

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 PETITIONER

QUESTIONS PRESENTED

- I. Whether, under *Payton v. New York*, the Fourth Amendment is violated when law enforcement officers, who remain outside, command a suspect inside the home to step outside and arrest the suspect outside the home without a warrant.

- II. Whether the Fourth Amendment is violated when a law enforcement officer conducts a warrantless search of a closed container located in a shared residence after obtaining a co-occupant's consent to search the residence, without specifically inquiring into ownership of the container.

- III. Whether, under Rule 806 of the Federal Rules of Evidence, extrinsic evidence of specific instances of conduct of a hearsay declarant may be admitted to impeach the declarant's character for truthfulness when the declarant is unavailable to testify at trial.

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OPINIONS BELOW

The transcripts of the hearings on the constitutional issues before the United States District Court for the Northern District of Boerum appear on the record at pages 19-39 and for the hearsay issue at pages 41-50. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 51-61.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions is provided below:

The Fourth Amendment to the United States Constitution 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.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

STATEMENT OF THE FACTS

I. Agents Investigate Local Tips that Fail to Rise to Probable Cause.

The Boerum Village police forwarded two tips from a local store manager and barista to the FBI regarding an alleged plan to kidnap a government official. R. at 20. On April 2, 2024, FBI Agent Hugo Herman and Ava Simonson followed up on the tips. R. at 6-7.

Around 8:30 AM, an Every-Mart employee reported that one male and one female had come into the store a few days prior and purchased zip ties, ski masks, a folding knife, trash bags, and bear spray. R. at 6. An hour later, the Agents interviewed a barista at Bean to Brew coffee shop. R. at 7. The barista recalled two people came in on March 28 and 29, occupied a large table in the back of the shop, and placed various papers and binders across the table. R. at 7. He recognized them as Atticus Hemlock and Iris Copperhead because he followed them on social media. R. at 7. Atticus and Copperhead were friends who had known each other since kindergarten. R. at 5. The barista was not close enough to identify the specific subject matter of the materials. R. at 7. The barista overheard parts of their conversation reference how corrupt a federal government official named “Jodie” was for colluding with real estate developers that would exploit the environment and a good place to grab her. R. at 5; 8. Based solely on these tips, Agent Herman and Simonson drove to the home of Atticus. R. at 20. They did not secure a warrant; the Agents agreed they lacked probable cause to arrest Atticus. R. at 21. According to their testimony, the Agents only intended to get answers to a few questions and “would arrest him only if it became obvious that he was taking steps towards carrying out these alleged plans.” R. at 21.

II. Agents Arrest Atticus without a Warrant.

Atticus lived in a small cabin in a “densely wooded area” with his girlfriend, Fiona Reiser. R. at 15; 20. Atticus is passionate about the environment and enjoys outdoor adventures. *See* R at

5; 8; 16. The home belonged to a landlord. R. at 20. It was 500 feet from the walking path in Joralemon State park, and ¾ mile from another home belonging to the same landlord. R. at 20. There were no other homes around the cabin. R. at 25. The officers did not have a warrant and “as such did everything in their power to lure Mr. Hemlock outside of his home.” R. at 28: 7-9.

Approaching the only entry (and exit) point of the house, the officers knocked on the door around 4:08pm. R. at 11; 17. The officers were in plain clothes, but sported their duty belts, which included a gun, taser, radio, baton, and handcuffs. R. at 25. They thumped loudly on the door but didn’t speak. R. at 11; 25. Atticus cautiously opened the door, asking “Can I help you?” R. at 11. The Agents then identified themselves, stating they were conducting an investigation and that they believed Atticus may have some information that would be useful to them. *Id.* Agent Simonson then asked if he would come outside to answer their questions. *Id.* Atticus politely declined, saying that he was ‘pretty busy,’ his girlfriend was about to get back, and they had a friend coming over. *Id.* Agent Simonson pressed again, asking him to “Please come outside for us” because they needed “to get as much information as possible.” *Id.* Atticus replied, “Yeah, I don’t know”; he let them know he was feeling uneasy and asked what was going on. *Id.* The Agents refused to tell him. R. at 11-12; 28. Agent Herman approached the cabin, spotted bottles inside, and commented about chloroform. R. at 11. Atticus said not to worry about those, but Agent Herman immediately interjected: “Sir, it is very important that you come outside, that way we can ask you some questions.” *Id.* Simonson quickly echoed “Come outside please!” *Id.* Increasingly nervous and confused, Atticus said, “No way” and “I told you I don’t want to come outside.” *Id.* He then asked them to leave him alone. *Id.* Agent Herman exclaimed, “You need to calm down!” *Id.* Atticus again asked what this was about, questioning if it had to do with Jodie. *Id.* Agent Herman repeated “Sir you need to calm down” and stated they could come back another time to talk. R. at 12.

Atticus again asserted his right to decline questioning, stating “I don’t want anything to do with you or to talk anything about that b**ch.” *Id.* Only then did the officers retreat to their squad car to reassess. *Id.* There, they decided their suspicions were confirmed. *Id.* Despite it being a Tuesday afternoon (when the courts would certainly be open), the Agents chose not to get a warrant. *Id.* Instead, Simonson told Herman, “We’ll get him to come outside, and then we’ll arrest him.” *Id.* During this conversation, Atticus could see the Agents sitting in the squad car through the cabin screen door. *Id.* On re-approach, both Agents placed their hands on their holsters in case they needed to access their guns. R. at 26: 6-13. Agent Herman agreed this movement would be fully visible and would be ‘pretty intimidating’ to a lay person. R. at 26:14-17.

Agent Herman yelled, “Sir! Come outside! Our investigation is important and we need answers. Now!” R. at 12. Simonson hollered, “Get outside right now!” *Id.* With that, Atticus uttered “Oh god, uh, okay. I’ll come out.” *Id.* He stepped outside. *Id.* As soon as he was beyond the threshold of the steps, Simonson handcuffed Atticus and announced that Atticus was under arrest. R. at 12; 23. The Agents searched and removed a notebook found on his person. R. at 12. The Agents escorted Atticus into the car to take him in for processing. *Id.* Around 4:30 PM, the siren of an approaching police car rang in the background; Officer Ristroph had arrived. *Id.* With Atticus in custody, Agent Herman and Simonson instructed Officer Ristroph to wait for Fiona to arrive home, stating “Let’s get a consent search of the cabin.” *Id.*

III. Fiona Gives Limited Consent to Search the Cabin.

Fiona arrived home from work around 5:00 PM. R. at 15. Fiona is a local cook at The Village Taproom and had been planning on spending her evening making a home-cooked meal and hosting dinner. R. at 15. As she was putting down her groceries, Special Agent Ristroph knocked at the door and identified himself as an agent with the FBI. R. at 15. To her surprise, she

was informed that Atticus had been arrested. *Id.* She asked why, but the Special Agent refused to provide any further information. *Id.* The Agent asked to “take a look around.” R. at 15. When Fiona tried inquiring about the purpose of the search, the Agent continued to withhold details. *Id.* Unbeknownst to Ristroph (because he did not ask), Fiona and Atticus had rented the cabin together since May 2023. *See* R. at 13-16.

Fiona complied with the vague request and let Ristroph in. R. at 15. The search was initially confined to the living room and kitchen on the lower level of the cabin, before Ristroph fixed his attention on a staircase leading to the second floor. *Id.* Ristroph gestured to the stairs, asking if Fiona slept up there. *Id.* Fiona said no and identified their bedroom at the back of the home on the first floor. *Id.* She further indicated that the space upstairs was a loft that Atticus used as a personal storage and office space. R. at 53. Fiona could not identify what specific belongings were up there given she rarely went upstairs. *Id.*

Ristroph intended to confine his search to the first floor based on this information. R. at 13. However, he immediately proceeded to the staircase to find a cardboard box sitting on the steps. *Id.* While he appeared to be heading up to the loft, he stopped on his way up at the box on the stairs. R. at 16. The box was closed, secured by the top flaps, with no information written on the outside. R. at 15. Although Fiona would later testify that Atticus often left items on the stairs to bring to the loft later, Ristroph did not care to learn about this information regarding their shared living habits. R. at 16. Without inquiring further, Ristroph opened the box to reveal what was inside. R. at 13. The box contained multiple items that appeared to match the list reported by Every-Mart Employee. R. at 6; 53. Fiona believed the items to be for Atticus’s outdoor excursions but had not otherwise seen the items before. R. at 16. Ristroph photographed the items, seized them from the residence, and took an inventory. R. at 13.

IV. Atticus’s Motions to Suppress the Evidence are Denied.

Based on the evidence secured from the warrantless arrest and third-party consent search, Atticus was charged with attempted kidnapping of a United States Government Officer in violation of 18 U.S.C. § 1201(a)(5); 18 U.S.C. § 1201(d). R. at 1. Atticus moved the District Court to suppress two pieces of evidence: the notebook found on Atticus’s person and the items in the closed box. R. at 19; 51. Atticus argued that the introduction of the evidence violated his Fourth Amendment right against unreasonable searches and seizures. *See* R. at 18. The District Court denied both motions, and the case proceeded to trial. R. at 39.

V. Copperhead’s Statements Go Unimpeached.

At trial, the prosecution called a hiker to testify to statements made by Copperhead. R. at 41. Copperhead was a former student at Court Street College (CSC), but due to an academic violation, she received an ‘F’ grade in her business capstone class and failed to complete her degree. R. at 9. This was documented by an Academic Violation Report, dated April 20, 2023. *Id.* According to the report, Copperhead had used Artificial Intelligence in violation of the course of policies and the CSC Academic Integrity Policy. Despite this setback, Copperhead pursued a position as the Executive Assistant to the Mayor posted on December 18, 2023, claiming she graduated from Court Street College that past spring. R. at 10. The application included a special signature below the statement: “My signature below confirms the truth and accuracy of all information submitted.” *Id.* The application was denied, noting that the employer had contacted the Court Street College registrar’s office to confirm the graduation date and was informed that Copperhead had never graduated. *Id.* The lack of a degree disqualified Copperhead from the position. *Id.* All this was documented by a Boerum Village Mayor’s Office record. *Id.*

On the day of Atticus's arrest, Copperhead was 22 years old and, on her way to spend the evening with her friends, Atticus and Fiona. R. at 10; 15. A local Boerum Village resident, was on a hike in Joralemon State Park when Copperhead came bursting out of the woods on the path in front of him. R. at 41-42. The hiker testified that 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. at 43:16-19. While the hiker's testimony of Copperhead's statements is hearsay, it was ruled admissible under Rule 803(2) as an excited utterance. R. at 43-44. Because Copperhead passed away in jail that same night (April 2) from an aortic rupture, she was unavailable to testify at trial. R. at 46:14-19. Her level of involvement was never verified by officers. *See* R. at 46.

Counsel for Atticus attempted to call a member of Court Street College's Board of Academic Integrity to present testimony about Copperhead's Academic Violation Report. R. at 47:1-4. Defense counsel then planned to call the Mayor's Chief of Human Resources to discuss Copperhead's job application denial. R. at 48-49. These documents would go to the issue of Copperhead's credibility. R. at 47:4. Despite defense counsel's argument that this was the only way to truly cross-examine Copperhead due to her tragic demise, and that it was allowable under the Federal Rules of Evidence (FRE) 806, the judge ruled against Atticus. R. at 49. The witnesses, and thus both reports, were excluded as prohibited extrinsic evidence under FRE 608(b). *Id.*

VI. Atticus Appeals to the Fourteenth Circuit.

Atticus appealed to the United States Court of Appeals for the Fourteenth Circuit. R. at 51. The Fourteenth Circuit affirmed the findings of the District Court and held that the introduction of Atticus's notebook and items seized from his box did not violate his Fourth Amendment rights. R. at 54-57. Additionally, the Fourteenth Circuit affirmed the District Court's

ruling prohibiting extrinsic evidence under FRE 608(b). R. at 57-58. Upon a grant of writ of certiorari, this appeal follows. R. at 62.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision because (1) Agents violated Atticus's Fourth Amendment right against unreasonable seizure by conducting a warrantless arrest at his home (2) Ristroph conducted an unreasonable search of Atticus's box by going beyond the scope of consent and failing to inquire into ambiguous ownership and (3) the Sixth Amendment confrontation right, Federal Rules of Evidence, and principles of our adversarial justice system support allowing extrinsic evidence to impeach an unavailable hearsay declarant.

First, Agents conducted a warrantless arrest at Atticus's home in violation of the constitutional precepts outlined by this Court in *Katz*, *Mendenhall*, and *Payton*. Fourth Amendment jurisprudence consistently underscores that privacy protections and expectations are at their height at the home and its curtilage. Because constructive entry tactics allow police to game the warrant requirement and intrude upon the sanctity of the home, multiple circuits find such conduct violates the Fourth Amendment. After repeatedly being asked to leave, two officers approached Atticus with hands on their guns and commanded Atticus to step outside his home, all without a warrant. Once Atticus involuntarily exited his home to submit to the assertion of authority, Agents immediately handcuffed him. Such conduct is characteristic of a constructive entry arrest and as such violates the Fourth Amendment. A contrary rule would incentivize police to circumvent *Payton*'s requirements, further increase citizen mistrust of law enforcement officers, and go against the purpose of the Fourth Amendment's protections.

Second, Ristroph's warrantless search of Atticus's closed box was unreasonable. To sustain a warrantless search of effects, an officer must maintain a reasonable belief that a third party retains

the proper authority to consent. However, the circumstances provided no reasonable basis for an officer to conclude that Fiona Reiser had such authority to consent to the search that took place. Fiona's direct statements provided no clear indication she had mutual use over the box. Meanwhile, there were clear indicators that the box likely belonged to Atticus. These circumstances created ambiguity. However, Ristroph did not resolve this ambiguity in ownership regarding the box, despite having a duty to inquire in such circumstances to sustain any reasonable belief. Even if this Court were to contend Fiona had the authority to consent, she explicitly limited her scope to exclude Atticus's box, and Ristroph violated the scope by searching the box anyways.

Third, extrinsic evidence dealing with Iris Copperhead's credibility should have been admitted allowing the jury to assess her character for truthfulness. The foundations of our justice system, the Federal Rules of Evidence, and a plain reading of FRE 806 all support allowing extrinsic evidence to impeach Copperhead, given her obvious unavailability resulting from an untimely demise. Without the use of such evidence, there is no other avenue to attack Copperhead's credibility and assess Atticus's level of guilt, thereby undermining the foundational principles of cross-examination. Disallowing the use of extrinsic evidence in this matter undercuts the role of the jury to be able to otherwise hear from a material witness, weigh evidence, and determine credibility. By preventing the use of extrinsic evidence in this matter, Atticus's Sixth Amendment confrontation right was violated.

ARGUMENT

I. Officers violated the Fourth Amendment when they commanded Atticus to leave his home for an arrest without a warrant.

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

The principles of the Fourth Amendment "apply to all invasions on the part of the government and

its employés of the sanctity of a man’s home and the privacies of life.” *Payton v. New York*, 455 U.S. 573, 585 (1980) (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Unless a specific exception applies, warrantless searches and seizures are considered *per se* unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

A. Constructive Entry is a violation of the Fourth Amendment under *Katz*, *Mendenhall*, and *Payton*.

i. Fourth Amendment protections are at their height in the home and its curtilage.

While officers may make warrantless felony arrests in public, this Court has routinely distinguished between public and private locations and considered how varying contexts impact “reasonable expectations of privacy.” See *Katz v. United States*, 389 U.S. 347, 361 (1967) (J., Harlan, concurring). The home and its curtilage are given the highest level of protection, because this is where “privacy expectations are most heightened.” *California v. Ciraolo*, 476 U.S. 207, 213 (1986). “It is axiomatic that the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’” *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984).

ii. This Court recognizes the varying contexts of arrests and the coercive nature of police authority.

In *Payton v. New York*, this Court explicitly outlined how warrantless arrests of individuals in the home violate everything the Fourth Amendment stands for. See *Payton*, 445 U.S. at 576. The case combined two appeals. *Id.* In one, the police used a crowbar to enter a man’s home and find evidence against him. *Id.* In the other, a man’s son opened the door, police spotted the man in bed covered in a sheet, and police placed the man under arrest before allowing him to dress. *Id.* at 577. Condemning these arrests, this Court reasoned “To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply

too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances...” *Id.* at 588-89.

Still, real life arrest scenarios aren’t always as black and white as ‘inside’ vs. ‘outside’. Just as this Court in *Miranda* recognized how intensely coercive police interrogation procedures can be even without resorting to physical torture, *Mendenhall* articulated how varying circumstances can equate to an arrest. *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Mendenhall*, 446 U.S. 544 (1980). “Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer . . . or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Mendenhall*, 446 U.S. at 554.

Thus, an arrest may include physical force, such as the use of handcuffing, but it also may be a person’s “submission to the assertion of authority.” *California v. Hodari D.*, 499 U.S. 621, 626 (1991). In those circumstances, the submission itself is the arrest, not the formal point where an officer announces an arrest or handcuffs someone. *See id.* Ultimately, the test is not from the officer’s point of view, but whether, under the circumstances, “a reasonable person would have believed that he was not free to leave.” *Mendenhall*, 446 U.S. at 554. Further clarifying this test for situations where an individual could not or would not wish to leave, “the appropriate inquiry is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” *Florida v. Bostick*, 501 U.S. 429, 436 (1991). This clarification is especially applicable in cases of police questioning and arresting individuals in or near the home.

iii. Warrantless submission to authority implicates the Fourth Amendment.

Because non-consensual encounters implicate the Fourth Amendment, *See Terry v. Ohio*, 392 U.S. 1, 16–19 (1968), submission to a show of authority to open the door or be lured outside

for an arrest must also raise similar levels of concern, *See United States v. Reeves*, 524 F.3d 1161, 1166-67 (10th Cir. 2008). Although brief ‘knock and talk’ procedures at a person’s home are theoretically permissible without a warrant, these interactions can devolve into Fourth Amendment violations. *See United States v. Taylor*, No. CR 24-6-DLB-CJS, 2024 WL 3262582, at*5 (E.D. Ky. July 1, 2024).

Circuits across the country have outlined circumstances where officers’ actions outside the door of a person’s home equate to an arrest of a person. When officers identify themselves, knock for several minutes, and shine a flashlight into the window, the subsequent opening of the door by the occupant is considered a submission to a show of authority and a seizure under the Fourth Amendment. *United States v. Jerez*, 108 F.3d 684, 691–93 (7th Cir. 1997). Similarly, when officers position themselves in front of the only exit with guns drawn, knock forcefully, and instruct a person to come outside, a reasonable person would not believe they are free to leave. *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001). In such circumstances, a seizure has occurred. *Id.* Meanwhile, when officers knock on a person’s motel door three times, identify themselves as police, and demand the person “open up,” the person did not voluntarily consent to the subsequent entry. *United States v. Conner*, 127 F.3d 663, 665–66 (8th Cir. 1997). Simply put, “[o]pening the door to one’s home is not voluntary if ordered to do so under color of authority.” *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008).

iv. Constructive entry violates the Fourth Amendment.

The doctrine of constructive entry articulates that *Payton*, and therefore the Fourth Amendment, is violated when there is a show of force by police that causes a defendant to come outside of the home and submit to being taken into custody. *See United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989). This doctrine arose from the well-founded concern that officers could

circumvent *Payton*'s definitive warrant requirement by "remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the "reach" of the arresting officers." *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980) *aff'd*, 457 U.S. 537 (1982). Unfortunately, this concern has proven prophetic.¹

In the foundational constructive entry case, *United States v. Johnson*, the Ninth Circuit determined that a man's warrantless arrest took place when he stood within his home at the doorway, confronted by agents with their guns drawn. *Johnson*, 626 F.2d at 755. Although the agents were outside the home at the time of arrest, the court found that this violated *Payton* because it "is the location of the arrested person, and not the arresting agent, that determines whether an arrest occurs within a home." *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984) (citing *Johnson*, 626 F.2d at 757). The court noted that "We doubt the Supreme Court would have reached a different result had the police stood at the doorway and immediately placed [the suspect] under arrest with weapons drawn." *Johnson*, 626 F.2d at 757. Importantly, the court explained that the man opening his door to the agents did not mean that he voluntarily exposed himself to warrantless arrest. *Id.*

Following the example of *Johnson* along with the reasoning of Supreme Court opinions, most reviewing courts have determined that constructive entry violates the Fourth Amendment. *See e.g.*, *Morgan*, 743 F.2d at 1164 (declaring that the Fourth Amendment is violated when police deploy overbearing tactics to force an individual out of the home); *Maez*, 872 F.2d at 1451 (holding that *Payton* is violated where there is such a show of force that a defendant leaves the home under coercion and submits to being taken into custody); *United States v. Allen*, 813 F.3d 76, 88 (2d Cir.

¹ Meg Penrose, "Knock-Knock" ... "Who's There?" *The Fourth Amendment Dilemma Posed by Warrantless Police Encounters at Home*, 33 Tex. A&M C.R. L. Rev. 305 (2023).

2016) (finding that police exerting authority to require a suspect to leave his home to be arrested is a sufficient ‘constructive’ entry to require a warrant). While the circuits vary in how they express the constructive entry doctrine, “It is therefore settled law that, at a minimum, law enforcement officers violate *Payton* when, in the absence of exigent circumstances or consent, they physically enter protected premises to effect a warrantless search or arrest.” *Allen*, 813 F.3d at 81. At the very core of this phenomenon, officers are taking advantage of a, supposedly, ambiguous area of the law to impose on the sanctity of the home and infringe upon an individual’s rights.

All these courts recognize the discontinuity of saying a warrantless arrest of a person inside the entry way is banned, but an arrest where the officers stand outside the threshold is fair game. Ultimately, the very same concerns and intimacies of the home discussed in *Payton* arise in both scenarios. *See Allen*, 813 F.3d at 79-80 (constructive entry case where man was not allowed to put on shoes and his daughter sat upstairs). This is why curtilage exists as a concept.² When you take *Payton* and combine it with the sound principles of cases like *Katz* (1967), *Mendenhall* (1980), and *Jardines* (2013), the conclusion is clear: constructive entry violates the Fourth Amendment.

While some circuits have rejected the constructive entry doctrine by reading *Payton* narrowly, *Payton* did not say that *only* arrests inside the home require a warrant and everything else is fair game. Rather this Court focused on the rights surrounding the home and declared the New York statute at issue unlawful. *Payton*, 445 U.S. at 576. *Nowhere* does it give police

² Curtilage dates back to English common law. Courts have extended Fourth Amendment protection to the curtilage, and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. *Oliver v. United States*, 466 U.S. 170, 180 (1984). The area immediately surrounding the home, such as the front porch, is considered part of the home itself for Fourth Amendment purposes. *Florida v. Jardines*, 569 U.S. 1 (2013).

permission to use coercive tactics to lure people to open their door and step outside just to circumvent the Fourth Amendment's vital protections.

Payton, and by extension the Fourth Amendment, can be breached by conduct other than physical entry. *Reeves*, 524 F.3d at 1165. In *United States v. Reeves*, officers knocked on a motel room door, shined flashlights in the window, made phone calls to the room, and loudly identified themselves as police officers, over the course of twenty minutes. *Id.* at 1163. Eventually, the suspect opened the door, stepped out, and was taken into custody. *Id.* at 1164. The court relied on previous holdings that if an individual's decision to open the door to his home to the police is not made voluntarily, the individual is seized inside his home. *Id.* at 1168. Because the occupants' decision to open the door and submit to arrest was not voluntary, the court held that this conduct violated the Fourth Amendment. *Id.* at 1169-71.

B. Officers violated the Fourth Amendment when they used constructive entry tactics.

Here, the officers violated Atticus's Fourth Amendment rights. At the time they arrived at Atticus's home, not only did the officers lack a warrant, but they knew they did not have probable cause. Wearing their duty belt (which included a gun, taser, baton, and handcuffs), the officers approached Atticus and Fiona's secluded home. Throughout their contact with Atticus, they refused to answer any of his questions. When Atticus declined to step outside, the officers returned to their fully visible, marked squad car to discuss a Plan B. After deciding between themselves that the brief conversation with Atticus gave them probable cause, they exited the car and returned to the front steps to make an arrest. Still, they did not attempt to secure a warrant. Blocking the only exit from the home, hands on their holsters, guns at the ready, and weapons fully visible to Atticus, they commanded Atticus to come outside. These are all markers indicative of the circumstances that indicate a seizure, according to *Mendenhall*.

Similar to the coercive tactics in *Reeves* where officers loudly identified themselves and continuously knocked on the door until the occupant complied with demands, the officers here identified themselves, came back to the door after Atticus’s refusal to answer questions, and loudly demanded that Atticus “Get outside right now!” Only then did Atticus come outside. Clearly, this was a “submission to the assertion of authority” under *Hodari D.* Because the officers were covering the only entry point to the home, the proper inquiry here is “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” *Bostick*, 501 U.S. at 436. Atticus’s prior attempts at ending contact with the police had obviously failed, so of course he did not feel free to decline submitting to this command. Instead, he did what any reasonable person would do: he obeyed the assertion of authority. The officers quickly acted on the opportunity presented by Atticus leaving the sanctuary of his home by immediately handcuffing him, hauling him off in the squad car, and processing him at a station.

Beyond this unlawful conduct of the officers, Atticus’s situation also raises heightened expectations of privacy that were wholly (and needlessly) disregarded by law enforcement. Unlike Fourth Amendment cases that examine a hotel room or a busy apartment complex, this case is about a young couple who chose to live in an isolated, densely wooded, area in a small cabin. The nearest “public” place was a walking path in the Joralemon State park—500 feet away. That’s 1.64 American football fields away. The location was also a far cry from a neighborhood or campground: there were no other homes around the cabin. The area the officers intruded upon would certainly count as part of the home’s curtilage.³ And the Second Circuit highlighted when

³ See *United States v. Dunn*, 480 U.S. 294, 301 (1987) (curtilage questions ordinarily “should be resolved with particular reference to four factors: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by”).

officers “physically enter protected premises to effect a warrantless search or arrest” they violate *Payton. Allen*, 813 F.3d at 81. The Agents intruded on protected premises without a warrant to effectuate an arrest; Atticus’s rights were violated. Therefore, the notebook taken from his person must be suppressed.

Certainly, some constructive entry cases present more obviously extreme circumstances than the case at bar, but this merely shows the complex range of situations. *See e.g., United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985) (bullhorn use and drawn weapons); *Morgan*, 743 F.2d 1158 (flooding the house with spotlights). Just because more atrocious situations can exist does not negate the fact that a violation took place here. Again, this concept underpins *Miranda* violations, where police can use coercive tactics without resorting to the extreme of physical violence. *Compare Haynes v. State of Washington*, 373 U.S. 503, 83 (1963) (involuntary confession where a man was held incommunicado and told by police officers that he could not call his wife until after he made a written confession) with *Brown v. Mississippi*, 297 U.S. 278 (1936) (coerced confession where black men were strung up in a tree and brutally beaten until they confessed to a murder they didn’t commit).

C. A contrary rule would undermine the principles of the Fourth Amendment.

Allowing officers to routinely perform constructive entry procedures without a warrant goes against the intent of the Fourth Amendment and sound public policy. As the Sixth Circuit warned, “[a] contrary rule would undermine the constitutional precepts emphasized in *Payton*.” *Morgan*, 743 F.2d at 1166-67. First, it would create less incentive to follow proper procedures. Second, it would entrench distrust between citizens and law enforcement. Finally, it goes against Supreme Court precedent, sound logic, and the purpose of the Fourth Amendment.

First, allowing constructive entry without a warrant incentivises law enforcement to circumvent proper procedure.⁴ As one legal scholar reasoned: “If police are permitted to use showings of force and coercive tactics to command people out of their homes to a place where a constitutional arrest can be made, there is less incentive to establish probable cause, obtain warrants, and follow the procedures that are set in place to protect against unreasonable search and seizure.”⁵ In both Atticus’s case and countless others, police have the time and resources to find more evidence and secure a valid warrant. *See Maez*, 872 F.2d at 1446-47. It is not a big ask, but it is a vital one. Warrants create a sense of legitimacy and help curtail corrupt processes.

Second, constructive entry increases tension with police and stokes citizen mistrust. “When police constructively enter the home, they use tactics that intentionally disrupt the tranquility of the home to get the attention of the occupants and take away a person’s right to choose whether or not to exclude the police presence from their home.”⁶ Given the current lack of trust in law enforcement, residual tensions following the George Floyd protests, and current unrest with ICE, it is crucial now more than ever to underscore the importance of the Fourth Amendment and demonstrate a commitment to upholding individuals’ rights. We should hope as a society that people will comply with legitimate police commands without resistance. However, in the current system “[o]pening your door in response to law enforcement’s armed commands may extinguish your Fourth Amendment rights” depending on the federal circuit you live in.⁷ Punishing people for obeying authority will never win the hearts and minds of the public.

⁴ Meg Penrose, *supra* note 1, 306 (“This tactic allows police to game the warrant requirement and conduct unreasonable seizures at people’s homes.”).

⁵ Christian Bugher, *Warrantless Arrest Inside the Home: Constructive Entry under the Fourth Amendment*, 93 U. Cin. L. Rev. (2024).

⁶ *Id.*

⁷ Meg Penrose, *supra* note 1, 305.

Finally, a contrary rule defies Supreme Court precedent, the Fourth Amendment, and sound logical reasoning. “The right to be secure in one’s home and free from unreasonable governmental interference is one of the few textually enumerated rights we have.”⁸ Despite this reality, some circuits urge taking *Payton* at its most narrow: “its literal holding that non-exigent warrantless arrests inside the home violate the Fourth Amendment.” *Gaddis v. DeMattei*, 30 F.4th 625, 633 (7th Cir. 2022). However, the reasoning given by the Eleventh Circuit outlines precisely the problem with this reading of *Payton*. To the Eleventh Circuit, “*Payton* keeps the officer’s body outside the threshold, not his voice. It does not prevent a law enforcement officer from telling a suspect to step outside his home and then arresting him without a warrant.” *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002). This reading renders *Payton*’s protections meaningless. Just as in *Payton*, where a child answered the door and the suspect was covered in a sheet, a person’s life in the home is still intruded upon; there may be children or family present, a person may be in a state of undress, and the intimacies of the home are exposed. In one study of police-citizen contacts in 2020, only 5% of individuals engaged in some action toward police like complaining, disobeying, or threatening an officer.⁹ This means that 95% of individuals were compliant; police only had to resort to threat or use of force in 3% of cases. Knowing that *Payton* would underscore the sanctity of the home just for warrantless police commands to be permitted to intrude upon a person’s private life with the assumption of compliance defies basic logic.

The solution to all of this is simple: for constructive entry arrests, require a warrant. The Fourteenth Circuit’s ruling should be overturned.

⁸ *Id.* (citing U.S. Const. amend. IV.).

⁹ *54 Million Police Citizen Contacts-2 Percent Involve Force Or Threat Of Force*, Crime in America, Nov. 18, 2022, crimeinamerica.net/54-million-police-citizen-contacts-2-percent-involve-force-or-threat-of-force/#:~:text=Gallup%20data%20matches%20numbers%20provided,generally%20supportive%20of%20law%20enforcement

II. Ristroph’s warrantless search of the defendant’s closed box located in a shared residence constitutes an unreasonable search under the Fourth Amendment.

A warrantless search is presumptively unreasonable under the Fourth Amendment, but one limited exception allows officers to rely on consent from a third party possessing common authority over the premises or effects. *United States v. Matlock*, 415 U.S. 164, 177 (1974). This Court later expanded third party consent to include anyone who officers “reasonably believe” to possess common authority. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (creating the “apparent authority” doctrine).

A. There was no reasonable basis for Ristroph to believe Fiona had common authority over the closed box.

The government bears the burden to establish a warrantless search was reasonable by showing that a third party with common authority over the premises consented to the search. *Rodriguez*, 497 U.S. 177 at 181. Common authority exists where there is “mutual use of the property by persons generally having joint access or control.” *Matlock*, 415 U.S. at 171. The existence of common authority assumes that the absent target has assumed the risk that a third party might give consent. *Id.* However, third party consent may not justify a warrantless search when the “circumstances provide no reasonable basis to believe that the third party possess[es]” such common authority to consent. *United States v. Block*, 590 F.2d 535, 540 (4th Cir. 1978) (*citing Stoner v. California*, 376 U.S. 483, 489 (1964)). Further, third party consent cannot validate a search if the surrounding circumstances demonstrate that “the absent target of the search retains an expectation of privacy.” *Block*, 590 F.2d at 540. Any attempt to show the validity of Fiona’s ability to consent to this search falls short of the mark. Ristroph did not gather enough information from Fiona’s statements regarding her use of the box, and the other surrounding markers contributed to ownership being, at minimum, ambiguous.

i. Fiona's statements to Ristroph do not inform a reasonable belief she had mutual use over the box.

While an officer may act on the consent from someone who does not use the property, they must sustain a reasonable belief, even if erroneous, that the individual giving permission possesses common authority over the premises. *Rodriguez*, 497 U.S. at 186. The reasonableness determination turns on the officer's knowledge of the third parties, "use of, control over, and access to the container to be searched." *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000). Therefore, the reasonableness of an officer's determination may only be judged based upon "the facts available to the officer at the moment." *Terry*, 392 U.S. at 21-22. Courts may also look further to "widely shared social expectations" to assess reasonableness. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). As such, officers may proceed based on the factual and practical considerations of everyday life and draw reasonable inferences to inform mutual use of property. *See United States v. Taylor*, 600 F.3d 678, 681 (6th Cir. 2010) (officers' reasonable belief that most items within an apartment were subject to sole owner's mutual use was valid). Still, if the officer does not learn enough, then a warrantless search is unlawful. *See United States v. Waller*, 426 F.3d 838, 842 (6th Cir. 2005).

Here, Ristroph lacked a reasonable basis to believe Fiona had common authority to consent. Fiona's statements provided Ristroph with a very limited basis of knowledge regarding her potential use of Atticus's box. When asked about the upstairs loft, Fiona identified it as Atticus's personal space, prompting Ristroph to confine his search to the lower level. This reflected his recognition that Fiona did lack control over certain areas. Fiona also voiced a lack of awareness of what was upstairs given she rarely went up there. At most, this information indicates that Fiona had physical access to the staircase where the closed box was located, which establishes only joint access, not the mutual use required for common authority under *Matlock*.

No further social expectations raise an assumption to support Ristroph's belief Fiona had mutual use of the box. Unlike *Taylor*, where the officer knew the consenting party was the sole owner of the property, Ristroph knew only that Fiona and Atticus were an unmarried couple that lived there, with no further knowledge of individual ownership of the property. The prevailing social expectation should be that, as unmarried and unrelated roommates, one party may not control all items in the household. Privacy expectations should not be lost by having roommates, especially given the increasing reliance in American society on shared living situations.¹⁰ The limited questions Ristroph posed to Fiona failed to provide a sufficient basis to conclude that she used or had access to the box, rendering any inference of her control purely speculative.

ii. Atticus retained a clear expectation of privacy in the closed box.

An individual does not forfeit their expectation of privacy of containers by sharing a home. See *United States v. Karo*, 468 U.S. 705, 725-27 (1984) (O'Connor, J., concurring). When an absent person retains a clear expectation of privacy in an item, a third-party lacking an appearance authority of may not reasonably provide consent. *Block*, 590 F.2d at 540. Courts look to certain markers associated with maintaining privacy to gauge the reasonableness of an officer's belief that a third party had mutual use of the container. *Basinski*, 226 F.3d at 834.

Although courts have recognized heightened expectations of privacy in certain types of containers, this does not foreclose having privacy interests in others. See *United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998). A defendant does not forfeit his expectation of privacy by storing his belongings in cardboard boxes given that the reasonableness of a search still, "depends

¹⁰ Shared living arrangements rose from 28.8% of 55 million adults in 1995 to 31.9% of nearly 79 million in 2017. Richard Fry, *More adults now share their living space, driven in part by parents living with their adult children*; Pew Research Center, [pewresearch.org/short-reads/2018/01/31/more-adults-now-share-their-living-space-driven-in-part-by-parents-living-with-their-adult-children/#:~:text=Living%20with%20nonrelatives%20has%20become,relatives%20other%20than%20romantic%20partners.](https://www.pewresearch.org/short-reads/2018/01/31/more-adults-now-share-their-living-space-driven-in-part-by-parents-living-with-their-adult-children/#:~:text=Living%20with%20nonrelatives%20has%20become,relatives%20other%20than%20romantic%20partners.)

on all the circumstances, not just on whether a container happens to be a suitcase, valise, purse, footlocker, or cardboard box.” *Fultz*, 146 F.3d at 1105. Likewise, in assessing all the circumstances, the D.C. Circuit Court in *Peyton* found it unreasonable for officers to believe that a man’s great-great grandmother had authority to consent to a search of a shoebox, despite the lid to the box being the only thing securing it closed. *United States v Peyton*, 745 F.3d 546, 554 (D.C. Cir 2014). Other considerations include the officer’s awareness of the, “consenting party’s lack of interest in the item,” *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992), and assertions or disclaimers of ownership, *See White v. United States*, 444 F.2d 724, 726 (10th Cir. 1971) (wife’s consent was valid in part because she never indicated the bag belonged exclusively to the defendant). Markings indicating ownership, or lack thereof, could further the reasonableness of an officer’s belief, though they are not dispositive. *See Basinski*, 226 F. 3d at 835 (lack of defendant’s name on briefcase did not undermine sole ownership where agents had no reason to believe otherwise).

Atticus’s placement of a closed box, in an area under his control, contributed to a clear expectation of privacy he retained in that item. In this case, Fiona’s authority over the staircase the box was located is distinct from any authority over the box itself and merely provides context for Ristroph’s assumptions regarding ownership. To be clear: the staircase was under Atticus’s authority, given it led to his private office space, as indicated by Fiona’s prior statements. This leads to the question of whether Ristroph’s belief in the ownership of the box itself was made to be reasonable by the box itself.

Apart from Fiona’s statements, Ristroph observed several indicators creating, at minimum, uncertainty in the box’s ownership, which should have further made it unclear whether the box was subject to Fiona’s mutual use. While the box contained no identifying markers, Atticus’s name

being absent is insufficient to establish a reasonable belief of Fiona's ownership, especially given that Fiona's statements still provided Ristroph with no legitimate reason to think Fiona held any possessory interest in it. In fact, Ristroph foreclosed an opportunity for Fiona to disclaim ownership given he immediately opened the box after fixating his attention on the staircase. The top flaps to the box itself were closed, requiring a deliberate effort to view its contents. Evidently, there is no way for the box to have been more securely contained with a zipper or lock. Given such, courts in *Fultz* and *Peyton* have recognized clear expectations of privacy in boxes like Atticus's. In the wake of these surrounding circumstances, a reasonable officer would have substantial doubt that the closed box was in fact subject to Fiona's mutual use.

iii. Ambiguity over the ownership of the box imposed a duty to inquire on Ristroph.

If an officer does not learn enough because the circumstances make it ambiguous as to whether the property is subject to mutual use, a warrantless search of the property is unlawful. *Peyton*, 745 F.3d at 554. Thus, the government's burden cannot be carried out if, when faced with such ambiguity, they barge ahead without further inquiry. *See Id*; *see also Taylor*, 600 F.3d at 685 (holding there was ambiguity over whether third party had mutual use or control of the shoebox and the officers failed to cure this ambiguity by asking for clarity in the situation, therefore the third party lacked apparent authority to consent to the search of the shoebox). In *United States v. Peyton*, the D.C. Circuit held that a grandmother's acknowledgment that her grandson kept his "personal property" in part of the living room contributed to the ownership of a shoebox found there ambiguous. *Peyton*, 745 F.3d at 554-555. That ambiguity triggered an affirmative duty for the officers to clarify ownership before searching the shoebox. *Id.*

As in *Taylor* and *Peyton*, where the officers failed to inquire further into ambiguous ownership, Ristroph asked no questions to directly address whether Fiona had mutual use of the

closed box. Fiona's statements regarding her control over the first-floor bedroom, like the grandmother's statements in *Peyton*, put Ristroph on notice that he was approaching an area outside of her control. Despite this, he asked no follow up questions. Instead, he proceeded towards the area she had just identified as Atticus's. Notably, the Fourteenth Circuit did not make a finding that the staircase constituted a "common area," but only presumed it to be, an assumption that is, at best, contested. This failure to inquire is especially significant given Fiona was standing a few feet away and evidently willing to answer questions. Clarifying ownership of the box would have been minimally burdensome, and ignorance of that ownership cannot justify a warrantless search of a closed container in light of the substantial Fourth Amendment interests at stake. Given Ristroph's failure to cure such an ambiguity, the government cannot establish Fiona had the apparent authority to consent to the search.

Circuits that have held that officers do not have an affirmative duty to inquire and resolve ambiguity improperly invert the apparent authority doctrine. *See United States v. Melgar*, 227 F.3d 1038 (7th Cir. 2000); *see also United States v. Snype*, 441 F.3d 119 (2d Cir. 2006). In *United States v. Snype*, law enforcement officers executed an arrest warrant for a man by forcibly entering the apartment of the woman he had been residing with for the evening. *Snype*, 441 F.3d at 136. The woman testified that the man was a stranger to her and only allowed him to stay overnight at her boyfriend's request. *Id.* at 137. Prior to obtaining the woman's consent, officers found a knapsack on the floor that was later determined to have incriminating evidence against the man. *Id.* at 136. On appeal, the Second Circuit held that a resident's general consent extends to containers within the home unless it is "obvious" they belong to someone else. *Id.* Similarly, the Seventh Circuit held that the "risk of uncertainty should run" in favor of police error over that of the defendant's

expectation of privacy unless there is positive information of ownership to the contrary. *Melgar*, 227 F.3d at 1041.

By placing the affirmative duty on defendants, the Second and Seventh Circuits improperly invert the apparent authority doctrine. Rather than requiring officers to show a reasonable basis for believing the consenting party exercised common authority over the knapsack, these courts shift the burden to the defendant to prove that the container was “obviously” his. This approach allows officers to capitalize on open-ended consent and citizen ignorance without resolving ambiguity, thereby diluting the traditional requirement that apparent authority be established by the facts known to the officers at the time of the search. *See Rodriguez*, 497 U.S. at 189 (“determination of consent to enter must “be judged against an objective standard: 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?”). Shifting the risk onto the defendant to prove a reasonable expectation of privacy would erode the Fourth Amendment’s core purpose of safeguarding individual privacy. This is especially true when the defendant is not even present at the time of the search. Simultaneously, the shift openly welcomes police officers’ failure to make reasonable inquiries into the validity of a third party’s authority to consent.

Think abstractly to other legal doctrines and how this same logic may apply to rules pertaining to ambiguous circumstances. The rule of lenity is a principle of statutory construction ensuring any ambiguities within criminal statutes are resolved in favor of the defendant. *Albernaz v. United States*, 450 U.S. 333, 342 (1981). Were we to apply the logic of the Second and Seventh Circuits, resolving ambiguity in ownership in favor of the government (whose actors have access to more knowledge, information, and training) a defendant’s rights would be blindly infringed upon. This inversion mirrors precisely what the rule of lenity forbids. Just as courts do not construe

ambiguous criminal statutes to expand liability through inference, officers may not exploit ambiguity in apparent authority to expand the scope of warrantless searches.

In comparison, the approach taken by the D.C Circuit and Sixth Circuit aligns more closely with this Court's precedent in *Rodriguez*. In *Peyton* and *Taylor*, when ownership of an item is uncertain, officers cannot reasonably conclude that the person granting consent has the authority over it. *Rodriguez*, by comparison, establishes that the doctrine of apparent authority permits officers to act based on an objectively reasonable belief that the consenting party controls the place or object searched. Requiring officers to inquire under ambiguous circumstances imposes no greater restriction on police conduct than *Rodriguez*'s standard, which allows a reasonable, even if mistaken, belief in the consenter's common authority. The D.C and Sixth Circuits' approaches simply clarify that a belief cannot be deemed reasonable when the surrounding circumstances are ambiguous. Such a clarification does not oppose the precedent set forth in *Rodriguez*, but rather clarifies its core principle in more precise terms

B. Even with apparent authority, Fiona limited scope to exclude the box.

Even if this Court were to conclude that Fiona had apparent authority to consent, her scope was limited to exclude the closed box. Common authority to consent to a search of a shared space does not automatically extend to "the interiors of every enclosed space within the area." *Peyton*, 745 F.3d at 552. In fact, a defendant's expectation of privacy may be at its "most intense" when a closed container is placed semi-permanently in an area under the general control of another. *Taylor*, 600 F.3d at 684. This rule governing an individual's scope of consent is not without limits, as officers are not required to verify authority over every closed container within a shared space. *Id.* at 553. However, this balance must be one that assesses the "critical circumstances indicating the presence or absence of a discrete expectation of privacy with respect to the particular object."

Block, 590 F.2d at 541. Simplistically, this inquiry requires asking “what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). In *Florida v. Jimeno*, this Court held that it was objectively reasonable for police to conclude that general consent to search a car for narcotics encompassed closed containers within the vehicle. *Id.* at 250. The officer explicitly defined the scope of the search, stating he was looking for narcotics, and the vehicle owner imposed no limitations on that consent. *Id.* at 251. Therefore, interpreting that consent to include all containers that might contain narcotics was reasonable. *Id.*

Here, Fiona’s consent did not extend to the closed box on the staircase leading to the loft. Although Ristroph received general permission to enter the residence, the scope of that consent is limited by what a reasonable officer would have understood from Fiona’s statements and conduct. Unlike *Jimeno*, where the officer defined the object of the search and the defendant imposed no limitations, Ristroph described the search only as part of an “investigation,” and Fiona identified her bedroom and the first floor as areas under her control. She distinguished the second-floor loft as space used by Atticus for storage and office purposes, explaining that she was unfamiliar with its contents. This distinction signaled a clear spatial boundary between common areas subject to her authority and a private area associated exclusively with Atticus. Ristroph himself recognized this limitation, noting that he intended to confine his search to the first floor. The closed box was located on this staircase leading only to the loft, at the threshold of a space Fiona had identified as Atticus’s private office. Even assuming Fiona had the general control over the stairs themselves, Atticus still placed the box in what he intended to be a temporary location, likely to bring it upstairs later as Fiona noted he often did. If privacy expectations remain “most intense” when a container

is semi-permanently stored in this common space, a temporarily placed box would fall even more clearly outside Fiona’s scope of consent.

Under these circumstances, a reasonable officer would have understood that Fiona’s consent extended only to the common area under her control and did not authorize the search of a closed, unidentified container located at the boundary of a private space. Accordingly, even assuming she had apparent authority, the search of the closed box exceeded the scope of Fiona’s consent, and the evidence unlawfully seized should be suppressed.

III. Extrinsic evidence should have been allowed to impeach Copperhead’s statements.

A. The foundations of our justice system support allowing extrinsic evidence to impeach an unavailable hearsay declarant.

Under Rule 806 of the Federal Rules of Evidence (FRE), extrinsic evidence of specific instances of conduct of a hearsay declarant may be admitted to impeach the declarant’s character for truthfulness when the declarant is unavailable to testify at trial. To fully understand the necessity of this rule, you have to recall the foundational principles of our justice system. First, our system of justice is rooted in the concept of an adversarial process. Second, cross-examination is one of the fundamental tools to discover the truth and expose information to the jury. Third, the role of the jury is to be the ultimate fact finder.

To begin, “The adversary system in this country is predicated on the assumption that there are always two sides to any question. . . .”¹¹ The purpose of a trial is “to arrive at the truth of the controversy, in order that justice may be done.”¹² The very concept underscores the need for two sides. This is why this Court in *Gideon* recognizes the fundamental right—and necessity—for

¹¹ Peter J. Riga, *The Supreme Court, The Adversary System and Some Moral Dilemmas*, 23 *Catholic Lawyer* 97 (1978).

¹² Edward F. Barret, *Adversary System and the Ethics of Advocacy*, 37 *Notre Dame Law Review* 479 (1962).

indigent individuals to have a lawyer. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Still, to allow for this combative structure, we have to have a vehicle: cross examination.

Renowned legal scholar John Wigmore, known for his expertise in the law of evidence, stated that cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” *United States v. Salerno*, 505 U.S. 317, 328 (1992). With this in mind, this Court noted that “in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate.” *Id.*

Finally, there must be someone to assess all the information revealed at trial. That’s where the jury comes in. The jury is meant to be the ultimate fact finder. This tenant resounds clearly throughout the FRE. *See* Fed. R. Evid. 104(b); 704; 1008. Embedded in this role is the promise that you—when faced with the full force of the state in a criminal prosecution—will be judged, not by some scholar on high removed from the daily demands of life, but by a jury of your peers. Justice Gorsuch confirmed “Judges may not assume the jury’s factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard. To hold otherwise [. . .] would intrude on a power the Fifth and Sixth Amendments reserve to the American people.” *Erlinger v. United States*, 602 U.S. 821, 834–35 (2024).

All of this unravels when relevant evidence is kept away from the jury. “When a hearsay declarant is unable to testify, the jury is unable to weigh these factors.” R. at 61. That’s why FRE 402 demonstrates a strong presumption in favor of *admitting* evidence (assuming the evidence does not violate some other rule in the FRE, a statute, or a constitutional provision). Fed. R. Evid. 402. The jury cannot judge what they do not know, and they cannot weigh credibility when relevant evidence is obscured or hidden.

Hearsay presents particular difficulty, but the FRE creates a sound structure to balance allowing evidence while ensuring the ability to question the truth of statements remains intact. *See* Fed. R. Evid. 801-807. Meanwhile, the FRE grapples with extrinsic evidence to prove specific instances of conduct to either attack or support a witness's character for truthfulness. Fed. R. Evid. 608. At common law, the use of such evidence was banned. According to Wigmore, the rationale behind this blanket ban was "to prevent confusion of issues through proliferation of testimony on minor matters; and to prevent unfair surprise arising from false allegations of improper conduct." *Carter v. Hewitt*, 617 F.2d 961, 971 (3d Cir. 1980). Today, the use of extrinsic evidence for proving a witness's character for truthfulness is *generally* not allowed. FRE 608(b); *See also United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992) ("The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters."). However, these matters can be inquired into during cross-examination if they are probative. Fed. R. Evid. 608(b)(1). "As such, Rule 608 "prohibits extrinsic evidence on cross-examination and thus [the] crossexaminer is 'stuck with whatever response'[the] witness gives." *United States v. Wright*, 534 F. Supp. 3d 384, 392 (M.D. Pa. 2021).

This presents a glaring problem. While it is certainly understandable that cross-examiners may be stuck with whatever response a witness gives, they at least had the opportunity to pose a probative question in front of the jury and gave the jury an opportunity to assess the witness's physical reaction and verbal response. But, what if there is no witness to begin with?

In this case, the witness isn't just unavailable—she's dead, and "few declarants are more "unavailable" than dead men." *United States v. Zannino*, 895 F.2d 1, 7 (1st Cir. 1990). The jury is unable to do the most fundamental fact-finding function: they cannot assess her body language, they cannot hear her voice, they cannot assess her words, and they cannot consider her reactions

to cross-examination questions. All they have is hearsay. Whether they believe that Copperhead's role was limited and "she had nothing to do with it," is critical for determining Atticus's guilt. To deprive Atticus the opportunity of introducing evidence of Copperhead's character for untruthfulness is to stand against the very purpose of the American adversarial system, the function of cross-examination, and the role of the jury.

B. The FRE provisions and related rules support allowing extrinsic evidence to impeach an unavailable hearsay declarant.

i. A plain language reading of FRE 608 & 806 supports this conclusion.

The FRE has taken great pains to allow for hearsay statements when a witness is unavailable. Fed. R. Evid. 804. For example, 804(b)(6) even clarifies that in cases of unavailability, the party cannot have wrongfully caused the person's absence and simultaneously reap the benefits of the 804 exceptions. But, the FRE does directly address this scenario. The best answer can be found in FRE 806 on Attacking and Supporting the Declarant. "When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. One court laid out the connection clearly: "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." *United States v. Friedman*, 854 F.2d 535, 570 n. 8 (2d Cir. 1988).

ii. Related rules support this plain language reading.

It is illogical to bar extrinsic evidence considering the provisions laid out in FRE 608(a); "A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of

an opinion about that character. But evidence of truthful character is admissible *only after* the witness’s character for truthfulness has been attacked.” Fed. R. Evid. 608(a) (emphasis added). Two crucial points must be made. First, reputation testimony is generally barred, but it is allowed here because our justice system recognizes the importance of a jury knowing whether or not to trust what a person says to begin with. *See id.* Second, the rule lays out a framework for when this reputation evidence may come in. *See id.* How can a witness’s character for truthfulness be attacked if they are unavailable to be cross-examined, the only type of reputation evidence is in the form of extrinsic evidence, and extrinsic evidence isn’t allowed? To put it bluntly: it can’t.

At this point, it is crucial to recall the point of banning extrinsic evidence in the first place: avoiding confusion of the issues or unfair surprise. Not only are these concerns not a problem in this case, but they would be taken care of in future cases by other rules of evidence. *E.g.*, Fed. R. Evid. 403 (explaining that the court may exclude relevant evidence if its probative value is substantially outweighed by dangers like confusing the issues, misleading the jury, or unfair prejudice); 901-902 (requiring documents be authenticated).

C. Preventing the evidence violates Atticus’s Sixth Amendment confrontation right.

Long before the Federal Rules of Evidence were codified by Congress, the Sixth Amendment guaranteed that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” U.S. Const. amend. VI. Ultimately, this clause encompasses the right of a defendant in a criminal case to face the witness against them, cross-examine them, and object to their testimony.¹³

¹³ Legal Information Institute, *Confrontation Clause*, Cornell Law School (Feb. 7, 2026), law.cornell.edu/wex/confrontation_clause.

Where a hearsay declarant is unavailable, a defendant is denied this basic right. That is why the general prohibition against hearsay exists in the first place. The hearsay exceptions and exemptions that allow a hearsay witness to testify come about either due to some necessity or because certain concerns inherent in hearsay may be alleviated. A common reason for allowing hearsay is that without it, the information would never otherwise get in front of the jury. Fair enough. However, that is precisely the issue here. Banning the extrinsic evidence means that the jury never hears the extremely relevant and probative testimony of the CSC Academic Integrity Board Member and the Mayor's Chief of Human Resources along with the authentic documents that deal with Copperhead's propensity to disobey codes for honesty and blatantly lie on official government applications. This Court does not need to be convinced of the likelihood that Copperhead stretched the truth when she said she had "nothing to do with it." Rather, this Court should recognize the relevance of the extrinsic information and the fundamental principle that Copperhead's credibility (or lack thereof) is a question for the jury.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourteenth Circuit's decision and find (1) the warrantless arrest of Atticus outside his home violated the Fourth Amendment, (2) the closed container search was unreasonable under law surrounding third party consent, and (3) extrinsic evidence should have been allowed to impeach an unavailable hearsay declarant.

Respectfully submitted,
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