

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1919

TITLE CITY OF OKLAHOMA CITY, Petitioner v. ROSE MARIE
TUTTLE, ETC.

PLACE Washington, D. C.

DATE January 8, 1985

PAGES 1 thru 35



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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF OKLAHOMA CITY, :
Petitioner, : No. 83-1919
v. :
ROSE MARIE TUTTLE, ETC. :
- - - - -x

Washington, D.C.
Tuesday, January 8, 1985

The above-entitled matter came on for oral
argument at 10:11 o'clock a.m.

APPEARANCES:
BURCK BAILEY, ESQ., Oklahoma City, Oklahoma; on behalf
of the Petitioner.
CARL HUGHES, ESQ., Oklahoma City, Oklahoma; on behalf
of the Respondent.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
BURCK BAILEY, ESQ.	
On behalf of the Petitioner	3
CARL HUGHES, ESQ.	
On behalf of the Respondent.	22

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1 He was -- he called the Oklahoma City Police
2 Department and reported an armed robbery in progress and
3 described to the dispatcher the armed robber as
4 himself. He said, "He's a white male. He's about 37
5 years old. He has glasses, brown hair," and such as
6 that.

7 The dispatcher put out an all-points bulletin
8 to all officers, and there were two officers patrolling
9 separately in the general vicinity of the bar. One of
10 them was Julian Rotramel, a rookie police officer who
11 had been out of the Oklahoma City Police Academy about
12 ten months following an 18-week training exercise at the
13 Oklahoma City Police Academy. He was 22 years old at
14 the time.

15 Another officer patrolling in the general
16 vicinity was a veteran police officer named Lennox.
17 Rotramel arrived on the scene almost within one minute
18 after he received the call. He was within eight or nine
19 blocks of the club.

20 What happened after he went into the club is
21 in sharp dispute in the testimony. Rotramel's testimony
22 was that he walked into the darkened bar -- it was a
23 so-called "blind" building, concrete blocks, with a
24 single door that operated on a trap spring that closed
25 behind you -- and found the person later found to be

1 Tuttle; in any event, the person who matched the
2 description of the robber at the bar, and that Tuttle
3 walked toward him as if to leave through the door behind
4 him.

5 Rotramel said that he put his hand on his
6 shirt or arm or chest, and anyway he held him, and that
7 Tuttle said something that's in dispute. Why can't I
8 leave, or something like that. And Rotramel replies,
9 "I've got a call. Stay put."

10 It's Rotramel's testimony that Tuttle tried
11 twice to reach for his boot, and that he straightened
12 him up. The two bartenders, female bartenders in the
13 bar, testified they saw Tuttle make no such action to
14 retrieve anything from his boot.

15 Rotramel lighted his flashlight, it was dark
16 in there, and signaled to the bartender to come toward
17 him. His testimony was he asked if there was a robbery
18 in progress, and that she uttered only one word,
19 "robbery," and it doesn't indicate whether it was with a
20 question mark like "robbery?" or whether it was
21 "robbery." It's not clear in the record.

22 In any event, it does seem to be clear that
23 Tuttle then broke loose from the officer's grasp and in
24 the words of the Plaintiff's witnesses, darted through
25 the door and that Rotramel spun around and went through

1 the door after him, in pursuit. And whether the door
2 slammed shut or was propped open by the officer's foot
3 is also disputed.

4 In any event, at some point in whirling after
5 him, the officer drew his service revolver. Outside the
6 bar, there was no witness other than Rotramel. He said
7 that he saw Tuttle down in a crouched position with his
8 hand going for his boot. He saw no weapon.

9 He said he had hollered "halt" when the man
10 went out, and "halt" when he saw him crouched with his
11 hand in his boot, and that Tuttle looked over his
12 shoulder at him and started to come up, and he fired.

13 It was Plaintiff's version that because of the
14 exit wound on Tuttle, it could not have happened the way
15 Rotramel said it happened, because the bullet exited
16 higher than it entered in the back. So he must have
17 been in a bent-over position. So, in any event, he
18 didn't come straight up. He was still in a crouched
19 position.

20 QUESTION: Mr. Bailey?

21 MR. BAILEY: Yes, ma'am.

22 QUESTION: Are you objecting to the jury
23 instructions or to the sufficiency of the evidence in
24 the case? It isn't clear to me.

25 MR. BAILEY: Both, Your Honor. We take the

1 position that under no circumstance was the evidence
2 sufficient to go to the jury because there was no proof
3 of any official policy or customs promulgated by the
4 City of Oklahoma City under the Monell standard, and
5 that the court's instruction on a single incident deemed
6 sufficient to let the triers of fact infer an official
7 policy to deprive someone of their constitutional rights
8 was --

9 QUESTION: Did you make your objections to the
10 instructions before the trial court?

11 MR. BAILEY: The objection was made,
12 Your Honor, not by -- I was not at the trial, but the
13 objection was made in chambers, I am advised, and then
14 following -- off the record -- and then following the
15 giving of the instructions, the trial judge summoned the
16 counsel to the bench, at which point there is an
17 objection in the record by the City Attorney, the
18 Assistant City Attorney trying the case, which is
19 ambiguous. He says, "We object to that City liability
20 instruction that contains a single instant language."

21 Plaintiff in their brief take the position
22 that that is an insufficient objection and doesn't
23 comport with the Federal Rules of Civil Procedure that
24 says it must be specific.

25 But I am advised the trial judge well knew

1 what the objection was. That had been aired in
2 considerable detail in chambers, and that it was just to
3 preserve the record at the -- on the record, as it were,
4 following the giving of the instructions.

5 QUESTION: Is there anything in the record
6 that would enable us to figure out for ourselves whether
7 the trial judge full well knew the meaning of the
8 objection?

9 MR. BAILEY: Yes, Your Honor, there is because
10 this was also raised in pretrial briefs, that is, the
11 single incident objection of the City. It was a very
12 central part of dispute between these parties from the
13 beginning.

14 QUESTION: So you say the term "single
15 incident" used by the Assistant City Attorney had taken
16 on a nomenclature that meant something more than just
17 the words alone might mean to the trial judge?

18 MR. BAILEY: I think there's no question of
19 that, Your Honor.

20 QUESTION: But, Mr. Bailey, was there other
21 evidence besides the single incident on the questions of
22 policy or custom?

23 MR. BAILEY: We take the position there was no
24 other evidence on the issue of policy or custom. There
25 was evidence from the Plaintiff's expert that the

1 training this officer received was grossly inadequate to
2 deal with an armed robbery situation.

3 The case was tried on that basis, as I see it,
4 Your Honor. The Plaintiff's case was predicated on a
5 contention that the State -- that the City was grossly
6 negligent in the training that it gave Officer Rotramel,
7 and that that constituted a deliberate indifference to
8 the rights of the citizens of Oklahoma City.

9 QUESTION: But did not bear on whether there
10 was a policy of training which was inadequate?

11 MR. BAILEY: Well, that is our position,
12 Your Honor, that that in and of itself is no showing of
13 an official policy. To state, it seems to me, that the
14 City of Oklahoma City has an official policy of
15 inadequately training its officers is preposterous. And
16 there was no proof of any pattern or tradition of
17 misbehavior or any other evidence whatever of any
18 aberrant police behavior.

19 There was -- this record is barren of that.

20 QUESTION: By that, do you mean that they
21 might have introduced evidence that in the previous
22 calendar year, 13 fleeing persons had been shot with no
23 further explanation?

24 MR. BAILEY: Well, I think that that would
25 be --

1 QUESTION: Is that the kind of evidence that
2 you say would have tended to support their case?

3 MR. BAILEY: I'm not even sure if I would say
4 that, but that is evidence that certainly would point in
5 that direction, that there would be some misbehavior on
6 the part of the police, not necessarily shootings. I
7 don't really mean it has to rise to that level of
8 seriousness, but some showing of an insensitivity to
9 constitutional rights that the City Council would be
10 able to infer that the City's training was not adequate.

11 I would suggest, Your Honor, that it's a
12 difficult proposition, logically, to say that the City
13 can be held to any negligence standard for training its
14 police officers. But I don't need to say that in this
15 case because there's no proof of any other instance,
16 other than this single event, this single incident.

17 QUESTION: Well, Mr. Bailey, would you take
18 the position that liability could be imposed under
19 Monell, based on a single incident of misconduct,
20 coupled with independent evidence of inadequate training
21 or supervision?

22 Is that enough?

23 MR. BAILEY: I don't think it is enough,
24 Your Honor. I don't think so, because just recently,
25 about two months ago, since our briefs closed, there's a

1 Fourth Circuit opinion that I think speaks to
2 Your Honor's point.

3 There, an automobile accident victim sued the
4 City of Newport News, saying that the City had grossly,
5 negligently trained its police officers in knowing how
6 to give medical treatment to an automobile victim, and
7 that she had been injured, her spine was injured as a
8 result of them putting her in a cab instead of in an
9 ambulance.

10 And if you -- there's no logical stopping
11 point, we would submit, if you can predicate municipal
12 liability solely on a contention that they negligently
13 trained an officer or a fireman or a meter reader.
14 There is -- it opens up Section 1983 to simple tort
15 actions.

16 QUESTION: What if the city or town adopted a
17 policy of hiring police with no training at all? Can
18 that amount to the equivalent of knowledge, constructive
19 knowledge?

20 MR. BAILEY: I've thought about that,
21 Your Honor, and frankly I doubt that there is a
22 constitutional duty on the part of a city to train
23 police officers at all.

24 I expect that there are hundreds of
25 municipalities that hire police officers with no

1 trainnig at all. And indeed, in the Languirand case in
2 the Fifth Circuit, recently decided, the officer who
3 shot the suspected prowler had no training whatsoever.

4 QUESTION: Is it not true that many, or at
5 least a considerable number of small communities elect,
6 by popular election, some of their police people,
7 sheriffs, and constables?

8 MR. BAILEY: They do in the little town I grew
9 up in, Your Honor. And I don't know, I suspect there
10 are many that do that.

11 QUESTION: Mr. Bailey --

12 MR. BAILEY: Yes, Your Honor,

13 QUESTION: You mentioned, I think, that this
14 officer had been only recently graduated from a police
15 training academy. Was there any evidence of the kind of
16 training he had at the academy?

17 MR. BAILEY: Tremendous amount of testimony
18 about that. And that, in fact, was the central part of
19 the case.

20 QUESTION: Was that offered as a predicate for
21 the conclusion that there was a practice, and that the
22 practice was inadequate to train this officer?

23 MR. BAILEY: I think that's what it was
24 offered for, Your Honor. It was offered to show he was
25 negligently trained. He went to the Oklahoma City

1 Police Academy, which the former Oklahoma City Police
2 Chief testified was rated by the FBI as the third best
3 in the nation, for 18 weeks, 700 hours of training.

4 The Plaintiff, through Dr. Kirkham, a
5 criminologist from Florida, testified that he had
6 studied the curriculum and that it did not contain more
7 than 24 minutes of time devoted to the response to an
8 armed robbery call, and that that was grossly
9 deficient. That was his testimony.

10 The testimony from the police side was
11 different from that. It was that the training was
12 extremely sophisticated and thorough and complete.

13 The problem I see with that, Your Honor, is
14 that the curriculum was extensive. Part of it is
15 established by the state law of Oklahoma, what a police
16 officer must study. It would be difficult, I would
17 think, for the Court to fashion a test as to what
18 curriculum needs to be taught in every city police
19 department in the country. There vast differences of
20 opinion about that, I think, among knowledgeable
21 professionals.

22 QUESTION: Well, independently of the
23 challenge you make to the instruction, suppose we were
24 to agree with you that the instruction was error. Would
25 we then have to address whether the rest of the evidence

1 sufficed to support a finding of policy or custom?

2 MR. BAILEY: I doubt that you would have to,
3 Your Honor. I think we would like for the Court to do
4 so. It just strikes us that a contention that the
5 training an officer receives is the springboard to
6 municipal liability is a hazardous test.

7 QUESTION: Mr. Bailey, it seems to me you are
8 making quite a different argument than the question
9 presented in the cert petition, which was focused on the
10 single incident point, rather than whether training can
11 ever be -- kind of training can ever be a policy.

12 Are you abandoning your single incident --

13 MR. BAILEY: No, not at all, Your Honor. That
14 is, we think that's our strongest point, and we are
15 urging that to the Court. But we think that there was
16 insufficient --

17 QUESTION: On that point, is it your position
18 that the single incident could never give rise to 1983?
19 I was thinking about a hypothetical case where you might
20 have a policy of shoot to kill traffic offenders or
21 something, an absurd hypothetical, I recognize.

22 But suppose you had a very extreme, very
23 dangerous policy, and the first implementation of the
24 policy resulted in a tragic death. Could that ever
25 constitute a violation?

1 MR. BAILEY: Your Honor, I think that points
2 up an interesting distinction in this case. If that
3 were the policy, shoot to kill, as you suggest, or shoot
4 on mere suspicion, it seems to me that policy just
5 wouldn't pass constitutional muster. That policy would
6 not.

7 Here, the policy of the City of Oklahoma City
8 on the use of firearms was, by Plaintiff's own expert
9 witness, ideal. And the position taken in the trial
10 court by Plaintiff was that Rotramel departed from City
11 policy which said an officer can use his weapon only in
12 defense of life when the suspect is armed or threatening
13 great bodily harm, and he must always use the utmost
14 discretion with due respect for the sanctity of human
15 life, that sort of thing.

16 QUESTION: But then if that's your theory, you
17 are really saying that the evidence doesn't show an
18 invalid policy. And that would be true if there were
19 three incidents or nine incidents or one incident, I
20 suppose.

21 MR. BAILEY: Your Honor, there's a dichotomy
22 there. The City policy now, in Plaintiff's brief, is
23 being questioned. At the trial, it never was. The
24 contention was that the officer was grossly inadequately
25 trained, not that the City policy was bad, but that the

1 policy in the sense that they grossly inadequately
2 trained the officer was flawed. That was the contention
3 at trial.

4 QUESTION: Well, and yet the instructions do
5 say the existence of such a policy is a question of fact
6 for you to determine, and that was the question; whether
7 there was a policy of putting unqualified people on the
8 street.

9 MR. BAILEY: That's correct, Your Honor, not
10 that -- I doubt in all -- I doubt in all truth that the
11 training the officer received had anything to do with
12 this incident. I've thought about that. I think if
13 they --

14 QUESTION: But the jury seems to come to a
15 different conclusion. We have to deal with what the
16 jury decided on the basis of instructions.

17 MR. BAILEY: I'm not -- the jury found in
18 favor of the officer, Your Honor, as you will recall.
19 They found in favor of the officer and against the
20 Plaintiff on the Plaintiff's suit against the officer,
21 presumably on the good faith qualified immunity that
22 exists for the benefit of City employees, but we don't
23 know that for sure, and against the City.

24 And that has been the pattern, Your Honor, in
25 these cases that are cited -- some are not cited. In

1 very recent cases, there's an awful lot of litigation in
2 this area going on. But the juries return verdicts in
3 favor of the officers and against the municipality. And
4 they are -- in the cases we've cited, it's astonishing
5 that they are all for \$1,500,000, all four of them.

6 QUESTION: Well, juries return verdicts in
7 favor of railroads, or against railroads and in favor of
8 engineers, too, in personal injury cases.

9 Isn't part of your argument, as least as I
10 understood you to have been previously making it, that
11 no matter what one says about the Oklahoma City policy
12 of training officers, that isn't the same kind of policy
13 as the New York City policy about maternity leaves that
14 was involved in Monell.

15 MR. BAILEY: It's not the same at all,
16 Your Honor. Monell was a specific, express, written,
17 official policy of the City which didn't pass
18 constitutional muster.

19 QUESTION: And it also was a policy that
20 directly affected constitutional rights.

21 MR. BAILEY: That's true. Yes, Your Honor, I
22 agree with that. And this query, whether there's any
23 constitutional right that the body has to a certain
24 quality of training by City employees. I'm not certain
25 that's true.

1 QUESTION: Did the trial judge, in his
2 instructions, define what a policy was?

3 MR. BAILEY: I don't recall that he did,
4 Your Honor. He might have.

5 QUESTION: Did he say anything about
6 negligence or gross -- or recklessness?

7 MR. BAILEY: A great deal.

8 QUESTION: Did he say that that was enough to
9 -- that was enough to amount to a policy?

10 MR. BAILEY: I think he did, Your Honor.

11 QUESTION: And did he say that a single
12 instance, or did he imply that a single instance of
13 gross negligence or recklessness or disregard could
14 amount to a policy?

15 MR. BAILEY: Specifically. Yes, Your Honor.

16 QUESTION: There were no objections to that?

17 MR. BAILEY: There was an objection to that
18 language, as I was responding to Justice O'Connor.

19 QUESTION: I thought part of your argument and
20 part of the question that you raised in your cert
21 petition was that a single instance of gross negligence
22 or of careless disregard, reckless disregard, could
23 never amount to a policy.

24 MR. BAILEY: Well, that's true, Your Honor,
25 and that was objected to.

1 QUESTION: That is the heart of your case,
2 isn't it?

3 MR. BAILEY: Yes.

4 QUESTION: And there was also no objection to
5 the trial judge saying to the jury that the issue of
6 policy is a question of fact for the jury. But if you
7 are going to define a policy, that a policy can be made
8 out by a single act of gross negligence, that is a legal
9 proposition.

10 MR. BAILEY: I quite agree, Your Honor.

11 QUESTION: Well --

12 MR. BAILEY: There was a motion for directed
13 verdict made by the City at the close of the Plaintiff's
14 proof, which was denied on the single incident basis.

15 There was a motion for judgment
16 notwithstanding the verdict made.

17 QUESTION: And the Court of Appeals seems to
18 have agreed that a single instance of gross negligence
19 could amount to a policy.

20 MR. BAILEY: Well, that's -- I think they had
21 to agree with that, because that's the only proof in the
22 record.

23 QUESTION: And you think the question has been
24 preserved all the way?

25 MR. BAILEY: Oh, yes. I don't think there is

1 any serious question about that, Your Honor.

2 QUESTION: Counsel, the Respondent brought out
3 the policy of Oklahoma, which was not to shoot in a
4 circumstance like this.

5 MR. BAILEY: That's correct.

6 QUESTION: Is there anything in the evidence,
7 as to what, if anything, was done by the City to the
8 police officer?

9 MR. BAILEY: I'm not sure there is anything in
10 the record about it. Rotramel departed the police force
11 shortly thereafter for other employment.

12 QUESTION: Oh, I see.

13 MR. BAILEY: And he went to work for, I think,
14 an oil company or something.

15 QUESTION: What worries me is, the jury
16 couldn't just have ignored that fact, that the policy,
17 as expressed by the City, was not to do what this man
18 did.

19 MR. BAILEY: Well, that's right.

20 QUESTION: And then the man innocently, it
21 seems to me, did something wrong. What happened?

22 MR. BAILEY: I think the situation was this.
23 Your Honor has asked me what happened. As I was
24 beginning to state a moment ago to Justice Stevens'
25 question, I doubt that if they had given this officer

1 five years of training on responding to armed robbery,
2 it would have had a thing in the world to do with this
3 incident.

4 You've got an armed robbery call, in a rough
5 area, in a dark bar. The person matches the description
6 of the robber precisely. He makes -- he darts out; it's
7 dark. I think the officer said, "It wasn't a question
8 of apprehending him; I thought my life was in danger. I
9 thought I was doing what I had to do to save myself."

10 And I suspect that training really didn't have
11 anything to do with that; that he was acting -- you've
12 got a very edgy officer going into that situation. It
13 was the Plaintiff's case at trial that the officer
14 should not have gone in that bar alone; that he should
15 have waited for a backup.

16 But they are always worried about hostage
17 situations. We had a horrible situation in Oklahoma
18 City. Well, my time is up, Your Honor, and I'll
19 complete that.

20 QUESTION: May I just ask one quick question,
21 if I may? In response to Justice White, you said that
22 the instructions did refer to the single incident
23 business.

24 Are you referring to some instruction other
25 than the one quoted by the Court of Appeals, or is it

1 supposedly the same --

2 MR. BAILEY: I don't know whether it's printed
3 in the Court of Appeals decision or not, Your Honor. I
4 don't remember. I think it was.

5 QUESTION: I'd be -- it would help me to know
6 what instruction you are complaining of. Maybe you'll
7 do it on your rebuttal. I don't want to use up all your
8 time. I, frankly, don't find what you describe in your
9 colloquy.

10 MR. BAILEY: Well, it's this instruction,
11 Your Honor. It's on page 44 of the Appendix, where the
12 court says this: "Absent more evidence of supervisory
13 indifference, such as acquiescence in a prior matter of
14 conduct, official policy such as to impose liability on
15 the City of Oklahoma city under the Federal Civil Rights
16 Act, cannot ordinarily be inferred from a single
17 incident of illegality such as the first excessive use
18 of force to stop a suspect; but a single, unusually
19 excessive use of force may be sufficiently out of the
20 ordinary to warrant an inference that it was
21 attributable to inadequate training or supervision
22 amounting to deliberate indifference or gross negligence
23 on the part of the officials in charge."

24 QUESTION: I see.

25 CHIEF JUSTICE BURGER: Mr. Hughes.

1 ORAL ARGUMENT OF CARL HUGHES, ESQ.

2 ON BEHALF OF THE RESPONDENT

3 MR. HUGHES: Mr. Chief Justice, and may it
4 please the Court, this is an appeal from the jury
5 verdict rendered in the Western District of Oklahoma, as
6 affirmed by the United States Court of Appeals for the
7 Tenth Circuit.

8 The issue before this Court is not whether the
9 City of Oklahoma City should have to pay damages to the
10 estate of William Adam Tuttle; the overall question of
11 liability depends on a number of issues which are simply
12 not before this Court.

13 First, liability depends in large part upon
14 resolution of factual issues which were resolved by the
15 jury in the case and are subject to limited review, due
16 to the provisions of the Seventh Amendment.

17 Second, most of the legal issues were
18 addressed in instructions given by the Court which were
19 simply either unobjected to or objected to in such a way
20 as to be insufficient under Rule 51.

21 And, third, any other issues, other issues
22 that have been discussed here this morning simply aren't
23 raised by the cert petition.

24 In this case, the policy, the case was
25 submitted to the jury in the court's instructions on

1 three separate theories; one, that the shooting itself
2 was justified under the policies of the City of Oklahoma
3 City. As I was interested in Mr. Bailey's concession
4 that if they'd a shoot to kill, shoot on suspicion
5 policy, that that would have been -- would not have
6 passed constitutional muster and would have been a basis
7 for liability, and that's precisely what the evidence
8 showed at the trial.

9 The chief of police testified, and it was a
10 matter of evidence, it was a matter of factual issue
11 that was resolved against the City, that the officer was
12 entitled to shoot on the basis of suspicion, if he had
13 any suspicion that his life was in danger.

14 Very briefly, the facts, as opposed to being
15 in a light most favorable to the City, in a light most
16 favorable to Mr. Tuttle, who prevailed in the trial
17 court, showed that Mr. Rotramel did go into the bar and
18 was advised -- it was not a dark bar, but it was a
19 well-lit bar -- that he was advised upon entering the
20 bar, he asked about an armed robbery, the bartender,
21 another bartender advised him that there was no armed
22 robbery in progress.

23 QUESTION: Just one little minor point. You
24 said it was a well-lit bar. Why did he need to turn on
25 the flashlight?

1 MR. HUGHES: He used it merely just for
2 motion, just to instruct --

3 QUESTION: In a brightly-lit bar?

4 MR. HUGHES: I don't know that the light was
5 turned on. I don't recall that being the evidence.

6 QUESTION: Well, you said it was a well-lit
7 bar.

8 MR. HUGHES: It was a lit bar.

9 QUESTION: Well-lit.

10 MR. HUGHES: Well, I took it --

11 QUESTION: And you still need a searchlight.

12 MR. HUGHES: Only for purposes of motion, Mr.
13 Justice Marshall.

14 QUESTION: I'd rather not emphasize
15 unimportant points.

16 QUESTION: Going back to your statement about
17 whether the officer thought his life was in danger, if
18 the officer in a given situation, an officer believes
19 that his life is in danger, you are saying he is not
20 entitled to shoot?

21 MR. HUGHES: Of course, that issue is not
22 preserved and presented in this case. I say that there
23 has to be more than just a totally unfounded belief that
24 his life was in danger, just a mere suspicion. And
25 there was no -- nothing more than that in the evidence

1 in the light most favorable to the --

2 QUESTION: Well, the jury's verdict would
3 suggest, at least it is susceptible of a meaning that
4 the jury thought that the police officer did have a
5 reasonable basis to think his life was in danger, and
6 therefore they excused him.

7 MR. HUGHES: That's a concern that I have
8 about an appellate court reviewing factual
9 determinations that were made at the trial. This court
10 in the record doesn't illustrate, and you can't see -- I
11 tried the case and I did see the timidity. It was sort
12 of like Mr. Creeper leaves the Marine Corps and goes on
13 the Oklahoma City Police Force with a gun.

14 You can't see the attitude of Rotramel. I
15 mean he didn't, to me at least, portray the attitude of
16 a Clint Eastwood Dirty Harry.

17 QUESTION: How it was portrayed to you or to
18 some judge is not as important as how the jury viewed
19 him. Now, the jury returned a verdict indicating that
20 they thought he was justified. At least that's the way
21 I would read the jury's verdict; that he was justified
22 in what he did.

23 MR. HUGHES: I didn't -- I respectfully
24 disagree -- read that it went that far; that it merely
25 held that he was in good faith in what he did. In other

1 words, that he thought he was complying with the policy,
2 that he thought he was passing constitutional muster, but
3 that's simply not what the facts illustrated and what
4 the jury resolved.

5 QUESTION: Mr. Hughes, a moment ago you said
6 that the policy that was relied upon by you as Plaintiff
7 was a policy of Oklahoma City to allow shooting on
8 suspicion.

9 I am looking at the Court of Appeals' opinion,
10 page 7A and 8A of the petition for certiorari. And it
11 seems to me they devote one paragraph to the question of
12 policy there, and the only policy they talk about is
13 negligence and gross negligence and supervising. They
14 don't mention the policy that you refer to.

15 Are you saying that the Court of Appeals
16 upheld the policy contention on the basis that you're
17 talking about of a policy of shooting on suspicion?

18 MR. HUGHES: Well, that issue, in terms of --

19 QUESTION: I think you can answer the question
20 yes or no.

21 MR. HUGHES: Well, I think they did; yes.

22 QUESTION: The Court of Appeals mentioned in
23 its opinion the policy which you refer to of shooting on
24 suspicion?

25 MR. HUGHES: The issue --

1 QUESTION: Did the Court of Appeals mention
2 that in its opinion?

3 MR. HUGHES: I don't recall them mentioning
4 it, but the issue wasn't before them in that context and
5 in that posture. And I think when the issues are
6 resolved in the trial court, we take less up to the next
7 level, and less up to the next, and it's simply a matter
8 that was addressed in the instructions, in unobjected to
9 instructions in the trial court.

10 QUESTION: Well, that may be, but if the Court
11 of Appeals affirmed on some ground that the policy was
12 negligent training or deliberate disregard of rights in
13 training, if that's the policy they identified -- and if
14 they were wrong in that, I don't know that we should
15 affirm on your ground.

16 MR. HUGHES: Well, of course, that's, in my
17 view, the purpose of Rule 51. You know, we have to
18 object to the instructions, object to the problems, and
19 properly preserve the error, and it's simply not
20 properly preserved.

21 I mean the only objection to the instructions
22 that's in the record, and I take issue with the
23 statements about matters that occurred outside the
24 record, the only instruction that's in -- the only
25 objection that's in the instruction is quoted in full at

1 footnote 62 at page 45 of our brief.

2 We make a second objection, Your Honor,
3 particularly to the one, the Oklahoma City language, the
4 language in the light of the City of Oklahoma City,
5 which is the single occurrence language. That is simply
6 the only matter that was objected to in the trial court
7 and preserved for review, and I don't think that
8 preserves anything.

9 QUESTION: Do you agree that the trial court
10 instructed the jury that a single instance of gross
11 negligence, or however you want to describe it, that you
12 may infer a policy from that?

13 MR. HUGHES: Well --

14 QUESTION: Do you agree or not? Yes or no?

15 MR. HUGHES: That language is contained in the
16 instructions, yes.

17 QUESTION: So you do agree with that?

18 MR. HUGHES: Yes.

19 QUESTION: So that it's possible that the jury
20 concluded that there was a single instance of gross
21 negligence, and that was a policy, was enough for a
22 policy.

23 And didn't the Court of Appeals agree to
24 that?

25 MR. HUGHES: The Court of Appeals agreed that

1 the instructions should be taken as a whole.

2 QUESTION: Yeah. Well, didn't the Court of
3 Appeals agree that a policy could be made out from a
4 single instance of gross negligence?

5 MR. HUGHES: I believe that they did.

6 QUESTION: Is that a question of law or of
7 fact?

8 MR. HUGHES: In the light of this case, I
9 thought it was a question of fact.

10 QUESTION: Well, certainly the trial judge
11 seemed to think so.

12 MR. HUGHES: I would say that's a fair and
13 accurate statement.

14 QUESTION: Although he did instruct the jury,
15 as a matter of law, that it could be made out from a
16 single instance.

17 MR. HUGHES: He did say that. Of course, I
18 don't see that as an issue that's -- there were more
19 issues than the single -- there were more theories than
20 the single incident theory, than the shooting itself,
21 that were presented.

22 Training, supervision, as well as the policy
23 of shoot to kill and shoot to center mass were
24 presented.

25 QUESTION: Of course, what we've taken is the

1 Court of Appeals' judgment. It might be that if we were
2 versed on this issue, the Court of Appeals might affirm
3 on your theory on remand. But all we have before us is
4 the Court of Appeals' opinion. That's the basis that
5 they have said was sufficient. And that just talks
6 about training.

7 MR. HUGHES: I'm sorry. I don't think I
8 follow that.

9 QUESTION: Well, I don't know how I could make
10 it any more clear. I said the Court of Appeals'
11 opinion, when it talks about policy, speaks only of
12 training and grossly negligent training. That's all we
13 have before us in this case as a matter of policy from
14 the Court of Appeals' opinions.

15 You may be absolutely right that there were 18
16 different policies offered in the trial court, but the
17 Court of Appeals discussed only one.

18 MR. HUGHES: They discussed training,
19 supervision, and the shoot to kill policy, as I recall.

20 QUESTION: I thought a minute ago, you said
21 the Court of Appeals did not discuss the shoot to kill
22 policy. The Court of Appeals' opinion is about eight
23 pages long. It devotes about one page to policy.

24 Did it or did it not discuss the shoot to kill
25 policy?

1 MR. HUGHES: Not in the specific context that
2 you're talking about.

3 QUESTION: Well, did it discuss it in some
4 other context?

5 MR. HUGHES: It discussed it in the context of
6 the overall case is the way I --

7 QUESTION: Well, where did it discuss the
8 shoot to kill policy in the context of the overall
9 cases?

10 MR. HUGHES: I don't think I can find it in
11 here.

12 QUESTION: But you are confident that the
13 Court of Appeals did discuss it?

14 MR. HUGHES: Yes. Especially in -- in any
15 event, yes.

16 And the issue is even narrower. The issue is
17 what is presented by the cert question, and the issue
18 comes down to, as I see it, whether or not -- whether we
19 have to prove the one free bite theory; whether a single
20 incident, taken together with training, an independent
21 proof of a policy is sufficient.

22 QUESTION: Mr. Hughes, it seemed to me that
23 basically the theory proceeded on by the Plaintiffs
24 below was that an isolated incident, plus evidence of
25 the training that was given police officers, was enough

1 to establish the liability here.

2 And what that argument boils down to, as far
3 as I can understand it, is that other procedures in
4 terms of training a police officer would have reduced
5 the likelihood that Officer Rotramel would have used
6 excessive force.

7 Is that the thrust of the theory?

8 MR. HUGHES: I would say so.

9 QUESTION: Well, didn't Rizzo v. Goode reject
10 that very approach as the basis for liability under
11 1983? It seemed to me that in Rizzo, this Court
12 rejected that.

13 MR. HUGHES: Well, we saw it as just a
14 straight Monell issue. Policy plus causation. And
15 that's the way it was presented.

16 QUESTION: Well, didn't Rizzo deal with
17 exactly that situation for purposes of 1983 liability?

18 MR. HUGHES: I don't know. In any event, the
19 theory presented to the Court at this time by the City
20 is that Rotramel departed by City policy. The theory
21 presented in the trial court was that Rotramel's actions
22 were in complete compliance with City policy.

23 They have changed their theory as they
24 proceeded through the appellate level. The long and
25 short of it is, the matter was properly instructed on in

1 our view, the evidence was submitted to the jury, the
2 jury resolved the factual issues against the City of
3 Oklahoma City, properly so.

4 There is just nothing before the Court at the
5 present time to properly preserve for resolution.

6 QUESTION: May I ask you a question? I didn't
7 realize you were just finishing your argument.

8 Supposing you had a case in which the City
9 didn't train their officers how to drive, and they put
10 an officer in a car, he went out and got in an
11 automobile accident and killed somebody, just because he
12 didn't know how to drive.

13 1983 liability or not under your theory?

14 MR. HUGHES: Under my theory? Of course,
15 under my theory, it's a fact question as to whether or
16 not the degree and nature of it, under my theory --

17 QUESTION: Just total -- they just let people
18 out who didn't even have a driver's license.

19 MR. HUGHES: If they had a policy.

20 QUESTION: The policy was, we don't train
21 people to drive. We hire them and we assume they can
22 drive. We don't even ask them.

23 MR. HUGHES: Under those circumstances --

24 QUESTION: But there's not any use of guns or
25 anything. It's just an automobile accident. They hit a

1 pedestrian.

2 MR. HUGHES: Under our theory and our reading,
3 that would create liability.

4 CHIEF JUSTICE BURGER: Do you have anything
5 further, Mr. Bailey?

6 MR. BAILEY: If the Court has any questions
7 I'll respond. If not, I'm finished.

8 CHIEF JUSTICE BURGER: I hear none.

9 Thank you, gentlemen. The case is submitted.

10 We'll hear arguments next in Burger King
11 Corporation v. Rudzewicz.

12 (Whereupon, at 10:51 o'clock a.m., the case in
13 the above-entitled matter was submitted.)
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CERTIFICATION

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#83-1919 - CITY OF OKLAHOMA CITY, Petitioner v. ROSE MARIE TUTTLE, ETC.

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BY Paul A. Richardson

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