

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 PETITIONER

Team 21P
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether law enforcement officers violate the Fourth Amendment when they use coercive tactics and order a person out of his home to arrest him without a warrant absent exigent circumstances.
- II. Whether a law enforcement officer violates the Fourth Amendment when he conducts a warrantless search of a closed box based on a co-occupant's consent of the home, where the box is in an area exclusively used by the defendant and the officer makes no inquiry into ownership.
- III. Whether Rule 806 of the Federal Rules of Evidence permits extrinsic evidence of specific instances of conduct to impeach an unavailable hearsay declarant's character for truthfulness.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unpublished but is reproduced in the Record on pages 51 to 61. The District Court for the Northern District of Boerum’s oral ruling on Petitioner’s motion to suppress the notebook is reproduced in the Record on page 31. The district court’s oral ruling on Petitioner’s motion to suppress the box and its materials is reproduced in the Record on pages 38 to 39. The district court’s oral ruling on Petitioner’s Federal Rule of Evidence 806 application is reproduced in the Record on page 50.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved questions arising under the Fourth Amendment to the United States Constitution and Federal Rules of Evidence 806 and 608(b). The full text of the Amendment and Rules are reprinted in an appendix to this brief, Pet’r’s App., *infra*, a.

STATEMENT OF THE CASE

Atticus Hemlock, a Boerum Village native, became the target of an investigation by the Federal Bureau of Investigation on April 2, 2024. R. at 6. FBI Special Agents Hugo Herman and Ava Simonson investigated two citizen reports that morning at the request of the Boerum Village Police Department involving an alleged plot to kidnap Jodie Wildrose, a federal official. R. at 20. A preliminary investigation led the agents to suspect the involvement of Iris Copperhead and Atticus Hemlock. *Id.*

1. Agents Herman and Simonson lure Mr. Hemlock outside of his home to arrest him without a warrant.

Agents Herman and Simonson drove to Mr. Hemlock’s home in the afternoon of April 2, 2024. R. at 20, 21. The agents did not at this time or at any time seek an arrest warrant for Mr. Hemlock or a search warrant for his home. R. at 28.

The agents exited their vehicle and approached Mr. Hemlock's home, climbing the front steps to reach the front door. R. at 21. Both agents wore an officer's belt carrying various weapons and tools, including a 9-millimeter handgun, taser, baton, and handcuffs, as well as a functioning body-worn camera. R. at 25, 29. Once at the front doorway, which was closed with only the exterior screen door, Agent Simonson knocked loudly on the doorframe. R. at 21, 25. Mr. Hemlock answered the door and addressed the agents from inside his home through the screen door. R. at 21. The agents displayed their badges of authority and identified themselves as FBI agents. R. at 11, 28. Then, the agents began a coordinated attempt to lure Mr. Hemlock outside of his home without an arrest warrant. R. at 22.

Agent Simonson asked Mr. Hemlock to come outside the home. R. at 11. Mr. Hemlock politely declined, at which point Agent Simonson asked again. *Id.* Notably, at no time throughout the encounter did the agents inform Mr. Hemlock that he had the ability to decline. *Id.* When Mr. Hemlock declined Agent Simonson's demand, Agent Herman climbed the front steps to the doorway once more to close in on Mr. Hemlock. R. at 22. From this position, Agent Herman peered around Mr. Hemlock and noticed two bottles labeled "Chloroform" on a counter within the home. *Id.* Mr. Hemlock did not respond to Agent Herman's questions about the bottles and moved to block Agent Herman's visual inspection of his home. *Id.*

Agent Herman demanded that Mr. Hemlock come outside. R. at 11. Agent Simonson echoed this demand, this time with a raised voice. *Id.* Mr. Hemlock refused and asked the agents to leave him be, saying "I told you I don't want to come outside!" *Id.* Confused, Mr. Hemlock asked the agents, "What the hell is this even about? Does this have to do with Jodie?" *Id.* The agents did not respond to Mr. Hemlock's question as to the purpose of their presence at his home. R. at 12.

The agents momentarily returned to their vehicle and conversed while Mr. Hemlock stood behind the screen door. R. at 12, 29. “He clearly does not want to talk to us,” Agent Simonson told her partner. R. at 12. The agents then agreed that their observations during the encounter “confirmed [their] suspicions” and amounted to probable cause to arrest. R. at 12, 22. The agents did not seek an arrest warrant at this time. Instead, the agents decided they would attempt to lure Mr. Hemlock outside of his home to arrest him without a warrant: “We’ll get him to come outside and then we’ll arrest him” Agent Simonson told her partner. R. at 12, 23. The agents radioed another agent, Special Agent Kiernan Ristroph, to come to Mr. Hemlock’s home as backup. *Id.*

The agents approached Mr. Hemlock’s home once more, each shouting at Mr. Hemlock to come outside. R. at 12, 23. “Sir! Come outside! Our investigation is important and we need answers. Now!” Agent Herman yelled. R. at 12. “Get outside right now!” Agent Simonson demanded. *Id.* As they approached Mr. Hemlock, Agents Herman and Simonson each visibly placed their hands on their holstered handguns. R. at 26. “Oh god...” Mr. Hemlock pleaded, “...uh, okay, okay. I’ll come out.” R. at 12. The agents handcuffed Mr. Hemlock and placed him under arrest at the foot of the front doorsteps. R. at 12, 23. Agent Herman immediately searched Mr. Hemlock and seized a notebook from his pants pocket. R. at 23. Agent Ristroph arrived at Mr. Hemlock’s home just as Agents Herman and Simonson prepared to leave with Mr. Hemlock in custody. R. at 12.

2. Iris Copperhead makes a statement in the presence of Theodore Kolber and shortly thereafter dies in custody.

In the nearby woods of Joralemon State Park, a hiker named Theodore Kolber is walking along the trail when he encounters a stranger who he later learned was Iris Copperhead. R. at 42, 45. When Mr. Kolber asks if she is okay, Ms. Copperhead responds, “I can’t believe I saw him

get arrested. It's all his fault. It was all Atticus' idea—NOT MINE! I can't run a business from prison!" R. at 43. Ms. Copperhead then left Mr. Kolber. R. at 42. She was arrested later that evening and died suddenly the same night from an acute aortic rupture while in custody. R. at 46, 53.

3. Agent Ristroph conducts a warrantless search of Mr. Hemlock's home based on a co-occupant's consent and searches a closed box located in an area used solely by Mr. Hemlock without first inquiring into ownership.

Before leaving Mr. Hemlock's home, Agent Herman instructs Agent Ristroph to wait at the home for Mr. Hemlock's girlfriend, Fiona Reiser, to arrive and to then "... get a consent search of the cabin" and Agent Ristroph agreed. R. at 12.

Agent Ristroph knocked at the front door, and Ms. Reiser opened the door. R. at 13. Agent Ristroph informed Ms. Reiser of Mr. Hemlock's arrest and relayed that he was conducting an investigation before asking if he could "take a look around" the home. R. at 13, 15. Ms. Reiser asked why Mr. Hemlock had been arrested, but Agent Ristroph did not answer. R. at 15. Nor did Agent Ristroph inform Ms. Reiser that she could decline his request to search the home. *Id.* Ms. Reiser then allowed Agent Ristroph to enter the home. *Id.*

Agent Ristroph entered the home and began to search the main floor, at which point he observed an alcove with a staircase leading to the second floor of the home. R. at 13. Agent Ristroph asked if Ms. Reiser slept on the second floor, and she explained that she and Mr. Hemlock slept in the bedroom on the first floor. R. at 15. Ms. Reiser informed Agent Ristroph that Mr. Hemlock used the second floor as an office space and storage area, although she could not tell him what Mr. Hemlock stored in the space because she "did not really ever go up there[.]" R. at 13.

Agent Ristroph approached a closed and unmarked cardboard box that sat atop the second step of the staircase. *Id.* Without making any inquiries to Ms. Reiser about the box or its

ownership, Agent Ristroph opened the box. Within the box, Agent Ristroph found a length of rope, a pair of gloves, a collection of zip ties, two black ski masks, a folding knife, a roll of duct tape, and two bottles of chloroform, which he documented and photographed. *Id.* Ms. Reiser told Agent Ristroph that she had never seen the items inside the box. R. at 13, 16. Agent Ristroph left Mr. Hemlock's home with the box and its contents. R. at 13.

4. The district court denied Mr. Hemlock's motions to suppress and prohibited Mr. Hemlock from offering impeachment evidence at trial; Mr. Hemlock was subsequently convicted, and the court of appeals later affirmed the judgment below.

Mr. Hemlock was indicted in the United States District Court for the Northern District of Boerum under 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 1201(d). The district court denied Mr. Hemlock's motion to suppress the notebook seized from Mr. Hemlock and the cardboard box and its contents seized from the staircase inside Mr. Hemlock's home. R. at 31, 38. The district court found that in the absence of an actual physical entry by the agents into Mr. Hemlock's home, the arrest was valid, and the notebook was thus validly seized incident to arrest and admissible at trial. R. at 31. Further, the district court found that ownership of the closed cardboard box was ambiguous, that Agent Ristroph's search of the box with apparent authority was reasonable and thus valid, and that the box and its contents were therefore admissible at trial. R. at 38. At trial, the Government admitted these items into evidence against Mr. Hemlock over his objection.

At trial, Mr. Hemlock was prohibited from offering extrinsic evidence to impeach the unavailable hearsay declarant Iris Copperhead after statements by Ms. Copperhead were admitted against Mr. Hemlock. R. at 50. During its case-in-chief, the Government called Theodore Kolber to testify to the statements Ms. Copperhead made to him in Joralemon State Park. R. at 20. The district court admitted this hearsay testimony over Mr. Hemlock's objection, finding that it fell within the excited utterance exception under Rule 803(2). R. at 44, 54. During

cross-examination, Mr. Kolber testified that he had never met Ms. Copperhead before and could not speak to her reputation in the community. R. at 45, 46.

During Mr. Hemlock's case-in-chief, he sought to call Dr. Andrea Joshi, a member of the Court Street College's Board of Academic Integrity, to testify concerning a Letter of Academic Integrity Policy Violation against Ms. Copperhead and accordingly authenticate this document. R. at 46, 47. Additionally, Mr. Hemlock sought to call Svetlana Ressler, the Boerum Mayor's Chief of Human Resources, to testify concerning a falsified job application by Ms. Copperhead and accordingly authenticate this document. R. at 48. Mr. Hemlock sought to offer this evidence to impeach Ms. Copperhead's character for truthfulness under Rule 806. *Id.*

The Government objected to this evidence, arguing that it was extrinsic evidence barred under Rule 608(b). R. at 49. The District Court sustained the Government's objection, and Mr. Hemlock was prohibited from introducing any witness testimony or documents related to Ms. Copperhead's character for untruthfulness. R. at 50, 54.

Mr. Hemlock was convicted at trial in the district court on August 12, 2024, and appealed his conviction to the United States Court of Appeals for the Fourteenth Circuit asserting three issues challenging his conviction. R. at 51. A majority panel of the Court of Appeals affirmed the judgment of the district court on April 14, 2025. R. at 58. This Court granted Mr. Hemlock's Writ of Certiorari on December 2, 2025. R. at 62.

SUMMARY OF THE ARGUMENT

The defendant is entitled to fairness at every stage of a criminal case, from investigation to adjudication. Three rulings by the district court, affirmed by the court of appeals, denied Mr. Hemlock fairness. First, the district court improperly denied Mr. Hemlock's motion to suppress the notebook because the agents constructively entered Mr. Hemlock's home and arrested him without a warrant. Second, the district court improperly denied Mr. Hemlock's motion to

suppress the cardboard box and its contents because the agents searched the box without a search warrant or valid consent. Finally, the district court improperly excluded Mr. Hemlock's extrinsic evidence to impeach Iris Copperhead, an unavailable hearsay declarant.

I. First, agents constructively entered Mr. Hemlock's house in violation of *Payton v. New York* when they coerced him to exit his home and arrested him without a warrant. The Fourth Amendment rigorously protects individuals' privacy within their homes regardless of physical entry. Constructive entry, like physical entry, results in a seizure in the home. Allowing police to seize a person within his home, even without physical entry, would undermine protections of the home and the purpose of the warrant requirement. Here, the agents constructively entered Mr. Hemlock's home and seized him inside before formally arresting him outside his home. The agents made a show of authority that indicated to Mr. Hemlock he was not free to disregard them. Mr. Hemlock submitted to that show of the authority and exited his home. Because the arrest was unlawful, the notebook obtained in the search incident to arrest must be suppressed.

II. Second, Agent Ristroph's search of Mr. Hemlock's box violated the Fourth Amendment because Ms. Reiser did not possess apparent authority to consent to the search. It was unreasonable for Agent Ristroph to believe that Ms. Reiser had access to or control over the box or the stairs where the box was located. At minimum, Ms. Reiser's access and control were ambiguous. When a third party's authority is ambiguous, officers have a duty to further inquire to resolve ambiguity. Even if Ms. Reiser had some authority to consent, she limited the scope of her consent to exclude the box. Agent Ristroph exceeded the scope of Ms. Reiser's consent by searching the box. Because the search was unlawful, the box and items inside must be suppressed.

III. Finally, Mr. Hemlock was denied a meaningful opportunity to challenge Iris Copperhead's credibility in contravention of Rule 806 when the court excluded his extrinsic impeachment evidence. When a hearsay statement is admitted for its truth, the opponent may challenge the hearsay declarant's credibility as if they had testified as a witness under Rule 806. Under Rule 806, a non-testifying hearsay declarant may be challenged with extrinsic evidence of specific instances of conduct without restriction by Rule 608(b). The hearsay statement of Ms. Copperhead, a non-testifying hearsay declarant, was admitted against Mr. Hemlock at trial for its truth. Rule 806 entitled Mr. Hemlock to attack Ms. Copperhead's credibility with extrinsic evidence of specific instances of her conduct probative of untruthfulness. Because the district court excluded this evidence, Mr. Hemlock was denied the opportunity to impeach Ms. Copperhead and suffered prejudice.

As set forth below, this Court should reverse the judgment below.

ARGUMENT

I. THE GOVERNMENT VIOLATED MR. HEMLOCK'S FOURTH AMENDMENT RIGHTS WHEN IT COMPELLED MR. HEMLOCK TO EXIT HIS HOME AND CONDUCTED A WARRANTLESS ARREST.

Agents Simonson's and Agent Herman's coercive tactics compelled Mr. Hemlock out of his home to be arrested without a warrant in violation of the Fourth Amendment. The Fourth Amendment guarantees "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. While police may conduct warrantless arrests in public with probable cause, *United States v. Watson*, 423 U.S. 411, 423 (1976), they may not conduct a warrantless arrest in an individual's home with probable cause absent exigent circumstances. *Payton v. New York*, 445 U.S. 588-589 (1980). A majority

of circuit courts recognize the constructive entry doctrine,¹ holding *Payton* is violated when an officer coerces a suspect to exit his home and conducts a warrantless arrest. Some circuits construe *Payton* narrowly, requiring actual entry for a violation.²

This Court should reverse the Fourteenth Circuit and hold that constructive entry violates the Fourth Amendment. Constructive entry is functionally equivalent to actual entry. History and precedent demonstrate that officers coercing a suspect out of his home to arrest him undermines the Fourth Amendment. Here, the agents constructively entered Mr. Hemlock's home and arrested him. The agents made a show of authority by loudly knocking, identifying as FBI agents, repeating commands that became increasingly aggressive, and placing their hands on their firearms. Mr. Hemlock submitted to this show of authority while inside his home and thus was seized therein. Mr. Hemlock exited his home, and the agents arrested him without a warrant, violating his Fourth Amendment rights.

A. The Constructive Entry Doctrine Is Consistent with the History and Spirit of the Fourth Amendment.

Fourth Amendment protection of the home, implicit in history and precedent, does not depend on formalistic distinctions about physical entry. Constructive entry poses the same threat to the privacy of the home as physical entry. When officers compel a suspect to exit his home, they effectively circumvent the Fourth Amendment's warrant requirement.

¹ See *United States v. Curzi*, 867 F.2d 36, 42 (1st Cir. 1989); *Sharrar v. Felsing*, 128 F.3d 810, 820 (3d Cir. 1997); *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005); *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985); *United States v. Reeves*, 524 F.3d 1161, 1165 (10th Cir. 2008). While some circuits have not expressly adopted the doctrine, they recognize officers use of coercive tactics to compel a suspect to the door for an arrest violates the Fourth Amendment. See *United States v. Allen*, 813 F.3d 76, 88-89 (2d Cir. 2016); *United States v. Jerez*, 108 F.3d 684, 692-693 (7th Cir. 1997); *United States v. Edmonson*, 791 F.2d 1512, 1515 (11th Cir. 1986).

² See e.g., *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987); *United States v. Berkowitz*, 927 F.2d 1376, 1386-88 (7th Cir. 1991); *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002).

The idea that “the home is the first among equals,” is “embedded in [American] traditions since the origins of the Republic.” *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *Payton v. New York*, 445 U.S. 573, 601 (1980). “At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.” *Silverman v. United States*, 365 U.S. 505, 511 (1961). This Court rejected the “trespass doctrine,” holding the Fourth Amendment’s reach “cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” *Katz v. United States*, 389 U.S. 347, 353 (1967). Police do not need to physically enter the house to violate the Fourth Amendment when they have used other methods to invade the privacy of the home. *See Kyllo v. United States*, 533 U.S. 27, 40 (2001). The “warrant requirement for in-home arrests is based on [this] understanding of the sanctity of the home [.]” *Fisher v. City of San Jose*, 509 F.3d 952, 959 (9th Cir. 2007). Requiring a “neutral and detached magistrate” to determine existence of probable cause, “minimizes the danger of needless intrusions.” *Johnson v. United States*, 333 U.S. 10,14 (1948); *Payton*, 445 U.S. at 586. Allowing officers to forgo obtaining a warrant because they believe there is probable cause, “reduces the [Fourth] Amendment to a nullity and leaves the people’s homes secure only in the discretion of police officers.” *Johnson*, 333 U.S. at 14.

In both constructive and actual entry cases, law enforcement seizes a suspect in their home. When officers demand to enter an individual’s house “under color of office,” an individual grants entry “in submission to authority rather than as understanding and intentional waiver of a constitutional right.” *Johnson*, 333 U.S. at 13. Studies and constitutional scholars support that during police-citizen encounters the average person will comply with law enforcement’s requests. *See* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Consensual Encounter Doctrine*, 38 *San*

Diego L. Rev. 507, 532-33 (2001). Police who use coercive tactics effectively force an individual in a public area where police are no longer restrained by the warrant requirement. *Johnson*, 333 U.S. at 14. After law enforcement arrests a person through constructive entry, “a physical intrusion into the home will very frequently follow the arrest.” *United States v. Allen*, 813 F.3d 76, 86 (2d Cir. 2016). Thus, constructive entry can lead to further invasions into the home.

B. The Agents’ Coercive Show of Authority Compelled Mr. Hemlock’s Submission, Effectuating a Seizure Inside His Home.

The agents constructively entered when they seized Mr. Hemlock in his home. *Payton* applies to both arrests and seizures inside the home, so “labeling an encounter in the home as either an investigatory stop or an arrest is meaningless.” *Payton*, 445 U.S. at 590; *United States v. Reeves*, 524 F.3d 1161, 1166 (10th Cir. 2008). Courts that recognize the constructive entry doctrine typically apply the law of seizure to determine a *Payton* violation. See *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001). A seizure or arrest “requires either physical force [] or [] submission to the assertion of authority.” *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Courts often apply the rule in *Mendenhall*, a case about a defendant’s encounter with law enforcement at the airport. See *United States v. Mendenhall*, 446 U.S. 544, 547 (1980). A seizure occurs when a reasonable person would have believed “he was not free to leave.” *Id.* at 554. However, for situations like encounters in the home, the more appropriate inquiry is the modified version of *Mendenall* in *Florida v. Bostick*. 501 U.S. 429, 436 (1991) (concluding the “free to leave analysis” is inapplicable where the defendant “has no desire to leave”). A person is seized if a “reasonable person would [not] feel free ‘to disregard the police and go about his business.’” *Bostick*, 501 U.S. at 434 (quoting *Hodari*, 499 U.S. at 628). Whether an arrest occurs in the home depends on the location of the person arrested, not the location of officers. *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980).

1. The agents' loud knocking, identification as FBI agents, escalating commands, and hands on their holsters communicated that Mr. Hemlock was not free to go about his business.

There is no perfect formula for determining whether a reasonable person feels they are free to disregard police and go about their business. Courts evaluate “all of the circumstances” including the presence of multiple officers, loud knocking, display or drawing of weapons, identification as law enforcement, repeated orders to open the door or exit the home, and raised voices. *See Mendenhall*, 446 U.S. at 554; *United States v. Grayer*, 232 Fed. Appx. 446, 450 (6th Cir. 2007); *Reeves*, 524 F.3d at 1164. Here, all of the circumstances demonstrate a reasonable person in Mr. Hemlock’s position would not feel like he could ignore the FBI agents and go about his business within his home.

Mr. Hemlock’s encounter became increasingly coercive after the agents arrived at his home. R. at 11-12. A lawful “encounter at the doorstep may evolve into a constructive entry when the police, while not entering the house, deploy overbearing tactics that essentially force the individual out of the house.” *Thomas*, 430 F.3d at 277. Agent Simonson and Agent Herman loudly knocked on Mr. Hemlock’s door three times, identified themselves as FBI agents, and flashed their badges. R. at 11, 25, 28. Between both agents they asked or told Mr. Hemlock to come outside four times. R. at 13. While Mr. Hemlock refused to speak with the agents, he expressed anxiety and did not leave his doorway, suggesting that he did not feel free to terminate the encounter.” *United States v. Drayton*, 536 U.S. 194, 197 (2002).

When the agents initially walked away, they believed they had probable cause to arrest Mr. Hemlock, but instead of obtaining a warrant, they decided to coerce him outside his home and arrest him. R. at 12. Their actions escalated to the point that Mr. Hemlock “reasonably believed he had no choice but to comply.” *Saari*, 272 F.3d at 809. When a suspect refuses to answer and police take additional actions to elicit a response, the suspect feels compliance is

necessary. *United States v. Jerez*, 108 F.3d 684, 692 (7th Cir. 1997). Both agents visibly placed their hands on their holsters, loudly demanding Mr. Hemlock come outside while drawing in on him. R. at 26. A reasonable person in Mr. Hemlock's position would have believed unless he exited the home, the agents would not leave or they would use force. *See Jerez*, 108 F.3d at 693.

Officers do not need to draw their weapons or threaten to shoot a suspect to demonstrate coercion. In fact, coercion can exist even when a suspect does not see an officer's weapon. *See e.g. Edmonson*, 791 F.2d at 1515 (holding officers conducted a warrantless arrest of defendant even though "there is no direct evidence that defendant actually saw the officers' drawn weapons"). Agents Simonson and Herman touching their guns tends to show the existence of a seizure. *See United States v. Barry*, 394 F.3d 1070, 1072, 1075 (8th Cir. 2005) (suspect was seized after officer knocked on suspect's car window, put his hand on holster, and asked suspect to exit his vehicle). Viewing all the circumstances, Mr. Hemlock was not free to ignore the agents and go about his business. Because Mr. Hemlock was standing in his home during the agents' coercive actions, he was seized inside his home. *See Johnson*, 626 F.2d at 757 (holding arrestee's location, not officer's location determines seizure).

2. Mr. Hemlock submitted to the agents' authority before crossing the threshold.

Mr. Hemlock was seized when he submitted to the agents' commands to exit his home. A seizure occurs when police make a show of authority, and the suspect submits to the show of authority. *Hodari*, 499 U.S. at 628. An individual who exits their home shortly after a show of authority essentially submits to the authority at the same time. *Fisher*, 475 F.3d at 1065. Where officers made a show of authority and summoned the suspect to exit his home, courts hold the arrest occurs in the home, despite the actual arrest occurring outside the home. *Al-Azzawy*, 784 F.2d at 893; *Morgan*, 743 F.2d at 1167; *Saari*, 272 F.3d at 809. Similarly, Agents Simonson and

Herman made a show of authority and commanded Mr. Hemlock to exit his home. Mr. Hemlock submitted to the agents' show of authority when he said "Oh god, uh, okay, okay. I'll come out," and immediately exited his home. R. at 14. Mr. Hemlock did not "voluntarily expose himself" to an arrest, rather he was left with no choice but to comply by exiting his home. *Johnson*, 626 F.2d at 757.

Nothing prevented Agents Simonson and Herman from obtaining an arrest warrant. In fact, the agents consciously chose not to. R. at 12. *Payton* is violated when, as here, officers constructively enter the home to effect an arrest without a warrant. Limiting *Payton* to actual entry allows law enforcement to evade the warrant requirement and threatens all citizens' privacy rights. Agents Simonson and Herman violated Mr. Hemlock's Fourth Amendment rights when they constructively entered his home and conducted a warrantless arrest.

II. THE GOVERNMENT'S WARRANTLESS AND NONCONSENSUAL SEARCH OF MR. HEMLOCK'S CLOSED BOX VIOLATED THE FOURTH AMENDMENT.

Agent Ristroph violated the Fourth Amendment when he searched a closed box in Mr. Hemlock's home without a warrant or valid consent from Mr. Hemlock or a third-party. Law enforcement may only conduct a warrantless search of property if they have voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1948). A co-occupant can only consent if she has "common authority over . . . the premises or effects" subject to the search. *United States v. Matlock*, 415 U.S. 164, 171 (1974). "[C]ommon authority rests on mutual use of the property by persons generally having joint access or control for most purposes." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (quoting *Matlock*, 415 at 171 n.7) (internal quotation marks omitted). The government has the burden to establish that a third-party has common authority. *Rodriguez*, 497 U.S. at 181. Officers can only rely on apparent authority to search if reasonable. *Id.* at 184.

Because Mr. Hemlock was not present and Ms. Reiser, a co-occupant, did not have actual³ or apparent authority to consent to the search of the closed box, the search was unconstitutional.

A. Ms. Reiser Had No Apparent Authority Over the Closed Box to Give Consent.

A co-occupant has apparent authority if the facts known to the officer at the time would cause a reasonable person to believe the co-occupant has “joint access or control for most purposes” over the property or premises. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990); *United States v. Terry*, 915 F.3d 1141, 1145 (7th Cir. 2019). As set forth below, Agent Ristroph could not rely on Ms. Reiser’s apparent authority to search the box because she lacked access and control over the box. At minimum, Ms. Reiser’s statements to Agent Ristroph created ambiguity, and Agent Ristroph had a duty to resolve the ambiguity through inquiry.

1. Agent Ristroph could not reasonably conclude that Ms. Reiser had joint access or control over the closed box or the stairway where the box was located.

When assessing authority to consent, courts only consider the facts officers knew at the time of consent. *Terry*, 915 F.3d at 1145. Although not exhaustive, courts consider several factors for apparent authority over containers: “(1) the type of container and whether that type ‘historically command[ed] a high degree of privacy,’ (2) whether the container's owner took any precautions to protect his privacy, (3) whether the resident at the premises initiated the police involvement, and (4) whether the consenting party disclaimed ownership of the container.” *United States v. Taylor*, 600 F.3d 678, 683 (6th Cir. 2010) (citing *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992)). Although Ms. Reiser consented to a search of the house, an

³ Whether Ms. Reiser had actual authority over the box was not an issue raised on appeal. *See R. at 51* (stating the second issue as the validity of a search based on “law enforcement [’s] reasonabl[e] belie[f] that a co-occupant of the cabin possessed apparent authority to consent”).

officer could not have reasonably believed Ms. Reiser had joint access or control over Mr. Hemlock's closed cardboard box.

First, Mr. Hemlock had a high degree of privacy in the box searched. Courts recognize a high expectation of privacy for closed containers. *United States v. Chadwick*, 433 U.S. 1, 13 (1977) (noting a higher expectation of privacy in a “repository of personal effects” than an automobile). The Fourth Amendment does not draw a “distinction between worthy and unworthy containers.” *United States v. Ross*, 456 U.S. 798, 822 (1982). A “closed, opaque container . . . ‘manifest[s] an expectation that contents [] remain free from public examination.’” *Robbins v. California*, 453 U.S. 420, 426 (1981) (quoting *Chadwick*, 433 U.S. at 11). Accordingly, consent to search a home does not automatically extend to every closed container in the home. *See United States v. Karo*, 468 U.S. 705, 725 (1984) (O'Connor, J., concurring); *United States v. Block*, 590 F.2d 535, 541 (4th Cir. 1978). Courts recognize an expectation of privacy in closed cardboard boxes and closed shoe boxes, which commonly hold personal items, even when in a shared residence. *See e.g., United States v. Fultz*, 146 F.3d 1102, 1104 (9th Cir. 1998); *United States v. Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014). Hence, Mr. Hemlock had an expectation of privacy in his closed cardboard box, even if he shared his home with Ms. Reiser.

Second, Mr. Hemlock took precautions to protect his privacy by putting his items in a closed box and placing the box in an “alcove” on the stairs leading to his loft. R. at 13. Closing a box and placing it in a secluded area or in one's personal space are examples of precautions to protect privacy that weigh against apparent authority. *See Peyton*, 745 F.3d at 554 (shoebox near defendant's bed where he kept his personal property); *Taylor*, 600 F.3d at 682 (box “in the corner of a closet in a little-used room”). If Mr. Hemlock wanted to give Ms. Reiser access to the box he would have placed it in a shared area like their bedroom, living room, or kitchen. By

placing the box on the stairs to bring to his loft, he demonstrated an intent to keep the box private from Ms. Reiser.

Furthermore, Ms. Reiser never “initiated police involvement.” *Taylor*, 600 F.3d at 683. Courts are “more forgiving of searches” initiated by a host seeking to protect the home. *Salinas-Cano*, 959 F.2d at 864. Ms. Reiser was unaware that the agents arrested Mr. Hemlock. R. at 15. She did not arrive at the home until after the arrest and asked Agent Ristroph the reason for the arrest. R. at 13, 15. Ms. Reiser gave no indication she was concerned about the safety of her home because of Mr. Hemlock.

Lastly, Ms. Reiser implicitly disclaimed ownership over the cardboard box when she said she “did not know [what Mr. Hemlock kept up in the loft] because [she] did not really ever go up there.” R. at 15. A co-occupant informing police the defendant keeps personal property in an area where the container was searched “strongly suggest[s] [the co-occupant] did not use the []box or have permission to do so.” *Peyton*, 745 F.3d at 554. Ms. Reiser’s statements indicated she did not use or access the stairs or any items located on the stairs. *See People v. McNair*, No. 364805, 2024 WL 2793467, at *28-29 (Mich. Ct. App. May 30, 2024) (holding co-occupant did not consent to officers search of the stairwell after she told officers she did not “commonly go upstairs” and the stairs led to the defendant’s bedroom); *cf. United States v. Marshall*, 348 F.3d 281, 285 (1st Cir. 2003) (holding third-party had common authority over the stairway when she told police she had gone upstairs, had some items in the upstairs bedrooms, and asked police to search the bedrooms). An officer would reasonably conclude that Ms. Reiser did not have joint access or control over the stairs or the cardboard box. Nevertheless, Agent Ristroph proceeded to the stairs and opened up the box without inquiring about them. R. at 16. Even if the staircase was a common area, Mr. Hemlock did not “forfeit his expectation of privacy merely because the

container [wa]s located in a place that [wa]s not controlled exclusively by [Mr. Hemlock].” *Fultz*, 146 F.3d at 1105. Ms. Reiser’s consent to the home and access and control over some areas of the house did not equate to access or control over the cardboard box.

2. Ms. Reiser’s authority was at least ambiguous, and Agent Ristroph did not resolve the ambiguity through inquiry.

Both the district court and court of appeals noted the ambiguity of the box’s ownership. R. at 39, 56. Even when a co-occupant gives consent, the “surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry.” *Rodriguez*, 497 U.S. at 188. The majority of circuit courts interpret *Rodriguez* to say that when officers encounter a situation where authority is ambiguous, they should further inquire to resolve the ambiguity.⁴ A minority of circuit courts hold officers have no duty to inquire as long as officers reasonably believe a co-occupant has authority over an item or premises. See *United States v. Almeida-Perez* 549 F.3d 1162, 1171 (8th Cir. 2008); *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006); *United States v. Antone-Herron*, 593 Fed. Appx. 960, 965 (11th Cir. 2014). This Court should adopt the duty to inquire rule. Here, the agents encountered uncertainty about the box’s ownership or control, and they should have asked Ms. Reiser about the box.

The duty to inquire rule adequately protects individuals’ privacy interests in their items and homes against third party consent searches. As discussed above, the home receives the greatest protection under the Fourth Amendment, and the warrant requirement protects against

⁴ See *United States v. Moran*, 944 F.3d 1,7 (1st Cir. 2019); *United States v. Harrison*, 689 F.3d 301, 311 n.5 (3d Cir. 2012); *Taylor*, 600 F.3d at 681 (6th Cir. 2010); *United States v. Arreguin*, 735 F.3d 1168, 1177 (9th Cir. 2023); *United States v. Cos*, 498 F.3d 1115, 1128 (10th Cir. 2007); *Peyton*, 745 F.3d at 554 (D.C. Cir. 2014). The court of appeals noted the Seventh Circuit does not adopt the duty to inquire rule, see R. at 56, but more recent precedent indicates a shift. See *United States v. Terry*, 915 F.3d 1141, 1145 (7th Cir. 2019) (“If the officers did not know enough to reasonably conclude that the third party had authority over the premises, they had a duty to inquire further before they could rely on her consent to the search.”) (internal quotation marks and citation omitted).

unreasonable searches in the home. *See Payton*, 445 U.S. at 596. The duty to inquire rule would ensure that consent remains a “jealously and carefully” drawn exception rather than a shortcut around the warrant requirement. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). Furthermore, ownership of a residence, tenancy, or presence in a residence is not sufficient to establish ownership and control over all areas and items in a home. *Randolph*, 547 U.S. at 112. A duty to inquire rule would address the increase in shared-living arrangements in the U.S. and protect people regardless of where they live or who they live with. *See* Russell M. Gold, Note, *Is This Your Bedroom?: Reconsidering Third-Party Consent Searches Under Modern Living Arrangements*, 76 *Geo. Wash. L. Rev.* 375, 375, 401-402 (2008). Here, Ms. Reiser’s authority over the cardboard box was at the very least, ambiguous because it was “plausible” Mr. Hemlock had exclusive use of it. *See Terry*, 915 F.3d at 1145. Agent Ristroph should have asked Ms. Reiser questions to clarify her access or control over the cardboard box.

Ms. Reiser’s relationship to Mr. Hemlock does not confer Ms. Reiser control over every item in their home, including the cardboard box. *See United States v. Purcell*, 526 F.3d 953, 964-965 (6th Cir. 2008). An “intimate relationship might contribute to the officers' good-faith basis for . . . [a third party’s] authority,” but that good faith belief is . . . constrain[ed] whenever new information comes to light that creates ambiguity[.]” *Id.* at 965. Second, Ms. Reiser only told officers she slept there, but even if Ms. Reiser lived there, “a co-tenant relationship does not create a presumption of control[.]” *United States v. Rith*, 164 F.3d 1323, 1330 (10th Cir. 1999). Any belief that Ms. Reiser had authority to consent to the search of the box because she lived there or had a relationship with Mr. Hemlock, became ambiguous when she told Agent Ristroph the loft was Mr. Hemlock’s space. Additionally, there was not any identifying information on the box that indicated control. To clarify control, Agent Ristroph could have asked Ms. Reiser if the

items in the box were hers, Mr. Hemlock's, or both of theirs. Additionally, he could have asked if Ms. Reiser lived there and how frequently she slept there. But Agent Ristroph decidedly chose not to.

Even though Agent Ristroph should have inferred Ms. Reiser did not have access to the stairs or the box from her lack of access to the loft, there was at least ambiguity. A third-party has joint access if the third party could “enter[] the premises or room at will, without the [defendant's] consent[.]” *Rith*, 164 F.3d at 1330. As Ms. Reiser noted, a reasonable person that saw a box on the stairs would infer the owner would be taking it up the stairs. R. at 16. Ms. Reiser told Agent Ristroph the loft was Mr. Hemlock's personal space, and she did not know what Mr. Hemlock stored in the loft. R. at 15. A reasonable person could conclude Mr. Hemlock owned the box and he placed it on the steps to take it to his room. On these facts, it is questionable whether Ms. Reiser could have opened the box and accessed the items in it without Mr. Hemlock's permission. Thus, Agent Ristroph had a duty to ask whether Ms. Reiser accessed the stairs and more importantly the box. Agent Ristroph neglected this duty when he opened the box when ambiguity existed despite his ability to resolve the ambiguity with a few questions. He cannot rely on “reasonable belief [to] save a search because his errors were errors of law and not of fact.” *United States v. Welch*, 4 F.3d 761, 765 (9th Cir. 1993).

B. Even if Ms. Reiser Had Authority Over the Box, Agent Ristroph Exceeded the Scope Because Ms. Reiser Limited Consent to Exclude the Box.

Assuming *arguendo* Ms. Reiser had authority to consent to the search of the cardboard box, she limited the scope of her consent to exclude it. Agent Ristroph exceeded the scope of the search of the house by searching the cardboard box. The scope of a search must be “objective[ly] reasonable[] – what [] the typical reasonable person [would] have understood by the exchange between the officer and the suspect[.]” *Florida v. Jimeno*, 500 U.S. 248, 249 (1991). “The scope

of a search is generally defined by its expressed object.” *Id.* at 251. An individual can “delimit the scope of the search.” *Id.* at 252. Officers must consider a third party’s implied limitations to determine the scope of consent. *United States v. Cotton*, 722 F.3d 271, 275 (5th Cir. 2013).

Ms. Reiser limited the scope of the consent when she pointed Agent Ristroph to her shared bedroom and said that Mr. Hemlock used the loft and she did not. R. at 15. A third party who informs police that a certain area is used by the defendant, places a limit on her consent. *See United States v. Jimenez*, 419 F.3d 34, 40 (1st Cir. 2005) (Search did not “extend” to defendant’s room when third-party told agents defendant’s room was “his space.”). Furthermore, Ms. Reiser did not expand the scope of her consent by not explicitly objecting to the search of the cardboard box. Lack of objection, “should not be treated as expanding a more limited consent, especially when the circumstances suggest some other possible reason for [the] defendant's silence.” *Cotton*, 722 F.3d at 278. Ms. Reiser was silent about the box because she did not know what items or areas Agent Ristroph might search. Ms. Reiser tried to ask Agent Ristroph why Mr. Hemlock was arrested and what he was looking for, but Agent Ristroph only responded he was there because of an investigation. R. at 15. Therefore, based on the Agent Ristroph’s and Ms. Reiser’s exchange, the scope should have been limited to exclude the loft, stairs, and items in those areas.

Ms. Reiser did not demonstrate joint access or control over the box. At minimum, her access and control were ambiguous, requiring that Agent Ristroph make further inquiry. Instead, Agent Ristroph chose not to seek clarification and opened the box. Even if Ms. Reiser had some authority to consent, Agent Ristroph exceeded the limited scope of her consent. Accordingly, Agent Ristroph violated Mr. Hemlock’s Fourth Amendment rights by searching the box.

III. RULE 806 PERMITTED MR. HEMLOCK TO USE EXTRINSIC EVIDENCE TO IMPEACH IRIS COPPERHEAD'S CREDIBILITY.

The district court erred by denying Mr. Hemlock the opportunity to present extrinsic evidence to impeach Iris Copperhead, an unavailable “non-testifying” hearsay declarant. At trial, the government introduced Ms. Copperhead’s hearsay statements against Mr. Hemlock through the testimony of Theodore Kolber. Once those statements were admitted, Rule 806 entitled Mr. Hemlock to attack Ms. Copperhead’s credibility with evidence that would have been admissible had she testified, including extrinsic evidence of specific instances of conduct probative of her character for untruthfulness. The district court nevertheless prohibited impeachment under Rule 608(b), depriving Mr. Hemlock of that right.

While some courts have interpreted Rule 608(b) to restrict impeachment under Rule 806, the most well-reasoned judicial opinions⁵ recognize that Rule 806 permits the use of extrinsic evidence to impeach a non-testifying declarant unconstrained by Rule 608(b). This interpretation gives effect to Rule 806’s purpose and preserves a meaningful opportunity to challenge hearsay evidence. The importance of this interpretation is especially apparent in criminal cases where, as here, the accused’s liberty turns on the ability to challenge incriminating evidence against them.

When the district court prohibited Mr. Hemlock from introducing extrinsic impeachment evidence against Ms. Copperhead, it shielded Ms. Copperhead’s statement from any credibility challenge. The government benefited from incriminating hearsay testimony against Mr. Hemlock

⁵ See *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988); *United States v. Washington*, 263 F. Supp. 2d 413 (D.Conn. 2003); *United States v. Uvino*, 590 F. Supp. 2d 372 (E.D.N.Y. 2008); *State v. Martisko*, 566 S.E.2d 274 (W. Va. 2002); *Taylor v. State*, 963 A.2d 197 (Md. 2009); *Mitchell v. Mod. Woodmen of Am.*, No. 2:10-cv-00965-JEO, 2015 WL 13637160 (N.D. Ala. June 8, 2015); *United States v. Finley*, No. 87 CR 364-1, 1989 WL 58223 (N.D. Ill. May 19, 1989); *United States v. Watts*, 934 F.Supp.2d 451 (E.D.N.Y. 2013); *Wepner v. County of Erie*, No. 22-cv-00519-MAV, 2025 WL 3052048 (W.D.N.Y. Nov. 2, 2025); *In re Alder, Coleman Clearing Corp.*, No. 95-08203 (JLG), 1998 WL 160036 (Bankr. S.D.N.Y. Apr. 3, 1998); *But see United States v. Saada*, 212 F.3d 210 (3d Cir. 2000); *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997); *United States v. Andrade*, No. 3:20-cr-00249-RS-1, 2025 WL 670456 (N.D. Cal. Mar. 3, 2025); *United States v. Shayota*, No. 5:15-cr-00298-BLF, 2016 WL 6093237 (N.D. Cal. Oct. 19, 2016).

entirely immune from attack. Mr. Hemlock was denied his only meaningful opportunity to impeach Ms. Copperhead's credibility and suffered prejudice that warrants reversal.

A. Rule 806 Permits Extrinsic Evidence to Impeach a Non-Testifying Declarant Without Restriction by Rule 608(b).

Rule 806 provides that when a hearsay statement has been admitted, “the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.” Fed. R. Evid. 806. Rule 806 reflects the principle that hearsay statements admitted for their truth function as the equivalent of live testimony and therefore must be subject to meaningful impeachment. Fed. R. Evid. 806 advisory committee’s note; *see* Margaret M. Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 Ohio St. L.J. 495, 495-96 (1995).

Rule 608(b), by contrast, generally limits impeachment by specific instances of conduct to inquiry on cross-examination that is “probative of [the witness’s] character for truthfulness or untruthfulness,” excluding the use of extrinsic evidence to accomplish the same. Fed. R. Evid. 608(b). This limitation attempts to draw a balance between two competing interests: the interest of a party in challenging the veracity of adverse witnesses against them and the judiciary’s efficiency interest in avoiding collateral “mini trials” on credibility. Fed. R. Evid. 608 advisory committee’s note; *see* Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 Ohio St. L.J. 495, 523 (1995).

If Rule 608(b) were applied plainly to Rule 806, impeachment of a declarant’s specific instances of conduct would seemingly be limited to cross-examination. However, this approach presumes the declarant can be cross-examined. This assumption collapses when Rules 806 and 608(b) intersect in the context of the non-testifying hearsay declarant. When the declarant is unavailable and never testifies, the only way to impeach the “non-testifying” hearsay declarant is

by admitting extrinsic evidence of the specific instances of conduct which demonstrate their character for untruthfulness. Interpreting Rule 608(b) to bar extrinsic evidence in this context would eliminate the very impeachment Rule 806 was designed to allow. Rule 806 must instead be interpreted to give effect to its purpose and preserve a meaningful opportunity to challenge the credibility of a non-testifying declarant.

1. Rule 806 permits impeachment of a declarant as if they had testified as a witness notwithstanding Rule 608(b).

“The declarant of a hearsay statement which is admitted in evidence is in effect a witness . . .” therefore, the declarant “should in fairness be subject to impeachment and support as though he had in fact testified.” Fed. R. Evid. 806 advisory committee’s note. The drafters of Rule 806 intended to place the hearsay declarant on equal footing with the testifying witness and provide an opportunity to fairly rebut the “phantom witness.” Fed. R. Evid. 608 advisory committee’s note; *see* David Sonenshein, *Impeaching the Hearsay Declarant*, 74 Temp. L. Rev. 163 (2001).

In light of this purpose, Rule 806 must be interpreted to permit extrinsic evidence to impeach notwithstanding Rule 608(b)’s general prohibition. The Second Circuit adopted this interpretation in *United States v. Friedman*. 854 F.2d 535, 570 n.8 (2d Cir. 1988). In *Friedman*, the district court admitted hearsay statements against the defendant by a non-testifying declarant who was unavailable to testify at trial due to his death. *Id* at 569. The defendant sought to introduce extrinsic impeachment evidence at trial showing that the declarant had previously fabricated an assault report related to injuries actually incurred from the declarant’s suicide attempt, but the court excluded the evidence. *Id*. On appeal, the defendant asserted that this extrinsic impeachment evidence should have been allowed under Rule 806. *Id*.

The *Friedman* court considered the extent to which Rule 806 is impacted by Rule 608(b)’s ban on extrinsic evidence. *See id*. Although the court ultimately affirmed the exclusion

on relevancy grounds, the court recognized that Rule 608(b) does not categorically bar extrinsic impeachment under rule 806: “Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury.” *Id* at 570 n.8.

The court explained that extrinsic evidence under Rule 806 remains subject to the ordinary relevance balancing analysis under Rule 403, “Specific issues of whether a declarant's past conduct may actually ‘cast doubt on the credibility of [his] statements,’ must be determined by comparing the circumstances of the past conduct with those surrounding the hearsay statements admitted into evidence.” *Id* at 570 (original citations omitted). The application of this rule allows the opponent to present relevant evidence to the factfinder to assist them in making credibility determinations of the declarant’s hearsay statement. *See United States v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D.N.Y 2008).

This interpretation has been recognized by courts across the nation which have encountered the dilemma of the non-testifying declarant⁶. At the state level, the West Virginia Supreme Court recognized this interpretation as applied to its rules of evidence, identical to Rules 806 and 608(b), in *State v. Martisko*. 566 S.E.2d 274, 281-82 (W. Va. 2002). The Court of Appeals of Maryland also recognized this interpretation as applied to its rules of evidence, which closely mirror Rules 806 and 608(b), in *Taylor v. State*. 963 A.2d 197, 212-13 (Md. 2009). Growing recognition of this interpretation at the federal and state levels demonstrates a shared momentum to adopt an interpretation aligned with the purposes of the evidentiary rules.

⁶ *See United States v. Washington*, 263 F. Supp. 2d 413 (D.Conn. 2003); *United States v. Uvino*, 590 F. Supp. 2d 372 (E.D.N.Y. 2008); *Mitchell v. Mod. Woodmen of Am.*, No. 2:10-cv-00965-JEO, 2015 WL 13637160 (N.D. Ala. June 8, 2015); *United States v. Finley*, No. 87 CR 364-1, 1989 WL 58223 (N.D. Ill. May 19, 1989); *United States v. Watts*, 934 F.Supp.2d 451 (E.D.N.Y 2013); *Wepnner v. County of Erie*, No. 22-cv-00519-MAV, 2025 WL 3052048 (W.D.N.Y Nov. 2, 2025); *In re Alder; Coleman Clearing Corp.*, No. 95-08203 (JLG),1998 WL 160036 (Bankr. S.D.N.Y. Apr. 3, 1998).

2. Rule 608(b) may not restrict the only available means of impeaching a non-testifying declarant with specific instances of untruthfulness.

Rule 806 must be interpreted without restriction by Rule 608(b) to preserve the only available means of impeaching a non-testifying declarant with specific instances of conduct probative of untruthfulness. The drafters of Rule 608(b) have recognized that “[e]ffective cross-examination demands that some allowance be made” for impeachment with specific instances of conduct. Fed. R. Evid. 608 advisory committee’s note. Applying the restrictions of Rule 608(b) to entirely foreclose impeachment of the declarant by specific instances of conduct is inconsistent with the drafters’ intent and deprives the hearsay opponent of a meaningful opportunity for impeachment.

Cases adopting a restrictive interpretation of Rule 806 illustrate this harm. In *United States v. White*, the D.C. Circuit’s application of a restrictive interpretation deprived the defendant of an opportunity to impeach a non-testifying declarant with evidence that the declarant had violated court orders and made false statements on an employment application. *See* 116 F.3d 903, 920 (D.C. Cir. 1997). In *United States v. Andrade*, the defendant was prohibited from impeaching a non-testifying declarant with evidence of the declarant’s prior fraud.⁷

In *United States v. Saada*, the Third Circuit’s application of a restrictive interpretation would have deprived the government the opportunity to impeach a declarant whose statement bolstered the defendant’s case.⁸ *See* 212 F.3d 210, 221-22 (3d Cir. 2000). Despite its ruling, the Third Circuit “recognize[d] the dilemma presented if the witness has no knowledge of the

⁷ *See* No. 3:20-cr-00249-RS-1, 2025 WL 670456, 4 (N.D. Cal. Mar. 3, 2025); *see also United States v. Shayota*, No. 5:15-cr-00298-BLF, 2016 WL 6093237, 6-7 (N.D. Cal. Oct. 19, 2016) (prohibiting the defendant from offering extrinsic evidence of the non-testifying declarant’s tax fraud).

⁸ In *Saada*, the Third Circuit found that the district court erred when it allowed the government to admit extrinsic evidence (in the form of judicial notice of other court opinions) of specific instances of conduct to impeach a non-testifying declarant whose statement had been offered by the defendant. 212 F.3d at 222. However, the court ultimately concluded that the admission was harmless error. *Id.*

hearsay declarant's misconduct” as effectively foreclosing the opportunity for impeachment with specific instances. *Id* at 226, n.12.

By contrast, courts which have interpreted Rule 806 to be unconstrained by Rule 608(b) have recognized the fundamental importance of preserving a meaningful means to impeach a declarant. In *Martisko*, the court explained the critical importance of preserving an opportunity for a defendant to impeach declarants with specific instances of conduct and found that the trial court erred by excluding the defendant’s extrinsic evidence. 566 S.E.2d at 280-81. The court in *Martisko* found the error to be so significant that it “... deprive[d] [the defendant] of a fair opportunity to rebut the hearsay testimony offered against him...” and warranted reversal of the defendant's conviction. *Id* at 281. “We are uncomfortable with a conviction based entirely on hearsay evidence where the defendant has had no opportunity to impeach his chief accuser,” the court held, explaining that the defendant should have been allowed to offer extrinsic evidence at trial to impeach the non-testifying declarant. *Id*.

In *United States v. Washington*, the court similarly found reversible error where the defendant was deprived of an opportunity to impeach a non-testifying declarant and vacated the defendant’s conviction. 263 F. Supp. 2d 413, 423-24, 440 (D. Conn. 2003). Adopting the *Friedman* approach, the *Washington* court recognized the power inherent in the trial court to allow extrinsic evidence of specific instances of conduct bearing on the declarant’s character for untruthfulness to discredit the admitted hearsay statements “...rather than permit (by operation of Fed.R.Evid. 608(b)) [the declarant’s] death to foreclose [the defendant’s] opportunity to demonstrate the untruthful character of his accuser[.]” *Id* at 423-24.

In addition to the direct consequences of a restrictive interpretation of Rule 806, a collateral consequence of this interpretation is its creation of a perverse incentive to admit

hearsay evidence rather than live testimony to insulate a declarant who would otherwise be vulnerable to attack. *See Cordray, Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 Ohio St. L.J. 495, 526 (1995). The court in *Taylor* recognized this danger, “To [prohibit extrinsic evidence of specific instances of conduct] would be to permit the State to insulate a non-testifying declarant from impeachment, by presenting his statements through other witnesses, instead of by calling the declarant to the stand; this we will not permit[.]” 963 A.2d at 213.

Interpreting Rule 806 as subordinate to Rule 608(b) is inconsistent with the purposes of both rules and with the broader principles of the Federal Rules of Evidence. Rule 806’s goal of parity between declarants and testifying witnesses is defeated if declarants enjoy greater protection from impeachment. Rule 608(b)’s balance between judicial efficiency and preserving a party’s opportunity to challenge an adverse witness collapses when impeachment is foreclosed. In each instance there is a windfall to the party offering the hearsay to the detriment of the party’s opponent inconsistent with the underlying principles of the rules.

Further, Rules 806 and 608(b) must not be interpreted in isolation, but alongside principles of fairness and truth-seeking implicit in the Federal Rules. These rules must be interpreted “so as to administer every proceeding fairly... [and] to the end of ascertaining the truth...” Fed. R. Evid. 102. Further, the courts must act as gatekeepers to ensure that evidence is presented in a manner “effective for determining the truth” Fed. R. Evid. 611(a). To interpret Rule 608(b) to deprive a meaningful opportunity to impeach a non-testifying declarant is surely inconsistent with these principles elsewhere in the Federal Rules.

B. The District Court Prejudiced Mr. Hemlock When It Denied Him a Meaningful Opportunity to Impeach Ms. Copperhead’s credibility.

At trial, the government introduced hearsay from Iris Copperhead, a non-testifying declarant. The district court then prohibited Mr. Hemlock from introducing extrinsic evidence to impeach Ms. Copperhead, and in so doing, deprived Mr. Hemlock of a meaningful opportunity to impeach Ms. Copperhead under Rule 806 resulting in prejudice.

1. Rule 806 was triggered when the Government admitted Ms. Copperhead’s statement against Mr. Hemlock.

At trial, the district court admitted Ms. Copperhead’s hearsay statement as an excited utterance through the testimony of Theodore Kobler. As such, the statement, “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!” was admitted for its truth and directly implicated Mr. Hemlock. Since the declarant, Ms. Copperhead, had died in custody and was unavailable to testify, she was a non-testifying declarant within the scope of Rule 806.

Once the statement was admitted, Rule 806 entitled Mr. Hemlock to attack Ms. Copperhead’s credibility with extrinsic evidence of specific instances of her conduct probative of untruthfulness. When Mr. Hemlock attempted to do so, the district court sustained the government’s Rule 608(b) objection and excluded the evidence summarily without first conducting a relevancy analysis under Rule 403.

2. Mr. Hemlock suffered prejudice when he was prohibited from introducing extrinsic evidence to impeach Ms. Copperhead under 608(b).

The district court’s exclusion deprived Mr. Hemlock of any meaningful opportunity to challenge Ms. Copperhead’s credibility. Mr. Hemlock had no means by which to cross-examine Ms. Copperhead as a result of her death and unavailability. Further, Mr. Hemlock could not

cross-examine Ms. Copperhead's statement through Mr. Kobler, who testified that Ms. Copperhead was a stranger to him. R. at 42, 45. Presenting extrinsic evidence of specific instances of conduct probative of Ms. Copperhead's character for untruthfulness under Rule 806 was the "only means of presenting such evidence to the jury." *Friedman*, 854 F.2d at 570 n.8.

As a result of the district court's exclusion of Mr. Hemlock's evidence, the jury heard Ms. Copperhead's statement without any evidence bearing on her character for truthfulness. That statement tended to establish the identity of Mr. Hemlock as the would-be perpetrator in the government's case. The ultimate conviction suggests that the jury did, in fact, consider Ms. Copperhead's statement to establish Mr. Hemlock's identity. Indeed, the court of appeals acknowledged the detrimental impact of Ms. Copperhead's hearsay statement to Mr. Hemlock, recognizing that it "was a crucial component of the Government's case[.]" R. at 57. Regardless, the jury was deprived of evidence bearing on Ms. Copperhead's character for truthfulness.

Mr. Hemlock sought to introduce extrinsic evidence that indicated Ms. Copperhead had engaged in academic dishonesty and relatedly falsified a job application, conduct directly probative of her untruthfulness. R. at 46-48. The district court's summary exclusion of that evidence under Rule 608(b) was error. The district court should have admitted the extrinsic evidence subject only to a balancing analysis of its probative value under Rule 403. *See Friedman*, 854 F.2d at 570, n.8. The jury was entitled to consider Ms. Copperhead's prior bad acts, as they were demonstrative of her character for truthfulness and stood to impact the jury's assessment of the veracity of her hearsay statement. The jury was deprived this opportunity to Mr. Hemlock's detriment.

By insulating Ms. Copperhead's hearsay statement from impeachment, the district court prejudiced Mr. Hemlock. In adopting an interpretation of Rule 806 restricted by Rule 608(b) and affirming the district court's ruling, the court of appeals compounded that error.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Team 21P
Counsel for Petitioner

APPENDIX

1. U.S. Const. Amend. IV provides:

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

2. Fed. R. Evid. 806 provides:

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

3. Fed. R. Evid. 608(b) provides:

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness’s character for truthfulness.