10-1984

Tennessee v. Garner

Lewis F. Powell Jr.

Probably Note
join 3

CA 6 invalidated Tenn statute that authorized Police to use deadly force if necessary to stop a fleeing person suspected of a felony.
There is a conflict.

PRELIMINARY MEMORANDUM

March 16, 1984 Conference
List 3, Sheet 1

No. 83-1035

TENNESSEE v. GARNER, et al.	Appeal from CA6 (Merritt, Edwards, Keith) Federal/Civil	Timely

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No. 83-1070

MEMPHIS POLICE DEPT, et al. v. GARNER	Cert to CA6 (Merritt, Edwards, Keith) Federal/Civil	Timely

Note – an important question.
David

1. SUMMARY: Whether a Tennessee statute that authorizes the use of deadly force as a last resort to apprehend a nondangerous suspect fleeing a nonviolent felony violates either the Fourth Amendment or the Due Process Clause.

2. FACTS AND DECISION BELOW: On the night of October 3, 1974, two Memphis police officers responded to a call from a person who reported that a burglary was underway next door. One of the officers went around to the back of the house, heard the door slam, and saw a figure running to the back of the lot. The officer shone a light on the suspect, and could see that he was a youth (15 years old) and apparently unarmed. As the boy jumped to get over the back fence, the officer fired at the upper part of the boy's body, because he believed the boy would elude capture in the dark once he was over the fence.

The officer was following standard procedure, because a Tennessee statute has been interpreted as allowing the use of deadly force against a fleeing felon rather than running the risk of allowing him to escape. That statute provides:

> If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

The statute allows an officer to use deadly force as a last resort to effect an arrest when no other means of apprehension is available.

In 1975, the decedent's father brought a § 1983 action against the City and the police department, as well as a number of police officials and the police officer who killed the suspect, to recover damages for wrongful death caused by

violations of the Fourth, Eighth, and Fourteenth Amendments. The defendants other than the officer were joined on the ground that their failure to exercise due care in hiring, training, and supervising the officer made them equally responsible for the death. A decision in favor of defendants was affirmed against the individual defendants, but remanded as against the City for reconsideration in light of Monell v. Department of Social Services, 436 U.S. 658 (1978). On remand, the DC held that the statute was not unconstitutional and the City was therefore not liable. On appeal, the CA6 held that the law authorized seizures unreasonable under the Fourth Amedment and violative of the Due Process Clause as well.

The CA first noted that killing a person constitutes a seizure. The CA rejected the State's reliance on the English common law, which authorized the use of deadly force against suspects fleeing from any felony. The court noted that this rule existed at a time when all of the small number of felonies were capital crimes. The court stated that it is inconsistent with the rationale of the common law "to permit the killing of a fleeing suspect who has not committed a life endangering or other capital offense and who we cannot say is likely to become a danger to the community if he eludes immediate capture." The CA observed that the Eighth Circuit in Mattis v. Schnarr, 547 F. 2d 1007 (8th Cir. 1976), vacated as moot sub nom. Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam), had held a similar Missouri statute unconstitutional as a matter of substantive due process because the historical basis for permitting the use of

deadly force against nonviolent fleeing felons has been substantially eroded.

The CA could find only one appellate decision that had addressed the Fourth Amendment limitations on the use of deadly force to capture a fleeing suspect. In Jenkins v. Averett, 424 F. 2d 1228 (1970), the CA4 held that the Fourth Amendment "shield covers the individual's physical integrity." The CA6 here concluded that the statute was invalid because it was too disproportionate, in that it does not make distinctions based on the magnitude of the offense or on the need to apprehend the suspect. The CA held that before taking the drastic measure of using deadly force as a last resort against a fleeing suspect, officers should have probable cause to believe that the suspect poses a threat to the safety of the officers or a danger to the community if left at large. Use of deadly force on less information is unreasonable under the Fourth Amendment.

The CA also found that a similar result was mandated under the Due Process Clause. The court held that before the state can deprive a person of the fundamental right to life it must demonstrate a compelling interest. Laws that infringe fundamental rights must be narrowly drawn, and this statute is not. The state's interest is compelling only when the fleeing felon poses a danger to the safety of others.

The CA held that the Model Penal Code contains an accurate statement of constitutional limitations on the use of deadly force:

> The use of deadly force is not justifiable ... unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Model Penal Code § 3.07(2)(b) (Proposed Official Draft, 1962).

The CA noted that its decision was in conflict with a CA2 decision that had declined to adopt the Model Penal Code test. See Jones v. Marshall, 528 F. 2d 132 (1975).

The CA went on to conclude that the City could not claim a good-faith defense based upon its reliance on the state statute.

3. CONTENTIONS: The State argues that the decision below calls into question similar laws in 24 states. The Fourth Amendment does not proscribe the use of deadly force as a necessary last resort to capture a suspect whom police have probable cause to believe committed a felony. The question of when deadly force should be applied is one of public policy that should be entrusted to the legislature. The CA6 had previously upheld the statute in Wiley v. Memphis Police Department, 548 F. 2d 1247, cert. denied, 434 U.S. 822 (1977), and in Beech v. Melancon, 465 F. 2d 425 (1972), cert. denied, 409 U.S. 1114 (1973). The decision extends unwarranted constitutional protection to the felon as a matter of constitutional law.

Resp argues that there is no conflict with Jones v. Marshall, because that case was decided before Monell and decided only that a police officer was privileged under § 1983 to use force. The deadly force policies of over 70% of large cities would not permit such force to be used in a case such as this one. The clear position of the organized, professional police community refutes the state's argument that effective law enforcement will be hampered without the authority to shoot nondangerous fleeing felony suspects.

The Memphis Police Department has a history of relying on deadly force to a far greater degree than necessary. Moreover, the policy discriminates on the basis of race, because blacks are shot at a much higher frequency than whites.

4. DISCUSSION: The question here seems substantial. On the one hand, there are strong policy reasons for a rule that nondangerous felons should not be killed merely to prevent their escape. On the other hand, it takes what may be a significant arrow from the quiver of the police. A "nondangerous" felon who knows that he cannot be shot simply for trying to escape has little incentive not to try. Of course, a great number of police departments already operate with apparent success under such a rule. The CA's adoption of the Model Penal Code as constitutional gospel is also somewhat troubling.

The appellation "nonviolent" in this case is also somewhat of a problem. Although it turned out that the house was empty and that the suspect was unarmed, burglary is a crime that is often associated with violence. Many burglars are armed, and

many people are killed by burglars each year. The lumping of the burglary suspect with an antitrust violator for constitutional purposes does not make that much sense. Moreover, although the statute at issue applies only to felonies, I don't see why as a constitutional matter deadly force could not be used against a violent misdemeanant.

Resp's arguments concerning the discriminatory operation of the policy are simply not relevant, because the CA6 struck down the statute on its face. His attempt to distinguish Jones v. Marshall is unpersuasive, because the CA2 there was not discussing merely the officers' privilege when acting pursuant to policy. The CA2 stated:

> This would seem peculiarly to be one of those areas where some room must be left to the individual states to place a higher value on the interest in this case of peace, order, and vigorous law enforcement, than on the rights of individuals reasonably suspected to have engaged in the commission of a serious crime.... While the Fourteenth Amendment may require us to make an independent assessment of the fairness of the state rule, however, we are today interpreting § 1983, and within that statute states must be given some leeway in the administration of their systems of justice, at least insofar as determining the scope of such an unsettled rule as an arresting officer's privilege for the use of deadly force. Further, in the light of the shifting history of the privilege, we cannot conclude that the Connecticut rule is fundamentally unfair.

5. RECOMMENDATION: Especially in light of the fact that this is an appeal, I think review by this Court may be appropriate. Consequently, I recommend noting probable jurisdiction.

There is a response.

March 7, 1984 Browne Opin in petn.

Jour 3
to Note

PRELIMINARY MEMORANDUM

March 16, 1984 Conference
List 3, Sheet 1

No. 83-1070

MEMPHIS POLICE DEPT., et al. Cert to CA6

v.

GARNER Federal/Civil Timely

1. SUMMARY: See memo for curve-lined No. 83-1035.

March 7, 1984 Browne Opin in petn.

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 83-1070

Submitted ....., *19*... *Announced* ....., *19*...

MEMPHIS POLICE DEPT.

vs.

GARNER

This is a pet. for writ of cert.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.		✓											
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Argued ....., 19... *Assigned* ....., 19... No. 83-1035

Submitted ....., 19... *Announced* ....., 19...

TENNESSEE

vs.

CLEAMTEE

granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
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Powell, J.				J3									
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

LFP/djb 08/24/84

Memorandum for the File

No. 83-1070, Memphis Police Department v. Garner

This is a summary memorandum on the basis of a preliminary reading of the briefs.

The caption of this case, stated above, refers to the original §1983 suit. The State of Tennessee was allowed to intervene, and because the case involves the constitutionality of a state statute, it has filed an "appeal" under the same number - 83-1035. The question presented, as stated in the jurisdictional statement, is:

> "Whether Tennessee Code §40-7-108 is unconstitutional as repugnant to the Fourth and Fourteenth Amendments to the Constitution of the United States?"

The petition for cert, filed by the police department and others, states the questions differently. But the issue is the same: the validity of §40-7-108 that reads as follows:

> "Resistance of Officer - if, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest."

This statute is known as the "Deadly Force Statute" that codifies the common law "fleeing felon" rule - a rule that allows the use of deadly force against even a non-violent fleeing felon. Reversing the DC, CA 6 held the Tennessee statute facially invalid.

The Facts

The briefs of the parties summarize the facts favorably to their respective positions. The findings of fact made by the DC following the original trial of this case are set forth in the petition for cert. See A-2 et seq. In summary, Memphis police, told by a neighbor that the home next door was being burglarized, went to the scene where Officer Hymon went to the west side of the house, a side yard cluttered with chicken wire and other obstacles. It was dark (at night), he heard a door slam and saw a figure running from the back of the house to the back of the lot where a cyclone fence - six feet high - extended across the boundray of the property.

Hymon could see a garbage can placed under a window and that "the glass was broken out of the window". Using his flash-light, Hymon saw a figure "in a stooped position next to the cyclone fence". The DC stated that: "He (the figure) did not appear to be armed, but Hymon could not be certain of this at the moment." (A-4). Hymon shouted "halt", and identified him-self as a police officer. Hymon testified that in the poor

visibility the figure appeared to him to be a black male about five feet six inches tall and about 17 or 18 years old. See A-5, n. 3. The figure paused for a moment, and then leaped to the top of the fence and was "half over" when Hymon shot. Using a service revolver, loaded with "hollow point" bullets, Hymon hit the youth in the side of the head - a fatal wound.

The youth, named Garner, was only 15 years old, he was not armed, and although the residence clearly had been burglarized, Garner had only about $10.00 in cash and jewelry in his pockets. Garner had been sentenced to probation twice by juvenile courts on burglary charges.

This suit was instituted by Garner's father under §1983 claiming, so far as presently relevant, invalidity of the Tennessee statute under both the "unreasonable search and seizure" provision of the IV Amendment and the due process provision of the XIV Amendment. Officer Hymon, because he acted in accordance with Tennessee law and pursuant to police department instructions with respect to the use of deadly force, was held to have good faith immunity. Following our decisions in Monell and City of Independence (and a resulting remand to the DC for reconsideration in light of these decisions), the case came back to CA 6 that held the Tennessee statute invalid.

The Decision of CA 6 (facially invalid under 4th & 14th

The panel of Chief Judge Edwards, and Judges Keith and Merrit was unanimous, with the opinion written by Judge Merrit. After summarizing the evidence somewhat more favorably to its ultimate holding than perhaps the findings of fact by DC justified, found the statute facially invalid under both the IV and XIV Amendments. The CA stated that the statute had been construed as follows:

> "Tennessee courts have interpreted their statute regarding the capture of fleeing felons to create a jury question on the issue of the "reasonableness" and the "necessity" of using deadly force. But the "reasonableness" and "necessity" of the officer's action must be judged solely on the basis of whether the officer could have arrested the suspect without shooting him. Purporting to follow the rule developed in England at common law allowing the use of deadly force against suspects fleeing from any felony, Tennessee courts have interpreted their statute to mean that once it is determined that the officer probably could not have captured the person without firing, the jury should find the police action reasonable under the statute." A44

Tenn. "construction" of statute:

could fleeing felon have been arrested w/o shooting him?

The CA recognized that "the common law permitted the killing of a felon who resists arrest without regard to the nature of the felony". But the harshness of the common law rule was viewed as having been ameliorated by more modern jurisprudence. It relied particularly on the proposed Model Criminal Code of the ALI.

common law permitted

The rationale of CA 6 is summarized in a paragraph on p. A51 of the petition. I quote only a portion of it:

> "The Tennessee statute in question here is invalid because it does not put sufficient limits on the use of deadly force. It is "too disproportionate." It does not make distinctions based on "gravity and need" nor on the "the magnitude of the offense." Before taking the drastic measure of using deadly force as a last resort against a fleeing suspect, officers should have probable cause to believe not simply that the suspect has committed some felony. They should have probable cause also to believe that the suspect poses a threat to the safety of the officers or a danger to the community if left at large."

There must be reasonable cause to believe the suspect would endanger the officer or the community

Interestingly enough, the court relied on language in the dissent of Chief Justice Burger in the Bivens case in which The Chief drew a distinction between the use of deadly force "to prevent the "escape of a convicted killer" and to prevent the escape of "car thiefs," pickpockets or a shoplifter." See A50.

Relied on C.J. - but none of these is a "violent" crime.

Comment

The briefs of the parties, including amici briefs, are not particularly helpful. There seems to be - to use the overworked phrase - "more heat than light" in what counsel say. The case presents a difficult and important constitutional issue. On the facts in this case, one's initial reaction is

to think the officer committed an unjustified murder of an unarmed fifteen year old kid whose crime was a minor breaking and entering. But upon more thoughtful reflection, it is clear that the officer acted in "good faith" under Tennessee law and as he had been instructed. Nor were the facts quite as indefensable as CA 6 and appellees' brief view them. It is conceded that Officer Hymon had probable cause to believe a felony had been committed - as indeed was the case. In the darkness of a strange yard, with obstructions preventing the officer from moving closer, it was not easy to make considered judgments in the few seconds during which the action occurred. As Hymon testified, he had no reason to believe the fleeing felon was armed, but could not be sure. Nor did he know whether the felon had a confederate who might be armed. Apparently he could see the person well enough to think he was a young black, 17 or 18 years of age. Hymon himself was a black (I believe). When the escaping person refused to halt when ordered to do so, the officer did what he was taught to do.

Thus, the case squarely presents the constitutional question as to the validity of a "fleeing felon" statute that - according to one of the briefs - is in effect in more than half of our states, in addition to having been the common law rule. The question that concerns me is how to draft a constitutional statute that reasonably would protect both the interests of persons reasonably suspected of crime and the general public interest in preventing felons to escape. There is little in CA 6's opinion that provides guidance.

Borrowing from The Chief's dicta in Bivens, CA 6 says the statute is invalid because it "does not put sufficient limits on the use of deadly force". It makes no distinction between "gravity and need" nor does it require consideration of the "magnitude of the offense". Moreover, an officer should have "probable cause to believe that the suspect posing a threat to the safety of the officers or danger to the community if left at large". CA 6's rule

How one writes these safeguards into a statute is far from clear. Even if the precise language of CA 6 were included in a statute, issues of fact would continue to exist as they did in this case. The Tennessee rule, based on interpretation of the statute by its courts, create a "jury question on the issue of the 'reasonableness' and the 'necessity' of using deadly force." If the Tennessee construction stopped at this point, it may be viewed more charitably. Questions of reasonableness present issue of fact quite similar to the factual issues that CA 6 would create. But apparently the Tennessee courts have not stopped with the general requirement of reasonableness and necessity. As paraphrased by CA 6 the "officer's action must be judged solely on the basis of whether the officer could have arrested the suspect without shooting him." If indeed this is the law in Tennessee, I would doubt the validity of the statute.

If the facts in this case had come within The Chief Justice's Bivens dictum, one readily could agree. For example, if in daylight, an officer had seen a 15 year old kid shoplift and run, clearly it would have been grossly unreasonable to shoot the kid in the back. Burglary not only is a serious felony but also frequently it leads to violence and sometimes to murder. The difficulty with CA 6's decision is that Officer Hymon could not possibly have made the judgments it would require. He could not be sure of the "gravity" of the burglary. He could not even be sure that violence had not committed within the house. These questions also would relate to the "magnitude" of the offense. How could Hymon have made an informed judgment as to the escaping person's danger to the community if left at large"?

* * *

I have perhaps become unduly interested in this case and talked into the dictating machine more than my secretary - or the law clerk - appreciates. I have little doubt that the Tennessee statute on its face is too open-ended to be valid. My clerk should take a close look at the Tennessee Supreme COurt's construction of the statute. Its validity is to be determined only as the statute has been construed. The range of felonies is quite wide, and clearly it would be unreasonable if an officer were authorized to shoot any fleeing felon regardless of the crime and the circumstances. I will be interested in my clerk's views.

L.F.P.

alb 10/18/84

Received 10/21 - Thoughtful memo.
See Lee's answers set forth below. I'm inclined to agree - at least tentatively.

See discussion of Welsh v. Wisc (WJB last Term) that viewed the nature of the offense as relevant to whether exigent circumstances justified warrantless search. (Traffic offense) - p 9

BENCH MEMORANDUM

To: Mr. Justice Powell October 18, 1984

From: Lee

No. 83-1070, Memphis Police Department, et al. v. Cleamtee Garner, et al. (CA6)

QUESTIONS PRESENTED

(1) Does the Fourth Amendment prohibit the use of deadly force to effect the arrest of a "non-violent" felon? Yes {common law felonies limited: ① murder ② rape & ③ manslaughter

(2) If the use of deadly force must be limited to violent felons, is the burglary of a dwelling a "violent felony"? Yes (if results in death or injury.

I. Factual Background

On October 3, 1974, a neighbor reported the burglary of a Memphis residence to the police. Two officers were dispatched

immediately, and arrived while the burglary was still in progress. One officer remained in the car to make a radio report, while the other officer, Hymon, ran behind the house. As Hymon approached the back corner of the house, he heard the rear door slam shut. He ran into the back yard, and began looking around with his flashlight. He saw the figure of a black male crouched next to a fence about thirty or forty feet away. The burglary suspect did not appear to be armed.

Officer Hymon identified himself, and ordered the suspect to "halt." Nevertheless, after a short pause, the young man started to climb over the six-foot fence. Hymon, realizing that he would not be able to apprehend the suspect on foot, fired his gun at the moving figure. The fleeing burglar was hit in the back of the head, and he subsequently died from the wound. The deceased was identified as Edward Garner, a fifteen-year-old black male. Garner had taken only ten dollars and some jewelry from the house, which was unoccupied at the time of the burglary.

At the time of the shooting, the Memphis police department did not have a formal policy with respect to the use of deadly force. Apparently, police officers were told to use the force permitted by state law. Because Tennessee had adopted the common law rule, see Tenn. Code Ann. §40-7-108, policemen were allowed to use deadly force when necessary to effect the arrest of any fleeing felon.

no formal policy w/r to deadly force

II. The Decisions Below

The decedent's father, Cleamtee Garner, filed a §1983 action against the City of Memphis, the police department, the mayor, and Officer Hymon. The plaintiff claimed that his son's constitutional rights were violated by the shooting. Holding that the city and the police department were not "persons" within the meaning of §1983, the DC dismissed the action against the municipal defendants. See Monroe v. Pape, 364 U.S. 167 (1961). The DC also dismissed the action against the individual defendants. The court found that they had acted in good faith reliance upon a Tennessee statute, which permits a police officer to shoot a fleeing felon in order to prevent his escape. See Tenn.C.A. §40-7-108.

CA6 affirmed the DC's decision that the individual defendants were protected by the doctrine of qualified immunity. The CA reversed the DC's judgment as to the municipal defendants, however. Under Monell v. Department of Social Services, 436 U.S. 658 (1978), which was decided after the DC had issued its opinion, a city can be sued for damages caused by an unconstitutional "policy or custom." The CA remanded the case so that the lower court could reconsider its decision in light of Monell.

On remand, the DC held that its decision was unaffected by Monell because Edward Garner's constitutional rights were not violated by the shooting.

In reversing the DC's judgment, CA6 held that Edward Garner's fourth amendment rights had been violated.[1] The use — a violation of 4th Amend right — CA 6

Footnote(s) 1 will appear on following pages.

of deadly force to capture Garner, who was suspected of committing only a non-violent felony, constituted an "unreasonable seizure." The CA found support for its decision in a dissent by the Chief Justice. The dissent states that a "shoot order" to apprehend a pickpocket, car thief, or shop lifter would be "intolerable." Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). Because Officer Hymon had no reason to believe that Garner had committed a violent felony, the shooting violated his fourth amendment rights. The Tennessee statute was held to be unconstitutional to the extent that it permitted policemen to use deadly force in arresting non-violent felons.[2] The court criticized the common law rule for its failure to consider the "gravity of the offense."

CA6 further held that the Tennessee statute violates the Due Process Clause of the fourteenth amendment. Because the common law rule often deprives suspects of their lives, it must be justified by a "compelling state interest." The court conceded that the Tennessee statute aids the state in the

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[1]While the second appeal was pending, the clerk of CA6 informed the Attorney General of Tennessee that Tenn. Code Ann. §40-7-108 was being challenged on constitutional grounds. Pursuant to 28 U.S.C. §2403(c), the state filed a motion to intervene for the purpose of defending the constitutionality of its fleeing felon rule. The motion was granted, and the state became a party to the action.

[2]CA6 also stated that deadly force may be used if there is probable cause to believe that "the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." Borrowed from Model Penal Code §3.07(2)(b), this justification for the use of deadly force is not relevant to the case at hand.

administration of its criminal justice system, which depends upon bringing suspects to trial. Nevertheless, CA6 found that this interest was not sufficiently compelling to justify the use of deadly force to apprehend non-violent criminals. The court cited with approval Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), in which CA8 invalidated a fleeing felon statute on substantive due process grounds.

Finally, the court held that the City of Memphis and its police department, although they relied in good faith on a state statute, were not entitled to qualified immunity. See Owen v. City of Independence, 445 U.S. 622 (1980). Therefore, the plaintiff could recover damages from the municipal defendants.

The municipal defendants and the state sought review by this Court, and filed separate merits briefs.

DISCUSSION

I. The Common Law Rule

Tennessee has codified the common law rule that a policeman may shoot any fleeing felon in order to prevent his escape. See Tenn. Code Ann. §40-7-108.[3] This statute was

[3]The Tennessee Supreme Court has not construed the statute so as to permit the use of deadly force only against violent felony suspects. In Scarborough v. State, 168 Tenn. 106 (1934), the court stated that deadly force may be used against an automobile thief, if necessary to effect his arrest. Nothing in more recent cases suggests an intention to depart from this common law rule. See, e.g., State v. Boles, 598 S.W.2d 821 (Tenn.App. 1980). Indeed, in his brief filed with the CA, the state Attorney General conceded that "Tennessee courts and enforcement agencies interpret the statute to permit the use of deadly force agasint

Footnote continued on next page.

invalidated by CA6, which held that the use of deadly force to apprehend non-violent felons violates the fourth amendment. The state points out that the common law rule was well-accepted at the time the fourth amendment was ratified. Therefore, it is unlikely that the Framers intended to preclude the use of deadly force to effect the arrest of any felon. Although this line of reasoning is plausible, it fails to recognize that most of the justifications for the common law rule no longer exist.

At common law, only a few serious crimes, such as murder, rape, and manslaughter, were classified as felonies. Because all of these crimes were punishable by death, the use of deadly force was viewed as an acceleration of the penal process. Note, The Use of Deadly Force in Arizona by Police Officers, 1973 L. & Soc. Order 481, 482. The use of deadly force was further justified by the necessity of capturing felons at the scene of the crime. With no national network of police forces, a suspect who eluded his initial pursuers probably would never be captured. Note, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. C.R. & C.L. L. Rev. 361 (1976).

Late in the nineteenth century, several developments in this country weakened the justifications for the common law rule. First, an increase in the number of crimes classified as felonies led to authorization of deadly force in many more situations than at common law. Second, restrictions placed on the death penalty

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any fleeing felon, whatever the felony."

meant that, in most states, the only crimes punishable by death were those endangering life or bodily security. See Furman v. Georgia, 408 U.S. 238, 331-341 (1972)(Marshall, J., concurring). This change undermined the penal rationale for the rule. Finally, police departments were established all over the country, so that a suspect who initially eluded capture was more likely to be arrested later.[4]

Tennessee's statute should not be invalidated simply because the original justifications for the common law rule no longer exist. The federal courts do not sit to evaluate the wisdom of state legislative judgments. Nevertheless, given the changes that occurred in the late nineteenth century, this Court should not hold the fleeing felon rule constitutional simply because it was recognized at common law when the fourth amendment was ratified.

II. The Fourth Amendment Analysis

The CA's holding that the fleeing felon rule violates the fourth amendment is not without problems. The apprehension of a suspect through the use of deadly force certainly

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[4]Although the justifications for the common law rule largely disappeared in the late 1800's, the courts proved "reluctant to abandon a convenient pigeon-hole disposal of cases on the basis of whether the crime was a felony or a misdemeanor." Pearson, The Right to Kill in Making Arrests, 28 Mich. L. Rev. 957 (1930). Even today, in those eight jurisdictions where the legislature has not intervened, the common rule remains unchanged. At least eighteen other states have codified the common law rule.

constitutes a "seizure." Cf. United States v. Mendenhall, 446 U.S. 544, 553 (1980) (a person is "seized" when his freedom of movement is restrained). Nevertheless, it is not so clear that this seizure is "unreasonable." In order to decide this point, the Court must balance the government's need for the "seizure" against the intrusion that the "seizure" represents.

The government has a strong interest in effecting the arrest of all suspects. Without arrests, none of the goals of the criminal law can be achieved; there can be no retribution, incapacitation, rehabilitation, or deterrence. The common law rule enhances the state's ability to bring suspected felons to justice, and enables the police to capture some fugitives who otherwise would outrun or outmuscle their pursuers. More importantly, the rule deters other suspects from attempting to elude the police.

Although the state has a strong interest in arresting non-violent felons, the common law rule is not a prerequisite to realizing that goal. It is undisputed that in most cases, the police can apprehend a criminal suspect without resorting to deadly force. Moreover, it seems obvious that non-violent felons, by their nature, probably will yield to less force. Moreover, because they usually are sentenced to shorter prison terms if convicted, non-violent felons have less incentive to take chances when running from the police. Finally, if the non-violent felon eludes the police, often he can be apprehended later. Cooperation among police departments hinders a criminal suspect to hide anywhere in this country.

Admittedly, abolishing the common law rule will make it more difficult to arrest non-violent felons. Thus, the state does have some "need" for its fleeing felon statute. This governmental "need" must be balanced against the "intrusion" of the use of deadly force. The taking of a human life is obviously the most serious "intrusion" possible. It outweighs any conceivable interest that the state has in the common law rule. A marginal improvement in the state's success rate in dealing with crimes against property, does not justify killing.

As the reasoning above suggests, the common law rule probably cannot be invalidated in the absence of a judicial "finding" that the state's interest in dealing with violent crime is greater than its interest in controlling non-violent crime. Traditionally, in interpreting the "fourth amendment," the Court has not looked at the gravity of the underlying offense. In Mincey v. Arizona, for example, the state's "murder scene exception" to the warrant requirement was rejected. The Court held that for there was no principled distinction between a murder scene, and the scene of a rape, robbery, or burgalary. Nevertheless, a case decided last term indicates that it is sometimes appropriate to consider the gravity of the underlying offense. In Welsh v. Wisconsin, the Court held that the nature of the offense is an important factor to consider in deciding whether exigent circumstances justify the warrantless search of a home. In Welsh, the Court held that the warrantless search of the home of an intoxicated driver was impermissible, when the underlying offense was a noncriminal traffic violation.

yes

WJB that I joined

Given the current Court's willingness to consider the gravity of the underlying offense, I think that the state's fleeing felon rule, as it applies to non-violent felons, should be invalidated on fourth amendment grounds.[5]

III. Substantive Due Process

Under the Due Process Clause of the fourteenth amendment, the deprivation of a fundamental right must be justified by a "compelling" state interest. Tennessee's fleeing felon rule often results in the loss of "life," a fundamental right. Therefore, as it has done in other substantive due process decisions, the Court must weigh carefully the relevant interests. See,e.g., Roe v. Wade, 410 U.S. 113 (1973). Using the reasoning set forth in the preceding section, the Court could find that the Tennessee statute does not further a "compelling" state interest. At least one other court has invalidated a fleeing felon statute on substantive due process grounds. See Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976)(en banc), vacated sub. nom. Ashcroft v. Mattis, 431 U.S. 171 (1977).

Despite the plausibility of the substantive due process approach, the Court should rely solely upon the fourth amendment

WJB's opinion I joined

[5] In Welsh, the Court noted that "the State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal civil forfeiture offense for which no imprisonment is possible." Therefore, in making its decision as to the gravity of the offense, the Court was able to look to the state legislature for guidance. A bright line between violent and non-violent felonies, on the other hand, would be drawn regardless of how a state chooses to punish these crimes.

in invalidating the Tennessee statute. The relevance of the fourth amendment is clear, for its primary function has been to place limits on police practices involving the apprehension and investigation of criminal suspects. Substantive due process, on the other hand, has been used to protect freedom of choice in matters involving family and procreation. The use of substantive due process has been criticized by many commentators as unprincipled. See Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 935 (1973). Therefore, I think that the Court should avoid relying upon the Due Process Clause when a more specific constitutional guarantee can be used to reach the desired result.

IV. Is Burglary a "Violent Felony"?

Tennessee's fleeing felon rule is unconstitutional on its face, for it allows the use of deadly force to effect the arrest of non-violent criminal suspects. Nevertheless, the statute is not unconstitutional as applied to Garner. The crime that he committed should be considered "violent" for purposes of fourth amendment analysis.

CA6 held that a crime is not "violent" unless it involves the "use or threatened use of deadly force." The CA thus focuses upon the facts of the particular crime. Instead, the court should have looked at the type of crime committed by the suspect. Some felonies, such as burglary, often result in death or serious bodily injury. Whether physical harm occurs during a particular incident is largely a matter of chance. The

state obviously has a tremendous interest in ensuring that its criminal justice system deals effectively such crimes. If "non-violent" burglars are not incapacitated, rehabilitated, or deterred, they may burglarize again, and cause death or serious physical injury during ensuing incidents.

The approach taken by the CA is not meritless. It may be wise to limit the use of deadly force to situations when the police officer believes that the "suspect used or threatened to use deadly force." First proposed by the drafters of the Model Penal Code, fourteen state legislatures have adopted this rule. Nevertheless, this model legislation should not be transformed into a constitutional requirement. The state has a large interest in dealing effectively with crimes that often result in death or physical injury. Therefore, I think that the decision whether a crime is "violent," for purposes of fourth amendment analysis, should depend upon the "type of crime committed."

SUMMARY

CA6 was correct in finding that Tennessee's fleeing felon statute, on its face, violates the fourth amendment. Policemen should not be permitted to use deadly force in order to effect the arrest of "non-violent" felons. Nevertheless, the statute is not unconstitutional as applied to the facts of this case. A crime should be considered "violent," if it is the type of crime that often results in death or seriously bodily injury. The breaking and entering of a dwelling often will result in physical harm to the victims. Therefore, the Memphis police

officer was justified in using deadly force to apprehend Garner. The judgment of CA6 should be reversed.

alb 10/27/84

TO: Justice Powell
FROM: Lee
RE: Nos. 83-1035, 83-1070, Tennessee v. Cleamtee Garner, et al. and Memphis Police Dept. v. Cleamtee Garner, et al., the Model Penal Code definition of burglary

Section 221.1 (1) of the Model Penal Code defines "burglary" as the entry "of a building or occupied structure ... with the purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." The Introductory Note recognizes that it would be possible to eliminate "burglary" as a separate offense. The criminal action could be treated as an attempt to commit the intended crime plus an offense of criminal trespass. Nevertheless, the drafters decided to treat "burglary" as an independent substantive offense because of their "considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants."

model code

The definition of "burglary" itself reflects the drafters' concern for human safety. The entry must be unprivileged; unprivileged entries, unlike the shoplifting situation, often result in physical violence. Moreover, the MPC provides that an affirmative defense to a prosecution for burglary is that the building or structure was abandoned. This, of course, suggests that the drafters were less concerned about "crimes against property."

83-1035 TENNESSEE v. CLEAMTEE GARNER Argued 10/30/84

Klein (for Petre - Memphis police)

Offense was burglary in "first degree". [Breaking & entering at night]

CA 6 accepted Model Penal Code as standard.

CA 6 erred in viewing burglary as non-violent crime.

Model Code standard can't be enforced. Police must make split second decisions.

Cody (ant AG of Tenn) — no distinction bet. violent & ~~violent~~ non-violent crime.

Winter (Resp)

Majority of States have no problem with Model Code.

Burglary not a violent crime - is defined as one w/o force.

Max penalty in Tenn for ~~first~~ first degree burglary is 15 yrs. In most States this ~~penalty~~ would would be max. for 3rd degree burg. See Solem v Helm

Winter (cont).

Officer knew victim was a juvenile.

No reason to believe he was armed.

Under Tenn. law, a juvenile ~~a~~ charged with burglary would be tried as a juvenile - not an ~~adult~~ adult, & could not impose a prison sentence (?).

Agreed we decide this case ~~on~~ on "as applied" basis - not facially.

Answering BRW, counsel was vague as to standard - did not endorse CA6's standard or standards (the opinion not clear)

Winter seems to agree that facts & circumstances must be considered.

Check transcript

Agree on standard: probable cause to believe a violent crime ~~to~~ has been committed.

Winter (cont).

On facts, this is easy case because officer knew a fleeing felon was juvenile, but would apply same standard to adult.

Under Memphis Police Dept. officer should not have shot at a juvenile.

7.

83-1035 Tenn. v Garner
(Deadly force & statute)

1. On its face - invalid, as no distinction based on nature of felony

2. Common law - limited number of felonies.
Today wide range of statutory felonies

3. Const. standard.
Must be related to violence.
Model Cr. Code
CA6

may be justified in using deadly force if the suspect has committed a violent crime or if they have probable cause to believe that he is armed or that he will endanger the physical safety of others if not captured. A statute which

4. Studies
Crime Comm
No empirical ev.
Most there is more serious crime in State that do not have deadly force

4. As applied

Crime vs prop —

Felony had been committed
Max penalty 15 yrs
No evidence of violence
No evidence of weapon
Juvenile - 17/18 } but these are
Small } immaterial

5. Decision

Affirm as applied basis.

Means other than "deadly force" are available:

1. "Stun guns" - pellets, possible tear gas.

2. "guns equipped with intense light beams" - ~~not~~ suspect knows he can be shot.

(teenager had probably never knew of State's "deadly force" statute.)

No. 83-1035, Tennessee v. Cleamtee Garner Conf. 11/2/84

The Chief Justice

Q - does 4th or 5th Amend. prevent use of deadly force vs a fleeing felon.

Officer had a clear right to think a felony had been committed. Officer reasonably could have believed there was violence.

A balancing Q. This was a crime of "violence".

Should decide case on applied basis.

CJ passed to hear discussion. Reserved her decision.

Justice Brennan Aff'm

Decide on applied. There was no reason to believe there was a danger of violence. There was a "seizure" & it was unreasonable.

Balance would be different if there was reason to believe fleeing person would engage in violence.

Justice White Affm on applied basis.

Agree generally with WJB.

Would not say statute is unconst. on its face - do not think it is.

May shoot if there is reason to believe violence.

Affm on 4th Amend.

If there was a warrant to arrest for a violent crime, could shoot.

Justice Marshall Affirm

Right to shoot only when appellee's life or life of some one else is endangered

Invalid on face as well as applied.

This was an "execution".

No one's life was in danger.

Justice Blackmun Affirm

Very little law

Decide only on 4th amend – as applied.

Narrow opinion on facts

Justice Powell Affirm

See my notes

Justice Rehnquist Reverse

On an as applied basis.

There is always danger of violence in a burglary at night.

Justice Stevens Affirm

On ~~as~~ applied basis.

Memphis policy is broader than statute.

No ex. of violence

This is nature of an execution.

Justice O'Connor Reverse

On an applied.

no violation of 4th amend in circumstances: fleeing after a burglary at night of a private resident

No

LEVEL 1 - 5 OF 13 STORIES

September 30, 1982, Thursday, Final Edition

SECTION: Metro; C4

LENGTH: 680 words

HEADLINE: Police Add 50,000-Volt Weapon to Arsenal

BYLINE: By Ed Bruske and Alfred E. Lewis, Washington Post Staff Writers

KEYWORD: TASER

BODY:

Future shock has arrived in the District of Columbia police department.

Tomorrow, members of the department's Special Operations Division are scheduled to add to their arsenal a 50,000-volt weapon called a Taser, a handgun the size of a flashlight that temporarily immobilizes suspects by firing electrically-charged darts.

Yesterday the weapon was demonstrated for reporters and police officials from the city and surrounding jurisdictions. The darts were fired into Michael Dinenna, a 250-pound Bethesda bar manager to whom police had paid $250 for the experiment.

When the darts had penetrated his clothing and the outer surface of his skin, Dinenna, 6-foot-7, instantly fell to the floor of the lineup room at police headquarters, a paralyzed lump.

He was able to rise in about 10 seconds, but police could have kept him stunned and on the ground by increasing the current through wires attached to the darts, police said.

Deputy Police Chief Marty M. Tapscott said four of the weapons, costing $200 each, will be deployed by special operations for a six-month trial period. If proved effective, he said, Tasers may eventually be placed in police patrol cars throughout the city.

Tapscott emphasized that the new weapons are not intended to replace service revolvers, but as a device to subdue unruly suspects, while avoiding physical harm to either civilians or police officers.

"I see the use being very selective," Tapscott said. "If no situation came up in six months where we had to use it, then we don't need it."

The Taser is being used by dozens of police departments across the country, with apparent enthusiasm.

Locally police in Fairfax and Prince George's counties have tried the weapon and found it useful in some situations.

Fairfax County police spokesman Capt. Andrew Page said four Tasers have been in use on a test basis since April, and the department is considering ordering seven more, one for each of the county's police substations.

Page said the Tasers have been called into action three times, twice on the same individual. That man, Page said, was a noncooperative "weight-lifter type" whose parents had signed mental commitment papers to have him taken away.

Page said the man was zapped once to get him to the hospital, and then, after being treated and released, he again was ordered commited and he again resisted -- until police approached with the Taser.

"He didn't want to get shot again," Page said.

"If you've ever worked on a car and touched a spark plug while the motor was running, then you know what it feels like," said Prince George's County Police Sgt. Bill Spalding. "It's the same pulsing sensation, only 20 times worse."

Spalding got the Taser's darts in his thigh last year during a demonstration in which he pretended to hold a cocked revolver to the head of a hostage. Both he and the revolver fell to the floor before he could pull the trigger.

Prince George's police have used Tasers to subdue two drug-influenced suspects at the Capitol Centre. On another occasion, while trying to serve commitment papers, Spalding used a Taser on a man who had barricaded himself inside his house with a wooden club.

"It knocked him right out of his house slippers," Spalding said.

Police in Los Angeles have had the use of 80 Tasers for the last year and a half. Department spokesman Pat Connelly said another 300 are being ordered for patrol cars.

The electrical pulse of the 1 1/2-pound Taser is transmitted through tiny wires to the barbed darts up to a range of 15 feet. According to the weapon's developer, California entrepreneur Jack Cover, the Taser acts on the nervous system to cause instant paralysis, but leaves no harmful after-effects.

"I think it's a wonderful weapon," said Gary Hankins, head of the bargaining committee for the Fraternal Order of Police, the labor organization for rank-and-file officers.

"This represents an opportunity for an officer to stop short of using deadly force that he currently doesn't have. It's an opportunity to save lives."

GRAPHIC: Picture, Steve Lyddane hold Taser weapon in his hand as he explains how device works. By Craig Herndon -- The Washington Post

LEVEL 1 - 1 OF 1 STORY

April 23, 1976, Friday

The "other side" has them, too!

LENGTH: 390 words

HEADLINE: The Taser Zap

BYLINE: Suzanne de Lesseps

BODY:

It was a scene right out of James Bond. Last November two jewel thieves accosted a diamond merchant in New York City, zapped him with an electric Taser dart gun and stole away with $100,000 worth of loot. The merchant suffered only temporary after-affects from the stinging attack. In Miami last fall, a young woman fired a Taser gun at a gas station attendant and made off with the station's cash. "I fell on the floor and couldn't move," William Lawson said after the incident. "It was like sticking your finger in a wall socket... the worst pain I ever felt."

What is this new, high-voltage weapon that sells for $199.50? Also known as a " stun gun, " the Taser was invented by a California man named John J. Cover, who always wanted to build an electronic rifle patterned after those owned by Buck Rogers and Flash Gordon. What he finally came up with, is a hand-held device weighing only one-and-one-half pounds which transmits an electric current through two darts, each attached to 15 feet of wire. The darts are fired into the skin or clothing of the victim.

"When the Taser's electrical force is powered into the body, it generates an electric current that dominates [the] neuromuscular system," says promotional advertising for the weapon. "When an attacker has been 'Tasered,' the muscles in his body involuntarily contract; he is virtually helpless and may experience pain." The most attractive feature of the Taser, according to its marketers, is that it is not lethal and its effects are over in minutes. Some doctors, however, have charged that the Taser can cause grave injury, particularly if used against young children, the elderly or those with heart problems.

The Taser has primarily been marketed as a self-defense weapon--a device for housewives, students, shopkeepers and security guards to use in case of attack. But as the examples above show, the Taser has appealed to perpetrators of crime as well. In New York City, the electrical device has been declared illegal, and according to a ruling by the Bureau of Alcohol, Tobacco and Firearms all

Tasers bought and sold after Friday, April 30, must be registered as firearms. In the world of mystery novels and science fiction, electric zap guns are romantic and intriguing. In reality, however, they may not be quite as appealing.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 9, 1984

RE: No. 83-1035) - Tennessee v. Garner
83-1070)- Memphis Police Dept. v. Garner

MEMORANDUM TO THE CONFERENCE:

Although I find it difficult to say the action of the officer was unreasonable, I am prepared to affirm on the narrow basis Byron and some others discussed. I have assigned it to Byron.

Regards,

WEB

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: DEC 17 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1035

TENNESSEE, APPELLANT
83-1035 *v.*
CLEAMTEE GARNER, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMPHIS POLICE DEPARTMENT, ET AL., PETITIONERS
83-1070 *v.*
CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1984]

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless necessary to prevent the escape and the officer reasonably believes that the suspect poses a significant threat of death or serious physical injury to the officer or others.

I

At about 10:45 p. m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing to-

ward the adjacent house.[1] She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the back yard. The fleeing suspect, who was petitioner's decedent, Edward Garner, stopped at a six-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. App. 41, 56; Record 219. He thought Garner was 17 or 18 years old and about 5' 5" or 5' 7" tall.[2] While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture,[3] Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance

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[1] The owner of the house testified that no lights were on in the house, but that a back door light was on. Record 160. Officer Hymon, though uncertain, stated in his deposition that there were lights on in the house. Record 209.

[2] In fact, Garner, an eighth-grader, was 15. He was 5' 4" tall and weighed somewhere around 100 or 110 pounds. App. to Pet. for Cert. A5.

[3] When asked at trial why he fired, Hymon stated:

"Well, first of all it was apparent to me from the little bit that I knew about the area at the time that he was going to get away because, number one, I couldn't get to him. My partner then couldn't find where he was because, you know, he was late coming around. He didn't know where I was talking about. I couldn't get to him because of the fence here, I couldn't have jumped this fence and come up, consequently jumped this fence and caught him before he got away because he was already up on the fence, just one leap and he was already over the fence, and so there is no way that I could have caught him." App. 52.

He also stated that the area beyond the fence was dark, that he could not have gotten over the fence easily because he was carrying a lot of equipment and wearing heavy boots, and that Garner, being younger and more energetic, could have outrun him. *Id.*, at 53–54.

to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.[4]

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennesse statute and pursuant to police department policy. The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. §40–7–108.[5] The department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. App. 140–144. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action. App. 57.

Garner's father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U. S. C. §1983 for asserted violations of Garner's constitutional rights. The complaint alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. It named as defendants Officer Hymon, the police department, its Director, and the Mayor and city of Memphis. After a 3-day bench trial, the District Court entered judgment for all defendants. It dismissed the claims against the Mayor and the Director for lack of evidence. It then concluded that Hymon's actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had

[4] Garner had rummaged through one room in the house, in which, in the words of the owner, "all the stuff was out on the floor, all the drawers was pulled out, and stuff was scattered all over." App. 34. The owner testified that his valuables were untouched but that, in addition to the purse and the 10 dollars, one of his wife's rings was missing. The ring was not recovered. App. 34–35.

[5] Although the statute does not say so explicitly, Tennessee law forbids the use of deadly force in the arrest of a misdemeanant. See *Johnson* v. *State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938).

employed the only reasonable and practicable means of preventing Garner's escape. Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." App. to Pet. for Cert. A10.

The Court of Appeals for the Sixth Circuit affirmed with regard to Hymon, finding that he had acted in good faith reliance on the Tennessee statute and was therefore within the scope of his qualified immunity. 600 F. 2d 52 (1979). It remanded for reconsideration of the possible liability of the city, however, in light of *Monell* v. *Department of Social Services*, 436 U. S. 658 (1978), which had come down after the District Court's decision. The District Court was directed to consider whether a city enjoyed a qualified immunity, whether the use of deadly force and hollow point bullets in these circumstances was constitutional, and whether any unconstitutional municipal conduct flowed from a "policy or custom" as required for liability under *Monell*. 600 F. 2d, at 54–55.

The District Court concluded that *Monell* did not affect its decision. While acknowledging some doubt as to the possible immunity of the city, it found that the statute, and Hymon's actions, were constitutional. Given this conclusion, it declined to consider the "policy or custom" question. App. to Pet. for Cert. A37–A39.

The Court of Appeals reversed and remanded. 710 F. 2d 240 (CA6 1983). It reasoned that the killing of a fleeing suspect is a "seizure" under the Fourth Amendment,[4] and is therefore constitutional only if "reasonable." The Tennessee statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes—"The facts, as found, did not justify the use of deadly force under the Fourth

[4] "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U. S. Const., Amdt. 4.

Amendment." *Id.*, at 246. Officers cannot resort to deadly force unless they "have probable cause to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large." *Ibid.*[7]

The State of Tennessee, which had intervened to defend the statute, see 28 U. S. C. § 2403(c), appealed to this Court. No. 83–1035. The city filed a petition for certiorari. No. 83–1070. We noted probable jurisdiction in the appeal and granted the petition. —— U. S. —— (1984).

CA6 holding — BRW's language is better - see p 1

II

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975). While it is not always clear just when minimal police interference becomes a seizure, see *United States* v. *Mendenhall*, 446 U. S. 544 (1980), there can be no question that apprehension by the use

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[7]The Court of Appeals concluded that the rule set out in the Model Penal Code "accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons." 710 F. 2d, at 247. The relevant portion of the Model Penal Code provides:

"The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." American Law Institute, Model Penal Code § 3.07(2)(b) (Proposed Official Draft, 1962).

The court also found that the Due Process Clause required the same result, because the statute was not narrowly drawn to further a compelling state interest. The court considered the generalized interest in effective law enforcement sufficiently compelling only when the the suspect is dangerous. Finally, the court held, relying on *Owen* v. *City of Independence*, 445 U. S. 622 (1980), that the city was not immune.

of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

A

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *E. g.*, *United States* v. *Watson*, 423 U. S. 411 (1976). Petitioners argue that if this requirement is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, —— U. S. ——, —— (1983); see *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 555 (1976). We have described "the balancing of competing interests" as "the key principle of the Fourth Amendment." *Michigan* v. *Summers*, 452 U. S. 692, 700, n. 12 (1981). See also *Camara* v. *Municipal Court*, 387 U. S. 523, 536–537 (1967). Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. *United States* v. *Ortiz*, 422 U. S. 891, 895 (1975); *Terry* v. *Ohio*, 392 U. S. 1, 28–29 (1968).

Applying these principles to particular facts, the Court has held that governmental interests did not support a lengthy detention of luggage, *United States* v. *Place*, *supra*, an airport seizure not "carefully tailored to its underlying justification," *Florida* v. *Royer*, 460 U. S. 491, 505–505 (1983) (plurality opinion), surgery under general anasthesia to obtain evidence, *Winston* v. *Lee*, —— U. S. —— (1985), or detention for fingerprinting without probable cause, *Davis* v. *Mis-*

sissippi, 394 U. S. 721 (1969). On the other hand, under the same approach it has upheld the taking of fingernail scrapings from a suspect, *Cupp* v. *Murphy*, 412 U. S. 291 (1973), an unannounced entry into a home to prevent the destruction of evidence, *Ker* v. *California*, 374 U. S. 23 (1963), administrative housing inspections without a warrant and without probable cause to believe that a code violation will be found, *Camara* v. *Municipal Court*, *supra*, and a blood test of a drunk-driving suspect, *Schmerber* v. *California*, 384 U. S. 757 (1966). In each of these cases, the question was whether the totality of the circumstances justified a particular sort of search or seizure.

B

The same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against this interest petitioners and appellant range governmental interests in effective law enforcement. They argue that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement." Brief for Petitioners 14.

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. Cf. *Delaware* v. *Prouse*, *supra*, at 659. The use of deadly force is a self-

defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts,[8] the presently available evidence does not support this thesis.[9] The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. See Section IIIC, *infra*. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the

[8] We note that the usual manner of deterring illegal conduct—through punishment—has been largely ignored in connection with flight from arrest. Arkansas, for example, specifically excepts flight from arrest from the offense of "obstruction of governmental operations." The commentary notes that this "reflects the basic policy judgment that, absent the use of force or violence, a mere attempt to avoid apprehension by a law enforcement officer does not give rise to an independent offense." Ark. Stat. Ann. § 41-2802(3)(a) and commentary. In the few States that do outlaw flight from an arresting officer, the crime is only a misdemeanor. See, *e. g.*, Ind. Code § 35-44-3-3. Even forceful resistance, though generally a separate offense, is classified as a misdemeanor. *E. g.*, Ill. Rev. Stat., ch. 38, § 31-1; Mont. Code Ann. § 45-7-301; N. H. Rev. Stat. Ann. § 642:2; Ore. Rev. Stat. § 162.315.

This lenient approach does avoid the anomoly of automatically transforming every fleeing misdemeanant into a fleeing felon—subject, under the common law rule, to apprehension by deadly force—solely by virtue of his flight. However, it is in real tension with the harsh consequences of flight in cases where deadly force is employed. For example, Tennessee does not outlaw fleeing from arrest. The Memphis City Code does, § 30-15, subjecting the offender to a maximum fine of $50, § 1-8. Thus, Garner's attempted escape subjected him to (a) a $50 fine, and (b) being shot.

[9] See M. Punch, Control in the Police Organization 98 (1983); Fyfe, Observations on Police Deadly Force, 27 Crime & Delinqu. 376, 378-381 (1981); W. Geller & K. Karales, Split-Second Decisions 67 (1981); App. 84 (Affidavit of William Bracey, Chief of Patrol, New York City Police Department). See generally Brief for the Police Foundation et al. as *Amici Curiae*.

use of such force is an essential attribute of the arrest power in all felony cases. See *Schumann* v. *McGinn*, 240 N. W. 2d 525, 540 (Minn. 1976) (Rogosheske, J., dissenting in part). Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than escape. Where the suspect poses no immediate threat, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer reasonably believes that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. If a fleeing suspect is armed with a lethal weapon or if there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute passes constitutional muster.

III

A

It is insisted that the Fourth Amendment must be construed in light of the common law rule allowing the use of whatever force that was necessary to effect the arrest of a

fleeing felon, though not a misdemeanant. As stated by Hale in 1788:

> "If persons that are pursued by these officers for felony or the just suspicion thereof . . . shall not yield themselves to these officers, but shall either resist or fly before they are apprehended or being apprehended shall rescue themselves and resist or fly, so that they cannot otherwise be apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony." 2 Hale, *History of the Pleas of the Crown* 85–86 (1788). See also 4 W. Blackstone, Commentaries on the Laws of England *289.

Most American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanant, coupled with a general privilege to use such force to stop a fleeing felon. *E. g.*, *Holloway* v. *Moser*, 193 N. C. 185, 136 S. E. 375 (1927); *State* v. *Smith*, 103 N. W. 944, 945 (Iowa 1905); *Reneau* v. *State*, 70 Tenn. 720 (1879); *Brooks* v. *Commonwealth*, 61 Pa. 352 (1869); *Roberts* v. *State*, 14 Mo. 138 (1851); see generally R. Perkins & R. Boyce, Criminal Law 1098–1102 (3d ed. 1982); Day, Shooting the Fleeing Felon: State of the Law, 14 Crim. L. Bull. 285, 286–287 (1978); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 807–816 (1924). But see *Storey* v. *State*, 71 Ala. 329 (1882); *State* v. *Bryant*, 65 N. C. 327, 328 (1871); *Caldwell* v. *State*, 41 Tex. 86 (1874).

The State and city argue that because this was the prevailing rule at the time of the adoption of the Fourth Amendment and for some time thereafter, and is still a frequent rule, use of deadly force against a fleeing felon must be "reasonable." It is true that this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity. See, *e. g.*, *United States* v. *Watson*, 423 U. S. 411, 418–419 (1976); *Gerstein* v. *Pugh*, 420 U. S. 103, 111, 114 (1975); *Carroll* v. *United States*, 267 U. S. 132, 149–153 (1925). On the other hand, it "has not

simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton* v. *New York*, 445 U. S. 573, 591, n. 33 (1980). Because of sweeping change in the legal and technological context, reliance on the common law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.

B

It has been pointed out many times that the common law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death.[10] "Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected." Model Penal Code § 3.07, Comment 3, at 56 (Tentative Draft No. 8, 1958) (hereinafter Model Penal Code Comment). Courts have also justified the common law rule by emphasizing the relative dangerousness of felons. See, *e. g.*, *Schumann* v. *McGinn*, 240 N. W. 2d 525, 533 (Minn. 1976); *Holloway* v. *Moser*, 193 N. C. 185, 187, 136 S. E. 375, 376 (1927).

Neither of these justifications makes sense today. Almost all crimes formerly punishable by death no longer are or can be. See, *e. g.*, *Enmund* v. *Florida*, 458 U. S. 762 (1978); *Coker* v. *Georgia*, 433 U. S. 584 (1977). And while in earlier

[10] The roots of the concept of a "felony" lie not in capital punishment but in forfeiture. 2 F. Pollock & F. Maitland, The History of English Law 465 (2d ed. 1909) (hereinafter Pollock & Maitland). Not all felonies were always punishable by death. See *id.*, at 466–467, n. 3. Nonetheless, the link was profound. Blackstone was able to write that "[t]he idea of felon is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony the law implies that is shall be punished with death, *viz.* by hanging, as well as with forfeiture . . . ." 4 W. Blackstone *98. See also R. Perkins & R. Boyce, Criminal Law 14–15 (3d ed. 1982); 2 Pollock and Maitland 511.

times "the gulf between the felonies and the minor offences was broad and deep," 2 Pollock & Maitland 467 n. 3; *Carroll* v. *United States*, 367 U. S. 132, 158 (1925), today the distinction is minor and often arbitrary. Many crimes considered to be misdemeanors, or nonexistent, at common law are now felonies. Wilgus 572–573. These changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have also made the assumption that a "felon" is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.[11]

There is an additional reason that the common law rule cannot be directly translated to the present day. The common law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. L. Kennett & J. Anderson, The Gun in America 91 (1975). Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common law rule has an altogether different meaning—and harsher consequences—now than in past centuries. See Wechsler & Michael, A Rationale for the Law of Homicide: I, 37 Colum. L. Rev. 701, 741 (1937).[12]

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[11] White collar crime, for example, poses a less significant physical threat than, say, drunken driving. See *Welsh* v. *Wisconsin*, —— U. S. —— (1984); *id.*, at —— (BLACKMUN, J., concurring). See Model Penal Code, comment 57.

[12] It has been argued that sophisticated techniques of apprehension and increased communication between the police in different jurisdictions have made it more likely that an escapee will be caught than was once the case, and that this change has reduced the "reasonableness" of the use of deadly force to prevent escape. *E. g.*, Sherman, Execution Without Trial: Police

One other aspect of the common law rule bears emphasis. It forbids the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe. See *Holloway* v. *Moser*, 193 N. C. 185, 187, 136 S. E. 2d 375, 376 (1927); *State* v. *Smith*, 103 N. W. 944, 945 (Iowa 1905).

In short, though the common law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.

B

In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions. See, *e. g.*, *United States* v. *Watson*, *supra*, at 421–422. The rules in the States are varied. Some 19 States have codified the common law rule,[12] though in two of these the courts have significantly limited the statute.[14] Four States, though without a rele-

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Homicide and the Constitution 33 Vand. L. Rev. 71, 76 (1980). We are unaware of any data that would permit sensible evaluation of this claim. Current arrest rates are sufficiently low, however, that we have some doubt whether in past centuries the failure to arrest at the scene meant that the police had missed their only chance in a way that is not presently the case. In 1983, 21% of the offenses in the FBI crime index were cleared by arrest. Federal Bureau of Investigation, Uniform Crime Index 159 (1983). The clearance rate for burglary was 15%. *Ibid.*

[12] Ala. Code § 13A–3–27; Ark. State. Ann. § 41–510; Cal. Penal Code Ann. § 196 (West); Conn. Gen Stat. § 53(a)–22; Fla. Stat. § 776.05; Idaho Code § 19–610; Ind. Code § 35–41–3–3; Kan. Stat. Ann. § 21–3215; Miss. Code Ann. § 97–3–15(d); Mo. Rev. Stat. § 563.046; Nev. Rev. Stat. § 200.140; N. M. Stat. Ann. § 30–2–6; Okla. Stat., Tit. 21, § 732; Ore. Rev. Stat. § 161.239; R. I. Gen. Laws § 12–7–9; SD Code §§ 22–26–32, –33; Tenn. Code Ann. § 40–7–108; Wash. Rev. Code § 9A.16.040(3). Wisonsin's statute is ambiguous, but should probably be added to this list. Wis. Stat. § 939.45(4) (officer may use force necessary for "a reasonable accomplishment of a lawful arrest").

[14] In California, the police may use deadly force to arrest only if the crime for which the arrest is sought was "a forcible and atrocious one which

vant statute, apparently retain the common law rule.[15] Three States have adopted the Model Penal Code's provision verbatim.[16] Sixteen others allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested.[17] Louisiana and Ver-

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threatens death or serious bodily harm," or there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed. *Kortum* v. *Alkire*, 69 Cal. App. 3d 325, 333, 138 Cal. Rptr. 26, 30–31 (1977). See also *People* v. *Ceballos*, 12 Cal.3d 470, 476–484, 526 P. 2d 241, 245–248 (1974); *Long Beach Police Officers Assn.* v. *Long Beach*, 61 Cal. App. 3d 364, 378–374, 132 Cal. Rptr. 348, 352–354 (1976). In Indiana, deadly force may be used only to prevent injury, the imminent danger of injury or force, or the threat of force. It is not permitted simply to prevent escape. *Rose* v. *State*, 431 N. E. 2d 521 (Ind. App. 1982).

[15] These are Michigan, Ohio, Virginia, and West Virginia. *Werner* v. *Hartfelder*, 113 Mich. App. 747, 318 N. W. 2d 825 (1982); *State* v. *Foster*, 60 Ohio Misc. 46, 396 N. E. 2d 246, 255–258 (Com. Pl. 1979) (citing cases); *Berry* v. *Hamman*, 203 Va. 596, 125 S. E. 2d 851 (1962); *Thompson* v. *Norfolk & W. R.*, 182 S. E. 880, 883–884 (W. Va. 1935).

[16] Haw. Rev. Stat. § 703–307; Neb. Rev. Stat. § 28–1412; N. J. Stat. Ann. § 2C:3–7. See n. 7, *supra*.

[17] Alaska Stat. Ann. § 11.81.370(a); Ariz. Rev. Stat. Ann. § 13–410; Colo. Rev. Stat. § 18–1–707; Del. Code Ann., Tit. 11, § 467 (felony involving physical force *and* a substantial risk that the suspect will cause death or serious bodily injury *or* will never be recaptured); Ill. Rev. Stat., ch. 38, § 7–5; Iowa Code § 804.8 (suspect has used or threatened deadly force in commission of a felony, or would use deadly force if not caught); Ky. Rev. Stat. § 503.090 (suspect committed felony involving use or threat of physical force likely to cause death or serious injury, *and* is likely to endanger life unless apprehended without delay); Me. Rev. Stat. Ann., Tit. 17–A, § 107 (commentary notes that deadly force may be used only "where the person arrested poses a threat to human life"); Minn. Stat. § 609.066; N. H. Rev. Stat. Ann. § 627:5(II) (Supp.); N. Y. Penal Law § 35.30; N. C. Gen. Stat. § 15A–401; N. D. Cent. Code § 12.1–05–07.2.d; Pa. Stat. Ann., Tit. 18, § 508 (Purdon); Tex. Penal Code Ann. § 9.51(c); Utah Code Ann. § 76–2–404. Massachusetts probably belongs in this category. Though it once rejected distinctions between felonies, *Uraneck* v. *Lima*, 359 Mass. 749, 750 (1971), it has since adopted the Model Penal Code limitations with re-

mont, though without statutes or case law on point, do forbid the use of deadly force to prevent any but violent felonies.[18] The remaining States either have no relevant statute or case-law, or have positions that are unclear.[19]

It is not accurate to say that there is a constant or overwhelming trend away from the common law rule. In recent years, some States have reviewed their laws and expressly rejected abandonment of the common law rule.[20] Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.

This trend is more evident and impressive when viewed in light of the policies adopted by the police departments themselves. Overwhelmingly, these are more restrictive than the common law rule. C. Milton et al., Police Use of Deadly Force 45–46 (1977). The Federal Bureau of Investigation and the New York City Police Department, for example, both forbid the use of firearms except when necessary to pre-

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gard to private citizens, *Commonwealth* v. *Klein*, 372 Mass. 823, 363 N. E. 2d 1313 (1977), and seems to have extended that decision to police officers, *Julian* v. *Randazzo*, 380 Mass. 391, 403 N. E. 2d 931 (1980).

[18] See La. Rev. Stat. Ann. § 14:20(2) (West); Vt. Stat. Ann., Tit. 53, § 2305. A Federal District Court has interpreted the Louisiana statute to limit the use of deadly force against fleeing suspects to situations where "life itself is endangered or great bodily harm is threatened." *Sauls* v. *Hutto*, 304 F. Supp. 124, 132 (ED La. 1969).

[19] These are Georgia, Maryland, Montana, South Carolina, and Wyoming. A Maryland appellate court has indicated that deadly force may not be used against a felon who "was in the process of fleeing and, at the time, presented no immediate danger to . . . anyone . . . ." *Giant Food, Inc.* v. *Scherry*, 445 A. 2d 483, 486, 489 (Md. App. 1982).

[20] In adopting its current statute in 1979, for example, Alabama expressly chose the common law rule over more restrictive provisions. Ala. Code pp. 67–68 (1982). Missouri likewise considered but rejected a proposal akin to the Model Penal Code rule. See *Mattis* v. *Schnarr*, 547 F. 2d 1007, 1022 (CA6 1976) (Gibson, C. J., dissenting), vacated as moot, 431 U. S. 171 (1977). Idaho, whose current statute codifies the common law rule, adopted the Model Penal Code in 1971, but abandoned it in 1972.

vent death or grievous bodily harm. *Id.*, at 40–41; App. 83. For accreditation by the Commission on Accreditation for Law Enforcement Agencies, a department must restrict the use of deadly force to situations where "the officer reasonably believes that the action is in defense of human life . . . or in defense of any person in immediate danger of serious physical injury." Commission on Accreditation for Law Enforcement Agencies, Inc., Standards for Law Enforcement Agencies 1–2 (1983). A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm. Boston Police Department, Planning & Research Division, The Use of Deadly Force by Boston Police Personnel (1974), cited in *Mattis* v. *Schnarr*, 547 F. 2d 1007, 1016, n. 9 (CA8 1976), vacated as moot, 431 U. S. 171 (1977). Overall, only 7.5% of departmental and municipal polices explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police 161 (1982) (table). See also Record 1108–1368 (written policies of 44 departments). See generally Brief for The Police Foundation, et al., as *Amici Curiae*. In light of the rules adopted by those who must actually administer them, the older and fading common law view is a dubious indicia of the constitutionality of the Tennessee statute now before us.

C

Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. Amici note that "[a]fter extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect cit-

izens or law enforcement officers, do not deter crime or alleviate problems cause by crime, and do not improve the crime-fighting ability of law enforcement agencies." Brief for Police Foundation et al. as *Amici Curiae* 11. The submission is that the obvious state interests in apprehension are not sufficiently served to warrant the use of lethal weapons against all fleeing felons.

Nor do we agree with petitioners that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. See Brief for Petitioners 11; Brief for Appellant 25. We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 20, 27 (1968). Moreover, the highly technical felony/misdemeanor distinction is equally, if not more, difficult to apply in the field. An officer is in no position to know, for example, the precise value of property stolen, or to know whether the crime was a first or second offense. Finally, as noted above, this claim must be viewed with suspicion in light of the similar self-imposed limitations of so many police departments.

IV

The District Court concluded that Hymon was justified in shooting Garner because state law allows, and the Federal Constitution does not forbid, the use of deadly force to prevent the escape of a fleeing felony suspect if no alternative means of apprehension is available. See App. to Pet. for Cert. A9–A11, A38. This conlusion made a determination of Garner's apparent dangerousness unnecessary. The court did find, however, that Garner appeared to be unarmed, though Hymon could not be certain that was the case. *Id.*, at A4, A23. Restated in Fourth Amendment terms, this means Hymon had no articulable basis to think Garner was armed.

In reversing, the Court of Appeals accepted the District Court's factual conclusions and held that "the facts, as found, did not justify the use of deadly force." 710 F. 2d, at 246. We agree. While we recognize the seriousness of the crime of burglary,[21] Officer Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. The District Court stated in passing that "[t]he facts of this case did not indicate to Officer Hymon that Garner was 'non-dangerous.'" App. to Pet. for Cert. A34. This conclusion is not explained, and seems to be based solely on the fact that Garner had broken into a house at night. However, the fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have a reasonable belief that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

V

We wish to make clear what our holding means in the context of this case. The complaint has been dismissed as to all

[21] The Federal Bureau of Investigation classifies burglary as a "property" rather than a "violent" crime. See Federal Bureau of Investigation, Uniform Crime Reports 1 (1983). However, burglary has also been viewed as an inherently life-threatening crime. See, *e. g.*, *Commonwealth* v. *Klein*, 363 N. E. 2d 1313, 1319 and n. 9 (Mass. 1977); W. Prosser, Law of Torts 134 (4th ed. 1964). Some state statutes that limit the use of deadly force to certain violent felonies include burglary in the list. See Ill. Rev. Stat. Ann., ch. 38, § 7–5. As this case demonstrates, however, the fact that someone has broken into a dwelling at night does not automatically mean he is physically dangerous. See also *Solem* v. *Helm*, —— U. S. ——, —— – —— and nn. 22–23 (1983). In fact, the available statistics indicate that burglaries only rarely involve physical violence. See T. Reppetto, Residential Crime 17, 105 (1974); Conklin & Bittner, Burglary in a Suburb, 11 Criminology 208, 214 (1974). The instances where violence has taken place and an officer pursuing the suspect is unaware of it will be even fewer.

the individual defendants. The State is a party only by virtue of 28 U. S. C. § 2403(c) and is not subject to liability. The possible liability of the remaining defendants—the police department and the city of Memphis—hinges on *Monell* v. *Department of Social Services*, *supra*, and is left for remand. We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. As for the policy of the police department, the absence of any discussion of this issue by the courts below, and the uncertain state of the record, preclude any consideration of its validity.

The judgment of the Court of Appeals is affirmed and the case remanded for further procedings consistent with this opinion.

So ordered.

December 18, 1984

83-1035 Tennessee v. Garner

Dear Byron:

Please join me.

Sincerely,

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 18, 1984

Re: 83-1035 - Tennessee v. Garner
83-1070 - Memphis Police Dept. v. Garner

Dear Byron:

Please join me.

Respectfully,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 19, 1984

Re: 83-1035 Tennessee v. Cleamtree Garner, et al.
83-1070 Memphis Police Department, et al. v. Cleamtree Garner, et al.

Dear Byron,

As you recall, at Conference I voted to affirm. You have written persuasively in your majority draft, but I intend to try to put forward a different view in a dissent.

Sincerely,

Sandra

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 20, 1984

Re: 83-1035 - Tennessee v. Garner
83-1070 - Memphis Police Department v. Garner

Dear Byron:

I agree with the result but will defer joining on the opinion until like the old lady in Peoria, I read what I am writing out in a concurring opinion.

Regards,

Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: 2/12/85

Recirculated: _____

1st DRAFT

noted
L.F.P.
2/16

I'm Joined
B.R.W.

SUPREME COURT OF THE UNITED STATES

Nos. 83–1035 AND 83–1070

TENNESSEE, APPELLANT
83–1035 v.
CLEAMTEE GARNER, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMPHIS POLICE DEPARTMENT, ET AL., PETITIONERS
83–1070 v.
CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1985]

JUSTICE O'CONNOR, dissenting.

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force as a last resort to apprehend a criminal suspect who refuses to halt when fleeing the scene of a nighttime burglary. This conclusion rests on the majority's balancing of the interests of the suspect and the public interest in effective law enforcement. *Ante*, at 6. Notwithstanding the venerable common law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon, and continued acceptance of this rule by nearly half the States, *ante*, at 13–15, the majority concludes that Tennessee's statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortunate, our constitutional holdings must be sensitive to both

Justice O'Connor's statistics about burglary are interesting (p.5). As you know, I am somewhat sympathetic to her view. Even if [redacted] deadly force cannot be used to apprehend nonviolent felons, one might view all

Tenn.

the history of the Fourth Amendment and to the general implications of the Court's reasoning. By disregarding the serious and dangerous nature of residential burglaries and the longstanding practice of many States, the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape. I do not believe that the Fourth Amendment supports such a right, and I accordingly dissent.

I

The facts below warrant brief review because they highlight the difficult, split-second decisions police officers must make in these circumstances. Memphis Police Officers Elton Hymon and Leslie Wright responded to a late-night call that a burglary was in progress at a private residence. When the officers arrived at the scene, the caller said that "they" were breaking into the house next door. App. 207. The officers found the residence had been forcibly entered through a window and saw lights on inside the house. Officer Hymon testified that when he saw the broken window he realized "that something was wrong inside," *id.*, at 656, but that he could not determine whether anyone— either a burglar or a member of the household— was within the residence. *Id.*, at 209. As Officer Hymon walked behind the house, he heard a door slam. He saw Edward Eugene Garner run away from the house through the dark and cluttered backyard. Garner crouched next to a six-foot-high fence. Officer Hymon thought Garner was an adult and was unsure whether Garner was armed because Hymon "had no idea what was in the hand [that he could not see] or what he might have had on his person." *Id.*, at 658–659. In fact, Garner was 15-years old and unarmed. Hymon also did not know whether accomplices remained inside the house. *Id.*, at 657. The officer identified himself as a police officer and ordered

Garner to halt. Garner paused briefly and then sprang to the top of the fence. Believing that Garner would escape if he climbed over the fence, Hymon fired his revolver and mortally wounded the suspected burglar.

Respondent, the deceased's father, filed a § 1983 action in federal court against Hymon, the city of Memphis, and other defendants, for asserted violations of Garner's constitutional rights. The District Court for the Western District of Tennessee held that Officer Hymon's actions were justified by a Tennessee statute that authorizes a police officer to "use all the necessary means to effect the arrest," if "after notice of the intention to arrest the defendant, he either flee or forcibly resist." Tenn. Code Ann. § 40-808. As construed by the Tennessee courts, this statute allows the use of deadly force only if a police officer has probable cause to believe that a person has committed a felony, the officer warns the person that he intends to arrest him, and the officer reasonably believes that no means less than such force will prevent the escape. See, *e. g.*, *Johnson* v. *State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938). The District Court held that the Tennessee statute is constitutional and that Hymon's actions as authorized by that statute did not violate Garner's constitutional rights. The Court of Appeals for the Sixth Circuit reversed on the grounds that the Tennessee statute "authorizing the killing of an unarmed, nonviolent fleeing felon by police in order to prevent escape" violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. 710 F. 2d 240, 244 (1983).

The Court affirms on the ground that application of the Tennessee statute to authorize Officer Hymon's use of deadly force constituted an unreasonable seizure in violation of the Fourth Amendment. The precise issue before the Court deserves emphasis, because both the decision below and the majority obscure what must be decided in this case. The issue is not the constitutional validity of the Tennessee statute on its face or as applied to some hypothetical set of facts.

Instead, the issue is whether the use of deadly force by Officer Hymon under the circumstances of this case violated Garner's constitutional rights. Thus, the majority's assertion that a police officer who has probable cause to seize a suspect "may not always do so by killing him," *ante*, at 7, is unexceptionable but also of little relevance to the question presented here. The same is true of the rhetorically stirring statement that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id.*, at 9. The question we must address is whether the Constitution allows the use of such force to apprehend a suspect who resists arrest by attempting to flee the scene of a nighttime burglary of a residence.

II

For purposes of Fourth Amendment analysis, I agree with the Court that Officer Hymon "seized" Garner by shooting him. Whether that seizure was reasonable and therefore permitted by the Fourth Amendment requires a careful balancing of the important public interest in crime prevention and detection and the nature and quality of the intrusion upon legitimate interests of the individual. *United States* v. *Place*, —— U. S. ——, —— (1983). In striking this balance here, it is crucial to acknowledge that police use of deadly force to apprehend a fleeing criminal suspect falls within the "rubric of police conduct necessarily [involving] swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances. Moreover, I am far more reluctant than is the Court to conclude that the Fourth Amendment proscribes a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures. Although the Court has recognized that the requirements of the

Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible. See, *e. g.*, *United States* v. *Watson*, 423 U. S. 411, 416–421 (1976); *Carroll* v. *United States*, 267 U. S. 132, 149–153 (1925). Cf. *United States* v. *Villamonte-Marquez*, —— U. S. ——, —— (1983) (slip op. 6–7, 13) (noting "impressive historical pedigree" of statute challenged under Fourth Amendment).

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries represent not only the illegal entry into a person's home, but also "pose[] real risk of serious harm to others." *Solem* v. *Helm*, —— U. S. ——, —— (1983) (BURGER, C. J., dissenting). According to recent Department of Justice statistics, "[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." Bureau of Justice Statistics Bulletin, Household Burglary, p. 1 (1985). During the period 1973–1982, 2.8 million such violent crimes were committed in the course of burglaries. *Ibid.* Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority's confident assertions that "the fact that someone has broken into a dwelling at night does not automatically mean he is physically dangerous" or that "burglaries only rarely involve physical violence." *Ante*, at 18, n. 21. Moreover, even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the "harsh potentialities for violence" inherent in the forced entry into a home preclude characterization of the crime as "innocuous, inconsequential, minor, or 'nonviolent.'" *Solem* v. *Helm*, —— U. S., at —— (BUR-

GER, C. J., dissenting). See also Restatement of Torts § 131 Comment g (1934) (burglary is among felonies that normally cause or threaten death or serious bodily harm); R. Perkins & R. Boyce, Criminal Law 1110 (3d ed. 1982) (burglary is dangerous felony that creates unreasonable risk of great personal harm).

Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance. Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending the suspect. With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene. See Report of President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 97 (1967). Indeed, the Captain of the Memphis Police Department testified that in his city, if apprehension is not immediate, it is likely that the suspect will not be caught. App. 334. Statutes such as Tennessee's reflect a legislative determination that the use of deadly force in prescribed circumstances will serve generally to protect the public. They assist the police in apprehending suspected perpetrators of serious crimes and provide notice that a lawful police order to stop and submit to arrest may not be ignored with impunity. See, *e. g.*, *Wiley* v. *Memphis Police Department*, 548 F. 2d 1247, 1252–1253 (CA6), cert. denied, 434 U. S. 822 (1977); *Jones* v. *Marshall*, 528 F. 2d 132, 142 (CA2 1975).

The majority unconvincingly dismisses the general deterrence effects by stating that "the presently available evidence does not support [the] thesis" that the threat of force discourages escape and that "there is a substantial basis for doubting that the use of such force is an essential attribute to the arrest power in all felony cases." *Ante*, at 8–9. There is no question that the effectiveness of police use of deadly force

is arguable and that many States or individual police departments have decided not to authorize it in circumstances similar to those presented here. But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality. Cf. *Spaziano* v. *Florida*, —— U. S. ——, —— (1984) ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws") (slip op. 16). Moreover, the fact that police conduct pursuant to a state statute is challenged on constitutional grounds does not impose a burden on the State to produce social science statistics or to dispel any possible doubts about the necessity of the conduct. This observation, I believe, has particular force where the challenged practice both predates enactment of the Bill of Rights and continues to be accepted by a substantial number of the States.

Against the strong public interests justifying the conduct at issue here must be weighed the individual interests implicated in the use of deadly force by police officers. The majority declares that "[t]he suspect's fundamental interest in his own life need not be elaborated upon." *Ante*, at 7. This blithe assertion hardly provides an adequate substitute for the majority's failure to acknowledge the distinctive manner in which the suspect's interest in his life is even exposed to risk. For purposes of this case, we must recall that the police officer, in the course of investigating a nighttime burglary, had reasonable cause to arrest the suspect and ordered him to halt. The officer's use of force resulted because the suspected burglar refused to heed this command and the officer reasonably believed that there was no means short of firing his weapon to apprehend the suspect. Without questioning the importance of a person's interest in his life, I do not think this interest encompasses a right to flee unimpeded from the scene of a burglary. Cf. *Payton* v. *New York*, 445 U. S. 573, 617, n. 14 (1980) (WHITE, J., dissenting) ("[T]he

policemen's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel"). The legitimate interests of the suspect in these circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt.

A proper balancing of the interests involved suggests that use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime burglary is not unreasonable within the meaning of the Fourth Amendment. Admittedly, the events giving rise to this case are in retrospect deeply regrettable. No one can view the death of an unarmed and apparently nonviolent 15-year old without sorrow, much less disapproval. Nonetheless, the reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action. The officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime.

Because I reject the Fourth Amendment reasoning of the majority and the Court of Appeals, I briefly note that no other constitutional provision supports the decision below. In addition to his Fourth Amendment claim, respondent also alleged violations of due process, the Sixth Amendment right to trial by jury, and the Eighth Amendment proscription of

cruel and unusual punishment. These arguments were rejected by the District Court and, except for the due process claim, not addressed by the Court of Appeals. With respect to due process, the Court of Appeals reasoned that statutes affecting the fundamental interest in life must be "narrowly drawn to express only the legitimate state interests at stake." 710 F. 2d, at 244. The Court of Appeals concluded that a statute allowing police use of deadly force is narrowly drawn and therefore constitutional only if the use of such force is limited to situations in which the suspect poses an immediate threat to others. 710 F. 2d, at 246–247. Whatever the validity of Tennessee's statute in other contexts, I cannot agree that its application in this case resulted in a deprivation "without due process of law." *Cf. Baker* v. *McCollan*, 443 U. S. 137, 144–145 (1979). Nor do I believe that a criminal suspect who is shot while trying to avoid apprehension has a cognizable claim of a deprivation of his Sixth Amendment right to trial by jury. See *Cunningham* v. *Ellington*, 323 F. Supp. 1072, 1075–1076 (W. D. Tenn. 1971) (three-judge court). Finally, because there is no indication that the use of deadly force was intended to punish rather than to capture the suspect, there is no valid claim under the Eighth Amendment. See *Bell* v. *Wolfish*, 441 U. S. 520, 538–539 (1978). Accordingly, I conclude that the District Court properly entered judgment against respondent, and I would reverse the decision of the Court of Appeals.

III

Even if I agreed that the Fourth Amendment was violated under the circumstances of this case, I would be unable to join the majority opinion. The reasoning of the majority is opaque with respect to the nature of today's holding and its more general implications. Relying on the Fourth Amendment, the majority asserts that it is constitutionally unreasonable to *use* deadly force against fleeing criminal suspects who do not appear to pose a threat of serious physical harm

to others. *Ante*, at 9. Although it is unclear from the language of the opinion, I assume that the majority intends the word "use" to include only those circumstances in which the suspect is actually apprehended. Absent apprehension of the suspect, there is no "seizure" for Fourth Amendment purposes. Perhaps I impute too much to the majority opinion, but I doubt that the Court intends to allow criminal suspects who successfully escape to return later with § 1983 claims against officers who used, albeit unsuccessfully, deadly force in their futile attempt to capture the fleeing suspect. Moreover, by declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk. Cf. *Los Angeles* v. *Lyons*, —— U. S. —— (1983).

The contours of the majority's holding are not even discernible in its application to the narrow question presented by this case. The majority first observes that deadly force "may not be used unless necessary to prevent the escape and the officer *reasonably* believes that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Ante*, at 9 (emphasis added). Such a belief, the majority further suggests, is reasonable and therefore justified if the "suspect is armed with a lethal weapon or if there is *probable cause* to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Ibid.* (emphasis added). The majority indicates, however, that a police officer need not have actual knowledge that the suspect is armed; instead, an *articulable basis* to think the suspect is armed apparently will justify the use of deadly force. Even assuming that a police officer confronted with a fleeing suspect who is possibly dangerous and refuses to heed a valid order to halt can "make subtle discriminations that perplex even judges in their chambers," *Payton* v. *New York*, 445 U. S., at 619 (WHITE, J., dissenting), the majority opinion leaves unclear the very require-

ments the Court today imposes on police conduct. Finally, even if it were appropriate in this case to limit the use of deadly force to the ambiguous class of suspects who "pose a significant threat of death or serious physical injury" to others, see *Wiley* v. *Memphis Police Department*, 548 F. 2d, at 1253, I believe that class should include nighttime burglars who resist arrest by attempting to flee the scene of the crime.

The ambiguities in the majority opinion simply invite second-quessing of difficult police decisions that must be made quickly in the most trying of circumstances. Cf. *Payton* v. *New York*, 445 U. S., at 619 (WHITE, J., dissenting). The majority states that the use of deadly force is permissible if the suspect is armed with a lethal weapon. *Ante*, at 9. It is unclear, however, whether a police officer's use of deadly force can be justified by the after-the-fact discovery that the suspect was armed. The majority's reasoning may imply that the result in this case would be no different if Garner in fact had a weapon concealed on his person. The uncertainty created by the majority opinion is compounded because, assuming that an officer has probable cause to arrest for burglary and the suspect refuses to obey an order to halt, the Court declines to outline the additional factors necessary to provide an "articulable basis" for believing that the suspect is armed or otherwise dangerous. Police are given no guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force. We can accordingly expect an escalating volume of litigation as the lower courts struggle to determine if a police officer's split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime. Thus, the majority opinion portends a burgeoning area of Fourth Amendment doctrine concerning the circumstances in which police officers can reasonably employ deadly force.

IV

The majority opinion sweeps broadly to adopt an ambiguous standard for the constitutionality of the use of deadly force to apprehend fleeing felons. Thus, the majority "lightly brushe[s] aside," *Payton* v. *New York*, 445 U. S., at 600, a longstanding police practice that predates the Fourth Amendment and continues to receive the approval of nearly half of the state legislatures. I cannot accept the majority's creation of a constitutional right to flight for burglary suspects seeking to avoid capture at the scene of the crime. Whatever the constitutional limits on police use of deadly force in order to apprehend a fleeing felon, I do not believe they are exceeded in a case in which a police officer has probable cause to arrest a suspect at the scene of a residential burglary, orders the suspect to halt, and then fires his weapon as a last resort to prevent the suspect's escape into the night. I respectfully dissent.

No action required.

02/15/85

TO: Justice Powell
FROM: Lee
RE: Nos. 83-1035 and 83-1070, Tennessee v. Garner and Memphis Police Dept. v. Garner, Justice O'Connor's dissent

Justice O'Connor's statistics about burglary are interesting. See page 5 of the dissent. As you may remember, I am somewhat sympathetic to her view. Even if deadly force cannot be used to apprehend "non-violent" felons, one might view all nighttime burglars, because of the type of crime that they commit, as "violent felons."

Nevertheless, I think that SO'C is unfair to Justice White's opinion, which you already have joined. Justice White did consider the validity of the statute "as applied." I also believe that BRW stated the holding in a clear, concise manner. There are, of course, some questions unresolved by the BRW opinion, but that is true any time the Court lays down a new rule of law.

There is certainly no need for you to reconsider your join of BRW's opinion. I agree

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 15, 1985

Re: Nos. 83-1035 Tennessee v. Garner
83-1070 Memphis Police Department v. Garner

Dear Sandra,

Please join me in your dissent.

Sincerely,

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 8, 1985

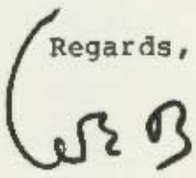
Re: No. 83-1035 - Tennessee v. Garner
83-1070 - Memphis Police Department v. Garner

MEMORANDUM TO THE CONFERENCE:

Few cases have given me more trouble than this one. I suspect it has given all of us trouble. At Conference, I was a "reluctant affirm," unduly, as I see it on reflection by the fact that the felon was only 15. But, if he turned out to be a 'smallish' 25 with a long record of crime, or if it turned out that he had left a dead woman and a wounded husband in the burgled house, I doubt there would be much sentiment to hold the Tennessee statute unconstitutional.

This is a proverbial, classic "hard case" and I now conclude it produces the "bad law" attributed to that class of cases. My note is changed to reverse and I may write something out while joining Sandra's dissent.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 11, 1985

Re: No. 83-1035-Tennessee v. Garner and
No. 83-1070-Memphis Police Dept. v. Garner

Dear Byron:

Please join me.

Sincerely,

T.M.
T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 22, 1985

Re: (83-1035 - Tennessee v. Cleamtee Garner, Etc., et al.
(
(83-1070 - Memphis Police Department, et al v. Cleamtee Garner, Etc., et al.

Dear Byron:

I have decided to consign my separate opinion in this case to the Deathless Prose file.

I will simply join Sandra.

Regards,

WEB

Justice White

Copies to the Conference

83-1035 Tennesse v. Garner (Lee)

BRW for the Court 11/9/84
1st draft 12/17/84
2nd draft 2/15/85
3rd draft 3/5/85
4th draft 3/18/85
Joined by LFP 12/18/84
JPS 12/18/84
HAB 12/20/84
WJB 3/6/85
TM 3/11/85

SOC dissenting
1st draft 2/12/85
2nd draft 2/21/85
Joined by WHR 2/15/85
3rd draft 3/6/85 joined by WHR
4th draft 3/11/85
Joined by CJ 3/22/85

CJ may write something while joining SOC's dissent 3/8/85
SOC will dissent 12/19/84