# International Municipal Lawyers Association

**2017 Mid-Year Seminar**

**Washington, D.C.**

**April 21, 2017**

**2:05- 3:05 p.m.**

## *Understanding Taser Use of Force, post Armstrong v. Pinehurst*

**Heather Mulloy, Assoc. Co. Atty and**
**Office of the County Attorney**
**Montgomery County, MD**

**Commander David Gillespie**
**Montgomery Co. Police Dept.**
**Montgomery County, MD**

**© 2017 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2017 Mid-Year Seminar, held April 21-24, 2017 in Washington, D.C. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.**

# UNDERSTANDING TASER USE OF FORCE POST *ARMSTRONG V. PINEHURST*



- ***ARMSTRONG V. PINEHURST*, 810 F.3d 892 *(4th Cir. 2016)*: AN EXAMPLE OF HOW TO HELP YOUR CLIENT NAVIGATE THE CHANGE IN CASE LAW**
- **GOAL: TO UNDERSTAND THE NEW TASER CASE LAW AND TO ASSIST YOUR CLIENT IN ALL ASPECTS OF LITIGATION**
- **WHAT ARE THE STEPS YOU NEED TO TAKE TO PROTECT YOUR CLIENT?**
  - **IMMEDIATE RESPONSE**
  - **POLICY CHANGES**
  - **TRAINING**
  - **FUTURE LITIGATION**

# GOALS IN REPRESENTING YOUR CLIENT IN USE OF FORCE CASES

- **DEFEND OUR CLIENTS TO THE BEST OF OUR ABILITY**
- **GET OUR CLIENTS OUT OF THE CASE EARLY/QUALIFIED IMMUNITY (*see, Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011)**
  - **KNOWLEDGE OF COURT NOTICES**
  - **WAS A CONSTITUTIONAL RIGHT VIOLATED?**
  - **IF SO, WAS IT CLEARLY ESTABLISHED SO THAT THE OFFICER HAD KNOWLEDGE OF THE VIOLATION?**

# HOW DO WE REACH THESE GOALS?

- REVIEW NEW CASE LAW AND EDUCATE YOUR CLIENT – BE PROACTIVE
- IS AN IMMEDIATE RESPONSE/BULLETIN NECESSARY
- SHOULD POLICY BE UPDATED?
- TRAINING
- INVOLVEMENT OF THE ATTORNEY TO UNDERSTAND THE CLIENT AND THE ISSUE



# NEW CASE LAW: WHAT IS THE RISK OF IMMEDIATE DANGER?

# USE OF FORCE – *GRAHAM* IS STILL KING:

- ***Graham v. Connor,* 490 U.S. 386 (1989)**
- **Objectively Reasonable Standard – what would a reasonable officer do under the exact same circumstances at that same moment in time that force is used (not in hindsight)**
- **Each case is looked at individually, on a case by case basis**

## THREE FACTORS COURT CONSIDERS IN ANALYZING USE OF FORCE:

1. The severity of the crime at issue
2. The extent to which the suspect poses an immediate threat to the safety of officers or others; and
3. Whether the subject is actively resisting arrest or attempting to evade arrest by flight

## TOTALITY OF CIRCUMSTANCES:

**The reasonableness of force used by an officer will be analyzed based on the totality of circumstances at the time the force was used.**

## QUALIFIED IMMUNITY:

**When an officer is sued for excessive use of force, the Court can grant the officer immunity under certain circumstances. In granting immunity to the officer, the Court considers whether in utilizing force, the officer was aware that the force used was unreasonable.**

## PAY ATTENTION TO THE "COURT NOTICE"

## PRE ARMSTRONG V. PINEHURST*: MEYERS V. BALTIMORE CITY*, 713 F.3D 723, (4TH CIR. 2013)

- Court analyzed each use of the taser
- Officer deployed taser in probe mode 3 times on Ryan Meyers while he was acting erratically, holding a baseball bat, not complying with orders, advancing toward officers, not relinquishing the bat.
- Officer was faced with task of subduing armed, agitated, physically imposing suspect in confined space with risk to officer and fellow officers.
- Ryan posed an immediate threat to officer safety and was actively resisting arrest

- **COURT: Officer's first 3 uses of taser on Ryan did not amount to excessive force because suspect was actively resisting arrest and was a threat to the officer's safety.**
- **Once Ryan was on the ground and relinquished the bat, officers sat on him and he was only able to move his legs.**
- **The officer deployed the taser on Ryan 7 additional times (1st in probe mode, additional 6 in stun mode).**
- **COURT: Officer's 7 additional taser uses constituted an excessive use of force.**

- **COURT NOTICE: “It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who is no longer armed, has been brought to the ground, has been restrained physically by several officers, and no longer is actively resisting arrest.”**

## *THE ESTATE OF RONALD ARMSTRONG V. VILLAGE OF PINEHURST, ET AL.*

- **The Estate of Ronald Armstrong sued 3 police officers involved in the seizure of Armstrong alleging the officers used excessive force in violation of Armstrong's constitutional rights.**
- **The Court found that the 3 officers used excessive force in seizing Armstrong.**
- **However, the officers received qualified immunity because they were not on notice that action constituted excessive force.**

## FACTS:

- Ronald Armstrong was a large man who was diagnosed with bipolar disorder and paranoid schizophrenia
- On the date of the incident, he had been off his medication for several days and was acting oddly (poking holes through his skin to “let the air out”)
- His sister took him to the hospital for an evaluation
- Armstrong walked out of the hospital during the evaluation

- The examining doctor judged Armstrong a danger to himself and issued involuntary commitment papers to compel his return
- The doctor did not designate him a danger to others
- Pinehurst police were called as soon as Armstrong left the hospital – 3 officers responded
- Armstrong was at an intersection close to the hospital entrance
- When officers arrived, Armstrong was acting strangely and wandering across an active roadway
- At that time, the officers had not received a commitment order

- 1 officer convinced Armstrong to get to the roadside
- Armstrong began to eat grass, chew on gauze, put cigarettes out on tongue while officers waited for order
- Once 3 officers learned order was complete, 3 officers surrounded and advanced toward Armstrong
- Armstrong then sat down and wrapped himself around the post of a stop sign
- The officers tried to pry his arms and legs off the post, but Armstrong would not budge, in defiance of the order

- The officers attempt to pull Armstrong off the post lasted 30 seconds
- 2 hospital security officers were also present, along with Armstrong's sister, who was pleading with her brother to return to the hospital
- The 3 officers did not engage in any further conversation with Armstrong.
- 1 officer drew his taser and set it to drive stun mode and told Armstrong if he did not let go of the post, he would tase him
- Armstrong did not let go. The officer tased Armstrong 5 separate times over a period of 2 minutes.

- The tasing only increased Armstrong's resistance.
- Once tasing ceased, 3 officers and 2 security officers pulled Armstrong off the post and laid him face down on the ground
- During the struggle, Armstrong complained he was being choked
- Armstrong's sister saw the officers pull his collar like they were choking him
- Two Officers pinned Armstrong down by placing a knee on his back and standing on his back, while handcuffs were applied.
- Armstrong continued to kick at officer, so his legs were shackled.

## COURT ANALYSIS:

**The Court applied the 3 Graham factors in determining whether the tasing constituted an excessive use of force:**

1. **Severity of crime at issue:**
   - **No crime**
   - **Officers knew Armstrong was mentally ill**
   - **Commitment Order – Doctor determined Armstrong to be a danger to himself ONLY**
   - **Court: No justification for use of force that risks substantial harm to subject when seizure was to prevent mentally ill man from harming himself.**

2. **Immediate threat to safety of officers or others:**
   - **Armstrong observed wandering in traffic; seizure only a few feet from traffic**
   - **Armstrong fled from hospital earlier**
   - **Armstrong was large man, stationary, seated, refusing to move, and surrounded by officers and security guards.**
   - **Court: A degree of force was justified knowing Armstrong may try to flee to street, endangering himself and others. However, degree of force is only that force reasonably calculated to prevent his flight. That degree of force is limited as he was stationary and refusing to move at time force used.**

3. **Active resistance or evading arrest by flight:**
   - **Resisting seizure by refusing to let go of post despite officer commands and brief (30 second) attempt by officers to pull him off post**
   - **Court: Noncompliance with orders justifies some use of force but level of justified force depends on risk posed by resistance**
   - **Risk: Very little**
   - **Armstrong stationary, non-violent, surrounded by people willing to help return him to hospital**
   - **No danger, no urgency, just a static impasse**
   - **Actively resisting, but only pulling away from officers prior to tasing**

## REVIEW OF TOTALITY OF CIRCUMSTANCES:

- Level of force officers used was NOT objectively reasonable
- Only limited use of force justified here
- Few exigencies in this situation
- When officer deployed taser, Armstrong was mentally ill man, seized for own protection, seated on ground, clinging to post to ensure immobility, surrounded by 3 officers and 2 security officers and failed to submit to lawful seizure for only 30 seconds.
- Reasonable officer: would perceive stalemate with few, if any exigencies. No severe immediate danger.

**COURT HOLDING**:

- **Officers used excessive force in violation of the 4th Amendment.**
- **A police officer may ONLY use serious injurious force, like a taser, when an objectively reasonable officer would conclude that circumstances present a RISK OF IMMEDIATE DANGER that could be mitigated by the use of force.**
- **Physical resistance does not equate to RISK OF IMMEDIATE DANGER.**

## COURT NOTICE:

- **“Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser in the face of stationary and non-violent resistance to being handcuffed, those officer use unreasonably excessive force. Law enforcement officers should now be on notice that such taser use violates the Fourth Amendment.”**

## COURT GUIDANCE:

- Deploying a taser is a serious use of force and designed to cause excruciating pain
- Subject of seizure does NOT create such a risk of immediate danger simply when resisting – even physically preventing an officer's manipulation of his body
- Erratic behavior and mental illness do not necessarily create a safety risk
- When a seizure is solely to prevent mentally ill person from harming himself, officer has a lessened interest in deploying potentially harmful force

## WHAT DO YOU DO NEXT?

- Need notice to client? Training Bulletin to inform client of new law?
- Need to update use of force policy? Create separate policy for taser use? Is the standard different because taser use is considered a “serious use of force”?
- How will you handle training? In-service, education of officers, scenario-based training?
- What will you do to better understand your client and use of force in general from the perspective of your client? (attend training sessions, participate in use of force scenarios, review videos)

## MCP TRAINING BULLETIN 16-01

## LEGAL UPDATE AND CLARIFICATION OF MCP POLICY FOR USING A TASER ON AN INDIVIDUAL WHO IS OFFERING STATIONARY, NON-VIOLENT RESISTANCE TO A LAWFUL SEIZURE

- In situations where officers encounter an unarmed and minimally threatening individual exhibiting symptoms of some form of mental illness, officers should make every effort to deescalate the situation to "adjust the application of force downward" to avoid the necessity to use a taser.
- A taser is not an all-purpose weapon that takes the place of de-escalation techniques and other options.

- **Officers are reminded that there have been circumstances where fatal outcomes have occurred after a taser has been deployed by law enforcement officers even when used in accordance with policy and training.**
- **A taser should only be used against subjects who are exhibiting active aggression or who are actively resisting in a manner that, in the officer's judgment, is likely to result in injuries to the officer or others.**
- **A taser should not be used against an unarmed, passively resistant subject.**

## GENERAL USE OF FORCE POLICY

- **Graham factors and standard**

## SEPARATE TASER POLICY

**ECW is a SERIOUS USE OF FORCE**

**RISK OF IMMEDIATE DANGER MUST BE PRESENT TO DEPLOY**

**Update definitions of passive and active resistance**

- **Passive Resistance**: A refusal by an unarmed person to comply with an officer's verbal command or physical control techniques by non-violent actions, in such a way that the subject does not use any physical force. Examples include ignoring verbal instructions by failing to respond or move, linking arms, going limp.

- **Active Resistance**: occurs when a subject takes action and / or uses evasive movements that attempt to physically counteract or defeat an officer's attempt to detain a subject or place them in custody and take control, and which may create a potential risk of bodily harm to the officer, subject and / or others persons. Examples; pulling away from the officer, breaking an officer's grip and /or control, fleeing arrest.

# TRAINING

- WHAT IS THE IMMEDIATE RISK OF DANGER?
- HOW DO YOU ARTICULATE THE RISK AND CIRCUMSTANCES?
- WHAT ABOUT REPORT WRITING?
  - Articulate the immediate risk of danger to officer or others
  - Articulate what officer heard, saw, did, etc.
  - Articulate each use of force separately and specify risk of immediate danger
- IMPLICATIONS OF THE BODY WORN CAMERA

**VIEW VIDEOS FROM THE PERSPECTIVE OF A POLICE OFFICER ON THE SCENE KEEPING IN MIND THE RULING IN *ARMSTRONG:***

- **What was the risk of immediate danger when you deployed the taser?**
- **Can you articulate the resistance?**
- **Were there other options you could have utilized before resorting to the taser?**

# THE VIDEOS

# RISK OF IMMEDIATE DANGER?






# RISK OF IMMEDIATE DANGER?




# RISK OF IMMEDIATE DANGER?



# RISK OF IMMEDIATE DANGER?

# RISK OF IMMEDIATE DANGER?



# RISK OF IMMEDIATE DANGER?




***WARNING***
This video contains
graphic video and
explict language

# SUMMARY

- When you are faced with significant new case law, look at ways to protect your client and avoid future litigation
- Determine whether you need to prepare a formal notice to your client
- Review policy to determine whether any updates are required
- Determine whether additional training is necessary
- Get to know your client so that you can provide them with the best possible representation