held that a warrantless arrest took place when SWAT surrounded the house and ordered the occupants to exit backwards with their hands raised. 128 F.3d 819-20. The court found there was a clear show of physical force and assertion of authority. *Id*. at 819. The court explained that no reasonable person would have believed they were free to remain in the house, and therefore, the suspects were seized within the home, even though officers did not physically arrest the suspects within the confines of the home. *Id.*

The Second Circuit's discussion in *Allen* accurately captures the dichotomy between courts that do not adopt the constructive entry doctrine by name but still interpret *Payton* broadly and hold that the Fourth Amendment is violated even in the absence of a physical intrusion by law enforcement. 813 F.3d at 86. The Fourteenth Circuit's opinion includes quotes from *Allen* to support its opinion that *Payton* sets a firm line at physical intrusion. R. 55. The Fourteenth Circuit mistakenly mischaracterized the Second Circuit's overall position. While the Second Circuit did express that the constructive entry doctrine was "conceptually muddled" and "beset with practical problems," this viewpoint did not stop the Second Circuit from holding that the suspect's rights were violated without a physical intrusion by officers. *Id.* at 88. The Second Circuit emphasized that to ensure the Fourth Amendment and the rule in *Payton* retain their "vitality," the proper analysis turns on the location of the suspect, not of the officers. *Id.* at 85.

The court found that while the suspect was still within the threshold of his home, the officers' actions and statements were such that a reasonable person would not have felt free to leave under the standard set out in *Mendenhall*. *Id.* at 86. The Second Circuit may have undermined the constructive entry doctrine by name, but its holding bolsters its spirit and clearly supports a broad interpretation of *Payton*.

In *Edmonson*, decided by the Eleventh Circuit, the government claimed the suspect consented to the arrest after he answered the door when the FBI ordered him to do so and stepped back with his hands on his head. 791 F.2d at 1515. However, the court held that a suspect does not consent to arrest within his home when his consent to entry is prompted by a show of official authority. *Id.* While this case does include a physical intrusion during arrest, the Eleventh Circuit's discussion of submission to authority undermining consent is analogous to the constructive entry discussion at hand. *Id.* at 1514. When a person is coerced by a show of official authority, their consent to arrest is invalid, and the warrantless arrest is unconstitutional. *Id.* at 1515. Similarly, when a person is coerced by government actors to step outside their home, that is not grounds for a legal arrest. The Eleventh Circuit stresses the importance of the warrant requirement and the agents' responsibility to be prudent in obtaining warrants before arrests. *Id.*

Before explicitly adopting the constructive entry doctrine in *Al-Azzawy* and *Fisher*, the Ninth Circuit began its discussion of what constitutes a *Payton* violation in *Johnson*. 626 F.2d at 757. In this case, the court first set out the notion discussed in a plethora of subsequent cases, stating, "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." *Id.* The Ninth Circuit drew attention to the extremely concerning, unconstitutional tactic that the narrow interpretation of *Payton* encourages. *Id.* If the focus is not on the location of the arrested person, "arresting officers could avoid illegal 'entry'

into a home simply by remaining outside the doorway and controlling the movements of suspects within." *Id.* Accordingly, the dissenting opinion from the Fourteenth Circuit recognized the need for a broad interpretation of *Payton* with a focus on the location of the suspect to protect against these tactics. R. 59.

3. *The officers' use of coercive techniques to lure Mr. Hemlock out of his home to arrest him achieved the same effect as physical entry and triggered* Payton *protections.*

Under the constructive entry doctrine, the officers' actions amounted to coercive forces upon Mr. Hemlock that induced him to exit his home and thus led to an unconstitutional arrest. The Fourteenth Circuit erred in holding that the officers' actions were not coercive. In *Saari*, the Sixth Circuit held that when officers, with weapons drawn, are positioned at the only exit of the apartment and instruct the suspect to come outside, this is coercive and effectively invades the privacy of the home. 272 F.3d at 810-11. As in *Saari*, Mr. Hemlock was outnumbered by the officers positioned at the only exit to his home. *Id.* R. 11. Like *Saari*, in *Morgan*, demanding a suspect to exit was considered a coercive tactic. 743 F.2d at 1166. In the case at hand, the officers told Mr. Hemlock to come outside six times. R. 11, 12. The officers began escalating the situation, despite Mr. Hemlock's clear refusals to speak or come outside with the statements of "I don't want anything to do with you…" and "I told you I don't want to come outside!" R. 12, 11. The officers repeatedly demanded that Mr. Hemlock come outside "now" and reapproached the stairs to the front porch, with their hands on their holsters. R. 12. It was only after this show of authority and multiple demands by the two officers that Mr. Hemlock came outside. R. 12.

The officers placing their hands on their holsters as they approached Mr. Hemlock is sufficiently similar to the officers drawing their guns in *Saari*. 272 F.3d at 812. Herman admitted on cross-examination that his hand was on his holster in case he needed to use it. R. 26. The officers could have drawn their guns in seconds and were prepared to do so. The officers carried

additional weapons on their belts, including batons and tasers. R. 25. Herman explained that seeing officers place their hands on their guns is "pretty intimidating" to a layperson. R. 26. Mr. Hemlock was faced with the situation of multiple officers who would not listen to his repeated denials to speak, told him to come outside six times, blocked the only exit of his home, and reapproached prepared to draw weapons and demanded he come outside "now!" R. 11, 12. He responded to such coercion with the only option he thought he could safely choose, and he was not met with a conversation, but with an unlawful warrantless arrest. R. 12. The officers' actions effectively coerced Mr. Hemlock out of his home, intruding on the sanctity provided to homes under the Fourth Amendment.

4. *The officers' actions towards Mr. Hemlock constituted a seizure within the confines of his home and triggered* Payton *protections.*

Alternatively, under another justification of a broad interpretation of *Payton*, Mr. Hemlock was unconstitutionally arrested without a warrant because he was effectively seized within his home, as a reasonable person in his situation would not have felt free to leave under the *Mendenhall* standard. 446 U.S. at 554. In *Sharrar*, the Third Circuit held that *Payton* is violated when no reasonable person would have believed they were free to remain in the house. 128 F.3d at 819. In *Sharrar*, the circumstances may have been considered more extreme than the case at hand because SWAT was present and ordered the occupants to exit. *Id*. at 819-20. But the situation Mr. Hemlock was placed in still rose to the level where no reasonable person would believe they were free to remain in their home.

Many factors presented by this Court in *Mendenhall* are present in this case: the threatening presence of several officers, the display of a weapon, and the use of language or tone implying compliance may be compelled. 446 U.S. at 554. Mr. Hemlock repeatedly stated he would not speak or come outside. R. 11, 12. However, his emphatic denials were met with

increasing hostility from the officers, who demanded that he come out "now." There was no indication that Mr. Hemlock's denials could sufficiently end the confrontation. In fact, just when Mr. Hemlock thought the officers might leave, they reapproached, drew attention to their weapons, and continued to order him out of his home. R. 11, 12. After this show of authority, Mr. Hemlock felt he had no control over the situation. Therefore, while Mr. Hemlock was still in his home, he was effectively seized because a reasonable person would not feel free to leave, and the arrest thus occurred there.

All in all, the Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits have either explicitly adopted the constructive entry doctrine or issued rulings indicating that *Payton* does not draw a firm line at physical intrusion. This Court should support the position of the majority of circuits and affirmatively address the constructive entry doctrine or a generally broader interpretation of *Payton* in this case. As the doctrine stands, a person receives stronger Fourth Amendment protections in certain geographic areas. This places an undue burden on a layperson to determine whether opening the door to law enforcement or complying with requests could lead to their unconstitutional arrest without remedy, depending on which circuit's precedent governs them. Additionally, a narrow interpretation of *Payton* that allows such coercive methods encourages noncompliance with police, since if a suspect obeys officers' requests to exit their home, they face warrantless arrest. The main critique of the constructive entry doctrine is that it is "conceptually muddled." *Allen*, 813 F. 3d at 88. This Court can clear the air and provide crucial assistance in interpreting *Payton*. To protect the constitutional liberties of its persons, and of Mr. Hemlock in this case, this Court must find that under *Payton*, the Fourth Amendment is violated when law enforcement officers coerce a suspect inside the home to step outside and arrest the suspect outside the home without a warrant.

II. The Fourth Amendment is violated when law enforcement conducts a warrantless search of a closed container located in a shared residence after obtaining a co-occupant's consent to search the residence, without specifically inquiring into ownership of the container.

The Fourteenth Circuit erred in finding that the Government reasonably believed Reiser had apparent authority over the cardboard box. The Fourth Amendment protects against "unreasonable searches" of "persons, houses, papers, and effects." U.S. Const. amend. IV. In *Byrd v. United States*, this Court stated, "[f]ew protections are as essential to liberty as the right to be free from unreasonable searches and seizures." 584 U.S. 395, 402 (2018). The clearest way for a search to be deemed reasonable is for law enforcement to obtain a valid warrant. This Court has affirmed the strong preference for warrants in a plethora of cases, describing the warrant process as "an important working part of our machinery of government" and "not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971); *See*, e.g. *Katz*, 389 U.S. at 357 (noting warrantless searches are per se unreasonable under the Fourth Amendment with few exceptions); *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (noting the Fourth Amendment expresses a strong preference for warrants). Nonetheless, here, law enforcement made no effort to obtain a search warrant for Mr. Hemlock's home and instead relied on the consent from co-inhabitant Reiser. R. 13.

In *Illinois v. Rodriguez*, this Court introduced a form of voluntary consent referred to as "apparent authority," in which a person who does not actually use the property can still authorize a search if a reasonable officer would believe they possessed the authority to. 497 U.S. 177, 186 (1990). However, circuit courts have failed to uniformly interpret law enforcement's duty under *Rodriguez* in situations regarding apparent authority over closed containers. *Id.* This Court has cautioned that closed containers sometimes require further consent. *See United States v. Karo*, 468 U.S. 705, 725 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("A

homeowner's consent to a search of the home may not be effective consent to a search of a closed object inside the home.").

The proper interpretation of the apparent authority doctrine is that law enforcement has the duty to specifically inquire into authority over containers in a shared residence when mutual control is ambiguous. This interpretation aligns with the Fourth Amendment and this Court's precedent regarding privacy in the home and a reasonable expectation of privacy. Here, Ristroph engaged in a very brief questioning of Reiser and obtained very little information that was insufficient to proceed without further inquiry. R. 15, 16. This Court has established that the reasonableness of an officer's determination of the authority of the party granting consent must be judged by "the *facts* available to the officer at the moment. . . ." *Terry v. Ohio*, 392 U.S. 1, 21-22, (1968). However, it is the government's burden to establish that a third party had apparent authority to consent to a search using these facts. Here, no articulated facts indicated that Reiser had apparent authority over the box, and the situation was ambiguous at best. This Court should find that Ristroph and similarly situated officers have the duty to specifically inquire into the ownership of a closed container in a shared residence when apparent authority is ambiguous. This properly places the informational burden on the government, the best situated party to bear it.

A. <u>This Court's jurisprudence regarding Fourth Amendment searches provides the highest possible privacy in homes and considers social expectations.</u>

There is no shortage of cases and quotes in this Court's history that exemplify the strong protections afforded to one's home. The metaphor of a man's home as his castle is deeply embedded in common law and adopted in modern tradition by this Court. *Miller v. United States*, 357 U.S. 301, 307 (1958). This tradition is evident in the Framers' construction of the Constitution, emphasizing the house as the only named location in the Fourth Amendment. U.S.

Const. amend. IV. Accordingly, this Court has repeatedly established doctrines that limit law enforcement's ability to infringe on the privacy of the home through warrantless searches in a range of situations. *See, e.g. Florida v. Jardines*, 565 U.S. 1, 8 (2013) (limiting law enforcement's ability to bring drug-sniffing dogs onto the porch of a home); *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (limiting law enforcement form using thermal-imaging technology on a home from a lawful vantage point); *Georgia v. Randolph*, 57 U.S. 103, 106 (2006) (noting that law enforcement may not search a home when one present co-occupant gives consent but another present co-occupant objects). The circuit split on the issue of apparent authority presents another scenario, like these cases, in which this Court should prioritize the privacy of one's home over law enforcement's desire for efficiency or ease.

This Court frequently and rightly considers social expectations in its decisions. In *Randolph*, this Court based its rule on "widely shared social expectations." 547 U.S. at 111. In *Katz*, the second step of Justice Harlan's two-part test is whether the subjective expectation of privacy is "one society is prepared to recognize as reasonable." 389 U.S. at 347. This Court should look to changing societal norms and expectations regarding cohabitation and apparent authority. Research shows a dramatic rise in the number of adults living with roommates in the United States. *See* Harlan T. Mechling, Comment, Third Party Consent and Container Searches in the Home, 92 Wash. L. Rev. 1029, 1042-44 (2017). Higher cohabitation rates underscore the importance of a clear third-party consent doctrine, as the potential for Fourth Amendment violations increases. A changing cohabitation landscape does not alter the strong protections the Constitution mandates for homes. Thus, this Court should require law enforcement to inquire into the ownership of closed containers in a shared residence when the situation is ambiguous.

B. If the circumstances make it unclear whether the property to be searched is subject to mutual control by the person giving consent, law enforcement has an affirmative duty to make further inquiries into the ownership of the container.

The search of the cardboard box violated the Fourth Amendment because the officer failed to make a specific inquiry into the ownership of the closed container, when Reiser's mutual control of the box was ambiguous. Multiple circuits have held that law enforcement did not meet its burden to proceed to further inquiry under *Illinois v. Rodriguez* in mutual control evaluations for Fourth Amendment searches, and thus the searches were unconstitutional. 497 U.S. at 186.

In *United States v. Whitfield*, agents gained consent from the adult defendant's mother, with whom he lived, to perform a search of the home. 939 F.2d 1071, 1072 (D.C. Cir. 1991). The agent inquired whether the defendant's bedroom was open, which he testified was to determine whether the mother had "free access" *Id.* The agent gained consent to search the defendant's bedroom, and the door was unlocked. *Id.* The agents thoroughly searched the bedroom, including the closet and inside the pockets of clothing. *Id.* at 1073. The D.C. Circuit found that the agents could not reasonably have believed that the mother had the authority to consent to the extensive search because of the lack of information. *Id.* at 1074. The court reasoned that the mother's ownership of the home, the room being unlocked, and the mother's presentation that she "generally" had "joint access" were not sufficient to constitute apparent authority. *Id.* at 1075. The questioning of the mother was not specific enough to determine whether she had authority, and the mother had not divulged enough information about her use of the son's room. *Id.* Instead, the court urged that when agents lack sufficient information, a search is unlawful if they do not engage in further inquiry. *Id.*

Subsequently, in *United States v. Peyton*, the D.C. Circuit expanded on its discussion of apparent authority and upheld its position that law enforcement must engage in specific

questioning when faced with a location or an object whose mutual control is ambiguous. 745 F.3d 546, 555 (D.C. Cir. 2013). In *Peyton*, the defendant lived in an apartment with his great-great-grandmother, who gave officers consent to conduct the search. *Id.* at 549. The evidence addressed in the motion to suppress was found in a shoebox. *Id.* at 550. The court held that the great-great-grandmother lacked apparent authority to consent to the search of the shoebox because she told officers that the defendant kept his personal property in the area where the shoebox was. *Id.* at 554. The court explained that these revelations of ownership and use were at least enough to mandate that officers refrain from searching the shoebox without further questioning. *Id.* The court expressed that these circumstances may have been enough to even suggest she did not use the shoebox at all or have permission to do so. *Id.* The search of the shoebox was consequently a Fourth Amendment violation. *Id.*

The Sixth Circuit has followed suit in the reasoning *Whitfield* concludes. In *United States v. Taylor*, the court found that a third party lacked apparent authority and noted that officers never questioned her about whether she had mutual control of the shoebox. 600 F.3d 678, 683 (6th Cir. 2010). The Sixth Circuit utilized the factors the Tenth Circuit has previously noted: (1) the type of container and if it "historically command[s] a high degree of privacy," (2) whether the container's owner took any precautions to protect his privacy, (3) whether the resident present at the premises initiated police involvement, and (4) whether the consenting party disclaimed ownership of the container. *Id.* (citing *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992)) (holding a girlfriend had no apparent authority over a defendant's suitcase, even though she had given the officers specific consent). Again, in *United States v. Purcell*, the Sixth Circuit encouraged law enforcement to pursue two legal avenues when facing ambiguity regarding a third party's consent: get a warrant or ask the potential consenter if he or she

possesses the authority to consent to the search of the other items. 526 F.3d 953, 964 (6th Cir. 2008). Similarly, the Tenth Circuit has continued to properly put the onus on law enforcement when relying on supposed apparent authority in a warrantless search. *See United States v. Kimoana*, 383 F.3d 1215, 1222 (10th Cir. 2004) (explaining that an officer presented with ambiguous facts regarding authority has a duty to investigate further before relying on consent).

The Second and Seventh Circuits have adopted an incorrect approach to the apparent authority doctrine, which results in unreasonable searches and violates the Fourth Amendment. In *United States v. Snype and United States v. Melgar*, the Second and Seventh Circuits, respectively, held that law enforcement officers have an affirmative duty to make further inquiries into ownership only if the container clearly belongs to someone other than the consenting party. *Snype*, 441 F. 3d 119, 126-27 (2d Cir. 2006); *Melgar*, 227 F.3d 1038, 1041-42 (7th Cir. 2000). This approach allows an officer to search containers in situations where the consenting party's mutual control over the object is ambiguous, simply because the officer has no positive knowledge that the container belongs to another person, such as exterior markings on the container. Following this illogical approach gives an officer the ability to search a container even if it is unreasonable to believe the consenting party had any authority to consent to the search. This approach is at odds with this Court's statements regarding third-party consent in *Rodriguez*. 497 U.S. at 188. This Court, in *Rodriguez*, warned that even if a person gives explicit consent, "circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Id.* Therefore, the proper approach is to require this further inquiry when the circumstances surrounding ownership are ambiguous.

Ristroph did not establish that Reiser had apparent authority or mutual control over the cardboard box, and, therefore, he had a duty to inquire further into her control before he searched

it. Ristroph should have found Reiser's initial consent insufficient to search the cardboard box because it did not include the loft space, and therefore, the location of the box was outside of the scope of the consent. In *Whitfield*, even when the mother claimed she generally had free control over the defendant's room, the court held the officer should have found this ambiguous. 939 F.2d at 1072. In this case, Reiser stated that she did "not really ever go up there" when referring to the loft. R. 15. This is even stronger evidence, more analogous to the facts in *Peyton*, which should lead an officer to believe Reiser does not have mutual control.

In *Peyton*, the great-great-grandmother stated that the defendant used the area where the shoebox was found for personal storage, and the court found this should have given officers an indication that apparent authority was unlikely to have been established without additional questioning. 745 F.3d at 554. Similarly, in the case at hand, Reiser told Ristroph that Mr. Hemlock used the loft for storage and office space. R. 15. The stairs are only used to access Mr. Hemlock's loft space and, therefore, are reasonably a part of the loft area over which Reiser has no common or actual authority. R. 17. Therefore, a reasonable officer would not conclude that Reiser had apparent authority over belongings on the stairs, especially a box typically used for storage, after Reiser stated Mr. Hemlock uses the loft for his storage. R. 15. Like the Sixth Circuit noted in *Taylor* regarding shoeboxes, cardboard boxes do not "historically command a high degree of privacy," however, they too are often used to store private items. 600 F.3d at 683 (citing *Salinas-Cano*, 959 F.2d at 864). Instead, a reasonable officer would find the situation ambiguous and inquire further if they wanted to search the box.

Further, Reiser clarified that she and Mr. Hemlock shared the downstairs bedroom, and she motioned to the room over which she had mutual control. When Ristroph decided the cardboard box was an item he wished to search, he had two viable choices to proceed legally in

this ambiguous situation: get a warrant or ask Reiser if she possessed the authority to consent to the search of the box. *Purcell*, 526 F.3d at 964. This requirement does not place an undue burden on law enforcement. Ristroph could have asked a few simple clarifying questions, which is not too much to expect of an officer conducting a warrantless search based on consent. Instead, Ristroph made the wrong choice and encroached on Mr. Hemlock's Fourth Amendment rights, effectively circumventing the warrant requirement. R. 16. This Court should hold fast to the Fourth Amendment protections afforded to searches within a home and hold that when mutual control of a closed container in a shared residence is ambiguous, law enforcement must inquire further to establish apparent authority.

III. Under Rule 806, extrinsic evidence is admissible to impeach Copperhead's character for truthfulness due to her unavailability to testify.

The Fourteenth Circuit erred in excluding extrinsic evidence of specific instances of conduct offered to impeach Iris Copperhead under Rule 806 of the Federal Rules of Evidence. Rule 806 provides that, "[t]he credibility of the declarant may be attacked [. . .] by any evidence which would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. Rule 806 requires courts to imagine how impeachment would operate if the witness were on the stand, an impossible scenario when the declarant is unavailable, and thus implicitly authorizes procedural adaptations to facilitate impeachment. Copperhead's unavailability presents precisely the circumstance Rule 806 anticipates, and thus, extrinsic evidence should have been admissible. R. 46. The Fourteenth Circuit's rigid exclusion undermines the central purpose of the evidentiary rules and unfairly shields hearsay declarants from impeachment. This Court should therefore reverse the Fourteenth Circuit's decision and hold that under Rule 806, extrinsic evidence is admissible to impeach Copperhead's character for truthfulness.

A. Rule 806 permits the use of extrinsic evidence as a procedural substitute for impeachment when cross-examination is categorically unavailable.

The Fourteenth Circuit erred in characterizing the admission of extrinsic evidence under Rule 806 of the Federal Rules of Evidence as an expansion of the scope of Rule 608(b). R. 57. Rule 806 permits the admission of extrinsic evidence as a necessary procedural substitute for cross-examination, preserving the right to meaningful impeachment when cross-examination is categorically unavailable. The language of Rule 806 reflects a counterfactual framework, evidenced by the phrase "if the declarant had testified" Fed. R. Evid. 806. As this language anticipates a procedural event that cannot occur, Rule 806 presupposes procedural adaptation when a declarant is unavailable.

Accordingly, given that Rule 608(b) assumes a live witness subject to cross-examination, Rule 806 must permit extrinsic evidence when the hearsay declarant is unavailable. Under Rule 608(b), a witness's credibility may be impeached solely through cross-examination regarding specific instances of conduct, as extrinsic evidence is generally excluded. Fed. R. Evid. 608(b) ("extrinsic evidence is not admissible to prove specific instances of a witness's conduct [. . .] [b]ut the court may, on cross-examination, allow them to be inquired into…"). Therefore, when the hearsay declarant is deceased or otherwise unavailable and cross-examination is not a viable impeachment mechanism, extrinsic evidence must be admissible as a substitute. As the Second Circuit stated in *United States v. Friedman*, "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." 854 F.2d 535, 570 n.8 (2d Cir. 1988).

Despite this, the Third and D.C. Circuits erroneously conflated Rule 608(b)'s procedural constraint as a substantive bar to impeachment. Both courts argued that Rule 806 requires the exclusion of extrinsic evidence because extrinsic evidence would have been inadmissible if the

declarant had testified on the stand. *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000); *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997). Fed. R. Evid. 608(b). However, Rule 608(b)'s prescription of cross-examination as the impeachment mechanism is a procedural limitation reserved for witnesses subject to cross-examination. Thus, in the absence of cross-examination, it is appropriate for that limitation to be removed. As the Ninth Circuit cautioned in *United States v. Batts*, "individual rules of evidence,[. . .] should not be read in isolation, when to do so destroys the purpose of ascertaining the truth." 558 F.2d 513, 517 (9th Cir. 1977), *opinion withdrawn and aff'd on other grounds*, 573 F.2d 599 (1978).

Further, treating the restriction on extrinsic evidence as a procedural limitation aligns with the rationale underlying Rule 608(b)'s typical exclusion of such evidence. When a live witness is available, Rule 608(b) confines impeachment to that inquiry to "avoid holding mini-trials on peripherally related or irrelevant matters" that can be adequately addressed through cross-examination. *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992); *see also United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993) ("The purpose of this rule is to [. . .] to prevent the proverbial trial within a trial.") In other words, Rule 608(b)'s exclusion of extrinsic evidence exists to prevent collateral issues from derailing the trial. *Id.* However, when cross-examination is impossible, the admission of extrinsic evidence is the only practical means of presenting specific instances of conduct to the jury. In this posture, such evidence is no longer collateral, irrelevant, or peripherally related but rather becomes central to assessing the declarant's character for truthfulness.

B. <u>The admission of extrinsic evidence to impeach an unavailable hearsay declarant directly aligns with Rule 806's purpose.</u>

The purpose of Rule 806 is to ensure hearsay declarants are subject to impeachment as if they had testified and barring extrinsic evidence contradicts that objective. As the Advisory

Committee notes explain, a declarant's "credibility should in fairness be subject to impeachment and support as though he had in fact testified," reflecting the Rule's goal of fully preserving impeachment opportunities. Fed. R. Evid. 806 advisory committee's note. As the Third Circuit concedes, if the hearsay declarant is unavailable and the witness testifying to the hearsay lacks knowledge of the declarant's misconduct, as is the case here, Rule 608(b)'s exclusion of extrinsic evidence would completely foreclose impeachment by specific acts. *Saada,* 212 F.3d at 222; R. 45-46. That means the declarant is no longer subject to impeachment as though he had testified, contradicting Rule 806's stated objective. Fed. R. Evid. 806 advisory committee's note.

Nonetheless, the Third Circuit contends that this interpretation is justifiable because other methods of impeachment, such as under Rules 608(a), 609, and 613, remain available. *Id.* at 221. However, the record contains no relevant convictions or prior statements that could be used to impeach the declarant under Rules 609 or 613. Fed. R. Evid. 609; Fed. R. Evid. 613. In addition, the witness who relayed the hearsay statement lacks knowledge about Copperhead, precluding opinion or reputation testimony from current witnesses under 608(a) as well. Fed. R. Evid. 608(a). While additional witnesses could potentially be called under Rule 608(a) to provide opinion or reputation testimony, doing so would consume just as much time, if not more, than admitting extrinsic evidence, and the resulting testimony would inherently be far less probative than specific instances of conduct. *See* Fed. R. Evid. 405 advisory committee's note. Ultimately, foreclosing upon even one method of impeachment prevents the declarant from being subject to impeachment as though they had testified, undermining the rules' sole function. Fed. R. Evid. 806 advisory committee's note.

Further, if impeachment by specific instances of conduct is foreclosed upon due to the hearsay declarant's unavailability, then Rule 806's protections are rendered hollow. *Id.* In

interpreting the Federal Rules of Evidence, this Court has recognized that courts may consider whether a proposed interpretation is "contrary to the liberal thrust of the Federal Rules," and an interpretation that deprives Rule 806 of meaningful effect in the very context for which it was designed would be precisely that. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988).

Moreover, Rule 806's explicit accommodation of prior inconsistent statements illustrates a practical solution to a procedural obstacle, not a limitation on the Committee's broader intent. The Fourteenth and Third Circuits reasoned that because Rule 806 expressly addresses a procedural problem created by the unavailability of a hearsay declarant in the context of impeachment by prior inconsistent statements, it forecloses any implied accommodation for Rule 608(b). R. 58; *Saada*, 212 F.3d at 221-22. Under Rule 613, impeachment by prior inconsistent statements typically requires that the witness be given the opportunity to explain or deny the statement, a requirement that cannot be met when the declarant is unavailable. Fed. R. Evid. 613.

To address this, Rule 806 permits the admission of a declarant's inconsistent statement "regardless of [. . .] whether the declarant had an opportunity to explain or deny it." Fed. R. Evid. 806. From this express accommodation, the Fourteenth and Third Circuits infer that Rule 608(b) cannot be similarly adapted, with the Third Circuit noting the absence of a "comparable allowance" for Rule 608(b). R.58; *Saada*, 212 F.3d at 222. This reasoning, however, overlooks the fact that Rule 806's broader purpose still remains preserving the ability to impeach an unavailable declarant as if they had testified. Fed. R. Evid. 806 advisory committee's note.

The Committee's explicit consideration of Rule 613 illustrates its readiness to provide procedural accommodations, and this acknowledgment does not imply that other forms of impeachment, including specific instances of conduct under Rule 608(b), are precluded. As this court recognized in *United States v. Barnes*, "[t]he maxim expressio unius est exclusio alterius is

a rule of construction and not of substantive law and serves only as an aid in discovering legislative intent when not otherwise manifest." 222 U.S. 513, 516 (1912). Here, the Committee's purpose is clear. It is to preserve impeachment in the name of fairness, and permitting extrinsic evidence does just that. This Court has in the past prioritized the purpose and objective of Federal Rules of Evidence in their interpretation and should continue to do so here. See, e.g., Giles v. California, 554 U.S. 353, 384 (2008) ("An examination of the forfeiture rule's basic purposes and objectives indicates that the rule applies here.")

C. A rigid reading of rules 806 and 608(b) unfairly shields hearsay declarants from impeachment and undermines the central purpose of the evidentiary rules.

A rigid reading of Rules 806 and 608(b) must be rejected because it produces unfair asymmetry and undermines the Federal Rules of Evidence's truth-finding function. As this Court has recognized, impeachment evidence is critical because "if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence[.]") That principle is particularly significant in the instant case as a rigid reading of the Rules would leave the defendant virtually unable to impeach the prosecution's principal witness, whom the government heavily relies upon to link the petitioner to the alleged crime. R. 50.

The ability to impeach a declarant's character for truthfulness under Rule 608(b) is superior to other methods of impeachment and therefore the inability use it would severely handicap the defendant's ability to present his case. Impeaching witnesses through specific instances of conduct has been regarded as "the most convincing" method of proving character, as it involves the presentation of the witness's own acts, as opposed to through a third-party

perspective provided by opinion or reputation testimony. Fed. R. Evid. 405 advisory committee's note. Here, the Board of Academic Integrity's letter detailing an instance of academic dishonesty, along with Copperhead's false statement on a job application, are both highly probative of Copperhead's character for truthfulness and no current witness is positioned to testify to them. R. 45-46. This means a rigid reading would deprive the defendant of one the most compelling ways to challenge a witness's credibility, undermining his ability to present his defense and in some cases may force defendants to accept testimony without qualification.

Further, adopting a rigid reading of the rules creates significant asymmetry between the hearsay proponent and the opposing party. Finding that Rule 806 does permit the use of extrinsic evidence when the hearsay declarant is unavailable, incentives the use of hearsay testimony over live witnesses because the hearsay proponent can effectively insulate the declarant from impeachment. The ability to shield a declarant from impeachment presents a substantial advantage in cases like this one, where a party's case heavily relies on that hearsay testimony. R.50. This outcome directly contradicts the purpose of the Federal Rules of Evidence as laid out in Rule 102. Fed. R. Evid. 102.

Rule 102 states that "[these] 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." *Id.* In other words, the Rules themselves clearly direct courts to construe rules in a way that is congruent with their justice and truth-seeking functions. Reading Rule 806 as permitting extrinsic evidence as a substitution for cross-examination as the Second Circuit did, aligns with all of Rule 102's stated objectives in a way the Fourteenth, Third, and DC Circuit's reading does not. R. 57-58; *Friedman*, 854 F.2d at 570 n.8; *White*, 116 F.3d at 920; *Saada*, 212 F.3d at 221.

Allowing extrinsic evidence in this context eliminates the apparent asymmetry created by its exclusion, as the opposing party can then effectively combat the hearsay testimony, ensuring the fair administration of the proceeding. It also does not create unjustifiable expense or delay, as the immense value of impeachment justifies any additional time or effort that admission requires. Moreover, it advances the development of evidence law and promotes justice and accurate fact-finding, by enabling Rule 806 to accomplish its stated purpose and allowing the jury to effectively evaluate the hearsay declarant's credibility. R. 50.

Further, in ascertaining the truth and securing a just determination, this reading of Rule 806 does not risk uncontrolled evidentiary expansion. Rule 806 permits the admission of extrinsic evidence only when the hearsay declarant is unavailable, and cross-examination is impossible. The rule allows procedural adaptations to fill gaps created by unavailability; however, when the declarant is available, no such gap exists, and extrinsic evidence remains impermissible. Accordingly, this interpretation is only implicated in a narrow subset of cases.

Moreover, Rule 403 provides an independent check on evidence that addresses the same concerns Rule 608(b)'s limitation on extrinsic evidence seeks to prevent. Rule 403 states in relevant part, "the court may exclude relevant evidence if its probative value is substantially outweighed by […]: unfair prejudice, confusing the issues, misleading the jury, [or] undue delay…" Fed. R. Evid. 403. Accordingly, if a court determines that admitting extrinsic evidence to impeach an unavailable hearsay declarant would confuse the issues or consume unnecessary time, it retains full discretion to exclude that evidence.

In sum, when read in concert, Rules 806 and 608(b) operate harmoniously: Rule 608(b) regulates the manner of impeachment when cross-examination is available, while Rule 806 remedies a procedural issue created by a non-testifying declarant to preserve the method of

impeachment. Rule 806's counterfactual language directs courts to allow procedural adaptations when necessary, and Copperhead's death necessitates the use extrinsic evidence as a substitute for cross-examination. Accordingly, we request, this Court reverse the decision of the Fourteenth Circuit and remand for a new trial in which the defendant may introduce extrinsic evidence of specific instances of Iris Copperhead's conduct to impeach her character for truthfulness under Rule 806.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

/s/ Team 24P
Attorneys for Petitioner