

In The
Supreme Court of the United States

CRYSTAL A. KEITHLY,
Executrix of the Estate of
William Albert Cooper,
Petitioner,

v.

WAYNE ROBERTS
AND
JUAN FIGUEROA,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

JOINT BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	7
I. There are no considerations governing the instant Petition for Writ of Certiorari that mitigate in favor of granting the relief requested	7
II. Petitioner did not raise any federal claims in the trial court or the Virginia Supreme Court	11
III. The Virginia Courts did not err in striking the evidence and entering judgment in this case	14
CONCLUSION	18

TABLE OF AUTHORITIESCase Law

	<u>Page</u>
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	11
<i>Black v. Cutter Laboratories</i> , 351 U.S. 292 (1956)	9
<i>DeChene v. Smallwood</i> , 226 Va. 475, 311 S.E.2d 749 (1984)	13
<i>Elliott v. Carter</i> , — Va. —, 791 S.E.2d 730 (2016)	15
<i>Frazier v. City of Norfolk</i> , 234 Va. 388, 362 S.E.2d 688 (1987)	14
<i>Green v. Ingram</i> , 269 Va. 281, 608 S.E.2d 917 (2005)	14
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945)	9
<i>New York ex rel. Bryant v. Zimmerman</i> , 278 U.S. 63 (1928)	11
<i>Railway Company v. Barden</i> , 200 Va. 98, 104 S.E.2d 13 (1958)	16
<i>Town of Big Stone Gap v. Johnson</i> , 184 Va. 375, 35 S.E.2d 71 (1945)	14

TABLE OF AUTHORITIES (CONT'D)

	<u>Page</u>
<i>Webb v. Webb</i> , 451 U.S. 493 (1981)	12
<i>Yeatts v. Minton</i> , 211 Va. 402, 177 S.E.2d 646 (1970)	13

Statutes

28 U.S.C. § 1441	12
42 U.S.C. § 1983	12, 13, 17
Va. Code Ann. § 8.01-420	12

Rules of Court

Sup. Ct. R. 10	7
Fed. R. Civ. P 56	12

STATEMENT OF THE CASE

On November 1, 2016 following the presentation of Petitioner's evidence during a two-day jury trial for the wrongful death of William A. Cooper ("Cooper"), the Circuit Court for the City of Hampton, Virginia granted the Respondents' Motion to Strike the Petitioner's evidence based upon the fact that said evidence failed to make out a prima facie case of gross negligence. Thereafter, the trial court granted summary judgment for the Respondents. (Tr. 344-345)¹. Prior to trial, the trial court had limited the Petitioner from presenting extraneous evidence that did not relate to the proximate cause of Cooper's death, including prohibiting the Petitioner from presenting evidence as to what medications Cooper took as well as what evidence was or was not recovered from the home. The trial court's decision granting summary judgment was affirmed by the Supreme Court of Virginia. Petitioner now seeks a reversal of these decisions based upon Fourth Amendment principles. The facts summarized below are taken from the trial transcripts.

On June 18, 2011, eight (8) members of the Hampton Police Division went to the decedent's (Cooper's) residence at 132 Clifton Street in

¹ The references are to the transcripts of the trial which occurred on October 31, 2016 - November 1, 2016.

Hampton, Virginia to execute a search warrant. (Tr. 142, 146-147, 159-160, 227). The officers left a field office that was not far from Cooper's home at approximately 9:50 a.m. and were traveling in a white van operated by Lieutenant Richard Winer ("Winer"). (Tr. 142-143, 160, 245). The other seven officers were the following: Corporal H. Keith Tucker ("Tucker"), Corporal Wayne Roberts ("Roberts"), Corporal Juan Figueroa ("Figueroa"), Corporal Christopher Hake ("Hake"), Patrolman Cherine Freemont n/k/a Cherine Meneghini ("Freemont"), Corporal Kendall Brown ("Brown"), and Officer Ryan Boone. (Tr. 152, 205-206, 227-228, 302-303, 314-315).

Freemont was wearing a normal police officer's uniform. (Tr. 144, 159). The remaining officers were each wearing a police-issued raid vest with a badge of authority displayed and "Police" prominently displayed on the front and back of the vest. (Tr. 147, 159-160, 218). Defense Exhibits 1, 2, 4, 5, 7, 8, 10 and 11 are photographs of the front and back of Winer, Freemont, Figueroa, and Brown, respectively, that were taken following the incident and depict the clothing each was wearing at the time of the search warrant execution. (Tr. 147-148, 214-215, 242-243, 316-317).

The officers parked the van a couple of houses away from Cooper's home, exited the van and walked to the house. (Tr. 143-144, 250). The house had a glass storm door with a main, wooden door behind it. (Tr. 149).

Winer, Freemont, Figueroa and Brown were the only officers involved in the search warrant execution who testified at trial. There were slight variations in their testimony as to exactly what took place at Cooper's home which is not surprising since the trial occurred over five (5) years after the incident.

Winer and Brown testified that Tucker knocked on the storm door and then pulled it open. (Tr. 149, 315). Their testimony indicated Tucker simply pulled on the storm door and it opened. (Tr. 149, 315). All four officers agreed that once the storm door was opened, Tucker knocked on the wooden door for two or three series of knocks with pauses in between. (Tr. 149-151, 210-213, 250-251, 315). These series of knocks were loud with Freemont describing them as "pounding". (Tr. 150, 210). All of the officers agreed that Tucker and Roberts then had a conversation after which Roberts advised Tucker to announce. (Tr. 151-152, 210, 250, 315). All of the officers agreed that Tucker knocked/pounded on the door with a closed fist while loudly announcing "Hampton Police, search warrant" at least once followed by another pause. (Tr. 152, 210, 251, 315). Figueroa and Freemont testified that Tucker knocked and announced two to three times. (Tr. 210, 251). All of the officers agreed that when no one responded, Roberts advised Hake to breach the door. (Tr. 152, 210, 251, 315).

Hake used the battering ram and hit the door three times before the door opened. (Tr. 153,

211-212, 252, 316). Once the door was opened, Tucker entered the home followed by a second officer not identified at trial, Brown and Figueroa. (Tr. 165, 253, 303). Winer was the sixth officer who entered the house. (Tr. 155). Freemont, who never entered the house, remained at the threshold with her gun in a “cover-down position.” (Tr. 213, 223). As each officer crossed the threshold of the residence, each individual loudly said, “Hampton Police, search warrant.” (Tr. 155, 165-166, 318-319). In fact, Figueroa testified the officers announced “Hampton police, search warrant” at least twice each going into the home. (Tr. 253-254).

The officers moved quickly as they entered the home. (Tr. 213, 234, 303). Brown went down a hallway and moved toward the bedrooms. (Tr. 307, 319). When Brown was a couple of feet away from one of the bedroom doors, he saw the door start to open. (Tr. 303, 320). This was the first movement he had seen inside the house. (Tr. 307-308). He yelled, “Hampton Police, search warrant.” (Tr. 308, 320). He was able to see into the bedroom through the slightly ajar door that was three to four inches open and saw Cooper’s silhouette and what he believed was a gun in his hand. (Tr. 308, 310, 320). Brown started yelling “gun, gun, gun” to alert the other team members that an occupant of the residence had a weapon. (Tr. 257-258, 308, 320). The door shut then reopened again three to four inches. (Tr. 308). Brown began moving backwards to try to exit the house. (Tr. 310, 320). This was

roughly a minute after entry. (Tr. 310). At no time did Cooper ever say anything to him. (Tr. 313).

As Brown was backing up, he ran into Figueroa who was emerging from the bathroom after clearing it of dangers. (Tr. 257, 311-312). They collided as Figueroa, who heard Brown's warning, began to retreat from the hallway. (Tr. 258-259). Brown pushed Figueroa back and knocked him to the ground. (Tr. 258-259, 311-312). Figueroa was on one knee with one leg extended and the entire front torso of his body visible, including the police vest and badge he was wearing. (Tr. 249-250, 258-259). Brown then tripped over Figueroa, spun around, stumbled, and fell out the front door. (Tr. 312, 320). Brown was retreating more forcefully than the other officers because he was in an open area with no cover. (Tr. 167, 311). As he was falling out of the house, Brown heard two shots being fired from a smaller caliber, non-police-issued gun. (Tr. 312, 321-322).

Figueroa saw Cooper approaching him with a gun. (Tr. 259- 260). Figueroa shouted "police, drop the gun; police drop the gun; police, drop the gun." *Id.* Cooper did not comply and fired his weapon at Figueroa. Figueroa returned fire. *Id.* Importantly, Brown and Winer both testified they heard, "Police, drop the weapon; police, drop the weapon" and "police, drop the gun", respectively, before any shots were fired. (Tr. 155-156, 167, 321).

Brown also specifically testified he heard two shots from the smaller-caliber weapon before any

police discharged their weapons. (Tr. 312). He then heard the police discharge their weapons. (Tr. 312). This sequence of events was also corroborated by Freemont who testified that after hearing one of the officers yelling, “gun, gun, gun”, she heard two shots that were not from a Hampton Police service weapon then 5-6 shots from a weapon she recognized to be a Hampton Police service weapon. (Tr. 213-214, 222-223). She testified it was less than a minute from the time the door was breached until the gunfire started. (Tr. 224).

The parties stipulated that Cooper died as a result of gunshot wounds and the bullets were fired from guns belonging to Figueroa and Roberts. (Tr. 226). Two bullets were recovered that had been fired from Cooper’s revolver. (Tr. 227).

Ronald Holloway resided two houses down from Cooper’s residence. (Tr. 189-190). As he was arriving home, Holloway witnessed police exiting a van and approaching Cooper’s residence. (Tr. 192). Importantly, Holloway was readily able to identify the individuals approaching Cooper’s residence as police officers. (Tr. 196). Holloway then drove into his back yard where he began off loading his lawn mower, moving it to a shed in his yard, and parking his truck. (Tr. 192-193, 197-198). Holloway then entered his home through the back door and spoke to his wife about the police activity he saw. (Tr. 192-193). Holloway conceded he was not in a hurry while putting away his lawn mover. (Tr. 201). While he

was in his home, the doors and windows were closed. (Tr. 199).

Holloway exited his home to retrieve an item from his vehicle when the police were knocking on Cooper's door. (Tr. 198-199). The police directed him to return into the home. (Tr. 198-199). Holloway did not hear Cooper's door being knocked down because Holloway was in his home with the door closed and could not hear anything else. (Tr. 199-200).

REASONS FOR DENYING THE PETITION

- I. There are no considerations governing the instant Petition for Writ of Certiorari that mitigate in favor of granting the relief requested.

Pursuant to Rule 10 of the Rules of the Supreme Court, consideration of a petition for certiorari by the Court is guided by a circumstance where a state court of last resort has decided an important federal issue in a manner that conflicts with other state courts of last resort or the federal courts of appeals or has resolved an important issue of federal law that should be resolved by the Supreme Court or has decided an important issue of federal law in conflict with a decision of the Supreme Court. Sup. Ct. R. 10 (b) and (c). In the case at bar, petitioner requests that this Court resolve that the Virginia Supreme Court erred in affirming the trial

court's ruling regarding the sufficiency of a search warrant that was being served at the time of the police entry into the home of petitioner's decedent. Additionally, petitioner seeks to have this Court reverse the decision of the Virginia Supreme that the evidence was not sufficient to impose liability on these respondents based upon state law tort claims under the unsupported theory that the police respondents violated the knock and announce rule derived from the Fourth Amendments proscription against unreasonable searches and seizures. As framed in the instant petition, it is attractive to consider these issues as having been federal questions on which the Supreme Court of Virginia had ruled. Importantly, however, a detailed examination of the record in this action belies such an assertion and demonstrates that the only basis for consideration by the Virginia Supreme Court were issues of state law.

As a threshold matter, there is only one issue raised by Keithly which even approaches a determination of an issue under federal law and that is the sufficiency of the search warrant being executed by the respondent officers in this case. This issue unravels for Keithly, however, because as the attachments to the Petition for Writ of Certiorari makes clear, the trial court ***ruled in petitioner's favor*** by deciding that the search warrant was

insufficient.²

The issue for petitioner is then whether or not the trial court erred in excluding exhibits and testimony related to the sufficiency of the search warrant. That issue is one purely of state law, specifically Virginia's law of evidence, and the Virginia Supreme Court's decision on matters of state law is final. See Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudicate federal rights"); Black v. Cutter Laboratories, 351 U.S. 292, 299 (1956) ("the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented"). Any invasion by the Supreme Court into an issue of state law of evidence brings the inescapable danger of an action of the Supreme Court being rendered a mere advisory opinion.

The same fate befalls Keithly's effort to transmute the claimed violation of the "knock and announce" rule after police approached the residence and before they gained entry into a question of federal law. In short, the question to be resolved by the state court was whether the defendants below

² Respondents do not concede the correctness of this ruling and have challenged the basis of the ruling by the trial court on this issue. At this juncture, however, petitioner cannot benefit before this court from an error that is committed in her favor.

and respondents here were liable for trespass, gross negligence, and/or assault and battery. Each claim was an issue of state tort law, and the determination of whether the respondents' conduct based upon the evidence amounted to a violation thereof. For the first time in the years of litigation leading to this point, Keithly attempts to characterize the claims as existing under the Constitution and laws of the United States. While arguments were raised in proceedings below that dealt with the sufficiency of the search warrant issued in this case and acted upon by the police respondents in the manner in which they executed the search, the questions did not involve the resolution of questions of federal law. Rather, the matters of law addressed dealt exclusively with whether the conduct supported by the record evidence in this case amounted to tortious activity for which the respondent officers should be held liable. The state courts, applying state tort law, answered no. It is not for the federal courts to indulge newly created federal claims when the decisions rendered by the state courts plainly and exclusively rest on matters of state law.

II. Petitioner did not raise any federal claims in the trial court or the Virginia Supreme Court.

At trial and on appeal, petitioner was careful not to raise any issue of federal law, and as a result this Court is unable to consider any federal question raised for the first time here. The Court requires that a party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it and she must have raised the issue at the appropriate time below. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) (“ There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented”); see also Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77 (1988). “At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or

substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.” Webb v. Webb, 451 U.S. 493, 501 (1981).

Here, petitioner has not adequately presented the federal issues to the state courts for consideration. Keithly was careful throughout the entirety of this litigation before the trial court to avoid stating a claim under 42 U.S.C. §1983 and, in so doing, managed to keep her case out of the reach of removal jurisdiction under 28 U.S.C. § 1441 *et seq.*. These respondents respectfully submit that it was done in an effort to avoid to specter of summary disposition that the facts of this case would justify if this case had been removed to the federal courts where the uncontradicted evidence was that petitioner’s decedent was killed after he had shot at police who commanded him to drop his weapon by officers who visually and verbally were identified themselves as police. Compare Fed. R. Civ. P 56 with Va. Code Ann. § 8.01-420 (generally disallowing the use of discovery depositions in support of summary judgment). Petitioner’s decision to use the state procedural rules that abhor summary disposition to her benefit by avoiding summary judgment in federal court was a purposeful one that

benefitted petitioner's litigation. To now read in federal claims would do violence to the pleading and record of this case.

On appeal, petitioner did no more to present federal claims. In reviewing the assignments of error offered to the Virginia Supreme Court, they deal with (i) alleged error related to state law of trespass, (ii) alleged error related to prior investigations being deemed inadmissible under Virginia evidence law, (iii) alleged error in ruling of qualified immunity³ and (iv) alleged error in striking the evidence and entering summary judgment under state law. The question presented in the instant submission appears for the first time with the Petition for Writ of Certiorari. In the absence of having allowed the Virginia Supreme Court an opportunity to address this alleged error, it simply cannot be raised for the first time before this Court.

³ The immunity to which petitioner appears to object is that discussed under the Virginia Supreme Court's holdings in DeChene v. Smallwood, 226 Va. 475, 311 S.E.2d 749 (1984) and Yeatts v. Minton, 211 Va. 402, 177 S.E.2d 646 (1970). The immunity conferred in those cases is immunity based upon the good faith belief of a law enforcement official in the lawfulness of his actions, notwithstanding a reasonable mistake of law or fact. It is not the qualified immunity that has been robustly developed as a area of the law accompanying a claim under 42 U.S.C. §1983. It appears that petitioner does not differentiate between the two and improperly discusses federal law and state law immunities interchangeably. See Petition at 17.

III. The Virginia Courts did not err in striking the evidence and entering judgment in this case.

Keithly contends that the state courts erred in failing to account for the alleged unlawful search warrant and claimed violation of the knock and announce requirement for serving the search warrant. It is critical to understand that petitioner is improperly conflating state law torts with federal constitutional rights. To recover under the law of the case as pleaded, the only claim that appears to be addressed in the brief is state law gross negligence. Under Virginia law, gross negligence is a degree of negligence that is sufficient to show indifference to others amounting to an utter disregard of prudence that amounts to complete neglect for the safety of another. *See Frazier v. City of Norfolk*, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987). It is a degree of negligence that would shock fair minded people, but less than willful recklessness. *Green v. Ingram*, 269 Va. 281, 290-291, 608 S.E.2d 917, 922 (2005). Gross negligence is a “heedless and palpable violation of legal duty respecting the rights of others” amounting to an “absence of slight diligence, or the want of even scant care.” *Town of Big Stone Gap v. Johnson*, 184 Va. 375, 378, 35 S.E.2d 71, 73 (1945). Virginia law requires a showing of indifference, not inadequacy, to establish gross negligence and a claim will fail as a matter of law in the face of evidence that

“defendants exercised some degree of care.” Elliott v. Carter, — Va. —, 791 S.E.2d 730 (2016). As these cases make clear, whether or not there was a violation of the knock and announce requirement is not an element of the state tort of gross negligence.

Here, the record is clear. The description of the knocking and announcing by the officers is detailed and thorough and does not reveal gross negligence. There is no dispute that William Cooper, while armed with a handgun, approached police officers who were attempting to effect service of a search warrant. The record is clear that police attempted to retreat away from him as he exited his bedroom, but Cooper advanced. Cooper then fired at police officers, causing them to return fire. There is simply no construction of the facts in this case that could sustain a decision in favor of Cooper’s administrator. Cooper fired at police who were clearly marked with badges of authority and visible indications of their status as police officers, as supported by the uncontradicted record evidence in the case. This is in addition to their uncontradicted statements that they announced their presence verbally as police officers. There is no dispute that Figueroa shouted three times for Cooper to drop his weapon before Cooper fired. There is no evidence whatsoever in the record to support a claim of gross negligence.

Petitioner then turns to an isolated series of record facts that bear no relation to the claims asserted in this case as being the basis of her gross negligence claim. Truly, these facts are offered in

blunderbus fashion without any explanation of their relationship to each other or these respondents. This collection of facts is taken in utter isolation and omits relevant and material other evidence from the witnesses offered by petitioner and by whose testimony she is bound. For example, the absence of a knock on the glass storm door is immaterial and did not constitute a breach of knock and announce, and most importantly did not cause any injury as the undisputed record in the case makes clear that the wooden door to the home was knocked upon numerous times before entry was made.

The testimony that Holloway heard gunshots within a short time period after being told to enter his home is not evidence of gross negligence. Holloway was two doors down and has offered evidence that he was engaged in several other activities at his home, both outside and inside (with his doors and windows closed), during the interaction with police. His testimony was that he did not hear the announcements made by police, he did not and could not testify that they were not made. Holloway's testimony makes clear that he was not in a position to serve as a complete historian of the events which were taking place two homes away, and are not sufficient in Virginia to refute positive evidence from each of the other witnesses present who were called by petitioner. *See Railway Company v. Barden*, 200 Va. 98, 102-104, 104 S.E.2d 13, 16-17 (1958)(holding that positive evidence from a witness who is in position and with opportunity to

observe that signals were given is not subject to contradiction by witnesses who did not hear signals but by virtue of their position and/or attention). Every witness called by petitioner that was on the same residential lot testified to the knocking and announcing that was done, along with the time taken to accomplish them. With every deference to Mr. Holloway, his testimony that he did not hear any announcements does not create an issue of fact to contradict petitioner's own witnesses.

At the end of the petitioner's evidence, the trial court was faced with only a single conclusion that could be reached. In a case where care and effort was taken by police to comply with the constitutional and statutory requirements, the testimony presented in this trial compels the conclusion that the respondents in this action exercised reasonable care and within the bounds of the law; and, the record is devoid of any evidence that could support a finding that no care was exercised in the efforts to enter Cooper's home and serve the search warrant in accordance with the law.

Petitioner's lengthy discussion of the constitutional underpinnings for the search warrant and the knock and announce procedures is for naught because as mentioned above, petitioner simply did not raise an issue of constitutional moment in the form of a claim under 42 U.S.C. § 1983.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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