No. 25-7373

IN THE

Supreme Court of the United States

ATTICUS HEMLOCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR RESPONDENT, THE UNITED STATES OF AMERICA

Team T20
Counsel for Respondent

QUESTIONS PRESENTED

I. *Payton v. New York* established that the Fourth Amendment requires law enforcement officers to obtain a warrant before entering a suspect's home to effect an arrest. Officers commanded Hemlock to exit his home because they had probable cause to support his arrest for attempted kidnapping. Hemlock exited his home and was arrested outside. Did the officers violate the Fourth Amendment, under *Payton v. New York*, despite never physically entering Hemlock's home?

II. The Fourth Amendment permits a warrantless search when law enforcement officers obtain valid consent from a third party who possesses apparent authority over the property. Officers obtained consent from Hemlock's girlfriend to search their shared residence, and searched an unmarked cardboard box without specifically inquiring into its ownership. Did the container search violate the Fourth Amendment?

III. When a hearsay statement is admitted into evidence, Federal Rule of Evidence 806 allows admission of impeachment evidence that would be admissible if the declarant had testified at trial. Federal Rule of Evidence 608(b) prohibits extrinsic evidence of specific instances of a witness's past dishonesty for impeachment purposes. Does Rule 806 allow circumvention of Rule 608(b)'s clear directive when a hearsay declarant is unavailable?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit, *Hemlock v. United States of America*, No. 24-1833 (14th Cir. Apr. 14, 2025), may be found in the record at pages 51–61. The opinion of the United States District Court for the Northern District of Boerum is unpublished and unavailable, but transcripts from the district court proceedings appear in the record at pages 18–50.

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides in relevant part 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 no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

STATEMENT OF THE CASE

On or about April 1, 2024, the Boerum Village Police Department alerted the FBI that Jodie Wildrose, the United States Department of Tourism's Under Secretary for Rural Development, was the target of a kidnapping plan. (R. at 20, 52.) The department's suspicions arose from two tips. (R. at 52.) FBI Special Agents Hugo Herman and Ava Simonson met with the two informants on April 2, 2024, where they learned the potential suspects' identities: Atticus Hemlock and Iris Copperhead. (*Id.*) After learning the suspects' identities, the agents began their investigation by going to question Hemlock at his home.

The Arrest

The agents went to Hemlock's home to speak with him about the tips. (R. at 20.) Hemlock lived in a cabin near Joralemon State Park, which he rented with his girlfriend, Fiona

Reiser. (R. at 52.) The agents were not dressed in full uniform; instead, they had on "khakis, black long sleeve polo shirts, and had their 9 millimeter handguns tucked securely into their holsters." (R. at 29.) Upon the agents' arrival, Hemlock came to the door but remained behind the screen and refused the agents' request to talk outside. (R. at 21, 52.) While the agents spoke with Hemlock through the screen door, Herman noticed two bottles labeled "Chloroform" in plain view on the counter behind Hemlock. (R. at 22.) When Herman asked him about the chloroform, Hemlock dismissed the question and stepped in the way of Herman's view. (*Id.*) Then, without solicitation, Hemlock yelled, "What the hell is this even about? Does this have to do with Jodie [Wildrose]?" (R. at 11.) Herman asked Hemlock to calm down and told him that the agents could "come back another time to talk if that would be better." (R. at 12.)

But after witnessing the chloroform and Hemlock's unsolicited comments, the agents went back to their car where they determined that they had probable cause to arrest Hemlock. (R. at 12, 22.) The agents decided to try to get Hemlock to come outside where they could arrest him for attempted kidnapping. (R. at 22–23.) Hemlock "look[ed] pissed" and was acting erratic. (R. at 12.) Thus, the agents called Agent Kiernan Ristroph for backup and reapproached the home cautiously, keeping their hands placed on their gun holsters. (*Id.*) The agents yelled for Hemlock to "[c]ome outside," because their "investigation [was] important and [they] need[ed] answers." (*Id*.) However, the agents never drew their weapons, never threatened Hemlock with repercussions for refusing to come outside, nor did they tell Hemlock he was under arrest. (R. at 30.) Hemlock agreed to come outside where he was arrested. (R. at 12.) Incident to the arrest, Herman searched Hemlock and discovered a notebook open to a page with "detailed and explicit" writing about Hemlock and Copperhead's plans to kidnap Wildrose. (R. at 23–24.) The

notebook also detailed Hemlock's hatred for Wildrose. (*Id.*) Ristroph arrived at the cabin, and Herman and Simonson brought Hemlock to the station for processing. (R. at 12.)

The Cabin Search

Before Herman departed with Hemlock, he instructed Ristroph to wait for Hemlock's girlfriend to arrive home so that he could search the cabin with her consent. (R. at 12.) Reiser arrived home twenty minutes later. (R. at 13.) Ristroph knocked on the door, identified himself, and informed Reiser that Hemlock had been arrested and an investigation was underway. (*Id.*) Ristroph then asked Reiser if he could search the cabin. (*Id.*) Reiser consented, allowing Ristroph into the cabin. (*Id.*) The front door of the small cabin opened into a living room area, with a kitchen to its rear and a set of stairs to the right of the door. (R. at 17.) Ristroph searched the kitchen and the living room, and then asked Reiser what the stairs led to. (R. at 13.) According to Ristroph's report, Reiser responded that "REISER and HEMLOCK used [the second floor] for storage and an office space."[1] (*Id.*) On one of the bottom steps of the stairs, Ristroph noticed a cardboard box. (*Id.*) The box appeared old, had no identifying markings, and was not sealed, but its flaps were closed. (*Id.*) Reiser silently watched Ristroph open and search the box, which contained rope, two ski masks, gloves, zip ties, duct tape, a knife, and two bottles of chloroform. (*Id.*) Ristroph photographed the items and removed them as evidence. (*Id.*)

Copperhead's Statement Implicating Hemlock

Meanwhile, around the time of Hemlock's arrest, a local resident, Theodore Kolber, was on a walk nearby in Joralemon State Park when Copperhead suddenly burst out of the woods. (R. at 41–42.) She screamed at him, "I can't believe I saw him get arrested. It's all his fault. It was all Atticus'[s] idea—NOT MINE! I can't run a business from prison!" (Copperhead's Statement).

[1] In Reiser's declaration, however, she claims she told Ristroph "the stairs led to the loft, which [Hemlock] used as storage and an office space." (R. at 15.)

(R. at 43.) She then ran off. (R. at 44.) Law enforcement officers found and arrested Copperhead later that evening, and she died that night in jail from an aortic rupture. (R. at 46, 53.) Kolber did not know who Copperhead was until he saw her in the news the next morning for being connected with the kidnapping plot. (R. at 45.) Realizing the importance of Copperhead's Statement, he called the FBI to report what he had heard. (*Id.*)

Procedural History

Hemlock was indicted for the attempted kidnapping of an officer of the United States government on account of the officer's official duties under 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 1201(d). (R. at 53.) Before trial, Hemlock moved to suppress both the notebook and the materials found in the cardboard box. (R. at 53–54.) Hemlock argued that "the notebook was the fruit of an illegal arrest in violation of *Payton v. New York*," and the materials were the fruit of an illegal search because "Reiser lacked authority to consent to the search of the box." (R. at 53–54.) The district court denied both motions to suppress. (R. at 31, 39.) The district court reasoned that *Payton v. New York* could not be violated where officers never enter a suspect's home, and that Ristroph's search was reasonable under Reiser's apparent authority. (R. at 31, 39.)

At trial, Kolber testified to Copperhead's Statement, which the court admitted over Hemlock's hearsay objection, reasoning that it was an excited utterance falling under Federal Rule of Evidence 803(2)'s exception to hearsay. (R. at 43–44.) To discredit Copperhead's Statement, Hemlock sought to introduce two pieces of extrinsic evidence showing specific instances of Copperhead's past dishonesty: a college report evidencing academic misconduct (R. at 9) and a falsified job application (R. at 10). (R. at 47–48.) The Government objected to the extrinsic evidence under Federal Rule of Evidence Rule 608(b), and the court sustained the Government's objection. (R. at 49–50.)

Ultimately, the jury found Hemlock guilty and he was sentenced to ten years in prison. (R. at 54.) Hemlock appealed his conviction and sentence to the United States Court of Appeals for the Fourteenth Circuit, arguing that the district court erred by denying his motions to suppress and by excluding the extrinsic evidence of Copperhead's past dishonesty. (R. at 51.) The Fourteenth Circuit affirmed the district court's rulings on all three issues. (*Id.*) Hemlock timely appealed, and this Court granted certiorari to decide the questions presented.

SUMMARY OF ARGUMENT

First, Hemlock's journal was properly admitted into evidence because it was seized incident to a lawful arrest. This Court, in *United States v. Watson*, held that law enforcement officers may make warrantless arrests upon probable cause that a suspect has committed a crime. The one exception to this general rule was established in *Payton v. New York*, where this Court held that officers must obtain a warrant to arrest a suspect *inside* their home. Here, the *Payton* exception should not apply because Hemlock was arrested outside of his home, and thus his notebook should be admissible. But even if this Court endorses the so-called constructive entry doctrine, it should hold that *Payton* was not violated because the hallmarks of constructive entry did not occur. Thus, under either interpretation of *Payton*, this Court should affirm the Fourteenth Circuit and hold that Hemlock's notebook was admissible.

Second, Ristroph's search of the cardboard box did not violate the Fourth Amendment, and its contents were thus properly admitted into evidence, because Reiser had apparent authority over the box. This Court established in *Illinois v. Rodriguez* that law enforcement officers can search property with the consent of a third party who they reasonably believe has authority over the property. Officers can reasonably believe that the third party's authority extends to containers within the property as long as officers do not have positive knowledge or

other obvious reasons to believe that the container does not belong to the third party. This standard is consistent with this Court's precedent and protects Fourth Amendment rights without imposing an impractical burden on law enforcement. Ristroph reasonably believed that Reiser had authority over the cardboard box because it was located in a common area of the cabin and there were no circumstances indicating it belonged exclusively to Hemlock. This Court should thus affirm the Fourteenth Circuit and hold that the search was valid.

Third, the district court properly excluded the extrinsic evidence of specific instances of Copperhead's dishonesty. Federal Rule of Evidence 608(b) expressly prohibits admission of extrinsic evidence to show specific instances of a witness's conduct for impeachment purposes. Federal Rule of Evidence 806 provides that litigants may attack the credibility of hearsay statements, but only with evidence that would be admissible if the declarant had testified as a witness. If Copperhead had been available to testify as a witness at trial, the extrinsic evidence would not have been admissible to impeach her under Rule 608(b), and thus it is not admissible under Rule 806. While this interpretation rules out one form of impeaching a hearsay declarant, there are other possible ways for litigants to call into question the credibility of a hearsay statement, and thus this concern should not override the Rules' plain language. For these reasons, the Court should affirm the Fourteenth Circuit and hold that the extrinsic evidence was inadmissible.

ARGUMENT

I. Hemlock's arrest did not violate the Fourth Amendment because the agents did not physically or constructively enter Hemlock's home to effect the arrest and the arrest was supported by probable cause.

The Fourth Amendment provides the people with the right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

This Court has emphasized that the Fourth Amendment's "text makes clear [that] the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Lange v. California*, 594 U.S. 295, 301 (2021) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). The Fourth Amendment's reasonableness standard "is not capable of precise definition or mechanical application." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citation modified).

Applying the Fourth Amendment's reasonableness standard to this case, this Court should conclude that the agents' actions when arresting Hemlock were reasonable because warrantless arrests are permissible if they occur outside the home's physical dimensions. But even if a warrant could be required under the so-called constructive entry doctrine, that requirement should not apply here because the agents never constructively entered Hemlock's home.

A. Hemlock's arrest did not violate the Fourth Amendment because an officer may make a warrantless arrest outside the home upon probable cause.

This Court, in *United States v. Watson*, held that warrantless arrests are reasonable if an officer has probable cause to support the arrest. *See* 423 U.S. 411, 417 (1976) ("The usual rule is that a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony." (citation modified)). But this Court expressly avoided deciding whether this general rule applied equally to warrantless in-home arrests. *See id.* at 418 n.6 ("Watson's midday public arrest does not present that question."). This question remained open post-*Watson* because this Court has emphasized that it is "not eager—more the reverse—to print a new permission slip for *entering* the home without a warrant." *Lange*, 594 U.S. at 303 (emphasis added). Ultimately, this Court, in *Payton v. New York*, resisted printing a new permission slip for entering the home by holding that the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." 445 U.S. 573, 576 (1980).

Since *Payton*, some courts have claimed to faithfully adhere to the decision by broadening its application through the constructive entry doctrine. These courts find that *Payton* may be violated despite officers never physically entering a suspect's home, because permitting officers to induce a suspect outside their home to be arrested could "undermine the constitutional precepts emphasized in *Payton*." *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984). Courts recognizing the constructive entry doctrine ignore whether the officers actually entered the home, because they find that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." *United States v. Johnson*, 636 F.2d 753, 757 (9th Cir. 1980).

In this case, the Court should conclude that this emerging doctrine is inconsistent with *Payton* and its progeny and would impose an unworkable standard on lower courts and law enforcement officers. Thus, this Court should affirm the Fourteenth Circuit and hold that the admission of Hemlock's notebook was proper.

1. *Payton's* warrant requirement only applies when law enforcement officers physically enter the home, because physically entering the home incidentally leads to unreasonable searches of the home for the suspect.

This Court, in *Payton*, aimed to protect the home from warrantless entry, not to protect the suspect from warrantless arrest. *Payton*'s holding repeatedly emphasized physical entry to justify the creation of its novel warrant requirement for arrests. This Court explained that "the Fourth Amendment has drawn a *firm line at the entrance to the house*." *Payton*, 445 U.S. at 590 (emphasis added). This line was drawn because, among "the variety of settings" where individuals' privacy interests are protected by the Fourth Amendment, "[i]n none is the zone of privacy more clearly defined when bounded by the *unambiguous physical dimensions* of an individual's home." *Id.* at 589 (emphasis added). Thus, this Court found that "absent exigent

circumstances, this *threshold* may not reasonably be crossed without a warrant." *Id.* at 590 (emphasis added).

The facts of *Payton*, and every case this Court cited to support its holding, make evident that this Court was solely focused on protecting homes from warrantless entry. *Payton* was a consolidated appeal involving two cases where law enforcement officers actually entered homes to effect arrests—one where officers used crowbars to break open a suspect's door and another in which officers entered a home without consent. *Id.* at 576, 578. This Court supported its decision by providing ten state court cases where "police entered a house or apartment without a warrant, sometimes forcing open or kicking down the door." *See State v. Felix*, 811 N.W.2d 775, 796 n.1 (Wis. 2012) (Prosser, J., concurring) (citing *Payton*, 445 U.S. at 575 n.3). And this Court cited six United States Court of Appeals cases that involved "actual entry" into "private residential property without a warrant." *Id.* (citing *Payton*, 445 U.S. at 575 n.4).

Payton solely focused on actual warrantless entry because this Court only aimed to prevent in-home arrests from morphing into broad and unreasonable warrantless searches of a suspect's home. This Court explained that requiring a warrant for in-home arrests was justified by "the basic principle of Fourth Amendment law that searches and seizures *inside* a home without a warrant are presumptively unreasonable," because "*physical entry* of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585–86 (emphasis added) (citation modified). This Court relied heavily on the D.C. Circuit's opinion in *Dorman v. United States*, *see id.* at 587–91, where the late Judge Leventhal reasoned that a warrant should be required for in-home arrests because "[t]he officers ente[r] the house to make a search;" even if it is "a search for a person rather than the usual search for an article of property, . . . it [is] a search." 435 F.2d 385, 390 (D.C. Cir. 1970). This Court shared Judge

Leventhal's concerns that many in-home arrests inevitably morph into presumptively unreasonable searches of suspects' homes because "it is inherent in such an entry that a search for the suspect may be required before he can be apprehended." *Payton*, 445 U.S. at 588.

And this Court disagreed with the New York Court of Appeals' suggestion below "that there is a substantial difference in the relative intrusiveness of an entry to search for property and an entry to search for a person" because "the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on search incident to arrest." *Id.* at 589. Notably, the Court emphasized that the "two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home." *Id.*; *see also* Steven B. Dow, *"Step Outside, Please": Warrantless Doorway Arrests and the Problem of Constructive Entry*, 45 New Eng. L. Rev. 7, 15 (2010) ("The entry to arrest implicates the same privacy interest as an entry to search for property . . . . This is the key reason that warrantless in-home arrests are treated differently than warrantless public arrests . . . ."). Thus, *Payton* created a warrant requirement for in-home arrests because "the warrant procedure minimizes the danger of needless intrusions of that sort." *Payton*, 445 U.S. at 586.

But since *Payton*, this Court has consistently reiterated that *Payton* does not apply where there is no risk that a suspect's home will be needlessly intruded. This Court has stated that "the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects . . . protection . . . outside their premises where the police have probable cause to arrest the suspect for committing a crime." *New York v. Harris*, 495 U.S. 14, 17 (1990). The Court has also repeated that an arrest warrant is only required to "'interpose the magistrate's determination of probable cause' to arrest before the officers could *enter* a house to effect an arrest." *Id.* at 18 (emphasis added) (quoting *Payton*, 445 U.S. at 602–03). And despite lower

courts focusing on the location of the arrestee, *e.g.*, *Johnson*, 636 F.2d at 757, this Court has reiterated that *Payton*'s purpose "was not to protect the person of the suspect but to protect his home from entry in the absence of a magistrate's finding of probable cause." *Minnesota v. Olson*, 495 U.S. 91, 95 (1990).

Recognizing that *Payton* does not apply where the home is not physically intruded, the Fifth, Seventh, and Eleventh Circuits have rejected the constructive entry doctrine. *See, e.g.*, *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987) (holding an arrest did not violate *Payton* because the arrest occurred without entering the suspect's hotel room); *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991) ("*Payton* holds the Fourth Amendment draws a clear line at the entrance of a person's house."); *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002) ("The entrance to the house . . . is where *Payton* drew the line."). These courts emphasize 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." *Berkowitz*, 927 F.2d at 1386.

Like these lower courts, this Court should conclude that *Payton* only stands for "its literal holding that non-exigent warrantless arrests inside the home violate the Fourth Amendment." *Gaddis v. DeMattei*, 30 F.4th 625, 633 (7th Cir. 2022). However, where officers never step inside the home, a warrantless arrest supported by probable cause should always be reasonable under *Watson* because the suspect's home will not be needlessly searched. *See Sparing v. Village of Olympia Fields*, 266 F.3d 684, 688–89 (7th Cir. 2001) ("What distinguishes [*Watson* and *Payton*] is that the latter involves an entry (i.e., a search) into the home, a place where individuals enjoy an especially heightened Fourth Amendment protection.").

2. Expanding *Payton*'s warrant requirement to arrests made outside of the home would create an unworkable standard for lower courts and law enforcement officers.

"[I]n determining what is reasonable under the Fourth Amendment" this Court "give[s] great weight to the 'essential interest in readily administrable rules.'" *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001)). But the constructive entry doctrine does not abide by that interest. In practice, the constructive entry doctrine has proven to be "conceptually muddled" and "beset with practical problems." *United States v. Allen*, 813 F.3d 76, 88 (2d Cir. 2016). The doctrine is complicated by a "non-exhaustive list of factors," which lower courts—and presumably law enforcement officers—are supposed to use to decide whether the novel combination of "circumstances [are] sufficient to trigger *Payton*." *Id.*; *see also* Dow, *supra*, at 31–32 ("Among the courts that have accepted the doctrine . . . there is a lack of consensus on where to draw the line . . . ."). Even presuming that lower courts and law enforcement could sort out these inquiries on a regular basis, "one cannot help but wonder why that burden should be imposed upon them." 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.1(e) (6th ed. 2025).

Rather than muddy the Fourth Amendment's doctrine for effectuating arrests, this Court should simply reaffirm that *Payton* only applies where law enforcement officers enter a suspect's home, which "presents a clear rule with a clear rationale, rooted in the special protection of the home against governmental intrusion." *Allen*, 813 F.3d at 88. This clear rule provides law enforcement officers with a simple dichotomy: if you enter the suspect's home, you must have a warrant under *Payton*; if you stay outside the suspect's home, you may arrest the suspect solely upon probable cause under *Watson*. Under this simple dichotomy, *Watson* applies in this case because the officers never entered Hemlock's home to arrest him.

3. Hemlock's notebook is admissible because it was seized incident to an arrest that occurred outside the home and was supported by probable cause.

Hemlock's arrest was lawful under *Watson* because the agents had probable cause to support the arrest and it occurred outside the home. Hemlock does not dispute that the agents had probable cause. (R. at 27.) Moreover, the agents never entered Hemlock's cabin. (R. at 12.) When the agents requested that Hemlock leave his home after determining that they had probable cause, Hemlock did not ask whether the agents had an arrest warrant. (*Id.*) Hemlock did not retreat to the vestibule of his home and shutter the blinds. (*Id.*) Rather, Hemlock exited his home and was arrested by the agents. (*Id.*) And incident to this arrest outside the home, Herman seized Hemlock's notebook. (*Id.*) Luckily for Hemlock, *Payton*'s warrant requirement ensured that only his person was searched and only his notebook was seized at that time.

Hemlock's privacy interest in his home was protected by the agents adhering to *Payton* by waiting to arrest him outside. Without *Payton*, the agents—based solely upon probable cause—may have entered Hemlock's home and searched his personal belongings that were within his grab area, potentially including the cardboard box on the stairs. (R. at 17.) And based on suspicions that someone else was inside the home, the officers may have conducted a protective sweep of the entire home for officer safety, as Judge Leventhal cautioned. But those unreasonable invasions never occurred here, because *Payton* ensured that Hemlock's home was protected up-and-until a neutral magistrate's determination of probable cause occurred, exigent circumstances were created, or consent was given by Hemlock or another co-occupant.

This case illustrates how *Payton* can adequately protect a suspect's privacy interests in their home from unreasonable intrusions, while simultaneously ensuring that officers may still deploy reasonable investigative tactics to protect the public. Thus, this Court should affirm the Fourteenth Circuit and hold that Hemlock's notebook was properly admitted because it was

seized incident to an arrest supported by probable cause and made outside the home's firm, unambiguous threshold.

B. Even if *Payton* may be violated through law enforcement conduct outside the home, Hemlock's arrest was lawful because a reasonable person in his position would have felt free to remain in his home.

Courts have found a constructive entry in violation of *Payton* where officers' conduct outside the home effectively seized the suspect while they remained inside. *See United States v. Reeves*, 524 F.3d 1161, 1168–69 (10th Cir. 2008). But this Court has made "clear that a seizure does not occur . . . so long as a reasonable person would feel free 'to disregard the police and go about [their] business.'" *Florida v. Bostick*, 501 U.S. 621, 628 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). This Court considers "all the circumstances surrounding the incident" to determine whether a reasonable person would feel free to go about their business, including the number of officers present, whether officers brandished a weapon, and whether officers used language or a tone of voice "indicating that compliance with the officer's request[s] might be compelled." *United States v. Mendenhall*, 446 U.S. 554, 554–55 (1980). The fact that agents were wearing badges and uniforms has "little weight in the analysis." *United States v. Drayton*, 536 U.S. 194, 204 (2002). And "the presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." *Id.* at 205.

When analyzing these considerations, courts have usually found constructive entry in violation of *Payton* where officers used overwhelmingly coercive tactics outside the home. *See, e.g.*, *Morgan*, 743 F.2d at 1164 (constructive entry where ten officers surrounded a suspect's home, blocked his car from leaving, flooded his house with spotlights, and used a bullhorn to command him out of his home); *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001)

(constructive entry where officers forcefully knocked on the door with guns drawn—including a pump-action shotgun); *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985) (constructive entry where officers surrounded the suspect's home, had weapons drawn, and used a bullhorn to command the suspect to leave his trailer and get on his knees); *United States v. Maez*, 872 F.2d 1444, 1446 (10th Cir. 1989) (constructive entry where a SWAT team surrounded the suspect's home with rifles drawn, commanding the suspect to exit the home over loud speakers).

In contrast, the Sixth Circuit, in *United States v. Grayer*, held that there was no constructive entry where "[n]one of the hallmarks of constructive entry were present: (1) drawn weapons; (2) raised voices; (3) coercive demands; or (4) a large number of officers in plain sight." 232 F. App'x 446, 450 (6th Cir. 2007) (unreported). The court emphasized that "neither officer at the door had his gun drawn," and the "two officers simply knocked on the door . . . and asked [the suspect] to step outside." *Id.* ("Without more, this does not amount to constructive entry."). Much like *Grayer*, this case lacks the normal hallmarks of constructive entry, because—under the totality of the circumstances—a reasonable person would have felt free to remain inside Hemlock's home.

The number of agents present would have led a reasonable person to feel free to remain inside their home. Hemlock's home was not surrounded by numerous officers shining spotlights and his car was not blocked from accessing the road by the agents' vehicles. Instead, like in *Grayer* where only two officers approached the suspect's home, only two agents were at Hemlock's home: Simonson and Herman. (R. at 21–22.)

The agents resting their hands on their weapon holsters would also not make a reasonable person feel compelled to leave their home. Like the two officers in *Grayer* who kept

their weapons holstered, the agents did not have their weapons drawn. (R. at 26.) Nor did the agents possess intimidating weapons, like pump-action shotguns or rifles. Instead, the agents carried only 9-millimeter handguns, tucked securely in their standard belt holsters, like what members of the public routinely see in nearly all law enforcement encounters. (R. at 26, 29.) Moreover, unlike SWAT teams dressed in gear suitable for breaching a suspect's front door, these agents were not even in full uniform. (R. at 29.) It would be unreasonable for Hemlock to have assumed that officers dressed in khakis and long-sleeve polo shirts were planning to forcefully remove him from his home, especially since Hemlock was considerably larger than the Simonson and Herman. (*Id.*)

Finally, the agents' language and tone of voice would not have made a reasonable person feel forced to exit their home. The agents' tone was conversational when they initially requested Hemlock to come outside and answer questions, and they even offered to come back at a more convenient time. (R. at 10–11.) The agents did not use other means to amplify their voice to be more intimidating. (R. at 12.) Their tone did eventually elevate to shouting once the officers grew certain that they had probable cause to arrest Hemlock; however, the message they were conveying to Hemlock remained consistent. (*Id.*) The agents only yelled that they needed Hemlock's cooperation to answer questions for their investigation. (*Id.*) They never told Hemlock that he must comply. (*Id.*) They never used threats to induce compliance. (*Id.*) Nor did they claim that they were going to enter Hemlock's home without consent. (*Id.*)

Ultimately, even under the constructive entry doctrine, this Court should affirm the Fourteenth Circuit and hold that the admission of Hemlock's notebook was proper because—under the totality of the circumstances—a reasonable person would have felt free to remain

inside his home, and Hemlock therefore was not seized but voluntarily exited to submit to a lawful arrest.

II. Ristroph did not violate the Fourth Amendment by searching the cardboard box because Reiser had apparent authority over the box and specific inquiry into the box's ownership was unnecessary.

The Fourth Amendment's protection against "unreasonable searches" generally prohibits warrantless searches of a person's home. *See* U.S. Const. amend. IV; *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). However, this Court has long held that a warrantless search is valid under the Fourth Amendment when law enforcement officers obtain voluntary consent to search the property from either the individual whose property is searched or a third party with authority over the property. *See United States v. Matlock*, 415 U.S. 164, 165–66, 171 (1974). A third party has authority over a property if they have "mutual use" of the property and "joint access or control for most purposes." *Id.* at 171 n.7. The third party need not have *actual* authority over the property, but only *apparent* authority, which exists as long as the officer reasonably believes the consenting third party has authority. *Rodriguez*, 497 U.S. at 188–89. The government bears the burden of establishing that this standard is met. *Id.* at 181.

The same principles apply to closed containers. During a consent search, law enforcement officers may search closed containers that they reasonably believe the consenting party has authority over. That belief is reasonable when the container is located in a residence over which the consenting party has authority and officers do not have positive knowledge or other facts making it obvious that the consenting party does *not* have authority over the container. Here, Ristroph's search of the cardboard box was valid under the Fourth Amendment because he had no reason to believe that Reiser did not have authority over it. This Court should thus affirm the Fourteenth Circuit.

A. A law enforcement officer may search a container in a shared residence without a warrant based on a co-occupant's consent to search the residence, unless the officer has positive knowledge or obvious reason to believe the co-occupant does not have authority over the container.

In *Illinois v. Rodriguez*, this Court established that a third party who does not have actual authority may provide valid consent to search a property if it is objectively reasonable to believe, based on the facts available to the officer at the time, that the third party has the requisite authority—joint access and mutual use of the property. *See* 497 U.S. at 181, 188. If the belief of authority is *not* reasonable, *only then* is further inquiry required. *Id.* at 188–89.

Hemlock misconstrues *Rodriguez*'s reasonableness standard and contends that because Ristroph was not certain that the cardboard box belonged to Reiser, it was not reasonable to believe Reiser had authority over it without further inquiry. (*See* R. at 38.) But the Fourth Amendment requires only reasonableness—not certainty or clarity. This Court should clarify that law enforcement officers conducting a consent search under apparent authority need not specifically inquire into the actual authority over every closed container that they reasonably believe the consenting party has authority over. Instead, a container search is valid as long as law enforcement officers do not have positive knowledge or obvious reason to believe the consenting party does not have authority over the container. This obviousness standard is consistent with this Court's precedent and avoids imposing an impractical burden on law enforcement officers by requiring them to clarify use of every potentially ambiguous container during a consent search.

1. This Court should adopt the obviousness standard because precedent requires only that law enforcement officers act reasonably, not with certainty.

This Court should reaffirm the principles it established in *Rodriguez* and clarify that when a person with authority consents to the search of a premises, law enforcement officers can search closed containers in the premises as long as doing so is reasonable—meaning officers do

not have positive knowledge or another obvious reason to believe the consenting party does not have authority over the container. *See* Frank J. Stretz, Comment, *An Objective Solution to an Ambiguous Problem: Determining the Ownership of Closed Containers During a Consensual Search*, 61 DePaul L. Rev. 203, 214 (2011) (calling this the "obviousness standard"). This obviousness standard is not only consistent with *Rodriguez*, but also with this Court's container search precedent established in *Florida v. Jimeno*, 500 U.S. 248 (1991).

In *Rodriguez*—the seminal case establishing apparent authority in the context of third-party consent searches—police conducted a warrantless search of the defendant's apartment with consent from the defendant's girlfriend. *Rodriguez*, 497 U.S. at 179–80. In the apartment, police found in plain view drugs and drug paraphernalia belonging to the defendant. *Id.* at 180. The girlfriend had a key to the apartment, but—unbeknownst to police at the time—had moved out of the apartment a month prior. *Id.* at 181. The girlfriend referred to the apartment as "our" apartment, but it was "unclear whether she indicated that she currently lived" there. *Id.* at 179. This Court concluded that although the state did not establish the girlfriend had actual authority over the apartment, the search was valid if the police reasonably believed that she did. *Id.* at 181.

The *Rodriguez* Court established that the inquiry in determining whether a search is valid under apparent authority is an objective standard: whether "the facts available to the officer at the moment" would lead a reasonable person to believe "that the consenting party had authority over the premises." *Id.* at 188. If so, the search is valid under the Fourth Amendment. *Id.* at 189. If not, "then warrantless entry without further inquiry is unlawful unless authority actually exists." *Id.* at 188–89. Resting his majority opinion on the Fourth Amendment's reasonableness requirement, Justice Scalia emphasized that law enforcement officers relying on third-party consent need not be correct, but only reasonable. *See id.* at 185.

The proper inquiry is reasonableness—not certainty—even where a search involves closed containers. In *Florida v. Jimeno*, this Court stated that when a suspect's "consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization." 500 U.S. at 252. This Court explicitly rejected the idea that police must "separately request permission" to search closed containers in a car when a suspect has granted general consent to search the car, stating that "we see no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness." *Id.*

Hemlock seeks a standard far higher than what this Court's precedent imposes and claims that any ambiguity over a container's ownership defeats apparent authority. In doing so, Hemlock misconstrues *Rodriguez* to require not just reasonableness, but certainty. Hemlock relies on the Sixth and D.C. Circuits in this misconstruction, which have stated that "[a]pparent authority does not exist where it is uncertain that the property is in fact subject to mutual use." *See United States v. Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014); *United States v. Waller*, 426 F.3d 838, 846 (6th Cir. 2005) ("If the circumstances make in unclear whether the property about to be searched is subject to mutual use by the person giving consent, then warrantless entry is unlawful without further inquiry." (citation modified)).

But *Rodriguez* does not require clarification or confirmation when a law enforcement officer can reasonably believe, without further inquiry, that the consenting party has authority over the property. *See Rodriguez*, 497 U.S. at 188–89. Nor does it require that a reasonable belief be based in certainty. To the contrary, the *Rodriguez* Court stated in its reasoning that "sufficient probability, *not certainty*, is the touchstone of reasonableness under the Fourth Amendment." *Id.* at 185 (emphasis added) (quoting *Hill v. California*, 401 U.S. 797, 803–04 (1971)).

The Second and Seventh Circuits have adopted a standard consistent with *Rodriguez*: the obviousness standard, which holds that the search of a container within a residence is valid under a third party's apparent authority as long as law enforcement officers do not have positive knowledge or other facts that make it obvious that the consenting party lacks authority over the container. *See United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000) (holding that a consent search of a closed container is valid "if the police do *not* have reliable information that the container is *not* under the authorizer's control"); *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006) (holding that valid consent to search apartment extends to "any items found in the apartment with the exception of those 'obviously' belonging to another person"). Facts making it obvious that a consenting party lacks authority include markings on the container indicating it belongs to someone other than the consenting party, or the container being located in an area clearly under someone else's exclusive control. *See Melgar*, 227 F.3d at 1041; *Peyton*, 745 F.3d at 555 (applying the ambiguity standard, but conceding that the search would fail even under the obviousness standard because the container was located in an area police knew belonged exclusively to defendant). Based on this Court's precedent, it should adopt the obviousness standard for determining whether a consenting party had apparent authority over a container.

2. The obviousness standard strikes the proper balance between Fourth Amendment protections and law enforcement efficiency.

Not only is Hemlock's proposed standard contrary to this Court's precedent, it would impose an impractical burden on law enforcement and render third-party apparent authority nearly obsolete. Law enforcement officers must be able to operate based on the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). "Because many situations

which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Id.* at 176.

If any ambiguity as to a container's ownership defeats apparent authority, then officers must be certain the consenting party has authority over every container prior to searching it. This Court has rejected placing similar affirmative confirmation requirements on law enforcement, because it would "needlessly limit the capacity of the police." *Georgia v. Randolph*, 547 U.S. 103, 122 (2006). For the same reasons this Court held in *Rodriguez* that "it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent," it would be unreasonable to require officers to separately confirm authority over every container in an area they have valid consent to search. *See id.* at 122 (citing *Rodriguez*, 497 U.S. 177).

Requiring officers to obtain clarity in every case of ambiguity means they "could *never* search closed containers within a dwelling . . . without asking the person whose consent is being given *ex ante* about every item they might encounter." *Melgar*, 227 F.3d at 1042; *see also Peyton*, 745 F.3d at 553 (conceding that it is often reasonable to believe, without further inquiry, that co-occupants share closed containers in a shared living area, such as television stand drawers). Even when searching a common living area, for example, officers would be required to clarify authority over every drawer in the television stand and every basket under the coffee table. Because it is conceivable that roommates, family members, or even spouses might have designated spaces in a common area that other people do not use, officers could never truly be certain that the consenting party has authority over a given container.

This Court should not place the "impossible burden" on law enforcement officers of acting with certainty, not just reasonableness. *Melgar*, 227 F.3d at 1042. If ambiguity defeats

apparent authority and officers must confirm authority over every container they encounter, then apparent authority would only exist when an officer receives false or erroneous information. This is a much narrower understanding of apparent authority than what the *Rodriguez* Court intended. *Rodriguez* says nothing about limiting apparent authority to situations where the officer was certain, but ultimately wrong. *See Rodriguez*, 497 U.S. at 188. After all, in *Rodriguez*, it was "unclear" whether the girlfriend currently lived in the apartment, which indicates that the officers could not have been certain, nor did they ask, whether she had authority. *See id.* If apparent authority was even conceivable in *Rodriguez*, it follows that this Court did not intend to limit apparent authority to situations where officers had clarified authority to the point of certainty. The obviousness standard, on the other hand, prohibits unreasonable searches without imposing an undue burden on law enforcement officers, and this Court should thus adopt it.

B. Reiser had apparent authority over the cardboard box because Ristroph reasonably believed that Reiser shared authority of both the stairs and box.

Here, Reiser had apparent authority over the cardboard box because Ristroph reasonably believed Reiser had authority over both the box and the stairs where it was located. Ristroph's search thus did not violate the Fourth Amendment.

1. Reiser had apparent authority over the stairs because she told Ristroph that she shared the loft with Hemlock, and even if Ristroph was mistaken, his belief was reasonable.

As a threshold matter, Reiser had apparent authority over the stairs where the cardboard box was located because she told Ristroph that she used the loft and he reasonably believed her. Even if Reiser told Ristroph that only Hemlock used the loft, Ristroph's search of the lower stairs was reasonable. Finally, Reiser never limited her authority or consent to exclude the stairs.

Under *Rodriguez*, Ristroph's search of the stairs was valid as long as Reiser had actual authority over the stairs or Ristroph reasonably believed that she did. *See Rodriguez*, 497 U.S. at

188. Ristroph stated in his report that Reiser told him "that REISER and HEMLOCK used [the loft] for storage and an office space." (R. at 13.) This statement—accompanied by Ristroph's undisputed understanding that Reiser lived at the cabin[2]—indicated Reiser had authority over both the loft and the stairs, and thus warranted Ristroph to search both areas. While an individual's explicit statement that she has authority over a premises can be negated by surrounding circumstances, *Rodriguez*, 497 U.S. at 188, Ristroph had no reason not to believe Reiser's word that she jointly used the loft in the residence she shared with Hemlock.

Reiser, however, stated in her declaration that she told Ristroph only Hemlock used the loft. (R. at 15.) While it is unclear which version of the facts is correct, Hemlock has never challenged the credibility of Ristroph's report, and Reiser had apparent authority either way. Even if Ristroph misunderstood Reiser, that error would not negate her apparent authority. *See Rodriguez*, 497 U.S. at 185 (emphasizing that officers need not "always be correct," but only "reasonable"). Knowing that Reiser and Hemlock were romantic partners who shared a home, it was reasonable for Ristroph to believe Reiser said both she and Hemlock used the loft. *See United States v. Whitfield*, 939 F.2d 1071, 1074–75 (D.C. Cir. 1991) (explaining that officers may reasonably assume romantic partners have shared authority over living areas in their residence).

And even if Ristroph *did* understand that only Hemlock used the loft, Reiser's apparent authority extended to the lower stairs where the cardboard box was located because a reasonable person could consider the stairs part of the common area. The stairs shared no resemblance to the types of private areas to which courts have found a co-occupant's authority did not extend. *See, e.g.*, *id.* at 1074 (holding that an adult man's mother did not have apparent authority over his

[2] Hemlock does not dispute Reiser's authority over the cabin. At issue is only whether her authority extended to the stairs and the cardboard box. (*See* R. at 36 (COURT: "[T]he real question here is not about Ms. Reiser's authority to consent to the search of the cabin, but really about whether that consent encompassed the box itself.").)

bedroom). The lower stairs were not separated from the common area by any barrier or distance. Instead, they sat in an open area on the first floor of the small cabin, which was connected to—if not actually part of—the living area. (R. at 17.) Ristroph could reasonably consider the lower stairs part of the common area of the home to which Reiser's consent and authority extended.

Further, the "factual and practical considerations of everyday life" do not indicate that romantic partners co-occupying a home live under strict boundaries dictating who may step foot where. *Brinegar*, 338 U.S. at 175. It was reasonable for Ristroph to believe that Reiser's relationship with Hemlock and status as co-occupant gave her authority over the stairs even if she did not regularly use them. *See United States v. Sealey*, 830 F.2d 1028, 1031 (9th Cir. 1987) (wife had authority over garage despite not regularly entering or using it).

Finally, Reiser did not limit the scope of her consent or apparent authority to exclude the stairs. The scope of an individual's consent depends on what a reasonable person would understand from the exchange between the officer and the consenting party. *United States v. Long*, 425 F.3d 482, 486 (7th Cir. 2005). While a search must stay within the boundaries of the consent, Reiser did not—under any version of the facts—"place any explicit limitation on the scope of the search" to exclude the lower stairs. *Jimeno*, 500 U.S. at 251. Reiser did not object as she watched Ristroph approach the stairs and open the cardboard box. (*See* R. at 16.) Even if Reiser excluded the loft itself by telling Ristroph that only Hemlock used it, Ristroph could still reasonably consider Reiser's consent to cover the lower stairs as part of the common area. And by pointing to the bedroom, Reiser was merely answering Ristroph's question about where she slept, not limiting the scope of her consent. (R. at 15.) In no way did Reiser negate Ristroph's reasonable belief that the lower stairs were part of the common area and within the scope of Reiser's consent.

2. Reiser had apparent authority over the cardboard box because Ristroph did not have positive knowledge or other obvious reason to believe otherwise.

Ristroph reasonably believed Reiser had authority over the box given the information he had at the time, and thus Reiser had apparent authority. Although specific ownership of the box was ambiguous, Ristroph had no positive knowledge or other obvious reason to believe that Reiser did not have authority, and thus further inquiry was not necessary under *Rodriguez*.

Once an individual gives consent to search an area over which she has authority, closed container searches are reasonable as long as "the police do *not* have reliable information that the container is *not* under the authorizer's control." *Melgar*, 227 F.3d at 1041. In *United States v. Melgar*, officers searched a hotel room with consent from the woman renting the room. *Id.* at 1039. In the room, officers found a purse containing a counterfeit check and identification belonging to the defendant. *Id.* at 1040. Even though there had been several women in the hotel room to whom the purse could have belonged and the police had not specifically inquired into its ownership, the Seventh Circuit held that the officers' search of the purse was reasonable because they "had no reason to know" the purse did not belong to the consenting party. *Id.* at 1041–42.

In a similar case, *United States v. Snype*, officers arrested the defendant inside his acquaintance's apartment. 441 F.3d at 126. The acquaintance consented to a search of the apartment. *Id.* at 127. In the bedroom where the defendant was arrested, officers found and searched a box and two bags, which all belonged to the defendant and contained incriminating evidence. *Id.* The Second Circuit held that the acquaintance's consent was valid and extended to any items in the apartment that did not "obviously" belong to another person. *Id.* at 136. The fact that the items were found in the same room where the defendant was arrested "hardly equate[d] to [the defendant's] obvious, much less exclusive, ownership of the bags." *Id.*

Here, like the officers in *Melgar* and *Snype*, Ristroph had no positive information or other obvious reason indicating that Reiser did *not* have authority over the box. Reiser did not tell Ristroph that the box was Hemlock's, nor did the box have any markings indicating so. It was sitting in a common area near the front door and the living room, on steps leading to what Ristroph understood to be a shared storage area. Even if Ristroph understood that Hemlock exclusively used the loft, he could reasonably consider the box to be located in the cabin's common area. Thus, Ristroph's search of the box was valid under the obviousness standard.

3. Other factors further demonstrate that Ristroph's search was reasonable.

Several lower courts, including those that do not endorse the obviousness standard, have adopted the Tenth Circuit's *Salinas-Cano* factors to determine whether law enforcement officers reasonably believed a consenting party had authority over a container. *See United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992); *see also, e.g.*, *United States v. Taylor*, 600 F.3d 678, 683 (6th Cir. 2010) (applying factors); *Peyton*, 745 F.3d at 553–54 (same). The non-exhaustive factors include (1) the type of container, (2) the owner's precautions to manifest an expectation of privacy, (3) whether the consenting party initiated the search, and (4) whether the consenting party disclaimed ownership or otherwise showed a lack of interest in the container. *Salinas-Cano*, 959 F.2d at 864.

Ristroph's search was reasonable under the *Salinas-Cano* factors. Although Reiser did not initiate the search, all other factors support her apparent authority over the box. *See id.* (noting that courts are "more forgiving" of searches initiated by the host). First, unmarked and unsealed cardboard boxes are not the type of container that historically demand a high degree of privacy, as opposed to containers such as lock boxes, purses, or suitcases. *See id.* at 865 (listing cardboard boxes as a type of container not associated with privacy expectations); *United States v. Block*,

590 F.2d 535, 541 (4th Cir. 1978) ("[S]uitcases, footlockers, strong boxes, etc. are frequently the objects of [the] highest privacy expectations.").

Second, Hemlock took no precautions to manifest an expectation of privacy in the box. He did not seal the box or tell Reiser not to open it. *See Salinas-Cano*, 959 F.2d at 864 (manifestations of privacy such as locking a container or forbidding a third party from opening it weigh against apparent authority). The box had no external markings indicating it did not belong to Reiser. *See United States v. Basinski*, 226 F.3d 829, 835 (7th Cir. 2000) (courts consider external markings such as names to "gauge the reasonableness of an officer's belief that the third party had use of the container"). The box was sitting out in the open in the first-floor common area. It was not "tucked away" (*contra* R. at 60) in the loft, in a closet, or anywhere indicating an expectation of privacy. *See Peyton*, 745 F.3d at 553–54 (considering box's private location).

Third, Reiser did not disclaim ownership of the box. When a consenting party tells officers that a container belongs to someone else, that obviously negates her apparent authority. *Snype*, 441 F.3d at 136. Conversely, a consenting party's silence supports apparent authority. *White v. United States*, 44 F.2d 724, 726 (10th Cir. 1971) (wife's authority extended to husband's bag, in part, because she "neither objected to the search of the bag nor indicated to [officers] in any way that it was exclusively [her husband's] property"); *United States v. Moran*, 944 F.3d 1, 8–9 (1st Cir. 2019) (explaining that apparent authority existed in other cases because the consenting party did not disclaim ownership). When Ristroph approached and began searching the box, Reiser said nothing. (R. at 16.) This factor weighs toward apparent authority.

The nature of Reiser and Hemlock's relationship further supports Reiser's apparent authority. It is more reasonable to believe that romantic partners who live together have shared authority over spaces and containers than, for example, roommates or house guests. *See*

Whitfield, 939 F.2d at 1074–75 (contrasting reasonable assumptions about a husband and wife's mutual use versus that of a parent and adult child living together); *Waller*, 426 F.3d at 848 (illustrating that a host-guest relationship weighs against the host's apparent authority over the guest's belongings). Ristroph knew that Reiser and Hemlock co-inhabited the cabin as girlfriend and boyfriend. (R. at 12.) Even if he understood that only Hemlock used the loft, it was reasonable for him to believe Reiser had authority over the box.

Ristroph reasonably believed that Reiser had apparent authority over both the stairs and the cardboard box, and his search was valid under both the obviousness standard and the *Salinas-Cano* factors. This Court should affirm the Fourteenth Circuit and hold that Ristroph's search of the cardboard box did not violate the Fourth Amendment.

III. The extrinsic evidence showing specific instances of Copperhead's dishonesty was properly excluded because such evidence is prohibited under Federal Rules of Evidence 608(b) and 806.

Federal Rule of Evidence 608(b) (Rule 608(b)) expressly prohibits admission of extrinsic evidence "to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). Meanwhile, Federal Rule of Evidence 806 (Rule 806) provides that when a hearsay statement is admitted into evidence, "the declarant's credibility may be attacked . . . by any evidence that *would be admissible* for those purposes *if the declarant had testified as a witness*." Fed. R. Evid. 806 (emphasis added). The plain text of these two rules prohibits admission of extrinsic evidence of specific instances of dishonesty regardless of whether the hearsay declarant is available to testify, and no policy concerns justify a different interpretation. This Court should hold that Rules 608(b) and 806 prohibit admission of extrinsic evidence showing specific instances of conduct to impeach an unavailable hearsay declarant's character for truthfulness.

A. The plain text of Rules 608(b) and 806 prohibit the admission of extrinsic evidence to impeach a hearsay declarant, even if the declarant is unavailable.

The district court properly excluded Copperhead's college report and job application, which Hemlock sought to introduce into evidence to attack the credibility of Copperhead's Statement implicating Hemlock in the charged offense. The plain text of Rules 608(b) and 806, together, expressly prohibit admission of extrinsic evidence showing specific instances of a hearsay declarant's prior dishonesty. This holds true even when a declarant, like Copperhead, is unavailable to testify at trial. Rule 608(b) provides no exception—besides criminal convictions under Rule 609—to its disallowance of extrinsic evidence of specific instances of conduct to attack a witness's character for truthfulness. Fed. R. Evid. 608(b). And Rule 806, which governs attacking a hearsay declarant's credibility, only allows for admission of evidence "that *would be* admissible" if the hearsay declarant testified as a witness. Fed. R. Evid. 806 (emphasis added). Because extrinsic evidence of specific instances of conduct *would not* be admissible under Rule 608(b) if the declarant testified as a witness, it is not admissible under Rule 806, either.

While most circuits have not had the opportunity to address this issue, the Third and D.C. Circuits have concluded that "the ban on extrinsic evidence of misconduct applies in the context of hearsay declarants, even when those declarants are unavailable to testify at trial." *See United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000); *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997) (explaining that although Rule 806 provides for impeachment of a hearsay declarant, Rule 608(b) plainly prohibits doing so with extrinsic evidence). In *Saada*, the district court admitted, under the excited utterance hearsay exception, a then-deceased declarant's statement that called into question the defendant's culpability. *Saada*, 212 F.3d at 218. The district court also admitted extrinsic evidence of the declarant's prior unethical conduct to attack the declarant's credibility. *Id.* at 219. The Third Circuit concluded that the district court erred in

admitting the extrinsic evidence, resting its holding on "the plain—albeit imperfectly meshed—language of Rules 806 and 608(b)." *Id.* at 221.

District courts across the country faced with the intersection of Rules 608(b) and 806 have also followed the rules' plain language, stating that Rule 806 does not allow parties "to end-run around Rule 608(b), simply because [a hearsay declarant] is absent." *United States v. Andrade*, No. 20-cr-00249-RS-1, 2025 WL 670456, at *4–5 (N.D. Cal. Mar. 3, 2025) (excluding extrinsic impeachment evidence, noting that "previous orders from this district have endorsed the approach of the Third and the [D.C.] Circuits," and collecting cases); *see also, e.g.*, *Murphy v. City of Tulsa*, No. 15–CV–528, 2018 WL 522095, at *4 (N.D. Okla. Jan. 23, 2018) ("The unavailability of a witness does not warrant a departure from the applicable Federal Rules of Evidence." (citing *Saada*, 212 F.3d at 220–21)).

Only one circuit has reached a different conclusion. In *United States v. Friedman*, the Second Circuit stated in dicta that "when the declarant has not testified and there has by definition been no-cross examination," Rule 806 "applies" and allows admission of specific instances of the hearsay declarant's conduct to attack the declarant's credibility. 854 F.2d 535, 570 n.8 (2d Cir. 1988). The court seemed to rest that conclusion on the implication that when a hearsay declarant is unavailable, "resort[ing] to extrinsic evidence may be the only means of presenting such evidence to the jury." *Id.* But that policy implication should not convince this Court to abandon the Rules' plain text.

B. Policy considerations weigh in favor of excluding extrinsic evidence under Rules 608(b) and 806 because litigants have alternative ways to impeach hearsay declarants and admitting such evidence would undermine Rule 608(b)'s purpose.

As the Third Circuit highlighted in *Saada*, the "unavailability of *one* form of impeachment, under a specific set of circumstances, does not justify overriding the plain

language of the Rules of Evidence." *Saada*, 212 F.3d at 221 (emphasis added). Nor do the potential drawbacks of not admitting extrinsic evidence to impeach a hearsay declarant "outweigh the reason for Rule 608(b)'s ban on extrinsic evidence." *Id.* at 222. Like the Third Circuit, this Court should be unpersuaded by the concern that when a declarant is unavailable to testify, Rule 608(b)'s ban "prevents using [extrinsic] evidence of prior misconduct as a form of impeachment." *See id.* at 221–22 ("We are unpersuaded by this rationale.").

Rule 608(b) does not deny litigants of every means of attacking a hearsay declarant's credibility, even when the declarant is unavailable to testify. A declarant's credibility may be "impeached with opinion and reputation evidence under Rule 608(a), evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613." *Id.* at 221. Moreover, Rule 608(b) does not prevent attorneys from questioning the witness testifying to the hearsay statement about the declarant's past dishonesty; they just cannot prove specific instances with extrinsic evidence. *See id.*; *White*, 116 F.3d at 920 (explaining that attorney could have asked witness about declarant's past misconduct without referencing extrinsic evidence of those acts). While this may be less impactful if the testifying witness does not have knowledge of the declarant's past dishonesty, it is not fruitless. After all, impeachment with specific acts "is always something of a charade; the asking of the question, rather than the witness'[s] answer, is typically the real point of the exercise." 30B *Wright & Miller's Federal Practice & Procedure* § 7054 (2025 ed.) [hereinafter *Wright & Miller's*].

Not only are there alternative means of attacking a hearsay declarant's credibility, the dangers justifying Rule 608(b)'s ban on extrinsic evidence are not overridden by the concern of potential prejudice to a litigant harmed by the hearsay statement. Rule 608(b) exists "to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury." *Saada*, 212

F.3d at 222. Neither Hemlock nor the Second Circuit identified any reason why a declarant's unavailability mitigates these dangers.

The district court was correct to exclude the extrinsic evidence of Copperhead's past dishonesty. If Copperhead had been available to testify at trial, this evidence would not have been admissible under Rule 608(b), and thus it is not admissible under Rule 806. Under Rule 806, Hemlock's trial lawyer could have asked Kolber about Copperhead's past instances of dishonesty. Although Kolber was likely not aware of those instances, the questions alone would have prompted the jury to question Copperhead's credibility. *See Wright & Miller's*, *supra*. Furthermore, under the circumstances of this case, Hemlock's concern that without the extrinsic evidence, the jury would be "forced to accept the credibility" of Copperhead's Statement "at face value" is unwarranted. (*See* R. at 49.) Copperhead's Statement was entirely self-exculpatory, giving jurors compelling reason to question its truth as it is. Hemlock's concern that without introducing extrinsic evidence, Copperhead's credibility was intact is unfounded. This Court should thus affirm the Fourteenth Circuit and hold that extrinsic evidence of Copperhead's specific instances of dishonesty was inadmissible under Rules 608(b) and 806.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,
/s/ Team T20
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