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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Case Authority

United States Supreme Court

TABLE OF AUTHORITIES (cont.)

TABLE OF AUTHORITIES (cont.)

TABLE OF AUTHORITIES (cont.)

TABLE OF AUTHORITIES (cont.)

TABLE OF AUTHORITIES (cont.)

Page(s)

Secondary Sources

ISSUES PRESENTED

I. Whether, under *Payton v. New York*, officers violate the Fourth Amendment by ordering an individual inside the home to step outside then arresting him without a warrant.

II. Whether officers violate the Fourth Amendment when they search a closed container found in the only access point to a private loft without a warrant, relying on a co-occupant's general consent, despite failing to inquire into its ownership.

III. Whether Rule 806 of the Federal Rules of Evidence allows relevant extrinsic evidence of a non-testifying hearsay declarant's character for untruthfulness in the absence of the ability to impeach.

OPINIONS BELOW

The indictment entered by a grand jury in the United States District Court for the Northern District of Boerum can be found at *United States v. Hemlock*, No. 24-cr-795 (N.D. Boerum Apr. 3, 2024). R. 1. The opinion of the Fourteenth Circuit can be found at *Hemlock v. United States*, No. 24-1833 (14th Cir. 2025). R. 51.

CONSTITUTIONAL PROVISIONS AND RULES

This appeal concerns violations of Petitioner's Fourth Amendment rights. 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 Warrant 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.

This case also concerns Rule 806 of the Federal Rules of Evidence. Fed. R. Evid. 806.

STATEMENT OF THE CASE

1. Statement of Facts

Jodie Wildrose, Under Secretary for Rural Development for the United States Department of Tourism, was scheduled to visit Boerum Village in April 2024. R. 4. Around 8:30 AM on April 2, 2024, Special Agents Herman and Simonson interviewed Ms. Caplow regarding her encounter with the two individuals that led to her calling the police. R. 6. Ms. Caplow reported the activity because of the combination of items the two individuals bought, their cash payment, and suspicious demeanors. R. 6. An hour later, Special Agents Herman and Simonson interviewed Mr. Hoag. R. 7. Mr. Hoag overheard two individuals planning something, repeatedly mentioning "Jodie" and "hiding Jodie away." R. 8. He recognized the individuals as Atticus Hemlock and Iris Copperhead from following them on social media. R. 7.

Mr. Hemlock's Arrest. Around 4:00 PM on April 2, 2024, Special Agents Herman and Simonson drove to Mr. Hemlock's house, a small cabin in a wooded area. R. 20. The officers arrived with the intention of asking questions based on the tips and interviews. R. 21. The officers had no intention of arresting Mr. Hemlock. R. 21. The agents arrived in an unmarked car, and both were wearing officer's belts and body cameras. R. 25. Both officers approached the home, and Special Agent Simonson walked up the steps and knocked on the doorframe. R. 21. The main door was open, but the screen door remained closed. R. 21. Mr. Hemlock emerged but did not open the screen door. R. 21. The agents asked Mr. Hemlock to talk; he declined and asked for the officers' purpose. R. 11. The agents noticed two bottles with the label "Chloroform" on the counter behind him, but Mr. Hemlock stepped to block their view. R. 22.

After some back and forth, the officers went to regroup at their vehicle. R. 12. The officers radioed Special Agent Ristroph for back-up and decided they would get Mr. Hemlock to come outside where they would arrest him. R. 12. When the agents reapproached the home, they began to shout at Mr. Hemlock. R. 23. Both agents had hands on their holsters. R. 26. Mr. Hemlock finally exited. R. 25. Special Agent Simonson handcuffed Mr. Hemlock and told him he was under arrest. R. 23. Special Agent Herman performed a search incident to arrest of Mr. Hemlock's person and found a spiral bound notebook allegedly implicating Mr. Hemlock in the kidnapping attempt. R. 23. Before leaving with Mr. Hemlock in custody, Special Agent Herman directed Special Agent Ristroph to wait down the road until Fiona Reiser, Mr. Hemlock's girlfriend, arrived home. R. 12.

Closed Container Search. Special Agent Ristroph arrived at Mr. Hemlock's residence at approximately 4:30 PM on April 2, 2024. R. 13. After waiting twenty minutes, Ms. Reiser returned home and Special Agent Ristroph introduced himself. R. 13. He informed Ms. Reiser

that Mr. Hemlock had been arrested and that he was conducting an investigation. R. 13. Ms. Reiser let Special Agent Ristroph into the home. R. 13. After looking around the kitchen and living room, Special Agent Ristroph asked Ms. Reiser what was on the second floor. R. 13. She responded that that Mr. Hemlock had unique control of the loft, and she never goes up there. R. 13, 15. Special Agent Ristroph proceeded in his search. R. 13. He then noticed a box on the second step of the staircase—the only access point—to the private loft. R. 13, 17. The box had no identifying information on the outside, and the top flaps were closed. R. 13. Special Agent Ristroph opened the flaps and found rope, ski masks, gloves, and zip ties. R. 13. Ms. Reiser did not recognize the box or its contents and stated that it looked like Mr. Hemlock and Ms. Copperhead's outdoor gear. R. 16.

Impeachment with Extrinsic Evidence. In Spring 2023, Ms. Copperhead received an academic violation report for use of Artificial Intelligence. R. 9. As a result, Ms. Copperhead received an "F" on her transcript. R. 9. In January 2024, Ms. Copperhead applied for an executive assistant position at the mayor's office. R. 10. Upon discovering the failing grade, the hiring committee denied Ms. Copperhead's application. R. 10.

On the afternoon of April 2, 2024, Theodore Kolber was on a walk in Joralemon State Park. R. 41. Mr. Kolber heard rustling and Ms. Copperhead came bursting out of the woods onto the path in front of him. R. 42. Mr. Kolber asked what was wrong. R. 42. Ms. Copperhead responded, "I can't believe I saw him get arrested. It's all his fault. It was all Atticus' idea–NOT MINE! I can't run a business from prison!" R. 43. Ms. Copperhead was arrested on April 2, 2024. R. 46. Ms. Copperhead died in jail that same night. R. 46.

2. Procedural History

On April 3, 2024, a grand jury in the United States District Court for the Northern District of Boerum indicted Mr. Hemlock on one count of attempted kidnapping of a United States government officer under 18 U.S.C. section 1201(a)(5) and 18 U.S.C. section 1201(d). R. 1–2. On July 29, 2024, the District Court heard two motions to suppress filed by Mr. Hemlock, regarding the notebook found on his person and the items found in the cardboard box on the staircase. R. 18–19. The District Court denied both motions. R. 31, 38–39. As to the constructive entry of the Special Agents, the District Court held that Mr. Hemlock was arrested outside. *See* R. 55. As to the box, the District Court held that Ms. Reiser had apparent authority to consent to the search of the box on the stairs leading to Mr. Hemlock's loft. R. 57.

At trial, the Government called Mr. Kolber to the stand to testify. R. 41. During the testimony, the trial judge admitted a hearsay statement made by Ms. Copperhead. R. 43. After the Government rested its case, Mr. Hemlock attempted to call Dr. Andrea Joshi to the stand to present testimony and discuss an academic violation report to impeach the credibility of the non-testifying hearsay declarant, Ms. Copperhead. R. 47. Additionally, Mr. Hemlock sought to introduce Ms. Copperhead's job application to the mayor's office that included Ms. Copperhead lying about graduating college. R. 48. The trial judge denied admission of the evidence. R. 50.

Mr. Hemlock was convicted of the attempted kidnapping on August 12, 2024, and received a sentence of ten years in prison on October 17, 2024. R. 51. On appeal, the Fourteenth Circuit affirmed the conviction. R. 51. As to Mr. Hemlock's arrest, the court did not adopt the constructive entry doctrine and held that no coercion took place. R. 55. Additionally, as to the box, the court affirmed that Ms. Reiser had apparent authority. R. 58. Finally, as to the extrinsic evidence, the court did not adopt Rule 806's allowance of extrinsic evidence. R. 58. Mr.

Hemlock then appealed to the Supreme Court, and the Supreme Court granted certiorari on December 2, 2025. R. 62.

SUMMARY OF ARGUMENT

Payton v. New York placed a threshold at the entrance to a home, protecting against warrantless entries to conduct an arrest. Special Agents Herman and Simonson coerced Mr. Hemlock to step outside of his home. A reasonable person would not have felt free to leave the encounter, constituting a Fourth Amendment seizure. Through the coercion, the officers constructively entered the home, and crossed the *Payton* threshold. Therefore, the arrest effectively took place within Mr. Hemlock's home, violating the Fourth Amendment. This Court should adopt the broad view of the *Payton* rule to preserve the sanctity of the home against governmental intrusion.

Further, Ms. Reiser lacked apparent authority to consent to the warrantless search of a sealed, unmarked, cardboard box located on the staircase leading to Mr. Hemlock's private loft. Although Ms. Reiser invited Special Agent Ristroph to search the first-floor common areas, her contemporaneous statements disclaimed access to the loft, the staircase, and its contents. Even if there was ambiguity over ownership of the loft or staircase, Special Agent Ristroph should have inquired further or obtained a warrant, as the Sixth and D.C. Circuits urge.

Rule 806 of the Federal Rules of Evidence allows defendants the opportunity to submit extrinsic evidence of specific instances of untruthfulness to impeach a non-testifying hearsay declarant's credibility. The Advisory Committee Notes and *United States v. Friedman* support the use of extrinsic evidence when a hearsay declarant does not testify at trial. Cases that hold that Rule 608(b) governs the application of Rule 806 fail to recognize the explicit use of "witness" in Rule 608(b) and rely on alternatives to extrinsic evidence that are not possible in

Mr. Hemlock's case. Finally, because Copperhead's letter and job application are probative to Copperhead's credibility, the extrinsic evidence should be allowed due to the absence of impeachment and cross-examination alternatives.

ARGUMENT

I. UNDER *PAYTON V. NEW YORK*, LAW ENFORCEMENT OFFICERS VIOLATED THE FOURTH AMENDMENT WHEN THEY REMAINED OUTSIDE, COERCED MR. HEMLOCK TO LEAVE HIS HOME, AND ARRESTED HIM WITHOUT A WARRANT.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. At "the very core" of the Fourth Amendment "stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). In *Payton v. New York*, this Court emphasized that there is no "zone of privacy" more clearly defined "than when bounded by the unambiguous physical dimensions of an individual's home." 445 U.S. 573, 589 (1980). *Payton* placed a threshold at the entrance of the home to prevent "the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a[n] . . . arrest." *Id.* at 576. The Fourth Amendment is violated if that "line at the entrance to the house" is crossed. *Id.* at 590. Courts have held that the *Payton* threshold can be "breached by conduct other than physical entry." *United States v. Reeves*, 524 F.3d 1161, 1165 (10th Cir. 2008). Officers cross the *Payton* threshold when there is such a show of force coercing an individual out of the home that they constructively enter to effectuate a warrantless arrest. *See, e.g.*, *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984); *United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989); *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1989).

Mr. Hemlock remained in the sanctity of his home when the arrest occurred. The initial seizure of Mr. Hemlock took place while he was still inside of his home, as that is where the coercion began. Through the coercion, the officers constructively entered Mr. Hemlock's home to effectuate a warrantless arrest, unequivocally crossing the *Payton* threshold. This Court should reverse the decision of the Fourteenth Circuit and hold that, under *Payton*, the officers violated the Fourth Amendment when they constructively arrested Mr. Hemlock inside his home.

A. This Court Should Adopt the Broad View of the *Payton* Rule and Hold That Constructive Entry Crosses the *Payton* Threshold.

This Court should adopt the broad view of the *Payton* rule in that conduct other than physical entry can cross the threshold and violate the Fourth Amendment. This Court has repeatedly and consistently "underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958).

Most circuit courts that have considered this issue have held that means other than physical entry can trigger *Payton* protections. The Sixth, Ninth, and Tenth Circuits adopt the broad view and explicitly hold that *Payton* is violated by constructive entry. *See Morgan*, 743 F.2d at 1166; *Al-Azzawy*, 784 F.2d at 892–93; *Maez*, 872 F.2d at 1451. The Second Circuit does not rely on the constructive entry doctrine, but nonetheless adopts the broad view of the *Payton* rule. *United States v. Allen*, 813 F.3d 76, 88–89 (2d Cir. 2016). The Second Circuit based its analysis on the goal of "retain[ing] the vitality" of the *Payton* rule and the "fundamental Fourth Amendment protection of the home." *Id.* at 85. The Second Circuit also cautioned that allowing the police to arrest an individual without physical entry would "undermine the barrier against government intrusions into the home that the warrant requirement attempts to erect." *Id.* at 86.

A minority of circuit courts adopt the narrow view of *Payton*, that there is no violation unless officers physically cross the threshold to enter the home. *See United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987); *United States v. Berkowitz*, 927 F.2d 1376, 1388 (7th Cir. 1991); *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002). In *Knight*, the court opined that the *Payton* rule keeps "the officer's body outside the threshold, not his voice." 300 F.3d at 1277. This exemplifies the exact reason the broad view should be adopted. If an officer's voice is permitted to intrude on an individual's home, there is no limit on officers' manipulation of individuals peacefully residing inside. This Court in *Payton* noted that there is no place where a person's expectation of privacy is greater than in his own home. 445 U.S. at 589. Allowing officers to boundlessly infiltrate this "zone of privacy," so long as they do not step "a toe into the doorway" of the home, endangers the very core of the Fourth Amendment. *Id.*; R. 55.

This Court should adopt the broad view of *Payton* to extinguish the motivation for officers to coerce individuals out of their homes while skirting the warrant requirement. Here, the officers constructively entered Mr. Hemlock's home through coercion, crossed the *Payton* threshold, and violated the Fourth Amendment. This Court should reverse the decision of the Fourteenth Circuit to protect the quintessential purpose of the Fourth Amendment.

B. The Officers Crossed the *Payton* Threshold Through Constructive Entry and Effectively Arrested Mr. Hemlock Inside of His Home.

Determining whether an unreasonable seizure occurred lays the foundation to establish whether a constructive entry violated *Payton* and the Fourth Amendment. An arrest requires "*either* physical force" or "*submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis in original). A "show of authority" constituting a seizure occurs when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980);

Florida v. Bostick, 501 U.S. 419, 436 (1991) (phrasing the inquiry as "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter").

Officers constructively violate the *Payton* threshold when such a show of authority manifests itself in coercive police conduct, to where the individual "reasonably believed he had no choice but to comply." *United States v. Saari*, 272 F.3d 804, 809 (6th Cir. 2001). To accomplish this, officers, "while not entering the house, deploy overbearing tactics that essentially force the individual out of the home." *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005). Under the constructive entry doctrine, when the individual exits the home because of extreme coercion, the arrest occurred while the individual was still inside of their home. *See Saari*, 272 F.3d at 811.

The officers' conduct here illustrates exactly the show of authority that would constitute an arrest under the Fourth Amendment. The officers deployed overbearing tactics to coerce Mr. Hemlock out of his home. The start of the officers' coercion marked the end of when a reasonable person would have felt free to terminate Mr. Hemlock's encounter. The analysis then turns on the location of the arrestee, rather than the arresting officers, to determine if constructive entry occurred. The seizure began while Mr. Hemlock was still within his home, rendering the arrest as executed within the home. By coercing Mr. Hemlock outside, the officers constructively entered the home to execute the warrantless arrest, simultaneously violating *Payton* and the Fourth Amendment.

1. The officers coerced Mr. Hemlock to step outside of his home.

This Court has recognized a difference between an individual submitting to the demands made under color of authority and "an understanding and intentional waiver of a constitutional right." *Johnson v. United States*, 333 U.S. 10, 13 (1948). The "show of force exhibited by the

police," or coercion, eliciting submission to demands made under color of authority is the defining factor of a constructive entry. *Thomas*, 430 F.3d at 277. Coercion is the means by which an unconstitutional seizure, as well as the consequent constructive entry, can occur and is "determined by the totality of the circumstances." *Mendenhall*, 446 U.S. at 557. Circumstances that indicate a constructive seizure of the person include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554.

Coercion in the context of constructive entry has taken several forms, both overt and covert. However, all coercion has the throughline of luring an individual out of the "zone of privacy" that is protected by the Fourth Amendment to effectuate a warrantless arrest. *See Payton*, 445 U.S. at 589. On the overt side, in *Morgan*, nine officers surrounded the individual's home at night, flooded the house with spotlights, and summoned the individual out of the home using a bullhorn. 743 F.2d at 1161. In *Maez*, ten armed officers and a SWAT team with weapons drawn surrounded the individual's home and used loudspeakers to command the family inside to exit the home one by one. 872 F.2d at 1446. Both courts held that the encounters were coercive, a reasonable person would not have felt free to leave, and both arrests effectively took place within the individuals' homes. *Morgan*, 743 F.2d at 1161, 1164; *Maez*, 872 F.2d at 1450, 1451.

Turning to the covert end of the coercion spectrum, in *United States v. Quaempts*, four officers went to the defendant's trailer. 411 F.3d 1046, 1047 (9th Cir. 2005). One officer knocked on the door, said the individual's name, then "I need to talk to you," to which the individual opened the door. *Id.* The court held that the actions amounted to constructive entry. *Id.* at 1048–49. In *United States v. Flowers*, four police officers went to the individual's home, and

one knocked on the door, stating "Tulsa Police Department, open the door" in a firm tone of voice. 336 F.3d 1222, 1224 (10th Cir. 2003). The court held that a *Payton* violation occurred, and the individual was seized inside of his home because the individual's decision to open the door was not made voluntarily. *Flowers*, 336 F.3d at 1227, 1231 n.2. The court concluded that a reasonable person would have believed that they must submit to the show of authority under these circumstances. *Id.* at 1231 n.2. Both courts relied on the principle that a reasonable person would not have felt free to leave, or to retreat into their dwelling.

In the constructive entry context, courts have held that there was no coercion in several cases. In *Thomas*, two officers knocked on the rear door of the home and, when the individual came to the door, the officers asked to talk to him and asked him to come outside, which he did. 430 F.3d at 276. The court held that no constructive entry occurred, and that a reasonable person would not believe he was under arrest or compelled to leave their home. *Id.* at 278. The individual "responded to a simple knock and request" from the officers, "not an order to emerge." *Id.* The court noted that there were no drawn weapons, raised voices, or coercive demands. *Id.* In *United States v. Grayer*, two officers approached the front door of the individual's home, had no weapons drawn, and simply knocked and asked the individual to come outside, which he did. 232 F. App'x. 446, 447 (6th Cir. 2007). The court stated that none of the hallmarks of the coercion needed for constructive entry were present. *Id.* at 450. These hallmarks echoed the *Mendenhall* factors, as they included "drawn weapons, raised voices, coercive demands, or a large number of officers in plain sight." *Id.*; *see Mendenhall*, 446 U.S. at 554. Although the factors put forth in *Mendenhall* and *Grayer* do not comprise an exhaustive list, they outline consistencies amongst coercion in constructive entry cases and Fourth Amendment

seizures. These cases create a framework for what constitutes coercion, and all turn on a reasonable individual's belief that he or she is unable to terminate the encounter.

Under the totality of the circumstances here, the officers' conduct demonstrates the coercive behavior that a reasonable person would not feel free to resist. Beginning with those factors, two officers, Special Agent Herman and Special Agent Simonson arrived together, outnumbering Mr. Hemlock. R. 21. Although they never brandished their weapons, both officers placed their hands on their holsters. R. 26. Special Agent Herman testified that both officers did so in case they needed to use them and, during the hearing, agreed that it "is a pretty intimidating thing to see as a layperson." R. 26. Both officers were also wearing body cameras and duty belts adorned with a gun, a taser, a flashlight, a baton, handcuffs, and a radio. R. 25. While there was no physical contact with Mr. Hemlock, Special Agent Herman approached the cabin during the encounter. R. 11. The officers exhibited coercive commands and raised voices. The officers escalated their demands as the encounter progressed, from "Please come outside for us" to "Come outside please!" to "Come outside! Our investigation is important and we need answers. Now!" to "Get outside right now!" R. 11–12. Special Agent Herman testified that he "yelled" and Special Agent Simonson "shouted" at Mr. Hemlock to come outside. R. 23. By this point, the encounter had transformed from "a simple knock and request," to an order to emerge. *Thomas*, 430 F.3d at 278. This is also long past the point at which the individuals in *Thomas* and *Grayer* complied with the officers' demands. These facts alone demonstrate coercion, encapsulated by Special Agent Herman's narrative that the officers decided they would "try to get him to come outside where [they] would arrest him." R. 23.

Additional facts exist that contribute to the totality of the circumstances here, and surpass the circumstances that existed in the constructive entries in *Quaempts* and *Flowers*. First, the

officers approached Mr. Hemlock's significantly isolated home in an unmarked vehicle. R. 14, 20. Special Agent Simonson walked up the front steps to knock on the doorframe three times, very loudly. R. 21, 25. Mr. Hemlock appeared, but did not open the screen door to the officers. R. 21. The officers flashed their badges and introduced themselves as FBI agents. R. 11. Mr. Hemlock was resistant to speak the first two times the officers asked him to talk and, when he asked what was going on, the officers did not provide an answer. R. 11. Mr. Hemlock then explicitly rejected the officers' requests to talk three more times. R. 11–12. This differs from both *Quaempts* and *Flowers* in which neither suspect exhibited hesitation to speak to officers, whereas Mr. Hemlock repeatedly did. R. 11–12. The officers ceased their efforts and returned to their car, during which Special Agent Simonson stated that Mr. Hemlock "clearly does not want to talk to us." R. 12. After a few minutes, the officers went back to the cabin and resumed their "yelling" and "shouting." R. 11–12, 23. Mr. Hemlock then exited his home, still uninformed of the nature of the situation. R. 11–12.

Coercion does not need to be overt to be effective. While this encounter does not rise to the level of the tactics employed by the officers in *Morgan* and *Maez*, the outcome is the same. Based on the totality of the circumstances, a reasonable person would not have felt free to leave Mr. Hemlock's encounter due to the officers' overbearing tactics. The officers' conduct stripped Mr. Hemlock's ability to retreat into his home. Therefore, the conduct here falls squarely in the spectrum of coercion, illustrating exactly what is necessary for constructive entry to occur.

2. By coercing Mr. Hemlock outside, the officers constructively entered his home.

This Court has "refused to lock the Fourth Amendment into instances of actual physical trespass." *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972). Despite a lack of physical entry into the home, the "constructive entry accomplishe[s] the same

thing"—the arrest of the individual. *Morgan*, 743 F.2d at 1166. This Court emphasized that the privacy of the home "deserve[s] the most scrupulous protection from governmental invasion." *Oliver v. United States*, 466 U.S. 170, 178 (1984). In cases of both physical intrusion and coercion to leave the home alike, "the privacy of the home is effectively invaded." *Maez*, 872 F.2d at 1451.

In *United States v. Johnson*, the court held that a Fourth Amendment violation occurred when the actions of an individual in his home were not voluntary and were instead the product of coercion from the officers outside the home. 626 F.2d 753, 757 (9th Cir. 1980). Two officers, using fictitious names, knocked on the individual's door with their guns drawn. *Id.* The court recognized the arrest as occurring within the home when the individual initially opened the door in response to the false identification from the officers. *Id.* The court concluded that a reasonable person, under the circumstances there, would believe they were under arrest. *Id.* at 756. The court provided important structure for the constructive entry doctrine in that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." *Id.* at 757. This facet is critical, "[o]therwise, arresting officers could avoid illegal 'entry' into the home simply by remaining outside the doorway and controlling the movements of suspects within." *Id.* This illuminates a flaw in *Knight*'s reasoning. Allowing an officer's voice to cross the threshold maintains the ability to control the individuals within. *See Knight*, 300 F.3d at 1277. Ultimately, "[i]n light of the strong language by the Court in *Payton* emphasizing the special protection the Constitution affords to individuals within their homes," the court held the warrantless arrest constituted a violation of the Fourth Amendment. *Id.*

In *Morgan*, the court held that when officers coerce a suspect out of the home to effectuate a warrantless arrest, the officers violate *Payton*. 743 F.2d at 1164. The court applied

the rule from *Johnson*, centering on the location of the arrested person, rather than the officers. *Morgan*, 743 F.2d at 1166. The court stated it was "undisputed" that the individual was "peacefully residing" in the home "until he was aroused by the police activities occurring outside." *Id.* These police activities compelled the individual to exit the home, and a reasonable person would not have believed he was free to leave under the circumstances. *Id.* at 1164. The individual emerged to the officers "*only because* of the coercive police behavior taking place outside of the house." *Id.* at 1166 (emphasis in original). The court held that the individual was under arrest as soon as the officers arrived and surrounded the home. *Id.* at 1168. Therefore, the arrest began while the individual was inside the home and, although the officers remained outside, they constructively entered and violated the Fourth Amendment. *Id.* at 1164.

Allen's recognition of "across the threshold" arrests and their entanglement with Fourth Amendment violations further the *Morgan* and *Johnson* analyses. 813 F.3d at 85. In *Allen*, the court concluded that "across the threshold" arrests violate *Payton* if officers forcefully command an individual to submit to arrest. *Id.* at 88. The officers "asserted their power" over the individual while he was "*inside his home*" to where, if the individual had retreated into his home, it "is inconceivable that the officers" would have turned away. *Id.* at 86 (emphasis in original). The court stated that although the individual "had no obligation to open the door or to speak to police officers in the first place, . . . the fact that he—as would most reasonable people—chose to do so does not mean that he forfeited the Fourth Amendment's protections of the home." *Id.* at 87.

Here, as directed by the court in *Johnson*, the focus turns to the location of the arrested person. The officers' coercion began when Mr. Hemlock was inside of his home, rendering the arrest as taking place within the home. Like *Morgan*, Mr. Hemlock emerged "*only because*" of the officers' behavior taking place outside of the house. 743 F.2d at 1166. A reasonable person

would not have felt free to leave the encounter, indicating a seizure of Mr. Hemlock had occurred. *See Mendenhall*, 446 U.S. at 554. This is bolstered by Mr. Hemlock's attempts, and failures, to end the encounter. R. 11–12. After Mr. Hemlock "refused," was "resistant," and exhibited "hesitation," he finally complied with the officers' demands. R. 22, 52, 53. By coercing Mr. Hemlock out of his home, constructive entry accomplished the exact same thing as if the officers physically entered—a warrantless arrest. *See Morgan*, 743 F.2d at 1166. As displayed by *Allen*, Fourth Amendment protections are not relegated by the front door of a home. Hemlock's initial colloquy with the officers, and the situation that led to his ultimate exit, did not forfeit his constitutional protections. The officers asserted their power over Mr. Hemlock while he was *inside his home*, effectively invading the privacy of his home. *See Allen*, 813 F.3d at 86. Given the circumstances here, Mr. Hemlock was an individual inside his home when the coercion began, and he deserves Fourth Amendment protections. Therefore, Mr. Hemlock's arrest took place inside of his home, and the Fourteenth Circuit because the notebook found on him should have been suppressed as fruit of an illegal arrest.

II. MS. REISER DID NOT HAVE APPARENT AUTHORITY TO CONSENT TO THE SEARCH OF A CLOSED, UNMARKED CARDBOARD BOX FOUND IN THE ONLY ACCESS POINT TO MR. HEMLOCK'S PRIVATE LOFT.

Full searches and seizures require a warrant. U.S. Const. amend. IV. There are several exceptions to the warrant requirement, including consent. *See generally Davis v. United States*, 328 U.S. 582 (1946); *see also Vale v. Louisiana*, 399 U.S. 30, 33 (1970) (a search authorized by consent is wholly valid). Consent is the surrender of constitutional protections, so courts must ensure some "minimal amount of integrity" in finding effective consent. *Effective Consent to Search and Seizure*, 113 U. Pa. L. Rev. 260, 261 (1964).

Consent must be freely and voluntarily given, and the decision to consent must be knowingly and intelligently made. *See Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *see*

also Johnson, 333 U.S. at 13 (consent given in submission to authority and not as an "understanding and intentional waiver of a constitutional right" is invalid). When justifying the lawfulness of a search, the burden is on the prosecution to show valid consent. *See Amos v. United States*, 255 U.S. 315, 317 (1921). And, the prosecution must show that the citizen consented, "not whether it was reasonable for the officers to suppose that he did." *Cipres v. United States*, 343 F.2d 95, 97–98 (9th Cir. 1965). For the purposes of apparent authority, courts look to the co-occupant's "mutual use or control" over an effect by weighing: (1) the appearance of the container; (2) where it was found; (3) the officer's belief of ownership; (4) and any manifestation of privacy over the container. *See United States v. Taylor*, 600 F.3d 678, 681 (6th Cir. 2010). This Court has recognized that Fourth Amendment rights should not be eroded by "unrealistic doctrines of apparent authority," so the standard remains high. *Illinois v. Rodriguez*, 497 U.S. 177, 187 (1990) (citing *Stoner v. California*, 376 U.S. 483, 488 (1964) (internal quotations omitted)); *United States v. Long*, 425 F.3d 482, 486 (7th Cir. 2005).

Under the totality of the circumstances, Ms. Reiser did not consent to the search of the closed container found on the staircase. She consented to a search of the first floor and common areas. R. 15. Ms. Reiser informed Special Agent Ristroph that the loft was "Atticus's," and she did not "go up there." R. 15. The only access point to the loft was the staircase, where officers found the closed, unmarked cardboard box. R. 15, 17. This Court should reverse the decision of the Fourteenth Circuit because while Ms. Reiser consented to a search of the first-floor common areas, the closed container was, unambiguously, outside the scope of a permitted consent search.

A. Ms. Reiser's Consent Was Expressly Limited to the Common Areas on the First Floor, So the Search of the Container Was Invalid.

A third party may consent if: (1) they have common authority over the premises or effects, *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974); or (2) possess apparent

authority over the premises or effects. *Rodriguez*, 497 U.S. at 186. Consent of a co-occupant is valid if officers reasonably believe they have apparent authority to consent, even if the belief is mistaken. *See Rodriguez*, 497 U.S. at 185–86. The doctrine of third-party consent must be applied cagily, "to prevent erosion of the . . . Fourth Amendment." *United States Ex Rel Cabey v. Mazurkiewicz*, 431 F.2d 839, 843 (3d Cir. 1970).

Despite findings that co-occupants may consent, generally, to the search of a home, this Court and circuit courts have stopped far short of extending that consent to papers and effects. The Fourth Amendment specification of "papers and personal effects" draws a boundary around the "area of personal privacy peculiar to the [owner], which should not be invaded by an officer without a warrant unless the individual *personally consents*." *Effective Consent to Search and Seizure*, 113 U. Pa. L. Rev. at 275 (emphasis added).

Here, Ms. Reiser's statements defined her scope of authority adequately, indicating that she did not have access or control to the loft, the staircase, or the container found on the stairs. Ms. Reiser's consent was expressly limited to the first floor of the cabin, and common areas.

1. Ms. Reiser's statements defined the scope of her authority.

When law enforcement officers rely upon consent as an exception for the warrant requirement, "the scope of the consent given determines the permissible scope of the search." *United States v. Gant*, 112 F.3d 239, 242 (6th Cir. 1997). The standard for measuring the scope of consent is objective reasonableness: what a reasonable person would have understood by the exchange between the officer and the consenting party. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991). And generally, courts look to the expressed object of the search and the consenter's statements to determine its permissible bounds, because the act of providing consent does not determine its scope. *United States v. Garrido-Santana*, 360 F.3d 565, 576 (6th Cir. 2004); *United*

States v. Lemmons, 282 F.3d 920, 924 (7th Cir. 2002). Courts have upheld third party consent only where the consenter exercised broad, unfettered access to the area or items searched. *See Sartain v. United States*, 303 F.2d 859, 863 (9th Cir. 1962) (search upheld where the defendant gave a friend his briefcase and key, granting full access and authority to consent); *see also Eldridge v. United States*, 302 F.2d 463, 466 (4th Cir. 1962) (search upheld where a friend consented while using the defendant's car as his own).

In *Sartain* and *Eldridge*, the defendants gave their friends full and complete freedom to use their belongings, supporting findings of apparent authority. *Sartain*, 303 F.3d at 862; *Eldridge*, 302 F.3d at 466. Similarly, in *Stein v. United States*, the suspect and a woman were unmarried but living together, and while the defendant owned the home, the woman shared title. 166 F.2d 851, 852 (9th Cir. 1948). The Court held that joint ownership of the home gave the woman sufficient control to authorize a search. *Id.* at 855. In each case, apparent authority rested on a reasonable inference of mutual use or control, such as statements or actions.

Here, Ms. Reiser's statements defined a much narrower scope as compared to *Sartain*, *Eldridge*, and *Stein*. Ms. Reiser had lived with Mr. Hemlock since May 2023, but her statements to Special Agent Ristroph made it clear that her authority did not extend beyond the first-floor common areas. R. 15. Before the cardboard box was opened, Ms. Reiser explained that the upstairs loft belonged to Mr. Hemlock *alone*, and she "did not really ever go up there." R. 15, 33. These contemporaneous statements affirmatively disclaimed any inference of joint access. R. 33, 35. Under the objective reasonableness standard, Ms. Reiser also renounced control over the access point to the loft—the staircase. R. 33, 35. A reasonable officer would have understood these statements as limiting the scope of the initial consent Ms. Reiser provided. Where a co-occupant expressly disclaims access to and control over a private loft and its only access point,

officers cannot reasonably rely on narrow consent to justify a warrantless search. *c.f. Donovan v. A.A. Beiro Construction Co.*, 746 F.2d 894, 900 (D.C. Cir. 1984). Ms. Reiser's consent was limited, and officers exceeded the scope of the consent she provided.

2. Because Ms. Reiser's consent was expressly limited to common areas, the staircase and cardboard box fell outside the scope of her apparent authority.

Even if Special Agent Ristroph erroneously believed the loft was a common area, that belief cannot resolve the issue of scope. As courts and commentators have recognized for decades, some common areas may be nonprivate "with respect to some infringements, but still private with respect to others." *Effective Consent to Search and Seizure*, 113 U. Pa. L. Rev. at 276. The Fourth Amendment does not allow limited access of a third party to be metamorphized into blanket authority to search unrelated areas.

In *Blok v. United States*, the D.C. Circuit held that a supervisor's limited access to a government-owned desk did not give him apparent authority to consent to a search inside that desk. 188 F.2d 1019, 1021 (D.C. Cir. 1951). The D.C. Circuit reasoned that while the supervisor could open the desk for a limited purpose, that did not extend to authorizing a search by law enforcement. *Id.* at 1020. *Blok* established that authority is tied to purpose, so access sufficient for one intrusion does not justify another intrusion of personal privacy. *Id.*

Blok's reasoning should control here. Ms. Reiser's consent permitted Special Agent Ristroph to enter the home and search common areas on the first floor. R. 15. Her statements expressly disclaimed access to the loft, its contents, and by extension the only access point: the staircase. R. 15, 33, 35. At most, the staircase *could be* a passage adjacent to a common area, but Ms. Reiser's actions and statements told Special Agent Ristroph that the staircase was not a

common area. R. 15, 33. Like the desk in *Blok*, the staircase here was accessible in a limited way, but it was functionally Mr. Hemlock's private and personal space. R. 33, 35.

Thus, the closed cardboard box located on the staircase had a heightened expectation of privacy. The Fourth Amendment's firm boundary around papers and effects is critical here. Because Ms. Reiser neither used the loft nor exercised control over the box, she lacked authority to consent to a search of a closed container associated with the space and with Mr. Hemlock. Thus, Special Agent Ristroph exceeded the scope of Ms. Reiser's consent and apparent authority when he searched the closed container without further inquiry.

B. Apparent Authority is Absent Here Because Officers Could Not Reasonably Believe Ms. Reiser Had Joint Control or Access to the Staircase or Cardboard Box.

Apparent authority is absent here because officers could not reasonably believe that Ms. Reiser had joint control over the loft, staircase, or box. The circuit courts are split on whether ambiguity permits officers to rely on third party consent, or instead requires officers to resolve that ambiguity pre-search. The Sixth and D.C. Circuits adopt a narrow approach. *See Taylor*, 600 F.3d at 685 (to establish apparent authority over a container, officers must clarify ownership); *see United States v. Whitefield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991) (officers faced with ambiguous situations should make further inquiries) (citing *United States v. Waller*, 426 F.3d 838, 845 (6th Cir. 2005)). If the situation is ambiguous, if the agents do not "learn enough," or if the "circumstances make it unclear whether the property . . . is subject to mutual use," a search is unlawful absent further inquiry. *Waller*, 426 F.3d at 845. When officers proceed where the facts are ambiguous, they should further inquire before a full search. *Whitefield*, 939 F.2d at 1075. While this standard may "impose an impossible burden on the police," it was not objectively reasonable for the search to continue in this case. *United States v. Melgar*, 227 F.3d 1038, 1041

(7th Cir. 2000). The Second and Seventh Circuits adopt a standard which gives officers much broader discretion during a search, stating searches "are permissible if the police do not have reliable information that the container is not under the authorizer's control." *Melgar*, 227 F.3d at 1041; *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006).

The Sixth Circuit's decision in *Taylor* illustrates that a search is unlawful where officers encounter an ambiguous situation regarding mutual use, and fail to resolve it. 600 F.3d at 685. There, while most items in the apartment were subject to a tenant's control, a reasonable officer could surmise that the tenant's lack of knowledge surrounding a particular shoebox indicated lack of mutual use. *Id.* at 682. Because ownership of the shoebox was ambiguous, the Sixth Circuit held that officers had a duty to resolve the ambiguity. *Id.* at 681.

The D.C. Circuit reached a similar outcome in *Whitefield*. There, a suspect's mother allowed officers to enter her home and search her son's bedroom. *Whitefield*, 939 F.2d at 1073. Although the bedroom door was closed, the court suppressed evidence found in the closet because there was no basis to believe the mother "made use of the room at any time for any purpose," even if her consent *implied* that she did. *Id.* at 1074. Importantly, the D.C. Circuit held that the officers should have made "further inquiries before engaging in [the] search[]" because the information was "insufficient" to establish the mother's joint access or control of the bedroom. *Id.* at 1075.

Here too, further inquiry was necessary. Like *Taylor*, where a tenant gave permission for officers to search the premises, Ms. Reiser also allowed Special Agent Ristroph to enter the cabin. R. 15. But Ms. Reiser expressly disclaimed access to the upstairs loft, because she "did not really ever go up there" and that it contained Mr. Hemlock's clothes and other belongings. R. 15, 16, 33. Ms. Reiser's statements affirmatively negated any inference of mutual use and

control. And under *Taylor*, once mutual use becomes unclear, third-party apparent authority no longer exists, absent further inquiry.

The officers in *Taylor* discovered a shoebox that was closed but *unsealed*, whereas here, the cardboard box was closed and *sealed*. R. 16, 35. There was a heightened expectation of privacy because the staircase led to Mr. Hemlock's private and personal loft. R. 15. Ms. Reiser established the stairs leading to that personal and private space were also in Mr. Hemlock's exclusive control. Ms. Reiser told Special Agent Ristroph she did not know what the box contained, but that it maybe had "outdoor gear . . . for [Mr. Hemlock and Ms. Copperfield's] outdoor excursions." R. 16. Although the Government argues that ownership was ambiguous, officers had clear knowledge that the box did not belong to Ms. Reiser, as she guessed at its contents. The cardboard box was also found on the second stair, not the bottom of the stairs, meaning it was within the private and exclusive control of Mr. Hemlock. R. 15.

Nonetheless, Special Agent Ristroph proceeded with the search without clarifying the ambiguity. R. 16, 35. As in *Whitefield*, where officers failed to confirm whether the consenting party used or controlled the bedroom, the lack of inquiry here rendered apparent authority unreasonable. Uncertainty is the enemy of apparent authority, and the Fourth Amendment does not allow officers to transform uncertainty into consent. 31 A.L.R. 3d 1078, § 2.5 (1953). Thus, because Ms. Reiser disclaimed access and control, and Special Agent Ristroph failed to resolve the ambiguity, the warrantless search of the container violated the Fourth Amendment.

III. THE EVIDENCE OF MS. COPPERHEAD'S CHARACTER FOR UNTRUTHFULNESS SHOULD HAVE BEEN ADMITTED AT TRIAL BECAUSE RULE 806 OF THE FEDERAL RULES OF EVIDENCE DOES NOT IMPLICATE RULE 608(b) AND THE EVIDENCE IS PROBATIVE UNDER RULE 403.

The trial court erred by sustaining Respondent's objection to extrinsic evidence of Ms. Copperhead's character of untruthfulness because Rule 806 allows for specific instances of

conduct to be introduced when the hearsay declarant cannot testify. Rule 806 permits the opponent of a hearsay statement to attack "the declarant's credibility" and support their attack with "any evidence that would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. Further, "evidence of the declarant's . . . conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it," may be admitted. *Id.*

This Court only reviews evidentiary rulings under an abuse of discretion standard if the lower court based its decision on a "permissible interpretation" of the Federal Rules of Evidence. *United States v. Saada*, 212 F.3d 210, 220 (3d Cir. 2000). To establish that the interpretation is permissible, this Court should apply a de novo standard. *Id.* Because the lower courts impermissibly misinterpreted Rule 806 as it relates to Rule 608(b), this Court should afford the evidentiary ruling plenary review and should hold that Rule 806 allows Mr. Hemlock to introduce Ms. Copperhead's academic violation report and the fraudulent job application in the absence of cross-examination and impeachment.

A. Rule 806 Allows the Introduction of Ms. Copperhead's Academic Violation Report and Job Application as Extrinsic Evidence of the Non-Testifying Hearsay Declarant's Character for Untruthfulness Because 608(b) Limits Extrinsic Evidence on Cross-Examination of Testifying Witnesses.

The District Court misapplied Rule 608(b) when it disallowed the introduction of Ms. Copperhead's cheating violation in college and the subsequent fabrication of her graduation on her job application because Rule 806 allowed Mr. Hemlock to introduce extrinsic evidence of the non-testifying declarant's character of untruthfulness. R. 50. Since the declarant cannot testify, thereby precluding cross-examination, "Rule 806 applies . . . and resort[ing] to extrinsic evidence may be the only means of presenting such evidence to the jury." *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988). Mr. Hemlock needs to "resort" to the specific instances of Ms.

Copperhead's untruthfulness, as that is "the only means" of presenting the relevant evidence to the jury. *Id.*

1. This Court should apply *United States v. Friedman* to Mr. Hemlock's case because Rule 608(b) does not apply outside of cross-examination and Rule 806 allows the introduction of extrinsic evidence.

Congress meant to keep the allowance of extrinsic evidence under Rule 806 separate from the prohibition of extrinsic evidence under Rule 608(b) of the Federal Rules of Evidence. Rule 608(b) prohibits extrinsic evidence to prove "specific instances of a *witness's* conduct" but that does not include a declarant's prior conduct. Fed. R. Evid. 608(b) (emphasis added); *see also* Fed. R. Evid. 608(b) Advisory Committee's Notes on 2003 Amendment ("[608(b)] has been amended to clarify that the absolute prohibition on extrinsic evidence applies *only* when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness") (emphasis added). Rule 806 focuses on the declarant's credibility, which could be attacked through impeachment of the specific instances if the declarant was a witness.

But in the absence of impeachment, as is the case when the declarant dies, Rule 806 allows extrinsic evidence to impeach the declarant's credibility. In *Friedman*, the Second Circuit confirmed that the language of Rule 806 allows for the introduction of extrinsic evidence when the declarant is dead and cannot testify. 854 F.2d at 570. Friedman sought to introduce as extrinsic evidence the deceased declarant's covering up of a suicide attempt to support his argument that the declarant was untruthful in his hearsay statements. *Id.* at 569. Ultimately, the court considered the declarant's fabrication to the police regarding his suicide attempt as "simply not probative" in relation to the declarant's co-conspirator statements. *Id.* However, the Second Circuit noted that the trial judge "was not insensitive to the commands of Rule 806" when he allowed Friedman to introduce extrinsic evidence attacking the credibility of another statement

by the declarant. *Id.* at 570. The court made clear that extrinsic evidence was permissible under Rule 806 because Rule 608(b) "limits such evidence of 'specific instances' to cross-examination," which is inapplicable when the evidence is meant to impeach a deceased declarant. *Friedman*, 854 F.2d at 570 n.8.

The Notes of the Advisory Committee on Rule 806 further support the *Friedman* court's position by referencing Rule 613's disallowance of prior inconsistent statements unless the witness is afforded an opportunity to "deny or explain." Fed. R. Evid. 613(b). First, the Notes explain that a declarant's credibility should "in fairness" be impeached by the opposite party. Fed. R. Evid. 806 Advisory Committee's Notes. The issue with Rule 613 in relation to Rule 806 is that evidence cannot be admitted without affording the witness an opportunity to explain or deny, which the Notes reference as an "impossible requirement" in the absent declarant context. *Id.* The Notes resolve this discrepancy by allowing the inconsistent statement, concluding that "the result [of denying the inconsistent statement] in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment." *Id.*

Here, likewise, enforcing Rule 608(b) by limiting the opposing party's inquiry into specific instances to cross-examination of an absent declarant represents an "impossible requirement" that should allow for the introduction of extrinsic evidence, just as the Notes allowed in relation to Rule 613. Fed. R. Evid. 608(b); *see* Fed. R. Evid. 806 Advisory Committee's Notes. The Fourteenth Circuit erred by prohibiting Mr. Hemlock from calling Dr. Joshi to testify and authenticate "the letter sent to Iris Copperhead . . . outlining an Academic Integrity Policy violation" and further prohibiting the production of evidence related to Ms.

Copperhead's falsified report on a job application that she had graduated Court Street College. R. 47, 48, 50. Ms. Copperhead is not a witness, but a declarant who died after her arrest. R. 46.

As the Notes of Advisory Committee for Rule 608(b) explicitly illustrate, Mr. Hemlock is only prohibited from proffering evidence of Mr. Kolber's character for untruthfulness, as he is the witness contemplated by Rule 608(b). R. 41; *see also* Fed. R. Evid. 608(b) Advisory Committee's Notes on 2003 Amendment. Under the plain language of Rule 608(b), Mr. Hemlock should be permitted to introduce extrinsic evidence of Ms. Copperhead's past conduct to attack the deceased declarant's credibility.

The *Friedman* decision provides the standard by which Mr. Hemlock's extrinsic evidence should be accepted. If evidence is probative to establish Ms. Copperhead's untruthfulness and is submitted outside of cross-examination, this Court should follow *Friedman*'s example and admit the evidence. *See Friedman*, 854 F.2d at 569–70. The *Friedman* court allowed the defendant to attack the credibility of the non-hearsay declarant with extrinsic evidence regarding the source of the declarant's $25,000 investment because it "directly involved the credibility" of the declarant's statements. *See Friedman*, 854 F.2d at 570. Similarly, Copperhead' academic violation report and her fraudulent statement to Boerum Village Mayor's office "directly involve[] the credibility" of Ms. Copperhead's later statement that the alleged kidnapping was only Hemlock's idea because these documents show that Ms. Copperhead will lie to benefit herself, as illustrated by her hearsay statement, in which she says that she "can't run a business from prison." R. 9–10, 43, 47–48; *see Friedman*, 854 F.2d at 570.

Additionally, the *Friedman* court correctly assessed that Rule 608(b) only applies to cross-examination, which gives Mr. Hemlock further reason to proffer evidence of Ms. Copperhead's untruthfulness. *See Friedman*, 854 F.2d at 570 n.8. Mr. Hemlock only sought to

introduce the extrinsic evidence after the Government rested its case, not during Kobler's cross-examination. R. 46. Rule 608(b) does not govern Mr. Hemlock's calling Dr. Joshi as a witness, but the rule would apply if Mr. Hemlock decided to attack Ms. Copperhead's credibility during Kobler's cross-examination. *See* Fed. R. Evid. 608(b); *see also Friedman*, 854 F.2d at 570 n.8. This Court should follow *Friedman* and allow Mr. Hemlock to introduce evidence of Ms. Copperhead's character for untruthfulness.

2. The Fourteenth Circuit erroneously applied the decisions of *Saada* and *United States v. White*, because the Third and D.C. Circuits misinterpreted Rule 806 and Mr. Hemlock's position is distinguishable from both cases.

Other decisions regarding Rule 806 fail to consider the legislative intent of Rule 608(b) and Rule 806, and further discount that most defendants lack alternatives to defend against a deceased declarant's hearsay statements. As such, this Court should decline to accept the reasoning in *Saada* and *White*.

In *White*, defendants sought to reference extrinsic proof of the alleged murder victim's false statements on an employment application during cross-examination of a police officer to discredit the victim's statements in debriefing with police regarding the defendants' drug dealing scheme. *United States v. White*, 116 F.3d 903, 910, 920 (D.C. Cir. 1997). The interrogative occurred during cross-examination of the police officer. *Id.* at 920. The D.C. Circuit clarified that the defendant's counsel "could have asked [the officer] only if Williams had ever lied on an employment form" and that Rule 608(b) prohibited reference to extrinsic evidence during the cross-examination of the officer. *Id.* Finally, the defendants were able to interrogate the police officer about the deceased declarant's drug use, dealing, and prior convictions, already damaging the declarant's credibility and rendering the job form inquiry superfluous. *Id.*

In *Saada*, the Third Circuit relied on *White* to hold that the lower court erred in admitting evidence of a deceased declarant's past unethical conduct as a judge. 212 F.3d at 221. The court relied on the alternative "avenues" that defendants could use to discredit the non-testifying hearsay declarant. *White*, 212 F.3d at 221. The court suggested questioning the witness regarding the declarant's misconduct or impeaching with opinion and reputational evidence under Rule 608(a), evidence of a criminal conviction under Rule 609, or evidence of prior inconsistent statements under Rule 613. *Id.* Finally, the Third Circuit reasoned that Rule 608(b)'s purpose is to "avoid minitrials" and "unfair surprise." *Id.* at 222.

Here, Mr. Hemlock's situation is distinguishable from *White* and *Saada*, because both courts provide an impermissible interpretation of Rule 806. First, distinguishing the *White* decision, the prevented questions regarding extrinsic evidence occurred on cross-examination of a witness, not the declarant. 116 F.3d at 920. Mr. Hemlock did not attempt to introduce the extrinsic evidence on cross-examination, but rather after the Government rested its case. R. 46. As such, the two trial postures are incongruous. The *White* court properly disallowed the extrinsic evidence on cross examination, as Rule 608(b) applies in that context. *See Friedman*, 854 F.2d at 570 n.8. Like the *Saada* rationale, the *White* defendants utilized alternatives unavailable to Mr. Hemlock. The police officer that worked with the declarant in *White* had "known Williams for less than two months," which still allowed the defendants to cross-examine him as to the declarant's drug use while working with the police. *White*, 116 F.3d at 920. In contrast to the *White* defendants, Mr. Hemlock could not have asked Mr. Kolber if Ms. Copperhead had ever lied on an employment form, as Mr. Kolber did "not know anything about her personal life other than the alleged kidnapping." *Compare* R. 45–46 *with White,* 116 F.3d at

920. Thus, the Fourteenth Circuit erred in relying on *White*, as it is distinguishable from Mr. Hemlock's situation and does not comport with Rule 806's allowance of extrinsic evidence.

Additionally, the *Saada* decision offers further alternatives that are unavailable to Mr. Hemlock, and their concerns regarding Rule 806's allowance of extrinsic evidence does not consider the language of the Federal Rules of Evidence. The *Saada* decision does not address *Friedman*'s clear delineation of Rule 608(b) as limited to cross-examination of the witness. *See Saada*, 212 F.3d at 920–21; *Friedman*, 854 F.2d at 570 n.8. Additionally, the Advisory Committee's Notes directly contradicts *Saada*'s application of Rule 608(b) by clarifying that Rule 608(b) "applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness." Fed. R. Evid. 608(b) Advisory Committee's Notes on 2003 Amendment. *Saada* does not contemplate this, instead erring by applying the Notes of Advisory Committee's explicit explanation of Rule 806's interaction with Rule 613 as a bar to apply a similar standard to Rule 608(b). *Barnhart v. Peabody Coal Co.*, 537 U. S. 149, 168 (2003) ("the *expressio unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it") (internal quotations omitted). Because the Notes of Advisory Committee for Rules 608(b) and 806 are incongruent, Rule 806 does not incorporate Rule 613 at the exclusion of 608(b). *See* Fed. R. Evid. 608(b) Advisory Committee's Notes on 2003 Amendment; *but see* Fed. R. Evid. 806 Advisory Committee's Notes; *see also United States v. Barnes*, 222 U.S. 513, 519 (1912) (*expressio unius* "expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest"). Therefore, Rule 806's contemplation of Rule 613's unique requirement as to prior inconsistent statements does not negate the inapplicability of Rule 608(b) in the non-cross-examination context.

Like *White*, the alternatives provided in *Saada* are inapplicable to Mr. Hemlock. *See United States v. Washington*, 263 F. Supp. 2d 413, 423 n.5 (D. Conn. 2003) (stating that though alternatives existed in *Saada*, "no such consolation prize exists for [other] defendants"). Mr. Hemlock is not seeking to introduce a criminal conviction or a prior inconsistent statement, nor does the record illustrate there was applicable conduct. *See* R. 3–17. Thus, *Saada*'s suggestion of Rule 613 or Rule 609 does not apply. 212 F.3d at 221. Nothing in the record indicates that Ms. Copperhead developed any reputation in the community, or that anyone besides Mr. Hemlock had an opinion on her truthfulness. *See generally* R. As such, Rule 608(a) is additionally unavailable to Mr. Hemlock. Finally, the *Saada* court suggested inquiring into specific instances through the witness, but that is impossible given Mr. Kobler's lack of knowledge regarding Ms. Copperhead's life. R. 45–46; *see Saada*, 212 F.3d at 221. Thus, *Saada* and its progeny do not provide enough support to counter the Notes of the Advisory Committee and *Friedman*'s analysis, and this Court should reverse Mr. Hemlock's conviction on these grounds. *See generally United States v. Andrade*, No. 20-CR-00249, 2025 WL 670456 (N.D. Cal. Mar. 3, 2025) (following the *Saada* ruling); *but see United States v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D.N.Y. 2008) (applying *Friedman* and allowing extrinsic evidence).

B. Due to the Impossibility of Impeachment or Cross-Examination, the Extrinsic Evidence Should Be Admitted Because Rule 608(b) Would Allow Mr. Hemlock to Confront Ms. Copperhead if the Declarant Had Testified and the Evidence Comports with Rule 403.

The Fourteenth Circuit erred by affirming the suppression of extrinsic evidence because Rule 608(b) presents an impossible requirement for defendants like Mr. Hemlock, and the extrinsic evidence is relevant and probative. Rule 608(b) allows for specific instances of conduct "to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness." Fed. R. Evid. 608(b). Because Mr. Hemlock cannot inquire into Ms. Copperhead's

specific instances of misconduct with Mr. Kobler as a witness, even though the conduct is probative, the trial court should have admitted Mr. Hemlock's extrinsic evidence.

The importance of the jury to observe the witness cannot be understated. In *United States v. Hamilton*, a defendant objected to testimony from a government agent on the grounds that the witness called in from a telephone and was not present at trial. 107 F.3d 499, 503 (7th Cir. 1997). In rejecting the government's use of telephoned testimony, the Seventh Circuit emphasized the importance of face-to-face confrontation of the witness. *Id.* One purpose served by in-person testimony is that it ensures the reliability of the evidence "by allowing the trier of fact to observe the demeanor, nervousness, expressions, and other body language of the witness." *Id.*

The trier of fact cannot assess the "demeanor, nervousness, expressions, and other body language" of a non-testifying, deceased hearsay declarant. *See id.*; *see United States v. Lakich*, 23 F.3d 1203, 1210–11 (7th Cir. 1994); *see also Churchill v. Waters*, 977 F.2d 1114, 1124 (7th Cir. 1992) (stressing the importance of "giving the judge or jury the opportunity to observe the verbal and non-verbal behavior of the witnesses"). If Ms. Copperhead had testified, Mr. Hemlock could have inquired into her past untruthful acts, and the trier of fact could have "observe[d] the verbal and non-verbal behavior of the witnesses focusing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements." *See Churchill*, 977 F.2d at 1124; *see also Snyder v. Louisiana*, 552 U.S. 472, 479 (2008); Fed. R. Evid. 608(b). Additionally, if Ms. Copperhead admitted to lying on her job application and violating Court Street College's academic policies under threat of perjury, Mr. Hemlock's impeachment would have been successfully achieved without needing extrinsic evidence. Fed. R. Evid. 608(b). In the absence of present testimony, the only way to ensure relevant evidence is available to the trier of fact is to admit extrinsic

evidence of Ms. Copperhead's untruthfulness. *Friedman*, 854 F.2d at 570 n.8 ("resort to extrinsic evidence may be the only means of presenting such evidence to the jury"); *see* Fed. R. Evid. 806 Advisory Committee's Notes; *see also Maryland v. Craig*, 497 U.S. 836, 845–46 (1990) (the Confrontation Clause right "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility").

Furthermore, the trial court should have admitted Mr. Hemlock's evidence as the dangers of unfair prejudice did not substantially outweigh the probative value of the academic violation report and her job application. *See* Fed. R. Evid. 403 (allowing the court to exclude evidence that is unfairly prejudicial). Since the extrinsic evidence is relevant to credibility, this Court should reverse the district court's decision to exclude it. *See United States v. Finley*, 1989 WL 58223, at *4 n.1 (N.D. Ill. May 19, 1989) (admitting extrinsic evidence relevant to credibility). Ms. Copperhead's hearsay statement, if unchallenged, places Mr. Hemlock as the mastermind of the alleged kidnapping plot. R. 43. Ms. Copperhead's credibility is directly tied to the trier of fact's analysis of her statement, and her academic violation report and the lies on her job application have the tendency to make her untruthfulness more probable than it would be without the evidence. *See* Fed. R. Evid. 401. Unlike *Friedman*, where the declarant's lies to police were predicated on not admitting guilt in the charged offenses, Copperhead's untruthful conduct did not stem from external pressure related to the charged crime. *Compare* R. 9–10, *with Friedman*, 854 F.2d at 569–70. Finally, the extrinsic evidence avoids Rule 608(b)'s purpose of preventing minitrials because the same result would occur if Ms. Copperhead testified and admitted to the academic violation and the lies on the job application, which is allowed under Rule 608(b). R. 46–47; Fed. R. Evid. 608(b). The Government may attempt to rehabilitate Ms. Copperhead's

credibility, but that would occur if Ms. Copperhead testified and Mr. Hemlock successfully impeached her within Rule 608(b). Thus, Mr. Hemlock's evidence is probative to Ms. Copperhead's character of untruthfulness and the trial court failing to admit the extrinsic evidence unfairly prejudiced Mr. Hemlock.

CONCLUSION

This Court should reverse the Fourteenth Circuit's decision and hold that the district court should have suppressed the notebook found on Mr. Hemlock and the items found in the cardboard box on the stairs, and should have admitted into evidence Ms. Copperhead's academic violation letter and her job application. Thus, this Court should reverse Mr. Hemlock's conviction, or in the alternative, remand for a new trial absent the notebook and boxed items, and with the extrinsic evidence.

Dated: February 8, 2026

Respectfully Submitted,

s/ Team #3

Attorneys for Petitioner