THE SHOT IN THE BACK CASE: *TENNESSEE v. GARNER*

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For centuries in this country, under the authority of the laws of the various states, it was accepted that a police officer had both the right and the duty to use all necessary—even deadly—force to prevent the escape from custody of anyone the officer had reason to believe had committed a felony. The word "felony," of course, encompasses many serious crimes, including murder. It also includes a wide variety of property crimes. In *Tennessee v. Garner*,[1] the Supreme Court addressed the following question: Is it consistent with the United States Constitution for a police officer to prevent by gunfire the escape of a person who the officer had reason to believe had committed a nonviolent property crime, but was neither armed nor an immediate danger to any person?[2]

My connection with, and deep concern about, this question began nearly a quarter of a century ago. In the early 1960s, at a time of great racial tension, I was Police Commissioner in Detroit. In two separate instances, application of the "shoot to kill" rule of law resulted in citizen fatalities. It also seriously interfered with the strenuous efforts being made to still strife between the Detroit Police Department and the citizens it served, particularly black citizens. In each instance, as Police Commissioner, I felt governed by the long-standing common law of the State of Michigan and by long-standing Detroit police regulations. I upheld the action taken by the two police officers, but I was made vividly aware of the impracticality and undesirability from society's viewpoint of the deadly force rule.

In the first instance, a Detroit police scout car was passed by an automobile whose license number was on the daily list of stolen vehicles. When the car failed to halt at siren and flasher signal, the officers pursued the car until it crashed at an overpass. The driver leaped from the car and ran for the nearest alley. One of the two police officers fired one shot at a distance of well over one hundred feet. It struck the driver of the car in the head, killing him instantly. The deceased was a mentally retarded fourteen year old boy who had escaped from the Wayne County training school. His death was greeted with strong condemnation in black newspapers and from black pulpits. The two officers had done precisely what their training called on them to do, and as Commissioner, I felt required to uphold their action. At the same time, I was

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1. 105 S. Ct. 1694 (1985).
2. *Id.*

certain that it would have been infinitely better if that youngster had managed to escape.

The next instance was similar in all respects except that the young suspected car thief was a few years older and white. Again, the stolen car was listed on the clipboard of a Detroit police scout car; again there was a chase; again the driver left the car and ran for an alley; again there was a police revolver shot and again it struck the fleeing young man in a vital spot; again there was a strong public reaction of hostility from the immediate community where the deceased had been both well known and well liked.

In the latter case, I had known for years the father of the young officer who fired the fatal shot. Several days after the fatality, the young officer's father called me. He was greatly concerned about his son. The young officer had not gone back to work since the shooting episode. The father wanted me to call him in and talk with him, and I agreed to do so.

In my office the young officer told me the story of checking the stolen car listing, making the identification, and initiating the chase. He described how he had leaped out of the scout car, drawn his revolver, and pursued the suspected car thief on foot. The young man had run between two houses and was close to an alley which might have allowed his escape. The officer leveled his revolver and fired, saw that the shot had taken effect, and ran to where the young man was lying. Thus far, he had told the story without great sign of emotion. The officer contiuned, "I ran up to him and he was lying on his face. He heard me and turned his head up to me and said, 'You shot my ass off,' and fell back and died." The young officer had tears in his eyes by the time he got these last words out. To the best of my knowledge, this young police officer never returned to his job on the Detroit police force, despite my best efforts to convince him that he should not blame himself for following what he had been taught was the law.

Like the two instances cited above, *Garner* was an instance of property theft not involving deadly danger to either the public or the police. The case was heard by a panel of the United States Court of Appeals for the Sixth Circuit.[3] The facts in the case were recited as follows in the unanimous opinion of the court authored by Judge Merritt:

> On the night of October 3, 1974, a fifteen year old, unarmed boy broke a window and entered an unoccupied residence in suburban Memphis to steal money and property. Two police officers, called to the scene by a neighbor, intercepted the youth as he ran from the back of the house to a six foot cyclone fence in the back yard. After shining a flashlight on the boy as he crouched by the fence, the officer identified himself as a policeman and yelled "Halt." He could see that the fleeing felon was a youth and was apparently unarmed.

3. Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983), *aff'd sub nom.* Tennessee v. Garner, 105 S. Ct. 1694 (1985).

> As the boy jumped to get over the fence, the officer fired at the upper part of the body, using a 38-calibre pistol loaded with hollow point bullets, as he was trained to do by his superiors at the Memphis Police Department. He shot because he believed the boy would elude capture in the dark once he was over the fence. The officer was taught that it was proper under Tennessee law to kill a fleeing felon rather than run the risk of allowing him to escape. The youth died of the gunshot wound. On his person was ten dollars worth of money and jewelry he had taken from the house.[4]

The Tennessee statute at issue read: "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."[5]

The sixth circuit panel unanimously concluded that the killing of this unarmed boy in flight violated the constitutional prohibition against "unreasonable seizures." Additionally, the court held that the shooting violated the due process clause of the fourteenth amendment which prohibits any state from depriving "any person of life, liberty or property without due process of law."

The City of Memphis appealed the sixth circuit's unanimous decision to the Supreme Court of the United States. The Police Foundation, together with nine national and international Associations of Police and Criminal Justice Professionals, plus the Chiefs of Police Associations of two states and thirty-one law enforcement chief executives, joined as amici curiae in support of Cleamtee Garner, the father of the deceased minor.[6] Following is a brief summary of their argument to the Supreme Court:

> After extensive research and consideration, amici have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies. Thus, arguments based on these factors would not justify use of deadly force against fleeing non-violent felony suspects. Moreover, we have concluded that laws permitting use of deadly force in those circumstances are responsible for unnecessary loss of life, for friction between police and the communities they serve resulting in less effective law enforcement, and for an undue burden upon police officers who must make and live with the consequences of hasty life-or-death decisions.[7]

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4. *Garner*, 710 F.2d at 241.
5. TENN. CODE ANN. § 40-7-108 (1982).
6. Brief for Police Foundation et al. as Amici Curiae.
7. *Id.* at 11, *cited in Garner*, 105 S. Ct. at 1705.

The amici brief ended with a very pertinent quote from Chief Justice Burger:

> Thirteen years ago Chief Justice Burger wrote: From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.[8]

In the *Garner* opinion, the Supreme Court held in part that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the fourth amendment.[9] To determine the constitutionality of a seizure, the Court prescribed a balancing test: "[T]he nature and quality of the intrusion on the individual's Fourth Amendment interests" must be balanced "against the importance of the governmental interests alleged to justify the intrusion."[10] The court cited with approval the Model Penal Code:

> 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.[11]

The Supreme Court affirmed the sixth circuit decision that "the facts, as found, did not justify the use of deadly force,"[12] and held the Tennessee statute "unconstitutional insofar as it authorizes the use of deadly force against . . . unarmed, nondangerous suspect[s]."[13]

The opinion for the Supreme Court was written by Justice White and joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens.[14] Justice O'Connor wrote the dissent, joined by Chief Justice Burger and Justice

8. Brief for Police Foundation et al. as Amici Curiae at 12.

9. *Garner*, 105 S. Ct. at 1699.

10. *Id.*

11. MODEL PENAL CODE § 3.07(2)(b) (Proposed Official Draft 1962), *cited in Garner*, 105 S. Ct. at 166 n.7.

12. *Garner*, 105 S. Ct. at 1706.

13. *Id.* at 1701.

14. *Id.* at 1694-1707.

Rehnquist.[15] The dissenters expressed the view that the use of deadly force as a last resort to prevent the escape of a suspect from a scene of a nighttime burglary does not violate the fourth amendment.[16] Justice O'Connor phrased the question for purposes of the dissent as being "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."[17] She noted that the police practice involved here "was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures."[18]

For the dissenters, it would appear that the critical distinction is that the offender in *Garner* was involved in burglary of a residence even though it was unoccupied at the time. This emphasis suggests that the deadly force used upon the suspected car thieves whose cases I described earlier might command the unanimous rejection of the Court as an unreasonable seizure.

The Constitution of the United States is a supremely civilized document. High among its principles are the prohibition against unreasonable searches and seizures and the requirement of punishment only after a trial according to due process of law. The Supreme Court's majority opinion in *Garner*, and to a lesser extent, the minority opinion, support our society's concept of civilization by more accurately establishing justice and promoting domestic tranquility.

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15. *Id.* at 1707-12.
16. *Id.* at 1707.
17. *Id.* at 1709.
18. *Id.*