



## UNITED STATES COURT OF APPEALS FOR THE 4<sup>th</sup> CIRCUIT DECIDES LIMITATIONS ON TASER USE

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United States Supreme Court Denies Appeal in Fourth Circuit  
PINEHURST, NC, ET AL. V. ESTATE OF RONALD H. ARMSTRONG (Order 15-1380) October 3, 2016

The United States Supreme Court denied issuance of a Writ of Certiorari in the *Armstrong v. Village of Pinehurst* case from the Fourth Circuit thereby leaving the restrictions on use of the TASER to cases of immediate danger in place for jurisdictions within the Fourth Circuit.

**The following is a reprint of our summary of the Fourth Circuit's decision:**

TASER Use on Mentally Impaired Subject in 4<sup>th</sup> Circuit

*Estate of Armstrong v. Village of Pinehurst et al.*<sup>1</sup>

United States Court of Appeals for the 4<sup>th</sup> Circuit Decides Limitations on TASER Use

And

Announces Use of Force Analysis when dealing with Persons of Diminished Capacity

In *Estate of Armstrong v. Village of Pinehurst et al.* the United States Court of Appeals for the 4<sup>th</sup> Circuit examined the use of a TASER, in the drive stun mode, on a mentally impaired subject and determined that the officers used unconstitutional excessive force, however because the law was not clearly established at the time the force was used, the officers were granted qualified immunity and the case against the individual officers was dismissed.

The court described the facts as follows:

Ronald *Armstrong* suffered from bipolar disorder and paranoid schizophrenia. On April 23, 2011, he had been off his prescribed medication for five days and was poking holes through the skin on his leg

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<sup>1</sup> *Estate of Armstrong v. Village of Pinehurst et al.*, 2016 U.S. App. LEXIS 380 (4<sup>th</sup> Cir. 2016).

"to let the air out." His sister, Jinia *Armstrong* Lopez ("Lopez"), worried by his behavior, convinced *Armstrong* to accompany her to Moore Regional Hospital ("Hospital") in *Pinehurst*, North Carolina. He willingly went to the Hospital and checked in, but "[d]uring the course of the evaluation he apparently became frightened and eloped from the [emergency department]." Based on that flight and Lopez's report about his odd behavior over the previous week, the examining doctor judged *Armstrong* a danger to himself and issued involuntary commitment papers to compel his return. *Armstrong's* doctor could have, but did not, designate him a danger to others, checking only the box that reads "[m]entally ill and dangerous to self" on the commitment form.

The *Pinehurst* police were called as soon as *Armstrong* left the Hospital, and three members of the department -- all [defendants] in this case -- responded in short order. Officer Gatling appeared on the scene first, followed a minute or two later by Sergeant Sheppard. Lieutenant McDonald arrived about ten minutes after Sheppard. *Armstrong* had not traveled far when Gatling arrived. He was located near an intersection near the Hospital's main entrance.

When the police arrived, *Armstrong's* commitment order had not yet been finalized. Therefore, Gatling and Sheppard engaged *Armstrong* in conversation. By all accounts, the parties were calm and cooperative at this point in time.

*Armstrong* was acting strangely, however. When Officer Gatling first initiated conversation, *Armstrong* was wandering across an active roadway that intersects with the Hospital's driveway. Gatling successfully convinced him to withdraw to the relative safety of the roadside, but *Armstrong* then proceeded to eat grass and dandelions, chew on a gauze-like substance, and put cigarettes out on his tongue while the police officers waited for the commitment order.

As soon as they learned that the commitment papers were complete, the three police officers surrounded and advanced toward *Armstrong* -- who reacted by sitting down and wrapping himself around a four-by-four post that was supporting a nearby stop sign. The officers tried to pry *Armstrong's* arms and legs off of the post, but he was wrapped too tightly and would not budge.

Immediately following finalization of the involuntary commitment order, in other words, *Armstrong* was seated on the ground, anchored to the base of a stop sign post, in defiance of the order. The three police officers at the scene were surrounding him, struggling to remove him from the post. Lopez was in the immediate vicinity as well, along with Jack Blankenship and Johnny Verbal, two Hospital security officers. So *Armstrong* was encircled by six people -- three *Pinehurst* police officers tasked with returning him to the Hospital, two Hospital security guards tasked with returning him to the Hospital, and his sister, who was pleading with him to return to the Hospital.

Appellees did not prolong this stalemate. Nor did they attempt to engage in further conversation with *Armstrong*. Instead, just thirty seconds or so after the officers told *Armstrong* his commitment order was final, Lieutenant McDonald instructed Officer Gatling to prepare to tase *Armstrong*. Officer Gatling drew his taser, set it to "drive stun mode," and announced that, if *Armstrong* did not let go of the post, he would be tased. That warning had no effect, so Gatling deployed the taser -- five separate times over a period of approximately two minutes. Rather than have its desired effect, the tasing actually increased *Armstrong's* resistance.

But shortly after the tasing ceased, Blankenship and Verbal jumped in to assist the three police officers trying to pull *Armstrong* off of his post. That group of five successfully removed *Armstrong* and laid him facedown on the ground.

During the struggle, *Armstrong* complained that he was being choked. While no witness saw the police apply any chokeholds, Lopez did see officers "pull[] his collar like they were choking him" during the struggle.

With *Armstrong* separated from the post, Appellees restrained him. Lieutenant McDonald and Sergeant Sheppard pinned *Armstrong* down by placing a knee on his back and standing on his back, respectively, while handcuffs were applied. But even after being cuffed, *Armstrong* continued to kick at Sergeant Sheppard, so the police shackled his legs too.

The officers then stood up to collect themselves. They left *Armstrong* facedown in the grass with his hands cuffed behind his back and his legs shackled. At this point, he was no longer moving -- at all. Lopez was the first to notice that her brother was unresponsive, so she asked the officers to check on him. Appellees did so immediately, but *Armstrong's* condition had already become dire. When the officers flipped him over, his skin had turned a bluish color and he did not appear to be breathing.

Sergeant Sheppard and Lieutenant McDonald administered CPR, and Lieutenant McDonald radioed dispatch to send Emergency Medical Services ("EMS"). EMS responders transported *Armstrong* to the Hospital's emergency department where resuscitation attempts continued but were unsuccessful. He was pronounced dead shortly after admission. According to the *Pinehurst* Police Department's summary of communications during the incident, just six and one-half minutes elapsed between dispatch advising Appellees that *Armstrong's* commitment papers were final and Appellees radioing for EMS.

In reviewing the case, the United States Court of Appeals for the 4<sup>th</sup> Circuit did not simply examine whether the law was clearly established at the time the force was used on Mr. Armstrong, but instead reviewed the facts to determine first, whether the force used was unconstitutional. It is noted that in doing so, the court considers the facts in the light most favorable to the Armstrong family because they are alleging that the officer's conduct violated a constitutional right.

The 4<sup>th</sup> Circuit began its analysis by noting that all uses of force are judged by the three-part test from *Graham v. Connor*.<sup>2</sup> Specifically the court noted that in deciding whether an officer's force was objective reasonable, the court looks at how serious was the offense; the extent to which the subject poses an immediate threat to the officers or others; and whether the subject is actively resisting arrest or attempting to evade arrest. Citing a prior 4<sup>th</sup> Circuit case, the court wrote: "To properly consider the reasonableness of the force employed we must view it in full context with an eye toward the proportionality of the force in light of the circumstances."

In looking at the first factor, serious of the offense, the court wrote that this factor went in favor of Armstrong because the officers were not arresting him for a crime but were instead trying to take custody of him for a mental health commitment. The court noted that even if the officers had articulated probable cause to arrest Armstrong for resisting their attempt to take him into custody, the offense would be minor, thus the "serious of offense" factor would still go in favor of Armstrong.

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<sup>2</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

The court also took notice of the fact that the officers had notice of two factors prior to contact with Armstrong. The court noted that first factor was that since Armstrong was the subject of an involuntary commitment order, the officers knew he was mentally ill. Thus, the court said that among the facts and circumstances that the officers had to consider in deciding when and how to use force was Armstrong's mental illness. Citing to the United States Court of Appeals for the 9<sup>th</sup> Circuit the court wrote:

“The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force to be exerted. The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous individual who has recently committed a crime.” (citing *Bryan v. MacPherson*, 630 F. 3d 805, 829 (9<sup>th</sup> Cir. 2010) (alteration omitted) (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9<sup>th</sup> Cir. 2001).

The court wrote: “Accordingly, ‘the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis.’” (citing *Deorle*). The court did recognize that mental illness covers a wide spectrum of issues and noted that the ideal may not always work. The court directed that even when the ideal is not feasible “officers who encounter an unarmed and minimally threatening individual who is exhibiting conspicuous signs that he is mentally unstable must de-escalate the situation and adjust the application of force downward.” (citing *Martin v. City of Broadview Heights*, 712 F.3d 951, 962 (6<sup>th</sup> Cir. 2013).

The second factor the officers had notice of was that the doctor had indicated that Armstrong was a danger to himself. With respect to this factor the court said that where the purpose of the seizure is to protect the person from himself or herself, there is little government interest in using force to accomplish the seizure. The court said that using force to protect the person against self-harm was contrary to the very purpose of the seizure, which was to protect the person from harm.

On the first *Graham* factor the court held: “The first *Graham* factor thus weighs against the imposition of force. The government's interest in seizing Armstrong was to prevent a mentally ill man from harming himself. The justification for the seizure, therefore, does not vindicate any degree of force that risks substantial harm to the subject.”

The court then to the second and third *Graham* factor, particularly whether Armstrong posed an immediate threat to the officers or anyone else or whether he resisted the seizure. The court found that since Armstrong was wandering in the area of an active roadway and may have tried to flee into the street to avoid being returned to the hospital, some degree of force would be justified to secure him. The court wrote that the amount of force justified would be the amount of force necessary to prevent Armstrong's flight.

The court noted several factors affecting the use of force decision. First, the court noted that Armstrong, who was 5'11" and 262 lbs., was seated and clinging to a pole refusing to move when the officers decided to use the TASER in the drive-stun mode. The court pointed out that an officer cannot use much force to prevent a subject from fleeing, if the subject, at the moment the force is used, is refusing to move.

The court did note that Armstrong was resisting by refusing to let go of the pole he clung to for the 30 seconds

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that officers tried to remove him. The court asserted: “Non-compliance with lawful orders justifies some use of force, but the level of justified force varies based on the risks posed by the resistance.” (citing *Bryan*). The court then described “Armstrong was stationary, non-violent, and surrounded by people willing to help return him to the Hospital.” The court concluded that Armstrong’s non-compliance posed little danger or urgency since he merely clung to the pole in a seated position and refused to let go.

The court then moved to look at the force from a proportionality analysis and concluded that the degree of force used, the drive stun TASER deployment was disproportionate to the need for force when dealing with a stationary, mentally impaired subject, who was hanging on to a pole while six people, including officers and hospital personnel stood by to take him into custody. As such the court found that the force was objectively unreasonable. The court wrote: “Immediately tasing a non-criminal, mentally ill individual, who seconds before had been conversational, was not a proportional response.”

The court then turned to TASER as a use of force. Without distinguishing the difference between the drive-stun and a probe deployment and citing cases involving both types of use, the court asserted that “Deploying a TASER is a serious use of force.”

The court in analyzing utilized suggested practices and materials from TASER International in determining whether TASER use under circumstances faced by these officers was reasonable:

These observations about the severe pain inflicted by tasers apply when police officers utilize best practices. The taser use at issue in this case, however, contravenes current industry and manufacturer recommendations. Since at least 2011, the Police Executive Research Forum ("PERF") and the Department of Justice's Office [\*21] of Community Oriented Policing Services ("COPS") have cautioned that using drive stun mode "to achieve pain compliance may have limited effectiveness and, when used repeatedly, may even exacerbate the situation." PERF & COPS, 2011 Electronic Control Weapon Guidelines, at 14 (March 2011) (emphasis omitted). The organizations, therefore, recommend that police departments "carefully consider policy and training regarding when and how personnel use the drive stun mode[]" and . . . discourage its use as a pain compliance tactic." *Id.* In 2013, moreover, Taser International, the manufacturer of the taser Appellees used in this case, warned, "Drive-stun use may not be effective on emotionally disturbed persons or others who may not respond to pain due to a mind-body disconnect." Cheryl W. Thompson & Mark Berman, Stun guns: 'There was just too much use.' Wash. Post, Nov. 27, 2015, at A1. Taser users, the warning goes on, should "[a]void using repeated drive-stuns on such individuals if compliance is not achieved." *Id.* Even the company that manufactures tasers, in other words, now warns against the precise type of taser use inflicted on *Armstrong*.

The court wrote: “Our precedent, consequently, make clear that tasers are proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser.” The court noted that in cases where an officer uses more than one deployment, each deployment will be viewed separately and its validity will be determined by what is occurring at the moment of each deployment.

The court reached a conclusion that “taser use is unreasonable force in response to resistance that does not raise the risk of immediate danger. In doing so the court wrote: Our precedent leads to the conclusion that a police

officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force. At bottom, ‘physical resistance’ is not [the same thing as the] ‘risk of immediate danger.’”

The court found that because Armstrong did not present a threat to the officers as he sat clinging to the pole, the use of force was excessive and thus the officers were denied summary judgment. The court then concluded that because the law was not clearly established at the time that Anderson was subjected to the TASER deployment, the officers were not on notice that their actions were improper, thus they were granted qualified immunity and dismissed from the lawsuit.

Although the officers were dismissed from this lawsuit, the United States Court of Appeals for the Fourth Circuit set significant restrictions on the use of the TASER prospectively. Agencies within the 4<sup>th</sup> Circuit’s jurisdiction are now on notice of the restrictions on TASER as well as the court’s analysis on use of force with respect to persons of diminished capacity, particularly those that are not subjected to arrest, but rather are to involuntary committed. Agencies within the 4<sup>th</sup> Circuit’s jurisdiction must review policy and training related to TASER, Use of Force, and Persons of Diminished capacity to ensure compliance with this decision.

Factors for all officers and agencies to Consider:

1. Not an arrest-mental health commitment-“When the subject of a seizure has not committed any crime, this [seriousness of offense] factor weighs heavily in the subject’s favor.”
2. Among the facts and circumstances an officer has to consider in deciding when and how to use force is the fact, when known, that the subject is mentally ill, particularly if the subject is unarmed.
3. “Officers who encounter an unarmed and minimally threatening individual who is exhibiting conspicuous signs that he is mentally unstable must de-escalate the situation and adjust the application of force downward.”
4. When the purpose of taking custody is to protect a person from harming him or herself, any force that causes harm is contrary to the mission of protecting the person.
5. An officer who is trying to prevent a subject from fleeing cannot use much force if the subject is refusing to move.
6. “Non-compliance with lawful orders justifies some use of force, but the level of justified force varies based on the risks posed by the resistance.”
7. Proportionality analysis-How much force was used in relation to what the subject was doing.
8. “Deploying a TASER is a serious use of force.”
9. “Tasers are proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the Taser.”

10. The court noted that in cases where an officer uses more than one TASER deployment, each deployment will be viewed separately and its validity will be determined by what is occurring at the moment of each deployment.
11. Use of TASER is unreasonable in response to resistance that does not raise a risk of immediate danger.
12. “Physical resistance’ is not [the same thing as the] ‘risk of immediate danger.’”
13. “Our precedent leads to the conclusion that a police officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force.”
14. Court notes that while subject clung to pole and refused to move, officers were not faced with any exigency or “immediate danger so severe that the officer” had to cause harm to the individual he or she was trying to protect from harm.