IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

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THE UNITED STATES OF AMERICA

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v. Criminal No. _____

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE (757 Druid Park Lake Drive)

STATEMENT OF FACTS

On September 9, 1994, a warrant was issued for the arrest of the defendant, _____. On September 20, the FBI allegedly received information from an informant about the whereabouts of Mr. Harris. Federal agents and members of the Baltimore City Police Department subsequently established surveillance at 757 Druid Lake Park Drive, Apartment 1B, in Baltimore, Maryland. During the surveillance, a man was viewed exiting the residence. After an officer allegedly identified the man as _____, the suspect was arrested.

Following the arrest, agents knocked on the front door of Apartment 1B and announced the presence of police. Ms. Susan Taylor answered the door and allegedly invited the agents inside. Ms. Taylor stated that she did not know a _____, and identified the person who had just left her residence as "Inch."

Ms. Taylor then allegedly informed the agents that she had resided at the apartment for one year and was the only person who paid rent there. The sworn statement of one of the investigating agents, Michael Murray, indicated that Ms. Taylor informed the authorities that she lived at the apartment with her daughter and her daughter's two children, and that "Inch" was her daughter's boyfriend. See Exhibit 1 at p. 5. However, according to Ms. Taylor's statement, Ms. Taylor told the agents that she lived at the apartment with her three children and a boarder named Tanya Spencer, and that "Inch" was the boyfriend of Ms. Spencer. See Exhibit 2 at p. 1.

Ms. Taylor then consented to a search of her home. See Exhibit 3. During the search, the agents came upon a green canvass duffel bag that was closed shut. The agents, who were aware that Ms. Taylor lived at her home with others, including a boarder whose boyfriend often visited her there, did not pause to briefly inquire as to the identity of the bag's owner. Instead, they immediately opened the bag, discovering inside a quantity of crack cocaine. After the bag was opened, Ms. Taylor allegedly disclaimed ownership claiming that the bag belonged to "Inch." Ms. Taylor further stated that she "assumed Inch would be back for the bag since he told me he was just going out to make a phone call." Exhibit 2 at

pp. 1-2. Based on the information obtained pursuant to the warrantless search of the bag, the agents secured a search warrant for the apartment at Druid Lake Park Drive and the bag located there. The green canvass duffel bag and its contents were seized pursuant to the warrant, along with other evidence located at the apartment.

ARGUMENT

Although Susan Taylor allowed the government agents in this case to search her apartment, she never consented to a search of the duffel bag located there, nor could she have. A homeowner or tenant can only consent to a search of another person's property located in the premises if the homeowner or tenant shares at least "common authority" over that property. The owner of the closed duffel bag was either someone who legally resided in the apartment or a person who was properly visiting there. Importantly, the owner of the bag kept it closed, thus manifesting a reasonable expectation of privacy in it. Because Ms. Taylor did not have permission to open the duffel bag and peruse its contents, she could not authorize government agents to do the same.

Nor did Ms. Taylor say anything to the agents in this case that would have led them to reasonably believe that she possessed "apparent" authority to consent to a search of the duffel bag. Rather than being reasonably mistaken about facts that, if true, would have supported Ms. Taylor's consent to search, the agents simply chose not to inquire about such facts by failing to ascertain the identity of the owner of the bag prior to conducting a warrantless search of its contents. This government conduct violated the Fourth Amendment. Because the illegal search

constituted the basis for the subsequently issued search warrant, evidence obtained pursuant to that warrant must be suppressed.

I. Susan Taylor did not have authority to consent to a search of the duffel bag located in her apartment.

The Fourth Amendment to the United States Constitution imposes a warrant requirement on agents of the government who wish to search an individual's home or personal effects. Accordingly, searches conducted by law enforcement authorities absent a warrant are "presumptively unreasonable" and violative of the Constitution. United States v. Campbell, 945 F.2d 713, 715 (4th Cir. 1991) (citation omitted). See also, Mincey v. Arizona, 437 U.S. 385, 390 (1978) ("The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment....") (quotation omitted).

Persons, of course, may consent to a search of their own premises or effects, thereby waiving the protections otherwise afforded them by the Fourth Amendment. A person may also consent to a search of property over which he or she shares "common authority" with another. See United States v. Matlock, 415 U.S. 164, 170 (1974) ("[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."). If a

person does not share common authority over the personal property of another, however, he or she cannot consent to a search of that property, even if it is located in the person's home or apartment. United States v. Block, 590 F.2d 535, 539-42 (4th Cir. 1978). The government bears the burden of establishing that the consenting person had the requisite authority to validate a warrantless search. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

Susan Taylor had the authority to consent to a search of at least the common areas of her apartment, even though a boarder and family members also had access to those areas. However, Ms. Taylor never consented to a search of the duffel bag located in her living room; nor could she have, because her "common authority" did not extend to that bag. Nothing in the record suggests that the owner of the bag, who either lived at the apartment or was invited into the home by a person who did live there, ever gave Ms. Taylor permission to use, move, or look inside the bag. The mere fact that the bag was located in the apartment, standing alone, is not enough to authorize Ms. Taylor to consent to a search of its contents (even if she had done so). See United States v. Karo, 468 U.S. 705, 725 (1984) (O'Connor, J., concurring):

> A privacy interest in a home itself need not be coextensive with a privacy interest in the contents or movements of everything situated inside the home. This

> has been recognized before in connection with third-party consent to searches. A homeowner's consent to a search of the home may not be effective consent to a search of a closed object inside the home. Consent to search a container or a place is effective only when given by one with "common authority over or other sufficient relationship to the premises or effects sought to be inspected." (quoting Matlock).

The Fourth Circuit has fully embraced this reasoning; see Block, 590 F.2d at 541 ("While authority to consent to search of a general area must obviously extend to most objects in plain view within the area, it cannot be thought automatically to extend to the interior of every discrete enclosed space capable of search within the area. The decided cases indicate precisely the contrary: that each such enclosed space stands on its own bottom for this purpose.") (footnote and citations omitted).

In Block, the Court held that a homeowner, although possessing authority to consent to a search of her home, did not have authority to consent to a search of the interior of another person's footlocker located in the home. The Court was clear: third party consent, even when "unambiguously given," id. at 540, (certainly not the case here), cannot validate a warrantless search when the circumstances provide no basis for a reasonable belief that the consenting individual possesses either the shared or exclusive authority necessary to properly permit the inspection.

Moreover, a warrantless search based on a third party's consent is "even more certainly" improper "when the circumstances manifest to the contrary that the absent target of the search retains an expectation of privacy in the place or object notwithstanding some appearance or claim of authority by the third person...." Id. (citations omitted).

There was clearly no claim of authority by Ms. Taylor over the duffel bag in question. Rather, her consent was expressly limited to a search of her home. See Exhibits 2 and 3. Moreover, there is no doubt that the circumstances facing the agents in this case indicated that the owner of the closed duffel bag retained an expectation of privacy in it. See id. at 541:

> Common experience of life, clearly a factor in assessing the existence and the reasonableness of privacy expectations, surely teaches all of us that the law's "enclosed spaces" -- mankind's valises, suitcases, footlockers, strong boxes, etc. -- are frequently the objects of his highest privacy expectations, and that the expectations may well be at their most intense when such effects are deposited temporarily or kept semi-permanently in public places or in places under the general control of another. Indeed, to the sojourner in our midst -- all of us at one time or another -- the suitcase or trunk may well constitute practically the sole repository of such expectations of privacy as are had.

See also, United States v. Salinas-Cano, 959 F.2d 861, 865 (10th Cir. 1992) ("Although it was unlocked, the suitcase searched here

was a type of container long associated with privacy expectations, unlike a cardboard box, a cassette tape, or a plastic bucket.").

A duffel bag is similar in character to a suitcase or valise; all are used as private repositories for the owner's most treasured personal possessions. See 3 W. LaFave, Search and Seizure, section 8.5(d) at 307 (2d ed. 1987) ("Among the articles which it would seem would most commonly be deserving of the 'high expectation of privacy' label in the host-guest context would be the overnight bag or suitcase"). The duffel bag in this case is therefore exactly the type of container that "historically command[s] a high degree of privacy...." Salinas-Cano, 959 F.2d at 864. The bag was carried into Apartment 1B by someone who had a legal right to be there; because it was closed when discovered by the government agents, the circumstances clearly indicated that its owner continued to possess a reasonable, indeed even a compelling, expectation of privacy in its contents.

If the agents in this case had observed contraband protruding from the duffel bag, Ms. Taylor's consent, which allowed them to legally be inside the apartment, would have authorized the subsequent search of the items in plain view.[1] However, Ms.

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[1] See e.g., United States v. Wright, 971 F.2d 176, 180 (8th Cir. 1992) (not reaching issue of whether third party had authority

Taylor's consent to enter the apartment did not justify the agents' additional step of opening the bag to observe its contents. See Exhibit 1 at p. 6. To validate that step, the officers were required to determine whether Ms. Taylor had in fact consented to allow them to open the bag, and, if so, whether she possessed the authority to do so. Absent evidence that Ms. Taylor had common authority over the duffel bag at issue here, the government cannot meets its burden of establishing that her consent to a search of the bag, even if she had so consented, was valid.

In Frazier v. Cupp, 394 U.S. 731, 740 (1969), the Supreme Court held that the joint user of a duffel bag had authority to consent to its search. In Matlock, the Court described the reasoning underlying the Frazier decision: "By allowing the cousin the use of the bag, and by leaving it in his house, Frazier was held to have assumed the risk that his cousin would allow someone else to look inside." 415 U.S. at 171 (emphasis added). This description is telling. It was not the mere fact that Frazier left his duffel bag in the home of another that allowed that homeowner to consent to a search of that bag. Rather, the Court emphasized

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to consent to search of defendant's bag located in third party's home, where officer's search and seizure only extended to items jutting out of the bag and in plain view).

the important additional fact that Frazier also allowed the homeowner to use the bag and thereby voluntarily accepted the possibility that the homeowner might also allow another to look inside.

Unlike Frazier, nothing in the record suggests that Ms. Taylor had permission to use or open the duffel bag in question here.[2] Accordingly, the government cannot meet its burden of demonstrating that Ms. Taylor shared the "common authority over, general access to, or mutual use of" the duffel bag to allow her to validly consent to a search of its contents. Block, 590 F.2d at 539; see also, United States v. Welch, 4 F.3d 761, 764 (9th Cir. 1993). Rather, the bag was temporarily left in the apartment, closed, by a person who either lived there or was invited there by a boarder (who had every right to extend such an invitation). As the case law uniformly indicates, the mere fact that the bag was in Ms. Taylor's apartment was legally insufficient to make valid her consent to its search. Accordingly, the warrantless search of the duffel bag violated the dictates of the Fourth Amendment. See

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[2] Cf. United States v. Sellers, 667 F.2d 1123, 1126 (4th Cir. 1981) (renter of apartment had authority to consent to search of effects of another located there; the property owners explicitly gave the renter free access to their effects when they authorized him to remove the effects from their apartment and store them in his apartment).

Block, 590 F.2d at 540-43; Salinas-Cano, 959 F.2d at 863-65; Welch, 4 F.3d at 764; see also, United States v. Wilson, 536 F.2d 883, 884-85 (9th Cir.) (tenant did not have authority to allow agent's search of suitcases located in her apartment; she had neither the common authority nor the mutual use of the suitcases necessary to "give constitutional validity to her consent"), cert. denied, 429 U.S. 982 (1976).

Because the warrantless search directly led to and served as the basis for the search warrant subsequently issued for Apartment 1B at 757 Druid Lake Park Drive, evidence obtained pursuant to that warrant must be suppressed.

II. The facts known to the agents in this case did not support a reasonable belief that Ms. Taylor had the apparent authority to consent to the search of the duffel bag.

In Illinois v. Rodriquez, the Supreme Court held that a warrantless search may be valid when based on the consent of a third party whom the police, at the time of the search, reasonably believe to possess common authority over the property searched, even if the consenting person in fact does not have such authority. 497 U.S. at 186-89. The "apparent authority" doctrine set out in Rodriquez is applicable when officers are mistaken about facts which, if true, would legally authorize the third party's consent to search. The doctrine is inapplicable, however, when the

officers choose not to inquire about the relevant facts, but instead proceed without determining whether the person allegedly consenting to a search of property has the authority to do so.

As with actual authority, the government bears the burden of establishing that a person who consents to a search has the apparent authority to do so. Id. at 181. "The burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to 'mutual use' by the person giving consent, 'then warrantless entry is unlawful without further inquiry.'" United States v. Whitfield, 939 F.2d 1071, 1075 (D.C. Cir. 1991) (quoting Rodriguez) (emphasis added by Whitfield Court). If the government could meet its burden by simply pointing out the absence of any evidence in the record indicating that the person did not have common authority over the item to be searched, it would always serve the agents' best interests not to clarify ambiguities regarding whether the person consenting to a search has the authority to do so. Rather, the government must be able to demonstrate the existence of affirmative information which justified a reasonably belief that the consenting person exercised common authority over the property at issue. Here, the record

contains no evidence indicating that Susan Taylor exercised mutual use of or possessed joint interest and control over the overnight bag. The government therefore cannot meet its burden of showing that the consent to search the bag was either legitimate or apparently legitimate. Id. at 865. See also, Block, 590 F.2d at 539-40 (circumstances must "make it reasonable to believe that the third person has the right to permit the inspection in his own right and that the absent target has assumed the risk that the third person may grant this permission to others").

In Salinas-Cano, the officer correctly believed that a tenant had consented to a search of both the home and a suitcase located there, which was actually owned by the defendant. The court found that the officer should have clarified the relationship between the tenant and the suitcase, and that searching the suitcase prior to doing so violated the United States Constitution: "To hold that an officer may reasonably find authority to consent solely on the basis of the presence of a suitcase in the home of another would render meaningless the Fourth Amendment's protection of such suitcases. We hold that the police 'could not infer such authority merely from [the consenter's] ownership of the house.'" 959 F.2d at 866 (Quoting Rodriguez). Because the information known to the officer was insufficient to support a reasonable belief in the

tenant's authority over the suitcase, the "apparent authority" exception to the warrant requirement was inapplicable. See also, id. ("'whether [the tenant] had "mutual use" of the [suitcase] ... could not be determined from anything the agents asked'") (Quoting Rodriquez).

Likewise, in United States v. Welch, the defendant and her co-defendant drove a rental car to Las Vegas, where they were apprehended by the authorities and the co-defendant consented to a search of the rental car. During a search of the car, the officers came across a purse, which was later found out to be that of the defendant. The officers searched the purse and discovered evidence of a crime. The appellate court held that the search of the purse was unlawful, noting that these facts would not have led a reasonable officer to believe that the co-defendant shared the use of and had joint access or control over the defendant's purse. Moreover, the court noted any such belief would have necessarily rested on the erroneous legal assumption "that [the defendant's] leaving the purse in the car gave [the driver] the right to open it without her consent." 4 F.3d 761 at 765. Because such an assumption would have reflected a mistaken belief as to the law, the court found that "the facts available to the officers at the

time of the search do not support application of the apparent authority doctrine." Id. (citation omitted).

In this case, Ms. Taylor never asserted that she had the requisite authority over the duffel bag necessary to allow her to consent to its search.[3] Moreover, at the time the agents entered and searched the apartment, they were aware that Ms. Taylor lived there with family members and one boarder, and further knew that there was at least one person who regularly visited the apartment. In short, they were aware that there was a very good likelihood that the bag in fact did not belong to Ms. Taylor. Nevertheless, without asking, the agents immediately opened the bag upon discovering it, choosing not to even momentarily pause to ask Ms. Taylor whether she had any ties to the bag (other than the mere fact that it was located in her apartment). Indeed, if the bag had belonged to Ms. Taylor, the agents would likely not have been interested in its contents, given that they were in the apartment solely to search for the defendant's property. In fact, given that

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[3] See United States v. Rodriguez, 888 F.2d 519, 523 (7th Cir. 1989) (government could not contend that consenting spouse had even apparent authority to consent to a search of her husband's suitcase or that she gave such consent: "[n]one of the versions to which the agents testified -- whether Mrs. Rodriguez said 'If you want to go ahead on in, go on in,' or 'go ahead and look in the room,' or just nodded -- included reference to containers such as briefcases").

the only reason for the search was to discover anything that might have been left there by Mr. Harris, it is reasonable to infer from the fact that the agents went immediately to the bag and opened it that they themselves believed it to be the property of someone other than Ms. Taylor. Because the agents opened the bag rather than clarifying what was, at best, an ambiguous situation, it is simply "not enough for the officer to [now claim] ... that he thought the consenting party had joint access or control." Salinas-Cano, 959 F.2d at 865.

In light of the above circumstances, the agents were compelled to inquire further about who owned the bag before searching it. See Welch, 4 F.3d at 765 (officers were required to, at a minimum, inquire further rather than merely assuming that consent to search rental car extended to purse found in the car). If they had so inquired, and Ms. Taylor had incorrectly stated that the bag belonged to her, the agents' search of the bag would have been proper under Rodriguez. However, these agents did not so inquire, and, accordingly, the government cannot now avail itself of the apparent authority exception to the Fourth Amendment's warrant requirement, because the facts, as the agents knew them to be, did not establish that Ms. Taylor had authority to consent to a search of the duffel bag.

At best, the agents in this case were operating under the mistaken belief that Ms. Taylor's consent to search her house in turn authorized the search of the duffel bag located there. This, however, is clearly not the law, as stated by the United States Supreme Court, the Fourth Circuit, or any other federal court. See e.g., United States v. Rodriguez, 888 F.2d 519, 524 (7th Cir. 1989) (Judge Easterbrook pointing out that "the United States has not cited a single case approving a search of a closed container in consequence of a general consent to enter the room in which it was found") (footnote omitted). The agents were therefore not mistaken about facts that, if they had been true, would have supported Ms. Taylor's authority to consent to a search of the duffel bag. Rather, the agents were mistaken about the legal significance of Ms. Taylor's consent to search the house. See Block, 590 F.2d at 540 (district court's conclusion that a person's authority to search the room extended to the footlocker found there was an "error of law"); see also, Salinas-Cano, 959 F.2d at 866 (officer's committed a mistake of law, not of fact, and Rodriguez therefore did not resolve the issue). The "apparent authority" doctrine set out in Rodriguez is thus inapplicable.

The burden is on the government to establish the propriety of the search the duffel bag. The search was only proper if Ms.

Taylor had the authority or the apparent authority to consent to it. Ms. Taylor did not have common authority over the bag, and never claimed that she did. The investigating agents bore the responsibility of ascertaining as much. Because they failed to do so, the warrantless search violated the Fourth Amendment.

III. Conclusion.

Investigating officers may bypass the Fourth Amendment's dictates when circumstances indicate that a warrantless search is necessary or appropriate. However, absent such circumstances, the United States Constitution is clear: officers must obtain a warrant before searching a person's personal effects. In this case, there was no valid reason for the warrantless search of the duffel bag. If prior to the search the agents had asked who owned the bag, and if Ms. Taylor had then informed them that the bag belonged to "Inch" (as she did later, after learning that the bag contained contraband), nothing would have prevented the agents from seeking a warrant authorizing a search of the bag. At that point, Mr. Harris had been under arrest for a significant period of time, and the agents themselves demonstrated the ease with which a search warrant could be obtained by easily securing one immediately following the search. However, the agents never asked who owned the bag, and this non-action cannot now satisfy the government's

burden. Ms. Taylor did not have authority to consent to a search of the bag, and never suggested to the investigating officers that she did. Accordingly, the warrantless search of the duffel bag was unconstitutional. Because the illegal search served as the basis for the subsequently issued search warrant, evidence obtained pursuant to that warrant must be suppressed.

Respectfully submitted,

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