

No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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DAVID L. MOORE,  
IN HIS OFFICIAL AND INDIVIDUAL CAPACITY,  
*Petitioner,*

v.

ESPERANZA GUERRERO, ET AL,  
*Respondents.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fourth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED FOR REVIEW**

1. If a magistrate receives a sworn complaint, finds probable cause to believe a crime has been committed, but he issues a criminal summons in lieu of an arrest warrant, does the Fourth Amendment prohibit a police officer from serving the summons on the accused in the same manner as a warrant?

2. If the answer to the foregoing is yes, was such law clearly established in November 2007, given that no federal court had ever issued such a ruling, and several state laws specifically allow criminal summonses to be served in the same manner as warrants?

3. If such law was not clearly established, is Petitioner-Defendant Moore entitled to qualified immunity from suits arising out of his service of a criminal summons?

## **LIST OF PARTIES**

The Petitioner-Defendant is David L. Moore.

The Defendants are Charlie T. Deane, in his official capacity as Chief of the Prince William County Police Department; Luis Potes, in his official and individual capacity; Adam Hurley, in his official and individual capacity; Does 1-6, in their official and individual capacities; Roes 1-6, in their official and individual capacities; Prince William County Police Department; Prince William County; Matthew Caplan, in his official and individual capacity; Karen Muelhauser, in her official and individual capacity; Does 1-5, in their official and individual capacities.

The Respondent-Plaintiff is Esperanza Guerrero.

The Plaintiffs are Maria Munguia; Juan Guerrero; JG, Minor; KG, Minor; JJG, Minor; MG, Minor.

## **RULE 29.6 DISCLOSURE STATEMENT**

This Petition for Writ of Certiorari is filed on behalf of Sergeant David L. Moore, who is not a corporation. No other Defendant is a corporation.

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### **OPINIONS BELOW**

The decision of the Fourth Circuit is not reported, but it is available at 2011 U.S. App. LEXIS 16178. The opinion is also reproduced in the Appendix. App. 1.

The memorandum opinion of the district court is reported at 750 F. Supp. 2d 631, and is also reproduced in the Appendix. App. 6.

### **JURISDICTION**

The judgment of the Court of Appeals was entered on August 4, 2011. A timely petition for rehearing and rehearing *en banc* was denied on September 6, 2011. App. 56.

This Court has jurisdiction pursuant to 42 U.S.C. § 1254(1) to review the judgment of Court of Appeals.

The order of the district court denying Petitioner qualified immunity was an appealable final decision within the meaning of Title 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Thus jurisdiction in the Court of Appeal was proper.

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED IN THE CASE**

This case involves the Fourth Amendment to the Constitution of the United States, and Virginia Code Sections 19.2-72, 19.2-73, and 19.2-76.

The aforementioned provisions are set forth verbatim in the appendix. App. 58.

**STATEMENT OF THE CASE**

David L. Moore (“Sergeant Moore”) is being sued for allegedly violating Esperanza Guerrero’s Fourth Amendment rights, because he did something that a Virginia Attorney General and several state laws specifically allow: he entered a first-party residence to serve upon the accused a magistrate-issued criminal summons. Sergeant Moore has asserted the defense of qualified immunity, but a court has yet to thoroughly analyze the applicable law.

Police officers sued under Title 42 U.S.C. Section 1983 may invoke the qualified immunity defense. Qualified immunity protects police officers from civil rights suits when the alleged wrongdoing “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).

In *Saucier v. Katz*, this Court set out a two-step inquiry to determine whether an officer is

entitled to qualified immunity.<sup>1</sup> *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). First, the Court determines whether, “[t]aken in the light most favorable to the party asserting the injury,” the facts alleged by that party “show the officer’s conduct violated a constitutional right.” *Id.* at 201. Second, if a constitutional violation did occur, then the Court asks “whether the right was clearly established.” *Id.* at 202.

This case presents important questions about how a summons-in-lieu-of-a-warrant may be served upon the accused, and to what degree such law was established when Sergeant Moore attempted to serve a criminal summons upon Antonia Munguia.

### **A. Statutory background**

In Virginia, after a magistrate finds probable cause to believe a misdemeanor has been committed, the magistrate can do one of two things. App. 60; § 19.2-73 VA Code. Ann. The magistrate can issue an arrest warrant, or, if he believes the accused will timely appear later in court, he can issue a summons. *Id.* If the magistrate decides to issue a summons, the law provides that it “shall be executed by delivering a copy to the accused personally.” App. 61; § 19.2-76 VA Code. Ann..

The manner in which a criminal summons-in-lieu-of-a-warrant may be personally served has been the subject of debate in Virginia. Two separate

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<sup>1</sup> In *Pearson v. Callahan*, the Court held that the sequence of the two-step inquiry is not mandatory. 129 S.Ct. 808, 818 (2009).

inquiries have been submitted to the Virginia Attorney General asking how criminal summonses may be personally served, and the Virginia Attorney General's Office has responded differently to each inquiry.

In 1982, the Commonwealth's Attorney for the City of Alexandria, Virginia, asked "whether a law-enforcement officer, armed with a summons issued pursuant to [19.2-73 *et seq.* of the Code of Virginia], may search a suspect's premises for the suspect . . . assuming the absence of exigent circumstances or consent." App. 68; 1982 Va. AG LEXIS 326; 1982-1983 Op. Atty Gen. Va. 18 (August 20, 1982).

In 2003, the Sheriff for the City of Portsmouth, Virginia, asked "whether law-enforcement officers have the authority to enter a dwelling without a warrant or consent of the dwelling owner for the purpose of serving a summons for a misdemeanor." App. 63; 2003 Va. AG LEXIS 59; 2003 Op. Atty. Gen Va. 59 (September 16, 2003).

In 1982, the Virginia Attorney General concluded that "warrants and summonses constitute alternate forms of arrest process" under Virginia Code Sections 19.2-73 and 19.2-74. App. 69; 1982 Va. AG LEXIS at \*2. Furthermore, he found that,

It would be inconsistent with the general provisions of criminal law to permit an individual to avoid service of a summons by merely refusing to open his door. Indeed, in *Payton, supra*, the

court held that the arrest warrant required the suspect to "open his doors to the officers of the law . . . ."

Moreover, there is no basis in the Code for concluding that the duty to execute a summons is less than the duty to execute an arrest warrant. In my opinion, therefore, the officer's authority and duty carries with it the right to conduct a search of a suspect's own premises for the suspect in cases where such is necessary in order to execute the summons.

*Id.*, citing *Payton v. New York*, 445 U.S. 573, 586 (1980).

But in 2003, a different Virginia Attorney General reached the opposite conclusion and opined that an officer may not enter a dwelling without a warrant or consent to serve misdemeanor summons. App. 66; 2003 Va. AG LEXIS at \*5. This opinion made no reference to the earlier one.

Opinions of the Virginia Attorney General are advisory and do not constitute the law. Furthermore, nothing in Virginia law provides that a later attorney general opinion overrides an earlier one. The 2003 opinion acknowledges that the question of serving criminal summonses at first-party residences, "has not been addressed by Virginia's courts." *Id.* Thus, the law was unclear in 2003.

The constitutional question of how a criminal summons may be served is open not only in Virginia, but in many other states as well. The laws of Michigan, Nebraska, Ohio, and Tennessee state that criminal summonses may be served like warrants. *See* Mich. MCLS § 764.9a(3); R.R.S. Neb. § 29-425(2); ORC Ann. 2935.12; Tenn. Code Ann. § 40-6-215.

The state of Ohio expressly allows officers to break down doors to serve a summons:

When making an arrest or executing an arrest warrant or *summons in lieu of an arrest warrant*, or when executing a search warrant, the peace officer, law enforcement officer, or other authorized individual making the arrest or executing the warrant or summons *may break down an outer or inner door or window of a dwelling house or other building*, if, after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance, but the law enforcement officer or other authorized individual executing a search warrant shall not enter a house or building not described in the warrant. [Emphasis added]

ORC Ann. 2935.12

Given the conflicting Virginia Attorney General opinions, which do not carry the force of law in Virginia, the varying ways in which states allow criminal summonses to be served, and the absence of judicial opinions on the issue, the legal parameters

for serving magistrate-issued criminal summons are unclear.

### **B. Factual Background**

In 2007, Antonia Munguia was the mother of a 16 year-old boy who was not going to school. County school officials tried to get Ms. Munguia to send her son to school, but she refused. After exhausting all administrative remedies, a school attendance officer decided to seek criminal process against Ms. Munguia. In Virginia, it is a crime for a parent to fail to send a child to school. *See* §§ 22.1-279.3, 22.1-263 VA Code Ann.

On October 19, 2007, the attendance officer appeared before a magistrate and submitted a sworn complaint that Ms. Munguia had committed truancy violations. After considering the evidence, the magistrate found probable cause to believe that Ms. Munguia committed the crime of truancy. At this point, the magistrate could have issued a warrant for Ms. Munguia's arrest. App. 58; § 19.2-72 VA Code Ann. However, instead of issuing a warrant, the magistrate relied upon Virginia Code Section 19.2-72 to issue a criminal summons in lieu of an arrest warrant, commanding Ms. Munguia to appear in court at a later date to answer to the charges of truancy.

The summons specified who was to be served, with what, and where. The summons listed Ms. Munguia's address as being on Walcott Court, because that is the address she had previously given to school officials as her residence.



The criminal summons was sent to the Prince William County Police Department to be served upon Ms. Munguia at her residence on Walcott Court. Virginia law requires that criminal summonses be served personally upon the accused. App. 61; § 19.2-76 VA Code Ann.

On October 27, 2007, a Prince William County Police Officer went to Walcott Court to serve the criminal summons upon Ms. Munguia. The attempt to serve Ms. Munguia was unsuccessful, but the officer did see the subject looking out of a window. The officer documented his attempt to serve the summons on a “warrant cover sheet,” and returned the summons to the warrants desk of the Police Department.

On Saturday morning, November 24, 2007, Sergeant Moore took the criminal summons from the warrants desk and went to the Walcott Court address to try to serve Ms. Munguia. Sergeant Moore had with him both the summons and the warrant cover sheet, which documented the previous officer’s attempted service and the officer’s observations of the subject looking out of a window. Unbeknownst to Sergeant Moore, the address shown on the criminal summons as Ms. Munguia’s residence was also the address of the Guerrero family.

Sergeant Moore knocked on the door of the townhouse, and a woman later identified as Esperanza Guerrero answered. Ms. Guerrero is the twin sister of Ms. Munguia. Sergeant Moore asked

for Ms. Munguia. Ms. Guerrero told Sergeant Moore that she was not there.

However, while talking with Ms. Guerrero, Sergeant Moore could hear voices coming from inside the house. Based on the previous officer's notes on the warrant cover sheet, the voices in the house, and Ms. Guerrero's demeanor at the door, Sergeant Moore thought Ms. Munguia was hiding inside the house listening to his conversation with Ms. Guerrero. Sergeant Moore had over twenty years experience in serving warrants and summons, and his intuition told him that the accused may be evading service. Sergeant Moore wanted to look around the door to see if Antonia Munguia was home and to serve her with the criminal summons.

Sergeant Moore then stepped forward. He was going to give Ms. Guerrero the business card she had asked for. While doing so, he stepped onto the doorplate of the door.

Immediately after stepping forward onto the doorplate, Ms. Guerrero slammed the door on him without warning, and pushed the door closed on Sergeant Moore's leg, which was in between the door and the doorframe. Ms. Guerrero would not stop pushing on the door, despite Sergeant Moore commands for her to stop. He told her that she was under arrest for assault and battery on a police officer, but she still pushed on the door and his leg.

Sergeant Moore called for backup assistance. Three officers hurried to the scene, pushed the door open, and arrested Ms. Guerrero for assault and

battery upon a police officer. Juan Guerrero, who was also inside the house, rushed at the police officers when they entered. Mr. Guerrero was pepper-sprayed and then arrested for obstruction of justice.

**C. Proceedings in the District Court and basis for federal jurisdiction in the court of first instance**

The Guerrero family (two adults and three minors) sued the Chief of Police, Prince William County, and five police officers, claiming unreasonable search and seizure in violation of their rights under the Fourth Amendment to the United States Constitution, (as applied through Title 42 U.S.C. Section 1983); excessive use of force against Mr. and Mrs. Guerrero in violation of their rights under the Fourth Amendment (as applied through Title 42 U.S.C. Section 1983); state-law tort of assault as to Mr. and Mrs. Guerrero; state-law tort of battery as to Mr. and Mrs. Guerrero; state-law tort of false arrest and imprisonment as to Mr. and Mrs. Guerrero; common-law tort of intentional infliction of emotional distress as to all Plaintiffs; and common-law tort of negligent infliction of emotional distress as to all Plaintiffs.

The district court had original jurisdiction pursuant to Title 28 U.S.C. Sections 1331, 1343 to hear the federal questions. The court had supplemental jurisdiction pursuant to 28 U.S.C. Section 1367 to hear the state tort claims.

After lengthy discovery, the Defendants moved for summary judgment.

The Honorable Judge James C. Cacheris granted summary judgment as to all Defendants on all counts, except as to Sergeant Moore and the claim of unreasonable search. App. 6, 55; *Guerrero v. Deane*, 750 F. Supp. 2d 631, 659 (E.D. Va. 2010). The District Court denied qualified immunity to Sergeant Moore for stepping onto the doorplate of the Guerrero home. *Id.* The District Court agreed with the legal conclusions reached in the 2003 Virginia Attorney General's opinion. App. 22; *Guerrero*, 750 F. Supp. 2d at 647. However, the District Court did not decide whether the law on serving summonses was clearly established for purposes of qualified immunity. Instead, the District Court determined whether a law regarding "implied consent" was clearly established. App. 27; *Guerrero*, 750 F. Supp. 2d at 647.

#### **D. The Court of Appeals Decision**

Sergeant Moore filed an interlocutory appeal to the Fourth Circuit Court of Appeals. Sergeant Moore argued that he did not violate Ms. Guerrero's Fourth Amendment rights when he stepped onto the doorplate, because he was serving a criminal summons-in-lieu-of-a-warrant. Simply put, Sergeant Moore argued that a criminal summons carries no less constitutional protection than a warrant, because both are issued only after a magistrate has found probable cause to believe a crime was committed. The only difference between the two is that, rather than taking the accused into custody, as

an officer does with a warrant, an officer's duty ends when he personally serves the summons upon the accused. The summons should be able to be served like a warrant because the magistrate's finding of probable cause satisfies the Fourth Amendment's privacy concerns. In this case there was no constitutional violation.

Furthermore, Sergeant Moore argued, even if entering a subject's dwelling to serve the subject with a summons-in-lieu-of-a-warrant did violate the Fourth Amendment, such law was not "clearly established." No court has ever ruled that entry into a first-party residence to serve a magistrate-issued criminal summons was unconstitutional. The cases cited in the 2003 Virginia Attorney General's opinion are not on point. Indeed, the Virginia Attorney General acknowledges that the question of serving criminal summonses at first-party residences, "has not been addressed by Virginia's courts." App. 66; 2003 Va. AG LEXIS at \*5. In light of the differing approaches to the service of magistrate-issued criminal summonses, the law was far from clearly established.

Nonetheless, on August 4, 2011, the Fourth Circuit issued a cursory opinion, without taking oral argument, affirming the denial of qualified immunity. App. 1.

The Court of Appeal's opinion was flawed, however, for two reasons. First, the court held that *Payton v. New York*, 445 U.S. 573, 586 (1980), "plainly stated the need for a warrant or an exception to the warrant requirement for an officer

to enter a dwelling to conduct a search or to make an arrest.” App. 4. But the court overlooked that *Payton* could not have made the unlawfulness of Sergeant Moore’s action apparent, because in 1982 the Virginia Attorney General himself relied on *Payton* for the proposition that officers *could* enter a first-party residence to serve a summons-in-lieu-of-a-warrant. App. 69; 1982 Va. AG LEXIS at \*2.

Second, the court held that “the right at issue” was clearly established. This too was in error, because the Court of Appeals never described the right allegedly violated. App.4. The Court of Appeals overlooked this Court’s holding in *Anderson v. Creighton*. 483 U.S. 635, (1987).

In *Anderson*, the Court held that the constitutional right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established. *Anderson*, 483 U.S. at 641. For example, in a case of warrantless entry, it is not enough for a reviewing court to make “an assertion that a general right alleged to have been violated -- the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances -- was clearly established.” *Id.* at 640. The District Court initially acknowledged the specificity mandate in this case by saying that, “defining the right as ‘to be free from warrantless searches in absence of certain well-accepted exceptions’ is too general,” but the court went on to specify a right unrelated to the service of a summons. App. 27. Unfortunately, the Court of

Appeals only said “the right at issue” was clearly established without ever defining the right. App. 4.

One way to define the right allegedly violated in this case is the right of citizens to be free from searches by officers who are attempting to serve judicially-issued criminal summonses, even when the summonses are issued after the warrant procedure is followed. Of course, there are other ways to define the right, but however the right is defined it needs to be done with some degree of specificity.

Sergeant Moore timely filed a petition for rehearing and rehearing *en banc*, describing these omissions, but his petition was denied on September 6, 2011. App. 56. In so doing, the Court of Appeals affirmed that Sergeant Moore, a uniformed police officer, should be held personally liable for not knowing what Virginia Attorneys General could not agree upon, and for doing what many states expressly allow.

### **PETITION FOR WRIT OF CERTIORARI**

Sergeant Moore respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

**REASONS FOR GRANTING A WRIT OF  
CERTIORARI**

This case presents not only an important question for Sergeant Moore, but also an important question of federal law for many of the states.

**I. Many state laws are based on the  
assumption that summonses-in-lieu-of-  
warrants may be served like warrants**

Most, if not all states and the federal government allow judicial officers to issue criminal summonses in lieu of warrants.<sup>2</sup> The states of Michigan, Nebraska, Ohio, and Tennessee further provide that such summonses may be served like warrants. *See* Mich. MCLS § 764.9a(3); R.R.S. Neb. § 29-425(2); ORC Ann. 2935.12; Tenn. Code Ann. § 40-6-215.

Indeed, the state of Ohio expressly allows officers to break doors to serve a summons-in-lieu-of-a-warrant:

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<sup>2</sup> USCS Fed Rules Crim. Proc. Rule 4; Ill. Rev. Stat. § 107-11; Ind. Code Ann. § 35-33-4-1; Ky. RCr. Rule 2.04; Michigan MCLS § 764.9a; NY CLS CPL § 130.10; Fla. Stat. § 775.15; S.C. Code Ann. § 22-5-115; N.J. Court Rules Rule 3:3-1; Mass. AL GL ch 276, § 25; N.C. Gen. Stat. § 15A-303; Tex. Code Crim. Proc. art. 15.03; Ala. R. Crim. P. Rule 3.1; A.R.S. § 13-3812; C.R.S. 16-5-206; Ark. R. Crim. P. Rule 6.3; La. C.Cr.P. Art. 209; Me. R. Crim. P. 4; Minn. R. Crim. P. 3.01; Mont. Code. Anno. § 46-6-211; R.R.S. Ne. § 29-425; Nev. Rev. Stat. Ann. § 171.106; N.M. Dist. Ct. R.Cr.P. 5-209; ND.R. Crim. P. Rule 4; 22 Okl. St. § 209; RI Super. R. Crim P. Rule 4; Tenn. Code Ann. § 40-6-215; Wash. CRR 2.2; Wyo. Stat. § 7-8-102;



When making an arrest or executing an arrest warrant or *summons in lieu of an arrest warrant*, or when executing a search warrant, the peace officer, law enforcement officer, or other authorized individual making the arrest or executing the warrant or summons may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance, but the law enforcement officer or other authorized individual executing a search warrant shall not enter a house or building not described in the warrant. [emphasis added]

ORC Ann. 2935.12

Magistrate-issued summonses are popular with governments because they avoid undue embarrassment to the accused, and they lead to significant governmental cost savings by reducing burdens on the criminal justice system.

The commentary to Alabama Rules of Criminal Procedure Rule 3.1 summarizes the benefits of summonses:

There are many reasons to use a summons in lieu of an arrest warrant in certain cases. The use of a summons reduces the burden that the criminal justice system places on those accused of crime. While in custody, a defendant represents a heavy financial burden on the state. All indications from other

jurisdictions and the federal system are that the use of the summons in lieu of an arrest warrant has been operationally successful, and its use is recommended where indicated.

Ala. R. Crim. P. Rule 3.1

The commentary to the Louisiana rule states,

The avoidance of undue hardship and embarrassment of a person complained against is further aided by the authorization for the use of a summons instead of a warrant of arrest. This is important since many peace bond complaints involve minor threats by persons who can be reasonably expected to appear upon a summons.

La. C.Cr.P. Art. 209

However, if this Honorable Court declines to issue a writ of certiorari to review the judgment of the Court of Appeals in this case, then Virginia, and perhaps other states, are less likely to use magistrate-issued summonses and stand to lose the aforementioned benefits.

As the Virginia Attorney General said in 1982, if officers were prohibited from entering first party residences to serve magistrate-issued summonses, “an individual [could] avoid service of a summons by merely refusing to open his door.” App. 69; 1982 Va. AG LEXIS at \*2. Avoiding service in this way might necessitate the need for the magistrate to issue a warrant. This in turn would negate all of the cost

saving benefits of the summons in the first place: now the accused would need to be taken into custody, booked, and brought before the magistrate.

The fact that a Virginia magistrate is even allowed to issue a summons in lieu of a warrant inures to the benefit of the accused. In the absence of Virginia Code Section 19.2-73, which allows for the issuance of a summons, the magistrate would be required to issue an arrest warrant. App. 60.

## **II. Magistrate-issued criminal summonses satisfy all of the Fourth Amendment privacy concerns**

Executing a magistrate-issued criminal summons in the same manner as a warrant does not violate the Fourth Amendment.

In this case, the Court of Appeals held that criminal summonses could not be served like warrants because *Payton v. New York*, 445 U.S. 573, 586 (1980) “plainly stated the need for a warrant or an exception to the warrant requirement for an officer to enter a dwelling to conduct a search or to make an arrest.”

In *Payton*, police officers had gone to the homes of two individuals, entered the homes without warrants or consent, and arrested the individuals for felony crimes. *Payton* 445 U.S. at 576-579. The Court held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest. *Id.* at 576. In so

holding, the Court focused on the procedural safeguards provided by the warrant procedure.

The *Payton* Court reasoned that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,” and that “the warrant procedure minimizes the dangers of needless intrusions.” *Id.* at 586-587, citing *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

The procedure for obtaining a search warrant involves a law-enforcement officer giving sworn testimony before an independent third-party judicial officer, the judicial officer finding probable cause to believe the accused committed a crime, and the judicial officer describing with particularity what may be searched or seized. These procedures provide safeguards against unreasonable searches and seizures, and they are the exact same procedures followed when a magistrate issues a summons in lieu of a warrant.

The Court in *Payton* underscored the procedural importance of obtaining a warrant by quoting Justice Jackson at length:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and

detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . *The right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.*  
[emphasis added]

*Id.* at 586 n. 24.

The Court thus makes clear that the right of privacy *yields* to the right of search when the government follows the warrant *procedure*, which necessarily includes the government appearing before a magistrate and establishing probable cause.

*Payton* did not, however, clearly establish a right to be free from searches by officers armed with other process obtained through the warrant procedure. This is evidenced by the fact that lawyers and law enforcement personnel alike in the Commonwealth of Virginia did not know if *Payton* prohibited police entry into a dwelling to serve a judicially-issued criminal summonses. Since *Payton* was decided, two separate inquiries were made by a prosecutor and a sheriff to the Virginia Attorney General, asking the very question presented in this case.

*Payton's* lack of clarity on the issue of serving judicially-issued summonses is further evidenced by the fact that the Virginia Attorney General came to different conclusions in response to each question

asked of the office. One opinion actually relied on *Payton* for the proposition that officers *could* enter first party residences to serve magistrate-issued criminal summonses.

Ironically, the facts of the instant case are not unlike the facts of *Semayne's Case*, which was approvingly cited by the *Payton* Court. *Id.* at 593. *Semayne's Case* dealt with a sheriff's authority to enter a home to effect service of civil process. 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195-196 (K. B. 1603). The *Payton* Court explained that, while some scholars viewed *Semayne's Case* as authority for searches without warrants, the case was more likely stating that a sheriff could enter a private home if he was executing the King's writ. *Id.* In other words, the sheriff could enter the home not on a whim, but because he was executing the government's papers.

What was good for the sheriff in *Semayne's Case* should be good for Sergeant Moore, because both Sergeant Moore and the sheriff in *Semayne's Case* were doing the same thing: executing government issued papers.

**III. In light of the conflicting legal opinions from the Virginia Attorney General and the varying state laws, the law about serving summonses-in-lieu-of-warrants was not clearly established and Sergeant Moore should be granted qualified immunity**

The opinions of the Virginia Attorney General show the following: legal professionals have different

understandings about *Payton's* application, and whether the case allows or forbids officers from entering first-party residences to serve a summons-in-lieu-of-a-warrant. The 2003 Virginia Attorney General opinion acknowledges that the question of serving criminal summonses at first-party residences, "has not been addressed by Virginia's courts." App. 66; 2003 Va. AG LEXIS at \*5.

Accordingly, Sergeant Moore should be entitled to qualified immunity. As this Court has said, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Sergeant Moore, a uniformed police officer, was not plainly incompetent when he did what one Virginia Attorney General and four states specifically allow.

## CONCLUSION

Sergeant Moore respectfully requests the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case, so that he can argue to the Court why he should not be held personally liable for doing what many states allow. In addition, the Court is encouraged to clearly establish the law of serving summonses-in-lieu-of-warrants for all the states that depend on such summonses to reduce the burdens on the criminal justice system.

Respectfully Submitted,

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Prince William County  
Attorney's Office  
1 County Complex Court  
Prince William, VA 22192  
*Counsel for Petitioner*



No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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DAVID L. MOORE,  
IN HIS OFFICIAL AND INDIVIDUAL CAPACITY,  
*Petitioner,*

v.

ESPERANZA GUERRERO, ET AL,  
*Respondents.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fourth Circuit

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**APPENDIX**

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*Counsel for Petitioner*

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**UNPUBLISHED**

UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 10-2177

ESPERANZA GUERRERO,  
Plaintiff - Appellee,  
and  
MARIA MUNGUIA; JUAN GUERRERO; JG, Minor;  
KG, Minor; JJG, Minor; MG, Minor,  
Plaintiffs,

v.

DAVID L. MOORE, in his official and individual  
capacity,

Defendant - Appellant,

and

CHARLIE T. DEANE, in his official capacity; LUIS  
POTES, in his official and individual capacity;  
ADAM HURLEY, in his official and individual  
capacity; DOES 1-6, in their official and individual  
capacities; ROES 1-5, in their official and individual  
capacities; PRINCE WILLIAM COUNTY POLICE  
DEPARTMENT; PRINCE WILLIAM COUNTY;  
MATTHEW CAPLAN, in his official and individual  
capacity; KAREN MUELHAUSER, in her official  
and individual capacity; DOES 1-5, in their official  
and individual capacities,

Defendants.

Appeal from the United States District Court for the  
Eastern District of Virginia, at Alexandria.

James C. Cacheris, Senior District Judge.

(1:09-cv-01313-JCC-TRJ)

July 18, 2011, Submitted  
August 4, 2011, Decided

Before MOTZ, KEENEN, and WYNN, Circuit  
Judges.

Affirmed by unpublished per curiam opinion.

Sergeant David L. Moore appeals the district court's partial denial of his motion for summary judgment on the basis of qualified immunity. We affirm.

"Qualified immunity protects government officials from liability for violations of constitutional rights that were not clearly established at the time of the challenged conduct." *Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 275 (4th Cir. 2011) (internal quotation marks, brackets, and citations omitted). Qualified immunity "is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Thus, to the extent it turns on an issue of law, a district court's denial of a claim of qualified immunity is immediately appealable despite the absence of a final judgment. *Witt*, 633 F.3d at 275. But, in hearing such an appeal, we "may not reweigh the record evidence to determine whether material factual disputes preclude summary disposition." *Id.* (internal quotation marks and citation omitted).

The Fourth Amendment to the Constitution protects individuals from unreasonable searches and seizures. "Except in such special situations [as consent or exigent circumstances], we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald v. United States*, 451 U.S. 204, 211, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981). "[A]ny physical invasion of the structure of the home, by even a fraction of an inch, [is] too much." *Kyllo v. United States*, 533 U.S. 27, 37, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (internal quotation marks omitted).

Moore contends that he did not violate the Fourth Amendment rights of Esperanza Guerrero when he entered her home in an effort to serve a judicially-issued misdemeanor summons on Antonia Munguia. He fails to persuade us, however, that the summons was the functional equivalent of an arrest warrant for Fourth Amendment purposes. Summonses confer more limited authority than arrest warrants; notably, Moore lacked the authority to take Munguia into custody upon service of the summons. Moore fails to cite any persuasive Fourth Amendment precedent that permits a government official to enter a dwelling to serve a non-custodial misdemeanor summons. Indeed, the latest relevant opinion of the Virginia Attorney General concludes that an officer lacks such authority. 2003 Va. Op. Att'y Gen. 64, 2003 Va. AG LEXIS 59, 2003 WL 23208766 (Sept. 16, 2003) ("[A]bsent consent of a dwelling owner, a law-enforcement officer must obtain a warrant before entering a dwelling for the purpose of serving a summons for a misdemeanor.").

The qualified immunity analysis does not terminate at the finding of a constitutional violation; rather we must discern whether the right at issue was "clearly established" at the time of the violation. "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (internal quotation marks omitted). Thus, qualified immunity extends "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

We find that the right at issue was clearly established at the time of the incident. Supreme Court precedent plainly stated the need for a warrant or an exception to the warrant requirement for an officer to enter a dwelling to conduct a search or to make an arrest. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."). The presence of an earlier opinion of the Virginia Attorney General, see 1982-83 Va. Op. Att'y Gen. 18, 1982 Va. AG LEXIS 326, 1982 WL 175892 (Aug. 20, 1982), does not upset that precedent, especially in light of the more recent superseding statement of the law by the same office.

Accordingly, we affirm the district court's partial denial of summary judgment on the basis of qualified immunity. We dispense with oral argument because the facts and legal contentions are

adequately presented in the materials before the court and argument would not aid the decisional process.

**AFFIRMED**

IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ESPERANZA GUERRERO, et al., Plaintiffs,

v.

CHARLIE T. DEANE, et al., Defendants.

1:09cv1313 (JCC)

October 27, 2010, Decided  
October 27, 2010, Filed

MEMORANDUM OPINION

This matter is before the Court on Defendants' Renewed Motion for Summary Judgment [Dkt. 107] and Plaintiffs' Motion for Partial Summary Judgment [Dkt. 112]. For the following reasons, the Court will grant in part and deny in part Defendants' Motion and will deny Plaintiffs' Motion.

**I. Background**

**A. Factual Background**

This case arises from a November 24, 2007 incident involving a number of Prince William County (the "County") police officers and the Guerrero family of Manassas, Virginia. As a result of

the incident, Plaintiffs have alleged Fourth Amendment violations pursuant to 42 U.S.C. ¶ 1983, as well as certain Virginia state-law claims.

i. Officer Moore Arrives and Steps Into the Guerrero Home

On November 24, 2007, Defendant Officer David Moore, an officer in the Prince William County Police Department (the "Department"), went to Plaintiffs' home in order to serve a summons on Antonia Munguia. (D. SMJ at 2; P. Opp. at 1). The summons required Ms. Munguia to appear before the Juvenile and Domestic Relations District Court for a Class 3 Misdemeanor charge of failing to assist the school in enforcing the standards of compulsory school attendance as a parent of a student enrolled in a public school pursuant to Va. Ann. Code § 22.1-279.3. (D. SMJ at 2; D. Ex.<sup>1</sup> 1 A1, A2.) The summons listed the Guerrero home in Manassas as Ms. Munguia's address, and while the parties dispute whether Ms. Munguia lived at the Guerrero residence on November 24, 2007, and whether Ms. Guerrero told Officer Moore that Ms. Munguia lived at the Guerrero residence, it is undisputed that Ms. Guerrero told Officer Moore that Ms. Munguia was not there that day. (D. SMJ at 3; P. Opp. at 1).

After telling Officer Moore that Ms. Munguia was not present, Ms. Guerrero asked for his business card. (D. SMJ at 3; P. Opp. at 2.) The parties dispute what occurred immediately following this initial exchange. According to Plaintiffs, after asking for

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<sup>1</sup> Defendants exhibits will be referred to as "D. Ex."; Plaintiffs' exhibits will be referred to as "P. Ex."



Officer Moore's card, Ms. Guerrero began closing the door, believing their conversation to have ended. (P. Opp. at 2.) According to Defendants, Ms. Guerrero took a step backward into her house while further opening the front door. (D. SMJ at 3.) Next, according to Plaintiffs, Officer Moore attempted to force his way into the Guerrero home. (P. Opp. at 2.) Defendants, in contrast, state that Ms. Guerrero charged forward and pushed Officer Moore out of the house. (D. SMJ at 3.)

Significantly, both parties agree that upon producing his business card, Officer Moore stepped onto the threshold of the Guerrero home. (D. SMJ at 3; P. Opp. at 2.) Ms. Guerrero then closed the door on Officer Moore's leg or foot, though the parties dispute the amount of force used. (D. SMJ at 3; P. Opp. at 2.) Also undisputed, after Ms. Guerrero closed the door on Officer Moore, he struggled against the door in attempting to enter the home to arrest her. (D. SMJ at 4; P. Opp. at 2.)

ii. Officer Moore Radios for Help and Officers Respond

While Officer Moore's foot was wedged in the Guerrero door with Ms. Guerrero pushing the door shut from the inside, Officer Moore called dispatch for help. (D. SMJ at 4.) Dispatch initially issued a "Signal One" alert, an emergency distress call, but Officer Moore then radioed asking for three cars to arrive only in normal mode. *Id.* The first officer to arrive in response was Officer Luis Potes, followed immediately by Officers Matthew Caplan and Adam Hurley. (D. SMJ at 5; P. Opp. at 3.) When the

officers arrived, they saw Officer Moore's leg caught in the door and his struggling against the door being closed on him. (D. SMJ at 5.) Officer Moore then told the officers that Ms. Guerrero was under arrest and asked for their help to push the door open in order to enter and arrest Ms. Guerrero. (D. SMJ at 5.)

iii. The Officers Enter the Guerrero Home

The Officers then pushed open the door, freeing Officer Moore's leg, and entered the home. (D. SMJ at 6.) It is undisputed that the officers' entry forced Ms. Guerrero to the floor, though the parties dispute whether Ms. Guerrero then struggled with the officers and resisted the arrest. (D. SMJ at 6; P. Opp. at 4.) The officers stayed in the small foyer area immediately behind the door, except for Officer Potes, who went several feet further into the house and up a few steps into the raised living area. (D. SMJ at 6.) The parties dispute whether the remaining members of the Guerrero family were yelling and screaming at the officers in the sunken foyer. (D. SMJ at 4; P. Opp. at 6.) The parties do not dispute, however, that as the officers in the foyer were effecting Ms. Guerrero's arrest, Mr. Guerrero came towards the officers. (D. SMJ at 6; P. Opp. at 4.)

Mr. Guerrero came out of a neighboring room and either "ran rapidly" or "walked fast" towards the officers who were effecting an arrest of Ms. Guerrero. (D. SMJ at 7.) The parties dispute whether Officer Potes, at this time, gave the Guerrero family numerous commands to stay back. (P. Opp. at 4.) As Mr. Guerrero approached the

officers, he made some gestures with his hands, alternatively described as either "like he was trying to grab something" or "with his hand out" as if to show he was not holding anything. (D. SMJ at 7; P. Opp. at 17.) Once Mr. Guerrero was "very close" to the officers, Officer Potes deployed oleoresin capsicum ("pepper") spray on Mr. Guerrero and pushed him up the stairs. (D. SMJ at 7.)

iv. The Officers Arrest Mr. and Ms. Guerrero

The parties dispute whether Ms. Guerrero resisted arrest by grabbing the banister and refusing to let go. (D. SMJ at 5; P. Opp. at 5.) Officer Moore then arrested and handcuffed Ms. Guerrero and escorted her outside. (D. SMJ at 8.) After placing Ms. Guerrero under arrest, Officers Potes and Caplan returned inside and placed Mr. Guerrero under arrest. *Id.*

Officer Moore called for a female officer to conduct a search of Ms. Guerrero, and Officer Karen Muehlhauser arrived on the scene. (D. SMJ at 8.) Officer Muehlhauser then searched Ms. Guerrero and checked her handcuffs to ensure they were secure. *Id.* The parties dispute whether Officer Muehlhauser tightened Ms. Guerrero's handcuffs and whether Officer Moore ordered Officer Muehlhauser to do so. (D. SMJ at 8; P. Opp. at 5.) The parties also dispute whether Officer Moore ordered Ms. Guerrero to lean farther back while she was in the police car in order to tighten her handcuffs. (D. SMJ at 8-9.)

v. Detention and Injuries

Mr. and Ms. Guerrero were taken to the Adult Detention Center and detained for several hours and a day and a half, respectively. (D. SMJ at 9.) Both suffered minor injuries from the incident. Ms. Guerrero suffered a two-inch abrasion on her left shoulder, a one-inch red mark on her right forearm, and pain in her shoulder. (P. Opp. at 5.) Ms. Guerrero also suffered emotional trauma from the incident. (P. Opp. at 6.) Mr. Guerrero had his eyes checked at a clinic and suffered nervousness following the event. *Id.* The Guerrero children, Plaintiffs J. Guerrero, Jr., M. Guerrero, and K. Guerrero, suffered emotional and psychiatric injury, feelings of shock and helplessness and fear. (P. Opp. at 6-7.)

The Commonwealth of Virginia charged Mr. Guerrero with obstruction of justice, and he was found not guilty. (P. Opp. at 7.) Ms. Guerrero was charged with assault and battery of a law enforcement officer and obstruction of justice. *Id.* The obstruction of justice charge was dismissed, and the assault and battery charge has not been prosecuted to date. *Id.*

vi. The County Resolution

The parties dispute the facts surrounding a County resolution concerning illegal immigration enforcement. According to Plaintiffs, on July 10, 2007, the Prince William County Board of Supervisors passed a resolution (the "Resolution") mandating county police officers to inquire into the

citizenship or immigration status of any person detained in violation of state law or a municipal ordinance. (P. Opp. at 9.) In response to the County's desire to curtail what it perceived to be an "illegal immigrant" problem, the Department created a unit devoted to investigating crimes involving illegal aliens and, on the County's direction, enacted a policy whereby officers could inquire as to immigration status following an arrest. (P. Opp. at 10.) Defendants, however, contend that while the Resolution was passed in July 2007, its directives were not implemented by the Department until the spring of 2008. (P. SMJ at 10.)

### **B. Procedural Background**

Plaintiffs filed a Second Amended Complaint on July 2, 2010 (the "Complaint"). On September 10, 2010, Defendants filed with this Court their Renewed Motion for Summary Judgment<sup>2</sup> [Dkt. 107], and Plaintiffs filed a Motion for Partial Summary Judgment [Dkt. 112]. On September 22, 2010, Plaintiffs filed their Opposition to Defendants' Renewed Motion for Summary Judgment [Dkt. 130], and Defendants filed their Opposition to Plaintiffs' Motion for Partial Summary Judgment. [Dkt. 124.] On October 1, 2010, Defendants filed their Reply to

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<sup>2</sup> Defendants' Memorandum in Support [Dkt. 108] will be referred to as "D. SMJ." Plaintiffs' [\*\*10] Opposition [Dkt. 130] will be referred to as "P. Opp." Defendants' Reply [Dkt. 137] will be referred to as "D. Reply". Likewise, Plaintiffs' Memorandum in Support [Dkt. 117] will be referred to as "P. SMJ.", Defendants' Opposition [Dkt. 124] will be referred to as "D. Opp.", and Plaintiffs' Reply [Dkt. 136] will be referred to as "P. Reply".

Plaintiffs' Opposition [Dkt. 137.], and Plaintiffs' filed their Reply in Support of their Motion for Partial Summary Judgment. [Dkt. 136.] These motions are now before the Court.

## II. Standard of Review

Summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996) (citations omitted). The party seeking summary judgment has the initial burden of showing the absence of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The party opposing summary judgment may not rest upon mere allegations or denials. Rather, it "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (quotation omitted).

Unsupported speculation is not enough to withstand a motion for summary judgment. See *Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986). Summary judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. In reviewing the record on summary judgment, "the court must draw any inferences in the light most favorable to the non-movant" and "determine whether the record taken as a whole could lead a reasonable trier of fact to find for the non-movant." *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1259 (4th Cir. 1991) (citations omitted).

### **III. Analysis**

Defendants argue that they are entitled to qualified immunity and, thus, summary judgment on all of Plaintiffs' § 1983 claims and that they are entitled to summary judgment on all Virginia state law claims. Plaintiffs argue that they are entitled to partial summary judgment on Count I with respect to the unlawful entry claim, and that in the alternative, collateral estoppel precludes re-litigation of whether Officer Moore's entry was unlawful.<sup>3</sup> The Court will address these arguments in turn.

#### **A. Constitutional Claims under § 1983**

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<sup>3</sup> Plaintiffs concede that any claims against those Defendants named as DOES and ROES should be dismissed.

Plaintiffs allege two Fourth Amendment violations: unreasonable search and seizure and excessive force. Defendants claim that they are entitled to qualified immunity with respect to these claims and, therefore, are entitled to summary judgment. Plaintiffs argue, with respect to the warrantless entry claim under Count I, that because there was a violation of clearly established constitutional law, they are entitled to summary judgment.

i. Qualified Immunity

Qualified immunity protects government officials 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, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Qualified immunity provides "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). "The qualified immunity determination should normally be made at the summary judgment stage in the litigation." *Ware v. James City County*, 652 F. Supp. 2d 693, 702 (E.D. Va. 2009) (citing *Schultz v. Braga*, 455 F.3d 470, 476 (4th Cir. 2006)). "Qualified immunity[, however,] does not override the ordinary rules applicable to summary judgment proceedings, nor does it give special substantive favor to the defense." *Henry v. Purnell*, 619 F.3d 323, 2010 WL 3720411, at \*7 (4th Cir. 2010) (internal quotation



omitted). "Hence, [the Fourth Circuit's] longstanding instruction that courts 'reserve[ ] for trial' genuine issues of material fact relating to an 'officer's conduct or its reasonableness under the circumstances.'" 619 F.3d 323, *Id.* at \*8 (quoting *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992)).

In *Saucier v. Katz*, the Supreme Court set forth a two-pronged inquiry for determining whether the defense of qualified immunity will apply. 533 U.S. 194, 201-02, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). First, a district court determines whether, "[t]aken in the light most favorable to the party asserting the injury," the facts alleged by that party "show the officer's conduct violated a constitutional right." *Id.* at 201. Second, if a constitutional violation did occur, the court then explores "whether the right was clearly established." *Id.* at 202. Qualified immunity, then, is "a doctrine which shields government actors from liability if they establish either that (1) the plaintiff's allegations fail to make out a violation of a constitutional right, or (2) the right at issue was not clearly established at the time of the alleged misconduct." *Purnell*, 619 F.3d 323, 2010 WL 3720411, at \*7.

The Court notes that the sequence of the two-step inquiry required by *Saucier* is no longer mandatory. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 817, 172 L. Ed. 2d 565 (2009). Thus, the Court is "permitted to exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."

*Id.* at 818.

A right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (internal quotation marks omitted). "That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Hope*, 536 U.S. at 739. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. In making the "clearly established" inquiry, then, a court "ascertain[s] 'whether a reasonable [official] could have believed [the challenged conduct] to be lawful, in light of clearly established law.'" *Meeker v. Edmundson*, 415 F.3d 317, 323 (4th Cir. 2005) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Moreover, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established[.]" *Saucier*, 533 U.S. at 202 (internal citations omitted). The purposes of this clearly established inquiry is "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, 533 U.S. at 206.

As the Supreme Court has stated, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). The Court has made clear "that the

Harlow standard . . . gives ample room for mistaken judgments." *Id.* at 343. For purposes of the clearly established inquiry, "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier*, 533 U.S. at 195.

ii. Count I: Warrantless Entry

Count I of Plaintiffs' Complaint alleges unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution. Plaintiffs direct this claim against Defendants Officers Moore, Potes, Hurley, and Caplan, in their official and individual capacity, and against the County and Department Police Chief Charlie T. Deane, in his official capacity. Plaintiffs' allege that both the officers' entry into the Guerrero home and the subsequent arrests of Mr. and Ms. Guerrero violated the Fourth Amendment, as unlawful searches and seizures, respectively. Defendants argue that they are entitled to qualified immunity as to these alleged Constitutional violations. Plaintiffs move for summary judgment as to the warrantless entry claim under Count I.

a. Exceptions to the Warrant Requirement

The Fourth Amendment forbids unreasonable searches and seizures. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Thus, "[i]n terms that apply equally to seizures of property

and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." *Id.* at 590. "That line . . . must be not only firm but also bright." *Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). The Supreme Court has "made clear that any physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door." *Id.* at 37 (internal citations omitted). Thus, searches and seizures conduct in absence of a valid warrant "are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Relevant here, among these exceptions are exigent circumstances and consent. *Payton*, 445 U.S. at 590; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Though the parties dispute whether Ms. Munguia lived at the Guerrero residence on November 24, 2007, the Court, as discussed below, finds that Officer Moore was not executing an arrest or search warrant carrying with it the limited authority to enter the Guerrero home. Thus, whether Ms. Munguia was a co-resident in the Guerrero home is immaterial. Absent a valid warrant, "[i]t is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'"

*Schneckloth*, 412 U.S. at 219. The issue with respect to the first prong of the qualified immunity inquiry, then, is whether one of the well-delineated exceptions to the warrant requirement is present in this case.

b. Officer Moore's Initial Entry

Plaintiffs allege that Defendant Officer Moore unlawfully entered the Guerrero home without a warrant and without the presence of exigent circumstances. (Comp. at ¶ 58.) Defendants counter that Officer Moore could lawfully enter in absence of a warrant, because of the consent and exigent circumstances exceptions to the warrant requirement (D. SMJ at 12; D. Opp. at 8.) Both parties have moved for summary judgment on the warrantless entry claim under Count I as to Officer Moore. (P. SMJ at 1; D. SMJ at 11.)

1. Officer Moore was not Executing a Warrant

As an initial matter, it is undisputed that when Officer Moore arrived at the Guerrero residence, he was not armed with an arrest or search warrant. Rather, he was there to serve a summons on Ms. Munguia requiring her to appear before the Juvenile and Domestic Relations District Court for a "Class 3 Misdemeanor" charge for failing to assist the school in enforcing the standards of compulsory school attendance as a parent of a student enrolled in a public school pursuant to Va. Ann. Code § 22.1-279.3--in short, a truancy summons--not an arrest warrant. (D. Ex. A1, A2.) See Va. Ann. Code § 22.1-263 ("Any person violating the provisions of . . . the

parental responsibility provisions relating to compulsory school attendance included in § 22.1-279.3, shall be guilty of a Class 3 misdemeanor."). As the document was not by its terms an arrest warrant, the Court examines whether it was the functional equivalent of an arrest warrant for Fourth Amendment purposes.

In Virginia, a police officer may, in limited instances, effect a custodial arrest of the subject of a summons for a person accused of committing a Class 3 Misdemeanor. As set forth in the Code of Virginia, when a person commits a Class 3 Misdemeanor in the presence of an officer, "if any such person shall fail or refuse to discontinue the unlawful [Class 3 Misdemeanor], the officer may [arrest the suspect without a warrant]." Va. Code Ann. § 19.2-74(A)(2); see also *Spiers v. Sydnor*, 3 F. App'x 176, 179 (4th Cir. 2001) ("[I]n the case of certain minor violations, such as Class [3] misdemeanors, the officer generally is limited to issuing a summons for the offense."); cf. *Lovelace v. Commonwealth*, 258 Va. 588, 522 S.E.2d 856, 860 (1999) (explaining that under § 19.2-74, the "'arrest' . . . is effected by issuing a citation or summons rather than taking the suspect into custody"). Additionally, if the subject of a summons refuses to give the required "written promise to appear under the provisions of [§ 19.2-74]" he or she "shall be taken immediately by the arresting or other police officer before a magistrate or other issuing authority having jurisdiction." Va. Code Ann. § 19.2-74(A)(3).

In this case, at the time of Officer Moore's initial entry into the Guerrero home, Ms. Guerrero

had committed no crime, so the exception for arresting a suspect committing a Class 3 Misdemeanor does not apply. (D. SMJ at 3.) Nor was Ms. Guerrero the subject of the summons. Ms. Munguia, the subject of the summons, was not at the Guerrero residence, and thus could not have possibly refused to give the written promise to appear, only after which Officer Moore could have taken her into custody. (D. SMJ at 3.) On the basis of the summons itself, without more, Officer Moore could not arrest anyone. Thus, the Court finds that the truancy summons, standing alone, did not grant Officer Moore the authority to enter the Guerrero home to effectuate an arrest.

Moreover, though not binding on this Court, the Court finds the 2003 Opinion issued by the Office of the Attorney General of Commonwealth of Virginia (the "AG") and the cases cited therein to be instructive on this very issue. *Warren v. Baskerville*, 233 F.3d 204, 207 n.2 (4th Cir. 2000) (citing *City of Virginia Beach v. Virginia Restaurant Assoc.*, 231 Va. 130, 341 S.E.2d 198, 201 (1986) (holding that while the Virginia Attorney General's opinion is not binding, it provides persuasive authority entitled to due consideration)). In its Opinion No. 03-064, the AG stated that a summons that "would commence misdemeanor proceedings against the person served," is not "for all purposes, an adequate substitute for an arrest of a search warrant." 2003 Va. AG LEXIS 59 (2003 Op. Atty Gen. Va. No. 03-064). Further, the AG noted that "[t]he issuance of a misdemeanor summons does not constitute a judicial determination that the right of privacy in a home is required to yield to an officer's purpose." *Id.* (citing

*Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948)). To arrive at this conclusion, the AG considered similar cases considered by other courts that held, absent exigency, that "an officer may not enter private premises without a warrant in order to arrest on a charging instrument or to serve papers." *Id.*

Officer Moore's reasonable belief as to whether the summons conferred upon him the legal authority to enter the Guerrero home does not convert the summons into an arrest warrant for purposes of addressing whether his conduct violated the Fourth Amendment protection against unreasonable searches and seizures. Because Officer Moore was not executing a warrant, but rather serving a summons, the Court must now determine whether one of the well-delineated exceptions to the warrant requirement is present in this case. *Schneckloth*, 412 U.S. at 219.

## 2. Implied consent

Defendants first argue that the consent exception to the warrant requirement is applicable to Officer Moore, because Ms. Guerrero "impliedly invited" Officer Moore to "step[] forward onto [her] threshold." (D. SMJ at 13.) As it is undisputed that Ms. Guerrero did not expressly consent to Officer Moore's entry, the issue, then, is whether the typical, reasonable person in Ms. Guerrero's position would have understood themselves to be giving Officer Moore implied consent to his entrance into the Guerrero home.



The Supreme Court has "long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* at 251. "The question whether the [a party's] consent [] was in fact voluntary [], express or implied, is to be determined by the totality of all the circumstances, and is a matter which the Government has the burden of proving." *United States v. Mendenhall*, 446 U.S. 544, 557, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (internal citations omitted). "There is no question that consent to search can be implied from a person's words, gestures, or conduct." *United States v. Moreland*, 437 F.3d 424, 429 (4th Cir. 2006) (citations omitted). "[M]agic words' (such as 'yes') are not necessary to evince consent because 'the key inquiry focuses on what the typical reasonable person would have understood by the exchange between the officer and the suspect.'" *United States v. Bynum*, 125 F. Supp. 2d 772, 783 (E.D. Va. 2000), rev'd on other grounds, 293 F.3d 192 (4th Cir. 2002) (citing *United States v. Stewart*, 93 F.3d 189, 192 (5th Cir. 1996)).

This Court explained in *Bynum*, a case cited by Defendants for their implied consent argument, that "[o]n occasion, non-verbal consent to searches evinced by gesture has been sustained." *Bynum*, 125 F. Supp. 2d at 783. The *Bynum* decision went on to

examine a number of cases in considering when a party gives implied, non-verbal consent to a search, and determined that "[t]hose decisions teach that, in examining the totality of the circumstances to determine whether a reasonable officer would interpret a gesture or conduct as consent, it is necessary to consider the question posed by, and the actions of, the law enforcement officers to which the defendant's non-verbal conduct was a response." *Id.* at 783-84.

It is undisputed that Ms. Guerrero told Officer Moore that Ms. Munguia was not present in the Guerrero residence, and that Ms. Guerrero offered to take his business card. (D. SMJ at 3; P. Opp. at 1.) The parties dispute, however, what happened immediately after. Defendants state that Ms. Guerrero took a step backward into her house and opened the door further, and that while Officer Moore was reaching for his business card, he stepped forward onto the threshold of the home. (D. SMJ at 3.) Plaintiffs state that Ms. Guerrero began to close the door after telling Officer Moore that Ms. Munguia was not at the Guerrero home, believing their conversation to have ended. (P. Opp. at 12.) Defendants do not contend that Officer Moore affirmatively asked to be let in to the Guerrero home.

Taking the facts in the light most favorable to the Plaintiffs, Defendants have not made a showing that no reasonable juror could return a verdict for Plaintiffs with respect to whether Ms. Guerrero impliedly consented to Officer Moore's entry into the Guerrero home. The totality of the circumstances

does not show, for purposes of granting summary judgment to the Defendants, that the typical reasonable person would have understood the exchange between the Officer Moore and Ms. Guerrero to mean that she consented to his entrance into her home. *Jimeno*, 500 U.S. at 251. The evidence at the least shows that all Ms. Guerrero did was ask Officer Moore for his business card, and it is not objectively reasonable to equate asking for one's business card to inviting one to enter one's home. Moreover, viewed in the light most favorable to the Plaintiffs, the evidence shows that Ms. Guerrero began to close the door; certainly, that is no invitation to enter. Taken together, the facts do not support Defendants' contention that no reasonable juror could find that Officer Moore was objectively reasonable in believing Ms. Guerrero's words, gestures, or conduct gave consent to his entrance into her home.

With respect to Plaintiffs' motion for summary judgment, taking the evidence in the light most favorable to the Defendants, i.e., that Ms. Guerrero took a step backward into her house and opened the door further, the question is a more difficult one. Because the disputed facts surrounding the initial exchange are material to whether Officer Moore's belief was reasonable, the Court finds Plaintiffs have not made a showing that no reasonable juror could return a verdict for Defendants with respect the whether Ms. Guerrero impliedly consented to Officer Moore's entry into the Guerrero home.

3. Implied Consent and the Second Prong of the Qualified Immunity Standard

Having found a triable issue as to whether Ms. Guerrero gave Officer Moore implied consent to enter the Guerrero home, the Court now turns to the second prong of the qualified immunity standard, i.e., whether the right was clearly established. As discussed above, a right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739. The first step in the analysis is to define the right allegedly violated at the appropriate level of specificity. Defining the right as "to be free from warrantless searches in absence of certain well-accepted exceptions" is too general. The Court finds the proper specificity to be whether it was sufficiently clear that an officer cannot enter a home on the basis of consent unless an objectively reasonable person would believe he or she had been given consent. On this basis, Officer Moore should have known his conduct, i.e., entering on the basis of Ms. Guerrero's alleged implied consent, was at least questionable, if not unlawful. Therefore, the Court finds that the right alleged to be violated was clearly established for purposes of the second prong of the qualified immunity inquiry.

4. Exigent Circumstances

Defendants next argue that Officer Moore's entry into the Guerrero home was lawful, because exigent circumstances were present permitting his entry in absence of a warrant. Specifically,

Defendants argue that when Ms. Guerrero slammed the door on Officer Moore's foot, he had probable cause to believe she had committed felony assault and battery on him, and therefore he was pursuing a fleeing felon in hot pursuit. (D. SMJ at 13; D. Reply at 16-17.)

The presence of exigent circumstances is a well-established exception to the warrant requirement. See, e.g., *United States v. Cephas*, 254 F.3d 488, 494 (4th Cir. 2001) ("[A]n exception to the warrant requirement is made when certain exigent circumstances exist."). "The existence of exigent circumstances must be determined as of the moment of the warrantless entry of the officers onto the premises of [the subject of the search]." *United States v. Reed*, 935 F.2d 641, 643 (4th Cir. 1991) (citing *Arkansas v. Sanders*, 442 U.S. 753, 763, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979) (emphasis added)). In determining whether an exigency existed when the search commenced, the Court inquires whether the circumstances would cause law enforcement officers to form an "objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within." *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992). "Exigent circumstances vary from case to case, and a determination of the issue is of necessity fact-specific." *Osabutey v. Welch*, 857 F.2d 220, 224 (4th Cir. 1988). Examples of such emergencies include, but are not limited to, "risk of danger [\*\*30] to the police or to other persons inside or outside the dwelling," and "hot pursuit of a fleeing felon." *United States v. Moses*, 540 F.3d 263, 270 (4th Cir. 2008); *Welsh v. Wisconsin*, 466 U.S. 740, 750,

104 S. Ct. 2091, 80 L. Ed. 2d 732 (citing *United States v. Santana*, 427 U.S. 38, 42-43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976)).

With respect to the parties' cross motions for summary judgment on Count I as to Officer Moore, exigent circumstances must exist as of the moment of the warrantless entry, i.e., stepping onto the threshold. At the time Officer Moore stepped forward into the threshold of the Guerrero home, however, Ms. Guerrero had not yet charged forward and hit Officer Moore in the chest. (D. SMJ at 3.) The Court, therefore, finds that no reasonable juror could return a verdict that exigent circumstances existed as of that moment.

5. Collateral Estoppel as to Officer Moore's Entry

Plaintiffs argue, in the alternative, that collateral estoppel precludes relitigation of whether Officer Moore's entry into the Guerrero home was unlawful, because the Prince William County General District Court determined that it was. (P. SMJ at 19.) The Prince William County General District Court, in *Commonwealth of Virginia v. Esperanza Guerrero*, January 25, 2008, dismissed the misdemeanor charge against Ms. Guerrero, because the court found Officer Moore's entry to be unlawful. (P. Ex. J at 84:12-15.) Thus, the issue is whether that ruling has preclusive effect before this Court on this Officer Moore's initial entry.

"The collateral estoppel effect of the Virginia court's decision is determined by Virginia law." *Kane*

*v. Hargis*, 987 F.2d 1005, 1008 (4th Cir. 1993) (citing 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)); see also *Capital Hauling, Inc. v. Forbes*, 75 F. App'x 170, 171 (4th Cir. 2003) (per curiam) ("When determining whether collateral estoppel arises from a prior state court judgment, federal courts apply the law of the state in whose courts the prior judgment was entered."). Under Virginia law, "[f]or the doctrine [of collateral estoppel] to apply, the parties to the two proceedings, or their privies, must be the same." *TransDulles Center, Inc. v. Sharma*, 252 Va. 20, 22-23, 472 S.E.2d 274 (1996); see also *Loudoun Hosp. Center v. Stroube*, 50 Va. App. 478, 492, 650 S.E.2d 879, 886 (2007) ("[B]efore the doctrine of collateral estoppel may be applied, four requirements must be met: (1) the parties to the two proceedings must be the same.") (quoting *Whitley v. Commonwealth*, 260 Va. 482, 489, 538 S.E.2d 296, 299 (2000)).

In this case, Officer Moore was not a party to the prior proceeding that Plaintiffs claim bars relitigation of the issue of whether his entry to the Guerrero home was unlawful. Ms. Guerrero and the Commonwealth of Virginia were the only parties to that action. Therefore, the Court finds that Virginia collateral estoppel law does not bar the relitigation of that issue here.

For the reasons set forth above, the Court denies both parties' motions for summary judgment as to Count I with respect to Officer Moore's initial entry into the Guerrero home.

c. Officers Potes, Hurley, and Caplan's Warrantless Entry

Plaintiffs allege that Defendants Potes, Hurley, and Caplan unlawfully entered the Guerrero home. (Complaint at ¶ 58.) Defendants, in response, argue that Officers Potes, Hurley, and Caplan entered lawfully in the presence of exigent circumstances. Both parties have moved for summary judgment on the warrantless entry claim under Count I as to Officers Potes, Hurley, and Caplan.

As stated above, the presence of exigent circumstances is a well-established exception to the warrant requirement. See, e.g., *Cephas*, 254 F.3d at 494. One well-established example of exigent circumstances is risk of danger to the police. *Moses*, 540 F.3d at 270 (internal citations omitted). The existence of exigent circumstances is measured at the time of the warrantless entrance and is determined by whether the circumstances would cause law enforcement officers to form an "objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within." *Reed*, 935 F.2d at 643 (internal citations omitted); *Moss*, 963 F.2d at 678.

With respect to Defendants' motion for summary judgment on Count I as to Officers Potes, Hurley, and Caplan, taking the facts in the light most favorable to the Plaintiffs, Defendants have made a showing that no reasonable juror could return a verdict for Plaintiffs as to the presence of



exigent circumstances for the officers' initial entry into the Guerrero home. At the time Officers Potes, Hurley, and Caplan arrived at the scene, they each saw Officer Moore's leg caught between the door and the door jam, and that Moore "was holding on for dear life, [to] prevent[] further injury to his leg." (Caplan Dep. at 78:20-21.) While Officer Moore admits he had the opportunity to remove his foot from the door, this subjective belief does not negate that Officers Potes, Hurley, and Caplan could have objectively and reasonably believed that an emergency existed that required immediate entry to render assistance or prevent harm to Officer Moore. (Moore Dep. at 134:22-135:2.) Accordingly, Officers Potes, Hurley, and Caplan are entitled to qualified immunity on that claim.

Plaintiffs cite *Minnesota v. Olson*, 495 U.S. 91, 101, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), for the proposition that if Officers Potes, Hurley, and Caplan believed Ms. Guerrero should be arrested, nothing prohibited at least one of them from leaving the scene and obtaining a proper arrest warrant. (P. Opp. at 16.) *Olson*, however, is inapposite; in *Olson*, there was no physical assault being committed on a police officer. Rather, the police officers there went to a house to arrest a suspect whom they had been told was within. *Id.* at 95. They surrounded the house and proceeded to enter without a warrant in order to arrest that suspect. *Id.* At no time was any police officer physically attacked in any way.

For these reasons, the Court also finds that with respect to Plaintiffs' motion for summary judgment as to Officers Potes, Hurley, and Caplan's

warrantless entry under Count I, Plaintiffs have not made a showing that no reasonable juror could return a verdict for Defendants as to the presence of exigent circumstances on the officers' initial entry into the Guerrero home, and, therefore, Plaintiffs' motion is denied.

iii. Count I: Warrantless Seizures

Plaintiffs next allege that Defendants Moore, Potes, Hurley, and Caplan violated Plaintiffs' Fourth Amendment right to be free from unreasonable seizures when the officers unlawfully seized Mr. and Ms. Guerrero without probable cause. (Complaint at ¶ 59; P. Opp. at 16.) Defendants, in response, argue that Officers Moore, Potes, Hurley, and Caplan each had probable cause to believe a crime was being committed in his presence, thereby permitting a seizure in absence of a warrant. Only Defendants have moved for summary judgment on the unreasonable seizure claim under Count I as to Officers Moore, Potes, Hurley, and Caplan, arguing that they are entitled to qualified immunity on that claim. (D. SMJ at 20-21.)

The Supreme Court has held that the Fourth Amendment's protection against unreasonable seizures includes seizure of the person. *California v. Hodari D.*, 499 U.S. 621, 624, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). "It is well-settled under Supreme Court precedent that a warrantless arrest is reasonable under the Fourth Amendment [] 'where there is probable cause to believe that a criminal offense has been or is being committed.'" *Ware*, 652 F. Supp. 2d at 703 (citing *Devenpeck v. Alford*, 543

U.S. 146, 152, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004)). Probable cause to make a warrantless arrest exists when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person . . . in the circumstances shown, [to conclude] that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). It is also well-settled that "[w]hether probable cause exists in a particular situation . . . always turns on two factors in combination: the suspect's conduct as known to the [arresting] officer[s], and the contours of the offense thought to be committed by that conduct." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992). "Although probable cause demands 'more than mere suspicion, . . . evidence sufficient to convict is not required.'" *Ware*, 652 F. Supp. 2d at 703 [\*\*37] (quoting *Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996)). Thus, "if a person is arrested when no reasonable officer could believe, in light of the contours of the offense at issue, that probable cause exists to arrest that person, a violation of a clearly established Fourth Amendment right . . . ensues." *Rogers v. Pendleton*, 249 F.3d 279, 290 (4th Cir. 2001).

Defendants argue that Officers Moore, Potes, Hurley, and Caplan each had probable cause to believe that the crimes of assault and battery and/or obstruction of justice were being committed in their presence. The Court, then, must examine the elements of these crimes and determine whether a "reasonable officer could believe, in light of the contours of the offense at issue, that probable cause

exists to arrest that person." *Rogers*, 249 F.3d at 290.

In Virginia, simple assault or assault and battery on a police officer is a Class 6 felony. Va. Code Ann. § 18.2-57(C). Assault "occurs when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm or engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim." *Clark v. Commonwealth*, 279 Va. 636, 641, 691 S.E.2d 786, 789 (2010). "To sustain a conviction for battery, the Commonwealth must prove a 'wil[l]ful or unlawful touching' of another." *Parish v. Commonwealth*, 56 Va. App. 324, 330, 693 S.E.2d 315, 319 (Va. App. 2010) (quoting *Wood v. Commonwealth*, 149 Va. 401, 404, 140 S.E. 114, 115 (1927)). It is not necessary that the touching result in injury to the person. *Id.* "It is sufficient if it does injury to the [victim's] mind or feelings." *Id.* (quoting *Wood*, 149 Va. at 405, 140 S.E. at 115).

The relevant Virginia crimes of obstruction of justice is set forth in subsections A and B of the Virginia Code § 18.2-460.<sup>4</sup> One violates subsection A when one "without just cause, knowingly obstructs a law-enforcement officer in the performance of his duties." *Washington v. Commonwealth*, 273 Va. 619, 624 643 S.E.2d 485, 488 (2007) "In contrast, a person violates subsection B by using threats or force to knowingly attempt to intimidate or impede a law-enforcement officer lawfully engaged in the

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<sup>4</sup> Subsection C is inapplicable [\*\*39] here. See *Washington*, 273 Va. at 628, 643 S.E.2d at 490.

performance of his duties. A violation of either of these subsections is deemed a Class 1 misdemeanor." *Id.*

a. Warrantless Seizure of Ms. Guerrero

1. Officer Moore

The Court will first examine whether a reasonable officer in Officer Moore's position could have believed that probable cause exists to arrest Ms. Guerrero on any of assault, battery, or obstruction of justice. Defendants claim that when Ms. Guerrero closed the door on Officer Moore, he could reasonably believe she committed assault and battery and/or obstruction of justice. (D. SMJ at 19.) Plaintiffs argue that Ms. Guerrero could not be liable for any crime, because "Virginia law is clear that a property owner may use force to expel a trespasser." (P. Opp. at 17.); citing *Brown v. Commonwealth*, 27 Va. App. 111, 116, 497 S.E.2d 527, 530 (Va. App. 1998). *Brown*, however, addresses resisting an unlawful arrest and does not address trespass; the word "trespass" does not even appear in the case. Nonetheless, Virginia common law "has long recognized the right of a landowner to order a trespasser to leave, and if the trespasser refuses to go, to employ proper force to expel him, provided no breach of the peace is committed in the outset." *Pike v. Commonwealth*, 24 Va. App. 373, 375-76, 482 S.E.2d 839, 840 (Va. App. 1997) [**\*\*40**] (citing *Montgomery v. Commonwealth*, 99 Va. 833, 37 S.E. 841, 842 (1901)).

As an initial matter, when Ms. Guerrero closed the door on Officer Moore's leg, he had probable cause to believe she had committed a battery on him, as that crime requires only unlawful touching of another, regardless of injury. Assuming, *arguendo*, that Officer Moore's initial entry was unlawful, the question is whether such a battery was excused by the defense set forth in *Pike*. Significantly, that defense first requires that the defending party order the trespasser to leave and then that the trespasser refuse to do so. Taking the evidence in the light most favorable to the Plaintiffs, i.e., that Ms. Guerrero never hit or shoved Officer Moore, it is undisputed that Ms. Guerrero did not order Officer Moore to leave before closing the door on his leg, though she did so afterwards. Though the facts immediately following the initial entry are in dispute, that original exchange of Officer Moore's stepping onto the threshold and Ms. Guerrero closing the door on his leg is undisputed. Thus, Officer had probable cause to conclude that Ms. Guerrero had committed a battery on him, and because she did not first ask him to leave before doing so, the *Pike* defense does not apply.

Plaintiffs cite *Strutz v. Hall*, 308 F.Supp.2d 767, 781 (E.D. Mich. 2004), for the argument that the power to make a warrantless arrest of a suspect when an officer believes that person has committed a crime in his or her presence "is not the wholly distinct power to enter a private home without a warrant, whether to effect an arrest or for some other purpose." While this argument may bear on whether Officer Moore's entry into the Guerrero home was lawful, which has been addressed at

length above, it is not applicable to the lawfulness of Officer Moore's seizure of Ms. Guerrero. The lawfulness of a warrantless seizure is determined by whether the officer has probable cause to believe a crime has been committed in his presence for which he can make an arrest.

## 2. The Other Officers

As to the lawfulness of the warrantless seizure of Ms. Guerrero with respect to Officers Potes, Hurley, and Caplan, the issue, again, is whether they had probable cause to believe a crime was being committed in their presence. As officers arriving on the scene in response to a call for assistance, "they were not required to conduct an independent investigation of the facts to come to their own determination regarding whether probable cause existed. Such a requirement would be unworkable in the environments in which the police operate." *Ware*, 652 F. Supp. 2d at 703. Officers Potes, Hurley, and Caplan were not required to make their own inquiry upon their arrival, rather "[i]t is enough that [Officer Moore] told [them] that he had probable cause to make an arrest, and that they had no information that would cause them to question [his] statement." *Id.*; see also *Wilson v. Kittoe*, 229 F. Supp. 2d 520, 537-38 (W.D. Va. 2002) (finding that a reasonable officer who arrives on the scene would defer to another officer's explanation of what transpired before his or her arrival).

It is undisputed that Officers Potes, Hurley, and Caplan arrived in response to a request for additional units to come to Officer Moore's

assistance. Officer Potes was the first to arrive, with Officers Caplan and Hurley arriving immediately thereafter. (D. SMJ at 5). When they arrived, they saw Officer Moore in some form of altercation with Ms. Guerrero, and Officer Moore told Officer Potes that Ms. Guerrero was under arrest. *Id.* Nothing in the record shows any reason for the officers to question Officer Moore's statement. Thus, Officers Potes, Hurley, and Caplan had probable cause to believe that Ms. Guerrero had committed a battery on Officer Moore, and therefore could lawfully seize Ms. Guerrero in absence of a warrant.

b. Warrantless Seizure of Mr. Guerrero

Defendants argue that the officers lawfully seized Mr. Guerrero, because they had probable cause to believe that he was obstructing justice. (D. SMJ at 20.) In Virginia, a person commits the crime of obstruction of justice if he or she knowingly obstructs a police officer in the performance of his duties. See *Washington*, 273 Va. at 624, 643 S.E.2d at 488.

Here, after the officers entered the Guerrero home, Mr. Guerrero came out of a neighboring room and either "ran rapidly" or "walked fast" towards the officers who were effecting an arrest of Ms. Guerrero. (D. SMJ at 7.) As Mr. Guerrero approached the officers, he made some gestures with his hands, alternatively described as either "like he was trying to grab something" or "with his hand out" as if to show he was not holding anything. (D. SMJ at 7; P. Opp. at 17.) Once Mr. Guerrero was "very close" to the officers, Officer Potes used pepper spray



on Mr. Guerrero and pushed him up the stairs. (D. SMJ at 7.) After escorting Ms. Guerrero outside, Officers Potes and Caplan returned inside to formally arrest Mr. Guerrero.

Taking the facts in the light most favorable to the Plaintiffs, Defendants have made a showing that there is no genuine issue of material fact as to whether Defendants had probable cause to believe Mr. Guerrero was about to commit the crime of obstruction of justice. In Virginia, one commits obstruction of justice when he or she knowingly obstructs a police officer in the performance of his duties. Here, Defendants could have reasonably believed that Mr. Guerrero knowingly came at the officers while they were in the performance of their duties. That is all the elements require; the officers need not have felt threatened, nor did Mr. Guerrero's obstruction have to be significant. Thus, the Court finds that Defendants had probable cause to arrest Mr. Guerrero for misdemeanor obstruction of justice.

iv. Constitutional Claims of the Guerrero Children

Defendants argue that the Guerrero children were not seized and, therefore, do not have constitutional claims. (D. Reply at 17.) One is seized when a reasonable person in his or her position would not have believed he was free to leave. *Hodari D.* 499 U.S. at 628. The Fourth Amendment, however, "does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Jimeno*, 500 U.S. at 250. "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's

state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.'" *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978) (emphasis removed)).

While the Court finds that a reasonable person in the Guerrero childrens' position would not have believed he or she was free to leave, and thus the Guerrero children were seized, their seizure was reasonable. In light of reasonable seizures of Mr. and Ms. Guerrero, as addressed above, the circumstances, viewed objectively, justified Officer Potes's brief seizure of the Guerrero children for their safety while the officers effected Ms. Guerrero's arrest. Therefore, the Court grants summary judgment with respect to the constitutional claims of Plaintiffs J. Guerrero, Jr., M. Guerrero, and K. Guerrero.

v. Count II: Excessive Force

Count II of Plaintiffs' Complaint alleges excessive use of force in violation of the Fourth Amendment to the United States Constitution. Plaintiffs direct this cause of action against all Defendants. Specifically, Plaintiffs claim Defendants used unreasonably excessive force in three instances: when Officers Moore, Potes, Hurley, and Caplan forcibly entered the Guerrero home, knocking Ms. Guerrero to the floor; when Officer Potes used pepper spray on Mr. Guerrero; and when Officer Muelhauser, on Officer Moore's direction, tightened Ms. Guerrero's handcuffs. (Comp. at ¶¶ 62-63.)

Defendants have moved for summary judgment as to Count II, arguing that they are entitled to qualified immunity on this claim.

When reviewing Plaintiffs' excessive force claim against an officer effecting a seizure, the Court uses an "objective reasonableness" standard in analyzing the officer's action. *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). This standard carefully balances Fourth Amendment rights "against the countervailing governmental interests at stake." *Id.* at 396. "To gauge objective reasonableness, a court examines only the actions at issue and measures them against what a reasonable police officer would do under the circumstances." *Rowland v. Perry*, 41 F.3d 167, 172 (4th Cir. 1994). "Subjective factors involving the officer's motives, intent, or propensities are not relevant." *Id.* at 173. Further, the "reasonableness" of a use of force is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

In making this inquiry, the Court takes into consideration that "police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. *Graham* provides three factors for the Court to consider when inquiring into the objective reasonableness: (1) "the severity of the crime"; (2) "whether the suspect poses an immediate threat to the safety of the officers or

others"; and (3) whether the suspect "is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396 (internal citation omitted). The thrust of *Graham*, then, is that an officer may be entitled to qualified immunity who reasonably, but mistakenly, believed the circumstances justified using more force than in was needed in hindsight.

a. Knocking Ms. Guerrero to the Floor

Plaintiffs allege Officers Moore, Potes, Hurley, and Caplan unreasonably used excessive force against Mrs. Guerrero when they forcibly entered the Guerrero home, knocking her to the floor. Applying the *Graham* factors, a reasonable officer in Defendants' position would have believed the circumstances justified the amount of force used in arresting Ms. Guerrero. Viewed from the perspective of a reasonable officer on the scene, Defendants reasonably believed Ms. Guerrero had committed battery on a police officer, was posing a threat to that police officer's safety, and was resisting an arrest for which the officer had probable cause.

b. Pepper Spraying of Mr. Guerrero

Plaintiffs next allege Officer Potes used excessive force when he deployed pepper spray on Mr. Guerrero. Judged from the perspective of a reasonable officer on the scene, Officer Potes could have believed that Mr. Guerrero posed immediate threat to the safety of the officers and, thus, Officer Potes was justified in his use of pepper spray. Mr. Guerrero was coming towards the officers in a scene that was tense and in flux, as the officers had not yet

secured the scene and arrested Ms. Guerrero. A reasonable officer in Officer Potes's position could have believed Mr. Guerrero posed an immediate threat to the safety of the officers and, therefore, believed he was justified using that amount of force.

Plaintiffs cite *Park v. Shiflett*, 250 F.3d 843 (4th Cir. 2001), in support of their excessive force claim. That case, however, is distinguishable in two significant ways. The officers in *Park* had secured the scene and had detained the parties before deploying pepper spray and the spray was deployed twice at a range of approximately 18 inches on a handcuffed subject. *Id.* at 848. Here, the officers had not yet secured the scene, which was tense, uncertain, and still evolving. The parties had not yet been detained, and it is undisputed that Mr. Guerrero was walking toward the officers when Officer Potes deployed pepper spray on Mr. Guerrero from a distance of "less than five feet." (Potes Dep. at 113:9.)

Plaintiffs also argue that Officer Potes's history of using pepper spray, which he had used in five previous instances, and the Prince William County Police Department's force escalation policy should weigh against the reasonableness of the force used. These factors, however, are subjective and specific to Officer Potes, where the excessive force inquiry is objective, from the perspective of the reasonable officer. Though in retrospect Officer Potes's use of pepper spray may have been mistaken, a reasonable officer in his position could have believed the circumstances justified the amount of force.

c. Tightening the Handcuffs

Plaintiffs next allege that Officers Muelhauser and Moore used unreasonable force when they tightened Ms. Guerrero's handcuffs. Plaintiffs state that Ms. Guerrero suffered pain from the handcuffs, but do not allege that she suffered any injury from them. (P. Opp. at 5.) A reasonable officer in Defendants position would have believed the circumstances justified handcuffing Ms. Guerrero, and even taking as true that Defendants tightened Ms. Guerrero's handcuffs, no reasonable juror could find for Plaintiffs as to this claim. *See Carter v. Morris*, 164 F.3d 215, 219 n. 3 (4th Cir. 1999) (finding that claim that handcuffs were too tight was too insubstantial to state a claim of excessive force under the Fourth Amendment).

For the reasons set forth above, the Court finds that Officers Moore, Potes, Hurley, Caplan, and Muehlhauser are entitled to qualified immunity as to and will grant Defendants' summary judgment motion with respect to Plaintiffs' Count II as to these Defendants.

**B. Counts I and II as to the County and Chief Deane**

Plaintiffs allege the Constitutional violations in Counts I and II against Prince William County and Chief Deane, in his official capacity. Prince William County and Chief Deane, according to Plaintiffs, enacted policies and practices that encouraged the violation of constitutional rights and failed to discipline and to properly investigate those

violations in violation of § 1983. Defendants move for summary judgment as to Prince William County and Chief Deane with respect to both Counts I and II.

In *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Supreme Court established that a municipality or a local governing body may be sued for federal claims under § 1983 when its employee's unconstitutional actions are taken in the course of executing a governmental policy or custom. If "the constitutional deprivation is not an official act of the municipality," however, then "recovery lies only against the officer in his official capacity." *Moultrie v. Mitchell*, No. 93-1510, 1995 U.S. App. LEXIS 958, 1995 WL 24891, at \*1 (4th Cir. Jan. 18, 1995) (citing *Hughes v. Blankenship*, 672 F.2d 403, 405-06 (4th Cir. 1982)).

To determine the liability of a municipality, courts must "(1) identify[] the specific policy or custom; (2) fairly attribute[] the policy and fault for its creation to the municipality; and (3) find[] the necessary affirmative link between identified policy or custom and specific violation" *Spell v. McDaniel*, 824 F.2d 1380, 1389 (4th Cir. 1987), cert. denied, 484 U.S. 1027, 108 S. Ct. 752, 98 L. Ed. 2d 765 (1988) (internal quotation marks omitted). Municipal liability "will attach only for those policies or customs having a 'specific deficiency or deficiencies . . . such as to make the specific violation almost bound to happen, sooner or later, rather than merely likely to happen in the long run.'" *Carter*, 164 F.3d at 218 (quoting *Spell*, 824 F.2d at 1390 (internal quotation marks omitted) (emphasis removed). As

the Fourth Circuit has stated, "the substantive requirements for establishing municipal liability for police misconduct are stringent indeed. The critical Supreme Court decisions have imposed this stringency in a deliberate effort to avoid the indirect or inadvertent imposition of forms of vicarious liability rejected in *Monell*." *Spell*, 824 F.2d at 1391.

With respect to Officer Deane, this Court has noted that "[d]ecisions in this circuit are divided as to whether a police chief or sheriff is a policymaker for § 1983 purposes." *Donaggio v. Arlington County, Va.*, 880 F.Supp. 446, 462 (E.D. Va. 1995) (surveying various cases). For present purposes, however, the Court will assume, arguendo, that Chief Deane could be a policymaker for § 1983 purposes.

a. Official Policy

Plaintiffs allege that the Resolution contributed to an atmosphere of distrust between police officers and Hispanic citizens and encouraged police officers to take liberties with the constitutional rights of Hispanic residents. (P. Opp. at 23.) According to Plaintiffs, the only reasonable explanation for why Ms. Guerrero was treated inhumanely was because of the County's immigration policy. *Id.*

Even assuming that the Resolution's directives had been implemented on November 24, 2007, and even assuming those policies caused an atmosphere of distrust between police officers and Hispanic citizens, Plaintiffs have made no showing of the necessary affirmative link between identified



policy or custom and specific violation at issue here. Plaintiffs do not allege that any officer involved in this case ever inquired into the citizenship of any of the Guerreros or otherwise illustrated any concern as to whether the Guerreros were illegal immigrants. Moreover, in their initial exchange, the logical point at which to ask about immigrant status, Officer Moore did not ask Ms. Guerrero for any identification. (P. SMJ at 17.)

b. Deliberate Indifference

Plaintiffs argue that the County and Chief Deane's failure to investigate the use of force complaint regarding the incident at issue here constitutes "deliberate indifference" subjecting the County and Chief Deane to liability under § 1983. (P. Opp. at 24.) Under this claim, Plaintiffs effectively argue municipal liability attaches because of a "custom or usage" that resulted in the constitutional violations in Counts I and II.

In certain instances, municipalities may be liable under § 1983 without having directly authorized or implemented a policy that results in constitutional violations. See *Spell*, 824 F.2d at 1390. This "custom or usage" liability may attach when public employees "fall into patterns of unconstitutional conduct" that "become sufficiently widespread" that they assume the quality of "custom or usage." *Id.* Such a developed "custom or usage" may then become the basis of municipal liability, "but only if its continued existence can be laid to the fault of municipal policymakers, and a sufficient causal connection between the 'municipal custom

and usage' and the specific violation can then be established." *Id.* As set forth in Spell, "[m]unicipal fault for allowing such a developed 'custom or usage' to continue requires (1) actual or constructive knowledge of its existence by responsible policymakers, and (2) their failure, as a matter of specific intent or deliberate indifference, thereafter to correct or stop the practices." *Id.* at 1391. "Constructive knowledge may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of these." *Id.* Municipal liability may attach when "either [] the municipal governing body itself, or [] municipal officials having final policymaking authority in municipal law enforcement matters" have the requisite inculcating knowledge. *Id.*

As the basis of their "custom or usage" claim, Plaintiffs state that Officer Moore was disciplined "several" times during his career with the Department, and "on at least a couple of occasions, he did not act professionally." (P. Opp. at 25.) As to Officer Potes "excessive" use of pepper spray, Plaintiffs state that the County and Chief Deane "appear" to ignore the five times Potes has used pepper spray. *Id.* With respect to Officer Moore, the Plaintiffs have not shown that any of the "several" prior incidents were related to unconstitutional conduct. With respect to Officer Potes, even assuming each of the five uses of pepper spray was unconstitutional conduct, and assuming five instances qualifies as "sufficiently widespread," Plaintiffs have made no showing that the County

and Chief Deane had even constructive knowledge of the practices, but have shown only that they "appear to have ignored" them.

For these reasons, the Court finds that the County and Chief Deane are entitled to qualified immunity as to Counts I and II, and the Court will grant Defendants' summary judgment motion with respect to Plaintiffs' Counts I and II as to the County and Chief Deane.

### **C. Virginia State-Law Claims**

The Court now turns to Plaintiffs state law claims. Plaintiffs have alleged five Virginia state law claims against Defendants Moore, Potes, Hurley, Caplan, and Muelhauser, in their official and individual capacities: Count III, assault, under Va. Code. § 18.2-57; Count IV, battery, under Va. Code. § 18.2-56; Count V, false arrest and imprisonment; Count VI, intentional infliction of emotional distress; and Count VII, negligent infliction of emotional distress. The Court will address each of these claims in turn. Only Defendants move for summary judgment with respect to the Virginia state-law claims.

#### **i. Counts III: Assault and Count IV: Battery**

Plaintiffs allege that Officers Moore, Potes, Hurley, Caplan, and Muelhauser committed assault and battery when they forcibly entered the Guerrero home knocking Ms. Guerrero to the ground, used pepper spray on Mr. Guerrero, and tightened Ms.

Guerrero's handcuffs.

In Virginia, "[a] plaintiff's assault or battery claim can be defeated by a legal justification for the act." *Ware*, 652 F. Supp. 2d at 712 (citing *Koffman v. Garnett*, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003)). Virginia law recognizes that police officers are legally justified in using reasonable force to execute their lawful duties. See, e.g., *Pike v. Eubank*, 197 Va. 692, 90 S.E.2d 821 (1956). Accordingly, if reasonable force is used by police officers in execution of their lawful duties, they are immune from suit for such acts.

As discussed above, the Court finds that the officers used reasonable force in the instances at issue here. Thus, the Court finds that Officers Moore, Potes, Hurley, Caplan, and Muelhauser cannot be liable for assault and battery under Virginia law.

ii. Count V: False Arrest and Imprisonment

Plaintiffs allege that Officers Moore, Potes, Hurley, Caplan, and Muelhauser falsely arrested and imprisoned Mr. and Ms. Guerrero.

In *DeChene v. Smallwood*, 226 Va. 475, 479, 311 S.E.2d 749 (1984), the Supreme Court of Virginia made clear that a law enforcement officer may not be held liable for a false arrest if the officer acted "in good faith and with probable cause." *Id.* (quoting *Pierson v. Ray*, 386 U.S. 547, 555, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967)). To establish the defense, an officer "need not allege and prove

probable cause in the constitutional sense." *Id.* (internal quotation marks and citation omitted). Instead, the officer must allege and prove (i) that he believed in good faith that the arrest was lawful and (ii) that his belief was reasonable. *Id.*

As set forth above, this Court finds that the seizures of Mr. and Ms. Guerrero were lawful. Accordingly, Officers Moore, Potes, Hurley, Caplan, and Muelhauser cannot be liable for false arrest and imprisonment under Virginia law.

iii. Count VI: Intentional Infliction of Emotional Distress

Plaintiffs next allege that Officers Moore, Potes, Hurley, Caplan, and Muelhauser committed intentional infliction of emotional distress when they forcibly entered the Guerrero home, knocked down Ms. Guerrero, used pepper spray on Mr. Guerrero, and arrested them in front of the Guerrero children, elderly mother, and neighbors.

Actions for intentional infliction of emotional distress are disfavored in Virginia. *Ware*, 652 F. Supp. 2d at 714. To recover on this claim, Plaintiffs must prove that "the wrongdoer's conduct is intentional or reckless; the conduct is outrageous or intolerable; the alleged conduct and emotional distress are causally connected; and the distress is severe." *Veney v. Ojeda*, 321 F. Supp. 2d 733, 748 (E.D. Va. 2004) (citations omitted). Significantly, the outrageous conduct required to prove this tort has been described by the Supreme Court of Virginia as conduct that is "so extreme in degree, as to go

beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Russo v. White*, 241 Va. 23, 26, 400 S.E.2d 160, 7 Va. Law Rep. 1253 (1991) (internal citations omitted). With respect to the fourth element, severe emotional distress, "liability arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it." *Id.* at 27 (internal citations omitted).

Here, Plaintiffs' claim must fail. Even taking the evidence in the light most favorable to Plaintiffs, Defendants conduct was not so extreme in degree as to go beyond all possible bounds of decency, to be regarded as atrocious and utterly intolerable in a civilized community. As set forth above, Defendants acted reasonably under the circumstances in effecting the seizures of Mr. and Ms. Guerrero. While their conduct was not ideal, it was not utterly intolerable in a civilized society. Therefore, Officers Moore, Potes, Hurley, Caplan, and Muelhauser cannot be liable for intentional infliction of emotional distress under Virginia law.

iv. Count VII: Negligent Infliction of Emotional Distress

Plaintiffs next allege that Officers Moore, Potes, Hurley, Caplan, and Muelhauser committed negligent infliction of emotional distress based on the same conduct as the claim of intentional infliction of emotional distress.

In *Hughes v. Moore*, 214 Va. 27, 34, 197 S.E.2d 214, 219 (1973), the Supreme Court of Virginia held that "where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone." The requisite physical injury for a claim of negligent infliction of emotional distress must be the "natural result of fright or shock proximately caused by the defendant's negligence. In other words, there may be recovery in such a case if, but only if, there is shown a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury," i.e., the physical injury must be the result of emotional distress. *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 137-38, 523 S.E.2d 826 (2000) (internal citations and quotation marks omitted.)

Plaintiffs have illustrated physical injury resulting from the incidents at issue in this case. Plaintiffs have also illustrated emotional injuries resulting from those incidents. Plaintiffs, however, have not shown that the physical injuries are a result of the emotional injuries, i.e., they have not claimed any physical injury that is the natural result of emotional disturbance proximately caused by Defendants alleged negligence. Thus, Officers Moore, Potes, Hurley, Caplan, and Muelhauser cannot be liable for negligent infliction of emotional distress under Virginia law.

#### **IV. Conclusion**

For these reasons, the Court will grant in part and deny in part Defendants Renewed Motion for Summary Judgment. With respect to Plaintiffs' unreasonable search claim under Count I, Defendants' Motion is denied as to Defendant Moore and granted as to all other Defendants; with respect to Plaintiffs' unreasonable seizure claim under Count I, Defendants' Motion is granted as to all Defendants; with respect to each of Plaintiffs' claims under Counts II, III, IV, V, VI, and VII, Defendants' Motion is granted as to all Defendants.

The Court will deny Plaintiffs' Motion for Partial Summary Judgment in all respects.

An appropriate Order will issue.

October 27, 2010  
Alexandria, Virginia

/s/

James C. Cacheris

UNITED STATES DISTRICT COURT JUDGE



UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 10-2177  
(1:09-cv-01313-JCC-TRJ)

ESPERANZA GUERRERO,  
Plaintiff - Appellee,

and

MARIA MUNGUIA; JUAN GUERRERO; JG, Minor;  
KG, Minor; JJG, Minor; MG, Minor,  
Plaintiffs,

v.

DAVID L. MOORE, in his official and individual  
capacity,

Defendant - Appellant,

and

CHARLIE T. DEANE, in his official capacity; LUIS  
POTES, in his official and individual capacity;  
ADAM HURLEY, in his official and individual  
capacity; DOES 1-6, in their official and individual  
capacities; ROES 1-5, in their official and individual  
capacities; PRINCE WILLIAM COUNTY POLICE  
DEPARTMENT; PRINCE WILLIAM COUNTY;  
MATTHEW CAPLAN, in his official and individual  
capacity; KAREN MUELHAUSER, in her official  
and individual capacity; DOES 1-5, in their official  
and individual capacities,

Defendants

**O R D E R**

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Keenan and Judge Wynn.

For the Court  
/s/ Patricia S. Connor, Clerk

FILED: September 6, 2011

## **CONSTITUTIONAL PROVISIONS**

### **Fourth Amendment to the Constitution of the United States:**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.

## **STATUTORY PROVISIONS**

### **Virginia Code Section 19.2-72.** When it may issue; what to recite and require:

On complaint of a criminal offense to any officer authorized to issue criminal warrants he shall examine on oath the complainant and any other witnesses, or when such officer shall suspect that an offense punishable otherwise than by a fine has been committed he may, without formal complaint, issue a summons for witnesses and shall examine such witnesses. A written complaint shall be required if the complainant is not a law-enforcement officer. If upon such examination such officer finds that there is probable cause to believe the accused has committed an offense, such officer shall issue a warrant for his arrest, except that no magistrate may issue an arrest warrant for a felony offense

upon the basis of a complaint by a person other than a law-enforcement officer or an animal control officer without prior authorization by the attorney for the Commonwealth or by a law-enforcement agency having jurisdiction over the alleged offense. The warrant shall (i) be directed to an appropriate officer or officers, (ii) name the accused or, if his name is unknown, set forth a description by which he can be identified with reasonable certainty, (iii) describe the offense charged with reasonable certainty, (iv) command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the offense was allegedly committed, and (v) be signed by the issuing officer. The warrant shall require the officer to whom it is directed to summon such witnesses as shall be therein named to appear and give evidence on the examination. But in a city or town having a police force, the warrant shall be directed "To any policeman, sheriff or his deputy sheriff of such city (or town)," and shall be executed by the policeman, sheriff or his deputy sheriff into whose hands it shall come or be delivered. A sheriff or his deputy may execute an arrest warrant throughout the county in which he serves and in any city or town surrounded thereby and effect an arrest in any city or town surrounded thereby as a result of a criminal act committed during the execution of such warrant. The venue for the prosecution of such criminal act shall be the jurisdiction in which the offense occurred.

**Virginia Code Section 19.2-73.** Issuance of summons instead of warrant in certain cases:

A. In any misdemeanor case or in any class of misdemeanor cases, or in any case involving complaints made by any state or local governmental official or employee having responsibility for the enforcement of any statute, ordinance or administrative regulation, the magistrate or other issuing authority having jurisdiction may issue a summons instead of a warrant when there is reason to believe that the person charged will appear in the courts having jurisdiction over the trial of the offense charged.

B. If any person under suspicion for driving while intoxicated has been taken to a medical facility for treatment or evaluation of his medical condition, the officer at the medical facility may issue, on the premises of the medical facility, a summons for a violation of § 18.2-266, 18.2-266.1, 18.2-272 or 46.2-341.24 and for refusal of tests in violation of subsection A of § 18.2-268.3 or subsection A of § 46.2-341.26:3, in lieu of securing a warrant and without having to detain that person, provided that the officer has probable cause to place him under arrest. The issuance of such summons shall be deemed an arrest for purposes of Article 2 (§ 18.2-266 et seq.) of Chapter 7 of Title 18.2.

C. Any person on whom such summons is served shall appear on the date set forth in same, and if such person fails to appear in such court at such time and on such date then he shall be treated in accordance with the provisions of § 19.2-128, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.

**Virginia Code Section 19.2-76.** Execution and return of warrant, capias or summons; arrest outside county or city where charge is to be tried:

A law-enforcement officer may execute within his jurisdiction a warrant, capias or summons issued anywhere in the Commonwealth. A warrant or capias shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally.

If the accused is a corporation, partnership, unincorporated association or legal entity other than an individual, a summons may be executed by service on the entity in the same manner as provided in Title 8.01 for service of process on that entity in a civil proceeding. However, if the summons is served on the entity by delivery to a registered agent or to any other agent who is not an officer, director, managing agent or employee of the entity, such agent shall not be personally subject to penalty for failure to appear as provided in § 19.2-128, nor shall the agent be subject to punishment for contempt for failure to appear under his summons as provided in § 19.2-129.

The law-enforcement officer executing a warrant or capias shall endorse the date of execution thereon and make return thereof to a judicial officer. The law-enforcement officer executing a summons shall endorse the date of execution thereon and make return thereof to the court to which the summons is returnable.

Whenever a person is arrested upon a warrant or capias in a county or city other than that in which the charge is to be tried, the law-enforcement officer making the arrest shall either (i) bring the accused forthwith before a judicial officer in the locality where the arrest was made or where the charge is to be tried or (ii) commit the accused to the custody of an officer from the county or city where the charge is to be tried who shall bring the accused forthwith before a judicial officer in the county or city in which the charge is to be tried. The judicial officer before whom the accused is brought shall immediately conduct a bail hearing and either admit the accused to bail or commit him to jail for transfer forthwith to the county or city where the charge is to be tried.

OFFICE OF THE ATTORNEY GENERAL OF THE  
STATE OF VIRGINIA

Op. No. 03-064

2003 Va. AG LEXIS 59

September 16, 2003

**REQUEST BY:**

The Honorable Gary W. Waters  
Sheriff for the City of Portsmouth

**OPINION BY:**

Jerry Kilgore, Attorney General

**OPINION:**

**Issue Presented**

You ask whether law-enforcement officers have authority to enter a dwelling without a warrant for the purpose of serving a summons for a misdemeanor, if they know the individual they are seeking to serve is within the dwelling.



## **Response**

It is my opinion that a law-enforcement officer may not enter a dwelling without a warrant or consent of the dwelling owner for the purpose of serving a summons for a misdemeanor.

## **Background**

You relate that a deputy sheriff charged with serving a summons on an individual for failure to pay child support observed the individual inside the dwelling, opened the door, and served the summons.

## **Applicable Law and Discussion**

Section 19.2-76 requires that "[a] warrant or capias shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally." Section 19.2-77 provides that, "whenever a person shall flee from an officer attempting to arrest him, such officer, with or without a warrant, may pursue such person anywhere in the Commonwealth and, when actually in close pursuit,<sup>1</sup> may arrest him wherever he is found." Because the General Assembly made the close pursuit statute applicable only to an officer attempting to arrest a suspect, § 19.2-77 does not

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<sup>1</sup> "'Close pursuit' is a relative term and has reference to time or distance, or both, depending on the facts of the case." *Callands v. Commonwealth*, 208 Va. 340, 342-43, 157 S.E.2d 198, 201 (1967), cited in *Neiss v. Commonwealth*, 16 Va. App. 807, 810, 433 S.E.2d 262, 264 (1993).

encompass the effort to execute a summons.

The Supreme Court of the United States and courts in Virginia consistently have recognized that, under the Fourth Amendment,<sup>2</sup> a firm line is drawn at the threshold of a home, which may not be crossed without a warrant, absent exigent circumstances.<sup>3</sup> These courts have recognized that close pursuit is an exigent circumstance that may permit an officer to pursue a suspect into a residence where he otherwise would not be permitted to go.<sup>4</sup>

A 1980 opinion of the Attorney General concludes that, absent exigent circumstances, an arrest warrant must be obtained as a prerequisite to entering the home of an accused to effectuate a felony arrest.<sup>5</sup> Under the facts you present, a

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<sup>2</sup> The Fourth Amendment to the Constitution of the United States, made applicable to states by the Fourteenth Amendment, protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

<sup>3</sup> See *Payton v. New York*, 445 U.S. 573, 590 (1980); *Jones v. Commonwealth*, 29 Va. App. 363, 368, 512 S.E.2d 165, 167 (1999).

<sup>4</sup> See, e.g., *United States v. Santana*, 427 U.S. 38 (1976) (officers in hot pursuit of respondent suspected of possessing marked money used to buy heroine); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967) (officers in hot pursuit of armed robbery suspect), cited in *Lugar v. Commonwealth*, 214 Va. 609, 629, 202 S.E.2d 894, 909 (1974); *Commonwealth v. Talbert*, 23 Va. App. 552, 478 S.E.2d 331 (1996) (officer in hot pursuit of defendant suspected of having rock of crack cocaine).

<sup>5</sup> 1980-1981 Op. Va. Att'y Gen. 15, 16.

summons was issued instead of an arrest warrant. Although such a summons, if served, would commence misdemeanor proceedings against the person served, the summons is not, for all purposes, an adequate substitute for an arrest or a search warrant. The issuance of a misdemeanor summons does not constitute a judicial determination that the right of privacy in a home is required to yield to an officer's purpose.<sup>6</sup>

Although the question you ask has not been answered directly by Virginia's courts under the facts you present, other courts considering similar cases have reached the conclusion that, absent exigency, an officer may not enter private premises without a warrant in order to arrest on a charging instrument or to serve papers.<sup>7</sup>

## **Conclusion**

The officer's duty to serve a misdemeanor summons

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<sup>6</sup> See *Johnson v. United States*, 333 U.S. 10, 14 (1948).

<sup>7</sup> See, e.g., *United States v. Bradley*, 922 F.2d 1290, 1295 (6th Cir. 1991) (holding that warrantless arrest of defendant in his home on felony indictment was unconstitutional), overruled on other grounds, *United States v. McGlockin*, 8 F.3d 1037 (1993); *Gateway 2000, Inc. v. Limoges*, 552 N.W.2d 591 (S.D. 1996) (ruling that corporation had justifiable expectation of privacy in nonpublic employee work areas, and was entitled to injunction against officers entering nonpublic employee areas to serve papers on employees); *In re: Walters*, 229 N.C. 111, 47 S.E.2d 709 (1948) (holding that respondent did not commit contempt of court in refusing to permit officers to enter home without search warrant for purpose of serving civil process on third party).

does not create an exigency similar to those considered by the federal and state courts in circumstances where they have approved warrantless entry to effectuate a felony arrest. Accordingly, absent consent of a dwelling owner, a law-enforcement officer must obtain a warrant before entering a dwelling for the purpose of serving a summons for a misdemeanor.

OFFICE OF THE ATTORNEY GENERAL OF THE  
STATE OF VIRGINIA

1982 Va. AG LEXIS 326; 1982-1983 Op. Atty Gen.  
Va. 18

August 20, 1982

**REQUEST BY:**

Honorable John E. Kloch  
Commonwealth's Attorney for the City of Alexandria

**OPINION BY:**

Gerald L. Baliles, Attorney General

**OPINION:**

You have referred to § 19.2-73, et seq., of the Code of Virginia and inquired (1) whether a law-enforcement officer, armed with a summons issued pursuant thereto, may search a suspect's premises for the suspect, if he has probable cause to believe that the suspect is inside, and if so, (2) what degree of force he may use in executing this search. You have indicated that this question relates only to execution of a summons issued by a magistrate or other judicial officer and you have further assumed the absence of exigent circumstances or consent.

Sections 19.2-73 and 19.2-74 specifically authorize both judicial and law-enforcement officers to issue a summons in lieu of a warrant for misdemeanor offenses therein prescribed. These statutory sections contemplate a suspect's giving his written promise to appear in cases where a summons has been issued. A suspect who refuses to give that promise may be taken to a magistrate. *See* § 19.2-74(A)(3).

In an Opinion found in the 1977-1978 Report of the Attorney General at 497, this Office stated that warrants and summonses constitute alternate forms of arrest process. A law-enforcement officer may conduct a search in a suspect's own house in order to make an arrest on the basis of a felony warrant issued by a judicial officer. *Payton v. New York*, 445 U.S. 573 (1980).

With respect to service with a summons on individuals, § 19.2-76 provides that "a summons shall be executed by delivering a copy to the accused personally . . . ." It would be inconsistent with the general provisions of criminal law to permit an individual to avoid service of a summons by merely refusing to open his door. Indeed, in *Payton*, *supra*, the court held that the arrest warrant required the suspect to "open his doors to the officers of the law . . . ." Moreover, there is no basis in the Code for concluding that the duty to execute a summons is less than the duty to execute an arrest warrant. In my opinion, therefore, the officer's authority and duty carries with it the right to conduct a search of a suspect's own premises for the suspect in cases where such is necessary in order to execute the

summons.<sup>1</sup>

I find no authority to the effect that less force must be used by a law-enforcement officer in conducting a search in order to serve a misdemeanor summons than in the case where such a search is being conducted in order to make an arrest for a felony. In the case of a felony, a reasonable amount of force may be used,<sup>2</sup> and, therefore, in my opinion, a law-enforcement officer may use a reasonable amount of force in conducting a search in order to make service of a misdemeanor summons issued by a judicial officer.

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<sup>1</sup> This authority would not extend to search of a third party's premises in the absence of a search warrant. *Steagall v. United States*, 451 U.S. 204 (1981).

<sup>2</sup> *Parker v. McCoy*, 212 Va. 808, 188 S.E.2d 222 (1972).