Memorandum

Subject	Memphis Police Department v. Garner, Nos. 83-1035, 83-1070	Date	May 18, 1984

To The Solicitor General From Samuel A. Alito

TIME

The brief for petitioners-appellants (the Memphis Police Department and the State of Tennessee) is due (with a 30-day extension) on June 4, 1984. The brief for respondent-appellee is due on July 5, 1984.

RECOMMENDATIONS

The Criminal Division recommends against amicus participation. The Office of Legal Policy recommends that amicus participation be seriously considered.

While I believe that the decision below is wrong, I recommend against amicus participation.

DISCUSSION

I. This case arises out of the shooting of a 15 year old boy who broke into a house at night and stole some ten dollars worth of money and jewelry. Police arrived at the scene, identified themselves and commanded the burglar to halt. When he failed to do so, an officer, who could see that his target was a youth who did not appear to be armed, fired a 38-caliber hollow point round, killing the suspect. The officer's action was protected by the Tennessee fleeing felon statute, which in accordance with the common law rule, permits the use of deadly force to prevent the escape of a felony suspect. The decedent's father sued the city of Memphis and the officers individually under 42 U.S.C. 1983, seeking damages for the deprivation of his son's constitutional rights. The district court dismissed the case against the officers on the ground of qualified immunity and held that the Tennessee statute was not unconstitutional on its face or as applied.

The court of appeals reversed the judgment in favor of the city. Garner v. Memphis Police Dept., 710 F.2d 240 (6th Cir. 1983). The court held that the shooting constituted an unreasonable seizure under the Fourth Amendment (id. at 243-248). The court noted (id. at 243-244) that the common law rule developed at a time when there were few felonies and all were capital offenses. Thus, the court observed (id. at 244): "The killing of a fleeing felon merely accelerated the time of punishment." Today, the court stated (ibid.), with the proliferation of non-capital felonies, adherence to the common law rule permits a police response that is "out of proportion to the danger to the community." Under the Fourth Amendment the court held (id. at 246), the following rule applies:

> 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. The officers 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 endager the physical safety of others if not captured.

The court recognized (id. at 247) that this is precisely the same rule contained in Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962). The court also held (710 F.2d at 246-247) that the same rule was required by substantive due process.

Finally, the court held (id. at 248-249) that, despite the city's reliance on the state statute, the city was not entitled to immunity under Owen v. City of Independence, 445 U.S. 622 (1980). Supreme Court review of this question has not been sought.

II. In my judgment, the court of appeals' decision is wrong and should be reversed.

A. Fourth Amendment. 1. Was there a seizure? In the first place, I am not sure that the shooting of a fleeing felony suspect should be analyzed as a "seizure." To be sure, a seizure for Fourth Amendment purposes is usually defined as restraint upon a person's freedom of movement by means of physical force or show of authority (see, e.g., United States v. Mendenhall, 446 U.S. 544, 553 (1980)), and killing is undoubtedly "the most decisive way to make sure that the suspect does not 'walk away'" (710 F.2d at 243). But what the court found objectionable here was not the fact that the suspect was prevented from fleeing; it is undisputed that a seizure by non-deadly means would have been justified. The court objected to the officer's conduct only insofar as he went further and killed the suspect.

If after taking a suspect into custody, an officer murdered him on the way to the station house, would that killing be an unreasonable seizure on the ground that it permanently interfered with the suspect's freedom of movement? What if an officer went berserk and shot people on the street?

The court of appeals' construction would produce a novel result. It would mean that there are some "seizures" that are always improper no matter how much probable cause the officer possesses.

In short, I question whether the Fourth Amendment's prohibition of unreasonable seizures goes beyond establishing the standard for taking suspects into custody or imposing lesser restraints upon their freedom of movement. The proposition that the Fourth Amendment defines the circumstances in which homicide is justifiable--and that is what is involved here--strikes me as dubious.

This construction finds historical support in the fact that the common law rule was universally accepted at the time of the adoption of the Fourth Amendment. And contrary to the court of appeals' suggestion, it is untrue that there were then only a few felonies, all of which were punishable by death. This is well illustrated by the penal statute enacted by the First Congress, which created felonies in addition to those recognized at common law and made most felonies punishable by a term of imprisonment rather than by death. See Act of April 30, 1790, ch. IX, 1 Stat. 112.

Having expressed my doubts about whether the shooting of a fleeing felony supsect should be analyzed as a "seizure," I must acknowledge that the contrary argument has considerable force. The shooting of a fleeing felony suspect, unlike the other examples of police homicide noted above, is done for the purpose of taking the suspect into custody and thus resembles other seizures. And since there are undoubtedly searches that would be unreasonable despite the presence of overwhelming probable cause--e.g., a life-threatening operation to remove a bullet or other

evidence1/--the Court may conclude that the same is true for seizures.

2. Was the shooting unreasonable? Assuming arguendo that the shooting was a seizure, the question is whether it was reasonable. (It should be noted that the issue is not whether every use of deadly force authorized by the Tennessee statute would be reasonable; there is no overbreadth analysis in Fourth Amendment law.2/

a. Here again, I think that the universally accepted rule in 1790 is highly relevant, if not dispositive. Such arguments have sometimes persuaded the Court. See United States v. Villamonte-Marquez, No. 81-1350 (June 17, 1983), slip op. 5-7 (passage of statute by same Congress that proposed adoption of Bill of Rights is strong evidence of reasonableness); United States v. Ramsey, 431 U.S. 606, 617 (1977) (same). Compare Steagald v. United States, 451 U.S. 204, 217 (1981) ("The common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."); Payton v. New York, 445 U.S. 573, 591 (1980).

b. If the lineage of the Tennessee statute is not sufficient to demonstrate the constitutionality of the shooting in this case, there are additional persuasive reasons why the courts should not attempt to develop an alternative constitutional rule more stringent than that of the common law. Judicial restraint is strongly counselled, it seems to me, because here is no single principle that can be used to judge when it is justified to use deadly force to stop a fleeing suspect. Instead, all such rules are based upon difficult moral

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1/ The Court has granted certiorari in a case involving the question whether non-life-threatening surgery to remove a bullet from a criminal suspect is an unreasonable search despite the presence of probable cause. Lee v. Winston, No. 83-1334, cert. granted April 16, 1984.

2/ It should also be noted, as pointed out in Jones v. Marshall, 528 F.2d 132, 137-138 (2d Cir. 1975), that the state statute is of only incidental importance in determining what constitutes a violation of the Fourth Amendment and which privileges and immunities are available in a Section 1983 suit.

and philosphical choices and a balancing of values that is peculiarly suited for legislative rather than judicial resolution. As the Second Circuit wrote in upholding Connecticut's fleeing felon statute, which also embodied the common law rule: "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 * * * 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" (Jones v. Marshall, 528 F.2d 132, 137-138 (2d Cir. 1975) (per Oakes, J.)).

In this case, the court of appeals simply adopted the Model Penal Code rule as the constitutional standard without inquiring whether other formulations might not be equally reasonable. There is nothing to suggest that the Model Penal Code rule was meant to be a constitutional standard. But assuming with the Sixth Circuit that the American Law Institute speaks with the voice of the Fourth Amendment, one should note that over the years the ALI has not only changed its position on the fleeing felon rule (and not always in the direction of leniency toward the suspect) but has simultaneously espoused different rules in different projects. As the court of appeals noted, the Model Penal Code provides that a police officer is not criminally responsible for the use of deadly force against a fleeing suspect if

> (i) the arrest is for a felony, 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.

By contrast, the Restatement (Second) of Torts § 131 (1965), adopts the common law rule and explains (Comment g at 235-236):

> It is important that those who are attempting to protect the public interest by arresting serious offenders know with reasonable

> certainty the means which they are privileged to employ. To this end, it is important that the extent of force which may be used shall be determined by the general character of the offense, which is capable of being known with reasonable certainly.

Because this provision concerns the circumstances in which an arresting office may be civilly liable, whereas the Model Penal Code concerns criminal responsibility, this contrast is particularly striking.

It is also apparent that the ALI did not arrive at this rule without seriously considering the alternatives. The first Restatement of Torts § 131 (1934) permitted the use of deadly force if

> (a) the arrest is made for treason or for a felony which normally causes or threatens death or serious bodily harm, or which involves the breaking and entry of a dwelling place, and
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> (b) the actor reasonably believes that the arrest cannot otherwise be affected.

(Since the suspect in the present case was reasonably believed to have committed a burglary of a dwelling, the shooting would have been justified under this standard.) In 1948, the ALI repealed the rule contained in the first Restatement and adopted the present rule.

The commentary on the Model Penal Code rule also illustrates the complexity of the problem and the wide range of reasonable solutions. The commentary reveals that one of the first reform proposals considered by the ALI was a provision listing the felonies thought to be sufficiently serious to justify the use of deadly force (Model Penal Code, Tent. Draft No. 8 § 3.07 at 58 (1958)). This proposal was rejected because it was felt that a "sufficiently comprehensive" list could not be compiled and because "knowledge that the person has committed a [particular] felony * * * does not reveal enough about the person's actual character and disposition."

Another alternative, proposed by Professor Henry Hart of the Advisory Committee, would have permitted the use of deadly force if (id. at 60):

> (iv) Postponement of the arrest until it can be made with less risk of death or serious bodily harm would be contrary to the public interest for one or more of the following reasons:
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> First, because the officer is executing a warrant of arrest which there is no reason to believe can be executed with materially less danger of death or serious bodily harm at a later time; or
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> Second, because the person to be arrested is known to the officer to have a record of conviction of one or more crimes evidencing a lawless readiness to take human life or inflict serious bodily injury wilfully, or a history of association with such persons; or
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> Third, because there is serious risk that the person to be arrested will cause death or serious bodily harm unless apprehended; or
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> Fourth, because there is serious doubt that the person to be arrested can be identified if he escapes, and the crime for which the arrest is made or attempted involved conduct evidencing a lawless readiness to take human life or inflict serious bodily harm.

This rule was rejected (wisely, I think) as far too complicated (id. at 60).

Professor John Barker Waite of the University of Michigan Law School provided the following cogent defense of the common law rule (id. at 60-62):

> I am convinced that only through truly effective power of arrest can law be satisfactorily enforced. Obviously until violators are brought before the courts the

law's sanctions cannot be applied to them. But effectiveness in making arrests requires more than merely pitting the footwork of policemen against that of suspected criminals. An English director of public prosecutions once explained to me that the English police had no need to carry pistols because (1) no English criminal would think of killing a police officer, and (2) even if a suspected offender should outrun an officer in the labyrinth of London he could be found eventually in Liverpool or Birmingham. As the director put it, if a man offends in his own district everyone notices him.

None of this is true in this country where fluidity of population and movement far exceeds anything anywhere in England. On the contrary a suspect who eludes arrest when first attempted, especially if he is a minor offender, may not be arrested at all.

For this reason, I myself would carry one provision of this Article to its logical extent, and eliminate others. The Article [Section 3.04(2)(a)(i)] denies a person being arrested any privilege of resistance; he must sacrifice his right of absolute freedom to the public necessities. I believe he should also be denied the privilege of flight. I would require not only his abstention from active resistance, but also the even easier abstention from flight. His preclusion from resistance is made effective by giving the officer authority to use whatever force is needed to overcome that resistance. I would make the preclusion from flight effective by giving the officer authority to utilize necessary force there also.

It should be unnecessary to say that such authorization ought in either case be limited to situations where the character of the officer as an officer attempting arrest is

> clearly made known to the fugitive and the use of extreme force is a last resort. * * * *
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> If we pass Subsection (d) we say to the criminal, 'You are foolish. No matter what you have done are foolish if you submit to arrest. The officer dare not take the risk of shooting at you. If you can outrun him, outrun him * * * * If you are faster than he is you are free, and God bless you.' I feel entirely unwilling to give that benediction to the modern criminal.

The standards discussed above illustrate the wide variety of reasonable rules in this area. They also show, I believe, the considerations that underlie all such rules and the process by which any such rule must be developed. To explain that process, I think, is to show that this is a field in which the judiciary should not intervene.

c. Any rule permitting the use of deadly force to stop a fleeing suspect must rest on the general principle that the state is justified in using whatever force is necessary to enforce its laws. Assuming that a fleeing felony suspect is entirely rational (obviously a doubtful assumption, but more on that later), what he is saying in effect is: "Kill me or alow me to escape, at least for now." If every suspect could evade arrest by putting the state to this choice, societal order would quickly break down.

Without the principle noted above, no other principle of which I am aware will support any of the rules allowing the shooting of a fleeing felony suspect. Protection of the officer or a third person from immediate harm cannot alone justify a different rule in this context than in those situations in which the person against whom the deadly force is used is not fleeing. Likewise, protecting society from less immediate harm--a factor in the Model Penal Code and some other rules--obviously cannot alone justify the use of deadly force. It is not settled whether a dangerous suspect may constitutionally be denied bail pending trial; consequently, it can hardly be argued that he may be killed because the nature of his suspected crime (see 710 F.2d at 246; Model Penal Code § 3.07(2)(b)(1)), his criminal record (Prof. Hart's rule), or his associations (Prof. Hart's rule)) provide reasonable grounds to believe that he is dangerous. Such

considerations, as I said, cannot bear the weight of any fleeing felon rule; they can merely reinforce its supporting principle. Thus, the fact that a suspect seems likely, based on his suspected crime, to commit violent crimes if allowed to go free, while not a permissible ground for denying bail under federal statutes (see 18 U.S.C. 3146), was thought by the court of appeals to be sufficient to tip the scale in favor of the use of deadly force if the suspect flees.

As noted, a fleeing suspect in effect states to the police: "Kill me or let me escape the legal process, at least for now." When a suspect puts the state to this choice in an open, direct way--when he stands his ground and meets every escalation in the use of force by the police--there is no question that the police may employ deadly force if necessary. See Model Penal Code § 3.04(2)(b)(iii)(2) (Proposed Offical Draft 1962). In that situation, the principle that the state must be prepared to use whatever force is necessary to enforce its laws is applied in undiluted form. Presumably this is because the suspect's conduct openly and directly calls into question a principle on which orderly society relies. When the suspect flees, however, no such frontal challenge is evident, and the principle is relaxed by a variety of mitigating factors.

The chief of these is the lack of severity of the offense; even the common law rule does not permit the use of deadly force to stop a suspected misdemeanant.3/ Other mitigating factors may include the likelihood that the suspect can be captured without force on another occasion, the chance that he fled out of panic or did not in fact commit any crime, and the possibility that he mistook the police for someone else. There are also limiting factors, such as danger to bystanders, that are not directly related to the suspect's conduct.

Any fleeing felon rule must also take into account important practicalities. The rule must be simple enough for an officer to apply in a split second and at a moment of great stress. And any rule must take into account the imperfect knowledge of the officer. For example, the officer may know that a potentially

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3/ But even the Model Penal Code permits use of deadly force where necessary to arrest a suspected misdemeanant who resists arrest (§ 3.04(2)(b)(iii)(2)).

dangerous felony was committed but not which felony (e.g., was it a simple burglary or also a murder, assault, rape, or robbery?).

It seems to me that the process of valuing all of these factors and producing a rule is a task for the state legislatures and one for which the courts are singularly ill-suited.

d. Returning to the facts of this case, I think the shooting can be justified as reasonable within the meaning of the Fourth Amendment. Many of the facts recited by the court of appeals (and repeated at the beginning of this memo) seem essentially irrelevant. The suspect's age (15) does not seem determinative, since teenage males are the most prone to commit violent crimes. It is also not determinative that it was later discovered that the suspect had only stolen some property while in the house. The officer had no way of knowing precisely what the suspect had done, but the nighttime burglary of a residence is an extremely serious crime that often leads to murder, assault, or rape. Finally, the use of hollow-point bullets is a separate issue. The district court found that death would have occurred even if such bullets had not been used. Moreover, since the issue is whether the use of deadly force was justified, it is not logically relevant that a particularly deadly form of force was employed. (I am not aware, for example, of any rule drawing a distinction between when the police may use a shotgun and when they may use a revolver.)

Boiled down to its essentials, the situation in this case was the following. The officer saw an unarmed suspect fleeing from the scene of a type of felony that is not uncommonly accompanied by violence. If he shot, there was the chance that he would kill a person guilty only of a simple breaking and entering; that is essentially what occurred. If he did not shoot, there was a chance that a murderer or rapist would escape and possibly strike again. I do not think the Constitution provides an answer to the officer's dilemma. Reasonable people might choose differently in this situation.

B. Substantive Due Process. This alternative basis for the court of appeals' decision amounts to little more than judicial fiat and is therefore even less supportable than the court's Fourth Amendment holding. Moreover, such a holding might have broader ramifications. Since the fleeing felon rule is part of the definition of unlawful homicide, if the present case were decided on substantive due process grounds, it would amount to

constitutional review of the elements of a crime--a novel and dangerous precedent.

C. Imposition of Punishment Without A Determination of Guilt. Memoranda prepared by staff attorneys in the Civil Rights Division contend that the common law fleeing felon rule amounts to the imposition of punishment prior to an adjudication of guilt and thus violates procedural due process. See Bell v. Wolfish, 441 U.S. 520, 535 (1979). This argument seems clearly incorrect. If shooting a fleeing felony suspect is punishment, as this argument holds, then such a suspect may never be shot. Deadly force could not be employed even under the circumstances in which the court of appeals in this case and the Model Penal Code would allow its use. See Jones v. Marshall, 528 F.2d at 136 n.9. The flaw in this argument is that the shooting is not punishment under the criteria of Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 91969). Among other things, it has not historically been regarded as punishment (at least not for the past few centuries) but as a means of arrest; and it is necessary and appropriate to achieve that purpose, at least in the circumstances here.

III. While I think that the decision below was wrong, I recommend against amicus participation.

As Criminal points out, the federal interest is not great. Criminal has surveyed the federal law enforcement agencies and has found that they uniformly restrict the use of deadly force by their agents at least as strictly (and generally more strictly) then the court of appeals' rule. The FBI, for example, prohibits

its agents from shooting a fleeing felon except in self-defense or to prevent immediate danger to others' lives.4/

OLP correctly points out that the government might want to change these policies in the future and that its options would then be restricted by a Supreme Court decision affirming the court of appeals. However, the likelihood that such a decision would have a practical effect on us does not seem great. As noted, all of the federal agencies now have extremely restrictive policies in this area; we have not been informed of any proposals to change the present policies; none of the agencies surveyed by Criminal expressed an interest in this case; and because of the nature of the crimes investigated by the federal agencies, a rule regarding the use of deadly force to stop a fleeing felony suspect is probably much less important to them than to state and local police. Due to our rather weak federal interest, participation might seem like meddling.

The extremely restrictive policies of the federal agencies militate against participation for another reason. Highlighting those policies might falsely undermine the state's and city's

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4/ The Bureau of Prison's policy regarding the use of force to prevent escape is more permissive (see 5/9/84 OLP memo and attachment). However, that is in accord with even the Model Penal Code rule. See Model Penal Code § 3.07(3) (Proposed Official Draft 1962):

> (3) Use of Force to Prevent Escape from Custody. The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

case. The Court might wonder why state and local police cannot follow the same rule as the federal agencies. In fact, there are important differences having to do with the nature of the crimes investigated (federal agents generally do not investigate street crime) and the method of investigation (federal agents are not usually called to the scene of an ongoing crime), but the explanation is not simple or easy and may not fully dispel the impression made by the disparate rules.

In conclusion, I would suggest that we provide the state and city with the benefit of our ideas but that we not file our own amicus brief.