83-1919

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Burck Bailey
Counsel of Record
Margaret McMorrow-Love
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
24th Floor, First National Center
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

May, 1984

QUESTION PRESENTED

Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. §1983.

PARTIES INVOLVED

The petitioner herein, the defendant-appellant/cross-appellee below, is the City of Oklahoma City, a municipal corporation organized and existing under the laws of the State of Oklahoma. An additional defendant in the United States District Court for the Western District of Oklahoma was Julian Rotramel, a former police officer for the City of Oklahoma City.

The respondent, the plaintiff-appellee/cross-appellant below, is Rose Marie Tuttle, individually and as administratrix of the Estate of William Adam Tuttle, deceased.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE CITY OF OKLAHOMA CITY,

Petitioner,

v.

ROSE MARIE TUTTLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on February 28, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 728 F.2d 456 and is reproduced as Appendix "A" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION

42 U.S.C. §1983 provides, in part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immmunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or any proceeding for redress."

STATEMENT

The City of Oklahoma City is a municipal corporation located in Oklahoma County, Oklahoma. Julian Rotramel was a police officer with the Oklahoma City Police Department on October 4, 1980, having completed 18 weeks of training at the Oklahoma City Police Academy in 1979.

William Adam Tuttle, deceased, was an Oklahoma resident who had relocated recently to Oklahoma City. On October 4, 1980, after a quarrel with his wife, he went to the "We'll Do Club", a drinking establishment, where he remained on and off all day and into the evening consuming alcoholic beverages. That evening, at approximately 8:00 p.m., he sustained a gunshot wound from which he died at 9:22 p.m. The gunshot was fired by Julian Rotramel.

Julian Rotramel was on duty with the police department on the evening of October 4, 1980. He was riding alone in his police car. He had previously graduated from the Police Academy and had ridden for several months with a senior patrolman assigned to the different areas of Oklahoma City.

On the evening of October 4, 1980, the decedent, William Tuttle, called the Oklahoma City Police Department to report a robbery in progress at the "We'll Do Club". He described the robber as brown-haired, white and approximately 37 years old, wearing colored glasses. The description matched Tuttle's physical appearance. He also reported that the robber had a gun. After placing the call, Tuttle informed a patron at the bar that "he was going to be shot that night". The police dispatcher sent out an all-points bulletin of a robbery in progress at the "We'll Do Club." Officer Rotramel responded to the call. He arrived at the club, parked his police vehicle and entered the club.

Upon entering the club, he observed ten to fifteen people. William Tuttle looked towards the officer and began walking towards him. Rotramel reached out, took hold of Tuttle's arm and requested him to stay within the club. Tuttle attempted to walk past Rotramel and was told to "stay put".

The officer proceeded to question other individuals in the bar while holding onto Tuttle. Tuttle attempted to bend towards his feet and continued to try to squirm loose from the officer and leave the club. Tuttle broke away from the officer. Rotramel ordered Tuttle to "halt" which command was ignored. Tuttle cleared the door which sprang shut in the face of the officer. Upon clearing the doorway, and having Tuttle in clear view, Rotramel pulled his revolver from his holster. He observed Tuttle in a crouched position with his hands located near his boot. It was the officer's belief that the suspect had recovered a weapon from his boot. Officer Rotramel believed that his life was in danger. Tuttle started to come up from his

crouched position, at which time Rotramel discharged his revolver.

Following the shooting, Tuttle was transported by ambulance to the Baptist Medical Center in Oklahoma City. During the course of his treatment, medical personnel disrobed him. When his boot was removed, a toy cap pistol fell to the cart. He was pronounced dead at 9:22 p.m.

Rose Marie Tuttle, individually and as administratrix of the estate of the decedent, William Adam Tuttle, filed an action in the United States District Court for the Western District of Oklahoma. The Complaint sought recovery under 42 U.S.C. §§ 1983, 1985, 1986 and 1988. She alleged that the defendants, including petitioner, the City of Oklahoma City, had violated the constitutional and statutory rights of the decedent, William Adam Tuttle. As to the City of Oklahoma City, Mrs. Tuttle alleged that the City inadequately trained its police officers and hired inadequately trained personnel. She further stated that the City should have known of the propensity of Rotramel for violence and knew or should have known that Rotramel was untrained to handle the situation as it arose on the night of October 4, 1980.

The City denied the allegations and alleged that the actions of the officer were reasonable under the circumstances and that he was properly trained and supervised and that Tuttle's death did not result from any improper training or supervision or from any official municipal policy or practice.

The trial commenced on May 28, 1982. No evidence was introduced of any prior incidents of violence or im-

proper conduct or behavior on behalf of Officer Rotramel. Likewise, there was no testimony of any prior incidents of violence, misconduct or unauthorized use of force by any officer on the Oklahoma City Police Department. The only incident brought before the jury as to the use of force was the incident on the night of October 4, 1980. Both parties introduced evidence of the training received by Oklahoma City Police officers including training in the guidelines under which the use of force would be authorized.

The jury returned a verdict on the evening of June 3, 1982. The verdict was in favor of the plaintiff and against the City of Oklahoma City but in favor of the co-defendant, Julian Rotramel and against the plaintiff. On June 4, 1982, the court entered judgment pursuant to the verdict rendered by the jury in favor of the plaintiff, Rose Marie Tuttle, individually and as administratrix of the estate of William Adam Tuttle, deceased, and against the City of Oklahoma City in the amount of $1,500,000.

The City of Oklahoma City filed a motion for judgment notwithstanding the verdict on June 24, 1982, which was overruled on August 11, 1982. An appeal was brought by the City of Oklahoma City to the United States Court of Appeals for the Tenth Circuit. A cross-appeal was filed by Rose Marie Tuttle from the decision rendered by the jury in favor of Officer Rotramel. On February 28, 1984, the Court of Appeals entered its opinion affirming the judgment below.

The principal issue on appeal was whether a single, isolated occurrence of the use of force results in municipal liability under 42 U.S.C. §1983. The Court of Appeals found that "The single incident rule is not to be considered as an

absolute where the circumstances plainly show a complete lack of training". 728 F.2d at 461.

Judge Barrett issued what he classified as a "concurring" opinion. However, in his concurring opinion, he stated "I am at a loss to ascertain the basis for the jury's obvious finding that Officer Rotramel was so lacking in training to cope with robberies that such constituted *proof* of Oklahoma City's violation of its duty to train Officer Rotramel to the extent that, as the opinion pinpoints it, it amounted to Oklahoma City's 'deliberate indifference to the rights of its citizens'. * * * I have not been enlightened with the factual basis of Oklahoma City's 'deliberate indifference' in the context of the facts of this case." 728 F.2d at 461, 462.

On the cross-appeal by Mrs. Tuttle from the decision in favor of Officer Rotramel, the court held that it could not asssume that the conclusion of the jury was improper.

REASONS FOR GRANTING THE WRIT

The issue of a municipality's liability for alleged inadequacies in training and supervision of police officers has been and continues to be highly ambiguous. The issue is even more troublesome when the question of liability arises from an isolated incident of excessive use of force by a police officer. The important federal question presented by this case is whether a single incidence of the use of excessive or deadly force by a police officer establishes an "official policy or custom" sufficient to render a municipality liable. This Court's decisions in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); and *Polk County* v. *Dodson*, 454 U.S. 312 (1981), support a negative answer and a judgment vindicating petitioner's position. The decision involved herein is also in clear conflict with decisions of other Federal Courts of Appeal on this issue.

In addition, this Court has granted the petition for a writ of certiorari in the matter of *Memphis Police Department, et al.* v. *Garner*, No. ----------, a matter involving the use of deadly force under a Tennessee statute. That case presents wholly different issues to this Court. However, the granting of this petitioner's writ of certiorari, coupled with that in *Memphis Police Department, et al.*, would afford this Court an opportunity to enunciate clear guidelines for use by the courts below in determining when municipal liability arises under the Constitution and under 42 U.S.C. §1984, for failure to train and/or supervise police officers.

I. THE DECISIONS SUPPORT THE PROPOSITION THAT AN ISOLATED INCIDENT OF THE USE OF EXCESSIVE FORCE DOES NOT RENDER A MUNICIPALITY LIABLE IN DAMAGES.

A. Decisions of this Court

Petitioner has found no opinion of this Court squarely addressing the question of when municipal liability arises in actions alleging improper training and/or supervsion of police officers resulting in injury to citizens. Earlier rulings established that a municipality may be liable for violations under 42 U.S.C. §1983. *Monell* v. *Department of Social Services, supra.*

In *Monell,* this Court held that a municipality may not be held liable under the doctrine of respondeat superior. Rather, municipal liability arises where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision *officially adopted and promulgated by that body's officers*" or is "visited pursuant to *governmental 'custom'* even though such custom has not received formal approval through the body's official decision making channels." 436 U.S. at 690-91 (emphasis supplied). This Court subsequently made clear that a local government is liable under Section 1983 only for deprivations caused by unconstitutional official policies or customs. *Polk County* v. *Dodson,* 454 U.S. 312 (1981). No decision of this Court establishes municipal liability on any other basis.

B. Recent Decisions of Federal Courts of Appeal

The recent case of *Languirand* v. *Hayden,* 717 F.2d 220 (5th Cir. 1983), is directly contrary to the decision by the Court of Appeals for the Tenth Circuit in the instant case. In *Languirand,* a police officer named Hayden, who was on the police force of defendant, City of Pass Christian, Mississippi, responded to a radio call concerning a prowler. He saw Languirand's car parked near the residence of the person who had reported the prowler. As Languirand's car started to drive away, Hayden fired his revolver at the car. The bullet struck Languirand in the base of the neck. The jury found in favor of police officer Hayden but against the City for $1,500,000. The Court of Appeals for the Fifth Circuit said:

> "The theory of the plaintiff's suit against the City was that Hayden was inadequately trained, particularly in the use of his pistol, and that the shooting of Languirand was, as this contention was phrased in the trial court's charge to the jury, 'a proximate result of the alleged policy or custom of the City of Pass Christian of placing armed officers on the streets without adequate training in the use of weapons or firearms.'" 717 F.2d at 222-223.

The Fifth Circuit reversed the judgment against the City, stating:

> "Our research discloses no decision of the Supreme Court, or of this Court, which has made any holding, or given authoritative direction, on the issue of the liability under §1983 of a governmental unit for injuries resulting from the lack of adequate training of its personnel." 717 F.2d at 225.

The Fifth Circuit reviewed all available authorities on the issue and found that the decisions were not "harmonious". However, it read *Monell* as requiring evidence of "at least a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or mishehavior was general or widespread throughout the police force", before liability could be imposed on the municipality. 717 F.2d at 227, 228.

The Fifth Circuit noted that Officer Hayden had not been given *any* formal police training whatsoever. This contrasts markedly with the facts in the instant case, where Officer Rotramel had successfully completed an intensive 18-week course (with an average grade of 91%) at an outstanding Police Academy.

At approximately the same time *Languirand* was decided by the Fifth Circuit Court of Appeals, the case of *Wellington* v. *Daniels,* 717 F.2d 932 (4th Cir. 1983), was decided by the Fourth Circuit Court of Appeals. The Fourth Circuit reached the same conclusions as the Fifth Circuit; to-wit, a single act or isolated incident is insufficient to establish municipal liabilty under Section 1983.

In *Wellington,* the action was brought by the guardian of the estate of Robert Gravelle. One Daniels, a police officer for the City of Newport News, Virginia, struck Gravelle in the head with a kel-lite flashlight. The injury resulted in body paralysis. Plaintiff predicated the action against the City of Newport News on "their failure to train and supervise properly the police department in the use of Kel-lite flashlights as weapons". 717 F.2d at 934. The result at

trial was, once again, identical to the result in the instant case: the jury found against the plaintiff and in favor of the police officer, but returned its verdict against the City in the amount of $1,500,000. The plaintiff in *Wellington* used the same "expert witness" as Tuttle used in the instant case; one Dr. Kirkham. Dr. Kirkham testified that in his opinion the Newport News Police Department was "clearly deficient" in its failure to train police officers in the use of kel-lite flashlights. His testimony in the instant case was essentially identical to his testimony in *Wellington.*

The Court of Appeals for the Fourth Circuit affirmed the District Court's decision to enter judgment notwithstanding the verdict in favor of the City of Newport News. The court stated:

> "In its most recent pronouncement on municipal liability under §1983, the [Supreme] Court made clear that a local government is liable under §1983 only for deprivations caused by *unconstitutional* official policies or customs." (emphasis by court) 717 F.2d at 935.

The Fourth Circuit noted:

> "Indeed, Gravelle could point to only the single incident during which the ward of the estate was injured on which to predicate the Police Chief's supervisory and the City's municipal liability. * * * Therefore, the district court appropriately granted the j.n.o.v. There simply was not sufficient evidence to support a finding of City policy to allow use of a dangerous instrumentality, or any encouragement by Chief Austin of such use." 717 F.2d at 937.

Also see, Herrera v. *Valentine,* 653 F.2d 1220 (8th Cir. 1981); *Hayes* v. *Jefferson County, Kentucky,* 668 F.2d 869 (6th Cir. 1982).

The decision by the Court of Appeals for the Tenth Circuit in the instant case is in clear conflict with the opinions issued by the other Federal Courts of Appeals that have addressed the "single incident" issue. The Court of Appeals for the Tenth Circuit ignored the authorities from other jurisdictions and erroneously concluded that an isolated incident is sufficient to establish a nexus between an official policy or custom of a municipality and the violation of an individual's rights.

The validity of the conclusion reached by the Tenth Circuit Court of Appeals raises important and recurring issues concerning liability of a municipality for the use of force by law enforcement officials throughout the country. The questions raised have not been addressed by this Court to date. Without clear directions from this Court concerning the appropriate test to be applied, the decision below will create additional confusion among law enforcement officers and legislators and will contribute to the growing split among the federal courts on the issue.

Petitioner contends that the test as applied by the Court of Appeals for the Tenth Circuit concerning a municipality's liability for the use of deadly force is unjustified in view of this Court's prior opinions and the weight of recent authority.

C. Other Recent Decisions Involving the Establishment of Official Policy or Custom

The scope of liability of a municipality under 42 U.S.C. §1983 has no clear contours. Justice Powell, concurring in *Monell* v. *Department of Social Services, supra,* noted:

> "Difficult questions nevertheless remain for another day. There are substantial line-drawing problems in determining 'when execution of a government's policy or custom' can be said to inflict constitutional injuries such that 'government as an entity is responsible under Section 1983.' " 436 U.S. at 713.

In *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 167-168, this Court described "custom or usage" as "persistent and widespread . . . practices," "systematic maladministration" of the laws and practices that are "permanent and well settled" and "deeply imbedded traditional ways of carrying out . . . policy." Isolated violations are not the persistent, oft-repeated, constant violations that constitute official custom or policy. *Berry* v. *McLemore,* 670 F.2d 30 (5th Cir. 1980).

In *Turpin* v. *Mailet,* 619 F.2d 196 (2d Cir. 1980), the court found that failure to discipline an officer on a single incident of illegality did not constitute an official policy where there was no prior pattern or practice of harassment and no violations were brought to the attention of the supervising entity. The lack of clear guidelines as to when a government's policy or custom can be said to inflict constitutional injury, has resulted in confusion and conflict among the various federal courts of appeal. There is also confusion in district courts. *See, Leite* v. *City of Providence,*

463 F.Supp. 585 (D.R.I. 1978); *Edmonds* v. *Dillin*, 485 F. Supp. 722 (N.D. Ohio 1980).

Petitioner submits that the question concerning the liability of a municipality for the use of excessive or deadly force is one that should be addressed by the highest court of this land. Much confusion exists among the Federal Courts of Appeal in the area of liability. The impact of the decision below is widespread. Municipalities are frequent defendants in litigation both at the State and Federal level. The decision below places in jeopardy the financial stability of local governments. This Court should review and reverse the decision below and articulate clear guidelines as to the elements necessary to establish an official policy or practice of a municipality in situations involving use of excessive or deadly force. Guidance is necessary in order to insure that a balance is maintained between the rights of the aggrieved individual citizen and the welfare of all other citizens of the municipality.

The centerpost of municipal liability, clearly etsablished by the decisions of this Court, is "that *official policy* must be the moving force of the constitutional violation in order to establish the liability of a government body under §1983." *Polk County* v. *Dodson*, 454 U.S. at 326 (emphasis supplied). The opinion by the Tenth Circuit Court of Appeals in the instant case contains no discussion whatever of the issue of official policy. Indeed, the Tenth Circuit totally ignored *Monell* and *Polk County*. Neither of these controlling cases is even cited in the Tenth Circuit's opinion. Nor did the Tenth Circuit discuss or even cite *Languirand, Wellington*, or the other Federal Courts of Appeal decisions on the issue.

CONCLUSION

The issues brought before this Court are of concern to each municipality in the United States. The decision reached by the Tenth Circuit Court of Appeals in the instant case simply makes the City an insurer. The scope of the protection afforded a citizen by 42 U.S.C. §1983 and its application to the conduct of a municipality are federal questions which should be resolved by this Court.

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Burck Bailey
Counsel of Record
Margaret McMorrow-Love
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
24th Floor, First National Center
Oklahoma City, Oklahoma 73102

Counsel for Petitioner

May, 1984

APPENDIX A

PUBLISH

[Filed Feb. 28, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, Plaintiff-Appellee and Cross-Appellant,	)	
v.	)	
CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of the CITY OF OKLAHOMA CITY through the OKLAHOMA CITY POLICE DEPARTMENT, Defendants-Appellants and Cross-Appellees.	)	Nos. 82-2164 & 82-2175

Appeal from the United States District Court
for the Western District of Oklahoma
(D. C. No. CIV-81-679-W)

Carl Hughes, Hughes, Nelson & Gassaway, Oklahoma City, Oklahoma (Michael Gassaway, Hughes, Nelson & Gassaway, Oklahoma City, Oklahoma, with him on the brief), for Plaintiff-Appellee and Cross-Appellant Rose Marie Tuttle

Burck Bailey, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma (Warren F. Bickford IV and Margaret McMorrow-Love, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant, Cross-Appellee City of Oklahoma City

[APPENDIX]

Robert E. Manchester, McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma (Susan Talbot, McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant, Cross-Appellee Officer Julian Rotramel

Michael C. Turpen, Attorney General of Oklahoma; David W. Lee, Assistant Attorney General, Chief, Federal Division, Oklahoma City, Oklahoma, for Amicus Curiae State of Oklahoma

Diane Pedicord, Oklahoma City, Oklahoma, for Amicus Curiae Oklahoma Municipal League

---

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges

DOYLE, Circuit Judge

This matter is before us pursuant to 28 U.S.C. § 1291, the regular appeals statute, and 42 U.S.C. § 1983, dealing with the violation of constitutional and statutory rights.

Rose Marie Tuttle was the plaintiff in the court below. She brought this action against the defendants, Oklahoma City and Police Officer Julian Rotramel, individually and as administratrix of the estate of her deceased husband. She alleged deprivation of her husband's statutory and constitutional rights to life and liberty, contrary to 42 U.S.C. § 1983.

The cause was tried to a jury in the United States District Court for the Western District of Oklahoma. A verdict was returned in favor of Mrs. Tuttle in the amount of $1,500,000 actual damages against the City. The jury returned a verdict in favor of the defendant Rotramel, the officer who caused the damage by shooting and killing Tuttle. The jury found in favor of Officer Rotramel because the jury found that he acted in good faith. Oklahoma City has appealed the verdict against it and Mrs. Tuttle appeals

the verdict and order to pay costs for Rotramel, the police officer.

This incident took place on October 4, 1980. The decedent William Tuttle was inside, and had been inside, the We'll Do Club in Oklahoma City. A complaint was made reporting an armed robbery in progress at the We'll Do Club. The party who called the police described the alleged robber as a 37 year old male with brown hair and glasses. The description matched Mr. Tuttle, and the parties stipulated that Mr. Tuttle actually made the call. Police Officer Julian Rotramel was dispatched to the Club, and when he arrived there was no armed robbery in progress. The bartender testified that she informed Rotramel that no robbery had occurred. Decedent attempted to leave the Club, and Officer Rotramel told him to stay where he was. Decedent disregarded Rotramel and left. Tuttle did not at any time brandish a weapon. In fact, Tuttle made no overt threat. Nevertheless, Officer Rotramel drew his gun and shot the decedent in the back. The latter was a short distance from the officer and had gone down on one knee. No weapon was found on the decedent; there was allegedly a toy gun which was said to have been found in Tuttle's possession. This was not visible to the officer, but he said that he was apprehensive that the decedent had a weapon. Decedent died from the gunshot wound very soon after the incident.

A limited number of contentions have been asserted in support of the requested reversal. These are set forth and also discussed below.

1. *The contention that the trial court erred as a result of not directing a verdict against Rotramel on the issue of liability.*

Mrs. Tuttle argues that the facts of the case fail to support Rotramel's claim of good faith, and hence the trial court should not have allowed the issue to go to the jury. We here address this issue.

The good faith defense of police officers charged with constitutional violations was first recognized by the Supreme Court in *Pierson* v. *Ray*, 386 U.S. 554 (1967). In its most recent pronouncement on the good faith defense, the Supreme Court made clear that an officer's good faith must be judged by an objective standard. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). *Harlow* reaffirmed the objective standard previously applied, but overruled earlier Supreme Court pronouncements that a subjective component existed as well. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975) ("A school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights . . . of the student"); *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with the good faith belief, that affords a basis for qualified immunity"); *Pierson* v. *Ray*, 386 U.S. at 557 ("If the jury found that the officer reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow, even though the arrest was, in fact, unconstitutional").

An officer's good faith is not an absolute defense to charges; it is an affirmative defense that must be pleaded and proved by the defendant officer. *See Gomez* v. *Toledo*, 446 U.S. 635; *Martin* v. *Duffie*, 463 F.2d 464, 468 (10th Cir. 1972).

Under certain circumstances, the facts may negate the good faith defense as a matter of law. If the facts construed in the light most favorable to the defendant officer utterly belie his belief or the reasonableness of it, his defense should not be considered by the jury. *Butler* v. *Gold-*

blatt Bros., Inc., 589 F.2d 323, 326 (7th Cir. 1978). Jury instructions on an affirmative defense should only be given if reasonably supported by the evidence.

Defendant Rotramel admitted at trial that he violated Police Department policy in shooting Mr. Tuttle. He testified however, that he believed Mr. Tuttle was a felon reaching for a gun. His belief was supported by some evidence. Officer Rotramel was responding to a report that a robbery had taken place. Apparently, Mr. Tuttle made the report, describing himself and reporting that the robber had a gun. Officer Rotramel testified that he attempted to stop Mr. Tuttle, that a struggle had ensued and that Mr. Tuttle repeatedly reached for his boot. Officer Rotramel claimed that Mr. Tuttle broke away and was again reaching for his boot, apparently retrieving a weapon, when Officer Rotramel shot him. The other witnesses to the shooting disputed these aspects of Rotramel's testimony. If the jury believed Officer Rotramel, however, it could find that he reasonably believed his response was permitted.

The trial court clearly thought the evidence was sufficient to send the issue to the jury, and the jury apparently believed Officer Rotramel's story. Inasmuch as the jury was properly instructed and since there is evidence which favors Rotramel, we cannot assume that the conclusion was improper. It is not enough that Officer Rotramel's good faith defense does not seem to be strongly supported in this case; we must decline to rule that it was inadequate as a matter of law. There was some evidence that he reasonably believed that his life was threatened and his actions were justified. Accordingly, we affirm the jury's finding that Officer Rotramel acted in good faith and thus deny the contention of Mrs. Tuttle.

2. *The contention of the City that the evidence was insufficient to justify submission to the jury.*

The City insists that the trial court erred in denying the defendant City's motions for a directed verdict and

judgment notwithstanding the verdict. Its claim is that the trial judge held the City to a standard of ordinary negligence in failing to train Officer Rotramel, rather than the allegedly required showing of gross negligence or deliberate indifference. The argument is also that a single incident of police misconduct cannot establish *grossly* negligent training, and that, in light of the single incident here, the trial court should have granted the City's motion for a directed verdict and for judgment notwithstanding the verdict.

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. *Owen* 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 *Leite* 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.

3. *Appellant's further contentions that the Judge's instructions to the jury were erroneous and that the judgment should be set aside because of these alleged error or errors.*

The argument of the City, taken as a whole, is that the jury instructions did not articulate the law governing the case. Particularly, the City challenges the instruction to the jury that it could find for the plaintiff based upon a single incident of the use of force, from which the jury could infer inadequate training. The plaintiff-appellee, Mrs. Tuttle, contends that the sufficiency of the instructions is not usually to be determined by error in any single instruc-

tion, but rather by viewing the charge as a whole. *United States* v. *Jenkins*, 701 F.2d 850 (10th Cir. 1983). We regard the challenged instruction to be proper, and we consider that the instructions, taken as a whole, properly state the law of municipal liability and affirmative defenses. Apart from the killing incident, there was adequate evidence. Even the officer admitted the inadequacy of the training.

There was much complaint on the part of the City to the effect that the standard of wrong-doing submitted by the court was that of ordinary negligence. However, the instructions given do not agree with this. The instruction which addresses the applicable standard of gross negligence and other elements of the claim is as follows:

> You are instructed that the City of Oklahoma City is not liable for the deprivation of the decedent's constitutional rights solely because it hired and employed the defendant Rotramel. But there are circumstances under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.
>
> This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies, or acquiesces in the constitutional deprivation in such a manner that such constitutional deprivation can be found to result from the execution of a city's official policy or custom.
>
> In the circumstances of the case before you, the City of Oklahoma City can be found to have authorized, sanctioned, or acquiesced in any denial of the decedent's rights only if an official policy which results in constitutional deprivations can be inferred from acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the decedent.
>
> It is the plaintiff's contention that such a policy existed and she relies upon allegations that the City

> is *grossly negligent* in training of police officers, in its failure to supervise police officers, and in its failure to review and discipline its officers. The plaintiff has alleged that the failure of the city to adequately supervise, train, review, and discipline the police officers constitutes *deliberate indifference* to the constitutional rights of the decedent and acquiescence in the probability of serious police misconduct. Furthermore, the policy of placing police officers on duty who were inexperienced and unqualified to act in a particular situation in applying the use of a deadly weapon constitutes deliberate indifference to the rights of the decedent.
>
> The City, of course, has denied the plaintiff's allegations and further denies the existence of an official policy of the City of Oklahoma City which results in constitutional deprivations.
>
> The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of an offensive act. (Emphasis supplied.)

Contrary to the present contention of appellant, the trial judge, in outlining the standard, required proof of the City's *gross negligence*. The jury was told that inadequate training of Rotramel amounting to gross negligence and deliberate indifference to the rights of the decedent was necessary in order to deprive the decedent of his right to liberty and life without due process. In other words, the gross negligence standard was plainly set forth as it pertains to the civil rights claim under § 1983.

The instructions were not erroneous. The gross negligence-indifference standard was sufficient as instructed. As

a result the court was correct in denying dismissal relief to the City.

4. *The appellant City's argument that the alleged liability of the City is based only on training and supervision arising out of a single incident.*

The City cites case law in support of the doctrine that a single incident is not adequate evidence to establish liability for inadequate training and supervision. *McClelland* v. *Facteau*, 610 F.2d 693, 696 (10th Cir. 1979). There it is noted that a police chief could be held liable if he neglected his duty to train subordinates and establish department procedures. He must provide protection for constitutional rights and supervision to correct misconduct of which he has notice. The showing that the individual police officer may have violated the law on an isolated occasion was said not to be sufficient to raise an issue of fact for purposes of imposing liability on police chiefs for failure to train subordinates and establish department procedures that would provide protection for constitutional rights. The court added that there was a genuine issue of material fact as to whether defendant police chiefs violated the duty of supervision to correct misconduct of which they had notice.

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. 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, demonstrate the City's gross negligence and deliberate indifference to the rights of the decedent.

5. *The Damages Requested by Plaintiff*

The plaintiff has sought on behalf of the estate and herself the following damages from the defendants, jointly and separately. The trial court described the plaintiff's alleged damages as follows:

> $2,134.65 for burial expenses;
>
> $984.60 for hospital and medical expenses;
>
> $55,000.00 for loss of consortium and grief as the surviving spouse;
>
> $2,000,000.00 for mental anguish and physical pain suffered by the decedent prior to his death;
>
> $455,000.00 for pecuniary loss, namely loss of future earnings of the decedent, and,
>
> $250,000.00 for grief and loss of companionship of the children.

The plaintiff also sought $1,500,000.00 in punitive damages from the defendant Rotramel.

We have called attention to the numbers which were contained in the complaint of the plaintiff and which the judge mentioned in his instructions for the purposes of explaining, in part at least, how the jury arrived at the verdict returned. This court is not in a favorable position to issue a remittitur with respect to these damages.

The judgment of the district court should be and the same is hereby affirmed.

BARRETT, Circuit Judge, concurring:

I concur because I am convinced the trial court properly and adequately instructed the jury. Even so, I am at a loss to ascertain the basis for the jury's obvious finding that Officer Rotramel was so lacking in training to cope with robberies that such constituted *proof* of Oklahoma City's violation of its duty to train Officer Rotramel to the extent that, as the opinion pinpoints it, it amounted to Oklahoma Ciy's "deliberate indifference to the rights of its citizens."

I have not been able to ascertain what facts the jury relied on to render Officer Rotramel's actions unreasonable. The factual background, as I view it, consists of the false call placed by Mr. Tuttle about the robbery at the Club involving an armed person who met his description, Officer Rotramel's immediate confrontation with Mr. Tuttle upon entering the Club, Rotramel's identification of Tuttle as the reported armed robber, Rotramel's testimony that he saw Tuttle reach down at which time Tuttle was ordered to stay put, Tuttle's hurried exit from the Club in the darkness with Officer Rotramel in pursuit, the fatal shooting by Rotramel when he observed Tuttle bent down near a vehicle and reaching for that which Rotramel believed to be a gun, and finally the discovery of a toy pistol on Mr. Tuttle's person following the shooting. Beyond this, I have not been enlightened with the factual basis of Oklahoma City's "deliberate indifference" in the context of the facts of this case.

APPENDIX B

[Filed June 7, 1982]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, Plaintiff, vs.	)	
CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of the City of Oklahoma City through the Oklahoma City Police Department, Defendants.	)	CIV-81-679-W

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Lee R. West District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, take nothing by way of her claims against the defendant, Julian Rotramel, and that said defendant recover of the plaintiff his costs of the action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, deceased, recover of the defendant the City of Oklahoma City, the sum of One Million Five Hundred Thousand Dollars ($1,-

500,000.00), with interest thereon at the rate provided by law, and her costs of the action.

DATED at Oklahoma City, Oklahoma, this 7th day of June, 1982.

(s) *Lee R. West*
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET 6-7-82