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**UNITED STATES COURT OF APPEALS  
for the FOURTH CIRCUIT**

**Record No.: 03-1975**

**ANNE DURNEY,**

Appellant,

v.

**C. DUVAL DOSS, TRAVIS DOOMS,  
DOUG GOWEN and SHERIFF L. J. AYERS, III,**  
Appellees.

On Appeal From The U.S. District Court for the Western District of Virginia  
Lynchburg Division

—

**Appellant s Opening Brief**

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## **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

The basis for subject matter jurisdiction in the district court is 28 U.S.C. § 1331. The basis for jurisdiction in the court of appeals is 28 U.S.C. § 1291. The district court issued a final order on July 14, 2003, granting summary judgment against the plaintiff. Plaintiff timely filed her Notice of Appeal, appealing to this United States Court of Appeals for the Fourth Circuit, and prays that the Court, upon *de novo* review, would reverse the order of the district court and deny summary judgment herein.

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. Whether the District Court Applied the Proper Standard of Review?**
- II. Whether the Deputy Sheriff s Search of the Toolbox Mounted on Plaintiff s Truck Without a Warrant Was a Violation of Plaintiff s Rights under the Fourth Amendment of the United States Constitution?**
- III. Whether Plaintiff Was Unlawfully Stopped, Detained and Arrested in Violation of Her Rights under the Fourth Amendment of the United States Constitution?**
- IV. Whether the Defendants Retaliated Against Plaintiff Due to Her Speech and Petition Against the Government in Violation of Her Rights under the First Amendment of the United States Constitution?**

**V. Whether the Defendants Are Entitled to Qualified Immunity?**

**NATURE OF THE CASE AND  
MATERIAL PROCEEDINGS BELOW**

This case involves the unlawful and unjustified search, detention and arrest of Anne Durney, a resident of Wyoming, in a Wal-Mart parking lot in Amherst County, Virginia, while on a trip to visit friends with her husband. The record shows that Amherst County Deputy Travis Dooms searched Mrs. Durney's vehicle without a warrant and detained Durney after she complained about the officer's unconstitutional conduct. Although Durney did nothing to impede the officer short of exercising her right not to waive her personal security and privacy in reliance on the United States Constitution, in accordance with her rights set out in *Brown v. Texas*, 443 U.S. 47 (1979), Dooms and other deputies detained and then arrested Durney because of her complaints and to provide a cover for their own unconstitutional conduct. The search, stop, false arrest and imprisonment of plaintiff by the defendants resulted in expenses, physical and mental pain and suffering, humiliation and embarrassment, and indignity as a citizen of the United States for which she should be compensated. The defendants violated the Constitutional rights of Durney on May 4, 2001. A complaint was filed on May 6, 2002. Summary judgment was granted against Durney dismissing her claims.

Plaintiff appeals the district court's order and memorandum dated July 14, 2003 granting Defendant's motion for summary judgment.

## FACTS

### 1. Overview.

The events surrounding the unlawful, search, detention and arrest of Anne Durney, and the temporary seizure of her vehicle, in the Amherst County, Virginia, occurred in a Wal-Mart parking lot on May 4, 2001. Amherst County Sheriff's Deputy Travis Dooms responded to a call that a pick-up truck had backed into the bumper of a red Chevrolet Camaro in a private parking lot at the Amherst County Wal-Mart store, causing the ball hitch of the truck to press into the license plate and slightly into the plastic of the bumper<sup>1</sup>. The pick-up truck was owned by Mrs. Durney, a resident of Wyoming and member of the Cato Institute, a public interest organization dealing with civil rights and other issues.

Upon returning to her pick-up truck from the Wal-Mart store, Mrs. Durney and her husband discovered Deputy Dooms leaning over the bed of the Durney's pick-up truck and rummaging through the previously closed toolbox without any

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<sup>1</sup> JA 455 radio transcript; 157:4-6 Dooms Dep.

justification.<sup>2</sup> When Mrs. Durney complained that the Deputy was violating her constitutional rights by the search and blocking her vehicle with his car, the Deputy became abusive and demanded to see identification, which Durney refused to provide, asserting she had done nothing wrong and he had no legal right to do what he did. The Deputy then alleged that Durney's truck had dented the bumper of another vehicle parked in the Wal-Mart parking lot. Durney denied the allegation (there was no vehicle nearby with any damage since the driver had left) and after further demand from Dooks for her identification and registration, Durney told Dooks she was proceeding to Wal-Mart to place a call to the Deputy's superior, Sheriff L. J. Ayers, III, to protest this treatment. At this juncture, Deputy Dooks thought about arresting her then because there were people stopped everywhere and it was a big scene.<sup>3</sup>

Durney reached Ayers by telephone and was assured that Dooks had no right to demand her identification or to hold her. However, when she returned, Dooks, now joined by Deputy Gowen, persisted in demanding identification and refused to let her leave, blocking her truck with Dooks's patrol vehicle. When

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<sup>2</sup> JA 68:20-25; 70:5-7 Jones G.D.; JA 76:9-11; 25:1-17 Dooks G.D.; JA95:15-18 Jones C.C.; JA100:18-21 Dooks C.C.

<sup>3</sup> JA 79:25-78:4 - Dooks G.D.; JA 110:17-22 -Dooks C.C..

Durney entered her truck, and Durney continued not to produce identification or registration, Officer Gowen said she was under arrest for hit and run and removed her from the truck. Durney was never formally charged with violation of §§ 46.2-896 or 46.2-897 of the Code of Virginia, Virginia's hit and run statutes. When she went limp in protest of what was going on, Gowen dragged her to the Deputy's vehicle, placed her under arrest and charged her with violations of Virginia Code § 18.2-460<sup>4</sup>, knowingly attempt to intimidate or impede law-enforcement officer lawfully engaged in duties, and §46.2-707 operate or permit the operation of an uninsured motor vehicle owned by the accused and licensed in the Commonwealth, subject to registration in the Commonwealth, or displaying temporary license plates provided for in § 46.2-1558 without first having paid to the Commissioner of the Department of Motor Vehicles the uninsured motor vehicle fee required by § 46.2-706.

Deputy Dooms conceded that Durney never threatened anything other than

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<sup>4</sup>18.2-460(B) provides in relevant part: If any person, by **threats** or force, **knowingly attempts to intimidate or impede** a judge, magistrate, justice, juror, attorney for the Commonwealth, witness, or any law-enforcement officer, lawfully engaged in his duties as such, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a Class 1 misdemeanor. (emphasis added)

to call his boss to complain about unconstitutional actions of the officers<sup>5</sup>; and that Durney never threatened anybody.<sup>6</sup>

There is no evidence in the record indicating that Dooms or the Camaro driver knew who the driver of the pick-up truck was or that the driver of the truck was aware that the ball hitch had pressed into the plastic bumper of the Camaro. The record does show that when the Chevrolet Camaro backed away from the truck, the only damage was a slight impression in the plastic which remained only for a short period of time and, in actuality, suffered no damage.<sup>7</sup>

## **2. Defendant Dooms Unlawful Search of the Closed Toolbox on Durney s Truck**

Upon arrival at the parking lot in response to the call, Deputy Dooms met the driver of the Camaro and investigated the truck s trailer hitch touching the Camaro bumper. When he did not find a note and could not locate any person accepting responsibility for the truck, he leaned over the truck bed and opened a closed, latched toolbox mounted on Dumey s truck and searched through the

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<sup>5</sup> JA 149 -Dooms Dep. 21:4-10;

<sup>6</sup> JA 127 -Dooms C.C. Trial 157:19-21.

<sup>7</sup> JA 157-Dooms Dep. 37: Q: But you do know that it turns out that the bumper was not damaged; isn t that correct? A: Yeah. Ultimately, I found that out.

toolbox.<sup>8</sup> He did not have a warrant.<sup>9</sup> He did not have permission. *Id.*

Nevertheless, Dooms claimed he could do so because of exigent circumstances; however, these circumstances did not involve the officer's safety or security, or any concern about contraband in the vehicle, they were in actuality the standard time-consuming procedures common to all law enforcement endeavors. Dooms based his search on the following;

(1) he had been there quite a long time;<sup>10</sup>

(2) he said he had made attempts to locate the operator and/or owner of the vehicle;<sup>11</sup>

(3) he said he had information on different vehicles or owners from dispatch, one of which matched a green 1997 Chevy pick-up (the vehicle in front of him) registered to Ann Durney;<sup>12</sup>

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JA 68:20-25-Jones G.D.; JA 70:5-7. JA 76:9-11 -Dooms G.D.; JA 77:1-17; JA 100:15-18 Jones C.C.; JA 105:18-21-Dooms C.C.

9 JA 140:3-6 Dooms Dep.; JA 85:6-15 Dooms G.D.

10 *Id.* lines 17-19.

11 by paging them at Walmart *id.* lines 19-21)

12

*Id.* lines 22-24; 12:14-18; JA 144-145 Dooms Dep; JA 74:18-20 -Dooms G.D.; JA 118:9-13 -Dooms C.C.; JA 75:8-11-Dooms G.D., JA 119:7-16 Dooms C.C..

(4) he said he had a Vehicle Identification Number that dispatch said was not on file;<sup>13</sup> and

(5) he thought there was damage to another vehicle.<sup>14</sup>

Detracting from his position, however, Dooms acknowledged that he did not know how Wyoming registered vehicles.<sup>15</sup> Further, Dooms admitted he never received any information that suggested that there was some hanky-panky, something wrong, with the license number on that truck.<sup>16</sup> Dooms also admitted that he had no subjective belief or probable cause to believe that a crime had been committed or enough information to obtain a warrant under § 19.2-54 of the Code of Virginia.<sup>17</sup> In fact, the *only* reason the Deputy claims to have sought the information was if we ever get called to civil court. It s not reportable to the

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<sup>13</sup> *Id.* lines 24-25

<sup>14</sup> JA 146:25- 147:1 Dooms Dep.

<sup>15</sup> JA 142-Dooms Dep. at 11: Q You didn t know how Wyoming vehicles are licensed, correct? A: Correct.

<sup>16</sup> JA 142 -Dooms Dep at 10-11: Q. Did you get any information from Wyoming to indicate, at any time point in time, even up to this present day, that there was some hanky-panky, something wrong, with the license number on that truck? A. Not personally, no, sir. Q. And, so, it would be fair to say that you were unfamiliar with the method by which Wyoming licensed its vehicles? A. Yes, sir.

<sup>17</sup> JA 146:4-25 Dooms Dep.

department of motor vehicles because they have it on private property and **there is no crime involved**, it s not a D.U.I or, you know, a hit-and-run, or anything like that or, you know, malicious wounding or, you know, **any kind of criminal offense**.<sup>18</sup> Unfortunately, Deputy Dooms did not even have sufficient training to know how to obtain a search warrant, even if there had been probable cause.<sup>19</sup>

### **3. The Unlawful Stop and Detention of Ann Durney and the Seizure of her Vehicle**

When Durney confronted Deputy Dooms regarding his unlawful and unconstitutional search, the Deputy demanded identification and the registration to Durney s vehicle. Durney was outside the vehicle and refused to provide it. She protested Dooms opening the toolbox and said the search violated her constitutional rights. Dooms then claimed that she had damaged a nearby car by backing into it. The driver of the Camaro had left, however, and no such vehicle was parked behind her vehicle, nor was any such vehicle or its owner ever identified to Durney or her husband.<sup>20</sup> Durney continued to object. When Dooms

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<sup>18</sup> JA 107:25-108:15 Dooms C.C. (emphasis added).

<sup>19</sup> JA 107:11-16 Dooms C.C.; JA121:3-19-Dooms C.C.

<sup>20</sup> JA146- Dooms stated in his deposition, I had suspicion of a hit-and-run, because I was having such difficulty Dooms Dep. at 16. Yet, Dooms subsequently admitted that there was no indication that they had run. JA 158- Dooms Dep. at 38: Q. I mean, was there any indication that they had run? A: No,

continued to insist upon her identification, and did not move his patrol car from blocking her truck, Durney told Doms she was going to go to Wal-Mart to call Doms superior, Sheriff Ayers. When she reached him, Ayers indicated to Durney that Doms had no basis to detain her or to ask for her identification.<sup>21</sup> Durney returned to the truck and told Doms what Ayers had said. She then got into her truck, but Doms refused to move the patrol car and radioed Ayers. The record shows that Ayers told defendants Doms and Gowen to arrest Durney despite the fact that the Deputies lacked subjective belief that Durney had committed a crime and lacked probable cause. Doms.<sup>22</sup> Durney was thus arrested without a warrant and without probable cause by defendants Doms, Gowen and Ayers who under the facts available, did not have an objective, good-faith belief that plaintiff was guilty of the offenses charged.<sup>23</sup>

Contrary to the suggestion of ¶ 10 of his affidavit, Doms never identified the driver of the Camaro, Ms. Jones, to Durney or her husband,<sup>24</sup> nor showed

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sir, but they didn't give the information to Ms. Jones, and she had been present.

<sup>21</sup> JA 96:21-77 Ayers G.D.; JA 111:13-112:18 Doom C.C.

<sup>22</sup> JA 107:25-108:15 Doms C.C.

<sup>23</sup> JA 136:17-138:15 Gowen C.C.

<sup>24</sup> See JA 235-Doms Aff ¶ 10 in pertinent part I explained to the woman and man that their truck...damaged the car of the woman who was standing right next

them the alleged damage to Jones vehicle.<sup>25</sup> Deputy Dooms stated in his affidavit

I thought that they were going to leave in the truck. I stayed in my car and asked dispatch to relay to the Sheriff what the woman was saying, that they looked like they were going to leave, and that I still did not have the information needed to be exchanged with Ms. Jones, but actually subsequently stated to dispatch They re right here to my left sitting in the green Chevy extended cab pickup. <sup>26</sup> Dooms testified that Dumey gave no indication of leaving.<sup>27</sup> Before arresting Durney, Dooms had also received from Dispatch information identifying Anne Durney as

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to me. But see his contradictory testimony. Contra Dooms Dep. at JA 152-29: Q: You never introduced Ms. Jones as the owner of the alleged damaged vehicle, did you? A. Ms. Jones was standing directly beside me when I told both of the Durneys that they had struck her vehicle. I didn't say, Hello, you know, so-and-so, this is Ms. Kara Jones, but she was standing beside me. JA 165:166- Dooms G.D. Testimony at 47-48: Q. You never took her to Ms. Jones with Ms. Jones there and showed her the damage to the car? ... You never introduced her to Kara Jones at that point when she came back from the sheriff? A. When she came actually no, I think it was before Q: When she came back from the sheriff Q: The question I'm asking is when she came back from the pay phone, at that point you didn't take her to Kara Jones' car at that point did you? A: At that point right there, no, I did not. Q: And you didn't take her to Kara Jones' car from that point forward did you? A. From that point forward, that is correct.

<sup>25</sup> JA 71:2-5 Jones G.D.; JA 101:2-23 Jones C.C.; JA 71-73 Jones G.D.; JA 87:8-88:1 Dooms G.D.; JA 94:14-19 and JA 95:2-10 Jones G.D.; JA 102:6-8 Jones C.C.

<sup>26</sup> JA 48 Dispatch Transcript at 12.

<sup>27</sup> JA 89 Dooms G.D.

the registered owner of the vehicle matching the license plates and truck description.<sup>28</sup> The well-established law in Virginia provided that in circumstances where a motor vehicle accident on private property causes damage and the owner of the other vehicle is not found, which was not the case here because there was no damage, that the driver and occupant were required to provide information to the police *within twenty-four hours* rather than upon demand under §§ 46.2-896 and 46.2-897 of the Code of Virginia.

#### **4. The Defendants Retaliated Against Durney Due To Her Speech and Petition Against Unlawful Governmental Action**

When Durney discovered Doms conducting an illegal search, Durney insisted that his conduct was unconstitutional and that she had a constitutional right to security and privacy free from police interference.<sup>29</sup> When Doms demanded her identification and registration, she continued to question his

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<sup>28</sup> JA 74:22-23 Doms G.D.

<sup>29</sup> Although not relevant to the inquiry of probable cause to arrest, Durney has been much criticized for not acquiescing to the Constitutional deprivations. Since the demands by Doms and Gowen were made only after Durney challenged Doms' right to be searching her vehicle without a warrant, Durney was not convinced that there had been any alleged accident. Instead, she was faced with two Deputies who were intimidating her after she cited the United States Constitution in protest to their unlawful conduct, JA 169:5-24-Durney Dep., feeling that she was in a surreal movie Deliverance experience. JA 171:20-24 Durney Dep.

authority for doing so. The record shows that Durney stated that

(1) Officer Doms had no right to open the tool box making reference to the United States Constitution and Officer Doms lack of a search warrant. Doms CC Trial 96:7-9; 132:21-133:15; Doms Dep. 19:14-24; Doms G.D. Trial 47:7-10;

(2) This is still America Doms G.D. Trial 28:24-25;

(3) this was still a free country, Doms Dep at 20:12-21:10; Doms C.C. Trial 105:1-25; 159:11-161:2;

(4) she normally carries a copy of the Constitution with her to hand out to people like Doms, but that she didn't happen to have one at that time, Doms C.C. Trial 135:17-23;

(5) she was going to call his boss and complained of violations of the Constitution, JA149-Doms Dep. 21:4-10; and

(6) the Constitution didn't allow this and she wasn't going to do it and she didn't have her copy of the Constitution that day and this was just unconstitutional and it wasn't a police state and she just wasn't going to do it, JA 90-Gowen G.D. Trial 57:13-22.

Deputy Doms rejected those complaint and continued to detain Durney by demanding identification and blocking her vehicle, even though she was not in it.

Durney complained to Doooms superior and thought she was free to go. However, when she got into her truck and continued to refuse the Deputies demands, the Deputies radioed Ayers and Ayers then directed them to arrest Durney without probable cause when Durney continued to insist upon her constitutional rights.<sup>30</sup> She was then subsequently charged with violations of Virginia Code § 18.2-460, knowingly attempt to intimidate or impede law-enforcement officer lawfully engaged in duties, and §46.2-707 operate or permit the operation of an uninsured motor vehicle owned by the accused and licensed in the Commonwealth, subject to registration in the Commonwealth, or displaying temporary license plates provided for in § 46.2-1558 without first having paid to the Commissioner of the Department of Motor Vehicles the uninsured motor vehicle fee required by § 46.2-

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<sup>30</sup> JA 89-Dooms G.D.: Q. You said that she got in her car. She never attempted to leave the scene? A. **No, she did not.** Q. And then at that point you placed her under arrest because she was arguing with you? A. No, I didn't place her under arrest because she was arguing with me. **I placed her under arrest because she refused to give the information we needed to put this to a close.** We repeatedly asked and

JA 91-Gowen G.D. Trial: Q. Who placed Mr. and Mrs. Durney under arrest? A. Well, myself and Deputy Doooms. I know he had told her and I had told her that you know, just basically the whole thing was ridiculous for it to have gone this far. **But the sheriff had said to go ahead and arrest them for the hit and run and we did so. We effected the arrest at that time.**

706. Virginia Code § 18.2-460.<sup>31</sup>

Deputy Dooms conceded that Durney never threatened anything other than to call his boss to complain about unconstitutional actions of the officers; JA 149:4-10 Dooms Dep.; and that Durney never threatened anybody. JA 127:19-21 Dooms C.C.

Durney continues to be afraid of further retaliation by defendants should she again revisit the Amherst County area. JA 457-Durney Aff. ¶ 7 and 8.

The words spoken by plaintiff did not under the circumstances constitute a breach of the peace. The words spoken by plaintiff were not such expressions which by their very utterance inflict injury. Nor were the words she spoke of a type that a police officer should react to or find offensive. The words spoken by plaintiff were protected speech, protesting what she perceived to be a gross and indifferent violation of the Fourth Amendment.

**5. In Addition to Physical and Emotional Injuries, Durney Suffered Damages Including Criminal Legal Defense Expenses in the Amount of \$14,334.55.**

The direct and proximate result of defendants acts is that plaintiff suffered direct and concrete injuries for the Deputies unlawful conduct. During the arrest following the unlawful search, her constitutional protest and the unlawful

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<sup>31</sup> JA 92-Gowen G.D.; JA 91:12-14 & 20-Gowen G.D.

detention, she was pulled out of her truck, and Deputy Gowen dragged her across the pavement on her back, and handcuffed in such a way as to damage her wrists. At the jail, she was dragged across the pavement with her nose pressed towards her forehead by the palm of Deputy Doss so hard that she felt like she was going to pass out.<sup>32</sup> He grabbed her ears and twisted them while anchoring his thumbs in the TMJ joint, all of which resulted in pain, swelling and discomfort, shoulder pain, wrist pain and back pain and nerve damage.<sup>33</sup> Durney was forced to endure physical and mental pain and suffering and to suffer indignity, humiliation, and embarrassment in a private parking lot in front of her husband and with many bystanders looking on.<sup>34</sup> Moreover, she has suffered damage to reputation, property damage and medical and legal expenses of \$14,334.55. from the deprivation of her constitutional rights and physical liberty.<sup>35</sup> Later, at the Amherst County jail, Durney was examined and had redness on her back and had redness and abrasions of her wrists and was given an ice pack and experienced severe anxiety. Her injuries are continuing. She incurred further restrictions on her freedom and the

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<sup>32</sup> JA 181:16-182:7 Durney Dep.

<sup>33</sup> JA 182:14-18 Durney Dep.; JA 181-185 Durney Dep.; JA 212-Plaintiff s Answer to Interrogatories #2.

<sup>34</sup> JA 214-Plaintiff s Answer to Interrogatories #3; JA 187- 188-Durney Dep.

<sup>35</sup> JA 216-Exhibits #13 (bates 200030-200041)

expense of defending against the baseless criminal charges.

## **6. The Disposition of the Charges Against Durney**

Durney was convicted in the Amherst County General District Court of violating Virginia Code § 18.2-460, knowingly attempt to intimidate or impede law-enforcement officer lawfully engaged in duties, and §46.2-707 operate or permit the operation of an uninsured motor vehicle owned by the accused and licensed in the Commonwealth, subject to registration in the Commonwealth, or displaying temporary license plates provided for in § 46.2-1558 without first having paid to the Commissioner of the Department of Motor Vehicles the uninsured motor vehicle fee required by § 46.2-706, but the court did not want to listen to constitutional arguments. However, upon appeal to the Amherst County Circuit Court, when Durney's counsel moved to strike the Commonwealth's case at the end of its evidence on the grounds that there was insufficient evidence to make out a prima facie case that Durney had committed a crime (when viewed *in the light most favorable to the Commonwealth*), the Court granted the motion and dismissed all charges without requiring any evidence from Durney! (JA at 495:16-17). The Commonwealth's Attorney did not appeal this final disposition of the charges.

## SUMMARY OF ARGUMENT

The facts in this case do not support summary judgment for the defendant, instead they set forth a clear case of violations by defendants of clearly established rights the right to be free from a warrantless search with no exigent circumstances, the right to be free from an unlawful stop and detention, the right to be free from warrantless arrest where there is no probable cause, the right to be free to express oneself concerning public matters without retaliatory or punitive action, all as guaranteed by the United States Constitution.

If the plaintiff, as the nonmoving party, is given the benefit of the law, as required by the decisions of this Court namely, being entitled to have the credibility of her evidence as forecast assumed, her version of all that is in dispute accepted, all internal conflicts resolved favorable to her, the most favorable possible alternative inferences from it drawn in her behalf, and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered --- then the Court must find that defendant officers are not only *not* entitled to summary judgment based upon the facts or upon the defendants assertion of the shield of qualified immunity, Mrs. Durney is, in fact, entitled to summary judgment in her favor.

There is no question that the defendants violated Durney s constitutional

rights. At the very least, there are genuine issues of material fact preclude summary judgment on the issue of whether defendant officers should be shielded by qualified immunity. This was not an incident requiring split second decision making where a reasonable police officer in similar circumstances would have believed that the plaintiff posed any immediate risk of harm to himself or others. They were operating under a long established, and very clear, regime of law prohibiting their conduct. The officers violated the clearly established rights of the plaintiff and should be held liable for those violations..

## **ARGUMENT**

### **1. STANDARD OF REVIEW**

This Court reviews a district court's granting of summary judgment *de novo* in the light most favorable to the non-moving party. *See Wiley v. Mayor and City Council of Baltimore*, 48 F.3d 773(4th Cir.1995); *Nguyen v. CNA Corp.*, 44 F.3d 234, 236-37 (4th Cir.1995). Moreover, when as in this case, substantial claims are raised involving important constitutional interests, including First, Fourth and Fifth Amendment claims, an appellate court has an obligation to make an independent examination of the whole record of the case. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). The standard is set out more fully in the discussion below.

## 2. DISCUSSION OF ISSUES

### I. Whether the District Court Applied the Proper Standard Of Review

This Court reviews a district court's granting of summary judgment *de novo*. See *Wiley v. Mayor and City Council of Baltimore*, 48 F.3d 773(4th Cir.1995); *Nguyen v. CNA Corp.*, 44 F.3d 234, 236-37 (4th Cir.1995). The Court must consider all the pleadings and allegations and decide whether there is a genuine issue of material fact to be submitted to the trier of fact. Fed.R.Civ.P. 56(c) (emphasis added). A genuine issue of fact is material if it "might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); see also *Allstate Fin. Corp. v. Financorp, Inc.*, 934 F.2d 55, 58 (4th Cir. 1991).

In determining whether summary judgment is to be entered, "*the facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to [the non-moving party] . . . .* The nonmoving party is in a favorable posture, being entitled 'to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts resolved favorable to him, *the most favorable possible alternative inferences from it drawn in his behalf*, and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered.'"

*Roehling v. National Gypsum Co.*, 786 F.2d 1225, 1228 n.4 (4th Cir. 1986) (*emphasis in the original*); *see also Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1004 (4th Cir. 1987).<sup>36</sup>

Moreover, when as in this case, substantial claims are raised involving important constitutional interests, including First, Fourth and Fifth Amendment claims, an appellate court has an obligation to make an independent examination of the whole record of the case. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *see also, Ornelas v. United States*, 517 U.S. 690, 691, 699 (1996); *Lilly v. Virginia* 119 S.Ct. 1887, 1900 (1999); *Hurley v. Irish-American Gay Group of Boston*, 515 U.S.557, 567 (1995); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Park v. Shiflet*, 250 F.3d 843, 849 (4<sup>th</sup> Cir. 2001); *In re Morrisey*, 168 F.3d 134, 137 (4<sup>th</sup> Cir. 1999). [T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact finding function be performed by a jury or by a trial judge. *Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, 466 U.S. at 501. The obligation is necessary because [u]ltimate questions of

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<sup>36</sup> Even if there is no dispute as to the evidentiary facts, summary judgment is nonetheless inappropriate if differing inferences and conclusions can be drawn from those facts, *Charbonages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979), or when the issue depends upon the credibility of witnesses. *Magill v. Gulf & Western Indus., Inc.*, 736 F.2d 976, 979 (4th Cir. 1984).

reasonable suspicion to make a warrantless seizure of a person involve both questions of fact and law, *Park v. Shiflet*, 250 F.3d at 849, and the reaches of the amendments to the Bill of Rights are ultimately defined by the facts [they are] held to embrace and [courts] must thus decide for [themselves] whether a given course of conduct falls on the near or far side of the line of constitutional protection. *Hurley v. Irish-American Gay Group of Boston, supra*, 515 U.S. at 567.

The problem with the District Court's review below is that its review failed to consider all of the facts in the light most favorable to the plaintiff. Indeed, the lower court seemed to bend over backward to excuse the officers' transgressions in this case and made findings that are directly *contradicted* by the record evidence. For example, the District Court stated that Mrs. Durney was later convicted of impeding a law enforcement officer lawfully engaged in his duties. (Opinion at 3). It is particularly egregious error to state this kind of half-truth that is not only materially false, but misleading, and to the otherwise uninformed, would skew the view of the entire case. The entire, and material, truth is Mrs. Durney *was* convicted in her initial trial in the Amherst County General District Court --- a court not of record--- but on appeal to the Amherst County Circuit Court, a Virginia court of record, *all* of the charges against her were stricken and

dismissed at the end of the Commonwealth's evidence. The District Court's omission of this dismissal from its rendition of the facts is particularly significant because the Circuit Judge --- who was required on the motion to strike to consider the state's evidence in a light most favorable to it --- nevertheless decided that the state's evidence did not even constitute a *prima facie* case sufficient to support the charges! In other words, the charges were make-weight, a sort of thin-blue-line cover-up for the officers' unconstitutional conduct, and wholly unsustainable as a matter of law. The U. S. District Court's inexplicable recitation of facts in a manner that is contrary to objective truth is troubling and only one of several instances throughout its opinion of significant departures from the requirements of Rule 56 and this Court's summary judgment precedents. The lower court's approach to the facts in this case may be fairly characterized as taking the evidence in the light *most favorable to the defendants* and without giving Mrs. Durney any benefit of both the objective facts and any favorable inferences therefrom --- a completely erroneous standard as a matter of law.<sup>37</sup>

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<sup>37</sup> Other examples of erroneous statements of fact by the district court include contentions that Durney slammed the door, (JA 497 Op. 2, Contra JA \_ 49:14-50:8 Dooks Dep.; JA 457 Durney Aff. ¶ 5), that she resisted being handcuffed, (JA 497 Op. 2, Contra Id., JA 116:3-117:11 Dooks CC; JA 137:21-138:15 Gowen CC), that the Amherst Life Saving Crew found nothing wrong with the Plaintiff, except a few minor abrasions where her handcuffs had been and some redness on her lower back (JA 498 Op. 3, Contra JA 457 Durney Aff. ¶ 7) that Defendants had no identifying information whatsoever

It is respectfully submitted that a complete and independent review of the record by this Court will reveal that Durney had established a factual record, based on admissions made by the Sheriff and his Deputies, and the record of her trials, sufficient for summary judgment to be granted in her favor because Deputy Dooks search was clearly warrantless and without justification, his detention of Durney and her vehicle was not based on a reasonable suspicion to sustain a stop, and the detention and subsequent arrest was a retaliatory act resulting from her complaints about the unconstitutional search and intended to discredit her and suppress her speech<sup>38</sup>. This case deserves exacting review by this Court, if only because, as this Court observed in *Park v. Shiflett*, 250 F.3d 843, 854 (4<sup>th</sup> Cir. 2001), "nothing can so militate against the effective administration of justice and the proper regard for the law of the land as unlawful and reckless conduct on the part of officers who are charged with its enforcement," *citing Crosswhite v. Barnes*, 139 Va. 471, 124 S.E. 242 (Va.App.1924) (*quoting Bourne v. Richardson*, 133 Va. 441, 113 S.E. 893 (Va.App.1922)).

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about the Plaintiff, (JA 503 Op. 7, Contra JA 75:8-11 Dooks G.D.; JA 119:7-16 Dooks C.C.)

<sup>38</sup> To the extent this Court in its review identifies disputed issues of material facts on such issues, which Durney asserts there were not, any such disputed issues should have been left to the jury to decide after full presentation of the evidence and not decided by the District Court on summary judgment.

## **II. Defendant Dooks Violated Durney s Fourth Amendment Right Against Warrantless Searches and Seizures When He Opened And Searched Through the Toolbox Mounted on Durney s Truck Without a Warrant, Permission or Exigent Circumstances.**

In relevant part, the Fourth Amendment protects " the right of the people to be secure in their ... papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV. Therefore, to be constitutional, a search or seizure must not be unreasonable, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995), and a search conducted without a warrant issued upon probable cause is *per se* unreasonable. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978))(emphasis added). This is so because the express language of the Bill of Rights specifically prescribes that [n]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV. "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge ... [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

Durney s claim for the unlawful search was alleged in Count III ( ¶¶ 60 and 64) of the Complaint which incorporated by reference the allegations of

Paragraphs 15-17 and 36.<sup>39</sup> It is undisputed that Dooms entered the tool box mounted on the back of Durney s truck without a warrant or permission. Absent a warrant or permission, the only question is whether or not Dooms could avail himself of any exigent circumstances that might permit such an entry, or for purposes of qualified immunity, whether or not Dooms reasonably believed that there were such circumstances, upon which belief he relied.

In *United States v. Presler*, 610 F.2d 1206 (4th Cir. 1979) this Court upheld

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<sup>39</sup> See JA 16 Complaint ¶¶ 4, 15-17, 36, 60-65 Although plaintiff s motion to amend the complaint to state a separate count for the unlawful search was denied by the District Court, this Court has cited approvingly *Krieger v. Fadely*, 211 F.3d 134, 137 (D.C. Cir. 2000) which notes that complaints need not plead law or match facts to every element of a legal theory. *Peters v. Jenney*, 2003 W.L. 1908728 (4<sup>th</sup> Cir. 2003). See, e.g., *Swierkiewicz v. Sorema N.A.*, 122 S.Ct. 92, 997-98 (2002) (noting that under the notice pleading regime embodied in Fed.R.Civ.P. 8(a)(2), highly technical requirements of pleading specificity are disfavored); *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (stating that courts must "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits"). *Peters v. Jenney*, 2003 WL 1908728, \*11 (4th Cir. 2003); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1219 (2d ed.1990). The complaint clearly placed defendants upon notice that Durney contended that the search was unlawful. See Complaint ¶¶ 4, 15-17, 36, 60-65. Moreover, early on in the litigation, on page 13 of the brief in opposition to defendants 12(b)(6) motion, again made it abundantly clear that she had not waived her claims based upon the unlawful search in violation of the Fourth Amendment. See generally *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir.1999) (noting that issues not briefed or argued *on appeal* are deemed abandoned); *Peters v. Jenney*, 2003 WL 1908728, 15 (4th Cir. 2003)(Widener dissenting).

a warrantless entry, but not the subsequent search, based on exigent circumstances justifying the entry, but not the search. However, a comparison of the facts in that case reveals why Defendant Doods in the case at bar cannot avail himself of the exigent circumstances exception to justify the search of the toolbox. In *Presler*, the police entered an apartment upon the request of Presler's landlady. She had not seen her tenant for some time and become concerned. She further had detected an unusual odor coming from the apartment. She then called upon the local police to investigate. When an officer responded to her request, she unlocked the door to defendant's apartment for him. *Id.*, 610 F.2d 1206, 1209. The officer, on entering the apartment, found the defendant lying immobile on his bed covered with blood which he had apparently vomited. *Id.* After determining that Presler was either drunk or ill, or both, since he bore no evidence of injury, the officer called an ambulance. While waiting for the ambulance, the officer noticed that the door had been damaged by what appeared to be buckshot. The officer then began looking for a gun, and his search eventually uncovered evidence of a crime for which Presler was later convicted. Presler appealed his conviction, arguing that the search had violated his Fourth Amendment rights. *Id.*

This Court overturned the conviction, holding that whereas the officer's *entry* into the apartment may have been legal, his subsequent *search* was unlawful.

*Id.* at 1210-11. The court began its analysis by reiterating that a **search conducted without a warrant issued upon probable cause is *per se* unreasonable.** *Id.* at 1210 (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978))(emphasis added). The court further stated that there are few specifically established and well-delineated exceptions to this principle. *Id.* One of these exceptions covers entries and searches when [the police] *reasonably* believe that a person within [the dwelling] is in need of *immediate* aid ... in those instances where the police come upon the scene of a *homicide*. *Id.* (emphasis added). Even in that instance, there is a need for prudent application of the exception:

The exigent circumstances doctrine is an exception to the warrant requirement and must therefore be *strictly construed* and *very sparingly applied*. Courts must take special care to subject claims of exigent circumstances to *close scrutiny* to ensure that the fundamental rights safeguarded by the Fourth Amendment are not lost through a broad or sham application of the doctrine. Courts must ensure that police authorities do not manipulate or create artificial circumstances for the purpose of avoiding the warrant requirement. Warrantless sweep searches should be the rare exception, upheld only where ... the authorities act in good faith on the basis of information which would lead a reasonable person to be concerned that evidence might be lost or destroyed unless the premises are secured.

*United States v. Wright*, 696 F.Supp 164, 170 n. 9. (E.D. Va. 1988)(citations omitted, emphasis added). In the case at bar there are clearly no facts at all that even vaguely resemble the urgent need for action which constituted exigent circumstances in the *Presler* case. Here, there was no urgency. Indeed, the

defendants never even attempted to identify what kind of evidence they thought could have been destroyed had they not acted immediately, because there was none. The District Court employed a novel, erroneous and contradictory view of the exigent circumstances doctrine that officers are entitled to qualified immunity because a quick [apparently, as opposed to a long] search of a truck's unlocked toolbox, for the purpose of obtaining identifying information and not to further a criminal inquiry, was lawful. JA 507. It said no warrant was needed because [w]ithout any identifying information, if the vehicle left the scene, Dooms may have had no way of finding it when he returned with a warrant. JA 506. This logic is faulty on three counts. First, the exigent circumstances exception to the warrant requirement "basically encompasses officer safety and the destruction of easily-disposed evidence." *Gould v. Davis*, 165 F.3d 265, 270-71 (4th Cir.1998). No such circumstances were present in this case.

Second, Officer Dooms admitted that he had no probable cause to search the vehicle, stating "because they have it on private property and there is no crime involved, it's not a D.U.I. or, you know, a hit-and-run, or anything like that or, you know, malicious wounding or, you know, any kind of criminal offense."<sup>40</sup> Implicitly, by these comments, Deputy Dooms likewise was admitting as well that

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<sup>40</sup> JA 107:25-108:15 Dooms C.C

he had no cause to believe that the truck contained illegal contraband. Thus, had he presented his reasons to a magistrate, he would not have been able to obtain a search warrant under § 19.2-54 of the Code of Virginia, because there was no probable cause, making irrelevant any argument regarding the risk that the vehicle might leave the scene. Without the reasonable predicate of probable cause, Deputy Dooms had no reasonable constitutional basis for the search and no authority to search.

Third, the District Court's willingness to excuse a quick and dirty search for purposes of identification is nothing short of a license for the warrantless searches of motor vehicles. Whenever an officer has a complaint about a parked vehicle, and its owner cannot be found, nothing will prevent him/her from taking a coat hanger and opening the door, let alone the toolbox, to search in the cause of attempting to identify its owner. However, the damage to Durney's constitutionally protected security and privacy with respect to her vehicle is made no less unreasonable -- or unconscionable, for that matter --- simply because the officer claims he was searching only for her identity, and not in furtherance of a criminal inquiry. Under the District Court's line of justification, pretextual searches for identification will become the rule and eliminate the need for probable cause for searches of unoccupied vehicles. Certainly, the capacity of

mobility has long been recognized as a relevant circumstance in justifying a warrantless search *if there is probable cause of criminal activity*. *Carroll v. United States*, 267 U.S. 132 (1925); *United States v. Husty*, 282 U.S. 694 (1931).

However, the important and essential predicate for any such search is probable cause, something missing in the present case. If mobility alone is sustained as an exigent circumstance without a showing of probable cause, as is essentially urged by the defendants in this case, Fourth Amendment protections will be emasculated, searches of unoccupied vehicles (or anything that can be moved) will become rampant, and precious constitutional safeguards will be thrown to the wind. This Court ought not affirm an analysis that makes a mockery of longstanding, narrowly drawn exceptions to the warrant requirement, absent probable cause in the present case. *U.S. v. Stanley*, 597 F.2d 866, 870 (4<sup>th</sup> Circuit 1979) *citing Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

The warrantless search of the toolbox on Durney's truck, stationary and parked in a private parking lot --- notwithstanding its potential mobility and even the possibility that evidence might be lost or destroyed by continuing on its way --- did *not* without more present an exigent circumstance justifying an exception to the warrant requirement. There was no reasonable ground for believing that an offense had been committed or that the truck contained contraband. *Carroll v.*

*United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed.2d 543 (1925);  
*Cardwell v. Lewis*, 417 U.S. 583, 594, 94 S.Ct. 2464, 2471, 41 L.Ed.2d 325 (1974)  
(plurality upheld the warrantless seizure of an unattended car parked in a public lot  
and the subsequent examination of the car's exterior); *Coolidge v. New  
Hampshire*, 403 U.S. 443, 461-63, 91 S.Ct. 2022, 2035-37, 29 L.Ed.2d 564 (1971)  
(plurality excluded evidence seized from an unoccupied car parked in a private  
driveway); *Chambers v. Maroney*, 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26  
L.Ed.2d 419 (1970). In short, the present case is not within the well-established  
rule that a warrant is not required for the search of a movable vehicle if the  
officers have reasonable cause to believe that it contain contraband or that it is  
being used in the commission of a crime. *United States v. Haith*, 297 F.2d 65, 67  
(4<sup>th</sup> Cir. 1961).

This Court has said that in a case in which a plaintiff's civil rights are  
found to have been violated, it is appropriate to award nominal damages. . . .  
[because] federal courts should provide some marginal vindication for a  
constitutional violation. *Park v. Shiflett*, 250 F.3d 843, 854 (4<sup>th</sup> Cir. 2001), *citing*  
*Carey v. Piphus*, 435 U.S. 247, 265, (1978) and *Norwood v. Bain*, 166 F.3d 243,  
254 (4th Cir.1999). In this case, Durney is entitled to a declaration that officer  
Dooms unlawfully searched the tool box and violated her Fourth Amendment

rights, justifying at the very least an award of nominal compensatory damages, if not punitive damages, as well as her attorneys fees and costs. *Price v. City of Charlotte N.C.*, 93 F.3d 1241, 1246 (4th Cir.1996). Indeed, as stated above, Mrs. Durney was forced to incur substantial attorneys fees in her successful defense of the frivolous charges brought by the officers against her.

**III. Defendant Doms, Gowen and Sheriff Ayers Violated Durney s Fourth Amendment Right to Be Free from A Warrantless Search and Seizure When They Stopped, Detained and Arrested Her Without a Warrant or Probable Cause.**

The Fourth Amendment also protects "the right of the people to be secure in their *persons* . . . against unreasonable searches and seizures." U.S. Const. amend.

IV. To be constitutional, a search or seizure must not be unreasonable, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995),

and [n]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV. Even a brief detention short of

traditional arrest without articulable suspicion violates this right, *Davis v.*

*Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968). These

requirements are imposed because there is a constitutional right to privacy in

personal information that a citizen is entitled withhold. *See McDade v. West*, 223

F.3d 1135, 1141 (9<sup>th</sup> Cir. 2000).

This Court has held that [t]he controlling principle here is that an investigative stop, amounting to a fourth amendment seizure, must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity, which means that the suspicion must be more than an inchoate and unparticularized suspicion or 'hunch,' " *United States v. Gooding*, 695 F.2d 78, 82 (4<sup>th</sup> Cir. 1982) (citations omitted). In enforcing this principle, courts must apply objective standards in determining whether at the time of the seizure the requisite degree of suspicion existed. See *Brown v. Texas*, 443 U.S. 47, 52 (1979). However, an arrest made with probable cause fails to violate the Fourth Amendment. *United States v. Watson*, 423 U.S. 411, 418 (1976).<sup>41</sup>

Police officers are free to approach citizens and request voluntary compliance with questions or other inquiries. However, [o]nce a citizen withdraws his consent to further questioning by the police, the reasonableness of any subsequent governmental invasion of a citizen's personal security is gauged

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<sup>41</sup> Probable cause exists when the facts and circumstances within an officer's knowledge -- or of which he possesses reasonably trustworthy information -- are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-76, (1949). In assessing whether probable cause exists, the Court must examine the totality of the circumstances. *Taylor v. Waters*, 81 F.3d 429, 434 (4<sup>th</sup> Cir. 1996). Determining whether the information surrounding an arrest suffices to establish probable cause is an individualized and fact-specific inquiry. *Wong Sun v. United States*, 371 U.S. 471, 479, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

by the Fourth Amendment. *United States v. Wilson*, 953 F.2d 116, 121 (4<sup>th</sup> Cir. 1991), *citing Terry v. Ohio*, 392 U.S. 1, 19 (1968). If an officer stops and demands that a person provide identification, or persists in such conduct, it is deemed a seizure of the person and must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Brown v. Texas*, 443 U.S. 47 (1979) *citing Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979); *United States v. Wilson*, 953 F.2d 116, 122 (4<sup>th</sup> Cir. 1991). [T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Florida v. Bostick*, 501 U.S. 429 (1991), *quoting Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). Accordingly, this Court has stated the "freedom to leave means fundamentally the freedom to break off contact, in which case officers must, in the absence of objective justification, leave the [person] alone." *United States v. Flowers*, 912 F.2d 707, 712 (4<sup>th</sup> Cir.1990), *cert. denied*, 501 U.S. 1253 (1991).

In this case, Deputy Dooms approached Durney and her husband as they were returning to the parking lot from the Wal-Mart store and demanded that they

produce identification. Having seen Deputy Dooks rifling through the closed toolbox on their vehicle, the Durneys were concerned about the violation of their rights and refused. Under the circumstances, Durney and her husband had a constitutional right to be free from the seizure, just as they did the unlawful search of their vehicle, indeed, perhaps more so in light of Deputy Dooks unconstitutional search which they clearly had a legitimate right to question and protest, *United States v. Wilson*, 953 F.2d 116, 126 (4<sup>th</sup> Cir. 1991), and his response that he did not care about the constitutional violation.

The Commonwealth justified the arrest on several grounds. First, they charged Mrs. Dumey with attempting to intimidate a police officer. However, it is clear that when a search is plainly illegal, mere verbal objection cannot constitute obstruction of justice. *Id.*; *Norwell v. City of Cincinnati*, 414 U.S. 14, 16, 94 S.Ct. 187, 188 (1973) ( Surely one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer. ); *cf. Lewis v. City of New Orleans*, 408 U.S. 913, 914, 92 S. Ct. 2499, 2500 (1972) (Police officers are expected to exercise a higher degree of restraint in the face of citizen protests) (Powell, J. concurring). It makes no difference whether the criticism was directed at the officer or were comments to her husband regarding the unlawful actions of the officers. *Wilson v. Kittoe*, 229

F.Supp.2d 520, 528 -529 (W.D.Va.,2002). The court there stated:

It logically follows that a citizen may advise another of his constitutional rights in an orderly and peaceable manner while the officer is performing his duty without necessarily obstructing \*529 or delaying the officer in the performance of his duty."

*Brooks v. NC Department of Correction*, 984 F.Supp. 940, 955 (E.D.N.C.1997) (quoting *State v. Leigh*, 278 N.C. 243, 246, 179 S.E.2d 708, 709-10 (1971)). The right to criticize the actions of a police officer during an arrest is held by those individuals actually being arrested, see *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16, 94 S.Ct. 187, 188, 38 L.Ed.2d 170 (1973) (holding that an individual's arrest was unlawful, as an individual "is not to be punished for nonproactively voicing his objection to what he obviously felt was a highly questionable detention by a police officer"); *Ford v. City of Newport News*, 23 Va.App. 137, 143, 474 S.E.2d 848, 850-51 (1996) (throwing out a disorderly conduct conviction on the basis that Virginia section 415 requires a "direct tendency to cause acts of violence" out of "concern for First Amendment free speech protections"); *Marttila v. City of Lynchburg*, 33 Va.App. 592, 535 S.E.2d 693 (2000) (overturning conviction for breach of the peace), as well as by third parties witnessing an arrest, see *City of Houston, Texas v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (protecting the right of a third party to verbally protest the treatment of a friend by the police); *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (examining the arrest of a third party for cursing at police officers); *Brooks*, 984 F.Supp. 940 (vacating the conviction of an individual under an obstruction statute for verbally protesting the treatment by the police of a young boy).

*Wilson v. Kittoe*, 229 F.Supp.2d 520, 528 -529 (W.D.Va.,2002).

Thus, because Mrs. Durney s protests did not rise to criminal obstruction of justice statute, and was otherwise constitutionally protected speech within proper bounds, the court must conclude that her arrest was plainly without probable cause to believe that she violated § 18.2- 460(A), and thus the arrest violated her clearly established Fourth Amendment rights. *Rogers v. Pendleton*, 249 F.3d 279 (4th Cir. 2001).

The Commonwealth also sought to justify Mrs. Durney s arrest on grounds

that she violated § 46.2-104<sup>42</sup> of the Virginia Code. However, as pointed out above, that section does not require an owner or operator of a vehicle parked on private property to produce his registration and license upon request of an officer. Moreover, neither Durney or her husband were in the vehicle at the time of the

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<sup>42</sup> §§ 46.2-104. Possession of registration cards; exhibiting registration card and licenses; failure to carry license or registration card.

The operator of any motor vehicle, trailer, or semitrailer *being operated* on the highways in the Commonwealth, shall have in his possession: (i) the registration card issued by the Department or the registration card issued by the state or country in which the motor vehicle, trailer, or semitrailer is registered, and (ii) his driver's license, learner's permit, or temporary driver's permit.

The owner or operator of any motor vehicle, trailer, or semitrailer shall stop on the signal of any law-enforcement officer who is in uniform or shows his badge or other sign of authority and shall, on the officer's request, exhibit his registration card, driver's license, learner's permit, or temporary driver's permit and write his name in the presence of the officer, if so required, for the purpose of establishing his identity.

Every person licensed by the Department as a driver or issued a learner's or temporary driver's permit who fails to carry his license or permit, and the registration card for the vehicle which he operates, shall be guilty of a traffic infraction and upon conviction punished by a fine of ten dollars. However, if any person summoned to appear before a court for failure to display his license, permit, or registration card presents to the officer issuing the summons or a magistrate of the county or city in which the summons was issued, before the return date of the summons, a license or permit issued to him prior to the time the summons was issued or a registration card, as the case may be, or appears pursuant to the summons and produces before the court a license or permit issued to him prior to the time the summons was issued or a registration card, as the case may be, he shall have complied with the provisions of this section. (emphasis added).

stop and demand. Virginia courts have made clear that § 46.2-104 applies only when a vehicle is being operated on the highways in the Commonwealth which at the time of the stop neither Durney or her husband were doing.<sup>43</sup> When Durney was seized by the demands for registration and license, she was not operating a vehicle even under the broadest definition of operating. *Gallagher v. Commonwealth*, 205 Va. 666, 139 S.E.2d 37 (1964), *Nicolls v. Commonwealth*, 212 Va. 257, 259, 184 S.E.2d 9, 11 (Va. 1971).

Further, there is absolutely no evidence in the record that the Walmart parking lot was a public highway<sup>44</sup>. Not only is the language of the statute plain, but the Virginia Supreme Court has confirmed

The true test is whether the 'way or place of whatever nature' is open to the use of the public for purposes of vehicular travel.' We find nothing in the context of the

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<sup>43</sup> The express language of the statute states being operated. Virginia Courts recognize that when a person is asked for their operator's license, they are seized. *See eg. Brown v. Com.* 17 Va.App. 694, \*697, 440 S.E.2d 619, 621 (Va.App., 1994) *citing Brown v. Texas*, 443 U.S. 47, 50, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979) (detention for purpose of requiring identification under state statute held to be a seizure).

<sup>44</sup> There is absolutely no evidence in the record to transform the private parking lot of Walmart into a highway relying on *Furman v. Call*, 234 Va. 437, 440-441, 362 S.E.2d 709, 711 (1987) or *Kay Management v. Creason*, 220 Va. 820, 831-32, 263 S.E.2d 394, 401 (1980). (roadways or streets in an apartment complex were privately owned and maintained but nothing to show that the streets were "restricted exclusively to the private use of the apartment dwellers or those persons who visited them," or that "access was denied to the public by security guards, gates, or warning signs and the evidence did not show that they were constructed solely to provide parking spaces.)

Motor Vehicle Code which indicates a different meaning.' In 25 Am.Jur., Highways, §§ 4, p. 340, it is stated: 'Highways are distinguished from private roads or ways in that the former are intended for the use of the public generally and are **maintained at the public expense**, as already noted, while the latter are intended for the exclusive use and benefit of particular persons. Giving a private way a name does not make it a public highway or thoroughfare.'

The premises of Setliff, owner and operator of Master Forks Service Station, were open to the public upon his invitation. **The invitation was for private business purposes and for his benefit.** He had the absolute right at any time to terminate or limit this invitation. He could close his doors and bar the public or any person from vehicular travel on all or any part of his premises at will. He had complete control of their use. This is not the case with regard to a **public highway, as it is a way open to the general public without discrimination, distinction or restriction except to regulate in order to secure to the general public the maximum benefit therefrom and enjoyment thereof.** There must be common enjoyment on the one hand and the duty of public maintenance on the other. It is the right of travel by everyone and not the exercise of the right that establishes a way a public highway. 25 Am. Jur., Highways, §§ 2, p. 339.

[4] [5] We conclude that the service station premises of Setliff were not 'open to the use of the public for purposes of vehicular travel' and were, therefore, not a 'highway' as defined in §§ 46-1(8), Code 1950.

*Prillaman v. Commonwealth*, 199 Va. 401, 407-408, 100 S.E.2d 4, 8 - 9 (Va.1957)(emphasis added.)

Indeed, when Dooks refused to cease his demands, and continued to block her pickup truck with his vehicle, Durney went to the Wal-Mart store to call and

protest to his superior. And even if the state law required Durney to produce identification as a pedestrian, which it did not, any such state statute clearly cannot supercede rights against unlawful searches and seizures guaranteed under the Fourth Amendment to the United States Constitution. When Sheriff Ayers subsequently ordered his Deputies to arrest Durney, there still was no probable cause to believe that the Durneys were involved in any criminal activity or attempting to secret contraband in their vehicle. The Deputies claimed at one time that Durney was arrested for hit-and-run, presumably under §46.2-896 or 46.2-897.<sup>45</sup> However, Dumey could not be lawfully arrested for that offense because there was no accident, no property damage, no owner or custodian of the Camaro to be found<sup>46</sup> and twenty-four hours had not elapsed from the time of the alleged accident that would require Durney to report to either the State Police or the local law-enforcement agency.<sup>47</sup> The Fourth Amendment right to be free from arrest

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<sup>45</sup> See Bates Stamp 200063-4.

<sup>46</sup>Below Defendants argued that Ms. Jones was found because they claim that she was present with Deputy Dooks. The undisputed fact in this case is that she was never identified as the owner of the vehicle that was not behind the vehicle of the Durney s during the entire incident and which was never shown to plaintiff that Deputy Dooks alleged was damaged after Durney challenged his unconstitutional conduct.

<sup>47</sup> Defendants have actually set forth widely conflicting, and continually varying, facts as reasons that they arrested Durney. Early in the state proceedings, they stated that they arrested her for not giving to the officers information. On the

without probable cause was clearly-established when the Sheriff ordered Durney's arrest, and the arrest and the subsequent treatment of Mrs. Durney was, therefore, unlawful. *See Smith v. Reddy*, 101 F.3d 351, 356 (4th Cir. 1996).

Finally, the defendants relied below on *Cramer v. Crutchfield*, 648 F.2d 943 (4<sup>th</sup> Cir. 1981) to the effect that the clearly erroneous decisions of the magistrate and the general district judge, in sustaining Durney's arrest and conviction, bar Durney from relief under 42 U.S.C. § 1983 for the violation of her Fourth Amendment rights. However, in *Cramer v. Crutchfield*, the plaintiff's constitutional claims under 42 U.S.C. § 1983 for an arrest in violation of the Fourth Amendment were dismissed because the statute of limitations had run. The remainder of the case dealt with issues related to malicious prosecution and not the arrest. *Id.* In an unpublished opinion, the Fourth Circuit declined from deciding whether *Cramer* stated a rule of preclusion applicable to a case where probable cause to arrest was lacking<sup>48</sup>.

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other hand, they stated that she was charged with impeding an officer because she didn't get out of the vehicle when directed to do so. Then they stated she was arrested for voicing her opinions that their conduct was unconstitutional which they theorize caused her husband not to pull his wallet from his pocket. They have also stated that she was arrested for impeding because she moved her hand an inch when Dooks was placing handcuffs on her.

<sup>48</sup> Because we find that probable cause was created by the facts and circumstances surrounding this incident, we need not consider the Commonwealth's alternative theory that this Court's opinion in *Cramer v.*

The Defendants, citing our decision in *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981), take the view that Dawkins's state court convictions for disorderly conduct and criminal domestic violence conclusively established the existence of probable cause to arrest. We decline to decide whether *Cramer* stated a rule of preclusion which applies to this case, however, because the facts readily support the existence of probable cause to arrest.

*Dawkins v. City of Cayce*, 8 F.3d 817, 1993 WL 430189, 2 (4th Cir.(S.C. (C.A.4,1993) (unpublished). Unlike *Cramer v. Crutchfield*, where after the appeal the prosecutor simply dismissed the case for reasons not in the record, in the present case, as stated above, the Virginia Circuit Court *dismissed* the charges against Durney upon her motion to strike at the conclusion of the evidence of the Commonwealth. In short, the Circuit Court found that the evidence *viewed in the light most favorable to the Commonwealth*, and granting to it all reasonable inferences fairly deducible therefrom, did not even make out a prima facie case. *McQuinn v. Commonwealth*, 19 Va.App. 418, 422, 451 S.E.2d 704, 706 (Va.App.,1994)( the court is required to view the evidence in the light most favorable to the prosecution. )

A motion to strike requires the trial judge to review the sufficiency of the proof as to each element of the crime.

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*Crutchfield*, 648 F.2d 943 (4th Cir.1981), mandates rejection of Corker's Fourth Amendment claim. *Corker v. Jones* 955 F.2d 40, 1992 WL 29282, 3 FN 2 (4th Cir.(Va. (C.A.4 (Va.),1992)(unpublished)

*Campbell v. Commonwealth*, 12 Va.App. 476, 490, 405 S.E.2d 1, 8 (Va.App.,1991) (Coleman concurring). Applying the logic of *Cramer v. Crutchfield* to the present case actually requires this Court to find conclusively that Gowen and Durney lacked probable cause to arrest Durney. In this case, the Circuit Court actually determined that based upon the facts and circumstances presented to Dooks and Gowen, as reflected in their trial testimony, even when viewing that evidence in the light most favorable to them together with all reasonable inferences fairly deducible therefrom, there was no evidence that a crime had been committed and, therefore, no probable cause. The proper disposition with regard to the defendants objections was best stated in this Court's decision in *Doe v. Broderick*, 225 F.3d 440, 452 (4<sup>th</sup> Cir. 2000):

The Supreme Court has instructed that the appropriate question is whether any "officer of reasonable competence would have requested the warrant" in the first place; if not, the magistrate's issuance of the warrant "is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty" and "[t]he officer ... cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Malley v. Briggs*, 475 U.S. 335, 346 n. 9, 106 S.Ct. 109(1986). Detective Broderick makes no assertion that the magistrate's issuance of the warrant was "within the range of professional competence of a magistrate," i.e., that the magistrate made a reasonable mistake, which would relieve him of liability, see *id.*, nor does he contend that his consultation with an assistant Commonwealth Attorney prior to applying for the warrant made his application any more reasonable, see *Swanson v. Powers*, 937 F.2d 965, 972 (4th Cir.1991).

In sum, the conduct of defendants Doom, Gowen and Ayers, violated the

Fourth Amendment of the United States. No reasonable officer could have believed that the warrantless stop and detention, and then the ensuing arrest, of Durney was justified in light of the facts and circumstances of this case. Durney is entitled to a declaration that the defendants unlawfully arrested her and thereby violated her Fourth Amendment rights and an award of compensatory damages, punitive damages, attorneys fees and costs.

**IV. Defendant Doms, Gowen, Ayers and Doss Violated Durney s First Amendment Right to Free Speech and to Be Free from Restraint and Retaliation for Exercising Her Right to Free Speech When They Retaliated Against Her by Arresting Her When She Opined That Doms Conduct Was Unconstitutional And By The Harsh Subsequent Treatment.**

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right. *See ACLU v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir. 1993) ("Retaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights."); *see also Pickering v. Board of Educ.*, 391 U.S. 563, 574, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968) (noting that retaliatory acts are

"a potent means of inhibiting speech"). Thus, by engaging in retaliatory acts, public officials place informal restraints on speech "allowing the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Perry v. Sindermann*, 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973).

A § 1983 retaliation plaintiff must demonstrate that the defendant's actions had some adverse impact on the exercise of the plaintiff's constitutional rights. *See Wicomico County*, 999 F.2d at 785 ("In order to state a retaliation claim, Appellees are required to show that WCDC's actions adversely impacted these First Amendment rights."). In light of these principles, a § 1983 retaliation plaintiff must establish three elements in order to prove a First Amendment § 1983 retaliation claim. First, the plaintiff must demonstrate that her speech was protected. *See Huang v. Board of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990). Second, the plaintiff must demonstrate that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech. *See Wicomico County*, 999 F.2d at 785 (stating that "a showing of adversity is essential to any retaliation claim"). Third, the plaintiff must demonstrate that a causal relationship exists between her speech and the

defendant's retaliatory action. *See Huang*, 902 F.2d at 1140.

In this case, the defendants do not dispute the fact Durney's statements criticizing the deputies unlawful activities as unconstitutional was speech protected by the First Amendment. The defendants do not dispute that the defendants' conduct adversely affected Durney's constitutionally protected speech. And finally, defendants admit that the defendants' conduct was causally connected to Durney's speech--blaming Durney for "circumstances created entirely by her."<sup>49</sup> Durney complained that the Doods search was unconstitutional, and then that the officers demand for information was unconstitutional. For this she was harassed, arrested, touched, caused to experience pain and imprisoned. Durney continues to fear that future exercise of her First Amendment rights to criticize the unconstitutional conduct of the Sheriff of Amherst County and his deputies will be met with additional retaliation.

The conduct of defendants violated the First Amendment of the United States. *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973). No reasonable officer could have believed that retaliating against Durney because she criticized the officers conduct as unconstitutional is permissible and not a violation of the First

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<sup>49</sup> Defendants Memorandum in Support of Defendants 12(b)(6) Motion, page 1; Doods G.D. 31:23-34:24; Doods Dep. 48:17-21.

Amendment. Durney is entitled to a declaration that the defendants unlawfully retaliated against her and thereby violated her First Amendment rights and an award of compensatory damages, punitive damages, attorneys fees and costs.

## **V. Defendants Are Not Entitled to Qualified Immunity**

Qualified immunity inquiry proceeds in two distinct steps. *See Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). First, viewing the evidence in the light most favorable to the plaintiff who is asserting the injury the court must decide whether it is sufficient to establish that [the officers] committed a constitutional violation...." *See Knussman v. Maryland*, 272 F.3d 625, 634 (4th Cir.2001). If the answer is "no" then the analysis ends; the plaintiff cannot prevail. *See Clem v. Corbeau*, 284 F.3d 543, 549 (4th Cir.2002). If the answer to that first question is "yes," however, then the next step is to ask whether the constitutional right was clearly established in the " 'specific context of the case'--that is, [whether] it was 'clear to a reasonable officer' that the conduct in which he allegedly engaged 'was unlawful in the situation he confronted.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)); *see also Wilson*, 526 U.S. at 615, 119 S.Ct. 1692; *Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). This second step of the qualified immunity inquiry is an objective one, dependent not on the subjective

beliefs of the particular officers at the scene, but instead on what a hypothetical, reasonable officer would have understood under those circumstances. *Milstead v. Kibler*, 243 F.3d 157, 161 (4th Cir.), *cert. denied*, 636 534 U.S. 888, 122 S.Ct. 199, 151 L.Ed.2d 141 (2001). It ensures that, when the legality of a particular course of action is open to reasonable dispute, an officer will not be subjected to trial and liability. Under the doctrine of qualified immunity, "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir.1992). *Figg v. Schroeder*, 312 F.3d 625, 635 -636 (4<sup>th</sup> Cir. 2002)

The exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established. *See Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (internal citation omitted)). Such precise precedent is not what the particularity principle mandates. Rather, the particularity principle mandates that courts refer to concrete applications of abstract concepts to determine whether the right is clearly established. *See Doe v. Broderick*, 225 F.3d 440, 458-59 (4th Cir. 2000) (Williams, J., concurring in part

and dissenting in part) (*citing Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)). Thus, "'clearly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992). The "contours of the right" must be drawn in such a way as to provide notice to a reasonable person in the official's position that his conduct violated the identified right. *See Anderson*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir. 1991) ("Rather, the 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional.").

Accordingly, the Court must determine whether the contours of the right to be free from an unreasonable search, unreasonable arrest, excessive force and punishment before trial have been identified in such a way as to afford the Amherst deputies adequate notice that their actions transgressed the First, Fourth, Fifth and Fourteenth Amendments. In doing so, the Court should look to "cases of controlling authority in this jurisdiction," as well as the "consensus of cases of persuasive authority" from other jurisdictions. *Wilson*, 526 U.S. at 617.

In exercising official responsibilities for which they are not accorded absolute immunity, public officers enjoy good faith or qualified immunity from suits for damages. [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *See Malley v. Briggs*, 475 U.S. 335, 341 (1986)(qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. ) To be clearly established, [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was clearly established for qualified immunity purposes. *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992). This Court must therefore determine whether or not Defendants' actions violated clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this determination, the Court must focus on the law as it existed at the time of the alleged violation. *Buonocore v. Harris*, 65 F.3d 347, 353 (4th Cir. 1995); *Torcasio v. Murray*, 57 F.3d 1340, 1343 (4th Cir. 1995). Second, the Court must

determine whether a reasonable person in the official's position would have known that his conduct would violate Plaintiff's rights. *Torcasio*, 57 F.3d at 1343; *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995)(*en banc*).

The in this case was clearly established. The rights violated by defendants under the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution are clearly established: (1) No warrant, no exigent circumstances, no search; (2) No probable cause, no arrest; (3) No retaliation for protected speech, including protesting opinions that officers conduct is in violation of the Constitution.

In *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997), the Fourth Circuit reaffirmed the long standing rule that when the question of a governmental official's qualified immunity defense turns on issues of material facts which are in controversy, summary judgment is inappropriate. It is only when the question turns on an issue of law, that summary judgment may be granted or the denial of summary judgment appealed. *Id.*<sup>50</sup>

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<sup>50</sup> To the extent that an order of a district court rejecting a governmental official's qualified immunity defense turns on a question of law, it is a final decision within the meaning of § 1291 under the collateral order doctrine recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), and therefore is subject to immediate appeal. See *Behrens v. Pelletier*, [516 U.S. 299,]133 L. Ed. 2d 773, 116 S. Ct. 834, 836 (1996); *Johnson [v. Jones]*, 115 S. Ct., 2151, 2155-56 (1995); *Mitchell v. Forsyth*,

It can not be disputed that the initial search was illegal, the detention of the Durney truck was unlawful, there was an absence of any facts necessary to establish probable cause for an arrest, and that the conduct of defendants was in retaliation for protected speech of Mrs. Durney. The conduct of the defendants violated clearly established law.

### **CONCLUSION**

The conduct of the deputies and the Sheriff violated Durney s constitutional rights and clearly established laws. On the facts set forth above, defendants are not entitled to summary judgment and this Court should proceed, based on the record, to grant Durney summary judgment in view of the complete lack of material evidence supporting their justifications for the stop, detention and arrest of Mrs. Durney at the Amherst County Wal-Mart.

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472 U.S. 511, 524-30, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). The Court has reiterated that when summary judgment is denied, it possesses no jurisdiction over a claim that a plaintiff has not presented enough evidence to prove that the plaintiff's version of the events actually occurred, but it does have jurisdiction over a claim that there was no violation of clearly established law accepting the facts as the district court viewed them, in the light most favorable to the non-moving party. *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997). In *Johnson v. Jones*, the Supreme Court held "that a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 515 U.S. 304, 132 L. Ed. 2d 238, 115 S. Ct. 2151, 2159 (1995).

REQUEST FOR ORAL ARGUMENT

Plaintiffs hereby request an opportunity to present oral argument.

Respectfully submitted,

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## Certificate of Compliance

*Certificate of Service*

I certify that on this 20th day of October, 2003, I caused to be filed with the Clerk s Office of the United States Court of Appeals for the Fourth Circuit, eight (8) copies of the Appellees Opening Brief, and six (6) copies of the Joint Appendix, and on the same day I caused to be served by mail two (2) copies of the Brief and one (1) copy of the Appendix to:

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