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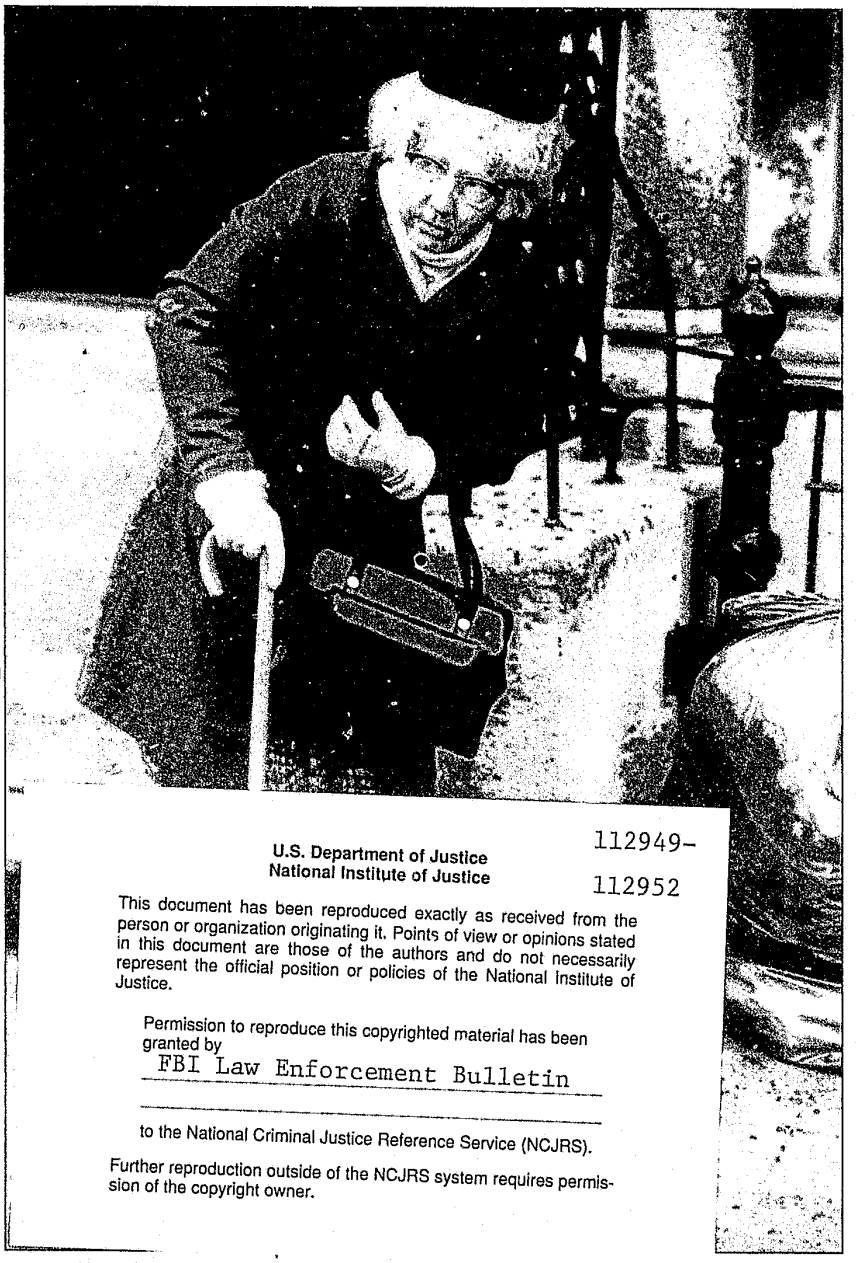

Violent Crime Against the Ag

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The Cover:
Ms. Patricia Moore (above), a noted gerontologist, appears on the cover in the disguise she wore during her travels throughout the United States and Canada. See article p. 11.

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Police Use of Deadly Force to Arrest

A Constitutional Standard

(Conclusion)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Part I of this article traced the American law governing the use of deadly force by police from its English Common Law origin to the recent Federal constitutional standard established by the Supreme Court in *Tennessee* v. *Garner*.[35] Part II will focus more precisely on the substance and scope of the new standard — as defined by the Supreme Court and relevant lower court decisions — and its practical implications for law enforcement officers and agencies.

APPLYING THE CONSTITUTIONAL STANDARD

In *Tennessee* v. *Garner*, the Supreme Court ruled that the use of deadly force by police to apprehend a person is a "seizure," subject to the reasonableness standard of the fourth amendment. Moreover, the Court held that it is constitutionally unreasonable to use such force "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." [36]

As a prerequisite to understanding *when* the use of deadly force is constitutionally permissible, it is necessary to understand *what* is meant by the expression "deadly force." Although the Court did not define the term anywhere in the *Garner* opinion, a workable definition — and one which seems consistent with the *Garner* case — is found in the Model Penal Code, which defines deadly force as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm." [37]

Perhaps the clearest illustration of deadly force is found in the *Garner* case itself, where a fleeing burglary suspect was shot to death. However, does it still constitute the *use* of deadly force if the suspect is only wounded?

Lower courts have generally followed the Model Penal Code definition and construed police action as use of

Special Agent Hall

deadly force even though the suspect is only injured, if the police used force that was either intended, or likely, to cause death or serious injury. A case in point is *Pruitt* v. *The City of Montgomery*,[38] in which an 18-year-old burglary suspect was shot by an officer who testified that he did not intend to kill him. The suspect did not die, but suffered permanent injury to one of his legs. The City of Montgomery contended that the shooting did not, as a matter of law, constitute the *use* of deadly force because the officer shot only to stop the suspect, not to kill him. The court, applying the Model Penal Code definition, noted that the city "does not argue, nor could it, that 'deadly force' occurs only when the victim actually dies. . . . [The officer], at the least, purposely fired his shots at Pruitt's legs, and in doing so used force capable of causing serious physical injury. We find such action a 'use of deadly force' in the constitutional sense, concluding that such finding is consistent with *Garner*." [39]

Notwithstanding the relatively broad language used by the Supreme Court in *Garner*, and by the appellate court in *Pruitt*, it is clear that every *use* of potentially deadly force does not fall within the *Garner* standard. The *Garner* dissent expressed concern on this point, suggesting that the majority opinion "unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk." As the Model Penal Code definition suggests, the risk of death or serious injury must be substantial.

Furthermore, the use of force must lead to a seizure of the person, because "[a]bsent apprehension of the suspect, there is no 'seizure' for Fourth Amendment purposes." [40] This view has been adopted by lower courts which have held, for example, that the firing of warning shots is not, standing alone, a *use* of deadly force, inasmuch as no seizure has occured.[41]

If the suspect is neither killed, injured, nor seized, it would strain the meaning of the fourth amendment to suggest that he was a victim of unconstitutional deadly force. Otherwise, a criminal suspect who is successful in his flight could conceivably sue the police for using potentially deadly force in their futile efforts to apprehend him.

The "Seizure" Requirement

The *Garner* case is not intended to — and indeed it does not — provide a general constitutional standard to govern the use of force in all contexts. By basing its holding on the fourth amendment, the Court explicitly limited its holding to "seizures" of persons. Thus, *Garner* is distinguishable from those cases where courts have found that the use of excessive force by police "shocks the conscience" of the court in violation of the Due Process Clause of the 5th and 14th amendments[42] or constitutes "cruel and unusual punishment" against prisoners in violation of the 8th amendment.[43] *Garner* addresses only those situations where an officer's use of force "restrains the freedom of a person to walk away."

As the Supreme Court clearly held in *Garner*, it is a "seizure" of a person when police shoot him dead. However, every attempt to apprehend a suspect which results in his death does not necessarily constitute a "seizure." An interesting case in point is *Cameron* v.

"Lower courts have . . . construed police action as use of deadly force even though the suspect is only injured, if the police used force that was either intended, or likely, to cause death or serious injury."

City of Pontiac.[44] Two police officers were dispatched to investigate a possible burglary. They were met at the scene by an elderly woman who ran from a house shouting "they broke in" and "they're trying to kill me." The officers ran to the back of the house where they saw two suspects run from the residence. The officers identified themselves and ordered the two men to halt. When the suspects ignored the command to halt, the officers each fired two shots in their direction, with the apparent intent to hit them. One of the suspects immediately stopped and surrendered, but the other, Cameron, continued to flee. Three more shots were fired in his direction as the pursuit continued. Eventually, when his escape was cut off by officers approaching from the opposite direction, Cameron scaled a fence and ran onto an expressway where he was struck and killed by a motor vehicle. A lawsuit was filed in Federal court by Cameron's mother against the officers and the City of Pontiac, alleging unjustifiable use of deadly force in attempting to apprehend her son. The suit was dismissed by the district court, and that decision was affirmed by the appellate court which concluded that Cameron was not seized within the meaning of the fourth amendment. The court stated:

> "The officers' show of authority by firing their weapons, while designed to apprehend Cameron, did not stop or in any way restrain him . . .. Cameron's freedom of movement was restrained only because he killed himself by electing to run onto a heavily traveled, high speed freeway." [45]

The appellate court then cited, at some length, the language of the district court, which is worth repeating:

> ". . . the manner in which [Cameron] met his death was completely independent of the application of deadly force by [the officers]; the moving vehicle by which Cameron was struck was a distinct, unrelated, unexpected, superseding, but effective medium. . . . It would be unfair, and possibly absurd, to permit a fleeing felon, uninjured by a pursuing police officer, to benefit from his unwise choice of an escape route." [46]

A somewhat different fact situation, but with a similar result, arose in *Galas* v. *McKee*.[47] In that case, a 13-year-old boy, who had taken his father's car without permission, was observed by Nashville police officers driving at estimated speeds of 65-70 miles per hour. Using lights and sirens, the officers gave chase. The pursuit, which reached speeds of 100 miles per hour at one point, ended when the young driver lost control and wrecked his car, sustaining serious and permanent injuries. A lawsuit was filed by the boy's parents against the officers and the city, alleging violations of the 4th, 8th, and 14th amendments. The district court dismissed the suit, holding that the suit did not constitute a seizure and that the conduct of the police did not involve the use of deadly force. The appellate court sustained the dismissal, holding that "the reasonableness of a seizure or method of seizure cannot be challenged under the Fourth Amendment unless there was a completed seizure (that is, a restraint on the individual's freedom to leave), accomplished by means of physical force or show of authority. . . . [The Court observed that] when plaintiff crashed he was tragically not free to walk away. This restraint on plaintiff's freedom to leave, however, was not accomplished by the show of authority but occurred as a result of plaintiff's decision to disregard it." [48]

A seizure may occur when police use a roadblock to halt a fleeing suspect. In *Stanulonis* v. *Marzec*,[49] the court declined to dismiss a lawsuit against one of three police officers who had been engaged in an attempt to stop a speeding motorist. That one officer allegedly parked his vehicle across the road to establish a roadblock, resulting in a collision and severe injuries to the motorcyclist. In declining to dismiss the suit against the one officer, the court held that if proven to be true, the officer's movement of the car to the center of the road when the plaintiff was so close as to create an immediate risk of a collision and significant injury could constitute "unreasonable force in an attempt to apprehend plaintiff." [50] It must be emphasized that the court did not hold that the officer had, in fact, used unreasonable force; only that the facts were sufficiently in dispute to preclude dismissal.

The *Stanulonis* case should not be read to mean that a roadblock is, per se, a fourth amendment seizure. In *Brower* v. *Inyo County*,[51] a roadblock was established to stop a suspected auto thief who was leading the police on a high-speed chase. The roadblock in this case, however, apparently gave the suspect sufficient opportunity to see it and stop. He failed to do so and was killed in the resulting crash. In the en-

suing lawsuit against the police, the appellate court held that no seizure of Bower by the police had occurred. The court explained:

> "Although Brower was stopped in the literal sense by his impact with the roadblock, he was not 'seized' by the police in the constitutional sense. Prior to his failure to stop voluntarily, his freedom of movement was never arrested or restrained. He had a number of opportunities to stop his automobile prior to the impact." [52]

These cases provide ample illustration of the importance of the "seizure" requirement in the *Garner* decision. They also give some meaning to that term as it is to be applied in the deadly force context. If there is no seizure, the fourth amendment does not apply. If there is a seizure, it must be reasonable.

The "Reasonableness" Requirement

Having described in *Garner* when deadly force is unreasonable under the Constitution — i.e., to prevent the escape of nondangerous suspects — the Supreme Court then provided some indications as to when the use of such force would be reasonable:

> "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." [53]

Clearly, the *Garner* decision does not establish a blanket prohibition against the use of deadly force to prevent escape. Rather, the decision requires that the justification for the use of such force be based upon the facts and circumstances which reasonably suggest to an officer that a person may be dangerous, instead of the mere categorization of the suspect as a felon. Furthermore, the Court offered some guidance in assessing those fact situations that would justify an officer's belief that a suspect is dangerous:

> ". . . 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 necessary to prevent escape, and if, where feasible, some warning has been given." [54]

Three elements may be gleaned from this statement:

1) The suspect threatens the officer with a weapon; or
2) The officer has probable cause to believe that the suspect has committed a crime involving infliction or threatened infliction of serious physical harm; and
3) The officer has given some warning, if feasible.

The first two elements are disjunctive, meaning that either of the two would satisfy the first part of the standard — i.e., reason to believe the suspect is dangerous. On the other hand, the third is conjunctive and would apply to the other two.

Each of these elements will now be examined in an effort to determine their meaning and importance in an officer's decision to use deadly force.

Threats With A Weapon

In *Garner*, the Supreme Court obviously attached great significance to a suspect threatening an officer or other person with a weapon. Without question, an officer can use deadly force in the immediate defense of his life or the lives of others. However, the Court also makes it clear that such action by a suspect can justify the use of deadly force *to prevent his escape*, since that individual presents an obvious danger to the community.

A case which illustrates this point is *Crawford* v. *Edmonson*.[55] Edmonson, a police officer, shot and killed two fleeing robbery suspects — brothers, 18 and 17 years old, respectively — when they declined to heed commands to "halt" and disregarded a warning shot. One of the suspects was visibly carrying a gun, and when he turned in the direction of a second officer, Edmonson fired at him twice with his shotgun. The pellets struck both suspects, mortally wounding them. A lawsuit, filed by the suspects' mother against the officers and city, resulted in a verdict for the defendants. The plaintiff filed a motion for a new trial, and when denied, she appealed the denial of her motion.

Affirming the ruling of the lower court, the appellate court discussed the factors that justified the shooting and supported the jury's verdict. First, the suspects had just committed a robbery, and the officers observed that at least one of them was armed; second, the officers yelled "halt" several times before firing any shots; third, a warning shot was fired which the suspects ignored; fourth, the officer who fired the

". . . the justification for the use of [deadly] force [must] be based upon the facts and circumstances which reasonably suggest to an officer that a person may be dangerous. . . ."

fatal shots testified that he was concerned for the safety of his brother officer toward whom the armed suspect was turning, as well as for the safety of some nearby youths who had gathered to watch the excitement.

An ironic twist to the case is that Edmonson was firing at the suspect who was known to be armed, but he struck the second, unarmed, suspect as well. The court reasoned that the unarmed suspect was not an innocent bystander, but rather a person who had just participated in an armed robbery. Although the fact "does not mean that Edmonson was entitled to disregard the possibility that [he] would be injured by the shots intended for [his brother], it does differentiate this case somewhat from the situation that would have been present if Edmonson's conduct had endangered the life of a completely innocent passerby." [56] In conclusion, the court noted that there was sufficient evidence that Edmonson did what a reasonably careful person would have done under the circumstances.

The court's reasoning is similar to that of the trial court in *Amato* v. *United States*,[57] a case where one bank robbery suspect sued the government for wounds received from FBI Agents in a shootout that was triggered by the second suspect's firing the first shot. The court likened the first shot to "the splitting of the atom," because within the next 33 seconds, 11 Agents fired their weapons 39 times, unleashing some 281 bullets and shotgun pellets that killed 1 suspect, wounded Amato 65 times, and put 141 holes in their automobile. Amato, hereinafter referred to as "plaintiff," alleged that he did not fire his weapon and was, in fact, endeavoring to surrender. The court observed:

> ". . . one acting in concert with others may have forfeited his right to effectuate such a surrender. . . . If [one's co-conspirator] has used deadly force against police officers, and they reasonably fear that he will continue to do so, the one inclined to surrender may be unable to dissolve his association where his partner, in close proximity, appears to have plans to carry on the battle. Having determined to enter into an illegal enterprise, the plaintiff may have deprived himself of the right and ability to disassociate himself from the venture under such circumstances. In other words, if the FBI had the right to fire at Mr. Vuono [Amato's partner], plaintiff cannot complain that he was hit because he was nearby, despite his unilateral desire to surrender." [58]

The justification for using deadly force under the prong of the *Garner* decision is not immediate self-defense, but preventing the escape of a person who has demonstrated his dangerous character by threatening the officer or others with a weapon. The distinction may sometimes be fine, but it is nevertheless important as the following case illustrates.

In *O'Neal* v. *DeKalb County*,[59] police officers shot and killed a hospital patient (O'Neal) who had just stabbed six people. The family of the patient sued the officers, their superiors, and the county government, alleging violations of numerous constitutional provisions, including the fourth amendment. Plaintiffs contended, *inter alia*, that O'Neil was not attacking the officers but only trying to get away at the time he was shot. The court did not attempt to resolve the factual dispute, but held that even if O'Neal's intent was to escape, rather than injuring the officers, the use of deadly force to stop him under the circumstances was not unconstitutional. The court noted that it was undisputed that "O'Neal stabbed several people before the police arrived, that the police ordered O'Neal to stop, surrender, and drop the knife thereby giving him several warnings, and that O'Neal moved quickly toward the defendant [officer] with a knife raised. . . ."[60]

These cases illustrate to some degree how the first element of the *Garner* standard has been interpreted by the courts. If a suspect "threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape. . . ."

It should be recalled that in *Garner*, the officer testified that he did not believe that Garner was armed, a point to which the Court obviously attached significance and noted that "the armed burglar would present a different situation. . . ." [61]

The logical inference to be drawn from the Court's reasoning is that a statistically nonviolent crime does not suggest that its perpetrator is dangerous, but additional factors — such as the presence of a weapon — can support the opposite conclusion.

In *Ryder* v. *City of Topeka*,[62] for example, the court upheld an officer's use of deadly force against a suspect fleeing from an arguably nondangerous crime. Police received a tip that a robbery was going to occur at a particular restaurant. The tip came from an employee of the restaurant who had been

involved in the original plan, but now wanted to back out. Although the robbery was planned as a consensual one — with the employee as the "insider" — the police were told that the suspects would be armed with knives and guns. On the appointed night, the officers staked out the restaurant and waited for the arrival of the "robbers," which was planned for 11:30 p.m. The evening's events were complicated by two members of the original group who decided to go into business for themselves and rob the restaurant before the main group arrived. After they were arrested and taken away, the officers settled back to await the arrival of the main group. At approximately 11:20 p.m., the employee-tipster received a telephone call announcing that the main group was on the way, and at 11:30, three people arrived. Two suspects went inside the restaurant and came out a short time later. The police then emerged from their places of concealment and attempted to place the three suspects under arrest. Notwithstanding commands to "halt," the three ran. Ryder, one of the three, was pursued by an officer who first fired a warning shot, and when that failed, fired a second round which brought the suspect's flight to a halt. The suspect was a 14-year-old girl, now a quadreplegic as a result of her wounds. A lawsuit was filed alleging, *inter alia*, unreasonable force in violation of the fourth amendment. A jury returned a verdict in favor of the officer who fired the shot and the municipality, and the planitiff appealed the trial court's denial of her motion for a new trial.

The appeals court began its analysis of the *Garner* issue by noting that there are basically two situations that would justify an officer's belief that a fleeing suspect poses a threat of serious physical harm:

> "(1) where the suspect has placed the officer in a dangerous, life threatening situation; or
>
> (2) where the suspect is fleeing from the commission of an inherently violent crime." [63]

The court explained that the first situation does not require that a suspect actually be armed, only that the officer have a reasonable belief that it is so. With respect to the second, the court explained:

> "This latter situation does not require that the officer's life actually be threatened by the suspect. Rather, the officer is allowed to infer that the suspect is inherently dangerous by the violent nature of the crime." [64]

Applying these principles to the specific facts of the case, the court held that the officer was aware of the "nonviolent, consensual nature of the crime" and could not suppose therefore that the offense was one which involved the "infliction or threatened infliction" of serious bodily harm. However, the court reasoned, even if the crime is not inherently dangerous so as to automatically justify the officer's use of deadly force in apprehending the suspect, there may nonetheless be other facts that would provide the officer with probable cause to believe that a fleeing suspect presents a danger to himself or the community. For example, the officers had previous information that the suspects would be armed with knives and guns, thus the officer could have reasonably believed that the suspect he was pursuing was both armed and prone to violence. Moreover, at the time the shot was fired which struck Ryder, she had her hands in her pockets and was about to run around a building into a darkened residential area. Deferring to the jury's verdict, the court concluded that it was reasonable to infer that "an ambush situation was created in which [the officer's] life was in danger." [65]

Probable Cause — Nature of Offense

The second element in the *Garner* decision that will justify the use of deadly force by the police to prevent escape of a suspect is when ". . . there is probable cause to believe that he [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm. . . ." [66] In *Garner*, the Court used this precise language to explain the meaning of its ruling that "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." [67] Thus, probable cause to believe that the suspect has committed a crime in which he inflicted or threatened infliction of serious physical injury logically supports the inference that the suspect poses a serious threat to the officers or others. This is generally the way in which the lower courts have been applying this standard.

The Supreme Court provided the first example of the application of the new standard when they held in *Garner* that probable cause to believe that a

"The authority to use deadly force within the constitutional framework is not a luxury . . . it is a responsibility."

person has committed a burglary does not provide the requisite probable cause to believe that the suspect poses a serious threat. Relying primarily on law enforcement classification of burglary as a "property" rather than a "violent" crime, the Court rejected the notion that it is so inherently dangerous as to justify automatically the use of deadly force against a suspect attempting to evade arrest.

A case in which the nature of the offense provided the justification for using deadly force to prevent escape is *Hill* v. *Jenkins*.[68] An off-duty police officer proceeded to a food store in response to a radio dispatch that a burglar alarm was sounding. Upon arrival at the scene, the officer heard a gunshot and saw three men, including Hill, coming from the store. At the time, Hill was apparently armed with two, perhaps three, handguns. Upon seeing a marked police car arriving, the three suspects fled and the officers gave chase. Hill was shot and captured, whereupon he filed suit against the police officers involved in his apprehension and the municipality alleging violation of his fourth amendment rights. After a recitation of the facts, the court granted summary judgment in favor of the defendant officers and city.[69]

In reaching this conclusion, the court noted that the facts were in dispute as to whether Hill ever actually threatened the officer with a gun — thus precluding summary judgment on the first element of the *Garner* standard — but held that the officer had probable cause to believe Hill had committed a crime involving the threat or infliction of serious bodily harm — the second element of the *Garner* standard. The following factors were cited by the court as supplying the necessary probable cause:

1) The radio dispatch announcing the robbery;

2) Upon arrival at the store, the officer heard a shot; and

3) The officer saw a gun in Hill's hand as he ran from the store.

In the opinion of the court, these facts were sufficient to provide Officer Jenkins with probable cause to believe that Hill had committed a crime involving the threat or infliction of serious bodily harm.

In *Ford* v. *Childers*,[70] the court upheld an officer's use of deadly force to apprehend a suspect even though the officer did not see a weapon. Officer Childers responded to a radio dispatch of a bank robbery in progress. Upon arrival at the bank, the officer was able to view the suspect (Ford) through a side window and observe that he was wearing a stocking mask and threatening the bank employees. Although the officer was unable to see a weapon in the suspect's outstretched hand because of an obstruction to his view, he did see several individuals inside the bank holding their hands above their heads. When the suspect left the bank, the officer yelled "Halt, police" at least twice, but Ford did not respond. The officer then fired two shots, striking and wounding Ford who was taken into custody without further resistance. The mask, gun, and money were found nearby.

Ford's resulting lawsuit, filed against the officer, the chief of police, and the city, alleged an unreasonable seizure in violation of the fourth amendment. In affirming a directed verdict in favor of the defendants, the court held that although Ford posed no immediate threat to Officer Childers, the facts supported a reasonable belief that Ford had committed a crime involving the threatened infliction of serious physical harm. In the words of the court:

> "Although the officer could not actually see the Plaintiff's gun, this fact becomes immaterial when coupled with the presumption arising from the position of the likely victims. Unquestionably, Officer Childers had probable cause to fire upon the fleeing felon. The threat Ford posed not only to those inside the bank but also to the entire community justified the use of deadly force." [71]

Some Warning — Where Feasible

The third element in the *Garner* standard, which provides a qualification to the first two, requires that some warning be given, where feasible, before an officer uses deadly force to prevent escape of a dangerous suspect. This requirement is consistent with the common law notion that deadly force should only be used when necessary. Obviously, if a suspect heeds a warning to "halt," there is no necessity to use deadly force. As one court stated it:

> ". . . even a criminal in the course of committing a crime has certain rights. If he surrenders upon command, does not resist, and makes no attempt to flee, he cannot and should not be physically

harmed, no matter how serious the crime just committed may be." [72]

In most of the cases described thus far to illustrate the different elements of the *Garner* decision, police officers gave some command or warning prior to firing a shot at a fleeing suspect. In many of those cases, the courts specifically commented on that practice, and in a few, it was actually an issue.

In *Acoff* v. *Abston*,[73] two officers were dispatched in early morning darkness to investigate a possible burglary in progress in a downtown store. One officer walked in the front, the other to the rear of the store. The officer in front saw a man standing beside the building. When the officer shined his light on the suspect and shouted, "Hey, police," the man ran. The officer shouted "halt" and fired a warning shot into the air. Meanwhile, the second officer at the rear of the building had heard his partner shout, followed by a shot and the sounds of running footsteps. He then saw the suspect and observed that he had some objects in his hands but was unable to identify them. Without shouting a warning, the officer fired his shotgun at the suspect, striking him and causing paralysis from the neck down. A lawsuit was filed against the officers and the municipality. The officer testified that he fired to apprehend the suspect because he believed he might have burglarized the store and shot the other officer, and because the suspect was running too fast to be apprehended any other way.

Because the facts of this case preceded the *Garner* decision, the court remanded the case for a determination of whether the officer who fired the shot should benefit from the good faith defense. The court particularly focused on the officer's failure to provide a warning before firing on the suspect and noted that prior to *Garner* that requirement was not a "clearly established" rule of law[74] by which the officer's conduct should be measured — the inference being that now it is clearly established.

Assuming, as seems reasonable, that *Garner* clearly establishes the "warning" requirement as a prerequisite to the use of deadly force, there is nothing in the Supreme Court's opinion to indicate a specific kind of warning is necessary to satisfy the rule. Some litigants have suggested that it requires more than just a command to halt and that it should include some specific warning of the action contemplated by the officer if the order to halt is not obeyed. The courts have not accepted that argument, however, it apparently being assumed that the command to halt carries with it the implication that failure to obey could have unpleasant consequences.

In *Hill* v. *Jenkins*,[75] for example, the plaintiff contended that the *Garner* decision requires an officer to give a specific warning before shooting, apparently suggesting that a shouted command to halt is insufficient. Agreeing that *Garner* requires *some* warning when feasible before deadly force is used, the court rejected the idea that it requires more than that which was given in this case where the officer shouted "stop" or "halt" at least twice before shooting.

It should not be overlooked that the Supreme Court in *Garner* conditioned the "warning" requirement on "feasibility," thus recognizing circumstances can arise which render a warning unnecessary. A case in point is *Trejo* v. *Wattles*,[76] where two plainclothes police officers observed a group of individuals engaged in a fight. The officers got out of their car to break up the fight when they noticed one of the individuals, Trejo, had a gun and was in the act of shooting at others. Without identifying themselves, the officers shot and killed him. Trejo's father filed a lawsuit against the officers, which the court dismissed. On the issue of the failure of the officers to identify themselves and give some warning before using deadly force, the court wrote:

> "[Trejo] was in the act of shooting at others when defendant detectives drew their weapons and opened fired on him. . . . Although the detectives did not identify themselves before fatally shooting [Trejo], such identification was not feasible because of the urgency and danger of the situation." [77]

Some Related Issues

The foregoing discussion examines the major components of the *Garner* decision, which must be satisfied if the use of deadly force by police to prevent the escape of a suspect is to be constitutionally reasonable. Occasionally, lawsuits challenging police use of deadly force raise other issues — not addressed by the *Garner* decision — but which deserve at least some brief comment. Those issues may be generally described as affecting the type or degree of force applied, once deadly

"If there is no seizure, the fourth amendment does not apply. If there is a seizure, it must be reasonable."

force is justified. For example, some lawsuits have challenged police use of certain calibers or types of ammunition, such as hollow point or magnum rounds. In fact, the issue of using hollow point ammunition was raised by the plaintiff in the *Garner* case, but was not decided by the lower courts, and therefore, was not considered by the Supreme Court. Others have questioned the reasonableness of firing multiple shots at a suspect. The theory appears to be that there are different degrees of deadly force, and that even in cases where the police are legally justified in using deadly force — whether in self-defense or to prevent the escape of a dangerous person — any actions on their part to increase the probability of success are "excessive" and therefore unconstitutional.

Fortunately, this theory has not been accepted by the courts, and there are no indications that it will be. Law enforcement experience has indicated that the human body is fully capable of absorbing the shock and damage of several gunshot wounds — even terminal ones — and yet continue to operate efficiently and lethally for an extended period of time. This observation is supported by the consensus of expert opinion in the area of forensic pathology and wound ballistics, which suggests that the only wounds which can reliably be counted upon to immediately incapacitate a person are those which disrupt the brain or upper spinal cord. Otherwise, wounds which may ultimately prove fatal may not suffice to cause the cessation of hostile action.[78]

In light of these realities, law enforcement officers faced with a need, and legal justification, to use deadly force seldom have the luxury of pausing after each shot to see if the criminal suspect has ceased the action that prompted the shot. Likewise, given the demonstrated uncertainty that any particular handgun round will effectively incapacitate a suspect, it seems unwise to suggest that police officers confronted with the need to do so should be condemned to try it with the least effective means.

In a recent case[79] involving a lawsuit against police officers for allegedly using unreasonable force, the plaintiffs focused on the fact that the suspect had already been shot twice, when one of the officers shot him a third time, causing his death. The court noted that even after being struck twice, the suspect still brandished a knife with which he had stabbed six people and that he was still moving — either to attack one of the officers or to escape. In either case, the court found the firing of the third shot justified by the facts and concluded:

> "Contrary to plaintiffs' contentions, the Constitution does not require police officers to use a minimum of violence when attempting to stop a suspect from using deadly force against police officers or others." [80]

A Question of Policy

As observed by the Supreme Court, at the time of the *Garner* decision, most law enforcement agencies had already developed departmental policies that were somewhat more restrictive than the common law "fleeing felon" rule. Whether such policies are within the constitutional boundaries now established by *Garner* is a matter which law enforcement administrators should carefully consider. Obviously, a policy that is more restrictive than the common law may nevertheless permit the unconstitutional use of deadly force. When such use of deadly force results from a policy or custom of a local governmental entity, that entity incurs a risk of liability under 42 U.S.C. §1983.[81]

Conversely, an overly restrictive policy can create increased risks to the lives of police officers and others in the community. Clearly, that was not the intent, and it should not be the result, of the Supreme Court's decision in the *Garner* case. A careful weighing of the issues, in light of the *Garner* decision and its progeny, is essential to striking a proper balance.

CONCLUSION

Tennessee v. *Garner* established a constitutional standard for police use of deadly force in apprehending criminal suspects. That standard, based on the fourth amendment proscription against "unreasonable seizures," demands that there be probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others and that deadly force is necessary to prevent his escape. If an officer uses deadly force to prevent the escape of a suspect, where the officer has no reason to believe the suspect is armed or otherwise dangerous, his action violates the fourth amendment. To the extent that a State statute or departmental policy permits the use of deadly force under these circumstances, they permit action which is unconstitutional.

All of the cases discussed herein — including the *Garner* case itself — are civil suits challenging the constitutionality of law enforcement actions which caused death or injury to criminal suspects. The fact that such suits can be filed in the courts of this country is a measure of the value we attach to the rights of the individual, regardless of the antisocial nature of his actions, and the fact that those actions caused, or contributed to, his plight.

The cases also demonstrate the latitude allowed under the Constitution to law enforcement officers engaged in the pursuit of dangerous suspects. A police officer, unlike the vast majority of other public servants in our society, has the legal authority to take a life. But also unlike his fellow servants, the police officer is daily asked to put his own life at risk in attempting to enforce our laws and protect our lives and property. The authority to use deadly force within the constitutional framework is not a luxury . . . it is a responsibility. One court stated the matter in this way:

> "There is a line over which a law enforcement officer may not cross. . . . However, one must also recognize the risks of this profession and the brief time allotted to evaluate such risk and respond to it. We must not permit or encourage the use of force unless it is reasonable and necessary. On the other hand, we should not condemn the use of force when it is essential to protect the law enforcement officer or the public." [82]

It is difficult to say it better. FBI

Footnotes

[35]471 U. S. 1 (1985).

[36]*Id.* at 4.

[37]Model Penal Code §3.11(2).

[38]771 F.2d 1475 (11th Cir. 1985).

[39]*Id.* at 1479, note 10. *See also, Ryder* v. *City of Topeka*, 814 F.2d 1412, footnote 11 (10th Cir. 1987).

[40]*Supra* note 35, at 22.

[41]*See, e.g., Garcia* v. *United States*, 826 F.2d 806 (9th Cir. 1987); and *Ryder* v. *City of Topeka*, 814 F.2d 1412 (10th Cir. 1987).

[42]*See, e.g., Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); (". . . quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.") at 1032. *See also, Gumz* v. *Morrissette*, 772 F.2d 1395 (7th Cir. 1985) (Under the Due Process Clause the "primary inquiry in addressing an excessive force claim . . . is whether the conduct of state officials was so egregious or intolerable as to shock the conscience of the court. . . .") at 1400; *cf. Benskin* v. *Addison Township*, 635 F.Supp. 1014 (N.D. Ill. 1986) (Allegations that police deliberately and maliciously crashed police car into motorcyclist to affect an illegal arrest would, if proven, establish a viable claim of excessive force under the Due Process Clause); *Wilson* v. *Beebe*, 770 F.2d 578 (6th Cir. 1985) *en banc.* (Officer was "reasonable" under fourth amendment in drawing weapon to effect arrest of suspect; subsequent *accidental* discharge of weapon and wounding of suspect does not rise to level of due process violation); and *Leber* v. *Smith*, 773 F.2d 101 (6th Cir. 1985).

[43]*See, e.g., Bell* v. *Wolfish*, 441 U.S. 520 (1979).

[44]813 F.2d 782 (6th Cir. 1987).

[45]*Id.* at 785.

[46]*Id.* at 786.

[47]801 F.2d 200 (6th Cir. 1986).

[48]*Id.* at 203; *see also, Jones* v. *Sherrill*, 827 F.2d 1102 (6th Cir. 1987) (Neither the suspect, involved in a high-speed chase with police, nor an innocent third party who was killed when struck by suspect's vehicle were "seized" within meaning of the fourth amendment.)

[49]649 F.Supp. 1536 (D. Conn. 1986).

[50]*Id.* at 1545; *see also, Jamieson By and Through Jamieson* v. *Shaw*, 772 F.2d 1205 (5th Cir. 1985).

[51]817 F.2d 540 (9th Cir. 1987).

[52]*Id.* at 546.

[53]*Supra* note 35, at 10.

[54]*Id.*

[55]764 F.2d 479 (7th Cir. 1985).

[56]*Id.* at 487.

[57]549 F.Supp. 863 (D. N.J. 1982).

[58]*Id.* at 869.

[59]667 F. Supp. 853 (N.D. Ga. 1987).

[60]*Id.* at 857.

[61]*Supra* note 35, at 16.

[62]814 F.2d 1412 (10th Cir. 1987).

[63]*Id.* at 1419.

[64]*Id*

[65]*Id.* at 1422. There is some question among the courts as to whether a suspect must *actually* be armed before an officer is justified in believing he poses a serious threat. For example, the 11th Circuit Court of Appeals has implied that such is the case. *See Pruitt* v. *City of Montgomery*, 771 F.2d 1475, n. 14 at 1483 (11th Cir. 1985) and *Acoff* v. *Abston*, 762 F.2d 1543 at 1547 (11th Cir. 1985) ("Probable cause [to believe suspect poses a threat] exists where the suspect *actually threatens* the officer with a weapon. . . ." (emphasis added). But, the 10th Circuit Court of Appeals disagrees. *See Ryder* v. *City of Topeka*, 814 F.2d 1412 at 1419 (10th Cir. 1987) ("There might be numerous situations that would justify a police officer's belief that a suspect was armed and that he posed an immediate threat to the officer, even though the suspect was not in fact armed.") The 10th circuit view is more consistent with the language in the *Garner* decision, which establishes "probable cause" rather than *certainty* as the standard for assessing the existence of a threat. It seems fair to say that a suspect who actually threatens an officer with a weapon has gone well beyond the *probable cause* stage.

[66]*Supra* note 35.

[67]*Id.*

[68]620 F.Supp. 272 (N.D. Ill. 1985).

[69]Under the Federal Rules of Civil Procedure, Rule 56(c), summary judgment may be entered in favor of a party in a lawsuit if there is no genuine issue as to any material fact and if the moving party is entitled to a judgment as a matter of law.

[70]650 F. Supp. 110 (C.D. Ill. 1986).

[71]*Id.* at 113.

[72]*Amato* v. *United States*, 549 F.Supp. 863, at 869 (D. N.J. 1982).

[73]762 F.2d 1543 (11th Cir. 1985).

[74]In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that government employees, sued for alleged constitutional violations, are shielded from liability if their conduct does not violate "clearly established" law of which a reasonable person should have known, and that in such instances, summary judgment should be granted before pretrial discovery occurs. In *Anderson* v. *Creighton*, 97 L.Ed.2d 523 (1987), the Court extended this protection to circumstances where government employees reasonably believe their conduct is within the bounds of clearly established law in light of the facts known at the time of the action. For example, an officer, who knows that under clearly established *law* deadly force may only be used to prevent the escape of a dangerous felon, may reasonably believe the *facts* confronting him justify the application of that rule.

[75]*Supra* note 70.

[76]654 F.Supp. 1143 (D. Colo. 1987).

[77]*Id.* at 1147.

[78]*E.g., see*, V.J.M. DiMaio, *Gunshot Wounds* (New York, NY: Elsevier Science Publishing Co., 1987); M. L. Fackler, Director, Wound Ballistics Laboratory, Letterman Army Institute of Research; and J. A. Malinowski, "The Wound Profile: A Visual Method for Quantifying Gunshot Wound Components," *Journal of Trauma*, vol. 25, 1985, pp. 522-529.

[79]*O'Neal* v. *DeKalb County*, 667 F.Supp. 853 (N.D. Ga. 1987).

[80]*Id.* at 858.

[81]*Supra* notes 11, 12, and 13.

[82]*Supra* note 72, at 871.

WANTED BY THE FBI

Any person having information which might assist in locating these fugitives is requested to notify immediately the Director of the Federal Bureau of Investigation, U.S. Department of Justice, Washington, DC 20535, or the Special Agent in Charge of the nearest FBI field office, the telephone number of which appears on the first page of most local directories.

Because of the time factor in printing the FBI Law Enforcement Bulletin, *there is the possibility that these fugitives have already been apprehended. The nearest office of the FBI will have current information on the fugitives' status.*

John Emil List.

W; born 9-17-25; Bay City, MI; 6'; 180 lbs; med bld; black, graying hair; brn eyes; fair comp; occ-accountant, bank vice-president, comptroller, insurance salesman; remarks: Reportedly a neat dresser; scars and marks: Mastoidectomy scar behind right ear, herniotomy scars both sides of abdomen.
Wanted by FBI for INTERSTATE FLIGHT-MURDER

NCIC Classification:

23DI1108141762130914

Fingerprint Classification:

23 L 17 W I O I 14 Ref: 17
L 1 R OO I 3

I.O. 4480

Social Security Number Used: 365-24-4674

FBI No. 215 305 J4

Caution

List, who is charged in New Jersey with multiple murders involving members of his family, may be armed and should be considered very dangerous.

Right index fingerprint

Photographs taken 1974

Stephen Allen Maser,

also known as "Sam," "Steve."
W; born 7-20-49; Raleigh, NC; 5'10"; 165 to 175 lbs; med bld; sandy blond hair; blue eyes; med comp; occ-automobile salesman, operator boutique store; scars and marks: Surgical scar across abdomen from side to side.
Wanted by FBI for BANK ROBBERY; ESCAPED FEDERAL PRISONER

NCIC Classification:

210506141117CO071212

Fingerprint Classification:

21 M 1 U I I O 11
L 3 W O I I

I.O. 4669

Social Security Numbers Used: 246-78-8485; 267-82-4929

FBI No. 990 344 G

Caution

Maser, who is being sought for escape, shot at a bank manager and police during commission of a bank robbery. He has been convicted of tampering with an auto and larceny and should be considered armed, dangerous, and an escape risk.

Left middle fingerprint

Photographs taken 1971 and 1968

Ronald Stanley Bridgeforth,

also known as Benjamin Matthew Bryant.
B; born 8-23-44; Berkeley, CA; 6'; 185 to 205 lbs; hvy bld; blk hair; brn eyes; med comp; occ-teacher; scars and marks: 3-inch scar left wrist and forearm, scar right heel.
Wanted by FBI for INTERSTATE FLIGHT-ASSAULT ON A POLICE OFFICER

NCIC Classification:

PMDM08POCM080611CI11

Fingerprint Classification:

8 M 25 W M I O Ref: 29
S 22 U I O I 11 22

I.O. 4515

Social Security Numbers Used: 568-92-3698; 547-64-2939

FBI No. 568 064 G

Caution

Bridgeforth allegedly engaged police officers in gun battle. He should be considered armed and dangerous.

Left ring fingerprint