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United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

January 29, 2026

Lyle W. Cayce  
Clerk

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No. 24-50925

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UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

DAVID DAVALOS,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 5:22-CR-378-1

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Before SMITH, STEWART, and HAYNES, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

David Davalos, charged with possession of a firearm by a convicted felon, challenges the denial of his motion to suppress evidence from a warrantless search of his car parked in the driveway of the fenceless home that he shared with his parents. Exigent circumstances justified the search, and an officer gathered sufficient facts to establish probable cause to search the car, which contained marihuana and a firearm. Because the officer's conduct did not run afoul of the Fourth Amendment, we affirm.

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I.

A state trooper observed Davalos commit a traffic violation by failing to signal a lane change. As the officer initiated a traffic stop by activating his lights, Davalos pulled into the driveway of his home and parked his car.

The driveway was beside the home. A public sidewalk ran in front of the house but stopped at the edge of the driveway. There were no fences or gates surrounding the house.

The officer parked his patrol vehicle on the street in front of Davalos's driveway, blocking Davalos's car from leaving. After getting out of his patrol vehicle, the officer instructed Davalos to do the same and walk to the street. Davalos complied, leaving the driver's side door open. The officer informed Davalos that he had failed to signal.

For his own safety, the officer walked to Davalos's car to verify that no one was inside. He could not see into Davalos's car because it had tinted windows. After knocking on the back left passenger side window to alert potential occupants of his presence, the officer walked to the open driver's side door to look inside. At that point, he smelled marihuana, saw ashes throughout the car, and noticed that the driver's side door had been tampered with, *i.e.*, that the panel had been taken off and put back on.

The officer returned to the street and asked Davalos to retrieve his driver's license and proof of insurance. They both walked to Davalos's car. While Davalos looked for his documents, the officer again smelled marihuana and noticed ashes and that the door panel that had been tampered with. The officer told Davalos that he smelled marihuana inside Davalos's car and asked him when he had last smoked. Davalos responded that he had just smoked. When the officer asked whether Davalos "had anything on him," Davalos replied that he had "a little bit of weed" in his pocket. Because of the odor of marihuana, Davalos's admission that he had recently smoked

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marihuana, and Davalos's possession of marihuana in his pocket, the officer informed Davalos that he would search his car. The search resulted in the discovery of marihuana and a firearm in the door panel.

## II.

Davalos was charged with possession of a firearm by a convicted felon. Before trial, he moved to suppress all evidence seized in connection with a warrantless search of his car while it was parked in the driveway of the house that he shared with his parents. Relying on *Collins v. Virginia*, 584 U.S. 586 (2018), and *Florida v. Jardines*, 569 U.S. 1 (2013), Davalos claimed the car was within the curtilage of his house and thus was entitled to the same Fourth Amendment protections. Davalos additionally asserted that no exigent circumstances justified the search.

Following a suppression hearing, the magistrate judge ("MJ") issued a report recommending that Davalos's motion to suppress the fruits of the search be denied. The MJ judge found that unlike in *Collins*, the driveway where Davalos's car was parked was not part of the home's curtilage. In making that finding, the MJ explained that there was no driveway enclosure, and the driveway where Davalos's car was parked was in front of the house next to the sidewalk and street. The MJ also found that all four factors in *United States v. Dunn*, 480 U.S. 294 (1987), weighed against a finding that Davalos's driveway was part of the home's curtilage. According to the MJ, Johnson was "entitled to approach the vehicle as part of the lawful stop," and the odor of marihuana, Davalos's admission that he had recently smoked marihuana, and his possession of a small amount of marihuana created the necessary probable cause to search the car.

Even if the driveway was part of the curtilage, the MJ found that the search of Davalos's car was permissible. Specifically, the MJ found that the officer was entitled to conduct the traffic stop after observing Davalos com-

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mit a traffic violation. After he stopped Davalos, the officer “only sought to ensure there was no other occupant in the heavily tinted vehicle.” The officer developed probable cause to support the search based on the smell of marihuana, Davalos’s admission that he had recently smoked, and Davalos’s possession of marihuana. The MJ further found that “[t]he immediacy of the pursuit and ensuing stop . . . also provid[ed] a basis for [the officer] to approach the car initially, at which point he smelled the marijuana that triggered the ensuing search.”

Davalos filed objections to the MJ’s report and recommendation. Over Davalos’s objections, the district court adopted the report and recommendation and denied the motion to suppress. Davalos pleaded guilty after signing a conditional plea agreement that allowed him to appeal the ruling on his motion to suppress.

The district court sentenced Davalos to time served and a three-year term of supervised release.<sup>1</sup> Davalos appeals.

### III.

When deciding the denial of a motion to suppress evidence, we review factual findings for clear error and conclusions regarding the constitutionality of law enforcement action *de novo*.<sup>2</sup> Evidence is viewed in the light most favorable to the prevailing party, in this case the government.<sup>3</sup> “And where, as here, the denial of a suppression motion is based on live oral testimony,

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<sup>1</sup> Although Davalos is not in BOP custody, that does not moot the challenge to his conviction because a successful appeal of the suppression ruling would allow him to withdraw his conditional guilty plea. *See United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006) (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)); FED. R. CRIM. P. 11(a)(2).

<sup>2</sup> *United States v. Guzman*, 739 F.3d 241, 245 (5th Cir. 2014).

<sup>3</sup> *United States v. Nelson*, 990 F.3d 947, 952 (5th Cir. 2021).

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the clearly erroneous standard is particularly strong because the judge had the opportunity to observe the demeanor of the witnesses.”<sup>4</sup> “[I]f there is any reasonable view of the evidence to support” the denial of a suppression motion, the denial should be upheld.<sup>5</sup>

### III.

The officer’s conduct did not run afoul of the Fourth Amendment. To begin, he validly conducted a stop after a traffic violation.<sup>6</sup> From there, he approached the car and merely looked for the presence of passengers for one obvious reason—officer safety. The officer’s approach and cursory look into the car were perfectly legitimate because the passenger’s presence could not be reasonably ascertained in the heavily tinted car.<sup>7</sup> Upon knocking on the window, the officer smelled marijuana and noticed, in plain view, that the driver side door was tampered with. Importantly, the officer returned to the patrol car parked on the street, without manipulating the door panel. He “[m]erely inspect[ed]” what came into view, which does not constitute an independent search.<sup>8</sup> On the street, the officer asked Davalos for his driver’s license and proof of insurance and then accompanied him to his car to keep an eye on him because the documents were in the car’s glovebox, a place

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<sup>4</sup> *Id.* at 952–53 (internal quotation omitted).

<sup>5</sup> *Id.* at 953.

<sup>6</sup> *See Whren v. United States*, 517 U.S. 806 (1996) (noting that the traffic offense was a legitimate basis for the police to stop the vehicle).

<sup>7</sup> *See Bishop v. Arcuri*, 674 F.3d 456, 466 (5th Cir. 2012) (“Because ‘reasonable suspicion of danger’ is a lower threshold than ‘particularized knowledge’ that a suspect possesses a weapon, an officer must be able to point to specific facts to explain his safety concerns but need not demonstrate that he specifically knew a certain suspect was armed.”).

<sup>8</sup> *See Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (noting that “[m]erely inspecting [what] came into view . . . would not have constituted an independent search, because it would have produced no additional invasion of respondent’s privacy interest”).

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where weapons are often kept. Indeed, the officer was well within his right, in the interest of his safety, to accompany Davalos because of the tampered-with door panel and glovebox retrieval.

Once again, the officer smelled marihuana odor emanating from Davalos's car and asked him when he had last smoked, to which Davalos confirmed that he just had. But the officer didn't immediately begin searching the car. In the interest of officer safety, he appropriately asked a relevant question—whether Davalos “had anything on him,” to which Davalos replied that he had a “little bit of weed” in his pocket. The officer's question was perfectly legitimate—Davalos was not in custody, the officer did not use any coercive police procedures and remained calm throughout, and Davalos voluntarily cooperated with the officer and believed no incriminating evidence would be discovered.

By then, the officer had gathered sufficient facts to establish probable cause to search Davalos's car,<sup>9</sup> particularly for marihuana.<sup>10</sup> The officer searched Davalos's car only after reconfirming the marihuana odor, hearing Davalos's admissions, and discovering a noticeably tampered-with door panel. The officer was well within his right to inspect the door panel, among other parts of the car, because the door panel could have contained the “object of the search”—marihuana.<sup>11</sup> That the search revealed marihuana

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<sup>9</sup> See *Collins*, 584 U.S. at 592 (noting that a warrantless search of an automobile is reasonable if the search is supported by probable cause).

<sup>10</sup> See, e.g., *United States v. Ogden*, 572 F.2d 501, 502 (5th Cir. 1978) (noting that the agent's identification of the marihuana odor was enough to support probable cause to search, and no warrant was required for the search of an automobile under such circumstances).

<sup>11</sup> See *United States v. Ross*, 456 U.S. 798, 825 (1982) (“If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”).

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and a firearm does not change the calculus. The officer's conduct was wholly appropriate under the circumstances.

Because exigent circumstances existed and the officer gathered sufficient facts to establish probable cause to search Davalos's car, we have no need to address whether the area searched was curtilage. The officer's conduct did not run afoul of the Fourth Amendment.

AFFIRMED.

**FILED**

February 23, 2024

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

BY: SAF  
DEPUTY

UNITED STATES OF AMERICA

Plaintiff

V.

DAVID DAVALOS

Defendant

CRIMINAL NO. SA-22-CR-378-OLG

## ORDER

The Court has considered the report and recommendation of United States Magistrate Judge Richard B. Farrer. Docket no. 48. Defendant filed objections thereto. Docket no. 49. After reviewing the record and the applicable law, the Court finds that the Magistrate Judge's recommendation should be ACCEPTED.

It is therefore ORDERED that the Magistrate Judge's recommendation (docket no. 48) is ACCEPTED and Defendant's motion to suppress (docket no. 33) is DENIED for the reasons stated in the recommendation.

SIGNED this 23 day of February, 2024.

John L. ...

ORLANDO L. GARCIA  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

(1) DAVID DAVALOS,

*Defendant.*

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5-22-CR-00378-OLG

**REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE**

**To the Honorable United States District Judge Orlando L. Garcia:**

This Report and Recommendation concerns Defendant’s Motion to Suppress. *See* Dkt. No. 33; *see also* Dkt. Nos. 36 (Response) & 39 (Reply). The District Court referred the Motion by text order dated April 19, 2023. The Court held a hearing on July 31, 2023. Dkt. No. 45 (Transcript, hereinafter referred to as “Tr.”). Authority to enter this recommendation stems from 28 U.S.C. § 636(b)(1)(B).

Invoking what Defendant Davalos’s Motion labels as “a fairly straightforward extension” of the holding in *Collins v. Virginia*, 138 S. Ct. 1663 (2018), Dkt. No. 39 (Reply) at 4, the Motion seeks suppression of evidence obtained from a warrantless search of Davalos’s car while it was parked in his father’s driveway. If successful, Davalos’s Motion would suppress evidence of the odor of marijuana emanating from his car, which a trooper detected as he approached the parked car, and a firearm secreted within the driver’s side door panel. In *Collins*, the Court suppressed evidence obtained from the warrantless search of a vehicle parked within the curtilage of a home. *Id.* at 1671, 1673. In *Collins*, the curtilage in question involved a partially

enclosed portion of the home's driveway, *id.* at 1671, near "the top of the driveway," *id.* at 1668, and a few steps from the home itself, *see id.* at 1671.

For the reasons set forth below, Defendant's Motion to Suppress, Dkt. No. 33, should be **DENIED**.

### **Factual and Procedural Background**

State Trooper Isaiah Johnson conducted a traffic stop on Defendant Davalos's white Lincoln Town Car at around 4:30 p.m. on June 16, 2022. Tr. 9. Trooper Johnson initially sought out the Town Car in response to reports from other officers asking for the Town Car to be stopped. Tr. 32-33, 41. Johnson thus acted in response to reports from other officers who stated they observed the Town Car committing traffic violations, *id.*, but he also personally observed the Town Car commit a traffic violation. Tr. 41 ("Yes, I did see a traffic violation.").

After first spotting the Town Car, Trooper Johnson followed it and eventually observed it pull into and stop in a driveway. *See* Tr. 8-12, 28, 32, 44; Def. Ex. 1 at 1:50-1:58 (dashboard-camera footage from Trooper Johnson's vehicle). Johnson pulled up and stopped his vehicle in the street immediately behind the Town Car, blocking it from exiting the driveway. *See* Tr. 8-12.

At this point, Trooper Johnson's body-worn camera provides a video recording of events. *See* Def. Ex. 1 (video footage from body-worn camera). After Johnson parked, he stepped out of his vehicle and, as Davalos began exiting the Town Car, Johnson can be heard and seen on the video directing Davalos to "step out of the vehicle" and meet Trooper Johnson on the street. Tr. 14; Def. Ex. 1 at 0:33-0:50. The video also shows Trooper Johnson directing that Davalos's passenger should step out of the Town Car as well. *Id.* at 0:41-0:43. Johnson later determined there was no passenger in the Town Car. But the video plainly shows the Town Car's heavily tinted windows through which one cannot see. *E.g., id.* at 0:30-0:50. Trooper Johnson credibly

testified at the July 31 hearing that he took these steps out of concern for officer safety. Tr. 14.

Johnson also explained at the hearing that he was not alone when he conducted the stop:

Q. And did you have anybody, any other Troopers with you that day?

A. Yes, sir, I was training a Trooper at that time, yes.

Q. So you were concerned not only about your safety, but his safety as well, correct?

A. Yes, sir.

Q. And is officer safety always a concern in situations like this?

A. Yes, sir.

Tr. 13.

Once Davalos met Trooper Johnson on the street, Johnson explained that the reason for the stop was “failed to signal multiple times.” Tr. 14-15; *see* Def. Ex. 1 at 0:52-1:00. When Johnson asked for a driver’s license and proof of insurance, Davalos indicated the documents were in the vehicle. *see* Def. Ex. 1 at 1:00-1:06. At that point, Johnson told the driver to wait by Johnson’s vehicle. Johnson instructed the trainee accompanying him to watch the driver. *Id.* Johnson then walked up to the car parked at the end of the driveway closest to the street. The Town Car’s front door can be seen on video standing wide open. *Id.* The video shows Johnson approaching the Town Car from an angle behind and the driver’s side as he walks up diagonally to the driver’s side rear portion of the Town Car. *Id.* at 1:06-1:13. In the video Johnson stops at the rear of the car and knocks on it in an obvious effort to determine if anyone else was in the car. A faint voice can be heard on the video, perhaps Davalos’s, saying something like “there’s nobody else in there.” *See id.* at 1:18-1:21. The tint on the car’s windows prevents looking into the car, as is readily apparent on the video. Def. Ex. 1 at 1:15-1:21. After determining via a quick glance that no one else was in the Town Car, Johnson’s body cam shows he returned immediately to Davalos on the street. *Id.* at 1:20-1:25.

Having determined that no one else is in the Town Car, Trooper Johnson can be seen on the video asking Davalos to retrieve his license and insurance information from the car. *Id.* at 1:25-1:34. Johnson and Davalos then walk up to the open car, and, the video shows, Davalos retrieves his insurance information from the driver's side door panel and his identification from his pocket. *Id.* 1:30-1:59. The body cam footage then shows the two then return to the street, and Johnson then again explains the reason for the stop. On the video Johnson also notes to Davalos that a marijuana smell is emanating from the car, and he asks Davalos when he last smoked. Davalos responds on the video that he just smoked a short while ago. *Id.* at 2:20-2:39. When questioned, Davalos indicates in the video that he has a "little bit of weed" in his pocket. *Id.* at 2:40-2:43. Johnson then turns Davalos around and pats him down. *Id.* 2:43-3:40. The video shows that as Johnson pats Davalos down also he inquires if there were any weapons in the vehicle. *Id.* 3:35-3:40.

The video next shows Johnson explaining that "we will be conducting a vehicle search . . . due to the odor of marijuana and the fact that you admitted to smoking marijuana not too long ago." *Id.* 3:40-3:50. When asked if there is anything in the vehicle that Trooper Johnson should know about, Davalos responds on the video there's nothing in the vehicle and that Johnson should "go ahead" with the search. *Id.* 3:50-3:58. Johnson then searched the car.

The search of the car revealed "marijuana and a firearm in the door panel," which is to say those items were "behind the door where the wiring is usually tucked away." Tr. 23-24; Def. Ex. at 7:35-7:58, 16:50-16:55.

### **Analysis**

Under the so-called automobile exception to the warrant requirement, "the search of an automobile can be reasonable without a warrant," provided the search is supported by probable

cause. *Collins*, 138 S. Ct. at 1669-70. But at the same time, the “curtilage—the area immediately surrounding and associated with the home—[is considered] to be part of the home itself for Fourth Amendment purposes.” *Id.* at 1670 (quotation marks omitted). And “[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred,”; “[s]uch conduct [ ] is presumptively unreasonable absent a warrant.” *Id.*

**A. Consistent with *Collins* and *Dunn*, the Portion of the Driveway at Issue Here Isn’t Curtilage.**

The portion of the driveway in which Davalos parked his car does not qualify as the home’s curtilage. A comparison of this case with *Collins* confirms the point. The “partially enclosed top portion of the driveway that abuts the house” recognized as curtilage in *Collins* is a far cry from the very public portion of the driveway next to the sidewalk and public street at issue here. The *Collins* Court’s description of the “partially enclosed portion of the driveway” reflects that the portion of the driveway at issue there was effectively part of the home itself:

The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch.

*Collins*, S. Ct. at 1670-71.

As the video and photographic evidence in this case reflects, the portion of the driveway in which Davalos parked his car shares little with upper portion of the driveway enclosure at issue in *Collins*. See Def. Ex. 2 (photo of the home and driveway); Def. Ex. 1 at 0:36 & 3:48-3:50 (showing the positioning of the parked car in the driveway, just past the public sidewalk and in front of the home). The portion of the driveway here is in front of the house, not behind the

house's front perimeter. The portion of the driveway here is not partially enclosed. There's no wall. Davalos's parked car was not close to a door into the home. The only minor similarities with *Collins* are that both cases involved a portion of the driveway and that the driveway in each was separate from the pathway to the front door. *Collins* does not control the outcome of this case, and the part of the driveway at issue here is not accurately described as "an area adjacent to the home and to which the activity of home life extends," as it would need to be to qualify as curtilage. *Collins*, 138 S. Ct. at 1671 (quotation omitted).

Application of the factors articulated in the seminal *United States v. Dunn*, 480 U.S. 294, 301 (1987), supports that Davalos's car was not parked within the home's curtilage. Those factors are: (1) the proximity of the area in question to the house, (2) whether it is included within an enclosure surrounding the house, (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. *Id.* "[T]hese factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* The area at issue here is not next to the house or even beside it; instead, it is in front of the house and to the side of it, just two or three steps away from the public street and sidewalk. *See, e.g.*, Def. Ex. 1 at 21:37 (showing proximity of parked car to road and sidewalk). No enclosure surrounds the entire house and includes the portion of the driveway on which Davalos parked. Whereas other areas of the driveway appear more private and farther from the public street and sidewalk, the portion on which Davalos parked is far more public. *See* Def. Ex. 1 at 21:27-21:34 (showing a second car parked in a portion of the driveway immediately next to

the home). No special measures appear to have been taken to protect the area in question from public view or access.

Accordingly, the vehicle search was permissible here, if supported by probable cause. Trooper Johnson's detection of the smell of marijuana emanating from the car, Davalos's verbal confirmation that he had recently smoked, and Davalos's possession of a small amount of marijuana on his person all supply the necessary probable cause to support the search of the car. Moreover, the open-air sniff by Trooper Johnson in which he detected the odor of marijuana emanating from the car was also justified because Johnson was entitled to approach the vehicle as part of a lawful stop. *See Terry v. Ohio*, 392 U.S. 1, 25-26 (1968); *cf. Florida v. Jardines*, 569 U.S. 1, 7 (2013) (dog sniff on home's front porch invaded the curtilage).

**B. Even if the Driveway Qualifies as Curtilage, the Search Was Permissible.**

There are exigencies presented here that were not present in *Collins* and which justify the search of the Town Car performed by Trooper Johnson even assuming for argument's sake it occurred on a portion of the driveway qualifying as the home's curtilage. "The possibility that evidence will be removed or destroyed, the pursuit of a suspect, and immediate safety risks to officers and others are exigent circumstances that may excuse an otherwise unconstitutional intrusion into a residence." *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001). When it comes to searching a vehicle, "[t]he automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." *Collins*, 138 S. Ct. at 1672. But if exigent circumstances provide a lawful right of access onto the curtilage, then an officer may conduct a search there if it is also supported by probable cause. *See id.* at 1670.

There's no doubt here that Trooper Johnson was entitled to stop. Johnson observed Davalos commit traffic infractions and pursued him to his driveway. A sweep or pat-down to ensure officer safety in these circumstances can be performed, provided it is reasonable under the circumstances:

A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. . . . Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion.

*Terry v. Ohio*, 392 U.S. 1, 25-26 (1968); *Maryland v. Buie*, 494 U.S. 325, 327 (1990); *see also United States v. Michelletti*, 13 F.3d 838, 839 (5th Cir. 1994) (en banc). *Buie* articulates the standard for a protective sweep, which is to say a "cursory visual inspection of those places in which a person might be hiding":

the Fourth Amendment would permit the protective sweep undertaken here if the searching officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing . . . that the area swept harbored an individual posing a danger to the officer or others.

*Buie*, 494 U.S. at 327 (cleaned up with quotations and citations omitted). Here, Johnson was instructed to initiate a stop because Davalos was suspected of having a bag containing contraband in his trunk. *See* Tr. 32. Upon noting Davalos commit traffic infractions, Johnson followed to initiate a stop. Once Johnson stopped Davalos, Johnson only sought to ensure there was no other occupant in the heavily tinted vehicle. That minimally intrusive visual inspection was objectively warranted under the circumstances, even if it required Johnson to set foot on a small portion of the driveway next to the street and sidewalk.

The totality of circumstances presented reflect that Trooper Johnson only approached Davalos's car to ensure his safety and the safety of the other trooper with him. Johnson didn't

immediately go onto the driveway but instead ordered Davalos to meet him in the street. It was only after Davalos indicated that he would need to access his car's interior to retrieve his proof of insurance that Johnson carefully went up to the car, knocked on it near the rear, ordered anyone inside to come out, and then peered inside through the open door to ensure no one else was present. These actions clearly reflect that Trooper Johnson was making sure the car was safe before allowing Davalos to access it again. And Trooper Johnson then accompanied Davalos to the side of the car to keep an eye on him as he retrieved his insurance information. Johnson credibly testified at the hearing that he took these steps for safety reasons. Tr. 12-14, 16-17, 18-19.

A. I walked over to the vehicle to verify that nobody was inside of the vehicle.

Q. And again, your main concern there was what?

A. Officer safety.

Tr. at 16.

At this point, Officer Johnson detected the aroma of marijuana, among other things, and he confronted Davalos about the odor once they were back on the street. Tr. 17-18. Davalos conceded that he had recently smoked, and Johnson secured a small amount of marijuana from Davalos's person. Tr. 22-23. Once again, the chain of events supports the conclusions that officer safety justified Johnson's approach to the open vehicle subsequent open-air sniff, and probable cause based on the presence of marijuana supported the warrantless vehicle search.

As to pursuit providing a basis for entry onto the driveway, Davalos pulled into the driveway as Trooper Johnson pursued him. Contrast that with the motorcycle searched in *Collins* that was parked in the driveway enclosure and covered with a tarp for some time. *Collins*, S. Ct. at 1669. This case thus bears a closer resemblance to the hot pursuit that occurred in *Scher* than it does to the events in *Collins*. And even as *Collins* viewed *Scher* with some skepticism, see

*Collins*, 138 S. Ct. at 1674 (“*Scher* is inapposite.”), it did not overrule *Scher*, which therefore remains binding on this Court and presents a remarkably similar fact scenario. The immediacy of the pursuit and ensuing stop, under *Scher*, therefore also provide a basis for Trooper Johnson to approach the car initially, at which point he smelled the marijuana that triggered the ensuing search.

### **Conclusion and Recommendation**

For the reasons discussed above, it is recommended that the Motion to Suppress, Dkt. No. 33, be **DENIED**.

### **Instructions for Service and Notice of Right to Object/Appeal**

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a “filing user” with the clerk of court, or (2) by mailing a copy by certified mail, return receipt requested, to those not registered. Written objections to this report and recommendation must be **filed within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59. The objecting party shall file the objections with the Clerk of the Court and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusory, or general objections. A party’s failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a de novo determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to timely file written objections to the proposed findings, conclusions, and

recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

**IT IS SO ORDERED.**

SIGNED this 16th day of October, 2023.



RICHARD B. FARRER  
UNITED STATES MAGISTRATE JUDGE