No. 83-1919

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

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

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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June, 1984

PARTIES IN THE COURT BELOW

Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, was Plaintiff below, Appellee and Cross-Appellant in the United States Court of Appeals for the Tenth Circuit. The City of Oklahoma City and Officer Julian Rotramel were Defendants below. The City of Oklahoma City was Appellant in the Tenth Circuit and Officer Rotramel was Cross-Appellee in the Tenth Circuit. Officer Rotramel is not involved in this Petition for Certiorari.

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STATUTE INVOLVED IN THIS CASE

This case involves 42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

R.S. §1979; Pub. L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1984.

CONCISE STATEMENT OF THE CASE

Petitioner's "Statement" relates the facts in the light most favorable to Petitioner and leaves out many material facts. William Adam Tuttle was shot in the back by a rookie officer, riding alone without supervision under a custom that allowed rookies to ride alone despite a formal policy requiring them to ride with a master patrolman for the first year of their actual sevice.

As stated by the Tenth Circuit (Petitioner's Appendix, page 9a):

> "Here there was plenty of independent proof of lack of actual training. In this case the individual defendant had been on the police force for a very short period of time; moreover, he admitted his lack of training to cope with robberies. Nevertheless, he was allowed to go in on a suspected robbery by himself. Also, his gross failure to successfully handle the problem clearly demonstrated his complete lack of training and also his lack of ability. Thus, the incident itself, as well as independent evidence, attested to the officer's lack of knowledge and ability. He claims to have considered Tuttle to be a robber but instead of pursuing him for the purpose of questioning, he fatally shot him without the least justifiable provocation. The single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training.
>
> Our conclusion must be that this action, coupled with the clearly inadequate training, demonstrates the City's gross negligence and deliberate indifference to the rights of the decedent."

Generally, Petitioners have taken substantial liberty with the facts of the case in terms of construing them in

the light most favorable to the City. Patrons in the club indicated that when the officer entered the club and made inquiry about an alleged armed robbery he was told that nothing was going on and that everyone was having a good time. Nothing out of the ordinary happened. Witnesses in the club also testified that Tuttle made no suspicious movements, that is he did *not* bend towards his feet and continue to try to squirm loose from the officer and leave the club. He did go past Rotramel and out the door of the club.

Upon going past Officer Rotramel and out the door, Rotramel whirled, kicked the door open, drew his gun and fired at Tuttle in one continuous motion. Rotramel admitted he *never* saw any weapon. Judging by the location it appeared Tuttle tripped on the curb. The bullet trajectory negated Rotramel's claim that decedent had jumped up.

After Tuttle was shot in the back his boot was searched by Officer Riley Lennox. Officer Lennox found nothing in the boot. While Tuttle was still alive and on the scene his wife was contacted and arrived at the scene. Officers refused to allow her to visit with or talk to her husband and kept her locked in the back of a patrol car. From the time he was searched until the time his boot was removed at Baptist Medical Center, Tuttle was continuously under the control of officers. When his boot was removed *at the hospital* a toy water pistol miraculously fell to the floor. Tuttle lived and suffered approximately one hour and twenty-two minutes after the shooting. The police would not release Mrs. Tuttle to be with her husband. They took her to the central station and questioned her last. When she arrived at the hospital her husband was dead. Did they need time to regroup and plant the toy pistol?

Rotramel's training was severely deficient. He had 24 minutes of training in how to respond to an armed robbery in progress and weeks of training in how to fire his weapon. Expert testimony established these and other deficiencies and established them directly in the light of appropriate constitutional standards. The expert's testimony, standing alone, is sufficient to establish liability.

SUMMARY OF ARGUMENT

1. In *Monnel* v. *Department of Social Services of the City of New York*, 346 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, this Court established (a) liability for municipalities under Section 1 of the Civil Rights Act (42 U.S.C. §1983), (b) that Section 1 is to be broadly construed and (c) that municipalities could be sued when an action pursuant to official policy (or custom without formal approval) caused an employee to violate another's constitutional rights.

2. Policies and customs of the Oklahoma City Police Department violated William Adam Tuttle's rights. He was shot in the back by an undertrained, unsupervised rookie officer, riding alone as per custom contrary to formal policy, responding without a partner, without a backup, into a blind building where nothing was actually going on. His reactions were grossly improper which graphically illustrated his training deficiencies.

3. The jury was fully instructed on the law as it applied to this case and returned a verdict in favor of the Plaintiff below.

4. There is no conflict between the Circuits. In *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983), the Fifth

Circuit held there was no custom or policy established by the evidence. In the instant case the customs and policies were clearly established and the problems exacerbated by the officer's actions. In *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983), the complaint was a failure to implement a policy as opposed to the actual policies and customs employed by the City of Oklahoma City.

5. The standard which the City of Oklahoma City seeks to implement is so restrictive as to amount to no liability at all. As they read *Monnel* in order to establish liability against the municipality a plaintiff would have to prove (a) a policy or custom which was *per se* unconstitutional, (b) injury or death, (c) that the municipality had notice of the constitutional deficiency and (d) that it had happened on other occasions. This standard is not being applied in the Circuits and does not justify consideration herein.

ARGUMENT

As noted by the Tenth Circuit, Officer Rotramel actually admitted he committed a judgment error and confessed that he shot Mr. Tuttle while acting only under suspicion; no felony had been committed and that the shooting occurred because he had not been properly trained. He admitted deficient training in the following, among other areas:

(a) How to respond to an armed robbery in progress, while patroling alone.

(b) How to properly enter the type of building involved.

(c) Whether to wait for a backup unit on this type of call.

(d) How to secure a potential armed robbery situation.

(e) How to determine entrance priority in an armed robbery situation.

(f) How to apprehend a fleeing suspect.

He further admitted he could and should have been given training on the specific situation he faced on the evening in question and that if he had been trained properly decedent would probably be alive today.

At the time of the shooting the City of Oklahoma City had a rule/regulation that required rookie officers to be under the direct supervision of a master patrolman for one year. Petitioner did not follow its own policy and allowed Officer Rotramel to patrol alone and on his own, without sufficient safeguards to insure that he was ready for this type of activity. Expert testimony established this policy as being grossly deficient.

Expert testimony also indicated:

(a) That this incident was one of the worst departures from acceptable police conduct ever investigated by this veteran expert.

(b) The conduct was far beyond gross negligence but instead reached criminal culpability.

(c) The shooting could have been prevented by proper training and supervision.

(d) That Officer Rotramel's action and conduct were due to improper training and that the training was so grossly inadequate and reckless that the shoot-

ing was the inevitable consequence thereof, hence that knowledge was imputed to the City.

(e) The shooting amounted to a "curb-side execution".

The Tenth Circuit agreed. In rejecting the City's argument now presented here, the court distinguished the City's principal case, *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979), and noted (Petitioner's Appendix, page 9a):

> "Although *McClelland* case is entirely different from the case at bar, involving as it does police chiefs failing to supervise, the principle is much more difficult to establish than the violation here. The act here was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training, the problem which is presented. We are not to be understood as holding that there exists a guarantee that all persons whose constitutional rights are violated by municipal employees will recover from the city. *Our holding requires proof of a city's violation of its duty such as to constitute deliberate indifference to the rights of its citizens.* Here there was plenty of independent proof of lack of actual training." (Emphasis added)

The proof in the trial court substantiated the City's violation of its duty, as noted by the Tenth Circuit, such as to constitute deliberate indifference to the rights of its citizens. *Owen* v. *City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398 (1980), made it clear that liability against municipalities in a civil rights case, may be based upon a single incident, and that the requirements of "policy" and "custom" do not necessitate proof of a long-standing practice.

In *Owens* v. *Haas*, 601 F.2d 1232 (2d Cir. 1979), *cert. denied*, 440 U.S. 980, 100 S.Ct. 483, 162 L.Ed.2d 407 (1979), the Court held that although there must be some causal link between the City's failure to train and the violation of constitutional rights, a single, brutal incident may be sufficient to create the causal link.

The brutality of the instant case is not contested.

The causal link in the case at bar is also present. Rotramel not only admitted that his training was inadequate, but stated that the shooting occurred because of his lack of training. Expert testimony further developed the causal link.

The Court, in *Owens* v. *Haas, supra,* went on to state that a plaintiff did not have to endure a pattern of past police misconduct before he might obtain a judgment under a cause of action for civil rights violations. If there was any evidence that the municipality had actual or imputed knowledge of the almost inevitable consequences that arise from grossly inadequate training and/or supervising of a police force, then liability would exist. That of course is present here where the City, without safeguards, allows its rookie officers on the street, without backup and without training as to how to handle an armed robbery.

In the case of *Liete* v. *City of Providence*, 463 F.Supp. 585 (D.C. R.I. 1978), the court, in relying upon *Rizzo* v. *Goode*, 423 U.S. 362. 46 L.Ed.2d 561, stated:

> "Although a city cannot be held liable for simple negligent training of its police force, the city citizens do not have to endure a pattern of past police misconduct before they can sue the city under Section 1983. If a municipality completely fails to train its

> police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a 'deliberate indifference' to the resulting violation of a citizen's constitutional rights. In such case, the municipality may fairly be determined as acquiescing in and implicity authorizing such violations. . . . If the Plaintiff's injury results from this complete lack of training or grossly inadequate training of a police force, such an injury was not the result of mere negligence, but the result of deliberate and conscious indifference by the city."

As established by eyewitnesses, expert testimony, the officer himself and the Tenth Circuit's opinion, the evidence was sufficient.

This is essentially a sufficiency of the evidence case. The Tenth Circuit held (Petitioner's Appendix, page 6a):

> "The Plaintiff-Appellee Mrs. Tuttle argues that extensive evidence, and not the single incident referred to, established the grossly negligent training provided by the City. She argues that virtually all of the evidence established the necessary link between the *inadequate* training and the constitutional deprivation. *Owens* v. *Haas*, 601 F.2d 1242 (2d Cir. 1979). She claims that the trial judge recognized that gross negligence existed if the City had actual or imputed knowledge of the almost inevitable consequences that arise from completely inadequate training or supervision. See *Liete* v. *City of Providence*, 463 F.Supp. 585, 590-91 (D.R.I. 1978). We agree that Judge West properly denied the City's motions and properly submitted the issue to the jury." (Emphasis Court's)

The evidence was and is sufficient.

CONCLUSION

Respondent submits and concludes that the Petition for Writ of Certiorari should be denied in this case.

Respectfully submitted,

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June, 1984

CERTIFICATE OF SERVICE

I hereby certify that Service of the foregoing Memorandum in Opposition to Petition for a Writ of Certiorari was made this _____ day of June, 1984, by depositing three (3) copies of the same, with postage fully prepaid, to the following:

Burck Bailey
24th Floor
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Counsel for Petitioner

All parties required to be served, have been served.

Carl Hughes