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March 2, 1999

The Honorable J. Joseph Curran, Jr.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202-2120

Re: Self Defense / Police Responsibility

Dear Mr. Curran:

Please clarify the following issues as codified by existing Maryland law:

- Police responsibility and/or obligation to protect and defend private citizens
- Police responsibility and/or obligation to protect society as a whole
- Police civil liability when response time is too slow to prevent injury or death
- Circumstances under which the police can use deadly force to protect life
- Circumstances under which the police can use deadly force to protect property
- Circumstances under which private citizens can use deadly force to protect life
- Circumstances under which private citizens can use deadly force to protect property
- Circumstances under which private citizens have an obligation to retreat when confronted by an intruder in the home
- Circumstances under which private citizens have an obligation to retreat when confronted by an attacker on a public street or in a public place

As always, please feel free to contact me with any questions that you may have.

Kindest personal regards,

John H. Josselyn
Legislative Vice President

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March 31, 1999

Mr. John H. Josselyn
Associated Gun Clubs of Baltimore, Inc.
P.O. Box 20102
Towson, Maryland 21284-0102

Dear Mr. Josselyn:

I have been asked by Attorney General Curran to respond to your letter of March 2, 1999. In your letter, you asked for clarification as to certain issues codified by existing Maryland law. In point of fact, with one exception, the nine issues you list are not codified in the Annotated Code of Maryland. To the extent that these issues have been addressed by Maryland's appellate courts, I will provide you with the relevant case citations.

1 & 2) Police responsibility and/or obligation to protect and defend private citizens, to protect society as a whole.

The Maryland State Police is charged, in Article 88B, Section 3 of the Annotated Code with "the general duty to safeguard the lives and safety of all persons within the State, to protect property, and to assist in securing to all persons the equal protection of the laws." However, the Maryland Court of Appeals has determined that police do not have a duty to protect individual citizens from the actions of other citizens absent a special relationship between the police and the victim or the police and the offender. See, Ashburn v. Anne Arundel County, 306 Md. 617 (1986)

3) Police civil liability when response time is too slow to prevent injury or death.

This issue is not addressed in statute. I have been able to find no appellate case law imposing such liability.

4) Circumstances under which the police can use deadly force to protect life.

This issue is not addressed in statute. In Tennessee v. Garner, 471 U.S. 1 (1985), the Supreme Court ruled that the use of deadly force was constitutionally permissible to protect the life of the officer or the life of another.

5) Circumstances under which the police can use deadly force to protect property.

This issue is not addressed in statute. There is no authority for a police officer to use deadly force to protect property.

6) Circumstances under which private citizens can use deadly force to protect life.

This issue is not addressed in statute. A private citizen may use deadly force in self defense or defense of another if death or serious bodily harm is threatened. The citizen must have reasonable grounds to believe himself, or another, in apparent immediate danger of death or serious bodily harm. See, Guerriero v. State, 213 Md. 545 (1957)

7) Circumstances under which private citizens can use deadly force to protect property.

This issue is not addressed in statute. There is no authority for a private citizen to use deadly force to protect property.

8) Circumstances under which private citizens have an obligation to retreat when confronted by an intruder in the home.

This issue is not addressed in statute. There is no duty to retreat if one is attached in his or her own home. See, Redcross v. State of Maryland, 121 Md.App. 320 (1998).

9) Circumstances under which private citizens have an obligation to retreat when confronted by an attacker on a public street or in a public place.

This issue is not addressed in statute. Generally, Maryland law does impose a duty to retreat when confronted in a public place. See, Redcross v. State of Maryland, 121 Md.App. 320 (1998).

This letter does not constitute an official opinion of the Office of the Attorney General. You may wish to consult with your own counsel to obtain detailed advice on the issues you have raised.

Sincerely,

Mark H. Bowen
Assistant Attorney General
Maryland State Police

No. 10, September Term, 1985
Court of Appeals of Maryland

Ashburn v. Anne Arundel County

306 Md. 617 (Md. 1986) · 510 A.2d 1078
Decided Jul 10, 1986

No. 10, September Term, 1985.

July 10, 1986.

Appeal from the Circuit Court, Anne Arundel
618 County, James C. Cawood, J. *618

Leonard A. Orman, Baltimore, for appellant.

Karen A. Murphy Jensen, Asst. County Sol. (Stephen R. Beard, County Sol. and Robert C. Wilcox, Deputy County Sol., on brief), Annapolis, for appellee.

Before SMITH, ELDRIDGE, COLE, RODOWSKY, COUCH, McAULIFFE and JAMES C. MORTON, Jr., (Retired, Specially Assigned), JJ.

619 *619

COLE, Judge.

In this case, we must determine whether a police officer may be held liable to a person injured by a drunk driver where the officer detected the driver's condition before the accident but failed to stop and detain him.

The parties have agreed to the following facts. On February 18, 1983, Officer Dennis Freeberger of the Anne Arundel County Police Department found John J. Millham in a pickup truck on the parking lot of a 7-11 store. Millham was intoxicated and sitting behind the wheel of the truck with its engine running and lights on. It is
620 agreed *620 that Millham was driving the vehicle and that, under Maryland law, Millham could have been charged with drunk driving.

Apparently noticing Millham's condition, Officer Freeberger told Millham to pull his truck to the side of the lot and to discontinue driving that evening. As soon as Officer Freeberger left the scene, however, Millham drove the truck away from the lot, proceeded a short distance and collided with appellant, John F. Ashburn, II, a pedestrian. Ashburn, who lost his left leg and suffered other injuries, brought suit against Millham, Officer Freeberger, Anne Arundel County and the Police Department in the Circuit Court for Anne Arundel County. He based his claim against the latter three on the theory that the police had a mandatory duty to detain all suspected drunk drivers under Md. Code (1977, 1984 Repl. Vol.), § 16-205.1 TRANSP.(b)(2) of the Transportation Article. The circuit court granted appellees' Motion to Dismiss and, in an opinion and order dated October 19, 1984, held that Anne Arundel County Police Department was not a separate legal entity, that Officer Freeberger and Anne Arundel County were immune from civil suit, and that Officer Freeberger owed no special duty to appellant. Appellant filed a timely appeal. We granted certiorari on our own motion before consideration by the intermediate appellate court.

Appellant argues that Officer Freeberger is not immune from suit under the doctrine of public official immunity because Freeberger negligently failed to perform the mandatory (as opposed to

discretionary) act of detaining a drunken driver. Appellant also argues that, under the circumstances of this case, a special duty was imposed upon Officer Freeberger to protect appellant. Appellees respond that the doctrine of public official immunity precludes suit by appellant against Officer Freeberger. Furthermore, appellees argue, even if public official immunity is unavailable to Freeberger, the officer owed no special duty to Ashburn to protect him from
621 injuries sustained as a result of the *621 accident caused by defendant Millham. Appellees therefore maintain that the cause of action in negligence must fail.

I

It was generally held in American courts prior to the mid-part of this century that all public employees were liable for their own torts. *See Prosser and Keeton on Torts* § 132 (W. Keeton 5th ed. 1984); 63A Am. Jur. 2d *Public Officers and Employees* § 358 (1984). This Court recognized before the turn of the century, however, the importance of shielding a public officer from liability where the officer's alleged negligence arose from the performance of his job in a manner which involved judgment and discretion. *Cocking v. Wade*, 87 Md. 529, 40 A. 104 (1898).

Cocking arose from a suit against the bond of a sheriff of Charles County for the sheriff's alleged negligence in guarding a prisoner. In the face of danger to the prisoner from mob violence, the sheriff moved the prisoner first to a jail in Baltimore City and then again to a dilapidated building which had been used as a jail in Charles County. While the prisoner was jailed in the Charles County building, a change of venue was granted, which increased unrest among the citizens of Charles County. Although the prisoner and his counsel repeatedly asked the sheriff to move the prisoner to a safer jail, the sheriff refused. Shortly thereafter, the prisoner was taken from the jail by a group of unknown men and hanged. This Court held that no action would lie against the sheriff by the children of the prisoner. The Court explained that the manner in which a sheriff carries forth his job function with regard to a prisoner:

> may often be a matter of great difficulty, and one calling for the exercise of much judgment and high degree of courage. He will be required to take careful account of all the circumstances that surround him, estimate in cases of outside attack the forces he must encounter, and compare them with his means of defense, and after due deliberation, determine what course is
> 622 best for him to *622 pursue. If he does this honestly, with a full purpose to perform his whole duty, even though he make a mistake whereby a prisoner is injured, it would be monstrous to hold him civilly liable for damages to such prisoner. "A public officer is not liable to an action, *if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even though an individual may suffer by his mistake*. A contrary principle would, indeed, be pregnant with the greatest mischief."

Id. at 541, 40 A. at 106 (citations omitted, emphasis supplied).

Since *Cocking*, the rule which we have applied to tort claims against a governmental representative is that the actor will be relieved of liability for his *non-malicious* acts where: (1) he "is a *public official* rather than a mere *government employee or agent;* and (2) his tortious conduct occurred while he was performing *discretionary*, as opposed to *ministerial*, acts in furtherance of his official duties." *James v. Prince George's County*, 288 Md. 315, 323, 418 A.2d 1173, 1178 (1980) (emphasis in original). *See also Bradshaw v. Prince George's County*, 284 Md. 294, 303, 396 A.2d 255, 261 (1970), overruled in part on other grounds in *James, supra; Robinson v. Bd. of*

County Comm'rs, 262 Md. 342, 346-47, 278 A.2d 71, 74 (1971); *Duncan v. Koustenis*, 260 Md. 98, 104, 271 A.2d 547, 550 (1970); *Clark v. Ferling*, 220 Md. 109, 113-14, 151 A.2d 137, 139 (1959).

We now turn to an analysis of the case sub judice. Clearly, Officer Freeberger is a public official when acting within the scope of his law enforcement function. *See Bradshaw, supra*, 284 Md. at 302, 396 A.2d at 261; *Robinson, supra*, 262 Md. at 347, 278 A.2d at 74. The question we must resolve, then, is whether Officer Freeberger was acting in a discretionary capacity when he
623 encountered the drunk driver. *623

In addressing the difference between discretionary and ministerial actions, our predecessors noted in *Schneider v. Hawkins*, 179 Md. 21, 25, 16 A.2d 861, 864 (1940):

> The term "discretion" denotes freedom to act according to one's judgment in the absence of a hard and fast rule. When applied to public officials, "discretion" is the power conferred upon them by law to act officially under certain circumstances according to the dictates of their own judgment and conscience, and uncontrolled by the judgment or conscience of others.

Almost any action, however, may involve the use of discretion. Thus, we noted in *James, supra*, 288 Md. at 327, 418 A.2d at 1180:

> When attempting to classify the particular actions of a public official, a court should be careful not to let the mere fact that decisions are made in performing the questioned task be determinative of whether liability attaches to the conduct, for "[i]n a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion." *Swanson v. United States*, 229 F. Supp. 217, 219-20 (N.D.Cal. 1964). Or as has been otherwise expressed: "it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." *Johnson v. State*, 69 Cal.2d 782, 447 P.2d 352, 357, 73 Cal.Rptr. 240 (1968) (en banc). *Thus, an act falls within the discretionary function of a public official if the decision which involves an exercise of his personal judgment also includes, to more than a minor degree, the manner in which the police power of the State should be utilized*. [Emphasis supplied.]

The *James* Court went on to state that in the case before it, the driving of an emergency vehicle involved only to a "minimal degree, if at all, the exercise of discretion with regard to the State's sovereignty." 288 Md. at 327-28, 418 A.2d at 1180. Thus, the Court held that the operation of
624 *624 such an emergency vehicle "is not ordinarily a discretionary act for which immunity will shield the driver from liability for negligence." *Id*. at 328, 418 A.2d at 1180-81. The driving of an emergency vehicle, as in *James*, however, is different from making a decision as to whether a citizen shall be apprehended. When a police officer performs this function, he is acting in a discretionary capacity. *Robinson v. Bd. of County Comm'rs, supra*, 262 Md. at 347, 278 A.2d at 74.

Appellant argues, nevertheless, that Officer Freeberger was not acting in a discretionary capacity when he encountered the drunk driver because, appellant contends, Freeberger had a mandatory (and thus purely ministerial) duty to detain the drunk driver in accordance with § 16.205.1(b)(2) of the Transportation Article, which reads:

> Except as provided in subsection (c) of this section, *if a police officer stops or detains any individual* who the police officer has reasonable grounds to believe is or has been driving or attempting to drive a motor vehicle while intoxicated or while under the influence of alcohol and who is not unconscious or otherwise incapable of refusing to take a chemical test for alcohol, the police officer shall:
>
> (i) Detain the individual;
>
> (ii) Request that the individual permit a chemical test to be taken of the individual's blood or breath to determine the alcohol content of the individual's blood;
>
> (iii) Advise the individual of the administrative penalties that shall be imposed for refusal to take the test; and
>
> (iv) If the individual refuses to take the test, send a sworn report to the Administration within 72 hours after the detention, that states. . . . [Emphasis supplied.]

Appellant contends that this section prescribes a mandatory procedure for the handling of drunk drivers and that because Freeberger failed to carry forth this mandatory duty, he is liable for all
625 results which flow from his error. *625 Appellant points to the word "shall" in § 16-205.1 TRANSP. (b)(2), and he argues that this word placed a mandatory duty upon Freeberger to stop, detain and administer sobriety tests to Millham. We disagree. What appellant fails to note is that the word "shall" is preceded by the wording *"if* a police officer stops or detains any individual." We believe that this introductory clause makes clear that Freeberger was not required by § 16-205.1 TRANSP.(b)(2) to detain Millham (under subsection (i)) or to request that Millham take a chemical test (under subsections (ii)-(iv)).

We have stated time and again that where a statute is plain and unambiguous, we will look no further than the words of the statute to ascertain legislative intent. *State v. Berry*, 287 Md. 491, 413 A.2d 557 (1980); *Collier v. Connolley*, 285 Md. 123, 400 A.2d 1107 (1979); *Mauzy v. Hornbeck*, 285 Md. 84, 400 A.2d 1091 (1979); *Massage Parlors v. City of Balto.*, 284 Md. 490, 398 A.2d 52 (1979). By the plain meaning of this statute, its directives are not invoked *until* the officer *"stops or detains* any individual." In *Willis v. State*, 302 Md. 363, 376, 488 A.2d 171, 178 (1985), we equated the phrase "stop or detain" in § 16-205.1 TRANSP. with the word "apprehension" ("apprehended" as used in Md. Code (1974, 1980 Repl. Vol.), § 10-303 of the Courts and Judicial Proceedings Article). We held in *Willis* that "an accused is `apprehended' when a police officer has reasonable grounds to believe that the person is or has been driving a motor vehicle while intoxicated or while under the influence of alcohol and the police officer reasonably acts upon that information by stopping or detaining the person." *Id. Webster's Third New International Dictionary* (1981) defines the verb "detain" as "to hold or keep in or as if in custody . . . to restrain especially
626 from proceeding. . . ."[1] *626 The verb "stop" is defined in *Webster's*, in relevant part, as "to keep confined . . . to hinder or prevent the passage of . . . to close up or block off access to . . . to make impassable . . . to keep from carrying out a proposed action: hold back: RESTRAIN. . . ."

[1] We note that the word "detain" is used twice in § 16-205.1 TRANSP.(b)(2): "if a police officer . . . detains . . . the police officer shall: (1) detain the individual." We do not believe that the second use of the word detain denotes a meaning different

> from or more restrictive than the first. *Cf. Willis v. State, supra*. Simply put, the proper interpretation of the section is: if the officer first detains (or stops) one whom he has reasonable grounds to believe is driving while intoxicated, the officer shall *further* detain the individual in order to carry out the procedures prescribed by the section.

Applying the facts of this case to these definitions, it does not appear that Officer Freeberger stopped or detained the drunk driver. Here, Officer Freeberger "found" the drunk driver sitting in a truck and "told" the driver to pull to the side of the lot and to discontinue driving. Freeberger then left the scene. Freeberger did not confine or restrain Millham. He did not begin an investigation of Millham. Instead, Freeberger told him to drive the car to the side of the parking lot, and then Freeberger left. Because Freeberger did not "stop or detain" Millham, the requirements of § 16-205.1 TRANSP.(b)(2) simply were not invoked. Under these facts, § 16-205.1 TRANSP.(b)(2) did not make it mandatory that Freeberger detain Millham. Consequently, because Freeberger was acting in a discretionary capacity, he is immune from suit under the circumstances of this case.

II

Even if we were to assume that § 16-205.1 TRANSP. required Freeberger to stop or detain Millham, i.e., that the statute made Freeberger's actions ministerial, and thus nondiscretionary, appellant's cause would still fail because he did not establish that Freeberger owed him a duty in tort. Judge McSherry stated for this Court over eighty years ago that:

> there can be no negligence where there is no duty that is due; for negligence is the breach of some duty that one person owes to another. It is consequently relative and can have no existence apart from some duty expressly or impliedly imposed. In every instance, before negligence can be predicated of a given act, back of the act
> 627 must be *627 sought and found a duty to the individual complaining, the observance of which duty would have averted or avoided the injury. . . . As the duty varies with circumstances and with the relation to each other of the individuals concerned, so the alleged negligence varies, and the act complained of never amounts to negligence in law or in fact, if there has been no breach of duty.

W. Va. Central R. Co. v. Fuller, 96 Md. 652, 666, 54 A. 669, 671 (1903). Judge McSherry's comments remain viable today: negligence is a breach of a duty owed to one, and absent that duty, there can be no negligence.

"Duty" in negligence has been defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Prosser and Keeton, supra*, § 53. There is no set formula for this determination. As Dean Prosser noted, "duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id*. In broad terms, these policies include: "convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, [and] the moral blame attached to the wrongdoer. . . ." *Id*. As one court suggested, there are a number of variables to be considered in determining if a duty exists to another, such as:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Tarasoff v. Regents of University of California, 17 Cal.3d 425, 434, 131 Cal.Rptr. 14, 22, 551 P.2d 628 334, 342 (1976). *628

Perhaps among these the factor deemed most important is foreseeability. *See id*. However, "foreseeability" must not be confused with "duty." The fact that a result may be foreseeable does not itself impose a duty in negligence terms. This principle is apparent in the acceptance by most jurisdictions and by this Court of the general rule that there is no duty to control a third person's conduct so as to prevent personal harm to another, unless a "special relationship" exists either between the actor and the third person or between the actor and the person injured. *See Lamb v. Hopkins*, 303 Md. 236, 242-44, 492 A.2d 1297, 1300-01 (1985); *Restatement (Second) of Torts* § 315 (1965); *Scott v. Watson*, 278 Md. 160, 166, 359 A.2d 548, 552 (1976) ("a private person is under no special duty to protect another from criminal acts by a third person, in the absence of statutes, or of a special relationship.").

Thus, we recognize the general rule, as do most courts, that absent a "special relationship" between police and victim, liability for failure to protect an individual citizen against injury caused by another citizen does not lie against police officers. *See Davidson v. City of Westminster*, 32 Cal.3d 197, 649 P.2d 894, 185 Cal.Rptr. 252 (1982); *Trautman v. City of Stamford*, 32 Conn. Sup. 258, 350 A.2d 782 (1975); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983); *Shore v. Town of Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982); *Morris v. Musser*, 84 Pa.Cmwlth. 170, 478 A.2d 937 (1984); *Porter v. City of Urbana*, 88 Ill. App.3d 443, 43 Ill.Dec. 610, 410 N.E.2d 610 (1980); *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 667 P.2d 380 (1983); *Crosby v. Town of Bethlehem*, 90 A.D.2d 134, 457 N.Y.S.2d 618 (1982); *J B Development Co. v. King County*, 100 Wn.2d 299, 669 P.2d 468 (1983). Rather, the "duty" owed by the police by virtue of their positions as officers is a duty to protect the public, and the breach of that duty is most properly actionable by the public in the form of criminal prosecution or administrative disposition. *See, e.g., Morgan v. District of Columbia, supra*, 468 A.2d at 1311 ("duty to protect individuals from 629 criminal conduct *629 `is a public duty, for neglect of which the officer is amenable to the public, and punishable by indictment only'", citing *South v. Maryland*, 59 U.S. (18 How.) 396, 403, 15 L.Ed. 433 (1856)); *Shore v. Town of Stonington, supra*, 444 A.2d at 1381-82; *Chapman v. City of Philadelphia*, 290 Pa. Super. 281, 434 A.2d 753, 754 (1984) (duty of city to provide police protection is a public one); *see also* 2 *Cooley On Torts* § 300, at 385-86 (4th ed. 1932) ("if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public and not an individual injury, and must be redressed, if at all, in some form of public prosecution."). As the District of Columbia Court of Appeals stated in *Morgan v. District of Columbia, supra*, 468 A.2d at 1311:

> public officials who act and react in the milieu of criminal activity where every decision to deploy law enforcement personnel is fraught with uncertainty must have broad discretion to proceed without fear of civil liability in the "unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). As the Connecticut Supreme Court recognized the public interest is not served "by allowing a jury of lay (persons) with the benefit of 20/20 hindsight to second-guess the exercise of a police [officer]'s discretionary professional duty. Such discretion is no discretion at all." *Shore v. Town of Stonington*, [187 Conn. 147, 444 A.2d 1379, 1381 (1982)].
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> * * * * * *
>
> [I]f the police were held to a duty enforceable by each individual member of the public, then every complaint — whether real, imagined, or frivolous would raise the spectre of civil liability for failure to respond. Rather than exercise reasoned discretion and evaluate each particular allegation on its own merits the police may well be pressured to make hasty arrests solely to eliminate the threat of personal prosecution by the putative victim. *Porter v. City of Urbana, supra*, 88 Ill. App.3d at 445, 43 Ill.Dec. at 612, 410 N.E.2d at 612.
> 630 Such a result *630 historically has been viewed, and rightly so, as untenable, unworkable and unwise.

Furthermore, a policy which places a duty on a police officer to insure the safety of each member of the community would create an unnecessary burden on the judicial system. *See Morgan, supra*, 468 A.2d at 1311; *see also Porter v. City of Urbana, supra*, 43 Ill.Dec. at 612, 410 N.E.2d at 612; *Walters v. Hampton*, 14 Wn. App. 548, 554, 543 P.2d 648, 652 (1975). Under such circumstances, the slightest error of a policeman would give rise to a potential law suit.

Presently, the police officer is subject to disciplinary proceedings or criminal prosecution for any dereliction of duty, *see* Md. Code (1957, 1982 Repl. Vol.), Art. 27, § 727 to 27, § 734D, and these proceedings are better suited to review charges against the police officer for the breach of a duty which his job, rather than his responsibility as a member of the public, imposes upon him. Moreover, as stated by the District of Columbia Court of Appeals in *Morgan, supra*,

> while public prosecution does little to console those who suffer from the mistakes of police officials, on balance, the community is better served by a policy that both protects the exercise of law enforcement discretion and affords a means of review by those who, in supervisory roles, are best able to evaluate the conduct of their charges.

468 A.2d at 1312.

A proper plaintiff, however, is not without recourse. If he alleges sufficient facts to show that the defendant policeman created a "special relationship" with him[2] upon which he relied, he
631 may maintain his action in *631 negligence. *See Restatement (Second) of Torts* § 315(b). This "special duty rule," as it has been termed by the courts, is nothing more than a modified application of the principle that although generally there is no duty in negligence terms to act for the benefit of any particular person, when one does indeed act for the benefit of another, he must act in a reasonable manner. *See Scott v. Watson, supra*, 278 Md. at 170-71, 359 A.2d at 555; *Penna R.R. Co. v. Yingling*, 148 Md. 169, 129 A. 36 (1925). In order for a special relationship between police officer and victim to be found, it must be shown that the local government or the police officer affirmatively acted to protect the specific victim or a specific group of individuals like the victim,

thereby inducing the victim's specific reliance upon the police protection. *See Williams v. State*, 34 Cal.3d 18, 192 Cal.Rptr. 233, 664 P.2d 137, 140 (1983); *Morgan v. District of Columbia, supra*, 468 A.2d at 1313-15; *Florence v. Goldberg*, 44 N.Y.2d 189, 196-97, 404 N.Y.S.2d 583, 587, 375 N.E.2d 763, 767 (1978); *Morris v. Muser, supra*, 478 A.2d at 940; *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451, 458 (1983).

[2] We also note that under § 315(a) of the *Restatement (Second) of Torts* a duty would be imposed upon an officer to prevent physical harm caused by another to a third person where a special relationship exists between the police officer and the actor. Such special relationship have been found as to: parent and child, master and servant, landowner and licensee, those in charge of persons with known dangerous propensities, and those who have custody of others. *See Lamb v. Hopkins*, 303 Md. 236, 492 A.2d 1297 (1985); *Restatement (Second) of Torts* §§ 316 to 320. In order for such a relationship to be found between police and perpetrator, it must be alleged that there was some type of ongoing custodial relationship between the police officer and the actor. *Lamb v. Hopkins, supra; see Jackson v. Clements*, 146 Cal.App.3d 983, 194 Cal.Rptr. 553, 555 (1983). Such was not the case sub judice. As the court in *Bailey v. Town of Forks*, 38 Wn. App. 656, 688 P.2d 526, 531 (1984) noted:

> a police officer's mere contact with an intoxicated person hardly creates the same type of relationship as exists between a psychiatrist and his patient or a custodian and his inmate. . . . [S]uch a fleeting contact fails to rise to a "special relationship" which would justify imposing an affirmative duty of care to prevent an intoxicated person from causing harm to others.

Appellant argues that the circumstances of this case imposed a special duty upon Officer Freeberger and Anne Arundel County to protect appellant. We disagree. Appellant has alleged no 632 facts which show that Officer *632 Freeberger affirmatively acted specifically for appellant's benefit or that Freeberger's actions induced appellant's reliance upon him. Although it is true that Freeberger affirmatively acted in approaching the driver and advising him to cease driving that evening, these actions on Freeberger's part created no special relationship with appellant.

The majority of jurisdictions which have addressed the issue of special relationship under similar circumstances agree with us, that no special relationship exists between the officer and the person injured by the drunk driver. In *Jackson v. Clements*, 146 Cal.App.3d 983, 194 Cal.Rptr. 553 (1983), the defendant officers were called to investigate a party where alcohol was being served to minors. The officers knew that two of the minors had been drinking, that based on their observations, the minors were too intoxicated to drive and that the minors intended to drive themselves away from the party. Nevertheless, the officers failed to detain either driver. Both drivers were involved in accidents thereafter, and the injured parties brought suit against the officers. The *Jackson* court stated that the police officers owed no duty to the injured person unless a "special relationship" had been created. The court held that no special relationship between the victim (only one of the victims raised this issue) and the officers was created because "[t]he officers did not create the peril to [the victim], they did not voluntarily assume a duty to protect her, they made no promise or statement to induce her reliance, nor did they alter the risk to her that would have otherwise existed." 196 Cal.Rptr. at 556.

The Supreme Court of Florida addressed the issue of public duty and special relationship recently in *Everton v. Willard*, 468 So.2d 936 (1985). In *Everton*, a sheriff's deputy had stopped a driver for

a minor traffic violation. The deputy recognized that the driver had been drinking alcohol, but the deputy did not charge the driver with an intoxicated driving offense. Instead, the deputy
633 issued the *633 driver a citation for the traffic offense and permitted the driver to continue driving. Shortly thereafter, the driver was involved in a collision with the petitioners. The petitioners filed suit against the driver, the deputy, the sheriff's department and the county. The court stated:

> There has never been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted to a police officer to make an arrest and to enforce the law. This discretionary power is considered basic to the police power function of governmental entities and is recognized as critical to a law enforcement officer's ability to carry out his duties. . . . We recognize that, if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual.

Id. at 938. The court found no special relationship on the facts before it.

Similarly in *Crosby v. Town of Bethlehem*, 90 A.D.2d 134, 457 N.Y.S.2d 618 (1982), the court held that where an off-duty police officer observed and talked to an intoxicated guest of the officer's next door neighbor, and the officer later observed the guest drive away, neither the officer nor other officers alerted by the off-duty officer owed any special duty to a pedestrian struck and killed by the driver. *See also Evers v. Westerberg*, 38 A.D.2d 751, 329 N.Y.S.2d 615 (1972) (where officer who investigated accident scene failed to take drunk driver into custody, and drunk driver drove away and killed plaintiff's decedent, municipality owed no special duty to decedent).

In *Bailey v. Town of Forks*, 38 Wn. App. 656, 688 P.2d 526 (1984), a police officer responded to an altercation involving a driver whom the officer knew or should have known was drunk. Instead of detaining the driver, the officer ordered him to leave the area. The court discussed the "public duty" doctrine and declared that it would find a "special relationship" in any given case where:
634 *634

> (1) There is some form of privity between the police department and the victim that sets the victim apart from the general public and (2) there are explicit assurances of protection that give rise to reliance on the part of the victim.

688 P.2d at 529. The court noted that neither factor was present before it and held that there was no special relationship created between the police officer and the victim.

Appellant cites *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984) to support its position that a special relationship had been created here. In *Irwin*, town police officers stopped a driver who was apparently intoxicated and then allowed the driver to continue driving. The driver later negligently caused a head-on collision, killing several members of a family. The Supreme Judicial Court of Massachusetts, over a strong dissent, found a special relationship under the facts before it between the police officer and the victims. The court based its holding upon the foreseeability of the consequences of the police officer failing to detain the drunk driver as well as the fact that the state's statutes dealing with intoxicated persons "evidence a legislative intent to protect both intoxicated persons and other users of the highway." 467 N.E.2d at 1304.

Appellant urges us to follow *Irwin* and to hold that § 16-205.1 TRANSP.(b)(2) of the Transportation Article evinces the intent of our legislature to impose civil liability upon a police officer who fails to comply with the section. We do not see that the legislature intended § 16-205.1 TRANSP.

to provide a civil cause of action for third parties injured by drunk drivers, and we decline to so hold. The purpose of § 16-205.1 TRANSP.(b)(2) clearly is to set forth procedures for a police officer who has stopped or detained a driver whom he believes to be intoxicated. Our statutory provisions concerning drunk driving embody a
635 legislative intent "to *635 discourage persons from drinking and driving, to enable law enforcement officers to identify those who drink and drive, and to afford certain rights to drivers who disclaimed that they were driving while drunk." *Willis v. State, supra*, 302 Md. at 374, 488 A.2d at 177. Of course, the underlying concern of the statutes is the safety of the public. In order to impose a special relationship between police and victim, and thereby to create a duty in tort, however, a statute must "set forth mandatory acts clearly for the protection of a *particular class* of persons rather than the public as a whole." *Morgan, supra*, 468 A.2d at 1314 (*quoting Cracraft* [*v. City of St. Louis Park*], *supra*, 279 N.W.2d [801] at 807 [1979]; emphasis supplied); *see Florence v. Goldberg*, 44 N.Y.2d 189, 404 N.Y.S.2d 583, 375 N.E.2d 763 (1978) (where police regulations set forth procedures to be followed in supervision of crosswalks and police assigned guards to crosswalk, police voluntarily assumed "special relationship" with special class of persons — school children).

We believe that if the legislature intended to impose civil liability upon a policeman who failed to comply with § 16-205.1 TRANSP.(b)(2), it would have so stated. *Cf.* Md. Code (1957, 1984 Repl. Vol.), §§ 19-101 TRANSP. and 19-102 TRANSP. of the Transportation Article (imposing civil liability upon police officer for damages and injuries caused by officer directing driver of motor vehicle to assist him in enforcing law or commandeering vehicle used in roadblock). Because there was no special relationship created by Freeberger's acts or by statute, Officer Freeberger owed no duty in tort to appellant.

Accordingly, we shall affirm the judgment of the circuit court.

JUDGMENT AFFIRMED.

APPELLANT TO PAY THE COSTS.

636 *636

No. 83-1035
U.S.

Tennessee v. Garner

471 U.S. 1 (1985) · 105 S. Ct. 1694
Decided Mar 27, 1985

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

No. 83-1035.

Argued October 30, 1984 Decided March 27, 1985–

– Together with No. 83-1070, *Memphis Police Department et al.* v. *Garner et al.*, on certiorari to the same court.

A Tennessee statute provides that if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, "the officer may use all the necessary means to effect the arrest." Acting under the authority of this statute, a Memphis police officer shot and killed appellee-respondent Garner's son as, after being told to halt, the son fled over a fence at night in the backyard of a house he was suspected of burglarizing. The officer used deadly force despite being "reasonably sure" the suspect was unarmed and thinking that he was 17 or 18 years old and of slight build. The father subsequently brought an action in Federal District Court, seeking damages under 42 U.S.C. § 1983 for asserted violations of his son's constitutional rights. The District Court held that the statute and the officer's actions were constitutional. The Court of Appeals reversed.

Held: The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, nondangerous fleeing suspect; such force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Pp. 7-22. *2

(a) Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. To determine whether such a seizure is reasonable, the extent of the intrusion on the suspect's rights under that Amendment must be balanced against the governmental interests in effective law enforcement. This balancing process demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. Pp. 7-12.

(b) The Fourth Amendment, for purposes of this case, should not be construed in light of the common-law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon. Changes in the legal and technological context mean that that rule is distorted almost beyond recognition when literally applied. Whereas felonies were formerly capital crimes, few are now, or can be, and many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Also, the common-law rule developed at a time when weapons were rudimentary. And, in light of the varied rules adopted in the States indicating a long-term movement away from the common-law rule, particularly in the police departments themselves, that rule is a dubious indicium of the constitutionality of the Tennessee statute. There is no indication that holding a police practice such as that authorized by the statute unreasonable will severely hamper effective law enforcement. Pp. 12-20.

(c) While burglary is a serious crime, the officer in this case could not reasonably have believed that the suspect — young, slight, and unarmed — posed any threat. Nor does the fact that an unarmed suspect has broken into a dwelling at night automatically mean he is dangerous. Pp. 20-22.

710 F.2d 240, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 22.

Henry L. Klein argued the cause for petitioners in No. 83-1070. With him on the briefs were *Clifford D. Pierce, Jr., Charles V. Holmes*, and *Paul F. Goodman. W. J. Michael Cody*, Attorney General of Tennessee, argued the cause for appellant in No. 83-1035. With him on the briefs were *William M. Leech, Jr.*, former Attorney General, and *Jerry*
3 *L. Smith*, Assistant Attorney General. *3 *Steven L. Winter* argued the cause for appellee-respondent Garner. With him on the brief was *Walter L. Bailey, Jr.*[†]

† Briefs of *amici curiae* urging affirmance were filed for the Florida Chapter of the National Bar Association by *Deitra Micks;* and for the Police Foundation et al. by *William Josephson, Robert Kasanof, Philip Lacovara*, and *Margaret Bush Wilson*.

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 it is necessary to prevent the escape and the officer has probable cause to believe 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 toward 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 backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a 6-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
4 Garner was 17 or 18 years old and *4 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 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]

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. *Id.*, at 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 1, 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.

4 Garner had rummaged through one room in the house, in which, in the words of the owner, "[a]ll the stuff was out on the floors, all the drawers was pulled out, and stuff was scattered all over." *Id.*, at 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. *Id.*, at 34-35.

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee 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.
5 Code Ann. *5 § 40-7-108 (1982).[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. *Id.*, at 57.

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).

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 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. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), which had come down after the District Court's decision. The District Court was
6 *6 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 (1983). It reasoned that the killing of a fleeing suspect is a "seizure" under the Fourth Amendment,[6] 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 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
7 the community if left at large." *Ibid.*[7] *7

6 "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.

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 Coded § 3.07(2)(b) (Proposed Official Draft 1962).

The court also found that "[a]n analysis of the facts of this case under the Due Process Clause" required the same result, because the statute was not narrowly drawn to further a compelling state interest. 710 F.2d, at 246-247. 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.

The State of Tennessee, which had intervened to defend the statute, see 28 U.S.C. § 2403(b), appealed to this Court. The city filed a petition for certiorari. We noted probable jurisdiction in the appeal and granted the petition. 465 U.S. 1098 (1984).

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 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 and appellant 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
8 reasonableness of *8 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*, 462 U.S. 696, 703 (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, 500 (1983) (plurality opinion), surgery under general anesthesia to obtain evidence, *Winston* v. *Lee*, 470 U.S. 753 (1985), or detention for fingerprinting without probable cause, *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Hayes* v. *Florida*, 470 U.S. 811 (1985). 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 probable cause to believe that a code violation will be found, *Camara* v. *Municipal Court, supra*, and a blood test of a drunken-driving suspect, *Schmerber* v. *California*, 384 U.S. 757 (1966). In each of these
9 cases, the question was whether *9 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 these interests are ranged governmental interests in effective law enforcement.[8] It is argued 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
10 making arrests requires the resort to deadly *10 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.

[8] The dissent emphasizes that subsequent investigation cannot replace immediate apprehension. We recognize that this is so, see n. 13, *infra;* indeed, that is the reason why there is any dispute. If subsequent arrest were assured, no one would argue that use of deadly force was justified. Thus, we proceed on the assumption that subsequent arrest is not likely. Nonetheless, it should be remembered that failure to apprehend at the scene does not necessarily mean that the suspect will never be caught.

In lamenting the inadequacy of later investigation, the dissent relies on the report of the President's Commission on Law Enforcement and Administration of Justice. It is worth noting that, notwithstanding its awareness of this problem, the Commission itself proposed a policy for use of deadly force arguably even more stringent than the formulation we adopt today. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 189 (1967). The Commission proposed that deadly force be used only to apprehend "perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed." In addition, the officer would have "to know, as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissible." *Ibid*.

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,[9] the presently available evidence does not support this thesis.[10] The fact is that a majority of police departments
11 *11 in this country have forbidden the use of deadly force against nonviolent suspects. See *infra*, at 18-19. 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 use of such force is an essential attribute of the arrest power in all felony cases. See *Schumann* v. *McGinn*, 307 Minn. 446, 472, 240 N.W.2d 525, 540 (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.

[9] 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) (1977) 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 (1982). Even forceful resistance, though generally a separate offense, is classified as a misdemeanor. *E. g.*, Ill. Rev. Stat., ch. 38, ¶ 31-1 (1984); Mont. Code Ann. § 45-7-301 (1984); N. H. Rev. Stat. Ann. § 642:2 (Supp. 1983); Ore. Rev. Stat. § 162.315 (1983).

This lenient approach does avoid the anomaly 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, § 22-34.1 (Supp. 17, 1971), subjecting the offender to a maximum fine of $50, § 1-8 (1967). Thus, Garner's attempted escape subjected him to (a) a $50 fine, and (b) being shot.

10 See Sherman, Reducing Police Gun use, in Control in the Police Organization 98, 120-123 (M. Punch ed. 1983); Fyfe, Observations on Police Deadly Force, 27 Crime Delinquency 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 Police Foundation et al. as *Amici Curiae*.

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 that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, 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 has probable cause to believe 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. Thus, if the suspect threatens the officer with a weapon or 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
12 necessary to prevent escape, and if, where *12 feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

III A

It is insisted that the Fourth Amendment must be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant. As stated in Hale's posthumously published Pleas of the Crown:

> "[I]f 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 be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony." 2 M. Hale, Historia Placitorum Coronae 85 (1736).

See also 4 W. Blackstone, Commentaries *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*, 127 Iowa 534, 535,

103 N.W. 944, 945 (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). *13

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 in force in some States, 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.[11] "Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or *14 fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected." American Law Institute, Model Penal Code § 3.07, Comment 3, p. 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*, 307 Minn., at 458, 240 N.W.2d, at 533; *Holloway* v. *Moser, supra*, at 187, 136 S.E., at 376 (1927).

[11] 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: "The idea of felony 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, Commentaries *98. See also R. Perkins R. Boyce, Criminal Law 14-15 (3d ed. 1982); 2 Pollock Maitland 511.

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. 782 (1982); *Coker* v. *Georgia*, 433 U.S. 584 (1977). And while in earlier times "the gulf between the felonies and the minor offences was broad and deep," 2 Pollock Maitland 467, n. 3; *Carroll* v. *United States, supra*, at 158, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Wilgus, 22 Mich. L. Rev., at 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.[12]

12 White-collar crime, for example, poses a less significant physical threat than, say, drunken driving. See *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984); *id.*, at 755 (BLACKMUN, J., concurring). See Model Penal Code Comment, at 57.

There is an additional reason why 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
15 *15 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 150-151 (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).[13]

13 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 also reduced the "reasonableness" of the use of deadly force to prevent escape. *E. g.*, Sherman, Execution Without Trial: Police 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 Federal Bureau of Investigation crime index were cleared by arrest. Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 159 (1984). The clearance rate for burglary was 15%. *Ibid.*

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., at 187, 136 S.E., at 376; *State* v. *Smith*, 127 Iowa, at 535, 103 N.W., at 945. See generally Annot., 83 A. L. R.3d 238 (1978).

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.

C

In evaluating the reasonableness of police procedures under the Fourth Amendment, we have
16 also looked to prevailing *16 rules in individual jurisdictions. See, *e. g., United States* v. *Watson*, 423 U.S., at 421-422. The rules in the States are varied. See generally Comment, 18 Ga. L. Rev. 137, 140-144 (1983). Some 19 States have codified the common-law rule,[14] though in two of these the courts have significantly limited the statute.[15] Four States, though without a relevant statute, apparently retain the common-law rule.[16] Two States have adopted the Model Penal Code's
17 *17 provision verbatim.[17] Eighteen others allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving the use or threat of 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.[18] Louisiana and Vermont, though without statutes or case law on point, do forbid the use of deadly force to prevent any but violent felonies.[19] The remaining States either have no relevant statute or case law, or have
18 positions that are unclear.[20] *18

14 Ala. Code § 13A-3-27 (1982); Ark. Stat. Ann. § 41-510 (1977); Cal. Penal Code Ann. § 196 (West 1970); Conn. Gen. Stat. § 53a-22 (1972); Fla. Stat. § 776.05 (1983); Idaho Code § 19-610 (1979); Ind. Code § 35-41-3-3 (1982); Kan. Stat. Ann. § 21-3215 (1981); Miss. Code Ann. § 97-3-15(d) (Supp. 1984); Mo. Rev. Stat. § 563.046 (1979); Nev. Rev. Stat. § 200.140 (1983); N.M. Stat. Ann. § 30-2-6 (1984); Okla. Stat., Tit. 21, § 732 (1981); R. I. Gen. Laws § 12-7-9 (1981); S.D. Codified Laws §§ 22-16-32, 22-16-33 (1979); Tenn. Code Ann. § 40-7-108 (1982); Wash. Rev. Code § 9A.16.040(3) (1977). Oregon limits use of deadly force to violent felons, but also allows its use against any felon if "necessary." Ore. Rev. Stat. § 161.239 (1983). Wisconsin's statute is ambiguous, but should probably be added to this list. Wis. Stat. § 939.45(4) (1981-1982) (officer may use force necessary for "a reasonable accomplishment of a lawful arrest"). But see *Clark* v. *Ziedonis*, 368 F. Supp. 544 (ED Wis. 1973), aff'd on other grounds, 513 F.2d 79 (CA7 1975).

15 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 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, 245-250 (1974); *Long Beach Police Officers Assn.* v. *Long Beach*, 61 Cal.App.3d 364, 373-374, 132 Cal.Rptr. 348, 353-354 (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).

16 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, 59-66, 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. Co.*, 116 W. Va. 705, 711-712, 182 S.E. 880, 883-884 (1935).

17 Haw. Rev. Stat. § 703-307 (1976); Neb. Rev. Stat. § 28-1412 (1979). Massachusetts probably belongs in this category. Though it once rejected distinctions between felonies, *Uraneck* v. *Lima*, 359 Mass. 749, 750, 269 N.E.2d 670, 671 (1971), it has since adopted the Model Penal Code limitations with regard 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 Alaska Stat. Ann. § 11.81.370(a) (1983); Ariz. Rev. Stat. Ann. § 13-410 (1978); Colo. Rev. Stat. § 18-1-707 (1978); Del. Code Ann., Tit. 11, § 467 (1979) (felony involving physical force *and* a substantial risk that the suspect will cause death or serious bodily injury *or* will never be recaptured); Ga. Code § 16-3-21(a) (1984); Ill. Rev. Stat., ch. 38, ¶ 7-5 (1984); Iowa Code § 804.8 (1983) (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 (1984) (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 (1983) (commentary notes that deadly force may be used only "where the person to be arrested poses a threat to human life"); Minn. Stat. § 609.066 (1984); N. H. Rev. Stat. Ann. § 627:5(II) (Supp. 1983); N.J. Stat. Ann. § 2C-3-7 (West 1982); N.Y. Penal Law § 35.30 (McKinney Supp.

1984-1985); N.C. Gen. Stat. § 15A-401 (1983); N. D. Cent. Code § 12.1-05-07.2.d (1976); 18 Pa. Cons. Stat. § 508 (1982); Tex. Penal Code Ann. § 9.51(c) (1974); Utah Code Ann. § 76-2-404 (1978).

19 See La.Rev.Stat. Ann. § 14:20(2) (West 1974); Vt. Stat. Ann., Tit. 13, § 2305 (1974 and Supp. 1984). 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).

20 These are Maryland, Montana, South Carolina, and Wyoming. A Maryland appellate court has indicated, however, 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*, 51 Md. App. 586, 589, 596, 444 A.2d 483, 486, 489 (1982).

It cannot be said 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.[21] 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.

21 In adopting its current statute in 1979, for example, Alabama expressly chose the common-law rule over more restrictive provisions. Ala. Code § 13A-3-27, Commentary, pp. 67-63 (1982). Missouri likewise considered but rejected a proposal akin to the Model Penal Code rule. See *Mattis* v. *Schnarr*, 547 F.2d 1007, 1022 (CA8 1976) (Gibson, C. J., dissenting), vacated as moot *sub nom. Ashcroft* v. *Mattis*, 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.

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, J. Halleck, J. Lardner, G. Abrecht, 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 prevent 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) (italics deleted). A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed the
19 firing of a weapon only when a *19 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. 19 (CA8 1976), vacated as moot *sub nom. Ashcroft* v. *Mattis*, 431 U.S. 171 (1977). Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. K. 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 W. Geller K. Karales, Split-Second Decisions 33-42 (1981); Brief for 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 indicium of the constitutionality of the Tennessee statute now before us.

D

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. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today. *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 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." *Id.*, at 11. The submission is that the obvious state interests in apprehension are not sufficiently served to warrant the use of lethal weapons against all
20 fleeing felons. See *supra*, at 10-11, and n. 10. *20

Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. See Brief for Petitioners 25; Brief for Appellant 11. 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., at 20, 27. Nor is there any indication that in States that allow the use of deadly force only against dangerous suspects, see nn. 15, 17-19, *supra*, the standard has been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing of police officers' split-second decisions. 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 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 conclusion 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. See also App. 41, 56; Record 219. 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
21 deadly force." 710 F.2d, at 246. *21 We agree. 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 'nondangerous.'" 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 probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. *Post*, at 29, 32. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. See Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 1 (1984).[22] Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. See also *Solem* v. *Helm*, 463 U.S. 277, 296-297, and nn. 22-23 (1983). In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973-1982, only 3.8% of all burglaries involved violent crime. Bureau of Justice Statistics, 22 Household *22 Burglary 4 (1985).[23] See also T. Reppetto, Residential Crime 17, 105 (1974); Conklin Bittner, Burglary in a Suburb, 11 Criminology 208, 214 (1973).

[22] In a recent report, the Department of Corrections of the District of Columbia also noted that "there is nothing inherently dangerous or violent about the offense," which is a crime against property. D.C. Department of Corrections, Prisoner Screening Project 2 (1985).

[23] The dissent points out that three-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home assaults are committed by burglars. *Post*, at 26-27. These figures mean only that if one knows that a suspect committed a rape in the home, there is a good chance that the suspect is also a burglar. That has nothing to do with the question here, which is whether the fact that someone has committed a burglary indicates that he has committed, or might commit, a violent crime. The dissent also points out that this 3.8% adds up to 2.8 million violent crimes over a 10-year period, as if to imply that today's holding will let loose 2.8 million violent burglars. The relevant universe is, of course, far smaller. At issue is only that tiny fraction of cases where violence has taken place and an officer who has no other means of apprehending the suspect is unaware of its occurrence.

V

We wish to make clear what our holding means in the context of this case. The complaint has been dismissed as to all the individual defendants. The State is a party only by virtue of 28 U.S.C. § 2403(b) 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. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), 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 is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force 23 as a last resort to *23 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 8. 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 14, 16-17, 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 both to 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. in No. 81-5605 (CA6), p. 207. The officers found the residence had been forcibly
24 entered through a window and saw lights *24 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 6-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.

Appellee-respondent, the deceased's father, filed a 42 U.S.C. § 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. § 40-7-108 (1982). 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
25 S.W.2d 819 *25 (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 9, 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." *ante*, at 11. 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
26 Amendment requires a careful balancing *26 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*, 462 U.S. 696, 703 (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*, 462 U.S. 579, 585 (1983) (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 not only represent the illegal entry into a person's home, but also "pos[e] real risk of serious harm to others." *Solem* v. *Helm*, 463 U.S. 277, 315-316 (1983) (BURGER, C. J., dissenting). According to recent Department of Justice statistics, "[t]hree-
27 fifths of all rapes in the home, *27 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 1 (January 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 assertion that "burglaries only rarely involve physical violence." *Ante*, at 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, supra*, at 316 (BURGER, 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 President's Commission on Law Enforcement and Administration of Justice, Task Force Report: 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. in No. 81-5605 (CA6), p. 334. Although some law enforcement agencies may choose to assume the risk that a
28 criminal will remain at large, the *28 Tennessee statute reflects a legislative determination that the use of deadly force in prescribed circumstances will serve generally to protect the public. Such statutes 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 Court 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 10, 11. 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*, 468 U.S. 447, 464 (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"). 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
29 force by police officers. The *29 majority declares that "[t]he suspect's fundamental interest in his own life need not be elaborated upon." *Ante*, at 9. 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 policeman'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
30 indications had just been burglarized. The *30 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, appellee-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 245. 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. *Id.*, 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 (WD Tenn. 1971) (three-judge court). Finally, because
31 there is no indication that the use *31 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 (1979). Accordingly, I conclude that the District Court properly entered judgment against appellee-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 Court's opinion. The Court holds that deadly force may be used only if

the suspect "threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Ante*, at 11. The Court ignores the more general implications of its reasoning. 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. *Ibid*. 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*, 461 U.S. 95 (1983).

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. 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. The Court's opinion, despite its broad language, actually decides only
32 that the *32 shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action.

The Court's silence on critical factors in the decision to use deadly force simply invites second-guessing 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). 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. The Court also declines to outline the additional factors necessary to provide "probable cause" for believing that a suspect "poses a significant threat of death or serious physical injury," *ante*, at 3, when the officer has probable cause to arrest and the suspect refuses to obey an order to halt. But even if it were appropriate in this case to limit the use of deadly force to that ambiguous class of suspects, I believe the class should include nighttime residential burglars who resist arrest by attempting to flee the scene of the crime. We can 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 Court's opinion sweeps broadly to adopt an entirely new standard for the constitutionality of the use of deadly force to apprehend fleeing felons. Thus, the Court "lightly brushe[s] aside," *Payton* v. *New York, supra*, 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
33 right to flight for burglary suspects *33 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
34 escape into the night. I respectfully dissent. *34

[No. 198, October Term, 1956.]
Court of Appeals of Maryland

Guerriero v. State

213 Md. 545 (Md. 1957) · 132 A.2d 466
Decided Jun 6, 1957

[No. 198, October Term, 1956.]

Decided June 6, 1957.

CRIMINAL LAW — *Assault — Self-Defense as Justifying — Rules as to — Third Person Closely Related to or Associated with One Attacked*. To justify an assault on the basis of self-defense, the accused must have had reasonable grounds to believe, and have in fact believed, himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant. This belief must coincide with that which would have been entertained under the same circumstances by a person of average prudence. The same standards of belief and reasonableness apply in assault cases as in homicide cases. In Maryland it is for the trier of the facts to determine whether the accused was justified in meeting force with force. If justification is found to have existed, the force used must not have been "unreasonable and excessive", *i.e.,* it must not have been more force "than the exigency reasonably demanded". A third person, closely related to or associated with one attacked in such a manner that he could properly have defended himself by the use of force, has a right to go to the defense of the person attacked
546 and to use the same *546 degree and character of force that the one attacked could have used. p. 549

CRIMINAL LAW — *Assault Case — Non-Jury Trial — Defense of Brother as Justifying — Conviction Upheld*. In this non-jury case the trial court was not clearly erroneous in convicting defendant of assault and carrying a deadly weapon, where defendant claimed that an altercation developed between his brother (who was parking a truck) and a passing motorist (whose passage was blocked) and that necessity in the form of defense of his brother justified his action in getting a gun and firing a shot which ricocheted and hit the motorist. The trial court found that although the motorist was the aggressor in the first instance, (1) defendant's brother was not in actual or apparent danger of his life or serious bodily harm, that he did not feel that he was, and that defendant could not reasonably have believed that he was, and (2) in any event, the force used by defendant was excessive under the circumstances. The evidence was sufficient to sustain this finding. Defendant had fired in the motorist's direction before he reached the truck, according to the finding, and at a time when it was problematical whether or not he would have continued on towards the truck. It was pertinent that the brother made no attempt to leave the truck and go into his store, to drive off or roll up the windows, and what the brother seemingly believed concerning the motorist's conduct, and how that belief apparently affected him, was of vital importance in passing on defendant's legal right to react to the real or apparent danger to the brother in the manner he did. The evidence also supported the finding that the use of the pistol was unjustified to repel whatever danger there may have been to the brother. pp. 547-550

J.E.B.

Decided June 6, 1957.

Appeal from the Criminal Court of Baltimore (CARTER, J.).

John Guerriero was convicted in a non-jury case of assault and carrying a deadly weapon, and from the judgments entered thereon, he appeals.

547 Affirmed, with costs. *547

The cause was argued before COLLINS, HENDERSON, HAMMOND and PRESCOTT, JJ., and KINTNER, J., Associate Judge of the Second Judicial Circuit, specially assigned.

Harry Leeward Katz, with whom were *C. John Serio* and *John Carroll Weiss, Jr.,* on the brief, for the appellant.

Clayton A. Dietrich, Assistant Attorney General, with whom were *C. Ferdinand Sybert, Attorney General, J. Harold Grady, State's Attorney for Baltimore City,* and *James W. Murphy, Assistant State's Attorney,* on the brief, for the appellee.

HAMMOND, J., delivered the opinion of the Court.

Convicted by the court, sitting without a jury, of assault and carrying a deadly weapon, John Guerriero appeals from the judgment and sentence that followed, of one year suspended, and a fine.

The appellant claims here as he did below that necessity in the form of self-defense justified what he did. He, his brother Charles, and their father conduct a wholesale grocery business in Baltimore. One October evening Charles was parking the firm's truck on the one-way street in front of the store and, in backing, blocked the passage of the automobile of one Adams in which he was riding with his wife. After he had managed to pass, Adams stopped his car, got out and an altercation ensued that was verbal at first but soon developed physical aspects. The appellant's version of what occurred is that Adams had been drinking and used vile language to his brother, threw a wooden "horse" or trestle weighing fifteen or twenty pounds at the truck, and then with knife in hand walked "threateningly" towards the truck. Observing this, and fearing for his brother's safety, according to his testimony, appellant ran some fifteen feet to the front of the store, told his wife to call the police, went on into the store, picked up a pistol from under the counter, ran back out to where he had been standing, fired one shot into the air to frighten Adams and then a shot at the ground which ricocheted and went through Adams' ankle.

548 *548

The prosecution's story of the fracas is that as Adams was protesting the blocking of traffic by the truck, with one foot in his car, which was seventy feet beyond the truck, and one foot on the ground, someone threw a piece of wood three or four feet long at him, which he managed to catch and throw back, that he had a penknife in his pocket but never had it in his hand, and that the appellant fired the shots without necessity or justification when Adams, without any intention of physical violence towards Charles, was standing some distance from the truck.

The printed record reveals a hopeless conflict in the testimony as to the distances involved, that is, how far Adams was from the truck when he threw the trestle or piece of wood, if he did, and how far away he was from the truck, and from the appellant, when the shots were fired. The trial court could well have found from the testimony that Adams threw the wood in an alcoholic pique at the truck, the offending inanimate object, that in the time that it took appellant to run twenty or twenty-five feet to get the pistol and twenty or twenty-five feet back that Adams had not advanced at all towards the truck, or had not advanced appreciably, that if Adams had a knife it had been tossed into his car which had been driven away before the police finished their investigation, although it was there when they arrived, that Charles Guerriero showed no signs of being in fear, or of anticipating serious bodily harm since he remained in the truck, did not roll up the windows of the cab nor drive or attempt to drive away, as he easily could have done, but merely continued his efforts to back his truck up to the curb as he had been doing when he blocked Adams' passage. The testimony in the record

permitted the further finding that after Adams had been shot, he continued his verbal barrage at appellant and his brother but apparently made no effort to take physical action, and that when the police arrived the Guerriero brothers were just inside the door of the store and Adams and his wife were right at the door, where the verbal exchange was continuing, without real physical violence. The accusations and counter-accusations of the parties made it difficult for the police, when they arrived, to ascertain just what had happened.
549 *549

The law of Maryland as to self-defense is clear. To justify an assault on the basis of self-defense, the accused must have had reasonable grounds to believe, and have in fact believed, himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant. This belief must coincide with that which would have been entertained under the same circumstances by a person of average prudence. *Winner v. State,* 144 Md. 682; *Baltimore Transit Co. v. Faulkner,* 179 Md. 598, 600; *Zell v. Dunaway,* 115 Md. 1, 6; *Turpin v. State,* 55 Md. 462; *Jenkins v. State,* 80 Md. 72. The same standards of belief and reasonableness apply in assault cases as in homicide cases. *Winner v. State, supra; Stockham v. Malcolm,* 111 Md. 615, 622. This is in accord with the rule of the majority of the States, that is, for the accused successfully to invoke self-defense, he must have done what he did to repulse an apparent danger of death or great bodily harm. A number of cases so holding are collected in an annotation in 114 A.L.R. 634. In Maryland it is for the trier of the facts to determine whether the accused was justified in meeting force with force. If justification be found to have existed, the force used must not have been "unreasonable and excessive", that is, must not have been more force "than the exigency reasonably demanded." *Baltimore Transit Co. v. Faulkner, supra*. A third person, closely related to or associated with one attacked in such a manner that he could properly have defended himself by the use of force, has a right to go to the defense of the person attacked and to use the same degree and character of force that the one attacked could have used. The cases differ as to whether, and under what circumstances, one may so defend a brother in danger but we assume, without deciding, that he may, since the State concedes the point.

Here the trier of the facts found that Adams was the aggressor in the affair but that the appellant went to unnecessary extremes without sufficient justification. Since it was the province of the trial court, sitting without a jury, to make this determination, under the rules we must conclude that his finding was "clearly erroneous" if the verdict is to be set aside. We think that the
550 evidence was sufficient to sustain *550 the court's finding, first, that Charles was not in actual or apparent danger of his life or serious bodily harm, that he did not feel that he was and that John could not reasonably have believed that he was or thought he was; and, second, that in any event, the force used by John was excessive under the circumstances. The court found that appellant had fired in Adams' direction before he had reached the truck, and at a time when it was problematical whether or not he would have continued on towards the truck. On the first finding it is particularly pertinent that Charles made no attempt either to get out of the truck and go into the store or to drive off in the truck. We need not consider whether the oft quoted rule that the one attacked must have retreated to the first obstacle, such as a hedge, wall or ditch, is applicable here, because not driving off in the truck has significance, as does Charles' failure to roll up the windows of the cab or to get out of the truck on the pavement side and go into the store, as a circumstance to be considered with all others in determining whether the appellant went further on Charles' behalf than he was justified in doing. What Charles seemingly believed concerning Adams' conduct and how that belief apparently affected him is of vital importance in passing on the appellant's legal right

to react to real or apparent danger to Charles in the manner he did. *Josey v. United States* (D.C.), 135 F.2d 809; *Gant v. United States* (Mun. Ct. App. D.C.), 83 A.2d 439.

Certainly, too, the court properly could have decided from the evidence, as he did, that the use of the pistol was unjustified to repel whatever danger there may have been to Charles. What Judge Henderson well said for the Court in the murder case of *Nixon v. State,* 204 Md. 475, 479, as to the claim that the killing was manslaughter only, is applicable here: "But the provocation must be great and the violence extreme to justify the use of a deadly weapon, and the question is usually one for the jury. * * * As bearing on the question of justification to repel the assault by the use of the pistol, the character and extent of the assault are important considerations, as to which the testimony is conflicting."

551 *Judgments affirmed, with costs*. *551

No. 1440, September Term, 1997
Court of Special Appeals of Maryland

Redcross v. State

121 Md. App. 320 (Md. Ct. Spec. App. 1998) · 708 A.2d 1154
Decided May 4, 1998

No. 1440, September Term, 1997.

May 4, 1998.

Appeal from the Circuit Court, Baltimore City, Barbara Kerr Howe, J. *321

John L. Kopolow, Asst. Public Defender (Stephen E. Harris, Public Defender, on the brief), Baltimore, for appellant.

Celia Anderson Davis, Asst. Atty. Gen. (J. Joseph Curran, Atty. Gen., Baltimore, and Sandra A. O'Connor, State's Attorney for Baltimore County, Towson, on the brief), for appellee.

Argued before MOYLAN, THIEME and KENNEY, JJ.

*322

THIEME, Judge.

A jury in the Circuit Court for Baltimore City convicted William Redcross, Jr., of first degree murder and first degree assault. On appeal, he raises three issues for our consideration, all of which pertain to jury instructions:

> 1. Did the trial court give an erroneous instruction on the duty to retreat when the appellant asserted that he had acted in self-defense?
>
> 2. Was the trial court's failure to instruct the jury on heat of passion manslaughter plain error?
>
> 3. Did the trial court give an erroneous instruction in response to a jury note requesting a definition of "mitigating circumstances?"

A narrow, but very important, question regarding self-defense is raised in this case: Was it reversible error to fail to instruct *323 the jury on the appellant's awareness of an avenue of retreat? We agree with the appellant that the trial court's instruction regarding self-defense was deficient and will reverse the judgment of the trial court and remand for a new trial. We do not reach the subsequent issues raised by the appellant.

Factual Background

The incident in question appears largely to have been the result of the appellant's jealous rage at his former girlfriend, Charisse Clough. The appellant and Ms. Clough had been involved for some fourteen months before Ms. Clough initiated a break-up in late October of 1996. According to Ms. Clough, the appellant did not take well the news of her desire to end the relationship, and on 26 October 1996, when the appellant and Ms. Clough were at her house dividing property obtained during the relationship, Walter Spencer, the victim, telephoned Ms. Clough. While Ms. Clough was speaking to the victim, the appellant hollered to the victim to leave Ms. Clough alone and further threatened to kill him or "put him in Shock Trauma." After the telephone conversation ended, the appellant again threatened the victim as well as Ms. Clough.

The following evening, Ms. Clough went to Ziggy's Bar and Restaurant, accompanied by her sister, Sandy Wallett, Damien Smith, and the victim. Ms. Clough informed one of the bouncers at the bar that she had been having problems with the appellant, and she requested that the bouncer notify her if the appellant arrived at the bar. Some time later she was informed that the appellant was outside.[1] After approximately forty-five minutes, Ms. Clough and her friends left Ziggy's and encountered the appellant outside of the bar. It is at this point that the testimony at trial diverged, describing two very different versions of what ensued.

[1] The appellant had been refused entry into the bar by one of the bouncers.

Ms. Clough, her sister, Damien Smith, and bouncers Alexander Gaither and Ronnie Minter testified as to one version of events. According to
324 them, when the group of four exited the *324 bar they encountered the appellant, who was yelling at the group. The four then walked over to Ms. Wallett's vehicle and got inside. The appellant followed and, still yelling, kicked the car door and pulled out a knife, stating that he "was gonna send somebody to Shock Trauma tonight." After the appellant waived the knife at Ms. Clough and argued with her, Damien Smith exited the vehicle. He walked toward the appellant swinging a belt provided by Mr. Gaither in an apparent attempt to dislodge the knife from the appellant's grasp as the appellant simultaneously approached Damien Smith. The victim, who had also exited the vehicle, approached the appellant from behind while the confrontation between the appellant and Damien Smith was taking place. It was then that the appellant turned and fatally struck the victim in the chest with the knife. After the stabbing, Mr. Minter struck the appellant across the back with a bar stool as the appellant approached the owner of the bar with his knife. When the owner pulled out a gun, the appellant discarded the knife and fled.

The version of events relayed by the appellant at trial was quite different from that of the other witnesses. According to the appellant, when he first arrived at Ziggy's he noticed Ms. Wallett's vehicle. He admitted to carrying the knife with him as he exited his vehicle, but only because a previous phone conversation with the victim had placed him in fear for his life.[2] He became upset when he was denied entrance to the bar, but the appellant maintained that he did not want to cause any trouble. As the appellant began to walk away he heard Ms. Wallett call to him. At that point, he saw Ms. Clough, accompanied by the victim, and he told the victim that he and Ms. Clough were still seeing each other and that if the victim was the same man that he had previously spoken to on the telephone he did not want any trouble. When the appellant and Ms. Clough began to argue, Mr.
325 Gaither rushed *325 toward the appellant in a "threatening manner." The appellant became angry and walked over to the vehicle occupied by Ms. Clough and her companions, striking the window and kicking the door. The appellant observed Damien Smith exit the vehicle, and the appellant attempted to retreat toward his own vehicle but was stopped by a blow to the back. When he turned around he saw a man with a stool in his hand. The appellant also saw Damien Smith coming toward him and the victim behind him. Damien Smith then began to strike the appellant in the face with the belt. As the appellant further testified:

[2] According to the appellant, he had spoken to the victim on the telephone once before, and during that conversation the victim "made Appellant feel threatened and upset."

> And when it [the stool] hit me it like almost knocked me down. Like I said, I thought I'd ran into a car that was coming up through there or something, and I glanced over my shoulder and all I could see was this guy standing there and he had a stool in his hand.

> And then I, it was like it happened so fast. I glanced back at Mr. Smith and he was like walking towards me, you know, cause I wasn't two foot from the car, you know, we was just that close together.
>
> And then I glance over here. It was just like a rhythm thing, because I was standing right by the car. The car is here, and this, it, somebody coming around this side of the car, which I later learned was Mr. Spencer.
>
> * * *
>
> I could see Mr. Spencer and he had something black in his hand. I couldn't see what it was because of the light in there. . . . Next thing I know, I glance, I look and he's maybe like a foot from me. And I had my arm up like this, cause I was protecting my face from getting hit with the belt. And then next thing I know, just glancing. I just pivoted like, and went like that. And I seen, I seen Mr. Spencer turn sideways and back up.

The appellant further maintained that his turning around and stabbing the victim was "just like a reflex pivot" and his wielding the knife at the victim was "a defensive move just to try to back him off." *326

326

The jury obviously chose to believe the testimony of Ms. Clough and her companions over that of the appellant. After he was convicted of first degree murder of the victim and first degree assault of Damien Smith, the trial court sentenced the appellant to life imprisonment plus twenty-five years consecutive. This timely appeal followed.

Standard of Review

Maryland Rule 4-325(c) provides that a trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." When the trial court does so instruct the jury, it has a duty "to provide an accurate *and complete* statement of the law." *Gainer v. State,* 40 Md. App. 382, 392, 391 A.2d 856 (1978) (emphasis supplied). We, as a reviewing court, must determine whether "the requested instruction was a correct statement of the law; whether it was applicable under the facts of the case; and whether it was fairly covered in the instructions actually given." *Gunning v. State,* 347 Md. 332, 348, 701 A.2d 374 (1997) (quoting *Grandison v. State,* 341 Md. 175, 211, 670 A.2d 398 (1995), *cert. denied,* ___ U.S. ___,.117 S.Ct. 581, 136 L.Ed.2d 512 (1996)); *Ellison v. State,* 104 Md. App. 655, 660, 657 A.2d 402, *cert. denied,* 340 Md. 216, 665 A.2d 1058 (1995); *Sangster v. State,* 70 Md. App. 456, 473, 521 A.2d 811 (1987), *aff'd,* 312 Md. 560, 541 A.2d 637 (1988). In making that determination, we view the instructions as a whole and not in isolation or out of context. *Brooks v. State,* 104 Md. App. 203, 213, 655 A.2d 1311, *cert. denied,* 339 Md. 641, 664 A.2d 885 (1995).

Instruction on Self-Defense

At trial, the appellant maintained that he acted in self-defense when stabbing the victim. Thus, in its instructions to the jury, the trial court included the following:

> Self-defense, as I've just told you, is a complete defense and you would be required to find the Defendant not guilty if all of the following five factors are present. First, the Defendant was not the aggressor
327 or, although the Defendant *327 was the initial aggressor, he did not raise the fight to the deadly force level; second, that the Defendant actually believed that he was in immediate and imminent danger of death or serious bodily harm; third, that the Defendant's belief was reasonable; fourth, that the Defendant used no more force than was reasonably necessary to defend himself in light of the threatened or actual force and, fifth, *that the Defendant had a duty, when defending himself outside of his home, to retreat or avoid danger if the means to do so were within his power and consistent with his safety. However, where peril is so imminent that he cannot retreat safely, he has a right to stand his ground and defend himself.*

(Emphasis supplied.) The appellant takes issue only with the italicized portion of the above instruction. Specifically, he claims that this language in the instruction constituted reversible error because "it did not adequately instruct the jury on a crucial factor in this case, Appellant's awareness of an avenue of safe retreat." At trial, defense counsel excepted to the instruction given by the trial court and requested, citing the criminal pattern jury instructions,[3] that the jury specifically be instructed as to the appellant's awareness of an avenue of retreat. The trial court, although noting defense counsel's exception for the record, did not include the requested modification in its instructions to the jury.

[3] The Maryland Pattern Jury Instruction dealing with self-defense provides, in relevant part:

> In addition, before using deadly force, the defendant is required to make all reasonable effort to retreat. The defendant does not have to retreat if . . . the avenue of retreat was unknown to the defendant. . . .
>
> MPJI-Cr 5:07.

In order for an accused successfully to claim self-defense in the case of a homicide, the following elements must be present:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or
328 potential assailant; *328 (2) The accused must have in fact believed himself in this danger;
>
> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

State v. Faulkner, 301 Md. 482, 485-86, 483 A.2d 759 (1984). If all of the aforementioned elements are present, self-defense acts as a complete defense to the offense and the result is an acquittal. *Id*. at 485, 483 A.2d 759. If, on the other hand, "`the defendant honestly believed that the use of [deadly] force was necessary but . . . this subjective belief was unreasonable under the circumstances,' an imperfect self-defense would exist and the defendant would be guilty only of manslaughter." *Rajnic v. State,* 106 Md. App. 286, 292-93, 664 A.2d 432 (1995) (quoting *Dykes v. State,* 319 Md. 206, 213, 571 A.2d 1251 (1990)).

In cases in which self-defense is claimed, the accused normally has a duty to retreat. In other words, except in limited circumstances,[4] the accused must make all reasonable efforts to withdraw from the encounter before resorting to the use of deadly force. *Corbin v. State,* 94 Md. App. 21, 25, 614 A.2d 1329 (1992). One exception to that general rule is where the avenue

of retreat, though a possible means of escape, is unknown to the accused. It is that exception which
329 we now consider. *329

> [4] The accused does not have a duty to retreat, even at the deadly force level, in the following situations: if the accused is attacked in his or her own home, *Gainer,* 40 Md. App. at 388, 391 A.2d 856; if the avenue of retreat is unsafe, *Barton v. State,* 46 Md. App. 616, 420 A.2d 1009 (1980); if the nonaggressor victim is lawfully arresting the aggressor; or if the nonaggressor victim is the robbery victim of the aggressor. The most common exception to the retreat rule is the "castle doctrine": there is no duty to retreat if one is attacked in his or her own home. *See e.g. Gainer,* 40 Md. App. at 388, 391 A.2d 856. Because none of those exceptions is an issue in the case at bar, we need not discuss them further.

In the case at bar, the instruction relating to the appellant's duty to retreat was taken directly from our decision in *Lambert v. State,* 70 Md. App. 83, 519 A.2d 1340, *cert. denied,* 309 Md. 605, 525 A.2d 1075 (1987). In *Lambert* we commented that

> it is the duty of the defendant, when defending himself outside the home, to retreat or avoid the danger if the means to do so are within his power and consistent with his safety. Where, however, the peril is so imminent that he cannot retreat safely, he has a right to stand his ground and defend himself.

Id. at 92, 519 A.2d 1340. That language was subsequently reaffirmed in the recent Court of Appeals decision in *Burch v. State,* 346 Md. 253, 282-83, 696 A.2d 443, *cert. denied,* ___ U.S. ___, 118 S.Ct. 571, 139 L.Ed.2d 410 (1997).

The State maintains that "[t]he trial judge's definition of self-defense as a whole, and of the duty to retreat in particular, was an accurate statement of the long-established legal standard." We agree with the State in one limited regard: the instruction given by the trial court was an *accurate* statement of the law. In fact, as the trial court readily acknowledged and as previously discussed, the instruction was taken practically verbatim from our decision in *Lambert*. Our inquiry cannot end there, however. As *Gainer* makes clear, the trial court has a dual obligation with regard to jury instructions — it must not only instruct *accurately* but also *completely*. This is where we part ways with the State. The statement taken from *Lambert* was undisputably accurate. Whether the means to retreat are "within his power and consistent with his safety" is not the same thing as whether "the avenue of retreat is known." The former implies a physical ability to retreat; the latter denotes an awareness of an avenue of retreat, regardless of that physical ability. Thus, the question becomes: Did the appellant successfully generate the issue of whether an avenue of retreat was known?

It is well-established that, in order to be entitled to a requested instruction, an accused must produce
330 "some" evidence *330 regarding the awareness of an avenue of retreat. In *Dykes v. State,* 319 Md. 206, 571 A.2d 1251 (1990), the Court of Appeals clarified that standard:

> *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says — "some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense, the defendant has met his burden. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the defendant did not kill in self-defense.

Id. at 216-17, 571 A.2d 1251 (emphasis in original); *accord Corbin v. State,* 94 Md. App. at 26, 614 A.2d 1329. As previously mentioned, one component of self-defense is the duty to retreat. Thus, if the appellant produced "some" evidence that he had no duty to retreat because he was unaware of an avenue of safe retreat, he would be entitled to a jury instruction, and the State would thus be saddled with the burden of proving, beyond a reasonable doubt, that the appellant *did not* avail himself of a known avenue of safe retreat.

Contrary to the State's assertions, the appellant did produce during the trial *some* evidence that he was unaware of an avenue of safe retreat. On direct examination, the appellant explained at length that, while outside of Ziggy's after he and Ms. Clough had argued, he had been surrounded by Mr. Smith wielding a belt, Mr. Gaither with a stool in his hand, and Mr. Spencer with something in his hand that the appellant believed could have been a weapon. The appellant further testified that his turning around and stabbing the victim was only "a defensive move" to "back [the victim] off." He also described how he was "stopped dead in [his] 331 tracks" by a blow *331 to the back with the bar stool. Additionally, on cross-examination, the following transpired:

> **Q:** And, again, nothing was blocking or preventing you from walking away at that time; isn't that correct, sir? Yes or no?
>
> **A:** The gentleman was way behind me, ahead with the stool. The gentlemen was still with the stool. The gentlemen hit me with the stool, and he just backed up and he was waving it. It just happened in matter of — it just happened all together.
>
> * * *
>
> **Q:** So you after you were hit with the stool, at that time, did you call 911 and complain again you just been hit with the stool?
>
> **A:** I couldn't. *I mean, they had me blocked in*. The car was in front of me, one on each side of me, and the guy behind me with the stool and then I was arrested after that. (Emphasis supplied.)

The State attempted to rebut the appellant's position that he had no ability to retreat. On direct examination by the State, Ms. Clough testified as follows:

> **Q:** Now, prior to that time [when the appellant was swinging the knife], was there anything blocking Mr. Red-cross from just walking away?
>
> **A:** No.

Ms. Wallett offered similar testimony of the scene just prior to the stabbing:

> **Q:** Was there anyone standing directly to the right of Mr. Redcross?
>
> **A:** Not that I know of.
>
> **Q:** Was there anyone standing to the left of Mr. Redcross at that time?

A: No.

Q: Was there anyone standing behind Mr. Redcross at that time?

332 *332

A: No.

Q: When Mr. Redcross struck Mr. Smith, was there anyone to the left of him at that time?

A: There was no one around him.

Q: Left, right or back?

A: No, any of them.

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Q: Was there anything at any time between the confrontation Mr. Redcross to Mr. Smith or Mr. Spencer? Was there anything physically — a pole, a car or anything blocking Mr. Redcross at that time?

A: No, there wasn't.

Mr. Gaither and Mr. Smith made similar statements during the trial.

The foregoing testimony leaves little doubt that a factual issue existed as to (1) whether the appellant could have retreated before Mr. Spencer was fatally wounded, and (2) whether the appellant was aware of an avenue of retreat if one did, in fact, exist. Furthermore, the fact that the appellant was the sole witness to testify that he did not know of an avenue of retreat or that he could not feasibly have retreated from the confrontation is of no import. As this Court has held previously, the issue of self-defense can be generated solely from the uncorroborated statements of the accused. *Watkins v. State,* 79 Md. App. 136, 139, 555 A.2d 1087 (1989) ("Although the vast majority of the witnesses testified that it was the appellant who first picked up the knife and stabbed the victim, the appellant testified otherwise. . . . Since the appellant did testify as a competent witness, there was obviously *some evidence* before the jury which, *if believed,* generated the issue calling for the requested instruction.")(emphasis in original). Accordingly, although clearly the vast majority of the witnesses testified that the appellant had, in fact, an avenue of safe retreat available to him, the appellant testified to the contrary, and his uncorroborated testimony was enough to generate the issue. 333 *333

In sum, the appellant's position that he did not retreat because he was unaware of a safe avenue of retreat was "supported by the evidence." *Lambert v. State,* 70 Md. App. at 91, 519 A.2d 1340. It was not, however, "fairly covered by the instructions actually given," and the trial court thus erred in refusing to give the requested instruction.

JUDGMENTS REVERSED; COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.

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