

No. 25-7373

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

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ATTICUS HEMLOCK,  
*PETITIONER,*

v.

UNITED STATES OF AMERICA,  
*RESPONDENT.*

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

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BRIEF FOR RESPONDENT  
UNITED STATES OF AMERICA

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**QUESTIONS PRESENTED**

- I. Whether, under *Payton v. New York* the Fourth Amendment is violated when law enforcement officers, who remain outside, command a suspect inside the home to step outside and arrest the suspect outside the home without a warrant.
- II. Whether the Fourth Amendment is violated when law enforcement conducts a warrantless search of a closed container located in a shared residence after obtaining a co-occupant's consent to search the residence, without specifically inquiring into ownership of the container.
- III. Whether, under Rule 806 of the Federal Rules of Evidence, extrinsic evidence of a specific instances of conduct of a hearsay declarant may be admitted to impeach the declarant's character for truthfulness when the declarant is unavailable to testify at trial.
- IV.

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## STATEMENT OF FACTS

On April 2, 2024 FBI Special Agents Hugo Herman (“Herman”) and Ava Simonson (“Simonson”) drove an unmarked car to the home of Atticus Hemlock (“Defendant”) and his girlfriend Fiona Reiser (“Reiser”). R. at 52. Herman and Simonson were acting on previous tips from local business workers who were concerned about the Defendant’s behavior. R. at 52.

On March 29, 2024 Elvis Hoag (“Hoag”) a local barista called the police to report two individuals discussing a kidnapping plan of a federal official. R. at 52.

On March 30, 2024 Tina Caplow (“Caplow”), the manager of the local Village Superstore called the police to report the Defendant had been acting suspiciously and purchased items including zip ties, ski masks, a folding knife, trash bags, and bear spray. R. at 52. These items were all purchased with cash. R. at 52.

Special Agents Herman and Simonson approached Defendant at home and requested he speak with them outside. R. at 52. Defendant refused to come outside upon request. R. at 52. During the course of the discussion, Special Agents Herman and Simonson saw two bottles of chloroform behind the Defendant. R. at 53. The Defendant mentioned the name Jodie unprompted. R. at 53.

Upon a second request to exit the home, Defendant left the confines of his home and came down the front steps. R. at 53. The Defendant was arrested outside of the home on probable cause by the two Special Agents. R. at 53.

Around this time, Iris Copperhead (“Copperhead”) was traveling to the home and saw Defendant’s arrest. R. at 53. Theodore Kolber (“Kolber”) saw Copperhead moving in the woods towards the walking path in Joralemon State Park. R. at 53. Kolber noticed that Copperhead was disheveled and upset, and when Kolber checked in with Copperhead 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 53. Copperhead then ran off, was arrested in the evening of April 2, 2024, and died that night from an acute aortic rupture. R. at 53.

At approximately 4:30 PM on April 2<sup>nd</sup>, Special Agent Kiernan Ristroph ("Ristroph") arrived on the premises, as Special Agents Herman and Simonson were preparing to transport Defendant for further processing. R. at 53. Special Agent Herman told Special Agent Ristroph to wait until Reiser returned to the cabin, and Reiser arrived back at the cabin about 20 minutes later. R. at 53.

Then, Special Agent Ristroph knocked on the door of the home, identified himself as an FBI agent, and told Reiser about Defendant's arrest. R. at 53. Special Agent Ristroph said he was at the premises to conduct an investigation. R. at 53. Special Agent Ristroph asked if he could "take a look around the cabin" and Reiser allowed Ristroph to enter the cabin. R. at 53. Special Agent Ristroph, noticing a set of set of stairs in a nearby area, asked Reiser if she slept on the second level. R. at 53. Special Agent Ristroph said she did not, and that her and Defendant slept in a downstairs bedroom and the stairs went to a loft that had Defendant's office and storage. R. at 53. Special Agent Ristroph did not enter the loft. R. at 53.

Special Agent Ristroph saw an old cardboard shipping box on the second to last step of the bottom stairs, which had the top flaps closed, and no external information for identification. R. at 53. Special Agent Ristroph, opening the box, found a length of rope, a folding knife, a collection of zip ties, a roll of duct tape, two black ski masks, one pair of gloves, and two bottles of chloroform. R. at 53. Special Agent Ristroph seized the box and its contents as evidence in Defendant's case. R. at 53. Defendant was then indicted for the attempted kidnapping of an

officer of the United States government on account of the officer's official duties under 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 1201(d). R. at 53.

The trial of Defendant commenced August 5, 2024. *Id.* Defendant made a pre-trial motion to suppress the seizure of the notebook during arrest under *Payton v. New York*, and additionally the materials obtained during the search of the cardboard box. *Id.* The District Court denied both motions. *Id.* During trial, following the testimony of Kolber regarding Copperhead's statement, the District Court sustained the government's objection that evidence of Copperhead's prior misconduct involving academic dishonesty and a falsified job application for the purposes of impeaching Copperhead should be kept out under Rule 608(b). *Id.*

## **SUMMARY OF THE ARGUMENT**

[To be added]

## ARGUMENT

### **I. Under *United States v. Payton*, the Special Agents had probable cause and the arrest took place outside the ‘firm entry’ of the home when the Defendant, who was aware he was free to leave, willingly surrendered to law enforcement.**

The Fourth Amendment protects “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. The Fourteenth Amendment states “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV. In *United States v. Payton*, this Court looked at both these amendments and the protection offered to people when law enforcement had probable cause they had committed a felony but no warrant. The court stated, “Thus, for Fourth Amendment Purposes, an arrest warrant founded on probable cause implicitly carries within it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” *Payton v. New York*, 445 U.S. 573, 603 (1980). This Court further stated, In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *Payton*, 445 U.S. at 590. *See also Silverman v. United States*, 365 U.S. 505 (1961)

In *Payton*, two defendants were arrested in their homes without warrants. *Payton*, 445 U.S. at 576-7. The first defendant was suspected of committing a murder. Officers knocked without response. They used a crowbar to force entry into the apartment where they observed a bullet matching the murder weapon and giving them further probable cause. *Payton*, 445 U.S. at

576. The second defendant was identified by the victims of two armed robberies. Police did not obtain a warrant but went to his house and knocked on the door, which his son opened. Officers found weapons and narcotics, giving them probable cause to arrest the second defendant. *Payton*, 445 U.S. at 578. Both defendants alleged that their Fourth Amendment rights had been violated by the warrantless arrest in their homes. The State argued that there was sufficient probable cause. This Court found that while in this case there was a Fourth Amendment violation because the arrest took place inside the home without a warrant, this Court also noted that if there was a warrant there was limited authority to enter someone's home to arrest them. *Payton*, 445 U.S. at 603. This Court established that there is a firm entry in the home where the Fourth Amendment offers the highest level of protection to both people and items.

**a. Under *United States v. Carroll*, the police had probable cause to arrest the Defendant based on police reports and his behavior the day of the arrest.**

This Court has long upheld that an arrest can be made without a warrant if the officer has probable cause based on their good faith belief. "A police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony." *Carroll v. United States*, 267 U.S. 132, 164 (1925). *See also Kurtz v. Moffitt*, 115 U.S. 487 (1885); *John Bad Elk v. United States*, 177 U.S. 529 (1900). In laying out whether the officer has probable cause, the court says that "Good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable." *Carroll v. United States*, 267 U.S. 132, 161 (1925) quoting *Director General v. Kastenbaum*, 263 U.S. 25 (1923).

In *Carroll*, a car was searched and liquor was seized without a warrant. The court pointed to the factors of (1) location near an international border where liquor was routinely smuggled in, (2) there was convincing evidence the men were "bootleggers" and (3) two months earlier

officers had stopped the same car with the same men on suspicion of smuggling. *Carroll v. United States*, 267 U.S. at 162. The defendant's argued that the officers lacked probable cause and were not looking for them at the time of their arrest. *Carroll v. United States*, 267 U.S. at 161. They further argued that the state did not show the contraband at trial. *Carroll v. United States*, 267 U.S. at 162. However, the court disagreed with the defense. Taken all together this Court found the officers had probable cause and were "entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to defendants." *Carroll v. United States*, 267 U.S. at 162. This Court further quoted *Commonwealth v. Phelps* and stated an officer arresting a person without a warrant is, "not bound to show his justification of a felony actually committed, to render the arrest lawful." *Carroll v. United States*, 267 U.S. at 161 quoting *Commonwealth v. Phelps*, 95 N. E. 868 (1911), See also *Rohan v. Sawin*, 59 Mass. 281 (1850).

Here, the Defendant was known to law enforcement from previous calls from local concerned business people including the barista and the convenience store worker. R. at 53. Prior to going to the Defendant's house on April 2, 2024, Special Agents Herman and Simonson spoke to the local business people and confirmed the identity of the Defendant. R. at 52. As with the *Carroll* case, the Defendant's history made him known to law enforcement. During their talk with the Defendant, his behavior gave further probable cause when the Special Agents took into account their previous knowledge of the Defendant. The Defendant mentioned the worker by name and had two Chloroform bottles behind him that he did not want to speak about and tried to block from the Special Agent's view. R. at 52. The Special Agents relied on their knowledge and the facts presented to them. They radioed for backup given the Defendant's behavior and the facts known to them from prior police reports. While there was no warrant for the arrest, even

the Defense's legal counsel agreed there was probable cause and chose not to challenge it at the hearing. R. at 27.

Therefore, this court should find that there was probable cause and the Special Agents acted in good faith based on the entirety of the facts known to them and including the Defendant's behavior.

**b. Under *United States v. Jardines*, the arrest took place outside the home and was therefore not an arrest inside the home as outlined in *United States v. Payton*.**

First established in *Carroll* and upheld in *Carney* and expanded in *Jardines*, this Court found ready mobility of automobiles justified a lesser degree of protection than stationary structures. In *Carney* this Court stated:

‘[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained.’ *Carney*, 471 U.S. 386 at 390 quoting *Carroll*, 276 U.S. 132 at 153.

In *Jardines*, this Court expanded the area of the home to include the curtilage, which they defined as anywhere directly outside the dwelling and familiar enough to be understood as part of the home from daily experience. *Jardines*, 569 U.S. 1 at 7; *Oliver v. United States*, 466 U.S. 170, 182 (1984). The stationary dwelling of a home and its curtilage are offered the most protection under the Fourth Amendment.

In *Jardines*, an officer walked a drug-sniffing dog around the front porch of a home where the officer suspected that there was marijuana inside the house. *Jardines* 569 U.S. 1 at 4. The dog sniffed the front door of Defendant's residence before signaling the presence of drugs the front door. *Jardines* 569 U.S. 1 at 4. Defendant fled his stationary dwelling with a readily mobile vehicle, but was apprehended by law enforcement. *Jardines* 569 U.S. 1 at 4. During trial,

he moved to suppress since there was no warrant at the time of the search his Fourth Amendment rights had been violated. *Jardines* 569 U.S. 1 at 5. This Court sided with Defendant, given the protections afforded to the home and curtilage by the Fourth Amendment. *Jardines* 569 U.S. 1 at 5.

Here, the arrest took place outside of the home. R. at 53. The Special Agents did not arrest the Defendant inside the home or in the area that could be understood to be part of the curtilage under *Jardines*. R. at 53. During the suppression hearing the Judge found that there was no line crossed at the entry to the home by the Special Agents. R. at 31.

Therefore, this Court should find the Special Agents did not enter the Defendant's home to arrest him.

**c. Under *United States v. Mendenhall*, the Defendant demonstrated awareness he was free to leave and therefore, his choice to leave his home was independent and not coerced.**

While the Fourth Amendment protects against unreasonable seizures of people, this Court has long debated when the Fourth Amendment comes into play during a warrantless arrest for probable cause. It was established in *Terry v. Ohio* that “Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *United States v. Mendenhall*, 446 U.S. 544, 552 (1980) *See also Terry v. Ohio*, 392 U.S. 1 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). When looking at when the Fourth Amendment comes into play with questioning outside of the home, in *Gaddis v. DeMattei* this Court stated, “It has long been established that the Fourth Amendment is not implicated when officers approach a doorway, knock, wait for an answer, and engage in conversation until asked to leave.” *Gaddis v. DeMattei*, 30 F.4th 625, 631 (7th Cir. 2022) *See Also Florida v. Jardines*, 569 U.S. 1, 8 (2013).

In *Terry*, an Officer saw two men loitering outside a store in a way he found suspicious. *Terry*, 392 U.S. at 6 (1968). The Officer, fearing that they may be armed, approached Terry, identified himself as an Officer and asked for his name. *Terry*, 392 U.S. at 7. Without warning the Officer grabbed Terry, spun him around and patted him down. *Terry*, 392 U.S. at 7. The Officer found a gun on Terry during the pat down and he was charged with illegally carrying a concealed weapon. *Terry*, 392 U.S. at 8. Terry argued that his Fourth Amendment rights had been violated by the warrantless seizure of his person and property. This Court found that “whenever a police officer accosts an individual and restrains his freedom to walk away he has ‘seized’ that person.” *Terry*, 392 U.S. at 16. However, this Court found that when the entirety of Terry’s behavior was taken into consideration, the Officer had probable cause to seize him for the safety of himself and the public. *Terry*, 392 U.S. at 30.

In *Gaddis*, two neighbors got into an altercation after Gaddis cut down numerous tree branches that were hanging over his fence. *Gaddis*, 30 F.4th at 628. Gaddis threw the branches back into his neighbors yard and the two got into a verbal altercation. *Gaddis*, 30 F.4th at 628. A neighbor called the police who spoke to Gaddis through his screen door for ten to fifteen minutes. *Gaddis*, 30 F.4th at 628. The Officers told Gaddis to come out and after he complied they arrested him on his front porch. *Gaddis*, 30 F.4th at 629. Gaddis argued that his Fourth Amendment rights had been violated and he was arrested without probable cause. *Gaddis*, 30 F.4th at 631. The court found that there was probable cause for arrest based on the officer’s interviews with neighbors and Gaddis’ combative behavior during their interaction. *Gaddis*, 30 F.4th at 631. The court further found that because Gaddis never asked the officers to leave and presented no evidence that he was not free to close the door and go about his business meant the

officers did not violate *Payton* nor did they infringe upon Gaddis' Fourth Amendment rights. *Gaddis*, 30 F.4th at 631.

In *Mendenhall* the defendant was detained at an airport after two experienced DEA agents became suspicious that she was carrying narcotics. *United States v. Mendenhall*, 446 U.S. 544, 547, (1980). When she was questioned, her behavior -- including having a different name on her airline ticket and nervous behavior -- added to the probable cause based on the DEA agents knowledge. *Mendenhall*, 446 U.S. at 548. The DEA agent request she accompany him to the office for further questioning. *Mendenhall*, 446 U.S. at 548. The defendant followed the officer to the area and consented to a search of her person and handbag after the officer made it clear she could refuse if she desired. *Mendenhall*, 446 U.S. at 548. Heroin was found on her person and she was arrested. *Mendenhall*, 446 U.S. at 549. The defendant argued this was a violation of her Fourth Amendment rights and she was unlawfully detained. *Mendenhall*, 446 U.S. at 549. This Court found that there was no unlawful detention and her Fourth Amendment rights were not violated. *Mendenhall*, 446 U.S. at 555. This Court looked at the totality of the circumstances, including that the defendant was asked to accompany the officers and her ticket and identification had already been returned to her. *Mendenhall*, 446 U.S. at 558.

Here, The Special Agents are described as both being physically smaller than the Defendant. R. at 29. When they approached the Defendant's door, they were armed, but their weapons were 'securely' holstered. R. at 29. During their conversation with the Defendant, the Special Agents never ordered him to come outside, nor did they state anything that could be construed as a repercussion for failure to comply. R. at 30. The conversation between the Special Officers and the Defendant was not brief, the Special Agents were able to radio for backup, move around the Defendant's residence and between the residence and their car. R. at 52-3.

Throughout this interaction the Defendant refused to exit the premises but stood behind a screen door completely unprotected. R. at 52. His behavior is not one of someone who felt like they had no choice in complying with the Special Agents. There is no evidence that the Defendant called for help from local authorities or tried to warn his alleged co-conspirator who was on her way to join him. The Defendant chose to exit his home without coercion, threats or any displays of force by the Special Agents.

Therefore, this Court should find the Defendant was not coerced, threatened or forced to exit his home and the seizure of his person did not violate his Fourth Amendment rights.

**d. This Court should uphold *United States v. Allen* in following the rule laid out in *United States v. Payton* rather than the constructive entry doctrine in *United States v. Johnson* due to the burden it's unclear guidance places on people, law enforcement and this Court.**

In *United States v. Johnson* the court laid the groundwork for constructive entry, stating, “it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within the home.” *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980). The court stated the location of the officers mattered more because, “otherwise, arresting officers could avoid ‘entry’ into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons.” *Johnson*, 626 F.2d at 758. *See also United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984). This was further clarified in *United States v. Allen* where the court stated “An ‘across the threshold’ arrest counts as an entry into the home by the police if their command to the occupant to submit to arrest is sufficiently and forcefully compelling, but not if, as in this case, the occupant calmly responds to an authoritative, but polite, command to accompany the officers and submit to police custody.” *United States v. Allen*, 813 F.3d 76, 88 (2d Cir. 2016) *See also California v. Hodari D.* 499 U.S.

621 (1991); *United States v. Mendenhall* 466 U.S. 544 (1980); *United States v. Reeves* 524 F.3d 1161 (2008).

In *Johnson*, the defendant was accused of attempting to forge a check. Special Agents gave fake names and then entered the home with their weapons drawn and asked to talk to the defendant. *Johnson*, 626 F.2d at 755. The Special Agents spoke to the defendant, informed him of his rights and the defendant stated he wanted to cooperate before confessing to the forgery. *Johnson*, 626 F.2d at 755. The defendant was placed under arrest in his home. *Johnson*, 626 F.2d at 755. The court found that the arrest was unlawful due to the location, the false names given by the Special Agents and their weapons. *Johnson*, 626 F.2d at 757.

In *Morgan*, the defendant was arrested inside his mother's home on suspicion of possessing an illegal weapon. The officers acted coercively to lure him out of the house by giving fake names. *Morgan*, 743 F.2d at 1166. The court found that the arrest violated Morgan's Fourth Amendment rights because he emerged, "in response to coercive police conduct." *Morgan*, 743 F.2d at 1167.

In *Allen*, Officers knocked on the door of the defendant and requested he come outside to speak to them. The defendant complied and officers spoke to him before placing him under arrest. *Allen*, 814 F.3d at 79. When Allen asked to go upstairs to get his shoes, the Officers said they had to accompany him. *Allen*, 814 F.3d at 79. The court elected to follow the rule laid out in *Payton*, stating, "the [rule] provides clear guidance to law enforcement, avoids undue complexities and perverse incentives to householders not to open their doors to inquiring police officers, and most importantly, ensures that the Fourth Amendment protections....are adequately protected." *Allen*, 814 F.3d at 90.

Here, the bright line rule laid out in *Payton* gives clarity to all parties involved and removes the potential burden on this Court. Furthermore, it also protects the rights of the Fourth Amendment while also protecting the public. The court in *Allen* correctly pointed to the clear rule incentivizes cooperation from homeowners. The constitution is intended to protect those within the borders of the United States. Having confusion that incentives illegal behavior is contrary to the very heart of the Framers' intention.

In this case, the suppression of evidence hearings go further and state that even if this Court were to uphold constructive entry doctrine, it would not apply to the officers. R. at 31. The Special Agents clearly identified themselves, kept their weapons holstered and at no point did they tell the Defendant he was not free to leave. R. at 52-3. The Defendant never asked the Special Agents to leave, rather he told them he was not coming out multiple times but never took steps to move away from the screen door. R. at 53. At no point did the Special Agents act in a coercive manner. If this Court decided not to uphold the precedent set in *Payton*, it would not apply to this case given the Special Agent's behavior. Behavior they had a clear line to follow given the clarity laid out in *Payton*.

Therefore, this Court should uphold the rule laid out in *Payton* that the firm entry is in the doorway of the home.

**II. The Fourth Amendment permits law enforcement to conduct a search of a closed container located in a shared residence after obtaining a co-occupant's consent to search the residence without specifically inquiring into ownership of the container, without a warrant.**

**a. Consent Exceptions under the Fourth Amendment:**

The Fourth Amendment permits law enforcement to conduct searches, provided they fall within "[the] few specifically established and well-delineated exceptions," developed by the

courts. *See Katz v. U.S.*, 389 U.S. 347, 357 (1967). These exceptions include direct consent by the “individual whose property is searched,” *see Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973), consent by “a third party who possess common authority over the premises or effects,” *United States v. Matlock*, 415 U.S. 164, 171 (1974), or consent by “[a] third party who possesses ‘apparent authority’ over the premises or effects,” *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). Apparent authority permits law enforcement to “enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises,” *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). In the case of any of these exceptions, such consent must be voluntary. *See id.* at 181. In *Snype*, the court found consent to be voluntary where after forcible entry by law enforcement, “numerous steps were taken that did restore calm to Bean's home before she consented to any search.” *See* 476 F.2d at 131. In contrast, in *Mapp*, consent was invalid because no such steps were taken. *See U.S. v. Mapp*, 476 F.2d 67, 78 (1973).

With respect to apparent authority, the circuit courts are divided on whether inquiry is required in factually ambiguous situations. For example, the Second Circuit has reasoned that “open-ended consent would permit the search and seizure of any items found in the apartment with the exception of those ‘obviously’ belonging to another person,” where consent was provided by the apartment resident after defendant spent the night at the residence. *United States v. Snype*, 441 F.3d 119, 130-37 (2d Cir. 2006). With respect to closed container searches, the Seventh Circuit has reasoned they “are ‘permissible if the police do not have reliable information that the container is not under the authorizer’s control,’” *see United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000). The court reasoned that “[a] contrary rule would impose an impossible burden on the police . . .” and “would mean that they could never search closed

containers within a dwelling (including hotel rooms) without asking the person whose consent is being given ex ante about every item they might encounter,” *id.* at 1042. In this case, the Thirteenth Circuit has adopted a similar approach in their affirmance of the District Court’s reasoning, holding that “there is no affirmative obligation on law enforcement officers to clarify ownership of ambiguous items in a common area,” and reasoning that “[w]ithout positive knowledge or an objective basis to conclude that the container belongs to someone other than the consenting party, the Government may rely on a co-occupant’s consent to search any container in a common area.” R. at 56.

In contrast, some courts, including the Sixth Circuit, require law enforcement to make inquiry in factually ambiguous circumstances. *See, e.g., United States v. Waller*, 426 F.3d 838, 846 (6th Cir. 2005). The Sixth Circuit has found ambiguity where a shoebox was in a “closet [containing] men’s clothes and was partially covered with a piece of men’s clothing . . .” as in *Taylor*, 600 F.3d at 679-81 or where a defendant had luggage at the full-time tenant’s apartment, *see U.S. v. Waller*, 426 F.3d 838, 848-49. In this analysis, courts look to whether the object searched or seized “historically [commands] a high degree of privacy,” and whether there were any circumstances indicating restrictions on usage or access to the object. 600 F.3d at 683. In this analysis, courts look to extrinsic facts that law enforcement observed. *See id.* at 681-88. For example, in *Taylor*, the court reasoned that a full-time female tenant of the apartment did not have apparent authority to consent to a search of a shoebox when the officers saw men’s clothing in a spare bedroom. *See* 600 F.3d at 681-82. The court reasoned that although “shoeboxes do not ‘historically command a high degree of privacy,’” the Defendant in that case had “[taken] precautions to manifest his expectations of privacy by closing the shoebox, putting it in the corner of a closet in a little-used room, partially covering it with an item of his clothing, and not

granting Arnett permission to look inside.” *See* 600 F.3d at 683. In other words, the search of the shoebox without further inquiry was unlawful. *See id.* In contrast, in *United States v. Howard*, the Sixth Circuit, applying apparent authority, reasoned that a search was lawful where the leaseholder resident allowed law enforcement to conduct a complete search of a residence, which extended to a mattress containing a firearm in an unlocked bedroom, and there were no other facts justifying ambiguity. *See United States v. Howard*, 806 Fed. Appx. 383, 386 (2020).

Under either approach, Special Agent Ristroph’s actions were lawful.

- b. Were this court to adopt the approach of the Second and Seventh Circuits, Special Agent Ristroph’s actions were lawful because Reiser consented for Special Agent Ristroph to search the cabin, and there were no circumstances indicating the box belonged to another person.**

Special Agent Ristroph’s actions were lawful under the approach of the Second and Seventh Circuits. For one, there was no forcible entry raising issues of invalid consent as in *Mapp* or *Snype*, instead here Special Agent Ristroph merely knocked at the cabin door. R. at 15. Further, as in *Snype*, Special Agent Ristroph acted lawfully in searching the cardboard box because it was not obvious the box belonged to another person, instead it was only obvious that Defendant used the upstairs loft as “storage and an office space,” R. at 15. And, as in *Melgar*, here Special Agent Ristroph had no reliable information, or any information at all, that the cardboard box was not under Reiser’s control. R. at 15. Therefore, Special Agent Ristroph’s actions were lawful under the approach of the Second and Seventh Circuits.

- c. Were this court to adopt the approach of the Sixth Circuit, Ristroph’s actions were lawful because there are not sufficient facts indicating defendant had manifested an expectation of privacy in the box.**

Special Agent Ristroph’s actions were lawful under the approach of the Sixth Circuit.

As an initial matter, the factual circumstances in the present case do not constitute ambiguity under *Taylor* and *Waller*. For one, a cardboard box is not a suitcase or an overnight bag, nor is it an “enclosed space” in the same manner as “valises, suitcases, footlockers, strongboxes, etc. . . .” which the court in *Waller* view as carrying a high expectation of privacy. *See* 426 F.3d at 838. Additionally, in contrast to *Taylor*, where there were men’s clothes sprawled indicating the space did not belong to the tenant, *see* 600 F.3d at 681-83, here Reiser only indicated that the upstairs loft was used by Defendant, R. at 52. While here, the top flaps of the box were closed, R. at 53, the court in *Taylor* relied on much more facts, for example the defendant “closing the shoebox, putting it in the corner of a closet in a little-used room, partially covering it with an item of his clothing, and not granting Arnett permission to look inside.” *See* 600 F.3d at 683. Therefore, Special Agent Ristroph’s actions were lawful under the approach of the Sixth Circuit.

**III. The Third Circuit’s findings should be upheld as using the plain language of 608(b) to modify Rule 806 would upset the balance between probative value and the risk of prejudice or confusion with non-testifying defendants**

The Third Circuit’s findings should be upheld as using the plain language of 608(b) to modify Rule 806 would upset the balance between probative value and the risk of unfair prejudice or confusion with non-testifying defendants. In *Saada*, the Third Circuit reasoned that “where the declarant is unavailable to testify, the ban prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant’s misconduct,” *U.S. v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000). As the court reasoned, “these possible drawbacks may not override the language of Rules 806 and 608(b), and do not outweigh the reason for Rule 608(b)’s ban on extrinsic evidence in the first place, which is ‘to avoid minitrials on wholly collateral matters which tend to distract and

confuse the jury ... and to prevent unfair surprise arising from false allegations of improper conduct,” *Id.* at 222.

While the dissent in the Fourteenth Circuit observes that, as a result of this reading, “[a]fter Copperhead’s passing, Defendant cannot question her about events from her past—events which may raise questions to a jury about her credibility,” R. at 61, this reading ignores that, as provided in *U.S. v. Saada*, “there are other avenues for impeaching the hearsay statement . . . [f]or example, the credibility of the hearsay declarant—and indeed that of the witness testifying to the hearsay statement—may be impeached with opinion and reputation evidence of character under Rule 608(a), evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613,” *see* 212 F.3d at 221. To whatever extent extrinsic evidence is kept out in these settings, there are other avenues to impeach witnesses without upsetting the plain reading of the Federal Rules of Evidence.

## CONCLUSION

Petitioner respectfully requests this Court affirm the ruling of the Fourteenth Circuit.

Respectfully submitted,

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