807 F.Supp.2d 1154
United States District Court,
N.D. Georgia,
Atlanta Division.
UNITED STATES of America,
v.
Juan Manuel ACOSTA
Gallegos, Noe Aguilar–Camudio, Defendants.
Criminal Case No. 1:09–CR–
184–JEC. | June 13, 2011.

II. Discussion

a. Search of Residence

Defendants Anaya–Medina/Cokis [Docs. 302 and 437] and Cruz–Plancarte/ Valda–Ceja [Docs. 322 and 439] contend that the warrantless search of the residence violates their Fourth Amendment rights because Valda–Ceja's consent to search the residence was involuntary. Defendant Cruz–Loya/Loza–Cruz [Docs. 297 and 442], citing the Supreme Court decision in *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), contends that the search of the residence violates his Fourth Amendment rights, regardless of any consent by one of the other Defendants, because he specifically refused consent for the agents to enter the residence. The Government responds contending that Valda–Ceja, a co-tenant in the residence, who had authority to consent, voluntarily consented to the agents' entry into the residence and to the subsequent search of the residence. [Doc. 466]. And, although the Government agrees not to introduce evidence obtained from the bedroom in which Loza–Cruz slept, the Government does not otherwise address the binding legal authority set forth in Randolph which appears, as Loza–Cruz contends, to require suppression of any evidence found in the residence as to Loza–Cruz.

The Government relies on the consent to enter the residence and subsequently to search the residence obtained from Valda–Ceja to justify the warrantless search. [Doc. 466 at 8]. "It has been long recognized that police officers, possessing neither reasonable suspicion nor probable cause, may nonetheless search [a residence] without a warrant so long as they first obtain the voluntary consent [for the ***1177** search]." *United States v. Blake,* 888 F.2d 795, 798 (11th Cir.1989) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). "Whether a suspect voluntarily gave consent to a search is a question of fact to be determined by the totality of the circumstances." *Blake,* 888 F.2d at 798 (citing *Schneckloth,* 412 U.S. at 249–50, 93 S.Ct. at 2059); *see also* *United States v. Nuyens,* 17 F.Supp.2d 1303, 1306 (M.D.Fla.1998) ("Voluntariness of consent is a question of fact, and the Court must look to the totality of the circumstances."). "The government bears the burden of proving both the existence of consent and that the consent was not a function of acquiescence to a claim of lawful authority but rather was given freely and voluntarily." *Blake,* 888 F.2d at 798 (citing *United States v. Massell,* 823 F.2d 1503, 1507 (11th Cir.1987)); *see also* *United States v. Purcell,* 236 F.3d 1274, 1281 (11th Cir.2001) ("A consensual search is constitutional if it

is voluntary; if it is the product of an 'essentially free and unconstrained choice.' ") (citation omitted). Factors in assessing voluntariness include: " 'voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found.' " *Blake,* 888 F.2d at 798 (citations omitted); *see also Purcell,* 236 F.3d at 1281 (same).

However, "the government need not establish [defendant's] knowledge of the right to refuse consent 'as the *sine qua non* of effective consent.' " *United States v. Zapata,* 180 F.3d 1237, 1241 (11th Cir.1999) (quoting *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996)). And, contrasting the test for the waiver of "rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment," *Schneckloth,* 412 U.S. at 241, 93 S.Ct. at 2055, the Supreme Court explained that, while a consent to search must be voluntary, it need not be " 'an intentional relinquishment or abandonment of a known right or privilege,' " that is, knowing and intelligent. *Id.* at 241–46, 93 S.Ct. at 2055–56 (citation omitted); *see also Tukes v. Dugger,* 911 F.2d 508, 516 (11th Cir.1990) (same). According to the former Fifth Circuit in *United States v. Elrod,* 441 F.2d 353 (5th Cir.1971), a case decided before *Schneckloth,* "[t]he question [whether an individual has validly consented to a search] is one of mental awareness so that the act of consent was the consensual act of one who knew what he was doing and had a reasonable appreciation of the nature and significance of his actions." *Id.* at 355. Nonetheless, that standard does not, after *Schneckloth,* mean that a voluntary consent to search requires a comprehension of Fourth Amendment rights. *United States v. Jennings,* 491 F.Supp.2d 1072, 1078–79 & n. 3 (M.D.Ala.2007).

And, as the Seventh Circuit Court of Appeals stated, "A third party with common authority over the premises [or effects] sought to be searched may provide such consent.... Common authority is based upon mutual use of property by persons generally having joint access or control." *United States v. Aghedo,* 159 F.3d 308, 310 (7th Cir.1998) (citations omitted); *accord United States v. Fernandez,* 58 F.3d 593, 597–98 (11th Cir.1995). As noted by the Supreme Court, "[c]ommon authority is, of course, not to be implied from the mere property interest a third party has in the property ... but rests rather on the mutual use of the property by persons generally having joint access or control for most purposes...." ***1178** *United States v. Matlock,* 415 U.S. 164, 171–72 n. 7, 94 S.Ct. 988, 993 n. 7, 39 L.Ed.2d 242 (1974); *see also United States v. Backus,* 349 F.3d 1298, 1299 (11th Cir.2003) (same). Furthermore, "a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of entry, reasonably believed possessed common authority over the premises, even if the third party does not in fact possess such authority." *United States v. Fernandez,* 58 F.3d 593, 597 (11th Cir.1995); *see also United States v. Brazel,* 102 F.3d 1120, 1148 (11th Cir.1997). "As with other factual determinations bearing upon search and seizure, 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?" *Illinois v. Rodriguez,* 497 U.S. 177,

188, 110 S.Ct. 2793, 2801, 111 L.Ed.2d 148 (1990) (quoting *Terry v. Ohio,* 392 U.S. 1, 21–22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)); *see also United States v. Mercer,* 541 F.3d 1070, 1074 (11th Cir.2008) (same). It is the Government's burden to establish that Valda–Ceja had actual authority or apparent authority to consent to the searches. *See Rodriguez,* 497 U.S. at 181, 110 S.Ct. at 2797. The validity of the search as to Cokis and Valda–Ceja depends on the voluntariness of Valda–Ceja's consent.15 Based on the totality of the circumstances, the court finds that Valda–Ceja's consent to allow the agents into the residence and to subsequently search the residence was voluntary.
On April 29, 2009, at approximately 8:00 a.m., federal agents arrived at 2265 Ranch Trail, Norcross, seeking to execute an arrest warrant for a person known to them as Cokis. (Tr. at 7–9, 54–55, 73). Eleven to thirteen agents surrounded the residence, and three of those agents, two with weapons holstered and the third with a long gun on strap pointing towards the ground, knocked at the front door. (Tr. at 9–10, 14, 38–39, 56).

When the door was eventually answered at approximately 8:30 a.m., by Loza–Cruz, Agent Bowen, in Spanish, identified herself and asked Loza–Cruz if there was anyone else in the residence. (Tr. at 10–11, 41, 57, 77–78). When Loza–Cruz responded, yes, she asked that the others come to the door, and then she asked that the four men exit the residence. (Tr. at 11–12, 57–58). As the men exited, no weapons were drawn and no one was handcuffed. (Tr. at 14, 51, 58). The agents tried to identify each man and asked for identification. (Tr. at 13, 43, 59–60, 76).

When Agent Bowen determined that one of the men, Valda–Ceja, appeared cooperative, she asked to speak with him away from the other men. (Tr. at 13, 76). She and Agent Cromer spoke with Valda–Ceja, who conversed with them for the most part in English. (Tr. at 13–14, 63). Valda–Ceja identified the other men and claimed ownership of the car parked on the driveway. (Tr. at 14–15, 63–64). The agents asked to see the registration which Valda–Ceja stated was in his bedroom in the house. (Tr. at 15, 64). Valda–Ceja agreed to show the registration to the agents and to allow them to accompany him into the residence to obtain the paperwork. (Tr. at 15, 64–65). Over the objection of Loza–Cruz, who did not want the agents in the residence, Valda–Ceja stated that the agents could come inside because he did not have anything to hide. (Tr. at 15, 80). As they entered, Agent Bowen also asked if other agents could look through the ***1179** residence to be sure no one else was inside, and Valda–Ceja agreed. (Tr. at 15, 65–66). According to Agent Bowen, during this ten to fifteen minute conversation, Valda–Cruz was not handcuffed, and the agents did not have weapons drawn. (Tr. at 45, 64).

Nothing about the circumstances of the initial interaction between the agents and Defendants, especially Valda–Ceja, establish that his consent to allow the agents into the residence or to conduct the protective sweep was coerced. The fact that Valda–Ceja and the other men were being detained for the purpose of identifying Cokis to execute the arrest warrant (Tr. at 85) does not alter this finding. Factual situations involving a much greater show of force and restraints on suspects have not been found sufficiently coercive to invalidate consents to enter residences or to search. *See, e.g., United States v. Kimoana,* 383 F.3d 1215, 1225–26 (10th Cir.2004) (although “officers entered the motel room with guns drawn, raising their voices at the occupants and ordering them to put

their hands where the officers could see them[,]" the trial court found that "[a]fter performing a pat down, the officers put their weapons back in their holsters, the atmosphere was described as 'calm,' and then [the officer] 'immediately' asked [the defendant] for consent to search the room [;]" therefore, when the consent to search was obtained, the situation had calmed down and no show of force was being exhibited); *United States v. Taylor,* 31 F.3d 459, 463–64 (7th Cir.1994) ("The record shows that the initial melee of agents, badges and weapons, necessary to protect the safety of the agents ..., dissipated only seconds after it had begun and that all was routine once the premises had been secured. Though certainly unpleasant, there is nothing so inherently coercive about such tactics, commonly used where a danger to life or limb is perceived by law enforcement agents, to render subsequent cooperation involuntary."); *United States v. Hidalgo,* 7 F.3d 1566, 1570–71 (11th Cir.1993) (facts that the defendant was arrested by "SWAT team members who broke into his home in the early morning, woke him, and forced him to the ground at gunpoint" did not establish consent to search was involuntary, even though consent was given after invocation of *Miranda* rights); *United States v. Garcia,* 890 F.2d 355, 360–62 (11th Cir.1989) (the court found voluntary a consent to search which was given after the defendant was arrested by numerous officers, patted down for weapons and a protective sweep of his house was conducted and after he was seated in his living room in handcuffs, given his *Miranda* rights, and the officers had refused to accept a limited consent). Valda–Ceja's consent allowing the agents to enter the residence and to conduct the protective sweep was voluntary.

Likewise, nothing about the events that occurred once the agents and Valda–Ceja entered the residence and went to his bedroom establishes that the consent to search the residence was involuntary. After Valda–Ceja found the registration form, as the agents were discussing the form with him and continuing to ask him about the other occupants, he began fidgeting and moving on the bed. (Tr. at 16, 46–47, 67–68). The agents were concerned about his actions, and Agent Cromer asked him if there was anything, such as guns, in the room that the agents needed to know about. (Tr. at 16, 47). When Valda–Ceja responded, no, the agent asked if they could search the room for his and their safety. He responded, yes. (Tr. at 16, 47–48, 68). That search revealed a handgun in the open closet a few feet from Valda–Ceja's location on the bed. He denied knowledge of the firearm. (Tr. at 16–17, 48–49, 68–70). Valda–Ceja denied knowing of any other guns in the residence. (Tr. at 17, 49). The agents then ***1180** asked for consent to search for guns, drugs and large amounts of currency in the residence. After Agent Bowen explained to Valda–Ceja that the previous walk through to look for other occupants was not a search, he agreed to the search. (Tr. at 17, 49–50, 70–71). He was provided with a consent to search form, which he was asked to read. Valda–Ceja then signed the form. (Tr. at 17–19, 71; Gov't Ex. 1). The agents conducted a search of the residence finding additional firearms, some drugs, packaging materials, cell phones and various documents. (Tr. at 21–30). Although Agent Barnes, who had the long gun, stood outside the bedroom doorway while Agents Bowen and Cromer spoke with Valda–Ceja, he did not participate in the conversation with Valda–Ceja. Agents Bowen and Cromer had their weapons holstered. And Defendant was not handcuffed. (Tr. at 45–46, 50, 56, 70).
Contrasted with the facts in other cases which courts have found did not invalidate the voluntariness of a consent to search, nothing in the events surrounding Valda–Ceja's

consent to search was sufficiently coercive to result in a finding that his consent was involuntary. In *United States v. Strickland,* 245 F.3d 368 (4th Cir.2001), the Fourth Circuit Court of Appeals refused to find that a consent to search was involuntary. In *Strickland,* officers arrived at the defendant's residence at 6:30 a.m. and unsuccessfully attempted to wake him by pounding on the door and the side of the trailer. They, therefore, broke open the front door, entered, and handcuffed both the defendant's wife and the defendant, who at the time was dressed only in his underwear.16 Both were seated, handcuffed, in the living room-the defendant still in his underwear. The agents asked if there were any weapons in the residence or any more marijuana, the agents having seen the latter on a kitchen counter. The defendant pointed out the location of a firearm and responded negatively to the question about additional marijuana. The agents then asked for consent to search the residence, and both the defendant and his wife consented. *Id.* at 382–83. The court upheld the consent finding that the officers did not use any force other than that necessary to effect the entry into the residence and to arrest the defendant and that no facts indicated that the defendant was coerced into consenting to the search. *Id. See also United States v. Guiterrez,* 92 F.3d 468, 470–71 (7th Cir.1996) (the circumstances surrounding the consent, including approximately a dozen federal agents entering the premises with weapons drawn, handcuffing the individuals present and ordering them up against the wall, including the defendant, and the fear of being arrested, was not so inherently coercive to render the consent involuntary); *United States v. Espinosa–Orlando,* 704 F.2d 507, 512–13 (11th Cir.1983) (the court found that the consent to search was voluntary although the defendant had been detained and placed on the ground by armed officers and although one of the officers still had his weapon drawn pointed away from the defendant at the ground, because there was no abusive language used and no threats, because the request was made in a conversational tone, and because the defendant was not handcuffed or removed from the scene of the stop and detention). The facts establish that Valda–Ceja was cooperative with the agents from the initial encounter and throughout the time spent at the residence. No credible evidence establishes that the agents threatened Valda–Ceja ***1181** to obtain his cooperation or the consent to search. He, in fact, in the face of Loza–Cruz's objections to the agents entering the residence, told Loza–Cruz that the agents could enter because he did not have anything to hide inside. (Tr. at 15, 80). He repeatedly denied being aware of any firearms or other contraband in the residence indicating that he had no reason to refuse to allow the search of the residence. For these reasons, the court finds that Valda–Ceja's consent to search was voluntary. As to Defendants Anaya–Medina/Cokis and Cruz–Plancarte/Valda–Ceja, the evidence found in the residence is admissible at trial.

However, the same result does not apply to Defendant Cruz–Loya/Loza–Cruz. In *Randolph,* 547 U.S. 103, 126 S.Ct. 1515, the Supreme Court addressed a situation not present in its earlier decisions addressing third party consents to search, that is, the impact of a present and objecting co-tenant to the search. In *Randolph,* Janet Randolph, the defendant's wife, who had recently returned to the marital residence after moving out, advised police that she and her husband had a domestic dispute and that the defendant had taken her son and left him at another location. She also advised officers that the defendant used cocaine causing financial problems. *Id.* at 106–07, 126 S.Ct. at 1519. The defendant arrived at the residence and explained about removing the child, and he also

denied drug use accusing his wife of the drug use. *Id.* at 107, 126 S.Ct. at 1519. Shortly thereafter, Janet Randolph advised officers that there were “items of drug evidence” in the house. When the defendant was asked for his consent to search the residence, he “unequivocally” refused. *Id.* The officer then asked Janet Randolph for consent which she “readily” gave, and she assisted the officer in locating an item of evidence before subsequently withdrawing her consent.17 *Id.* The defendant moved to suppress the evidence seized from the residence. *Id.*

On these facts, and specifically not undercutting the rulings in *Matlock,* 415 U.S. at 171–72 n. 7, 94 S.Ct. at 993 n. 7, and *Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, the Supreme Court held that “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.” *Randolph,* 547 U.S. at 120, 126 S.Ct. at 1526; *see also United States v. Harris,* 526 F.3d 1334, 1339 (11th Cir.2008) (same). Recognizing that the decision in *Matlock* involved a situation where the defendant was not present with an opportunity to object because he was in police custody close by and that *Rodriguez* involved a situation where the defendant was asleep in the residence and could have been roused before the consent was obtained but was not, the Supreme Court acknowledged that it “drew a fine line” and concluded: “if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.” *Randolph,* 547 U.S. at 121, 126 S.Ct. at 1527. Loza–Cruz falls precisely within the category of objecting defendants, with a self-interest in objecting, who stand at the door of the residence and object to the agents' entry.

When Agent Bowen asked the four men to exit the residence, Loza–Cruz asked her if she had a warrant. (Tr. at 11, 58, 78). After the agent responded, no, he stated that the agents could not come into the residence. And as he exited the residence, ***1182** Loza–Cruz closed the door. (Tr. at 11, 78). He explicitly stated and demonstrated his refusal to allow agents into the residence. Then, subsequently, as the agents started to enter the residence with Valda–Ceja, Loza–Cruz stated, “you know, I don't want them in the house.” (Tr. at 15, 80). Loza–Cruz affirmed his objection to the agents' entry.

And Valda–Ceja's consent to the entry and search, which was disputed by Loza–Cruz, “without more, [gave the agents] no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.”18 *Randolph,* 547 U.S. at 114–15, 126 S.Ct. at 1523. As the Supreme Court stated, “[T]he cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place.” *Id.* at 115, 126 S.Ct. at 1523; *see also United States v. Travis,* 311 Fed.Appx. 305, 310 (11th Cir.2009) (“Where co-tenants are present at the entrance, and one consents while the other objects, police may not search.”). As was true in *Randolph,* “[t]his case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant.” *Randolph,* 547 U.S. at 122–23, 126 S.Ct. at 1528. Loza–Cruz's Fourth

Amendment rights were violated by the warrantless search of the residence; therefore, no evidence seized during the warrantless search, from any areas within the residence, may be used against him at trial.

For these reasons, the court **RECOMMENDS** that Defendant Anaya–Medina/Cokis' motion [Doc. 302] and Defendant Cruz–Plancarte/Valda–Ceja's motion [Doc. 322] to suppress evidence be **DENIED** and that Defendant Cruz–Loya/Loza–Cruz's motion [Doc. 297]to suppress evidence be **GRANTED.**