

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: BOARD OF THE COUNTY COMMISSIONERS OF  
BRYAN COUNTY, OKLAHOMA, PETITIONER V JILL  
BROWN, ET AL.

CASE NO: No. 95-1100

PLACE: Washington, D.C.

DATE: Tuesday, November 5, 1996

PAGES: 1-55

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IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF THE COUNTY :  
COMMISSIONERS OF BRYAN :  
COUNTY, OKLAHOMA, :  
Petitioner :  
v. : No. 95-1100  
JILL BROWN, ET AL. :

- - - - -X  
Washington, D.C.  
Tuesday, November 5, 1996

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:02 a.m.

APPEARANCES:

WALLACE B. JEFFERSON, ESQ., San Antonio, Texas; on behalf  
of the Petitioner.  
BRIAN SERR, ESQ., Waco, Texas; on behalf of the  
Respondents.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 95-1100, Board of the County  
5 Commissioners -- the spectators are admonished, do not  
6 talk until you get out of the courtroom. The Court  
7 remains in session.

8 We'll hear argument now in Number 95-1100, the  
9 Board of County Commissioners of Bryan County v. Jill  
10 Brown.

11 Mr. Jefferson, you may proceed.

12 ORAL ARGUMENT OF WALLACE B. JEFFERSON

13 ON BEHALF OF THE PETITIONER

14 MR. JEFFERSON: Mr. Chief Justice and may it  
15 please the Court:

16 The Commissioners of Bryan County, Oklahoma, are  
17 required by statute to levy and collect nearly \$900,000 in  
18 taxes to satisfy the judgment in this case. The taxpayers  
19 might reasonably inquire how they became liable to pay  
20 such damages to the respondents. The answer cannot  
21 readily be found in any decision of this Court, rather  
22 derives from an unprecedented extension of municipal  
23 liability contained in the decision of the Fifth Circuit.

24 The Fifth Circuit says Bryan County is liable  
25 under section 1983 because its sheriff employed his

1 nephew, who subsequently was held to have used excessive  
2 force during the course of an investigatory stop.

3 QUESTION: Mr. Jefferson, would you just  
4 straighten me out on how much money is at stake? I  
5 thought that apart from \$100,000 the rest of the award  
6 against the county sticks because it's just based on State  
7 law negligence? Wasn't that -- that the State has  
8 consented, or the county is liable for ordinary negligence  
9 under State law, no civil right thing. So we're talking  
10 about only \$100,000 of the award. Is --

11 MR. JEFFERSON: No, Your Honor, I think that's  
12 incorrect. The judgment against the county was for the  
13 violation of civil rights, and in fact the Fifth Circuit  
14 didn't reach the question of negligence. That issues  
15 remain --

16 QUESTION: That's what the jury -- wasn't this a  
17 jury trial, and didn't they have a set of interrogatories  
18 that they --

19 MR. JEFFERSON: Your Honor, if you'll look at  
20 the judgment, the judgment that's in the appendix to the  
21 petition for cert. The judgment itself awards damages  
22 jointly and severally against the county and against the  
23 officer for somewhere near \$800,000. My figure of  
24 \$900,000 --

25 QUESTION: Yes, but look at 42(a), and the only

1 two items that seem to be related to the 1983 exclusively  
2 are (k) and (l). The jury answered yes to interrogatory 8  
3 and 9, do you find that the county was negligent, and the  
4 same thing in interrogatory 9. There were State law  
5 negligence claims --

6 MR. JEFFERSON: That's correct.

7 QUESTION: -- given to the jury, right?

8 MR. JEFFERSON: Yes, Your Honor.

9 QUESTION: Do your arguments here depend on the  
10 amount of jury verdict?

11 MR. JEFFERSON: They do not. They do not, Your  
12 Honor.

13 QUESTION: Okay.

14 MR. JEFFERSON: They do not depend on the  
15 amount, but --

16 QUESTION: But you -- in the opening you made a  
17 statement about how much was at stake, and I just wanted  
18 to point out that it seems to me that most of this is  
19 plain old ordinary negligence under State law, and we're  
20 only talking about part of the award.

21 MR. JEFFERSON: I appreciate that, Justice  
22 Ginsburg.

23 What the Fifth Circuit found was that because  
24 the nephew pleaded guilty to misdemeanor assault and other  
25 misdemeanor offenses before he was hired, the Fifth

1 Circuit held that the Sheriff was precluded from hiring  
2 him in the first place. In its 2 to 1 opinion, the court  
3 then held that the sheriff's decision actually caused the  
4 injury suffered by the respondent at the hands of the  
5 nephew.

6 We contend the Fifth Circuit is wrong on several  
7 fronts. In the first place, Bryan County never adopted an  
8 official policy of employing unqualified applicants.

9 QUESTION: What instructions on causation were  
10 given here, and what should have been given, and did the  
11 county preserve any objection?

12 MR. JEFFERSON: Yes, Your Honor. The  
13 instructions are contained in 124(a) through 132(a) of the  
14 Joint Appendix. The instruction on causation was the  
15 standard deliberate indifference instruction that this  
16 Court has derived from Canton and other cases.

17 The objections were clear. The objections were  
18 that there is no policy in this case of hiring unqualified  
19 applicants, there is no policy of hiring one individual  
20 officer, and that as a matter of law the case ought not to  
21 be submitted to the jury. We moved for summary judgment.  
22 We moved for a directed verdict. We renewed the directed  
23 verdict. We moved for JNOV, or a motion for judgment both  
24 before and after the judgment.

25 QUESTION: Do you think that perhaps the jury



1 under these instructions could have based liability on a  
2 finding of just but-for causation?

3 MR. JEFFERSON: Exactly, Your Honor. I think  
4 that that is what they found.

5 QUESTION: And has this Court approved that  
6 approach?

7 MR. JEFFERSON: It has not. It has not approved  
8 that approach, and in fact the causation has to be much  
9 more highly regulated than a but-for causation under  
10 Canton, under Tuttle, under every single case that this  
11 Court has decided in the section 1983 context.

12 QUESTION: Mr. Jefferson, could we go back to  
13 the question of policy, and you have said the county  
14 doesn't have a policy here, and I guess more exactly the  
15 sheriff doesn't have a policy here of hiring unqualified  
16 or violence-prone applicants.

17 MR. JEFFERSON: That's correct.

18 QUESTION: It makes perfect sense to distinguish  
19 between policy and implementation, or failure to implement  
20 the policy, when the policy is made by one person or body  
21 and it's being carried out by another one.

22 If the county commissioners were setting this  
23 policy and they said, investigate the applicants carefully  
24 and don't hire ones with criminal records indicating  
25 violence, and somebody like the sheriff, for whatever

1 reason, failed to follow it, we would say one instance  
2 does not convert that instance into county policy. It's  
3 only when the policymakers know that it's not being  
4 carried out and they do nothing about it that we can say  
5 they become deliberately indifferent to it, and so on.

6 The trouble is, here we have a different  
7 situation. The policy is being made by the sheriff  
8 himself, and on the one hand we'll assume that the sheriff  
9 has traditionally had a general policy of investigating  
10 applicants and not hiring those with criminal records  
11 indicating violence, but we also have to face the fact  
12 that it was the sheriff himself who said, in effect, I  
13 didn't even bother to finish reading the criminal record.  
14 I didn't care.

15 When the policymaker himself does not follow  
16 that policy, why don't we judge the policymaker based on  
17 that one instance, rather than saying, oh, well, we'll  
18 wait and see if he does it several times before we  
19 attribute a change of policy to him?

20 MR. JEFFERSON: I think there are several  
21 answers to that question. Maybe even not the first in  
22 order of priority is, compare what happened in this case  
23 to what happened in Pembaur, where again the county  
24 prosecutor there made one decision and the Court held in a  
25 plurality opinion that was enough to establish liability

1 of the county. That decision to go in without a warrant  
2 and arrest --

3 QUESTION: Because it was a deliberate decision  
4 in that case, wasn't it?

5 MR. JEFFERSON: It was a deliberate decision,  
6 that's correct, Your Honor, just like in our case a  
7 deliberate decision to hire Stacy Burns, no question about  
8 that.

9 QUESTION: And a deliberate decision not to even  
10 finish reading the criminal record.

11 MR. JEFFERSON: Or negligence, a negligent -- a  
12 negligent failure --

13 QUESTION: Well, do we have the option to  
14 characterize it as negligence?

15 MR. JEFFERSON: I think we can speculate that  
16 that's what it is. I think the jury --

17 QUESTION: What was the standard put to the  
18 jury? Did they have to find that there was deliberate  
19 indifference, and if they found that there was, then we  
20 can't call it negligence.

21 MR. JEFFERSON: They had to find that it was  
22 deliberate indifference, but the facts of the case --

23 QUESTION: So why doesn't that put it in the  
24 same class with --

25 MR. JEFFERSON: Because the facts of the case

1 are as consistent -- when you look at the facts, they're  
2 as consistent with either finding negligence, failure to  
3 use ordinary care, or, Your Honors, even a finding that he  
4 was pursuing his own personal interest in hiring --  
5 employing his nephew.

6 QUESTION: Yes, but the jury did find deliberate  
7 indifference, didn't it?

8 MR. JEFFERSON: You're correct, Your Honor,  
9 that --

10 QUESTION: So that the fact -- we have to take  
11 the facts as they come to us, I suppose.

12 MR. JEFFERSON: And I'm offering the facts.

13 QUESTION: I don't know why we would  
14 recharacterize them, and if we don't recharacterize them,  
15 why aren't we in a Pembaur situation?

16 MR. JEFFERSON: Justice Souter, the other answer  
17 to that question is, in Pembaur it was a governmental  
18 purpose that this county prosecutor was furthering. I  
19 think the answer here is, we don't know what the purpose  
20 was, and I don't think, just because the jury found that  
21 there was deliberate indifference here that you're -- this  
22 Court is bound to that opinion, when -- when there's --

23 QUESTION: Mr. Jefferson --

24 MR. JEFFERSON: Yes, Your Honor.

25 QUESTION: We're talking about policy. The word



1 policy isn't in the statute, is it?

2 MR. JEFFERSON: No, it is not.

3 QUESTION: I mean, that's just sort of a  
4 shorthand that we've used, and maybe in a close case we  
5 should stop using it. The statute doesn't require a  
6 policy, it requires a statute, ordinance, regulation,  
7 custom, or usage. Now, maybe a single act may establish a  
8 policy, but it's hard to see how a single act can  
9 establish a custom or usage.

10 MR. JEFFERSON: I think that's exactly correct,  
11 Your Honor, and this raises -- this case raises the  
12 question in Pembaur which I don't think was fully  
13 resolved, and Chief Justice Rehnquist, you'll recall this.

14 Is it the case that every time someone who is  
15 designated policymaker makes a decision, no matter what it  
16 is, that he's making policy for the county? In other  
17 words --

18 QUESTION: Isn't the answer to that clearly no?

19 MR. JEFFERSON: Yes, it is.

20 QUESTION: But whether he is or whether he isn't  
21 depends on whether the action is essentially a negative  
22 action or whether it's an intentional one. If I was just  
23 careless -- if, you know, the coffee was boiling over and  
24 I forgot to come back and finish reading the record of the  
25 applicant, sure, negligence.

1 But if, in fact, I simply said here's this  
2 record, I don't know what's in it, I'm not even going to  
3 bother to finish reading it, I suppose that's intentional.

4 MR. JEFFERSON: Even if he had read it --

5 QUESTION: Isn't that what it turns on?

6 MR. JEFFERSON: I think -- I think not, Your  
7 Honor, but even if he had read what was in the record --  
8 and this is a very central point here, and it's not an  
9 easy one to make based on these facts, but I think the  
10 analysis has to be this way. Even if he had read that  
11 record, he was authorized to put this person on the force  
12 under the Constitution.

13 QUESTION: Well, he may have been authorized by  
14 State law, but there would be a question of whether it was  
15 constitutional.

16 MR. JEFFERSON: I disagree with that, Your  
17 Honor.

18 QUESTION: Why?

19 MR. JEFFERSON: Because there's nothing in the  
20 Constitution or in any opinion of this court that I'm  
21 aware of that says that it is unconstitutional to hire  
22 somebody who has a background of misdemeanor arrests.  
23 If -- and/or conviction.

24 QUESTION: No, I mean, we are -- our standards  
25 are not that specific, but we do have a standard of --

1     which we've been characterizing as deliberate  
2     indifference, and I would suppose that it could be found  
3     to be within the scope of deliberate indifference.

4             MR. JEFFERSON: Well, I disagree, and I think  
5     that that is a policy question for the Court.

6             QUESTION: Well, Mr. Jefferson, even if there's  
7     a finding here of deliberate indifference, does that mean  
8     that the jury does not have to evaluate whether that  
9     single act of deliberate indifference caused the  
10    respondent's injuries?

11            I don't think they were asked to decide that.  
12    It was a theory that, well, this employee was hired, and  
13    therefore there had to be causation, because if he hadn't  
14    been hired, this accident wouldn't have occurred, and  
15    isn't something more required than that?

16            MR. JEFFERSON: Yes, Your Honor. I mean,  
17    there --

18            QUESTION: Even if there was deliberate  
19    indifference in a single act of hiring, it seems to me an  
20    act that no law required or prohibited the hiring of  
21    someone with misdemeanor convictions, and --

22            QUESTION: Isn't it true, Mr. Jefferson, that  
23    the jury specifically found that the inadequate hiring  
24    directly caused the plaintiff's injury?

25            MR. JEFFERSON: It did.

1 QUESTION: Yes. So there was a finding on  
2 causation direct --

3 QUESTION: In a but-for sense.

4 QUESTION: But there's no -- but-for is not used  
5 in the instruction, is it?

6 QUESTION: But it could be --

7 MR. JEFFERSON: But that's the only evidence of  
8 it, Your Honor. I mean, it's only a but-for -- the  
9 evidence behind this jury's verdict is only in a but-for  
10 and a vicarious sense, that there's a causative link of  
11 any kind between the --

12 QUESTION: Well, is your principal argument that  
13 there was inadequate evidence to support the judgment?  
14 Then we don't have to wrestle with the question of whether  
15 a single incident could constitute a policy, if that's the  
16 case.

17 MR. JEFFERSON: I believe that that is our  
18 position. The evidence doesn't support --

19 QUESTION: We could basically set the judgment  
20 aside for inadequate evidence.

21 On the single incident point, is it the county's  
22 position that if the sheriff had before him a record that  
23 showed us not just misdemeanor -- you of course say that's  
24 a minor record, but had a record before him of a series of  
25 felonies and violent behavior, and just an extremely



1 obvious danger putting the officer on the street, that  
2 that still could not constitute a basis for liability?

3 MR. JEFFERSON: I think you have to be very  
4 careful, Your Honor, when we're talking about what is  
5 really a negligent hiring.

6 QUESTION: I'm assuming that the record is so  
7 clear that any competent sheriff would have recognized a  
8 serious danger to the public by letting this man be hired  
9 as a police officer. That still would not justify  
10 liability, as I understand your theory.

11 MR. JEFFERSON: It would not. It would not be  
12 unconstitutional to hire him, and I'll support that with a  
13 case that Your Honor wrote for a unanimous Court, the  
14 Collins v. Harker Heights case. There was clear evidence  
15 there.

16 It's under the Due Process Clause, and I  
17 understand that's a different amendment that we're talking  
18 about, but there was clear evidence there that sending  
19 this person down into the sewer was going to result in  
20 death. I mean, that's what the --

21 QUESTION: We held there was no constitutional  
22 violation.

23 MR. JEFFERSON: That's exactly right.

24 QUESTION: I thought the assumption in this case  
25 was that the officer who had been hired did commit a

1 violation of the Fourth Amendment rights of the plaintiff.

2 MR. JEFFERSON: But you would have to find here  
3 that the county violated the Constitution.

4 QUESTION: Well, and my question is, if it had  
5 been as foreseeable as my hypothetical suggested, you  
6 would still say no.

7 MR. JEFFERSON: I would say no, and I give as an  
8 answer, Your Honor, Collins v. Harker Heights. In that,  
9 you stated the Due Process Clause is not a guarantee  
10 against incorrect or ill-advised personnel decisions, and  
11 that's correct.

12 I mean, there are States that have lesser  
13 standards than Oklahoma's does, there are States that have  
14 more severe standards, but nothing about any of those  
15 standards in and of themselves shows that the standard is  
16 unconstitutional.

17 QUESTION: Mr. Jefferson, you put Pembaur in one  
18 box because that involved a direction by the prosecutor,  
19 go do it, so the causation problem that Justice O'Connor  
20 brought up here didn't exist there, but you also had in  
21 your brief something about a category of dangerous  
22 practices, and I was not clear on what would fit that  
23 category. It wasn't something, a direct command like  
24 shoot him, but --

25 MR. JEFFERSON: I had --

1 QUESTION: -- what is a dangerous practice that  
2 might make the municipality liable?

3 MR. JEFFERSON: I had in mind something like  
4 Canton, where a dangerous practice would be putting people  
5 out on the police force, for example, with no training in  
6 the use of deadly weapons. That could be enough to  
7 make --

8 QUESTION: One person? Suppose it's done just  
9 once. Would you acknowledge that that would be enough?

10 MR. JEFFERSON: Under Canton, I would  
11 acknowledge it would, under Canton, yes, for that training  
12 sort of idea, but for hiring -- for hiring, the Court has  
13 been clear for generations now that there is no respondeat  
14 superior liability, and we're talking about holding the  
15 county here liable for a hiring decision, not just a  
16 standard, but one particular decision that is geared  
17 toward one particular person.

18 I think it's very critical to note that the  
19 jury's question in this case said, do you find that in the  
20 case of Stacy Burns, only him, that there was an  
21 inadequate hiring by the county.

22 QUESTION: What you're saying, I take it, is  
23 that if we start saying that one particular instance like  
24 this of a deviation from a regular rule is itself a  
25 policy, then you're back to respondeat superior.

1 MR. JEFFERSON: Yes, and strict liability,  
2 because there are thousands upon thousands of personnel  
3 decisions being made every day. Some of them are not good  
4 decisions.

5 QUESTION: Well, they wouldn't be the same as  
6 respondeat superior, because under respondeat superior you  
7 wouldn't even have to look at the hiring at all.

8 MR. JEFFERSON: Well, that's what you'd be  
9 saying in effect, that it doesn't matter, you don't really  
10 have to look at the hiring.

11 QUESTION: If you did respondeat superior, but  
12 if you look at the hiring and say that you looked at --  
13 that he hired somebody who was obviously going to go out  
14 and commit violent acts, that's another step in the chain,  
15 that it would not be enough -- I mean, you wouldn't need  
16 to even look at that under respondeat superior.

17 MR. JEFFERSON: But the first step in the chain  
18 would be, is the hiring itself unconstitutional. Can this  
19 Court --

20 QUESTION: Why do you keep --

21 QUESTION: No.

22 MR. JEFFERSON: Well --

23 QUESTION: Does the hiring cause a  
24 constitutional violation? That's the issue.

25 MR. JEFFERSON: Well, but if it were --



1 QUESTION: And here you admit that there was a  
2 constitutional violation, you admit but-for causation, but  
3 you say it's not sufficiently direct.

4 MR. JEFFERSON: That's correct, Your Honor, but  
5 when we're talking about causation and your -- the Court's  
6 opinions in this area are not crystal clear on this.  
7 Deliberate indifference is not a standard in and of  
8 itself. It has causation elements to it, and you have to  
9 show that when the decision was made, if it's hiring or  
10 training, that almost the Court -- the county had in mind  
11 that this violation is going to occur.

12 QUESTION: Well, you're saying, then, that one  
13 deliberately indifferent act, even by the policymaker, is  
14 never going to be enough.

15 MR. JEFFERSON: It is not enough in the context  
16 of this case, because the deliberate --

17 QUESTION: Well, why would it ever be enough, on  
18 your theory?

19 MR. JEFFERSON: The --

20 QUESTION: I thought you were saying, all right,  
21 if the policymaker says, I intend, or it is my purpose  
22 that the constitutional violation will occur, one instance  
23 would be enough, but you're saying that in deliberate  
24 indifference cases it's not -- I think you're saying that  
25 in deliberate indifference cases it's not enough, because

1 you can never establish the direct causal connection by  
2 one instance of deliberate indifference.

3 MR. JEFFERSON: I'll -- have a report that the

4 QUESTION: Isn't that your argument? Is the

5 MR. JEFFERSON: I'll give you an example --

6 QUESTION: No, isn't -- do I get your argument.

7 MR. JEFFERSON: No, no, no, you do not. You do  
8 not, because I do believe that there would be an extreme  
9 case which we probably will never see where one instance  
10 would be enough, and that would be where someone like  
11 Bryan County had a report in front of them, the  
12 psychological examination -- there's no question of Burns  
13 passed it here, but had a report in front of them that  
14 said this person had a psychopathic disorder. He has --  
15 he is going to -- by a psychiatrist. He is going to  
16 commit excessive force, criminal acts.

17 QUESTION: But that's like Justice Stevens'  
18 example, isn't it, and I thought your answer to Justice  
19 Stevens was, no, that wouldn't be enough.

20 MR. JEFFERSON: Well, Justice Stevens was asking  
21 me whether someone with a felony record. I think that's a  
22 very dangerous --

23 QUESTION: Yes, but his said the felony record  
24 was so bad, as he characterized it, that any reasonable  
25 person would say that if you put the officer in a position

1 to use force, he's going to misuse it, and you said no,  
2 that still wouldn't be enough, and I don't see why it  
3 should be any difference if you have a report that the  
4 individual's a psychopath. The probable result is the  
5 same in each instance.

6 MR. JEFFERSON: Granted, Your Honor, if -- there  
7 could be a situation like that that's extreme. Why  
8 Justice Stevens --

9 QUESTION: I don't understand this whole line of  
10 concession. I thought you were basing your argument upon  
11 the distinction between what happens once and what is --  
12 what can be called a policy, but the extremeness of the  
13 negligence, whether it's indifference or gross negligence  
14 or whatever, certainly has no bearing upon that principle.

15 MR. JEFFERSON: Your Honor, I agree -- my --

16 QUESTION: So you should have to say, it seems  
17 to me, that even if he had psychiatric evaluation that  
18 said that this fellow was a serial killer, it -- you would  
19 have a cause of action against the individual who hired,  
20 but not against the city.

21 MR. JEFFERSON: My concession is based only on  
22 your decision in Canton, which recognized the ability --

23 QUESTION: Which suggests that your argument is  
24 contrary to our precedent.

25 MR. JEFFERSON: Well, no, Your Honor. What I'm

1 saying is that the examples of Justice Stevens' and  
2 Justice Souter's are almost never going to happen. The  
3 example in the footnote in Canton about putting people out  
4 on the police force without training them in the use of  
5 deadly weapons, that is quite an extreme example, and  
6 the -- MR. JEFFERSON: Yes.

7 QUESTION: No, but would one person do? You  
8 contend that -- you maintain that failure to train one  
9 person would be enough. That is a policy. But hiring one  
10 bad person is not enough.

11 MR. JEFFERSON: Failure to train one person  
12 under Canton is not enough unless the link is so direct  
13 that no person could ever -- it's the functional  
14 equivalent of the city telling that one person go out and  
15 commit excessive force. then how can the policy of the

16 statute be? QUESTION: Who actually will pay the judgment  
17 here if in fact you win and the judgment is only against  
18 the sheriff personally? I just wonder, in other words,  
19 does your client have an insurance policy? liable for

20 something MR. JEFFERSON: It has no insurance policy. In  
21 fact, it's going to --

22 QUESTION: Well, is it in the habit when there  
23 are judgments against individual police officers or others  
24 to pay those judgments? see.

25 MR. JEFFERSON: Your Honor, there is not



1 anything in the record, and I cannot tell you.

2 QUESTION: Have you ever heard, if you've looked  
3 into this generally, of cities or municipalities that  
4 don't have some kind of policy or custom of paying these  
5 judgments for --

6 MR. JEFFERSON: Yes.

7 QUESTION: Are there many?

8 MR. JEFFERSON: Yes, I believe there are.

9 QUESTION: And how do the plaintiffs recover in  
10 those cases?

11 MR. JEFFERSON: The plaintiffs --

12 QUESTION: Are policemen independently wealthy  
13 that they can pay these things?

14 MR. JEFFERSON: Sometimes there is no recovery.

15 QUESTION: And then how can the policy of the  
16 statute be vindicated if, in fact, the judgments -- the  
17 defendants are judgment-proof, by and large?

18 MR. JEFFERSON: You can't get around the intent  
19 to vindicate the statute by holding a county liable for  
20 something it did not do, even if the officer cannot pay  
21 the judgment.

22 QUESTION: Under Monell.

23 MR. JEFFERSON: Under Monell.

24 QUESTION: I see.

25 MR. JEFFERSON: That's correct.

1       QUESTION: Suppose in this case that the sheriff  
2       made a notation in the file, I[ am hiring this man as a  
3       matter of policy, will not check background for college  
4       offenses. Would the case be different?

5               MR. JEFFERSON: Not if it's not a more  
6       generalized policy than that, than that one case, no. We  
7       would still --

8       QUESTION: In other words, even though he says  
9       it's a policy, it's not a policy.  
10      MR. JEFFERSON: That's right. That's right.

11     QUESTION: I suppose that would be some evidence  
12     that the policy they claim to follow was not followed, but  
13     the real policy was to hire people regardless of, you  
14     know, any felony record.

15             MR. JEFFERSON: It would be a closer case, and  
16     maybe, you know, perhaps you would get to a jury on it,  
17     but the evidence in this case is, in every single  
18     instance, every hiring decision made by this sheriff,  
19     every other time, adequate background investigation. The  
20     Fifth Circuit found that as well.  
21     There was one deviation from this consistently  
22     good policy, and that was --

23     QUESTION: And it was for a relative..

24             MR. JEFFERSON: For a relative, for hiring a  
25     nephew, and that's my point, Your Honor, that the

1 explanation for this hiring is, in my view, as consistent  
2 with the fact that he hired just to promote his nephew --

3 QUESTION: Well, why isn't that a policy of and  
4 hiring relatives without adequate background checks?

5 negligent MR. JEFFERSON: Well, if it were a policy, that  
6 would be correct, but it's not. Monroe v. Pape and beyond

7 that there QUESTION: Well, I don't see how it gets you  
8 anything, I really don't. al,

9 MR. JEFFERSON: I guess the point on that, Your  
10 Honor, is, whether or not it's an official policy, that is  
11 not the end of the question for the Court. I don't think  
12 it's an official policy because it's a one-time deviation  
13 from a policy which could be consistent with negligence  
14 and not established policy for the county.

15 The causation is lacking here as a matter of  
16 law. If the Court were to find that there was causation  
17 in this case, then you look at the statutes at the end of  
18 the amicus brief for the National League of Cities, and  
19 look at all the statutes that allow hiring people with  
20 this sort of record, those would have to go out the door,  
21 or at least, if you hold that way, then there's going to  
22 be liability in each and every case for every single  
23 hiring decision. It is the hiring decision as part of a

24 causal chain QUESTION: What's the standard you want us to  
25 adopt in order to reach your conclusion? Do you want us

1 to just make a judgment on this record, or are you first  
2 suggesting that there's a legal standard here? Of a more  
3 generalize MR. JEFFERSON: I think the legal standard, and  
4 I would put this for your consideration, is that in a  
5 negligent hiring context the Court is going to maintain  
6 its consistent position since Monroe v. Pape and beyond  
7 that there is no liability for respondeat superior, for  
8 simply hiring an individual. characterize the whole chain of  
9 events as QUESTION: And suppose its an ax murderer. that  
10 fair? MR. JEFFERSON: If it's an ax murderer, that,  
11 even in itself -- and that's my distinction, Justice  
12 Souter. It -- an ax -- it's not unconstitutional to hire  
13 an ax murderer in itself. Now, that's an extreme  
14 position. that I will in fact hire ax murderers, but if I  
15 never hire QUESTION: But that is -- you keep coming back  
16 to this concept of unconstitutional hiring, and isn't the  
17 proper concept an act which results in or causes an  
18 unconstitutional injury? concerned when the whole chain is  
19 failed in QUESTION: Well, it's a policy which results in  
20 or causes, not an act. But if Your Honor's correct then  
21 the Federal QUESTION: Well, act or policy, depending on how  
22 we analyze it, but it's not the hiring decision that is  
23 unconstitutional. It is the hiring decision as part of a  
24 causal chain that results in an unconstitutional injury,  
25 and our question is, does that hiring decision -- can one



1 hiring decision, if it's intentional, qualify as the first  
2 step in that chain, or does it have to be part of a more  
3 generalized practice or policy?  
4 MR. JEFFERSON: It cannot be the starting point,  
5 unless you're to say --  
6 QUESTION: No, but I mean, the point here is  
7 it's not that you characterize step one as being per se  
8 unconstitutional. You characterize the whole chain of  
9 events as having an unconstitutional result, isn't that  
10 fair?  
11 MR. JEFFERSON: Well, no. The -- because the  
12 first --  
13 QUESTION: Well, I could have a policy, I  
14 suppose, that I will in fact hire ax murderers, but if I  
15 never hire an ax murderer, there is an -- if no ax  
16 murderers apply, and I never hire one, there's never going  
17 to be a constitutional injury, so we won't be concerned  
18 about it. We're only concerned when the whole chain is  
19 filled in.  
20 MR. JEFFERSON: But if Your Honor's correct then  
21 the Federal courts in every case or controversy have the  
22 right to look behind personnel standards that everyone  
23 agrees are -- that States implement that every one agrees  
24 are not constitutionally infirm themselves. They can go  
25 behind it in every instance.

1           So if Your Honor is correct there that you don't  
2 first look at whether the hiring decision itself is  
3 constitutional, then what you're doing is saying Federal  
4 courts are able to intrude on an area that has been, at  
5 least, and even under Collins, your case, the prerogative  
6 of the State government.

7           QUESTION: Well, the argu --

8           QUESTION: To say that the -- you have a policy  
9 of unconstitutional hiring I think is mistaken. The  
10 constitutional violation is done by the person who  
11 actually inflicts the injury on the person who's the  
12 plaintiff, and the question of whether you can recover  
13 against the county or not is whether the county has the  
14 policy -- I don't think you refer to the policy as the  
15 policy of unconstitutional hiring.

16          MR. JEFFERSON: I agree with that proposition,  
17 Your Honor. The -- but the federalism question is still  
18 at play because if the Court were to rule in this case to  
19 affirm the case, then the question becomes, do all these  
20 hiring standards, these personnel standards that we have,  
21 and all of the States around the country, and they're all  
22 different, or many are different, are they enough to  
23 create a jury question every single time?

24          QUESTION: Oh, but I think --

25          QUESTION: No, but that's not true, because in

1     this case it's been conceded, the case is argued to us on  
2     the assumption that the sheriff is the policymaker. It's  
3     just as if the board of supervisors debated this, or  
4     whatever the governing board is in Oklahoma, debated this  
5     entire issue.

6             MR. JEFFERSON: But -- yes, Your Honor --

7             QUESTION: And said that after due deliberation  
8     we think that this is a good hire.

9             MR. JEFFERSON: And what I'm saying is, let's  
10    say it was. Let's say he really had looked at the record  
11    and said I want to hire him anyway. That is authorized by  
12    State law. That hiring decision would be authorized by  
13    State law.

14            QUESTION: Well, but that's not this case, and  
15    if this case were decided against you it would not open  
16    any such door, because this case proceeds not only on the  
17    assumption that the sheriff is the policymaker, it  
18    proceeds on the assumption, as I understand the jury  
19    instructions, that he was deliberately indifferent to this  
20    kind of result when he made his hiring decision. That  
21    does not open the door to looking behind every particular  
22    act of hiring, no matter what the governmental policy is.

23            MR. JEFFERSON: Well, I believe it does, because  
24    of the way the case was submitted to the jury. It wasn't  
25    just --

1 QUESTION: It was submitted on a deliberate  
2 indifference theory.

3 MR. JEFFERSON: Deliberate indifference with  
4 respect to one particular employee.

5 QUESTION: Thank you, Mr. Jefferson.

6 Mr. Serr, we'll hear from you.

7 ORAL ARGUMENT OF BRIAN SERR

8 ON BEHALF OF THE RESPONDENTS

9 MR. SERR: Mr. Chief Justice and may it please  
10 the Court:

11 First, I'd like to respond to Justice O'Connor's  
12 concern that this case turns in but-for -- on but-for  
13 causation. That's simply not true. The --

14 QUESTION: But it could. The jury could have  
15 reached a verdict on but-for causation.

16 MR. SERR: Absolutely not, because the  
17 instructions came right out of the Canton case. The  
18 instructions required a finding of direct cause, and in  
19 the verdict iform required a finding of proximate cause.  
20 This doesn't turn on but-for causation.

21 I don't know how one defines proximate cause any  
22 clearer than saying direct cause. Direct cause, closely  
23 related to, affirmative link, moving forth, are the terms  
24 that this Court has employed to refer to the causation  
25 requirement. But Canton specifically says closely related



1 to. That's direct. That's direct causation. That is a  
2 common way for judges to refer to proximate cause.

3 And moreover, as a matter of law, the evidence  
4 here was not insufficient to establish that direct cause,  
5 because what we had here was precisely the constitutional  
6 deprivation that was predicted by the red flags that were  
7 up at the time that the county hired Sheriff Burns. If --  
8 sorry, Officer Burns.

9 If Officer Burns had gone out and enforced the  
10 law in a racially discriminatory manner, there's no  
11 causation. If Officer Burns had gone out and committed a  
12 sexual assault of a juvenile detainee, there's no  
13 causation. The link between the deliberate indifference  
14 and the constitutional deprivation just doesn't match up.

15 But here, the deprivation that occurred, the  
16 excessive use of force, was precisely the deprivation that  
17 was endangered, that was ignored when the sheriff ignored  
18 the red flags that were there right at the time of hiring.

19 Justice Scalia, I'm glad you referred to the  
20 statute, because it seems to me that the word policy is --  
21 that they're trying to use the word policy against us, and  
22 that's what I would say. The word policy isn't in the  
23 statute.

24 The statute says every person who -- and a  
25 municipality can be a person so long as the municipality

1     itself is doing the acting. Every person who under color  
2     of any statute, ordinance, regulation, customer usage,  
3     that has been interpreted by this Court as doing nothing  
4     more, nothing less than saying that the person must act  
5     under color of State law, State action as interpreted in  
6     the Lugar v. Edmondson case.

7             I don't know how a sheriff can act for the  
8     county and not be acting under color of State law.

9             QUESTION: It doesn't say State action. It --  
10    State action has to be reflected in a statute, ordinance,  
11    regulation --

12            MR. SERR: The --

13            QUESTION: -- custom, or usage.

14            MR. SERR: Your Honor, the statutes of Oklahoma  
15    clearly provide that the sheriff is the final  
16    decisionmaker on matters of employing deputies. They  
17    serve -- in the Oklahoma Revised Statutes, Chapter 19,  
18    section 547, those deputies serve at the pleasure of the  
19    sheriff.

20            Prior to 1979, boards of county commissioners in  
21    Oklahoma had final approval authority over deputies.  
22    Since a 1979 change in the law, that's not true. The  
23    sheriff, they serve at the pleasure of the sheriff. The  
24    sheriff --

25            QUESTION: That may be true, but was it under

1 color of that statute? Did that statute authorize hiring  
2 of unqualified police officers?

3 MR. SERR: This Court has never interpreted  
4 section 1983, as Justice Souter indicated, to require that  
5 the action by the municipality be facially  
6 unconstitutional. This Court has already decided that in  
7 Canton.

8 QUESTION: But we also decided in Monell that a  
9 municipality could not be held liable unless there were a  
10 policy.

11 MR. SERR: And this Court in Pembaur looked back  
12 on Monell and interpreted Monell as -- Monell wanted to  
13 preclude respondeat superior. Liability of municipalities  
14 must be premised on acts of the municipality itself, not  
15 merely on acts of subordinate employees.

16 Pembaur took a very common sense view of how  
17 municipal power is exercised. It's often vested in  
18 individuals such as sheriffs who have final county  
19 authority to make policy, to make decisions that bind the  
20 county. The sheriff was the alter ego of the county. The  
21 sheriff was the county when acting in matters within the  
22 sphere of his authority, and the sphere of his authority  
23 clearly allowed him to make decisions as to who can wear  
24 the badge and who may not wear the badge.

25 QUESTION: Oh, yes, he personally would have

1     been acting under color of a statute, or of a law, but  
2     when you try to place liability on the municipality for  
3     the municipality's failure to have higher standards for  
4     the recruitment of police officers, you have to refer to  
5     something else. You have to refer to some custom or  
6     usage, or call it a policy.

7             MR. SERR: That's not what this Court said in  
8     Pembaur.

9             QUESTION: Well, that's certainly what we said  
10    in Monell. Are you questioning our decision in Monell?

11            MR. SERR: I am not questioning your decision in  
12    Monell. I agree --

13            QUESTION: Well, but then, you see, your  
14    argument so far, as I interpret it, is a strictly  
15    respondeat superior argument. Monell says respondeat  
16    superior doesn't work when you're seeking to hold the city  
17    liable. You must have something other --

18            MR. SERR: Your Honor --

19            QUESTION: -- than respondeat superior, and  
20    we're asking whether or not you -- and you seem to  
21    disagree with that.

22            MR. SERR: No. Your Honor, subordinate  
23    employees, a county is not liable for the acts of  
24    subordinate employees such as the officer using the  
25    excessive force.



1           Pembaur recognized, however, that official  
2           municipal power, the municipal -- a county cannot  
3           literally pick itself up off the map and go out and commit  
4           a constitutional tort on someone. A county can only act  
5           through human beings. Sometimes a county acts officially  
6           through boards, through legislative boards. Sometimes a  
7           county acts officially through executive officers.

8           The question under Monell, as this Court later  
9           explained in Pembaur, is, who is doing the acting? Is the  
10          municipality itself doing the acting, rather than being  
11          held liable based only on the actions of some subordinate  
12          employee who doesn't have the authority, who doesn't have  
13          the power to bind the county?

14          The sheriff here was a final policymaker, an  
15          executive decisionmaker. Matters of hiring and training  
16          officers under State law were exclusively within his  
17          control. The county could not act on these matters other  
18          than through the sheriff.

19          QUESTION: Mr. Serr, I assume that you would win  
20          this point if we analyzed the case in either of these two  
21          ways. The first alternative is, we could say that  
22          regardless of what the announced policy is, if the  
23          policymaker, in this case the sheriff, intentionally,  
24          consciously, deliberately follows a different rule in a  
25          given case, that that is in fact a change of policy, and

1       therefore we come within Monell.

2               Or we could say, even though the stated policy  
3       remains the same, when the policymaker itself or himself  
4       acts contrary to it, that is, in fact, the act of the  
5       county --

6               MR. SERR:   When there's --

7               QUESTION:   -- because the county can act in no  
8       other way, and we don't require multiple instances because  
9       there's no question of attributing this act to the  
10      ultimately -- ultimate policymaker.   He's doing it.

11              Now, we could come out your way on this point if  
12      we follow either one of those analyses.   Does it matter to  
13      you which one we follow?

14              MR. SERR:   It matters to me whether you come out  
15      in our favor.

16              QUESTION:   I realize that.

17              (Laughter.)

18              QUESTION:   But how about those two avenues, road  
19      A, road B.   Does it make any difference to your case --

20              MR. SERR:   What was road A again?

21              QUESTION:   Road A is that when the policymaker  
22      intentionally acts contrary to the stated policy, that  
23      action establishes a new policy.

24              MR. SERR:   Sure.   We --

25              QUESTION:   So it still falls within --

1 MR. SERR: We would agree with that.

2 QUESTION: All right. Does it matter whether we  
3 take that analysis or the second one?

4 MR. SERR: We win under either of those  
5 analyses.

6 QUESTION: No, but does it have any implications  
7 for your case other than winning or losing? In other  
8 words, does it --

9 QUESTION: What's the second one again? I  
10 forgot the second one by now.

11 (Laughter.)

12 MR. SERR: Other -- under either one of those  
13 roads, I think we win in this case. I would submit that  
14 the bottom line is whether liability is being premised on  
15 the acts or omissions of the municipality itself.

16 QUESTION: The difficulty that I'm having with  
17 this, frankly, is if you take either of those lines,  
18 what -- it would end up with the cities being held  
19 responsible for the actions of their higher level  
20 employees even when those higher level employees are  
21 really going against the preexisting policy or just making  
22 a mistake, or just being negligent or grossly negligent.

23 What reason -- and maybe they should be held  
24 liable for that, but how can you hold them liable for the  
25 higher action employees but not the policeman who, after

1 all, is going out in the course of duty and also making a  
2 mistake, and using too much force, and breaking a door  
3 down when he shouldn't, and either thinking that I'm just  
4 making a mistake or being indifferent, et cetera.

5 Why should it be the one that they have to pay  
6 and not the other? Maybe they should pay both.

7 MR. SERR: Well, for one thing, liability can  
8 only be premised on deliberate indifference. It's not  
9 merely negligence or gross negligence. Deliberate  
10 indifference is, as explained by this Court in Farmer v.  
11 Brannon, that is a very high standard. That is equated  
12 with criminal recklessness.

13 When the person that is vested with ultimate --  
14 when the ultimate vessel of county power on a particular  
15 matter makes an affirmative, conscious exercise of that  
16 power, then the county has acted.

17 Now, that doesn't open up counties to broad form  
18 liability. That's the way it's been done, really, since  
19 Pembaur, since Canton. It's very difficult to prove  
20 deliberate indifference. There are very few hiring  
21 claims --

22 QUESTION: Mr. Serr, don't you recognize any  
23 difference between a prosecutor who says, go seize that  
24 evidence illegally, and a city that says we're going to  
25 put guns in the hands of police officers and not train



1       them in its use --

2               MR. SERR:   Sure.

3               QUESTION:   -- and this case, where the record  
4       shows assault, but it turns out to have been an incident  
5       on a college campus?

6               MR. SERR:   This Court in Canton looked at the  
7       language of section 1983 and decided that section 1983  
8       admits of no distinctions between actions of the  
9       municipality that directly authorize or command  
10       constitutional violations or actions that just are  
11       deliberately indifferent and directly cause constitutional  
12       violations.   The language of section 1983 does not include  
13       words like intent, or directly authorize, or command.  
14       Canton's already done that.

15               The action does not have to be unconstitutional.  
16       The municipal action does not have to directly authorize  
17       violations of the constitutional rights.   The municipal  
18       action just has to directly cause the violation, and --

19               QUESTION:   Well, I'm talking about that  
20       causation requirement, because it seems to me that it was  
21       a lot closer in Canton than it is here.

22               MR. SERR:   You mean in Pembaur?

23               QUESTION:   But -- well, certainly in Pembaur.  
24       There it was, go do it, and in Canton it was putting a  
25       dangerous weapon in the hand of an untrained person.

1           MR. SERR: Okay. Well, Canton actually involved  
2 police officers that failed to discern a severe emotional  
3 disturbance in an arrestee, and the Court said, well,  
4 there was no notice of any need -- of any obvious need to  
5 train in that matter, but Canton did recognize that there  
6 are certain recurring situations that police officers to a  
7 moral certainty will face, such as decisions regarding the  
8 use of force, clear constitutional duties in recurrent  
9 situations regarding the use of force -- Do I use force?  
10 How much force do I use? How do I apply that force? --  
11 such that counties are inherently on notice that that is  
12 the job description of a police officer.

13           QUESTION: Well, that was the allegation here,  
14 the use of excessive force that turned on that, and yet  
15 the instruction given on deliberate indifference, as I  
16 understand it, required the jury to assess whether it was  
17 so obvious that Sheriff Moore's decision would lead to  
18 violations, plural, of constitutional rights, plural.

19           Now, doesn't Canton at least suggest that we  
20 require a jury to conclude that the violation of a  
21 discrete and identifiable right, here the right to be free  
22 from excessive force used, would be obvious and here, how  
23 do we know, under that instruction, that the jury wasn't  
24 just thinking, well, with that misdemeanor record probably  
25 some right would be violated?

1 MR. SERR: Well, deliberate --

2 QUESTION: How is it focused here?

3 MR. SERR: Your Honor, the deliberate  
4 indifference instruction came right out of the language in  
5 the majority opinion in Canton that the --

6 QUESTION: Well --

7 QUESTION: Be that as it may, maybe that hadn't  
8 been thought through, or it wasn't pressed as a point.  
9 Here, it becomes key, and it seems to me it left it very  
10 open.

11 I mean, you can say in every case that a  
12 constitutional deprivation by the officer who's hired  
13 wouldn't have occurred if the employee hadn't been hired,  
14 and what is there in the instructions that makes clear  
15 that isn't the basis?

16 MR. SERR: Well, that was precisely the problem  
17 faced by this Court in Canton with respect to failure-to-  
18 train cases, that it would be easy for a plaintiff to  
19 manufacture a situation of respondeat superior: if you  
20 had only trained the officers in Canton to recognize  
21 severe emotional disturbance, this wouldn't have happened.

22 And that's why the Court responded in Canton in  
23 order to eliminate respondeat superior with the deliberate  
24 indifferent standard, that the decisions by the  
25 municipality itself must be so inadequate in light of the

1 specific duties assigned to officers as to amount to  
2 deliberate disregard.

3 QUESTION: But these instructions nowhere  
4 focused on precisely what it was that was going to be the  
5 basis of the liability. Excessive force, and not leaving  
6 it plural, so that it was open to them to think well, gee,  
7 he might be a careless driver.

8 MR. SERR: The instructions focused the jury on  
9 the training and the hiring of Stacy Burns, and the  
10 constitutional right that was at issue here, as the jury  
11 knew, well knew, was excessive force, violations of Fourth  
12 Amendment rights, and the deliberate indifference must,  
13 that's true, directly cause the deprivation.

14 I can't imagine a case where there is a closer  
15 affirmative link or causal connection between the red  
16 flags present at hiring --

17 QUESTION: Well --

18 MR. SERR: -- and the deprivation that occurred.

19 QUESTION: -- perhaps you could have offered  
20 instructions that would have clarified it, but under the  
21 instructions that were given, I don't see why it wasn't  
22 open to the jury to base it on --

23 MR. SERR: Your Honor, I suppose it's always  
24 possible for the judge to give more specific instructions,  
25 to spell it all out. There was no objection here by



1 petitioner's -- and the training program did not include

2 training QUESTION: Well, you're the plaintiff. I mean,  
3 it's -- you represented the plaintiff, so it's up to the  
4 plaintiff to offer appropriate -- training program. I mean,

5 that seems MR. SERR: We think these instructions do the You  
6 trick under Canton. The judge looked at Canton. We  
7 looked at Canton. These instructions do the trick under  
8 Canton. an opinion in this case referring to the hiring

9 program QUESTION: Well, do you think Canton supports  
10 the proposition that deliberate indifference is the element  
11 standard with respect -- across the board, or just with  
12 omissions by -- it seemed to me that Canton was more setting  
13 talking about omissions to do something on the part of the  
14 supervisor. an opinion in this case referring to the hiring

15 shielding MR. SERR: Well, we would certainly assert that  
16 it can't be more difficult to prove municipal liability  
17 for omissions than for affirmative exercises of municipal  
18 power, that if deliberate indifference supports municipal  
19 liability for omissions, for failures to act when the s. in  
20 notice is there, when the notice is apparent, that There  
21 certainly that deliberate indifference model supports  
22 municipal liability for affirmative exercises of official  
23 municipal power so long as -- county decided not to train

24 anyone. QUESTION: What there existed in Canton was a  
25 training program. The opinion repeatedly discusses the

1 training program, and the training program did not include  
2 training in this particular type of skill, and that was  
3 the issue.

4 We don't have here a hiring program. I mean,  
5 that seems to me the central difference in this case. You  
6 have a one-shot hiring by somebody who does have  
7 policymaking authority, but it would be very difficult to  
8 write an opinion in this case referring to the hiring  
9 program of the municipality.

10 MR. SERR: Your Honor, there is no requirement  
11 of a program. Again, that I think is taking a  
12 nonstatutory term, policy, out of context and interpreting  
13 it in such a way that goes well beyond Monell's rejection  
14 of respondeat superior and would result in actually  
15 shielding municipalities from fault when a plaintiff can  
16 demonstrate, as plaintiff did here, that the fault clearly  
17 lies at the municipality's doorstep.

18 Canton explained -- in the very description of  
19 the deliberate indifference standard in Canton it says, in  
20 light of the duties assigned to specific officers. There  
21 doesn't have to be deliberate indifference across the  
22 board. There's never going to be deliberate indifference  
23 across the board. Even if a county decided not to train  
24 anyone, some of those officers are probably going to have  
25 been well trained by other counties. It --

1 QUESTION: But why insist on -- if what you say  
2 is true, why insist on going up to the level of the  
3 policymaker anyway, then? Why not just take the  
4 individual officer?

5 MR. SERR: Because in order to avoid respondeat  
6 superior, liability must flow from the acts or omissions  
7 of the municipality itself and not merely from the  
8 deprivations committed by the low-level employee.

9 The single incident standing alone, the  
10 excessive force standing alone does not by itself put  
11 liability on the municipality.

12 QUESTION: Unless it's committed by somebody  
13 high enough up in the municipal hiring --

14 MR. SERR: No. It has to be caused by official  
15 municipal action, which has been defined in Pembaur. That  
16 municipal action must be done in deliberate disregard to a  
17 constitutional deprivation, Canton, and there must be a  
18 direct causal connection, again Canton, between that  
19 deliberately indifferent, official municipal exercise of  
20 power and the constitutional deprivation that in fact  
21 results, and we have all that here.

22 QUESTION: Can I ask about that? A minor  
23 factual question would be helpful. On page 114 of the  
24 appendix I take it is the heart of what the sheriff did  
25 that was wrong.

1           He ran the driving record down with the Oklahoma  
2 police authorities. The Oklahoma police authorities gave  
3 him a piece of paper called a rap sheet. If he'd looked  
4 at that rap sheet he would have seen that this individual  
5 did some other bad things and he never checked on them.

6           MR. SERR: Recently.

7           QUESTION: All right.

8           MR. SERR: Recent bad things.

9           QUESTION: Right, but then -- so I thought what  
10 would be relevant, I'd like to look at the piece of paper  
11 that the sheriff had in his hand so that I could make a  
12 judgment, perhaps, at a great distance, about what he  
13 should have done, or what the jury thought he should have  
14 done. Is that piece of paper in the record? I can't find  
15 it.

16          MR. SERR: It is in the record.

17          QUESTION: All right, well, your associate --

18          MR. SERR: Actually, it's not in those volumes.

19          QUESTION: Well, can you supply it to the clerk  
20 afterwards?

21          MR. SERR: Yes. But it was a lengthy record.  
22 It showed several instances of assaultive behavior.

23          QUESTION: I just wanted to look at the piece of  
24 paper that the sheriff looked at when he supposedly, in  
25 your view, made a mistake of not going further.



1 MR. SERR: Mm-hmm, and we would submit that  
2 that's also a jury question, that the length of that, how  
3 red the red flag was -- was it just pink, or was it real  
4 red? The jury in this case apparently decided that that  
5 was a very red flag that was highly predictive of this  
6 particular type of deprivation, the excessive force.

7 You know, deliberate indifference, Farmer v.  
8 Brandon, that's criminal recklessness. You don't have to  
9 do much. Once you have notice of the likely, of the high  
10 likelihood of a particular constitutional deprivation, you  
11 don't have to do much. You just have to pay attention.  
12 You just have to make a little bit of an effort. That  
13 effort can be flawed. It can be a negligent effort. It  
14 can be a grossly negligent effort. You just have to do  
15 something.

16 There was nothing done here. There was no  
17 effort. The only effort on hiring that's present in the  
18 record is, we ran his record. We got his rap sheet. But  
19 then they didn't read it.

20 QUESTION: Why, in the face of a custom or usage  
21 in the past of checking on records, why should this single  
22 deviation violate that statute?

23 MR. SERR: Because the deviation was a  
24 conscious, deliberate decision made by the ultimate vessel  
25 of county authority on a matter within his sphere of

1 policymaking --

2 QUESTION: Why does that make it a policy, a  
3 single departure for a relative? So he simply wasn't  
4 following the policy in that instance.

5 MR. SERR: Well, again, that goes back to Monell  
6 and what Monell meant by the use of the word policy.

7 That term, policy, in Monell was juxtaposed with  
8 the rejection of respondeat superior. That -- when the  
9 Court rejected respondeat superior they said, the acts  
10 must be the acts of the municipality itself.

11 Monell recognized and Pembaur recognized that  
12 municipalities must act through human beings, and  
13 sometimes those human beings aren't on boards passing laws  
14 that take the form of standard operating procedure.  
15 Sometimes those individuals who are vested with the -- the  
16 ultimate vessels of county power are singular executive  
17 individuals --

18 QUESTION: Well, what if the supervisors in this  
19 case, so there'd be no question of a single -- what if the  
20 supervisors had said, we always check out the records of  
21 people we're going to hire, but in this case it's the  
22 chairman's nephew, so we're going to depart in this case.  
23 Now, does that become a policy?

24 MR. SERR: Mr. Chief Justice, if you take that  
25 kind of thinking far enough, every political subdivision

1 in the country -- counties, cities, school districts --  
2 they all get to deliberately, knowingly hire one bad  
3 apple.

4 QUESTION: Well, if you take your thinking far  
5 enough you're right back to respondeat superior.

6 MR. SERR: No. My thinking is that deliberate  
7 indifference is the key. Criminal recklessness is the  
8 key, criminal recklessness by the municipality itself.

9 QUESTION: Well, you know, if you're talking  
10 about what you find in the statute, where do you find  
11 criminal recklessness in the statute?

12 MR. SERR: Well, in the Canton case, and I guess  
13 this traces back to Justice O'Connor's opinion in Kibbe,  
14 there was a concern by this Court about what to do with  
15 those policies that are not facially unconstitutional, or  
16 those policies, actions of a municipality that do not  
17 directly authorize constitutional deprivation, the failure  
18 to train cases, the bad hiring cases, and Justice O'Connor  
19 articulated in her opinion in Kibbe that the reason we  
20 need a deliberate indifference requirement is to satisfy  
21 that causation requirement in the statute. There was --

22 QUESTION: In answer to the Chief Justice's  
23 question in the hypothetical that he put you where they  
24 hire the nephew, was that a policy?

25 MR. SERR: Absolutely. As that term has been

1 used by Monell and interpreted by this Court in Pembaur,  
2 that was a policy.

3 QUESTION: And then if they -- suppose they  
4 said, we're too busy today and we're just not going to  
5 check the references, would that be a policy?

6 MR. SERR: That would be negligence, perhaps  
7 grossly negligent. That would not be an actionable  
8 decision by the municipality under Canton. Canton  
9 requires criminal recklessness.

10 Canton says that when you've got deliberate  
11 indifference, deliberate disregard of constitutional  
12 rights, then you have a policy as that term was used by  
13 Monell, so long as that deliberate indifference is  
14 attributable to the county itself.

15 QUESTION: I don't see how the state of mind of  
16 the actor can make something a policy. In other words, a  
17 policy is a practice that's followed in an -- you know,  
18 thick and thin, that sort of thing. You have a departure,  
19 and whether it's a negligent departure or a deliberately  
20 indifferent departure, it's still -- one swallow doesn't  
21 make a summer.

22 MR. SERR: The majority in Pembaur actually  
23 reported several dictionary definitions of policy in a  
24 footnote, and those dictionary definitions of policy even  
25 refer to a single decision.



1           When my dean goes out to collect money from  
2   alums and he has to make a decision as to, do we ask this  
3   guy for a million bucks now or do we wait a few years and  
4   ask him for 3 million bucks, he refers to that as a policy  
5   decision. I made a policy decision to ask for the million  
6   bucks now.

7           QUESTION: But let's go back to Justice Souter's  
8   question, because here there is a policy over a 6, 7 year  
9   period of being careful about who is hired to be a police  
10  officer. That's the policy, and we have one -- does the  
11  deviation --

12          MR. SERR: In --

13          QUESTION: -- from the policy become in itself a  
14  policy?

15          MR. SERR: The Court spoke directly to that in  
16  Canton, that when you have genuinely adequate municipal  
17  decisionmaking, the fact that one person negligently slips  
18  through the cracks or accidentally slips through the cracks,  
19  no problem, but if that one person deliberately,  
20  indifferently, criminally, recklessly slips through the  
21  cracks, then you've got a problem under Canton.

22          Rarely will the predictors be there. Rarely  
23  will the red flags be there at the time of hiring. There  
24  aren't many winning hiring cases. You don't need to worry  
25  about that, because rarely are the red flags there at the

1 time of hiring that are particularly predictive of the  
2 specific constitutional deprivation.

3 The only situations that I've seen in the  
4 lower --

5 QUESTION: It's a lawsuit.

6 MR. SERR: Pardon?

7 QUESTION: But it's a lawsuit.

8 MR. SERR: It's a lawsuit. The only --

9 QUESTION: It may be cheaper to -- you know, to  
10 settle than to litigate.

11 MR. SERR: Sometimes, Your Honor, the job  
12 description and the applicant behavior, the preemployment  
13 applicant behavior known to the county decisionmakers just  
14 doesn't match the job description.

15 You don't put child molesters in a first grade  
16 classroom. You don't make them janitors at the elementary  
17 school. Maybe groundskeepers at the high school, maybe an  
18 assistant to the tax collector.

19 The same thing here. The job description of a  
20 police officer, as this Court recognized in Canton, as  
21 Justice O'Connor's concurring opinion noted in Canton,  
22 police officers are expected, by the nature of their job,  
23 to face recurring situations where there are clear  
24 constitutional duties regarding the use of force. Those  
25 recurring situations often involve stressful, tense

1 confrontations with citizens. That's the job description.

2           You don't hire individuals -- some persons are  
3 unfit. Recent, lengthy, lawless disrespect for law and  
4 order, immature, occasional violent behavior is a red  
5 flag. It is highly predictive of the constitutional  
6 deprivation that in fact occurred.

7           Again, if you've got a different constitutional  
8 deprivation, enforcing the law in a racially  
9 discriminatory manner, you don't have the causal link, but  
10 we've got all that. We've got the red flag.

11           We -- also, I think the lack of hiring suits  
12 speaks well of the municipal policymakers in this country,  
13 that normally when they see that red flag they don't hire,  
14 or if they hire, they take some corrective measures  
15 subsequent to hiring, but -- and again, that's all the  
16 deliberate indifference standard requires of persons to  
17 do.

18           The Federal district courts, Justice Scalia,  
19 have not been reluctant to grant summary judgment to  
20 counties if the county comes up with the least bit of  
21 summary judgment proof that they made an effort, that they  
22 paid attention.

23           This record in this case is devoid of that  
24 paying attention. We ran his record, but then we didn't  
25 read it, but he had no felonies, as it turned out. That

1 was the brunt of their case on the hiring.

2 With respect to the bad training, in the face of  
3 expert testimony that there was no formal departmental  
4 training, that the training was nonexistent in the county,  
5 the only thing they came up with was, well, he rode with  
6 grandpa a few times in the squad car and grandpa -- in the  
7 terms of -- in its testimony, pointed out the do's and  
8 don'ts of what to do, things to look for with the drunk  
9 drivers, possible causes, possible reasons to pull people  
10 over, and things of that nature.

11 They didn't -- the county didn't produce  
12 evidence of one single, solitary representative of the  
13 county that took Stacy Burns, despite Stacy Burns' lengthy  
14 preemployment record of behavior including violence, they  
15 didn't point to one county official that took him aside  
16 and said, son, let me tell you about the use of force.  
17 You're going to be facing situations where you need to use  
18 force. Here's when you can, here's when you can't. The  
19 record is devoid of that.

20 And I'd like to point out that I think there's a  
21 blatant misstatement of the record on page 5 of  
22 petitioner's brief here claiming that Calclazier, which  
23 was grandpa, and Howell gave Burns general instructions on  
24 law enforcement, particular instruction on how to detect  
25 drunk drivers, on proper procedures to conduct an



1     investigatory stop, and on methods of placing a suspect  
2     under the officer's custody and control.

3             That last, methods of placing a suspect under  
4     the officer's custody and control, the transcript cite,  
5     580, simply doesn't bear that out. No one told him about  
6     the use of force.

7             Now, that's deliberate indifference, and it's  
8     going to be a rare case, a case like ours, where you can  
9     meet all those standards.

10            This is -- in conclusion, I think this is a case  
11     ultimately about accountability, accountability of police  
12     officers on the street, which is enforced largely through  
13     the Fourth Amendment, accountability on the part of those  
14     ultimate policymakers that decide who to put on the  
15     street, yet in a Fourth Amendment arena, under Michigan v.  
16     Sitz, which is the drunk driving roadblock case, under --

17            CHIEF JUSTICE REHNQUIST: Thank you, Mr. Serr.

18            MR. SERR: Thank you.

19            CHIEF JUSTICE REHNQUIST: The case is submitted.

20            (Whereupon, at 12:02 p.m., the case in the  
21     above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the  
attached pages represents an accurate transcription of electronic  
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The United States in the Matter of:

BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,  
PETITIONER V JILL BROWN, ET AL.  
CASE NO. 95-1100

and that these attached pages constitutes the original transcript of  
the proceedings for the records of the court.

BY Donn Miani Frederico  
(REPORTER)