**Team 32R**

**No. 25-7373**

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 32R
*Counsel for Respondent*

## QUESTIONS PRESENTED

I. Whether special agents who arrest a kidnapping suspect outside the home violate the Fourth Amendment's warrant requirement for arrests inside the home.

II. Whether special agents who obtain an occupant's consent to search a home may search an unsealed, unlabeled, unidentified cardboard box in that home.

III. Whether Federal Rule of Evidence 806 permits impeachment of a hearsay declarant with extrinsic evidence where that evidence would be inadmissible against a live witness.

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## OPINION BELOW

The opinion of the Court of Appeals for the Fourteenth Circuit affirming Hemlock's conviction for attempted kidnapping of a federal officer appears in the Record at R. 51-61.

## CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fourth Amendment provides:

> 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.

Rule 608(b) of the Federal Rules of Evidence provides, in relevant part:

> 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. . . .

Fed. R. Evid. 806(b).

Rule 806 of the Federal Rules of Evidence provides, in relevant part:

> When a hearsay statement . . . 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. . . .

Fed. R. Evid. 806.

## STATEMENT OF THE CASE

For years, Atticus Hemlock nursed a schoolboy grudge. Jodie Wildrose had once "snickered" at him, and he "wanted to hurt her, bad." (R. 5.)

So, Hemlock and his friend Iris Copperhead planned to knock Wildrose out with

chloroform, throw her in a van, and threaten her family and her dog. (R. 5, 7-8.) This was not just talk: Hemlock amassed supplies, including zip ties, duct tape, and chloroform. (R. 13.)

The F.B.I. discovered Hemlock's plan and arrested him before he could harm Wildrose. (R. 12.) Hemlock now challenges the arrest and subsequent conviction for attempted kidnapping of a federal officer.

### A. Factual Background

Jodie Wildrose is an acclaimed scientist and the Under Secretary for Rural Development at the United States Department of Tourism. (R. 4.) She planned to visit Boerum from April 8 to April 12, 2024, to promote a rural development initiative. (R. 3.) In a press release, the Department of Tourism announced that Wildrose planned to begin her visit at a local high school. (R. 4.)

Enter Atticus Hemlock. Hemlock had been Wildrose's geology student in college. (R. 5.) He disliked Wildrose's "high-and-mighty attitude." *Id.* He was suspicious of the development initiative she was promoting. *Id.* And he felt "so happy" when he learned that her visit to Boerum would give him the chance to "get [her] back." *Id.*

Hemlock detailed his preparations in his diary:

> Me and Iris staked out the high school parking lot yesterday. On April 8 we will grab Jodie as soon as she gets there. We're gonna knock her out with that chloroform I've been saving up in the cabin and make sure she can't run away or warn anyone. Then we'll take her away in the van and threaten her wife, kids, and dumb dog.

*Id.* He vowed that the duo "won't stop" until Wildrose agreed never to come back to Boerum. *Id.*

On April 1, 2024, a clerk at a local grocery store called the police and reported that several days earlier, a man and a woman had purchased "a pack of zip ties, two ski masks, a six-inch folding knife, black trash bags, and bear spray, and paid for their purchases with cash." (R. 6.)

That same day, a local barista reported that a man and a woman had visited his coffee shop on March 28 and 29. (R. 7.) The barista recognized them from Instagram as Hemlock and

Copperhead. *Id.* He said they had spent hours excitedly poring over what appeared to be a timeline, a parking lot map, and a map of a school building. (R. 7-8.) He overheard them describe "hiding Jodie away" after grabbing her in the parking lot and throwing her in a van. (R. 8.) He heard Hemlock describe Jodie as a federal government official. *Id.* The barista told the police that this level of detail seemed like "much more than just your average crazy talk." *Id.*

Just after four o'clock in the afternoon on April 2, Special Agents Hugo Herman and Ava Simonson visited Hemlock's cabin in an unmarked car. (R. 11, 29.) The Special Agents were wearing khakis, black long-sleeve polo shirts, and duty belts. (R. 25, 29.) Both are shorter and weigh less than Hemlock. (R. 29.)

Because Hemlock's main door was open, the Special Agents "could kind of see into the home" through the closed screen door. (R. 21.) Herman climbed the front steps to knock loudly on the doorframe before returning to stand near Simonson several feet from the base of the steps. (R. 21, 25.) During the encounter, the Special Agents never crossed the cabin's threshold. (R. 21.)

Hemlock came to the door. (R. 11.) Simonson said they were conducting an investigation and asked him to come outside. *Id.* Hemlock responded, "Um, can I not?" adding, "You guys freak me out." *Id.* Simonson said they needed information and told Hemlock to "[p]lease come outside." *Id.* Hemlock replied, "I don't know," and said he felt "uneasy about talking" with them. *Id.*

Herman approached the cabin and noticed bottles labeled "Chloroform" on the counter. (R. 11, 22.) He asked about the bottles, and Hemlock moved to block his view. *Id.* Herman told Hemlock it was "very important" to come outside, and Simonson added, "Come outside please!" (R. 11.) Hemlock refused and asked, unprompted, "Does this have to do with Jodie?" *Id.* The Special Agents had made no mention of Wildrose. (R. 22.) Herman ignored the question about Wildrose and instead offered to "come back another time." (R. 12.) Hemlock responded, "Hell

no," and added that he didn't want "anything to do with you or to talk about that b**ch." *Id.*

The Special Agents returned to their car and agreed that they had probable cause to arrest Hemlock. (R. 12, 22.) Simonson proposed going back to "get him to come outside." (R. 12.) They reapproached the cabin. (R. 12, 23.) At no point did the Special Agents draw their weapons, although they rested their hands on their holsters while reapproaching the house. (R. 26.) Outside the cabin, Herman said, "Sir! Come outside! Our investigation is important and we need answers. Now!" (R. 12.) Simonson added, "Get outside right now!" *Id.* Hemlock said, "Oh god," and agreed. *Id.* After Hemlock reached the bottom of the front steps, the Special Agents handcuffed him, told him he was under arrest, and searched his person. (R. 23.) In his pocket, they found his diary, which was open to his plan to kidnap Wildrose and threaten her family. (R. 12, 23-24.)

Moments later, a neighbor named Theodore Kolber was walking near Hemlock's house when a young woman "came bursting out of the woods." (R. 28, 41-42.) She was "out of breath," "white as a ghost," "frenzied," shaking, crying, and cut up from the woods. (R. 42.) Kolber asked what was wrong, and she 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. 42-43.) The woman, who Kolber later learned was Copperhead, died from an aortic rupture that evening. (R. 46.)

Back at Hemlock's house, Special Agent Kiernan Ristroph joined the scene. (R. 13-14.) Herman and Simonson drove Hemlock away, and Ristroph waited for Hemlock's girlfriend, Fiona Reiser, to get home. (R. 13.) When she did, Ristroph advised her of the arrest, explained that he was investigating, and asked her to enter the home. *Id.* Reiser agreed. *Id.*

Ristroph entered, looked around the first floor of the home, and noticed a staircase. *Id.* He asked Reiser what was on the second floor, and she said she and Hemlock used it as an office and storage space. *Id.* Per his report, Ristroph "continued looking around the living room" and walked

toward the staircase. *Id.* On one of the bottom stairs, he saw an unlabeled cardboard box with the top flaps closed. *Id.* He opened the flaps and found a fifty-foot rope, two black ski masks, gloves, zip ties, a folding knife with a six-inch blade, duct tape, and two bottles of chloroform. (R. 13-14.)

**B. Proceedings Below**

A grand jury indicted Hemlock for attempted kidnapping of a United States Government officer in violation of Title 18, United States Code, Section 1201(a)(5) and 1201(d). (R. 1-2.)

Before trial, Hemlock moved to suppress the diary with the kidnapping plans. (R. 19.) He argued that the diary was the fruit of an illegal arrest because the Special Agents had "constructively" arrested him in his home without a warrant. (R. 19, 27.) Judge Araiza denied the motion, emphasizing that the Special Agents never crossed the "firm line" of physical entry into the home. (R. 31.) She observed that even if she were to recognize "constructive entry," the Special Agents' actions "seemed non-coercive," so that doctrine would not apply. *See id.*

Hemlock also moved to suppress the materials from the cardboard box: rope, a knife, zip ties, duct tape, ski masks, gloves, and chloroform. (R. 13, 31.) He submitted an affidavit by Reiser confirming that she had allowed Ristroph into the house. (R. 15.) But in her telling, when Ristroph asked about the second floor, she said that Hemlock was the one who used that loft space and that she didn't know what he kept there. *Id.* She said that after she made that comment, "Ristroph walked straight over to the stairs" and opened the box. (R. 16.) Reiser attached a floorplan of the cabin showing the cardboard box on the second stair from the bottom. (R. 17.)

Hemlock argued that Reiser's consent to search the cabin did not extend to areas exclusively controlled by Hemlock, including the second stair and the cardboard box. (R. 32, 34.) The Government responded that Reiser had apparent authority to consent to a search of the whole house. (R. 35-36.) The court said the search was reasonable because "[o]wnership of the box was

ambiguous" and denied the motion to suppress the kidnapping paraphernalia. (R. 39.)

At trial, the Government called the neighbor, Kolber, who recounted Copperhead's statements about seeing Hemlock get arrested and about the kidnapping being Hemlock's idea. (R. 41-45.) The court admitted the hearsay testimony as an excited utterance. (R. 43.) Hemlock sought to call two witnesses to impeach Copperhead. (R. 46-50.) He proffered that Andrea Joshi would testify that Copperhead violated her college's academic integrity policy by using artificial intelligence to complete an assignment, and Svetlana Ressler would testify that Copperhead falsely reported on a job application that she had graduated from that college. (R. 47-49.) The Government objected to the extrinsic evidence, and the court sustained the objection. (R. 47-50.)

The jury convicted, and Judge Araiza sentenced Hemlock to ten years in prison. (R. 51.) The Fourteenth Circuit affirmed on all issues. *Id.* This Court granted certiorari. (R. 62.)

## SUMMARY OF ARGUMENT

Atticus Hemlock's conviction for attempted kidnapping of a federal officer rests on solid constitutional and evidentiary ground. The district court was right to deny the motion to suppress the diary with the kidnapping plot, deny the motion to suppress the box full of kidnapping equipment, and disallow extrinsic evidence intended to impeach the late Iris Copperhead.

*First*, Hemlock's arrest did not violate the Fourth Amendment's warrant requirement because it occurred outside his home. *Payton v. New York* establishes a "firm line": as long as officers do not transgress the four walls of the home, they may carry out an arrest without a warrant. 445 U.S. 573, 590 (1980). This bright-line rule is logical, supported by history, administrable, and sensible. This Court should reject the tortured doctrine of "constructive entry," reaffirming *Payton*'s key point that officers need an arrest warrant only upon physical entry into the home.

Even applying the "constructive entry" doctrine, Hemlock's warrantless arrest was justified. The Special Agents did not draw their weapons or apply other extreme tactics. Because their conduct was routine and inoffensive, it lacked coercion and thus did not amount to "constructive entry." Because the Special Agents did not enter Hemlock's house—either physically or "constructively"—his arrest was valid, and the diary seized incident to his arrest was properly admitted.

*Second*, Special Agent Ristroph's search of Hemlock's cardboard box—containing zip ties, duct tape, chloroform, and other kidnapping supplies—did not violate the Fourth Amendment because Fiona Reiser had apparent authority to consent to that search. Ristroph found the cardboard box on the second stair from the bottom of a staircase leading up to the loft area in the small cabin Reiser and Hemlock shared. Even if Hemlock was the sole user of the loft, it was clear to Ristroph that Hemlock and Reiser shared use of the living room, and the stair was part of the living room. Reiser therefore had apparent authority over the stair. Moreover, Reiser's consent to search the living room covered containers within it, including the cardboard box. There was nothing distinctive about the box that would suggest to Ristroph that Reiser did not have authority over it. The box was not labeled, and Reiser did not tell Ristroph that it belonged to Hemlock. Ristroph acted reasonably in opening the box based on Reiser's consent for him to search the cabin.

*Third*, the trial court correctly excluded extrinsic evidence about Copperhead's academic misconduct and fraudulent job application. Rule 806 allows for impeachment of a hearsay declarant only by evidence that "would be admissible" for impeachment "if the declarant had testified as a witness." Fed. R. Evid. 806. And Rule 608(b) makes clear that extrinsic evidence of prior conduct is not admissible for impeachment purposes. Fed. R. Evid. 608(b). Because Hemlock's proffered extrinsic evidence would be inadmissible if Copperhead had testified as a

witness, the text of the rules makes clear that it is inadmissible for impeachment purposes in her absence. A contrary holding would burden the courts by allowing "mini-trials" within trials, and would do little to promote fairness or truth-seeking.

Moreover, even if this Court were to hold that Rule 806 abridges Rule 608(b) as Hemlock claims, the trial court's ruling was harmless error. Copperhead's hearsay statements—that the kidnapping had been Hemlock's idea—were not central to the case against Hemlock. Given Hemlock's diary entry planning the kidnapping, his box of supplies, and the statements by the barista and grocery store clerk, Copperhead's statements had, at most, a very slight effect on the outcome. In light of the overwhelming evidence of Hemlock's guilt, his conviction should stand.

## ARGUMENT

### I. The warrantless arrest of a kidnapping suspect did not violate the Fourth Amendment because law enforcement did not enter the suspect's home.

The Special Agents did not violate the Fourth Amendment's requirement that officers obtain an arrest warrant before entering a home because they never entered Hemlock's home. Under Fourth Amendment jurisprudence, "the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). But our legal tradition has long treated arrest warrants as categorically unnecessary elsewhere. *See California v. Acevedo*, 500 U.S. 565, 584 (1991) (Scalia, J., concurring). Because the Special Agents engaged in neither physical nor "constructive" entry of Hemlock's home, the Constitution did not require an arrest warrant.

#### A. The Special Agents did not violate the Fourth Amendment because a warrantless arrest becomes impermissible only upon physical entry, not "constructive entry."

Because the Special Agents arrested Hemlock outside his home, they did not need an arrest warrant. Law enforcement must obtain an arrest warrant to enter a home for a routine felony arrest.

*Payton*, 445 U.S. at 576. But no such requirement exists outside the home. *United States v. Watson*, 423 U.S. 411, 417 (1976). As this Court recognized in *Payton*, "the Fourth Amendment has drawn a firm line at the entrance to the house." 445 U.S. at 590. That line is the "threshold." *Id.*

At no point did the Special Agents who arrested Hemlock cross the threshold into his home. Special Agent Simonson knocked on the front doorframe, and the agents otherwise remained several feet from the bottom of the stairs that led to the front door. (R. 21.) They arrested Hemlock only after he had left the house. (R. 11.) Hemlock does not contest this. (R. 28.)

In fact, the agents in this case acted more carefully than the Fourth Amendment requires. A person standing in the doorway of a house is in a "'public place,' and hence subject to arrest without a warrant permitting entry of the home." *Illinois v. McArthur*, 531 U.S. 326, 335 (2001) (citing *Santana*, 427 U.S. at 42). Special Agent Herman testified that she and Special Agent Simonson did not seize Hemlock until he exited his front door, walked down the front steps, and was standing on the ground outside the home. (R. 23.) They did not need a warrant.

Hemlock tries to sidestep the fact that the agents never entered his home by asking the Court to countenance the "constructive entry" doctrine some lower courts have embraced. Under this doctrine, when a suspect leaves his house only "in response to coercive police conduct," his warrantless arrest outside the home is treated as a warrantless arrest inside the home because they "accomplish[] the same thing." *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984).

The "constructive entry" doctrine is illogical, ahistorical, unworkable, and unwise. This Court should reject it.

*First,* the "constructive entry" doctrine turns *Payton*'s logic on its head. Central to *Payton*'s firm line is the notion that the home is a "zone of privacy." *Payton*, 445 U.S. at 589. The officers in *Payton* transgressed that zone of privacy when they used crowbars to break into the defendant's

apartment. *Id.* at 576. It was that "breach of the entrance to an individual's home" that violated the Constitution. *Id.* at 589. In subsequent cases, the Court reiterated that "the chief evil against which the wording of the Fourth Amendment is directed" is "physical entry of the home" because it is only *physical* entry that compromises the occupant's privacy interest. *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972).

But under "constructive entry," the touchstone is not privacy but alleged coercion, forbidding even law enforcement tactics that do not intrude upon privacy at all. Consider this case. The Special Agents had license to approach Hemlock's house and knock. *See Kentucky v. King*, 563 U.S. 452, 469 (2011). Hemlock's door was open, and they could see inside. (R. 21.) It is axiomatic that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 349 (1967).

Instead of closing the other door, Hemlock chose to speak to the Special Agents through the screen. *Id.* He had no obligation to do so. *See King*, 563 U.S. at 469-70. And Special Agents did violate his privacy rights merely by speaking with him: "*Payton* prohibits only a warrantless entry into the home, not a policeman's use of his voice to convey a message." *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991); *accord Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002). Instead, during the encounter, Hemlocks was "exposed to public view, speech, [and] hearing" as if in public. *United States v. Santana*, 427 U.S. 38, 42 (1976). And when Hemlock came out from behind the screen door, he relinquished his remaining privacy interests. The Special Agents were thus justified in treating the arrest as occurring in public, where no arrest warrant is required. *See Watson*, 432 U.S. at 423. A contrary result would warp the privacy-protective logic of *Payton*.

*Second*, "constructive entry" reflects a sharp break from our constitutional history and legal

tradition. The Fourth Amendment does not prohibit all searches and seizures—only those that are "unreasonable." U.S Const., amend. IV. History and tradition are highly relevant to assessing what searches and seizures are "unreasonable."

The Founding-era understanding that a "man's house is his castle" afforded heightened protections to the home. *Payton*, 445 U.S. at 596. Scholars debate the full extent of those protections, including whether a warrant was required to enter a home. *Id.* at 594. A compelling line of originalist scholarship contends that the Framers never meant to impose any warrant requirements at all—even for entry to the home. *See, e.g.*, Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 13 (1997); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Michigan L. Rev. 547, 551 (1999). But one historical fact is clear: if an arrest warrant requirement existed, it did not extend beyond the home. *Payton*, 445 U.S. at 596; *Watson*, 423 U.S. at 418-23. Such was "the unanimous view[] of the commentators," "supported by cases directly [o]n point." *Payton*, 445 at 597-98. "Constructive entry" would flout this inheritance, stretching the warrant requirement far beyond what the Framers imagined.

*Third*, "constructive entry" doctrine is "muddled" and "beset with practical problems." *United States v. Allen*, 813 F.3d 76, 87-88 (2d Cir. 2016). In circuits that endorse "constructive entry," there has been a "lack of consensus over where to draw the line." Steven B. Dow, *"Step Outside, Please": Warrantless Doorway Arrests and the Problem of Constructive Entry*, 45 New Eng. L. Rev. 7, 30 (2010). The Sixth and Ninth Circuits, for instance, reached opposite results in analogous situations where four officers approached a house and asked to speak with someone. *Compare United States v. Grayer*, 232 F. App'x 446, 449 (6th Cir. 2007), *with United States v. Quaempts*, 411 F.3d 1046, 1047-49 (9th Cir. 2005). The Sixth Circuit said the defendant had left the house "willingly and voluntarily," *Grayer*, 232 F. App'x at 450, whereas the Ninth Circuit

found "constructive entry," *Quaempts*, 411 F.3d at 1048-49.

This disagreement is not the product of different circuits using different tests; they purport to be applying the same standard. *See, e.g.*, *Grayer*, 232 F. App'x at 449-50 (citing the leading cases from other circuits). Instead, the dissensus reveals the incoherence at the heart of "constructive entry": whether and when law enforcement conduct approximates physical entry is in the eye of the beholder. That subjective analysis flies in the face of this Court's "general preference to provide clear guidance to law enforcement through categorical rules." *Riley v. California*, 573 U.S. 373, 398 (2014).

*Fourth*, the "constructive entry" doctrine needlessly hampers law enforcement's ability to respond to dangerous situations like Hemlock's planned kidnapping of Wildrose. Arrest without a warrant is the "usual rule" for a reason. *Carroll v. United States*, 267 U.S. 132, 156 (1925). To overread *Payton*'s narrow carveout for the home would "encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." *Watson*, 423 U.S. at 423-24.

The house—and the house alone—are subject to heightened requirements because inside the physical structure of a house, the criminal suspect is contained. Law enforcement can wait until the suspect leaves, exigent circumstances arise, or a magistrate authorizes a warrant. But outside its four walls, any opportunity to apprehend the suspect may be fleeting. The law accommodates the need to act quickly in such situations. Just as the Fourth Amendment allows for the warrantless entry of a house to prevent escape, and the warrantless search of an automobile to intercept flight to another jurisdiction, so too it must allow for warrantless arrests outside the physical boundaries of the home. *See Lange v. California*, 594 U.S. 295, 301 (2021); *Carroll*, 267 U.S. at 153 (1925).

Even where, as here, a suspect exits the house at the bequest of the police, the police must

be allowed to arrest without delay. Even a suspect who has willingly come outside to speak with police might flee after realizing that his arrest is imminent. Indeed, upon witnessing Hemlock's arrest, his co-conspirator did just that. (R. 43.) American courts have long recognized that warrantless arrests are essential for "public safety, and the due apprehension of criminals." *Watson*, 423 U.S. at 419 (quoting *Rohan v. Sawin*, 59 Mass. 281, 285 (1850)). Extending the arrest warrant requirement outside the home would impede these functions.

Hemlock asks this Court to treat "constructive entry" as an extension of the notion that an arrest can occur even before someone is physically handcuffed. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *California v. Hodari D.*, 499 U.S. 621, 628 (1991). Per this argument, if Special Agents arrested Hemlock before he exited his house—by making him feel that he was not free to leave—they needed a warrant to do so. This logic treats Hemlock's purported *arrest* inside his home as if the officers had *entered* his home. This is wrong for two reasons.

To start, Hemlock was not arrested inside his home. The district court expressly found that the Special Agents "arrested Mr. Hemlock outside of his home." (R. 31.) That is a factual finding subject to clear error review. *E.g.*, *United States v. Watson*, 273 F.3d 599, 602 (5th Cir. 2001). There was no error here. Determining when an arrest occurred depends on an assessment of "all of the circumstances surrounding the incident." *Mendenhall*, 446 U.S. at 555. Here, few indicia of an arrest were present before Hemlock exited his house: the Special Agents were not in full uniforms, arrived in an unmarked car, did not draw their weapons, never touched or threatened Hemlock, and never told him that he was not free to leave. (R. 11-12, 29.) Because the district court's finding was not clearly erroneous, this Court should defer.

Moreover, the operative question under *Payton* is not whether Hemlock was inside the house when he was seized but whether the Special Agents entered the house. It is the location of

the police, not the location of the suspect, that triggers the warrant requirement. As the leading treatise writer explains, "the warrant requirement makes sense only in terms of the *entry*, rather than the arrest." 3 Wayne R. LaFave, *Search & Seizure* § 6.1(e) (6th ed. Nov. 2025 update). Crucial here is the distinction between the warrant requirement and the probable cause requirement, which serve different functions. The warrant requirement protects against "needless intrusions" into the home. *Payton*, 445 U.S. at 586. But it is the probable cause requirement that protects against capricious arrests. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Hemlock concedes that the Special Agents had probable cause to arrest him. (R. 27, 53 n.1.)[1] It is therefore immaterial whether he was *arrested* inside or outside of his house. What matters is whether the Special Agents physically *entered* his house. They did not.

It may be true that Hemlock felt pressured to leave his house. But the threshold of which *Payton* speaks—the threshold at which an arrest warrant is required—is physical, not psychological. Law enforcement officers need no arrest warrant outside "the unambiguous *physical* dimensions of an individual's home." *Payton*, 445 U.S. at 589 (emphasis added). This Court should reject Hemlock's attempt to turn this firm line into a mushy metaphysical standard that blurs the boundary between the vast outside world and the circumscribed sanctity of the home.

### B. Even if this Court recognized "constructive entry," that doctrine is inapplicable here because the Special Agents did not coerce Hemlock out of his home.

"Constructive entry," in jurisdictions that recognize it, is predicated upon law enforcement coercion. No coercion existed here. Thus, even if this court were to hold that "constructive entry" requires a warrant, that holding would not help Hemlock.

If this Court were to apply the "constructive entry" doctrine, the key inquiry is whether

[1] Hemlock waived any argument that the arrest was impermissible because Special Agent Herman intruded upon the curtilage when he observed Hemlock's chloroform bottles. Hemlock cannot challenge the arrest as fruit of an unlawful search because Hemlock has conceded that the arrest was supported by probable cause. (R. 53 n.1.)

Hemlock exited his house "*only because of* . . . coercive police behavior taking place outside of the house." *Morgan*, 743 F.2d at 1166. Coercion is a high bar: this Court has found impermissible law enforcement coercion only in extreme situations. *See, e.g.*, *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (physical torture); *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (threats of violence); *Lynumn v. Illinois*, 372 U.S. 528, 537 (1963) (threats of removing one's children); *Ziang Sung Wan v. United States*, 266 U.S. 1, 16 (1924) (denial of medical care to an acutely ill man over several weeks); *Ashcraft v. Tennessee*, 322 U.S. 143, 153 (1944) (thirty-six-hour interrogation and sleep deprivation); *Spano v. New York*, 360 U.S. 315, 320 (1959) (eight-hour pressure campaign). Fleeting psychological pressure is not enough to make a situation coercive; if it were, few encounters with the police would be consensual.

In the "constructive entry" context, lower courts have tended to find coercion only where law enforcement use exceptional tactics. In *Morgan*, for instance, the Sixth Circuit found constructive entry where nine officers surrounded the defendant's home, flooded it with spotlights, and used a bullhorn. 743 F.2d at 1161, 1166. The Tenth Circuit reached the same conclusion when a SWAT team surrounded a defendant's home with guns drawn, used loudspeakers, and handcuffed the defendant's son, who was not a suspect. *United States v. Maez*, 872 F.2d 1444, 1447, 1451 (10th Cir. 1989). Other circuits have likewise found violations where law enforcement pointed guns at a home or at a suspect to induce someone to come outside. *See, e.g.*, *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985); *United States v. Edmondson*, 791 F.2d 1512, 1514-15 (11th Cir. 1986). But absent factors like drawn weapons, use of floodlights or bullhorns, and physical force against the suspect's family, law enforcement conduct is not sufficiently coercive to be constitutionally infirm, even under "constructive entry."

This case does not approach that level of intimidation. The two Special Agents kept their

weapons holstered throughout the entire encounter. (R. 26.) The agents—both smaller than Hemlock, not wearing full uniforms, and arriving in an unmarked car—were not physically intimidating. (R. 29.) They visited Hemlock's house in the afternoon rather than the middle of the night. (R. 11.) They did not use bullhorns or speakers to disrupt the peace of the home; they talked to Hemlock through a screen door, something neighbors do all the time. (R. 21.) They approached the front door only to knock and otherwise stood back. *Id.* They truthfully identified themselves and explained that they were conducting an investigation. (R. 11-12.) At no point did they threaten Hemlock or mislead him that he had to submit to their requests. *See id.* In fact, Special Agent Herman even offered to come back at a time that was more convenient for Hemlock. (R. 12.) That is hardly the type of "overbearing tactic[] that essentially force[s]" someone from their home. *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005).

To be sure, the Special Agents repeatedly requested that Hemlock come outside. (R. 11-12.) While perhaps annoying, such annoyances do not rise to the level of a constitutional violation. If police could only ask something once, few crimes would ever be solved. Courts have therefore declined to find constructive entry based on such innocuous requests to exit one's house. *See, e.g.*, *Grayer*, 232 F. App'x at 449; *Thomas*, 430 F.3d 274 at 276-78.

Nor does the fact that the Special Agents "outnumber[ed]" Hemlock make their conduct coercive. (R. 59.) That argument proves too much: police officers often work in pairs, which does not make all police conduct coercive. *See* Sadie Gurman, *Police Across US Patrolling in Pairs After Ambush Attacks*, Associated Press (July 19, 2016), https://perma.cc/5GXG-PBTA.

Similarly, there is no constitutional infirmity in the fact that the Special Agents "identified themselves as F.B.I. and flashed their badges." (R. 28.) Such conduct is "encouraged" and "cause for assurance, not discomfort." *King*, 563 U.S. at 468 (quoting *United States v. Drayton*, 536 U.S.

194, 204 (2002)). This proactive identification was empowering rather than coercive, giving Hemlock "the opportunity to make an informed decision" about whether to engage. *Id.*

The fact that the Special Agents rested their hands on their holstered firearms changes nothing. Hemlock makes much ado of this hand placement, but that focus just highlights the key fact: the guns remained holstered. Even in "constructive entry" jurisdictions, courts are loath to find coercion without drawn weapons. *See, e.g.*, *Thomas*, 430 F.3d at 278.

Hemlock points to two aberrant cases in which circuits found "constructive entry" based on light-touch law enforcement tactics with no guns drawn. *See* R. 30-31 (invoking *Watson v. City of Burton*, 764 F. App'x 539, 542 (6th Cir. 2019)); *United States v. Reeves*, 524 F.3d 1161, 1168 (10th Cir. 2008)). Those cases only highlight the need for this Court to reject or circumscribe the runaway "constructive entry" doctrine on which they rest. Coercion requires more.

It cannot be the case that every routine doorstep encounter with police is cause for constitutional concern. Because this Court has never recognized "constructive entry"—and because this case would not rise to the level of "constructive entry" even if it had—Hemlock's arrest was lawful, and the diary seized incident to that lawful arrest was properly admitted.

## II. The search of a box filled with kidnapping paraphernalia did not violate the Fourth Amendment because an occupant with apparent authority consented to the search.

Special Agent Kiernan Ristroph acted reasonably in opening the unlabeled cardboard box that contained Atticus Hemlock's chloroform, zip ties, and other kidnapping supplies. The search was reasonable because Hemlock's girlfriend, Fiona Reiser, consented, and "it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v. Jimeno*, 500 U.S. 248, 250-251 (1991).

Hemlock does not now suggest that Reiser's consent was invalid—only that its scope excluded the loft, stairs, and thus the cardboard box. (R. 35-36.) Per this logic, notwithstanding

Reiser's consent to search at least the first floor, Ristroph did not have consent to search a box several inches from that floor because it was on the second stair leading to the second floor.

This Court need not decide whether the second stair is part of the first floor, part of the second floor, or in between; "such metaphysical subtleties" are beside the point. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). What matters is that Reiser gave valid consent. Hemlock's consent was not required, as he had been removed from the property pursuant to a lawful arrest. *Fernandez v. California*, 571 U.S. 292, 303 (2014). And Ristroph had no reason to think that Reiser's consent did not extend to the second stair or the cardboard box. Ristroph did not violate the Fourth Amendment by opening a box that he reasonably believed Reiser had allowed him to search.

**A. Reiser had apparent authority over the second stair.**

Ristroph had no reason to think that Reiser's open-ended consent to search excluded the second stair where the box of kidnapping equipment was found. The key question is not whether Reiser actually had authority to consent, but whether "law enforcement officers reasonably believed she did." *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990).

This analysis requires an assessment of "the surrounding circumstances." *Id.* at 188. According to both Ristroph and Reiser, she gave him permission to enter and search their house, and he told her that he was conducting an investigation. (R. 13, 15.) But there are factual discrepancies. Ristroph's contemporaneous F.B.I. report recounts that while searching the first floor, he "asked REISER what was on the second floor, and she responded that REISER and HEMLOCK used it for storage and an office space." (R. 13.) This conflicts with Reiser's account, in which she says she tells Ristroph that "the stairs led to the loft, which Atticus used as storage and an office space," and that she did not know what was up there because she "did not really ever

go up there." (R. 15.) In other words, Ristroph's report says that Reiser told him that both she and Hemlock used the loft; in Reiser's telling, she said only Hemlock used it.

Most circuits reviewing a denial of a motion to suppress construe the facts in "the light most favorable to the government." *United States v. Kramer*, 75 F.4th 339, 342 (3d Cir. 2023); *see* Petition for a Writ of Certiorari at 21-27, *Canada v. United States*, 144 S. Ct. 556 (2024) (No. 23-327), 2023 WL 6390672 (detailing circuit split). Under the majority approach, Reiser's apparent authority is clear. Resolving the factual discrepancy in the Government's favor, Reiser told Ristroph that both she and Hemlock used the loft space. Ristroph would be wholly reasonable in concluding, from that statement, that Reiser had authority to consent to a search the whole cabin—the first floor, the second floor, and every stair in between.

This inference of broad authority is supported by the fact that Reiser and Hemlock's relationship is of the sort where "a reasonable officer would usually assume that the person in the position of the consenter *does* have the authority." *United States v. Jenkins*, 92 F.3d 430, 437 (6th Cir. 1996). "When a man and woman are living together under circumstances which approximate those of husband and wife, albeit without the benefit of marriage, there would appear to exist a degree of intimacy supporting a finding of rather broad consent authority in each of them." 4 Wayne R. LaFave, *Search & Seizure* § 8.5(c) (6th ed. Nov. 2025 update); *see id.* § 8.5(c) n.63 (collecting cases). Ristroph knew that Reiser was not just Hemlock's roommate but his cohabitating girlfriend. (R. 13.) It was reasonable for him to conclude that she had broad authority over everything in their shared living space.

But even if it were not reasonable for Ristroph to think that Reiser had authority over the loft, it was clear that she had authority over the stair on which the box was found. This is the result even in the minority of circuits that review a denial of a motion to suppress "without viewing the

evidence in either party's favor." *United States v. Pabon*, 871 F.3d 164, 173 (2d Cir. 2017). This Court need not now decide which approach to reviewing the evidence is better. Either way, Fiona Reiser had apparent authority to consent to a search of the stair. Even if this Court were to resolve the factual discrepancy in favor of Hemlock—finding that Reiser told Ristroph that only Hemlock uses the loft, and that Reiser rarely goes up there—Reiser's undisputed control over the first floor would still extend to the second step of the staircase to the loft. The Record reflects no doubt that the living room is shared by Reiser and Hemlock, and the stairs are in the living room. (R. 17.) The second step on a staircase is barely one foot off the ground—not even the height of typical living room furniture like a coffee table or sofa. *See* Lee Wallender, *What is the Standard Size of Residential Stairs?*, SPRUCE (June 4, 2025), https://perma.cc/D5NB-6NSH. If a coffee table or couch is part of a living room, as surely they are, the second step on the staircase is too.

But this Court need not entertain "such metaphysical subtleties." *Frazier*, 394 U.S. at 740. Even taking the facts in the light most favorable to the defense, there was factual ambiguity about whether Reiser had control over the second stair. Where such ambiguity exists, "law enforcement officials must be expected to apply their judgment" to the question of apparent authority, "and all the Fourth Amendment requires is that they answer it reasonably." *Rodriguez*, 497 U.S. at 186. "[R]oom must be allowed for some mistakes," provided the mistakes are reasonable. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Even if Reiser told Ristroph that she rarely visited the loft, as she contends, it was nevertheless reasonable for Ristroph to conclude that she had control over that stair as part of the shared living room, and that she could consent to a search of it.

Perhaps the result would be different if the staircase were hidden behind a door or otherwise cordoned off. It was not. The stair was in reach of the living room and visible from the front door.

(R. 17.) In a small, loft-style cabin, Ristroph's conclusion that the stair was part of the shared space—and thus covered by Reiser's valid consent—was reasonable.

**B. Reiser had apparent authority over the box.**

Not only did Reiser have apparent authority over the second stair, but she also had apparent authority to consent to a search of the box itself. The Fourth Amendment does not require law enforcement officers to proactively clarify ambiguous ownership of containers in a shared area.

Consent to search a house or a room includes consent to search containers in that space. *See Jimeno*, 500 U.S. at 251. When an officer conducts a search, "nice distinctions between closets, drawers, and containers . . . give way to the interest in the prompt and efficient completion of the task at hand." *United States v. Ross*, 456 U.S. 798, 821 (1982). Although the consent-giver may place limitations on the scope of a search, Reiser did not do so. *See Jimeno*, 500 U.S. at 251. Instead, when Reiser consented to a search of the shared area, it was reasonable for Ristroph to understand her as consenting to a search of each container within that area.

Hemlock argues that Ristroph should have inquired into ownership of the box before opening it. This reasoning is inconsistent with this Court's decision in *Jimeno*. There, a police officer stopped a car and asked permission to search the car. *Id.* at 249. The driver of the car consented, and the officer opened a folded, brown paper bag. *Id.* at 250. The bag contained cocaine, which belonged to one of the occupants of the car. *Id.*

On appeal, the owner of the drugs argued that police must obtain separate permission for each container they wish to search. *Id.* at 251. The Court dismissed the call to add "this sort of superstructure to the Fourth Amendment's basic test for objective reasonableness." *Id.* As long as "consent would reasonably be understood to extend to a particular container," the Court said, "the Fourth Amendment provides no grounds for requiring a more explicit authorization." *Id.*

Here, Reiser's consent would reasonably be understood to extend to the cardboard box. There was nothing distinctive about the cardboard box suggesting that it was exclusively controlled by Hemlock. There may be situations where a container is so distinctive that no reasonable police officer would infer that the consent-giver had apparent authority over it. If the box had been labeled "Atticus's things—nobody open—private," the case for Reiser's apparent authority would be unpersuasive. That is not the situation we have here. The court found that the ownership of the box was "ambiguous." (R. 39.) The box was unlabeled. (R. 13-14) Reiser never identified either herself or Hemlock as the owner; she simply gave consent to search the house. (R. 13-16.) Absent evidence demonstrating that the cardboard box was "obviously and exclusively" Hemlock's, there was no reason for a reasonable officer to hesitate before opening it. *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006).

Hemlock's argument is unpersuasive for two other reasons. *First*, there are compelling policy reasons to encourage broad consent-based searches. As this Court explained in *Schneckloth v. Bustamonte*, "the community has a real interest in encouraging consent," as consent-based searches can turn up evidence to stop crime and to prevent wrongful convictions. 412 U.S. 218, 243 (1973). A requirement that law enforcement inquire into the ownership status of each individual box, drawer, and cabinet would impede this function. Officers in some instances would have to "ask[] the person whose consent is being given *ex ante* about every item they might encounter"—impossible when officers do not know what containers they will encounter. *United States v. Melgar*, 227 F.3d 1038, 1042 (7th Cir. 2000).

*Second*, by leaving the box in an area—the living room—that he shared with Reiser, Hemlock "assumed the risk" that Reiser might allow police to search it. *Frazier*, 394 U.S. at 740. This risk is inherent to living with another person: "surely when one enters into a joint living

arrangement there is a surrender of privacy with respect to individually-owned objects in areas regularly used by other occupants." 4 Wayne R. LaFave, *Search & Seizure* § 8.5(c) (6th ed. Nov. 2025 update). The responsibility to guard against this risk of privacy infringement does not lie with Ristroph, a stranger to the house and to the dynamic between Hemlock and Reiser. It lies with Hemlock. Hemlock failed to take simple steps to protect against a search of the box—like labeling it or putting it in an area exclusively controlled by him—so he must bear the consequences.

## III. The district court correctly refused to admit extrinsic evidence about a deceased hearsay declarant's prior dishonest conduct.

Federal Rules of Evidence 608(b) and 806 barred Hemlock from introducing extrinsic evidence of Copperhead's prior misconduct at trial. The issue arose when neighbor Theodore Kolber testified that he had heard Copperhead say that the kidnapping plot was "all Atticus' idea—NOT MINE!" and "all his fault." (R. 43.) The trial court admitted that statement as an excited utterance. (R. 43-44.) Hemlock sought to introduce testimonial and documentary evidence to undermine Copperhead's credibility by showing that she had cheated on an assignment in college and then lied on a job application about having graduated from that college. (R. 46-50.) The Government objected, and after a proffer, the trial court properly sustained the objection. (R. 50.)

Rule 806 allows a party to impeach a hearsay declarant's credibility "by any evidence that would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. This provision must be read alongside Rule 608(b), which explicitly bars extrinsic impeachment evidence "to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). To interpret Rule 806 as circumventing this ban would defy the plain text of the Rules and bog the federal courts down with "mini-trials" on collateral issues like Copperhead's long-ago college disciplinary proceeding.

Moreover, even if the court had admitted Hemlock's proffered evidence, the outcome would not have changed: the weight of the evidence against him was overwhelming.

### A. The plain language of Rule 806 and Rule 608(b) precludes impeaching a hearsay declarant with extrinsic evidence of prior conduct.

Rule 806's text makes plain that Rule 608(b)'s ban on extrinsic evidence applies to impeaching hearsay declarants. Both circuits that have resolved cases on this basis have reached this result. *See United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997); *United States v. Saada*, 212 F.3d 210, 220-221 (3d Cir. 2000). Only the Second Circuit has suggested that the contrary reading might be permissible, and only in dicta. *See United States v. Friedman*, 854 F.2d 535, 569-70 (2d Cir. 1988).

Rule 806 provides that impeachment evidence is admissible if that evidence "would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. If the evidence would have been inadmissible in a live-witness situation, it is inadmissible under Rule 806. It is true that had Copperhead testified, Hemlock could have cross-examined Copperhead about the academic dishonesty or fraudulent job application. *See* Fed. R. Evid. 608(b). But he would have been expressly forbidden from introducing the proffered extrinsic evidence. *See id.*

Rule 806 does provide an explicit exception, but it is inapplicable to Hemlock's case. When the Advisory Committee drafted Rule 806, it considered the potential interplay with Rule 613's provisions for impeaching with prior inconsistent statements. Fed. R. Evid. 806, advisory committee's note on 1972 proposed rules. The Committee anticipated that a live witness could be impeached only by "a *prior* statement," whereas a hearsay declarant might be productively impeached by "a *subsequent* one." *Id.* This insight motivated Rule 806's provision allowing for admission of declarant's prior inconsistent statement "regardless of when it occurred or whether

the declarant had the opportunity to explain or deny it." Fed. R. Evid. 806. Through this language, Rule 806 explicitly and purposefully modified Rule 613's requirements as to hearsay declarants.

But the Committee provided for no such exception regarding Rule 608(b)'s ban on extrinsic evidence of prior conduct in the context of an unavailable hearsay declarant. The text is clear: extrinsic evidence of prior conduct is inadmissible to impeach a live witness under Rule 608(b), and evidence can come in under Rule 806 only if it could come in to impeach a live witness. Fed R. Evid. 608(b); Fed. R. Evid. 806. The absence of a modification of Rule 608(b) is presumably the result of Congress's "careful judgment." *United States v. Salerno*, 505 U.S. 317, 322 (1992). This Court adheres to the intent of Congress when interpreting the Federal Rules of Evidence. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989). It should therefore "enforce the words that [Congress] enacted" and find that Rule 608(b) applies as written to impeachment of a hearsay declarant. *Salerno*, 505 U.S. at 322.

**B. Admitting extrinsic evidence would allow "mini-trials" to proliferate without promoting fairness.**

Reading Rule 806 to alter Rule 608(b)'s ban on extrinsic impeachment evidence would undermine efficient trial administration. The ban on extrinsic evidence prevents mini-trials on collateral issues that could "complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation." Michelson v. United States, 335 U.S. 469, 478 (1948). Allowing Hemlock's criminal trial to evolve into relitigation of a long-resolved academic misconduct inquiry would waste time and resources, channeling the jury's attention towards an issue that is only marginally relevant.

Hemlock argues that because Rule 608(b) would allow him to cross-examine a live witness about these incidents, it should allow him to introduce extrinsic evidence to impeach an unavailable witness. But cross-examination and impeachment by extrinsic evidence are not the

same thing. Collapsing them would "obliterate the rules of evidence that govern how impeachment is to proceed." *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991). If Copperhead testified, Hemlock could ask on cross-examination whether she had ever been found guilty of academic misconduct or lied on a job application. But if Copperhead lied and said no, Hemlock would be stuck with that answer. Hemlock could not introduce testimony or documents to refute her account. In other words, Rule 608(b) would not allow him to introduce the evidence he seeks to introduce here. In contrast, if allowed to use extrinsic evidence to impeach a hearsay declarant, as he seeks, Hemlock could introduce a bevy of additional witnesses and documents. The effect would be qualitatively different from cross-examination—akin, instead, to a standalone trial.

That sort of mini-trial is unnecessary in light of the Rules' many other avenues for impeaching an unavailable hearsay declarant. The Second Circuit suggested in dicta that "when the declarant has not testified," the "resort to extrinsic evidence may be the only means of presenting [impeachment] evidence to the jury." *Friedman*, 854 F.2d at 570 n.8. This overstates the consequences of the Government's position. Refusing to improperly enlarge the scope of impeachment because the hearsay declarant was unavailable should not have prevented Hemlock from impeaching Copperhead's truthfulness. Hemlock might still have introduced opinion and reputation evidence under Rule 608(a), criminal convictions under Rule 609, and prior inconsistent statements under Rule 613. Indeed, Hemlock could have called the very same witnesses and—instead of asking them about the academic dishonesty and fraudulent job application—simply asked what they thought about Copperhead's truthfulness. Functionally, that would lead to the same result, and it is expressly permitted by Rule 608(a).

Moreover, Hemlock could have introduced the proffered evidence for some other purpose. The "absolute prohibition on extrinsic evidence" applies only to attacks on a witness's veracity,

"leav[ing] the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403." Fed. R. Evid. 608, advisory committee's note on 2003 amendment. Rule 608(b) would present no bar to that approach.

Finally, even when these other mechanisms of impeachment are unavailing, jurors discount the credibility of hearsay declarants. Empirical research has repeatedly demonstrated that jurors give "very little weight to hearsay." Angela Paglia & Regina A. Schuller, *Jurors' Use of Hearsay Evidence: The Effects of Type and Timing of Instructions*, 22 Law & Hum. Behav. 501, 514 (1998) (collecting studies). Jurors intuit that the lack of cross-examination and the lack of opportunity to assess the declarant's credibility in person undermine their statement's probative value. This result explains why Rule 608(b) and Rule 806 allow cross-examination of a live witness but not extrinsic impeachment of a hearsay declarant: jurors trust live witnesses more than they trust hearsay declarants, so there is more need to test a live witness's credibility.

Hemlock asks the Court to undermine a crucial pillar of the Federal Rules of Evidence, which he suggests would place the hearsay declarant and the testifying witness on equal footing. But the remedy he seeks would only deepen the gulf between them. "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." *Michelson*, 335 U.S. at 486. Given that jurors already disregard hearsay evidence, and there are other avenues for impeachment, there is no need for a trial within a trial. The administrative burdens would be astronomical, with limited—if any—fairness or truth-seeking gains.

**C. The excluded evidence would not have altered the outcome.**

The trial court properly excluded extrinsic evidence of Copperhead's prior misconduct pursuant to Rule 608(b). However, even if this Court were to reach a contrary result, the trial court's decision to exclude the evidence would be harmless error.

Harmless errors "must be disregarded." Fed. R. Crim. P. 52(a). When a defendant alleges a violation of the Federal Rules of Evidence on appeal, the analysis turns on whether "the judgment was substantially swayed by the error" either because "the error did not influence the jury" or "had but very slight effect." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Where there is "overwhelming evidence of guilt," an error is harmless and cannot be a basis for overturning a conviction. *United States v. Lane*, 474 U.S. 438, 450 (1986).

The evidence of Hemlock's guilt was voluminous and damning. The trial record establishes that he wrote in his diary that he planned to "grab Jodie," "knock her out with that chloroform," "make sure she can't run away or warn anyone," "take her away in the van," and then "threaten her wife, kids, and dumb dog." (R. 5.) He vowed never to stop until she promised to leave Boerum. *Id.* He and Copperhead had already "staked out the high school parking lot" in preparation. *Id.*

What's more, two eyewitnesses observed Hemlock and Copperhead making preparations for the kidnapping: drawing up plans and purchasing supplies. (R. 6-8.) They were hardly discrete. One of the witnesses heard them describe "hiding Jodie away," and heard Hemlock identify "Jodie" as a federal government official. (R. 8.)

Then there were the supplies the Special Agents recovered in Hemlock's house. They found "1 50-feet 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." (R. 13.) No juror would have attributed these supplies to Hemlock's girlfriend, the co-occupant of his house.

She denied knowledge of them, and Hemlock himself wrote that she "has no idea" about his plans to kidnap Wildrose. (R. 5, 13, 16.)

Given this evidence, Copperhead's statements were window dressing for the Government—if that. All that Copperhead's statement adds is that the idea to kidnap originated with Atticus Hemlock, which is immaterial. *See Attempt: The Essential Elements of the Offense Charged*, 2 Federal Jury Practice & Instructions § 21:03 (6th ed.). If the extrinsic impeachment evidence had been admitted, perhaps the jury would have given less weight to Copperhead's statements. But even if the jury had ignored Copperhead's statements altogether, Hemlock would be in the same position he is in now.

The remaining evidence paints a clear picture of a man who drew up detailed plans to terrorize a teacher who had slighted him, and whose government work offended him. He "staked out" the kidnapping site. (R. 5.) He pored over timelines and maps. (R. 7.) He amassed rope, zip ties, duct tape, a knife, and multiple bottles of chloroform. (R. 13.) He was "so happy" at the thought of harming this public servant. (R. 5.) He even fantasized about threatening her dog. *Id.*

This is not an edge case. This Court should let Atticus Hemlock's conviction stand.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Fourteenth Circuit.

Respectfully submitted,

/s/ Team 32
*Counsel for Respondent*