

9 called for record.
It has been filed,
aml 08/07/84 + New memo
supplements orig.
Pool memo by
David Charney

Grant
(Square
conflict)

9/22

Presents an important Q
as to application of Morell:
Whether a single incident (in
this case a policeman negligently
killed an ~~innocent~~ innocent person)
can be viewed as ^{sufficient} evidence of
a "policy or custom" of violating
const. rights.

CA10, declined to follow
other circuits, held one incident
was sufficient.

SUPPLEMENTAL MEMORANDUM to JUSTICE POWELL

From: Annmarie

September 24, 1984 Conference
Summer List 5, Sheet 2

No. 83-1919-CFX

Cert to CA 10
(Barrett, Doyle, Seymour)

City of Oklahoma City

v. Tuttle

Federal/Civil Timely

1. SUMMARY: This memorandum supplements David's original pool memo in light of the record which you requested. The

issue presented by this case is whether a single incident of police misconduct is enough to establish a policy or custom of violating constitutional rights in order to hold a municipality liable under §1983.

2. FACTS AND DECISION BELOW: A police officer, responding to a false report of an armed robbery, shot and killed the resp's husband when he attempted to leave the scene after instructions not to do so. The jury returned a verdict in favor of the officer, finding that he acted in good faith. It found against the city, however, apparently on the theory that the officer's grossly negligent conduct was the result of an official policy or custom. CA10 held that there was sufficient evidence in the record to support the finding of municipal liability. In so doing, it stated that in addition to the evidence of the officer's poor performance on the occasion in question, "there was plenty of independent proof of lack of adequate training ." I have read the trial transcript to try to ascertain what this independent proof might have been, or whether there really was only the single incident from which the city's "policy" of inadequate training was established.

4. DISCUSSION: I found nothing in the record about incidents similar to the one in which the resp's husband was killed. Resp's attorneys attempted to show a policy or custom of inadequate training primarily by having an expert evaluate the city's police training program and various practices of the department. Their expert was quite good, specifically addressing a number of areas in which he felt training was inadequate. Never-

theless, if Monell requires the plaintiff to show a series of incidents in which officials have acted to deprive individuals of their constitutional rights, this testimony is clearly not sufficient to make a prima facie case of municipal liability. Thus, *the* case squarely presents the question whether a "single incident can support a finding of a municipal policy authorizing or acquiescing in constitutional violations."

Since David's original memorandum which pointed out that this case conflicted with decisions of CA4 and CA5, CA11 has also decided a case which directly conflicts with this one. Gilmore v. City of Atlanta, Doc. Nos. 82-8457, 82-8760 (July 9, 1984). Given the importance of the question and the fact that it is likely to be a recurring one, I recommend granting cert.