TENNESSEE v. GARNER, etc., et al.
Supreme Court of the United States
Argued October 30, 1984, Decided March 27, 1985
105 S.Ct. 1694 – Nos. 83-1035, 83-1070

Father, whose unarmed son was shot by police officer as son was fleeing from the burglary of an unoccupied house, brought wrongful death action under the federal civil rights statute against the police officer who fired the shot, the police department and others. The United States District Court for the Western District of Tennessee, Harry W. Wellford, J., after remand, 600 F.2d 52, rendered judgment for defendants, and father appealed. The Court of Appeals for the Sixth Circuit, 710 F.2d 240, reversed and remanded. Certiorari was granted. The Supreme Court, Justice White, held that: (1) apprehension by use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement; (2) deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others; (3) Tennessee statute under authority of which police officer fired fatal shot was unconstitutional insofar as it authorized use of deadly force against apparently unarmed, nondangerous fleeing suspect; and (4) the fact that unarmed suspect had broken into a dwelling at night did not automatically mean that he was dangerous.

Judgment of Court of Appeals affirmed and case remanded.

Justice O'Connor, with whom the Chief Justice and Justice Rehnquist joined, dissented, with opinion.

****1696 *Syllabus*[*]**

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

Held: The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, nondangerous fleeing suspect; such force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Pp. 1699–1707.

(a) Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. To determine whether such a seizure is reasonable, the extent of the intrusion on the suspect's rights under that Amendment must be balanced against the governmental interests in effective law enforcement. This balancing process demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. Pp. 1699–1701.

(b) The Fourth Amendment, for purposes of this case, should not be construed in light of the common-law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon. Changes in the legal and technological context mean that that rule is distorted almost beyond recognition when literally applied. Whereas felonies were formerly capital crimes, few are now, or can be, and many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Also, the common-law rule developed at a time when weapons were rudimentary. And, in light of the varied rules adopted in the States indicating a long-term movement away from the common-law rule, particularly in the police departments themselves, that rule is a dubious indicium of the constitutionality of the Tennessee statute. There is no indication that holding a police practice such as that authorized by the ****1697** statute unreasonable will severely hamper

effective law enforcement. Pp. 1701–1706.

(c) While burglary is a serious crime, the officer in this case could not reasonably have believed that the suspect—young, slight, and unarmed—posed any threat. Nor does the fact that an unarmed suspect has broken into a dwelling at night automatically mean he is dangerous. Pp. 1706–1707. 710 F.2d 240 (CA6 1983), affirmed and remanded.

Opinion

Justice WHITE delivered the opinion of the Court.

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

I

At about 10:45 p.m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. App. 41, 56; Record 219. He thought Garner was 17 or 18 years old and about 5′5″ or 5′7″ tall. While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.

****1698** In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn.Code Ann. § 40–7–108 (1982). The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. App. 140–144. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action. *Id.,* at 57.

Garner's father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U.S.C. § 1983 for asserted violations of Garner's constitutional rights. The complaint alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. It named as defendants Officer Hymon, the Police Department, its Director, and the Mayor and city of Memphis. After a 3-day bench trial, the District Court entered judgment for all defendants. It dismissed the claims against the Mayor and the Director for lack of evidence. It then concluded that Hymon's actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing Garner's escape. Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." App. to Pet. for Cert. A10.

The Court of Appeals for the Sixth Circuit affirmed with regard to Hymon, finding that he had acted in good-faith reliance on the Tennessee statute and was therefore within the scope of his qualified immunity. 600 F.2d 52 (1979). It remanded for reconsideration of the possible liability of the city, however, in light of *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, which had come down after the District Court's decision. The District Court was directed to consider whether a city enjoyed a qualified immunity, whether the use of

deadly force and hollow point bullets in these circumstances was constitutional, and whether any unconstitutional municipal conduct flowed from a "policy or custom" as required for liability under *Monell.* 600 F.2d, at 54–55.
The District Court concluded that *Monell* did not affect its decision. While acknowledging some doubt as to the possible immunity of the city, it found that the statute, and Hymon's actions, were constitutional. Given this conclusion, it declined to consider the "policy or custom" question. App. to Pet. for Cert. A37–A39.

The Court of Appeals reversed and remanded. 710 F.2d 240 (1983). It reasoned that the killing of a fleeing suspect is a "seizure" under the Fourth Amendment, and is therefore constitutional only if "reasonable." The Tennessee statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes—"the facts, as found, did not justify the use of deadly force under the Fourth Amendment." *Id.,* at 246. Officers cannot resort to deadly force unless they "have probable cause ... to believe that the suspect [has committed a felony and] poses a threat to the safety of the ****1699** officers or a danger to the community if left at large." *Ibid.*

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

II

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. *United States v. Brignoni-Ponce,* 422 U.S. 873, 878. While it is not always clear just when minimal police interference becomes a seizure, see *United States v. Mendenhall,* 446 U.S. 544, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

A

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *E.g., United States v. Watson,* 423 U.S. 411. Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." We have described "the balancing of competing interests" as "the key principle of the Fourth Amendment." Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. (internal citations omitted).

Applying these principles to particular facts, the Court has held that governmental interests did not support a lengthy detention of luggage, *United States v. Place, supra,* an airport seizure not "carefully ****1700** tailored to its underlying justification," *Florida v. Royer,* 460 U.S. 491, 500 (plurality opinion), surgery under general anesthesia to obtain evidence, *Winston v. Lee,* 470 U.S. 753 (1985), or detention for fingerprinting without probable cause, *Davis v. Mississippi,* 394 U.S. 721 (1969); *Hayes v. Florida,* 470 U.S. 811 (1985). On the other hand, under the same approach it has upheld the taking of fingernail scrapings from a suspect, *Cupp v. Murphy,* 412 U.S. 291 (1973), an unannounced entry into a home to prevent the destruction of evidence, *Ker v. California,* 374 U.S. 23 (1963), administrative housing inspections without probable cause to believe that a code violation will be found, *Camara v. Municipal Court, supra,* and a blood test of a drunken-driving suspect, *Schmerber v. California,* 384 U.S. 757 (1966). In each of these cases, the question was whether the totality of the circumstances justified a particular sort of search or seizure.

B

The same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a

condition precedent to the state's entire system of law enforcement." Brief for Petitioners 14.
Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. Cf. *Delaware v. Prouse, supra,* 440 U.S., at 659. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence ****1701** does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. See *infra,* at 1704–1705. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. See *Schumann v. McGinn,* 307 Minn. 446, 472 (1976) (Rogosheske, J., dissenting in part). Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if 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.

III

A

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

> "[I]f persons that are pursued by these officers for felony or the just suspicion thereof ... shall not yield themselves to ****1702** these officers, but shall either resist or fly before they are apprehended or being apprehended shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony." 2 M. Hale, H. Placitorum Coronae 85 (1736).

Most American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanant, coupled with a general privilege to use such force to stop a fleeing felon. (internal citations omitted).

The State and city argue that because this was the prevailing rule at the time of the adoption of the Fourth Amendment and for some time thereafter, and is still in force in some States, use of deadly force against a fleeing felon must be "reasonable." It is true that this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity. (internal citations omitted). On the other hand, it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton v. New York,* 445 U.S. 573, 591 (1980). Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.

B

It has been pointed out many times that the common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death. "Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected." American Law Institute, Model Penal Code § 3.07, Comment 3, p. 56 (hereinafter Model Penal Code Comment). Courts have also justified the common-law rule by emphasizing the relative dangerousness of felons. (internal citations omitted).

Neither of these justifications makes sense today. Almost all crimes formerly punishable by death no longer are or can be. See, *e.g.,* ****1703** (internal citations omitted). And while in earlier times "the gulf between the felonies and the minor offences was broad and deep," 2 Pollock & Maitland 467, n. 3; *Carroll v. United States, supra,* 267 U.S., at 158, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Wilgus, 22 Mich.L.Rev., at 572–573. These changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have also made the assumption that a "felon" is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.

There is an additional reason why the common-law rule cannot be directly translated to the present day. The common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. L. Kennett & J. Anderson, The Gun in America 150–151 (1975). Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning—and harsher consequences—now than in past centuries. See Wechsler & Michael, A Rationale for the Law of Homicide: I, 37 Colum.L.Rev. 701, 741 (1937).

One other aspect of the common-law rule bears emphasis. It forbids the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe. (internal citations omitted).

In short, though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.

C

In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions. (internal citations omitted). The rules in the States are varied. See generally Comment, 18 Ga.L.Rev. 137, 140–144 (1983). Some 19 States have codified the common-law rule, though in two of these ****1704** the courts have significantly limited the statute. Four States, though without a relevant statute, apparently retain the common-law rule. Two States have adopted the Model Penal Code's provision verbatim. Eighteen others allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested. Louisiana and Vermont, though without statutes or case law on point, do forbid the use of deadly force to prevent any but violent felonies. The remaining States either have no relevant statute or case law, or have positions that are unclear.

It cannot be said that there is a constant or overwhelming trend away from the common-law rule. In recent years, some States have reviewed their laws and expressly rejected abandonment of the ****1705** common-law rule. Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.

This trend is more evident and impressive when viewed in light of the policies adopted by the police departments themselves. Overwhelmingly, these are more restrictive than the common-law rule. C. Milton, J. Halleck, J. Lardner, & G. Abrecht, Police Use of Deadly Force 45–46 (1977). The Federal Bureau of

Investigation and the New York City Police Department, for example, both forbid the use of firearms except when necessary to prevent death or grievous bodily harm. *Id.,* at 40–41; App. 83. For accreditation by the Commission on Accreditation for Law Enforcement Agencies, a department must restrict the use of deadly force to situations where "the officer reasonably believes that the action is in defense of human life ... or in defense of any person in immediate danger of serious physical injury." Commission on Accreditation for Law Enforcement Agencies, Inc., Standards for Law Enforcement Agencies 1–2 (1983) (italics deleted). A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm. Boston Police Department, Planning & Research Division, The Use of Deadly Force by Boston Police Personnel (1974), cited in *Mattis v. Schnarr,* 547 F.2d 1007 (CA8 1976), vacated as moot *sub nom. Ashcroft v. Mattis,* 431 U.S. 171 (1977). Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police 161 (1982) (table). See also Record 1108–1368 (written policies of 44 departments). See generally W. Geller & K. Karales, Split-Second Decisions 33–42 (1981); Brief for Police Foundation et al. as *Amici Curiae.* In light of the rules adopted by those who must actually administer them, the older and fading common-law view is a dubious indicium of the constitutionality of the Tennessee statute now before us.

D

Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today. *Amici* noted that "[a]fter extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies." *Id.,* at 11. The submission is that the obvious state interests in apprehension are not sufficiently served to warrant the use of lethal weapons against all fleeing felons. See *supra,* at 1700–1701, and n. 10.

Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. See Brief for Petitioners 25; Brief for Appellant 11. We do not deny the ****1706** practical difficulties of attempting to assess the suspect's dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances. See, *e.g., Terry v. Ohio,* 392 U.S., at 20, 27. Nor is there any indication that in States that allow the use of deadly force only against dangerous suspects, see nn. 15, 17–19, *supra,* the standard has been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing of police officers' split-second decisions. Moreover, the highly technical felony/misdemeanor distinction is equally, if not more, difficult to apply in the field. An officer is in no position to know, for example, the precise value of property stolen, or whether the crime was a first or second offense. Finally, as noted above, this claim must be viewed with suspicion in light of the similar self-imposed limitations of so many police departments.

IV

The District Court concluded that Hymon was justified in shooting Garner because state law allows, and the Federal Constitution does not forbid, the use of deadly force to prevent the escape of a fleeing felony suspect if no alternative means of apprehension is available. See App. to Pet. for Cert. A9–A11, A38. This conclusion made a determination of Garner's apparent dangerousness unnecessary. The court did find, however, that Garner appeared to be unarmed, though Hymon could not be certain that was the case. *Id.,* at A4, A23. See also App. 41, 56; Record 219. Restated in Fourth Amendment terms, this means Hymon had no articulable basis to think Garner was armed.

In reversing, the Court of Appeals accepted the District Court's factual conclusions and held that "the facts, as found, did not justify the use of deadly force." 710 F.2d, at 246. We agree. Officer Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. The District Court stated in passing that "[t]he facts of this case did not indicate to Officer Hymon that Garner was 'non-dangerous.' " App. to Pet. for Cert. A34. This conclusion is not explained, and seems to be based solely on the fact that Garner had

broken into a house at night. However, the fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. *Post,* at 1711, 1712. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. See Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 1 (1984).[22] Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. See also *Solem v. Helm,* 463 U.S. 277, 296–297. In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973–1982, only 3.8% of all burglaries involved violent crime. Bureau of Justice Statistics, ****1707** Household Burglary 4 (1985). (internal citations omitted)

V

We wish to make clear what our holding means in the context of this case. The complaint has been dismissed as to all the individual defendants. The State is a party only by virtue of 28 U.S.C. § 2403(b) and is not subject to liability. The possible liability of the remaining defendants—the Police Department and the city of Memphis—hinges on *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, and is left for remand. We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. As for the policy of the Police Department, the absence of any discussion of this issue by the courts below, and the uncertain state of the record, preclude any consideration of its validity.

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force 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 1699. 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 1703–1704, the majority concludes that Tennessee's statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortunate, our constitutional holdings must be sensitive both to the history of the Fourth Amendment and to the general implications of the Court's reasoning. By disregarding the serious and dangerous nature of residential burglaries and the longstanding practice of many States, the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape. I do not believe that the Fourth Amendment supports such a right, and I accordingly dissent.

I

The facts below warrant brief review because they highlight the difficult, split-second decisions police officers must make in these circumstances. Memphis Police Officers Elton Hymon and Leslie Wright responded to a late-night call that a burglary was in progress at a private residence. When the officers arrived at the scene, the caller said that "they" were breaking into the house next door. App. in No. 81–5605 ****1708** (CA6), p. 207. The officers found the residence had been forcibly entered through a window and saw lights on inside the house. Officer Hymon testified that when he saw the broken window he realized "that something was wrong inside," *id.,* at 656, but that he could not determine whether anyone—either a burglar or a member of the household—was within the residence. *Id.,* at 209. As Officer Hymon walked behind the house, he heard a door slam. He saw Edward Eugene Garner run away from the house through the dark and cluttered backyard.

Garner crouched next to a 6-foot-high fence. Officer Hymon thought Garner was an adult and was unsure whether Garner was armed because Hymon "had no idea what was in the hand [that he could not see] or what he might have had on his person." *Id.,* at 658–659. In fact, Garner was 15 years old and unarmed. Hymon also did not know whether accomplices remained inside the house. *Id.,* at 657. The officer identified himself as a police officer and ordered Garner to halt. Garner paused briefly and then sprang to the top of the fence. Believing that Garner would escape if he climbed over the fence, Hymon fired his revolver and mortally wounded the suspected burglar.

Appellee-respondent, the deceased's father, filed a 42 U.S.C. § 1983 action in federal court against Hymon, the city of Memphis, and other defendants, for asserted violations of Garner's constitutional rights. The District Court for the Western District of Tennessee held that Officer Hymon's actions were justified by a Tennessee statute that authorizes a police officer to "use all the necessary means to effect the arrest," if "after notice of the intention to arrest the defendant, he either flee or forcibly resist." Tenn.Code Ann. § 40–7–108 (1982). As construed by the Tennessee courts, this statute allows the use of deadly force only if a police officer has probable cause to believe that a person has committed a felony, the officer warns the person that he intends to arrest him, and the officer reasonably believes that no means less than such force will prevent the escape. See *Johnson v. State,* 173 Tenn. 134. The District Court held that the Tennessee statute is constitutional and that Hymon's actions as authorized by that statute did not violate Garner's constitutional rights. The Court of Appeals for the Sixth Circuit reversed on the grounds that the Tennessee statute "authorizing the killing of an unarmed, nonviolent fleeing felon by police in order to prevent escape" violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. 710 F.2d 240, 244 (1983).

The Court affirms on the ground that application of the Tennessee statute to authorize Officer Hymon's use of deadly force constituted an unreasonable seizure in violation of the Fourth Amendment. The precise issue before the Court deserves emphasis, because both the decision below and the majority obscure what must be decided in this case. The issue is not the constitutional validity of the Tennessee statute on its face or as applied to some hypothetical set of facts. Instead, the issue is whether the use of deadly force by Officer Hymon under the circumstances of this case violated Garner's constitutional rights. Thus, the majority's assertion that a police officer who has probable cause to seize a suspect "may not always do so by killing him," *ante,* at 1700, is unexceptionable but also of little relevance to the question presented here. The same is true of the rhetorically stirring statement that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Ante,* at 1701. The question we must address is whether the Constitution allows the use of such force to apprehend a suspect who resists arrest by attempting to flee the scene of a nighttime burglary of a residence.

II

For purposes of Fourth Amendment analysis, I agree with the Court that Officer ****1709** Hymon "seized" Garner by shooting him. Whether that seizure was reasonable and therefore permitted by the Fourth Amendment requires a careful balancing of the important public interest in crime prevention and detection and the nature and quality of the intrusion upon legitimate interests of the individual. *United States v. Place,* 462 U.S. 696, 703. In striking this balance here, it is crucial to acknowledge that police use of deadly force to apprehend a fleeing criminal suspect falls within the "rubric of police conduct ... necessarily [involving] swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry v. Ohio,* 392 U.S. 1, 20. The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances. Moreover, I am far more reluctant than is the Court to conclude that the Fourth Amendment proscribes a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures. Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible. (internal citations omitted- noting "impressive historical pedigree" of statute challenged under Fourth Amendment).

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries not only represent the illegal entry into a person's home, but also "pos[e] real risk of serious harm to others." *Solem v. Helm,* 463 U.S. 277, 315–

316 (BURGER, C.J., dissenting). According to recent Department of Justice statistics, "[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." Bureau of Justice Statistics Bulletin, Household Burglary 1 (January 1985). During the period 1973–1982, 2.8 million such violent crimes were committed in the course of burglaries. *Ibid.* Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority's confident assertion that "burglaries only rarely involve physical violence." *Ante,* at 1707. Moreover, even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the "harsh potentialities for violence" inherent in the forced entry into a home preclude characterization of the crime as "innocuous, inconsequential, minor, or 'nonviolent.' " *Solem v. Helm, supra,* at 316, (BURGER, C.J., dissenting). See also Restatement of Torts § 131, Comment *g* (1934) (burglary is among felonies that normally cause or threaten death or serious bodily harm); R. Perkins & R. Boyce, Criminal Law 1110 (3d ed. 1982) (burglary is dangerous felony that creates unreasonable risk of great personal harm).

Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance. Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending the suspect. With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene. See President's Commission ****1710** on Law Enforcement and Administration of Justice, Task Force Report: The Challenge of Crime in a Free Society 97 (1967). Indeed, the Captain of the Memphis Police Department testified that in his city, if apprehension is not immediate, it is likely that the suspect will not be caught. App. in No. 81–5605 (CA6), p. 334. Although some law enforcement agencies may choose to assume the risk that a criminal will remain at large, the Tennessee statute reflects a legislative determination that the use of deadly force in prescribed circumstances will serve generally to protect the public. Such statutes assist the police in apprehending suspected perpetrators of serious crimes and provide notice that a lawful police order to stop and submit to arrest may not be ignored with impunity. (internal citations omitted).

The Court unconvincingly dismisses the general deterrence effects by stating that "the presently available evidence does not support [the] thesis" that the threat of force discourages escape and that "there is a substantial basis for doubting that the use of such force is an essential attribute to the arrest power in all felony cases." *Ante,* at 1701. There is no question that the effectiveness of police use of deadly force is arguable and that many States or individual police departments have decided not to authorize it in circumstances similar to those presented here. But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality. Cf. *Spaziano v. Florida,* 468 U.S. 447, 464 ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws"). Moreover, the fact that police conduct pursuant to a state statute is challenged on constitutional grounds does not impose a burden on the State to produce social science statistics or to dispel any possible doubts about the necessity of the conduct. This observation, I believe, has particular force where the challenged practice both predates enactment of the Bill of Rights and continues to be accepted by a substantial number of the States.

Against the strong public interests justifying the conduct at issue here must be weighed the individual interests implicated in the use of deadly force by police officers. The majority declares that "[t]he suspect's fundamental interest in his own life need not be elaborated upon." *Ante,* at 1700. This blithe assertion hardly provides an adequate substitute for the majority's failure to acknowledge the distinctive manner in which the suspect's interest in his life is even exposed to risk. For purposes of this case, we must recall that the police officer, in the course of investigating a nighttime burglary, had reasonable cause to arrest the suspect and ordered him to halt. The officer's use of force resulted because the suspected burglar refused to heed this command and the officer reasonably believed that there was no means short of firing his weapon to apprehend the suspect. Without questioning the importance of a person's interest in his life, I do not think this interest encompasses a right to flee unimpeded from the scene of a burglary. Cf. *Payton v. New York,* 445 U.S. 573, 617, n. 14 (WHITE, J., dissenting) ("[T]he policeman's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel"). The legitimate interests of the suspect in these circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the

valid order to halt.

A proper balancing of the interests involved suggests that use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime **1711 burglary is not unreasonable within the meaning of the Fourth Amendment. Admittedly, the events giving rise to this case are in retrospect deeply regrettable. No one can view the death of an unarmed and apparently nonviolent 15-year-old without sorrow, much less disapproval. Nonetheless, the reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action. The officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime.

Because I reject the Fourth Amendment reasoning of the majority and the Court of Appeals, I briefly note that no other constitutional provision supports the decision below. In addition to his Fourth Amendment claim, appellee-respondent also alleged violations of due process, the Sixth Amendment right to trial by jury, and the Eighth Amendment proscription of cruel and unusual punishment. These arguments were rejected by the District Court and, except for the due process claim, not addressed by the Court of Appeals. With respect to due process, the Court of Appeals reasoned that statutes affecting the fundamental interest in life must be "narrowly drawn to express only the legitimate state interests at stake." 710 F.2d, at 245. The Court of Appeals concluded that a statute allowing police use of deadly force is narrowly drawn and therefore constitutional only if the use of such force is limited to situations in which the suspect poses an immediate threat to others. *Id.,* at 246–247. Whatever the validity of Tennessee's statute in other contexts, I cannot agree that its application in this case resulted in a deprivation "without due process of law." Cf. *Baker v. McCollan,* 443 U.S. 137. Nor do I believe that a criminal suspect who is shot while trying to avoid apprehension has a cognizable claim of a deprivation of his Sixth Amendment right to trial by jury. See *Cunningham v. Ellington,* 323 F.Supp. 1072, 1075. Finally, because there is no indication that the use of deadly force was intended to punish rather than to capture the suspect, there is no valid claim under the Eighth Amendment. See *Bell v. Wolfish,* 441 U.S. 520. Accordingly, I conclude that the District Court properly entered judgment against appellee-respondent, and I would reverse the decision of the Court of Appeals.

III

Even if I agreed that the Fourth Amendment was violated under the circumstances of this case, I would be unable to join the Court's opinion. The Court holds that deadly force may be used only if the suspect "threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Ante,* at 1701. The Court ignores the more general implications of its reasoning. Relying on the Fourth Amendment, the majority asserts that it is constitutionally unreasonable to *use* deadly force against fleeing criminal suspects who do not appear to pose a threat of serious physical harm to others. *Ibid.* By declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk. Cf. *Los* **1712 *Angeles v. Lyons,* 461 U.S. 95.

Although it is unclear from the language of the opinion, I assume that the majority intends the word "use" to include only those circumstances in which the suspect is actually apprehended. Absent apprehension of the suspect, there is no "seizure" for Fourth Amendment purposes. I doubt that the Court intends to allow criminal suspects who successfully escape to return later with § 1983 claims against officers who used, albeit unsuccessfully, deadly force in their futile attempt to capture the fleeing suspect. The Court's opinion, despite its broad language, actually decides only that the shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action.

The Court's silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances. Cf. *Payton v. New York,* 445 U.S., at 619 (WHITE, J., dissenting). Police are given no guidance for determining which objects,

among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force. The Court also declines to outline the additional factors necessary to provide "probable cause" for believing that a suspect "poses a significant threat of death or serious physical injury," *ante,* at 1697, when the officer has probable cause to arrest and the suspect refuses to obey an order to halt. But even if it were appropriate in this case to limit the use of deadly force to that ambiguous class of suspects, I believe the class should include nighttime residential burglars who resist arrest by attempting to flee the scene of the crime. We can expect an escalating volume of litigation as the lower courts struggle to determine if a police officer's split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime. Thus, the majority opinion portends a burgeoning area of Fourth Amendment doctrine concerning the circumstances in which police officers can reasonably employ deadly force.

IV

The Court's opinion sweeps broadly to adopt an entirely new standard for the constitutionality of the use of deadly force to apprehend fleeing felons. Thus, the Court "lightly brushe[s] aside," *Payton v. New York, supra,* at 600, 100 S.Ct., at 1387, a long-standing police practice that predates the Fourth Amendment and continues to receive the approval of nearly half of the state legislatures. I cannot accept the majority's creation of a constitutional right to flight for burglary suspects seeking to avoid capture at the scene of the crime. Whatever the constitutional limits on police use of deadly force in order to apprehend a fleeing felon, I do not believe they are exceeded in a case in which a police officer has probable cause to arrest a suspect at the scene of a residential burglary, orders the suspect to halt, and then fires his weapon as a last resort to prevent the suspect's escape into the night. I respectfully dissent.

Dethorne GRAHAM, Petitioner v. M.S. CONNOR et al.
Supreme Court of the United States
Argued February 21, 1989, Decided May 15, 1989
109 S.Ct. 1865 – No. 87-6571

Diabetic brought § 1983 action seeking to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during course of investigatory stop. The United States District Court for the Western District of North Carolina, 644 F.Supp. 246, directed verdict for defendants. On appeal, the Court of Appeals, 827 F.2d 945, affirmed, and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that claim that law enforcement officials have used excessive force in course of arrest, investigatory stop or other "seizure" of a person are properly analyzed under Fourth Amendment's "objective reasonableness" standard.

Vacated and remanded.

Justice Blackmun concurred in part and concurred in the judgment and filed opinion in which Justices Brennan and Marshall joined.

****1866 *Syllabus***

Petitioner Graham, a diabetic, asked his friend, Berry, to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction. Upon entering the store and seeing the number of people ahead of him, Graham hurried out and asked Berry to drive him to a friend's house instead. Respondent Connor, a city police officer, became suspicious after seeing Graham hastily enter and leave the store, followed Berry's car, and made an investigative stop, ordering the pair to wait while he found out what had happened in the store. Respondent back-up police officers arrived on the scene, handcuffed Graham, and ignored or rebuffed attempts to explain and treat Graham's condition. During the encounter, Graham sustained multiple injuries. He was released when Connor learned that nothing had happened in the store. Graham filed suit in the District Court under 42 U.S.C. § 1983 against respondents, alleging that they had used excessive force in making the stop, in violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983." The District Court granted respondents' motion for a directed verdict at the close of Graham's evidence, applying a four-factor test for determining when excessive use of force gives rise to a § 1983 cause of action, which inquires, *inter alia,* whether the force was applied in a good-faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm. *Johnson v. Glick,* 481 F.2d 1028. The Court of Appeals affirmed, endorsing this test as generally applicable to all claims of constitutionally excessive force brought against government officials, rejecting Graham's argument that it was error to require him to prove that the allegedly excessive force was applied maliciously and sadistically to cause harm, and holding that a reasonable ****1867** jury applying the *Johnson v. Glick* test to his evidence could not find that the force applied was constitutionally excessive.

Held: All claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard. Pp. 1869–1873.

a) The notion that all excessive force claims brought under § 1983 are governed by a single generic standard is rejected. Instead, courts must identify the specific constitutional right allegedly infringed by the challenged application of force and then judge the claim by reference to the specific constitutional standard which governs that right. Pp. 1870–1871.

(b) Claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are most properly characterized as invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable seizures," and must be judged by reference to the Fourth Amendment's "reasonableness" standard. P. 1871.

(c) The Fourth Amendment "reasonableness" inquiry is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying

intent or motivation. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation. Pp. 1871–1872.

(d) The *Johnson v. Glick* test applied by the courts below is incompatible with a proper Fourth Amendment analysis. The suggestion that the test's "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances is rejected. Also rejected is the conclusion that because individual officers' subjective motivations are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. The Eighth Amendment terms "cruel" and "punishments" clearly suggest some inquiry into subjective state of mind, whereas the Fourth Amendment term "unreasonable" does not. Moreover, the less protective Eighth Amendment standard applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. Pp. 1872–1873.

827 F.2d 945, (CA4 1987), vacated and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. ___.

Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" ****1868** standard, rather than under a substantive due process standard.

In this action under 42 U.S.C. § 1983, petitioner Dethorne Graham seeks to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during the course of an investigatory stop. Because the case comes to us from a decision of the Court of Appeals affirming the entry of a directed verdict for respondents, we take the evidence hereafter noted in the light most favorable to petitioner. On November 12, 1984, Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when Graham entered the store, he saw a number of people ahead of him in the check outline. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.

Respondent Connor, an officer of the Charlotte, North Carolina, Police Department, saw Graham hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car. About one-half mile from the store, he made an investigative stop. Although Berry told Connor that Graham was simply suffering from a "sugar reaction," the officer ordered Berry and Graham to wait while he found out what, if anything, had happened at the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene in response to Officer Connor's request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." App. 42. Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. Finally,

Officer Connor received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.

At some point during his encounter with the police, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day. He commenced this action under 42 U.S.C. § 1983 against the individual officers involved in the incident, all of whom are respondents here, alleging that they had used excessive force in making the investigatory stop, in violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983." Complaint ¶ 10, App. 5. The case was tried before a jury. At the close of petitioner's evidence, respondents moved for a directed verdict. In ruling on that motion, the District Court considered the following ****1869** four factors, which it identified as "[t]he factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983": (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." 644 F.Supp. 246, 248 (WDNC 1986). Finding that the amount of force used by the officers was "appropriate under the circumstances," that "[t]here was no discernable injury inflicted," and that the force used "was not applied maliciously or sadistically for the very purpose of causing harm," but in "a good faith effort to maintain or restore order in the face of a potentially explosive situation," *id.,* at 248–249, the District Court granted respondents' motion for a directed verdict.

A divided panel of the Court of Appeals for the Fourth Circuit affirmed. 827 F.2d 945 (1987). The majority ruled first that the District Court had applied the correct legal standard in assessing petitioner's excessive force claim. *Id.,* at 948–949. Without attempting to identify the specific constitutional provision under which that claim arose, the majority endorsed the four-factor test applied by the District Court as generally applicable to all claims of "constitutionally excessive force" brought against governmental officials. *Id.,* at 948. The majority rejected petitioner's argument, based on Circuit precedent, that it was error to require him to prove that the allegedly excessive force used against him was applied "maliciously and sadistically for the very purpose of causing harm." *Ibid.* Finally, the majority held that a reasonable jury applying the four-part test it had just endorsed to petitioner's evidence "could not find that the force applied was constitutionally excessive." *Id.,* at 949–950. The dissenting judge argued that this Court's decisions in *Terry v. Ohio,* 392 U.S. 1, and *Tennessee v. Garner,* 471 U.S. 1, required that excessive force claims arising out of investigatory stops be analyzed under the Fourth Amendment's "objective reasonableness" standard. 827 F.2d, at 950–952. We granted certiorari, 488 U.S. 816, and now reverse.

In *Johnson v. Glick,* 481 F.2d 1028, cert. denied, the Court of Appeals for the Second Circuit addressed a § 1983 damages claim filed by a pretrial detainee who claimed that a guard had assaulted him without justification. In evaluating the detainee's claim, Judge Friendly applied neither the Fourth ****1870** Amendment nor the Eighth, the two most textually obvious sources of constitutional protection against physically abusive governmental conduct. Instead, he looked to "substantive due process," holding that "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." 481 F.2d, at 1032. As support for this proposition, he relied upon our decision in *Rochin v. California,* 342 U.S. 165, which used the Due Process Clause to void a state criminal conviction based on evidence obtained by pumping the defendant's stomach. 481 F.2d, at 1032. If a police officer's use of force which "shocks the conscience" could justify setting aside a criminal conviction, Judge Friendly reasoned, a correctional officer's use of similarly excessive force must give rise to a due process violation actionable under §1983. *Ibid.* Judge Friendly went on to set forth four factors to guide courts in determining "whether the constitutional line has been crossed" by a particular use of force—the same four factors relied upon by the courts below in this case. *Id.,* at 1033.

In the years following *Johnson v. Glick,* the vast majority of lower federal courts have applied its four-part "substantive due process" test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard. Indeed, many courts have seemed to assume, as did the courts below in this case, that there is a generic "right" to be free from excessive force, grounded not in any particular constitutional provision but rather in "basic principles of § 1983

jurisprudence."

We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. As we have said many times, § 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan,* 443 U.S. 137, 144, n. 3. In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. See *id.,* at 140 ("The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged").[9] In most instances, ****1871** that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard. See *Tennessee v. Garner, supra,* 471 U.S., at 7–22 (claim of excessive force to effect arrest analyzed under a Fourth Amendment standard); *Whitley v. Albers,* 475 U.S. 312, 318–326 (claim of excessive force to subdue convicted prisoner analyzed under an Eighth Amendment standard).

Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures" of the person. This much is clear from our decision in *Tennessee v. Garner, supra.* In *Garner,* we addressed a claim that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's constitutional rights, notwithstanding the existence of probable cause to arrest. Though the complaint alleged violations of both the Fourth Amendment and the Due Process Clause, see 471 U.S., at 5, we analyzed the constitutionality of the challenged application of force solely by reference to the Fourth Amendment's prohibition against unreasonable seizures of the person, holding that the "reasonableness" of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out. *Id.,* at 7–8. Today we make explicit what was implicit in *Garner* 's analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake. *Id.,* at 8, quoting *United States v. Place,* 462 U.S. 696, 703. Our Fourth Amendment jurisprudence ****1872** has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry v. Ohio,* 392 U.S., at 22–27. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish,* 441 U.S. 520, 559, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner,* 471 U.S., at 8–9. (the question is "whether the totality of the circumstances justifie[s] a particular sort of ... seizure").

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio, supra,* 392 U.S., at 20–22. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill v. California,* 401 U.S. 797, nor by the mistaken execution of a valid search warrant on the wrong premises, *Maryland v. Garrison,* 480 U.S. 79. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick,* 481 F.2d, at 1033, violates the Fourth Amendment. The calculus

of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott v. United States,* 436 U.S. 128, 137–139; see also *Terry v. Ohio, supra,* 392 U.S., at 21 (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard"). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. See *Scott v. United States, supra,* 436 U.S., at 138, citing *United States v. Robinson,* 414 U.S. 218.

Because petitioner's excessive force claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson v. Glick* test. That test, which requires consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm," is incompatible with a proper Fourth Amendment analysis. We do not agree with the Court of Appeals' suggestion, see 827 F.2d, at 948, that the "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances. Whatever the empirical correlations between "malicious and sadistic" behavior and objective unreasonableness may be, the fact remains that the "malicious and sadistic" factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is "unreasonable" under the Fourth ****1873** Amendment. Nor do we agree with the Court of Appeals' conclusion, see *id.,* at 948, n. 3, that because the subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, see *Whitley v. Albers,* 475 U.S., at 320–321, it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms "cruel" and "punishments" clearly suggest some inquiry into subjective state of mind, whereas the term "unreasonable" does not. Moreover, the less protective Eighth Amendment standard applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Ingraham v. Wright,* 430 U.S. 651, 671, n. 40. The Fourth Amendment inquiry is one of "objective reasonableness" under the circumstances, and subjective concepts like "malice" and "sadism" have no proper place in that inquiry. Because the Court of Appeals reviewed the District Court's ruling on the motion for directed verdict under an erroneous view of the governing substantive law, its judgment must be vacated and the case remanded to that court for reconsideration of that issue under the proper Fourth Amendment standard.

It is so ordered.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, concurring in part and concurring in the judgment.

I join the Court's opinion insofar as it rules that the Fourth Amendment is the primary tool for analyzing claims of excessive force in the prearrest context, and I concur in the judgment remanding the case to the Court of Appeals for reconsideration of the evidence under a reasonableness standard. In light of respondents' concession, ****1874** however, that the pleadings in this case properly may be construed as raising a Fourth Amendment claim, see Brief for Respondents 3, I see no reason for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard. I also see no basis for the Court's suggestion, *ante,* at 1871, that our decision in *Tennessee v. Garner,* 471 U.S. 1, implicitly so held. Nowhere in *Garner* is a substantive due process standard for evaluating the use of excessive force in a particular case discussed; there is no suggestion that such a standard was offered as an alternative and rejected.

In this case, petitioner apparently decided that it was in his best interest to disavow the continued applicability of substantive due process analysis as an alternative basis for recovery in prearrest excessive force cases. See Brief for Petitioner 20. His choice was certainly wise as a matter of litigation strategy in his own case, but does not (indeed, cannot be expected to) serve other potential plaintiffs equally well. It is for that reason that the Court would have done better to leave that question for another day. I expect that the use

of force that is not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns. But until I am faced with a case in which that question is squarely raised, and its merits are subjected to adversary presentation, I do not join in foreclosing the use of substantive due process analysis in prearrest cases.

STATE of Maryland v. Stephen PAGOTTO, 361 Md. 528
Court of Appeals of Maryland
Nov. 16, 2000
No. 99, Sept. Term, 1999

Defendant police officer was convicted after jury trial in the Circuit Court, Baltimore City, John C. Byrnes, J., of involuntary manslaughter and reckless endangerment in connection with incident in which a bullet from his handgun killed a motorist who was driving a vehicle that defendant was attempting to stop. Defendant appealed. The Court of Special Appeals reversed, 127 Md.App. 271, 732 A.2d 920. On grant of state's petition for a writ of certiorari, the Court of Appeals, Raker, J., held that evidence was insufficient to support convictions.

Court of Special Appeals affirmed. Bell, C.J., filed a dissenting opinion.

Opinion
RAKER, Judge.
Respondent, Stephen Pagotto, a sergeant with the Baltimore City Police Department, was convicted of involuntary manslaughter and two counts of reckless endangerment in violation of Maryland Code (1957, 1992 Repl.Vol.) Article 27, § 120(a) following a jury trial in the Circuit Court for Baltimore City. Pagotto noted a timely appeal to the Court of Special Appeals, contending that the State presented legally insufficient evidence at trial to sustain his convictions. The Court of Special Appeals agreed with Pagotto and reversed the judgment of conviction. *See Pagotto v. State,* 127 Md.App. 271. We granted the State's petition for a writ of certiorari. We shall hold that the evidence was insufficient to support Pagotto's convictions. Accordingly, we shall affirm the judgment of the Court of Special Appeals.

I.

We are mindful that, in an appeal based upon insufficiency of evidence, it is not the function of the appellate court to undertake a review of the record that would amount to a retrial of the case. *See State v. Albrecht,* 336 Md. 475, 478. Rather, we must view the evidence in the light most favorable to the prosecution, and the judgment can be reversed only if we find that no rational trier of fact could have found the essential elements of the crime. *See* ***534** *Jackson v. Virginia,* 443 U.S. 307, 319; *Albrecht,* 336 Md. at 478. Fundamentally, our concern is not with whether the trial court's verdict is in accord with the weight of the evidence, *see Jackson,* 443 U.S. at 319, but only with whether the verdict was supported by sufficient evidence—evidence which could fairly convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt. *See Albrecht,* 336 Md. at 479.

In other words, in a sufficiency of the evidence challenge, the appellate court is not to ask whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Rather, the court only asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319. (internal citations omitted).

II.

The facts of this case are undisputed until the critical moments leading up to the discharge of Respondent's weapon. Sergeant Pagotto and his partner, Officer Stephen Wagner, were both assigned to the Gun Recovery Unit of the Baltimore City Police Department (hereinafter "Department"). The mission of the Gun Recovery Unit was to remove guns from the streets of Baltimore City. Each officer assigned to this unit was trained to look for people with certain characteristics that police profiles indicated were more likely to carry guns. The Gun Recovery Unit frequently used pretextual traffic stops to accomplish their mission. *See Whren v. United States,* 517 U.S. 806, 813, (holding no Fourth Amendment violation if police have probable cause to believe driver of automobile is violating traffic regulation, but the stop is to accomplish some other investigative purpose). ***535** The incident in question occurred on the night of February 7, 1996. Officers Pagotto and Wagner were assigned to the Northeastern District of Baltimore in an area called "Little Eastern." This area was selected because it has a high concentration of narcotics trafficking and gun related violence. Pagotto and Wagner were dressed in plain clothes that evening, although they were driving a "marked Tracker," making

them easily identifiable as police officers.

At approximately 8:30 p.m., the two officers spotted a white Subaru in the 2600 block of Kirk Avenue. Although the officers stopped the car because the license was displayed improperly, they both testified that their subjective motive in stopping the car was to look for guns.[3] According to Sergeant Pagotto, they decided to stop this particular car because it was in a high drug and gun area and looked suspicious. Officer Pagotto explained the significance of the license tag:

> A lot of times people who are going to conceal what they are doing like dealing narcotics or doing a drive-by shooting or even if it is a stolen car, guns and narcotics are synonymous with each other, and they just ... [remove the tag] to conceal their identification.

In response to the officers' signal to stop, the Subaru pulled over on the 2700 Block of Kirk Avenue. Sergeant Pagotto stopped the Tracker about ten feet behind the Subaru. Both officers left the Tracker and began to approach the Subaru. Officer Pagotto approached the driver's side and Officer Wagner approached the passenger's side. Three people were in the Subaru: Preston Barnes, Damien Jackson, and Ali Austin. Officer Wagner testified that, as they approached the car, he noticed that all three persons were "very excited and moving." ***536** Officer Pagotto testified that, when he was about five feet from the back of the car, he saw the driver of the car, Preston Barnes, tilt his head back and drop his shoulder. As part of his training for the Gun Recovery Unit, Pagotto had been instructed that movements such as these were consistent with the picking up of a weapon or the placing of one under the seat. It was at this time that Pagotto withdrew from his holster his police weapon, a Glock 17 automatic.

Damien Jackson, testifying for the prosecution, stated that, earlier that evening, the three men in the car had stopped to pick up ten bags of "Ready Rock," a form of cocaine. He further testified that, when the police signaled for them to pull over, Preston Barnes exclaimed, "Oh shit, I'm dirty," referring to the fact that he was carrying drugs. Barnes was on probation for a drug conviction, and Jackson testified that Barnes knew that any new convictions would constitute a violation of probation and could result in a minimum of five years in prison.

Jackson also explained an escape plan that he and Barnes had worked out in case they were ever caught in such a situation. The plan was that, if they were stopped while carrying drugs, they would pull the car over and bring it to a stop. The officers would then presumably stop their vehicle and begin to approach the car. When the officers came close to the car, Barnes would "rev up" the engine and take off. The two figured that they would be able to make a clean getaway by the time that the officers made it back to their vehicle, started it, and began pursuit. It appears that it was this plan that Barnes was attempting to implement on the night in question.

As the two officers approached the car, it began drifting forward slightly. Officer Wagner originally believed that it was drifting because the car had parked on a downslope along Kirk Avenue. Both officers were yelling orders at the driver of the car "to stop, put on the brake, put the car in park." Sergeant Pagotto then arrived at the driver's side door with his weapon drawn in his right hand. Two separate versions of ***537** the precise events from this point forward were provided by Sergeant Pagotto, on the one hand, and Damien Jackson and Ali Austin, on the other hand.

Damien Jackson testified that, when Sergeant Pagotto arrived at the driver's side door, Pagotto opened the door and then stepped back two or three feet from the car. He further testified that, as Pagotto stepped back from the door, Pagotto was yelling at Barnes to "[s]top the car, stop the car, or I am going to shoot." It was at this point that Barnes shifted from park to drive and pressed down on the gas pedal. Because there was a car parked in front of the Subaru, Barnes had to move the car toward the center of Kirk Avenue and Sergeant Pagotto. As he did so, Jackson and Austin heard a shot, then heard Barnes exclaim, "Oh shit," and slump over. The car proceeded to crash into a parked car down the street. When it did so, both Jackson and Austin fled the scene.

Sergeant Pagotto's testimony differed slightly. He testified that, as he approached the car, he withdrew his

gun from the holster, holding it in his right hand with his finger on the slide of the gun.[4] He then took another two or three steps, and, when he neared the door, the driver opened the door slightly. Sergeant Pagotto had seen a training video that instructed officers to be cautious when a car door opens slightly because many officers had been killed in similar situations. Fearing that he was about to be ambushed by Barnes, he instinctively moved forward to attempt to grab Barnes's arm. Pagotto testified that he had been trained to go into an ambush because it draws other fire towards the attacker.

Pagotto struggled with Barnes with his left hand while his police weapon remained outside the vehicle in his right hand, along his side. Barnes managed to rip his arms away from Pagotto and toward the console. Fearing that Barnes was going for a gun, Pagotto attempted to disengage himself from ***538** the car. Pagotto testified that, at this point, he was stuck halfway in the car with his feet outside of the car while the car was rolling forward. When Pagotto heard the engine start, he yelled to Wagner to "get the Tracker," meaning the police vehicle. Pagotto testified that he was then able to free himself of the Subaru just before Barnes put the car into gear. When the Subaru moved out toward him, his hand struck the side of the car, knocking him to the ground, and causing his gun to discharge. Officer Wagner testified that it was while he was getting the Tracker that he heard the shot. He turned around to see Sergeant Pagotto's body falling forward from a position against the car.

The bullet entered the left rear passenger window through the lower left hand corner. It passed between the post that separates the front and rear door and the driver's seat. It then struck the body of Preston Barnes just under his left armpit and continued through his chest, piercing his heart and lung. The trajectory of the lethal bullet was consistent with Sergeant Pagotto's testimony.

III.

The chief question in this case is whether Pagotto's conduct on that night, "considering all of the factors of the case, was such that it amounted to 'wanton or reckless disregard for human life.'" (internal citations omitted). As such, we must determine if the State produced sufficient evidence from which a rational trier of fact could conclude that Pagotto had not acted as "a reasonable police officer, similarly situated." *Albrecht,* 336 Md. at 501.

The State argues that Pagotto was grossly negligent by violating Baltimore City Police Department guidelines in three respects: (1) closing on the victim with his gun drawn; (2) ***539** attempting a one-armed vehicular extrication with his gun in the other hand; and (3) placing his trigger finger on the slide of the gun, rather than under the trigger guard as he approached the decedent's car. Pagotto contends that each of these acts was reasonable under the circumstances.

Each side presented several expert witnesses. The State called four key witnesses as experts on police procedure. They were Major Francis Melcavage, a former instructor at the Baltimore City Training Academy and an expert in defense tactics and use of force; Sergeant Craig Meier, a member of the Firearms Training Unit of the Baltimore City Police Education and Training Division and an expert in the use of force and firearms; Sergeant Timothy Vittetoe of the Maryland State Police, an expert in use of force, defense tactics, police training, and police procedures; and John L. Meiklejohn, an expert in defense tactics, training points and procedures, standards of police conduct, and use of force. We shall review the evidence presented at trial, in the light most favorable to the State, to determine if any rational trier of fact could have convicted the defendant of the crimes charged.

A.

The first alleged grossly negligent act is that Pagotto closed on the victim with his gun drawn. It is first important to note that three of the State's experts stated that they did not feel that it was inappropriate for Pagotto to draw his gun when he did; the only problem was that he should not have closed with his gun drawn. Sergeant Meier testified that an officer is justified in drawing his weapon anytime that he has a reasonable belief that there is a threat of death or serious injury to himself or others and that Sergeant Pagotto was, therefore, justified in drawing his weapon when he did. He testified, however, that it is inappropriate for an officer to close with his weapon drawn and that it is a violation of general police ***540** guidelines. Once Pagotto perceived a threat, he should have returned to his car and called for backup, rather than closing on Barnes. He explained that the rationale for the policy is the concern that, should the officer come too close to a suspect, he could become engaged in a struggle and accidentally discharge his weapon.

John Meiklejohn corroborated Sergeant Meier's testimony, stating that Pagotto was justified in drawing his weapon, but should have retreated to his vehicle upon perceiving a threat. Sergeant Vittetoe's testimony differed only slightly. He testified that, once Pagotto perceived a threat, he should not have drawn his weapon, should not have continued to close, and should have sought cover:

> THE COURT: [H]e should have stopped closing as soon as he determined or apprehended a danger, correct?
>
> [VITTETOE]: As he approached and he made the determination that the actions of the driver could either put his life in jeopardy and/or his partner's, indicated in his report, his actions of closing should have ceased at that point. Two things he should have done: disengaged making greater distance and also seeked an area of cover or concealment for his protection and also notify his partner of what he was dealing with at that point so his partner could better defend himself.

The one State witness with a different opinion was Major Francis Melcavage. He testified that, while it is inadvisable for an officer to close with a weapon in hand, it is inadvisable only because of the danger that it poses to the officer and that an officer may, therefore, do so if he chooses:

> [DEF. ATT'Y]: So it would be in your mind a violation of a policy or guideline to come within five or six feet of a subject with your gun drawn if you suspected they had a weapon?
>
> [MELCAVAGE]: I don't think that policy has even been delineated. I wouldn't say it was a violation of policy, I would say it was probably inadvisable action.
>
> ***541** [DEF. ATT'Y]: Well, but there is a policy that you are familiar with that you should not close with your weapon in your hand, right? Isn't that what you are saying?
>
> [MELCAVAGE]: No, not that I am aware of.
>
> [DEF. ATT'Y]: All right. So you can close with a weapon in your hand?
>
> [MELCAVAGE]: Yes.

The defense presented several witnesses addressing the question whether Sergeant Pagotto was reasonable in closing with his weapon drawn. Detective Jeffries, an original member of the Gun Recovery Unit and an expert in defensive strategies and Gun Recovery Unit practices, testified that, while the Department has a guideline to the contrary, an officer must determine if it is appropriate to close with a drawn gun on a case-by-case basis and that it is within the officer's discretion to do so if he deems it appropriate. In addition, he testified that he has been in twenty-five to fifty situations in which he or someone that he was working with had closed with a drawn gun. Lieutenant Charles J. Key, author of the guidelines that Pagotto had allegedly violated, also testified for the defense. He stated that Pagotto had violated the guideline against closing with a drawn gun. He went on to state, however, that guidelines are discretionary and that Pagotto had acted reasonably under the circumstances.

B.

The second alleged violation is that Pagotto attempted a one-armed vehicular extrication with his gun in the other hand. The only testimony that described any contact between Preston Barnes and Sergeant Pagotto was from Sergeant Pagotto. He characterized this confrontation in a far different light than that in which the State had characterized it. According to Sergeant Pagotto, he did not attempt to extricate Preston Barnes; rather, he was attempting to defend himself from what he felt was an oncoming attack. Pagotto's testimony on direct examination was as follows:

> ***542** [DEF. ATT'Y]: What was the next thing you did after pulling the gun from the holster?
>
> [PAGOTTO]: I took about two or three more steps toward the car, and got to about the back door on the driver's side.... [T]hat is when the door sprung open.
>
> [DEF. ATT'Y]: What were you thinking when that door sprung open?
>
> [PAGOTTO]: I was thinking I was going to get shot.
>
> [DEF. ATT'Y]: Why?
>
> [PAGOTTO]: Because I have had training and saw videos where a ... door would open up ... and there would be a shotgun right inside the door ... the shotgun goes off and kills the officer. I also saw a video showing officers being ****105** killed as they approached. I just thought at that point in time, I was going to get killed.
>
> ******
>
> [DEF. ATT'Y]: Why didn't you turn and run back to the Tracker?

[PAGOTTO]: I didn't think of it at the time.
[DEF. ATT'Y]: What did you do instead?
[PAGOTTO]: I went towards the driver.
[DEF. ATT'Y]: And why did you do this?

* * * * * *

[PAGOTTO]: It was the best plan of attack that way to go in and get ahold of him.
[DEF. ATT'Y]: And what are you basing that on when you say it was the best plan of attack?
[PAGOTTO]: Years of experience, and all the time in a possible ambush situation, I was always trained to go into the ambush, drawing any fire towards that person. It was just instinct, I mean, I pushed the door out of the way and grabbed his hand.

Major Melcavage's testimony was most critical of Sergeant Pagotto's attempted extrication. Major Melcavage, who ***543** teaches control tactics and vehicular extrications at the police academy, stated that an officer should always holster his weapon before attempting to remove a driver. He testified:

[STATE'S ATT'Y]: If you have a gun in your hand and you intend to remove a driver from a vehicle through the use of a control tactic, what should you do with the weapon?
[MELCAVAGE]: You would have to holster the weapon.
[STATE'S ATT'Y]: And why is that?
[MELCAVAGE]: Because you need two hands to gain control of an individual or to apply a technique as taught at the academy as I taught. And by keeping the gun in the situation, you are unnecessarily endangering yourself. They can take the gun from you just as well, the subject could take the gun from you just as well as you using it on them, or the gun could go off and you could injure innocent bystanders, yourself, or the subject.
[STATE'S ATT'Y]: Okay. Would that fact change whether the vehicle was stationary or moving?
[MELCAVAGE]: No, sir.
[STATE'S ATT'Y]: If you have your weapon drawn and it is not safe to holster it in order to use the control tactic, what should you do?
[MELCAVAGE]: It is not safe to holster them, you need to seek cover and call for assistance, call for other officers. You have to disengage.

Sergeant Vittetoe testified on this subject as well. He stated that an officer should always holster his weapon before struggling with a suspect because two hands are needed to control a suspect. In addition, the holstered weapon protects against the eventuality that the weapon could be used against the officer. He was, therefore, of the opinion that Sergeant Pagotto should not have attempted to reach into the car with a gun in one of his hands. On cross examination, however, Sergeant Vittetoe testified that, prior to 1994, Maryland State Police Officers were permitted to grab a suspect with one hand while the officer had the service weapon in the other hand. ***544** Detective Kenneth Jeffries, testifying for the defense, stated that it is within an officer's discretion whether to attempt to extricate a suspect with a drawn gun. Lieutenant Key testified that the guidelines are designed for departmental use only and are not to be used as a basis for criminal charges. He further testified that, in evaluating officers, the Department gives the officers wide discretion in applying the guidelines.

C.

The final alleged violation is that Sergeant Pagotto had his finger on the slide of the gun rather than below the trigger guard as required by Baltimore City Police guidelines. Major Melcavage testified that the current Baltimore City Police Department guidelines require an officer to place his trigger finger below the trigger guard. He further testified, however, that, when Sergeant Pagotto was trained in 1980, the Department issued revolvers. The guidelines at that time did not address the location or placement of the officer's trigger finger. He also stated that the Department first issued a guideline with respect to the trigger finger in 1990, when the Department switched to the Glock 17. He testified that, in 1990, police officers were taught to keep their trigger finger on the slide of the gun. According to Major Melcavage, this standard was changed to the current one sometime in 1993 or 1994. Sergeant Meir essentially corroborated the testimony of Major Melcavage in this respect and also stated that Baltimore City is the only police department in Maryland that has this particular requirement.

Captain Meiklejohn testified that Montgomery County officers, unlike the officers in Baltimore City, are still trained to keep their trigger finger on the slide of the weapon. He further testified that the reason that Montgomery County officers are taught to keep their finger on the slide is because keeping the finger below

the trigger guard can slow reaction time in a critical situation. Sergeant Vittetoe also testified as to the Maryland State Police Department's practices in this regard:

> ***545** [DEF. ATT'Y]: And isn't it true that the Maryland State Police Department trains their officers to also keep their finger in a ready position along the slide of the gun as opposed to under the trigger guard, correct?
>
> [VITTETOE]: That is correct, ma'am.

Lieutenant Key, author of the Baltimore City Police Department guidelines requiring the placement of the trigger finger below the trigger guard, testified for the defense. He testified that Baltimore City is the only police department in the State that requires the placement of the trigger finger below the guard. He further testified that, because Sergeant Pagotto had originally been trained to keep his trigger finger on the slide of the gun, his "muscle memory" would have caused him, in a stress situation, to go back to his original training and past experience. He testified:

> Your body trains itself to do certain things. That applies in this situation because if over the years, and in this case 13 years, your finger is alongside the slide, you cannot eradicate this muscle memory in ... 20 or 30 minutes worth of training. It just won't happen. He's going to go back and do what he did in a stress situation, what he's trained himself to do most frequently.

He continued that, due to these circumstances, Sergeant Pagotto's placement of his finger along the slide of the weapon was reasonable.

D.

Based on this testimony, the trial judge, in denying the motion for judgment of acquittal, concluded that the evidence was sufficient to send the case to the jury on the charges of involuntary manslaughter and reckless endangerment. The trial judge stated:

> I think the evidence that has been submitted so far has been strong, certainly permissible to conclude beyond a reasonable doubt that there was gross negligence and recklessness in the defendant's conduct.

***546** The intermediate appellate court found that the State had failed to meet its burden of production with respect to gross negligence and reversed the judgment. The court held:

> [T]he evidence shows three or four possible deviations from or violations of departmental guidelines of the Baltimore City Police Department. It shows that the actions of Sergeant Pagotto may well have contributed to the creation of a dangerous confrontation between himself and Preston Barnes. It shows what may be a case of actionable civil negligence. We hold that it does not show, however, such a departure from the norm of reasonable police conduct that it may fairly be characterized as "extraordinary and outrageous." We hold that it does not show on the part of the law enforcement officer, even if guilty of some negligence in the performance of his duties, a *mens rea* that qualifies as a "wanton and abandoned disregard of human life." The burden of production with respect to gross criminal negligence was not satisfied. *Pagotto,* 127 Md.App. at 357.

The court based this conclusion, in part, on the fact that the prosecution had failed to present evidence that the violation of a police guideline amounted to an action that was not that of a "reasonable police officer similarly situated" or evidenced a "wanton or reckless disregard of human life." The court stated:

> All of the testimony of all of the experts, save one, made no mention of a key link in the chain of logic that was an indispensable but unspoken part of the State's case. Even granting, *arguendo,* the failure of an officer to follow a departmental guideline, what is the significance of such a failure? The missing premise was vital to the validity of the State's ultimate syllogism of guilt. *Id.* at 325.

The only witness to testify as to the significance of an officer's failure to follow departmental guidelines was Lieutenant Charles Key, an expert for the defense and author of the relevant guidelines. Judge Moylan, ***547** writing for the intermediate appellate court, pointed out that Key testified that the police guidelines are used for internal evaluations of the officer only and are highly discretionary.

The Court of Special Appeals also found, in the alternative, that Preston Barnes had removed Sergeant Pagotto from the field of proximate cause by attempting his getaway. The court stated:

> As a completely alternative holding, we also conclude that when Preston Barnes put into motion his predetermined tactic of attempting a vehicular getaway from the detention scene, that criminal act on his part constituted an independent intervening cause that resulted in his own death. *Id.* at 358.

We turn now to determine if the evidence was legally sufficient to convince a rational trier of fact of Officer Pagotto's guilt of involuntary manslaughter and reckless endangerment beyond a reasonable doubt.

IV.

Upon our independent review of the record in this case, we conclude that the Court of Special Appeals was correct in its determination that there was insufficient evidence to support Pagotto's convictions. Specifically, we conclude that Pagotto's actions on the night of February 7, 1996, when viewed in their totality, were neither grossly negligent nor reckless.

At the close of the State's case, the trial court granted Pagotto's motion for judgment of acquittal with respect to the charge of voluntary manslaughter. The trial court found that the State had presented no evidence from which a rational jury could find that Pagotto had intentionally killed Preston Barnes. Thus, the case went to the jury on the charge of involuntary manslaughter. ***548** Involuntary manslaughter is a common law felony in Maryland. It is defined as:

> an unintentional killing done without malice, (1) by doing some unlawful act endangering life but which does not amount to a felony, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *Albrecht,* 336 Md. at 499.

The charge in this case is predicated upon the negligent doing of some lawful act. For the conviction to lie, however, the State must prove more than mere negligence. The State must show a greater degree of negligence or "gross" negligence. (internal citations omitted).

In order for the accused's conduct to constitute gross negligence, "the conduct must manifest 'a wanton or reckless disregard of human life.'" (internal citations omitted). In other words, the accused's conduct, under the circumstances, must manifest such a gross departure from what would be the conduct of an ordinary and prudent person so as to amount to a disregard of the consequences and an indifference to the rights of others. (internal citations omitted).

The defendant was also charged with two counts of reckless endangerment of the two passengers in the car: Damien Jackson and Ali Austin. While involuntary manslaughter requires the death of a person, reckless endangerment does not require that any actual harm occur to another. (internal citations omitted). Maryland's reckless endangerment statute, codified at the time of this incident as Maryland Code (1957, 1992 Repl.Vol.) Article 27, § 120(a), provided, in pertinent part, as follows:

> Any person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to ***549** another person is guilty of the misdemeanor of reckless endangerment and on conviction is subject to a fine not exceeding $5,000 or imprisonment not exceeding 5 years or both.

This statute is aimed at deterring the commission of potentially harmful conduct before an injury or death occurs. *See Minor,* 326 Md. at 442. The statute was enacted "to punish, as criminal, reckless conduct which created a substantial risk of death or serious physical injury to another person. It is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." *Id.* at 441. Thus, the focus is on the conduct of the accused. The test to determine whether a defendant's conduct was reckless is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish. *Id.* at 443.

A defendant's conduct is typically measured against the conduct of an ordinarily prudent citizen similarly situated. Where the accused is a police officer, however, the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated. As the intermediate appellate court explained:

> Under almost all circumstances, the gratuitous pointing of a deadly weapon at one civilian by another

> civilian would almost certainly be negligence *per se,* if not gross negligence *per se.* A police officer, on the other hand, is authorized and, indeed, frequently obligated to threaten deadly force on a regular basis. The standard of conduct demanded of a police officer on duty, therefore, is the standard of a reasonable police officer similarly situated. ***550** *Albrecht,* 336 Md. at 501 (citations omitted).

The theory of the prosecution was that the conduct at issue was identical for the charges of involuntary manslaughter and reckless endangerment. The prosecution was predicated upon the theory that Sgt. Pagotto's conduct, i.e., the alleged violations of departmental guidelines, was both a gross departure from the standard of conduct that a reasonable police officer similarly situated would observe, thereby creating a substantial risk of death or serious physical injury to the two passengers, as well as such grossly negligent conduct that manifested a wanton or reckless disregard of human life. Therefore, under the circumstances presented herein, if we find that the evidence provided by the State was legally insufficient to sustain a conviction for manslaughter, then the evidence was also insufficient to sustain a conviction for reckless endangerment.

V.

We emphasize again that, in reviewing for legal sufficiency of the evidence, we are not sitting as the trier of fact. Rather, we only determine if any rational trier of fact could have found Pagotto guilty. The Court of Special Appeals found that each of the State's alleged violations of departmental guidelines, at best, amounted to an actionable case in civil negligence. We agree.

With respect to Pagotto's placement of his trigger finger on the slide of the gun, the Court of Special Appeals found that the evidence presented was insufficient to support a charge of involuntary manslaughter. The court stated:

> We hold that Sergeant Pagotto's placement of his trigger finger along the "slide" of his Glock automatic, whether considered alone or in combination with any other factor, does not remotely generate a *prima facie* case of gross criminal negligence. We are not substituting our weighing of the evidence for that of the jury. We are holding, as a matter of law, that the burden of production as to gross ***551** criminal negligence was not satisfied so as even to permit the jury to consider such a charge. Although Sergeant Pagotto may not have followed a recently imposed and geographically unique guideline, his action in that regard was not inherently wrong or of a *malum-in-se* character.

Had a Maryland State Trooper or a Baltimore County Officer, for instance, ridden along with Sergeant Pagotto on February 7, 1996, and engaged in precisely the same conduct that Sergeant Pagotto did, that State Trooper or County Officer would have been acting with complete propriety with respect to the placement of the trigger finger on a weapon. Had Sergeant Pagotto himself placed his trigger finger on the "slide" of his weapon on February 7, 1993, instead of on February 7, 1996, he would then have been acting with complete propriety. Except for a criminal violation of a local municipal or county ordinance, precisely the same act under precisely the same circumstances cannot be a crime in Baltimore City but not a crime in Baltimore County. *Pagotto,* 127 Md.App. at 310–11, 732 A.2d at 941.

The State's logic leads to the conclusion that a police officer placing his finger on the slide of the weapon is criminally negligent behavior if committed by a Baltimore City Police Officer in Baltimore City, but acceptable, non-criminal behavior if committed by any other police officer anywhere else in the State. The Court of Special Appeals was correct in concluding that this result is illogical.

We also agree with the Court of Special Appeals' conclusion that Sergeant Pagotto's act of closing with a drawn gun was not criminally negligent. The intermediate appellate court held:

> Even assuming that "closing" to within a few feet of Preston Barnes constituted ordinary civil negligence, there was nothing in the appellant's behavior to suggest "a wanton or reckless disregard for human life." He approached an inherently dangerous confrontation with his weapon in hand. ***552** Hindsight, indeed, revealed that Sergeant Pagotto's suspicions and fears were well-grounded. Although Sergeant Pagotto did not know it at the time, Preston Barnes was almost certainly committing a felony in his presence—the possession of cocaine with intent to distribute. Rather than risk a violation of probation, Preston Barnes was poised, just as the Sergeant drew near, to initiate a high speed getaway, wantonly running down Sergeant Pagotto in the process if need be. If in a stress-laden situation and for his own self-protection

> Sergeant Pagotto violated a departmental guideline, he did not thereby commit an act of gross negligence. *Id.* at 318.

The final alleged violation of Department guidelines was Sergeant Pagotto's so-called one-armed vehicular extrication. The Court of Special Appeals found that Sergeant Pagotto had not violated this guideline and, even if he had, it was not behavior that could legally rise to the level necessary to sustain a conviction of involuntary manslaughter. The court stated in this regard:

> The testimony of both Major Melcavage and Sergeant Vittetoe dealt with the subject of vehicular extrication as an abstract academic or training exercise. Self-evidently, one can wrestle with an opponent more effectively with two hands than with one. That's the school situation. They analyzed the problem as if Sergeant Pagotto had moved forward *ab initio* with a pre-formed and deliberate plan to perform a one-armed vehicular extrication. Their opinions had no pertinence to an instinctive, split-second reaction, actual or hypothetical, where the right hand is already holding a weapon and where a car door suddenly opens, a foot or two away, in front of one's face. The instantaneous reaction either to "move into the ambush" or to attempt to retreat to the cover of the police cruiser is something that is not concerned with the schoolroom paradigm of a model vehicular extrication. ***553** The appellant's version of this part of the encounter does not permit a finding that the Baltimore City Police Department guideline as to vehicular extrication had been violated. Even assuming, *arguendo,* that there had been a violation, however, that would be, at most, a *prima facie* case of ordinary civil negligence. Assuming that this is a case in which an officer might be civilly liable for negligence, there was insufficient evidence of the type of wanton and abandoned indifference to human life required to meet the incremental burden of production that must be satisfied before a jury can consider the issue of gross criminal negligence. *Id.* at 320–22,.

We agree with the Court of Special Appeals that the evidence presented at trial, as a matter of law, was insufficient to support a conviction of involuntary manslaughter or reckless endangerment. Sergeant Pagotto's behavior simply did not evidence a "wanton or reckless disregard for human life."

In arguing for legal sufficiency, the State relies heavily on *State v. Albrecht,* 336 Md. 475. The State contends that *Albrecht* is dispositive of the instant case because "[l]ike *Albrecht,* Pagotto's case involves issues of: a police officer's use of his service firearm; the officer's placement of his finger with respect to that service weapon; the officer's aiming of his service weapon at the victim; and, the officer's resort to use his service weapon under circumstances in which the victim presented no threat to the officer." In *Albrecht,* a Montgomery County Police officer was convicted of involuntary manslaughter and two counts of reckless endangerment when the shotgun he was holding accidentally discharged, killing one woman. This Court held that the evidence was sufficient to warrant a conviction for both involuntary ***554** manslaughter and reckless endangerment. We conclude, however, that *Albrecht* is distinguishable.

While these two cases are facially similar, there are several key factors present in *Albrecht* that are not present in this case. In *Albrecht,* we noted five factors which elevated Albrecht's behavior from ordinary civil negligence to gross criminal negligence. We stated:

> The State adduced sufficient testimony from which the trial court could have concluded that a reasonable Montgomery County police officer would not have acted as Albrecht did on this occasion, in drawing and racking a shotgun fitted with a bandolier and bringing it to bear, *with his finger on the trigger,* on an unarmed individual who did not present a threat to the officer or to any third parties, in a situation where nearby bystanders were exposed to danger. *Id.* at 505.

Not one of the five factors that we specifically identified in *Albrecht* is present in this case. The first factor we noted in *Albrecht* was the drawing and racking of a shotgun fitted with a bandolier. Sergeant Pagotto, however, drew a standard issue police handgun with no alterations. The second factor in *Albrecht* was bringing the gun to bear on the victim. The State produced no evidence that Officer Pagotto was aiming his gun at Preston Barnes when it discharged.[8] The third factor we found of particular importance in *Albrecht* was Albrecht's placement of his trigger finger on the almost universally prohibited position of directly on the trigger of the gun. Officer Pagotto, in contrast, had his finger on the almost universally accepted position of

the slide of the gun. The fourth factor was the fact that Officer Albrecht had ascertained that the victim, Rebecca Garnett, was not armed and no longer presented a threat to him at the time his gun discharged. Preston Barnes, however, still presented a substantial ***555** threat to Officer Pagotto. Barnes was inside a car with his hands hidden from view, and was in the midst of an escape attempt when Officer Pagotto's gun discharged. The final key factor we noted in *Albrecht* was that several adults and children were standing directly behind the victim when she was shot. The confrontation in this case, by contrast, took place at night on an empty city street. Based on these distinctions, the Court of Special Appeals concluded:

> This case, key factor by key factor, is the diametric opposite of *Albrecht.* The contrast, moreover, highlights the deficiency of the evidence of gross negligence in this case. Even in *Albrecht* the evidence was close. Here, it did not get close. *Pagotto,* 127 Md.App. at 334. We agree with the intermediate appellate court and find that the State's reliance on *Albrecht* to sustain its convictions against Officer Pagotto is misplaced.

The Supreme Court has explained, albeit in the context of a 42 U.S.C. § 1983 action, but equally apposite herein, the proper prospective from which we must view a police officer's use of force:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the $^{20}/_{20}$ vision of hindsight....With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Graham v. Connor,* 490 U.S. 386, 396–97 (internal citations omitted).

In hindsight, perhaps Sergeant Pagotto should have acted differently on the night of February 7, 1996. His actions "in ***556** circumstances that are tense, uncertain, and rapidly evolving" may even amount to ordinary civil negligence, but they are not such a gross deviation from the actions of an ordinary police officer similarly situated so as to evidence the "wanton or reckless disregard for human life" necessary to support a conviction in this case. We hold, therefore, that Sergeant Pagotto's conduct cannot, as a matter of law, rise to the level of gross negligence. His convictions for involuntary manslaughter and reckless endangerment must be reversed.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED.
BELL, Chief Judge, dissenting.

The majority today decides that evidence pertaining to an incident, in which Preston Barnes was killed allegedly as the result of the violation, by police officer Stephen Pagotto ("the respondent"), of three police departmental guidelines; was legally insufficient to sustain the jury verdict convicting the respondent of involuntary manslaughter and two counts of reckless endangerment. To reach its decision, the majority purports not to have weighed the evidence, but to have neutrally concluded that the respondent's conduct, judged from the perspective of a reasonable police officer, similarly situated, was neither grossly negligent nor reckless. *See* 361 Md. 528, 555–56.

The respondent's conduct as a police officer is directly in question here. On the night of February 7, 1996 the respondent conducted a vehicle stop of a car being driven by Preston Barnes. The respondent testified that he thought the car may have been stolen because of the placement of the license plate ***557** tag. The respondent also testified that, at about five steps from the vehicle, he saw activity that caused him to fear for his safety and therefore draw his weapon. Thus, he approached Preston Barnes, with his service weapon drawn, and instructed Mr. Barnes to stop the now drifting vehicle. This method of approach was referred to as "closing on the suspect."

Subsequently, when Preston Barnes ignored the respondent's instructions to stop the vehicle, the respondent then reached into the vehicle and attempted to extricate Mr. Barnes with his free hand. This method of extrication was referred to as a "control tactic."

At some point during the control tactic, the respondent's weapon discharged and Mr. Barnes was fatally wounded. An autopsy revealed that Mr. Barnes was wounded while either placing his hands up defensively to protect his face from an onslaught, or placing them on the steering wheel in plain view of the respondent.

The respondent was charged with violation of three police departmental guidelines: closing on a suspect with a drawn weapon; attempting to control a suspect with one hand, with his weapon drawn; and improper placement of his finger on the weapon's trigger, rather than its trigger guard. In Maryland, a violation of police guidelines *may* be the basis for a criminal prosecution, which may, in turn, result in a criminal conviction. *See State v. Albrecht,* 336 Md. 475, 502–03 (holding that police officer could be held criminally liable for conduct not in compliance with standard police guidelines, procedures or practices). Thus, to be sure, while a violation of police guidelines is not negligence *per se,* it is a factor to be considered in determining the reasonableness of police conduct. (internal citations omitted)***558**

As to the first violation, it was alleged that closing on a suspect could result, as it did in this case, in a discharge of the weapon, thereby killing the suspect. The second alleged violation was charged because officers were taught to control suspects with two hands and moreover, in a vehicle situation, attempting a control tactic with a drawn weapon unnecessarily endangered all passengers in the vehicle. Finally, Baltimore City Police Department guidelines specifically mandate that a police officer's trigger finger be placed under the trigger guard, in order to prevent an "accidental" discharge and, consequently, the possibility of an unnecessary killing.

The majority quickly dismisses each of alleged violations of police guidelines. Regarding closing with a drawn weapon, the majority adopts the view of the Court of Special Appeals that the respondent approached an inherently dangerous situation and if, "in a stress-laden situation and for his own self-protection Sergeant Pagotto violated a departmental guideline, he did not thereby commit an act of gross negligence." *Pagotto v. State,* 127 Md.App. 271, 318. As to the one-armed vehicular extrication attempt, the majority again embraces the intermediate appellate court's position:

> ***559** "The testimony of both Major Melcavage and Sergeant Vittetoe dealt with the subject of vehicular extrication as an abstract academic or training exercise. Self-evidently, one can wrestle with an opponent more effectively with two hands than one. That's the school situation. They analyzed the problem as if Sergeant Pagotto had moved forward *ab initio* with a pre-formed and deliberate plan to perform a one-armed vehicular extrication. Their opinions had no pertinence to an instinctive, split-second reaction, actual or hypothetical, where the right hand is already holding a weapon and where a car door suddenly opens, a foot or two away, in front of one's face. The instantaneous reaction either to 'move into the ambush' or to attempt to retreat to cover of the police cruiser is something that is not concerned with the schoolroom paradigm of a model vehicular extrication." *Pagotto,* 127 Md.App. at 320–22.

On the last issue, the respondent's placement of his trigger finger on the slide of his service weapon—and ultimately the trigger, the majority concludes that because some police departments permit that finger placement, then the conduct cannot be reckless or negligent. ***560** I cannot agree with the majority. Rather than review the sufficiency of the evidence as it is charged with doing, it improperly weighs the evidence considered by the jury. Although appellate courts have the power and are now expected to "pass upon [review] the sufficiency of the evidence to sustain a conviction," *Md. Const. art. 23,* that review does not involve ***561** weighing the evidence. When an appellate court reviews the sufficiency of the evidence needed to sustain a conviction obtained as the result of a criminal trial, rather than measuring the weight of the evidence to ascertain whether the State has proved its case beyond a reasonable doubt, it determines whether there was *any* relevant evidence considered by the jury which would sustain a conviction. (internal citations omitted). Indeed, as even the majority acknowledged, review by the appellate court is limited to viewing the evidence in the light most favorable to the State, to ascertain whether "*any* rational trier of fact could have found the essential elements of the crime beyond a ***562** reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319; *Bedford v. State,* 293 Md. 172, 175. Quite recently, this Court noted that, in reviewing the sufficiency of the evidence to sustain a criminal conviction, "*[w]e do not measure the weight of the evidence;* rather, our concern is only whether the verdict was supported by sufficient evidence,

direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Taylor v. State,* 346 Md. 452, 457.

In a review of the sufficiency of evidence, it is not the place of this Court to weigh the finder of facts—the jury's—credibility determination or any of the reasonable inferences flowing therefrom. Indeed, this Court should only *measure,* and not weigh, the evidence to ensure it is based on more than a scintilla of evidence. As such, the evidence on which a conviction rests is sufficient if it measures to "more than surmise, possibility, or conjecture ... [where] such evidence [is] of legal probative force and evidential value." (internal citations omitted).

Neither does an appellate court weigh a witness' expert testimony where the "facts upon which an expert bases his opinion ... permit reasonably accurate conclusions as distinguished from mere conjecture or guess." (internal citations omitted). It is then, according to *Simmons v. State,* 313 Md. 33, 42:

> "proper to lay before the jury all the facts, which are necessary to enable them to form a judgment on the matters in issue; and when the subject under investigation requires special skill and knowledge, they may be aided by the opinion of persons whose pursuits or studies or experience, ***563** have given them a familiarity with the matter in hand."

Therefore, if a jury's judgment of conviction is supported by the testimony of a qualified expert, ordinarily the evidence is sufficient. (internal citations omitted).

Once a jury has performed its task and deliberately decided to convict, appellate courts should be slow to second guess that decision. To be sure, a jury verdict that is based on insufficient evidence may be overturned, but the case is rare indeed, usually involving jury instructions that are inadequate. *See, e.g., Richmond v. State,* 330 Md. 223, 237 (failing to instruct jury that prosecution was required to prove specific intent, "resulted in a guilty verdict that otherwise would not have been rendered"); *Franklin v. State,* 319 Md. 116 (overturning conviction because jury instruction that specific intent to kill was not required to establish crime of assault with intent to murder, was clearly erroneous); *State v. Hutchinson,* 287 Md. 198, 205 (reversing conviction because jury ***564** not instructed it could find defendant not guilty where "the error was likely to unduly influence the jury and thereby deprive the defendant of a fair trial").

There are instances, of course, where this Court has overturned a criminal conviction because of insufficient evidence. In *Taylor v. State,* 346 Md. 452, a conviction was reversed because, "any finding that [defendant] was in possession of marijuana could be based on no more than speculation or conjecture." *Id.* at 459. Judge Raker, for the court, further opined that:

> "Circumstantial evidence may support a conviction if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture, but '[c]ircumstantial evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient. It must do more than raise the possibility of guilt or even the probability of guilt. [I]t must ... afford the basis for an inference of guilt beyond a reasonable doubt.' " *Id.* at 458, 697 A.2d at 465 (internal citation to treatise omitted).

Conyers v. State, 345 Md. 525, is another example of this Court's rare reversal of a jury verdict on the basis of the insufficiency of criminal evidence. There, the Court reversed the defendant's conviction for burglary, concluding that the State failed to produce any evidence of an actual breaking and there was "even less [constructive] evidence upon which a jury could base an inference that Appellant's entrance into the house was gained by 'artifice, fraud, conspiracy or threats.' " *Id.* at 558; *see also Oken v. State,* 327 Md. 628, 663, (reversing conviction because evidence of breaking was insufficient). Plainly put, in a determination of "insufficiency of evidence it is necessary to show that there was *no* legally sufficient evidence or inferences drawable therefrom on which the jury could find a defendant guilty beyond a reasonable doubt." *Wilson v. State,* 261 Md. 551, 563 (emphasis added). This is so because, as we pointed ***565** out in *Gore v. State,* 309 Md. 203, 214, *citing Talley v. Dept. of Correction,* 230 Md. 22, 28–29, " the individual and total weight assigned to the evidence is within the exclusive province of the jury."

The majority correctly points out that, for an accused police officer's conduct to amount to gross negligence, it must manifest, under the circumstances, such a departure from that of a reasonable police officer similarly

situated, so as to amount to a disregard of the consequences and an indifference to the rights of others. (internal citations omitted). In this case, viewed in the light most favorable to the prosecution, the evidence, consisting of expert testimony and inferences drawable therefrom, clearly is legally sufficient. This simply is not a case in which the jury was left to speculate or guess either as to the respondent's conduct or the quality of that conduct. The evidence clearly addressed both issues, and a jury could have found the respondent grossly negligent in failing to comply with the guidelines of the Baltimore City Police Department.

At trial, no less than thirteen witnesses, with six of them, *i.e.,* Major Melcavage, Major France, Sergeant Meier, Mr. Vittetoe, Mr. Meiklejohn and Mr. Key, qualified and testifying as experts, provided evidence regarding the alleged violations of the police guidelines. On the basis of that testimony alone, ***566** the jury could fairly have been convinced that the respondent's conduct was grossly negligent and that he recklessly endangered the lives of Preston Barnes and the passengers in the car Mr. Barnes was driving.

The record is replete with testimony supporting the jury's verdict convicting the respondent on the basis that closing on Mr. Barnes with his service weapon drawn, was a violation, recklessly done, of police department guidelines. Sgt. Vittetoe testified, on direct examination:

> ***567** "If [Pagotto] says that he stopped [the car] for suspicion of being stolen, this elevates the stop from not a routine, unknown risk stop, but this is now a high risk stop because you don't know the other components involved in this, exactly how was the car taken. To me [closing] is reckless because if this is not a routine or unknown risk traffic stop, Sergeant Pagotto should have never left his vehicle or the area surrounding his vehicle.

* * * * * *

> "His closing as we've heard in here, the closing of the distance, should have ceased when Sergeant Pagotto felt that something was wrong with this traffic stop.... I thought that Sergeant Pagotto was reckless in closing the distance, in having his gun out."

Sgt. Vittetoe was corroborated by the following testimony elicited from Major France on cross examination:

> "[DEF. ATT'Y]: All right, and what is the training of Baltimore City police officers on closing with a gun in your hand?
>
> "[MAJ. FRANCE]: Closing with a gun in your hand is not good training. It's not part of our training.
>
> "[DEF. ATT'Y]: Why not?
>
> "[MAJ. FRANCE]: I believe for a couple of reasons. One it limits your mobility. Two, you have nowhere else to go if you need the other hand and it's a situation where there's lethal force required, and, three, the gun can be taken from you and used against you."

Several other witnesses, *i.e.,* Officer Wagner, Major Melcavage, Sergeant Meier, Mr. Key, and the respondent himself, provided further corroboration. Officer Wagner testified that an officer is not supposed to close with a gun in hand because "the assailant is close enough he can take that gun away from you and use it on you ... you can struggle, whatever." Major Melcavage testified that if a handgun is introduced into a closing situation, then you "*unnecessarily* endanger the police officer, the subject you are trying to control, or anyone else." Sergeant Meier testified that closing with the suspect with the ***568** weapon drawn may end up in a "struggle over that weapon, a discharge of that weapon which may injure or kill the police officer, or may injure and kill the suspect or any innocent bystanders that are around." Mr. Key, the defense witness, even stated that the respondent should not have closed with his weapon drawn because it was "not consistent with guidelines."

Moreover, there was testimony, including that of the respondent, indicating that the respondent was familiar with the applicable guideline. Sergeant Meier testified that on the 1994 in-service training test, the respondent correctly answered the question of whether an officer should close on a suspect with a drawn weapon. Mr. Meiklejohn testified that on the 1995 in-service training test, the respondent again correctly answered the question regarding closing on a suspect. The respondent himself conceded his actual knowledge of the applicable guideline:

> "[OFFICER PAGOTTO] (reading): An officer should not close with or tackle a running suspect but should direct other units to contain him or her.... If possible, officers should not close with suspects to frisk or handcuff until backup officers arrive to assist.... Maintain a safe reactionary distance-ten feet or more

when the pistol is drawn.... If the suspects run, pursue them but do not close with or tackle them.
"[STATE'S ATT'Y]: Okay. Now, are you familiar with those concepts?
"[OFFICER PAGOTTO]: Yes, sir.
* * * * * *
"[OFFICER PAGOTTO] (reading from 1995 in-service training test): Closing with a suspect with your weapon drawn could very likely result in the suspect grabbing the officer's weapon?
"[STATE'S ATT'Y]: And the answer to that is what?
"[OFFICER PAGOTTO]: True.
"[STATE'S ATT'Y]: And you answered it correctly?
***569** "[OFFICER PAGOTTO]: Yes, sir."

There was also evidence that supported the jury's finding that the respondent attempted a one-armed vehicular extrication in violation of police regulations. Major Melcavage, on direct examination, testified why a one-armed vehicular extrication was, and is, improper:

"[STATE'S ATT'Y]: Was part of the training [you provided to defendant] ever to use or hold a handgun in one hand while applying a defense tactic?
"[MAJ. MELCAVAGE]: No, sir.
"[STATE'S ATT'Y]: Why is that?
"[MAJ. MELCAVAGE]: No. Because all the techniques I know that I taught required two hands. Plus, if you enter the handgun into the equation, you unnecessarily endanger the police officer, the subject you are trying to control, or anyone else.
"[STATE'S ATT'Y]: Now would this training be altered in that aspect whether the person who the defense tactic is being applied to is either on the street or in a vehicle?
"[MAJ. MELCAVAGE]: No, sir.
"[STATE'S ATT'Y]: If you have a gun in your hand and you intend to remove a driver from a vehicle through the use of a control tactic, what should you do with the weapon?
"[MELCAVAGE]: You should holster your weapon.
"[STATE'S ATT'Y]: And why is that?
"[MELCAVAGE]: Because you need two hands to gain control of an individual or to apply a technique as taught at the academy as I taught. And by keeping the gun in the situation, you are unnecessarily endangering yourself. They can take the gun from you just as well, the subject could take the gun from you just as well as you using it on them, or the gun could go off and you could injure innocent bystanders, yourself, *or the subject.*
"[STATE'S ATT'Y]: Okay. Would that fact change whether the vehicle was stationary or moving?
"[MELCAVAGE]: No, sir.
***570** "[STATE'S ATT'Y]: If you have your weapon drawn and it is not safe to holster it in order to use the control tactic, what should you do?
"[MELCAVAGE]: It [sic] is not safe to holster them, you need to seek cover and call for assistance, call for other officers. You have to disengage."

There was more testimony which a reasonable trier of fact could have relied upon in finding that the respondent's conduct was grossly negligent. Sgt. Vittetoe added:

> "At one point in time in Sergeant Pagotto's report he had indicated that he reached in for a control tactic on [Preston Barnes]. That goes beyond modern police standards. There is nothing that I know of today where a police officer controls someone with one hand and with a gun in the other. And this is for a reason. First of all, it's difficult to control somebody with one hand. You don't know of their physical size, strength, abilities, or anything else, and it generally requires two hands. Also, for the protection of the firearm, once you take it out and are dealing with a suspect, you don't want to present that gun to that person because that weapon can now be used against you. If an altercation were to occur at that point in time, it could not only deal in injuries involving the person you are dealing with or other innocent parties that may not be in that conflict, for example, passengers in the vehicle or innocent civilians standing away from this particular scene...."

Major Melcavage testified, on cross examination, that approaching an open car door with a gun in hand and reaching into that car as a defense tactic is a violation of the standard and "is not in keeping with the training

of the police academy." Major France agreed:

"[DEF. ATT'Y]: In other words, that door opens and he can't see everything going on and he makes a decision for his own protection to get that guy—and to reach in and get that guy for his own protection, you really think that's a problem?

"[MAJ. FRANCE]: I have a problem with that."

***571** Mr. Meiklejohn opined that the respondent "should have never been up to that vehicle close enough to where he's reaching in. I believe that reaching in is extremely reckless on his part."

One of the passengers, a Mr. Jackson, testified on direct examination:

"[MR. JACKSON]: The only reason why Preston was scared, [Officer Pagotto] hopped out of the car with the gun in his hand.

"[DEF. ATT'Y]: The car was drifting?

"[MR. JACKSON]: He had to hold his hands on the steering wheel.

"[DEF. ATT'Y]: The car was drifting because he wanted it to drift?

"[MR. JACKSON]: No, it was something with the automatic.

"[DEF. ATT'Y]: Are you telling me that he couldn't put his foot on the brake and stop that car?

"[MR. JACKSON]: Yeah, it was on the brake.

"[DEF. ATT'Y]: Well, then why was the car moving if he didn't want it to move?

"[MR. JACKSON]: It wasn't in park.

"[DEF. ATT'Y]: I understand—the car—you understand—

"[MR. JACKSON]: He was nervous. In the car he was nervous.

"[DEF. ATT'Y]: I understand he was nervous, but if the car is in drive and his foot is off the gas and on the brake won't the car stop?

"[MR. JACKSON]: Maybe because he thought the car was in park."

Adding a moving vehicle to the equation, testimony revealed, makes what the respondent did more dangerous and reckless. Sergeant Vittetoe addressed the issue on direct examination:

***572** "[STATE'S ATT'Y]: Sergeant Vittetoe, would [your opinion that Officer Pagotto was reckless the night in question] be altered in any way or influenced if there were evidence in the case that Preston Barnes was fleeing from the police at the time of the shooting?

"[SGT. VITTETOE]: Yes, sir, it would change.

"[STATE'S ATT'Y]: And how's that?

"[SGT. VITTETOE]: First of all, it would worsen. I would feel that his actions would be more so reckless and against his agency policy. His policy or guidelines do indicate that they are not supposed to chase after someone fleeing. Yes, they are to observe them and do certain things but not to chase them, particularly with your gun out. So I would look at that as being even more so reckless than my previous statement."

Nor is there evidence that Mr. Barnes did anything justifying the respondent's actions. Mr. Barnes' hands were visible at all times after the respondent approached the car. Mr. Jackson testified that even when the respondent opened the car door, Mr. Barnes only placed his hands near his face in a defensive gesture. On cross examination, Mr. Jackson continued to assert that Preston Barnes' hands were visible.

***573** This testimony was corroborated by that of the Deputy Chief Medical Examiner. Regarding the location of Mr. Barnes' hands just prior to being shot to death, he testified that the wound path was both consistent with Preston Barnes' hands being on the steering wheel and with his hands up to protect his face.

The testimony of Officer Wagner regarding his actions during the traffic stop, that he never drew his gun and neither received any communication from the respondent indicating the need to do so, is both relevant and telling. In particular, Officer Wagner testified:

"[STATE'S ATT'Y]: Was there any activity in the vehicle that you could observe that would cause you to draw your weapon?

"[OFFICER WAGNER]: There [sic] were very excited and moving, but none to make me draw my weapon, no....

"[STATE'S ATT'Y]: At any time during the course of this car stop did you receive any communication from

the defendant that would indicate you should be concerned or draw your weapon?
"[OFFICER WAGNER]: No.
* * * * * *
"[STATE'S ATT'Y]: Is there any practice or protocol that should kick in when a—one officer in a team of two makes observations on the street that would be important to the other officer?
"[OFFICER WAGNER]: The officers should communicate to what they see and observe in the vehicle.
"[STATE'S ATT'Y]: All right. So if one officer sees activity that he believes is suspicious of an armed individual in the vehicle such that he draws his weapon, that should be communicated to the partner?
***574** "[OFFICER WAGNER]: Should be."

The jury also heard testimony, which it could have believed, and obviously did, regarding the third allegation, the placement of the respondent's trigger finger on his weapon's slide, and how that violation of the guidelines amounted to gross negligence. Major Melcavage testified as to why there is a requirement that the finger be placed under the trigger guard: to avoid "an accidental discharge, shooting the weapon off, unnecessarily injuring somebody." He explained on cross examination, the reason for the change of the requirement from placing the finger on the slide, *i.e.,* "at times at the Police Academy, there were accidental discharges with them, with them like this (indicating placement)."

The State also elicited testimony from Sergeant Meier regarding his expert opinion that the violation of the finger placement regulation was the cause of death of Mr. Barnes:

"[STATE'S ATT'Y]: Sergeant Meier, do you have an opinion, based on the statement rendered by the defendant in this case, whether his actions caused the death of Preston Barnes?
"[SGT MEIER]: Yes.
"[STATE'S ATT'Y]: What is it?
"[SGT. MEIER]: I believe his actions did cause the death of Preston Barnes by having his finger on the trigger of a weapon when he shouldn't have, for one thing, and closing with an individual that he felt could bring great harm or even death to him."

And from Mr. Meiklejohn, the following testimony was elicited:

"[STATE'S ATT'Y]: Mr. Meiklejohn, if the defendant had his finger where it was supposed to be according to his training, this discharge never would have taken place?
"[MR. MEIKLEJOHN]: It's my opinion that your statement is correct."

***575** Finally, it is significant that there was evidence from which the jury could conclude that the respondent's life was not in immediate danger. Mr. Meiklejohn testified to reading the respondent's statement and seeing "nothing that shows that his life is in immediate danger of death or serious bodily injury."

Thus, the State produced evidence, which, if accepted, proved that the respondent initiated the vehicle stop in question on an admittedly pre-textual basis. Having made the stop, he left his police cruiser and closed on the "suspects" with his service weapon drawn. When the driver of the car failed to come to a complete stop and, in fact, attempted to flee, the respondent, with gun still in hand and his finger on the trigger, opened the door of the drifting car in an effort to effect an one-armed vehicular extrication. Certainly the respondent's conduct—closing with a drawn weapon, attempting a one-armed vehicular extrication and placing his finger on the trigger slide rather than the under the trigger guard-violated departmental guidelines and, based on expert testimony, was reckless and criminally negligent. As a result of that conduct, Mr. Barnes was shot and killed. The jury accordingly was presented with ample evidence on the basis of which it could, and obviously did, convict the respondent.

***576** As the majority and I agree, the conduct of the respondent must be viewed from the eyes of a reasonable similarly situated police officer. In this case, we need look no further than the respondent's partner. Officer Wagner, who was present on the night in question, testified that had he observed dangerous activity then he would have "discarded my ***577** flashlight, pulled my weapon and used the radio that I had to call for additional units or a uniform backup." Thus, he would not have closed on the " suspects" with a drawn police weapon, and in fact, saw no need to ever draw his weapon. Neither would he have opened the vehicle door, or had his finger on the trigger of his weapon while attempting a one-armed vehicular extrication.

The latest statement of Maryland law in this area is *Albrecht, supra.* In *Albrecht,* this Court, with Judge Raker also writing for the majority, upheld the conviction of a police officer who killed a civilian during a vehicle stop, following however, a chase, concluding that the record was "replete with evidence from which the trial court could have concluded that Albrecht did not comply with Montgomery County departmental guidelines, procedures or practices." *Id.* at 502–03. As in *Albrecht,* "[u]ltimately, deadly force was used, without justification, and [Mr. Barnes] was killed. [I] conclude that sufficient evidence was presented from which a rational trier of fact could have found that [the respondent's] actions on [February 7, 1996], in their totality, were both grossly negligent and reckless." *Id.* at 486.

To be sure, the facts and circumstances surrounding the police shooting in *Albrecht* differ significantly from those in this case. There, Officer Albrecht and Officer Thomas responded to the scene of a stabbing. When they arrived, they learned that the suspects, one whom Albrecht knew by name, might be armed and had fled the scene in a green Chevrolet driven by Rebecca Garnett. The officers spotted the green Chevrolet and gave chase. Although they lost the vehicle, further searching revealed it parked in a neighborhood parking lot. Exiting his cruiser, Albrecht yelled "Stop! Freeze!" and, at that time, removed his customized shotgun from its rack inside his vehicle, immediately placed a shotgun shell in the chamber and "racked" the shotgun into its final stage of firing capability. He then aimed the shotgun directly at Garnett, who at that time posed no threat or danger to any other person. Taking account of the facts and circumstances in that case, Albrecht's drawing and racking of a shotgun ***578** fitted with a bandolier and bringing it to bear, with his finger on the trigger, on an unarmed individual who did not present a threat to the officers or any third parties and in a situation where nearby bystanders were exposed to danger, we rejected Albrecht's argument that the shooting was unintentional and thus not reckless. We reasoned, 336 Md. at 486:

> "[T]he evidence was sufficient to establish that, notwithstanding the fact that Rebecca Garnett did not pose any danger to either Albrecht himself or to third parties, Albrect took substantial steps to use deadly force against her—to wit, racking his shotgun and aiming it, with his finger on the trigger, at Garnett. Ultimately, deadly force was used, without justification, and Rebecca Garnett was killed. We conclude that sufficient evidence was presented from which a rational trier of fact could have found that Albrecht's actions ... in their totality, were both grossly negligent and reckless."

The majority notes that, although "the two cases are facially similar, there are [five factors specifically identified in *Albrecht*] that are not present in this case." 361 Md. at 554. That is true, of course; however, that is also to be expected. These cases are fact specific and therefore must be decided on their unique facts and circumstances. Consequently, simply because all of the same facts and circumstances that informed the Court as to the actions of Albrecht, in that case, do not exist in this case, does not mean that the reasoning underlying *Albrecht* does not apply here. In point of fact, the relevant facts and circumstances of the instant case include the placement of the respondent's trigger finger, whether the victim posed a threat to the officer, and whether the officer's actions exposed others to danger, factors also present in *Albrecht.* Analyzing the facts and circumstances of this case, the jury could have concluded, and obviously did, that the respondent had his finger on the trigger of his service weapon, in violation of departmental guidelines; that, while so holding the weapon, he closed on the stopped car and all "suspects," in violation of another departmental guideline; and ***579** that he tried to extricate one " suspect" from the car with one hand, while continuing to hold the weapon, with finger on the trigger, in violation of yet another departmental guideline. Because there was evidence that Mr. Barnes' hands were not hidden from view, and, in fact, were on the steering wheel or the dashboard, the jury could have and in all probability did, conclude that the two passengers in the car driven by Mr. Barnes were exposed to danger, thereby rejecting the " finding" made by the majority that the confrontation "took place at night on an empty street." 361 Md. at 555.

The dissenter in *Albrecht* focused on the aiming of the gun and not the actual discharge thereof, to assert that in the split second before the gun went off the officer was not criminally liable. *Id.* at 507 (Murphy, C.J., dissenting). The rationale, in other words, was that we should "freeze in time the split second before the gun went off and inquire as to whether, at that instant Officer Albrecht could have been found guilty of gross criminal negligence and reckless endangerment or not." *Id.* at 508. We rejected that argument, *id.* at 505; it was wrong then, and it is wrong now. As we pointed out in *Albrecht,* that approach ignores the facts and

circumstances that inform the defendant's actions. *Id.* As related to that case, we said, it "ignores the testimony at trial ... and particularly that on the day in question, considering the facts and circumstances facing Albrecht, he should not have had his finger on the trigger, but rather it should have been on the trigger guard." *Id.*

Judge Chasanow, concurring, while also rejecting the freeze frame approach, took the analysis a step further, requiring an analysis of the very act that caused the ultimate injury, the pulling of the trigger, "[b]ut we should not freeze frame and stop our analysis before the trigger was pulled. We cannot access Albrecht's culpability in taking Rebecca Garnett's life and, in doing so, exclude the ultimate act that took her life-pulling the trigger." *Id.* at 506. He went on to explain:

> ***580** "The trial judge found that the act of pulling the trigger was unintentional; he did not find that it was reasonable. The intermediate appellate court assumes the unintentional shooting is a non-negligent shooting. Albrecht did not intentionally pull the trigger, but the trial judge was justified in finding he negligently, carelessly or even recklessly pulled the trigger. There was no external cause for the shotgun discharge, and the fact that Albrecht may have been 'startled into pulling the trigger' of a loaded, racked, and aimed shotgun need not, as a matter of law, excuse his carelessness in doing so. The pulling of the trigger could be found to be a careless act that, when considered along with all the antecedent acts, at least tips the scale to permit a finding of gross negligence."

Id. This applies equally well to the facts *sub judice.* Particularly in this case, when one considers that the respondent's service weapon was equipped with three safeties that prevented it from firing unless the trigger was pressed with 10 ½ pounds of pressure, making it almost impossible to discharge if dropped or struck against an object.

I dissent.