

***Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, --- F.3d ----, 2016 WL 105386 (C.A.4, Jan. 11, 2016)**

Thoughts for Consideration (© Copyright 2016 LAAW International, LLC (January 18, 2016))

BASIC THOUGHTS/INFORMATION	
Armstrong Decision Applicability	<p>The <i>Armstrong</i> decision is mandatory precedent in the states within the United States Court of Appeals for the Fourth Circuit (Virginia, West Virginia, Maryland, North Carolina, and South Carolina).</p> <ul style="list-style-type: none"> • However, the concepts are important to understand for law enforcement officers in the U.S. Constitution.
Key Officer Learning Points	<ul style="list-style-type: none"> • If no exigency (including “immediate safety risk”), slow down and consider minimal options/solutions: if no exigency exists that is sufficiently dangerous to justify potentially injurious force, slow down the situation and response and consider options as the circumstances of the incident allow. • Physical resistance does not equate to a risk of immediate danger: physical resistance (including minimally risky physical resistance) does not equate to (is not) “risk of immediate danger.” • Mentally ill subject is not necessarily a safety risk. • Avoid using force option that is not reasonably likely to cure the immediate safety risk. • If subject is not a risk of immediate danger do not use serious injury force (including Conducted Electrical Weapon (CEW), punch, throwing to ground, tackling, wrestling maneuver): Do not use CEW, or other serious injury force, on a person who is not a serious threat or posing some risk of immediate danger to officers and others (not just himself). • Document immediate safety risks, risks of danger, resistance, force used, etc. (avoid embellishment).
Legitimate Purpose of CEW	For example, protecting officers, protecting arrestee, or preventing arrestee’s escape (<i>Orem</i>).
CEW a “Tool of Compliance” (From <i>Armstrong</i> Decision)	Traditional tools of compliance: pepper spray, punch, throw to ground, wrestling maneuver, tackling [“And this conclusion, that [CEW] use is unreasonable force in response to resistance that does not raise a risk of immediate danger, is consistent with our treatment of police officers’ <i>more traditional tools of compliance.</i> ” (emphasis added.)]
Basic Points	<ul style="list-style-type: none"> • CEW “may only be [used] when ... officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the [CEW].” • “The subject of a [4th Amendment] seizure does not create such a risk simply because he is doing something that can be characterized as resistance—even when that resistance includes physically preventing an officer’s manipulations of his body.” • “Erratic behavior and mental illness do not necessarily create a safety risk...” • “... when a [4th Amendment] seizure is intended solely to prevent a mentally ill individual from harming himself, the officer effecting the [4th Amendment] seizure has a lessened interest in deploying potentially harmful force.”
Very Basic Synopsis of Armstrong Decision	<ul style="list-style-type: none"> • Do not use “<i>serious injury force</i>” (CEW (in any mode), pepper spray, punch, grounding, tackling, wrestling maneuver) • to gain compliance from a person, • who is exhibiting only <i>minimally risky physical resistance</i>, • who is not a serious threat or posing some risk of immediate danger to officers or others (not just himself).
What is the Court’s Clarification in the Armstrong Decision?	<p>The <i>Armstrong</i> decision clarifies that officers violate the 4th Amendment’s “objective reasonableness” force standard when they:</p> <ul style="list-style-type: none"> • Use “<i>serious injury force</i>” (CEW, pepper spray, punch, grounding, tackling, wrestling maneuver) that is a [4th Amendment] seizure,

	<ul style="list-style-type: none"> • On a person who is not a serious threat or posing some risk of immediate danger to officers or others (not just himself), <ul style="list-style-type: none"> ○ And, physical resistance (including minimally risky physical resistance) does not equate to (is not) “risk of immediate danger.” ○ “Minimally risky physical resistance” (alone) does not justify use of “serious injury force.”
Armstrong Decision Also Focused on	<p>When person not a serious risk or risk of immediate danger to officers or others (not just himself), then:</p> <ul style="list-style-type: none"> • Where a mentally ill person who is physically resisting or presenting minimal risk physical resistance then less force is justified than in a criminal arrest [4th Amendment] seizure. • Officers should take their time and not rush to use force. (Court included that CEW force began in 30 seconds.) • Do not use force that the officers do not reasonably believe will work to mitigate the need for force.
What this Case Means	<p>“Serious injury force” (CEW, pepper spray, punch, grounding, tackling, wrestling maneuver) is excessive if the person is only showing “physical resistance” or “minimally risky physical resistance” and is not a “risk of immediate danger” or a “serious threat” to others (not just himself).</p> <ul style="list-style-type: none"> • This is correct especially if the person is mentally ill; rather than a criminal arrest. • Physical resistance or minimally risky physical resistance does not equate to (is not) “risk of immediate danger.”
Selected Important Points:	<ul style="list-style-type: none"> • Force must be proportional to threat. • Physical resistance does not equate to (is not) “risk of immediate danger.” • Mental illness is to be considered differently than criminal activity. • CEW (just like pepper spray, punch, throw to ground, grounding, wrestling maneuver) is “serious injury force” [as would be canine, baton, bean bag, significant pain joint lock and pain compliance]. • Do not use “serious injury force” where there is physical resistance without risk of immediate danger to others. • Only use “serious injury force” to thwart “risk of immediate danger” to others (including officers), NOT just to himself. • Use force that officer reasonably believes will mitigate immediate danger. [Meaning, as an example, if officer does not believe (pain compliance) drive-stun will mitigate danger and gain compliance, do not use drive-stun.]
Case Holding (Precedent)	<ul style="list-style-type: none"> • “Proportionality” - Officer’s force must be “Proportional.” <ul style="list-style-type: none"> ○ 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 all the circumstances. ○ Officer’s force is only proportional if subject’s resistance raised a risk of immediate danger that outweighs the <i>Graham</i> factors mitigating against harming the subject. • “Physical resistance” does not equate to, and is not synonymous with, “risk of immediate danger.” <ul style="list-style-type: none"> ○ Resistance does not equate with an objective threat to safety entitling officer to escalate force. • CEW (just like pepper spray, punch, throw to ground, grounding, wrestling maneuver, tackling) is “serious injury force.” <ul style="list-style-type: none"> ○ Officer may only use serious injury force when objectively reasonable officer would conclude that circumstances present a risk of immediate danger that could be mitigated by the force selected to be used. ○ CEWs “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 [CEW].” ○ CEW use is unreasonable (excessive) force in response to resistance that does not raise a risk of immediate danger.
ADDITIONAL DETAILS AND INFORMATION	

<p>Constitutional Right in Question in Armstrong</p>	<p>Right not to be subjected to use of CEW while offering stationary and non-violent resistance to a lawful seizure, i.e. excessive force.</p>
<p>Basic Facts (viewed in the light most favorable to plaintiff, because ruling was an appeal from a dismissal, granted on grounds of Qualified Immunity)</p>	<p>When officer used CEW on Armstrong (5 drive-stuns within 2 minutes):</p> <ul style="list-style-type: none"> • Armstrong (5’11”, 262 pounds) was a mentally ill man (off of his psych meds for 5 days); • being seized for his own protection (NOT because he was a danger to officers or others); • was seated on the ground; • hugging a post to ensure his immobility; • surrounded by 3 officers and 2 hospital security guards; and • had failed to submit to a lawful seizure for only 30 seconds. (Court emphasized short time.) <p>A reasonable officer would have perceived a static stalemate with few, if any, exigencies—not an immediate danger so severe that the officer must beget the exact harm the seizure was intended to avoid.</p> <p>(Also, that Armstrong had already left the hospital and was acting strangely while the officers waited for the commitment order to be finalized does not change this calculus. If merely acting strangely in such a circumstance served as a green light to CEW use, it would then be the rule rather than the exception when law enforcement officials encounter the mentally ill. That cannot be. By the time officers chose to inflict force, any threat had sunk to its nadir—Armstrong had immobilized himself, ceased chewing on inedible substances, and ceased burning himself. Use of force designed to “caus[e] ... excruciating pain,” (<i>Cavanaugh</i>), in these circumstances is an unreasonably disproportionate response.)</p>
<p>Graham Factors Analysis</p>	<ul style="list-style-type: none"> • Armstrong had not committed a crime, and officers had no probable cause to effect a criminal arrest. • Officers were on notice of 2 facts that bear on the question of whether officers had reason to believe Armstrong was dangerous. • The 2nd and 3rd <i>Graham</i> factors, whether Armstrong threatened the safety of others and resisted seizure, justify some—limited—use of force. Officers had seen Armstrong wandering into traffic with little regard for avoiding the passing cars, and the seizure took place only a few feet from an active roadway. Armstrong fled from the hospital earlier that day although he did not go far. Under such circumstances, officers’ concerns that Armstrong may try to flee into the street to avoid being returned to the hospital, thereby endangering himself and individuals in passing cars, were objectively reasonable. A degree of force (not serious injurious force) was, consequently, justified. <ul style="list-style-type: none"> ○ But that justified degree of force is the degree reasonably calculated to prevent Armstrong’s flight. <ul style="list-style-type: none"> ▪ When officers decided to begin using force, Armstrong, who stood 5’11” tall and weighed 262 pounds; <ul style="list-style-type: none"> • was stationary; • seated; • clinging to a post; and • refusing to move. • He was also outnumbered and surrounded by police officers and security guards. • The degree of force necessary to prevent an individual who is affirmatively refusing to move from fleeing is obviously quite limited.
<p>Mental Illness Mitigating Graham Factors</p>	<ul style="list-style-type: none"> • Armstrong was the subject of an involuntary commitment order, thus, was necessarily considered “mentally ill.” • Armstrong’s mental health was thus one of the “facts and circumstances” that “a reasonable officer on the scene” would ascertain, a fact that officers must account for when deciding when and how to use force.

	<ul style="list-style-type: none"> ○ (“It cannot be forgotten that the police were confronting an individual whom they knew to be mentally ill.... The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force 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 criminal who has recently committed a serious offense.” ● “[T]he use of force that may be justified by” the government’s interest in seizing a mentally ill person, therefore, “differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.” ● Mental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations. <ul style="list-style-type: none"> ○ But “in some circumstances at least,” it means that “increasing the use of force may ... exacerbate the situation” (<i>Deorle</i>). ○ 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” (<i>Deorle</i>). <ul style="list-style-type: none"> ▪ And even when this ideal course is not feasible, officers who encounter an unarmed and minimally threatening individual who is “exhibit[ing] conspicuous signs that he [i]s mentally unstable” must “de-escalate the situation and adjust the application of force downward.” ● Danger to “himself,” NOT a danger to others: The 2nd relevant fact that officers could glean from Armstrong’s commitment order is that a doctor determined him to be a danger to himself (NOT a danger to others). <ul style="list-style-type: none"> ○ Where a seizure’s sole justification is preventing harm to the subject of the seizure, the government has little interest in using force to effect that seizure. Rather, using force likely to harm the subject is manifestly contrary to the government’s interest in initiating that seizure (<i>Drummond</i>). <ul style="list-style-type: none"> ▪ When “a mentally disturbed individual not wanted for any crime ... [i]s being taken into custody to prevent injury to himself[,] [d]irectly causing [that individual] grievous injury does not serve th[e officers’] objective in any respect” (<i>Drummond</i>). ● The first <i>Graham</i> (immediate threat to others) factor weighs against imposition of force. The government’s interest in seizing Armstrong was to prevent a mentally ill man from harming himself (not others). The justification for the seizure, therefore, does not vindicate any degree of force that risks substantial harm to the subject.
<p>Officer Could Use “Some” Force Not “serious injury force”</p>	<ul style="list-style-type: none"> ● We are cognizant that courts ought not “undercut the necessary element of judgment inherent in a constable’s attempts to control a volatile chain of events” (<i>Brown</i>). ● And we certainly do not suggest that officers had a constitutional duty to stand idly by and hope that Armstrong would change his mind and return to the hospital on his own accord. ● But the facts of this case make clear that our ruling does not hamper officers’ ability to do their jobs: Tasing Armstrong did not force him to succumb to officers’ seizure—he actually increased his resistance in response. When officers stopped tasing and enlisted the hospital’s security guards to help pull Armstrong off of the post, however, the group removed Armstrong and placed him in restraints.

	<ul style="list-style-type: none"> • Had officers limited themselves to permissible uses of force (such as physically pulling Armstrong off of the post) when seizing Armstrong, they would have had every tool needed to control and resolve the situation at their disposal.
<p>Pepper spray: (Court’s conclusion that CEW use is unreasonable force in response to resistance that does not raise a risk of immediate danger is consistent with treatment of officers’ more traditional tools of compliance)</p>	<ul style="list-style-type: none"> • Causes “closing of the eyes through swelling of the eyelids, ... immediate respiratory inflammation, ... and ... immediate burning sensations,” • pepper spray is excessive force when used on arrestee’s wife, who was sprinting toward officers to assist her husband upon seeing him placed in handcuffs (<i>Park</i>). <ul style="list-style-type: none"> ○ Though the officers thought the wife’s running full-bore toward their detainee was basis to arrest the wife for “disorderly conduct[]and obstruction of a law enforcement officer in the performance of his duties” (<i>Park</i>). Court rejected any notion that such behavior justified the application of pepper spray. ○ Because “[i]t [wa]s difficult to imagine the unarmed [wife] as a threat to the officers or the public,” the officers’ “irresponsible use of pepper spray twice from close range ... was indeed excessive.”
<p>Punch, throw to ground, grounding, wrestling maneuver: (Court’s conclusion that CEW use is unreasonable force in response to resistance that does not raise a risk of immediate danger is consistent with treatment of officers’ more traditional tools of compliance)</p>	<ul style="list-style-type: none"> • [Punch, throw to ground, wrestling maneuver excessive] officer, who punched arrestee, threw him to the ground, and used a wrestling maneuver on him, because when there was no real evidence that a relatively passive, mentally delayed man was a danger to the larger, trained police officer (<i>Rowland</i>). <ul style="list-style-type: none"> ○ Despite this resistance, the arrestee “posed no threat to the officer or anyone else” (<i>Rowland</i>). • [Punching, throwing to ground excessive] punching and throwing arrestee to ground because she “took only a single step back off of the small stoop in front of the door” and “pulled her arm away” during attempted handcuffing was excessive force (<i>Smith</i>). <ul style="list-style-type: none"> ○ Nominal resistance did not justify officer’s use of force where reasonable officer at the scene would not have “any reason to believe that [arrestee] was a potentially dangerous individual” or “was at all inclined to cause [the officer] any harm” (<i>Smith</i>).
<p>CEW use NOT Permissible When</p>	<ul style="list-style-type: none"> • CEW used against unrestrained person who is (only) actively resisting (not a risk of immediate danger or serious safety threat). • Questions whether arrestee (1) has been restrained and (2) is complying with police directives: <ul style="list-style-type: none"> ○ are relevant to any inquiry into the extent to which the arrestee “pose[s] a continuing threat to the officers’ safety” (<i>Meyers</i>); and ○ they are not dispositive. ○ A rule limiting CEW use to situations involving a proportional safety threat does not countenance use in situations where an unrestrained arrestee, though resistant, presents no serious safety threat.
<p>Defining the Situation / Force</p>	<p>(1) Warning of force was given, (2) to a person exhibiting nonviolent resistance to desist, and (3) force was discontinued before that person was secured.</p>
<p>“Immediate Danger” is Key</p>	<p>Immediate danger is a key distinction—tasing arrestee ceased being proportional force when officer continued to use CEW after arrestee “did not pose a continuing threat to the officers’ safety” (<i>Meyers</i>).</p>
<p>“Non-Violent” or “Minimally Risky” Physical Resistance</p>	<p>Nonviolent physical resistance does not necessarily create a continuing threat to the officers’ safety (<i>Meyers</i>).</p> <ul style="list-style-type: none"> • Examples of minimally risky physical resistance: <ul style="list-style-type: none"> ○ Refusing to enter an out-of-state officer’s police car until a local officer is summoned is not a sufficient threat to the arresting officer to justify physically striking arrestee (<i>Rambo</i>);

	<ul style="list-style-type: none"> ○ arrestee pulling her arm away when an officer attempting to grab her without explanation (<i>Smith</i>); and ○ arrestee “yank[ing] his arm away” from officer does not justify “being tackled” (<i>Goodson</i>).
CEW use can be excessive force when used in response to “non-violent” resistance	<ul style="list-style-type: none"> ● Subject “refus[ing] to release his arms for handcuffing,” for example, “is no[t] evidence suggesting that [he] violently resisted the officers’ attempts to handcuff him” (<i>Cyrus</i>). <ul style="list-style-type: none"> ○ Such a refusal does not justify use of a CEW when subject “[i]s unarmed and there [i]s little risk [he] could access a weapon” (<i>Cyrus</i>). ● Suspect “actively resist[s] arrest [when] she refuse[s] to get out of her car when instructed to do so and stiffen[s] her body and clutche[s] her steering wheel to frustrate the officers’ efforts to remove her from her car,” but when she also “d[oes] not evade arrest by flight, and no other exigent circumstances exist[] at the time [,] ... [a] reasonable fact-finder could conclude ... that the officers’ use of [a CEW in drive-stun] was unreasonable and therefore constitutionally excessive” (<i>Mattos</i>, discussing <i>Brooks</i>). ● Refusal to terminate phone call after police ordered arrestee to do so does not justify use of CEW even though officer was concerned that arrestee could use glass tumblers near her feet as weapons or could kick the officer (<i>Brown</i>).
Exigencies	Court tied permissible CEW use to situations that present some exigency that is sufficiently dangerous to justify the force (<i>Orem, Meyers</i>).
Analysis Factors	Parsing CEW use based on the level of resistance the arrestee was offering—and the danger that resistance posed to the officers—when each shock was administered (<i>Meyers</i>). (Each use of force must be justified by continuing danger/threat and resistance.)
Force is Excessive When	<ul style="list-style-type: none"> ● Officer repeatedly shocks a person who is no longer armed, has been brought to the ground, has been restrained physically by several other officers, and no longer is actively resisting arrest (<i>Meyers</i>). ● Use of CEW on suspects after they have been secured (<i>Meyers, Bailey</i>). ● Punching or pepper spraying suspects in response to minimal, non-violent resistance (<i>Park, Rowland</i>). ● “[I]t is excessive to use a [CEW] to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance.” ● Painful, injurious, serious inflictions of force, like the use of a CEW (in any mode), do not become reasonable simply because officers have authorization to arrest a subject who is unrestrained. ● CEW use against individual exhibiting “unusual behavior” and “shouting gibberish[] and ... expletives” who was “unarmed, stationary ..., [and] facing away from an officer at a distance of fifteen to twenty-five feet (<i>Bryan</i>). ● CEW use when misdemeanor was not violent and did not try to flee but resisted being handcuffed (<i>Cyrus</i>). ● “[I]t was unlawful to [use a CEW on] a nonviolent, suspected misdemeanor who was not fleeing or resisting arrest, who posed little to no threat to anyone’s safety, and whose only noncompliance with the officer’s commands was to disobey two orders to end her phone call to a 911 operator” (<i>Brown</i>).
Additional Force Considerations	<ul style="list-style-type: none"> ● Force was not initiated without warning or opportunity to cease any noncompliance. ● Officers did not continue using force after Armstrong was secured.