

No. 25-7373

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

**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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*Counsel for the Respondent*

## QUESTIONS PRESENTED

- I. Whether an officer's verbal direction from outside a home, without physical entry or coercive tactics, is an unconstitutional in-home arrest under *Payton v. New York*?
- II. Whether law enforcement can conduct a warrantless search of a closed container in a shared residence pursuant to a co-occupant's consent search when they did not specifically inquire into ownership of the container?
- III. Whether, under Rules 608(b) and 806 of the Federal Rules of Evidence, extrinsic evidence of specific instances of a hearsay declarant's conduct was properly excluded when used solely to impeach an unavailable declarant's character for truthfulness?

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## OPINIONS BELOW

The transcripts of the hearings on the motions to suppress evidence regarding the constitutional issues before the United States District Court for the Northern District of Boerum appear in the record at pages 18–39. The transcript of the trial proceedings regarding the hearsay issue appears in the record at pages 40–50. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 51–61.

## CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions is provided below:

The Fourth Amendment states:

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

## STATEMENT OF THE FACTS

On February 20, 2024, the United States Department of Tourism announced the “Grow Your Own Way” program, a project designed to transform underutilized farmland into large-scale garden attractions. (R. 3.) The Department announced that a promotional kickoff event for the program would take place in Boerum Village during the week of April 8, 2024. (R. 4.) This event would be led by the Under Secretary for Rural Development, Jodie Wildrose, a former geology professor at Court Street College in Boerum. (R. 4.)

### **I. Boerum Village Police Department alerts the FBI of suspicious activity related to a federal official.**

On March 29, 2024, the Boerum Village Police Department received a call from a local barista, Elvis Hoag (“Hoag”). (R. 7.) In a police interview, Hoag reported that two individuals at the coffee shop had discussed unsettling plans involving a federal official named Jodie at length.

(R. 8.) He recounted statements such as “hiding Jodie away,” grabbing her from a parking lot, throwing her in a van, and claiming she was corrupt. (R. 8.) Hoag observed that their discussions were accompanied by maps, timelines, and diagrams, which gave the impression that something was not right. (R. 7–8.) These individuals were identified as Petitioner, Atticus Hemlock (“Hemlock”), and Iris Copperhead (“Copperhead”), former students at Court Street College. (R. 7.)

The next day, the Boerum Village Police received another report of suspicious criminal activity. (R. 6.) Tina Caplow (“Caplow”), the manager at a superstore in Boerum Village, reported that while working the checkout register, she observed a man and woman purchase an unusual combination of items with cash. (R. 6.) The pair purchased a pack of zip ties, two ski masks, a six-inch folding knife, black trash bags, and bear spray. (R. 6.) Because the two reports appeared related, and the first report involved a federal official, the police alerted the Federal Bureau of Investigation (“FBI”). (R. 52.) Special Agents Hugo Herman (“Herman”) and Ava Simonson (“Simonson”) were assigned to the investigation. (R. 52.)

## **II. Agents Herman and Simonson begin their investigation.**

On April 2, Herman and Simonson interviewed Hoag and Caplow. (R. 6–8.) Later that day, the agents drove to Hemlock’s home, a small cabin located near Joralemon State Park. (R. 20.) Around 4:00 p.m., the agents arrived at the cabin to ask Hemlock questions as part of their investigation. (R. 20–21.) The main door was open upon the agents’ arrival, so Simonson walked up the front steps and knocked on the door frame. (R. 20.) Simonson walked back down the cabin’s porch steps and stood next to Herman as they awaited Hemlock’s answer. (R. 11, 21.) Hemlock came to the open door but stood behind the screen door as he looked at the agents standing several

feet away from the bottom of the cabin steps. (R. 11, 21.) Herman and Simonson identified themselves as FBI Special Agents and stated that they were conducting an investigation. (R. 11.)

Simonson politely requested that Hemlock step outside to answer questions related to their investigation, but he refused. (R. 11, 22.) Agent Herman noticed two bottles of chloroform sitting on the counter behind Hemlock. (R. 11.) When the agents asked about the items, Hemlock quickly moved to obstruct their view and said, “Don’t worry about those.” (R. 11, 22.) Unprompted, Hemlock asked the agents if their visit had to do with “Jodie” and screamed, “I don’t want anything to do with you or to talk anything about that b\*\*ch.” (R. 11–12.) In an attempt to deescalate the situation, the agents walked back to their car, and Hemlock continued to stand behind the screen door and stare at them as they conversed. (R. 12.)

Hemlock’s agitated demeanor, the presence of chloroform, his movement to block it from the agents’ view, and the unprompted question about Jodie raised the agents’ suspicions. (R. 12, 22.) They determined that there was probable cause to arrest Hemlock, so they radioed Agent Ristroph (“Ristroph”) to come to the scene for safety precautions before reapproaching the cabin. (R. 12, 23.) Both agents told Hemlock to step outside. (R. 12.) Hemlock complied and walked out of his cabin and down the porch steps. (R. 12.) The agents placed Hemlock under arrest for attempting to kidnap a federal official and conducted a search incident to arrest as a safety precaution. (R. 23.) Except for knocking on Hemlock’s front door, the agents never stepped onto the porch steps, and, while they touched their holsters, neither agent drew their weapon during the encounter. (R. 24, 26.) Everything was recorded through the agents’ body cameras. (R. 25.)

Agent Herman found an open spiral notebook in one of Hemlock’s pockets. (R. 23.) On the open page of the notebook, a detailed and explicit diary entry was written out describing

Hemlock's hatred for Jodie and his plans to kidnap her. (R. 5, 23–24.) The entry, dated April 1, 2024, explained that Hemlock and Copperhead knew their former college professor, Jodie Wildrose, was visiting Boerum soon. (R. 5.) They planned to stake out the high school parking lot so they could knock Jodie out with chloroform and threaten her and her family. (R. 5.) At the end of the diary entry, read the initials "A.H." (R. 5.)

While this occurred, Copperhead was on her way to the cabin to join Hemlock and his girlfriend, Fiona Reiser ("Reiser"), for dinner. (R. 11.) Copperhead witnessed her accomplice's arrest and, in a panic, immediately sprinted away from the cabin. (R. 53.) At this time, Theodore Kolber ("Kolber") was enjoying the weather while walking along a path in the nearby Joralemon State Park. (R. 42.) Suddenly, Kolber witnessed Copperhead burst out of the woods onto the path. (R. 42.) She was out of breath, pale faced, crying, and shaking. (R. 42.) Instinctively, Kolber attempted to ask her what was wrong when Copperhead screamed, "I can't believe I saw him get arrested. It's all his fault. It was all Atticus' idea—NOT MINE! I can't run a business from prison." (R. 43.) Copperhead ran off before Kolber could say anything else. (R. 44.) Copperhead was arrested later that evening and passed away the same night in prison. (R. 53.)

### **III. Agent Ristroph arrives to Hemlock's cabin.**

As Agents Herman and Simonson prepared to leave with Hemlock, Agent Ristroph arrived at the 750-square-foot cabin. (R. 13, 17.) Ristroph waited until Reiser arrived at her home around 5:00 p.m. (R. 15.) After she entered her home, Ristroph knocked on the door and identified himself. (R. 13.) He explained to Reiser that he was there to conduct an investigation and asked for her consent to search the cabin. (R. 13, 15.) Reiser granted Agent Ristroph permission to enter and look around the residence as part of his investigation. (R. 13, 15.)

As Ristroph began looking around the kitchen and living room located on the first floor of the cabin, he asked Reiser what was on the second floor after he noticed the stairs. (R. 15, 33.) According to Ristroph's 302 report taken on the day of the investigation, Reiser responded that her and Hemlock used it for storage and an office space. (R. 13.) Agent Ristroph decided on his own to limit his search to the first floor of the cabin. (R. 13.) Reiser, in a sworn declaration taken almost three months later, explained that she and Hemlock slept on the first floor, and that the second floor was only used by Hemlock for his office and storage. (R. 15.)

Next, Ristroph walked over to the last place on the first floor that he had yet to search: the stairs located in the living room. (R. 13, 17.) On the second step from the bottom, there was an old cardboard box that lacked any identifying marks. (R. 13.) As Reiser remained silent, Ristroph opened the box. (R. 13, 16, 34–35.) Inside this box, Ristroph found rope, a six-inch folding knife, zip ties, a roll of duct tape, ski masks, gloves, and two bottles of chloroform. (R. 14.)

### **STATEMENT OF THE CASE**

On April 3, 2024, Hemlock was formally indicted in the presence of a grand jury. (R. 1–2.) Hemlock was charged in violation of 18 U.S.C. §§ 1201(a)(5) and 1201(d) Attempted Kidnapping of an Officer of the United States Government. (R. 1.) Prior to his trial, Hemlock moved to suppress his notebook and the materials found in his cabin on the day of his arrest. (R. 19, 31.) District Court Judge Florence Araiza held oral arguments on July 29, 2024, and denied both motions after finding law enforcement's actions constitutionally permissible. (R. 39.)

The Government called Kolber to testify at trial on August 6, 2024. (R. 40.) On direct examination, Kolber explained the statement Copperhead shouted to him on April 2. (R. 43.) Despite defense counsel's objection, the district court admitted Copperhead's statement as an

excited utterance under Federal Rule of Evidence 803(2) because Copperhead was seen shaking, crying, and frenzied. (R. 43–44.) On cross-examination, Kolber was questioned regarding his knowledge of Copperhead’s credibility. (R. 45–46.)

During cross-examination, the defense attempted to impeach Copperhead’s character for truthfulness through the use of two pieces of extrinsic evidence. (R. 47–49.) Specifically, an academic violation from one of Copperhead’s classes at Court Street College and her job application for the executive assistant position to the mayor of Boerum. (R. 9–10.) The Government objected to the introduction of this evidence, on the basis that it would not be admissible under Federal Rule of Evidence 608(b) if Copperhead were present to testify in court. (R. 47, 49.) Judge Araiza sustained the objection, and instructed that the defense may not introduce any extrinsic evidence regarding either the academic integrity violation or job application for the sole the purpose of impeaching Copperhead’s character for truthfulness. (R. 50.)

Hemlock was tried before a jury and found guilty on August 12, 2024, under 18 U.S.C. §1201(a)(5) and §1201(d) for the attempted kidnapping of a U.S. government officer on account of their official duties. (R. 51.) On October 17, 2024, Hemlock was sentenced to ten years in federal prison. (R. 51.)

Subsequently, Hemlock appealed his conviction to the United States Court of Appeals for the Fourteenth Circuit. (R. 51.) In a decision written by Judge Gora, the Fourteenth Circuit affirmed the ruling of the district court on all grounds. (R. 58.) Hemlock raised three issues for the Fourteenth Circuit, arguing the district court abused its discretion when it decided the following evidentiary decisions: (1) admitting a notebook seized pursuant to law enforcement’s search incident to arrest outside of Hemlock’s home, (2) admitting evidence seized from a cardboard box

inside Hemlock’s home after his girlfriend allowed Agent Ristroph to search their home, and (3) excluding the use of extrinsic evidence of specific instances of a hearsay declarant’s conduct solely to impeach the declarant’s character for truthfulness. (R. 51.) After the Fourteenth Circuit affirmed the district court’s ruling, Hemlock appealed again to this honorable Court. (R. 58.) He was granted certiorari on all three issues on December 2, 2025. (R. 62.)

### **SUMMARY OF THE ARGUMENT**

The evidence seized from Hemlock’s search incident to arrest was properly admitted because *Payton v. New York* is a narrow, threshold-based rule that prohibits warrantless in-home arrests absent exigent circumstances. *Payton* drew “a firm line at the entrance to the house,” and the warrant requirement it announced is keyed to the “physical entry of the home.” Courts applying *Payton* as written hold that an arrest implicates *Payton* only when officers cross the threshold to effect it, and that arrests effected outside are governed by the ordinary public-arrest rule. Some courts have adopted a “constructive entry” doctrine, but even under that approach, *Payton* is triggered only when outside officers employ extreme coercive tactics that functionally accomplish an in-home arrest. Under either framework, no Fourth Amendment violation occurred here. The officers stayed outside for the duration of Hemlock’s encounter and used no coercive techniques; Hemlock made the choice to leave. Accordingly, because *Payton* does not extend beyond its entry-based holding, and because any constructive-entry theory is confined to objectively coercive conduct, the denial of Hemlock’s motion to suppress was properly affirmed.

The contents of the cardboard box were properly admitted at trial because Ristroph reasonably believed Reiser had apparent authority to consent to a search of the closed container. A search is constitutionally permissible when a person of reasonable caution believes the

consenting party has authority over the property. Some personal belongings, like a suitcase or footlocker, deserve a higher level of privacy. An unmarked cardboard box does not fit into this category. Further, this Court should not require law enforcement to specifically inquire into the ownership of every item inside a home after obtaining consent to search, as this would place an impossible burden on officers. The facts available at the time of the search gave Ristroph a reasonable belief that Reiser's consent extended to the box. Thus, the denial of the motion to suppress was properly affirmed.

The attempt to introduce extrinsic evidence of specific instances of conduct to impeach Copperhead's character for truthfulness was properly excluded at trial. A hearsay declarant, under Rule 806, is treated identically as if he had testified as a witness. Rule 608(b) clearly prohibits the use of extrinsic evidence to impeach a witness's character for truthfulness. Admission of this evidence would allow Rule 806 to become a tool to bypass Rule 608(b)'s sole limitation, as multiple forms of impeachment outside the use of extrinsic evidence for specific acts are still permissible. The declarant's availability is irrelevant and does not warrant departure from the explicit text of the rules. Hearsay exceptions under Rule 803 are already designed under the principle this type of evidence possesses guarantees of trustworthiness regardless of the declarant testifying at trial. This type of evidence creates the exact kind of mini-trial over a collateral matter the rules are designed to prevent, thus its exclusion was proper.

## ARGUMENT

- I. The evidence seized from Hemlock's search incident to arrest was properly admitted because the arrest, taking place outside the home and without coercive police tactics, did not violate *Payton v. New York*.**

The Fourteenth Circuit properly applied *Payton v. New York* in determining there was no unconstitutional search and that the constructive entry doctrine does not expand *Payton's* clearly defined holding. This Court uses *Payton* to ensure there are no warrantless in-home arrests absent extraordinary circumstances. Some courts expand this rule to include coercive police conduct outside the home, even if no officer crosses the threshold. Under either approach, Hemlock's arrest was constitutional. For those reasons, the Court should affirm the decision below.

*A. No Payton violation occurs absent a physical breach of the home's threshold.*

The Fourth Amendment guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,” and requires that warrants issue only upon probable cause and particularity. U.S. Const. amend. IV. This Court has recognized that these protections are most crucial in the home, where privacy is paramount. *See Payton v. New York*, 445 U.S. 573, 585–86 (1980) (describing the “physical entry of the home” as the “chief evil” targeted by the Fourth Amendment). Because the Fourth Amendment governs searches and seizures, courts are instructed to use reasonableness by examining the nature of the intrusion and where it occurred. U.S. Const. amend. IV.

At the very core of the Fourth Amendment is the protection of the home. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) (“The Fourth Amendment ... stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion”); *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals.”). In *Payton v. New York*, the Supreme Court translated that principle into a workable rule. 445 U.S. at 589. This Court held that the Fourth Amendment prohibits police from making a warrantless entry into a home to effect a routine arrest without exigent circumstances or

consent. *Id.* at 590. There, the police broke down the door to Payton’s residence to arrest him. *Id.* at 576–77. Nobody was home, but officers viewed and seized a bullet casing in plain view. *Id.* In its companion case, *Riddick v. New York*, the defendant’s child opened the door, after which police rushed in and arrested Riddick. *Id.* at 578. Officers seized drug evidence after entry while searching the home. *Id.* Ultimately, that evidence was suppressed as unconstitutionally seized. *Id.* *Payton* arose from New York statutes authorizing officers to enter residences without warrants to make felony arrests. *Id.* This Court invalidated those provisions because they intruded into individuals’ zones of privacy. *Id.* at 589.

*i. A Payton violation is triggered by entry into the home.*

*Payton*’s text is anchored in avoiding physical intrusions. This Court emphasized that “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,” and that the “zone of privacy is nowhere more clearly defined than when bounded by unambiguous physical dimensions of an individual’s home.” *Id.* at 586, 589. In its holding, the Court drew “a firm line at the entrance to the house.” *Id.* at 590. This language is unambiguous and reflects the rule’s focus against physical warrantless intrusions.

Lower courts applying *Payton* as written generally treat outside arrests as beyond its scope of application. The key inquiry is whether the officers physically intruded. In *Knight v. Jacobson*, an officer went to a suspect’s residence late at night, knocked, told the suspect to exit, and arrested him once he left. 300 F.3d 1272, 1274 (11th Cir. 2002). The defendant argued that the command to exit, followed by an outside arrest, should have been treated as an in-home arrest, violating *Payton*. *Id.* at 1277. The Eleventh Circuit rejected this theory, holding there was no *Payton* violation because the officer never crossed the threshold, and the arrest occurred outside. *Id.*

The Seventh Circuit followed suit. In *United States v. Berkowitz*, officers went to the defendant's residence to arrest him, and he was taken into custody at the doorway without officers entering the home. 927 F.2d 1376, 1380 (7th Cir. 1991). The defendant argued *Payton* was violated because the police leveraged their authority at the home's threshold. *Id.* at 1385. The Seventh Circuit disagreed, emphasizing that *Payton* "prohibits only a warrantless entry into the home, not a policeman's use of his voice to convey a message of arrest from outside the home" and that there is "nothing in *Payton* that prohibits a person from surrendering to police at his doorway." *Id.* at 1386. In *United States v. Carrion*, officers arrested a suspect after he exited his hotel room in response to police presence at the door. 809 F.2d 1120, 1124 (5th Cir. 1987). The Fifth Circuit upheld the arrest as outside *Payton*'s scope because the arrest was effected outside and no physical entry occurred. *Id.* at 1128. The court explained that *Payton* governs warrantless entry into a private dwelling and does not create a warrant requirement for outside seizures supported by probable cause. *Id.*

The Fourteenth Circuit correctly followed the reasoning from these circuits, declining to apply *Payton* where no physical intrusion occurred. (R. 55.) This ruling upholds *Payton*'s principle as written and should be affirmed.

- ii. *Because Payton draws a physical line, arrests outside the home, even if they are just beyond the threshold, do not implicate Payton.*

Outside the home, warrantless arrests are permissible. In *United States v. Watson*, this Court held that a warrantless felony arrest in a public place does not violate the Fourth Amendment when supported by probable cause. 423 U.S. 411, 417 (1976). This holding reflects the common law rule permitting an officer to arrest for a felony he witnessed or has a reasonable basis to believe was

committed. *Id.* at 419. *Payton* and *Watson* together create a framework for law enforcement and courts to follow. Inside the home, a warrant is necessary; in public, probable cause is enough.

This Court has also treated a suspect at the very threshold of the home as being in a public place for arrest purposes. *United States v. Santana*, 427 U.S. 38, 42 (1976). In *Santana*, a suspect stood in the doorway, was visible to the public, and therefore was in public by her own actions. *Id.* The doorway marks the boundary between home and public space: a step outward places an individual on the public side of the line, while a step inward returns the individual to the home. *Id.* at 41 n.1. *Payton* confirms that *Watson* and *Santana*'s public-arrest authority remains intact, and that the warrant requirement is triggered *only* when officers cross the threshold to effect an arrest inside the home. *Payton*, 445 U.S. at 589 (emphasis added). Together, these cases establish a clear, location-based standard for what arrests require to be constitutional.

Here, the officers never crossed the line *Payton* established. Hemlock remained behind the closed screen door while Agents Herman and Simonson stood on the ground outside of the cabin several feet from the stairs. (R. 11–12.) After developing probable cause, the agents told him to come outside, and the arrest occurred only after Hemlock exited, walked down the stairs, and reached the ground outside the home. (R. 11–12.) The agents remained outside the cabin for the entire encounter. (R. 11–12.) Because *Payton*'s warrant requirement is triggered by crossing the home's threshold to effect an arrest, no *Payton* violation can be shown on these facts. *Payton*, 445 U.S. at 590. The arrest is therefore analyzed under the ordinary public arrest rule, which permits a warrantless felony arrest when supported by probable cause. *See Watson*, 423 U.S. at 417. Under this Court's precedent, this arrest did not create a constitutional violation.

iii. *Payton did not rule on the issue of constructive entry, and a narrow interpretation should rule.*

*Payton's* rule reflects the idea that Fourth Amendment doctrine must be protective and workable. By establishing a firm line at the entrance of the home, *Payton* created a workable, constitutional standard. *Payton*, 445 U.S. at 590. Despite this, courts have split over whether police tactics that fall short of stepping inside can nonetheless cross that line. Several circuits have adopted a “constructive entry” theory that can treat an arrest as occurring in the home even when officers remain outside, turning on whether the police compelled the occupant to leave.

Courts that uphold the constructive entry doctrine exhibit a common thread of inconsistent and vague standards, with variance in how the doctrine is applied. In *United States v. Morgan*, the court found that, after a suspect was faced with loud commands, many police officers, and lights, their emergence was “in response to [that] coercive police conduct” that amounted to constructive entry. 743 F.2d 1158, 1166 (6th Cir. 1984). The Tenth Circuit in *United States v. Maez* held that the arrestee’s location inside the home is what matters, not the officers’ position. 872 F.2d 1444, 1451 (10th Cir. 1989). The constructive entry doctrine was applied, and the suspect was found to be arrested once the police surrounded the home. *Id.* The Second Circuit in *United States v. Allen* took a similar approach, stating that “the protections of *Payton* are primarily triggered by the arrested person’s location,” and because Allen was effectively seized in the home, the warrantless arrest was unconstitutional. 813 F.3d 76, 78 (2d Cir. 2016). The Third Circuit found *Payton* to be implicated when “[n]o reasonable person would have believed that he was free to remain in the house” in *Sharrar v. Felsing*. 128 F.3d 810, 819 (3d Cir. 1997). Among these circuits, there is a troubling lack of consensus. Some require extreme coercion, others focus on suspect location, and others emphasize the subjective perception of freedom to remain indoors.

The Fourth Amendment favors objective, administrable rules that give law enforcement clear notice when constitutional constraints apply. *See Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (emphasizing that Fourth Amendment standards should be applied consistently through an objective test that allows police to determine in advance whether contemplated conduct will implicate the Amendment). It is this Court’s intention to provide clear guidance to law enforcement by creating categorical rules. *Riley v. California*, 573 U.S. 373, 398 (2014). The “constructive entry doctrine” turns away from this standard by turning *Payton* disputes into variable assessments of measuring tone, force, and situational nuance.

As the Second Circuit acknowledged, the “legal fiction” of constructive entry is not necessary to resolve these cases and, more importantly, fails to provide “adequate guidance” to officers or reviewing courts in “liminal cases.” *Allen*, 813 F.3d at 87–88. *Allen* explained that a coercion-based test invites an added layer of uncertainty, requiring courts to weigh a non-exhaustive list of factors and increasing the difficulty of applying *Payton* in a predictable way. *Id.* The same concern is reflected by the Tenth Circuit, stating that expansive constructive-entry theories are “unsound” because they depart from *Payton*’s threshold-based language and misconceive the rationale of the warrant requirement, which is keyed to entry, not the arrest itself. *United States v. Reeves*, 524 F.3d 1161, 1172 n.2 (10th Cir. 2008) (quoting 3 Wayne R. LaFare, *Search & Seizure* § 6.1(e), at 301–02). The adopting circuits have not provided a clear standard under the constructive entry doctrine, and a broad reading of *Payton*’s rule should not be adopted due to the impractical concerns it raises.

The narrow approach embraced by circuits like the Fifth, Seventh, and Eleventh avoids that problem by anchoring the analysis in what *Payton* emphasized: physical entry. The Court

should follow that clear interpretation and hold that because the officers stayed outside and arrested Hemlock beyond the home, a *Payton* violation did not occur.

*B. Even if this Court recognizes the doctrine of constructive entry, the arrest remains constitutionally permissible because the officer's conduct lacked the coercion required to treat an outside arrest as an in-home arrest.*

Even if this Court were to recognize that officers can violate *Payton* without physically entering the home, the constructive entry doctrine is limited to situations where police conduct outside objectively compels an occupant to exit, thereby accomplishing the equivalent of an in-home arrest. Hemlock's arrest fails to meet this standard because doorstep contact from outside the home does not amount to constructive entry and the facts of his arrest lack the coercive tactics necessary.

*i. Constructive entry cases involve extreme coercion not reflected by the facts here.*

The constructive entry decisions supporting a broader application of *Payton* share a common feature: a conspicuous show of authority where a reasonable person would not feel free to stay inside the home. *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005). Many circuits focus not on whether officers stepped across the threshold, but whether the suspect was effectively seized while still within the home. See *Allen*, 813 F.3d at 76; see *Maez*, 872 F.2d at 1444. If so, the arrest is treated as occurring inside, triggering *Payton*. *Id.* The hallmarks of constructive entry have been developed through case law illustrations.

In *United States v. Morgan*, police followed the suspect to his residence after a violent incident, then surrounded the house with nine officers, shone spotlights into the house, and used a bullhorn to order him out. 743 F.2d at 1161. The court treated the arrest as occurring while the suspect was still within the home because the coercive tactics left no meaningful choice. *Id.* at

1164. The suspect's home was encircled by officers, and commands were issued through amplified equipment under bright lights, eliminating the occupant's freedom to remain. *Id.*

The Ninth Circuit's *United States v. Al-Azzawy* also involved extraordinary force where officers surrounded a mobile home with armed agents and ordered the suspect out via bullhorn and arrested him once he emerged. 784 F.2d 890, 892 (9th Cir. 1986). The court found the coercive standoff to be the functional equivalent of a home arrest. *Id.* at 893. Similarly, the Tenth Circuit's *United States v. Maez* involved a SWAT-style operation where officers encircled the home with weapons drawn and loudspeakers to convey commands. 872 F.2d at 1446–47. In *United States v. Reeves*, officers pounded on a motel-room door for roughly twenty minutes late at night, shouted commands, and immediately arrested the occupant upon opening. 524 F.3d at 1163. The conduct was found to have effectively seized the suspect within the room by using sustained pressure to manufacture the "exit." *Id.* at 1169.

What unites these cases is not merely that the officers did remain outside, but that they applied pressure that was indistinguishable from them actually entering. Constructive entry does not encompass every threshold arrest. Instead, it's reserved for circumstances where the suspect's surrender is clearly compelled by forceful tactics, and no reasonable person would have felt free to stay inside the home. The doctrine was designed to prevent siege-like tactics to circumvent the *Payton* rule, not punish standard police encounters. To treat a request to exit as equivalent to surrounding a home with weapon-drawn police would not only collapse the constructive entry limiting principle but also blur the constitutional distinction preserved between entering the home and speaking from its doorstep.

Here, there were no weapons drawn, no police perimeter, no threats, and no display of tactical force. (R. 11–12, 55.) Hemlock was not surrounded or confronted with any conduct resembling the coercion found in constructive entry cases. (R. 55.) Rather, he voluntarily exited his residence after officers knocked and told him to step outside. (R. 12.) That is exactly the type of interaction that courts consistently decline to treat as constructive entry. *See Thomas*, 430 F.3d at 279; *Berkowitz*, 927 F.2d at 1387.

ii. *Doorstep communication from outside the home, including firm language, does not constitute constructive entry.*

The Supreme Court draws a sharp line between speaking from outside the home and crossing the threshold. *Payton* created the physical boundary by drawing a line at the entrance of a home. 445 U.S. at 590. Typical doorstep interactions, however, do not implicate *Payton*. Referred to as “knock and talks” by lower courts, officers may stand where any ordinary visitor would and attempt consensual communication so long as they do not enter. *Kentucky v. King*, 563 U.S. 452, 469 (2011). In *King*, this Court explained that officers do not violate the Fourth Amendment by approaching a residence, knocking on the door, and announcing their presence. *Id.* This principle relies on the implied license that allows any member of the public, including law enforcement, to approach a home and knock for legitimate purposes. *See Jardines*, 569 U.S. at 8. Federal courts likewise recognize “knock and talk” encounters as a legitimate investigative technique consistent with the Fourth Amendment. *Thomas*, 430 F.3d at 278.

Building on that baseline, circuits—including those that recognize a “constructive entry” theory—recognize that the doctrine is confined to situations demonstrating a show of force or compulsion, not police statements alone. The Sixth Circuit recognizes constructive entry and requires an objective show of force. *See United States v. Saari*, 272 F.3d 804, 806 (6th Cir. 2001).

But in *United States v. Thomas*, the court found there was no constructive entry where officers remained outside and there were no “drawn weapons, raised voices, or coercive demands.” 430 F.3d at 278. Where the Sixth Circuit did find constructive entry in *United States v. Saari*, it was because officers blocked the only exit, drew their weapons, and ordered the defendant out, which was deemed inconsistent with voluntary exposure. 272 F.3d at 808. This also appears in the Second Circuit in *United States v. Gori*, where cases like *Berkowitz*, which involved police communication and voluntary submission at the doorway, were distinguished from cases like *Morgan* and *Al-Azzawy*, where exposure was produced by “extreme coercion.” 230 F.3d 44, 53 n.5 (2d Cir. 2000).

While coercive and threatening conduct is not allowed, officers are allowed to speak in an authoritative tone so long as they are not aggressive or threatening. *United States v. Bernard*, 680 F.3d 1206, 1211 (10th Cir. 2012). Without other hallmarks of force present, authoritative language is not automatically coercive. *See id.* To find otherwise would effectively convert lawful doorstep engagement into an arrest whenever officers speak firmly. Courts have cautioned against rules that effectively treat “any ‘show of force’ that induces a suspect to leave the home” as “tantamount to formal arrest regardless of the circumstances,” because that approach would convert routine doorstep encounters into constitutional violations. *See Reeves*, 524 F.3d at 1171 (Tymkovich, J., concurring).

Under longstanding precedent, the officers here were allowed to approach Hemlock’s home, knock on his door, and speak with him. Even if their language became directive, the encounter lacked the objective indicia of coercion that courts require to find a constructive entry. The encounter was not overly long, lasting fifteen minutes in total. (R. 11–12.) There were no drawn weapons. (R. 11–12.) There were no threats made or aggressive announcements of police

presence. (R. 11–12.) There were two officers without uniforms, both of whom stood shorter than Hemlock himself. (R. 29.) Under a totality of the circumstances assessment, there was no Fourth Amendment violation here.

In conclusion, because the threshold of the home was never crossed and no police coercion took place, Hemlock’s arrest did not violate *Payton v. New York*, and thus is sound under the Fourth Amendment.

**II. The evidence seized during Ristroph’s search of the cabin pursuant to Reiser’s consent was properly admitted because it was reasonable to believe Reiser had control over the unmarked box.**

The Fourteenth Circuit properly affirmed the denial of Hemlock’s motion to suppress the evidence recovered during a consent search of the cabin. (R. 57.) The warrantless search of a person’s home does not violate the Fourth Amendment if someone with the proper authority gave voluntary consent. Three categories of individuals have the proper authority to consent to a search of property inside the home: (1) the individual who owns the property, *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973); (2) a third party who possesses common authority over the property, *United States v. Matlock*, 415 U.S. 164, 171 (1974); and (3) a third party who possesses apparent authority over the seized items, *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). An objective reasonableness standard is used for determining whether a person had apparent authority to consent. *Id.* at 188. Reiser allowed the search without limitation and never stopped Ristroph, so a reasonable officer would have believed that she had control over the unmarked, unsecured box located in a shared space. For those reasons, the Court should affirm the decision below.

- A. It was reasonable to believe Reiser had control over the box that she never disclaimed ownership of, because it was located in a common area of the cabin, and it lacked identifying marks or privacy measures.*

The Fourth Amendment’s reasonableness analysis accounts for practical realities and requires courts to weigh “the promotion of legitimate governmental interests” against “the degree to which [the search] intrudes upon an individual’s property.” *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). Under that framework, a third-party consent search is proper when the officer reasonably believed that the consenting party had authority to consent, given the facts available at the time. *Rodriguez*, 497 U.S. at 183–88 (establishing the apparent authority doctrine).

This Court applied the apparent authority doctrine in *Illinois v. Rodriguez*. There, officers reasonably believed the defendant’s girlfriend had authority to consent to a search of the apartment even though she had moved out weeks earlier. *Id.* at 181. She brought the officers to the apartment, let them in with her key, and visibly kept clothes and furniture in the apartment. *Id.* The Court held that these facts supported apparent authority because they would lead a reasonable officer to believe she retained joint access and control over the unit. *Id.* at 179 (noting the girlfriend referred to the apartment as “our apartment” several times). This principle aligns with the common-law premise that a person who shares control over property assumes the risk that another user may permit a search of areas under common use. *Matlock*, 415 U.S. at 171 n.7; see e.g., *United States v. Morning*, 64 F.3d 531, 534 (9th Cir. 1995) (holding it was clear a husband had at least equal interest in the use and possession of a home because he lived there full time and paid the bills); *United States v. Smith*, 930 F.2d 1081, 1085 (5th Cir. 1991) (“defendant produced no evidence that his wife’s access to the residence was limited”).

Importantly, apparent authority over premises does not extend to every closed container inside, and a third party’s proximity to a container alone does not establish authority to consent to its search. *United States v. Karo*, 468 U.S. 705, 726 (1984) (O’Connor, J., concurring). Instead,

apparent authority turns on what the officers knew about the third party's use of, control over, and access to the container searched. *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000). Courts consider factors such as (1) the type of container, (2) precautions taken by the owner to ensure privacy, such as a lock or an order to *not* open the container, and (3) whether the consenting party disclaimed ownership. *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992) (emphasis added). External markings on the container, such as a person's name, label, or similar markings, are considered to gauge the reasonableness of the officer's actions. *Basinski*, 226 F.3d at 835.

The type of container is an objective cue for privacy expectations and therefore informs reasonableness. Historically, certain types of containers, such as suitcases and footlockers, command a higher degree of privacy. *Salinas-Cano*, 959 F.2d at 864 (“Although it was unlocked, the suitcase searched here was a type of container long associated with privacy expectations...”); *United States v. Block*, 590 F.2d 535, 541 (4th Cir. 1978) (explaining that some enclosed spaces, like suitcases and footlockers, are the objects of the highest privacy expectations under the law). In contrast, cardboard boxes are not the type of containers commonly used to preserve privacy. *United States v. Sealey*, 830 F.2d 1028, 1032 (9th Cir. 1987); *Salinas-Cano*, 959 F.2d at 864 (contrasting ordinary containers like a “cardboard box, a cassette tape, or a plastic bucket” as not typically associated with the same privacy expectations as a suitcase).

Containers associated with lesser privacy expectations may nonetheless carry a heightened expectation of privacy when the owner takes steps to secure them as private. See *United States v. Markland*, 635 F.2d 174, 177 (2d Cir. 1980). In *United States v. Taylor*, the Sixth Circuit treated an ordinary shoebox as a private container because the surrounding circumstances signaled

exclusive control. 600 F.3d 678, 685 (6th Cir. 2010). There, the consenting resident lived in the apartment, and officers understood the defendant was merely storing his belongings there. *Id.* The shoebox uncovered during the search was tucked into a closet corner, concealed under the defendant's clothing, and the consenter was not allowed to look inside, so the third-party consent did not reasonably extend to opening it. *Id.*

Here, it was objectively reasonable for Ristroph to believe Reiser had control over the entire first floor of the cabin, including the stairs. Similar to *Rodriguez*, Reiser's own description of the cabin supported the same objective inference of shared control. *See* 497 U.S. at 179; (R. 13.) After allowing Ristroph to search the cabin, Reiser explained that she and Hemlock slept in the first-floor bedroom. (R. 15.) She described the second floor as a loft used for storage and office space and said she "did not really ever go up there," though she understood it likely held clothes and other belongings. (R. 15–16.) The cabin is only 750-square-feet, and the second-floor loft was not a livable space. (R. 17.) The staircase was open to the living area, and because the box sat at the bottom of the stairs, it appeared to be part of the larger shared space. (R. 17.) A reasonable officer could conclude she had authority over the steps where the box was located, including the box itself.

The condition and placement of the container reinforced that conclusion under the container-specific apparent-authority factors. This unmarked box was not taped up, and it sat in plain view on the second-to-last stair just above the living-room floor. (R. 53.) Nothing in those circumstances gave Ristroph reason to question Reiser's authority. Under *Basinski* and *Salinas-Cano*, the box lacked objective privacy indicators that would signal exclusive ownership or heightened expectations. 226 F.3d at 835; 959 F.2d at 864. Ristroph's belief was therefore

reasonable because the box was left out in the open and bore no identifying information. (R. 13–14.) And because a cardboard box is not ordinarily associated with the highest privacy expectations, Hemlock’s claim of heightened privacy depended on steps to secure it that he did not take. The box was not locked, sealed, labeled, or even taped shut. (R. 13.) Hemlock initialed his own diary entries, yet did not mark the box he now claims was private. (R. 5, 13.) On this record, the district court properly determined Reiser had apparent authority to consent to the search of the box. (R. 57.)

*B. Based on the facts available to Ristroph at the time of the search, it was reasonable to understand Reiser’s consent extended to include the box.*

When a third party gives valid consent to a search, law enforcement may examine items within the scope of that consent, which is evaluated under the totality of the circumstances. *See United States v. Jimeno*, 500 U.S. 248, 251 (1991); *see Bustamonte*, 412 U.S. at 219. The standard is what a reasonable person would have understood by the exchange between the officer and the consenting party. *Jimeno*, 500 U.S. at 251. Whether the scope of consent has been exceeded is a factual determination under the totality of the circumstances. *Sealey*, 830 F.2d at 1032.

Searches pursuant to third party consent often involve uncertain or shared spaces, where ambiguity about control or ownership can complicate the scope of consent. While the federal circuits are split on whether ambiguity, on its own, can defeat apparent authority, this Court is clear that the standard is reasonableness. In order to satisfy this burden, the agents’ many factual determinations do not *always need to be correct*; they just need to be reasonable. *Rodriguez*, 497 U.S. 177 at 185. (emphasis added). Law enforcement is constantly met with ambiguous situations; thus, room must be allowed for some mistakes on their part as long as they are reasonable. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

Requiring law enforcement to make further inquiries would place an impossible burden on officers to reclarify consent for every individual item found in a dwelling. *United States v. Melgar*, 227 F.3d 1038, 1042 (7th Cir. 2000); *but see United States v. Waller*, 426 F.3d 838, 846 (6th Cir. 2005) (noting law enforcement cannot reasonably rely on a third party’s consent when there is no further inquiry regarding unclear ownership of property). Such a rule would conflict with *Rodriguez’s* good-faith framework, which recognizes that apparent-authority determinations are “recurring factual question[s]” officers must answer based on their judgment and that the Fourth Amendment requires only that they do so reasonably. *Rodriguez*, 497 U.S. at 185; *see also United States v. Snype*, 441 F.2d 119, 136 (2d Cir. 2006) (holding the challenging party needs “credible evidence demonstrating that [the items searched] were obviously and exclusively his” to challenge the reasonableness of a consent search).

Even in circuits that recognize a duty to inquire in ambiguous situations, reliance on a third party’s consent is unreasonable only when the facts available do not sufficiently support the third party’s authority. *See e.g., Waller*, 426 F.3d at 846 (reasoning it is unlawful for agents to search property when it is unclear if it is subject to mutual use); *United States v. Welch*, 4 F.3d 761, 765 (9th Cir. 1993) (explaining it is unreasonable for an officer to believe a boyfriend has control over his girlfriend’s purse without further clarification); *United States v. Rosario*, 962 F.2d 733, 738 (7th Cir. 1992) (holding that *Rodriguez* suggests officers need to determine whether they can reasonably infer the consenting party has authority in the absence of sufficient facts).

Here, it was reasonable for Agent Ristroph to believe Reiser’s consent extended to the cardboard box given the facts available to him at the moment. Defense counsel claimed ownership of the box was ambiguous because Reiser’s comments “indicated that the loft and stairs were

personal areas of [Hemlock] only.” (R. 35.) But the on-scene information did not convey exclusive control. When Ristroph asked about what was on the second floor, Reiser stated that she and Hemlock both used it for storage and as office space. (R. 13.) Although Reiser later stated in a sworn declaration that solely Hemlock used the upstairs space, her statement to the officer at the time of the search gave him a reasonable belief of her control over the entire apartment. (R. 15–16.) Nothing in the record shows that the box or stairs were so clearly exclusive to Hemlock as to overcome the presumed reasonableness of a consent search. (R. 13–16.); *Snype*, 441 F.3d at 136. Judge Kim, in dissent, even notes that it was reasonable to conclude that Reiser consented to the search of the shared spaces on the first floor. (R. 60.)

Reiser also never limited the scope of her consent. Despite watching Ristroph approach the box, Reiser never stopped or limited the search, and she never disclaimed ownership of the unlabeled box. (R. 13–16.) Against that backdrop, the “totality of the circumstances” supported the trial court’s finding that the search stayed within the scope of consent. Even if there was a duty to further inquire, which there is not, Reiser’s inaction would lead Ristroph to have sufficient information to believe she had control over the box. (R. 38.) Thus, the Fourteenth Circuit properly affirmed.

**III. Copperhead’s prior academic violation and alleged falsified job application were properly excluded because extrinsic evidence of specific instances of conduct in order to attack a witness’s character for truthfulness is explicitly prohibited under 608(b).**

The Fourteenth Circuit properly affirmed the exclusion of any extrinsic evidence regarding the academic integrity policy violation or alleged fraudulent job application for the sole purpose of impeaching Copperhead’s character for truthfulness. (R. 58.) Rule 806 must be read in conjunction with Rule 608(b), which provides an explicit prohibition on the use of extrinsic

evidence of specific instances of a witness's conduct to attack their character for truthfulness. A hearsay declarant's credibility is only subject to impeachment evidence that would be admissible as if they had in fact testified as a witness. Although Copperhead passed away the night she was arrested, the unavailability of that witness does not warrant departure from the rules of evidence. *See Murphy v. City of Tulsa*, 2018 U.S. Dist. LEXIS 10170 at \*10 (N.D. Okla. 2018); (R. 46.) The exclusion of this evidence was consistent with the limitations imposed by Rules 608(b) and 806, therefore this Court should affirm.

*A. The explicit language of Rules 608(b) and 806 clearly bars the use of extrinsic evidence solely to attack a hearsay declarant's character for truthfulness.*

Rule 806 of the Federal Rules of Evidence governs attacking and supporting a hearsay declarant's credibility after a hearsay statement has been admitted into evidence. The rule provides that the declarant's credibility may be attacked and supported "**by any evidence that would be admissible for those purposes as if the declarant had testified as a witness.**" Fed. R. Evid. 806 (emphasis added). The declarant of a hearsay statement admitted into evidence "is in effect a witness."<sup>1</sup> Fed. R. Evid. 806 advisory committee's note; *United States v. Graham*, 858 F.2d 986, 989 (5th Cir. 1988) (permitting the hearsay declarant's credibility to only be impeached with evidence that would be admissible if the declarant had in fact testified as a witness.); *see also United States v. Scott*, 48 F.3d 1389, 1397 (5th Cir. 1995) ("Thus, any evidence that would have been admissible to impeach [the declarant] had he testified was admissible to impeach [the declarant] even though he did not testify.")

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<sup>1</sup> The committee further states, to ensure fairness, that a hearsay declarant's credibility be subject to impeachment and support as though he had in fact testified. Thus, Article VI of the Federal Rules of Evidence, which governs witnesses, must apply to the cross-examination of a hearsay declarant.

Rule 608 regulates one of the methods of impeachment provided in the Federal Rules, regarding a witness's character for truthfulness. An important limitation of the rule is a party may inquire into specific instances of conduct on cross-examination, but is expressly prohibited from the use of extrinsic evidence when doing so. Fed. R. Evid. 608(b). This rule provides one limitation of cross-examination, only prohibiting extrinsic evidence of the witness's past conduct when used to attack or support the witness's character for truthfulness.<sup>2</sup> *United States v. Abel*, 469 U.S. 45, 55 (1984); see e.g., *United States v. Brooke*, 4 F.3d 1480, 1484 (9th Cir. 1993) (refusing the admission of extrinsic evidence of specific instances of conduct solely for the purpose of impeaching a witness's credibility); *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992) (introducing extrinsic evidence to merely show a witness's general character for truthfulness represents the exact type of mini-trial over a collateral matter that Rule 608(b) forbids).

Read together, Rules 608(b) and 806 perform a simple function: a declarant's statement admitted into evidence is subject to the same impeachment rules as if the declarant had actually testified. The D.C., Third, Fifth, and Seventh Circuits have all held that the plain language of Rule 608(b) is not modified by Rule 806 even if the hearsay declarant is unavailable to testify at trial. *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997); *United States v. Saada*, 212 F.3d 210, 221 (3d. Cir. 2000) (concluding Rule 806 does not modify Rule 608(b)'s ban on extrinsic evidence of prior bad acts for hearsay declarants, even when unavailable to testify); *United States v. Moody*,

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<sup>2</sup> In 2003, the rule was amended to clarify that the absolute prohibition on extrinsic evidence applies when the sole reason for offering the evidence to attack or support the witness's *character for truthfulness*. Fed. R. Evid. 806 advisory committee's note (emphasis added). The committee cites *United States v. Fusco*, 748 F.2d 996, 998 (5th Cir. 1984), explaining 608(b) limits the use of evidence, "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se."

903 F.2d 321, 329 (5th Cir. 1990) (“the scope of impeachment parallels that available if the declarant had testified in court, since Rule 806 treats the physical location of the testifying declarant, for impeachment purposes, as legally insignificant.”); *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991) (explaining Rule 806 does not allow the use of evidence made inadmissible by another rule; it allows the impeachment of a hearsay declarant but does not obliterate the rules of evidence that govern how impeachment is to proceed.)

Although the regulation of attacking a *hearsay declarant’s* credibility with extrinsic evidence of specific instances of conduct is imperfectly reflected in the language of Rules 608(b) and 806, federal common law supports exclusion of this type of evidence. The Third Circuit, in *Saada*, explained that Rule 806 allows the impeachment of a hearsay declarant only to the extent permissible *as if the declarant testified as a witness*. 212 F.3d at 221. (emphasis added). Thus, in the case of specific instances of conduct, cross-examination of a hearsay declarant is subject to the limitations placed under Rule 608(b). *Id.* In *White*, the court used identical reasoning to hold the witness could be cross-examined on whether the hearsay declarant had lied on an employment form, but impermissible to refer to extrinsic proof of that act. 116 F.3d at 920.

Here, Kolber testified that he saw Copperhead out of breath with a pale face, crying, and shaking. (R. 42.) He then heard her scream, “I can’t believe I saw him get arrested. It’s all his fault. It was all Atticus’ idea—NOT MINE! I can’t run a business from prison.” (R. 43.) Having admitted this statement as an excited utterance under Rule 803(2), Copperhead’s credibility as a hearsay declarant was only subject to impeachment permitted as if she had testified at trial. *Saada*, 212 F.3d at 221; *Moody*, 903 F.2d at 329; *Finley*, 934 F.2d at 839; *White*, 116 F.3d at 920; (R. 42–43.) Identically to *White*, here the defense attempted to introduce extrinsic evidence of Copperhead’s

specific conduct in the form of a fraudulent job form. 116 F.3d at 920; (R. 48.) As the D.C. Circuit explained, it was permissible to question Kolber regarding Copperhead’s credibility; however, the line is drawn at the use of extrinsic evidence. *White*, 116 F.3d at 920; (R. 48.)

*B. Copperhead’s unavailability as a hearsay declarant does not warrant departure from the explicit text of Rules 608(b) and 806.*

The rationale for declining to stick to the clear language of the rules is based solely on the hearsay declarant’s unavailability. Nevertheless, courts have firmly held that a declarant’s unavailability does not justify overriding the plain text of the rules. In fact, Rule 806 actually rejects any rationale for lifting Rule 608(b)’s explicit prohibition against extrinsic evidence. *Saada*, 212 F.3d at 221; *Finley*, 934 F.2d at 839 (“Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed.”); *but see United States v. Friedman*, 854 F.2d 535, 569–70 (2d Cir. 1988) (holding extrinsic impeachment evidence was properly excluded because the evidence was not probative of truthfulness, but would have been admissible if it had been more probative.)

A witness’s character for truthfulness is the only impeachment method regulated under Rule 608(b). The application of Rule 608(b) leaves the admissibility of extrinsic evidence offered for other impeachment methods (contradiction, prior inconsistent statement, bias, etc.) to Rules 402 and 403. Fed. R. Evid. 608(b) advisory committee’s note. There are still other avenues of impeachment tools available for the opposing party, including: (1) questioning the witness concerning the declarant’s character for truthfulness on cross-examination, (2) impeachment with opinion and reputation evidence under Rule 608(a), (3) evidence of criminal convictions under Rule 609, and (4) evidence of prior inconsistent statements under Rule 613. *Saada*, 212 F.3d at

221. In fact, Kolber was cross-examined by the defense under this first method in an attempt to impeach Copperhead's credibility. (R. 45–46.)

Decisions and commentary that disregard the plain language of the Rules, by permitting this type of extrinsic evidence simply because the hearsay declarant is unavailable, fails to recognize that impeachment is not entirely foreclosed. The Second Circuit missed the mark when they emphasized, “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.” *Friedman*, 854 F.2d at 570 n.8. Although the *Friedman* court misread the interplay of Rules 608(b) and 806, it nonetheless held that excluding the extrinsic evidence was not an abuse of discretion; because whether prior conduct casts doubt on a declarant's credibility depends on a comparison of the prior circumstances and the admitted hearsay statements. *Id.* at 570.

Even when courts permit extrinsic evidence in this manner, they recognize that the plain text of the rules does not authorize it. The West Virginia Supreme Court concluded that Rule 806 does not modify Rule 608(b), even when a declarant is unavailable. *State v. Martisko*, 211 W. Va. 387, 394 (W. Va. 2002). There, the court felt it should have been permissible to impeach the credibility of the hearsay declarant with extrinsic evidence because the conviction was solely based upon hearsay evidence. *Id.*; See also Margaret Meriwether Cordary, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 Ohio St. L.J. 495, 525 (1995) (“If the declarant does not testify, the attacking party will not have an opportunity to cross-examine the declarant about relevant misconduct.”) Here, during cross-examination, the defense had every opportunity to impeach Copperhead through other impeachment methods. (R. 45–46.) The trial

court even permitted the cross-examination of Kolber regarding his knowledge of Copperhead's credibility. (R. 45–46.) Unlike *Martisko*, this conviction rests on far more than just hearsay evidence. 211 W. Va. at 394; (R. 5–8, 14.)

Finally, the argument that a hearsay declarant's unavailability must permit the use of extrinsic evidence fails to recognize that the hearsay exceptions under Rule 803 already guarantee a measure of trustworthiness. Admission of an excited utterance is grounded in the principle that, under some circumstances, a hearsay statement bears sufficient guarantees of trustworthiness regardless of the declarant's availability. Fed. R. Evid. 803 advisory committee's note; (R. 43–44.) Allowing extrinsic evidence solely because the declarant is unavailable further ignores that the hearsay statement is only admitted in the first place because the Rules recognize its inherent reliability and utility. *Compare* Fed. R. Evid. 803 advisory committee's note *with Friedman*, 854 F.2d at 570 n.8 *and Martisko*, 211 W. Va. at 394 (“We are uncomfortable with a conviction based entirely upon hearsay evidence where the defendant has had no opportunity to impeach his chief accuser”).

C. *Even if extrinsic evidence of specific instances of conduct were permissible to impeach a hearsay declarant's character for truthfulness, it was not an abuse of discretion to exclude the evidence and sustain the Government's objection.*

The standard of review as to the permitted scope of cross-examination in a criminal trial is abuse of discretion. *Geders v. United States*, 425 U.S. 80, 86 (1976); *see United States v. Van Dreel*, 155 F.3d 902, 905 (7th Cir. 1998); *see also Saada*, 212 F.3d at 220 (reviewing a ruling to admit or exclude evidence for an abuse of discretion as long as it was based on a permissible reading of the Rules of Evidence.) In *Van Dreel*, the Seventh Circuit explained,

“We afford great deference to the trial court's determination of the admissibility of evidence because of the trial judge's first-hand

exposure to the witnesses and the evidence as a whole, and because of the judge's familiarity with the case and ability to gauge the impact of the evidence in the context of the entire proceeding."

155 F.3d at 902. Reversible error will only be found if the district court's decision falls outside the options that would be expected of a reasonable trial judge. *Id.*

The Fourteenth Circuit properly recognized the trial court's discretion to exclude the introduction of extrinsic evidence of Copperhead's prior acts solely to impeach her character for truthfulness. A trial judge already has Rule 403 at their disposal to act as a guide for handling of situations for which no specific rules have been formulated. Fed. R. Evid. 403 advisory committee's note. Even if extrinsic evidence were admissible in this instance, which it is not, evidence would still be excluded to preserve judicial efficiency in avoiding mini-trials and distracting the jury. (R. 58.) Judge Araiza immediately called sidebar and dismissed the jury to recess when the defendant attempted to introduce this evidence to avoid juror confusion. (R. 47.) It was not an abuse of discretion to exclude evidence that has a prohibition clearly articulated in Rule 608(b) and would undermine efficient trial administration. (R. 49–50.) Thus, the Fourteenth Circuit properly affirmed the district court's ruling.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the Fourteenth's Circuit's decision and hold that (1) *Payton* is triggered by a warrantless in-home arrest and does not apply where officers remain outside and effect the arrest outside the home; (2) the Fourth Amendment permits a consent search where officers reasonably rely on a co-occupant's apparent authority over the area or item searched; and (3) an unavailable hearsay declarant's character for truthfulness may not be impeached with extrinsic evidence of their prior acts.

*Respectfully Submitted,*

Team 10  
Counsel for Respondent