Team 26R

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

Team 26
Attorneys for the Respondent, the United States of America

QUESTIONS PRESENTED

I. When an officer stands outside of a suspect's home and asks the suspect to come outside, does the subsequent arrest of the suspect outside of his home violate his right to be free from warrantless arrests inside of his home?

II. When a law enforcement officer searches a common area of a home pursuant to a valid grant of consent, does the duty to inquire about the ownership of containers in the area arise when the consenting occupant is not the intended suspect of a crime?

III. Did the District Court correctly exclude evidence of Iris Copperhead's allegedly untruthful actions, applying Rule 608(b) in the context of impeachment of an unavailable hearsay declarant?

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CONSTITUTIONAL PROVISIONS

This case involves the Fourth Amendment to the United States Constitution.

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 FACTS

Between March 29 and March 30, 2024, the Boerum Village Police Department received two different phone calls, both reporting suspicious activity displayed by two individuals: one male and one female. (R. 6-7.) The first report came from Elvis Hoag on March 29. (R. 7.) Hoag, a barista at From Bean to Brew coffee shop reported that over the previous two days Atticus Hemlock ("Petitioner") and Iris Copperhead sat in the coffee shop and discussed plans involving "nabbing" a federal government official named Jodie. (R. 8.) The following day, on March 30, the Boerum Village Police Department received a second report of suspicious activity from Tina Caplow, the manager of Every-Mart. (R. 6.) Caplow reported that two individuals, one male and one female, "bought a pack of zip ties, two ski masks, a six-inch folding knife, black trash bags, and bear spray, and paid for their purchases with cash." *Id.* The police referred both reports to the Federal Bureau of Investigation ("FBI") because the first message involved the potential

kidnapping of a federal government official, and the second message appeared to be related and to demonstrate a substantial step toward committing the crime. (R. 7, 52.)

Petitioner lives with his girlfriend, Fiona Reiser ("Ms. Reiser"), in Boerum Village. (R. 15.) Special Agents Hugo Herman and Ava Simonson visited their home on April 2, 2024, to talk to Petitioner as part of the investigation. (R. 20.) The agents did not wear their full police uniforms; rather, both agents wore khaki pants and a black long-sleeved polo, and their firearms remained securely tucked in their holsters for the entirety of the encounter. (R. 26, 29.) The agents were able to see into the home as they approached because the front door was open, and it was only blocked by a screen door. (R. 21.) When the agents knocked and announced their presence, Petitioner came to the door and stood behind the closed screen door. *Id.* During this encounter, the agents stood on the ground outside of Petitioner's home, "[m]aybe three or four feet from the bottom stair." *Id.*

The agents noticed two bottles of chloroform in the home. (R. 22.) Without prompting, Petitioner then asked whether the agents' visit "had to do with Jodie." *Id.* Based on those facts, and the information learned from the two tips, the agents felt they had probable cause to arrest Petitioner. *Id.* While standing several feet from Petitioner's front steps, the agents informed Petitioner their investigation was important and instructed Petitioner to come outside. (R. 12.) Petitioner then exited his home and joined the agents on the ground beyond the front steps. (R. 23.) Agent Simonson then handcuffed Petitioner and informed him that he was under arrest for attempting to kidnap a federal official. *Id.*

While conducting a search incident to arrest, Agent Herman found a spiral notebook in Petitioner's pant pocket. *Id.* The notebook was folded open to a page describing plans to kidnap Jodie Wildrose, the Under Secretary for Rural Development for the United States Department of Tourism. (R. 23-24); *see* (R. 2, 5.) Agents Simonson and Herman left with Petitioner for processing

at around 4:30 p.m. (R. 12.) The agents did not step into Petitioner's home during the entirety of this encounter, aside from when Agent Simonson initially knocked on the door. (R. 24.)[1]

Special Agent Kiernan Ristroph arrived at the scene at approximately 4:30 p.m. after Special Agent Herman radioed him for backup. (R. 12.) Agent Herman informed Agent Ristroph that "[Petitioner] said his girlfriend is going to be home soon." *Id.* At around 5:00 p.m., Agent Ristroph approached Petitioner's residence. (R. 15.) Petitioner's girlfriend, Ms. Reiser, answered the door just after she brought in groceries. *Id.* Agent Ristroph informed Ms. Reiser that Petitioner had been arrested and asked if he could look around the cabin as part of an investigation. *Id.* Ms. Reiser agreed and let Agent Ristroph inside. *Id.* Agent Ristroph checked the kitchen before entering the living room. (R. 13.) The living room contains a staircase leading upstairs, and Ms. Reiser informed Agent Ristroph that the stairs led to the loft. (R. 15.) Ms. Reiser stated that Petitioner uses the loft area for storage and an office space, and that she did not know what he stored up there because she hardly used the area. *Id.* Agent Ristroph reported that he confined his search to the first floor because of this information. (R. 13.)

While searching the living room, Agent Ristroph approached a cardboard box on one of the bottom steps of the staircase. *Id.*; (R. 17.) The box was unmarked with the top flaps closed. (R. 13.) Agent Ristroph opened the box to find rope, ski masks, gloves, zip ties, a folding knife, duct tape, and chloroform. *Id.* After Agent Ristroph opened the box, Ms. Reiser stated that she had never seen the items in the box before. (R. 16.) Ms. Reiser later reported that she believed Petitioner left the box on the steps to bring up later. *Id.*

[1] Iris Copperhead was also arrested on April 2, 2024. (R. 46.) She died from an aortic rupture while in jail on the night of her arrest. *Id.*

STATEMENT OF THE CASE

On April 3, 2024, Petitioner was indicted by a grand jury for attempted kidnapping of a United States government officer in violation of 18 U.S.C. §§ 1201(a)(5), 1201(d). (R. 1-2.) Petitioner later filed motions to suppress two categories of evidence: (1) his notebook, which included incriminating statements, and (2) the rope, ski masks, zip ties, knife, chloroform, and other materials found in the cardboard box. (R. 5,13,19,31.) At a hearing on the motions on July 29, 2024, the District Court for the Northern District of Boerum denied both motions. (R. 31,39.)

At Petitioner's trial, Robert Cahill, an Assistant United States Attorney for the Northern District of Boerum, called Theodore Kolber to the stand. (R. 40-41.) Kolber testified that he had been walking in Joralemon State Park on April 2, 2024, when a disturbed woman, later identified as Iris Copperhead, exited the woods onto the path ahead of him; when Kolber asked Copperhead if she was okay, she stated: "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. 41-43.) Petitioner objected to that statement as inadmissible hearsay, but the District Court overruled that objection under Rule 803(2)'s exception for excited utterances. (R. 43-44.) On cross-examination, Kolber testified that he had no previous interactions with Copperhead and knew nothing of her personal life, outside of what he had read in the news. (R. 45-46.)

After the prosecution rested, Petitioner sought to call Dr. Andrea Joshi, "a member of Court Street College's Board of Academic Integrity," to testify as to Copperhead's credibility. (R. 47.) Petitioner's counsel stated that Dr. Joshi would testify about Copperhead's academic dishonesty while enrolled at Court Street College. (R. 47-48.) Petitioner further "[sought] to introduce evidence related to Iris Copperhead's falsifying a job application to the Mayor's office." (R. 48.) The prosecution objected to both sets of evidence pursuant to Federal Rule of Evidence 608(b),

and the District Court upheld its objection on that basis. (R. 49-50.) On August 12, 2024, Petitioner was found guilty of the charged offense. (R. 51.)

Petitioner appealed to the United States Court of Appeals for the Fourteenth Circuit, raising three issues: (1) the admission of his notebook, (2) the admission of the box's contents, and (3) the exclusion of impeachment testimony relating to Iris Copperhead's previous actions. (R. 51-52.) The Fourteenth Circuit affirmed the ruling of the District Court on all three issues. (R. 51.) On December 2, 2025, this Court granted a writ of certiorari on the three questions presented.

SUMMARY OF THE ARGUMENT

Special Agents Herman, Simonson, and Ristroph did not violate Petitioner's rights in the course of their search and his arrest, and the lower courts did not err in excluding testimony concerning Iris Copperhead's prior dishonest acts.

The rule against warrantless arrests inside the home is offended only when the officer physically enters the home to arrest the suspect inside. If an officer stands outside and instructs a suspect to exit, the suspect is not arrested until they exit the home and submit to police authority. A suspect's mere feeling that they are not free to leave the home due to the officer's commands is insufficient to amount to an arrest. Petitioner was not under arrest until he exited the home to join the agents outside, and therefore his Fourth Amendment rights were not violated.

Petitioner's Fourth Amendment rights were also not violated when Special Agent Ristroph searched his cardboard box. Agent Ristroph received valid consent from Ms. Reiser to search the common area, and consent to search extends to all objects in the area unless expressly limited. The general rule that consent to search an area applies to effects within that area governs regardless of whether the suspect or a co-tenant grants consent. Unless circumstances render it objectively unreasonable to consider an object to be within the scope of consent, an officer is authorized to

search the object within the area. Since Ms. Reiser validly consented to the search of the common area that Petitioner's box was located within, and nothing about the box or Ms. Reiser's statements made it objectively unreasonable to consider it included within that grant of consent, Agent Ristroph's search of the box was reasonable.

Lastly, the District Court correctly excluded testimony regarding Iris Copperhead's prior dishonest acts under Federal Rule of Evidence 608(b). Federal Rule of Evidence 806 clarifies that substantive impeachment rules, which includes Rule 608(b), apply in the context of impeachment of a hearsay declarant. Nothing in the text of either Rule suggests that the analysis differs when the hearsay declarant is unavailable for trial. Further, Petitioner's argument for a pragmatic limitation on the plain text of the Rules is undermined by the numerous alternative impeachment options available to him and others who are similarly situated.

ARGUMENT

I. Petitioner's Fourth Amendment Rights Were Not Violated Under *Payton v. New York* Because He Was Not Arrested Until He Voluntarily Left His Home.

This Court should affirm the Fourteenth Circuit's holding that Petitioner's Fourth Amendment rights were not violated when he was arrested outside of his home because *Payton v. New York* only disavows warrantless arrests effectuated inside of the home. *Payton v. New York*, 445 U.S. 573, 599 (1980). As the Fourteenth Circuit correctly noted, "a *Payton* violation only occurs when arresting officers step into the home, beyond the 'firm line at the entrance to the house,' and arrest a suspect *inside.*" (R. 55) (quoting *Payton,* 445 U.S. at 599) (emphasis in original). Special Agents Herman and Simonson did not violate Petitioner's Fourth Amendment rights because they did not arrest Petitioner until he voluntarily exited the home and stood outside. (R. 23.)

The agents' actions in arresting Petitioner outside of his home are consistent with this Court's ruling in *Payton v. New York*, where it was held that police may not effectuate a warrantless arrest by entering the suspect's home unless an exigency applies. *Payton*, 445 U.S. at 590. *Payton* involved two consolidated cases: in the first case, the police knocked on a suspect's door to arrest him and, when there was no response at the door, used crowbars to break open the door to his apartment. *Id.* at 576. In the second case, the police knocked on the suspect's door, and when the suspect's young son answered, the police entered the house and placed the suspect under arrest. *Id.* at 577. Both of these warrantless arrests were unreasonable because the Fourth Amendment protects an individual's privacy, and "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Id.* at 598. The Court further emphasized that the plain text of the Amendment—"[t]he right of the people to be secure in their . . . houses . . . shall not be violated"—establishes that the Fourth Amendment has "drawn a firm line at the entrance to the house." *Id.* at 589-99. Thus, *Payton* established that the "threshold" into the home "may not reasonably be crossed without a warrant." *Id.* at 599.

Although *Payton* restricts officers from entering a suspect's home, some federal courts of appeals have incorrectly extended this protection to officers standing outside of a suspect's home and commanding them to exit under theories of "constructive" or "coercive" entry. *See, e.g.*, *United States v. Thomas,* 430 F.3d 274, 279 (6th Cir. 2005); *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008). In contrast, the Fourteenth Circuit joined the Seventh and Eleventh Circuits in properly limiting *Payton*'s protections to physical entry into the home. *See* (R. 55); *United States v. Berkowitz,* 927 F.2d 1376, 1386 (7th Cir. 1991); *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002). This Court should similarly follow the Seventh and Eleventh Circuits and correctly find

that *Payton* is only violated when "the firm line" at the threshold of the suspect's home has been physically crossed by arresting officers.

A. A suspect cannot be under arrest inside of their home while the officer stands outside because an arrest requires submission to authority.

The Fourteenth Circuit's rejection of extending *Payton* protections comports with this Court's long-standing requirement that a suspect must actually submit to authority to be arrested. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991). In *California v. Hodari D*., this Court held that a suspect who was being chased by police but did not yield to them was not arrested or seized. *Id.* The Court explained that an arrest occurs when an officer uses physical force to restrain a suspect "*or*, where that is absent, [the suspect] *submi*[*ts*] to the assertion of authority." *Id.* (emphasis in original). But, in meeting that latter definition of a seizure, the suspect must actually acquiesce and comply with police orders to find that a seizure has occurred. *Id.*

Using this definition, the Court in *California v. Hodari D.* re-analyzed its previous decision in *Brower v. County of Inyo* and declined to extend the definition of an arrest to a suspect in pursuit. *Id.* at 628. In *Brower*, the police chased a suspect with their lights flashing for twenty miles, but the suspect did not stop until he fatally crashed into a police-erected blockade. *Id.* (citing *Brower v. County of Inyo,* 489 U.S. 593, 596 (1989)). The Court noted that the police cars with flashing lights were "surely an adequate 'show of authority,'" but the suspect was not seized because this "show of authority" did not produce the suspect's stop. *Id.* (discussing *Brower*, 489 U.S. at 697). Thus, it is the "submission" to police orders, not merely hearing them or receiving them, that effectuates the arrest of a suspect. *Id.* at 626; *see also* Submission, Ballentine's Law Dictionary (3rd ed. 1969) (defining "submission" as "[a] surrender or yielding, as to an arrest or a command").

Some courts of appeals, such as the Ninth Circuit, have incorrectly determined that when a police officer stands outside of the home and commands a suspect to come outside, the resulting

arrest occurs within the home because "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." *See United States v. Johnson,* 626 F.2d 753, 757 (9th Cir. 1980). However, this is incompatible with the requirement that suspects must surrender into police custody to be arrested. *See Hodari D.*, 499 U.S. at 626. "From the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'" *Id.* at 624 (citing 2 N. Webster, An American Dictionary of the English Language 67 (1828)). At common law, an arrest involved "a power of taking immediate possession of the body, and the party's submission thereto, and a declaration of the officer that he makes an arrest."[2] *Torres v. Madrid*, 592 U.S. 306, 319 (2021) (quoting J. Backus, A Digest of Laws Relating to the Offices and Duties of Sheriff, Coroner and Constable 115-116 (1812)). When an officer exercises a show of authority, the suspect has not been arrested until the police have taken "possession" of them, *see id.*, and therefore, it is not until the suspect is in police control that the arrest has been completed. *See Possession, Black's Law Dictionary* (12th ed. 2024) (defining "possession" as "[t]he right under which one may exercise control over something to the exclusion of all others"). Therefore, when police stand outside of the home and exercising a show of authority by commanding a suspect to leave, it is not until the suspect comes outside and submits to police control that the arrest has been effectuated. *See Torres*, 592 U.S. at 319.

B. A suspect merely feeling as if they are not free to leave the home does not render them under arrest while inside of the home.

This Court should reject the constructive entry doctrine because a suspect's belief that they are not free to leave is insufficient to constitute an arrest if the suspect has not exited the home to submit to authority. Those that seek to defend the constructive entry doctrine, such as Petitioner

[2] "In evaluating the scope of [Fourth Amendment] right[s], we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

and the dissenting opinion below, incorrectly argue that the definition of seizure in *Hodari D*. is constrained by the voluntariness test in *United States v. Mendenhall. See* (R. 59.) In *United States v. Mendenhall,* the Court stated that, in the context of a "street encounter between a citizen and the police," a person approached by police is seized when "a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 554 (1980). In support of Petitioner's position, the dissent below incorrectly applied the *Mendenhall* test to the definition of an arrest, stating that a "[s]ubmission to the assertion of authority occurs only if, under the circumstances, 'a reasonable person would have believed that he was not free to leave,'" and concluding that a person inside the home who cannot leave because of police authority has therefore been arrested. (R. 59) (citing *Mendenhall*, 446 U.S. at 554). This Court directly addressed and rejected this argument in *Hodari D.* when the defendant argued that he was seized while in flight from the police because, "a reasonable person would have believed that he was not free to leave." *Hodari D*., 499 U.S. at 627 (quoting *Mendenhall*, 446 U.S. at 554). In rejecting this argument, this Court stated that the *Mendenhall* test states "that a person has been seized 'only if' [a reasonable person would have believed that he was not free to leave] not that he has been seized 'whenever'; it states a necessary, but not a sufficient, condition for seizure -- or, more precisely, for seizure effected through a 'show of authority.'" *Id.* (discussing *Mendenhall*, 446 U.S. at 554). Thus, even if the Petitioner did not feel "free to leave," he still was not arrested while in the home because he had not yielded to authority. *See id.*

Petitioner and the dissent below are similarly misplaced in their reliance on *United States v. Reeves* because there the Tenth Circuit partook in only half the analysis. In *Reeves*, the Tenth Circuit held that a police officer who ordered a suspect to open his door and then arrested him when he came outside violated the Fourth Amendment because "[o]pening the door to one's home

is not voluntary if ordered to do so under color of authority." *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008). To reach this holding, the Tenth Circuit relied on *Mendenhall*'s holding that a seizure occurs when a reasonable person would not feel free to leave. *Id.* (citing *Mendenhall*, 446 U.S. at 554). However, a suspect feeling like they are not free to leave is not enough to effectuate an arrest; *Hodari D.* clarified that a suspect must also submit to the show of authority to be arrested. *See Hodari D*., 499 U.S. at 627. Thus, the Tenth Circuit's assertion that "if an individual's decision to open the door to his home to the police is not made voluntarily, the individual is seized inside his home," *Reeves*, 524 F.3d at 1168, crucially omits the second part of the analysis: whether the suspect has "submitted" to authority.

Here, Petitioner's arrest did not violate the Fourth Amendment regardless of whether he felt free to leave while standing inside of his home because the officers' show of authority and Petitioner's submission both occurred outside of the home. Agents Herman and Simonson stood on the ground outside of Petitioner's front steps while they informed him of the importance of their investigation and asked him to come out. (R. 23.) By issuing this instruction while acting as agents of the law, the agents exercised a show of authority while outside of the home, several feet away from the stairs leading to the door. (R. 21); *see Hodari D*., 499 U.S. at 627. While Petitioner remained inside of the home, he had not yet submitted to the assertion of authority and was not under arrest. *See id.* Petitioner's submission did not occur until he voluntarily exited the home and surrendered himself to police custody. *See Torres*, 592 U.S. at 319. Upon this submission, the officers effectuated Petitioner's arrest without crossing the "firm line at the entrance to the house." *Payton,* 445 U.S. at 599; *see Hodari D*., 499 U.S. at 628. Therefore, Petitioner's Fourth Amendment rights were not violated when he was arrested outside of his home.

C. Even if this Court does adopt the constructive or coercive entry doctrine, Special Agents Herman and Simonson's conduct did not violate *Payton*.

Even if this Court decides to interpret the protections of *Payton* broadly, Special Agents Herman and Simonson's conduct did not amount to a constructive or coercive entry. "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And . . . the occupant has no obligation to open the door or to speak." *Kentucky v. King*, 563 U.S. 452, 469-70 (2011). The difference between "a permissible consensual encounter and an impermissible constructive entry [] turns on the show of force exhibited by the police." *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005). Here, Agents Herman and Simonson did not exhibit any forceful conduct that could transform their lawful warrantless knock into a constructive entry.

Courts that have adopted a broad reading of *Payton* have recognized that a permissible attempt to knock-and-talk becomes a constructive entry when officers employ threatening tactics like drawing their weapons and surrounding the home to force a suspect out of the home. *See United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001); *United States v. Al-Azzawy*, 784 F.2d 890, 895 (9th Cir. 1985). For example, the Third and Tenth Circuits have both found a *Payton* violation where police officers, the FBI, and a SWAT team pointed guns at a suspect's home while ordering the suspect and his family out of the home. *United States v. Maez*, 872 F.2d 1444, 1450 (10th Cir. 1989); *Sharrar v. Felsing,* 128 F.3d 810, 819 (3d Cir. 1997). Similarly, the Sixth Circuit and Ninth Circuit found constructive entry where police officers surrounded a suspect's home with guns drawn and ordered him to come outside. *Saari*, 272 F.3d at 804; *Al-Azzawy*, 784 F.2d at 895.

In contrast, police encounters that do not involve threatening maneuvers or the display of weapons are consensual encounters. *See United States v. Thomas,* 430 F.3d 274, 278 (6th Cir. 2005). In *United States v. Thomas,* the Sixth Circuit held that no constructive entry occurred when

police officers asked the suspects to leave his home for questioning because they did so without the display or threat of force. *Id.* In *Thomas*, two police officers stood at the suspect's front door while two stood at the back door. *Id.* at 276. When the suspect came to the back door, one officer told him that "investigators wanted to talk to him and asked him to come out of the residence, which he did." *Id.* at 278. Since the officers did not draw their weapons or threaten force, the court found that the suspect's exit was consensual and his subsequent arrest was valid. *Id.*

Here, Agents Simonson and Herman did not constructively arrest Petitioner because they did not exhibit any "show of force." *Thomas*, 430 F.3d at 277 (6th Cir. 2005). Agents Simonson and Herman did not surround Petitioner's house with their weapons drawn. *Cf Saari*, 272 F.3d at 804;. *Al-Azzawy*, 784 F.2d at 895. The agents also did not bring a SWAT team for support or point guns at Petitioner's window. *Cf Maez*, 872 F.2d at 1450; *Felsing,* 128 F.3d at 819. Rather, Agents Simonson and Herman stood by at Petitioner's door, just the two of them. (R. 25.) The agents identified themselves but wore khaki pants rather than a full uniform. (R. 29.) The agents had their weapons secured in their holsters throughout the encounter. (R. 26.)

The agents' conduct was similar to that of the officers in *United States v. Thomas* which the Sixth Circuit found to be non-coercive. Like in *Thomas*, Agents Herman and Simonson did not draw their weapons at any point during their encounter with Petitioner. (R. 26); *Thomas,* 430 F.3d at 278. The agents similarly asked Petitioner to exit the home to discuss an investigation and, like in *Thomas*, Petitioner chose to comply. (R. 12); *Thomas,* 430 F.3d at 278. Agents Herman and Simonson simply exercised their right to knock and request to speak without a warrant. *See King*, 563 U.S. at 469-70. In absence of any forceful or otherwise coercive behavior, Petitioner voluntarily exited the home before he was lawfully arrested outside of his home. Therefore, the agents did not violate Petitioner's Fourth Amendment rights during the course of his arrest.

II. The Search of Petitioner's Box Was Reasonable Because Officers Do Not Have a Duty to Inquire About Ownership During Consensual Searches of a Shared Area within a Home

This Court should affirm the Fourteenth Circuit's holding that the search of Petitioner's box was reasonable because Ms. Reiser had actual and apparent authority to consent to the search of the common area, and officers were not required to inquire before opening objects in that area. A police officer may conduct a warrantless search of a residence pursuant to a valid grant of consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). A valid grant of consent can come from the individual whose home is being searched, *see id.*, a person who "possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected," *United States v. Matlock*, 415 U.S. 164, 171 (1974), or a person who reasonably appears to have the authority to validate a search. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990); *but see Georgia v. Randolph,* 547 U.S. 103, 122-23 (2006) (holding that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant").

The existence of actual or apparent authority to consent to a search is based on "mutual use of the property by persons generally having joint access or control for most purposes" rather than traditional laws of property and ownership. *Matlock*, 415 U.S. at 171 n.7. When the object of a search is a common area or a jointly-used effect, a person with common access may validate a search because the owner has "assumed the risk that [a person with access] might permit the common area to be searched." *Id.*; *Frazier v. Cupp,* 394 U.S. 731, 740 (1969).

The scope of consent to search an area is limited to what "the typical reasonable person [would] have understood by the exchange between the officer and the suspect . . . ." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Where a suspect's consent "would reasonably be understood to

extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization." *Id.* at 252. If it is "objectively reasonable for the police to conclude that the general consent to search [an area] include[s] consent to search containers within that [area]," police are permitted to open the container without further inquiry. *Id.* Searching a closed container within the granted area is unreasonable if the suspect places an "explicit limitation" on the scope of consent or if particular facts surrounding the container render it objectively unreasonable to believe the object is included within the suspect's grant of consent. *Id.* at 251-52. For example, "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise [reasonable] with respect to a closed paper bag." *Id.*

Some federal courts of appeals have departed from the traditional rule that a grant of general consent to search an area includes the containers in the area in situations where the officer intends to gain information on someone other than the party that validly consented to the search. *See, e.g. United States v. Waller,* 426 F.3d 838, 847 (6th Cir. 2005); *United States v. Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014). Instead of presuming authority to search an object absent an "explicit limitation," *see Jimeno*, 500 U.S. at 252, these courts impose an affirmative duty to inquire when, after receiving valid consent from someone other than the intended suspect, ownership of an object within the area of search is "ambiguous." *Waller,* 426 F.3d at 847. The imposition of an affirmative duty to inquire if ambiguity is present fails to properly transfer the "explicit limitation" standard to the context of co-tenant consent.

A. A valid grant of consent from a co-tenant is equal to a grant of consent from a suspect.

Valid consent obtained from a co-inhabitant of the suspect is equal to explicit consent from the suspect themselves. This Court recognizes that a co-tenant's consent to search a shared area is

valid against any non-present co-tenants because when multiple people share a common area, it "is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right . . . ." *Matlock,* 415 U.S. at 171 n.7. When a common tenant consents to a search of shared premises, that tenant is "permit[ting] the inspection in his own right," *id.,* which makes clear that "third-party" consent is simply an ordinary consent search in which the officer intends to collect evidence to use against a person other than the consenting party.

That third-party consent is no different than traditional consent is consistent with this Court's framing of the consenting tenant not as a third-party acting as an agent of the suspect, but as an occupant authorizing the search "in [their] own right." *See id.* When this Court affirmed this practice in *Matlock*, it stated that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id.* at 170. This Court did not refer to the consenting party as an agent acting on behalf of the suspect, nor did it create a new "third-party consent doctrine." In fact, the broad language of this holding makes clear that it overlays all consent searches: whenever a person with authority over an area personally consents to its search, that search does not violate the Fourth Amendment rights of any "absent, nonconsenting person with whom that authority is shared," regardless of whether the suspect is the consenting or non-consenting occupant. *See id.* Thus, a so-called "third-party" consent search is any consensual search that produces evidence against a co-occupant, and this Court has already rejected the need to safeguard a co-tenant's personal belongings within the search of a common area by realizing that other tenants "have assumed the risk that one of their number might permit the common area to be searched." *Matlock,* 415 U.S. at 171 n.7.

Furthermore, this Court has repeatedly rejected inquiring into an officer's intent or subjective motives to determine reasonableness under the Fourth Amendment. *Kentucky v. King*,

563 U.S. 452, 464 (2011). "[This Court has] never held, outside limited contexts such as an 'inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment.'" *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 812 (1996)). Therefore, if the search of an area is objectively justifiable because of the valid consent of a person with authority over the premises, an officer's subjective motive to use the information gained from the search against a different party cannot be the basis for imposing a higher standard upon law enforcement. *See id.* Accordingly, the fact that a party other than the intended suspect is the one granting the consent does not alter the analysis—if the search is reasonable within the consent granted, it cannot be treated differently because of an officer's subjective intent to gain information on a person other than the validly consenting party. *See id.*

Since the same rules of construction apply to all consent cases, regardless of the party the police subjectively intend to gain information on, the rule that when consent "would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization," *Jimeno*, 500 U.S. at 251, applies in full force to so-called "third-party" consent cases. Applying this to a shared living space, if the consenting party gives an "explicit limit" to the scope of consent by disclaiming that an object falls out of their control, officers may require further authorization. *See id.* Similarly, if it is objectively unreasonable for an officer to believe that the party shares control over an object, it may be excluded from the general grant of consent. *See id.* This does not create a duty to inquire merely because the officers are searching to find evidence relating to a different party—this would offend the key principle that subjective intent does not change Fourth Amendment analysis. *See King*, 563 U.S. at 464. Rather, only when an officer is made aware of facts or assertions indicating lack of authority does a third-party's consent to search the area not apply to that object. *See Rodriguez*, 497 U.S. at 187-88.

B. There is no duty for officers to inquire about particular objects because the authority to consent to a search applies to all objects within the entire area.

Police do not have the duty to inquire about containers during a consent search because authority to consent extends to all objects within the area unless specifically limited. Courts that require police to inquire about containers during consent searches incorrectly analyze a party's authority over individual effects rather than authority over the general premises. *See United States v. Peyton,* 745 F.3d 546, 553 (D.C. Cir. 2014); *United States v. Taylor*, 600 F.3d 678, 682 (6th Cir. 2010). When police seek access to a home or a room to search, the inquiry is whether the party has authority over the "common area." *See Matlock,* 415 U.S. at 171 n.7. In *United States v. Matlock*, police gained consent to search a room within a home from the girlfriend of the intended suspect. *Id.* at 175. The consenting party made three claims that the state relied on for this authority: that she shared the bedroom with the suspect, that she used one drawer in the dresser, and that her clothes were in the room. *Id.* at 175-76. The officers searched the room and found evidence of the suspect's crime within a diaper bag in the closet of the room. *Id.* at 167. Although the consenting party only claimed use of one dresser drawer, this Court upheld the search of the bag because "[the party's] voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence the [items] found in the diaper bag." *Id.* at 177.

In reaching its holding, the Court in *Matlock* relied on *Frazier v. Cupp*, where this Court declined to analyze individual pockets of a duffel bag separately when a party who only used one compartment consented to a search of the whole bag. *Frazier v. Cupp*, 394 U.S. at 740. In *Frazier*, a third-party consented to the search of the suspect's bag that was left in his home.[3] *Id.* Although the suspect claimed that the consenting party only had authority over one compartment rather than

[3] *Frazier* analyzed the search of a bag because the party only gave consent to search the bag, not the premises it was located in. *Frazier,* 394 U.S. at 740.

the entire bag, this Court declined to "engage in such metaphysical subtleties in judging the efficacy of [the third-party's] consent." *Id.* Use of one compartment granted authority over the entire bag. *Id.* The Court in *Matlock* applied this argument to the search of objects within shared premises: when someone leaves an object in a shared area, "[the party is] held to have assumed the risk that [another person] would allow someone else to look inside." *Matlock*, 415 U.S. at 170. *Matlock* and *Frazier* make clear that objects left within a common space are presumed to be accessible to a party that shares the space. *Id.* (referencing *Frazier,* 394 U.S. at 740). Courts will not parse minute details separating one person's ownership from another's when some sort of mutual use exists; thus, in a shared space, courts and officers have no duty to individually analyze each section of a shared area unless the presumption of ownership is rebutted. This presumption can be rebutted through an "explicit limitation" or where it is objectively unreasonable to believe the consenting party shares ownership. *See Jimeno*, 500 U.S. 251-52.

Petitioner's position incorrectly imposes the duty to inquire when "ambiguity" exists rather than presuming that authority over an area extends to all objects within unless explicitly rebutted. The dissent below states that officers must assess each instance of "ambiguity regarding a co-inhabitant's 'mutual use or control' over a container" and that "[o]fficers should not search the container without first inquiring into whether the co-inhabitant has authority over it." (R. 59-60.) The cases cited in the dissent below, which Petitioner relies on, have found ambiguity to exist when it is apparent that someone other than the consenting party uses the space for storage, when another party's belongings are found near the object, and when the consenting party disclaims that another person primarily uses the space. *See Peyton,* 745 F.3d at 553; *Taylor*, 600 F.3d at 682. This approach improperly creates a distinct standard based on the officer's intended suspect and

disregards the recognition that co-tenants "assume the risk" of the search of objects in shared spaces. *See Matlock,* 415 U.S. at 171 n.7.

For example, in *United States v. Peyton,* the D.C. Circuit found that ownership of a shoebox within a common living room was ambiguous because the suspect's bed was in the room, the third-party stated that the suspect stored belongings in the room, and knowledge that two people lived in the apartment put the officers "on notice that some spaces in the apartment might be used exclusively by [the suspect]." *Peyton*, 745 F.3d at 553. Even though the consenting party had authority over the area searched, the D.C. Circuit imposed a duty to inquire about objects based on "ambiguity" about ownership. *Id.* at 554. Similarly, in *United States v. Taylor,* the Sixth Circuit decided that a shoebox located inside an apartment that was owned solely by the consenting party had ambiguous ownership because it was surrounded by men's clothes and children's toys when the homeowner/consenting party was a woman without children. *Taylor*, 600 F.3d at 681. The court stated that even though "[t]he officers began the search with the reasonable belief that most items within the apartment were subject to [the consenting party's] mutual use, given that she was the sole tenant of the apartment," the men's clothing near the shoebox "would indicate to a reasonable officer that the clothing *might* belong to a visitor or a guest like [the suspect]." *Id.* (emphasis added).

The D.C. Circuit's principle that a consent search over a commonly shared area must be constrained from the outset because officers should be "on notice that some spaces in the apartment might be used exclusively by [another party]," *Peyton*, 745 F.3d at 553, conflicts with two key principles: first, that in a shared area, a co-tenant has "assumed the risk that [a person with access] might permit the common area to be searched," *Matlock*, 415 U.S. at 171 n.7, and second, that the Fourth Amendment does not consider the subjective intent of officers. *King*, 563 U.S. at 464.

First, *Peyton's* premise is directly refuted by the recognition of a co-tenant's "assump[tion] of risk": so-called "third-party consent" considers a tenant's consent to be "in his own right," presuming that objects in the area are subject to search by authority of the consenting party or by the co-tenant's assumption of risk in a shared space. *Matlock,* 415 U.S. at 171 n.7. Second, the principle of objectiveness is offended because the duty to inquire about objects only arises when the officers intend to find evidence about a suspect other than the tenant that validly consented. *See id.* Imposing different standards for police to consider depending on the intent behind identical conduct is contrary to the Fourth Amendment. *See King*, 563 U.S. at 464. Allowing an "officer's motive [to] invalidate[]" the search of an object that is otherwise "objectively justifiable behavior" similarly offends the Fourth Amendment's bar on considering an officer's intent. *See id.*

Furthermore, the Sixth Circuit's assertion in *Taylor* that an officer's reasonable belief that objects in the area are under the authority of the consenting party lessens when the surroundings "would indicate to a reasonable officer that the [object] *might* belong to [another party]," *Taylor*, 600 F.3d at 681, misstates the standard set forth in *Florida v. Jimeno. Jimeno* stated that the duty to seek further authorization only arises when consent to search an object has been explicitly limited or when there are specific facts that make an object's inclusion in the consent unreasonable. *Jimeno*, 500 U.S. at 251. Requiring inquiry based on mere ambiguity—that an object "*might*" belong to someone else—restricts an officer's ability to search far beyond this Court's standard for consent searches. *See id.* Ambiguity is insufficient to require explicit authorization to search an object within an area consented to; consistent with this Court's holding in *Jimeno*, the duty to seek express permission only arises when the consenting party expressly disclaims a lack of ownership or if it is objectively unreasonable to believe an object is within the consenting party's

ownership. *See id.* at 251-52. But absent this limiting information, an officer may search the object without further inquiry.

C. Special Agent Ristroph's search of Petitioner's cardboard box was reasonable.

The Fourteenth Circuit correctly concluded that Special Agent Ristroph's search of Petitioner's box was reasonable. Agent Ristroph asked Ms. Reiser if he could look around the cabin as part of an investigation, and Ms. Reiser agreed by letting him inside. (R. 15.) This exchange defined the scope of consent to "the cabin," which constitutes the entirety of the residence. *See id.*; *Jimeno*, 500 U.S. at 250. It was objectively reasonable for Agent Ristroph to believe that Ms. Reiser had the requisite authority to consent to a search of the entire residence. First, he had actual knowledge that Petitioner's girlfriend was a co-tenant because Agent Herman relayed that "[Petitioner] said his girlfriend is going to be home soon." (R. 12.) Second, Ms. Reiser came home with groceries, parked in the driveway, and let herself into the home, (R. 15), which showed control and independent use of the home. *See United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006) (holding that a suspect's girlfriend conveyed sufficient authority over the home because "she had a key to the apartment, possessions within the apartment, and represented that she lived there on-and-off and frequently cleaned and did household chores in the home . . . [and] was allowed into [suspect's] residence when he was not home"). Given this display of authority, it was objectively reasonable for officers to conclude that Ms. Reiser's initial grant of consent included the entirety of the cabin. *See Jimeno*, 500 U.S. at 250.

Without a duty to inquire, a search of Petitioner's box would only be unreasonable if it was "explicitly" outside the bounds of Ms. Reiser's consent to search the entire cabin. *See id.* at 251. The parties agree that Ms. Reiser's statement concerning Petitioner's use of the loft limited the

scope of her consent, *see* (R. 36), so Ms. Reiser's lack of authority over Petitioner's storage and office area in the loft is assumed on appeal.

The box that Agent Ristroph opened was located in a common area, which Ms. Reiser had authority over, so "the typical reasonable person [would] have understood" that it was included within her grant of consent to search the cabin. *See Jimeno*, 500 U.S. at 251. To the extent that Ms. Reiser's disclaimer that she hardly uses the loft functioned as an "explicit limitation" of consent, it did not explicitly limit the scope of the search of the common area. The package was located on the second step of the stairs in the living room, which is an area that Ms. Reiser had authority over. (R. 17.)

Ms. Reiser also did not place an "explicit limitation" on the box itself. Ms. Reiser's declaration states that Agent Ristroph "walked straight over to the stairs. [She] thought he was about to go up to the loft, but then he stopped and opened a cardboard box . . . ." (R. 16). Ms. Reiser told Agent Ristroph that "[she] had never seen the items found in the cardboard box before" *after* he had opened the box. *Id.* Ms. Reiser was silent as to the ownership of the box and its contents before Agent Ristroph opened it, and her after-the-fact disclaimer could not have retroactively imputed a limitation to the bounds of consent. *Id.* Similarly, Ms. Reiser's statement that she "believe[d] Atticus left the box there to bring upstairs later," (R. 15), has no bearing on the reasonable consent conveyed to Agent Ristroph because she only wrote it in her declaration; Ms. Reiser did not express this as a limitation before or during Agent Ristroph's search, and it cannot be applied retroactively.

The fact that the stairs led up to the loft has no impact on the analysis—the second step was firmly in the shared living room, so it was reasonably within Ms. Reiser's grant of consent. In *Frazier*, this Court declined to meticulously dissect the bounds of authority within a shared area

because the suspect claimed that the consenting party only used specific sections of the shared area. *See Frazier,* 394 U.S. at 740. The second step of Petitioner's cabin was situated in the living room, which Ms. Reiser had authority over. (R. 17.) Like in *Frazier*, this Court should not "engage in such metaphysical subtleties in judging the efficacy" of Ms. Reiser's consent by dissecting one small portion of the living area because of its proximity to an area she does not have authority over. *See Frazier,* 394 U.S. at 740; *Matlock*, 415 U.S. at 171 (applying *Frazier* to the scope of authority of co-tenants to consent to common areas of a residence). Ms. Reiser's minimal use of the stairs also does not affect her authority over the portion in the living room—the box was still located in a common area in which co-tenants are assumed to have "assumed the risk" of search. *See Matlock*, 415 U.S. at 171 n.7.

Since Agent Ristroph had consent to search the area the box was located in, the final inquiry is whether anything about the box made its inclusion within the scope of consent objectively unreasonable. *See Jimeno*, 500 U.S. at 251. The box's location did not alert Agent Ristroph that it was Petitioner's because it was on a portion of the stairs in the common area, not the private area, so it is subject to search either by Ms. Reiser's control or under Petitioner's assumption of risk within the common area. *Matlock*, 415 U.S. at 170. The box's appearance also did not make its inclusion objectively unreasonable. *See Jimeno*, 500 U.S. at 251. First, the box was unmarked and did not indicate ownership. (R. 13.) Since there were no facts to rebut the presumption that Ms. Reiser owed the box, it was reasonable for Agent Ristroph to believe it was included in the grant of consent. *See id.* Second, the top flaps of the box were closed, but they were not locked or sealed in any way. (R. 13.) This is unlike the example of officers unreasonably breaking open a locked briefcase in *Jimeno*; Petitioner's box was easily accessible without obvious measures to keep its content private, making its inclusion in the grant of consent reasonable. *See* (R. 13); *Jimeno*, 500

U.S. at 251. There were no facts or delimiting language that made the inclusion of the box within Ms. Reiser's consent unreasonable and accordingly, the search of Petitioner's box did not violate the Fourth Amendment.

III. The Fourteenth Circuit Correctly Affirmed the Exclusion of Evidence of the Allegedly Untruthful Acts of Iris Copperhead, an Unavailable Hearsay Declarant.

The Fourteenth Circuit correctly upheld the District Court's exclusion of the testimony of Dr. Andrea Joshi and Svetlana Ressler and associated documents under Federal Rule of Evidence 608(b). (R. 47-48, 50, 57); Fed. R. Evid. 608(b). Such extrinsic evidence offered to demonstrate an unavailable hearsay declarant's character for untruthfulness is barred by the confluence of Rule 608, which governs impeachment through suggestion of an individual's character for untruthfulness, and Rule 806, which governs impeachment of hearsay declarants, regardless of availability. Fed. R. Evid. 608, 806.

At trial, Theodore Kolber testified that he saw Iris Copperhead in Joralemon State Park on April 2, 2024; Mr. Kolber testified that Ms. Copperhead 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. 41, 43.) This testimony was admitted over Petitioner's objection on the basis of hearsay, as the statement fell into the hearsay exception for excited utterances. (R. 43, 44); Fed. R. Evid. 803(2). After Mr. Kolber's testimony, Petitioner attempted to call Dr. Andrea Joshi, indicated that he would call Svetlana Ressler, and indicated that he intended to introduce documentary evidence. (R. 47-48.) The proffered testimony and documents concerned actions in Ms. Copperhead's past that allegedly "[went] to Ms. Copperhead's character for untruthfulness."[4] (R. 47-48.) The prosecutor rightly objected on the basis of Rule 608(b), which bars the admission of "extrinsic evidence . . .

[4] The excluded evidence is not actually probative of the credibility of Ms. Copperhead's spontaneous, excited statement to a stranger. (R. 43-44). Since this argument is outside the scope of the question presented, however, it is not presented as a basis for affirming the Court of Appeals' decision.

to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b); (R. 47.) The District Court sustained the prosecutor's objection, recognizing the error in Petitioner's argument that Rule 608(b) does not apply in the context of the impeachment of an unavailable hearsay declarant pursuant to Rule 806. (R. 49-50.)

A. The text and structure of the Rules of Evidence require that Rule 608(b)'s prohibition apply to the impeachment of Iris Copperhead.

The Rules of Evidence must be interpreted according to their "plain language" and "structure." *Huddleston v. United States*, 485 U.S. 681, 687 (1988). When an out-of-court statement is hearsay, but is declared to be admissible nonetheless, the plain language of Rule 806 provides that "the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. The Rule raises the question of whether, if the declarant made the statement during live testimony, the evidence in question would be admissible. Applied to this case, the question is whether the evidence would be admissible if Ms. Copperhead had provided live testimony and made her statement in court. That inquiry necessarily turns on the other substantive rules of evidence, including Rule 608(b)'s prohibition on using "extrinsic evidence . . . to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). Since Ms. Copperhead had to be treated like a witness under Rule 806, and witnesses cannot be impeached through evidence of specific instances of their untruthful conduct under Rule 608(b), Petitioner could not introduce the testimony and documents at issue to attack Ms. Copperhead's character for truthfulness.

This fact does not change because Ms. Copperhead was unavailable for cross-examination. The "plain language" of neither Rule 806 nor Rule 608(b) contains any provision carving out this

scenario from their constraints. *See Huddleston*, 485 U.S. at 687. In fact, Rule 806 only applies "[w]hen a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence," and hearsay statements can only be admitted if an exclusion or exception applies. Fed. R. Evid. 802. The largest set of exceptions are ones that explicitly apply "regardless of whether the declarant is available as a witness." Fed. R. Evid. 803, 806. Ms. Copperhead's statement in this case was only itself admissible under the exception for excited utterances in Rule 803(2), which exempts from the rule against hearsay any "statement relating to a startling event or condition, made while the declarant was under the stress of the excitement that it caused." (R. 43-44); Fed. R. Evid. 803(2).

The Fourteenth Circuit, the Third Circuit, and the District of Columbia Circuit agree with this reading of the text. *See* (R. 57-58); *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). The Third Circuit held that, per the rules' plain text, "Rule 806 does not modify Rule 608(b)'s ban on extrinsic evidence of prior bad acts in the context of hearsay declarants, even when those declarants are unavailable to testify." *Saada*, 212 F.3d at 221. The defendants there were convicted of mail fraud, wire fraud, and conspiracy to commit insurance fraud. *Id.* at 213. On appeal, they raised a number of evidentiary issues, including a challenge to the admission of certain evidence to impeach the credibility of a former judge whose hearsay statement was admitted through the testimony of another government witness. *Id.* at 213, 218. In response, the government sought judicial notice of the judge's "removal from the bench and disbarment for unethical conduct," and the district court took the requested judicial notice over the objections of defendants under Rule 608(b). *Id.* at 219.

The Third Circuit agreed with defendants, concluding "that the District Court erred in admitting such evidence," although it also found the district court's error to be harmless. *Id.* at 222.

The court recognized that its "holding [was] dictated by the plain—albeit imperfectly meshed—language of Rules 806 and 608(b)," and that any "possible drawbacks may not override the language of" those Rules. *Id.* at 221-22.

The District of Columbia Circuit has previously ruled similarly to the Third Circuit, stating that the Rule 608(b) bar applied to an unavailable hearsay declarant. *White*, 116 F.3d at 920. The only federal court of appeals to suggest otherwise is the Second Circuit, years before *White* and *Saada* were decided. *See United States v. Friedman*, 854 F.2d 535, 570 n. 8 (2d Cir. 1988). That court said in a footnote that, in the context of an unavailable hearsay declarant, "there has by definition been no cross-examination, and resort to extrinsic evidence [of specific instances of untruthful conduct] may be the only means of presenting such evidence to the jury." *Id.* Although the Second Circuit suggested that Rule 806 should override the text of Rule 608(b), the court failed to properly analyze whether this interpretation was consistent with the language and structure of the Rules. *See id.* The court ultimately did not allow admission of the extrinsic evidence for impeachment of the declarant; instead, it ruled that "the evidence was properly excluded because it was simply not probative on the issue of the credibility of [the hearsay statements]." *Id.* at 569. The footnote concerning Rule 608(b)—the only statement from a federal court of appeals to take its position—lacked reasoning and was not relied on in the Second Circuit's actual holding.

The dissent below challenged the straightforward application of the Rules by noting that Rule 608(b) uses the word "witness" and suggesting that this meant the provision applied to witnesses who testify about hearsay statements, not the hearsay declarants themselves. (R. 61.) Such a suggestion disregards Rule 806's requirement that hearsay declarants be treated as a "witness" for purposes of admitting or excluding impeachment evidence; the Rule allows "any evidence that would be admissible [to impeach or support credibility] *if the declarant had testified*

as a witness." Fed. R. Evid. 806 (emphasis added). Since the Rule insists that hearsay declarants be treated as witnesses, then, the fact that the substantive rule discusses witnesses makes it applicable to hearsay declarants in this context.

An interpretation of a Rule of Evidence should be rejected if "it is inconsistent with the structure of the Rules of Evidence and with the plain language of" the Rule or Rules in question. *Huddleston*, 485 U.S. at 687. Here, not only does the plain language of the Rules require the exclusion of the evidence at issue, but this conclusion is supported by the Rules' structure, in terms of both the theory underlying the Rules and the context surrounding the applicable provisions.

If Rule 608(b)'s prohibition did not apply in the context of unavailable hearsay declarants, the opponent of a particular statement would have significantly stronger impeachment options available if the individual who made the statement was an unavailable hearsay declarant as opposed to a live witness. Rule 608(b) allows the opponent of a witness's statement to mention instances of the witness's prior conduct that reveal a character for untruthfulness during cross-examination of that witness—but the bar on extrinsic evidence requires the opponent to accept the witness's responses. Fed. R. Evid. 608(b). Here, if Ms. Copperhead had testified at trial, Petitioner would not have been able to introduce the evidence at issue; he could only question Ms. Copperhead on cross-examination about her allegedly untruthful conduct and accept her answers, even if she denied it.

That this restriction would fall away when the witness is unavailable is not only counter-intuitive, it is contrary to the reasoning behind the hearsay doctrine and its exceptions. Rule 803, a list of exceptions under which hearsay can be admitted, "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even

though he may be unavailable." Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules. Petitioner's contention that stronger impeachment options are necessary for unavailable hearsay declarants is therefore in conflict with the fact that Rule 803 ensures that statements admitted thereunder are trustworthy. In this case, Ms. Copperhead's statement was an "excited utterance," which the Rules consider credible because the "condition for excitement . . . temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *Id.* In general, concerns about the need for live testimony and cross-examination are adequately addressed by the substance of the rule against hearsay and its exceptions. The drafters of the Rules have considered the tradeoffs and decided that a witness's live testimony is not required to ensure trustworthiness.

Further, Rule 806 includes a specific carveout that sheds light on the intent of the Rule's drafters: "The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it." Fed. R. Evid. 806. This provision allows evidence of a hearsay declarant's prior inconsistent statements to be admitted under circumstances where a witness's prior inconsistent statements would not be admissible under Rule 613. Fed. R. Evid 613. The inclusion of this language, by affecting only one particular mode of impeachment, signals that the drafters of the Rules intended for those governing other modes of impeachment to apply in their normal course. *Saada*, 212 F.3d at 222. The "well-established" canon of "*expressio unius est exclusio alterius*" says when one thing is explicitly included in a statute and the statute is silent about the inclusion of something else, there is an inference that the latter is excluded. *Esteras v. United States*, 606 U.S. 185, 195 (2025). This canon has also been carried over to interpretation of the Rules of Evidence, and specifically to the text of Rule 806. *See United States v. Herrera*, 51 F.4th 1226, 1287 (10th Cir. 2022).

Applying this canon here: Rule 806's explicit carveout for impeachment by introduction of prior inconsistent statements implies that there is no carveout for impeachment by introduction of prior untruthful actions because the Rule mentions the former but not the latter.

B. This Court should reject Petitioner's argument that violating Rule 608(b) is necessary to impeach unavailable hearsay declarants.

The Federal Rules of Evidence allow parties to impeach witnesses through a wide variety of methods. Petitioner argued at trial that adhering to Rule 608(b) "would force defendants like [Petitioner] to simply accept damaging hearsay testimony without any way to undermine or test the credibility of its source." (R. 50.) That argument is unfounded; there are numerous options available to litigants such as Petitioner to impeach the credibility of an unavailable declarant's hearsay statement without violating Rule 608(b). The record here does not clarify exactly which impeachment methods were used at trial, so it is possible that Petitioner effectively impeached Ms. Copperhead's statement through any or all of the numerous methods laid out below.

A party can attempt to impeach a hearsay declarant by asking the testifying witness about specific instances of the declarant's conduct that demonstrate a character for untruthfulness. *Saada*, 212 F.3d at 221. In this case, that would consist of Petitioner's counsel asking Theodore Kolber about his knowledge, if any, of previous dishonest acts Ms. Copperhead may have committed. Not only was this method available to Petitioner at trial, but his counsel actually took advantage of it, asking Mr. Kolber if he "[knew] anything about [Ms. Copperhead's] personal life other than this alleged kidnapping plot," and whether he had any "reason to doubt the credibility of Ms. Copperhead." (R. 45-46.) Mr. Kolber answered in the negative to both of these questions, but a particular line of inquiry's availability to a party at trial does not depend on that party getting their ideal testimony out of the inquiry.

A party can also introduce opinion and reputation evidence concerning a hearsay declarant's character for untruthfulness. "A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character." Fed. R. Evid. 608(a); see *Saada*, 212 F.3d at 221. Here, since Ms. Copperhead was treated as a witness pursuant to Rule 806, that would consist of Petitioner introducing testimony either that the witness believed Ms. Copperhead to be an untruthful person or that Ms. Copperhead was believed to be an untruthful person in the community at large. Again, the record reflects that Petitioner's counsel actually pursued such an inquiry with Mr. Kolber, asking whether he knew "what [Ms. Copperhead's] neighbors think of her," *et cetera*. (R. 46.) Mr. Kolber again had no knowledge of Ms. Copperhead's reputation, but Petitioner's counsel apparently knew of this method of impeachment and chose to take advantage of it, at least with respect to Theodore Kolber.

A party can further seek to impeach a hearsay declarant by introducing evidence of a criminal conviction in compliance with Rule 609. *Saada*, 212 F.3d at 221; *see* Fed. R. Evid. 609. Here, the record does not reflect whether Ms. Copperhead had any criminal convictions prior to her untimely death or whether Petitioner sought to introduce evidence of any such convictions.

As previously discussed, a hearsay declarant can be impeached through the introduction of a prior inconsistent statement, even if the declarant is unavailable. *Saada*, 212 F.3d at 221; Fed. R. Evid. 613(b), 806. This would allow the Petitioner here to introduce a statement made by Ms. Copperhead in which she claimed fault for the attempted abduction of Ms. Wildrose, because that would be inconsistent with the admitted hearsay statement; the record does not reflect whether such an inconsistent statement exists or whether Petitioner sought to introduce evidence of such a statement to impeach Ms. Copperhead's hearsay statement.

Finally, a hearsay declarant can be impeached through evidence of bias, which is "a permissible and established basis of impeachment under the Rules." *United States v. Abel*, 469 U.S. 45, 50 (1984). Here, Petitioner had the ability to introduce evidence suggesting bias, and it is not in the record whether he chose to do so.

Petitioner seeks to avoid the restrictions of Rule 806(b) because of a supposed need to impeach Iris Copperhead through one specific method of impeachment. Not only do the text and structure of the Rules of Evidence preclude this line of argument, but the purported need is nonexistent given the assortment of impeachment options available. The District Court and the Fourteenth Circuit recognized these realities. Therefore, this Court should affirm the judgment of the Fourteenth Circuit.

CONCLUSION

For the foregoing reasons, this Court should affirm the Fourteenth Circuit's decision that Petitioner's Fourth Amendment rights were not violated, and that extrinsic evidence of an unavailable hearsay declarant's untruthful actions was properly excluded.

Respectfully submitted,

/s/ Team 26R
Attorneys for the Respondent