

SUBJECT INDEX

	Page
Table of citations	iii
Assignments of error	1
Statement of the questions presented	2
Statement of the nature of the case and of the material proceedings in the trial court.....	3
Statement of the facts	5
Summary of argument	10
Principles of law, argument, and authorities	
1. As a matter of law, the trial court in this wrongful death action erred in concluding that the facts did not present a jury issue as to whether the actions of a police officer were willful and wanton or grossly negligent, under the circumstances of this case. (Those circumstances include the following. The defendant Sgt. Ingram, an employee of the Richmond Police Department, fired a 12 gauge shotgun five times at point blank range at an apartment’s wooden door in an attempt to gain entry. His ammunition was a #22 TKO -- a specialty round designed to destroy a door’s hardware and then disintegrate into a fine (and relatively harmless) powder. Sgt. Ingram was familiar with the #22 TKO, having shot it on ten or so different occasions and even having taught others how to use it. The first #22 TKO severed the door’s metal latchbolt and disintegrated into a fine powder. When the door did not open, instead of turning the knob or hitting the door with a battering ram, he fired four more #22 TKOs into the space below where the latchbolt had been and above the knob -- a space where there was no hardware. With each shot he assumed that there might be someone on the other side of the door, and with each of the last four shots he violated the FBI/RPD aiming rule: “AIM SHOTGUN . . . AT THE LATCHBOLT BETWEEN THE LOCK AND THE FRAME.” As a result, lethal slug fragments from one of the last four #22 TKOs blasted through the wooden door without hitting metal, killing the plaintiff’s decedent -- an innocent, eighteen year old woman.)	12

2.	As a matter of law, the trial court was wrong to conclude that evidence of heroin and guns was somehow relevant and hence admissible, where such evidence was not discovered until after the defendant police officer killed the plaintiff's decedent.	16
Conclusion		20
Certificate		21

TABLE OF CITATIONS

Cases

<i>Alfonso v. Robinson</i> , 257 Va. 540, 514 S.E.2d 615 (1999)	14
<i>Dandridge v. Marshall</i> , 267 Va. 591, 594 S.E.2d 578 (2004)	20
<i>Griffin v. Shively</i> , 227 Va. 317, 315 S.E.2d 210 (1984)	13, 14, 18, 19
<i>Jackson v. Chesapeake & Ohio Ry. Co.</i> , 179 Va. 642, 20 S.E.2d 489 (1942)	18
<i>Koffman v. Garnett</i> , 265 Va. 12, 574 S.E.2d 258 (2003)	15

Statutes

<i>Virginia Code</i> section 8.01-384	16
---------------------------------------	----

ASSIGNMENTS OF ERROR:

1. As a matter of law, the trial court in this wrongful death action erred in concluding that the facts did not present a jury issue as to whether the actions of a police officer were willful and wanton or grossly negligent, under the circumstances of this case. (Those circumstances include the following. The defendant Sgt. Ingram, an employee of the Richmond Police Department, fired a 12 gauge shotgun five times at point blank range at an apartment's wooden door in an attempt to gain entry. His ammunition was a #22 TKO -- a specialty round designed to destroy a door's hardware and then disintegrate into a fine (and relatively harmless) powder. Sgt. Ingram was familiar with the #22 TKO, having shot it on ten or so different occasions and even having taught others how to use it. The first #22 TKO severed the door's metal latchbolt and disintegrated into a fine powder. When the door did not open, instead of turning the knob or hitting the door with a battering ram, he fired four more #22 TKOs into the space below where the latchbolt had been and above the knob -- a space where there was no hardware. With each shot he assumed that there might be someone on the other side of the door, and with each of the last four shots he violated the FBI/RPD aiming rule: "AIM SHOTGUN . . . AT THE LATCHBOLT BETWEEN THE LOCK AND THE FRAME." As a result, lethal slug fragments from one of the last four #22 TKOs blasted through the wooden door without hitting metal, killing the plaintiff's decedent -- an innocent, eighteen year old woman.)

2. As a matter of law, the trial court was wrong to conclude that evidence of heroin and guns was somehow relevant and hence admissible, where such evidence was not discovered until after the defendant police officer killed the plaintiff's decedent.

STATEMENT OF THE QUESTIONS PRESENTED:

1. As a matter of law, did the trial court in this wrongful death action err in concluding that the facts did not present a jury issue as to whether the actions of a police officer were willful and wanton or grossly negligent, under the circumstances of this case? (Those circumstances include the following. The defendant Sgt. Ingram, an employee of the Richmond Police Department, fired a 12 gauge shotgun five times at point blank range at an apartment's wooden door in an attempt to gain entry. His ammunition was a #22 TKO -- a specialty round designed to destroy a door's hardware and then disintegrate into a fine (and relatively harmless) powder. Sgt. Ingram was familiar with the #22 TKO, having shot it on ten or so different occasions and even having taught others how to use it. The first #22 TKO severed the door's metal latchbolt and disintegrated into a fine powder. When the door did not open, instead of turning the knob or hitting the door with a battering ram, he fired four more #22 TKOs into the space below where the latchbolt had been and above the knob -- a space where there was no hardware. With each shot he assumed that there might be someone on the other side of the door, and with each of the last four shots he violated the FBI/RPD aiming rule: "AIM SHOTGUN . . . AT THE LATCHBOLT BETWEEN THE LOCK AND THE FRAME." As a result, lethal slug fragments from one of the last four #22 TKOs blasted through the wooden door without hitting metal, killing the plaintiff's decedent -- an innocent, eighteen year old woman.)

2. As a matter of law, was the trial court wrong to conclude that evidence of heroin and guns was somehow relevant and hence admissible, where such evidence was not discovered until after the defendant police officer killed the plaintiff's decedent?

STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT:

This is a wrongful death action arising out of the death of Christie D. Green (“Ms. Green”). There are two¹ defendants: George Ingram (“Sgt. Ingram”) and Defense Technology Corporation of America, a Delaware corporation (“Defense Technology”). In the Motion for Judgment, Ms. Green’s estate alleged that these two defendants were jointly and severally liable for compensatory damages resulting from Ms. Green’s death, based on theories of negligence, breach of warranty, and gross negligence. Her estate also sought punitive damages against both defendants. The trial court severed the trial of the claims against Defense Technology from the trial of the claims against Sgt. Ingram, and ordered Ms. Green’s estate to elect which claims to try first. Ms. Green’s administrator elected to try the claims against Defense Technology first. During the trial against Defense Technology, Ms. Green’s estate non-suited the claims against Defense Technology based on failure to warn, both as to the negligence count and as to the implied warranty.

In the trial against Defense Technology, the jury returned a defense verdict. Ms. Green’s estate appealed, assigning error to the trial court’s decision to sever and to admit certain evidence. This Court denied a writ by order entered July 24, 2002, stating “the Court is of opinion there is no reversible error in the judgment complained of.” By order entered September 13, 2002, this Court denied a petition for rehearing.

¹ Initially, there were other defendants: John B. Buckovich (dismissed as a defendant when the trial court in the second trial granted his motion to strike the plaintiff’s evidence); Armor Holdings (non-suited by the plaintiff); and Defense Technology of America (also non-suited by the plaintiff). The plaintiff has included Defense Technology Corporation of America, a Delaware corporation, as an appellee. She has done so in the belief that the judgment in favor of that corporation is not final at this stage of the litigation.

Next, the trial took place against the two policemen John B. Buckovich (“Officer Buckovich”) and Sgt. Ingram. Once the plaintiff rested these defendants moved to strike the plaintiff’s evidence. The trial court granted Officer Buckovich’s motion and denied Sgt. Ingram’s motion. Sgt. Ingram rested (presenting no evidence) and renewed his motion to strike. The trial court took Sgt. Ingram’s motion under advisement and submitted the case to the jury. When the jury deadlocked, the trial judge declared a mistrial. The trial court then denied the request of Ms. Green’s estate that a new jury be impaneled, granted Sgt. Ingram’s motion to strike, and entered final judgment in favor of Sgt. Ingram. This appeal followed, and by order entered October 1, 2004 this Court granted a writ in response to a petition for rehearing. Ms. Green’s estate is not appealing the trial court’s decision to strike the evidence as to Officer Buckovich.

The Honorable Randall G. Johnson decided all pre-trial motions, including the motion to sever, and was the trial judge for the second trial (the one involving Officer Buckovich and Sgt. Ingram).

The Honorable T. J. Markow presided at the first trial (the one involving Defense Technology).

STATEMENT OF THE FACTS:

1. Ms. Green's death.

On December 29, 1998, fragments from a 12 gauge shotgun round tore into Ms. Green's chest as she cowered in a small kitchen, attempting to shield herself and her three year old daughter Kevasha from a sudden outburst of gunfire. Her aorta perforated, Ms. Green fell on top of Kevasha and quickly bled to death. Kevasha was soaked in her mother's blood but was otherwise unharmed. For a photograph of Ms. Green's fatal chest wounds, please see Plaintiff's Exhibit 3 in the attachments at the back of this brief.² Ms. Green was survived by two statutory beneficiaries: daughters Kevasha and DiQasha (Kevasha's younger sister).³

2. Ms. Green: wrong place/wrong time.

For Ms. Green, it was a classic case of "wrong place, wrong time." She was a visitor at 1112 C Dove Street. She had arrived less than twenty minutes before the SWAT team fired its first shot. Ap.⁴ 683:17 - 684:6. She had no criminal record, no alcohol or drugs in her system, and she fired no weapon. Ap. 516:5 - 516:18.

² The attachments at the back of this brief are facsimiles of each of the exhibits mentioned by number in this brief. Those same exhibits appear at pages 282 - 289 of the Appendix.

³ The family pronounces these names as if they were spelled "Kuh Vaa Zha" and "Di Kwaa Zha."

⁴ Pages from the Appendix are referred to by the designation "Ap."

3. The police raid.

The sudden outburst of gunfire was the opening salvo in an attempt by the Richmond Police Department (“RPD”) to serve a search warrant for drugs and guns at 1112 C Dove Street, a small two story apartment. It began at approximately 11 PM when a number of things happened almost at the same time. Ap. 277 at 62:23 - 63:1 and Ap. 277-78 at 63:22 - 64:8. Officer Buckovich gave the signal to begin; another policeman created a diversion by using a crowbar-like tool to break the apartment’s front window; Sgt. Ingram’s team leader ordered Sgt. Ingram to “move;” Sgt. Ingram tried the kitchen door’s doorknob (which turned freely, but the deadbolt held the door shut); and Sgt. Ingram and another officer began firing shotguns. Sgt. Ingram’s target was the kitchen (or side) entrance door. The other officer’s target was the front door. Each officer emptied his shotgun into his respective target, firing five rounds each at point blank range, in an effort to breach (or force open) the doors. The two target doors were identical: exterior, heavy, composite wooden doors, with a passage (or lockless) knob set below a single cylinder deadbolt lock mortised into the door. Plaintiff’s Exhibit 16 shows the exterior of the kitchen door after Sgt. Ingram fired his five rounds into it.

In spite of these five blasts, the kitchen door did not open. His shotgun empty, Sgt. Ingram gave the door “one tap” with a battering ram (Ap. 263 at 56:17 - 56:19) and the door opened, disclosing Christie Green on the kitchen floor, bleeding to death on top of Kevasha.

4. Allegations against Sgt. Ingram.

The gist of the plaintiff's evidence against Sgt. Ingram is that he killed Ms. Green because he violated the applicable aiming rule that the RPD had obtained from the FBI. Plaintiff's Exhibit 1 is a copy of this aiming rule. It states: "AIM SHOTGUN AT A 45-DEGREE DOWN ANGLE AT THE LATCHBOLT BETWEEN THE LOCK AND THE FRAME." As a result, Ms. Green's estate claimed that Sgt. Ingram was grossly negligent (and hence not immune), and that this negligence was so egregious as to justify an award of punitive damages.

To avoid killing anyone inside the apartment, it was essential that Sgt. Ingram follow the FBI/RPD aiming rule strictly and aim only at the latchbolt -- the steel bolt that pulls back, out of the door jamb, as the door is unlocked. This is because the shotgun slug that Sgt. Ingram was using **can kill** if it goes through a wooden door without hitting metal first. On the other hand, when the slug hits metal, it disintegrates into a fine powder **and can not kill**. These slugs are specialty ammunition, designed to perform a special job -- namely, to demolish a lock that is holding a door shut, without endangering the people on the inside. Their brand name is "#22 TKO," whereas their generic name is "frangible round."

Sgt. Ingram knew well the FBI/RPD aiming rule. The FBI trained him in the use of frangible rounds. Ap. 633:22 - 634:2. The RPD got the rule from the FBI and included it in its own written instructions for breaching doors. Ap. 632:21 - 633:14. Sgt. Ingram taught it to others. Ap. 270 at 129:16 - 129:21. Even so, Sgt. Ingram broke the rule with each of the last four of his five shots.

Sgt. Ingram also knew well the performance characteristics of the #22 TKO. He had fired it at least ten times before he killed Ms. Green. Ap. 270 at 112:20 -113:5. This experience with the #22 TKO put Sgt. Ingram on notice as to the reason for the aiming rule. After all, in order to do its job the #22 TKO had to cut its way through the door's wood into which the deadbolt had been mortised and, after doing so, still retain enough power to cut through the latchbolt and then blast the severed latchbolt through the other side of the door.

One final point, and a critical one, about Sgt. Ingram's negligence: he testified that "[y]ou always assume that there might be somebody on the other side of the door, yes, sir." Ap. 266 at 76:9 - 76:10.

5. Causation related to Sgt. Ingram's actions.

There was substantial evidence that it was one of these last four shots, fired in violation of the FBI/RPD aiming rule, that killed Ms. Green: for example, because, after activating the light under the barrel of his shotgun (Ap. 273 at 152:17 - 153:18), Sgt. Ingram aimed at the latchbolt at point blank range (Ap. 257 at 36:10 - 36:14 and Ap. 258 at 43:24 - 44:5), the shotgun at his shoulder and his eye on the gunsight (Ap. 257 at 36:21 - 37:1); because the #22 TKO "disintegrates into a fine powder upon impact" with metal (Plaintiff's Exhibit 25); because the entry points of the wounds (Plaintiff's Exhibit 3) suggest that Ms. Green was crouching when hit, whereas she had no reason to crouch until after Sgt. Ingram's first shot; and because Sgt Ingram testified that his shots were essentially vertical (Ap. 260 at 48:4 - 48:8):

Q So they were basically vertical?

A Vertical, more or less vertical, yes, sir.

Q And so no one shot was beside another shot?

A No, sir.

6. Sgt. Ingram's defenses.

Although Sgt. Ingram presented no evidence, he did testify as an adverse witness during Ms. Green's case in chief. In that testimony Sgt. Ingram told the jury that, after he began shooting, someone inside shot a pistol several times. Yet Sgt. Ingram also made clear that self-defense was not an issue (Ap. 266 at 75:15 - 75:21 and Ap. 267 at 81:9 - 81:12):

Q You weren't trying to hit anybody on the other side, were you?

A No, sir.

Q You weren't trying to defend yourself or others from shots you heard inside when you fired at that door?

A No, sir.

....

Q Because you heard a shot fired from inside the apartment, did you change your course of action in any way?

A No, sir.

Sgt. Ingram also testified that the reason he shot below the latchbolt was "to dislodge the dead bolt and anything that may have jammed up getting that door open, yes, sir." (Ap. 264 at 63:19 - 63:21). But he never reported seeing anything that looked like an obstruction; his shots were not aimed into the jamb (Plaintiff's Exhibit 19); and he neither turned the passage lock's door knob after his first shot nor shot that door knob's throw (Ap. 262-63 at 56:3 - 56:19 and Ap. 264 at 63:22 - 64:1).

SUMMARY OF ARGUMENT:

As a matter of law, the trial court was wrong to conclude that the facts did not present a jury issue as to the entitlement of Ms. Green's estate to compensatory and punitive damages against the defendant Sgt. Ingram, a Richmond police officer. True, Ms. Green's estate did not challenge the defense contention that Sgt. Ingram (as a police officer) was immune from claims for simple negligence. Yet even so, he disregarded the aiming rule of the FBI and of his own police department when he fired the last four of his five #22 TKO breaching rounds into the exterior of a kitchen door. That aiming rule required him to fire at the kitchen door's metal latchbolt. Instead, he fired those four shots below the latchbolt and into pure wood, killing Ms. Green. He was familiar with that aiming rule, since he had attended an FBI workshop where the FBI had taught it; Richmond included it in its own written training materials; and he had taught it to others. Furthermore, he was familiar with the performance of the #22 TKO specialty ammunition, and consequently had reason to know that it had lethal power upon exiting a wooden door unless it struck metal first. In addition, when he fired he assumed that "there might be somebody on the other side of the door, yes sir." Finally, since the jury hung, we know that at least one of the seven jurors was convinced that Sgt. Ingram was grossly negligent. Even so, after the jury hung, the trial judge denied the plaintiff's request to impanel a new jury and instead sustained Sgt. Ingram's motion to strike.

In that same trial against Sgt. Ingram, the trial court also committed reversible error when it admitted evidence that, after Sgt. Ingram fatally wounded Ms. Green, heroin and gun paraphernalia were found inside the apartment. This evidence included

photographs of heroin (Defense Exhibit 3), of an assault rifle (Defense Exhibit 4),⁵ and of a pistol silencer and banana clips (Defense Exhibit 5). There is no evidence that Christie Green knew of the heroin or had anything to do with it. Likewise, there is no evidence that the firearms and related paraphernalia depicted in Defense Exhibits 4 and 5 were used in the raid in which Sgt. Ingram killed Christie Green.

Such evidence was not relevant: it tended neither to prove nor to disprove that, before he got the kitchen door open, Sgt. Ingram's actions constituted gross negligence or justified an award of punitive damages; neither contributory negligence nor assumption of risk was an issue (the trial court having ruled *in limine* to exclude all evidence that Ms. Green assumed the risk or was contributorily negligent); and Sgt. Ingram did not claim self-defense.

At the same time, such evidence was devastating to Ms. Green's case: it tended to validate (retroactively and improperly) what Sgt. Ingram did; and it tainted Ms. Green with guilt by association.

⁵ The table of contents prepared by the trial court clerk refers to this exhibit as a "photograph of shotgun." This is not accurate. Instead, it is a photograph of an assault rifle found in the apartment where Sgt. Ingram killed Christie Green, inside a closet. Ap. 589:15 - 589:23.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES:

Argument.

1. **As a matter of law, the trial court in this wrongful death action erred in concluding that the facts did not present a jury issue as to whether the actions of a police officer were willful and wanton or grossly negligent, under the circumstances of this case. (Those circumstances include the following. The defendant Sgt. Ingram, an employee of the Richmond Police Department, fired a 12 gauge shotgun five times at point blank range at an apartment's wooden door in an attempt to gain entry. His ammunition was a #22 TKO -- a specialty round designed to destroy a door's hardware and then disintegrate into a fine (and relatively harmless) powder. Sgt. Ingram was familiar with the #22 TKO, having shot it on ten or so different occasions and even having taught others how to use it. The first #22 TKO severed the door's metal latchbolt and disintegrated into a fine powder. When the door did not open, instead of turning the knob or hitting the door with a battering ram, he fired four more #22 TKOs into the space below where the latchbolt had been and above the knob -- a space where there was no hardware. With each shot he assumed that there might be someone on the other side of the door, and with each of the last four shots he violated the FBI/RPD aiming rule: "AIM SHOTGUN . . . AT THE LATCHBOLT BETWEEN THE LOCK AND THE FRAME." As a result, lethal slug fragments from one of the last four #22 TKOs blasted through the wooden door without hitting metal, killing the plaintiff's decedent -- an innocent, eighteen year old woman.)**

Concerning punitive damages, the most salient facts are these:

- The FBI/RPD aiming rule was explicit: "aim shotgun . . . at the latchbolt between the lock and the frame."
- Four times Sgt. Ingram violated the FBI/RPD aiming rule when he fired below where the latchbolt had been, in a pattern that extended downward vertically, killing Christie Green. Plaintiff's Exhibit 16.
- Sgt. Ingram knew well this aiming rule, the FBI having taught it to him, the RPD having incorporated it into its lesson plan for breaching doors, and Sgt. Ingram even having taught it to others.

- Sgt. Ingram knew well the performance characteristics of the #22 TKO. He had fired it at least ten times before he killed Ms. Green. Furthermore, common sense put Sgt. Ingram on notice that wood alone would not cause the #22 TKO's slug to disintegrate into a harmless, fine powder. After all, in order to do its job, the #22 TKO had to cut its way through the door's wood before reaching and destroying the metal latchbolt, and then still retain enough power to blast the latchbolt remnant through the other side of the door.
- When Sgt. Ingram fired each of his shots, he assumed that there might be someone on the other side of the door.

On these facts, Virginia precedent requires the conclusion that Ms. Green's evidence presents a jury question as to whether the actions of Sgt. Ingram constituted willful and wanton negligence. *Griffin v. Shively*, 227 Va. 317, 322, 315 S.E.2d 210, 213 (1984), where this Court held:

We conclude that the evidence in the present case presents a jury issue whether Shively was guilty of willful and wanton negligence. The undisputed evidence is that Shively consciously discharged a deadly weapon in close proximity to a number of people in a relatively small room. We believe a jury reasonably could find that this conduct, in light of the surrounding circumstances, established willful and wanton negligence. On the other hand, a jury reasonably could conclude that Shively's conduct did not rise to that degree of culpability.

(In *Shively*, the trial court struck the plaintiff's evidence on grounds that the plaintiff's decedent was guilty of contributory negligence as a matter of law. The plaintiff's decedent, knowing that the defendant Shively was deathly afraid of snakes and had a pistol, flung a black belt toward Shively, who shot at it, unintentionally killing the

prankster. This Court concluded that the evidence presented a question for the jury as to whether Shively's acts constituted willful and wanton negligence, entitling the plaintiff to a verdict in spite of the prankster's contributory negligence, and reversed the trial court's decision to strike the plaintiff's evidence.) *See Alfonso v. Robinson*, 257 Va. 540, 546, 514 S.E.2d 615, 619 (1999), holding that the trial court had correctly concluded that it was for the jury to decide whether a truck driver's conduct in failing to deploy safety flares and safety triangles constituted willful and wanton negligence and emphasizing that the defendant, a professional truck driver, "had received specialized safety training warning against the very omissions he made prior to the accident."

When measured against the benchmark of *Griffin v. Shively*, the facts of Ms. Green's case present a jury issue as to whether Sgt. Ingram's actions were willful and wanton:

- The FBI had taught Sgt. Ingram the applicable aiming rule. In contrast, there is no evidence that Shively had received any safety training.
- Sgt. Ingram had taught the FBI/RPD aiming rule to others. In contrast, there is no evidence that Shively had taught anyone anything about gun safety.
- Sgt. Ingram violated the FBI/RPD aiming rule on four successive shots. In contrast, there is no indication that Shively shot more than once.

At the same time, there are striking similarities between the actions of Sgt. Ingram and the actions of Shively: both men consciously discharged an obviously lethal weapon; both men fired that weapon into a small room; and whereas Shively consciously fired in close proximity to a number of people, Sgt. Ingram testified that "[y]ou always assume

that there might be somebody on the other side of the door, yes, sir.” Ap. 266 at 76:9 - 76:10.

Thus, the facts present a jury question as to whether Sgt. Ingram’s actions were willful and wanton, justifying an award of punitive damages, and the trial court committed reversible error to conclude otherwise.

Concerning gross negligence, the same evidence, and similar reasoning, compel the conclusion that the trial court also committed reversible error when it found that, as a matter of law, Sgt. Ingram had not committed gross negligence, and that consequently the claim of Ms. Green’s estate for compensatory damages must be struck. *Koffman v. Garnett*, 265 Va. 12, 15, 574 S.E.2d 258, 260 (2003) (the case involving the football coach who allegedly slammed a middle schooler to the ground), stating that “[w]hether certain actions constitute gross negligence is generally a factual matter for resolution by the jury....” Furthermore, we know for certain that, because the jury hung, at least one member of the jury was convinced that Sgt. Ingram’s actions constituted gross negligence.

Accordingly, Ms. Green’s estate asks this Court to reverse and remand for a jury trial as to compensatory damages as well as to punitive damages.

- 2. As a matter of law, the trial court was wrong to conclude that evidence of heroin and guns was somehow relevant and hence admissible, where such evidence was not discovered until after the defendant police officer killed the plaintiff's decedent.**

Over Ms. Green's objection, the trial court admitted evidence that, **after** Sgt. Ingram breached the kitchen door, heroin, guns, and related gun paraphernalia were found inside. For example, Defense Exhibits 3 (photograph of heroin), 4 (photograph of assault rifle), and 5 (photograph of a pistol, a pistol silencer, and other gun paraphernalia.) Citing no authority, the trial court admitted this evidence because:

It seems to me that what was actually the situation inside the apartment is relevant. I think the jury has a right to know that. I think the defendants have a right to have the jury know that, because I think it either lends credence or it takes away credence from what was the situation. I think the jury has a right to know that.

Ap. 405:6 - 405:12.⁶ Please note that self defense was not an issue. (Ap. 266 at 75:15 - 75:21 and Ap. 267 at 81:9 - 81:12).

The following is a portion of the trial testimony describing these photographs:

⁶ In *in limine* motions argued on three occasions, counsel for Christie Green's estate asked the trial court to exclude evidence of drugs and guns found inside the apartment after Sgt. Ingram fatally wounded Ms. Green. (9/25/03 transcript at various places, beginning at Ap. 295:11 and ending at Ap. 405:15; 9/30/03 transcript at various places, beginning at Ap. 420:7 and ending at 469:6; and 1/8/04 transcript at various places, beginning at Ap. 481:4 and ending at 496:2.) The briefs filed in anticipation of these three hearings and the orders memorializing those hearings set forth the basis for Ms. Green's opposition to this evidence. Based on the authorities and argument presented *in limine*, at trial the trial court recognized Ms. Green's standing objection to such evidence. Ap. 588:7 - 589:11 and 603:8 - 605:5. This is consistent with *Virginia Code* section 8.01-384, stating that a party need not repeat an objection in order to challenge a ruling on appeal.

Q Officer Provost, let me ask you to refer to what's been marked as Defendant's Exhibit 1. Now, in the middle of that picture on the floor right there, that's a handgun; is it not?

A Yes, it is.

Q That was one of the handguns that you found in the apartment after you went in to investigate; isn't that true?

A That's correct. That's my item number 20.

Q There are several items on the table in this picture; isn't that true?

A That's correct.

MR. CUTHBERT: Your Honor, I just want the record to reflect that I have a continuing objection, so I don't have to keep popping up.

THE COURT: Yes, sir. I appreciate that.

Q Referring now to Exhibit 2, that's a close-up of what's on the table; isn't that true?

A That's correct.

Q There is an even larger close-up of one of the items on the table; isn't that true?

A That's correct.

Q In Defendant's Exhibit 3, what is the item right here that appears to be in plastic?

A It's a plastic bag with numerous folded pieces of tinfoil folded with a white powder substance inside that was sent to the state lab.

Q As a part of your investigation, did you make a determination as to what that substance was?

A Yes, ma'am. It was heroin.

Q Were there any other illegal substances shown on this photograph?

A No, ma'am.

Q Now, in what's been marked as Defendant's Exhibit 4, describe for the jury, please, what that item is. Hold it up so the jury can see.

A Exhibit 4 is my item number 40, which is a rifle. It's an SKS 7.62 caliber.

Q Where is the area where this rifle is sitting? Do you know?

A Yes, ma'am. This is sitting in the closet, which is in the living room.

Q Referring to what's been admitted as Defendant's Exhibit 5, can you tell the jury, first of all, where these items were found?

A Yes, ma'am. That is, again, in the living room. My item number 32 is over near the table, but it's in that -- if you come in the kitchen door, it's directly to the left passed the table -- the dining room table.

Q Can you point on what's Plaintiff's Exhibit 18 to the area that you're speaking of where the items in Defendant's Exhibit 5 were found?

A Here's a table here. Over a little further in this corner, here is a dresser. When you pull the dresser drawer out, there was item number 32, which is a Haskell .45 caliber pistol.

Q Still referring to Defendant's Exhibit 5, what is the long round item right here?

A That is a silencer for a firearm.

Q What's the purpose of a silencer for a firearm?

A That's to muffle the gases that expel.

Q Is it legal to have those things?

A It's illegal to have that.

Ap. 588:7 - 590:21.

Contrary to the trial court's reasoning, however, "what was actually the situation inside the apartment" is not relevant. This is because the heroin and guns were found only **after** Sgt. Ingram fatally wounded Christie Green, and consequently have no probative value as to whether Sgt. Ingram acted reasonably **when** he fatally wounded her earlier that night. *Griffin v. Shively*, 227 Va. at 321, 315 S.E.2d at 213 ("Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, **with the defendant aware, from his knowledge of existing circumstances and conditions,** that his conduct probably would cause injury to another.") (Emphasis added). *Cf. Jackson v. Chesapeake & Ohio Ry. Co.*, 179 Va. 642, 649, 20 S.E.2d 489, 492 (1942), (referring to negligence "at the time of the injury complained of"). Instead, the only evidence probative of Sgt. Ingram's gross

negligence is the totality of information that he knew or reasonably should have known at the moment when he killed Christie.

Perhaps the trial court's error becomes more apparent if we assume the converse -- namely, that heroin and guns were not found inside the apartment after Sgt. Ingram killed Christie. Under these hypothetical circumstances, once again "what was actually the situation inside the apartment" would tend neither to prove nor to disprove Sgt. Ingram's fault at the moment when he killed Christie. This is because the hypothetical absence of heroin and guns, learned only after the fact, would not tend to prove or to disprove the reasonableness of his actions based on "his knowledge of existing circumstances and conditions" as *Griffin v. Shively* requires. To put it another way, these hypothetical facts would tend to invalidate, retrospectively and hence improperly, the actions of Sgt. Ingram, and it would be unjust to base Sgt. Ingram's liability upon facts that were not part of "his knowledge of existing circumstances and conditions." *Griffin v. Shively*.

Perhaps yet another hypothetical will underscore the trial court's error. Suppose that drugs and guns were found inside the apartment after Sgt. Ingram killed Christie, but that the drugs were powdered aspirin and that the guns were plastic. Would this after discovered evidence tend to prove that Sgt. Ingram was grossly negligent at the moment when he fired the fatal shot, before he ever knew that heroin and real guns were not inside?

In two ways, the evidence of heroin and guns, discovered only after Sgt. Ingram killed Christie, was devastating to Ms. Green's case: because it tended to validate, retrospectively and hence improperly, the actions of Sgt. Ingram; and because it tainted

Ms. Green with “guilt by association.” *Dandridge v. Marshall*, 267 Va. 591, 594 S.E.2d 578 (2004), holding that, in a personal injury action arising out of a motor vehicle accident, the trial court abused its discretion in allowing a psychiatrist called by the defense to testify that, as an example of impulsive behavior caused by the plaintiff’s depression, the plaintiff had used his limited funds to buy an “assault weapon” and ammunition rather than to obtain further medical treatment. This Court also held that the error was not harmless, explaining:

The mention of an assault weapon and ammunition distracts the jury from the matter at issue and prejudices *Dandridge*. . . .

. . . Well established principles require that error be presumed prejudicial unless the record clearly shows that the error could not have affected the result.

267 Va. at 596-97, 594 S.E.2d at 581-82.

CONCLUSION:

For these reasons, Katina Green, Administrator of the Estate of Christie D. Green, asks this Court to remand this matter for a trial in which a jury may consider awarding compensatory and punitive damages against Sgt. Ingram, without the tainting photographs of heroin and guns.

KATINA GREEN, Administrator
of the Estate of Christie D. Green

By _____
Counsel

Charles H. Cuthbert, Jr.
Margaret Cuthbert Broaddus
Cuthbert Law Offices
A Professional Corporation
220 North Sycamore Street
Petersburg, Virginia 23803-3228

CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that on November 9, 2004 I have caused twenty copies of this brief to be filed in the office of the Clerk of this Court and three copies to be mailed or delivered, on or before the date on which the brief is filed, to each opposing counsel, as follows:

William D. Bayliss, Esquire
Williams Mullen
P.O. Box 1320
Richmond, VA 23218-1320
804-643-1991
Counsel for Defense Technology Corporation of America,
a Delaware corporation

Beverly A. Burton, Esquire
Senior Assistant City Attorney
Office of the City Attorney
900 East Broad Street, Room 300
Richmond, VA 23219
(804) 646-7940
Counsel for George Ingram

Charles H. Cuthbert, Jr.
M:4

INDEX OF ATTACHMENTS

Plaintiff's Exhibits

1. FBI/RPD aiming rule.
3. Photograph showing Ms. Green's fatal chest wounds.
16. Photograph showing the exterior of the kitchen door.
19. Diagram drawn by Forensic Detective Provost.
25. Product literature concerning the #22 TKO.

Defense Exhibits

3. Photograph of heroin.
4. Photograph of an assault rifle found in closet.
5. Photograph of a pistol, a pistol silencer, and related gun paraphernalia found in a drawer.