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

Case No. 25 -7373

ATTICUS HEMLOCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER, ATTICUS HEMLOCK

Attorneys for the Petitioner

QUESTIONS PRESENTED

- I. Whether the United States violated Hemlock's Fourth Amendment rights when they constructively entered his home by luring him out of his home to carry out a warrantless arrest?

- II. Whether the United States violated Hemlock's Fourth Amendment rights by finding that Reiser had apparent authority to consent to the search of Hemlock's container?

- III. Whether, under Fed. R. Evid. 806, the trial court erred when it excluded the evidence Hemlock sought to admit to attack Copperhead's character for truthfulness when Copperhead is unavailable to testify?

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OPINION BELOW

The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Atticus Hemlock v. United States of America*, No. 24-1833, was entered April 14, 2025, and may be found in the Record. R. 53-61.

CONSTITUTIONAL PROVISIONS

This case is an appeal from a verdict under 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 1201(d). This appeal concerns alleged violations of the Petitioner’s Fourth Amendment right against unreasonable searches and seizures. U.S. Const. amend IV. Additionally, this case involves Federal Rule of Evidence 806.

STATEMENT OF THE CASE

I. Statement of Facts

A. FBI Received Tips

Between March 31 to April 1, 2024, the Boerum Village police reported two tips that they believed were related to the FBI, which the FBI decided to investigate further. R. 20.

The first tip was from Elvis Hoag, a local barista, who contacted the police after “he overheard a conversation between two patrons at the coffee shop” on approximately March 28 or March 29, 2024 between 8:30 a.m to 12:30 p.m. R. 7. He identified the two individuals as Atticus Hemlock and Iris Copperhead. *Id.* He recognized Hemlock and Copperhead because he followed Hemlock on Instagram, and Hemlock regularly posts photos of himself and Copperhead. *Id.*

The barista testified that they had a poster “that contained some sort of timeline, with dates, times of day, and arrows” and another poster with “what looked like a map of a parking lot” and “a school building,” but conceded “he did not have a clear enough view of the materials

to identify the subject matter.” *Id.* The barista heard Hemlock and Copperhead joke about throwing Jodie in a van when she pulled into the parking lot because she was a government official who was colluding with real estate developers to benefit the government. *Id.* The barista admitted that it was not the first time his patrons had exhibited unusual behavior but reported the conversation to the police out of an abundance of caution. *Id.*

The second tip was from a local store manager who reported that she saw two unidentified individuals, one man and one woman, who “bought a pack of zip ties, two ski masks, a six-inch folding knife, black trash bags, and bear spray, and paid for their purchases with cash.” R. 6. She thought they were suspicious because of “the combination of items bought, the cash purchase, and their demeanor,” but did not describe what about their demeanor made her suspicious. *Id.* She conceded she did not overhear any conversation between the two individuals. *Id.*

B. Hemlock’s Arrest

On April 2, 2024, Special Agents Ava Simonson and Hugo Herman went to Atticus Hemlock’s home, located “in a densely wooded area” far from others, to allegedly only ask him questions. R. 20-21, 24-25. When they arrived, the “main door was open, but the screen door was closed.” R. 21. Agent Simonson knocked loudly on the door three times, and Hemlock came to the screen door but did not open it. R. 21-22. Agent Simonson asked Hemlock to come outside, so the Agents could ask Hemlock some questions but did not clarify what the questions were about. R.11. Hemlock said no because he was busy and admitted that their presence scares him. *Id.* Agent Simonson and Herman “immediately identified themselves as FBI and flashed their badges.” R.28. Their large officer belts clearly displayed their weapons, and they had their hands on the holster of their guns when they asked the Hemlock to step outside. *Id.* Although the defendant is six foot and two inches, “Special Agent Herman is five foot, eleven inches and

weighs 185 pounds” and “Special Agent Simonson is five foot, five inches and weighs 145 pounds.” R. 29.

Shortly after Agent Herman saw two bottles on a counter labeled "Chloroform" and Hemlock exercised his right not to answer, the agents started demanding that Hemlock come outside of the house. R. 11. After being yelled at several times, Hemlock decided to come out of his home. R.12. Hemlock was arrested for attempting to kidnap a federal official and Agent Simonson read him his Miranda rights. *Id.* Agent Herman then searched Hemlock without a warrant and found a notebook, which includes a diary entry in which Hemlock describes an alleged plan to kidnap Jodie Wildrose. R. 5.

Copperhead witnessed Hemlock’s arrest at his home because she was there to have dinner with Hemlock and his girlfriend, Fiona Reiser. R. 59. The agents did not notice her presence. *Id.* Minutes later, Copperhead ran into Theodore Kolber as he was walking in Joralemon State Park and yelled “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!” before sprinting off. On April 2, 2024, Copperhead was arrested and died from an acute aortic rupture the same night. *Id.*

C. Cabin Search

On April 2, 2024, Special Agent Kirernan Ristroph went to Fiona Reiser and Atticus Hemlock’s home to search their home. R. 15.

When he arrived, Fiona Reiser was the only person home. *Id.* He informed her that Atticus had been arrested and asked for her permission to conduct the search. *Id.* When she asked him why he was arrested and what he was looking for, he only responded that it was part of the investigation, and she let him in. *Id.*

As he was searching, Special Agent Ristroph “noticed a set of stairs leading to the second floor. He asked Ms. Reiser if she slept on the second floor, and she said no, that she and

[Hemlock] slept in the bedroom.” *Id.* She pointed him to the only bedroom in the cabin located on the first floor.” R. 33. Instead of going to the bedroom, however, he “continued toward the stairs” once she told him that it was mainly used by Atticus and she did not know what he kept up there. *Id.* R. 15.

Ms. Reiser thought “he was about to go up the loft, but then he stopped and opened a cardboard box that was sitting on the stairs.” R. 16. She thought the items “looked like outdoor gear that Atticus and Iris would use for their outdoor excursions” but Agent Ristroph took the box and items with him anyway as part of the investigation. *Id.*

II. Procedural History

Before trial began, the trial court denied Hemlock's motion “to suppress the notebook that was seized during the arrest” that Hemlock argued was obtained through an illegal arrest. R. 51. In his motion to suppress, Hemlock alleged that the police officers constructively entered his home by commanding him to step out. R. 30. The trial court also denied Hemlock’s motion to suppress “materials found in the cardboard box during the search of the cabin” based on Hemlock’s arguments that “Reiser lacked authority to consent to search of the box.” R. 52. In this motion to suppress, Hemlock alleged that ownership of the box was ambiguous and thus, control over the box could not be determined by the officer at the time the search occurred. R. 34-35.

At trial, Kolber testified about Copperhead’s statements, and the trial court admitted “Copperhead’s statement as hearsay under the excited utterance exception in Rule 803(2).” R. 51. Hemlock “attempted to impeach Copperhead's credibility as a hearsay declarant pursuant to Rule 806 of the Federal Rules of Evidence” through “a report detailing academic dishonesty by Copperhead and (ii) a falsified job application misrepresenting Copperhead’s academic credentials, and to have witnesses authenticate and testify to the contents of these documents.”

Id. The district court held that “Rule 608(b) precludes the admission of such extrinsic evidence of specific conduct.” *Id.* The Defendant was found guilty, and the Fourteenth Circuit affirmed all of the District Court's rulings. *Id.*

Hemlock then appealed to this Court and was granted certiorari on all three issues on December 2, 2025. R. 62.

SUMMARY OF THE ARGUMENT

This case is about how the government exploited its authoritative power by violating fundamental constitutional rights laid within the Fourth Amendment and by excluding evidence critical to the Defendant’s case. These perverse actions have interrupted Hemlock’s right to protect himself against unreasonable searches and seizures and his right to a fair trial. This Court must reverse the Fourteenth Circuit on all three certified issues and grant Hemlock a new trial to uphold fairly uphold the Constitution and the Federal Rules of Evidence.

First, the Fourteenth Circuit improperly affirmed the district court’s denial of Hemlock’s motion to suppress the notebook evidence when the government improperly arrested Hemlock under *Payton v. New York*. Government agents violated Hemlock’s Fourth Amendment rights by constructively entering his home through two methods. First, officers coerced Hemlock to step outside of his home to effectuate an arrest, giving him no choice but to leave. Second, no exigent circumstances existed to allow officers to conduct this warrantless arrest. Thus, in looking at the totality of the circumstances to determine that constructive entry existed, this Court must not approve of this kind of violation to Hemlock’s constitutional protections.

Second, the government violated Hemlock’s Fourth Amendment protections by assuming that Reiser had apparent authority to consent to the search of Hemlock’s closed container located in a portion of his home only accessed by him. Although the government was

granted access to enter the home by Reiser, that access grant does not extend to closed containers that clearly do not belong to the consenting party. When the government has not properly met its burden of proof in showing Reiser's apparent authority, the government has violated Hemlock's Fourth Amendment rights.

Third, the trial court erred in excluding the evidence that the Defense sought to admit under Fed. R. Evid. 806. First, the Fourteenth Circuit misinterpreted Fed. R. Evid. 608(b) to bar the use of extrinsic evidence to impeach a hearsay declarant. The plain language of Fed. R. Evid. 608(b) only refers to witnesses, not hearsay declarants. Alternatively, if Fed. R. Evid. 608(b) does apply to hearsay declarants, then Fed. R. Evid. 806 still allows for Dr. Andrea Joshi and Svetlana Ressler's Testimonies about Copperhead's specific instances of misconduct based on case law and the rule's purpose. The trial court's denial limited Hemlock's ability to effectively challenge an unavailable hearsay declarant's statement that strongly contributed to his conviction. Accordingly, this Court must reverse the Fourteenth Circuit on all three issues and grant Hemlock a new trial.

ARGUMENT

I. The District Court and the Fourteenth Circuit erred by failing to recognize that the police officers carried out an illegal arrest by constructively entering Hemlock's home, which is a violation of Hemlock's Fourth Amendment rights.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. Generally, the police will be required to obtain a warrant before arresting an individual. *Id.* However, the police may conduct a warrantless arrest of an individual if the police officers have probable cause to do so. *Chimel v. California*, 395 U.S. 752, 773 (1969). However, under *Payton v. New York*, the Supreme Court has held that without exigent circumstances, police officers may not make a warrantless and nonconsensual entry into an individual's home to

make an arrest because of a suspicion that the individual has committed a felony. 445 U.S. 573 (1980). The Supreme Court explains that the “zone of privacy” in the home is “more clearly defined than when bounded by the unambiguous physical dimensions...” *Id.* at 589. Thus, *Payton* sets a distinct boundary in which a warrantless arrest may occur: “Absent exigent circumstances, [the home’s boundaries] may not reasonably be crossed without a warrant.” *Id.* at 590.

The present appeal is an opportunity for the Court to clarify whether an individual is coerced into exiting their home when officers compel the individual to do so. Precedent demands that this court respond in the affirmative because the totality of the circumstances show that the officers have constructively entered Hemlock’s home. Even if this Court determines that Hemlock’s arrest was not a seizure as understood by the Fourth Amendment, it must still find the underlying arrest to be unconstitutional.

A. Law enforcement constructively entered Hemlock’s home by not allowing him the opportunity to leave.

Generally, under the Fourth Amendment, an individual is protected against any unreasonable searches or seizures by state or government actors. U.S. Const. amend. IV. Included in that protection is a space in which the Fourth Amendment gives the utmost protection to: the sanctity of the home. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001) (holding that there is a bright line rule in which physical invasion into an individual’s home will be unconstitutional unless a warrant is obtained or the suspect gives valid consent to enter the home).

A seizure will exist “by means of physical force or a show of authority when freedom of movement is restrained.” *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). However, a seizure will not exist if an individual is free to leave at any point in which they feel they can

discontinue the encounter with the officer. *Id.* at 554. Situations where a person may not feel free to leave include: “threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” *Id.*

The understanding of what an assertion of authority may look like is an objective one. *California v. Hodari D.*, 499 U.S. 621, 628 (1991). The understanding of what an assertion of authority may look like is an objective one. *Id.* at 628. Under the objective test, the court will look at “...whether the officer's words and actions would have conveyed [to a reasonable person that they were restricted from moving].” *Id.* Thus, police cars chasing a suspect with the car’s flashing lights is an adequate showing of authority. *Id.* at 629.

The court held the objective standard was satisfied in *Saari* when four police officers approached the individual’s home and engaged in forceful knocking to compel the individual to go outside. *United States v. Saari*, 272 F.3d 804, 806 (6th Cir. 2001). One of the officers “had a 12-gauge, pump-action shotgun drawn and in a ‘low ready’ position...” when the individual opened the door. *Id.* One of the officers later acknowledged that the individual would not have been permitted to stay inside his home after the officers had instructed him to step outside. *Id.* at 808.

Courts have repeatedly found constructive entry in circumstances similar to *Saari*. See *United States v. Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984) (holding that ten officers who surrounded the home had blocked the individual’s car and had flooded the house with spotlights and used bullhorns to summon the individual out constituted constructive entry); *United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989) (finding that constructive entry occurs when armed officers surround a trailer home with loudspeakers, asking the individual to step outside); *United States v. Al-Azzawy*, 784 F.2d 890, 892 (9th Cir. 1985) (holding that constructive entry exists

when the police officers surround a person's trailer with their weapons drawn as they order the person, through the use of a bullhorn, to exit the home); *Gaddis v. Demattei*, 30 F.4th 625, 631-32 (7th Cir. 2022) (explaining that once officers have been asked to leave and they do not, the individual will no longer feel free to leave).

Here, Hemlock was not free to retreat into his home because the officers continually asserted their official authority, compelling him to step outside its protections. Under the Fourth Amendment and *Kyllo*, Hemlock was entitled to remain secure from arrest while inside his home. *See* U.S. Const. amend. IV; *Kyllo*, 533 U.S. at 31. Hemlock was no longer free to remain inside once FBI Agents Herman and Simonson identified themselves and repeatedly instructed him to come outside. R. 53. Although Hemlock's arrest occurred outside the home, courts have held that the officers had effectuated a constructive entry in violation of the Fourth Amendment when such coercive conduct occurs. *See Morgan*, 743 F.2d at 1161 (spotlights); *Maez*, 872 F.2d at 11451 (loudspeakers); *Al-Azzawy*, 784 F.2d at 892 (bullhorn).

The officer's actions constituted constructive entry in violation of the Fourth Amendment because not only did the agents persist in their commands, but they also stood with their weapons visibly holstered and their hands resting on their guns. R. 28, 53. As *Mendenhall* recognizes, the display of weapons combined with the presence of multiple officers signals to a reasonable person that they are not free to ignore police demands. 446 U.S. at 553. Although the agents never drew their weapons, *Mendenhall* makes clear that the visible display of firearms alone can constitute a show of authority. *Id.* Therefore, based on the situations surrounding Hemlock's arrest, Hemlock objectively would not feel free to leave.

Hemlock was confronted by officers who refused to leave after he asked them to do so like in *Saari* where officers' forceful knocking while armed and commanding a suspect to exit constituted constructive entry. 272 F.3d at 808; R. 11. This conduct would cause a reasonable

individual, such as in *Saari*, to believe he was not free to remain inside his home. 272 F.3d at 808. Moreover, in looking at the totality of the circumstances, the size of the officers adds to Hemlock's feeling of coercion. R. 29. Although Hemlock is bigger than both officers, the officers were still objectively big. When officers assert their authority in this manner, they undermine any claim that a suspect voluntarily exited their home. As *Saari* holds, such conduct constitutes a constructive entry because it conveys that compliance is required. 272 F.3d at 810.

B. Absent exigent circumstances law enforcement constructively entered Hemlock's home.

Law enforcement cannot enter into an individual's home unless there exist exigent circumstances, or the officers have effectuated a constructive entry of the suspect's home in violation of the Constitution. *Payton v. New York*, 445 U.S. 573, 603 (1980). Exigent circumstances may include officers in pursuit of a fleeing felon, officers attempting to prevent the immediate destruction of evidence, or officers attempting to prevent an escape. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). Moreover, the court should also consider the crime of the individual that the police are investigating and whether the individual is armed. *Id.* Thus, if it is clear that the individual is not going anywhere, exigent circumstances will not exist. *Id.* at 101. *See Johnson v. United States*, 333 U.S. 10, 15 (1948) (explaining that an example of exigent circumstances is one in which to prevent the destruction of evidence).

No exigent circumstances exist if the officer's actions demonstrate that no urgency existed. *United States v. Morgan*, 743 F.2d 1158, 1162 (6th Cir. 1984). In *Morgan*, prior to making physical contact with the suspect's home, the police officers discussed a plan of how the suspect's home would be surrounded. *Id.* at 1160. Once all ten officers were in their planned-out spots, spotlights flooded the home and the officers used a bullhorn to call the suspect out of the home to arrest him. *Id.* at 1161. In *Morgan*, the officers had testified that all the officers had time

before the arrest to meet at a coffee shop and assess the situation before all going to the suspect's home. *Id.* at 1162. Moreover, in determining whether constructive entry occurred, the *Morgan* court addressed that the situation should be analyzed in terms of the location of the arrested person rather than of the arresting officer. *Id.* at 1166. *See United States v. Reeves*, 524 F.3d 1161, 1168 (10th Cir. 2008) (explaining that if the individual has not voluntarily opened the door to his home and the officer arrests him, the court will find that the individual has been seized within his home in violation of the Fourth Amendment).

Although Hemlock was ultimately arrested outside his home, the officers' conduct throughout the encounter amounted to a constructive entry under *Payton*. As *Payton* makes clear, absent exigent circumstances, officers may not compel a suspect to exit his home to effectuate an arrest. 445 U.S. at 603. Exigency exists only when there is an urgent need to act, such as hot pursuit, imminent destruction of evidence, or immediate danger to life. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). None of those conditions were present here. Like the officers in *Morgan*, the agents admitted they could "come back another time" to speak with Hemlock. R. 12; *Morgan*, 743 F.2d at 1162. Moreover, the alleged kidnapping was not planned for another six days. R. 5, 53. Hemlock was alone in his home in a secluded area. R. 11, 24-25. The agents were not in hot pursuit because the agents conceded they merely planned and "intended to have a conversation" when they initially went to his home and even told Hemlock they could return another time. R. 52; R. 12. Those facts foreclose any claim of urgency and exigent circumstances. *See Morgan*, 743 F.2d at 1162.

Accordingly, Hemlock was seized within the meaning of the Fourth Amendment while still under the protection of his home, and that constructive seizure violated *Payton*, 445 U.S. at 603. Although the officers never physically entered the residence, their conduct effectively stripped Hemlock of his constitutional right to remain inside his home. Because the arrest was

unconstitutional, the notebook seized incident to that arrest is fruit of the poisonous tree and must be suppressed. Therefore, this Court should reverse the district court and Fourteenth Circuit's decision on this issue.

II. Hemlock's Fourth Amendment rights were violated when law enforcement conducted a warrantless search of a closed container without apparent consent.

The Fourth Amendment does not allow a government actor to search an individual's person, house, papers, or effects without a valid warrant. U.S. Const. amend. IV. Underlying the Fourth Amendment's purpose is that the government cannot intrude on an individual's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967).¹ In regard to an expectation of privacy in a closed container, the determination of whether the Fourth Amendment has been violated is more fact specific.

Apparent authority is evident through the presence of certain factors. *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000). The factors that should guide a government actor include: nature of the container; external markings on the container; and government's knowledge of the third party's use, control, and access to the container. *Id.* at 835. Thus, the question the government will have to consider is whether it is reasonable that the third party had the authority to consent to the search of the property.

Here, Hemlock's Fourth Amendment rights were violated when his motion to suppress the evidence found in the closed container at his home was denied. R. 35. Precedent demands that this Court find that Hemlock's girlfriend, Fiona Reiser, did not have apparent authority to consent to the search of Hemlock's closed container.

¹ Although the defendant did not bring up an expectation of privacy argument under *Katz*, Hemlock has an expectation of privacy for items that are his. *See Florida v. Jimeno*, 500 U.S. 248 (1991).

A. Reiser Lacked Apparent Authority Over Hemlock’s Cardboard Box and the Contents Within It Because It Was Not Hers.

Consent is an exception to a warrantless search to the Fourth Amendment. *United States v. Matlock*, 415 U.S. 164 (1974). Under the consent exception, a third party with a common authority over an area may validly consent to a warrantless search that will be binding on an absent, nonconsenting co-occupant. *Id.* See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973) (holding that a warrantless search is not a violation of the Fourth Amendment if a third party has voluntarily consented to the search at issue).

Common authority, including apparent authority, are further indications of mutual use of the property in which there is joint access or control for most purposes. *Id.* at 171 n. 7. Apparent authority exists if the “facts available to an officer at the time of a search would allow a person of reasonable caution to believe that the consenting party had authority.” *United States v. Wright*, 838 F.3d 880, 887 (7th Cir. 2016) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990)). Apparent authority to consent to a search exists if the following factors are met: (1) “did the searching officer believe some untrue fact that was then used to access the extent of the consent-giver’s use of and access to or control over the area searched?”; (2) “was it under the circumstances objectively reasonable to believe that the fact was true?”; and (3) “assuming the truth of the reasonably believed but untrue fact, would the consent-giver have had actual authority?” *United States v. Ruiz*, 428 F.3d 877, 880-81 (9th Cir. 2005). See *United States v. Melgar*, 227 F.3d 1038 (7th Cir. 2000) (explaining that if the police have no reason to know that a container does not belong to the third party, the officers can assume that apparent authority exists to give valid consent to search that container).

Additionally, a third party may have apparent authority if the third party has access to the area, has a substantial interest to the area or has permission to gain access. *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006) (quoting *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 53 (2d Cir. 2003)). See *United States v. James*, 571 F.3d 707, 714 (7th Cir. 2009) (finding that a third party will have apparent authority to consent to a search if the third-party exercises control and possession over an individual's personal property).

Although a person may have common authority over a home or room, that authority will not authorize the person to consent to a search of everything in that area. *United States v. Peyton*, 745 F.3d 546, 552 (D.C. Cir. 2014). In *Peyton*, the officers were told that a portion of the living room was where the suspect kept his own property. *Id.* at 549. In determining whether consent for an entire area extends to consent to containers in that area, the court will ask questions regarding the entirety of the circumstances such as whether the object was secured or whether it was commonly used for preserving privacy. *Id.* at 553. In applying this standard, the *Peyton* court acknowledged that because the third party had told the officers that the suspect kept his own property in a specific area, the court determined that that would be clear to the officers that that portion of the area was not the third party's and thus, no apparent authority could have existed. *Id.* at 553-54.

Additionally, in *United States v. Davis*, officers came to search the home and the third party who allowed the officers to enter told the officers that she and the suspect slept in different bedrooms, and because of that, the suspect's belongings were in his room. 332 F.3d 1163, 1166 (9th Cir. 2003). Therefore, the officers could no longer reasonably believe that the third party had control over the suspect's belongings. *Id.* at 1170. See *United States v. Fultz*, 146 F.3d 1102, 1106 (9th Cir. 1998) (holding that an individual's containers that are stored in a specific area of the home separate from the third party's will not give officers reasonable belief that the third

party had apparent authority to consent to the search); *United States v. Campany*, 2022 U.S. App. LEXIS 9518, at *7-8 (6th Cir. Apr. 8, 2022) (addressing that when a suspect takes no measures to prevent others from entering his area such as by leaving the bedroom door open or not having clear manifestation of an expectation of exclusivity, apparent authority is more likely to exist); *United States v. Penney*, 576 F.3d 297, 309-10 (6th Cir. 2009) (finding that apparent authority exists if mutual use in a closed but unlocked container inside the residence is evidenced by notes indicating that both the third party and the suspect had access to the container);

Here, Reiser lacked apparent authority to consent to the search of Hemlock's cardboard box. Although Reiser had authority to consent to a search of the house generally, that authority does not extend to spaces or containers over which she lacks mutual use or control. *See Matlock*, 415 U.S. at 171. As in *Davis*, 32 F.3d at 1170, and *Peyton*, 745 F.3d at 559, where courts held that officers lose the ability to rely on third-party consent once informed that an area belongs exclusively to another, Reiser explicitly told the officer that the loft, plus the stairs leading to it, were Hemlock's. R. 15. By making clear that only Hemlock accessed the loft, Reiser alerted the officer that she lacked authority over that space and its contents. *Id.* As the *Campany* court recognized, Hemlock has taken steps in having his personal property, including the container, be exclusive to himself. 2022 U.S. App. LEXIS 9518 at *8. For that reason, Reiser lacks apparent authority to consent to the container in which she had no mutual access or control over.

Furthermore, none of the *Ruiz* apparent-authority factors are satisfied. 428 F.3d at 880-81. First, the officer did not rely on facts suggesting Reiser had access, mutual use, or control over Hemlock's closed box in Hemlock's private space. *Id.* Instead, the officer ignored Reiser's statements that the loft and its contents were Hemlock's. Second, even if the officer initially believed Reiser had authority over the home, that belief became objectively unreasonable once she denied using the loft or knowing what was stored there. *Id.*, R. 15. Third, even assuming that

Reiser had mutual use of the loft, she still lacked actual authority over a closed container belonging to Hemlock. Because none of the *Ruiz* factors are met, Reiser lacked apparent authority to consent to the search of Hemlock's container. 428 F.3d at 880-81. Taking all the facts known to the officer at the time the search occurred, opening the container exceeded the scope of any reasonable understanding that Reiser had apparent authority to consent.

B. The existence of ambiguity between Reiser And Hemlock's container indicates no consent could be given through apparent consent.

When ambiguity is present in the circumstances surrounding the search of a container, apparent authority to consent to that container will not exist. Ambiguity exists if the officer has not asked clarifying questions to resolve the ambiguity. *See United States v. Taylor*, 600 F.3d 678, 681 (6th Cir. 2010) (finding that apparent authority did not exist when ambiguity related to the container was present because the owner of the apartment was female and the container contained male clothing); *United States v. Purcell*, 526 F.3d 953, 965 (6th Cir. 2008) (finding that apparent authority cannot exist if the situation becomes ambiguous as to the container and the officers do not attempt to resolve the ambiguity); *United States v. Salinas-Cano*, 959 F.2d 861, 865-866 (10th Cir. 1992) (holding that apparent authority did not exist where the officer could not reasonably believe that the third party had mutual use over the container based on the questions the officers asked); *United States v. Waller*, 426 F.3d 838, 847 (6th Cir. 2005) (finding that apparent authority was not present when the third party gave consent to search the suspect's luggage because the circumstances were ambiguous to whether the luggage was subject mutual use and without further inquiry to clarify it, the officers engaged in a constitutional violation).

Even if the officer did ask clarifying questions, those questions must be adequate to have a reasonable finding of apparent authority. *See United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991) (finding that because the officers did not ask enough questions to determine

mutual use or joint access of an area, apparent authority will not exist); *United States v. James*, 353 F.3d 606 (8th Cir. 2003) (explaining that the reasonableness standard is based on what government agents know at the time of obtaining consent and not what the consenting third party knows).

Here, Reiser's use and control over the area was ambiguous. When Reiser informed the officer that she did know what was in the loft because "[she] did not really ever go up there" the situation became ambiguous as to who exactly had exclusive control over the area. R. 15. Therefore, under *Purcell*, apparent authority does not exist. 526 F.3d at 965.

The officer here failed to make further inquiry, rendering his search of the container unconstitutional. Without anything more, the officer could not reasonably infer joint access or mutual use of the container. Under *Taylor*, officers must make further inquiry when faced with uncertainty about a third party's authority. 600 F.3d at 682. Similar to *Whitfield*, where the officers lacked apparent authority where they failed to confirm that a third party had mutual use over the suspect's space, here, the officer knew that only Hemlock used the loft up the stairs where the container sat. 939 F.2d at 1075. Therefore, the officer could not reasonably believe the box was within Reiser's control. As *Salinas-Cano* explains, apparent authority cannot exist when officers fail to investigate ownership or control over the property searched. 959 F.2d at 866.

Once the officer here was told that the container belonged to Hemlock and there were no identifying markings, the officer had no reason to assume that Reiser had apparent authority. R. 13. Like *Waller* explains, the absence of identifying markings, combined with Reiser's statements, meant the officer could not reasonably assume she had mutual use or control over the box. 426 F.3d at 849. Thus, as *Peyton* explains, the officer must have sought clarification before searching. 745 F.3d at 559.

Accordingly, the warrantless search of Hemlock's container violated the Fourth Amendment, and the evidence obtained must be suppressed. Therefore, this Court should reverse the district court and Fourteenth Circuit's decision on this issue.

III. Fed. R. Evid. 806 allows for the admission of the letter from the Board of Academic Integrity about Copperhead's academic violation, Copperhead's job application, and Dr. Andrea Joshi and Svetlana Ressler's testimonies.

Hemlock was unfairly deprived of his liberty when the court did not allow him to admit the only means of evidence he had available to challenge Copperhead's statements, even though this evidence was highly probative of Copperhead's character of untruthfulness and her statements strongly contributed to his conviction. R. 57. The district court abused its discretion when it excluded the Defense's evidence because it misinterpreted Fed. R. Evid. 608(b)'s bar on extrinsic evidence to apply to hearsay declarants. Alternatively, if Fed. R. Evid. 608(b) does apply to hearsay declarants, then Fed. R. Evid. 806 does allow for Dr. Andrea Joshi and Svetlana Ressler's testimonies about Copperhead's specific instances of misconduct based on case law and Fed. R. Evid. 806's purpose. This error was harmful because it significantly prejudiced the defendant and likely affected the outcome of the case. *Lech v. von Goeler*, 92 F.4th 56, 64 (1st Cir. 2024). Therefore, this Court should reverse the trial court and Fourteenth Circuit's decision on this issue.

A. The District Court and Fourteenth Circuit misinterpreted Fed. R. Evid. 608(b) to bar the use of extrinsic evidence to impeach a hearsay declarant because the plain language of Fed. R. Evid. 608(b) only refers to witnesses, not hearsay declarants.

The plain language of Fed. R. Evid. 608(b) expressly says that "extrinsic evidence is banned specifically when attacking a "witness' character of truthfulness" but does not say such evidence is banned when attacking a *hearsay declarant's* character of truthfulness. R. 61. Evidence of fraud is highly probative of witness's character of untruthfulness. *See United States*

v. Tomblin, 46 F.3d 1369, 1389 (5th Cir. 1995) (holding that “perjury, fraud, swindling, forgery, bribery and embezzlement” are “clearly probative of...untruthfulness”).

Here, the plain language of Fed. R. Evid. 608(b) does not ban the admission of extrinsic evidence because the defendant sought to admit the extrinsic evidence to attack a hearsay declarant, Copperhead, not a witness. R. 61. The extrinsic evidence is highly probative of Copperhead’s character of untruthfulness because it demonstrates she committed fraud on two separate occasions. *See Tomblin*, 46 F.3d at 1389. First, the letter from the Board of Academic Integrity at Court Street College and Dr. Andrea Joshi’s testimony about this violation proves that she took credit for work that wasn’t entirely her own. R. 9. Second, the job application and Svetlana Ressler's testimony proves she lied about her credentials. R. 10. Since this evidence attacks a hearsay declarant’s character for truthfulness, not a witness’s, Fed. R. Evid. 608(b) does not apply.

This Court should not conclude that Fed. R. Evid. 608(b) applies to hearsay declarants from Fed. R. Evid. 806’s language that “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.” This language does not say *the only* evidence that can be used to attack a hearsay declarant’s credibility is the evidence that is admissible to attack a witness and therefore, *includes* but is not limited to this evidence. Therefore, this Court should allow the defense to introduce this extrinsic evidence.

B. Alternatively, if Fed. R. Evid. 608(b) does apply to hearsay declarants, then Fed. R. Evid. 806 still allows for Dr. Andrea Joshi and Svetlana Ressler's testimonies about Copperhead’s specific instances of misconduct.

This Court should permit Dr. Andrea Joshi and Svetlana Ressler's testimonies for two reasons. First, all of the circuits who have had the opportunity to decide whether to allow witness

testimony about an unavailable hearsay declarant's specific instances of misconduct support the admission of this testimony. Second, allowing their testimony would best satisfy Fed. R. Evid. 806's purpose.

1. All of the circuits who had the opportunity to decide whether to allow witness testimony about an unavailable hearsay declarant's specific instances of misconduct support the admission of this testimony.

The trial court erred in preventing Dr. Andrea Joshi and Svetlana Ressler's testimonies based on *United States v. Saada* because both *Saada* and the case *Saada* relies on, *White*, allow for witness testimony about a hearsay declarant's specific instances of misconduct. 212 F.3d 210, 220 (3d Cir. 2000).

In *United States v. White*, the court allowed for a witness to testify about a hearsay declarant's "drug use, drug dealing, and prior convictions," but prohibited the witness from referring to any extrinsic proof of those acts. 116 F.3d 903, 919 (D.C. Cir. 1997). This holding shows that the court in *White* either sees the witness's testimony of these acts as distinct from "extrinsic proof of [those] acts" or it sees the witness' testimony as the type of extrinsic evidence that is not prohibited under Fed. R. Evid. 608(b). *Id.*

The Court in *Saada* said it agreed with the holding in *White*. 212 F.3d at 220. It did not say the court in *White* erred in admitting this witness testimony about a hearsay declarant's specific instances of misconduct. *Id.* This silence on the matter shows that *Saada* also did not see witness testimony as extrinsic evidence or sees the witness's testimony as the type of extrinsic evidence that is not prohibited under Fed. R. Evid. 608(b).

Therefore, this Court should allow for Dr. Andrea Joshi and Svetlana Ressler's testimonies because the cases that the Fourteenth Circuit relied on to exclude these testimonies allow witness testimony under the circumstances here.

2. This Court should allow for Dr. Andrea Joshi and Svetlana Ressler to testify to best satisfy Fed. R. Evid. 806's purpose.

The purpose of Fed. R. Evid. 806 is to treat hearsay declarants and witnesses the same. R. 61. First, the Fed. R. Evid. 806 expressly states a “hearsay declarant may be attacked...by any evidence which would be admissible for those purposes if the declarant had testified as a witness.” Second, the court in *United States v. Friedman*, which supports the admission of extrinsic evidence under the circumstances here, states, “the declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment...as though he in fact testified.” 854 F.2d 535, 569 (2d Cir. 1988) (quoting Fed. R. Evid. 806 advisory committee’s note).

Here, the purpose of the rule would be best satisfied by allowing Dr. Andrea Joshi and Svetlana Ressler to testify because the jury will not learn the same information about Copperhead that it would have learned had she been a witness without the admission of Dr. Andrea Joshi and Svetlana Ressler’s testimonies. In fact, the Fourteenth Circuit conceded that the Defendant would have been entitled to question Copperhead about her past misconduct had she testified. R. 57. Unfortunately, however, Copperhead cannot be cross-examined because Copperhead is dead. R. 46. Therefore, the jury has one less opportunity than it would have had for a witness to learn about Copperhead's misconduct and assess Copperhead’s “body, language, tone of voice, and verbiage,” which are “all factors in determining whether they believe a witness.” R. 61 (quoting *United States v. Hamilton*, 107 F.3d 499, 503 (7th Cir. 1997)).

Congress could not have intended to exclude Dr. Andrea Joshi and Svetlana Ressler’s testimonies here because no other means exist for Hemlock to challenge a hearsay statement that the Fourteenth Circuit concedes “was a crucial component of the Government’s case against the defendant.” R. 57. Hemlock could not challenge Copperhead’s statement with evidence that is

highly probative of her character of untruthfulness, since the evidence proves her fraudulent behavior. *See Tomblin*, 46 F.3d at 1389 (holding that fraud is clearly probative of untruthfulness).

The jury also could not have learned about Copperhead's misconduct through any of the other means *Saada* suggested. 212 F.3d at 220-21. First, the defense could not question Theodore Kolber about Copperhead's misconduct because he and Copperhead only met once. *Id.*; R. 45. Second, the defendant could not impeach Copperhead with evidence of criminal convictions under Fed. R. Evid. 609 because the record does not indicate she had prior convictions, nor can she be impeached through extrinsic evidence of prior inconsistent statements because the record does not indicate Copperhead made these statements. *See Saada*, 212 F.3d at 221. Therefore, Copperhead's credibility will be completely immune from challenge, which will substantially and unfairly prejudice the defendant.² This prejudice to the defendant outweighs any probative value of excluding this evidence to avoid "mini trials on collateral issues" that would "distract the jury from the central issues it would be tasked to decide." R. 58. Therefore, this prejudice upsets the balance between these two interests that the Fourteenth Circuit concedes Fed. R. Evid. 608 is designed to maintain. *Id.* The *Friedman* court implicitly recognizes this when it states, "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.*" 854 F.2d at 569.

This Court should not assume that Congress did not intend to admit Dr. Joshi and Ressler's testimonies merely by comparing Fed. R. Evid. 806's silence on the admissibility of

² Although the defendant did not argue in the courts below that the exclusion of this evidence might violate his Sixth Amendment right to confront witnesses, his right is potentially violated because the Framers of the Constitution only intended for an unavailable witness's statements to be admitted against a defendant when the defendant had a prior opportunity to examine the witness and Hemlock had no opportunity to challenge Copperhead. *See Crawford v. Washington*, 541 U.S. 36, 54-56 (2004).

extrinsic evidence with Fed. R. Evid. 613's express authorization of such evidence to prove inconsistent statements. The reason is that there are other differences between the Fed. R. Evid. 613 and 806 that support that Congress intended to allow for witness testimony here. For example, the plain language of Fed. R. Evid. 806 does not require courts to give a hearsay declarant an opportunity to explain or deny an inconsistent statement before evidence of the inconsistent statement is admitted. This contrasts Fed. R. Evid. 608's plain language, which requires a court to give witnesses this opportunity. This difference shows the court's recognition that there will be situations like this one where the hearsay declarant is unavailable and has decided that the defendant's interest in being free from imprisonment outweighs the unavailable hearsay declarant's interest in maintaining their reputation under these circumstances. Therefore, this Court should allow for Dr. Joshi and Ressler's testimonies to best satisfy Fed. R. Evid. 806's purpose.

In conclusion, the district court and Fourteenth Circuit misinterpreted Fed. R. Evid. 608(b) to bar the use of extrinsic evidence to impeach a hearsay declarant because the plain language of Fed. R. Evid. 608(b) only refers to witnesses, not hearsay declarants. Alternatively, if Fed. R. Evid. 608(b) does apply to hearsay declarants, then Fed. R. Evid. 806 still allows for Dr. Andrea Joshi and Svetlana Ressler's testimonies about Copperhead's specific instances of misconduct based on case law and the rule's purpose. Therefore, this Court should reverse the district court and Fourteenth Circuit's decision on this issue.

CONCLUSION

For the foregoing reasons, Atticus Hemlock respectfully submits that the opinion of the Fourteenth Circuit Court of Appeals should be reversed on all three issues, and he should be granted a new trial.

Respectfully submitted,

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