NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 6, 2022

LETTER OPINION

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Re: *Commonwealth v. Williams M. Claros*, Case Number FE-2021-52

Dear Counsel:

Before the Court is the defendant's Motion to Suppress the warrantless search and seizure of the defendant's vehicle, and any evidence derived therefrom. For the reasons stated below, the motion is GRANTED.

I. PROCEDURAL HISTORY

On March 9, 2020, two felony warrants were issued for the defendant's arrest, charging him with Driving Under the Influence – Involuntary Manslaughter, pursuant to Virginia Code § 18.2-36.1, and Failing to Stop After an Accident, pursuant to Virginia Code § 46.2-894. On February 16, 2021, the defendant was indicted on the same two felony charges. On May 27, 2022, the defendant filed a Motion to Suppress. The Commonwealth filed its opposition on June

6, 2022. The matter came before this Court for an evidentiary hearing on June 10, 2022, and argument on the motion on June 17, 2022. At the conclusion of the argument, the Court took the matter under advisement.

II. FACTS

The facts are not substantially in dispute. According to the suppression hearing testimony of Detective Christopher J. Elliott[1], at approximately 1:00 a.m. on February 1, 2020, an individual by the name of David Velasquez was crossing Industrial Road near the intersection of Industrial Road and Backlick Road.[2] A witness, identified as a "Mr. Spence," told the police that he saw the individual stumble and then fall down in the roadway of Industrial Road. While he was in the process of trying to get up, he was struck by a vehicle. According to Mr. Spence, the vehicle did not stop.[3] Mr. Spence described the vehicle to the police as a "dark-colored" vehicle, "probably black," and that he believed the vehicle to be a Hummer.[4]

A Shell gas station was located at the corner of Industrial Road and Backlick Road. The police were able to pull recorded video from two cameras at the station. This is how Det. Elliott described what he observed on the recorded video made by each camera: "During the time frame where the accident occurred you could actually see a vehicle, very similar, if not being an actual Hummer, traveled through the, screen I guess you call it. It was actually going in the direction just as Mr. Spence said." Det. Elliott also said he observed on the video "what appeared" to be "aftermarket wheels" on the vehicle. He explained that "aftermarket wheels" changes the look of a Hummer "a little bit" and that the tires were "bigger tires than your standard tires." Det. Elliott agreed that it made the vehicle look "rather distinctive." On the video recorded on the other camera, the same vehicle could be observed making a right turn on Industrial Road and going north on Backlick Road, according to Det. Elliott.

Det. Elliott also testified that while at the scene of the accident, he collected Mr. Velasquez's "bag or backpack" that was still in the roadway. Det. Elliott also observed in the roadway "[m]aybe a scrape mark or two."

According to the detective, the only business open in that area at that time of night was a nearby SportsPlex, where people play soccer and "gather to socialize." Within "24 or 48" hours,

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[1] Detective Elliott indicated that he has been with the Fairfax County Police Department for 28 years and with the Crash Reconstruction Unit for the past ten years.

[2] All quotations attributed to Detective Elliott are taken from the June 10, 2022 suppression hearing transcript.

[3] Mr. Spence was himself in a vehicle. According to Det. Elliott, he "drove by [the victim], saw him stumbling. He saw him fall down and he saw the SUV coming."

[4] Det. Elliott described a Hummer as "[a] fairly large SUV."

detectives talked to staff at the SportsPlex and learned that an individual by the name of "Chato" drove a black Hummer and that "Chato" was "a regular" at the SportsPlex, and came "most times on every Friday night."[5] Staff persons at the SportsPlex confirmed that "Chato" had been there on the night of the accident and had left "a little after midnight or closer to 1:00." The police were able to determine that the individual known to the SportsPlex staff as "Chato" was Williams Carlos, the defendant.

A second detective involved in the investigation, Det. Posey, examined the defendant's Facebook page and, according to Det. Elliott, observed "[a] picture of Mr. Claros standing in front of a black Hummer." The police determined that the defendant was the registered owner of a black Hummer and that he lived at 5417 Dublin Drive, in Springfield, Virginia. That location was about a mile to two miles from the SportsPlex, according to Det. Elliott. The detective also testified that to get from the SportsPlex to the defendant's home, one would travel on the portion of Industrial Road where Mr. Velasquez was struck.

On February 3, 2020, Det. Elliott and Det. Posey went to the defendant's home, at 5417 Dublin Drive, in Springfield, Virginia. They arrived separately in unmarked vehicles and called for a marked police cruiser to join them. The home at 5417 Dublin Drive is a single-family house with an attached carport. The purpose of the detectives in going to the defendant's home was to "[f]ollow up and actually maybe talk to Mr. Claros about this crash." Upon arrival at the house, but while still on the street, the detectives observed a black Hummer in the carport and were able to read the license plate number. They confirmed that it was the defendant's vehicle. They were also able to observe aftermarket rims on the vehicle.

Det. Elliott took photos of the carport, and two of the photos were entered into evidence at the suppression hearing by the defendant. An examination of the photos indicates that, viewed from the street, the carport is on the left side of the house. The carport is physically attached to the house and is open on its left side. The defendant's Hummer was partially in the carport and was facing forward. The front of the vehicle was in the carport.

With the marked cruiser parked across the street from the house, the detectives "went to the front door, rang the doorbell. Knocked on it and got no answer." Det. Elliott testified that he knocked at least twice. The detectives did not identify themselves as police officers when they knocked. Det. Elliott and Det. Posey then "walked around the house. We walked around the side of the house or the back to see if someone else might be in the back yard. I was trying to make contact with anyone there." There was a fence around the back yard and the detectives did not enter the back yard. They saw no one.

After "coming off the steps from ringing the doorbell, trying to make contact, went to the right side of the house just to see if someone might be in the back yard. Came back." At that point, Det. Elliott went to the right side of the car and again observed that it had aftermarket rims similar to what he had seen in the Shell gas station video. He then walked around the back of the

[5] The accident occurred at 1:00 a.m. on a Saturday morning.

car and proceeded to the left side of the vehicle. He observed the aftermarket rims on the left side of the vehicle as well.

Det. Elliott testified that he then went to the front of the car: "Looked at the front. Examined a little bit closer. At one point we did kneel down to check underneath. Just looking at it. Didn't touch anything, just looked. Noticed scrape marks consistent with possibly running over a bag that had buttons on it which would [cause] scrape marks similar to that." Det. Elliott believed that there could be fibers, paint transfer, or other trace evidence on the car. (The detective had already obtained a DNA buccal swab from the body of the victim.) Det. Elliott indicated that in order to look underneath the vehicle, he had to get down on his knees.

Det. Elliott believed "[t]hat this vehicle is most likely the vehicle I had been looking for. And that there was a potential for it to be damaged – a potential for evidence to be lost if anything happens to the vehicle: Rain, gets washed, gets driven again, et cetera." He viewed the evidence as both "[f]ragile and critical for my case." Further, "vehicles being mobile, who knows where that vehicle could go or be taken to at some point in time. That's if I don't find it or it gets lost."

At this point, a man and a woman who were tenants in the Claros house approached. After Det. Elliott identified himself and explained to the tenants why he was there – that the vehicle "had been involved in some sort of accident" – the female tenant said: "Oh, I knew something like this would happen." The tenant explained that this was "because she knows about his drinking behavior, especially on Friday [n]ights." Det. Elliott indicated that the tenants knew the defendant as Mr. Claros and that he thinks "they also know him as Chato as well."

The female tenant then called the defendant on her phone and handed the phone to Det. Elliott. The defendant was not home at the time. The detective indicated that the defendant "works and has a separate work van. The work van was not there." The female tenant also told the detective that "he was most likely at work." The detective then had a "very short conversation" with the defendant. The detective testified: "I was able to identify myself and say who I was and why I was there, what could potentially happen." The detective told the defendant that the Hummer would probably or possibly be seized as evidence. "The only response he gave to me was, 'Okay.'" The detective did not ask the defendant for consent to search or seize his vehicle.

Shortly thereafter, the defendant's wife came home. The detective asked her "if she knew where her husband was and who drove the vehicle Friday night or Saturday morning." She responded, according to the detective, that the defendant was "the only one that drove that vehicle." The detective told her that the defendant's "vehicle may have been involved in an accident and might be seized as evidence." The defendant's wife "just nodded." Det. Elliott indicated that the defendant's wife had been cooperative.

After talking to the defendant, the police called for a flatbed tow truck. Det. Elliott is not "100 percent sure" whether, at the time he called for the tow truck, he had also talked to the defendant's wife. The tow truck driver wanted the keys to the vehicle and the defendant's wife

was asked to provide the keys to the vehicle, which she did. The Hummer was then transported by the tow truck to a secure facility in Fairfax.

Between the time the detective called for the tow truck and the time the vehicle was actually removed, Det. Elliott confirmed that the defendant did not come home, nor did the defendant's wife or the tenants try to do anything to the vehicle.

Det. Elliott was asked to describe the "logistical issues with going to get a warrant and then coming back." He said the following: "We're talking at least a two-hour window. It takes time to sit down and write the search warrant built on probable cause. Then drive from wherever that's done to get to the magistrate. Have the magistrate sign it and then come all the way back to Springfield." Det. Elliott was "[e]specially" concerned because "I had now talked to Mr. Claros about it, potential for him to just come back and just drive away in that truck." When asked whether "those concerns [were] present even before you talked to Mr. Claros," Det. Elliott stated that "[t]hose concerns were present the entire time, yes."

Det. Elliott stated that, in addition to himself and Det. Posey, there was a uniformed officer at the scene. But "[i]f an emergency comes up he may have to leave."

Det. Elliott acknowledged that he could have blocked the driveway with a vehicle to prevent the Hummer from being moved: "I guess we could have. It doesn't mean he couldn't drive across the grass or anything else like that."

Two days after seizing the defendant's car, Det. Elliott applied for and received a search warrant for the Hummer, specifically to search for "[h]uman blood, bone, skin, hair and other tissue, fingerprints, fibers, fabric impressions, paint transfer and plant samples, glass, lamps, lamp filaments, speedometer, gauges, instrument panel, and other motor vehicle parts." (Def.'s Ex. B.) The affidavit in support of the search warrant included a reference to an examination of the vehicle performed by the detectives: "An initial check of the vehicle also showed drag/scrape/transfer marks on the under front skid plate consistent with dragging a person."

The Search Warrant Inventory and Return indicates that the following were seized pursuant to the warrant: (1) Hair; (2) Fibers; (3) DNA Swab; and (4) Skid Plate.

Det. Elliott indicated that the search warrant of the vehicle resulted in the development of evidence that connected the vehicle to the victim. According to Assistant Commonwealth's Attorney Gardy, this included the victim's DNA and fiber evidence.

III. DISCUSSION

In order to resolve this motion, the Court needs to answer nine questions:

- Was the defendant's carport within the curtilage of the defendant's home?

- If the carport was within the curtilage, did the defendant have a reasonable expectation of privacy in the area between the front of the defendant's vehicle and the back of the carport?

- When the detectives examined the front of the defendant's vehicle, did that constitute a search for purposes of the Fourth Amendment?

- Did the detectives have consent to conduct this search?

- When the detectives towed the defendant's vehicle to a secure facility, did that constitute a seizure for purposes of the Fourth Amendment?

- Did the police have probable cause to search and/or seize the defendant's vehicle prior to entering within the curtilage of the defendant's home?

- Did the police have exigent circumstances to search and/or seize the defendant's vehicle without a search warrant?

- If the answer to either the probable cause or exigent circumstances question is in the negative, are there any other exceptions to the warrant requirement that would be applicable?

- If the search and/or seizure of the defendant's vehicle was unconstitutional, must the evidence seized from the vehicle, and the forensic analysis of that evidence, be suppressed?

A. Was the defendant's vehicle within the curtilage of the defendant's home?

When Det. Elliott got on his knees to look beneath the undercarriage of the front of the defendant's vehicle, he was certainly within the curtilage of the defendant's home. He was: (1) on the defendant's property; (2) within a carport attached to the rest of the defendant's home; (3) under the carport's roof that was attached to the defendant's home; and (4) due to the presence of the defendant's vehicle, at a location that could not be observed from the street or even from the driveway leading up to the carport.

In *United States v. Dunn*, the Supreme Court cited four factors particularly relevant to determining whether a location was within the curtilage of a home: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." 480 U.S. 294, 301 (1987) (citations omitted). The fundamental question is "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.*

1. Proximity

The portion of the carport where Det. Elliott kneeled to examine the underside of the Hummer was not only proximate to the house but actually attached to the house. *See* Def.'s Ex. A. It could hardly have been *more* proximate to the house. *See, e.g., United States v. Perea-Rey*, 680 F.3d 1179, 1184 (9th Cir. 2012) ("The carport more than satisfies the proximity factor. It is directly adjacent to and shares a common façade and wall with the one-story stucco home.").

2. Enclosure

While the carport was not in a fenced-in enclosure, the carport itself was an enclosure, albeit not closed on all sides. It had a roof attached to the home, and was enclosed on the right side by the home itself. *See United States v. Darden*, 353 F.Supp.3d 697, 709 (M.D. Tenn. 2018) (*quoting Collins v. Virginia*, 138 S.Ct. 1663, 1675 (2018) ("While the carport is essentially open on three sides and objects can be seen from the street, '[s]o long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage.'").

3. Use

The carport typically is used to park a resident's vehicle and shield it from the elements. That, in fact, is how the carport was being used on this occasion. The defendant's private vehicle was pulled in front first into the carport, with only the rear part of the vehicle extending out from the carport.

4. Steps Taken to Protect from Observation

The spot where Det. Elliott kneeled to examine the underside of the Hummer could not be viewed from the street. Nor could it be viewed from the path leading up to the front door. While the rear of the vehicle could be viewed from the street, the front of the vehicle, which was under the carport, could not be observed.

These factors all support the conclusion that the location where Det. Elliott was kneeling was within the curtilage of the defendant's home.[6]

B. If the carport was within the curtilage, did the defendant have a reasonable expectation of privacy in the area between the front of the defendant's vehicle and the back of the carport?

When Det. Elliott and Det. Posey walked up the path to the defendant's front door in order to speak with the defendant, the defendant had no reasonable expectation of privacy to prevent such an intrusion. *See, e.g., Robinson v. Commonwealth*, 273 Va. 26, 38 (2007) (citing cases for the proposition "that an officer does not violate the Fourth Amendment by entering onto private property for the limited purpose of contacting, interviewing, or speaking with an occupant of the property.").

However, when the detectives then proceeded to enter the carport to inspect the underside of the defendant's vehicle, the defendant did have a reasonable expectation of privacy. While it is the case that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," *Katz v. United States*, 389 U.S. 347, 351 (1967) (citations omitted), there is no evidence in this case to indicate, or even suggest, that this part of the defendant's carport, blocked from public view by the defendant's vehicle, was a location "knowingly expose[d] to the public." Similarly, it can hardly be argued that the forward underside of the defendant's vehicle, parked in the defendant's carport front-end-in, was a sight "knowingly expose[d] to the public."[7]

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[6] In *Collins v. Virginia*, the Supreme Court reached a similar conclusion with respect to a search of a motorcycle parked in a "partially enclosed top portion" of a driveway. 138 S. Ct. at 1671. The enclosure was described as follows: "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. When Officer Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house." *Id.* at 1670-71. The Supreme Court concluded that the search took place within the home's curtilage: "Just like the front porch, side garden, or area outside the front window, the driveway enclosure where Officer Rhodes searched the motorcycle constitutes an area adjacent to the home and to which the activity of home life extends, and so is properly considered curtilage." *Id.* at 1667 (internal quotations and citations omitted).

[7] Nor does the law make any distinction between a carport and a garage. "So long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage." *Collins*, 138 S. Ct. at 1675.

Moreover, even if it were true (which it was not) that the defendant lacked a reasonable expectation of privacy to preclude a law enforcement officer from *standing* in the back of his carport and observing what might be in plain view, here the detective saw nothing from that *vertical* vantage point. It was only when he got on his knees to peer under the vehicle that he saw something which might be of evidentiary value to his investigation.

In sum, the Court finds that the defendant had a reasonable expectation of privacy in (at least) any area of his carport that could not be observed by the public from the street. In this case, that certainly included the space between the front of the defendant's vehicle and the back of the carport, which is where the detectives were standing and then kneeling.

C. When the detectives examined the front of the defendant's vehicle, did that constitute a search for purposes of the Fourth Amendment?

A "Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

The fact that an area is "within the curtilage" does not "itself bar all police observation." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home or public thoroughfares." *Id.* Here, however, the law enforcement officers were not "passing by a home or public thoroughfares," or its functional equivalent.[8] Nor could the underside of the defendant's vehicle be observed from the street. Even if it could be observed from the street, "the ability visually to observe an area protected by the Fourth Amendment does not give officers the green light physically to intrude on it." *Collins*, 138 S. Ct. at 1673 n.3 (citation omitted). "The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible." *Id.* at 1675.

[8] *See, e.g., Dow Chemical Company v. United States,* 476 U.S. 227, 239 (1986) (no Fourth Amendment violation when EPA took aerial photographs of industrial plant from navigable air space).

In order to examine the underside of the front part of the defendant's vehicle, Det. Elliott had to enter the carport and get down on his knees. He was on the defendant's property, within the curtilage, in an area protected from public view. Thus, the detective's examination of the underside of the defendant's vehicle constituted a search for purposes of the Fourth Amendment.[9]

D. Did the detectives have consent to conduct this search?

The Commonwealth does not contend and, in any event there would be no evidence to support, a claim of consent. At the time the detectives examined the underside of the vehicle, they had spoken with no one at the defendant's home – not the defendant, not his wife, and not the tenants.

E. When the detectives towed the defendant's vehicle to a secure facility, did that constitute a seizure for purposes of the Fourth Amendment?

Yes.

F. Did the police have probable cause to search and/or seize the defendant's vehicle prior to entering within the curtilage of the defendant's home?

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[9] *See* this excerpt from the Supreme Court's opinion in *Collins v. Virginia*, 138 S. Ct. at 1675:

> [T]he Fourth Amendment's protection of curtilage has long been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U. S. 1, 6 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Ibid.* (quoting *Silverman* v. *United States*, 365 U. S. 505, 511 (1961)). To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home'"—to be "'part of the home itself for Fourth Amendment purposes.' " *Jardines*, 569 U. S., at 6 (quoting *Oliver* v. *United States*, 466 U. S. 170, 180 (1984)). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U. S. 207, 212–213 (1986). When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *Jardines*, 569 U. S., at 11. Such conduct thus is presumptively unreasonable absent a warrant.

"When government agents conduct a search or seizure within protected areas of a dwelling without a warrant such actions are presumptively unreasonable, and unlawful unless they are supported by both probable cause and exigent circumstances." *Robinson v. Commonwealth*, 273 Va. 26, 34 (2007); *see also White v. Commonwealth,* 73 Va. App. 535, 553 (2021) (searches inside a home without a warrant are presumptively unreasonable and presumptively invalid).

The Court will first examine the question of whether the police had probable cause. As a preliminary matter, it is important to define *when* it would have been necessary for police to have probable cause. To be precise, it is important to define *when* it would have been necessary for police to have probable cause, first, for the *search* of the defendant's vehicle and, second, for the *seizure* of the defendant's vehicle. Each requires its own probable cause determination since each protects a distinct expectation under the Fourth Amendment.[10]

1. Probable Cause for the Search

The police needed probable cause to search *before* entering the carport area in front of the defendant's car. While the detectives did not need probable cause to take the path to the defendant's front door and to knock on the door, they did need probable cause before they entered the carport to examine the defendant's vehicle.[11] At that point, a search was underway subject to the protections of the Fourth Amendment. If the police did not have probable cause, the search was unconstitutional. If the police did have probable cause, the search may or may not have been unconstitutional depending on whether they also had exigent circumstances to justify the warrantless search and seizure of the defendant's vehicle.

Probable cause "takes into account the 'totality of the circumstances' surrounding the search." *Bunch v. Commonwealth*, 51 Va. App. 491, 495 (2008) (citations omitted). When the Court considers the "totality of circumstances" at the time the police entered the curtilage of the defendant's home and conducted their examination of the vehicle, the Court finds that the police did have probable cause to believe: (1) that a crime had been committed (felony hit and run); and (2) that evidence of that crime would be found on the defendant's vehicle. This is based on the following:

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[10] *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("The first clause of the Fourth Amendment . . . protects two types of expectations, one involving 'searches,' the other 'seizures.' A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.")

[11] The Court need not determine whether the detectives needed probable cause to go to the sides of the house and look over the fence into the backyard. To the extent that this was a search, it did not result in the acquisition of any additional evidence or information other than that no one was present in the backyard.

- Det. Elliott knew from an eyewitness that Mr. Velasquez had been run over by a car that did not stop. Thus, he certainly had probable cause to believe a crime had been committed, specifically the felony offense of Failing to Stop After an Accident.

- Det. Elliott also knew that the crime had not occurred in the middle of the day or at rush hour but, rather, at approximately 1:00 a.m. in the morning. At that time, the only business open nearby was the SportsPlex.

- Det. Elliott – an experienced crash scene investigator – knew that evidence of a hit and run might well be found on the vehicle that struck Mr. Velasquez, including possibly blood, DNA, fibers, and other types of trace evidence.

- Det. Elliott knew that the eyewitness who saw the accident identified the vehicle that struck Mr. Velasquez as dark in color, probably black, and believed to be a Hummer.

- Det. Elliott had access to the video from two cameras at a Shell gas station located very close to the accident scene. The video bore out the eyewitness' observation. Not only did the video display a vehicle that appeared to be a Hummer, but the vehicle came into view at a time and in a direction consistent with being the vehicle that struck the victim.

- Det. Elliott noticed that the vehicle observed on the video had aftermarket rims, which made the vehicle look even more distinctive.

- Investigation at the SportsPlex led to the identification of an individual – known as "Chato" – who drove a black Hummer, was at the SportsPlex on Friday evening, and left the SportsPlex shortly before the accident.

- "Chato" was determined by the police to be the defendant and the detectives also determined that the defendant had a black Hummer registered to him.

- The defendant's home was not only close to the accident scene – just one to two miles away – but the accident occurred on the road, and in a direction, that an individual would be expected to take to get from the SportsPlex to the defendant's home.

- Upon arrival at the defendant's home, and without entering the defendant's property, Det. Elliott confirmed that the defendant's Hummer was parked in the carport and driveway. Det. Elliott was also able to observe aftermarket rims on the vehicle.

The Court finds that the "totality" of these circumstances establishes that Det. Elliott had probable cause to search the defendant's Hummer for evidence associated with the fatal accident.

2. Probable Cause for the Seizure

The police needed probable cause to seize the defendant's vehicle at the time the tow truck, at the instruction of the detectives, actually removed the defendant's vehicle from the premises of the defendant's home.

The Court finds that the police did have probable cause to seize the vehicle at that point in time. All the evidence that justified the search, as described above, would also be applicable to justify the seizure of the vehicle. In addition, the police now had the defendant's wife's statement that the defendant was the only person who drove the vehicle. This provided additional support for the conclusion that the defendant was driving the Hummer when he left the SportsPlex. Additionally, the police now knew that there were scrape marks on the underside of the defendant's vehicle that were consistent with the vehicle having run over a bag or dragging a person.[12] Even without this additional information, however, the Court finds that the police had probable cause to seize the vehicle.

Given the existence of probable cause both to search and seize the vehicle, the Court now turns to the key questions of whether the police had exigent circumstances to search and seize the vehicle without a search warrant.

G. Did the police have exigent circumstances to search and/or seize the defendant's vehicle without a search warrant?

The "exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant." *Birchfield v. North Dakota,* 579 U.S. 438, 456 (2016) (citation omitted). In determining whether a law enforcement officer had exigent circumstances to make a warrantless entry when a warrant would normally have been required, the Court considers the following:

- The burden of proving exigent circumstances "rests with the government." *Commonwealth v. Campbell,* 294 Va. 486, 495 (2017). And, where police have made warrantless entries into dwellings followed by searches, seizures and arrests, the burden is a "heavy" one. *Verez v. Commonwealth*, 230 Va. 405, 410 (1985) (citations omitted).

- A court considers the "totality of circumstances" in determining whether an officer was "justified acting without a warrant." *Missouri v. McNeely*, 569 U.S. 141, 149 (2013).

- The examination of the "totality of circumstances" is not a "retrospective analysis," *Moreno v. Commonwealth*, 73 Va. App. 267, 276 (2021). Law

[12] Of course, if the search was unlawful, this additional information could not be relied upon to establish probable cause to seize the vehicle.

> enforcement officers are not "required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight." *Keeter v. Commonwealth*, 222 Va. 134, 141 (1981). Rather, the circumstances are judged "as they reasonably appeared to trained law enforcement officers" at the time "the decision to enter was made." *Id.*

In addition to the foregoing considerations, the Supreme Court of Virginia has described ten circumstances that other courts have considered relevant in determining whether exigent circumstances existed to make a warrantless entry. As set forth in *Verez v. Commonwealth*, they are as follows:

> (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit.

230 Va. 405, 410-11 (1985) (citations omitted).

Before turning to the facts of this case, the Court would note that an exception that is *not* available to the Commonwealth is the "automobile exception." *See Collins*, 138 S. Ct. 1663.

The facts in *Collins* were quite similar to the instant case. A police officer was searching for a stolen motorcycle that had been used to commit traffic violations and elude the police. *Id.* at 1668. Collins was identified as the individual who was "likely" in possession of the stolen motorcycle. *Id.* An officer went to the house of Collins' girlfriend, where Collins stayed "a few nights per week." *Id.* The officer observed what appeared to be a motorcycle at the top of the driveway, covered by a tarp. *Id.* The officer entered the property and walked up to the top of the driveway where the motorcycle was located. *Id.* The officer pulled off the tarp, and ascertained the vehicle identification numbers as well as the license plate. *Id.* He ran a search with this additional information, "which confirmed that the motorcycle was stolen." *Id.* He took photographs and then replaced the tarp and went back to his car. *Id.* He waited for Collins to come home and asked to speak with him, which Collins agreed to do. *Id.* When Collins acknowledged that the motorcycle belonged to him, he was arrested. *Id.* at 1668-69.

The search of the motorcycle in *Collins* was conducted without a warrant. The Commonwealth of Virginia argued that the "automobile exception" to the warrant requirement applied, an exception justified by the "ready mobility" and "pervasive regulation of vehicles capable of traveling on the public highways." *California v. Carney*, 471 U.S. 386, 390-392 (1985). The Supreme Court rejected this assertion. "Nothing in our case law, however, suggests

that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant." *Collins*, 138 S. Ct. at 1671. "[S]earching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage." *Id.* at 1672. Therefore, concluded the Court, "the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein." *Id.* at 1675.

The Court now turns to the question of whether Det. Elliott had exigent circumstances to conduct either the search of the defendant's vehicle or the seizure of the defendant's vehicle. For the reasons described below, the Court finds that there were no exigent circumstances that justified either the search or seizure of the vehicle.

1. <u>The Exigent Circumstances Issue with Regard to the Search</u>

What were the circumstances as they reasonably appeared to Det. Elliott at the time he entered the curtilage of the defendant's home?

First, Det. Elliott knew that Mr. Velasquez had been run over and killed by a hit and run driver.

Second, Det. Elliott had probable cause to believe that the defendant was the hit and run driver and that the vehicle involved in the offense was sitting in the carport/driveway of the defendant's home. Moreover, Det. Elliott *knew* he had probable cause at the time he arrived at the defendant's home.[13]

Third, there was no indication that anyone was home at the time of the search. No one answered the door when the detectives knocked at least twice. Nor did the detectives see anyone in the backyard. Significantly, the detectives did not identify themselves as police officers when knocking on the door. Thus, someone inside the house – had there been anyone in the house – would not have known that the Fairfax County Police were at the door.

Fourth, Det. Elliott believed that any trace evidence that might exist on the defendant's vehicle was "fragile" and could be lost if it rained, or was intentionally washed away. However, no evidence was offered at the suppression hearing that rain was imminent or likely. Det. Elliott also knew that the front end of the defendant's vehicle was under the roof of the carport, which would have provided some protection from the elements.

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[13] *See* this exchange between defense counsel and Det. Elliott at the suppression hearing:

> Q. When you arrived at the house you believed you had probable cause that Mr. Claros was the individual involved in this collision; correct?
>
> A. Everything was pointing in his direction, yes.

Fifth, Det. Elliott knew that the defendant's vehicle – like any other operable vehicle – was mobile and he was concerned that it might be driven away by the defendant.[14]

Sixth, Det. Elliott knew that the defendant's vehicle was in a location where one would expect a personal vehicle to be parked – in the homeowner's driveway, partially in the carport. Thus, Det. Elliott had no reason to suspect that the defendant was attempting to hide or secrete his vehicle.

Seventh, Det. Elliott knew that there were other police officers with him at the defendant's house, including a uniformed officer in a marked police cruiser. This meant that had Det. Elliott chosen to get a warrant before entering the property, either the uniformed officer or Det. Posey, or some other officer summoned to the scene, could have been stationed at the defendant's home to prevent the removal of the vehicle, including by blocking the driveway with one of the officers' vehicles. Significantly, there were three police vehicles at the scene at the time the search was undertaken: the marked cruiser, Det. Elliott's vehicle, and Det. Posey's vehicle.

Eighth, Det. Elliott knew that it would take approximately two hours to obtain a search warrant. But one of the reasons that Det. Elliott testified that it would take two hours was that this time estimate included drafting the affidavit in support of the warrant. As he said: "It takes time to sit down and write the search warrant built on probable cause." Since the only additional information obtained by Det. Elliott before entering the curtilage was that the defendant's vehicle was parked in the carport/driveway, the bulk of the affidavit might have been prepared in advance, thus shortening the time it would take to obtain the warrant – especially since Det. Elliott already had concluded that he had probable cause that the defendant was the person whose vehicle struck and killed the victim.

Finally, there was no evidence offered at the suppression hearing to suggest that the defendant knew, or even suspected, that both he and his car were the subject of investigative interest by the Fairfax County Police Department. No one had answered the knock on the door. No one was in the backyard. Thus, Det. Elliott had no reason to suspect that an effort would be made *imminently* to eradicate evidence or move or hide his car. Indeed, the fact that the car was

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[14] In *Collins v. Virginia, supra*, the Supreme Court held that the automobile exception did not authorize a police officer to enter the curtilage of a home to conduct a search of a vehicle. Given that the "ready mobility" of vehicles is a core rationale for the automobile exception, it would not appear that the Commonwealth can rely on a vehicle's mobility to justify a warrantless search or seizure within the curtilage of a home. Even if the Court were to consider this concern, however, it would not change the Court's analysis or conclusions for two reasons: first, there was no evidence that the vehicle was actually at imminent risk of being moved; and, second, even if the defendant had returned home and tried to move or wash his vehicle, there was a sufficient law enforcement presence at the defendant's home to prevent this from happening during the two hours it would have taken to obtain a search warrant.

parked in the usual location for the parking of a homeowner's car suggested that the defendant was either unaware of police interest or, if aware, did not plan to do anything about it.

Having described the "totality of circumstances" that reasonably appeared to the officer, the Court now turns to the application of the ten potential circumstances outlined by the Supreme Court of Virginia in *Verez v. Commonwealth, supra.*

a. The degree of urgency involved and the time required to get a warrant.

There is little doubt that searching the defendant's vehicle was an urgent priority. However, there is a material difference between urgent and immediate, and no evidence was presented at the suppression hearing that the vehicle needed to be removed immediately, and could not stay put for the two hours it would have taken to obtain a warrant.

Officers were on the scene and certainly could have ensured that the car was not removed or altered until the search warrant was obtained. While the Court recognizes that Det. Elliott was also concerned about the fragility of the potential evidence, there was no indication that such evidence was so ephemeral or evanescent that it would have disappeared or degraded within the two-hour time period necessary to get a search warrant. Indeed, it was not until February 5, 2020, – two days after the seizure – that Det. Elliott actually obtained a search warrant for the vehicle.

That leaves the possibility of rain impacting on potential evidence. But the Commonwealth – which has the burden of proving exigent circumstances – offered no evidence to suggest that rain was imminent or that the carport would not offer protection if it did rain.

b. The officers' reasonable belief that contraband is about to be removed or destroyed.

Contraband was not an issue in this case. The real question here is whether the officers' had a "reasonable belief" that trace evidence on the exterior of the car was "about to be removed or destroyed." No evidence was offered by the Commonwealth at the suppression hearing to support such an assertion.

c. The possibility of danger to others, including police officers left to guard the site.

No evidence was offered by the Commonwealth at the suppression hearing to suggest the possibility of danger to others, including the police officers.

d. Information that the possessors of the contraband are aware that the police may be on their trail.

Again, contraband was not an issue in this case. The question is whether the defendant was aware that he had become the focus of the law enforcement investigation. There is no evidence to suggest that the defendant was aware of the investigation at the time the police entered the carport to search the defendant's vehicle. (That would, of course, change *after* the police did their search and talked to the defendant on the phone.)

e. Whether the offense is serious, or involves violence.

This was obviously a very serious offense. Mr. Velasquez died as a result of his injuries, and so the defendant was facing not only felony hit and run charges but potentially an involuntary manslaughter charge.

f. Whether officers reasonably believe the suspects are armed.

No evidence was offered at the suppression hearing to suggest that the officers reasonably believed the defendant was armed.

g. Whether there is, at the time of entry, a clear showing of probable cause.

For the reasons stated above, the Court finds that that there was a clear showing of probable cause at the time of the detectives' entry into the curtilage.

h. Whether the officers have strong reason to believe the suspects are actually present in the premises.

There was no indication at the time of the search that anyone was home. No one answered the knocks on the door and no one was in the backyard. So the detectives certainly could not have had a "strong reason to believe" that the defendant was home at the time of the search. And, since they had not identified themselves as police officers when knocking, if anyone *had* been at home, they would not have known that officers were at the door.

i. The likelihood of escape if the suspects are not swiftly apprehended.

This circumstance is not applicable. The police were not attempting to make an arrest at the time they entered the carport but, rather, to examine the defendant's vehicle.

j. The suspects' recent entry into the premises after hot pursuit.

This circumstance is not applicable either.

In sum, the Commonwealth has not proven that there were exigent circumstances justifying a warrantless search of the defendant's vehicle. The detectives had adequate time and opportunity to get a search warrant as well as the personnel resources to guard the defendant's vehicle while the process of obtaining the search warrant was underway. None of the other circumstances, individually or collectively, constitute exigent circumstances to justify the warrantless search of the defendant's vehicle.

2. The Exigent Circumstances Issue with Regard to the Seizure

The seizure of the defendant's vehicle by tow truck occurred after the following events: (1) the examination of the underside of the defendant's vehicle and the observation of scrape marks; (2) the detectives' conversation with the tenants; (3) the detectives' conversation with the defendant himself; and (4) the detectives' conversation with the defendant's wife. These additional events had the following impact on the "totality of circumstances" as they reasonably appeared to the officers.

First, the detectives now knew that the defendant was not at home.

Second, the defendant's wife was also now aware of the investigation but she was cooperative, according to Det. Elliott.

Third, the defendant was now aware that he, and his vehicle, were under investigation and that the police might seize his vehicle.

Fourth, the detectives now knew that there were scrape marks on the underside of the defendant's vehicle. However, there is no indication that this information was revealed to the defendant, or to the defendant's wife, or to the tenants.

While this additional information does slightly alter the "totality of circumstances" analysis, it does not do so in a way that makes it more likely that there were exigent circumstances. Indeed, it made it less likely. For while the defendant now knew that the police were "on his trail," the police also had acquired additional information, and that additional information was quite significant: The detectives now knew *definitively* that the defendant was not at home and, therefore, it was physically impossible for him to move the car or wash away evidence. It is true, of course, that the defendant could have come home and attempted to move the car or alter evidence on the car. But a police officer stationed at the home to guard the car while Det. Elliott obtained a search warrant could certainly have prevented this from happening.[15] Nor was there any reason to suspect that the defendant's wife would attempt to remove or alter the vehicle. Not only was the defendant's wife "cooperative," according to Det. Elliott, but she handed over the keys to the defendant's vehicle when asked to do so.

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[15] Det. Elliott confirmed during the suppression hearing that he did not ask the marked unit to guard the vehicle and he did not call for backup to come stay on the scene.

Therefore, the Court finds that there were no exigent circumstances justifying the warrantless seizure of the defendant's vehicle.

k. If the answer to either the probable cause or exigent circumstances question is in the negative, are there any other exceptions to the warrant requirement that would be applicable?

The Court has considered whether there are any exceptions to the warrant requirement that would justify the search and seizure in this case. There are none.

Certainly, the "plain view" doctrine would not apply. "[A]n essential predicate to any valid warrantless seizure of incriminating evidence [is] that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California,* 496 U.S. 128, 136 (1990). Here, Det. Elliott was only able to observe "scrape marks" on the defendant's vehicle by unlawfully entering the curtilage without a warrant and getting on his knees to look underneath the vehicle. "A plain-view seizure … cannot be justified if it is effectuated "by unlawful trespass." *Collins,* 138 S. Ct. at 1672 (*quoting Soldal* v. *Cook County*, 506 U.S. 56, 66 (1992)).

Nor would the "inevitable discovery" doctrine apply. That doctrine permits the admission of illegally acquired evidence if "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v.* Williams, 467 U.S. 431, 444 (1984). The Court cannot make such a finding in this case. Indeed, the very arguments that the Commonwealth makes in support of exigent circumstances undermine a claim of "inevitable discovery." It has been the Commonwealth's position that the trace evidence on the vehicle was so "fragile," and the possibility of the evidence disappearing (in one way or another) so great, that the detectives could not even wait two hours to get a warrant. How then can it be persuasively argued that this evidence would have been "inevitably" discovered at some point in the future? It cannot.

The "independent source" doctrine would not apply either. "The independent source doctrine works to put the Commonwealth in the same position it would have been in if there was no police error or misconduct." *Carlson v. Commonwealth*, 69 Va. App. 749, 760 (2019), *quoting Nix v. Williams*, 467 U.S. 431, 443 (1984). Thus, the "independent source doctrine allows the admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Id.* at 443. Here, the defendant's vehicle was seized unlawfully by the police, and it was the examination of that vehicle while in the possession of the police that yielded the trace evidence that connected the defendant's vehicle to the accident. Thus, the source was, in no respect, "independent."

In addition, as stated above, the automobile exception to the warrant requirement would not apply, given the Supreme Court's decision in *Collins v. Virginia*, *supra.* Nor would the 'good faith" exception to the exclusionary rule apply as it did when *Collins v. Virginia* was remanded. However, in holding that the "good faith" exception applied to the search conducted by the police officer in the *Collins* case, the Supreme Court of Virginia noted the following: "At

the time that Officer Rhodes searched the motorcycle, no binding precedent had held that the automobile exception was inapplicable to a vehicle parked in a private driveway located close enough to a home to be considered within the curtilage." *Collins v. Commonwealth*, 297 Va. 207, 220 (2019). In contrast, on February 3, 2020 – the date on which Det. Elliott searched and seized the defendant's vehicle – binding precedent had been in place for nearly two years prohibiting the use of the automobile exception in a case such as this. *See Collins v. Virginia, supra.*

Finally, it must be emphasized that the unlawful seizure of the defendant's vehicle was not "cured" or "excused" by the police obtaining a search warrant *after* they seized the vehicle. When a warrant is constitutionally required, it obviously must precede the seizure of evidence, not follow it. It makes no difference that the trace evidence was not actually removed from the vehicle until after the search warrant was obtained because it was the illegal act of seizing the vehicle in the first place that brought the vehicle into police possession.[16]

I. <u>If the search and/or seizure of the defendant's vehicle was unconstitutional, must the evidence seized from the vehicle, and the forensic analysis of that evidence, be suppressed?</u>

The evidence derived from the unlawful search and seizure of the defendant's vehicle must be suppressed.

As the Court of Appeals stated in *Commonwealth v. Ealy*: "The exclusionary rule prohibits the introduction into evidence of tangible and testimonial evidence acquired during an unlawful search, while also prohibiting the introduction of derivative evidence that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint. The exclusionary rule's prohibition of derivative evidence is the essence of the fruit of the poisonous tree doctrine." 12 Va. App. 744, 754 (1991) (citations and internal quotations omitted).

The Court recognizes, of course, that the exclusionary rule "exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Collins*, 297 Va. at 214 (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011)) (citations omitted). Nevertheless, the law is clear, as is this Court's obligation.

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[16] It is also worth noting that the affidavit in support of the search warrant makes reference to the scrape marks observed by Det. Elliott when he examined the underside of the defendant's vehicle. ("An initial check of the vehicle also showed drag/scrape/transfer marks on the under front skid plate consistent with dragging a person.").

The evidence is hereby suppressed. An Order, in accordance with this Letter Opinion, shall issue this day.

Sincerely,

[redacted]

Randy I. Bellows
Circuit Court Judge

OPINION LETTER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	**CRIMINAL NUMBER FE-2021-52**
VERSUS	)	
WILLIAMS M CLAROS	)	**INDICTMENT – INVOLUNTARY MANSLAUGHTER (COUNT I) and FAILING TO STOP AFTER AN ACCIDENT (COUNT II)**

ORDER

Before the Court is the Defendant's motion to suppress the warrantless search and seizure of the Defendant's vehicle, and any evidence derived therefrom. For the reasons stated in the Letter Opinion issued this date, the motion is GRANTED.

SO ORDERED this 6th day of July, 2022.

JUDGE RANDY I. BELLOWS

RIB / ccs
FE-2021-52