

The Burger Court Opinion Writing Database

Tennessee v. Garner

471 U.S. 1 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 9, 1984

RE: No. 83-1035) - Tennessee v. Garner
83-1070)- Memphis Police Dept. v. Garner

MEMORANDUM TO THE CONFERENCE:

Although I find it difficult to say the action of the officer was unreasonable, I am prepared to affirm on the narrow basis Byron and some others discussed. I have assigned it to Byron.

Regards,

W. J. Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 20, 1984

Re: 83-1035 - Tennessee v. Garner
83-1070 - Memphis Police Department v. Garner

Dear Byron:

I agree with the result but will defer joining on the opinion until like the old lady in Peoria, I read what I am writing out in a concurring opinion.

Regards,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 8, 1985

Re: No. 83-1035 - Tennessee v. Garner
83-1070 - Memphis Police Department v. Garner

MEMORANDUM TO THE CONFERENCE:

Few cases have given me more trouble than this one. I suspect it has given all of us trouble. At Conference, I was a "reluctant affirm," unduly, as I see it on reflection by the fact that the felon was only 15. But, if he turned out to be a "smallish" 25 with a long record of crime, or if it turned out that he had left a dead woman and a wounded husband in the burgled house, I doubt there would be much sentiment to hold the Tennessee statute unconstitutional.

This is a proverbial, classic "hard case" and I now conclude it produces the "bad law" attributed to that class of cases. My note is changed to reverse and I may write something out while joining Sandra's dissent.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 22, 1985

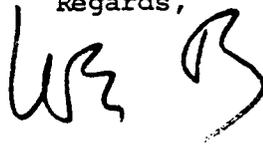
Re: (83-1035 - Tennessee v. Cleamtee Garner, Etc., et al.
(
(83-1070 - Memphis Police Department, et al. v. Cleamtee Garner, Etc.,
et al.

Dear Byron:

I have decided to consign my separate opinion in this case to
the Deathless Prose file.

I will simply join Sandra.

Regards,

Handwritten signature of Justice White, consisting of the letters 'WR' followed by a large, stylized flourish.

Justice White

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 20, 1984

No. 83-1035) Tennessee v. Garner
)
) Memphis Police Department
No. 83-1070) v. Garner

Dear Byron:

I'm prepared to join if you will clarify a few things for me.

1. The Sixth Circuit held that the required standard is probable cause to believe the fleeing suspect is dangerous, and I read the Police Foundation's amicus brief as urging that we affirm that standard. At several points in your draft you appear to suggest that probable cause is the appropriate standard. See p. 9. At others, however, you speak of "reasonable belief" as the operative test. See pp. 1, 9, 18.

Although "probable cause" and "reasonable belief" are not at all necessarily conflicting terms in this context, "reasonable belief" could be read as imposing a lower threshold. I do not believe you intend this distinction, for you speak at one point of "probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm." P. 9. If my reading is correct, would it not avoid a problem if the "reasonable belief" language on pages 1, 9, and 18 was changed to "probable cause"?

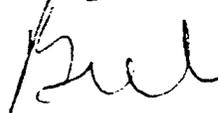
2. In the second full paragraph on page 9, you state that "[i]f a fleeing suspect is armed with a lethal weapon or if there is probable cause to believe" he has committed a violent crime, the police may shoot in appropriate circumstances. (Emphasis added.) In light of your previous analysis, is possession of a lethal weapon without more necessarily sufficient to justify shooting the suspect? (Consider the teenager who carries a switchblade.) Rather, you have made clear that the suspect must actually pose "a threat of serious physical harm" to others. What would you think of a substitution something like this:

"If there is probable cause to believe that a fleeing suspect has committed a crime involving

the infliction or threatened infliction of serious physical harm, or that there is a substantial risk that he would do so if not immediately apprehended, deadly force may be used if necessary to prevent escape and, unless infeasible, some warning has been given."

3. You will note that I favor a slight change in wording about the required warning. Should we not emphasize that warnings are required except in exigent circumstances?

Sincerely;

A handwritten signature in cursive script, appearing to read "White", written in dark ink.

Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 14, 1985

No. 83-1035) Tennessee
) v. Garner
)
) Memphis Police
) Department
No. 83-1070) v. Garner

Dear Byron:

Thanks so much for your response to my suggestions. Unfortunately, because I've just got back from St. Thomas and am confronted with a huge pile of stuff, I'll not be able to give you my reaction for a couple of days. I'll get to it as soon as I possibly can.

Sincerely,



Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
Wm. J. BRENNAN, JR.

February 20, 1985

No. 83-1035) Tennessee v. Garner
)
)
No. 83-1070) Memphis Police Department v. Garner

Dear Byron:

Thanks so much for your responsive changes. As we discussed last week, it's important to have a Court on this one, and your changes do go a long way toward meeting my suggestions.

We both agree that the relevant standard is "probable cause to believe that the suspect poses a threat of serious physical harm." Ante, at 10. The draft continues to suggest, however, that this standard could be met where there was probable cause to believe that the suspect "committed a crime ... while armed with a weapon capable of inflicting serious physical harm." In turn, I continue to believe that language such as this could be read as authorizing the use of deadly force against fleeing suspects possessing objects that could be used in a dangerous way even where there was no cause to believe that the object had been or would be so used. I do not believe, for example, that an officer could shoot a fleeing teenager wielding a tire iron--which could certainly be used as a weapon in some circumstances--where there was cause only to believe that the tire iron had been used in stealing hubcaps. Your standard of "a threat of serious physical harm" would seem to require just a bit more. Possession of a given object and probable cause to believe the possessor is dangerous will frequently be congruent, but not necessarily so.

I do appreciate that we may not see eye to eye on this question, but I still wonder whether it is necessary to spell it out in this opinion. If you could see fit in any way to eliminate or modify the phrase "while armed with a weapon capable of inflicting serious harm," I'll be able to join. I do believe this change could be made in a way as to leave the issue open for another day.

If you don't believe you can make this change, I think I'll have to add a paragraph or two distancing myself from the implications of this language. I'll try my best to write it in a

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way that would enable me to join the opinion, but I'd need to give it a bit more thought.

If you can let me know one way or the other, you'll have my prompt response.

Sincerely,

A handwritten signature in cursive script, appearing to read "G. White".

Justice White



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 6, 1985

No. 83-1035) Tennessee v. Garner
)
) Memphis Police
) Department
No. 83-1070) v. Garner

Dear Byron,

Please join me in your 3rd draft. Thanks so
very much for your response to my worries.

Sincerely,

Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: DEC 17 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1035

TENNESSEE, APPELLANT

83-1035

v.

CLEAMTEE GARNER, ETC., ET AL.

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

MEMPHIS POLICE DEPARTMENT, ET AL.,
PETITIONERS

83-1070

v.

CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[December —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless necessary to prevent the escape and the officer reasonably believes that the suspect poses a significant threat of death or serious physical injury to the officer or others.

I

At about 10:45 p. m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "proowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing to-

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 12, 1985

83-1035 - Tennessee v. Garner

83-1070 - Memphis Police Dept. v. Garner

Dear Bill,

Now that the dissent is in, I should like to move forward with this case.

In response to your letter of December 20, I am quite willing to refer to probable cause rather than reasonable belief on pages 1, 9 and 18.

Also, I would be willing to recast the second full paragraph on page 9 to read as follows:

"It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, or while armed with a weapon capable of inflicting serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster."

I know that this is not fully responsive to your suggestions, but it does go a long way in that direction: that there is reason to believe that the suspect is armed is not in itself sufficient grounds for using deadly force to prevent escape.

I shall have some limited responses to Sandra's dissent.

Sincerely yours,

Justice Brennan



To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES and
pp. 1, 7-8, 10, 17-20

From: Justice White

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1035

TENNESSEE, APPELLANT

83-1035

v.

CLEAMTEE GARNER, ETC., ET AL.

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

MEMPHIS POLICE DEPARTMENT, ET AL.,
PETITIONERS

83-1070

v.

CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[February —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless 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.

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Stylistic and pp. 9, 10, 19

Circulated: _____

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1035

TENNESSEE, APPELLANT

83-1035

v.

CLEAMTEE GARNER, ETC., ET AL.

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

MEMPHIS POLICE DEPARTMENT, ET AL.,
PETITIONERS

83-1070

v.

CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[March —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless 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.

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At about 10:45 p. m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "proowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing to-

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

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Recirculated: MAR 18 1985

STIC CHANGES THROUGHOUT.
SEE PAGES:

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-1035 AND 83-1070

83-1035
TENNESSEE, APPELLANT
v.
CLEAMTEE GARNER, ETC., ET AL.

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

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[March —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless 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.

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At about 10:45 p. m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "proowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing to-

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 11, 1985

Re: No. 83-1035-Tennessee v. Garner and
No. 83-1070-Memphis Police Dept. v. Garner

Dear Byron:

Please join me.

Sincerely,

T.M.
T.M.

Justice White

cc: The Conference

7M

December 20, 1984

Re: No. 83-1035, Tennessee v. Garner
No. 83-1070, Memphis Police Department v. Garner

Dear Byron:

I noted two minor errors in the opinion that your clerk may wish to correct. The first is in the sixth line on page 2 where the suspect is referred to as "petitioner's decedent." Should this reference not be to the "appellee-respondent," or the like? At least it made me jump.

The second is on page 15 in footnote 20 where the Mattis case is ascribed to the Sixth Circuit, rather than the Eighth. I knew Floyd Gibson was not the Chief Judge of the Sixth.

Sincerely,

HAB

Justice White



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 20, 1984

Re: No. 83-1035, Tennessee v. Garner
No. 83-1070, Memphis Police Department v. Garner

Dear Byron:

Please join me.

Sincerely,

Justice White

cc: The Conference



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 18, 1984

83-1035 Tennessee v. Garner

Dear Byron:

Please join me.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

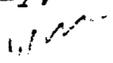
CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 15, 1985

Re: Nos. 83-1035 Tennessee v. Garner
83-1070 Memphis Police Department v. Garner

Dear Sandra,

Please join me in your dissent.

Sincerely,


Justice O'Connor

cc: The Conference



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 18, 1984

Re: 83-1035 - Tennessee v. Garner
83-1070 - Memphis Police Dept. v. Garner

Dear Byron:

Please join me.

Respectfully,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 19, 1984

Re: 83-1035 Tennessee v. Cleamtree Garner, et al.
83-1070 Memphis Police Department, et al. v.
Cleamtree Garner, et al.

Dear Byron,

As you recall, at Conference I voted to affirm. You have written persuasively in your majority draft, but I intend to try to put forward a different view in a dissent.

Sincerely,



Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-1035 AND 83-1070

TENNESSEE, APPELLANT

83-1035

v.

CLEAMTEE GARNER, ETC., ET AL.

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

MEMPHIS POLICE DEPARTMENT, ET AL.,
PETITIONERS

83-1070

v.

CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[February —, 1985]

JUSTICE O'CONNOR, dissenting.

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force as a last resort to apprehend a criminal suspect who refuses to halt when fleeing the scene of a nighttime burglary. This conclusion rests on the majority's balancing of the interests of the suspect and the public interest in effective law enforcement. *Ante*, at 6. Notwithstanding the venerable common law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon, and continued acceptance of this rule by nearly half the States, *ante*, at 13-15, the majority concludes that Tennessee's statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortunate, our constitutional holdings must be sensitive to both

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Stylistic changes throughout
Changes on 1, 5, 6, 9-11

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-1035 AND 83-1070

TENNESSEE, APPELLANT

83-1035

v.

CLEAMTEE GARNER, ETC., ET AL.

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

MEMPHIS POLICE DEPARTMENT, ET AL.,
PETITIONERS

83-1070

v.

CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[February —, 1985]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST
joins, dissenting.

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force as a last resort to apprehend a criminal suspect who refuses to halt when fleeing the scene of a nighttime burglary. This conclusion rests on the majority's balancing of the interests of the suspect and the public interest in effective law enforcement. *Ante*, at 6. Notwithstanding the venerable common-law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon, and continued acceptance of this rule by nearly half the States, *ante*, at 13-15, the majority concludes that Tennessee's statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortu-

deletion on p. 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-1035 AND 83-1070

TENNESSEE, APPELLANT

83-1035

v.

CLEAMTEE GARNER, ETC., ET AL.

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

MEMPHIS POLICE DEPARTMENT, ET AL.,
PETITIONERS

83-1070

v.

CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[February —, 1985]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST
joins, dissenting.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-1035 AND 83-1070

TENNESSEE, APPELLANT

83-1035

v.

CLEAMTEE GARNER, ETC., ET AL.

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

MEMPHIS POLICE DEPARTMENT, ET AL.,
PETITIONERS

83-1070

v.

CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[March —, 1985]

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

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force as a last resort to apprehend a criminal suspect who refuses to halt when fleeing the scene of a nighttime burglary. This conclusion rests on the majority's balancing of the interests of the suspect and the public interest in effective law enforcement. *Ante*, at 6. Notwithstanding the venerable common-law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon, and continued acceptance of this rule by nearly half the States, *ante*, at 13-15, the majority concludes that Tennessee's statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortu-

p. 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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Recirculated: 3/14/85

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-1035 AND 83-1070

83-1035
TENNESSEE, APPELLANT
v.
CLEAMTEE GARNER, ETC., ET AL.

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

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[March —, 1985]

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

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apprehend a criminal suspect who refuses to halt when flee-
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on the majority's balancing of the interests of the suspect and
the public interest in effective law enforcement. *Ante*, at 6.
Notwithstanding the venerable common-law rule authorizing
the use of deadly force if necessary to apprehend a fleeing
felon, and continued acceptance of this rule by nearly half the
States, *ante*, at 13-15, the majority concludes that Tennes-
see's statute is unconstitutional inasmuch as it allows the use
of such force to apprehend a burglary suspect who is not obvi-
ously armed or otherwise dangerous. Although the circum-

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