



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 85-151

Charles E. Simmons
Chief Legal Counsel
Department of Corrections
Jayhawk Towers
700 Jackson
Topeka, Kansas 66603

Re: Crimes and Punishments -- Code; Principles
of Criminal Liability -- Use of Deadly
Force by Correctional Officers.

Synopsis: A correctional officer at a state penitentiary
is not prohibited from using deadly force to
prevent the escape of an inmate incarcerated
for a felony, when such force is necessary to
prevent or terminate the escape. Cited herein:
K.S.A. 21-3215.

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Dear Mr. Simmons:

You request our opinion as to whether the decision of the
United States Supreme Court in Tennessee v. Garner, 471
U.S. ____, 105 S.Ct. ____, 85 L.Ed.2d 1 (1985) is
applicable to a prison setting. Specifically, you ask
whether a correctional officer may use deadly force to
prevent an inmate who is escaping from a Kansas prison or
to retake an inmate who has previously escaped.

In Garner, the Court stated that the use of deadly force
by a police officer to prevent the escape of an apparently
unarmed, nondangerous, suspected felon violates the
Fourth Amendment. In that case, two police officers

responded to a report of a prowler at a residence. As he proceeded to the rear of the house, one officer noticed a young male suspect, approximately 5'4" tall, 100-110 pounds and 15 years of age (later shown to be Edward Garner). Shining his flashlight on the youth, the officer could see that the suspect was apparently unarmed. The officer ordered him to "halt." Ignoring the warning, the suspect attempted to climb a six-foot-high fence. The officer shot him once in the back of the head, and he later died.

The Supreme Court balanced the nature and quality of the intrusion on the individual's Fourth Amendment rights against the importance of the governmental interests alleged to justify the intrusion. The Court concluded that unless "the officer has probable cause to believe that the suspect poses a serious threat of physical harm, either to the officer or others," deadly force may not be used simply to prevent the escape of an unarmed, nondangerous, suspected felon. 85 L.Ed.2d at 9-10.

In contrast to Garner, the United States District Court for the Western District of Michigan considered the issue you have raised, i.e., whether deadly force may be used in the prison setting to stop a fleeing felon, in Newby v. Serviss, 590 F.Supp. 591 (1984). In Newby, correctional officers attempted to stop two inmates from escaping from a Michigan prison, first by verbal warnings, then by warning shots. When the inmates failed to heed the warnings, an officer shot at Newby, hitting him in the neck. The court stated:

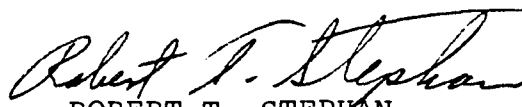
"Garner addressed the issue of when deadly force may be used against a suspect. In contrast, the instant case presents the situation where the escapee has already been found guilty of one felony and is in the process of committing another. Additionally, many prisoners in the Michigan Training Unit have already been found guilty [of] the commission of a violent felony. Prison guards have no way of distinguishing which inmates have committed violent crimes. Additionally, guards and prison officials have probable cause to believe that any given escapee may be armed or pose a danger to others in the community. An escapee, by virtue of his escape, is a desperate individual and is in the process

of committing a felony. I am persuaded that the prevention of a prison escape comes within the circumstances where the Sixth Circuit stated that deadly force may be justified.

"Applying the principles enunciated in Garner, I am convinced that an escaping convicted felon has no constitutional right to be free from the use of deadly force, when deadly force is necessary to prevent or terminate his escape." Id. (Emphasis in original.)

We are of the opinion that Kansas correctional officers may be guided by the decision in Newby and may use deadly force to prevent an inmate incarcerated for a felony from escaping or to recapture the inmate when necessary. However, we caution correctional officers that the facts and circumstances surrounding each incident must be evaluated in determining whether deadly force should be used. While it will admittedly be difficult to make such a balancing determination in the split-seconds during which an escape or recapture occurs, officers can and should be trained to anticipate such situations before they arise. See also K.S.A. 21-3215.

Very truly yours,



ROBERT T. STEPHAN
Attorney General



Brenda L. Braden
Deputy Attorney General

RTS:BLB:may