

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

QUESTIONS PRESENTED

- I. Whether, under *Payton v. New York*, the Fourth Amendment is violated when law enforcement officers never enter a suspect's home, tell him to step outside to answer questions, and arrest him outside without a warrant after he voluntarily exits.
- II. Whether the Fourth Amendment prohibits a law enforcement officer from searching an unmarked, closed container located in a shared area of a residence during a consent search, where the consenting co-occupant did not disclaim authority over the container or limit the scope of consent to exclude it.
- III. Whether Rule 806 of the Federal Rules of Evidence authorizes the admission of extrinsic evidence to impeach a hearsay declarant's character for truthfulness, even though Rule 608(b) expressly prohibits extrinsic evidence of specific instances of conduct when offered to impeach a testifying witness.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

OPINONS BELOW 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE..... 1

I. **Factual Background**..... 1

A. FBI Agents went to Hemlock’s cabin to investigate and arrested him outside his cabin. 2

B. Agent Ristroph got Hemlock’s girlfriend’s consent and searched the cabin...... 3

C. A hiker encountered Copperhead near the cabin in Joralemon State Park. 4

II. **Procedural Background** 4

SUMMARY OF ARGUMENT 7

ARGUMENT..... 8

I. **Hemlock’s arrest outside his cabin did not violate the Fourth Amendment because officers never physically entered the cabin and Hemlock voluntarily exited before being arrested.**..... 8

A. Hemlock’s arrest did not violate the Fourth Amendment because Payton prohibits only physical entry and this Court should not recognize constructive entry...... 10

 1. *Payton prohibits only physical entry and Agents Herman and Simonson never entered the cabin.* 10

 2. *This Court should not extend Payton and recognize constructive entry because that rule is riddled with practical problems.*..... 12

B. Even if this Court were to recognize a form of constructive entry, it would not apply here because the officers’ conduct was not coercive and Hemlock voluntarily exited his home, making his arrest reasonable. 14

II. **The warrantless search of the box did not violate the Fourth Amendment because officers have no duty to inquire into ownership of ambiguous containers and Agent Ristroph reasonably believed that Reiser had authority to consent to the search of the container, which is all that is required under *Illinois v. Rodriguez*.**..... 18

A. The Fourth Amendment does not impose an affirmative duty to inquire into ownership of ambiguous containers because such a rule is inconsistent with this Court’s precedents, unworkable, and extraordinarily burdensome...... 19

B. The search was constitutionally valid because Agent Ristroph reasonably believed Reiser had authority over the unmarked box, which sat in a shared space of the 750-square-foot cabin and which Reiser never disclaimed ownership of...... 22

III. Rule 806 of the Federal Rules of Evidence does not authorize the admission of extrinsic evidence to impeach a hearsay declarant’s character for truthfulness because Rule 806 incorporates Rule 608(b)’s explicit prohibition on such evidence.	27
<i>A. The court properly excluded extrinsic evidence of Copperhead’s character for truthfulness because, under the plain text of Rules 806 and 608(b), attacking a hearsay declarant’s credibility with extrinsic evidence is prohibited.</i>	<i>28</i>
<i>B. Allowing extrinsic evidence of Copperhead’s character for truthfulness would undermine the goals of Rule 608(b): avoiding collateral mini-trials on irrelevant or tangentially related matters.</i>	<i>32</i>
CONCLUSION	33

TABLE OF AUTHORITIES

Cases

<i>Bratt v. Genovese</i> , 782 F. App'x 959 (11th Cir. 2019)	30
<i>Brigham City v. Stuart</i> , 547 U.S. 398 (2006).....	9
<i>Brinegar v. United States</i> , 338 U.S. 160 (1949)	19
<i>Carter v. Hewitt</i> , 617 F.2d 961 (3d Cir.1980)	29, 32
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013)	14
<i>Florida v. Jimeno</i> , 500 U.S. 248 (1991)	20, 23
<i>Florida v. Rodriguez</i> , 469 U.S. 1 (1984).....	16
<i>Foster v. United States</i> , 282 F.2d 222 (10th Cir. 1960).....	32
<i>Frazier v. Cupp</i> , 394 U.S. 731 (1969).....	21
<i>Gaddis v. DeMattei</i> , 30 F.4th 625 (7th Cir. 2022).....	10
<i>Georgia v. Randolph</i> , 547 U.S. 103 (2006).....	24
<i>Glenn v. Commonwealth</i> , 654 S.E.2d 910 (Va. 2008).....	23, 26
<i>Illinois v. Rodriguez</i> , 497 U.S. 177 (1990)	18, 19, 22, 23
<i>INS v. Delgado</i> , 466 U.S. 210 (1984)	16
<i>Kentucky v. King</i> , 563 U.S. 452 (2011).....	13, 14
<i>Knight v. Jacobson</i> , 300 F.3d 1272 (11th Cir. 2002).....	10, 11
<i>Lange v. California</i> , 594 U.S. 295 (2021).....	9
<i>New York v. Harris</i> , 495 U.S. 14 (1990)	10, 13
<i>Ohio v. Robinette</i> , 519 U.S. 33 (1996).....	21
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996).....	8
<i>Payton v. New York</i> , 445 U.S. 573 (1980).....	passim
<i>Riley v. California</i> , 573 U.S. 373 (2014)	9, 13
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973).....	22
<i>Scott v. Harris</i> , 550 U.S. 372 (2007).....	23
<i>Skinner v. Ry. Lab. Execs. 's Ass'n</i> , 489 U.S. 602 (1989)	8
<i>Torres v. Madrid</i> , 592 U.S. 306 (2021)	8
<i>United States v. Al-Azzawy</i> , 784 F.2d 890 (9th Cir. 1985).....	15, 16, 17
<i>United States v. Allen</i> , 813 F.3d 76 (2d Cir. 2016).....	12, 13, 14
<i>United States v. Andrade</i> , No. 20-CR-00249, 2025 WL 670456 (N.D. Cal. Mar. 3, 2025).....	30
<i>United States v. Basinski</i> , 226 F.3d 829 7th Cir. 2000).....	23, 24
<i>United States v. Berkowitz</i> , 927 F.2d 1376 (7th Cir.1991).....	11, 12
<i>United States v. Burr</i> ; 25 F. Cas. 55 (Cir. Ct., Va. 1807)	32
<i>United States v. Caldwell</i> , 518 F.3d 426 (6th Cir. 2008).....	23, 24
<i>United States v. Carrion</i> , 809 F.2d 1120 (5th Cir. 1987)	10
<i>United States v. Chadwick</i> , 433 U.S. 1 (1977).....	24
<i>United States v. Correa</i> , 908 F.3d 208 (7th Cir. 2018).....	8, 9
<i>United States v. Drayton</i> , 536 U.S. 194 (2002)	16, 18

<i>United States v. Finley</i> , 934 F.2d 837 (7th Cir. 1991).....	28, 30
<i>United States v. Freeman</i> , 482 F.3d 829 (5th Cir. 2007).....	20
<i>United States v. Friedman</i> , 854 F.2d 535 (2d Cir. 1988)	30
<i>United States v. Fultz</i> , 146 F.3d 1102 (9th Cir. 1998).....	25
<i>United States v. Gallagher</i> , 65 M.J. 601 (N-M. Ct. Crim. App. 2007).....	23
<i>United States v. Gori</i> , 230 F.3d 44 (2d Cir. 2000).....	13
<i>United States v. Groves</i> , 530 F.3d 506 (7th Cir. 2008).....	24
<i>United States v. Maez</i> , 872 F.2d 1444 (10th Cir. 1989)	14, 15
<i>United States v. Marshall</i> , 348 F.3d 281(1st Cir. 2003).....	20, 23
<i>United States v. Martz</i> , 964 F.2d 787 (8th Cir. 1992)	32
<i>United States v. Matlock</i> , 415 U.S. 164 (1974).....	18, 23
<i>United States v. May</i> , 727 F.2d 764 (8th Cir. 1984).....	32
<i>United States v. Melgar</i> , 227 F.3d 1038 (7th Cir. 2000)	20, 22, 23
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980).....	14, 15
<i>United States v. Morgan</i> , 743 F.3d 1158 (6th Cir. 1984)	10, 15, 17
<i>United States v. Peña</i> , 24 F.4th 46 (1st Cir. 2022)	30
<i>United States v. Peyton</i> , 745 F.3d 546 (D.C. Cir. 2014)	20
<i>United States v. Robinson</i> , 479 F.2d 300 (7th Cir. 1973).....	22
<i>United States v. Rodriguez</i> , 888 F.2d 519 (7th Cir. 1989).....	24
<i>United States v. Rosario</i> , 111 F.3d 293 (2d Cir. 1997).....	31
<i>United States v. Ross</i> , 456 U.S. 798 (1982)	21
<i>United States v. Saada</i> , 212 F.3d 210 (3d Cir. 2000)	28, 29, 31
<i>United States v. Saari</i> , 272 F.3d 804 (6th Cir. 2001)	15
<i>United States v. Salinas-Cano</i> , 959 F.2d 861 (10th Cir. 1992)	24, 25
<i>United States v. Snype</i> , 441 F.3d 119 (2d Cir. 2006).....	20, 25, 26
<i>United States v. Taylor</i> , 600 F.3d 678 (6th Cir. 2010).....	20
<i>United States v. United States Dist. Ct.</i> , 407 U.S. 297 (1972).....	10
<i>United States v. Watson</i> , 423 U.S. 411 (1976)	9
<i>United States v. White</i> , 116 F.3d 903 (D.C. Cir. 1997)	29
<i>United States v. Whitfield</i> , 939 F.2d 1071 (D.C. Cir. 1991).....	20
<i>Wyoming v. Houghton</i> , 526 U.S. 295 (1999).....	21

Other Authorities

Fed R. Evid. 806 Adv. Comm. Note.	27
H. Doc. No. 118-126 (2024)	31

Rules

Fed. R. Evid. 608(b).....	27, 28
Fed. R. Evid. 613	31
Fed. R. Evid. 806	27, 28, 29

Treatises

4 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment (6th ed. 2020) 24
Wright & Miller, 30B Fed. Prac. & Pro. Evid. (2024 ed.) 27

Constitutional Provisions

U.S. Const. amend. IV 8, 18, 22

OPINONS BELOW

The transcripts of the suppression hearings on the constitutional issues before the District Court appear in the record at pages 18–39. The transcript of the trial, where the Rule 806 issue was discussed, appears at pages 40–50. The Court of Appeals’ opinion appears at pages 51–61.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment states:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Factual Background

This case begins with, of all things, a teacher embarrassing her student in a geology class; embarrassed and deluded about her supposed “corruption,” that student later resolved to kidnap her. (R. 5.) On the morning of March 29, 2024, a barista in Boerum Village, Boerum reported suspicious conversations between two patrons. (R. 7.) Using social media, he identified the suspicious patrons as Atticus Hemlock and Iris Copperhead. (*Id.*) That morning, and the morning before, the barista saw the two spread out papers, notebooks, binders, and backpacks over the table. (R. 8.) He did not get a clear view what was spread out, but he identified two posters, one with what looked like a timeline with dates, times of day, and arrows, and another with what looked like a map of a parking lot and a school building. (R. 7.) He told police that Hemlock and Copperhead repeatedly referred to someone named “Jodie”; and he said they talked about “hiding Jodie away.” (R. 8.) The barista also stated that Hemlock referred to Jodie as a federal government official. (*Id.*)

The next morning, a store clerk in Boerum Village reported suspicious purchases: Two individuals, one male and one female, bought zip ties, ski masks, a six-inch folding knife, black trash bags, and bear spray. (R. 6.) They paid cash. (*Id.*) The Boerum Village Police referred the two tips to the FBI, as they believed the tips were related to the upcoming April visit from Under Secretary Jodie Wildrose of the Department of Tourism. *See* (R. 20.) In response, the Bureau sent two agents, Hugo Herman and Ava Simonson. (*Id.*)

A. FBI Agents went to Hemlock's cabin to investigate and arrested him outside his cabin.

On April 2, 2024, after interviewing the barista and the store manager, the agents went to visit Hemlock's home to talk to him as part of their investigation. (*Id.*) At around 4:00 PM, agents arrived at Hemlock's cabin, which he and his girlfriend, Fiona Reiser, were renting from a local farmer. *See* (R. 11, 20, 28.) Then, Agent Simonson walked up the front steps and, noticing the main door was open but the screen door was closed, knocked on Hemlock's doorframe three times before returning to the bottom of the stairs; Hemlock answered. (R. 21.) The agents, dressed in polos and khakis, stood "three or four feet from the bottom stair" of the cabin and began talking to Hemlock. (R. 21, 29.) While Agent Herman is five foot eleven inches and 185 pounds, and Agent Simonson is five foot five inches, and 145 pounds, Hemlock is six foot two inches, and weighs 210 pounds. (R. 29.)

Simonson introduced the officers as Special Agents with the FBI and asked Hemlock to come outside. (R. 11.) Hemlock was resistant. (R. 20.) While Agent Simonson was questioning Hemlock, Agent Herman spotted bottles labeled "chloroform" behind Hemlock on the counter. (R. 11.) In response to questioning about those bottles Hemlock said, "[d]on't worry about those." (*Id.*) Hemlock then refused multiple requests to come outside, and said, unprompted, "Does this have to do with Jodie?" (*Id.*)

At this point, Hemlock was getting agitated and agents tried to calm him down, but he continued to refuse to come outside and said he did not want “to talk anything [sic] about that b**ch.” (R. 12.) Then, agents went back to the car for a moment to regroup and talk about what they had just seen, agreeing that the events confirmed their suspicions about Hemlock and that they now had probable cause to arrest. *See (id.)* They then radioed for backup and waited a few minutes before trying to get Hemlock to come outside again. (*Id.*) At around 4:20 PM, Agents Herman and Simonson told Hemlock to come outside, at which point Hemlock left his cabin and Agents placed him under arrest and read him his rights. (*Id.*) Agents then completed a search incident to arrest, yielding an open spiral-bound notebook where Hemlock described his plan to “take [Wildrose] away in [a] van and threaten [her] wife, kids, and dumb dog.” (R. 9, 12.) In that entry, dated April 1, 2024, he described how he and Copperhead had “staked out the high school parking lot yesterday” and would grab Wildrose during her visit on April 8 and “knock her out with that chloroform [he’d] been saving up in the cabin.” (R. 9.)

B. Agent Ristroph got Hemlock’s girlfriend’s consent and searched the cabin.

At around 4:30 PM, Agent Kiernan Ristroph arrived on the scene, finding Hemlock already in custody. (R. 13.) Around 5 PM, Hemlock’s girlfriend, Fiona Reiser, arrived at the cabin, at which point Agent Ristroph came up to the front door and identified himself. (R. 13, 15.) Agent Ristroph then notified Reiser that her boyfriend had been arrested and asked if he could look around the residence as part of the investigation. (R. 13.) Reiser allowed Agent Ristroph to enter the 750-square-foot-cabin and begin his search. (R. 13, 17.) Agent Ristroph asked Reiser what was on the second floor, and Reiser responded that she and Hemlock used it for storage and an office space. (R. 13.) He thus confined his search to the first floor. (*Id.*) Spotting a plain, unadorned cardboard box at the bottom of the stairs leading to the loft, Agent Ristroph walked

over and opened the top flaps of the box. (*Id.*) Inside he found one fifty-foot-long rope, two black ski masks, one pair of green gloves, forty-eight black zip ties, one folding knife with a six-inch blade, one roll of duct tape, and two bottles of chloroform. (*Id.*) Agent Ristroph then took photographs of the items he found in the box, the box itself, and the outside of the cabin. (*Id.*)

C. A hiker encountered Copperhead near the cabin in Joralemon State Park.

Around the same time the arrest and search were taking place, a hiker named Theodore Kolber saw a woman, later identified as Iris Copperhead, come “bursting out of the woods onto the path right in front of [him]” while he was walking in Joralemon State Park. (R. 41–42.) According to Kolber, Copperhead “did not look well,” as she was out of breath, had tears streaming down her face, was cut up from branches, and appeared “frenzied.” (R. 42.) Kolber barely said anything before Copperhead screamed “I can’t believe I saw him get arrested. It’s all his fault. It was all Atticus’ idea—NOT MINE! I can’t run a business from prison!” (R. 43.) Copperhead was arrested later that day, and, sadly, she died suddenly from an aortic rupture that same night. (R. 46.)

II. Procedural Background

The day after Hemlock’s arrest, a grand jury in the United States District Court for the Northern District of Boerum indicted him for attempting to kidnap an officer of the United States government, in violation of 18 U.S.C. §§ 1201(a)(5) and 1201(d). (R. 1.)

Shortly after being indicted, Hemlock moved to suppress the notebook found on him during the search incident to arrest, arguing that the notebook was the product of an illegal search because agents “constructively entered” his cabin and unlawfully arrested him without a warrant. (R. 19.) Hemlock also moved to suppress the contents of the box, as he believed Reiser had no

authority to consent to the search of the box and that the search of the box was outside the scope of Reiser's consent. (R. 32, 35–36.)

In July, the district court held a hearing on the motions. The district court denied Hemlock's first motion, concluding that "*Payton* draw[s] a firm line at physical entry to the home." (R. 31.) The court also denied Hemlock's second motion because Reiser's statements to Agent Ristroph conveyed apparent authority and she did not place any limits on the scope of the search. (R. 38–39.)

Beginning in August, Hemlock was tried in the Northern District of Boerum. (*See* R. 40.) During trial, the Government called Theodore Kolber to testify. (R. 41.) He testified there that he saw Copperhead burst onto the trail and scream "I can't believe I saw him get arrested. It's all his fault. It was all Atticus' idea—NOT MINE! I can't run a business from prison!" (R. 43.) Hemlock objected to hearsay, but the court overruled the objection and admitted the statement as an excited utterance under Federal Rule of Evidence 803(2). (R. 43–44.)

After Kolber had finished testifying, Hemlock attempted to introduce two pieces of evidence to impeach Copperhead. (*See* R. 46–48.) The first was an academic disciplinary record showing that Copperhead had used artificial intelligence to complete a final assignment for a university course, which resulted in her failing the class and not completing her degree. *See* (R. 9, 46.) The second was a job application in which Copperhead falsely claimed to have obtained a degree from Court Street College. *See* (R. 10, 48.) Because Kolber had no personal knowledge of these events, Hemlock tried calling two other witnesses to introduce this evidence: Dr. Andrea Joshi, who could testify to the academic disciplinary record, and Svetlana Ressler, who could testify to the false job application. (R. 47–49.) On the Government's objection, the court refused to admit

their testimony or the extrinsic evidence offered to impeach Copperhead on the ground that Rule 608(b) prohibited that evidence. (R. 50.)

At the conclusion of trial, the jury convicted Hemlock of attempted kidnapping of an officer of the United States government, and he was sentenced to ten years in prison. (R. 51.) Hemlock then appealed to the Fourteenth Circuit. *See (id.)* First, he argued that his warrantless arrest violated *Payton v. New York* because agents constructively entered his cabin when they arrested him. (R. 54.) The Fourteenth Circuit disagreed, rejecting “constructive entry” and calling that doctrine “conceptually muddled” and “beset with practical problems.” (R. 55.) For that reason, and because the agents “did not so much as step[] a toe into the doorway of [Hemlock’s] home,” the Court of Appeals followed the reasoning of those circuits which have held that “a *Payton* violation only occurs when arresting officers step into the home[.]” (*Id.*)

Second, Hemlock argued that the evidence seized during the consent search of his cabin should be suppressed because Reiser did not have apparent authority to consent to the search of the cardboard box. (R. 56.) The Fourteenth Circuit again disagreed, explaining that, from Agent Ristroph’s perspective, it was reasonable to believe Reiser had apparent authority because the box was sitting in a common area, was unmarked, and “bore no exterior details” indicating it belonged to Hemlock. (R. 57.)

Third, Hemlock argued that the district court erred in excluding the extrinsic evidence of Copperhead’s prior academic violation and falsified job application. (*Id.*) Once again, the Fourteenth Circuit disagreed, reasoning that “a contrary ruling would have allowed Rule 806 to become a vehicle for circumventing the explicit limitation of Rule 608(b) merely because the hearsay declarant was absent.” (R. 57–58.) And the Circuit specifically noted that “Rule 806’s silence on the admissibility of extrinsic evidence, particularly when contrasted with Rule 613’s

express authorization of such evidence to prove prior inconsistent statements, underscores that the omission was deliberate.” (R. 58.)

SUMMARY OF ARGUMENT

First, Payton v. New York prohibits only arrests made *inside* the home. That means that to cross the boundary *Payton* drew officers must physically enter a person’s home. An officer who, as here, knocks on a door, identifies himself, and later tells a suspect to come outside has not crossed that line. A constructive entry doctrine would replace that clear rule with an indeterminate standard, requiring officers to assess, under pressure, whether there are too many of them, or they are being too insistent, or too loud, or too demanding. Officers would have no way of knowing when their conduct crossed an invisible line. And even if this Court recognized some form of constructive entry, it would not help Hemlock because he exited voluntarily and the agents’ conduct was not coercive.

Second, under Illinois v. Rodriguez, an officer’s belief in a co-occupant’s authority to consent to a search of property need only be objectively reasonable. This objective reasonableness requirement does not mean that officers need to inquire into ownership of ambiguous containers before searching them. Reiser lived in the cabin. She allowed Agent Ristroph inside. She did not limit her consent or disclaim authority over the unmarked box sitting in a common area of the small cabin. Nothing indicated the box belonged exclusively to Hemlock. Based on these facts, Agent Ristroph’s belief in Reiser’s authority to consent was objectively reasonable under the totality of the circumstances.

Third, under Federal Rule of Evidence 806, hearsay declarants may be impeached “by any evidence that would be admissible for those purposes if the declarant had testified.” That language incorporates Rule 608(b)’s prohibition on extrinsic evidence of specific conduct to

attack a witness's character for truthfulness; it does not circumvent it. Had Copperhead testified, Hemlock could have cross-examined her about her dishonesty, but he could not have introduced documents proving it. Rule 806 does not change that. And allowing extrinsic evidence through a backdoor in 806 goes against the stated purpose of Rule 608(b): avoiding collateral mini-trials on tangentially related or irrelevant issues.

ARGUMENT

I. Hemlock's arrest outside his cabin did not violate the Fourth Amendment because officers never physically entered the cabin and Hemlock voluntarily exited before being arrested.

The Fourth Amendment prohibits "unreasonable searches and seizures," not all searches and seizures. U.S. Const. amend. IV; *Skinner v. Ry. Lab. Execs. 's Ass'n*, 489 U.S. 602, 619 (1989). So assessing a potential Fourth Amendment violation involves "asking two questions: first, has there been a search or seizure, and second, was it reasonable?" *United States v. Correa*, 908 F.3d 208, 217 (7th Cir. 2018) (citations omitted).

This Court has "definitively stated that 'the arrest of a person is quintessentially a seizure.'" *Torres v. Madrid*, 592 U.S. 306, 321 (2021) (quoting *Payton v. New York*, 445 U.S. 573, 585 (1980)). The Government does not dispute that Hemlock's arrest was a seizure. Hemlock previously argued that the arrest began as soon as agents started questioning him, but the district court found, as a matter of fact, that Hemlock was not arrested until he was outside. (R. 55.) If Hemlock disputes that finding now, he does so while fighting against the scope of the first question presented and a clear error standard of review. *See* (R. 62); *Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("[A] reviewing court should take care . . . to review findings of historical fact only for clear error"). And at any rate, to split hairs over exactly when Hemlock's

arrest occurred serves no purpose; it was a seizure at one point, or it was a seizure at another. Either way, the only question is whether the arrest was reasonable. *See* U.S. Const. amend. IV.

As the Amendment’s text “makes clear, ‘the ultimate touchstone of the Fourth Amendment is reasonableness.’” *Lange v. California*, 594 U.S. 295, 301 (2021) (citation omitted). “That standard ‘generally requires the obtaining of a judicial warrant’ before a law enforcement officer can enter a home without permission.” *Id.* (citation omitted). This is so because typically “[w]arrants are a proxy for reasonableness.” *Correa*, 908 F.3d at 217 (citing *Riley v. California*, 573 U.S. 373, 382 (2014); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

That said, the “Fourth Amendment has drawn a firm line at entrance to the house.” *Payton*, 445 U.S. at 590. And “[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *Id.* But as long as officers do not cross *Payton*’s threshold and enter the home, warrantless felony arrests supported by probable cause are valid, consistent with the “settled rule that warrantless arrests in public places are valid.” *Id.* at 587; *see also United States v. Watson*, 423 U.S. 411, 421 (1976) (citation omitted) (“The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony” (internal quotation marks omitted)).

Hemlock’s arrest was reasonable. Agents Herman and Simonson had probable cause to believe Hemlock had taken substantial steps toward kidnapping a federal official: Two independent witnesses had reported his suspicious conduct; and when agents arrived at his home, they observed chloroform on his counter and heard him spontaneously mention Jodie Wildrose by name. (R. 22–23.) Indeed, Hemlock does not dispute that Agents Herman and Simonson had probable cause to arrest him. *See* (R. 27.) Armed with that probable cause, they arrested Hemlock outside his cabin. Because the agents remained outside and Hemlock exited of his own

accord, the Fourteenth Circuit held that his arrest was constitutional. (R. 55.) This Court should affirm that judgment.

A. Hemlock's arrest did not violate the Fourth Amendment because Payton prohibits only physical entry and this Court should not recognize constructive entry.

1. *Payton* prohibits only physical entry and Agents Herman and Simonson never entered the cabin.

The Fourth Amendment protects a person “against unreasonable . . . seizures” inside his “house”; it does not protect that person’s subjective sense of security within his “house.” *See Payton v. New York*, 445 U.S. 573, 585–86 (1980). *Payton* located the constitutional violation at “physical entry of the home,” which the Court described as “the chief evil against which the wording of the Fourth Amendment is directed.” 445 U.S. at 585–86 (quoting *United States v. United States Dist. Ct.*, 407 U.S. 297, 321 (1972)). Indeed, it was “searches and seizures *inside* a home without a warrant” that the *Payton* Court described as “presumptively unreasonable.” *Id.* at 586 (emphasis added). This rule flows from the home’s status as a protected space: “In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.” *Id.* at 589. That “zone” finds its constitutional foundation in the Fourth Amendment’s explicit textual reference to “houses,” and the rule the Court derived is correspondingly spatial: “[T]he Fourth Amendment has drawn a firm line at the entrance to the house.” *Id.* at 590. “[T]he rule in *Payton* was designed to protect the physical integrity of the home,” *New York v. Harris*, 495 U.S. 14, 17 (1990), so the line *Payton* drew is a physical one, not a metaphysical one.

Some circuits correctly recognize that *Payton*’s line is a physical one. *See Gaddis v. DeMattei*, 30 F.4th 625, 633 (7th Cir. 2022); *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002); *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987); (R. 55.). Others, however,

have turned the black-and-white line *Payton* drew into a grey area, untethering it from the requirement that officers arrest the person *inside* the home. *See, e.g., United States v. Morgan*, 743 F.3d 1158, 1166–67 (6th Cir. 1984) (holding that officers accomplished “constructive entry” into defendant’s home which violated “the constitutional precepts emphasized in *Payton*”). But this approach, sometimes called “constructive entry,” misconceives *Payton*’s rationale by substituting a person’s psychology for the physical boundary the Court actually drew, that boundary being the “unambiguous physical dimensions of an individual’s home,” *Payton*, 445 U.S. at 589. *Payton* asks whether officers entered the home, nothing more. *See id.* at 589–90.

And “*Payton* keeps an officer’s *body* outside the threshold, not his voice.” *Knight*, 300 F.3d at 1277 (emphasis added). In *Knight*, an officer knocked on the suspect’s door, told him to step outside, and arrested him on the spot once he complied. *Id.* at 1274. The Eleventh Circuit rejected the suspect’s claim that this procedure violated *Payton*, holding that the officer “never crossed that threshold or went over the line at the entrance to the house.” *Id.* at 1277. Because *Payton*’s rule is that “there is ‘a firm line at the entrance to the house,’” the court explained, an officer who remains outside that line and directs a suspect to exit does not implicate the warrant requirement. *Id.* (quoting *Payton*, 445 U.S. at 590). Similarly, in *United States v. Berkowitz*, agents went to the home of a man suspected of stealing files. 927 F.2d 1376, 1385 (7th Cir.1991). On the government’s telling, agents knocked on Berkowitz’s door, he answered, agents told him he was under arrest, and he complied with agents’ demands shortly afterward. *Id.* at 1385–86. Assuming the government’s account was accurate, the Seventh Circuit would have upheld Berkowitz’s arrest, explaining 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.” *Id.* at 1386 (emphasis in original).

Here, agents' various requests that Hemlock come outside, even if perceived as commands, do not implicate *Payton*. As the Seventh Circuit explained in *Berkowitz*, when officers "assert from outside the home their authority to arrest a person, they have not breached the person's privacy interest in the home." *Id.* at 1387. Even assuming Hemlock subjectively felt he had no choice but to comply, *Payton* does not ask how the suspect felt; it asks whether officers "entered" a suspect's home to arrest him. *See Payton*, 445 U.S. at 585–86. Agents Herman and Simonson remained "standing on the ground just outside his home" during the entire initial encounter, "maybe three or four feet from the bottom stair." (R. 21.) Even when Agent Herman re-approached, he never "step[ped] foot into [Hemlock's] home" or even "step[ped] foot on his front stairs." (R. 24.) The closest the agents got to Hemlock during the entire encounter was the doorframe, when Agent Simonson initially went up to knock. *See* (R. 11–12, 19–26.) Agents arrested Hemlock only after he "came outside" and "was on the ground" at "the bottom of the steps." (R. 23.) And here, as in *Knight* and *Berkowitz*, it was only the agents' voices that "entered" the suspect's home. *See* (R. 11–12.) Because the agents never crossed the "firm line" at the entrance to Hemlock's cabin, there was no *Payton* violation, and Hemlock's warrantless arrest based on probable cause was reasonable.

2. This Court should not extend *Payton* and recognize constructive entry because that rule is riddled with practical problems.

The Second Circuit correctly described "constructive entry" as a "legal fiction" that is "conceptually muddled" and "beset with practical problems." *United States v. Allen*, 813 F.3d 76, 87–88 (2d Cir. 2016). This Court should not adopt it. Here is why.

First, acknowledging "constructive entry" would make it practically impossible for law enforcement to tell beforehand when their conduct has crossed the line. If officers "enter" someone's home just because there are too many of them outside, or they are being too loud, or

too pushy, those officers have no way of knowing when they have crossed an invisible line at “entry into the house.” This Court rejected a police-created exigency rule in *Kentucky v. King* for nearly identical reasons. *See* 563 U.S. 452, 468–69 (2011). If exigency “turn[s] on such subtleties” as “the officers’ tone of voice in announcing their presence and the forcefulness of their knocks,” the Court explained, it is “nearly impossible for a court to determine whether that threshold ha[s] been passed.” *Id.* And if “entry” hinges on “subtleties” like the forcefulness of a knock, or an officer’s tone of voice, figuring out when the line has been crossed into “entry” becomes “nearly impossible.” *Id.*

Second, a “constructive entry” rule would multiply the burden on courts. As the Second Circuit put it, “the need to sort out whether an arrest occurred in, at, on, or by the threshold already presents close fact-finding issues for the district courts,” and “to add an additional layer of uncertainty to that rule by requiring courts to determine whether a non-exhaustive list of factors . . . constitute circumstances sufficient to trigger *Payton* would multiply the difficulties of applying the rule.” *Allen*, 813 F.3d at 88. Indeed, “[s]uch a rule not only requires courts to ‘employ[] metaphysical subtleties to resolve Fourth Amendment challenges,’ . . . but also contravenes the ‘general preference to provide clear guidance to law enforcement through categorical rules[.]’” *Id.* (quoting *United States v. Gori*, 230 F.3d 44, 54 (2d Cir. 2000); *Riley v. California*, 573 U.S. 373, 398 (2014)).

Third, adopting a “constructive entry” rule would create perverse incentives that undermine *Payton*’s purpose. *Payton* requires a warrant for in-home arrests to protect the home’s sanctity. *See New York v. Harris*, 495 U.S. 14, 17 (1990). But it does not prohibit officers from approaching a home, knocking, and asking the occupant to speak with them. *See King*, 563 U.S. at 469–70. If officers who remain outside can nonetheless “enter” by being too insistent, law

enforcement will face a choice: either abandon the knock-and-talk entirely, or obtain an arrest warrant before every doorstep encounter that might lead to an arrest. The former deprives officers of a legitimate investigative tool this Court has repeatedly sanctioned. *See id.*; *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (recognizing that “a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do” (citation modified)). The latter extends the warrant requirement beyond the home, requiring warrants for encounters that occur entirely outside. *Payton* does not require this. *Payton*’s bright line rule permits officers to, without a warrant, approach, knock, ask questions, and arrest outside, so long as they do not cross the threshold. Constructive entry blurs that line and chills legitimate law enforcement activity that *Payton* nowhere prohibits.

For these reasons, and because *Payton*’s bright line at “physical entry,” 445 U.S. at 585, provides clear guidance, this Court should decline to extend *Payton* beyond its holding: that warrantless *physical* entry into the home is unreasonable absent exigent circumstances.

B. Even if this Court were to recognize a form of constructive entry, it would not apply here because the officers’ conduct was not coercive and Hemlock voluntarily exited his home, making his arrest reasonable.

Even the circuits that have recognized constructive entry have done so only where there was clear coercive conduct. *See United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989) (“[C]ourts have held that *Payton* is violated where there is such a show of force that a defendant comes out of a home under coercion and submits to being taken in custody.”) (collecting cases). Because of this coercion element, “constructive entry” has also been described as “coercive entry.” *E.g.*, *United States v. Allen*, 813 F.3d 76, 89 (2d Cir. 2016) (Lohier, J., concurring).

Police conduct is only considered sufficiently coercive as to amount to an “entry” when that conduct meets the *Mendenhall* test. Under that test, a person is “seized . . . *only if*,” considering

the totality of the circumstances, “a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (emphasis added). For instance, in *United States v. Morgan*, the defendant was accused of shooting in a public park, and after spotting the defendant’s car several officers followed that car to his mother’s house. 743 F.3d 1158, 1160–61 (6th Cir. 1984). There, nine officers and several patrol cars surrounded the house, flooded it with spotlights, and summoned the defendant to the door “with the blaring call of a bullhorn.” *Id.* at 1161. The defendant then appeared at the door, and police arrested him. *Id.* Concluding this arrest violated *Payton*, the Sixth Circuit reasoned that the defendant “appeared at the door *only because of* the coercive police behavior taking place outside of the house,” *id.* at 1166 (emphasis in original), and it explained that “[t]he police show of force and authority was such that a ‘reasonable person would have believed he was not free to leave,’” *id.* at 1164 (quoting *Mendenhall*, 446 U.S. at 554). *See also, e.g., United States v. Saari*, 272 F.3d 804, 806–09 (6th Cir. 2001) (applying *Mendenhall* and concluding that arrest occurred while defendant was still in his home where four officers drew their guns, positioned themselves in front of the only exit, forcefully knocked on the door, yelled “police,” and ordered the defendant outside).

Typically, the *Mendenhall* test is only satisfied when the police make an overwhelming show of force or authority. Take *Maez*. In that case a man was suspected of robbing a bank and some ten police officers, including FBI agents, and a SWAT team, surrounded and pointed rifles at his trailer while he was still inside along with his wife and son. 872 F.2d at 1446–47. With guns trained on his home, officers used loudspeakers to command him and his family to come out of the trailer. *Id.* at 1447. Applying *Mendenhall*, the court held that the man was arrested in his home because given these facts “a reasonable person would have believed he had to come out of the home and submit to the show of authority.” *Id.* at 1450. And in *United States v. Al-Azzawy*,

Los Angeles police were told that a man was seen “in possession of hand grenades and automatic weapons.” 784 F.2d 890, 891 (9th Cir. 1985). In response, several police officers surrounded the man’s trailer with their guns drawn and ordered him to come outside. *Id.* At this point, “his freedom of movement was totally restricted, and the officers’ show of force and authority was overwhelming.” *Id.* at 893. Accordingly, the Ninth Circuit concluded that “[a]ny reasonable person would have believed he was under arrest in these circumstances.” *Id.*

This Court has consistently held that minimal shows of force or authority, like flashing a badge, or displaying a holstered firearm, do not satisfy the *Mendenhall* test. Consider *United States v. Drayton*, 536 U.S. 194 (2002). There, two armed police officers boarded a bus and began questioning passengers. *Id.* at 203–04. Both officers were carrying their holstered firearms, and one of them flashed his badge at one of the questioned passengers. *Id.* at 204. The *Drayton* Court flatly rejected the argument that the questioned passenger had been “seized,” noting that “[t]he presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of [an] encounter absent active brandishing of the weapon.” *Id.* at 205. Similarly, in *Florida v. Rodriguez*, the Court concluded that the defendant was not “seized” when officers merely approached him in an airport, flashed their badges, and asked him to answer questions. 469 U.S. 1, 5–6 (1984). And likewise, in *INS v. Delgado*, this Court held that INS agents wearing badges and questioning factory workers was not a “seizure.” 466 U.S. 210, 212–13 (1984).

The difference between the conduct circuits have recognized as “constructive entry” and the conduct of agents here is night and day. Indeed, the agents’ conduct here does not come close to satisfying the *Mendenhall* test. Being confronted by two plainclothes agents with holstered weapons, both of whom are smaller than you, standing several feet away from your house, and telling you to come out and answer questions is a far cry from being overwhelmed by nine

officers, several patrol cars, floodlights, and the “blaring call of a bullhorn,” *Morgan*, 743 F.3d at 1161. Nor is it anything like what happened in *Saari*, where four armed police blocked the only exit to the suspect’s home while pointing guns at him and yelling at him to come out. Unlike in *Morgan* and *Saari*, it is far from clear that a reasonable person would feel compelled to come out and submit to the agents’ show of authority here. In fact, by the time Agents Herman and Simonson told Hemlock to come out, Hemlock had already terminated an encounter with them minutes ago, indicating not just that a reasonable person might feel free to terminate the encounter, but that *he* may still have felt free to terminate the encounter. *See* (R. 11–12.)

Further, Hemlock’s arrest did not involve anything close to the overwhelming show of force and authority courts have typically used to justify recognizing “constructive” or “coercive” entry. Far from approaching with a SWAT team and several armed police, all of whom were pointing rifles at a trailer and yelling over loudspeakers (*Maetz*), agents here stayed several feet from the cabin and told Hemlock to exit only twice before he came out. And in sharp contrast to the “overwhelming,” 784 F.2d at 893, show of force and authority from police in *Al-Azzawy*, agents here displayed at most a minimal show of authority by telling Hemlock to come outside. *See* (R. 12.) Before that point, all agents had done was ask Hemlock to step outside to answer questions. *See* (R. 19–22.) Plus, agents made no show of force whatsoever beyond gesturing toward their holsters, which Hemlock may not have even seen given he was standing in the cabin behind a screen door several feet away. *See* (R. 22–26.)

Herman and Simonson’s conduct was much closer to what this Court has consistently held is not enough to be a “seizure,” let alone an unlawful “entry” into someone’s home. All agents did was approach Hemlock while wearing their holstered firearms, which they never brandished. In *Drayton*, the mere “presence of [] holstered firearm[s]” was “unlikely to contribute to the

coerciveness of the encounter” because agents never “active[ly] brandish[ed]” their weapons. 536 U.S. at 205. So too here. If anything, the police’s conduct in *Drayton* was *more* coercive than the agents’ conduct here; a bus is an enclosed space, and when two armed police come up to a person while he is sitting in an enclosed space that can make a person feel restrained. And like the agents in *Rodriguez* and *Delgado*, all agents did here was flash their badges and ask Hemlock to answer questions. None of that conduct would even be a “seizure,” much less an “entry.”

In sum, the agents’ conduct does not satisfy the *Mendenhall* test. Even in the circuits that have recognized “constructive entry,” the conduct of Agents Herman and Simonson could not be described “constructive entry,” much less “coercive entry.” So even if this Court recognized constructive entry in line with how those circuits have viewed it, there would still be no *Payton* violation, and thus no “unreasonable seizure,” here.

II. The warrantless search of the box did not violate the Fourth Amendment because officers have no duty to inquire into ownership of ambiguous containers and Agent Ristroph reasonably believed that Reiser had authority to consent to the search of the container, which is all that is required under *Illinois v. Rodriguez*.

What Hemlock “is assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is unreasonable.” *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (internal quotation marks omitted) (quoting U.S. Const. amend. IV). One thing that can make a warrantless government search of a home “reasonable” is “consent of the person *or his cotenant*.” *Id.* at 184 (emphasis added).

A search conducted with a co-occupant’s consent is generally reasonable because most co-occupants have “joint access or control for most purposes,” and thus other co-occupants “have assumed the risk that one of their number might permit the common area to be searched.” *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). Put differently, most co-occupants have

“common authority” over what is ultimately searched, so it is perfectly reasonable for their consent to be all that is necessary for a search. *Id.*

Occasionally, though, an officer reasonably, but mistakenly, believes a co-occupant actually has authority over something when she in fact does not. *Rodriguez*, 497 U.S. at 186–87. And “[b]ecause 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 186 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). Indeed, these factual determinations need not “always be correct,” but they must “always be reasonable.” *Id.* at 185. The Fourth Amendment thus permits searches conducted in reasonable reliance on an “appearance of authority.” *Id.* at 187–88. The test for whether a consenting party has that “apparent authority” is objective: “would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?” *Id.* at 188 (internal quotation marks omitted) (citation omitted).

Agent Ristroph’s search of the unmarked box was reasonable. Even assuming Reiser had no authority over the box, it does not matter because the only question is whether it was objectively reasonable for Agent Ristroph to *believe* Reiser had authority over the box. Agent Ristroph’s belief in Reiser’s authority was reasonable because the box was located in a common area of the small cabin, and Reiser did not limit her consent to exclude the box. Accordingly, this Court should affirm the Fourteenth Circuit’s ruling that the consent search was reasonable.

A. The Fourth Amendment does not impose an affirmative duty to inquire into ownership of ambiguous containers because such a rule is inconsistent with this Court’s precedents, unworkable, and extraordinarily burdensome.

The Fourth Amendment does not mandate that officers affirmatively inquire into ownership of ambiguous containers before searching them with a co-occupant’s consent. While some

circuits have adopted a contrary rule,¹ that rule is inconsistent with this Court's precedents, unworkable, and burdensome. The correct rule is the one accepted by the First, Second, Fifth, Seventh, and Fourteenth Circuits: It is reasonable for law enforcement to search closed containers in common areas with a co-occupant's consent, as long as they lack positive knowledge of ownership of the container or an objective basis to conclude the container belongs to someone else. *See United States v. Marshall*, 348 F.3d 281, 287–88 (1st Cir. 2003) (citing *Florida v. Jimeno*, 500 U.S. 248, 252 (1991)); *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006); *United States v. Freeman*, 482 F.3d 829, 833 (5th Cir. 2007) (citing *Jimeno*, 500 U.S. at 252); *United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000); (R. 56.)

First, this Court's precedents squarely foreclose a duty-to-inquire rule. In *Jimeno*, a suspect consented to the search of his car without placing any explicit limitation on the scope of the search. 500 U.S. at 249–50. The police then searched a folded, brown paper bag found on the floorboard of the car. *Id.* at 250. The suspect argued that this search was outside the scope of consent because police did not separately request permission to search the closed container. *Id.* at 252. But the Court flatly rejected this argument. *See id.* In fact, the Court saw “no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness.” *Id.* “A suspect may of course delimit the scope of the search,” the Court explained, “[b]ut if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization.” *Id.* Moreover, this Court has clarified that this rule does not depend on the special attributes of automobile searches; rather, it rests on general principles of Fourth Amendment law.

¹ *See United States v. Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014); *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991); *United States v. Taylor*, 600 F.3d 678, 681 (6th Cir. 2010) (citation omitted).

See Wyoming v. Houghton, 526 U.S. 295, 302 (1999); *see also United States v. Ross*, 456 U.S. 798, 820–21 (1982) (“A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.”).

Second, this Court has already rejected the kind of hyper-technical parsing of consent that a duty-to-inquire rule would demand. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969). In *Frazier*, the defendant argued that his cousin’s consent to search a shared duffel bag did not extend to compartments the cousin lacked permission to access. *Id.* The Court dispatched this argument in a sentence, refusing to “engage in . . . metaphysical subtleties in judging the efficacy of [his cousin’s] consent.” *Id.* As the Court put it, the defendant, “in allowing [his cousin] to use the bag and in leaving it in his house, must be taken to have assumed the risk that [his cousin] would allow someone else to look inside.” *Id.*

Third, a duty-to-inquire rule would be unworkable in practice. What counts as sufficient inquiry? Must officers ask about every closed container in a shared residence? Every drawer, every cabinet, every closet? And what response satisfies the duty? Must the consenting party affirmatively claim ownership over the container, or is silence enough? What if she says “I’m not sure” or “I think it’s his, but I’ve opened it before”? These questions have no principled answers, which is precisely why the Fourth Amendment employs an objective reasonableness standard based on the totality of the circumstances. *Cf. Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (rejecting bright line rule requiring officers to inform detained motorists they are free to go before seeking consent because the Fourth Amendment requires reasonableness under the totality of the circumstances, not rigid adherence to any “litmus-paper test” (citation omitted)).

Fourth, adopting a duty to inquire would impose an “impossible burden” on law enforcement. *Melgar*, 227 F.3d at 1041. Officers conducting consent searches of shared residences routinely encounter containers whose ownership is unclear; suitcases in a hallway, boxes in a garage, bags in a closet. Requiring officers to stop and interrogate the consenting party about each such item before proceeding would transform every consent search into a protracted inquisition, undermining the efficiency that makes consent searches a practical law enforcement tool in the first place. *Id.*; *cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (“[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a whole innocent person is not wrongly charged with a criminal offense.”). Indeed, echoing this Court’s concern with “metaphysical subtleties” in *Frazier*, the Seventh Circuit warned that requiring police “to ascertain the ownership or possession or custody of every article or space” would effectively deprive law enforcement of consent searches altogether because “the metaphysical [subtleties] would be endless.” *United States v. Robinson*, 479 F.2d 300, 303 (7th Cir. 1973).

In short, the Fourth Amendment does not require such a rule; it requires only that “searches” not be “unreasonable.” *See* U.S. Const. amend. IV. Therefore, this Court should decline to adopt a duty-to-inquire rule and uphold the Fourteenth Circuit’s decision.

B. The search was constitutionally valid because Agent Ristroph reasonably believed Reiser had authority over the unmarked box, which sat in a shared space of the 750-square-foot cabin and which Reiser never disclaimed ownership of.

There is no mechanical test for apparent authority; it is a question of reasonableness. *See Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990). As this Court once put it, evaluating “reasonableness” means “slosh[ing] . . . through the factbound morass.” *Scott v. Harris*, 550 U.S.

372, 383 (2007). Or more prosaically, reasonableness depends on the totality of the circumstances, viewed from the officer's perspective. *Rodriguez*, 497 U.S. at 188.

The apparent authority of a co-occupant hinges on what the searching officers knew about the co-occupant's "use of, control over, and access to the container." *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000) (citing *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (other citations omitted)).

If officers lack specific affirmative knowledge of ownership of a container, however, a general consent to search by a co-occupant will typically be enough to convey apparent authority. Indeed, "[c]onsent to search an area normally includes the containers within that area." *United States v. Caldwell*, 518 F.3d 426, 430 (6th Cir. 2008) (citing *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)); *see also, e.g., United States v. Marshall*, 348 F.3d 281, 286–89 (1st Cir. 2003) (upholding search of videotapes found in upstairs apartment defendant shared with his girlfriend based on girlfriend's consent to search the entire apartment even though police had no specific knowledge of ownership of the tapes); *United States v. Melgar*, 227 F.3d 1038, 1039–42 (7th Cir. 2000) (upholding search of purse found between mattress and box of springs in hotel room based on woman who rented the room's general consent despite no specific knowledge of purse's ownership); *Glenn v. Commonwealth*, 654 S.E.2d 910, 915–16 (Va. 2008) (upholding search of backpack in room used by guest based on general consent of homeowner where backpack "bore no indicia of ownership, evidenced no limitations on access, had no characteristics that reflected a use by reason of age or gender, and was located in a place open to all occupants of the house"); *United States v. Gallagher*, 65 M.J. 601, 606–07 (N-M. Ct. Crim. App. 2007) (upholding search of closed briefcase in garage based on wife's consent).

The nature of the container searched is particularly important in the apparent authority calculus. A person does not have the same expectation of privacy in a double-locked footlocker as in a paper bag or unzipped CD case, for example. *Compare United States v. Chadwick*, 433 U.S. 1, 11 (1977) (double-locked footlocker) *with Caldwell*, 518 F.3d at 430–31 (paper bag and unzipped CD case). *See also* 4 Wayne R. LaFare, *Search & Seizure: A Treatise on the Fourth Amendment* § 8.5(c) (6th ed. 2020) (“Where the object [searched] is a container, the extent to which it is subject to ready access is an important consideration. A search of an overflowing and unsealed box is quite a different matter than a search of a locked attaché case.”).

Also important are the “precautions taken to ensure privacy.” *Basinski*, 226 F.3d at 835. Searching, say, a locked briefcase or a marked metal filing box with a co-occupant’s consent is less reasonable than searching an unmarked, unlocked nightstand. *Compare id.* at 833–35 (finding man entrusted with locked briefcase lacked apparent authority to consent to search of that briefcase) *and United States v. Rodriguez*, 888 F.2d 519, 524–25 (7th Cir. 1989) (finding wife lacked apparent authority over metal filing box with defendant’s name on it) *with United States v. Groves*, 530 F.3d 506, 511 (7th Cir. 2008) (finding girlfriend had authority to consent to search of unmarked, unlocked nightstand in shared bedroom). After all, if a person wants to ensure that his effects are “subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed.” *Georgia v. Randolph*, 547 U.S. 103, 135 (2006) (Roberts, C.J., dissenting) (emphasis preserved).

But if the police specifically knew the container belonged exclusively to the other co-occupant, the Government cannot claim the consenting party had apparent authority. *United States v. Salinas-Cano*, 959 F.2d 861 (10th Cir. 1992) is illustrative. There, Salinas-Cano left a

suitcase in his girlfriend's apartment. *Id.* at 862. When his girlfriend consented to a search of her apartment, she "specifically denied that she owned the suitcase" which officers *knew* when they searched and seized it. *Id.* The district court thus suppressed the evidence, which the Tenth Circuit upheld because officers knew exactly who the suitcase belonged to. *Id.* at 865–66. In the same vein, consider *United States v. Fultz*, 146 F.3d 1102 (9th Cir. 1998). In that case police searched cardboard boxes a man had left in the garage of a home he had been living with the consent of the owner, but the owner told police the boxes were his. *Id.* at 1104. Because of this, the Ninth Circuit upheld the suppression of the contents of the boxes. *Id.* at 1106. *United States v. Snype*, in contrast, concerned the search of a red plastic bag and knapsack belonging to the defendant, who had been an overnight guest in an apartment. 441 F.3d 119, 136 (2d Cir. 2006). The court upheld the apparent authority of the lessor of the apartment because it was not enough for the defendant to offer "the conclusory argument that law enforcement officers 'had no objectively reasonable basis for concluding' that [the lessor] had access to or any interest in the seized knapsack and red plastic bag." *Id.* "Rather," the court explained, he "was obliged to adduce credible evidence demonstrating that these items were obviously and exclusively his." *Id.*

Here, the search of the unmarked box at the bottom of the stairs was reasonable because Reiser had apparent authority. Reiser let Agent Ristroph into the cabin to "look around." (R. 13, 15.) A reasonable officer could take that as a general consent to search the entire cabin; nothing in Reiser's consent limited its scope. It also would have been clear to Agent Ristroph that Reiser lived with Hemlock in the cabin. *See* (R. 13.) In Agent Ristroph's mind, then, Reiser would have had common authority over most, if not all, of the property.

And because Reiser gave a general consent to search the area—just as the girlfriend did in *Marshall*, the other room guest did in *Melgar*, the homeowner did in *Glenn*, and the wife did in

Gallagher—her consent covered closed containers in common areas. Like in *Marshall* and *Melgar*, the police here had no specific knowledge of the ownership of the searched item; all Agent Ristroph knew about the box was that it sat at the bottom of the stairs where anyone could access it. And like how the backpack in *Glenn*, “bore no indicia of ownership, evidenced no limitations on access, had no characteristics that reflected a use by reason of age or gender, and was located in a place open to all occupants of the house,” 654 S.E.2d at 915, the box here was “at the bottom of the stairs” in a “presumably common area,” was “not labeled,” and “bore no exterior details,” (R. 57). Plus, like the briefcase in *Gallagher*, the box here was unlocked and located in a common area.

What is more, the box here was utterly nondescript and Hemlock took no precautions to ensure privacy. Unlike the double-locked footlocker in *Chadwick*, the locked briefcase in *Basinski*, or the box with the defendant’s name on it in *United States v. Rodriguez*, the box here was not locked, taped, or marked in any way. And it was sitting at the bottom of a staircase, leading up to an area both occupants had access to. *See* (R. 13.) The box here was much more like an unlocked, unmarked nightstand (*Groves*) or a paper bag, or an unzipped CD case (*Caldwell*).

And crucially, unlike in *Salinas-Cano* and *Fultz*, where police had positive knowledge that the suitcase and cardboard boxes did not belong to the consenting parties, Agent Ristroph knew only that the box was on a staircase that led to an area primarily used by Hemlock, *see* (R. 13.) It would hardly be obvious to a reasonable officer in Agent Ristroph’s position that anything left on a staircase in a small, 750-square-foot cabin would obviously belong to either co-occupant. This case is instead like *Snype*, because here, as there, police had no affirmative knowledge of the

ownership of the separate containers. And here, as in *Snype*, Hemlock has “adduce[d] no credible evidence,” 441 F.3d at 136, indicating the box was exclusively his.

Because Reiser’s consent was general and not limited in scope, it was reasonable for Agent Ristroph to believe that Reiser’s consent covered the unmarked, unsecured, and unlocked box sitting at the bottom of the stairs in a 750-square-foot cabin. So this Court should affirm the Fourteenth Circuit’s conclusion that the search of the box was reasonable.

III. Rule 806 of the Federal Rules of Evidence does not authorize the admission of extrinsic evidence to impeach a hearsay declarant’s character for truthfulness because Rule 806 incorporates Rule 608(b)’s explicit prohibition on such evidence.

Rule 806 allows a hearsay declarant’s credibility to 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 text of the rule dictates that only *admissible* evidence may be used to attack a hearsay declarant’s credibility. *Id.* And as the Advisory Committee’s Note explains, “[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness.” Fed. R. Evid. 806 Adv. Comm. Note. Plainly, then, Rule 806 does not allow for the admission of evidence made inadmissible by some other rule. If Rule 806 did allow for the admission of such evidence, “the party attacking an unavailable hearsay declarant’s credibility through Rule 806 [would] receive[] something of a windfall.” Wright & Miller, 30B Fed. Prac. & Pro. Evid. § 7054 (2024 ed.).

Rule 608(b) provides that “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.” Fed. R. Evid. 608(b). The logical effect of the interaction between these two rules is that Rule 806 does not allow for the admission of evidence that would have been inadmissible under Rule 608(b) if

the witness had testified. Rather, Rule 806 *incorporates* Rule 608(b)'s language prohibiting the use of extrinsic evidence of prior bad acts to attack a witness's character for truthfulness.

Copperhead passed away shortly after being arrested. But if she had survived to testify, any extrinsic evidence of prior bad acts bearing on her character for truthfulness would have been inadmissible. *See* Fed. R. Evid. 608(b). Rule 806 does not compel a different result just because Copperhead is not available to testify.

A. The court properly excluded extrinsic evidence of Copperhead's character for truthfulness because, under the plain text of Rules 806 and 608(b), attacking a hearsay declarant's credibility with extrinsic evidence is prohibited.

There is no freestanding exception to Rule 608(b)'s bar on extrinsic evidence in Rule 806. Indeed, Rule 806 “does not allow the use of evidence made inadmissible by some other rule.” *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991). In fact, “[i]t says the opposite—that counsel may use ‘any evidence which would be admissible . . . if [the] declarant had testified as a witness.’” *Id.* (quoting Fed. R. Evid. 806).

The clear weight of authority holds that Rule 806 does not circumvent Rule 608(b)'s bar on extrinsic evidence. On this point, *United States v. Saada*, 212 F.3d 210 (3d Cir. 2000), is most instructive. There, the court considered testimony of a deceased coworker of the defendant, which the district court had admitted as an excited utterance. *Id.* at 218–19. The coworker was a former New Jersey judge disbarred for unethical conduct. *Id.* The district court allowed the introduction of the former judge's unethical conduct and resulting disbarment, which the defendant appealed as a violation of 608(b). The Third Circuit held that 806 did not modify 608(b)'s prohibition on the use of extrinsic evidence, and therefore that the district court's admission of such evidence was erroneous. *Id.* at 221.

In so holding, the court stressed that it “perceive[d] [its] holding to be dictated by the plain—albeit imperfectly meshed—language of Rules 806 and 608(b).” *Id.* at 221. And it emphasized that “[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.* In reaching this decision, the court was “mindful of its consequences”—including the consequence that if the declarant is unavailable to testify, the ban in Rule 608(b) operates to prevent using evidence of prior misconduct as a form of impeachment at all (unless, of course, the witness testifying to the hearsay has personal knowledge of the declarant’s prior misconduct). *Id.* at 222. Still, the Third Circuit explained that “these possible drawbacks may not override the language of Rules 806 and 608(b).” *Id.* Nor do they “outweigh the reason for Rule 608(b)’s ban on extrinsic evidence in the first place, which is ‘to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury . . . and to prevent unfair surprise arising from false allegations of improper conduct.’” *Id.* (quoting *Carter v. Hewitt*, 617 F.2d 961, 971 (3d Cir.1980)).

The D.C. Circuit’s opinion in *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997) is also on point. At issue in *White* were the statements of an informant who was killed before trial. *Id.* at 909–10. The Government introduced those statements through testimony from police. *Id.* at 910. But on cross-examination, the detective testified about the informant’s previous drug use and convictions, as well as an instance where the informant lied on a job application. *Id.* at 920. The trial court allowed questioning regarding the informant’s drug use, but prohibited any questioning on the lies on the informant’s job application. *Id.* The D.C. Circuit upheld this decision, reading Rules 806 and 608(b) in tandem. *Id.* While the circuit acknowledge that Rule 806 permits attacking the credibility of a hearsay declarant “by any evidence which would be admissible for those purposes if the declarant had testified as a witness,” it emphasized that

attacking that credibility with extrinsic evidence of prior bad acts is not permitted under Rule 608(b). *Id.* (quoting Fed. R. Evid. 806).

Other courts have similarly acknowledged that Rule 806, properly read, does not circumvent 608(b)'s bar on extrinsic evidence. The First Circuit, for example, noted in dicta that specific statements of a non-testifying confidential informant were not permitted by the plain reading of Rules 806 and 608(b). *United States v. Peña*, 24 F.4th 46, 69 (1st Cir. 2022). Similarly, the Northern District of California explicitly endorsed this reading of Rules 806 and 608(b) in *United States v. Andrade*. See No. 20-CR-00249, 2025 WL 670456, at *5 (N.D. Cal. Mar. 3, 2025). And in *Bratt v. Genovese*, the Eleventh Circuit upheld a prohibition on the introduction of extrinsic evidence to impeach a non-testifying witness where it “was solely an attempt to back-door substance evidence under the guise of impeachment.” 782 F. App’x. 959, 968 (11th Cir. 2019). Judge Easterbrook put it best: “Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed.” *Finley*, 934 F.2d at 839.

Only one circuit has even suggested a contrary approach. See *United States v. Friedman*, 854 F.2d 535, 569–70 (2d Cir. 1988). But contrary to the dissent below’s assertion, (R. 61), the Second Circuit in *Friedman* did not clearly hold that Rule 806 provides a freestanding exception to Rule 608(b)'s bar on extrinsic evidence. See *id.* Rather, the Second Circuit noted in a footnote that “Rule 806 applies . . . when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury.” *Id.* at 570 n.8. But one would think that if the Circuit meant to interpret Rule 806 to provide an exception to 608(b) it would have said so clearly, rather than bury it in a footnote where it could easily be interpreted as dictum. And notably, the court upheld the

exclusion of the testimony at issue under Rules 403 and 608(b). *See id.* at 569–70. Meaning, the court’s statements about Rule 806 did not bear on its ultimate decision. So this footnoted statement was likely dictum, not an acknowledgment of a freestanding exception to Rule 608(b) buried within Rule 806.²

Additionally, Rule 613’s express authorization of extrinsic evidence for impeachment by prior inconsistent statements confirms that silence in Rule 806 was deliberate. *Saada*, 212 F.3d at 221. Under Rule 613, extrinsic evidence of a witness’s prior inconsistent statements is sometimes admissible, but only after the witness is given an opportunity to explain or deny the statement and an adverse party gets the opportunity to question the witness about it. Fed R. Evid. 613. Recent amendments to Rule 613 further confirm that if the drafters of Rule 806 wanted to permit the introduction of extrinsic evidence through Rule 806, they would have said so. *See* H. Doc. No. 118-126, at 19–20 (2024) (advisory committee’s note on the 2024 amendments to the federal rules explaining that the amendments brought Rule 613 in line with the common law approach that “prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement” (citation omitted)). After all, it would make no sense for impeachment by extrinsic evidence to be permitted only by narrowly circumscribed terms in one rule and yet silently permitted in all instances in another.

Ultimately, nothing in Rule 806 indicates that it circumvents Rule 608(b). On the contrary, the text of Rule 806 indicates just the opposite. The fact that a declarant may be unavailable does not permit courts to ignore the text of those rules and read into them an exception to Rule 608(b) that is nowhere written in either rule. The *Saada* and *White* courts were both faced with

² Later interpretations of Rule 806 from the Second Circuit further confirm that its footnoted statement in *Friedman* was dictum. *See United States v. Rosario*, 111 F.3d 293, 296 (2d Cir. 1997) (“Rule 806 does not overcome [a] Rule 410 objection . . .”).

unavailable hearsay declarants, and yet they both held that Rule 608(b) forbade the admission of extrinsic evidence of prior bad acts. There was no reason for the district court to reach a different result here. Indeed, a straightforward application of these two rules yields exactly the result the district court reached and the Fourteenth Circuit upheld: the exclusion of all extrinsic evidence relating to Copperhead's character for truthfulness.

B. Allowing extrinsic evidence of Copperhead's character for truthfulness would undermine the goals of Rule 608(b): avoiding collateral mini-trials on tangentially related or irrelevant matters.

By barring extrinsic evidence, Rule 608(b) serves its purpose: "to avoid holding mini-trials on peripherally related or irrelevant matters." *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992); *see also United States v. May*, 727 F.2d 764, 765 (8th Cir. 1984) ("Impeachment by extrinsic evidence threatens to expand the trial to an inquiry into collateral matters which could distract and confuse the jury."); *Carter v. Hewitt*, 617 F.2d 961, 971 (3d Cir. 1980) ("The purpose of rule 608(b)'s extrinsic evidence ban, as noted, is 'to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury.'" (citation omitted)); *Foster v. United States*, 282 F.2d 222, 223 (10th Cir. 1960) ("[T]he witness is not on trial, his character is not in issue and extrinsic testimony in respect thereto tends to confuse the issues and promote unfair surprise and multifariousness"). In the words of Chief Justice Marshall in the trial of Aaron Burr, "[t]he law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him." *United States v. Burr*, 25 F. Cas. 55, 170 (Cir. Ct., Va. 1807).

It is this interest that Rule 608(b) protects. And more to the point, Rule 608(b) prevents judges and juries from getting stuck in an infinite testimony-impeachment loop on completely unrelated, or only peripherally related, matters. Imagine this: A plaintiff offers the statement of an unavailable hearsay declarant that gets admitted under the excited utterance exception. In

response, the defendant attempts to impeach that hearsay declarant by calling another witness who can testify about the hearsay declarant's character for truthfulness. Then the plaintiff responds in kind by offering evidence attacking the credibility of the *defendant's* witness. And on, and on, and on.

Neither Dr. Joshi nor Ms. Ressler had any testimony related to the events leading to Hemlock's kidnapping plot and subsequent arrest in 2024. *See* (R. 46–50.) It is not clear that either of them even know who he is. *See* (R. 47–50.) The record likewise does not suggest that either witness personally knew Copperhead; rather, they were called to describe a grade on a transcript and a resume submitted through an online portal. (R. 47–48.) A rule allowing either to testify in this case would open the door for an unending cycle of impeaching witnesses. Special Agent Herman's barber could be called to testify based on conversations during a shave; the barber's mechanic might need to discuss the barber's penchant for lying and gossip; the mechanic's accountant would in turn tell the court about his late taxes. Hours, days, and weeks of the court's time would be swallowed up, and the proceedings would be no closer to resolution. This is turtles (and impeachments) all the way down.

Rule 806 neither permits nor requires such an infinite regress. The district court's exclusion of the testimony on Copperhead's character for truthfulness was, therefore, correct, and the Fourteenth Circuit's decision upholding that ruling was likewise correct.

CONCLUSION

The judgment of the Fourteenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,
/s/ Team 16R
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