

No. 25-7373

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IN THE

**Supreme Court of the United States**

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**ATTICUS HEMLOCK,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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Team 14R  
Counsel for Respondent

## QUESTIONS PRESENTED

- I. Whether, under *Payton v. New York*, the Fourth Amendment is violated when law enforcement officers, who remain outside, command a suspect inside the home to step outside and arrest the suspect outside the home without a warrant.
- II. Whether the Fourth Amendment is violated when law enforcement conducts a warrantless search of a closed container located in a shared residence after obtaining a co-occupant's consent to search the residence, without specifically inquiring into ownership of the container.
- III. Whether, under Federal Rules of Evidence 806 and 608(b), extrinsic evidence of specific instances of conduct of a hearsay declarant may be admitted to impeach the declarant's character for truthfulness when the declarant is unavailable to testify at trial.

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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. 51–61.)

### STATUTORY AND CONSTITUTIONAL PROVISIONS

This case is on appeal from a verdict under 18 U.S.C. §§ 1201(a)(5) and 1201(d). This appeal concerns alleged violations of the Defendant’s Fourth Amendment privilege against unreasonable searches and seizures. U.S. Const. amend IV. Additionally, this case involves the Federal Rules of Evidence 608(b) and 806.

### STATEMENT OF THE CASE

**Background.** In February 2024, the United States Department of Tourism announced an initiative to turn underutilized farmland into “large-scale garden attractions.” (R. 3.) Boerum Village, Boerum was one of the targeted locations, and a “kickoff event” was set for April 8–12, headed by the Secretary for Rural Development, Jodie Wildrose. (R. 4.) Atticus Hemlock was one of Wildrose’s former college students and strongly disliked her. (R. 5.) Hemlock believed the Department’s program was a sham, and Wildrose was colluding with real estate developers to profit off Boerum’s farmers. *Id.* Enraged, Hemlock hatched a plan, along with his friend, Iris Copperhead, to kidnap Wildrose and threaten her until she agreed to leave Boerum. *Id.*

**Police are notified of suspicious behavior.** In March, Boerum Village Police received calls from local businesses detailing suspicious activity. (R. 6–8.) A local barista informed the police that a man and woman had spent two days excitedly discussing “nabbing” or “hiding Jodie.” (R. 8.) A cashier at a local store stated that, on March 30, a man and woman purchased “a pack of zip ties, two ski masks, a six-inch folding knife, black trash bags, and bear spray” and paid in cash. (R. 6.)

**Hemlock is arrested.** Believing the tips were related and concerned a federal official, Boerum Police alerted the FBI. (R. 52.) Around 4:00 p.m. on April 2, Special Agents (“agent(s)”) Herman and Simonson arrived at Hemlock’s home—a 750-square-foot cabin in the woods near a state park. (R. 20, 28.) Hemlock had lived there with his girlfriend, Fiona Reiser, for eleven months. (R. 15, 28.) The agents had no arrest warrant as they only intended to question Hemlock. (R. 20–21.) Upon their arrival, Hemlock’s front door was open, but the screen door was closed. (R. 21, 29–30.) Rather than a full uniform, the agents wore khakis, black polos, and duty belts. (R. 25, 29.) After Agent Simonson knocked on the doorframe three times, the agents stepped a few feet back. (R. 21.) Hemlock approached and stood behind the screen door. (R. 11, 21.) Agent Simonson said, “Hello there. How are you?” and asked Hemlock to come outside to answer a few questions. (R. 11, 22.) He refused. *Id.* Agent Herman noticed two bottles labeled “Chloroform” on the counter behind Hemlock. (R. 22.) When the agents inquired about the bottles, Hemlock blocked their view. *Id.* Hemlock then asked if the visit “ha[d] to do with Jodie?,” though the agents had not mentioned her. (R.11, 22.) The agents returned to their vehicle and determined there was probable cause to arrest Hemlock. (R. 22.) Hemlock remained at his screen door, “glaring at” the agents. (R. 12.) The two agents called Agent Ristroph for back-up and reapproached to the home. (R. 23.)

The agents walked towards Hemlock’s door with their hands resting on their holsters and exclaimed, “Get outside right now!” (R. 12, 23, 26.) Both agents stood feet away from the door and were physically smaller than Hemlock. (R. 29.) Hemlock exited and the agents arrested him outside. (R. 23.) Agent Herman then searched Hemlock, finding a spiral notebook in his pocket. *Id.* The notebook was open to a journal entry, dated April 1, 2024. (R. 5.) The entry explained Hemlock’s anger at Wildrose and contained a detailed account of his plan to kidnap her using chloroform. *Id.* The entry explicitly stated that Copperhead was in on the plan, but Reiser “ha[d] no idea.” *Id.*

**The home is searched.** Agent Ristroph arrived and remained at the home until Reiser, Hemlock's girlfriend, came home. (R. 15.) He knocked, informed Reiser of Hemlock's arrest, and asked "if he could look around the cabin" as part of his investigation. (R. 13, 15.) Reiser let the agent inside. (R. 13.) He asked Reiser "what was on the second floor." *Id.* Accounts vary as to Reiser's response: Agent Ristroph testified that both Reiser and Hemlock used the second floor for office space and storage, while Reiser's declaration stated that only Hemlock used the space. (R. 13, 15.) Agent Ristroph confined his search to the first floor. (R. 13.) While searching the living room, Agent Ristroph saw an unmarked, unsealed cardboard box on the bottom stairs. *Id.* He opened the box and found "1 50-feet [sic] long length of rope, 2 black ski masks, 1 pair of green gloves, 48 black zip ties, 1 folding knife with 6-inch blade, 1 roll of duct tape, and 2 bottles of chloroform." *Id.* Reiser denied knowledge of the box's contents. (R. 13, 15.)

**Copperhead's overheard statement.** Unbeknownst to the FBI, Iris Copperhead, Hemlock's co-conspirator, had been walking to Hemlock's cabin around 4:00 p.m. and witnessed his arrest. (R. 43.) Panicked, she ran into the surrounding park, where she "came bursting out of the woods onto the path" of Theodore Kolber. (R. 42.) Copperhead was distressed, crying, covered in scratches, and screamed, "I can't believe I saw him get arrested. It's all his fault. It was all Atticus' idea—NOT MINE!" (R. 43.) She then fled. *Id.* Copperhead died that night from an aortic rupture. (R. 46.) When Kolber saw Copperhead's mugshot in the news the next morning, he called the authorities. (R. 45.)

**Procedural History.** At trial, multiple evidentiary disputes arose. First, Hemlock moved to suppress the journal, arguing it was the result of an illegal arrest because officers had coerced him to come outside his home. (R. 27.) Second, Hemlock moved to suppress the contents of the box, asserting that Reiser did not have the authority to consent to the agent's search. (R. 31–32.) The District Court of Boerum denied both motions and admitted the journal and contents of the box. (R. 31, 38.)

Additionally, Kolber testified about his interaction with Copperhead. (R.41–46.) Her outburst was admitted as an excited utterance under Federal Rule of Evidence 803(2). (R. 43–44.) To undermine the credibility of Copperhead’s statement, Hemlock moved to admit evidence of specific instances of her dishonesty—documents showing she cheated in college and lied on a job application. (R. 9–10, 47–49.) The Government objected, arguing Rule 608(b) prohibited the admission of extrinsic evidence. (R. 49–50.) The District Court sustained the objection, barring the documents. (R. 50). Hemlock was ultimately convicted of 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 1201(d) and sentenced to ten years in prison. (R. 54.)

The United States Court of Appeals for the Fourteenth Circuit affirmed the District Court’s rulings on all three evidentiary issues. Hemlock’s petition for certiorari to this Court was granted on December 2, 2025. (R. 62.)

#### **SUMMARY OF THE ARGUMENT**

The lower court properly admitted Hemlock’s notebook into evidence because his arrest was lawful. This Court should hold that officers must physically enter a home and arrest an individual inside to violate the Fourth Amendment under *Payton v. New York*. This straightforward rule follows directly from Fourth Amendment caselaw and prioritizes safety, judicial efficiency, and the sanctity of the home. But even if this Court adopts the constructive entry doctrine, which forbids officers from coercing a suspect to exit his home, the agents’ conduct towards Hemlock was still constitutional because the agents did not coerce Hemlock’s exit; they merely requested that he come outside. Under either theory, Hemlock’s notebook should not be suppressed.

Special Agent Ristroph’s search of Hemlock’s box was permitted under the Fourth Amendment’s apparent authority doctrine. Reiser gave the agent general consent to search her and Hemlock’s shared cabin. The agent searched only the common spaces, finding kidnapping supplies

in an unlabeled box on the bottom stairs. As Hemlock's intimate partner and cohabitant, it was reasonable for the agent to believe that Reiser had authority to consent to a search. Requiring officers to obtain affirmative consent to search every ambiguous closed container in common areas would impose an impractical burden on officers. Thus, the box's contents should not be suppressed.

The extrinsic evidence of Copperfield's dishonesty was properly excluded at trial. Federal Rule of Evidence 806 dictates that hearsay declarants are subject to the same evidence constraints as witnesses. Rule 608(b) prohibits parties from admitting extrinsic evidence to attack a witness's truthfulness. The plain language of the Rules is clear and contains no exception for absent declarants like Copperfield. Hemlock's inability to cross-examine Copperfield does not override the text and purpose of Rule 608(b)'s prohibition. The extrinsic documents should be excluded from evidence.

#### ARGUMENT

**I. The agents lawfully arrested Hemlock under the Fourth Amendment because *Payton v. New York* forecloses the constructive entry doctrine by permitting warrantless arrests when officers command a suspect to exit a home and conduct the arrest outside.**

Hemlock's arrest did not violate the Fourth Amendment because when a suspect follows an officer's command to exit their home and is subsequently arrested, the arrest is legal under *Payton v. New York*, and even if the court adopts the "constructive entry" doctrine, the agents' actions were not coercive. Special Agents Simonson and Herman approached Hemlock's home to investigate an alleged plan to kidnap Jodie Wildrose. (R. 21.) The agents knocked on Hemlock's screen door and asked him to exit the home. (R. 11.) Ultimately, Hemlock exited, and the agents arrested him. (R. 12.) During Agent Herman's search of Hemlock's pocket incident to arrest, he found an incriminating journal entry. (R. 23.) The Fourteenth Circuit denied Hemlock's motion to suppress the notebook, holding the arrest was lawful. (R. 31.) This Court should affirm.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

Warrantless arrests of a suspect in a public place are reasonable under the Fourth Amendment. *United States v. Watson*, 423 U.S. 411, 423 (1976). The doorway to one’s home, when open, is considered a public place because “[w]hat a person knowingly exposes to the public” is not subject to Fourth Amendment protection. *United States v. Santana*, 427 U.S. 38, 42 (1976). In *Payton v. New York*, this Court limited the permissible scope of warrantless arrests, holding that officers violate the Fourth Amendment by entering a home to arrest a suspect. 445 U.S. 573, 576 (1980).<sup>1</sup>

Since the *Payton* decision, a circuit split has emerged as to whether a “constructive entry” violates *Payton*’s standard. Strict-*Payton* circuits hold that officers violate the Fourth Amendment only by physically crossing the threshold into a home. See *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987). Meanwhile, constructive entry circuits claim officers violate *Payton* by “engag[ing] in actions to coerce the occupant outside of the home.” *United States v. Allen*, 813 F.3d 76, 81 (2d Cir. 2016). The holding and intention of *Payton* foreclosed the invention of the constructive entry doctrine—this Court drew an explicit line at *physical* entry to the home. *Payton*, 445 U.S. at 590. And even if this Court adopts the constructive entry doctrine, the agents’ conduct here was not sufficiently coercive. Either way, Hemlock’s notebook should not be suppressed.

**A. Supreme Court precedent dictates that officers do not violate the Fourth Amendment by telling a suspect to leave his home and arresting him outside.**

The language of *Payton v. New York* articulates a straightforward rule that officers may not cross the threshold of a home to effectuate a warrantless arrest. 445 U.S. 573. Supreme Court precedent supports this bright-line rule, and concurring circuits thereby promote officer safety, avoid unnecessary litigation, and uphold the sanctity of the home under the Fourth Amendment.

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<sup>1</sup> Though outside the scope of this issue, in *Payton v. New York* this Court also noted that officers may enter home if the suspect consents or if there is an exigent circumstance.

**1. Fourth Amendment caselaw directly supports the legality of Hemlock’s arrest outside his home.**

Under the Fourth Amendment, an arrest occurs when an individual actually and involuntarily submits to an officer’s assertion of authority. *California v. Hodari*, 499 U.S. 621, 626 (1991). Warrantless arrests are reasonable, and thus permissible, when effectuated in the open doorway of one’s home under *United States v. Santana*, but following *Payton*, officers may not cross into a home to conduct an arrest. *Santana*, 427 U.S. 38 (1976); *Payton*, 445 U.S. 573 (1980). These leading Fourth Amendment cases support the application of a strict-*Payton* rule.

*Payton*’s language is clear: a warrantless arrest violates the Fourth Amendment only if officers physically enter a home to execute the arrest. 445 U.S. 573. *Payton* explains that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *Id.* at 586. That “the zone of privacy” is chiefly defined “by the unambiguous *physical dimensions* of an individual’s home.” *Id.* at 589 (emphasis added). That the “*threshold* may not reasonably be *crossed*.” *Id.* at 590 (emphasis added). And that the “Fourth Amendment has drawn a *firm line at the entrance* to the house.” *Id.* (emphasis added). These statements are unambiguous. Officers must physically enter a home for a warrantless arrest to violate the Fourth Amendment.

Several circuit courts likewise interpret *Payton* to prohibit officers’ “*crossing of thresholds* without a warrant.” *People v. Gillam*, 734 N.W.2d 585, 590 (Mich. 2007). The Seventh Circuit explains that “nothing in *Payton* [] prohibits a person from surrendering to police at his doorway.” *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991). The Eleventh Circuit similarly held that an arrest is constitutional when an officer goes to a suspect’s home, tells him to exit, and arrests him outside. *Knight v. Jacobson*, 300 F.3d 1272 (11th Cir. 2002). The *Knight* court reasoned that “*Payton* keeps the officer’s body outside the threshold, not his voice.” *Id.* at 1277. The Fifth Circuit agrees: in *United States v. Carrion*, police accompanied housekeeping to a defendant’s hotel room. 809 F.2d 1120, 1123 (5th Cir. 1987). Housekeeping knocked, and when the defendant answered,

officers drew their weapons and ordered him to raise his hands. *Id.* The court held the officers did not violate *Payton* because they did not physically enter the defendant’s room. *Id.* at 1128; *see also Gaddis v. DeMattei*, 30 F.4th 625, 632 (7th Cir. 2022) (allowing officers to tell a defendant he could be charged with resisting arrest if he failed to come outside because the defendant “presented no evidence that he was not free to close the door”); *McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984) (holding that officers did not violate the Fourth Amendment because they “did not cross the threshold” but noting that it would have been a different case had the officers “come in and taken him”). These strict-*Payton* circuits adhere to a clear rule directly grounded in *Payton*’s “literal holding that non-exigent warrantless arrests *inside the home* violate the Fourth Amendment.” *Gaddis*, 30 F.4th at 633.

This Court’s principal Fourth Amendment decisions in *Hodari* and *Santana* also support a strict-*Payton* interpretation. In *Hodari*, this Court held that a suspect is not under arrest until they submit to an officer’s assertion of authority or the officer uses physical force. 499 U.S. 621, 626 (1991). But constructive entry circuits allow for a seizure to occur before an individual submits to authority, while a choice remains “between terminating or continuing the encounter with the law enforcement officers.” *United States v. Johnson*, 626 F.2d 753, 755 (9th Cir. 1980). In the Eighth Circuit, for instance, constructive entry “occurs when officers gain visual or physical access to a [home] after an occupant opens the door . . . in response to a demand.” *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997). However sensible that might seem, this interpretation does not require an occupant to exit the home. It implies that an occupant who opens their front door, allowing police to see inside, is under arrest *even if* they then close the door on the police, refusing to submit to authority. This is contrary to this Court’s holding in *Hodari*—there is no Fourth Amendment seizure if there is no “submission to the assertion of authority.” *Hodari*, 499 U.S. at 626.

The policy behind constructive entry also frustrates this Court’s directive in *Santana*, where

this Court held that the privacy interests applicable to homes are not implicated when a suspect stands at their doorway because the suspect voluntarily exposes themselves to the public. 427 U.S. 38, 42 (1976). Circuits that follow the constructive entry doctrine, which expands privacy protections *beyond* the home, must simultaneously limit protections to the home itself by permitting doorway arrests under *Santana*. See, e.g., *Fredericks v. Wright*, No. 94-35494, 1995 WL 23651, at \*2 (9th Cir. Jan. 20, 1995).<sup>2</sup> Circuits that permit doorway arrests but prohibit constructive entries cite the same policy interest: protecting the home’s privacy. But they’d seem to argue that an arrest in the doorway of one’s home is less invasive than an arrest on the sidewalk outside one’s home. This tension demonstrates that *Payton*, *Santana*, and *Hodari* together, forecloses the constructive entry doctrine. To hold otherwise would introduce inconsistency into the law and controvert precedent.

**2. A straightforward rule that prohibits only officers’ physical entry into the home furthers Fourth Amendment interests of protecting the sanctity of the home and promoting safe and effective law enforcement.**

In determining the reasonableness of a seizure under the Fourth Amendment, courts balance individual privacy interests against society’s interest in safe and effective law enforcement. See *Graham v. Connor*, 490 U.S. 386, 396 (1989). A strict-*Payton* approach properly balances those interests. Proponents of constructive entry argue that strict-*Payton* circuits undermine the sanctity of the home. In doing so, they ignore that more significant privacy interests are implicated during an in-home arrest than a public one. *Payton v. New York*, 445 U.S. 573, 587 (1980). *Payton* demonstrates the distinct privacy threats of in-home arrests.

*Payton* consolidated two cases in which officers only found contraband because they crossed the threshold of a home to arrest, or attempt to arrest, a suspect. 445 U.S. 573. In one case, police knocked, and the suspect’s three-year-old son opened the door. *Id.* at 583. Officers entered the home, arrested the suspect in his bed, and executed a search incident to arrest, finding contraband in the

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<sup>2</sup> This Ninth Circuit case even cites strict-*Payton* cases to showcase the permissibility of doorway arrests, including *United States v. Berkowitz* 927 F.2d 1376 (7th Cir. 1991) and *United States v. Carrion*, 809 F.2d 1120 (5th Cir. 1987).

bedside table drawers. *Id.* at 578. In the second case, officers entered a suspect’s home to arrest him, but he was not present. *Id.* at 576–77. The officers saw a shell casing in plain view, which was used to secure a conviction. *Id.* In both cases, the officers found contraband due to their physical entry into a home, and the court’s impetus was to protect the home’s sanctity and privacy. *Id.* at 585.

Distinct privacy interests arise in the factual scenarios of *Payton*’s in-home arrests compared to constructive entry cases. In *Payton*, both the contraband in the bedside table and the shell casing would not have been discovered had officers remained outside the residences. *See also McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984) (holding that “the privacy of [the defendant’s] home was not invaded” when officers did not enter the residence). Had the agents in this case entered Hemlock’s residence, they could have seized the chloroform under the plain view doctrine. Had they arrested Hemlock at the threshold of his home, they could’ve searched drawers next to the door under the search incident to arrest exception. But because Hemlock was not arrested until after he left his home, the agents were limited to searching his person—the same privacy interest implicated in a public arrest and permitted by this Court in *Watson*. 423 U.S. 411, 423 (1976) (holding that warrantless arrests in public do not violate the Fourth Amendment).

The privacy implications from public arrests under *Watson*, doorway arrests under *Santana*, and constructive entry arrests are identical: officers may conduct searches of the person incident to arrest, but not a home. Conversely, arrests that violate *Payton*’s rule gives officers the opportunity to search inside a home, undermining unique privacy interests.

In addition to properly balancing individual privacy interests, a strict-*Payton* approach ensures officer and civilian safety, while the constructive entry doctrine prevents officers from adequately protecting themselves. The Sixth Circuit’s constructive entry cases focus on officers’ weapons. *See United States v. Saari*, 272 F.3d 804, 806 (6th Cir. 2001) (holding a constructive entry occurred when four officers approached a home with a gun drawn); *but see United States v. Thomas*,

430 F.3d 274 (6th Cir. 2005) (finding no constructive entry when five officers surrounded the suspect's home but did not draw a gun). The Tenth Circuit similarly emphasizes officers' "show of force" in determining what conduct is coercive. *United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989). By focusing on officers' weapons, constructive entry circuits disincentivize officers from protecting people in dangerous encounters, even though the court acknowledges that "officers may take reasonable security precautions in doing their jobs." *See Thomas*, 430 F.3d at 280.

The ramifications to officer safety are further illustrated by the facts in *United States v. Allen*, 813 F.3d 76 (2d Cir. 2016). There, officers told a suspect that he was under arrest while inside his home. *Id.* at 79. The suspect calmly submitted to the police, so no coercive actions were taken to effectuate his arrest. *Id.* In a constructive entry circuit, this would likely be a lawful arrest. Yet, had the suspect resisted, officers may have drawn their weapons, yelled, or called for backup, and the suspect would have an argument for constructive entry. This result is nonsensical: suspects who resist are more likely to receive the benefit of evidence suppression, while amenable suspects are not. The constructive entry doctrine undermines safe and effective law enforcement.

The strict-*Payton* rule strikes a meaningful balance between privacy and safety. This Court should adopt the bright-line rule, focus on the simple issue of whether an officer physically crossed the threshold of a home, and hold that Hemlock's arrest in this case did not violate the Fourth Amendment because the agents did not enter his home.

**B. The constructive entry doctrine is conceptually muddled and has been inconsistently applied across circuits, confusing law enforcement and courts.**

Circuits adopting a constructive entry theory created a complex doctrine that cannot "provide[] adequate guidance to law enforcement officers or to the judiciary." *Id.* These circuits err "in focusing on *arrests* without a warrant when the concern expressed in *Payton* was the *crossing of thresholds* without a warrant." *People v. Gillam*, 734 N.W.2d 585, 590 (Mich. 2007). By rejecting *Payton's* bright-line rule, these circuits, including the Sixth, Ninth, and Tenth, invented a

“conceptually muddled” doctrine that stifles effective law enforcement and confuses courts. *Allen*, 813 F.3d at 88. This Court should reject that approach.

The constructive entry doctrine is a legal fiction “beset with practical problems,” illustrated by the different variations and applications of the doctrine amongst and within concurring circuits. *Id.* Generally, constructive entry circuits contend that officers functionally enter a home and violate the Fourth Amendment by coercing a suspect to step outside. For example, in *United States v. Morgan*, nine officers surrounded a suspect’s home in the dark, strategically positioned their cars so the suspect could not leave, flooded the home with spotlights, and summoned the defendant from the house through a “blaring” bullhorn. 743 F.2d 1158, 1161 (6th Cir. 1984). The court held that this was an illegal constructive entry because officers “utilized coercive tactics and physical restraints which induced [the defendant’s] presence at the door.” *Id.* at 1168. But when factual scenarios are not as obviously coercive, “determining whether a seizure occurred becomes problematic, and the outcome becomes more unpredictable.” Steven B. Dow, “*Step Outside, Please*”: *Warrantless Doorway Arrests and the Problem of Constructive Entry*, 45 *New Eng. L. Rev.* 7, 33 (2010).

Throughout constructive entry circuits, the application of the doctrine differs substantially, especially with respect to courts’ interpretations of coercive behavior. Sixth Circuit courts focus on four factors in determining coercion: “(1) drawn weapons; (2) raised voices; (3) coercive demands; or (4) a large number of officers in plain sight.” *United States v. Grayer*, 232 F. App’x 446, 450 (6th Cir. 2007). The Tenth Circuit measures coercion by a “show of force,” considering officers’ drawn not only weapons like the Sixth Circuit, but also whether officers surrounded the home or blocked exits. *United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989).

The Ninth Circuit emphasizes officer misrepresentation, a factor not considered by the Sixth or Tenth Circuits, arguing that if police misidentify themselves, the suspect did not voluntarily open the door to their home, but was coerced to do so. For instance, in *United States v. Johnson*, police

knocked and identified themselves with fictitious names before the suspect opened the door. 626 F.2d 753, 754 (9th Cir. 1980). The court held that because of the officer's misrepresentation, the suspect's "initial exposure to the view and the physical control of the agents was not consensual" and the arrest was unlawful. *Id.* at 757. Not only does the Ninth Circuit's focus seem disconnected from other circuits, but it is also contrary to well-established Fourth Amendment principles: "in other contexts, courts have considered the police tactic of misinformation and have found no constitutional violation." 3 Wayne R. LaFare, *Search & Seizure: A Treatise On The Fourth Amendment* § 6.1(e) (6th ed. 2025). It is precisely this kind of confusion that counsels against adopting the constructive entry doctrine.

The application of constructive entry is also inconsistent within circuits. For example, in the Tenth Circuit, coercion is primarily identified through a "show of force," as in *Maez*, where a SWAT team and ten officers surrounded a suspect's home with rifles and loudspeakers. 872 F.2d at 1446–47, 1451. But that court also found constructive entry in *United States v. Flowers*, where none of the typical coercion factors were present: officers arrived at the suspect's door at night and told him to let them in. 336 F.3d 1222 (10th Cir. 2003). There was no show of force. Had an officer in the Tenth circuit based his understanding of constructive entry on *Maez*, decided over ten years earlier, the officer in *Flowers* would likely be surprised to learn that her actions were coercive. This confused application of the constructive entry doctrine reinforces the strict-*Payton* approach.

These cases suggest that there is "no one determinative factor" in invoking the constructive entry doctrine, and "there is no consensus among the courts on how much weight to place on the various existing factors." Steven B. Dow, "*Step Outside, Please*": *Warrantless Doorway Arrests and the Problem of Constructive Entry*, 45 *New Eng. L. Rev.* 7, 34–35 (2010). Adhering instead to *Payton*'s bright-line rule allows officers to make decisions quickly and avoids "encumber[ing] criminal prosecutions with endless litigation." *United States v. Watson*, 423 U.S. 411, 423 (1976).

**C. Even if this Court adopts the constructive entry doctrine, Hemlock's arrest was legal because the agents did not coerce him to leave his home.**

This Court should not adopt the constructive entry doctrine, but even if it does, Hemlock's arrest was permissible under the Fourth Amendment because the agents' conduct was not coercive. Around 4:00 p.m. on April 2, Agents Simonson and Herman approached Hemlock's home and loudly knocked three times. (R. 20, 29.) It was a sunny day, and the agents wore typical safety equipment, but didn't "dress[] in full uniform." (R. 29.) The main door was open, and Hemlock appeared behind his screen door. (R. 21.) Seeing him, the agents stepped back from the home and "identified themselves as FBI." (R. 21, 28.) After a brief exchange in which Hemlock refused to leave his home, the agents observed bottles of chloroform inside the cabin and asked Hemlock to come outside to talk. (R. 11.) Hemlock refused again and, without prompting, asked if the agents' "visit had to do with Jodie." (R. 11, 22.) Sensing Hemlock's growing agitation, the agents returned to their car and agreed they had probable cause for an arrest. (R. 12.) Hemlock remained at his screen door, "glaring" at the agents. *Id.* The agents walked back to the home with their hands resting on their holsters and told Hemlock to come outside. (R. 12, 26.) Hemlock exited. (R. 12.) The agents then arrested him and conducted a search incident to arrest, finding Hemlock's journal in his pocket. (R. 23.) The agents never stepped foot into Hemlock's home nor drew their weapons. Because the agent's actions were not coercive, Hemlock's notebook was properly admitted.

Under the constructive entry doctrine, officers violate the Fourth Amendment by "coerc[ing] the occupant outside of the home" before effectuating an arrest. *United States v. Allen*, 813 F.3d 76, 81 (2d Cir. 2016). While circuits significantly vary in the factors used to interpret coercion, most courts analyze typical seizure factors, along with additional factors specific to constructive entry.

Generally, a Fourth Amendment seizure occurs when officers exert their authority such that a "reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 545 (1980). In the context of a home, where an individual naturally does not wish to

leave, “the appropriate inquiry is whether a reasonable person would feel free to decline the officers’ request or otherwise terminate the encounter.” *United States v. Jerez*, 108 F.3d 684, 689 (7th Cir. 1997) (citation omitted). But a seizure occurs only when a person *involuntarily* submits to an officer’s authority. *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008). Thus, the key question is whether the submission to authority was voluntary. When officers’ actions are coercive such that a reasonable person would not feel free to ignore their commands, submission is not voluntary, and a constructive entry occurs. In determining coercion, courts look to several factors, including those articulated in *United States v. Mendenhall* and in constructive-entry-specific cases. 446 U.S. at 554. These factors include the presence of many officers, drawing of weapons, physical touching, threatening language, time of day, voice amplification systems, officer misidentification, surrounding the home, forceful knocking, and blocked exits. *See, e.g., United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985). Under the constructive entry doctrine, an arrest violates the Fourth Amendment when officers use coercive tactics to compel an individual to exit their home. Here, the agents did not show force, misidentify themselves, use threatening language, or prevent Hemlock from terminating the encounter. So, the arrest was lawful, and Hemlock’s notebook is admissible.

Cases where courts have found constructive entry factually differ from this case. In *United States v. Morgan*, the court found a constructive entry when nine officers surrounded the suspect’s home in the dark, flooded it with spotlights, and summoned the defendant with a bullhorn. 743 F.2d 1158, 1161 (6th Cir. 1984). The officers strategically positioned their cars around so the defendant couldn’t leave. *Id.* Similarly, in *United States v. Maez*, ten officers and a SWAT team in tactical gear “surrounded the [defendant’s] trailer” and asked the occupants to exit “over loud speakers” while pointing rifles at the home. 872 F.2d 1444, 1446–47 (10th Cir. 1989). The court held this was a constructive entry because the occupants had no choice but to comply with the officers’ “show of force.” *Id.* at 1451. In *United States v. Johnson*, the court similarly held that a defendant was

illegally arrested when agents misrepresented their identities, causing the defendant to involuntarily open the door where he was “confronted by the agents with their guns drawn.” 626 F.2d 753, 755 (9th Cir. 1980); *see also United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008) (holding there was a constructive entry when officers made multiple phone calls and banged on the defendant’s door and window with flashlights for twenty minutes at 3:00 a.m.); *Al-Azzawy*, 784 F.2d at 893 (finding constructive entry when officers “completely surrounded” the defendant’s trailer with their weapons drawn and ordered the defendant to “drop to his knees” using a bullhorn); *Sharrar v. Felsing*, 128 F.3d 810, 815–16 (3d Cir. 1997) (ruling there was a constructive entry when a large SWAT team created a perimeter around the residence, pointed “shotguns, rifles and submachine guns” at the home, and “threatened to blow [the occupants’] brains out if [they] made one wrong move”) (abrogated on other grounds).

In contrast, the instant case mirrors those in which constructive entry circuits did not find coercion. In *United States v. Thomas*, the presence of five officers in an encounter with one suspect was not coercive. The Sixth Circuit explained that this alone was not a show of force that rendered the officer’s actions coercive. *Id.* Similarly, in *United States v. Von Marschner*, the Ninth Circuit found no constructive entry when officers knocked forcefully and agents “amassed in force upon his doorway and were spilling over into the shadows.” No. 86-5334, 1988 WL 65553, at \*2 (9th Cir. June 16, 1988). The court reasoned that no weapons were drawn, and the defendant was not forced to leave his home. *Id.* And in *United States v. Vaneaton*, officers knocked on a defendant’s door without identifying themselves. 49 F.3d 1423, 1425 (9th Cir. 1995). The court held the arrest was legal because, without “threats or force,” the defendant “voluntarily opened the door.” *Id.* at 1427; *see also United States v. Botero*, 589 F.2d 430 (9th Cir. 1978) (holding there was no constructive entry when agents knocked on the door without identifying themselves, and the defendant opened it).

The agents' arrest of Hemlock does not meet the standard for a constructive entry. The Fourteenth Circuit's dissent cited *United States v. Reeves* to show that Hemlock did not voluntarily open his door because he was "ordered to do so under color of authority." (R. 59.) But *Reeves* is factually distinguishable. In *Reeves*, where officers came to the suspect's home at 3:30 a.m., the court relied on the coercive nature of a nighttime visit from police. 524 F.3d 1161, 1168 (10th Cir. 2008); *see also United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997) ("[P]olice encounters at a person's dwelling in the middle of the night are especially intrusive."). In contrast, the agents knocked on Hemlock's door at 4:00 p.m. on a sunny day. (R. 29.) Further, in *Reeves*, the officers banged on the suspect's door and windows with flashlights for over twenty minutes. 524 F.3d at 1163. Here, the agents knocked just three times in quick succession and "did not slam on the door." (R. 25.) Not only are officers trained to knock loudly on occupants' doors to "easily get the attention of anyone inside," (R. 25), but "there is no rule" that makes it illegal for anyone "to walk up the steps and knock" on a suspect's door, *Jerez*, 108 F.3d at 691 (citation omitted).

Hemlock's arrest is also distinguishable from that in *Johnson*, where the court found constructive entry because officers misrepresented their identities. 626 F.2d 753, 755 (9th Cir. 1980). Like in *Vaneaton*, the agents knocked without misidentifying themselves, so Hemlock's initial arrival at his door was voluntary, not coerced. 49 F.3d 1423, 1427 (9th Cir. 1995); *see also United States v. Botero*, 589 F.2d 430, 431 (9th Cir. 1978). Additionally, the absence of a "large number of officers" supports the voluntariness of this interaction. *See United States v. Grayer*, 232 F. App'x 446, 450 (6th Cir. 2007). In *Thomas*, no constructive entry was found, even though five officers were present. 430 F.3d 274, 280 (6th Cir. 2005). And only two agents were present here, both standing feet away from the door and physically smaller than Hemlock. (R. 29.) And the agents in this case did not surround the home or block the exits as in *Morgan*. 743 F.2d 1158, 1161 (6th Cir. 1984).

The conversation between the agents and Hemlock began on a calm, friendly note, with Agent Simonson asking Hemlock how he was doing. (R. 11.) In contrast, constructive entry cases often begin with a loudspeaker, bullhorn, or threat. *See, e.g., United States v. Maez*, 872 F.2d 1444, 1447 (10th Cir. 1989); *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985). Not only did the agents begin the conversation in a friendly manner, but the agents “never ordered [Hemlock] to come outside or risk repercussions.” (R. 30.) This is similar to *Thomas*, *Vaneaton*, and *Von Marschner*, where the officers simply told the suspect to exit his home, compared to the threatening language in *Sharrar*, where officers “threatened to blow [the occupants’] brains out if [they] made one wrong move.” 128 F.3d 810, 816 (3d Cir. 1997). Although the agent’s tone grew more assertive as the conversation progressed, officers are allowed to speak firmly. *See Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002). Hemlock also contends that the agents’ hands resting on the holsters of their guns created an intimidating encounter. But courts focus on whether the officers drew their weapons or exerted a “show of force,” neither of which occurred here. *See United States v. Von Marschner*, No. 86-5334, 1988 WL 65553, at \*2 (9th Cir. June 16, 1988) (finding no coercion when officers’ guns were not *drawn*); *but see United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985) (finding coercion when officers *drew* guns). Here, the agents touched their holsters to maintain their safety, which was reasonable after seeing Hemlock’s chloroform stash. *See United States v. Thomas*, 430 F.3d 274, 280 (6th Cir. 2005) (explaining that “[o]fficers may take reasonable security precautions,” without creating a coercive environment.).

In the middle of the agents’ interaction with Hemlock, he verbally and physically refused to exit his home. (R. 11.) This shows that Hemlock felt “free to decline the officers’ request.” *United States v. Jerez*, 108 F.3d 684, 689 (7th Cir. 1997) (citation omitted). Similarly, when the agents returned to their cars to discuss their next steps, Hemlock could have chosen “between terminating or continuing the encounter.” *United States v. Johnson*, 626 F.2d 753, 755 (9th Cir. 1980). Hemlock

chose to stand in the officer's plain view, "glaring" at them. (R. 12.) By doing so, Hemlock voluntarily exposed himself to the agents, the public, and his subsequent arrest. *See United States v. Berkowitz*, 927 F.2d 1376, 1399 (7th Cir. 1991) (Coffey, J., concurring) ("[The defendant] could have objected or refused to surrender himself and shut the door . . . he chose not to do so. Instead, [the defendant's] actions are tantamount to a voluntary arrest."). This case, therefore, aligns more closely with *Santana*, in which this Court expressly permitted arrests when an occupant voluntarily comes to their doorway, than with *Payton*, which governs in-home arrests. *United States v. Santana*, 427 U.S. 38, 43 (1976); *Payton v. New York*, 445 U.S. 573 (1980).

For a constructive entry, there must be a combination of coercive factors. None of these factors were present here. Because there was no coercion, Hemlock voluntarily exited his home. When a suspect voluntarily exposes themselves to the public by opening their door or exiting their home, the "*Payton* proscription on warrantless in-home arrests does not apply," and the arrest does not violate the Fourth Amendment. *United States v. Saari*, 272 F.3d 804, 807 (6th Cir. 2001).

The constructive entry doctrine is contrary to the straightforward rule established in *Payton* and long-standing Fourth Amendment caselaw, fails to balance privacy interests with effective and safe law enforcement, and creates an inconsistent doctrine. This Court should find that a warrantless arrest only violates the Fourth Amendment if police physically cross the threshold into a suspect's home. Even if this Court chooses to adopt the constructive entry doctrine, it should still uphold the legality of Hemlock's arrest because the agents did not use coercive tactics, and Hemlock voluntarily exited his home. However one slices it, the notebook is admissible.

**II. Special Agent Ristroph did not violate the Fourth Amendment by searching the unmarked cardboard box containing Hemlock's kidnapping supplies because Reiser had apparent authority to consent to the search.**

This Court should affirm the Fourteenth Circuit's holding that the contents of the box found in Hemlock's home were admissible because Hemlock's girlfriend, Fiona Reiser, had apparent

authority to consent to Special Agent Ristroph’s search of the box. After Hemlock’s arrest, the agent waited at the cabin for Reiser to return so he could obtain consent to search their home. (R. 12.) After Reiser entered the cabin, the agent knocked on the door, informed her of Hemlock’s arrest, and asked if he could “take a look around the residence.” (R. 13.) Reiser opened the door for him to enter. *Id.* According to Reiser, the agent asked her where the cabin’s stairs led, and Reiser answered that they led to “the loft” that Hemlock “used as storage and an office space.” (R. 15.)<sup>3</sup> The agent confined his search to the first-floor common areas—including the bottom portion of the stairs connected to the living room. (R. 13, 15–16.) On one of the bottom stairs, the agent found a cardboard box containing kidnapping supplies. (R. 13, 15.)

The Fourth Amendment did not require the agent to explicitly ask Reiser about the ownership of the box, and it was reasonable for him to believe that Reiser, as Hemlock’s intimate partner and cohabitant, had authority to consent to a search of the box. Accordingly, the contents of the box were properly admitted at trial.

**A. The Fourth Amendment does not require officers to specifically inquire into the ownership of every closed container when conducting warrantless consent searches of shared residences.**

The Fourth Amendment prohibits unreasonable searches, and those “inside a home without a warrant are presumptively unreasonable.” *Payton v. New York*, 445 U.S. 573, 586 (1980). This Court has held that warrantless searches can be reasonable, however, if done with the “voluntary consent” of (1) the defendant, (2) a third party with common authority—that is, mutual access or control—over what is being searched, *United States v. Matlock*, 415 U.S. 164, 171 (1974), or (3) a third party with “apparent authority.” *Illinois v. Rodriguez*, 497 U.S. 177, 187 (1990). So, even if a third party lacks common authority, a search is still permissible under the doctrine of apparent authority if an officer reasonably believes they have such authority. *Id.* at 188. The standard for apparent authority

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<sup>3</sup> Notably, Agent Ristroph’s report differs from Reiser’s, and explains that Reiser replied that she “*and Hemlock used [the loft] for storage and an office space.*” (R. 13) (emphasis added).

is an objective one: if the facts available would “warrant [an officer] of reasonable caution in the belief that the consenting party had authority over the premises,” the search did not violate the Fourth Amendment. *Id.* (cleaned up). This rule is rooted in the principle that officers’ factual determinations need not “always be correct,” so long as they are reasonable. *Id.* at 185.

This Court established in *Matlock* a presumption that co-tenants share control over common spaces, because “it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” *Matlock*, 415 U.S. at 171 n.7. Sometimes, however, it would be unreasonable for an officer to believe there to be such authority—like when a container in a common area is labeled with the name of the non-consenting tenant. *See United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000) (noting that an exterior marking can extinguish apparent authority). Likewise, the “[c]ommon experience of life, clearly a factor in assessing the existence and the reasonableness of privacy expectations, surely teaches all of us that” suitcases, lockers, strong boxes, and the like are the objects of greater privacy expectations than other closed containers. *United States v. Block*, 590 F.2d 535, 541 (4th Cir. 1978). In cases of ambiguity, the ultimate question is whether the officer may rely on the consent of a co-tenant in searching closed containers in common areas. *Melgar*, 227 F.3d at 1041. This question has produced a circuit split.

A majority of circuits have answered in the affirmative, holding that apparent authority persists unless there is a positive indication that the item is “*not* under the authorizer’s control.” *Id.* at 1041; *see* (R. 56) (containing the Fourteenth Circuit’s conclusion that “[o]nce consent is obtained, closed container searches are ‘permissible if the police do not have reliable information that the container is not under the authorizer’s control.’”) (quoting *Melgar*, 227 F.3d at 1041); *United States v. Snype*, 441 F.3d 119, 137 (2d Cir. 2006) (holding a search was reasonable because the defendant “failed to demonstrate that any seized items so obviously belonged exclusively to him that the

officers could not reasonably rely on [the third party's] unrestricted consent to search"); *United States v. Navarro*, 169 F.3d 228, 232 (5th Cir. 1999) (holding that an officer's search of a defendant's luggage was permissible because a third party gave "general consent" to search and there was no "indication" that the luggage was *not* under the control of the third party consentor).

A minority of circuits have held, on the contrary, that ambiguity "evaporates" apparent authority. *See United States v. Purcell*, 526 F.3d 953, 964 (6th Cir. 2008); *see also United States v. Taylor*, 600 F.3d 678, 685 (6th Cir. 2010) (same); *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991) (holding that in an ambiguous situation, law enforcement officers may not proceed with a search based on apparent authority "without making further inquiry" into the item's owner). Notably, many of the principal minority circuit cases include persuasive dissents that agree with the government's position because of the impracticability of requiring officers to obtain renewed consent from a co-tenant for the search of *each* closed container. *See Purcell*, 526 F.3d at 968 (Sutton, J., concurring in part and dissenting in part) (endorsing the rule set forth in *Melgar* that ambiguity alone does not defeat apparent authority); *Taylor*, 600 F.3d at 685 (Kethledge, J., dissenting) ("[C]onsent ought to be effective as to an unsecured container on the premises, absent a clear indication that some other person exclusively controls the container.").

This Court should adopt the majority view. In recognizing that apparent authority is based on the reasonable determination of an officer at the moment the party consents, this view honors this Court's reasonableness standard. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)). The minority rule, on the other hand, "impose[s] an impossible" and impracticable "burden on police"—officers bound by such a standard would be required to clarify a third party's authority, *ex ante*, over every potentially ambiguous item the officers encountered. *United States v. Melgar*, 227 F.3d 1038, 1042 (7th Cir. 2000).

*Rodriguez*'s reasonableness standard is best elaborated by the majority rule, and this Court should accordingly hold that ambiguity alone does not defeat apparent authority. In *Melgar*, the Seventh Circuit held that a third party had apparent authority to consent to the search of a purse located in her hotel room, despite the room being used by multiple women. *Id.* The court relied on the fact that the purse had "no exterior markings" to indicate its ownership, so the police "had no reason to believe that [the third party] could not consent to the search." *Id.* at 1042. The Court explained that there must be a reason to believe the third-party consenter *did not* have authority to consent because "[a] contrary rule would impose an impossible burden on the police." *Id.* at 1042. Namely, it would require officers to obtain consent for each closed container in a home, essentially vitiating the third party's general consent to search the premises. *Id.* Such a standard goes far beyond the constitutional imperative that searches be reasonable, not always correct.

Likewise, in *United States v. Snype*, the Second Circuit held that a third party had apparent authority to consent to the search of an overnight-guest's knapsack and plastic bag because, as a resident of the apartment, the third party's consent was reasonably understood to extend to the search of all "items found in the apartment[,] with the exception of those 'obviously' belonging to another person." 441 F.3d 119, 136 (2d Cir. 2006). In upholding the constitutionality of the search, the *Snype* court reasoned that "[n]o officer ever saw [the defendant] carrying the [bags]," and "[n]o marks on the bags linked them to him." *Id.* The mere discovery of the items in the same room as the defendant "hardly equate[d] to [the defendant's] obvious, much less exclusive, ownership of the bags." *Id.*

In his partial dissent in *United States v. Purcell*, now-Chief Judge Sutton explained that the majority rule best fit with the inquiry articulated in *Matlock* and *Rodriguez*: determining whether there is, in a given situation, enough uncertainty to undermine the officers' reasonable belief that the third-party consenter has authority to consent. 526 F.3d 953, 967 (6th Cir. 2008). This principle cuts in favor of apparent authority extinguishing only when serious ambiguity makes an officer's belief

*unreasonable*. Likewise, the dissenting judge in *United States v. Taylor* observed that the minority rule constituted an unwise “extension” of the reasonableness standard insofar as it “vitiat[e]” the consent given by the third party. 600 F.3d 678, 685. Both dissents cited *Melgar*’s “impossible burden” passage with approval. See *Purcell*, 526 F.3d at 968; *Taylor*, 600 F.3d at 686. Simply put, without some positive indication to the contrary, it is reasonable for an officer to believe a third party has authority to consent to the search of closed containers in common areas of a shared residence.

The minority rule is an unwise and unnecessary extension of this Court’s Fourth Amendment jurisprudence, a fact illustrated by the outcomes of cases applying the rule. In *United States v. Taylor*, officers initially requested consent to enter an apartment to execute Taylor’s arrest. 600 F.3d at 679. They found Taylor on the second floor in his underwear. *Id.* After the arrest, the officers asked a third-party who lived there for permission to search the entire apartment—which she gave. *Id.* The officers entered the bedroom where they had arrested Taylor and found a closet “strewn with men’s clothes, children’s clothes, and toys.” *Id.* In the corner, partially covered with clothes, they found a shoebox, inside of which was stored contraband belonging to Taylor. *Id.* at 679–80. In holding this search unconstitutional, the court found that “a reasonable person would have had substantial doubts about whether the box was subject to mutual use by [the third party],” even though Taylor did not live in the apartment, and the closet contained children’s items. *Id.* at 682. This holding defies reason. It is common sense that those with guest bedrooms sometimes use the closet to store things, including shoeboxes. Moreover, temporary guests, like Taylor, do not typically travel with shoeboxes. The Monday-morning quarterbacking of the *Taylor* majority opinion illustrates why the minority rule is not tenable. The officers’ reliance on the tenant’s consent was reasonable.

Applying the minority rule here, Agent Ristroph would have been required not only to ask Reiser about the ownership of the cardboard box, but also about a picnic basket, a toolbox in the garage, or even a trash can. As the *Taylor* dissent put it—“it should take more than a shoebox to vitiate a

resident’s consent to search the premises.” *Id.* at 685. It should also take more than an old cardboard box. The Fourteenth Circuit agreed. This Court should too.

**B. It was reasonable for Special Agent Ristroph to believe that Reiser had authority to consent to the search because the box was unmarked, unsealed, and sitting in a common area of the small cabin.**

By opening the door in response to the agent’s request to search the cabin, the scope of Reiser’s authorization was simple and broad—she consented to a search of the entire small, 750 square foot cabin. And while Reiser’s statement that she did not know what was kept upstairs may have rendered it unreasonable for the agent to search the loft, he did not do so. Indeed, the agent intentionally constrained his search to only the common areas, including the lower portion of the stairs connected to the living room where the box was found. (R. 15.)

Reiser and Hemlock were co-tenants and intimate partners—a fact that made it reasonable to believe they shared joint access to and control of common areas. *See United States v. Whitfield*, 939 F.2d 1071, 1074–75 (D.C. Cir. 1991) (“[Officers] may assume that a husband and wife mutually use living areas in their residence and have joint access to them so that either may consent to a search.”); *see also United States v. Purcell*, 526f F.3d 953, 967 (6th Cir. 2008) (Sutton, J., concurring in part and dissenting in part) (noting that the existence of an intimate relationship enhanced the reasonableness of believing the third party had authority to consent to the search of closed containers).

Consider whether it would have been reasonable for Reiser to open the box herself. The answer to that question is simple: yes. If one does not wish a cohabitating intimate partner to look in a private box, one should indicate that desire by way of a message, label, or lock on the box, or at minimum by placing the box somewhere clearly reserved for private items. And if it is common sense that the co-tenant has access to and control of closed containers in shared spaces, then it would be reasonable for an officer to believe so too when requesting consent for a search. A can of Pringles

in the pantry or a guitar case in the office do not, merely by virtue of being “closed,” create consent-vitiating-ambiguity as to an intimate partner’s apparent authority. A cardboard box is no different—there is no legitimate expectation of privacy in an unmarked, unsealed box left in a common area. *See United States v. Harrison*, 679 F.2d 942, 947 (D.C. Cir. 1982) (finding that a wife had authority over boxes stored in the basement by her husband because the “area was unlocked and open[,] . . . [t]he boxes were not sealed or taped and were closed only by ‘criss-crossed’ flaps[,] . . . [and] the boxes were [not] marked in any way indicating [the husband’s] ownership.”).

The Fourth Amendment does not require officers to obtain specific consent to search each closed container in a shared space when a third party has already consented to the search of that area, absent some obvious indication that the container is under the exclusive control of the defendant. Here, there was no indication that the cardboard box belonged exclusively to Hemlock. It was located in a common area—the bottom of the stairs connected to the living room—of the small cabin that Hemlock shared with Reiser, his cohabitating intimate partner. It was thus reasonable for the agent to find that Reiser had the authority to consent to the search. Accordingly, this Court should affirm the Fourteenth Circuit’s denial of the motion to suppress the contents of the box.

**III. The text and purpose of Federal Rules of Evidence 608(b) and 806 preclude the admission of extrinsic evidence demonstrating Copperhead’s past dishonesty in order to attack her credibility.**

This Court should affirm the decision of the Fourteenth Circuit and forbid the use of extrinsic evidence to impeach the credibility of an absent hearsay declarant. Applying an absolute prohibition on the use of extrinsic evidence is consistent with the plain text and purpose of Rules 608(b) and 806. This straightforward reading also maintains fairness across different types of witness testimony.

On April 2, a passerby overheard Iris Copperhead’s exclamations incriminating Hemlock as she fled the scene of Hemlock’s arrest. (R. 43.) At trial, Copperhead’s hearsay statement was

admitted as an excited utterance. (R. 43–44, 54.) To undermine her statement’s credibility, Hemlock attempted to admit evidence of specific instances of Copperhead’s dishonesty—a document showing she cheated in college, and another showing she lied on a job application (R. 9–10, 47–49.) The district court excluded the extrinsic documents as required by the plain text of Rules 608(b) and 806 (R. 49–50.) The Fourteenth Circuit affirmed this common-sense reading of the Rules. (R. 57–58). This Court should too.

The text of each Rule alone is unambiguous. Federal Rule of Evidence 806 states that “[w]hen a hearsay statement . . . has been admitted in 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. Witness testimony is cabined by Rule 608(b), which states that “extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack . . . the witness’s character for truthfulness.” Fed. R. Evid. 608(b). The rules together thus provide that extrinsic evidence is just as inadmissible against hearsay declarants as against witnesses. This prohibition persists even when a declarant is unable to testify and cannot be cross-examined.

While Hemlock argues that fairness concerns warrant an exception when a declarant is absent, the majority of courts have followed a textually grounded approach, holding that such use of extrinsic evidence is barred by the plain language of Rules 608(b) and 806. *See United States v. Saada*, 212 F.3d 210 (3d Cir. 2000); *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997). Allowing extrinsic evidence to impeach an absent declarant would be a significant, atextual exception to Rule 608(b)’s restriction and an outright negation of the text and intent of Rule 806.

This Court should affirm the exclusion of the extrinsic documents and correctly interpret Rule 806 to maintain Rule 608(b)’s scope of permissible impeachment, rather than inflating it.

**A. The plain text of Rules 608(b) and 806 maintain an absolute prohibition on using extrinsic evidence to attack the truthfulness of an absent hearsay declarant.**

A straightforward reading of Rules 608(b) and 806, adopted by most circuits, maintains consistency with the plain language of the rules. Both the Third and D.C. Circuits have adopted this approach. *Saada*, 212 F.3d at 221 (3d Cir. 2000) (holding the plain language of the rules dictates that “Rule 806 does not modify Rule 608(b)’s ban on extrinsic evidence of prior bad acts in the context of [unavailable] hearsay declarants”); *White*, 116 F.3d at 920 (D.C. Cir. 1997) (stating that counsel “could not have made reference to any extrinsic proof” to impeach a declarant).

Individually, the Rules are clear. Rule 806 provides that once a hearsay statement is admitted, a declarant’s credibility may only be attacked or supported by evidence that would be admissible “if the declarant had testified as a witness.” Fed. R. Evid. 806. Copperhead is a hearsay declarant per Rule 801(b). So, under Rule 806, Copperhead’s credibility may only be attacked by evidence that would have been admissible had she testified as a witness.

Witness impeachment evidence is constrained by Rule 608(b), which is an “absolute prohibition on extrinsic evidence” to attack a witness’s truthfulness. Fed. R. Evid. 608(b) (Advisory Committee Notes on 2003 Amendments). Had Copperhead testified, any extrinsic evidence of her previous dishonesty would have been barred. Rule 608(b) does go on to provide that, although extrinsic evidence may not be used to prove specific instances of witness conduct, “the court may, on cross-examination, allow them to be inquired into if they are probative of the [witness’s] character for truthfulness or untruthfulness” Fed. R. Evid. 608(b). Here, Copperhead was unable to testify, so Hemlock could not inquire into her specific instances of dishonesty on cross-examination.

Hemlock argues this is unfair; the impossibility of impeachment under Rule 608(b) in the case of an absent hearsay declarant should compel an exception to the bar on extrinsic evidence. But the text of the rules themselves creates a coherent syllogism. A declarant is subject to impeachment

of credibility *only* by evidence that would be admissible if she were a witness. And extrinsic evidence of specific instances of conduct is *absolutely prohibited* to attack a witness's truthfulness.

Moreover, the inclusion of specific exceptions for unavailable declarants and extrinsic evidence in other Rules indicates that the omission of such language in Rules 608(b) and 806 was intentional. It is a standard maxim of statutory interpretation that the express mention of one thing excludes all others (*expressio unius est exclusio alterius*). The inclusion of exceptions for unavailable witnesses and the authorization of extrinsic evidence elsewhere in the Rules of Evidence demonstrate that neither are implicitly lurking behind the text of Rules 608(b) or 806. *Expressio unius* is especially applicable to the Federal Rules of Evidence because they were enacted together after careful judicial and congressional review.<sup>4</sup>

Neither Rule 608(b) nor 806 provides an exception for unavailable declarants, despite the inclusion of such an exception in another Rule. *See* Fed. R. Evid. 804 (allowing an exception to the rule against hearsay "if the declarant is unavailable as a witness," including upon the declarant's death). Evidently, the Advisory Committee and Congress were sensitive to the need for exceptions in certain cases of witness unavailability, but chose to omit such an exception in Rule 608(b).

Similarly, the text of Rule 806 includes no reference to extrinsic evidence whatsoever, unlike Rule 613, which expressly authorizes the use of extrinsic evidence to prove inconsistent prior statements. *See* Fed. R. Evid. 613(b). Again, this shows that Congress was aware of the choice to allow extrinsic evidence and chose not to do so here. Reading an implicit exception into Rule 806 would be a usurpation of Congress's prerogative to legislate. What's more, this Court has previously rejected attempts to read such implicit limitations into the Rules, emphasizing that "[t]his Court

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<sup>4</sup> *See* Edward J. Imwinkelried, "Importing" Restrictions from One Federal Rule of Evidence Provision to Another: *The Limits of Legitimate Contextual Interpretation in the Age of Statutes*, 72 Okla. L. Rev. 231, 278 (2020) (stating that in the context of the Federal Rules, "it is entirely appropriate to apply the interpretive presumption that the drafters' omission is intentional if one provision is silent on a restriction expressly stated in another provision").

cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.” *United States v. Salerno*, 505 U.S. 317, 322 (1992). When a hearsay declarant is unable to testify, extrinsic evidence of specific instances of conduct intended to prove truthfulness are not admissible. There is simply no room in the text for an implied exception.

The Third Circuit has endorsed this interpretation. In *United States v. Saada*, the court held that Rule 608(b)’s ban on extrinsic evidence applies in full force to absent hearsay declarants. 212 F.3d 210, 221 (3d Cir. 2000). The declarant in that case, upon witnessing the defendant flood his own business in an insurance fraud scheme, exclaimed to a third party that the defendant had done “something stupid.” *Id.* at 218. The declarant, a former judge, died before trial. The Government sought to impeach the declarant’s credibility by bringing in extrinsic evidence, including orders removing him from the bench and disbaring him for unethical conduct. *Id.* at 219. In holding that the evidence should have been excluded under Rule 608(b), the court observed that the “plain—albeit imperfectly meshed—language” of the rules provided no exceptions. *Id.* at 221. While it recognized that in some cases this interpretation may prevent impeachment of a declarant’s credibility, “[t]he unavailability of one form of impeachment, under a specific set of circumstances, does not justify overriding the plain language of the Rules of Evidence.” *Id.*

Similarly, in *United States v. White*, the D.C. Circuit held that the defense counsel was barred from referencing extrinsic evidence of a hearsay declarant’s previous false statements, despite the fact that the declarant had been murdered prior to trial. 116 F.3d 903, 920 (D.C. Cir. 1997). The *White* Court concluded that “specific examples of misconduct . . . cannot be proved by extrinsic evidence” under Rule 608(b). *Id.* The court’s succinct treatment of the issue reinforces the clarity of the rules: the text of the Rules speak for themselves.

In contrast, the only circuit court to state that Rule 806 should allow for an exception to Rule 608(b) for absent declarants was the Second Circuit in *United States v. Friedman*, 854 F.2d 535, 570

n. 8 (2d Cir. 1988). Yet the *Friedman* court’s only reference to Rules 806 and 608(b) was in dicta—in a footnote no less—stating only that “Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury.” *Id.* *Friedman* makes no reference to the text of the rules nor explains why Rule 806 would “of course” overcome 608(b)’s absolute prohibition when the declarant is unable to testify. Moreover, the extrinsic evidence in that case was excluded as non-probative and prejudicial under Rule 403, not Rule 608(b). *Id.* at 569.

The only other court to adopt Hemlock’s reading of the Rules did so citing *Friedman*, with no additional reasoning, and admitted the extrinsic evidence on alternative grounds. *Mitchell v. Mod. Woodmen of Am.*, No. 2:10-CV-00965-JEO, 2015 WL 13637160, at \*9 (N.D. Ala. June 8, 2015). To put a finer point on it, Hemlock’s reading is supported by dicta alone—the only courts that have endorsed an implied exception to Rule 608(b) have rested their holdings on alternative grounds.

Like the declarants in *Saada* and *White*, Copperhead’s statement was overheard by a third party, but she died before trial. And unlike in *Friedman*, Copperhead’s statement was probative to the issue, and the exclusion of the extrinsic evidence to impeach her credibility was properly decided based on Rules 608(b) and 806. This Court should adopt the majority view and hold that the plain text of the Rules bar extrinsic evidence in these circumstances: “Rule 806 does not . . . allow the defense to end-run around Rule 608(b), simply because [the declarant] is absent.” *United States v. Andrade*, No. 20-CR-00249-RS-1, 2025 WL 670456, at \*5 (N.D. Cal. Mar. 3, 2025).

**B. The intended function and purpose of Rules 608(b) and 806 outweigh any perceived unfairness resulting from the inability to impeach an absent declarant.**

In addition to the straightforward text, this Court should not create an exception to Rule 608(b)’s absolute prohibition on extrinsic evidence due to perceived unfairness from an inability to impeach a declarant. Doing so would frustrate the purpose of barring extrinsic evidence: to avoid confusing or misleading evidence and prevent the waste of judicial resources from the inevitable

disagreements regarding such evidence. *United States v. A.S.*, 939 F.3d 1063, 1071 (10th Cir. 2019); *c.f.* Fed. R. Evid. 405 (Advisory Committee Notes on 1972 Proposed Rules) (explaining that evidence of specific acts also “possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.”). It is Congress’s role to balance these competing interests, not the courts’.

Hemlock argues that because witnesses are subject to cross-examination, courts should allow impeachment through extrinsic evidence when a declarant is absent to maintain fairness. (R. 49–50.) His theory is that adhering to the text of Rule 608(b) when a declarant is absent would ignore the underlying purpose of Rule 806: “to place hearsay declarants on equal footing with live witnesses by allowing their credibility to be undermined as if they were testifying.” (R. 49.) The Fourteenth Circuit dissent also invokes the importance of jurors observing the witness during cross-examination, citing *United States v. Hamilton*, 107 F.3d 499, 503 (7th Cir. 1997), and argues that the lack of this opportunity necessitates an implied exception to Rule 608(b) to create an “equal playing ground.” (R. 61.) Yet prohibiting extrinsic evidence in this circumstance would be to do exactly as Hemlock wishes—to treat the hearsay declarant like any other witness.

The closure of one door does not require the opening of another, especially one that does not exist. Hemlock relies on *Friedman*’s footnote as the basis for recognizing an exception to the bar on extrinsic evidence. 854 F.2d 535, 570 n.8 (2d Cir. 1988). But that footnote provides no reasoning—Hemlock has read a fairness argument into its sparse statement that Rule 806 “of course” allows for an exception to Rule 608(b)’s bar. *Id.* This Court should not arbitrarily create exceptions to congressionally approved text due to perceived unfairness, especially in light of the countervailing policy concerns of misleading evidence and judicial strain.

Even if the documents showing Copperhead’s previous dishonesty were the only way to impeach her credibility, that alone cannot overcome the plain text and legislative intent of Rules 608(b) and 806. While the inability to impeach a declarant’s credibility may seem initially unfair, the

alternative would raise a host of additional issues. Primarily, to adopt such a reading would ignore the purpose of the prohibition: to “avoid mini-trials that may consume a disproportionate amount of time and confuse the issues.” *United States v. A.S.*, 939 F.3d 1063, 1071 (10th Cir. 2019) (citation omitted). Further, the introduction of extrinsic evidence against an absent declarant could be unfairly prejudicial as the declarant would have no opportunity for rebuttal, contrary to a present witness. Had Copperhead been present at trial, the documents showing her academic dishonesty and false job application would not have been admissible. That these incidents cannot be inquired into on cross-examination does not create an implicit exception to the clear rule.

Importantly, “the unavailability of the declarant will not always foreclose using prior misconduct as an impeachment tool.” *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000). Alternative methods of introducing impeachment evidence are available in most cases, including cross-examining the witness who testified to the hearsay statement about the declarant’s misconduct, opinion and reputation evidence of character under Rule 608(a), evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613. *Id.* Thus, adopting the bar on extrinsic evidence would rarely implicate the fairness concerns raised by Hemlock.

The plain text of the Rules and their intended purpose dictate that Rule 608(b)’s absolute prohibition on extrinsic evidence applies equally to absent hearsay declarants under Rule 806. Therefore, this Court should affirm the Fourteenth Circuit’s decision and exclude the documents.

### CONCLUSION

This Court should affirm the Fourteenth Circuit’s rulings on all three evidentiary issues and hold that (1) Hemlock’s arrest was lawful, (2) the agent’s search of the box was permissible, and (3) extrinsic evidence is not admissible against Copperhead, an absent declarant.

Respectfully Submitted,  
/s/ Team 14R  
Attorneys for Respondent

## APPENDIX

### Fed. R. Evid. 608(b)

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

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

### Fed. R. Evid. 806

#### **Attacking and Supporting the Declarant**

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

### U.S. Const. amend. IV

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