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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1035 & 83-1070

TITLE TENNESSEE, Appellant v. CLEAMTEE GARNER, ETC., ET AL.; and MEMPHIS POLICE DEPARTMENT, ET AL., Petitioners v. CLEAMTEE GARNER, ETC., ET AL.

PLACE Washington, D. C.

DATE October 30, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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TENNESSEE, :

Appellant, :

v. : No. 83-1035

CLEAMTEE GARNER, ETC., ET AL., :

and :

MEMPHIS POLICE DEPARTMENT, ET :

AI., :

Petitioners, :

v. : No. 83-1070

CLEAMTEE GARNER, ETC., ET AL. :

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Washington, D.C.

Tuesday, October 30, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 o'clock a.m.

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APPEARANCES:

HENRY I. KLEIN, ESQ., Memphis, Tennessee; on behalf of petitioners in 83-1070.

W.J. MICHAEL CODY, ESQ., Attorney General of Tennessee; Nashville, Tennessee; on behalf of appellants in 83-1035.

STEVEN L. WINTER, ESQ., New York, New York; on behalf of appellees in 83-1035 and respondents in 83-1070.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Tennessee against Garner and the consolidated case.

Mr. Klein, you may proceed whenever you are ready.

ORAL ARGUMENT OF HENRY L. KLEIN, ESQ.,

ON BEHALF OF PETITIONERS IN 83-1070

MR. KLEIN: Mr. Chief Justice, and may it please the Court, there are two issues in this case. The first deals with the constitutionality of a state statute with regard to the use by a police officer of all necessary means to effect an arrest.

The second is whether the municipality's use of deadly force to apprehend a fleeing burglary suspect after exhausting all other reasonable means is constitutionally permissible.

The reason the city asked for certiorari in this case is that it has a substantial public interest in being able to apprehend persons fleeing from serious crimes such as burglary in the first degree.

The facts in this case are such that they lend themselves to show that the officer involved had probable cause to believe that a felony had been committed.

On the evening of October 3rd, 1974, the police received a call to come to the scene of what was an apparent breaking and entering. The police arrived on the scene. They were advised by the next-door neighbor that "They are breaking in next door."

The officer then proceeds to survey the situation and then to move into the area where the reported burglary was taking place.

The officer goes down the side of the house, and as doing so, notices as he comes to the rear of the house that there was a window that had been broken, and a garbage can beneath the window, which appeared to him that someone had used the garbage can get up to the window, had broken the window, and then had gained admittance to the home.

This all took place at approximately 11:00 o'clock in the evening. The officer then, as he reaches the back of the house, sees an individual exiting from the house and running toward the back of the yard. There was a lot of clutter in the yard at the time. There was a small mesh fence that was an obstacle to the police officer as he started to move into the back yard.

There was a chain link fence in the back of the yard which was approximately six feet tall. The suspect, after exiting the back door, immediately

proceeds to the fence, and then pauses at the fence in a stooped position.

The officer gives the command to halt, police. At this point, the individual turns and looks in the direction of the police officer, and does remain in this stooped position momentarily, and then as the officer is about to make his advance forward to attempt to apprehend the individual, he then begins to jump and vault over the fence, at which time the officer fires, and unfortunately it results in the death of the suspect.

Now, these basically are the facts that are involved, and as I pointed out earlier, there can be little or any question that at the time the officer arrived on the scene, there was probable cause if not more to believe that a burglary in the first degree had been committed.

Burglary in the first degree under Tennessee law is the breaking and entering in a dwelling place in the nighttime with intent to commit a felony, and the Tennessee legislature has determined that burglary is a serious crime, which, if nothing more, is evidenced by the fact that it carries of not less than five, no more than 15 years.

The officer also made the judgment or

determination, as he so testified, that he could not apprehend this individual by any other means. Now, under Tennessee law, it is clear that an officer must use all means available to apprehend a fleeing felon, and he is only justified in using deadly force as a last resort.

This officer testified that because of the conditions out at the place, the fact that it was dark, he was unfamiliar with the neighborhood, and that beyond the fence there was growth -- I think he described it Johnson grass -- which was rather tall, that he knew that once the individual got beyond the fence, there was no chance for him to apprehend, and that's the reason that he used the deadly force to attempt to apprehend.

Now, in the court proceedings below, the District Court found in favor of all defendants. Named in the original action was the City of Memphis, the individual officer who was on the scene, and two supervisory personnel.

The case was appealed to the Sixth Circuit Court of Appeals, and was sent back because in the meantime this Court had decided the Manell case, and that the Court of Appeals decided that the case should be remanded in light of Manell to further consider whether there was any liability on the part of the

city.

The judgment as to the individual defendants was affirmed by the Court of Appeals. The case was reconsidered by the District Judge, and again the District Judge found that the city was not liable, found in favor of the city, and the case went up again.

The second time the court declared that the Tennessee statute allowing the use of deadly force was unconstitutional. The reasons given were that it did not put sufficient limits on the use of deadly force, it was too disproportionate, and it did not make distinctions on the magnitude of the offenses.

QUESTION: Mr. Klein --

MR. KLEIN: Yes, sir.

QUESTION: -- did the Court of Appeals say that the statute was unconstitutional across the board or on its face, or did it just say it couldn't constitute a defense in this action?

MR. KLEIN: It said it is unconstitutional across the board.

QUESTION: Did it intimate that there was some First Amendment problem involved here?

MR. KLEIN: No, sir, there was no indication. The Fourth and Fourteenth Amendment were the two bases that the court used for declaring it unconstitutional.

The court said that the use of deadly force could only be implemented if a suspect had committed a violent crime, if there was probable cause to believe the suspect was armed or that he would endanger the physical safety of others if not captured.

The standard which the Court of Appeals used was based upon the Model Penal Code. It is the city's position that the Model Penal Code was implemented to be used as a guide for legislatures, and that really the purpose of the Model Penal Code should be as a guide to legislatures in the event they see fit to enact legislation to cover situations such as this.

The reasons the city disagreed with the Sixth Circuit opinion are, first, the city feels strongly that the court erred in concluding that this was not a serious crime. Again, I emphasize and reiterate, the crime involved was burglary in the first degree. And the court doesn't really deal with why it considered the crime to be nonviolent. They did label it as a so-called property crime.

Also, the city feels that the standard which was imposed, which was that which is based upon the Model Penal Code, is an impediment to apprehension. Because of the standards placed under the Model Penal Code, it puts an undue burden on law enforcement in

situations such as this in attempting to apprehend fleeing felons.

Because of the standards set out in the Model Penal Code, it requires a police officer to make an on the spot constitutional analysis and still react to the exigencies of an emergency situation.

Because of these standards set out by the Sixth Circuit, it is difficult to determine how an officer will ever know reasonably or otherwise if the felon is allowed to escape whether he will ever again be free to commit another crime if not apprehended.

QUESTION: Mr. Klein, may I ask you a question?

MR. KLEIN: Yes, sir.

QUESTION: Supposing there had been another officer on the other side of the fence unbeknownst to the man who felt it necessary to shoot the fleeing felon, and he had later been -- say he had missed and he had actually been apprehended. What penalty could the state have imposed on him under your code for the crime of not submitting to the officer's demand?

MR. KLEIN: Not submitting to the arrest?

QUESTION: Yes, fleeing. What sort of crime is it?

MR. KLEIN: Your Honor, I might add factually

there was another officer on the scene.

QUESTION: But you understand my hypothetical. Just say instead of shooting him they had been able to catch him. He has committed a crime, surely, of escaping in defiance of the officer's command to halt. I am just wondering, what is the penalty under Tennessee law for that crime?

MR. KLEIN: Well, of course, he is still in the process of perpetrating burglary in the first degree.

QUESTION: I understand. He is subject to penalty for that. But I assume he has committed a separate offense when he flees.

MR. KLEIN: In refusing to obey the officer's command to halt.

QUESTION: Yes.

MR. KLEIN: If Your Honor please, that is -- there is a city ordinance which covers that, but it is a very minor offense, and it really would be a city violation. It is not a state violation.

QUESTION: It is not a state violation?

MR. KLEIN: No, sir, it is not a state violation. Of course --

QUESTION: So the only deterrent that the state imposes for that offense really is to shoot the

man at the time.

MR. KLEIN: Well, if they cannot apprehend him by any other means.

QUESTION: That's right. But if he can apprehend him, basically you are telling me there really is no legislative deterrent other than the threat that if you don't get away you might get shot.

MR. KLEIN: That's correct, sir.

QUESTION: What is the penalty for first degree burglary?

MR. KLEIN: Not less than five nor more than 15 years. And if a weapon is involved, it becomes not less than ten nor more than 14 -- or 15 years.

QUESTION: No more than 40?

MR. KLEIN: Fifteen, sir.

QUESTION: When a weapon is involved?

MR. KLEIN: Where a weapon is involved, not less than ten nor more than 15 years, if a weapon is involved, so the Tennessee statute makes it even a more serious crime if a weapon is involved.

The city further contends that what the Sixth Circuit has done is imposed a standard which should be left to the legislature. It is a standard of morals, a standard of public policy, and it is the position of the city that this is something that should be left to the

legislatures.

What the court did was, under the guise of constitutional -- is imposing upon the various states which would be involved its own standards. Furthermore, the level of crime which would justify use of force should also be left to the legislature.

Tennessee has determined that burglary is a serious crime, and therefore it makes it all the more important that in a situation such as this, that the right to apprehend is compelling, and is certainly a compelling state interest.

The legislature has an interest in protecting its citizens against burglaries. Of course, we confine ourselves to the facts of this particular case, and when we talk in terms of compelling state interest as opposed to the rights of the individual, the city takes the position that the individual burglar has no constitutional right to commit burglary and escape the consequences, and he has no constitutional right to flee from burglary when told to stop.

And in this particular situation, when the police officer arrived on the scene, all the individual had to do when confronted by the officer and told to stop was to do so, and that would have been an end to the situation.

So, really, there are two things that are involved from the standpoint of the individual. He has put himself in the position by committing the burglary, which he takes to do himself, and certainly assumes a certain risk of what might happen when he does put himself in that position, and, then secondly, when told to stop, all he has to do is stop, and the matter is at an end.

And all the constitutional rights that he contends that were deprived of him come into play. He gets a fair trial. He gets an opportunity to be heard. But in this particular case the individual chose to perpetrate the crime and chose to continue after being told to stop.

QUESTION: Mr. Klein, may I ask you a question? In your reply brief, you emphasize the Memphis policy, and you say that it is limited to situations where there are violent crimes, and you list the types of violent crimes.

MR. KLEIN: Yes, Your Honor.

QUESTION: Does the Memphis -- you call it a policy. Is it a state ordinance, a city ordinance?

MR. KLEIN: Your Honor, what has happened is, the city has implemented what is known as a general order.

QUESTION: A general order by the city council?

MR. KLEIN: No, sir, it is by the city police department.

QUESTION: The police department.

MR. KLEIN: Yes, sir.

QUESTION: Does the police department have authority to limit the full scope of state law?

MR. KLEIN: No, it does not.

QUESTION: Do you consider this ordinance consistence with state law?

MR. KLEIN: Yes, sir.

QUESTION: Is state law limited only to serious violent crimes?

MR. KLEIN: Well, that's --

QUESTION: It doesn't say so, does it?

MR. KLEIN: It doesn't say so, but I might add the courts in interpreting the state law, and again, the state law is really the common law, and the courts in interpreting the state law have said even as far back as 1879 in the case of Reneau versus State that the statute only intended that the use of deadly force be against what I categorize as serious crimes, and that even --

QUESTION: Serious or violent?

MR. KLEIN: Well, serious -- they didn't use

the word "serious." What they said in Beneau versus State is that if there were certain crimes of lesser degree, felonies of lesser degree -- they talk in terms of felonies, but if there were certain felonies of lesser degree, then there may be some question.

But I want to emphasize that the state courts have always interpreted this statute to apply to what I would classify as the more serious category.

QUESTION: Do you draw a distinction between serious and violent?

MR. KLEIN: Well, my distinction of serious is that it is serious, as I indicated, because the legislature said it is serious. Violent crimes are those such as burglary in the first degree which have a great potentiality for violence. You may have a burglary that may not in fact involve violence. It may on the other hand involve violence.

For example, in the case here, the officer, when he arrived on the scene, didn't know what was going on inside. There may have been some victims laying on the floor.

QUESTION: Suppose this house or building, instead of being a private residence, had been a deserted building in a field somewhere. Would the officer still have had the right under Tennessee law to

shoot a person fleeing from the scene who apparently had broken into it?

MR. KLEIN: I can't say that a dwelling in a deserted field would be burglary under the Tennessee statute. At best it would be burglary in the third degree, which carries a lesser penalty.

QUESTION: Of course, your Memphis policy would cover burglary in the third degree.

MR. KLEIN: Memphis policy would cover burglary in the third degree, but again, the point of this is that burglary in and of itself, and again, that is what we had in this case that is before us today, burglary is a serious offense with a great potentiality for violence.

And even though it may not have been a violent act that was committed in the example that Your Honor gave with regard to a dwelling house in a deserted field, the idea that an individual who will break and enter is the type of individual that has a great propensity or likelihood for violence, whether it be -- it may not be at that time, but it may be in the apprehension of that individual, and it is by the nature of the crime, the nature of the person that perpetrates such a crime that it is our position that therein lies the great potentiality for violence.

QUESTION: Mr. Klein, may I ask you a question about what we mean by the term "deadly force?" Do we mean that the officer can deliberately shoot to kill the individual?

MR. KLEIN: Well, deadly force means using that force, whether it be -- usually in the context we think of it it would be a pistol, a firearm.

QUESTION: And it also means, I take it, that he may deliberately shoot to kill.

MR. KLEIN: Well, when you say deliberately, Your Honor, yes.

QUESTION: Or doesn't it mean that? I am just trying to understand.

MR. KLEIN: Yes, when he pulls his weapon, that is what he is intending to do.

QUESTION: So it is really more than apprehending him then.

MR. KLEIN: No, it is apprehending him. That is the purpose. It is the attempt to apprehend, and that is the last resort. That is the last thing he can do. If it not that, the perpetrator is gone, and free to commit a felony on another day or down the road.

If Your Honor please, I would like to reserve my time.

QUESTION: Mr. Klein, let me ask you one

question if I may. In your introduction to your argument in your brief, you say that the Tennessee courts have interpreted the statute to allow the use of force that may result in death if the officer reasonably believes that the person has committed a felony, he notifies the person that he intends to arrest him, and he reasonably believes that no means less than such force will permit the escape.

Now, I would read that as indicating that if the officer thinks that by shooting to wound the person and he can prevent the escape, that he is obligated to do that.

MR. KLEIN: Well, that is true, but to be candid with Your Honor, the police policy has been to shoot for the mast. The reason --

QUESTION: Shoot for the what?

MR. KLEIN: The mast, which is -- and the reason for that is that it is obvious that one who uses a pistol cannot be as accurate as, say, a marksman with a rifle because of the circumstances, the fact that he may be running or he stops, and the fact that a pistol is just not an accurate weapon.

QUESTION: What you are talking about really is a shot that has a potential for killing. It is not a shot intended to kill.

MR. KLEIN: That's correct, sir. No one can argue that once you use a firearm, there is always the potential for killing, and it is not that the officer is intending to kill. He is intending to apprehend or attempting to apprehend, and that is the only means he has left to do it.

CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF W.J. MICHAEL CODY, ESQ.,

ON BEHALF OF APPELLANTS IN 83-1035

MR. CODY: Mr. Chief Justice, and may it please the Court, in considering the constitutionality of the statute here, I believe that there are two overriding questions for the Court.

First, was the Court of Appeals correct in rejecting the common law rule and establishing as a federal constitutional mandate that deadly force may only be used when the officer has probable cause to believe a violent as distinguished from a nonviolent crime has been committed.

And secondly, is a federal court under our system of federalism the appropriate body to make this ethical and moral public policy decision, or is it more appropriately left to the state legislature as the elected representatives of the people?

And we submit that the answers to these

questions will turn on an understanding and a recognition of the state's substantial interest in being able to apprehend serious criminals and preserve the public safety.

It is the position of the state that Section 40-7-108 of the Tennessee Code, which is generally an embodiment of the common law rule as it has been construed over the years by the Tennessee Supreme Court, is constitutional as applied to the facts of this case, and as I have indicated, I think there are serious considerations before the Court.

The ethical and the moral judgments of public policy that a society must make are judgments we believe better made in the state legislature than in the federal court, and the ability of the state to effectively apprehend suspects that are fleeing from felony crimes reflects a substantial interest on the part of the state and does not amount, as has been suggested, to punishment of the suspect.

And in balancing the interests in this case, we are talking about that substantial state interest in apprehending criminal suspects measured against the right of the criminal, who can lawfully submit to arrest and possibly lose his liberty, because if he submits to arrest, he may in all probability for a felony go today

to jail, so he loses some of his liberty and freedom, or to disregard the lawful order of the police and risk the possible losing of his life if in the apprehension process the force that was used was deadly force.

These questions, we believe, under the Fourteenth Amendment will allow this Court to recognize that the felon should not have a right to unwarranted protection from apprehension which would jeopardize the public security in not being able to bring a criminal to justice.

It is the apprehension process that is necessary before any of the other criminal justice procedures can come into play, and unless the state is able to recognize and to implement its substantial interest in arresting and apprehending felonies, then the state has lost forever its ability to do that.

And the rule which would allow a fleeing felon to disregard the fact and to say that the police have no threat or no ability to use maximum force if necessary will encourage in property crimes or burglary crimes as we have here, will encourage the criminal to run each time.

If there is a person helping him who merely looks out for the police, all that has to be said is, here come the police, and they know that the police

cannot use all necessary force to apprehend them, and it becomes basically a foot race.

The Court of Appeals drew the line in its setting up, we think, of a constitutional mandate based on a Model Penal Code rule which is at variance with at least half of the state rules between violent and nonviolent felonies. We believe that there are other indicators of the state's substantial interest in apprehending criminals other than violence.

And if the Court will allow me, I would like to leave --

QUESTION: Mr. Cody, I guess some states have adopted a more restrictive provision than Tennessee has, and something more along the lines of the Penal Code, Model Penal Code.

MR. CODY: That is true.

QUESTION: Has that proved to be workable in most states, do you know?

MR. CODY: I suspect that would depend upon that legislature's analysis of how it has worked. The point that we have tried to make in our brief is that if a police department or a city or a legislature makes a rule which is more restrictive or like the Court of Appeals rule, then it is just that. It is a rule that the police department or the legislature looking at the

changing circumstances may wish to change again.

But if this Court --

QUESTION: Well, I understand, but I thought you were arguing that any more restrictive standard would be unworkable, and so I was curious.

MR. CODY: Well, I have no information, but I believe that it would be unworkable if the officer is put to the task of trying to make this probable cause analysis when he arrives at an arrest scene.

QUESTION: Certainly the fact that other states have a different rule would indicate that it works.

MR. CODY: That it has worked for those states, or that they have chosen to let some fleeing felons escape rather than jeopardize their life, but we contend that that is a policy decision for the legislature to make.

QUESTION: Would you take the same position with respect to a fleeing felon whose felony is an antitrust violation?

(General laughter.)

MR. CODY: If the Court please, that makes a difficult question, but I think that I would have to answer that if there was a state antitrust statute that provided a sufficient enough penalty to indicate that

the state's substantial interest felt that that was a serious crime, then they could authorize deadly force.

The situation never arises because they can identify that person, and you don't ever get to the last resort.

QUESTION: May I ask one other question, just briefly? In measuring the state policy at stake, do you agree with Mr. Klein that there is no legislsative determination of the appropriate punishment for fleeing in these circumstances?

MR. CODY: I think that is correct.

QUESTION: General, I was going to ask you a question somewhat similar to Justice Blackmun's. The Court of Appeals stated that the question in this case was whether under state law a nonviolent fleeing felon, unarmed, could be shot by the police to prevent his escape.

I am interested in whether or not you think the Supreme Court of Tennessee would apply its statute to an unarmed, nonviolent fleeing felon.

MR. CODY: If the Court please, the Tennessee Supreme Court in the only case that directly seemed to refer to this had a property crime, the stealing of a small amount of merchandise, and the court in that case said that we would not extend the privilege to that

case.

It is difficult, however, to see whether it was because there were other means of apprehension or not. I think that the Tennessee Supreme Court would of necessity, based upon some reasonable interpretation, make the crime one that had enough seriousness to it to reflect a substantial state interest.

QUESTION: You do not draw the line with respect to violent and nonviolent crimes?

MR. CODY: No, I do not. I think that is the error in the Court of Appeals.

CHIEF JUSTICE BURGER: Mr. Winter?

ORAL ARGUMENT OF STEVEN L. WINTER, ESQ.,

ON BEHALF OF APPELLEES IN 83-1035

AND RESPONDENTS IN 83-1070

MR. WINTER: Chief Justice, and may it please the Court, I would like to start by trying to address some of the questions. In answer to Justice Stevens' question, the maximum penalty for fleeing from an officer under the Memphis Code is a $50 fine, and that is -- the citation for that is Footnote 31 of our brief.

In reference to the question about the workability of the standard adopted by the Court of Appeals asked by Justices O'Connor and Blackmun and

Justice Powell, we would point out that not only do the majority of the states apply a rule consonant with the rule adopted by the Court of Appeals, but the overwhelming majority of municipal police departments in this country, something at the rate of 75 percent, apply a rule similar to that adopted by the Court of Appeals.

The experience under these statutes and under these municipal policies has been investigated. I would point the Court to the amicus brief filed by the various police organizations in over 30 individual police departments in this country, from common law and non-common law states alike, in support of our position in this Court.

They recount the studies that have been done in these jurisdictions. Arrest rates do not go down. Crime rates do not go up. The only thing that is affected by a more restrictive deadly force policy is the rate of officer safety, and the rate of officer safety improves under these more restrictive policies.

QUESTION: What if after the event it developed there were two dead bodies in the house and a third person who was seriously wounded but alive who later identified the fleeing felon as the person who had done the killing and the wounding? What would be your view?

MR. WINTER: I think the Chief Justice's question points out one of the problems with my opponent's position. That is, often times there are other means of apprehension short of killing the fleeing felon, eye witness identification, evidence on the scene. In this particular case --

QUESTION: Before you get to the eye witness, you have to apprehend the individual, don't you?

MR. WINTER: If the officer can, certainly.

QUESTION: If he isn't apprehended, the eye witness is not much help.

MR. WINTER: Well, if the eye witness can identify him, then the witness is of a lot of assistance. In this particular case, the officer, when he ordered Garner to halt, and Garner did halt, the officer was able to see Garner. Now, it is possible that he would have been able to make an identification after the fact.

QUESTION: Well, do you think the officer was able to know whether there were or were not some dead bodies in the house?

MR. WINTER: No, but the officer had no reason to believe that there were any dead bodies in the house, and I think that is a critical point, because one of the major differences between our position and the position

of the city and the state is that they would premise the right to kill of a police officer on what the officer does not know.

But this Court has held, and I am thinking of Your Honor's opinion for the Court in Brown versus Texas, that the Fourth Amendment requires police actions to be governed by what the officer does know, specific objective facts indicating society's legitimate interests that require a seizure of the particular individual.

The Fourth Amendment answers that question for us, because it requires that specific objective knowledge on the part of a police officer before he acts.

Now, Justice Powell asked about the nature of the crime and the punishment for first degree burglary in Tennessee. We would point out that the Court ought to be clear about the nature of the underlying crime in this case.

First of all, if Garner had been guilty of first degree burglary, the punishment would have been a maximum of 15 years. This first degree burglary statute is the equivalent of the third degree burglary statute in South Dakota that the Court discussed in Solon versus Helm. It defines the exact same crime, with the

selfsame punishment of 15 years.

It is not a first degree burglary statute like many other states such as New York that define first degree burglary as a life-endangering burglary where the burglar may be armed or where harm results to a victim.

So, although it is first degree as a matter of Tennessee law, this is not the first degree crime defined by many of the states, and is equivalent to the third degree burglary that this Court has already addressed in Solon.

I would point out that the Court in Solem versus Helm recognized what is in fact the case, that this kind of third degree burglary is a nonviolent crime. It is a property crime, a property crime listed under crimes against property in the Tennessee code. Numerous state courts have observed what this Court observed in Solon, that burglary is not a violent crime.

I am thinking of the Lewis case in Florida, cited in our brief, as well as the Brown case from Alaska, and this is cited in the city's reply brief. In Brown the Alaska Supreme Court held that burglary was a serious crime against property, but not per se a violent crime.

QUESTION: Mr. Winter, how old was this

victim?

MR. WINTER: The victim was 15 years old, Your Honor, and the District Court found at two places, and I refer to A10 in the Appendix and the petition for certiorari at A5, Footnote 3, that the officer reasonably believed that Garner was a juvenile. The officer misjudged by two years. He thought Garner was 17, possibly 18 years old.

Under Tennessee law, he could not have been prosecuted for burglary. Based on the actual facts, at 15 he absolutely could not have been prosecuted as a felon. He would only have been assigned to the juvenile courts, and perhaps adjudged delinquent, which is an expressly noncriminal status under Tennessee law, and even under what the officer reasonably believed, that he was 17, it was likely that he would not be transferred to the adult courts under the statutes in effect in 1974, but would have similarly been assigned only to the juvenile courts.

QUESTION: If in fact there were two dead bodies, and he was identified as the killer, what would have been the maximum penalty?

MR. WINTER: If he had committed murder, then he could have been treated as an adult at that time, but the Tennessee statute, which is 37-234, specifically

provides that juveniles less than 16 at that time could only be bound over for violent crimes, and it specifically excluded burglary as one of those crimes for which a 15-year-old could be bound over to the adult courts.

So, the answer to Your Honor's question, he could have been treated as an adult for murder, but not for the burglary that he in fact committed.

QUESTION: Mr. Winter, this was an action for damages, was it not?

MR. WINTER: Correct.

QUESTION: And the state asserted the statute as a defense. As I read the Court of Appeals opinion, it declares the statute perhaps facially invalid. Is that your reading of it, too?

MR. WINTER: I am not quite certain, Your Honor. I understand the operative language can be found at A44 of the Appendix, where the court at the outset of its analysis states, "The narrow question presented is whether a state law authorizing the killing of an unarmed, nonviolent fleeing felon by police in order to prevent escape constitutes an unreasonable seizure of the person."

QUESTION: That doesn't strike me as a very happy phrasing of any question. I had never known

before that a law could constitute an unreasonable seizure.

MR. WINTER: There are problems with the court's formulation, I would agree, but I think the essential import of what the court was saying is clear, and that is that as applied to these facts, certainly, where the officer testified that he knew the juvenile to be unarmed, that the shooting under these circumstances is unconstitutional.

QUESTION: You would agree, then, that if the Court of Appeals opinion goes any further than to say that on these facts, the Tennessee defense statute can't be applied, the Court of Appeals is wrong.

MR. WINTER: I would say that this Court need go no further than to affirm the judgment below on these facts.

QUESTION: So we are talking about an as applied basis, not an on its face basis.

MR. WINTER: The other aspect I wanted -- the Court should also be clear about the facts that my opponents neglected to mention. That is that the District Court in an explicit finding, which is also found at A4 in the Appendix, that when Hyman, the officer, stopped 15-year-old Garner, "Garner did not appear to be armed," and this finding was based on

substantial record testimony.

The officer testified repeatedly that he had no indication that Garner was armed, that he was reasonably sure that Garner was unarmed, and finally, on direct testimony, when asked, did you know positively whether or not he was armed, he answered, I assumed that he was not.

In our view, this case presents really three issues for the Court to determine. There is a constitutionality of the state statute and the municipal policy as applied to this case, given the facts, a nonviolent, nondangerous fleeing property crime suspect.

There is the question of the constitutionality of the city's policies and customs that encourage, in fact, encourage and insulate the use of excessive force where officers do not exhaust reasonable alternatives.

And finally, the question of whether the Memphis policy is in violation of the Fourteenth Amendment because it is racially discriminatory.

Our position before this Court on the first issue, that is, the constitutionality of the statute, is that the Court of Appeals is clearly correct that a statute is only narrowly drawn to express a legitimate state interest at stake, and is only carefully tailored

to its underlying justification if it permits the shooting when safety interests are at stake.

And the Court ought to be clear about what is involved. This is not a case about shooting to wound or a case about apprehension at all. The Memphis policy is not to shoot to wound. It is explicitly not so. It is a policy of shooting to kill.

QUESTION: When you say the Memphis policy, I had read the Court of Appeals opinion to deal only with the Tennessee statute.

MR. WINTER: That is correct, Your Honor. We raised in both of the courts below the question, the narrower question of the Memphis policy, and that is a question that I think the Court could rule on without reaching the statute.

QUESTION: But the Court of Appeals didn't pass on it.

MR. WINTER: The Court of Appeals did not, but the factual basis was before the Court of Appeals. In a prior case in Wiley versus Memphis police department, the District Court made a finding of fact that Memphis officers are taught to shoot to kill whenever they shoot.

The testimony was based on -- this was based on testimony that Memphis arms its officers with dum-dum

bullets, it teaches them to shoot at the torso or center mast, where viscera are more likely to be hit, and death more likely to ensue, and the officers understand their training to be to shoot to kill.

Officer Hyman, who fired in this case, so testified, that he fired as he was taught, at the torso, and he shot to kill. The police director's testimony, Director Hubbard, is found at Page 1,500 of the record. It makes very clear that there is no shoot to wound policy in Memphis.

He says, "Our officers simply have to be trained so that if the use of a firearm is justified at all, then the full consequences have to be accepted. The likelihood of killing someone in that process is very high. You simply have to. It takes a shoot to kill policy. Just a shoot to wound policy is impractical."

So, this, we submit, is precisely the shoot to kill policy identify by the Chief Justice in his Bivens dissent, and recently discussed by the dissenters in Los Angeles versus Lyons.

QUESTION: How do you think the Court of Appeals formulated the standard as to when you can shoot to kill?

MR. WINTER: The Court of Appeals --

QUESTION: Or did it? Or did it? Did it?

MR. WINTER: It formulated more than one standard, I am afraid.

QUESTION: Yes, I thought so. I wondered which one you thought was correct, if either one is.

MR. WINTER: Well, the one that we would urge on this Court is, I think, best stated at Page A51 of the Appendix. The Court of Appeals says the police can only shoot, and we are talking about shooting to kill, when the suspect poses a threat to the safety of the officers or a danger to the community if left at large. We submit that this is --

QUESTION: Did you say "or" or "and?"

MR. WINTER: Or a danger to the community if left at large. We submit that this is the clear rule. It is rational. It is proportioned to the state's underlying interest and underlying justifications. And it is workable for the police on the beat. Indeed, we would submit it is more workable than the common law rule.

QUESTION: How would you ever know that alternative or?

MR. WINTER: I take it that the police officer would make this decision -- we would apply this -- we would suggest that the standard to be applied is the

standard enunciated by the Chief Justice for the Court in United States versus Cortez, that what a reasonably prudent officer exercising his professional judgment based on his training would conclude under all circumstances.

If, for -- the city in its --

QUESTION: In this particular case, I suppose you would just have to conclude that that other, that alternative could just never have been satisfied.

MR. WINTER: In this case -- I think this case --

QUESTION: Or in most cases. What you would really have to say is that the officer would have to know or reasonably believe that the man or lady was a danger to the community.

MR. WINTER: That's right. If he were armed, for example. If the next-door neighbor --

QUESTION: Would being armed be enough to satisfy the alternative?

MR. WINTER: Certainly if the suspect, when told to halt, the officer was -- police officer refused to throw down his weapon --

QUESTION: How would you know whether he was armed?

MR. WINTER: If the officer knows that he is

armed

QUESTION: So the officer has to know that the person -- if he is armed but the officer doesn't know it, the officer can't shoot.

MR. WINTER: If in fact the person is armed but he never reaches for his weapon, I don't see where the state interest in shooting to apprehend --

QUESTION: A person can be armed and can be not reaching for his weapon one minute, and 15 seconds later he can be reaching for his weapon.

MR. WINTER: When he reaches, I think the officer is obviously entitled to and should shoot.

QUESTION: And not until then?

MR. WINTER: Not until then.

QUESTION: I suppose if you have a warrant to arrest someone who is known to be dangerous, and you encounter him, and he runs, what about that?

MR. WINTER: I think that may well be a case. For example, thinking of a year or so ago, the tax evader in South Dakota, Gordon Kalb, who shot two FBI agents. The FBI were moving in to arrest him, and he started to run. I think he was a dangerous individual. The police may be justified in shooting in that circumstance.

It depends on all the circumstances, and what

a reasonably prudent officer would do knowing what he knows. If the woman next door who had called in the burglary had said, I heard screams next door, I think the officer might well have probable cause to believe that the fleeing suspect is dangerous.

QUESTION: Would you think that a burglar who enters the homes or residences of people at nighttime is a danger to the community?

MR. WINTER: It seems so intuitively, Your Honor, but I think that it is not borne out, as this Court has recognized in Solon and as other courts have recognized. The statistics we have marshalled in our brief are very, very clear and convincing: 92 percent of all burglaries occur when nobody is home. Only 8 percent of all burglaries are armed with guns. Burglaries result in confrontations between the burglar and the victim only 2.8 percent of the time, and half of those never escalate beyond shouting.

QUESTION: These statistics based upon people who are apprehended, aren't they?

MR. WINTER: These statistics are based -- I believe that is correct.

QUESTION: Of necessity. Those who are not apprehended, there is no basis for a statistic, is there?

MR. WINTER: Well, there were several studies that were done. I think it was one of them, the Toronto study, that is cited in our brief, was done by going through police records of all reported burglaries, and not all arrests. So I think it is not -- and the studies are all generally consistent in their findings on the low confrontation rate.

This is not surprising, because those studies that have been done that have interviewed the burglars have found that the overwhelming common denominator of all burglars is that they choose to burgle unoccupied houses, and thus the --

QUESTION: Are you familiar with the statistics in New York City?

MR. WINTER: No, I am not, Your Honor.

QUESTION: As to what percentage of all crimes, including burglary, are ever apprehended?

MR. WINTER: No, I do not know those.

QUESTION: It is something less than 15 percent.

MR. WINTER: I would point out, Your Honor, that the statistics for rates of murders in residences and rates of rapes in residences are extraordinarily low. Only 2.2 percent of all murders occur in a residence. Only 6.5 percent of all rapes occur in a

residence between strangers.

So, the statistical probability of Justice O'Connor's hypothetical is very, very low, that somebody may in fact have been harmed inside the building.

QUESTION: What do you suppose the homeowners feel about whether someone who burglarizes homes is a danger to the community?

MR. WINTER: There is no doubt that burglary is both a serious crime and a frightening crime. Indeed, the reason why burglary is punished severely in our society is because all of us feel the sanctity of our home violated and all of us are very frightened by the prospect of a stranger coming in at night.

We have no quarrel with burglary being treated as a serious crime under state law and lengthy punishments being imposed. The only question that we pose is whether the state's interests in preventing escape because apprehension is not what occurs are sufficiently substantial to justify the taking of life.

We submit that it is not, and that it is not proportionate only unless the state's interests are implicated, and they are not with most burglaries. Now, if the officer has some reasonable objective basis in fact to believe that this particular burglar is dangerous, that he is armed, or if he has information

that there was a scream or a shot inside, to use some of the hypotheticals from the city reply brief, I think that is a different case.

QUESTION: So you would say violent crimes then, would you say automatically this test that you propose is satisfied?

MR. WINTER: Yes, I would --

QUESTION: If there is a probable cause to believe that he has just committed a violent crime?

MR. WINTER: In most instances, I would say yes.

QUESTION: And that violent means violent -- a danger to a person, is that it, or --

MR. WINTER: Correct. It could be dangerous to a police officer.

QUESTION: It doesn't mean that he just happens to use violence to break into a house.

MR. WINTER: No. I mean, Garner broke a window to get into the house. That would certainly not give the officer probable cause to believe he would assault an individual.

QUESTION: What about someone thought to be guilty of espionage or treason? Obviously, this would affect federal statutes if you are correct.

MR. WINTER: I must confess to having not

thought about that. The policy of the FBI as I understand it would not be to shoot such people. The FBI policy is one of only shooting in defense of life. Perhaps the state interest would be substantial enough. Under the rule that we are suggesting, it would not apply.

Justice White asked about alternative readings of the Court of Appeals holding. I take it that the citation of the Court of Appeals to the Model Penal Code suggests that it might have had in mind a rule slightly different than what we are proposing here today.

QUESTION: Yours would not make an exception because treason and espionage are not crimes of violence?

MR. WINTER: Correct. Unless it was a crime of sabotage.

QUESTION: Yes.

MR. WINTER: No, under the Model Penal Code rule, I take it that the distinction drawn, and we think it is a less satisfactory rule, the distinction drawn is one based on the gravity of the crime. And basically it is violence also. If it is a dangerous crime and for violent crime the gravity of the crime is sufficient to justify use of deadly force.

The state and the city attack that position on

the grounds that it is too difficult to draw those kind of lines and legislatures should. I take it that this Court has already addressed an analogous question in the Eighth Amendment context in the Solon case. And in Solem, the Court identified three objective factors that are capable of judicial application to ascertain the gravity of a crime.

The Court identified whether the crime is violent or nonviolent, secondly, the magnitude of the offense, and third, the culpability of the offender. By each of these criterion, the crime involved in this case falls on the less grave side.

Certainly this was a nonviolent crime. And as we have demonstrated, burglary is inherently a nonviolent crime.

QUESTION: That brings me back to some of your responses, and I will repeat again the question, what if in fact there were two or three dead bodies in there who had been stabbed to death? Would you have a case?

MR. WINTER: We would have certainly a more difficult case, but I think the case has to turn on what the officer knows.

QUESTION: Do you just think it would be more difficult?

MR. WINTER: I think it has to turn on what

the officer knows. The officer can't justify shooting after the fact.

QUESTION: How can the officer conceivably know one way or the other whether there are or whether there are not some dead bodies inside the house?

MR. WINTER: He might well. This officer testified -- the facts of the case are, when the officer arrived on the scene, he went along the side of the -- west side of the house to the back yard, which was where he found young -- 15-year-old Garner.

While he was walking along the side of the house, he had occasion to look into the house. He saw the bedroom that had been ransacked, although I am not sure if he saw it had been ransacked at that point, but he looked into the house. When he got to the back yard, he saw that a window had been broken into. He saw the garbage can.

He might have reason to know that something more had occurred if it had. The neighbor might have reported, instead of hearing glass breaking, that she heard screams. Any of those would have constituted probable cause.

QUESTION: But you think you would just have a more difficult case if there were some dead bodies, people stabbed to death in the house?

MR. WINTER: If the officer -- the officer's action has to be based on what he knows or has probable cause to believe, and not on what is found out after the fact. Just as if the officer thought that Garner was armed, if he saw a shiny object, it would have been reasonable for him to shoot, even though it turned out after the fact that the shiny object wasn't a gun.

It seems to me that the rule cuts both ways.

QUESTION: Have you thought about -- I suppose in carrying the case you must have thought about it -- suppose the police want to stop a car, and they walk along side of it and flash a red light, and he takes off at high speed, and they chase him.

MR. WINTER: Can they shoot the tires?

QUESTION: Certainly armed with a car.

MR. WINTER: Yes.

QUESTION: Can they shoot?

MR. WINTER: No, but for a different reason, Your Honor. The two constants of almost every police shooting policy are not to shoot at cars that are moving, and not to fire warning shots.

QUESTION: That may be --

MR. WINTER: And there is a good reason, because the people who get hit are almost --

QUESTION: That may be so, but would it be

unconstitutional under your rule?

MR. WINTER: If the people in the car were armed and dangerous, I think no.

QUESTION: Well, they are being quite a danger to the community by driving up and down the street at 90 miles an hour.

MR. WINTER: It seems to me that the better alternative would be to get on the radio and call other cars and head them off. I would note that the policy in Memphis is that people who are driving under the influence, who are quite dangerous, even though it isn't a felony --

QUESTION: Yes, they don't shoot them.

MR. WINTER: -- get shot. They may well be substantially more dangerous than people like 15-year-old Garner.

QUESTION: Mr. Winter, the Tennessee law does require some kind of a warning by the officer to the suspect?

MR. WINTER: Yes, and I take it "Halt, police" is sufficient. I mean, the officer neither here nor in many other cases said "Stop or I'll shoot." Garner had no specific warning from the officer.

QUESTION: But was told to stop by an officer in uniform. Is there any validity to the concept that a

person, a suspect in those circumstances is giving up certain rights by refusing to heed a warning of that kind by an officer in uniform?

MR. WINTER: Well, I start from the premise that the suspect should stop, but whether he is waiving his constitutional rights it seems to me is hard to say. I mean, I would point out that we are talking about a 15-year-old who the last time he broke into a neighbor's house had been turned in to the police by his own father. He was probably more scared of being caught and being turned over to his father than of the policeman's bullet.

Also, on the night of his death, 15-year-old Garner had had a beer and was somewhat intoxicated, according to the medical examiner. It is hard to imagine a knowing and voluntary waiver under those circumstances.

QUESTION: But we are not talking just about -- at least your argument isn't premised just on the fact that this particular plaintiff was 15 years old, perceived to be 17 years old. I mean, if you are talking about giving up some rights when you refuse to heed, you are equally talking about a cold sober 45-year-old.

MR. WINTER: That's correct.

QUESTION: Is that right? I am just trying to think it through. Are we thinking about the statute as applied to the facts of this case, or is applied to hypotheticals in both directions?

MR. WINTER: The rule that we would suggest as applied to the case that Justice Rehnquist has hypothesized, I think, is that we would suggest that there is no waiver, but Your Honor is quite correct. On the facts of this case as the officer knew them, he was dealing with a juvenile who, as this Court has recognized in Eddings versus Oklahoma and Vellcti versus Barrett, is less capable of being responsible, is less capable of thinking of the consequences of his or her actions, who also is acting impulsively, and is less capable of conforming his or her actions to the law, all things that this Court discussed in the Eddings opinion and in the prior opinion in Velotti. The officer knew that.

QUESTION: All I was suggesting is, if we measure the police officer's conduct as applied in this case, should we not also analyze the waiver issue as applied, or do we have one rule for one situation and another for --

MR. WINTER: Certainly, and at least as the officer knew it to be, which was that he was dealing

with a juvenile. I might point out that under the --

QUESTION: Well, do you think that it really is unreasonable under the Fourth Amendment for an officer who would tell an experienced adult burglar, stop or I'll shoot, you think the Fourth Amendment prohibits that? You think that there is no room there for saying that the person who refuses to heed that warning is knowingly giving up any right to have alternative action taken?

MR. WINTER: No, I don't think that the Fourth Amendment should allow such a shooting. I think that unless the state interests require it because of the interests of protecting the public, the Fourth Amendment would bar that shooting. The officer may have other alternatives.

He should run after him. He should call in assistance. He should investigate the scene. It does not invariably follow that the person gets away and he will never be caught, although that may often be the consequence.

With regard to both the workability and the question of the shooting in this case, I would also point out that at least since 1976 Memphis has had a rule with regard to the shooting of juveniles that is precisely the rule that we urge in this Court. That is,

under the Memphis policy, only juveniles who are dangerous to life can be shot. That was not in effect in 1974, but it was adopted -- well, I may be wrong on the date. Perhaps 1979.

With regard to the Tennessee statute and whether it only covers serious crimes or nonserious crimes, we would draw the Court's attention to Page 1,460 in the Court of Appeals record, which is a listing of every nonviolent property crime suspect shot at by the Memphis police between 1969 and 1975.

This listing was prepared by Captain Colleta of the Memphis Police Department. It lists shootings for such circumstances as a prowler who is stealing from a car lot.

QUESTION: Are you suggesting that in every instance the particular policeman who shot was acting in conformity with the Tennessee law?

MR. WINTER: Well, we suggest that in many instances, whatever the Tennessee law may be on the books, or as the courts would construe them if it got the cases, it is not the practice under either the Tennessee law or the Memphis policy to restrict shootings only to serious and dangerous people.

QUESTION: That might be useful evidence in your attack on the Memphis practice. It is certainly not

any good evidence at all in your attack on the Tennessee statute.

MR. WINTER: No, but we bring it to the Court's attention because the argument that the Tennessee statute is somehow sufficient to prevent these unconstitutional shootings and that the Court need not rule on the question we suggest is just not borne out by the practice and the record.

People who have stolen checks have been shot at by Memphis police. These are the petty -- the pickpockets and the petty thieves identified by the Chief Justice in Bivens which the reply briefs say, no, never happens in Tennessee.

QUESTION: Mr. Winter, before you sit down, you didn't get to your third argument, and I just am not clear on one factual matter. Does the record tell us the race of the victim and the race of the officer in this case?

MR. WINTER: In this case, yes. Both were black.

QUESTION: Both were black?

MR. WINTER: Both were black. But I would point, Your Honor, to the testimony of the police director that he "had more problems with his black officers trying to out-redneck his white officers."

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Klein? You have six minutes remaining.

ORAL ARGUMENT OF HENRY L. KLEIN, ESQ.,

ON BEHALF OF THE PETITIONERS IN 83-1070 - REBUTTAL

MR. KLEIN: In response to Justice O'Connor's question earlier about whether or not any states have adopted the Model Penal Code and whether it proved satisfactory, it is our understanding that both Idaho and New York had adopted the Model Penal Code, but later Idaho has reverted back to the common law, which is the same as what Tennessee has, and that New York now has something in between which is referred to as a forcible felony statute.

With regard to the penalty that would come into play just for not stopping, and that is true, that is -- and I think I have pointed that out earlier, that is just a $50 fine, but we again want to emphasize that what is in progress is a burglary, and that is a continuous violation from the time that there is the breaking and entering which is known to the police officer through the attempt to apprehend.

QUESTION: Yes, but of course he wouldn't be shot just for the burglary. He is shot because he tried to escape.

MR. KLEIN: That is correct, but he is

escaping from a serious crime, which is burglary.

QUESTION: I understand, but it still puzzles me that the legislature didn't make that a serious crime as well, because I think that is a serious matter.

MR. KLEIN: Well, of course, the point of all of this, and this gets back to what states adopt what, really what may be good in Idaho may not be good in California, or vice versa, and that is our argument about these policy questions. Not only does it relate to the state and the legislature, but also to the city of Memphis. And that each state has to gauge what its particular problems are and what policies it needs to enforce, and that is our argument with the Sixth Circuit Court of Appeals.

QUESTION: Yes, but I would suppose you would agree that the state could not adopt a statute making it a capital offense to flee in these circumstances.

MR. KLEIN: That is correct. That would be --

QUESTION: So there are some limits on the state's power.

MR. KLEIN: Right. Regardless of what happens in the state, they are all subject to certain minimal constitutional guarantees. We have to work within that framework, and if a state gets out of bounds or out of whack, then they are subject to those restrictions.

I appreciate the honor of being able to appear before the Court.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#83-1035 - TENNESSEE, Appellant v. CLEAMTEE GARNER, ETC., ET AL.; and

#83-1070 - MEMPHIS POLICE DEPARTMENT, ET AL., Petitioners v. CLEAMTEE GARNER, ETC. ET AL.

nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)