

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 THE PETITIONER

Counsel for Petitioner
February 8, 2026

QUESTIONS PRESENTED

- I. Whether law enforcement officers violated the Fourth Amendment when they forcefully directed and yelled at Mr. Hemlock to step outside his home to arrest him without a warrant, notwithstanding the heightened constitutional protection afforded to the home established in *Payton v. New York*.

- II. Whether law enforcement officers violated the Fourth Amendment by conducting a warrantless search of a closed box under Mr. Hemlock's control based solely on a third-party's apparent authority, when it was unclear whether the third-party had any actual or joint use of the box.

- III. Whether, under Federal Rule of Evidence 806, the district court should have allowed Mr. Hemlock to use extrinsic evidence to impeach Ms. Copperhead when it was the only possible way to impeach her through specific instances of untruthfulness.

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OPINION BELOW

The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Atticus Hemlock v. United States*, No. 22-1833, was entered on April 14, 2025. R. at 51–61.

CONSTITUTIONAL PROVISION

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Police Investigation

On February 20, 2024, the United States Department of Tourism announced that Under Secretary for Rural Development Jodie Wildrose planned to visit Boerum Village on April 8, 2024. R. at 3–4. The visit was part of an initiative to assess the farmland and public garden to promote tourism and economic development. R. at 4. In late March of 2024, Boerum Village law enforcement received two reports of suspicious activity in the area. R. at 6–7. Tina Caplow, a superstore manager, reported that while she was working on March 30, 2024, two individuals purchased zip ties, ski masks, a knife, trash bags, and bear spray with cash. R. at 6. Additionally, a local barista named Elvis Hoag reported two suspicious individuals talking in his coffee shop on March 28 and 29, 2024. R. at 7. He reported overhearing them discuss what he thought was a kidnapping plot involving a federal official named “Jodie.” R. at 7. Mr. Hoag said that he recognized the individuals through social media as Atticus Hemlock and Iris Copperhead. R. at 7. On April 2, 2024, FBI Special Agents Hugo Herman and Ava Simonson interviewed Ms. Caplow and Mr. Hoag about the suspicious activity that they reported. R. at 6–7.

Later that day, Agents Herman and Simonson went to Mr. Hemlock's residence to ask him about his interest or involvement with Under Secretary Wildrose. R. at 11. Mr. Hemlock lives in a rented cabin located in a wooded area near Joralemon State Park. R. at 11. The agents arrived in an unmarked car and without a warrant. R. at 19–20. Upon arrival at 4:08 p.m., Agent Simonson knocked loudly three times on Mr. Hemlock's door, told Mr. Hemlock she was an FBI agent, and asked him to come outside his home to talk. R. at 21.

II. The Seizure

Upon seeing federal agents at his door, Mr. Hemlock was hesitant to exit his home. R. at 23. He spoke to the agents through the screened front door but refused to physically step outside his home. R. at 11–12. Mr. Hemlock told the agents that he did not “want anything to do with [them].” R. at 12. Nonetheless, Agent Herman continued to talk with Mr. Hemlock through the screen door of his home and yelled for him to “come outside” and that their investigation “need[ed] answers. Now.” R. at 12.

During his interaction with Mr. Hemlock, Agent Herman noticed what he believed to be two bottles of chloroform behind Mr. Hemlock on the counter. R. at 11. When asked, Mr. Hemlock told the agents to not worry about the bottles. R. at 11. After relentlessly asking Mr. Hemlock to talk, Mr. Hemlock asked Agent Herman if they were there to talk about “Jodie.” R. at 11. Mr. Hemlock clarified that that he did not want to talk about her and did not want to speak with the agents. R. at 11–12. Based off of their suspicions, Agents Herman and Simonson called for Agent Kiernan Ristroph to come to the scene at 4:16 p.m. R. at 12.

Before Agent Ristroph arrived, Agents Herman and Simonson continued trying to get Mr. Hemlock to come out of his home, given that they lacked a warrant to enter his home. R. at 12. After radioing for backup, the agents re-approached Mr. Hemlock's front door. R. at 12. During

this re-approach, the agents placed their hands on their gun holsters. R. at 26. The agents admitted during the trial that this would be an intimidating thing to see. R. at 26. However, Mr. Hemlock still did not want to talk or come outside his home. R. at 11–12. Agent Simonson said that she and Agent Herman should continue to ask Mr. Hemlock to come outside so they can arrest him. R. at 12. Mr. Hemlock stepped outside after Agent Simonson said he needed to “get outside right now.” R. at 12. After Mr. Hemlock exited the home, the agents immediately arrested him. R. at 12.

III. The Search

After arresting Mr. Hemlock, agents searched his person. R. at 12. The agents found a spiral-bound notebook in his pocket which discussed his disdain towards Under Secretary Wildrose. R. at 5, 12. At 4:30 p.m., Agent Ristroph arrived and waited for Mr. Hemlock’s girlfriend, Fiona Reiser, to return to the cabin. R. at 13. Upon Ms. Reiser’s arrival, Agent Ristroph received consent to search the cabin. R. at 13–14. She had lived in the cabin with Mr. Hemlock since May of 2023. R. at 15.

After Ms. Reiser consented to Agent Ristroph’s search, he found a closed cardboard shipping box with the top flaps closed and no obvious identifying information on the stairs that lead to Mr. Hemlock’s personal loft. R. at 13, 15. Ms. Reiser told Agent Ristroph that he could search the space but admitted later that she did not know what Mr. Hemlock did or kept up in the loft, and that she did not use that space. R. at 15. Additionally, Ms. Reiser told Agent Ristroph that she believed Mr. Hemlock left the box to bring up to his personal loft later. R. at 16. Without a warrant, based solely off Ms. Reiser’s consent, Agent Ristroph searched the box and found a roll of duct tape, two black ski masks, one pair of gloves, and two bottles of chloroform, a length of rope, a folding knife, and zip ties, and a roll of duct tape. R. at 13. Ms. Reiser told Agent Ristroph

that she had never seen the items in the box before, nor did she have any idea what the box was or what it contained. R. at 16.

IV. Ms. Copperhead's Statement

At around the time of Mr. Hemlock's arrest, Ms. Copperhead was headed to the cabin to meet Mr. Hemlock and Ms. Reiser for dinner. *See* R. at 11, 40, 53. As she approached the cabin, Ms. Copperhead witnessed Mr. Hemlock's arrest. R. at 43. Several minutes later in nearby Joralemon State Park, Boerum Village resident Theodore Kolber saw Ms. Copperhead run through the woods towards the park's walking path. R. at 42. Kolber observed that Ms. Copperhead was visibly upset. R. at 42. When he asked if Ms. Copperhead was okay, she said "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. at 43. Ms. Copperhead ran off and was arrested later that day. *See* R. at 44–45, 53. The evening of her arrest, Ms. Copperhead died suddenly from an acute aortic rupture. R. at 46.

V. Trial

At his trial, Mr. Hemlock moved to suppress the notebook under the Supreme Court's precedent in *Payton v. New York* and the evidence found in the cardboard box, as the detective lacked proper consent to search it. R. at 19. The court denied both motions. R. at 31, 38–39.

During the government's case-in-chief, they called Mr. Kolber to testify against Mr. Hemlock. R. at 41. The government questioned Mr. Kolber about his interaction with Ms. Copperhead on April 2, 2024, in Joralemon State Park. R. at 41. The government elicited the statement that Mr. Kolber heard Ms. Copperhead say on the trail, and the court admitted the statement into evidence as an excited utterance under Federal Rule of Evidence 803(2). R. at 43. On cross-examination, the defense questioned Mr. Kolber's relationship to Ms. Copperhead. R. at 45. Mr. Kolber said that he had never met Ms. Copperhead before April 2, 2024, and that he did

not know anything about her personal life until he read about the alleged kidnapping attempt in the news. R. at 45. Mr. Kolber confirmed that he did not know what people in the community thought of Ms. Copperhead and that he had no reason to doubt her credibility. R. at 46.

In their case-in-chief, the defense called Dr. Andrea Joshi to the stand. R. at 47. Dr. Joshi is a member of Court Street College's Board of Academic Integrity, the university that Ms. Copperhead attended. R. at 47. The defense planned to use Dr. Joshi to authenticate an Academic Integrity Policy violation by Ms. Copperhead in her senior capstone course. R. at 47. According to the letter, Ms. Copperhead violated course policies by using artificial intelligence to complete her final assignment and subsequently failed the course. R. at 47–48.

Additionally, during a side bar, the defense stated that they intended to also call the Mayor's Chief of Human Resources Svetlana Ressler to testify about a falsified job application that Ms. Copperhead submitted to the Mayor's office. R. at 48. Upon reviewing Ms. Copperhead's application, Ms. Ressler called Court Street College and found out that Ms. Copperhead had lied about graduating from the college. R. at 49.

The government argued that Dr. Joshi and Ms. Ressler's testimony and the documents were extrinsic evidence and therefore inadmissible to attack Ms. Copperhead's credibility. R. at 49. The government argued that while Rule 806 allows for the hearsay opponent to impeach the hearsay declarant as if she was testifying, that rule does not lift Rule 608(b)'s ban on extrinsic evidence. R. at 49. The defense argued that the purpose of Rule 608(b) is to ensure that the defendant does not have to accept a hearsay declarant's statement without impeachment. R. at 49. The defense argued that Rule 806's promise would serve little purpose without the ability to introduce extrinsic evidence. R. at 49–50. The court sustained the government's objection to the extrinsic evidence. R. at 50.

VI. Procedural History

Defendant Atticus Hemlock appeals the judgment of the United States District Court for the Northern District of Boerum that was entered on August 12, 2024. Mr. Hemlock appeals the lower court's judgment that found him guilty and sentenced him to ten years in prison for the attempted kidnapping of an officer of the United States government. Additionally, he appeals the Fourteenth Circuit's decision, arguing the notebook and cardboard box were fruits of an illegal seizure and search, and that the district court should have allowed extrinsic evidence to impeach Ms. Copperhead's prior acts of dishonesty.

SUMMARY OF THE ARGUMENT

First, the Fourteenth Circuit erred in holding that there was no constructive entry into Mr. Hemlock's home. The police coerced Mr. Hemlock to leave his home for the sole purpose of arresting him in public, without a warrant. Adopted by the Ninth and Sixth Circuits, police constructively enter a home even if they do not cross the physical threshold when they use coercive tactics to draw someone outside to arrest them without a warrant. The federal agents repeatedly commanded Mr. Hemlock to leave, reached for their weapons in front of Mr. Hemlock, and continuously told him that he needed to answer their questions, outside his home, immediately. The Supreme Court in *Payton v. New York* held the home deserves the utmost protection, and officers cannot arrest someone in their home without a warrant. Therefore, when the federal agents continuously berated Mr. Hemlock at his home, they constructively entered his house without a warrant, violating his Fourth Amendment right.

Second, after arresting Mr. Hemlock, Agent Ristroph illegally searched Mr. Hemlock's personal box based off of Ms. Reiser's third-party consent. Although police officers are not required to have absolute certainty that a third party has apparent authority over a space or

property, they must resolve any ambiguity regarding that authority to reasonably believe the property or area is jointly used or owned. Here, the officers exploited the ambiguity surrounding ownership of the box on Mr. Hemlock's loft stairs to search it without a warrant. Ms. Reiser's consent was limited to the communal and joint areas of the home and did not extend to the box; she swore under penalty of perjury that she did not know the box was or what it contained. The agents failed to investigate if Ms. Reiser even used the box or had some authority over it, committing an illegal search and violating Mr. Hemlock's Fourth Amendment right to privacy.

Third, the Fourteenth Circuit's ruling that extrinsic evidence was not admissible to impeach Ms. Copperhead's character for truthfulness when Ms. Copperhead was unavailable to testify goes against the purpose of Federal Rule of Evidence 806. The purpose of Rule 806 is to put hearsay declarants on equal footing with live witnesses, but Rule 608(b) impeachment through specific acts of dishonesty is usually only meaningful through cross-examination of the person whose character is being attacked. However, Rule 806 applies precisely when that person is not on the stand. Admission of extrinsic evidence is the only way to make up for the fact that the hearsay opponent cannot cross-examine a live witness. That is what happened here, where Mr. Kolber did not know Ms. Copperhead so the defense had no way to impeach her truthfulness through specific instances of dishonesty, despite having evidence that could have had a significant impact on her credibility. Availability of other forms of impeachment do not make up for the fact that Rule 608(b) is unavailable, and Rule 806 promises all forms of impeachment for hearsay declarants. Judges concern about "mini trials" on collateral issues are easily managed through the judge's discretion to control the courtroom through Rules 403 and 611. Rule 806 is meant to ensure meaningful impeachment of non-testifying hearsay declarants and prevent hearsay from becoming a "shield" for uncredible witnesses. Without extrinsic evidence, that purpose is unattainable.

ARGUMENT

I. The Fourteenth Circuit erred in holding that the federal agents did not violate the Fourth Amendment when they arrested Mr. Hemlock just outside his home because they coerced him to leave through authoritative commands and threatening mannerisms.

A. The Fourth Amendment prohibits warrantless seizures inside the home absent exigent circumstances.

The Fourth Amendment protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV. The government cannot arrest someone in their home without a warrant. *See Payton v. New York*, 445 U.S. 573, 577–78; *see also United States v. Allen*, 813 F.3d 76, 81 (2d Cir. 2016) (interpreting *Payton* in finding that when officers engage in actions to coerce the occupant outside of the home, they accomplish the same thing and achieve the same effect as an actual warrantless entry). Therefore, to arrest an individual without a warrant, officers must only do so outside of the home when the suspect willingly steps outside, or if an exigent circumstance is present. *Payton*, 445 U.S. at 577; *United States v. Jones*, 565 U.S. 400, 423 (2012) (holding that the home deserves the utmost protection under the Fourth Amendment).

1. The police constructively entered Mr. Hemlock’s home when they coerced him to step outside his front door to arrest him without a warrant, violating his Fourth Amendment right as protected in *Payton v. New York*.

Under the Fourth Amendment, law enforcement may not arrest someone inside their home absent a warrant or exigent circumstances. *See Payton*, 445 U.S. at 578; *United States v. Watson*, 423 U.S. 411, 418 (1976) (discussing that police can only conduct a warrantless arrest in public, not in one’s home). Even without physically stepping into the house, police can seize someone in their home through coercive conduct. *See United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984); *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980). Various circuit courts held that even if someone is in their home and police remain outside, submission to authoritative commands, threatening presence of police officers, or other coercive measures constitutes a seizure

when a reasonable person would not feel free to disregard the officers' authority. *See Johnson*, 626 F.2d at 757; *United States v. Saari*, 272 F.3d 804, 809 (6th Cir. 2001) (discussing that because the police blocked the entry way with weapons, they coerced the defendant into stepping outside and committed an illegal in-home warrantless seizure).

The Fourth Amendment establishes a firm line upon which the government can seize an individual. The Supreme Court makes clear that police, under no circumstances other than exigency, can enter a person's home without a warrant. *Payton*, 445 U.S. at 576–77. In *Payton*, police officers, without obtaining a warrant, forcibly entered Payton's apartment to arrest him for a suspected homicide. *See Payton*, 445 U.S. at 576. Payton was not present, but a shell casing was seized in plain view when the officers entered the home. *Id.* Payton later turned himself in, and the lower court held that the warrantless search and entrance into his home was valid under an exigent circumstance according to the New York Criminal Code. *Id.* However, upon appeal, the Court held that the "chief evil" that the Amendment was designed to prevent was broader than the abuse of a general warrant and thereby found the police's entry unconstitutional. *Id.* at 586 (holding the home deserves the utmost protection under the Fourth Amendment).

Here, because federal agents confronted Mr. Hemlock at his doorstep and he was subject to their commands while remaining inside, the seizure thereby began inside the home, triggering Payton's bright line warrant requirement. Agent Herman and Simonson's demands for Mr. Hemlock to come outside and grabbing the holster of their weapons in front of Mr. Hemlock to coerce him to step outside shows that they constructively entered Mr. Hemlock's home. *See R.* at 21, 23–24. The agents shouted at Mr. Hemlock to come out of his home in order to answer their questions, and even testified they felt Mr. Hemlock was "pretty resistant" to their request. *R.* at 22. They seized Mr. Hemlock even though they were not physically inside his home. *See Payton*, 445

U.S. at 585 (holding that a seizure occurs the moment a reasonable person would not feel free to disregard police authority, especially in one's home). Even without direct physical access, the officers constructively entered Mr. Hemlock's home through their coercive tactics that lured him outside, violating his Fourth Amendment rights under *Payton*.

When police officers use coercive tactics to lure someone outside their home to arrest them, they are constructively entering that person's home without a warrant to conduct the arrest. The Sixth Circuit held that officers coerced a defendant out of his home when they surrounded the defendant's home and illuminated it with spotlights. *See Morgan*, 743 F.2d at 1161. The court ruled that these coercive tactics surmounted to constructive entry. *Id.* The police used these tactics to specifically force the defendant out of their home with the sole intent of arresting him in public, given the fact they did not have a warrant to arrest him in his home. *Id.* at 1166. The court concluded the police constructively entered the home and violated the defendant's right to privacy. *Id.*

The issue at bar here is akin to the facts of *Morgan*. Like the defendant in *Morgan*, Mr. Hemlock was restrained inside his home through the authoritative commands and stern language from the officers. Having their hands on their weapons, loud knocks on his door, and verbally commanding him to come out numerous times for over ten minutes coerced him into leaving his house. R. at 23, 26. Accordingly, Mr. Hemlock's liberty was restrained even though the officers did not physically step into the home; they constructively entered it by coercing Mr. Hemlock to step outside to arrest him. The agents lacked both a warrant and exigent circumstances—their coercive conduct compelled Mr. Hemlock to exit his home. In doing so, the agents effectively arrested him inside his residence, crossing the bright-line rule established in *Payton* and violating the core constitutional protection afforded to the home.

Additionally, the Ninth Circuit has also expanded upon the Court's reasoning in *Payton* and held that constructive entry is an in-home warrantless arrest, violating one's Fourth Amendment right. The Ninth Circuit held that law enforcement can illegally seize someone in their residence without physically entering the home if the officers' conduct coerced the occupant to submit to their commands and step outside. *See Johnson*, 626 F.2d at 757. In *Johnson*, federal agents surrounded a trailer with their weapons drawn and misrepresented their identities while shouting at the defendant to come out. *Id.* The court concluded that the defendant was coerced to comply with authoritative commands coming from outside his trailer, which constituted a constructive entry under the Fourth Amendment. *Id.* at 757–58. The court underscored that the Fourth Amendment prohibits constructive entry into the home, recognizing that a seizure may occur when law enforcement compels compliance through a show of authority, even without physical intrusion into one's home. *Id.*

Here, federal agents confronted Mr. Hemlock at his residence and repeatedly commanded him to step outside. Mr. Hemlock remained inside and told the agents he did not want to talk, yet the agents did not stop berating him to come outside. R. at 25. He was not free to ignore the officers' authority and was unconstitutionally seized, without a warrant, inside his home. Mr. Hemlock's situation is analogous to the defendant in *Johnson*, in which the Ninth Circuit held the police constructively entered his home and coerced him into stepping outside when they surrounded his home and yelled at the defendant to step outside, even though they did not physically enter the home. *See Johnson*, 626 F.2d at 757–58; *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985). Like the defendant in *Johnson*, Mr. Hemlock was coerced to step outside his home because of the federal agents' actions and commands, including berating him to come outside over a span of around ten minutes, reaching for their weapons in front of him, and

demanding he speaks with them that instant, outside. R. at 25–26. The agents constructively entered the home to seize Mr. Hemlock, having coerced him outside solely for the purpose of arresting him.

2. The facts differ from the holdings of the Seventh and Eleventh circuits as the agent’s methods to get Mr. Hemlock outside surpass mere conversation.

Although some circuits have adopted constructive entry as a substantial legal doctrine interpreted under *Payton*, there remains a split amongst jurisdictions. Both the Seventh and Eleventh Circuits held there was no constructive entry because if a person leaves their apartment, even if the police are outside asking them to do so, it was volitional and not in violation of the Fourth Amendment. *Knight v. Jacobson*, 300 F.3d 1272, 1275 (11th Cir. 2011); *Gaddis v. DeMattei*, 30 F.4th 625, 630 (7th Cir. 2022). Nonetheless, the facts present here are distinct from the holdings of the Seventh and Eleventh Circuits.

Mere conversation with someone standing in their home does not rise to the level of coercion required to prove an illegal seizure under the constructive entry doctrine. In *Gaddis*, the Seventh Circuit held that when the officers spoke to the occupant at the doorway and encouraged him to step outside, it did not constitute constructive entry because the encounter was consensual and the occupant was free to close the door or terminate the interaction. *See Gaddis*, 30 F.4th at 630 (7th Cir. 2022). Nonetheless, this circuit holding is distinguishable from this case. In *Gaddis*, the officers had talked to the defendant and engaged in actual conversation. *Gaddis* communicated with Officer DeMattei about people in the neighborhood and was telling him how the citizens “were behaving like girls.” *Gaddis*, 30 F.4th at 628. However here, Mr. Hemlock made it clear he did not want to engage in conversation, but the federal agents repeatedly commanded him to step outside while he remained inside his home. A reasonable person in Mr. Hemlock’s position would not have felt free to disregard the officers’ authority. Unlike *Gaddis*, where mere conversation at

the door was insufficient to trigger Fourth Amendment protection, Mr. Hemlock was coerced to come outside through the agent's verbal threats, the fact that they reached for their weapons, and their call for backup. Thus, this is more akin and satisfies the criteria for a constructive in-home seizure recognized in *Johnson*. See *Johnson*, 626 F.2d at 757. But see *Gaddis*, 30 F.4th at 631 (distinguishing conversations at the door from demands, threats, and coercive tactics used to gain constructive entry into one's home).

Similarly, the Eleventh Circuit also held that simple conversation does not arise to the level of coercion necessary to prove a Fourth Amendment constructive entry and illegal seizure. The Court in *Knight* held the officer did not coerce the defendant to step outside, but rather it was the defendant's own decision to do so. The court found that because the officer asked once for Knight to step outside and he did, the officer did not coerce him to leave his apartment. *Knight*, 300 F.3d at 1276. Here, however, the police continuously shouted at Mr. Hemlock to leave his apartment and remained at his house even though he explicitly stated he wanted nothing to do with them. The facts present in *Knight* are distinct from the case at bar today; the officers' actions surpassed conversation and asking once. Rather, they continued to berate Mr. Hemlock over a span longer than a short encounter until he ultimately came outside, solely so they could arrest him without a warrant.

The Fourth Amendment prohibits law enforcement from accomplishing through coercion what it cannot do directly: effect a warrantless arrest inside the home. Courts have consistently recognized that a seizure occurs when officers, through authoritative commands or a show of authority, restrain a person's liberty while the person remains inside their residence, even if officers do not physically cross the threshold. Here, federal agents repeatedly commanded Mr. Hemlock to step outside, threatened him, and held their hands on their weapons. Mr. Hemlock was not free

to disregard their authority as they continued to berate him at his front door for over ten minutes. By coercing him to step outside, the officers constructively entered Mr. Hemlock's home, unlawfully seizing him in violation of the Fourth Amendment. Therefore, Petitioner asks this Court to adopt the doctrine of constructive entry and hold that the notebook, which was only found after the police forced Mr. Hemlock to come out of his home, is a fruit of an unlawful seizure.

II. The Fourteenth Circuit erred in holding that federal agents did not violate the Fourth Amendment by searching a closed box in Mr. Hemlock's personal space because Ms. Reiser lacked the apparent authority to consent to the search of the box.

A. Under the Fourth Amendment, a warrantless search is valid based on apparent authority when law enforcement officers reasonably believe that the third-party giving consent retained the authority to do so.

A warrantless in-home search is constitutional under the Fourth Amendment if an individual who possessed common authority over the property or space provided consent for the government authorities to conduct a search. *See United States v. Matlock*, 415 U.S. 164, 172 (1974) (discussing that because the consenter shared the room equally with the defendant, she had authority to consent to the entirety of the police officer's search). Regardless of whether their belief was mistaken, officers still need reasonable belief that the consenter has apparent authority and must investigate any ambiguity present over who retains proper authority over the area or goods searched. *See Illinois v. Rodriguez*, 497 U.S. 177, 187 (1990) (holding that common authority is based on the parties' mutual use of the property); *United States v. Taylor*, 600 F.3d 678, 682 (6th Cir. 2010.)

1. Ms. Reiser lacked the apparent authority to consent to the search of Mr. Hemlock's box inside their home because she did not have joint ownership or control of the box or its contents.

To identify whether a third-party has apparent authority, courts look at a variety of factors to establish the level of use and control they retained over the specific space or property police

officer's want to search. *Rodriguez*, 497 U.S. at 190–91. Providing consent alone does not determine the scope; the consenter must demonstrate mutual access, joint use, and ownership of the property to validly give third-party consent to a search. *See United States v. Peyton*, 45 F.3d 546, 554 (D.C. Cir. 2014); *United States v. Lemmons*, 282 F.3d 920, 923 (7th Cir. 2002); *Matlock*, 415 U.S. at 176.

The Court in *Rodriguez* held that common authority relied on mutual use of the property, joint access or control over the property, and if one voluntarily limited their expectation of privacy. *Rodriguez*, 497 U.S. at 190–91 (ruling these factors determine whether apparent consent was legally given). Fischer, the third-party consenter in *Rodriguez*, consented to the police's search of the apartment, stating that it was both hers and her defendant's apartment. *Id.* at 191. However, the Supreme Court directed the opinion back to the lower courts to determine if Fischer retained joint or communal use over the property searched because it was ambiguous if Fischer retained apparent authority. *Id.* at 191.

Ms. Reiser had no apparent authority to consent to the police's search of Mr. Hemlock's cardboard box. The Supreme Court has clarified that a third-party consenter must have mutual use and access of the property. *See Rodriguez*, 497 U.S. at 191. However, Ms. Reiser swore, under penalty of perjury, that she did not own the box, and that Mr. Hemlock left the box to bring upstairs to his personal loft area. R. at 14–15. She lacked any apparent authority to consent to a search of the box. Thus, the police abused their scope of the search and conducted an illegal Fourth Amendment search of Mr. Hemlock's personal belongings.

Additionally, under the apparent authority doctrine, a third-party cannot merely consent to a search unless they have joint, frequent, and common use over the space or property police want to search. The Supreme Court held that a warrantless search is valid when voluntary consent is

given by a third party who possesses common, apparent authority. *Matlock*, 415 U.S. at 171. The Court noted that officers must factually determine if the third-party consenter retained apparent authority over the space or property being searched through questions or investigatory methods. *Id.* at 172. The Court highlighted that even if the consenter explicitly stated they live in the home and have authority over that space or item, there needs to be reasonable facts that likely prove one would not doubt their authority, such as recognition or common use of the items or space searched. *Id.* Therefore, police can only conduct a warrantless search if there is unambiguous apparent authority and consent from a third-party. *Id.*

Although Ms. Reiser lived in the home, that does not mean she can consent to the police searching throughout the entire property. Rather, she can only consent to things she retains apparent authority over. Ms. Reiser told Agent Ristroph she never saw the items in the box in her sworn declaration. R. at 15. The box did not belong to her, and she believed Mr. Hemlock left it there to bring upstairs to his loft, proving she lacked apparent authority over the box and items therein. The police lacked reasonable facts or assumptions to assume that she had authority over the box. *See Matlock*, 45 U.S. at 171 (holding the police need to have reasonable facts to determine if the third party has authority over what wants to be searched).

Similarly, the D.C. Circuit also held that there must be facts present to confirm that the third-party consenter had mutual use over the property searched. In *Peyton*, the court held that although the defendant's great-grandmother had common authority over the apartment they shared, her consent did not extend to the closed shoebox next to the defendant's bed. *Peyton*, 45 F.3d at 554–55. Since she did not retain apparent authority over his room or his belongings in his room, the search was unconstitutional and her apparent consent was invalid. *Id.* *But see United States v. Melgar*, 277 F.3d 1038, 1040–41 (7th Cir. 2000) (distinguishing that because the co-

defendant had equal use and thus consent over the purse and room, they gave valid apparent consent to search). Whether apparent consent is valid ultimately hinges on the consenter's actual authority over the specific space or property in question, making the scope of consent a critical determinant in the constitutionality of a search. *See Peyton*, 45 F.3d at 555; see generally *United States v. Long*, 425 F.3d 482, 486–87 (7th Cir. 2005) (discussing how apparent consent must be analyzed through a totality of the circumstances and not based solely off one factor).

Although Ms. Reiser had authority to let Officer Ristroph search the general areas of the home or anything she and Mr. Hemlock jointly use, the box was solely Mr. Hemlock's. Ms. Reiser swore in her declaration that she did have control over the shared bedroom but did not use or go up to Mr. Hemlocks loft, located in the back of the home. R. at 14–15. Like the third-party consenter in *Peyton*, Ms. Reiser did not retain apparent authority over the cardboard box. Rather, it is Mr. Hemlock's exclusive property that the police illegally searched based on invalid third-party consent. Therefore, the police illegally searched Mr. Hemlock's personal property and violated his Fourth Amendment right to privacy.

2. Officers could not reasonably rely on apparent authority where obvious ambiguity existed regarding who owned the box.

Though apparent authority does not have to be fully accurate, there still needs to be reasonable facts to prove one retains authority over the property searched, and here, there was not. Critically, the Supreme Court emphasized that apparent authority cannot rest on uncertainties or assumptions. *Rodriguez*, 497 U.S. at 188. When officers are confronted with ambiguous facts regarding ownership or control, the Fourth Amendment requires them to conduct further inquiry before proceeding with a warrantless search. *Id.* at 188–89. The Court explained that consent is invalid where officers fail to resolve such ambiguity and instead rely on an unreasonable inference of authority. *Id.* at 189. Accordingly, the Court made clear that apparent authority turns not on

whether the officers' belief was sincere, but on whether it was objectively reasonable in light of any ambiguity surrounding the consenting party's authority. *Id.* at 190.

Since Ms. Reiser did not know about the box, that created ambiguity to which the police needed to ask sufficient questions to determine who owns the box. The police needed to ask further questions and investigate into the owner of the cardboard box, especially since it sat on the stairs which led to Mr. Hemlock's personal space and Ms. Reiser did not recognize it. The officers knew that Ms. Reiser lived in the apartment but faced clear ambiguity regarding the box's owner. Reiser herself stated under penalty of perjury that the box belonged to Mr. Hemlock, that she did not know its contents, and that he intended to move it upstairs to his personal space. R. at 15.

Similarly, the validity of apparent consent depends on whether officers reasonably resolve any ambiguity about the consenter's authority over the space or property. The Sixth Circuit affirmed the suppression of evidence obtained from a closed shoebox discovered during a warrantless search, holding that apparent authority cannot be based on unresolved ambiguity concerning ownership and control. *Taylor*, F.3d at 684–85. Law enforcement officers received permission from the apartment's tenant to search the premises for the defendant, but during the search they found a closed shoebox in a closet containing men's clothing and, without seeking further clarification, opened it and uncovered contraband. *Id.* at 683. The court concluded that the tenant lacked actual or common authority over the shoebox because the defendant retained exclusive control and had not authorized her to access his property. *Id.* The Sixth Circuit emphasized that the presence of men's clothing and the officers' own belief that the box belonged to the defendant created genuine uncertainty about whether the consenting tenant could authorize a search of the box, and the officers failed to resolve that uncertainty by making reasonable inquiries before opening it. *Id.* at 684–85.

Like the shoebox in *Taylor*, Mr. Hemlock's box presented obvious ambiguity as if Ms. Reiser retained any joint ownership or control over it. Although Reiser consented to a search of the apartment generally, she had no knowledge of the box's contents and testified that it belonged to Mr. Hemlock. R. at 14–15. Agent Ristroph failed to resolve this uncertainty of if Ms. Reiser used or owned the box and its contents before opening it, relying instead on an unverified assumption of authority. Under *Taylor*, where ambiguity exists and officers fail to investigate, apparent consent is invalid. Accordingly, Agent Ristroph's search of Mr. Hemlock's box violated the Fourth Amendment.

Agent Ristroph abused his power to search Mr. Hemlock's personal belongings based off Ms. Reiser's consent. There was clear ambiguity over whether Reiser actually used or owned the box. Instead of further investigating the rightful owner or owners as the Fourth Amendment requires, Agent Ristroph searched the box without a warrant and without valid, legal consent. Therefore, the items of the box were the fruits of the unlawful search and should not be admitted into evidence.

III. The Fourteenth Circuit erred when it ruled that extrinsic evidence relating to Ms. Copperhead's prior acts of dishonesty were correctly excluded at trial because the purpose of Rule 806 is to achieve parity between testifying witnesses and hearsay declarants, and extrinsic evidence is necessary to achieve equality for Rule 608(b) impeachment.

Cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970). By observing a witness's demeanor and body language, jurors are better able to assess the credibility of the witness's testimony. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974); *United States v. Hamilton*, 107 F.3d 499, 503 (7th Cir. 1997). Given the benefits of live testimony in the fact finder's assessment of credibility, courts and the Federal Rules of Evidence strongly favor cross-examination over hearsay statements. *See Fed. R. Evid.* 804 advisory committee notes (1972); *United States v. Inadi*, 475 U.S. 387, 394 (1986).

Cross-examination gives the opposing party the opportunity to undermine the witness's credibility through impeachment. *See Davis*, 415 U.S. at 316. In addition to forms of common law impeachment, the Federal Rules of Evidence outline impeachment based on the witness's character for truthfulness and untruthfulness, criminal convictions, and prior inconsistent statements. *See Fed. R. Evid.* 608, 609, 613. Coupled with live testimony, these forms of impeachment provide necessary context for the jury to decide how much weight to give a witness's testimony. *See Davis*, 415 U.S. at 316.

When a hearsay declarant does not testify and their statement is admitted through a different witness, the jury loses the benefits of live testimony. *See Inadi*, 475 U.S. at 394. To ensure that the opposing party still has a way to impeach the declarant's credibility, Federal Rule of Evidence 806 allows for impeachment of hearsay declarants, regardless of whether they later testify. *See Fed. R. Evid.* 806. Given the importance of impeachment and the purpose of Rule 806, it is crucial that hearsay opponents have all forms of impeachment at their disposal to test the credibility of hearsay declarants. *See Mitchell v. Modern Woodmen of Am.*, No. 2:10-CV-00965-JEO, 2015 WL 13637160, at *8 (N.D. Ala. June 8, 2015).

However, under the Fourteenth Circuit's ruling, it is practically impossible to impeach an unavailable hearsay declarant through specific instances of dishonesty under Rule 608(b). *See R.* at 61; *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988). Without the declarant on the stand, the only avenue to ask about specific instances of dishonesty is through the witness testifying about the hearsay statement. *See United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000). More often than not, the witness testifying about the hearsay statement does not have personal knowledge of the hearsay declarant's prior acts of dishonesty and cannot testify about them. *See United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997). Allowing extrinsic evidence

to prove prior acts of dishonesty of unavailable hearsay declarants is the only way to guarantee meaningful Rule 608(b) impeachment. *See Friedman*, 854 F.2d at 570 n.8. Therefore, this Court should reverse the Fourteenth Circuit’s ruling and hold that extrinsic evidence is admissible to impeach an unavailable hearsay declarant’s character for truthfulness under Rule 608(b).

A. Rule 806 guarantees meaningful impeachment of a hearsay declarant but, without extrinsic evidence, that guarantee is meaningless for impeachment regarding prior acts of dishonesty.

Federal Rule of Evidence 806 aims to put hearsay declarants in the same position as testifying witnesses by subjecting their statements to “impeachment and support as though [they] had in fact testified.” Fed. R. Evid. 806 advisory committee notes (1972). Under this rule, “[w]hen a hearsay statement . . . has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.” *Id.*

Rule 806 empowers parties to use the various forms of impeachment to test the hearsay declarant’s credibility. *See id.* One of the main ways to impeach a witness’s character is through specific instances of dishonesty under Rule 608(b). *See id.* (referencing Rule 806’s interaction with Rule 608(b)). Rule 608(b) prohibits the use of extrinsic evidence, such as testimony from other witnesses or documents, to prove specific instances of a witness’s dishonesty. *See Fed. R. Evid. 608(b); Carter v. Hewitt*, 617 F.2d 961, 969–70 (3d Cir. 1980).

The core conflict between Rules 806 and 608(b) is that Rule 608(b) allows for impeachment only by questioning the witness, while Rule 806 applies precisely when there is no witness to question. *See Daniel J. Capra & Jessica Berch, Evidence Circuit Splits, and What to Do About Them*, 56 U.C. Davis L. Rev. 127, 178 (2022). Rule 608(b) refers to using “specific instances of a *witness’s* conduct in order to attack or support the *witness’s* character for truthfulness.” Fed. R. Evid. 608(b) (emphasis added). But when using Rule 806 to impeach an unavailable hearsay

declarant, the cross-examining attorney is asking the witness about specific instances of dishonesty of the *hearsay declarant*, not the witness on the stand. *See Saada*, 212 F.3d at 221. Applying Rule 608(b)'s extrinsic evidence ban rigidly means that—barring the off-chance that the witness knows about the declarant's prior acts of dishonesty—there is no way for the hearsay opponent to use Rule 608(b) on the hearsay declarant. *See Friedman*, 854 F.2d at 570 n.8. Extrinsic evidence, which is allowed in other forms of impeachment to bolster claims, serves a crucial role when using Rule 806 to impeach a hearsay declarant on their character for truthfulness. *Id.*

1. This Court should follow the precedent from *United States v. Friedman* in holding that extrinsic evidence is allowed for impeachment through specific instances of dishonesty.

In *United States v. Friedman*, the Second Circuit suggested that extrinsic evidence of specific instances of dishonest acts would be admissible when impeaching a hearsay declarant because extrinsic evidence would be “the only means of presenting such evidence to the jury.” *Id.* The Second Circuit ruled that the extrinsic evidence presented in *Friedman* was not probative but stated that it would have allowed the extrinsic evidence had it been. *Id.* The Second Circuit noted that “[R]ule [608(b)] limits such evidence of ‘specific instances’ to cross-examination [but that] Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination . . .” *Id.* Since the ruling in *Friedman*, many lower courts both in and outside the Second Circuit have followed its precedent in allowing extrinsic evidence to impeach non-testifying hearsay declarants through specific instances of dishonesty. *See, e.g., United States v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D.N.Y. 2008); *United States v. Washington*, 263 F. Supp. 2d 413, 423 (D. Conn. 2003) (holding that the defendant could have impeached a deceased hearsay declarant with extrinsic evidence of his untruthful character); *United States v. Finley*, No. 87 CR 364-1, 1989 WL 58223, at *2 n.1 (N.D. Ill. May 19, 1989), (noting that the reasoning is sound

behind allowing extrinsic evidence for 608(b) impeachment under Rule 806); *Mitchell v. Modern Woodmen of Am.*, No. 2:10-CV-00965-JEO, 2015 WL 13637160, at *10 (N.D. Ala. June 8, 2015) (applying *Friedman*).

The Third and D.C. Circuits went against *Friedman*'s authority and held that Rule 806 does not modify Rule 608(b)'s ban on extrinsic evidence of untruthful character for hearsay declarants, even when the declarant is unavailable to testify. *Saada*, 212 F.3d at 221; *White*, 116 F.3d at 920. In *Saada*, the Third Circuit admitted that the language of Rules 806 and 608(b) are "imperfectly meshed," but reasoned that what remains of 608(b) without extrinsic evidence is sufficient to achieve its purpose. *See Saada*, 212 F.3d at 221. Both *White* and *Saada* reasoned that extrinsic evidence is not necessary for impeachment under Rule 608(b) because the hearsay opponent still has the option to ask the witness testifying to the hearsay statement questions about the declarant's prior acts of dishonesty. *See id.*; *White*, 116 F.3d at 920.

Both *Saada* and *White* rely on a mistaken assumption that Rule 608(b) is still useful without extrinsic evidence because the testifying witness has knowledge of the unavailable hearsay declarant's prior acts. *See id.* In practice, the testifying witness usually does not have firsthand knowledge of the hearsay declarant's prior acts of dishonesty and therefore is unable to testify to them. *See Fed. R. Evid. 602* ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.") This was the case in *White*. 116 F.3d at 920 ("[h]aving known [the declarant] for less than two months before his death, [the witness] may or may not have been able to answer [the] questions.").

Here, the defense was unable to impeach Ms. Copperhead through prior acts of dishonesty under Rule 608(b) because the testifying witness, Mr. Kolber, had never met Ms. Copperhead before their interaction at Joralemon State Park. *See R.* at 45. On the stand, Mr. Kolber confirmed

that he did not know anything about Ms. Copperhead's personal life, had never heard of her before seeing her in the news, and had "no reason to doubt [her] credibility." R. at 45–46. It would have been of no use for the defense to attempt to question Mr. Kolber about Ms. Copperhead's prior acts of dishonesty because he had no prior knowledge or interactions with her and therefore would not have been allowed to testify on the issue. *See id.*; Fed. R. Evid. 602.

Without extrinsic evidence, Rule 806's promise of equal impeachment opportunity is hollow. Ms. Copperhead's hearsay statement is crucial to the prosecution's case, and without extrinsic evidence, the prosecution gets a windfall allowing them to present the evidence with no meaningful way for the defense to question Ms. Copperhead's truthfulness. *See R.* at 41–44. The defense attempted to present two pieces of evidence that could have drastically changed the jury's trust in Ms. Copperhead's testimony: a letter from her undergraduate institution outlining an Academic Integrity Policy violation and a falsified job application where Ms. Copperhead lied about graduating from that institution. *See R.* at 48. In some instances where the witness knows the defendant well or when the declarant can be called to testify, there may be redress for the lack of extrinsic evidence. *See Saada*, 212 F.3d at 221. But the court in *Friedman* anticipated situations exactly like this one: where "extrinsic evidence may be the only means of presenting [evidence of dishonesty] to the jury." 854 F.2d at 570 n.8. Without the ability to present the Academic Integrity Policy violation and falsified job application to the jury, Rule 806's promise of equal impeachment opportunity is meaningless. *See id.* Therefore, this Court should read Rule 806 as modifying Rule 608(b)'s ban on extrinsic evidence. *See Finley*, 1989 WL 58223, at *2 n.1.

2. Rule 806's mention of extrinsic evidence in other rules has no relevance here.

The Respondent may argue, as the court did in *Saada*, that because Rule 806 directly addresses extrinsic evidence regarding Rule 613, its lack of a direct reference to 608(b) is

intentional. *See Saada*, 212 F.3d at 221–22. Rule 613 says that for impeachment in the context of a witness’s prior statement, extrinsic evidence of the prior inconsistent statement may not be admitted until after the witness is given an opportunity to address the statement. Fed. R. Evid. 613(b). In *Saada*, the court reasoned that “[t]he fact that Rule 806 does not provide a comparable allowance for the unavailability of a hearsay declarant in the context of Rule 608(b)’s ban on extrinsic evidence indicates that the latter’s ban on extrinsic evidence applies with equal force in the context of hearsay declarants.” 212 F.3d at 222.

However, this argument goes both ways—Rule 806 could also *import* the language of 608(b) and ban extrinsic evidence for specific instances of dishonesty, but the writers decided against it. The canon of *expressio unius est exclusio alterius*, that the express mention of one thing implies the exclusion of others, bears little weight here. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). There is nothing in the language of Rule 806 that indicates exclusivity on the issue of extrinsic evidence. *See id.* (explaining that *expressio unius* mainly applies with items are members of an “associated group or series”); Fed. R. Evid. 806. Instead, what the language of Rule 806 makes clear is that all forms of impeachment are available for unavailable hearsay declarants. *See Fed. R. Evid. 806.*

B. Without extrinsic evidence, 806 becomes an impeachment shield for 608(b), incentivizing declarants to not testify.

Excluding extrinsic evidence for prior acts of dishonesty gives the hearsay proponent an opportunity to not call the declarant to the stand and avoid the hearsay declarant’s credibility being impeached. *See Gregory J. Gianoni, Lose the Battle, Win the War: The Use, Dangers, and Problems Surrounding Rules 806 & 608(b), and How They Can be Fixed*, 20 Suffolk J. Trial & App. Advoc. 1, 20 (2015). In most cases, impeaching a hearsay declarant’s prior dishonest acts without extrinsic evidence is either extremely limited or impossible. *See id.* Therefore, when

presented with the choice to call a hearsay declarant to testify to their own statement and subject them to impeachment or to elicit the hearsay through a witness who does not know enough about the declarant to testify to her dishonest acts, hearsay proponents will most likely pick the latter option. *See id.*

Additionally, “the law of evidence should not provide incentives for the proffer and admission of hearsay evidence.” Alan D. Hornstein, *On the Horns of an Evidentiary Dilemma: The Intersection of Federal Rules of Evidence 806 and 608(b)*, 56 Ark. L. Rev. 543, 570 (2003). Instead of impeachment being a sword to be wielded in the pursuit of truth, without extrinsic evidence, it becomes a shield protecting declarant’s prior dishonest acts from being heard in court. *See id.* It goes against the purpose of Rule 806 for the out-of-court declarant to remain more credible than the testifying witness because the declarant is not impeached on prior dishonest acts. *See Gianoni*, 20 Suffolk J. Trial & App. Advoc. at 20.

Opponents of this interpretation of Rule 806 argue that the impeaching party usually can call the hearsay declarant, sometimes as a hostile witness, to forgo the extrinsic evidence issue. *See Saada*, 212 F.3d at 221. However, as in this case, that option is not always available. *See R.* at 46 (noting Ms. Copperhead’s death shortly after her arrest). Even if the declarant is available, “[t]he impeaching party ought not to be put to the burden of calling the declarant to the stand even if he is available, since his adversary has adduced the statement which gave rise to the need for impeachment.” *Finley*, 1989 WL 58223, at *1 n.1. Calling Ms. Copperhead as a hostile witness was not an option for Mr. Hemlock, and he should not have to take Ms. Copperhead’s statement at face value because of it. *R.* at 45–46; *see also Washington*, 263 F. Supp. 2d at 423 (finding that a hearsay declarant’s death did not foreclose the hearsay opponent’s ability to demonstrate the declarant’s untruthful character because he could use extrinsic evidence).

1. The availability of some other forms of impeachment does not make up for the lack of 608(b).

Rule 608(b) impeachment of prior acts of dishonesty is a crucial tool used to influence the jury's trust in a witness's testimony. *See* Fed. R. Evid. 608(b); *Davis*, 415 U.S. at 316. The fact that other forms of impeachment are available does not compensate for Rule 608(b) impeachment being unavailable. *Id.* The directive from Rule 806 is clear: when a hearsay statement has been admitted into evidence, the declarant's credibility may be attacked by "any evidence that would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. (emphasis added). "[A]ny evidence" means *all* evidence that would have been available, which includes impeachment through prior acts of dishonesty. *See id.* (referencing Rules 608, 609, and 613).

Here, Mr. Kolber had no prior knowledge of Ms. Copperhead. R. at 45. He did not know about her reputation in the community beyond the media coverage of the event. He was not equipped to testify to her reputation in the community. R. at 45. To impeach someone's character under Rule 608(a) reputation or opinion evidence, the testifying witness needs firsthand knowledge of the witness's reputation. *See* Fed. R. Evid. 608(a) ("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."). Mr. Kolber lacked firsthand knowledge and therefore could not testify under 608(a). *See id.*; R. at 45–46. Because not every form of impeachment will be relevant for each declarant, it is vital that Rule 806 allows for all impeachment forms as if they declarant were testifying. *See* Fed. R. Evid. 806.

2. The fear of "mini trials" is easily mitigated by Rules 403 and 611.

A common fear with allowing extrinsic evidence for impeachment of hearsay declarants is that the questioning will devolve into "mini trials" on collateral issues. *See Carter*, 617 F.2d at

971. However, the judge has plenty of discretion through Rules 403 and 611 to tailor the questioning to avoid this issue altogether. *See* Fed. R. Evid. 403, 611. Rule 611 encourages judges to exercise reasonable control over the mode and order of examining witnesses to make ensure procedures are effective, avoid wasting time, and protect witnesses from harassment. Fed. R. Evid. 611. Rule 403 gives judges broad discretion to exclude relevant evidence if its probative value outweighs its risk of confusing the issues, wasting time, or misleading the jury. Fed. R. Evid. 403. Between these two rules, judges would be able to tailor the questioning in relation to the hearsay declarant to ensure that it does not confuse the jury but still follows the purpose of Rule 806. *See Mitchell*, 2015 WL 13637160, at *10 (dismissing the concern raised in *Saada* about collateral mini trials).

Here, the judge easily could have allowed Dr. Andrea Joshi and Svetlana Ressler to testify to Ms. Copperhead's prior acts of dishonesty. *See* R. at 47–48. Under Rule 611, the judge would have been able to tailor the extent of the direct and cross-examinations on the Academic Integrity Policy violation and falsified job application to ensure that the matter did not devolve into a trial on a collateral issue. *See Mitchell*, 2015 WL 13637160, at *10. Additionally, the judge could have used Rule 403 to ensure that there was no confusion of the issues in introducing the extrinsic evidence. *See Uvino*, 590 F. Supp. 2d at 375.

Without extrinsic evidence, the promises of equal impeachment opportunity under Rule 806 are hollow. *See Friedman*, 854 F.2d at 570 n.8. Just as the Second Circuit in *Friedman* found that extrinsic evidence is essential to ensuring Rule 608(b) impeachment of hearsay declarants, this Court too should allow extrinsic evidence and reverse the Fourteenth Circuit's ruling.

CONCLUSION

For the foregoing reasons, Petitioner kindly requests this Court to reverse the decision of the Fourteenth Circuit and remand for further proceedings.

Respectfully submitted,

s/ Team 12P
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