

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

BARBARA BARRICK, as Special
Administrator of the ESTATE OF
BARRICK DALE BARRICK, deceased,

Plaintiff,

V.

BOARD OF COUNTY COMMISSIONERS OF
McCURTAIN COUNTY, OKLAHOMA;
McCURTAIN COUNTY SHERIFF KEVIN
CLARDY; DEPUTY MATTHEW KASBAUM;
DEPUTY QUENTIN LEE; DEPUTY KEVIN
STOREY; and, WARDEN MARK HANNAH,

Defendants.

Case No. CIV-23-129-JFH-GLJ

**MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF DEFENDANTS
MATTHEW KASBAUM AND QUENTIN LEE**

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**MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT
OF DEFENDANTS KASBAUM AND LEE**

Defendants Matthew Kasbaum and Quentin Lee, in their individual capacities, hereby move the Court to grant summary judgment in their favor pursuant to Fed. R. Civ. P. 56(a) with regard to the claims asserted by Plaintiff against them. In support thereof, the Defendants submit the following Brief:

STATEMENT OF THE CASE

Plaintiff brings this lawsuit under 42 U.S.C. § 1983 accusing the Defendants of using excessive force and causing the death of Bobby Dale Barrick (“Barrick”). This action has been brought by Barrick’s wife, Barbara Barrick (“Plaintiff”). In March 2022, Barrick had been living in a hotel room near his construction job on I-44 in Tulsa after Barbara had kicked him out of their marital home. Between March 6, 2022, and March 9, 2022, Plaintiff called the police on Barrick on two separate occasions. It is a mystery precisely what Barrick was up to in the period between March 9 and March 13, when Barrick reappeared very dramatically in a rampage in Eagletown, Oklahoma, several hours away from his Tulsa home.

On the evening of March 13, 2022, at approximately 7:10 p.m., Decedent was high on methamphetamine when he broke into Lori’s Corner Store in Eagletown, Oklahoma. The store was closed for remodeling when Barrick ran in through the back door of the store. He was ranting and raving, extremely agitated, and was yelling, “[t]hey’re going to kill me.” Barrick grabbed a contractor’s level and used it to bash out the glass front door. Contractors chased after Barrick, who had run onto nearby Highway 70. Barrick then attempted to hijack two different vehicles that were driving on the highway—the first a semi-truck, and the second, a car occupied by a woman and two children. Barrick continued to scream and yell throughout the ordeal. The contractors were able to restrain Barrick by hog-tying him. During this time, eight 911 calls came in from the contractors, the drivers of the two vehicles, and other unknown individuals.

Sergeant Matthew Kasbaum (“Sergeant Kasbaum”) and Sergeant Quentin Lee (“Sergeant Lee”) were the first officers to arrive on the scene at approximately 7:30 p.m. Upon their arrival, they observed Barrick lying face down on the pavement. Barrick’s hands and feet were tied, and there was a group of people standing around in the area. Sergeants

Kasbaum and Lee placed Barrick in handcuffs and started untying him. Barrick continued to yell as he lay on the ground. In Barrick's pocket, officers found a Choctaw Nation Membership Card. The officers at the scene were cross-commissioned officers with the Choctaw Nation, but requested a tribal officer be dispatched to the scene. They also requested EMS because Barrick had what appeared to be minor injuries from being momentarily trussed up by the workers.

After being cuffed, Barrick stood up and was fully conscious, breathing, and talking with the officers. Barrick was put into the back of Sergeant Lee's patrol vehicle. While the officers were gathering statements from witnesses, Barrick continued screaming, yelling, and rocking back and forth in the back of the vehicle. When EMTs arrived, Sergeant Kasbaum asked them to check Barrick and clear him for transport to jail. Sergeant Kasbaum also told the EMTs that, for their safety, the officers would stand between Barrick and EMS as they opened the door. When the door was opened, Barrick attempted to kick out of the door, but Sergeant Kasbaum was blocking Barrick's legs using the door of the unit and Sergeant Kasbaum's leg. Barrick would not comply, and became violent while trying to escape. During this struggle, Barrick kicked Oklahoma Game Warden Mark Hannah ("Game Warden Hannah") hard in the face.

Deputy Kevin Storey ("Deputy Storey") had an Axon "Pulse" TASER and handed it to Lee. Lee attempted a drive stun to Barrick through his jeans, with little to no effect. The TASER was never deployed in dart mode. The TASER was then given to Sergeant Kasbaum who delivered 2-3 one-second drive stun touches to Barrick's left hip bone in an attempt to get him to release his grip on the truck's wall. Barrick eventually slid out of the truck and attempted to crawl under the truck. The officers dragged Barrick out from under the truck and tried to hold him down on the pavement. Barrick continued to scream, yell and fight the officers during this entire time. The officers never got on top of Barrick's torso, and never engaged in any form of "positional asphyxiation."

After several minutes, all of the officers say that Barrick suddenly stopped yelling and went limp. It was like "a switch was flipped." The officers immediately backed off called out to the EMTs to check on Barrick immediately. EMTs (who were only a few feet away when Barrick became nonresponsive) took over and loaded Barrick into the ambulance.

Barrick was taken to McCurtain Memorial Hospital and was later transferred to Paris Regional Medical Center. Barrick tested positive for methamphetamine and amphetamines. Further, he had multiple medical complications during his hospitalization, including: respiratory failure; altered mental status; acute renal failure; volume overload; and, acute respiratory distress syndrome. Barrick died five days later on March 18, 2022, due to pneumonia with acute respiratory failure due to acute kidney injury. Contributing factors to his death included bipolar disorder, schizophrenia, and hypertension. The family declined an autopsy, and allowed Barrick to be cremated.

STATEMENT OF UNDISPUTED FACTS

1. During the early morning hours on March 13, 2022, at approximately 4:30 a.m., Sergeant Kasbaum responded to a call about an individual whose truck was stuck in the mud. Upon arrival, Sergeant Kasbaum first encountered Barrick. Barrick did appear to be under the influence of something, but he was functional, under control, and cooperative. Sergeant Kasbaum offered to call a tow truck for Barrick and give him a ride into town, but Barrick declined. Because Barrick's vehicle was immobilized, Barrick was not placed under arrest for being intoxicated. (Exhibit 1: Deposition of Matthew Kasbaum, 46-48; 245-246); (Exhibit 2: Deposition of Quentin Lee, 31-32); (Exhibit 3: Body Cam Video of Matthew Kasbaum).

2. On March 13, 2022, Barrick was dropped off at Lori's Corner Store in Eagletown, Oklahoma by a vehicle that was described as a green 90s model Chevrolet 4x4 with Arkansas plates. (Exhibit 4: Video surveillance video from the front of Lori's Corner Store); (Exhibit 5: Statement of Mark Hannah).

3. Lori's Corner Store was closed, but contractors were on site working on a remodel of the store. (Exhibit 6: Video surveillance video from the back of Lori's Corner Store); (Exhibit 7: Written Statement of Ryan Rincon); (Exhibit 8: Written Statement of Chris Pesetsky); (Exhibit 9: Written Statement of Laura Stafford); (Exhibit 10: Body Cam Video of Quentin Lee); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 12: Deposition of LaChanna Hall, 18).

4. Barrick ran in the back door of the store yelling that someone was trying to kill him. Two of the contractors working on the store, Chris Pesetsky and Ryan Rincon (hereafter, "the contractors") chased Barrick throughout the store. Barrick grabbed Rincon's

contractor's level and used it to break the glass out of the front door. (Exhibit 6: Video surveillance video from the back of Lori's Corner Store); (Exhibit 4: Video surveillance from the front of Lori's Corner Store); (Exhibit 7: Written Statement of Ryan Rincon); (Exhibit 8: Written Statement of Chris Pesetsky); (Exhibit 9: Written Statement of Laura Stafford); (Exhibit 10: Body Cam Video of Quentin Lee); (Exhibit 11: Written Statement of Matthew Kasbaum).

5. The contractors chased after Barrick, who then ran onto Highway 70, where he got into Roger Driver's ("Driver") semi-tractor trailer rig, which had slowed when he saw Barrick in the road, being followed by the contractors. Barrick got into Driver's truck cab and shouted at the driver: "Go, they're going to kill me." Driver told Barrick that he was "not going anywhere." (Exhibit 13: Written Statement of Roger Driver); (Exhibit 8: Written Statement of Chris Pesetsky); (Exhibit 7: Written Statement of Ryan Rincon); (Exhibit 1: Deposition of Matthew Kasbaum, 257); (Exhibit 10: Body Cam Video of Quentin Lee); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 12: Deposition of LaChanna Hall, 19).

6. Barrick either pulled Driver out, or pushed him away from the cab. Driver shut down the truck motor and engaged the brake so that Barrick could not drive away in the semi-truck. Barrick repeated, "they are going to kill me," then got out of the truck cab. (Exhibit 1: Deposition of Matthew Kasbaum, 257).

7. Another citizen named LaChanna Hall ("Hall") was driving behind Driver's truck with children in her vehicle. Barrick punched at her window a few times and then grabbed onto the mirror of Hall's car and jumped onto her car as she was driving east on Highway 70 at the intersection with Mudline Road. Hall drove into the Lori's Corner Store parking lot with Barrick hanging onto her car. Barrick released his grip on her car after she pulled into the parking lot of Lori's Corner Store. (Exhibit 14: Written Statement of LaChanna Hall); (Exhibit 12: Deposition of LaChanna Hall, 10; 20-22); (Exhibit 8: Written Statement of Chris Pesetsky); (Exhibit 7: Written Statement of Ryan Rincon); (Exhibit 1: Deposition of Matthew Kasbaum, 257); (Exhibit 10: Body Cam Video of Quentin Sergeant Lee); (Exhibit 11: Written Statement of Matthew Kasbaum).

8. The contractors, among possible others, grabbed Barrick and struggled to restrain him. They used some sort of binding material to tie him up in the hog tie fashion, his chest on the ground with his hands bound behind his back and his ankles bound together and

pulled toward his waist at a 90° angle. (Exhibit 8: Written Statement of Chris Pesetsky); (Exhibit 7: Written Statement of Ryan Rincon); (Exhibit 3: Body Cam Video of Matthew Kasbaum); (Exhibit 10: Body Cam Video of Quentin Lee); (Exhibit 15: Photograph of Bobby Barrick hog-tied); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 12: Deposition of LaChanna Hall, 22).

9. Sergeants Kasbaum and Lee were at the McCurtain County Sheriff's Office in Idabel, Oklahoma, when they were dispatched. The dispatcher told them that they needed to go to Lori's Corner Store in Eagletown and that a guy was swinging a level and had busted out a door. Sergeants Kasbaum and Lee left in separate vehicles. (Exhibit 1: Deposition of Matthew Kasbaum, 242); (Exhibit 2: Deposition of Quentin Lee, 168-169); (Exhibit 11: Written Statement of Matthew Kasbaum).

10. Eagletown is approximately 35-40 miles away from the McCurtain County Sheriff's Office. While the officers were on the way to the scene, they were receiving additional information from dispatchers. The officers were trying to get there as quickly as they could to stop the situation from spiraling out of control any further. (Exhibit 1: Deposition of Matthew Kasbaum, 115, 242-243); (Exhibit 2: Deposition of Quentin Lee, 11-12; 16; 170); (Exhibit 11: Written Statement of Matthew Kasbaum).

11. As Sergeants Kasbaum and Lee were driving to Lori's Corner Store, they called for emergency medical services to respond to the scene. (Exhibit 2: Deposition of Quentin Lee, 181); (Exhibit 16: Written Statement of Quentin Lee).

12. Officer Storey was in Tom, Oklahoma, about 45 miles from Eagletown, at the time that the information was coming in from dispatch. The call came in as high-priority so he drove as fast as he could. After it was reported that Barrick was in custody, Storey slowed down, but continued driving to Eagletown to assist. While on his way, Storey was informed that a suspect was trying to get into a truck, was on highway 70 and had gotten onto a car. (Exhibit 17: Deposition of Kevin Storey, 54-56); (Exhibit 18: Written Statement of Kevin Storey).

Officers Arrive on Scene

13. Sergeant Kasbaum was the first officer on scene at approximately 7:27 p.m., with Quentin Lee ("Lee") arriving shortly behind him. Upon their arrival, they observed Barrick lying face down on the pavement. He had been hog-tied. Barrick's hands and feet

were tied together with his legs pulled toward his waist at a 90° or greater angle. There was a group of people standing around in the area. Barrick was screaming “Help me. Help me. They’re going to kill me.” (Exhibit 19: Radio Log); (Exhibit 3: Body Cam Video of Matthew Kasbaum); (Exhibit 10: Body Cam Video of Quentin Lee); (Exhibit 15: Photograph of Bobby Barrick); (Exhibit 1: Deposition of Matthew Kasbaum, 84; 115; 243); (Exhibit 2: Deposition of Quentin Lee, 52; 171); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee).

14. Sergeants Kasbaum and Lee placed Barrick in handcuffs. Sergeant Kasbaum used his knife to cut the strapping material from Barrick’s hands. He had injuries to his face from the earlier altercations. (Exhibit 1: Deposition of Matthew Kasbaum, 84-85; 115; 247-248); (Exhibit 2: Deposition of Quentin Lee, 56; 172; 174); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee).

15. After being cuffed and released from the bindings, Barrick stood up and was fully conscious, breathing, and talking with the officers. (Exhibit 3: Body Cam Video of Matthew Kasbaum); (Exhibit 10: Body Cam Video of Quentin Lee).

16. Because Barrick had what appeared to be minor injuries from being trussed up by the citizens prior to law enforcement’s arrival, Sergeant Kasbaum requested that the dispatcher send emergency medical services. Sergeant Kasbaum requested that the EMTs call his cell phone so that he could tell them about Barrick before they arrived. (Exhibit 1: Deposition of Matthew Kasbaum, 115; 249; 251-252); (Exhibit 2: Deposition of Quentin Lee, 102); (Exhibit 3: Body Cam Video of Matthew Kasbaum); (Exhibit 10: Body Cam Video of Quentin Lee); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee).

17. In Barrick’s pocket, officers found a Choctaw Nation Membership Card. The officers at the scene were cross-commissioned officers with the Choctaw Nation. Because of *McGirt* and subsequent case law, the officers did not have jurisdiction through the McCurtain County Sheriff’s Office over Barrick. (Exhibit 1: Deposition of Matthew Kasbaum, 248:6-19); (Exhibit 2: Deposition of Quentin Lee, 177); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 20: Official Tribe Police Commission Card for Kevin Storey); (Exhibit 21: Cross-Commission Card for Matthew Kasbaum); (Exhibit 22: Affidavit of Sheriff Kevin Clardy).

18. However, pursuant to a Deputation Agreement, officers Kasbaum, Lee, and Storey were authorized to immediately respond to emergency situations in and outside of Choctaw Nation Tribal boundaries. Eagletown is within the jurisdiction of the Choctaw Nation. (Exhibit 1: Deposition of Matthew Kasbaum, 249-250); (Exhibit 22: Affidavit of Sheriff Kevin Clardy).

19. Upon learning that Barrick was a member of the Choctaw Nation, they began acting within the scope of their cross-deputation by the Choctaw Nation Tribe of Oklahoma. Even though they were authorized to respond, they requested assistance from an officer with the Choctaw Nation. Sergeant Lee is also a registered tribal member. (Exhibit 1: Deposition of Matthew Kasbaum, 214; 249); (Exhibit 2: Deposition of Quentin Lee, 177-178; 213); (Exhibit 22: Affidavit of Sheriff Kevin Clardy); (Exhibit 3: Body Cam Video of Matthew Kasbaum); (Exhibit 11: Written Statement of Matthew Kasbaum).

20. For the safety of Barrick and the bystanders and in an effort to de-escalate the volatile situation, the decision was made to place Barrick in Lee's patrol unit while they continued to investigate. Sergeants Kasbaum and Lee walked Barrick to Lee's patrol vehicle. As they walked, Barrick exclaimed, "help me, don't let them kill me." Barrick was placed in the back of the unit with his hands cuffed behind his back. (Exhibit 1: Deposition of Matthew Kasbaum, 116; 248-249); (Exhibit 2: Deposition of Quentin Lee, 10-11; 141; 176); (Exhibit 3: Body Cam Video of Matthew Kasbaum); (Exhibit 10: Body Cam Video of Quentin Lee); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee).

21. Sergeant Kasbaum spoke with the arriving medics on his cell phone, telling them that Barrick was in custody, explaining, "he is hopped up on something. He is bleeding pretty good from the forehead and face area where the citizens held him down and literally hog-tied him. We need your unit to medically clear him for transport." (Exhibit 3: Body Cam Video of Matthew Kasbaum); (Exhibit 23: Body Cam Video of Quentin Lee).

22. Right about then, Game Warden Mark Hannah arrived to assist. Sergeant Kasbaum asked Officer Hannah to help locate a truck that had reportedly dropped Barrick off at the store. Game Warden Hannah said that he was familiar with the truck, a green 1990s era Chevrolet four-wheel drive pickup, and he drove through the area looking for it. Game Warden Hannah did not find the truck, and he returned to Lori's Corner Store. (Exhibit 24: Deposition of Mark Hannah, 170; 18); (Exhibit 3: Body Cam Video of Matthew Kasbaum);

(Exhibit 23: Body Cam Video of Quentin Lee); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah).

23. While Sergeants Kasbaum and Lee were interviewing the witnesses, Barrick continued screaming, yelling, and rocking back and forth with enough force to visibly rock Lee's truck. (Exhibit 1: Deposition of Matthew Kasbaum, 132; 164; 257); (Exhibit 3: Body Cam Video of Matthew Kasbaum); (Exhibit 23: Body Cam Video of Quentin Lee); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah); (Exhibit 24: Deposition of Mark Hannah, 20).

24. The emergency medical providers then arrived. Sergeant Kasbaum asked the paramedics to assess Barrick and clear him for transportation, telling them that Barrick was under the influence of some unknown substance. Sergeant Kasbaum also told the EMTs that for their safety the officers would stand between Barrick and EMS as they opened the door. Because of how much Barrick was screaming and rocking the vehicle, Sergeant Kasbaum was concerned about what would occur when he opened the door to allow the paramedics to assess Barrick. (Exhibit 1: Deposition of Matthew Kasbaum, 129; 258); (Exhibit 2: Deposition of Quentin Lee, 76; 78; 136); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 5: Statement of Mark Hannah).

25. When Sergeant Kasbaum opened the rear door of Lee's truck, Barrick pivoted on the seat and began to kick at the door, again shouting that persons were trying to kill him. Sergeant Kasbaum told Barrick to sit back on the seat and let the paramedics examine him, but Barrick refused. (Exhibit 1: Deposition of Matthew Kasbaum, 113-114; 133); (Exhibit 2: Deposition of Quentin Lee, 85); (Exhibit 25: Body Cam Video of Matthew Kasbaum); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah); (Exhibit 24: Deposition of Mark Hannah, 27).

26. Barrick attempted to kick out of the door, but Sergeant Kasbaum was blocking Barrick's legs using the door of the unit and Sergeant Kasbaum's leg. Barrick would not comply, and became violent and kicking them while trying to escape. He was holding onto something behind him and his legs were out of the cab. (Exhibit 2: Deposition of Quentin Lee, 86-87; 104; 107-108); (Exhibit 1: Deposition of Matthew Kasbaum, 95-100; 132-133); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 5: Statement of Mark Hannah); (Exhibit 24: Deposition of Mark Hannah, 61).

27. Barrick slid down into the floorboard area of the truck. He had tensed his leg muscles and locked them rigid to brace against the door jamb of Lee's truck. (Exhibit 2: Deposition of Quentin Lee, 109); (Exhibit 1: Deposition of Matthew Kasbaum: 112-114; 133-134); (Exhibit 11: Written Statement of Matthew Kasbaum).

28. Lee used a baton to try to pry Barrick's legs away from the door jam. However, Lee could not reach Barrick's legs from his position. During this time, Barrick was actively resisting the officers and kicking at them, causing Lee to unintentionally hit Sergeant Kasbaum in the head with the baton. Lee never touched Barrick with the baton. (Exhibit 2: Deposition of Quentin Lee, 90-91; 195-196); (Exhibit 25: Body Cam Video of Matthew Kasbaum); (Exhibit 11: Written Statement of Matthew Kasbaum).

29. At some point, Deputy Kevin Storey arrived on scene and observed a struggle occurring in Lee's patrol vehicle. Barrick appeared to be partially out of the vehicle and kicking. Storey attempted to grab one of Barrick's legs, but he was somehow pushed backward. During this struggle, Barrick delivered a "mule kick" to Game Warden Hannah, injuring his jaw, and then kicked Game Warden Hannah's eyeglasses from his nose. Storey handed his TASER Pulse electronic control device to Lee in an effort to gain compliance from Barrick so they could remove Barrick from the truck. The cartridge was removed from the TASER, which placed it in drive stun mode. (Exhibit 2: Deposition of Quentin Lee, 106; 193; 198); (Exhibit 1: Deposition of Matthew Kasbaum, 112-113; 160-161); (Exhibit 17: Deposition of Kevin Storey, 25-26; 28-32; 60; 63); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah); (Exhibit 18: Written Statement of Kevin Storey); (Exhibit 24: Deposition of Mark Hannah, 24; 64-65; 92).

30. Lee attempted a single drive stun to Barrick through his jeans, with little to no effect. He delivered a one or two-second contact stun to Barrick's hip or upper buttocks. Lee heard the clicking sound of the TASER, highly indicative that the TASER probes did not make effective contact. Sergeant Kasbaum saw that Sergeant Lee's attempted contact stun had little or no effect. Game Warden Hannah perceived that the contact stun may have momentarily distracted and calmed Barrick. The TASER was never deployed in dart mode. (Exhibit 2: Deposition of Quentin Lee, 65; 67; 106-107; 111-112; 198); (Exhibit 1: Deposition of Matthew Kasbaum, 159); (Exhibit 17: Deposition of Kevin Storey, 64); (Exhibit 11: Written Statement

of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah); (Exhibit 18: Written Statement of Kevin Storey).

31. The TASER was then given to Sergeant Kasbaum who then delivered two to three one-second drive stun touches to Barrick's left hip bone in an attempt to get him to release his leg muscles and his grip on the truck's wall. On the final drive stun, Sergeant Kasbaum perceived a brief release of muscle tension in Barrick's legs. (Exhibit 1: Deposition of Matthew Kasbaum, 134:18-23; 159:14-17); (Exhibit 2: Deposition of Quentin Lee, 65; 111-112); (Exhibit 17: Deposition of Kevin Storey, 64); (Exhibit 11: Written Statement of Matthew Kasbaum).

32. Barrick eventually slid out of the truck, and attempted to crawl under the truck. Because the undercarriage of the truck was very hot and the truck motor was still running, the officers were concerned that Barrick would get burned. The officers pulled Barrick out from under the truck. (Exhibit 1: Deposition of Matthew Kasbaum, 78-79; 167); (Exhibit 17: Deposition of Kevin Storey, 68-71); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah); (Exhibit 18: Written Statement of Kevin Storey); (Exhibit 24: Deposition of Mark Hannah, 50; 72-73; 75).

33. The officers were trying to hold Barrick down on the pavement, but Barrick continued to scream, yell, and fight the officers the entire time. Barrick was moving all over, rolling around, and kicking. (Exhibit 1: Deposition of Matthew Kasbaum, 79-80; 167-168); (Exhibit 17: Deposition of Kevin Storey, 39); (Exhibit 18: Written Statement of Kevin Storey); (Exhibit 24: Deposition of Mark Hannah, 76).

34. Sergeant Kasbaum and Game Warden Hannah were at Barrick's feet trying to place leg restraints on him. Lee and Storey were at Barrick's upper body. (Exhibit 1: Deposition of Matthew Kasbaum, 87); (Exhibit 17: Deposition of Kevin Storey, 35); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 18: Written Statement of Kevin Storey); (Exhibit 24: Deposition of Mark Hannah, 77-78).

35. Lee laid down on the ground beside Barrick, acting as a wedge to prevent Barrick from crawling under the truck again. His left shoulder and left side of his torso were on the ground. His right side was in contact with Barrick's torso, but he was mostly on the ground. Lee did not put any pressure on Barrick's back. At the same time, Lee had his right leg wrapped around Barrick's left leg to try to help control his legs until Sergeant Kasbaum

requested that Lee move his leg so Barrick could be shackled. (Exhibit 2: Deposition of Quentin Lee, 113; 115-117; 153-154; 208-209); (Exhibit 1: Deposition of Matthew Kasbaum, 89-91; 222-223); (Exhibit 16: Written Statement of Quentin Lee).

36. After Sergeant Kasbaum told Lee to move his leg, Lee moved almost 90°, so that he was partially under the truck. He was trying to control Barrick's head in an effort to prevent Barrick from further injuring himself because Barrick was thrashing his head around and hitting his head on the torn up asphalt. At no point did he have Barrick in a carotid hold, or have his arm positioned in such a way as to restrict Barrick's breathing. In fact, Barrick continued to yell throughout this entire ordeal. Lee had Barrick's shoulder pushed down with part of his chest and he reached around to hold Barrick's forehead to keep him from hurting himself. Because Barrick was sweaty, Lee's arm slipped and Barrick bit him. (Exhibit 2: Deposition of Quentin Lee, 113; 115; 118-119; 123; 131-132; 199-200; 216-217); (Exhibit 1: Deposition of Matthew Kasbaum, 87-90; 105-106; 108; 127-128; 223); (Exhibit 17: Deposition of Kevin Storey, 33-35); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah); (Exhibit 18: Written Statement of Kevin Storey); (Exhibit 24: Deposition of Mark Hannah, 90-92; 160; 239-242); (Exhibit 26: Photographs of Quentin Lee's arm).

37. Storey was near Barrick's upper body attempting to assist Lee with control of Barrick's upper body. He was squatting down beside Barrick. Storey was not applying any pressure to Barrick; instead, he had hold of Barrick's shirt. (Exhibit 17: Deposition of Kevin Storey, 33; 40-41; 43); (Exhibit 2: Deposition of Quentin Lee, 120; 122-124); (Exhibit 1: Deposition of Matthew Kasbaum, 87; 107); (Exhibit 18: Written Statement of Kevin Storey).

38. Barrick then kicked Game Warden Hannah in the face. Game Warden Hannah used a baton to hold down Barrick's right leg. Sergeant Kasbaum was able to place a leg restraint on Barrick's right leg, and Game Warden Hannah assisted in securing Barrick's left leg into the other side of the restraint. (Exhibit 1: Deposition of Matthew Kasbaum, 86-89; 95); (Exhibit 2: Deposition of Quentin Lee, 123); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah); (Exhibit 24: Deposition of Mark Hannah, 80).

39. Although Barrick was handcuffed, he still posed a risk to the officers, to the general public, and to himself. By this point, Barrick had already attempted to commandeer two vehicles, he bit an officer, he kicked multiple officers, had been rolling all over the ground,

and had been flailing his head around hitting it on the pavement. (Exhibit 1: Deposition of Matthew Kasbaum, 79-80; 88-90; 95-98; 104-108; 127-128; 167-168; 227-228; 257-258); (Exhibit 5: Statement of Mark Hannah); (Exhibit 18: Written Statement of Kevin Storey); (Exhibit 24: Deposition of Mark Hannah, 159-162).

40. Likewise, Barrick still posed a risk of escape, and in fact, had already attempted to escape by forcing his way out of the vehicle and attempting to crawl under the vehicle. (Exhibit 1: Deposition of Matthew Kasbaum, 73-74; 86; 102-103); (Exhibit 2: Deposition of Quentin Lee, 197-198); (Exhibit 17: Deposition of Kevin Storey, 68; 72-73); (Exhibit 18: Written Statement of Kevin Storey).

41. Almost simultaneously with the closing of the second leg restraint, Barrick stopped resisting, yelling, struggling, and went limp, as if a “switch was flipped.” (Exhibit 1: Deposition of Matthew Kasbaum, 136-137; 258-259); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 5: Statement of Mark Hannah); (Exhibit 18: Written Statement of Kevin Storey); (Exhibit 24: Deposition of Mark Hannah, 92-93).

42. Game Warden Hannah, who was previously licensed as an emergency medical technician, perceived that Barrick’s respirations slowed, and he told the others this. The officers immediately rolled Barrick onto his side and his handcuffs and leg restraints were removed. (Exhibit 1: Deposition of Matthew Kasbaum, 136-137); (Exhibit 2: Deposition of Quentin Lee, 74-75; 129; 205); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 5: Statement of Mark Hannah); (Exhibit 24: Deposition of Mark Hannah, 93; 151; 234).

43. The officers backed off and called out to the EMTs to check on Barrick immediately. Game Warden Hannah called out to one of the EMTs to bring a bag valve mask to assist with respirations. (Exhibit 2: Deposition of Quentin Lee, 75); (Exhibit 5: Statement of Mark Hannah).

44. Perceiving that Barrick was under the influence of an unknown intoxicant, Sergeant Kasbaum offered his Narcan to the paramedics for administration to Barrick. (Exhibit 1: Deposition of Matthew Kasbaum, 261); (Exhibit 17: Deposition of Kevin Storey, 57-59); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 18: Written Statement of Kevin Storey).

45. The EMTs (who were only a few feet away when Barrick became nonresponsive) assessed Barrick at the scene, and transported him to the McCurtain Memorial Hospital, where he was placed on a ventilator. The initial toxicology screening at the hospital indicated that Barrick had consumed methamphetamine and/or amphetamine. He was later transferred to Paris Regional Medical Center, where he developed multiple medical complications during his hospitalization, including: respiratory failure; altered mental status; acute renal failure; volume overload; and, acute respiratory distress syndrome. (Exhibit 27: Medical Record from McCurtain County Memorial Hospital); (Exhibit 28: Medical Record from Paris Regional Hospital).

46. The cause of death was determined to be pneumonia with acute respiratory failure due to acute kidney injury. Contributing factors to his death included bipolar disorder, schizophrenia, and hypertension. Barbara Barrick decided to cremate his body before an autopsy could be performed. (Exhibit 29: Death Certificate of Bobby Barrick); (Exhibit 30: Deposition of Barbara Barrick, 155-156; 205).

47. The defense experts have opined that methamphetamine toxicity was likely a contributing factor, if not THE factor, that caused his death. This is so because methamphetamine toxicity is known to cause respiratory failure. The Plaintiff does not have an expert witness. However, her rebuttal expert, Dr. Sperry, has not disputed these opinions. In fact, he agrees that methamphetamine toxicity was a factor in his death and the only part of the opinions that he takes issue with is the reference to excited delirium. Dr. Sperry did not give any other opinions as to the cause of Barrick's death or identify any restraints by the officers that led to his death. (Exhibit 34: Deposition of Jeff Reames, M.D., 69-70); (Exhibit 35: Deposition of Kris Sperry, M.D., 64-66).

48. The entire interaction between the officers and Barrick from the time that the door opened until the time that Barrick went limp was a matter of minutes. (Exhibit 1: Deposition of Matthew Kasbaum, 255); (Exhibit 2: Deposition of Quentin Lee, 194-195).

49. At no point from the moment that the door was opened until the time that he went limp did Barrick complain that he could not breathe or that he was having trouble breathing. (Exhibit 1: Deposition of Matthew Kasbaum, 256:2-9); (Exhibit 2: Deposition of Quentin Lee, 208:18-19); (Exhibit 17: Deposition of Kevin Storey, 66:8-12); (Exhibit 24: Deposition of Mark Hannah, 241-242).

50. At no point did any of the officers use a TASER in dart mode, strike Barrick with a baton, or use pepper spray on him. (Exhibit 1: Deposition of Matthew Kasbaum, 264:6-13); (Exhibit 17: Deposition of Kevin Storey, 13-14; 74).

51. From the moment that the door was opened to allow EMTs to assess Barrick until the time that he went limp, Barrick was combative with the officers, refused all commands by the officers, was actively resisting, non-compliant, and was uncommonly strong. (Exhibit 1: Deposition of Matthew Kasbaum, 79-80; 88-90; 95-98; 104-109; 127-128; 167-168; 227-228; 263-264; 271-272); (Exhibit 2: Deposition of Quentin Lee, 53-54; 205); (Exhibit 17: Deposition of Kevin Storey, 66-67); (Exhibit 5: Statement of Mark Hannah); (Exhibit 24: Deposition of Mark Hannah, 71; 76; 236-237).

52. Based upon their training and experience, it was apparent to the officers that Barrick was under severely intoxicated. (Exhibit 1: Deposition of Matthew Kasbaum, 260); (Exhibit 2: Deposition of Quentin Lee, 42-43; 52; 104-105; 186-188); (Exhibit 17: Deposition of Kevin Storey, 9; 69); (Exhibit 24: Deposition of Mark Hannah, 27-28).

The Investigation

53. Officers Kasbaum, Storey, and Lee each completed a written statement regarding this incident. (Exhibit 2: Deposition of Quentin Lee, 19-23; 208-209); (Exhibit 1: Deposition of Matthew Kasbaum, 64-65); (Exhibit 17: Deposition of Kevin Storey, 46); (Exhibit 11: Written Statement of Matthew Kasbaum); (Exhibit 16: Written Statement of Quentin Lee); (Exhibit 18: Written Statement of Kevin Storey).

54. The United States Attorney for the Eastern District of Oklahoma reviewed the use-of-force involving Sergeants Kasbaum and Lee, and declined to pursue federal criminal charges for the use-of-force in this incident. (Exhibit 22: Affidavit of Sheriff Kevin Clardy); (Exhibit 2: Deposition of Quentin Lee, 199).

Body Worn Cameras

55. Officers Kasbaum, Lee, and Storey were all issued body worn cameras from the McCurtain County Sheriff's Office. (Exhibit 2: Deposition of Quentin Lee, 7:22-25; 158:2-4).

56. Lee was wearing his body worn camera during the initial encounter with Barrick on March 13, 2022. After the officers had placed Barrick in the back of Lee's patrol vehicle, Lee disengaged his camera. When the officers opened the door to Lee's unit to allow EMS to evaluate Barrick, Lee did not re-engage his body cam because they were trying to get

Barrick medical assistance and he did not expect any of the events that ultimately transpired. (Exhibit 2: Deposition of Quentin Lee, 8-9; 158-159; 210).

57. Sergeant Kasbaum was also wearing his body worn camera during a portion of the encounter with Barrick. However, during the struggle with Barrick while he was still in the vehicle, his camera became unintentionally disengaged from their bodies bouncing together in the struggle when the button on the front of his camera was hit. (Exhibit 1: Deposition of Matthew Kasbaum, 140; 197; 264) (Exhibit 2: Deposition of Quentin Lee, 95; 197-198).

58. Storey also had a body worn camera issued to him. However, the batteries were dead, so the camera was not recording. (Exhibit 17: Deposition of Kevin Storey, 27-28).

Sergeant Kasbaum's Training

59. Sergeant Kasbaum has 30-years of experience in law enforcement, starting in the mid-90s. He received training on the use of a TASER in the 90s. He has been CLEET certified since June 2004, over 20 years ago. (Exhibit 1: Deposition of Matthew Kasbaum, 50; 238); (Exhibit 22: Affidavit of Sheriff Kevin Clardy).

60. Prior to his employment with the McCurtain County Sheriff's Office, Sergeant Kasbaum gained extensive experience at multiple agencies. (Exhibit 1: Deposition of Matthew Kasbaum, 240-241).

61. Throughout his career in law enforcement, Sergeant Kasbaum has attended continued training through CLEET and the McCurtain County Sheriff's Office. He is also familiar with the standard established by the Court in *Graham v. Connor*, 490 U.S. 386, 393 (1989). (Exhibit 1: Deposition of Matthew Kasbaum, 53; 240-241; 253:1-11); (Exhibit 31: CLEET Training Profile for Matthew Kasbaum); (Exhibit 22: Affidavit of Sheriff Kevin Clardy).

Sergeant Lee's Training

62. Lee has years of experience in law enforcement, having been CLEET certified since June, 2012. He has also worked for the Drug Task Force in McCurtain County under the district attorney. (Exhibit 2: Deposition of Quentin Lee, 36-37; 161; 166-167); (Exhibit 22: Affidavit of Sheriff Kevin Clardy).

63. Although Lee was not a drug recognition expert, he was Clandestine Lab certified, giving him experience with people on methamphetamine. (Exhibit 2: Deposition of Quentin Lee, 161-162).

64. Throughout his career in law enforcement, Lee has attended continued training through CLEET and the McCurtain County Sheriff's Office. He is also familiar with the standard established by the Court in *Graham v. Connor*, 490 U.S. 386, 393 (1989). (Exhibit 2: Deposition of Quentin Lee, 184); (Exhibit 32: CLEET Training Profile for Quentin Lee); (Exhibit 22: Declaration of Sheriff Kevin Clardy).

65. Lee has been certified to use a TASER since 2011. He has also taken several recertifications since his initial certification. (Exhibit 2: Deposition of Quentin Lee, 190).

Deputy Storey's Training

66. Storey has over 35 years of law enforcement experience, having worked in and being CLEET certified since 1989. (Exhibit 17: Deposition of Kevin Storey, 22-23; 53); (Exhibit 22: Affidavit of Sheriff Kevin Clardy).

67. Throughout his career in law enforcement, Storey has attended continued training through CLEET and the McCurtain County Sheriff's Office. (Exhibit 17: Deposition of Kevin Storey, 23; 52); (Exhibit 33: CLEET Training Profile for Kevin Storey); Exhibit 22: Affidavit of Sheriff Kevin Clardy); (Exhibit 36: Declaration of Kevin Storey).

68. Storey has been certified to use a TASER since 2012. (Exhibit 17: Deposition of Kevin Storey, 62-63).

ARGUMENTS AND AUTHORITIES

Plaintiff seeks to hold Defendants liable based on their alleged use of force and their alleged failure to intervene to prevent the use of excessive force. Both these claims must fail for three reasons. First, the Defendants were not acting "under the color of state law," and thus, cannot be held liable under 42 U.S.C. § 1983. Second, these Defendants' use-of-force was reasonable. Finally, Plaintiff cannot establish that any of these Defendants' actions caused Barrick's death. Thus, these Defendants are entitled to summary judgment.

I. PLAINTIFF CANNOT STATE A 42 U.S.C. § 1983 CLAIM AGAINST THESE DEFENDANTS AS THEY WERE NOT ACTING UNDER THE COLOR OF STATE LAW.¹

“To state a claim for relief in an action brought under § 1983, a Plaintiff must establish not only the deprivation of a right secured by the Constitution or laws of the United States, but also a deprivation committed under color of state law.” *Brokers’ Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1143 (10th Cir. 2014) (emphasis added); *see also Polk Cnty. v. Dodson*, 454 U.S. 312, 315 (1981). A defendant acting under the color of state law is a jurisdictional requirement for a 42 U.S.C. § 1983 claim. *Polk Cnty.*, 454 U.S. at 315. A defendant’s actions taken under tribal authority are not actions taken “under color of state law” for the purpose of maintaining an individual capacity suit against that defendant under § 1983. *See Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006); *McKinney v. State of Oklahoma*, 925 F.2d 363, 365 (10th Cir. 1991); *Chapoose v. Hodel*, 831 F.2d 931, 934 (10th Cir. 1987).

State law enforcement officers have *no law enforcement jurisdiction whatsoever* over “Indians in Indian country.” *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990). “Indian country,” a term of art for purposes of federal criminal jurisdiction, includes “all land within the limits of any Indian reservation.” 18 U.S.C. § 1151. While there is no question that tribal and federal officers may exercise law enforcement authority over Indians in Indian country, there is no authorization for *state* law enforcement officers to do the same. *See Neff*, 905 F.2d at 1353 (“states [lack] independent authority to enforce their own laws over Indians on Indian land.”). “Indian country is subject to **exclusive federal or tribal** criminal jurisdiction.” *Id.* at 1352 (citing 18 U.S.C. § 1152) (emphasis added).

The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. *E.F.W. v. St. Stephen’s Indian High Sch.*, 264 F.3d 1297, 1305 (10th Cir. 2001). “Therefore, the only proper

¹ Defendant Hannah previously made this argument as a Motion for Judgment on the pleadings (See Doc. 54). This Court denied such Motion because the Complaint was devoid of information to show Defendant Hannah was not acting under the color of state law, and taking judicial notice of the facts that Defendant Hannah presented in his motion would be improper at that time. (See Doc. 91).

defendants in a § 1983 claim are those who represent [the state] in some capacity, whether they act in accordance with their authority or misuse it.” *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1305 (10th Cir.2001) (quoting *Jojoba v. Chavez*, 55 F.3d 488, 492 (10th Cir. 1995)). Plaintiff’s § 1983 individual capacity claims require proof that the Defendants were acting under color of state law at the time of the challenged conduct. If these Defendants were acting under tribal law, then 42 U.S.C. § 1983 does not apply because a § 1983 action “is unavailable for persons alleging deprivation of constitutional rights under color of tribal law.” *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006). A defendant’s actions pursuant to tribal authority are not actions taken “under color of state law” for the purpose of maintaining an individual capacity suit against that defendant under § 1983. *McKinney v. State of Oklahoma*, 925 F.2d 363, 365 (10th Cir.1991); *Chapoose v. Hodel*, 831 F.2d 931, 934 (10th Cir. 1987).

It is undisputed that this incident took place on tribal land, that Barrick was a member of the Choctaw Nation, and that the officers ordinarily did not have jurisdiction over Barrick on tribal land due to *McGirt* and subsequent case law. (Facts 17-19). The only reason that these Defendants were able to respond to this incident is because of a Deputation Agreement that authorized them to respond to emergency situations within the Choctaw Nation’s Tribal boundaries. (Fact 18). Thus, they were not acting under the color of state law, but instead, were acting within the scope of their cross-deputation by the Choctaw Nation Tribe of Oklahoma when they interacted with Barrick. (Fact 19). Therefore, Plaintiff’s 42 U.S.C. § 1983 claims against these Defendants were doomed from the outset, as they cannot possibly be acting “under the color of state law,” and thus, are entitled to summary judgment.

II. THE COURT SHOULD GRANT THESE DEFENDANTS JUDGMENT AS A MATTER OF LAW ON PLAINTIFF’S EXCESSIVE USE OF FORCE CLAIM.

If this Court finds that these Defendants were acting under the color of state law, and thus, Plaintiff’s claims can proceed under 42 U.S.C. § 1983, then these Defendants should still be granted judgment as a matter of law because there was no use of excessive force. Further, even if Defendants did use excessive force, they did not violate any clearly established law, and thus, are entitled to qualified immunity.

Officers are not required to use “the least intrusive means [...] only reasonable ones,” during an arrest or use-of force. *See Medina v. Cram*, 252 F.3d 1124, 1133 (10th Cir. 2001). To establish liability under § 1983 against the Defendants in their individual capacity, Plaintiff

must establish that their actions were objectively unreasonable. *See Graham v. Connor*, 490 U.S. 386, 393 (1989). Thus, the actions of an officer must be analyzed under the Fourth Amendment’s objective reasonableness standard in light of the particular circumstances “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” and “must embody the allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are often tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” *Id.* at 396-97.

Courts must consider the totality of the circumstances that an officer was facing when determining if the force used was objectively reasonable. *Cortez v. McCauley*, 478 F.3d 1108, 1125 (10th Cir. 2007). The Supreme Court has outlined three non-exclusive factors to guide the excessive force inquiry: “[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396. Each of these factors must be evaluated from the perspective of the officer at the scene. *See Henry v. Storey*, 658 F.3d 1235, 1239 (10th Cir. 2011); *see also Thomson v. Salt Lake County*, 584 F.3d 1304, 1319 (10th Cir. 2009). In this case all three factors weigh in favor of the Defendants.

A. BARRICK WAS IN THE MIDST OF COMMITTING A SERIOUS CRIME.

The first *Graham* factor requires the Court to consider the severity of the crime at issue. *Graham*, 490 U.S. at 396. Tenth Circuit precedent is clear that this “factor weighs against the plaintiff when the crime at issue is a felony, irrespective of whether that felony is violent or nonviolent.” *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1170 (10th Cir. 2021) (collecting cases). When the Defendants were called to the scene, they were told by dispatch that Barrick had broken into Lori’s Corner store through the back door. (Facts 4, 9). He then took a level that he found and busted out the front door of Lori’s Corner Store. (Fact 4). The officers also were told that he was trying to break into vehicles, including an 18-wheeler. (Facts 5-7; 9-12) These crimes are all felonies. *See* 21 O.S. § 799; 21 O.S. § 1435. Thus, this prong weighs in favor of the Defendants.

B. BARRICK POSED AN IMMEDIATE THREAT TO HIMSELF, THE OFFICERS, AND THE BROADER PUBLIC.

The second *Graham* factor considers whether the subject posed an immediate threat to the safety of the officers, himself, or the public at large. *Graham*, 490 U.S. at 396. This factor

“is undoubtedly the most important and fact intensive factor in determining the objective reasonableness of an officer’s use-of-force.” *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1180 (10th Cir. 2021) (further citations and quotations omitted). The Court “must look at whether the officers or others were in danger at the precise moment that they used force.” *Emmett v. Armstrong*, 973 F.3d 1127, 1136 (10th Cir. 2020) (quotations and alterations omitted). Courts should also consider that these situations are often “tense, uncertain, and rapidly changing,” which leads officers to have to make quick decisions about the level of force required in the given moment. *Edwards v. City of Muskogee, Oklahoma*, 841 F. App’x 79, 84 (10th Cir. 2021). For example, in *Edwards*, the Tenth Circuit was faced with a scenario where a suspect disregarded the officers’ repeated commands to put his hands behind his back and physically resisted the officers, sometimes grabbing them and attempting to stand up. *Id.* His large physical build, incoherent behavior, and apparent drug-induced resistance made him seemingly unaffected by pain. *Id.* Ultimately, it took several officers and a prolonged struggle to restrain and handcuff the suspect. *Id.* Under these circumstances, the Tenth Circuit found the officers’ use of physical force, including punches, tasers, and a neck restraint, to be reasonable. *Id.*

Barrick displayed behaviors that would lead a reasonable officer to believe they needed to use force. When these Defendants arrived on the scene, they had been told that Barrick had been acting violently and had tried to steal vehicles. (Facts 9-12). They also believed he was “hopped up” on something. (Fact 21). Barrick’s concerning behavior continued when the officers placed him in the patrol vehicle while they began gathering statements from witnesses. Throughout this period of time, Barrick continued to scream, yell, and rock back and forth with enough force to visibly shake Defendant Lee’s vehicle. (Fact 23). The officers were concerned about what Barrick would do before they even opened the door to allow the medics to assess him. (Fact 24). After the officers opened the vehicle door to allow the medics to assess him, the scene only escalated. Barrick pivoted and began to kick out the door. (Fact 25-26) He continued to kick at the door, and refused to follow officers’ directions. (Facts 25-31). At some point, Barrick slid out of the truck and attempted to crawl under it. (Fact 32). The officers continued to attempt to subdue him and prevent him from injuring himself. (Facts 32-40). Throughout the whole interaction, Barrick was physically resisting the

officers and refusing to follow commands – so much so that it took multiple officers restraining him to prevent him from escaping after he exited the vehicle. (Facts 32-40).

Barrick's behavior also would lead an objective officer in these Defendants' position to believe he presented a possible danger to the public if he were to flee. He had already proven to be a danger to the public as he was intoxicated and had tried to steal cars. (Facts 4-7; 9-12; 39-40). He also recently had an altercation with the crowd at Lori's Corner Store. (Facts 5, 8). The vast amount of undisputed facts show that a reasonable officer would believe that Barrick was a danger to himself, the officers, and the public. In fact, he proved to be a danger to the officers as he injured Game Warden Hannah's jaw by kicking him and bit Officer Lee. (Facts 29, 36, 38-40). Thus, the second Graham factor weighs in favor of the Defendants.

C. BARRICK DISOBEYED ALL OFFICERS' COMMANDS AND CONTINUED TO RESIST ARREST THROUGHOUT THE ENCOUNTER.

The third Graham factor considers whether the subject was "actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. This factor is particularly important in this case as the use-of-force utilized by the officers on the scene were only necessary because Barrick continued to resist arrest and refused to follow officers' commands. The Tenth Circuit, and other circuits, have held that the use of the prone restraint and that the use of a TASER is not objectively unreasonable when a subject is actively resisting officers' commands and efforts to subdue them. *See, e.g., Giannetti v. City of Stillwater*, 216 F. App'x 756, 765 (10th Cir. 2007) (holding that the officer's use of prone restraint against an arrestee, coupled with the officer's use of pressure on the detainee's back was objectively reasonable because she was continually resisting arrest); *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 781 (10th Cir. 1993) (holding that an officer's use of a stun gun on an individual who resisted arrest was not unreasonable); *Bornstad v. Honey Brook Twp.*, 211 Fed. App'x. 118, 123-25 (3d Cir.2007) (placing a knee on detainee's chest and turning him over on his stomach did not constitute unreasonable force when detainee was actively resisting arrest, even though he stated that he was having trouble breathing); *Wagner v. Bay City, Tex.*, 227 F.3d 316, 324 (5th Cir. 2000) (no unreasonable force when officers sprayed decedent with pepper spray, placed him face down on the ground, and placed a knee on the decedent's neck or back while handcuffing him); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 593 (7th Cir. 1997) (placing decedent on floor in prone position with hands and legs restrained was

not unreasonable force because it was necessary to protect the safety of the officers and others present). Because Barrick actively resisted the officers' commands throughout their encounter, the third factor also favors the Defendants.

It is reasonable for an officer to use the prone restraint when a subject is actively resisting attempts to restrain them. *Gianetti*, 216 F. App'x at 758. In *Giannetti*, Ms. Giannetti was arrested for a misdemeanor and taken to jail where she was asked to change into a jumpsuit. She refused and struck an officer, leading other officers to intervene. *Id.* They restrained her in a facedown position after she continued to resist by kicking, moving her head, and digging her nails into officers for ten to fifteen minutes. *Id.* at 760. The Tenth Circuit referred to the Seventh Circuit's finding in *Phillips v. City of Milwaukee*, which found that restraining a person in the prone position is not excessive force if they are resisting arrest. *Id.* at 765 (*quoting Phillips v. City of Milwaukee*, 123 F.3d 586, 593 (7th Cir. 1997)). The Court concluded that the officers did not use excessive force with Ms. Giannetti because she continued to resist their attempts to restrain her throughout the encounter. *Id.*

Similar to Ms. Giannetti, Barrick continued to struggle throughout his encounter with the officers. Throughout the brief encounter he continued to kick multiple officers, bite them, and flail around on the pavement. (Facts 29; 32-40). He also ignored officers' commands and even attempted to crawl under the truck to escape officers. (Facts 32, 40). His efforts to resist officers' restraints and refusal to obey officers' commands would lead a reasonable officer to believe that, in this scenario, the use of the prone restraint was reasonable. The reasonableness of the Defendants' actions is further supported by the fact that they ceased their use of force the instant that they recognized that Barrick's respirations slowed. (Fact 41-43). One could even say that Barrick's situation is less severe than Ms. Giannetti's as the officers' struggle with Barrick lasted mere minutes and the officers immediately ceased their use of force when they recognized Barrick's distress, whereas Ms. Giannetti was in the prone position for up to fifteen minutes, and expressed that she was struggling to breathe. *Giannetti*, 216 Fed. App'x at 760. The Defendants' use of the prone restraint was reasonable.

Plaintiff will likely argue that this case is different from *Giannetti* and will urge the Court to consider the cases she cited in her Complaint to show that the use of the prone restraint is per se unconstitutional. But this is simply untrue. The principle behind the prone restraint is that it is only excessive when the subject is placed in a face down prone position

with significant pressure on their back ***after being subdued***. *Estate of Booker v. Gomez*, 745 F.3d 405, 424 (10th Cir. 2014) (emphasis added). The cases that Plaintiff cites in her Complaint to support her contention that the use of the prone restraint are factually distinct from this case, as the arrestees in those cases were fully subdued and not actively resisting arrest. First, Plaintiff relies on *Estate of Booker v. Gomez*, 745 F.3d 405, 424 (10th Cir. 2014), which bears little resemblance to this case. The decedent in *Booker* became aggressive with a deputy and as a result other officers intervened. *Id.* at 412. The officers pinned the man to the ground, put him in a choke hold for an extended period, applied pressure to his back, and used a TASER on him ***even after*** he had stopped resisting the officers. *Id.* at 424. Plaintiff also relies on *Weigel v. Broad*, a case in which the officers continued to put weight on the subject's legs and back, even after he was subdued face-down in leg restraints and handcuffs. 544 F.3d 1143, 1153 (10th Cir. 2008).

Barrick's case is factually distinct from both *Booker* and *Wiegel* for three reasons. First, unlike the arrestees in *Booker* and *Wiegel*, there was no time in which Barrick was not resisting arrest or attempting to escape custody. The undisputed facts show that he was struggling with officers from the time the truck door opened until he lost consciousness. (Fact 51). Second, the Defendants in this case did not place pressure on him that would have restricted his breathing or perform a carotid hold. (Fact 36). Nor did they use the TASER in dart mode, strike Barrick with a baton, or use pepper spray on him. (Fact 50). Finally, there are no facts that show the officers ever placed Barrick in leg restraints for an extended period of time or that they placed any pressure on Barrick for extended periods of time. (Facts 35-35-41; 50). Plaintiff will undoubtedly argue that Barrick was subdued purely based on the fact that he was handcuffed. But the Tenth Circuit has not equated being handcuffed with being "subdued." *Walker v. Anderson*, 2024 WL 3905733 at * 8 (N.D. Okla. 2024) (citing *McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018)).

It is not unreasonable for an officer to use a TASER in scenarios which a subject is actively resisting arrest or disobeying officers' orders. *See Hinton v. City of Elwood*, 997 F.2d 774, 781 (10th Cir. 1993); *see also Cockrell v. City of Cincinnati*, 469 F. Appx. 491, 495 (6th Cir. 2012). On the other hand, when officers tase a subject who is nonviolent, not resisting, and not fleeing arrest, courts have allowed excessive force claims to proceed. *See Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 759-60 (10th Cir. 2013); *Casey v. City of Federal Heights*, 509

F.3d 1278, 1279-80 (10th Cir. 2007). Again, Plaintiff's attempts to compare this case to previous Tenth Circuit cases that found the use of a TASER excessive, also fail due to the distinct differences in facts. Plaintiff relies on *Casey v. City of Federal Heights*, in which the Tenth Circuit found that the officers' use of a TASER on a nonviolent subject, who was not fleeing arrest, was excessive force. 509 F.3d 1278, 1279-80 (10th Cir. 2007). However, the facts in this case are more analogous the recently decided *Heard v. Dulayev*, in which the subject disobeyed the officers' orders and continued to approach, despite their warnings. 29 F.4th 1195, 1199 (10th Cir. 2022). The Tenth Circuit noted that the subject in *Heard* was different than the one *Casey*, as he did not follow orders and continued to resist. *Id.* Thus, the use of a TASER was reasonable force. Similar to the subject in *Heard*, Barrick was disobeying officers' commands and continued to resist. Thus, it was reasonable for the Defendants to believe the use of a TASER was reasonable. As discussed multiple times, Barrick was not following orders, was resisting arrest, and was fighting officers. Thus, again, it cannot be said that the use of a TASER in this scenario was excessive.

All three Graham factors indicate that the officers' use of force on Barrick was reasonable. Thus, they should be granted summary judgment on the use of force claims against them.

III. THE COURT SHOULD GRANT DEFENDANTS JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S FAILURE TO INTERVENE CLAIM.

Plaintiff's assertion that these Defendants violated the Fourth Amendment because they failed to intervene to stop the use of excessive force must also fail, as there is no underlying use of excessive force. To establish a constitutional violation in the form of failure to intervene, the Plaintiff must first establish that a government actor observed a constitutional violation, and second, that they had a realistic opportunity to intervene. *Jones v. Norton*, 809 F.3d 564, 576 (10th Cir. 2015). Plaintiff cannot establish either prong, and thus, her failure to intervene claim must fail.

If there is no underlying use of excessive force, then the officers cannot be held liable for failing to intervene. *See Flores v. Henderson*, 1010 F.4th 1185, 1199 (10th Cir. 2024) (granting qualified immunity to the officers on the plaintiff's failure to intervene claim after finding no constitutional violation occurred because "for there to be a 'failure to intervene, it logically follows that there must exist an underlying [clearly established] constitutional

violation.” (alteration in original) (quoting *Jones v. Norton*, 809 F.3d 564, 576 (10th Cir. 2015))) As discussed in the death above, Plaintiff cannot establish that any Defendant used excessive force against Barrick. Barrick was struggling the whole time and attempting to flee. The force used was reasonable under the circumstances. Thus, there was no excessive force for any of these Defendants to prevent. Thus, Plaintiff’s failure to intervene claim must fail.

Plaintiff must also establish that there was a meaningful opportunity for these Defendants to intervene to stop the use of excessive force. *See, e.g., Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008); *O’Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988) (holding that defendant had no duty to intervene when “three blows were struck in such rapid succession that [the defendant] had no realistic opportunity to attempt to prevent them”) “The opportunity to intervene must be realistic, and summary judgment is appropriate where no reasonable jury could conclude that an officer was forewarned of the violation or had the ability to stop it once in progress.” *Stevenson v. City of Albuquerque*, 446 F. Supp. 3d 806 (D.N.M. 2020) (citing *Hall v. Burke*, 12 F. App’x 856, 861 (10th Cir. 2001) (holding that other officers did not fail to intervene when knee strikes by other officer were delivered in rapid succession during a struggle with a resisting arrestee). Again, Plaintiff can show no such opportunity. The alleged use-of-force by these Defendants began when Sergeant Kasbaum opened the rear door of the truck that Barrick was in, and Barrick tried to escape. (Facts 24-25). From there, Barrick attempted to kick out the door, kicked an officer in the jaw and then kicked his eyeglasses from the officer’s nose. (Fact 29). This whole interaction lasted mere minutes, which left no time for these officers to intervene even if there was use of excessive force. (Fact 48). Because there was no underlying constitutional violation and there was no opportunity for any of these Defendants to intervene, this Court should grant summary judgment to these Defendants on the failure to intervene claim.

IV. DEFENDANTS DID NOT CAUSE BARRICK’S DEATH.

In addition to the clear fact that these Defendants acted reasonably—it is equally undisputed that his acts did not cause Barrick’s death. § 1983 imposes liability on anyone who causes a constitutional deprivation while acting under color of state law. *See Furber v. Taylor*, 685 F. App’x. 674, 678 (10th Cir. 2017) (citing 42 U.S.C. § 1983). Courts employ general tort principles of causation in § 1983 cases to determine whether a defendant’s constitutional violation caused a plaintiff’s damages. *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (“§ 1983

should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions”), overruled in part on other grounds by *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978); see also *Cty. of Los Angeles v. Mendez*, 581 U.S. 420, 430-31 (2017) (“[P]laintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation”). As such, the Plaintiff must prove that these Defendants were both the cause-in-fact and the proximate cause of Barrick’s death. See *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006).

Not only do the undisputed facts show that these Defendants acted reasonably, the facts also show that their actions did not cause Barrick’s death. When the officers arrived on the scene, Barrick was hogtied by citizens. (Fact 13). They immediately cut him loose from such restraint and called paramedics to the scene to assess Barrick. (Facts 14; 16). The paramedics had arrived by the time Barrick began resisting officers. (Fact 24). Immediately after Barrick lost consciousness, the officers rolled him onto his side and removed his restraints. (Fact 42-43). The EMTs on the scene then assessed Barrick and transferred him to McCurtain Memorial Hospital, where he was placed on a ventilator. (Fact 45). They performed a drug test at the hospital and found methamphetamine in his system. (Fact 45). Barrick was eventually transferred to Paris Regional Medical Center, where he developed multiple medical complications and ultimately died five days after the incident. (Facts 45-46).

Barrick’s cause of death on his death certificate was determined to be pneumonia with acute respiratory failure due to acute kidney injury. Barrick’s bipolar disorder, schizophrenia, and hypertension also contributed to his death. However, Barrick’s body was cremated before an autopsy was performed. Defense counsel retained an expert witness who opined that Barrick’s cause of death was a contributing factor or THE factor that caused his death. (Fact 47). Plaintiff’s rebuttal witness does not dispute these opinions. (Fact 47). He agreed that methamphetamine toxicity was a factor in Barrick’s death and did not give any other opinions regarding the cause of death. (Fact 47) Methamphetamine toxicity is also known to cause respiratory failure. (Facts 45-47). The undisputed facts all show that it was Barrick’s methamphetamine toxicity that led to multiple medical complications at the hospital which ultimately led to his death. There simply is no evidence that any actions taken by the officer during their brief interaction with Barrick caused his ultimate demise. The evidence shows that it was his consumption of methamphetamine that led to him developing

multiple medical complications while being hospitalized, which ultimately led to his death. Thus, these Defendants should be granted summary judgment due to lack of causation.

V. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

The Court is no doubt firmly aware of qualified immunity's principles. The affirmative defense of qualified immunity "creates a presumption that [the defendant is] immune from suit." *Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir. 2020) (quoting *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016)) (alteration in original). To overcome the qualified immunity defense the Plaintiff must show: (1) these Defendants violated Barrick's constitutional or statutory rights; and, (2) that the right was clearly established at the time of the defendant's conduct. *Arnold v. City of Olathe*, 35 F.4th 778, 788 (10th Cir. 2022); *Andersen v. DelCore*, 2023 WL 5313974, at *4 (10th Cir. Aug. 18, 2023). The Plaintiff bears the "heavy burden" of satisfying both parts of this test to overcome qualified immunity and survive a summary judgment motion. *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017).

"A right is clearly established for qualified immunity purposes if 'every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 577 U.S. 7, 11–12 (2015), quoting *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

As discussed above, the case law firmly establishes: (1) Plaintiff has not, and cannot, show that these Defendants used excessive force on Barrick or that any Defendant failed to intervene in such a use of force; and, (2) that Plaintiff has not, and cannot, show that the law was clearly established at the time these Defendants interacted with Barrick. The cases that Plaintiff relies on to argue that Defendants knew or should have known that they were using excessive force are not analogous to this case. See *Booker*, *Weigel*, and *Casey*, *supra*. Defendants acknowledge that these cases do establish that the continued use of significant force *after* a suspect is subdued is excessive. But, as discussed above, the distinguishing factor in this scenario is that Barrick was *not* subdued and was actively resisting arrest throughout the struggle. (Facts 39; 49; 51). Not only does this distinction show that the Defendants did

not use excessive force, but also, it shows that there is no way an officer could have known he may be violating someone's constitutional rights by using force when they were still actively resisting arrest by kicking and biting officers. Multiple courts have granted officers qualified immunity when faced with similar circumstances, holding that it is not clearly established that using force on a suspect who is continues to resist arrest would violate their Fourth Amendment rights. *See, e.g., Edwards, Hinton, Giannetti, Cockrell, supra; see also Walker v. Anderson*, No. 23-CV-0008-CVE-JFJ, 2024 WL 3905733, at *8 (N.D. Okla. Aug. 22, 2024) (holding that officers were entitled to qualified immunity as Tenth Circuit precedent does not establish "that using force after an individual has been handcuffed automatically violates the Fourth Amendment"); *Stevenson v. City of Albuquerque*, 446 F. Supp. 3d 806 (D.N.M. 2020) (holding that an officer was entitled to qualified immunity because him striking a subject three times on the shoulder with his knee did not violate any clearly established law as the subject was a non-compliant felony suspect).

Additionally, even if this Court is doubtful that the *Graham* factors weigh in favor of Defendants, the factors also do not clearly indicate that their conduct was unlawful which further speaks to the fact that the officers did not violate any clearly established right. Thus, further indicating that qualified immunity applies. *Wilson v. City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013). The Defendants actions in this case were not those that violated a clearly established right. Thus, these Defendants are entitled to qualified immunity.

VI. PUNITIVE DAMAGES.

As discussed previously in this Brief, there is no evidence that these defendants deliberately intended to cause the Decedent any harm. "In § 1983 matters, punitive damages will be awarded only when 'the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Fuerschbach v. Southwest Airlines Co.*, 439 F.3d 1197, 1214, fn. 7 (10th Cir. 2006) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)); *see also Wulf v. City of Wichita*, 883 F.2d 842, 867 (10th Cir. 1989) ("an award of punitive damages requires an assessment of [defendant's] subjective state of mind"). The evidence, even viewed in the light most favorable to Plaintiff, does not support a reasonable inference that the Defendants' conduct rose to that level in this case. *See, e.g., Wulf*, 883 F.2d at 867 ("[N]ot every intentional violation of a plaintiff's constitutional rights subjects a defendant to punitive damages."). Not a single witness has

testified that these Defendants exhibited any malevolence or other sufficiently culpable wrongful intent, nor is there any evidence thereof. In fact, the evidence confirms these Defendants' position that they used the amount of force necessary to restrain Barrick to effect the lawful arrest.

CONCLUSION

Wherefore, premise considered, these Defendants respectfully request this Court grant summary judgment in their favor and dismiss them from this action.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the **4th day of November**, 2024, I electronically transmitted this document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the ECF registrants in this case.

s/ Sheila G. Jessee

Sheila G. Jessee