

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA**

**BARBARA BARRICK, as Special
Administrator of the ESTATE OF
BOBBY 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

**PLAINTIFF'S AMENDED RESPONSE IN OPPOSITION TO
DEFENDANTS MATTHEW KASBUAM AND QUENTIN LEE'S
MOTION FOR SUMMARY JUDGMENT**

Submitted by:

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Attorneys for Plaintiff Barbara Barrick

Plaintiff Barbara Barrick (“Plaintiff”), for her amended response to the *Motion for Summary Judgment* [Dkt. #165] filed by Defendants Matthew Kasbaum (“Kasbaum”) and Quentin Lee (“Lee,” collectively “Defendants”), would hereby show the Court as follows:

RESPONSE TO DEFENDANTS’ “STATEMENT OF UNDISPUTED FACTS”

For purposes of summary judgment only, and without admitting the materiality of any such fact, Plaintiffs admit Facts 1-7, 9-16, 18, 20-24, 27, 30, 45, 46, 49, 50, 52, 53, 55, 60-64 & 66-68.

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. **Admitted, but incomplete.** [See Additional Fact No. 1]

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. **Denied.** [See Additional Fact Nos. 95 – 101, *infra*.]

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. **Denied.** [See Additional Fact Nos. 95 - 101, 103, 110, 111, 120, 121, *infra*; Dkt. #195-1, 249:21 – 250:16] 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. **Admitted for purposes of summary judgment only, but immaterial.**

20. 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. **Admitted that Barrick attempted to exit the vehicle and that Kasbaum was able to control Barrick’s legs using the door.** [Dkt. #195-2] Barrick would not comply, and became violent and kicking them while trying to escape. **Denied that Barrick “became violent.”** Barrick was handcuffed behind his back at all times. He did not threaten any officer, strike or attempt to strike any officer, attempt to grab any of the officers’ weapons, or “violently” kick any officer. [See Additional Fact Nos. 24 – 32, 34 – 43, 50 – 56 & 58 - 61, *infra*.] He was holding onto something behind him and his legs were out of the cab. **Admitted for purposes of summary judgment only.**

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. **Denied**

that Kasbaum opened the truck door. [See Additional Fact Nos. 73 & 83] Sergeant Kasbaum told Barrick to sit back on the seat and let the paramedics examine him, but Barrick refused. **Denied** that Kasbaum told Barrick to “let the paramedics examine him.” [See Dkt. #165-25] The balance of “Fact” No. 25 is **admitted** for purposes of summary judgment only.

28. Lee used a baton to try to pry Barrick’s legs away from the door jam. **Denied**. Hannah claims that it was he – not Lee – who used the baton during this part of the encounter. [See Dkt. #165-5, ¶ 14] However, Lee could not reach Barrick’s legs from his position. **Admitted** for purposes of summary judgment only. During this time, Barrick was actively resisting the officers and kicking at them. **Denied**. Barrick was not “kicking at” any officer; rather, his legs were braced / locked “rigid against the door jamb of Lee’s truck.” [See Additional Fact Nos. 24 & 43, *infra*] Nor was Barrick “actively resisting.” He was handcuffed behind his back at all times. He did not threaten any officer, strike or attempt to strike any officer, attempt to grab any of the officers’ weapons, or kick any officer. Any perceived contact between Barrick and any officer was “superficial” at best. [See Additional Fact Nos. 24 – 32, 34 – 43, 50 – 56 & 58 - 61, *infra*] [This] caus[ed] Lee to unintentionally hit Sergeant Kasbaum in the head with the baton. **Admitted** that Kasbaum was struck with the baton; **denied** that Barrick “caused” Lee to do so. Lee never touched Barrick with the baton. **Admitted** for summary judgment only.

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. **Denied**. [See Additional Fact Nos. 24 – 32, 34 – 43, 50 – 56 & 58 - 61] 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. **Denied**. [See Additional Fact No. 38, *infra* (citing Dkt. #195-5; Dkt. #195-9, 64:2 – 65:17; 72:4-7; 75:25 – 76:4; 76:15-21; 92:14-24; 119:10 – 120:15; 244:16-17)] 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. **Admitted** for purposes of summary judgment only.

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. **Admitted for purposes of summary judgment only, but incomplete.** [See Additional Fact No. 43, *infra*.]

32. Barrick eventually slid out of the truck, and attempted to crawl under the truck. **Denied.** The officers **extracted** Barrick from Lee's truck, forcefully "**pull[ing]** Barrick] out of the vehicle onto the ground." [See Additional Fact Nos. 3 & 4] 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. **Denied.** Barrick, who was in the prone position, did not make it under the truck very far, and "was stopped" from "crawl[ing] under the vehicle" when Hannah alone pulled Barrick completely clear of the truck without any problem. [Dkt. #195-9, 50:4-9; 73:17-22; 74:24 – 75:12; Dkt. #195-11, 138:11-18; 154:12-15; *see also* Dkt. #165-5, ¶ 18]

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. **Admitted** that "[t]he officers got on top" of Barrick. [Dkt. #195-11, 23:20-22] **Denied** that Barrick "continued to ... fight the officers the entire time." [See Additional Fact Nos. 25 – 41 & 44 - 61]

34. Sergeant Kasbaum and Game Warden Hannah were at Barrick's feet trying to place leg restraints on him. **Denied in part.** [See Additional Fact No. 14] Lee and Storey were at Barrick's upper body. **Admitted in part, but incomplete.** Lee also wrapped his legs around Barrick using the "grapevine" technique to maintain control both of Barrick's legs. [Dkt. #195-1, 90:7-24; Dkt. #195-5; Dkt. #195-22, p. 3]

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. **Denied.** Hannah saw Lee "mount Barrick's back" and "attempt[] to control [Barrick's] head." [See Additional Fact Nos. 8 - 12] Lee did not put any pressure on Barrick's back. **Denied.** [See Additional Fact Nos. 10, 12, 77 & 92] 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. **Admitted.**

36. After Sergeant Kasbaum told Lee to move his leg, Lee moved almost 90°, so that he was partially under the truck. **Denied** that Lee dismounted Barrick. [See Additional Fact Nos. 10, 12, 77, 78, 88 & 92] 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. **Admitted** that Lee was, among other things, “control[ling] Barrick’s head”; **denied** that Barrick was hitting his head on the asphalt or anything else (e.g., such as headbutting a deputy, etc.). [Dkt. #195-4, 131:15-17; 132:19-25; Dkt. #195-7, 34:1-14; 71:18-20; Dkt. #195-9, 91:18 – 92:8; 160:19 – 161:1; 240:5-11] 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. **Denied** that Lee did not restrict Barrick’s breathing [see Additional Fact Nos. 9, 10, 12, 62, 74-78, 91 & 92] or have his arm positioned over Barrick’s mouth. [See Additional Fact No. 23; see also Dkt. #195-4, 119:5-20; Dkt. #195-11, 140:17-20; Dkt. #195-24, 76:2-8] In fact, Barrick continued to yell throughout this entire ordeal. **Admitted** for purposes of summary judgment only. 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. **Denied in part**. Lee did not dismount Barrick or let up in anyway, and at all times used his **full** chest and torso to apply downward pressure to Barrick’s full torso. [See Additional Fact Nos. 10, 12, 77, 78, 88, 91 & 92] **Denied** that Lee needed to “hold Barrick’s forehead to keep him from hurting himself.” [Dkt. #195-7, 34:1-7 & 11-14; Dkt. #195-9, 160:19 – 161:1; 240:5-11]

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. **Denied**. [See Additional Fact No. 13]

38. Barrick then kicked Game Warden Hannah in the face. **Denied**. [See Additional Fact No. 38, *infra* (citing Dkt. #195-2; Dkt. #195-6 Dkt. #195-8; and Dkt. #195-10)] Game Warden Hannah used a baton to hold down Barrick’s right leg. **Admitted**. 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. **Denied**. [See Dkt. #165-5, ¶ 22] **Incomplete**. Kasbaum and Hannah acted together to effectuate a prohibited “hogtie” configuration which, when used in combination with Lee’s 250 pounds of downward pressure on Barrick’s back, caused Barrick to quit breathing. [See Additional Fact Nos. 62 – 79 & 91, *infra*]

39. Although Barrick was handcuffed, he still posed a risk to the officers, to the general public, and to himself. **Denied**. [See Additional Fact Nos. 25 – 41 & 44 - 61, *infra*] 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. **Denied** that Barrick “kicked multiple officers” [see Additional Fact Nos. 24 – 46, *infra*], “had been rolling all over the ground” [see Additional Fact Nos. 15 - 18, *infra*], or was “hitting [his head] on the pavement.” [See Response to “Fact” No. 36, *supra*, and Additional Fact No. 23, *infra*]

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. **Denied**. [See Additional Fact Nos. 15 - 18, 47 – 49, 52 & 55 – 57, *infra*]

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.” **Denied in part**. There was no **meaningful** resistance or struggle on the part of Barrick prior to the “switch [being] flipped.” [See Additional Fact Nos. 18 – 23, 25 – 41 & 44 - 61, *infra*]

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. **Denied**. [See Additional Fact Nos. 64 – 79 & 91, *infra*]

43. The officers backed off and called out to the EMTs to check on Barrick immediately. **Denied** [See Additional Fact Nos. 64 – 79 & 91, *infra*] Game Warden Hannah called out to one of the EMTs to bring a bag valve mask to assist with respirations. **Denied**. [See Dkt. #195-11, 73:6-10]

44. Perceiving that Barrick was under the influence of an unknown intoxicant, Sergeant Kasbaum offered his Narcan to the paramedics for administration to Barrick. **Denied**. [See Dkt. #195-11, 73:11-13]

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. **Denied**. [See Dkt. #195-26]

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. **Denied.** [See Additional Fact Nos. 82 - 91, *infra*]

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. **Denied.** [See Response to “Fact” No. 28, *supra*; Additional Fact Nos. 24 – 32, 34 – 43, 50 – 56 & 58 - 61]

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. **Admitted but incomplete; immaterial.** In his letter dated June 6, 2022, U.S. Attorney Christopher J. Wilson stated:

The decision [‘not to pursue federal criminal charges’] does not include a determination of whether Deputies Matthew Kasbaum and Quentin Lee violated state law, CLEET rule, or policy of the McCurtain County Sheriff’s Office. Lastly, it is outside the purview of the United States Attorney’s Office for the Eastern District of Oklahoma to determine whether civil liability exists against the McCurtain County Sheriff’s Office or the deputies involved.

[Dkt. #195-34 (emphasis added); see also Dkt. #195-4, 215:14 – 216:10]

56. Lee was wearing his body worn camera during the initial encounter with Barrick on March 13, 2022. **Admitted.** After the officers had placed Barrick in the back of Lee’s patrol vehicle, Lee disengaged his camera. **Admitted.** 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. **Denied.** [See Dkt. #165, p. 8, Fact Nos. 23 & 24]

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. **Denied.** [Dkt. #195-1, 195:21 – 213:24]

58. Storey also had a body worn camera issued to him. However, the batteries were dead, so the camera was not recording. **Denied.** Storey testified that “the batteries had ran down,” not that they were dead. [Dkt. #195-7, 27:3-5] **Incomplete.** Storey never attempted

to activate the camera at the scene of Barrick's arrest. [Dkt. #195-7, 27:6-9; 28:7-16]

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. **Denied in part; incomplete.** At the time of Barrick's arrest, Kasbaum was not certified to use a TASER. Kasbaum got written up for using a TASER without being certified to use a TASER. [Dkt. #195-4, 66:22 – 67:1]

65. Lee has been certified to use a TASER since 2011. He has also taken several recertifications since his initial certification. At the time of Barrick's arrest, MCSO had not issued a TASER to Lee. [Dkt. #195-4, 66:8-10] Deputies were not permitted to use weapons that were not issued by MCSO. [Dkt. #195-27, 153:21 – 154:4]

PLAINTIFF'S ADDITIONAL MATERIAL AND/OR DISPUTED FACTS

If a moving party has not addressed all material facts¹, summary judgment for the movant is not proper. *See* FED.R.CIV.P. 56(a). In that regard, Plaintiff's "brief in opposition [to Defendants' summary judgment motion] may, in concise, numbered paragraphs, state any additional facts the non-movant contends preclude judgment as a matter of law." LCvR 56.1(c).

Here, Defendants failed to address the following material facts, which are essential elements to Plaintiff's causes of action and to the affirmative defenses asserted by Defendants.

A. ARREST, RESTRAINT, AND DEATH

(i) Barrick had been severely assaulted prior to the arrival of Kasbaum and Lee

1. The same contactors who had been fighting Barrick were threatening, *inter alia*, to "[r]un that mother*cker over," to "f*ck him up" with a two-by-four. One of the contractors yelled, "Who's got a pistol? I wish I had my pistol." When Kasbaum arrived on the scene, he found a large, angry crowd standing around Barrick, making comments about taking Barrick's money and committing further acts of violence against him. Kasbaum quickly placed Barrick in the back of Lee's vehicle for Barrick's own protection and to "deescalate the anger towards [Barrick] from the large crowd around them." [Dkt. #195-1, 251:12-16; Dkt. #195-4, 12:24 – 13:15; 14:15-19; 16:1-11; Dkt. #195-17, pp. 3-4; Dkt. #195-40]

(ii) No more than five seconds after pulling Barrick from Lee's truck, Barrick was immobilized for the remainder of the encounter.

¹ For purposes of summary judgment, "[a] fact is material when it is capable of affecting the outcome of the suit under governing law." *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000); *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

2. Prior to being pulled from Lee's truck, Barrick had not "become violent" with the officers. **[See Additional Fact Nos. 24 – 32, 34 – 43, 52 – 55 & 58 - 61]**

3. The officers extracted Barrick from Lee's truck, forcefully "pull[ing Barrick] out of the vehicle onto the ground." **[Dkt. #195-12, p. 1; Dkt. #195-13, p. 7; Dkt. #195-16; Dkt. #195-17, p. 3]**

4. Barrick's hands were still secured with handcuffs behind his back, and his entire body was facing towards the ground and floorboard of the truck as the officers pulled him out of the truck by his legs. Barrick's torso and head – which were the last parts of Barrick's body to be dragged out of the vehicle – were allowed to fall onto the ground, hitting it with full force (since Barrick was not able to use his hands to break his fall from the cabin of the truck to the ground). **[Dkt. #195-1, 84:22-24; Dkt. #195-9, 60:12-21; Dkt. #195-11, 23:12-18; 131:21 – 132:7; 136:2 – 137:23; 156:24 – 157:14; Dkt. #195-14, 18:20 – 19:5; 88:22 – 89:21; 107:25 – 108:8]**

5. Barrick, who was in the prone position, did not make it under Lee's truck very far, and "was stopped" from "crawl[ing] under the vehicle" by Hannah alone, who pulled Barrick completely clear of the truck without any problem. **[Dkt. #195-9, 50:4-9; 73:17-22; 74:24 – 75:12; Dkt. #195-11, 138:11-18; 154:12-15]**

6. According to Kasbaum, Barrick was placed on the ground for the express purpose of gaining control of him **[Dkt. #195-1, 221:16 – 222:3]**

7. As Kasbaum had hoped, once Hannah pulled Barrick out from under the truck (to the extent Barrick was under it), it only took between 2 and 5 seconds for the officers to collectively gain control of Barrick positionally and to keep Barrick from moving anywhere else. **[Dkt. #195-9, 75:10-16; 77:7-19; Dkt. #195-11, 142:21 – 143:5; 158:10-22; 164:8-16; 165:8-22; 166:9-17]** The remainder of the officers' encounter with Barrick stayed in that same place. **[Dkt. #195-9, 75:10-16; 77:7-19]**

8. Two or more deputies were lying on top of Barrick and "held him still" as his legs were being cuffed. **[Dkt. #195-11, 23:16-22; 146:11-15; Dkt. #195-17, p. 3; Dkt. #195-15, p. 1; see Resp. to Fact No. 35, *supra*]**

9. Specifically, after Hannah pulled Barrick from under Lee's truck, Hannah saw Lee immediately "mount Barrick's back" and "attempt[] to control [Barrick's] head." **[Dkt. #195-9, 182:4-10; Dkt. #195-10, p. 1]**

10. Likewise, EMT Wyatt saw Lee “g[e]t on top of [Barrick] to restrain him,” and thereafter observed Lee lying on top of Barrick’s “upper half,” positioned “on top of [Barrick’s] back and on top of his handcuffs.” [Dkt. #195-11, 24:19-20; 25:9-13; 139:1-4; Dkt. #195-12, p. 1; Dkt. #195-13, p. 7]

11. Lee also wrapped his legs around Barrick using the “grapevine” technique to maintain control both of Barrick’s legs. [Dkt. #195-1, 90:7-24; Dkt. #195-5; Dkt. #195-22, p. 3]

12. Lee put pressure on Barrick’s back. Specifically, Defendants’ expert Michael Graham testified that Lee -- who is 6 feet 4 inches tall, weighed 228 pounds without his equipment, and weighed an additional 20 to 30 pounds with his equipment -- “actually put ... pressure on [Barrick’s] torso.” [Dkt. #195-21, 118:18 – 119:1; *see also* Dkt. #195-4, 26:20-25]

13. At the same time, Storey was lying on top of Barrick (“in something less than a ‘full’ mount”) “below” Lee, also trying to control Barrick’s torso. [Dkt. #195-9, 182:15 – 183:12; *see also* Dkt. #195-17, p. 3] For a portion of this time, Storey also had a grasp on Barrick’s arms and shoulders. [Dkt. #195-14, 21:3-7; Dkt. #195-20, p. 20, ¶ 17]

14. Also at this time -- and throughout the time that Kasbaum and Hannah were working together to place leg restraints on Barrick -- Kasbaum (who weighed approximately 200 to 220 pounds at the time) was lying across the top of Barrick, too, such that Kasbaum’s torso and arms were pressing down on Barrick’s hips. [Dkt. #195-9, 56:14-23; 78:9; 79:22 – 80:18; 248:5-10; 248:21 – 249:10; *see also* Dkt. #195-14, 90:3-10]

15. Once Barrick was on the ground and the officers had positioned themselves on Barrick, Barrick had no mobility and was unable to go anywhere. [Dkt. #195-11, 164:8-13; 164:25 – 165: 13; 166:9-17]

16. For the remainder of the encounter, Barrick did not change his body position, move anywhere else in the parking lot, attempt to escape, or appear to have any ability to escape. [Dkt. #195-11, 142:21 – 143:5; 158:10-22; 164:8-16; 165:8-22; Dkt. #195-14, 113:2-8]

17. Once the officers took up their positions on Barrick, the situation ceased to evolve during the four- to seven-minute period that followed. [Dkt. #195-11, 142:21 – 143:5; 158:10-22; 164:8 - 165:22; 166:9-17]

18. Although Defendants claim Barrick continued “fighting” until the moment he went limp [*see, e.g.,* Dkt. #195-2, p. 2], there was no meaningful resistance, struggle, or fighting on the part of Barrick once the officers took up their positions on him.[Additional Fact Nos. 19-61]

(iii) **“Fighting”**

19. The only “fighting” consisted of Barrick (1) “roll[ing] right” and “roll[ing] left,” (2) “bounc[ing] his [own] head off the pavement,” and (3) “kick[ing] both feet.” [Dkt. #195-1, 104:1-19]

a. **“Rolling Right” and “Rolling Left”**

20. Barrick’s fullest range of motion was to rock his shoulders side to side; he could “rotate” only “a little to the left and the right,” and had no ability to turn completely on his left or right side or to turn over. [Dkt. #195-4, 133:1-11; Dkt. #195-11, 146:17 – 147:7]

21. This “kind of rocking to the left or to the right” by Barrick did not “pose any risk of serious bodily injury to any of the law enforcement officers involved.” [Dkt. #195-11, 164:1-7] Indeed, according to Lee, there was nothing Barrick had the ability to do with the top part of his body (*i.e.*, hands, torso, or head) that might have seriously injured Lee or Storey. [Dkt. #195-4, 134:11-25] Similarly, when deposed, Kasbuam could not identify any specific injury to which the officers risked being exposed as a result of Barrick rolling right or left. [Dkt. #195-1, 104:20 – 105:19]

22. Barrick’s fullest range of motion was to rock his shoulders side to side, and there was nothing that Barrick had the ability to do with the top part of his body (*i.e.*, hands, torso, or head) that might have seriously injured Lee or Storey. [Dkt. #195-4, 132:11 – 133:19; 134:11-25]

b. **Barrick’s Head Movements**

23. Barrick’s movement of his own head did not pose a threat or constitute “fighting.” Lee had Barrick’s head well-enough controlled that Barrick was not going to hit it into the ground. [Dkt. #195-4, 132:19-25] Lee had wrapped his right arm around Barrick’s head / face (positioning the inside crease of his elbow first against Barrick’s forehead and later near Barrick’s mouth), which Hannah acknowledged “was working to keep [Barrick] from flailing his head” and “hit[ting] it on the pavement.” [Dkt. #195-4, 118:24 – 120:4; Dkt. #195-9, 90:16-20; 91:3 – 92:4; Dkt. #195-11, 140:14-20; Dkt. #195-22, p. 3]

c. **“Kicking”**

24. During the portion of the encounter that occurred partially inside of Lee’s truck, Barrick used his legs only in an attempt to push the door of the truck open [*see Additional Fact No. 28, infra*], to briefly “stand[] on both feet on the pavement” [Dkt. #195-2, pp. 1-2], and to brace himself against the door jamb of Lee’s truck. [*See Additional Fact No. 43, infra*]

25. None of the written statements contemporaneously prepared by the three EMT's present on the scene reported that Barrick kicked any of the officers. **[See Dkt. #195-12; Dkt. #195-14; and Dkt. #195-16]**

26. Barrick did not violently kick Deputy Kasbaum. **[Additional Fact Nos. 27-29]**

27. Shortly after the incident involving Barrick on March 13th, Kasbaum completed a *Response to Resistance Form*. Although he reported therein that Barrick "kicked Game Warden Hanna," nowhere in the *Response to Resistance Form* did Kasbaum state (or otherwise indicate) that he, too, was kicked by Barrick. **[Dkt. #195-3, p. 3]**

28. Although Kasbaum now claims that he was "kicked multiple times prior to [Barrick] coming out of the vehicle," the only instances of being kicked that Kasbaum could identify were 3 to 5 instances of "superficial" contact between Barrick's feet and Kasbaum's lower legs that were "not hard enough to hurt," and appear to have been inadvertent (as Barrick was "kicking at the door" and "struggling to push the door open" with his feet). **[Dkt. #195-1, 96:2-25; 97:24 – 98:1; 98:11-14; 99:24 – 100:2; see also Dkt. #195-4, 102:24 – 103:12; Dkt. #195-14, 13:1-17]** Despite Barrick's attempts to exit the vehicle, Kasbaum was able to "trap" and control Barrick's legs using the door. **[Dkt. #195-2, p. 1]**

29. Lee testified that Kasbaum was "out of range to be kicked," and refused to testify under oath that Kasbaum was ever kicked. **[Dkt. #195-4, 107:6-11 & 17; 127:24 – 128:8]**

30. Barrick did not violently kick Deputy Lee. **[See Additional Fact Nos. 31 - 35]**

31. In the *Response to Resistance Form* that Lee completed shortly after the March 2022 incident, while reporting that Barrick "kicked Game Warden Hanna," nowhere does Lee state that he himself was kicked. **[Dkt. #195-6, p. 3]**

32. When deposed, Lee initially claimed Barrick kicked him "in [his] leg area." **[Dkt. #195-4, 107:19-21]** Lee later acknowledged, however, that he has no memory of any specific kick. **[Dkt. #195-4, 156:1-4]**

33. Lee further acknowledged that neither he nor Storey were kicked by Barrick while Barrick was being controlled on the ground. **[Dkt. #195-4, 127:17-28]**

34. At no point did Kasbaum ever see Barrick kick Lee. **[Dkt. #195-1, 99:24 – 100:18]**

35. Lee never reported that he suffered any injury (superficial or otherwise) as a result of being kicked. **[Dkt. #195-4, 107:25 – 108:2]**

36. Barrick did not violently kick Deputy Storey. Storey testified that Barrick never

kicked him. **[Dkt. #195-7, 31:2-16]**

37. The only kicks that any of the officers specifically mentioned in their written statements or testimony were the two kicks allegedly received by Hannah. **[Dkt. #195-4, 156:5-9; 156:15 – 157:3]**

38. The officers' accounts of Hannah being kicked, however, vary widely. **[See Dkt. #195-2** (in which Kasbaum claims that before Barrick “fell” out of the truck and onto the ground, he “kicked past [Kasbaum] and kicked Oklahoma State Game Warden Mark Hanna in the face”); **Dkt. #195-5** (in which Lee claims that after Barrick “went to the ground,” he “heard Hanna say that [Barrick] just kicked [him] in the face”); **Dkt. #195-6** (in which Lee reported that Barrick “kicked Game Warden Hanna in the face” before “completely exit[ing] the patrol vehicle”); **Dkt. #195-8** (in which Storey claims that he “heard Wildlife officer Hanna yell that he had been kicked in the head” before Barrick came out of the unit and fell to the ground); **Dkt. #195-10** (in which Hannah reported that before dropping to the ground, Barrick “mule kicked” him “in the right jaw” and “also kicked [him] with his other foot, knocking [Hannah’s] glasses off [his] nose”); **Dkt. #195-9, 64:2 – 65:17; 72:4-7; 75:25 – 76:4; 76:15-21; 92:14-24; 119:10 – 120:15; 244:16-17** (in which Hannah changed his story, testifying that Barrick kicked him two times – a “mule kick” to his jaw and another “glancing blow” that “wasn’t nearly as bad” -- after Barrick “was completely out of the truck” and “on the ground facing down”); **Dkt. #165-5, ¶ 13-15 & 17** (in which Hannah changed his story again, claiming that two times Barrick allegedly kicked him was before Barrick “dropped [from the truck] onto the ground”); **Dkt. #195-37, pp. 11-12, Resp. to Interrogatory No. 14** (in which Hannah claims that Barrick “vehemently kicked [him] in the face several times,” as opposed to just twice); **Dkt. #195-18, p. 3** (in which Officer Muse recounts being informed that Barrick kicked Hannah before being “assist[ed] ... out of the patrol vehicle”)]

39. Lee did not see Hannah get kicked, and aside from allegedly hearing Hannah state, “He kicked me,” Lee has no indication Hannah was ever kicked. **[Dkt. #195-4, 127:24 – 128:8]**

40. Similarly, although Kasbaum claims he “became aware” that Hannah got kicked before Barrick “fell” out of the truck, Kasbaum never actually saw Barrick kick Hannah (or Lee or Storey). **[Dkt. #195-1, 95:12-22; 99:24 – 100:18]**

41. When deposed, EMT Candice (Wyatt) Spencer testified that she did not remember Hannah getting kicked in the face, Hannah say anything to that effect, or Barrick ever landing a kick on any of the other officers (Kasbaum, Lee, and Storey). **[Dkt. #195-11, 132:8-15; 132:22 –**

133:8]

42. Kasbaum's body-worn camera (which depicts 1 minute and 46 seconds of the officers' encounter with Barrick while Barrick was still in the truck) does not depict Barrick kicking anyone. [Dkt. #195-1, 202:2-22; 204:14-19; 205:8-21; 206:15 – 207:3; Dkt. #195-4, 84:15-24; 89:15-17; Dkt. #195-11, 134:1-4; Dkt. #195-36]

43. According to Defendants, Barrick "locked [his legs] rigid against the door jamb of Lee's truck," and they remained that way until Kasbaum used a TASER to deliver "two to three drive stun touches" that caused a "release of muscle tension in Barrick's legs," at which point the officers extracted Barrick from Lee's truck and Barrick "went to the ground." [See Dkt. #165, pp. 9-10, Fact Nos. 27, 31 & 32; Dkt. #195-5; Dkt. #195-22, p. 3] According to Lee, while bracing in this fashion, Barrick was not kicking. [Dkt. #195-4, 110:17-20]

44. Kasbaum and could not identify any specific blow or kick by Barrick after being pulled out of the truck that made contact with anyone. [Dkt. #195-1, 95:12-22; 99:24 – 100:18; Dkt. #195-2; see also Additional Fact No __, *supra*.]

45. Similarly, EMT Powers could not recall Barrick ever landing a kick or kicking anyone specific once he was on the ground. [Dkt. #195-14, 110:6-11]

46. Indeed, once on the ground, Barrick's legs were controlled from the knee up, so he could only move his legs from the knee down. [Dkt. #195-1, 93:19-23; 95:2-11; Dkt. #195-11, 145:1-6 & 13-23; 163:9-14]

- (iv) At all times after being pulled from Lee's truck, Barrick remained on the ground in the face-down prone position with his hands securely cuffed behind his back, and with two to three deputies on top of him. During this time, he posed no immediate threat to the safety of the officers or public, and was incapable of escape.

47. At all times after being pulled out of the truck and onto the ground, Barrick remained in the prone position, face down on the pavement, with his hands cuffed behind his back (and his cuffed hand resting near his lower back / the small of his back) [Dkt. #195-11, 142:21 – 143:10; 163:6-11; 167:20 – 168: 2; Dkt. #195-14, 107:25 – 108:5], and with two to three deputies on top of him. [Additional Fact Nos. 8 – 10, 12 – 14 & 77]

48. Kasbaum acknowledged that Barrick being prone on the ground with his hands cuffed behind his back reduced the risk of Barrick escaping [Dkt. #195-1, 219:16-23], and minimized the risk of Barrick attempting to stand, standing, fleeing, or otherwise harming an

officer.” [Dkt. #195-1, 220:6-13] Likewise, it reduced the risk of Barrick “grappling with the officer[s],” or “grabbing the officer[s]’ force tools.” [Dkt. #195-1, 219:2-15; *see also* 227:15-17]

49. At no point after being pulled out of the truck did Barrick stand or have the ability to stand up. [Dkt. #195-1, 227:10-14; Dkt. #195-14, 109:7-15]

50. Barrick’s hands were bound behind his back at all times during which Kasbaum, Lee, Storey, and Hannah used force on him. [Dkt. #195-1, 102:9-20; Dkt. #195-14, 107:25 – 108:8]

51. Handcuffing lowers the likelihood that an officer will need to use force on a suspect. [Dkt. #195-1, 217:6-10]

52. “Handcuffing a [suspect] with [his] hands behind the back offers greater safety” to officers, makes “[e]scaping ... more difficult,” prevents a suspect from punching and delivering hammer blows, and prevents a suspect from running and kicking as efficiently as a frontally-handcuffed person (whose balance is less affected than a person handcuffed behind his back). [Dkt. #195-1, 217:14 – 218:1; 218:5-18]

53. Barrick never used his hands to strike or attempt to strike any officer. [Dkt. #195-1, 100:19-22; Dkt. #195-11, 133:9-12; Dkt. #195-14, 109:3-10] Barrick was restrained such that he was unable to hit any officer with his fist. [Dkt. #195-1, 227:18-20; Dkt. #195-9, 144:18-23]

54. Kasbaum had no concern that Barrick might be able to punch any of the officers. [Dkt. #195-1, 219:24 – 220:3]

55. Kasbaum did not have any concern that Barrick was going to escape the handcuffs fastening his hands behind his back. [Dkt. #195-1, 218:2-4]

56. Hannah had no concern that Barrick might escape. [Dkt. #195-9, 121:20 – 122:11; 144:24 – 145:5]

57. Indeed, after Barrick was on the ground with his hands cuffed behind his back, his legs partially or wholly controlled, and Deputies Lee and Kasbaum on top of him, Barrick had no apparent ability to escape. [Dkt. #195-11, 164:8-16]

58. Barrick never made any threats to any of the officers. [Dkt. #195-1, 114:25 – 115:4; Dkt. #195-4, 73:14-17]

59. Barrick had no ability to carry out a threat of serious bodily harm on any of the bystanders. [Dkt. #195-14, 114:21 – 115:6]

60. Barrick did not have a weapon on him at any time during the encounter, nor did he

ever attempt to grab any of the officers' weapons. [Dkt. #195-1, 38:20 – 39:15; Dkt. #195-14, 111:1-3]

61. There was no concern on the part of the officers that Hannah might attempt to grab one of their weapons. [Dkt. #195-9, 144:12-17]

- (v) Kasbaum and Hannah acted together to effectuate a prohibited “hogtie” configuration which, when used in combination with Lee’s 258 pounds of downward pressure on Barrick’s back, and Kasbaum’s 200 to 220 pounds of downward pressure on Barrick’s hips and lower torso, caused Barrick to quit breathing.

62. EMT Wyatt observed deputies lying on top of Barrick as other officers were cuffing his legs. [Dkt. #195-11, 146:11-15; *see also* Additional Fact Nos. 8 – 10 & 12 – 14, *supra*]

63. Kasbaum and Hannah worked together to place Barrick in leg shackles connected by a 12-inch chain. [Dkt. #195-9, 83:23 – 84:15; 227:1-6] In addition to controlling one of Barrick’s legs with his baton, Hannah helped bring Barrick’s legs up so that Kasbaum could fasten a shackle around each of Barrick’s ankles. [Dkt. #195-9, 83:14-22; 86:20 – 87:2; 87:6-9; 87:13 – 88:3]

64. During the process of fastening the leg irons around Barrick’s ankles, both of Barrick’s legs were bent at the knee past 90 degrees² and toward his back / buttocks. [Dkt. #195-9, 85:7-17; 88:6 – 89:3; *see also* Dkt. #195-1, 92:6-15] EMT Wyatt observed Hannah pull Barrick’s ankles up “right at his butt” to a less-than-ninety-degree angle, holding them in close proximity to his wrists. [Dkt. #195-11, 81:13-22; 91:15-17; 158:23 – 160:1; 188:1-9] After Barrick’s “ankles were brought to the buttocks,” he did not move at all. [Dkt. #195-11, 162:18 – 163:5]

65. Once both of Barrick’s ankles were cuffed, Kasbaum and Hannah did not return Barrick’s feet to the ground [*see* Dkt. #195-1, 137:6-9; 223:24 – 224:18], but instead continued to “pull[Barrick’s] legs all the way back to his ... butt” and “press[his ankles] back toward the buttocks,” holding them there for approximately 30 seconds (at which point Barrick quit breathing), and thereafter for another 1 minute and 28 seconds (*i.e.*, until after EMT Wyatt had

² Kasbaum explained that in the prone position, a person’s legs are at “90 degrees” when they are bent at the knees with the lower legs being held straight “up and down.” “180 degrees,” on the other hand, refers to legs that are fully extended (*i.e.*, with no bend at the knee). [Dkt. #195-1, 92:6-11]

made her way to Barrick, started her assessment, and had repeatedly told the officers to get off Barrick). [Dkt. #195-11, 28:15 – 29:9; 30:11 – 33:1; 78:15-21; 81:13-22; 147:19 – 148:4; 158:23 – 160:19; 174:15 – 175:6; 186:8-14; 188:1-9; Dkt. #195-14, 26:2 – 29:11; 86:2-7]

66. EMT Wyatt testified that during the latter period, there was no reason for the officers to remain on top of Barrick. [Dkt. #195-11, 115:16-25; *see also* Dkt. #195-9, 156:19-22; 159:16-18; 163:8-23]

67. Hannah acknowledges that “[t]he use of excessive force shall be presumed when a Game Warden continues to apply physical force in excess of the force permitted by law to a person who has been rendered incapable of resisting arrest.” [Dkt. #195-9, 202:19 – 203:23]

68. After approximately 30 seconds in this position, as his legs were being shackled, Barrick quit breathing. [Dkt. #195-11, 28:15 – 29:9; 81:13 – 82:2; 149:8-13; 160:4-10; 174:15 – 175:6; 175:13-18]

69. It did not appear to EMT Wyatt that Barrick had lost consciousness or quit breathing at any time before that. [Dkt. #195-11, 30:2-5; 149:18-22]

70. Kasbaum recounted that Lee was on Barrick’s left side and Storey was on Barrick’s right side when Barrick went limp. [Dkt. #195-2, p. 2]

71. Kasbaum acknowledged that when a suspect is in the prone position (as Barrick was), bringing the suspect’s legs beyond 90 degrees towards his waist³ “begins to inhibit blood flow to the lower extremities” and “[i]t also strains the diaphragm of the human body.” [Dkt. #195-1, 58:24 – 59:12; Dkt. #195-11, 163:9-11] Kasbaum was aware that these factors can also come into play when a suspect is hogtied. [Dkt. #195-1, 59:6-17]

72. The officers continued to use force on Barrick after his feet were bound. [Dkt. #195-1, 102:21-23]

73. EMT Wyatt estimates that from the time Lee opened the door of his truck to the time that Barrick quit breathing was eight to nine minutes. [Dkt. #195-11, 55:14-19; 71:5-11; 110:20 – 111:19]

74. After Barrick stopped breathing, a period of time elapsed before EMT Wyatt a short

³ Defendants’ use-of-force expert, Kenneth Wallentine, acknowledged that restraining a prone suspect in this manner may very well be the same thing as holding the suspect’s bound ankles within 12 or fewer inches of his bound wrists. [Dkt. #195-19, 116:24 – 117:7; 117:15-25; 118:2-8]

was able to get over to him. [Dkt. #195-11, 147:19 – 148:4] According to Kasbaum -- who admits he is “critical of the amount of time it took” for the EMT’s to respond -- the EMT’s “were like deer in the headlights” and “just froze,” “[i]t just took [them] too long” to “[g]et over” to Barrick, and “it felt like an eternity.” [Dkt. #195-1, 261:18-22; 262:5-11]

75. EMT Wyatt testified that once she got to Barrick, “I checked for a pulse while the patient was still on the ground while he was still on his stomach. I felt for a pulse before [the officers] moved off of him.” [Dkt. #195-11, 148:10-13; *see also* 179:7-10; Dkt. #195-4, 81:7-11] Wyatt’s assessment was conducted at 7:58 p.m. (*i.e.*, between 7:58:00 p.m. and 7:58:59 p.m.). [Dkt. #195- 11, 55:6-13; Dkt. #195-13, pp. 3 & 5]

76. Wyatt found that Barrick had no pulse, was not breathing, had gone into cardiac arrest, and had turned blue/purple. [Dkt. #195-11, 30:20 – 31:7; 55:21 – 56:51; 69:8-11; *see also* Dkt. #195-14, 32:20-25; 33:5-7; 71:13-21; 102:23 – 103:15]

77. Once EMT Wyatt realized that Barrick did not have a pulse and did not seem to be breathing, she told the officers to “get off of [Barrick] so [they] could take the handcuffs off and roll him over.” [Dkt. #195-11, 31:12-17] The officers, however, did not comply [Dkt. #195-11, 31:20-22] (including Lee, who did not adjust his position at all, and remained on top of Barrick’s torso even though Barrick was not breathing [Dkt. #195-11, 139:1-14; 140:21 – 141:7; 161:11 – 162:15]). Wyatt repeated herself two more times, and after the third time she told the officers to get off of Barrick, they finally did. [Dkt. #195-11, 31:25 – 32:2; 32:18-21; 75:23 – 76:7; 114:17 – 115:25; Dkt. #195-14, 27:24 – 28:13; 29:5-11; 82:12-20; 100:21 – 101:2]

78. Wyatt estimates that from the first time she asked the officers to get off of Barrick to the time they actually got off of him and started removing the handcuffs (at her express request) was “less than a minute,” during which time she observed no improvement or change in Barrick’s condition. [Dkt. #195-11, 32:22 – 33:1; 33:4-8; 128:5-10; 132:1-7]

79. Barrick’s legs were not brought back down from his buttocks until after EMT Wyatt had made it over to Barrick, conducted her assessment, and repeatedly told the officers to get off of Barrick. [Dkt. #195-11, 160:11-19; 186:9-14] After the officers finally got off of Barrick and Barrick was rolled over, he gasped and started breathing again. [Dkt. #195-11, 149:23 – 150:9; Dkt. #195-14, 26:2-12]

80. Barrick, however, was in serious distress. He was breathing at a rate of 6 breaths per minute – well below the normal breathing rate of 12 to 20 breaths per minute, and even more

abnormal for somebody who has been struggling. [Dkt. #195-11, 169:16 – 170:11] He was unable to breathe on his own and had to be intubated. [Dkt. #195-11, 172:16-19] Barrick's heartrate of 50 beats per minute was also abnormally low for someone who had been struggling. [Dkt. #195-11, 170:8-11] Barrick's blood oxygen level was 66, well below the normal saturation level of 95 to 100. [Dkt. #195-11, 170:12-20] Barrick's pupils were dilated and not reacting, indicative of possible brain injury. [Dkt. #195-11, 171:1-21] EMT Wyatt observed involuntary arm movements, leading her to conclude that Barrick was experiencing a seizure. [Dkt. #195-11, 172:2-8]

81. EMT Wyatt testified that in the course of treating Barrick, she formed the belief that positional asphyxia was the cause of the respiratory and cardiac arrest he suffered, and shared this information with the ER doctor, Chris Bradshaw. [Dkt. #195-11, 80:4-13; 166:18 – 169:7] EMT Powers shared this concern. [Dkt. #195-14, 103:22 – 104:14; 115:9 – 116:4]

B. TIMING OF KEY EVENTS

82. Kasbuam's body-worn camera began recording at 7:50:35 p.m. [Dkt. #195-1, 202:2-22]

83. Lee opened the rear passenger-side door of his truck (where Barrick was sitting) at 7:51:06 p.m., commencing the use of force incident. [Dkt. #195-1, 204:20-22; Dkt. #195-4, 83:3-11; Dkt. #195-36 (at 18:51:06)]

84. The video ends at 7:52:52 while Barrick is still in or partially in Lee's truck. [Dkt. #195-36]

85. After Barrick's bound ankles had been brought to his buttocks and held near his bound wrists for approximately 30 seconds, Barrick quit breathing. [Dkt. #195-11, 28:15 – 29:9; 81:13 – 82:2; 149:8-13; 160:4-10; 174:15 – 175:6; 175:13-18]

86. Hannah continued to "pull[Barrick's] legs all the way back to his ... butt" and "press[his ankles] back toward the buttocks," during the 29 seconds it took EMT Wyatt to make her way to Barrick.

87. At 7:58 p.m. (*i.e.*, between 7:58:00 p.m. and 7:58:59 p.m.), Wyatt conducted her assessment of Barrick. [Dkt. #195-11, 55:6-13; Dkt. #195-13, pp. 3 & 5]

88. The officers (Lee, Kasbuam, and possibly Storey) remained positioned on top of Barrick, and Hannah continued to hold Barrick's feet in the hogtie position, for up to an additional 59 seconds (*i.e.*, as late as 7:59:58 p.m.). [Dkt. #195-11, 32:22 – 33:1; 33:4-8; 78:15-21; 81:13-22; 147:19 – 148:4; 158:23 – 160:19; 174:15 – 175:6; 186:8-14; 188:1-9; Dkt. #195-14, 26:2 –

29:11; 86:2-7]

89. The use of force incident involving Barrick and Defendants is divisible into two parts -- the initial part that occurred in and around the truck, and the latter part that took place when Barrick was prone on the ground. **[Dkt. #195-1, 75:18-23]**

90. EMT Wyatt testified the officers' efforts to extract Barrick from Lee's patrol vehicle (which began at 7:51:06 p.m.) "was probably about the same amount of time" as the second part of the encounter **[Dkt. #195-11, 129:12 – 130:2]** (which ended when Barrick and lowered his legs from the "hogtie" position from between approximately 7:58:59 p.m. and 7:59:58 p.m.) **[See Additional Fact Nos. 83, 87 & 88, supra]** Using this estimate, the duration of each half ranges from approximately 3 minutes and 57 seconds (on the shorter side) to 4 minutes and 27 seconds (on the longer side).

91. Accordingly, Lee and Kasbaum held Barrick down by positioning up to approximately 450 pounds of their weight directly on top of Barrick's back (*i.e.*, torso-to-torso) and hips / lower torso for between **3 minutes and 57 seconds** and **4 minutes and 27 seconds**. During this entire time, Barrick was prone on the ground with his hands cuffed behind his back. Additionally, for as long as the final **1 minute and 58 seconds** of this period, Barrick's shackled feet were held against his buttocks, in very close proximity to his wrists, at an angle significantly less than ninety degrees (*i.e.*, the "full prone maximum restraint" position, or "hog-tie" configuration). Defendants maintained these holds for up to **1 minute and 28 seconds** after Barrick went limp and up to **59 seconds** after EMT Wyatt determined that Barrick had gone into cardiac arrest. **[See Additional Fact Nos. 8 – 10, 12 – 14, 77, 83, 87, 88 & 90, supra]**

92. Defendants' expert Michael Graham acknowledged that weight on Barrick's torso in excess of 225 pounds could have contributed to his difficulty breathing. **[Dkt. #195-21, 119:11-23]**

C. BARRICK'S DIMINISHED CAPACITY WAS APPARENT TO OFFICERS

93. Almost immediately upon their arrival, Kasbaum, Lee, Storey, and Hannah all noted Barrick's apparent intoxication / diminished capacity. **[See Dkt. #165, Fact Nos. 21]** (Kasbaum informed medics that he believed Barrick was "hopped up on something"); **23** (Kasbaum and Lee observed Barrick yelling, screaming, and rocking back and forth with enough force to visibly rock Lee's truck); **24** (Kasbaum told medics that Barrick was under the influence of some unknown substance); **25** (the officers observed Barrick shouting that persons were trying

to kill him); **30** (officers pain compliance techniques had little effect on Barrick); **36** (officers observed Barrick attempting to hurt himself); **51** (Barrick allegedly exhibited uncommon strength); **52** (“it was apparent to the officers that Barrick was ... severely intoxicated”)]

94. Kasbaum reported that when he tried to remove Barrick from the back of Lee’s truck, “Barrick began acting in excited delirium,” as evidenced by the statements he was making. [Dkt. #195-18, p. 3]

D. KASBAUM, LEE, STOREY, AND HANNAH WERE ACTING UNDER STATE AUTHORITY

95. The *Deputation Agreement* between the Choctaw Nation and the Oklahoma Department of Wildlife Conservation is identical to the *Deputation Agreement* under which MCSO Deputies Kasbaum, Lee, and Storey were cross-deputized. [Dkt. #195-27, 18:12 – 19:16; Dkt. #195-28; Dkt. #195-38]

96. The “intent of [the Deputation] Agreement is to provide for the cross deputation of law enforcement officers employed by the tribes, the State of Oklahoma, and political subdivisions of the State of Oklahoma which are a party to [the] Agreement.” Thus, according to the express terms of the *Deputation Agreement*, the cross-deputization of Kasbaum, Lee, and Storey was **wholly** dependent upon their status as “law enforcement officers employed by ... [a] political subdivision[] of the State of Oklahoma” (*i.e.*, McCurtain Co. / MCSO). [Dkt. #195-38, pp. 5-6]

97. The Choctaw Nation’s *Deputation Agreement* with ODWC and MCSO states, in pertinent part:

All parties to this Agreement recognize that when law enforcement officers arrest a criminal suspect, the officers may not know whether the suspect of the victim is an Indian or non-Indian, or whether the arrest or the suspected crime has occurred in Indian country, ... and that therefore there is great difficulty in determining immediately the proper jurisdiction for the filing of charges. **It is further recognized that the official jurisdiction determination will be made by a prosecutor or court from one of the various jurisdictions, not by cross-deputized arresting officers.**

[Dkt. #195-28, p. 3; Dkt. #195-38, p. 6; *see also* Dkt. #195-27, 33:11-23]

98. Accordingly, no official jurisdictional determination was made at the time of Barrick’s arrest, and none of the officers who effectuated Barrick’s arrest (including Kasbaum, Lee, Storey, and Hannah) made -- nor were they permitted to make -- such a determination. [Dkt. #195-28, p. 3; Dkt. #195-2, 213:2-4; 214:22 – 215: 4; Dkt. #195-4, 213:2-4; 214:4 – 215:10; Dkt. #195-9, 127:18 - 128:17; Dkt. #195-27, 33:11-23; *see generally* Dkt. #195-8, 5:17 – 6:4]

99. Seventeen (17) months after Barrick’s death, Kasbaum, Lee, and Storey **still** had

not determined whether they had been “acting under color of state law” when they arrested Barrick. [Dkt. #2, ¶¶ 21, 24 & 27; Dkt. #30, ¶ 21; Dkt. #31, ¶ 24; Dkt. #32, ¶ 27]

100. At the time of Barrick’s arrest, Alicia Manning was the third highest ranking member of MCSO, was one of four administrators, held the rank of Captain, oversaw all of MCSO’s criminal investigations, was “responsible for anything that happens there” [at MCSO], and was subject to, and familiar with, the *Deputation Agreement* between the Choctaw Nation and MCSO deputies. [Dkt. #195-27, 18:7 - 19:16; 20:4-6 & 13-17; 21:3-5; 21:15 - 22:2; Dkt. #195-4, 61:9-10]

101. Manning testified that when making an arrest, MCSO’s cross-deputized personnel “wear both hats” (*i.e.*, “the state’s hat” and “the tribe’s hat”), and “don’t even have to worry about whose hat [they’re] wearing,” because “that’s for the prosecutor to decide later,” and because the issue of jurisdiction “only becomes relevant [‘later’] when you’re filing charges.” [Dkt. #195-27, 32:14 - 34:2; *see also* Dkt. #195-4, 214:23 – 215:10]

102. MCSO’s policy and procedure manual provides that “[t]he office of County Sheriff was created by article XVII, section 2 of the Oklahoma Constitution, and that Office is vested with the authority to uphold the laws of the state.” [Dkt. #195-39, p. 2] MCSO “deputies are, at all times, considered to be Sheriff’s Office employees,” “their primary responsibility is to the maccurtain (sic) County Sheriff’s Office,” and each of them is permitted, by virtue of “the scope of his authority” as an MCSO deputy, to “make reasonable inquiries, conduct investigations, and arrest on probable cause.” [Dkt. #195-39, pp. 10, 14 & 20]

103. MCSO’s policy and procedure manual further mandates that MCSO deputies “will use Department time, equipment, and personnel for departmental business only.” [Dkt. #195-39, p. 15]

104. According to MCSO’s policy and procedure manual, the “statutory responsibilities” of MCSO deputies under 19 O.S. § 516 include the duty “to keep and preserve the peace” in McCurtain County, “to quiet[and] suppress all affrays,” and to “apprehend[] or secur[e] any persons for felony breach of the peace.” [Dkt. #195-39, p. 20]

105. Several other duties and powers that MCSO deputies are authorized to carry out and exercise are expressly enumerated in MCSO’s policy and procedure manual, and include “[t]ransporting prisoners,” “[p]erform[ing] follow up investigations on criminal cases,” “prevent[ing] crime” and “respond[ing] quickly to calls for assistance” in “primarily

unincorporated areas of [McCurtain] County,” “[c]omplet[ing] initial investigations of criminal acts when responding to calls for assistance,” and “arrest[ing] all offenders against the laws of the State.” **[Dkt. #195-39, pp. 2 & 20]**

106. Under MCSO’s policies and procedures, deputies must “work **cooperatively** with all segments of ... Government to provide a safe environment and preserve the peace,” while “[u]tilizing the authority in safeguards of the constitution of the United States and freedoms cited in the Bill of Rights [and] the laws and statutes of the State of Oklahoma.” **[Dkt. #195-39, p. 2]**

107. Pursuant to MCSO’s policies and procedures, “[a] Response to Resistance form” is the form that a supervisor is required to prepare “whenever an officer of this agency utilizes reportable force ... in the performance of their duties.” In turn, “reportable force” is when any of the eight “force options” **[see Dkt. #195-39, p. 28, ¶ C(a)(i)-(viii)]** -- including “Electronic Control Devices,” “Batons,” and “Deadly Force” -- are “used by an officer to compel compliance from a subject in conformance with the officer’s official duties, whether on or off duty.” **[Dkt. #195-39, p. 28, ¶ C(b)(ii)]**

Lee

108. On March 13, 2022, Lee was working his scheduled shift as a MCSO deputy. **[Dkt. #195-32, p. 22]** Lee was dispatched to investigate possible violations of Oklahoma law, including under 21 O.S. §§ 1362, 1435 & 1760 and 37 O.S. § 37-8. **[See Dkt. #195-32, p. 22; Dkt. #195-20, pp. 6-8]**

109. Lee arrived on the scene driving a marked Ford F-150 (issued to him by MCSO) with the emergency lights engaged. Lee was wearing a tan uniform shirt with MCSO patches on each shoulder, an outer carrier with “Sheriff” across the chest. **[Dkt. #195-32, p. 22; Dkt. #195-9, 14:17 – 15:10; 169:13-18; 170:21-24; Dkt. #195-11, 16:15-18]**

110. At all times during the arrest of Barrick and related on-site investigation, Lee held himself out as exercising the authority of a MCS deputy. **[Dkt. #195-9, 170:25 – 171:4]**

111. Lee and Kasbaum investigated Barrick’s suspected crimes themselves **[Dkt. #195-1, 250:5-16]** and, in so doing, asked witnesses to provide handwritten statements on pre-printed MCSO forms. **[Dkt. #195-4, 180:23 – 181:1; see also, e.g., Dkt. #195-12, Dkt. #195-15, and Dkt. #195-16]**

Storey

112. On March 13, 2022, Storey was working his scheduled shift as a MCSO deputy.

[Dkt. #195-32, p. 26] Storey was dispatched to investigate possible violations of Oklahoma law, including under 21 O.S. §§ 1362, 1435 & 1760 and 37 O.S. § 37-8. [See Dkt. #195-32, p. 26; Dkt. #195-20, pp. 6-8]

113. Storey arrived on scene in a marked Ford Taurus issued by MCSO. [Dkt. #195-32, p. 26]

114. Storey was wearing a green polo shirt with an embroidered MCSO badge on the left chest and a hat with the word “Sheriff” across the front. [Dkt. #195-32, p. 26]

115. At all times during the arrest of Barrick and related on-site investigation, Storey held himself out as exercising the authority of a MCSO deputy. [Dkt. #195-9, 170:25 – 171:4]

116. Storey’s formal statement regarding the Barrick arrest was prepared on MCSO letterhead and signed by Storey in his capacity as a MCSO deputy. [Dkt. #195-2, p. 1]

Kasbaum

117. On March 13, 2022, Kasbaum was working his scheduled shift as a MCSO deputy. [Dkt. #195-32, p. 30] Kasbaum was dispatched to investigate possible violations of Oklahoma law, including under 21 O.S. §§ 1362, 1435 & 1760 and 37 O.S. § 37-8. [See Dkt. #195-32, p. 30; Dkt. #195-20, pp. 6-8]

118. Kasbaum arrived on scene in a Chevrolet Tahoe (issued by MCSO). [Dkt. #195-32, p. 30]

119. Kasbaum was wearing a black polo shirt with an embroidered MCSO badge on the left chest, and an overvest with “Sheriff” across the front and back. [Dkt. #195-32, p. 30]

120. At all times during the arrest of Barrick and related on-site investigation, Kasbaum held himself out as exercising the authority of a MCSO deputy. [Dkt. #195-9, 170:25 – 171:4]

121. Kasbaum’s formal statement regarding the Barrick arrest was prepared on MCSO letterhead [Dkt. #195-2, p. 1] and signed by Kasbaum in his capacity as a MCSO deputy. [Dkt. #195-2, p. 2]

Hannah

122. In response to the allegation in Plaintiff’s *Complaint* that the acts in which Hannah engaged “were incidental to some service being performed for [his] employer” (*i.e.*, the Oklahoma Department of Wildlife Conservation), Hannah “admit[ted] that he was acting within the scope of his employment.” [Dkt. #36, ¶ 94; *see also* Dkt. #195-9, 129:23 – 130:24]

123. Indeed, Hannah claims that prior to using force upon Barrick, he had reason to

believe that Barrick had violated one or more laws of the State of Oklahoma. [Dkt. #195-9, 122:12 – 123:12; 138:11 – 140:20; 141:9-14; 141:19 – 142:14] Hannah assisted in carrying out the arrest to enforce what he perceived as violations of State law. [Dkt. #195-9, 168:19-23]

124. Hannah arrived to the scene in a state vehicle. [Dkt. #195-9, 130:25 – 131:2; 169:13-18]

125. At all times during the encounter, Hannah wore his state warden's uniform [Dkt. #195-9, 131:3-4; 169:19-22] and was displaying the state warden's insignia. [Dkt. #195-9, 169:23 – 170:20]

126. Hannah's only official report of the incident was the statement he was prepared "for the ODWC" in compliance with its general orders. Hannah typed out his report on a *Game Warden Incident Statement* form (issued by the ODWC Law Enforcement Division), signed the report as a state "Game Warden," and turned it in to the ODWC. [Dkt. #195-9, 132:9-11; 171:5 – 173:6; 174:21 – 175:11; Dkt. #195-10] Hannah did not prepare a written report for, nor was he ever interviewed by, Choctaw Nation police or investigators. [Dkt. #195-9, 134:22-25]

STANDARD OF REVIEW

"Under Rule 56, [a] movant must demonstrate that he is entitled to a summary judgment beyond a reasonable doubt." *Florum v. Elliott Mfg.*, 867 F.2d 570, 574 (10th Cir. 1989); *citing Madison v. Desert Livestock Co.*, 574 F.2d 1027, 1037 (10th Cir. 1978). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Luke v. Hospital Shared Services, Inc.*, 2013 WL 1136937 *1 (10th Cir.); *citing* FED.R.CIV.P. 56(a). An issue of fact is material if it could affect the outcome of the case under the governing law. *Allen v. Muskogee, Okla.*, 119 F.3d 837, 839 (10th Cir. 1997). A "dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.*; *see also Crowe v. ADT Sec. Servs., Inc.*, 649 F.3d 1189, 1194 (10th Cir. 2011) (holding that "[a] dispute is genuine if there is sufficient evidence so that a rational trier of fact could resolve the issue either way").⁴

⁴ In ruling on a motion for summary judgment, courts must construe "pleadings and documentary evidence ... liberally and in favor of the party opposing the motion," and must otherwise view the factual record, including any reasonable inferences drawn from it, in the light most favorable to the non-movant. *Harman v. Diversified Medical Investment Corp.*, 488 F.2d 111, 113 (10th Cir. 1973); *see also Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 528 (10th Cir. 1994); *Calhoun v. Gaines*, 982 F. 2d 1470, 1472 (10th Cir. 1992). Thus, **even if there are no**

“Since the *Graham* reasonableness inquiry [in excessive force claims brought pursuant to § 1983] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [courts] have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.” *Catlin v. City of Wheaton*, 574 F.3d 361, 367 (7th Cir 2009); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003); *cited with approval in Estate of Booker v. Gomez*, 745 F.3d 405, 429 (10th Cir. 2014).

Furthermore, “at the summary judgment stage, the court must consider whether a rational fact-finder could disbelieve the police officer’s testimony based on circumstantial evidence.” *Elix v. Synder*, 2011 WL 4497145 *6 (W.D.Okla.); *Pauly v. White*, 814 F.3d 1060, 1079-80 (10th Cir. 2016). Indeed:

Deadly force cases pose a particularly difficult problem [in evaluating whether the use of force was objectively reasonable] because the officer defendant is often the only surviving eyewitness. Therefore, **the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story -- the person [upon whom force was used] -- is unable to testify.** The judge must carefully examine all the evidence in the record ... to determine whether the officer’s story is **internally consistent and consistent with other known facts.** ... [T]he court may **not** simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer’s story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.

Id.; *quoting Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). As noted by the U.S. District Court for the Western District of Oklahoma, “[e]ach circuit court to consider [the principles addressed in *Scott*] has followed the Ninth Circuit’s holding and rationale, embracing the importance of circumstantial evidence at the summary judgment stage to determine whether a rational fact-finder could disbelieve part or all of the officer’s version of events.” *Id.*

ARGUMENTS AND AUTHORITIES

I. ALTHOUGH DEFENDANTS CLAIM THAT KASBAUM AND LEE “WERE NOT ACTING UNDER THE

material facts in dispute, summary judgment must be **denied** if there are **different inferences that may be drawn from the undisputed facts.** *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir. 1992) (holding summary judgment to be inappropriate “when reasonable jurors might disagree, even if the judge would find for the moving party”). Indeed, “[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ruling on a motion for summary judgment ... [whose] function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.” *Morgan v. Ramsey*, 2013 WL 869046 (N.D.Okla. 2013); *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

COLOR OF STATE LAW” DURING THEIR ENCOUNTER WITH DECEDENT BOBBY BARRICK, THE SUBSTANTIAL EVIDENCE PRODUCED BY PLAINTIFF OPERATES TO BAR SUMMARY JUDGMENT ON SUCH ISSUE.

To maintain an action under 42 U.S.C. § 1983 against an individual defendant, Plaintiff must show that: (1) the conduct complained of was committed by a person acting under the color of state law; and (2) this conduct deprived Decedent Bobby Barrick of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). The Supreme Court has held that the “state action” requirement in a § 1983 claim is satisfied when the party charged with an alleged constitutional deprivation “may fairly be said to be a state actor.” *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982).

“[S]tate employment is generally sufficient to render the defendant a state actor.” *Id.* at 936 & n. 18. “Thus, a state employee generally acts under color of state law when, while performing in his official capacity or exercising his official responsibilities, he abuses the position given to him by the state.” *West v. Atkins*, 108 S.Ct. 2250, 2251, 2254 & 2258 (1988) (further reiterating that “generally, a public employee acts under color of state law while acting in his official capacity”⁵ **or** when engaging in conduct “**clothed with the authority of state law**”); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (holding “[t]he involvement of a state official ... plainly provides the state action essential to [a claim for relief under Section 1983], whether or not the actions of the police were officially authorized”). Indeed, a defendant’s “lack of **actual** state authority is **not** determinative” of whether he acted “under color of state law.” *Hall v. Witteman*, 569 F.Supp.2d 1208, 1222 (D.Kan. 2008); *see also Screws v. U.S.*, 325 U.S. 91, 111 (1945) (holding “[i]t is clear that under ‘color’ of law means under ‘pretense’ of law”).

Furthermore, “the fact that a state employee’s role parallels [his role in some other capacity] is not, by itself, reason to conclude that the former is not acting under color of state law in performing his duties.” *West*, 108 S.Ct. at 2259 & n. 15. Rather, “[i]f an individual is possessed of state authority and purports to act under that authority, his authority is state action. It is irrelevant that he might have taken the same action had he acted in a purely [non-state] capacity or that the particular action which he took was not authorized by state law.” *Griffin v. State of*

⁵ “[A]cts [that a police officer typically performs] within the scope of [his] employment” generally “constitute acts performed in [the officer’s] official capacity.” *Redwood v. Ferry*, 2006 WL 8445016 *8 & n. 5 (C.D.Ill.).

Maryland, 84 S.Ct. 1770, 1772-73 (1964). Thus, a cross-deputation agreement alone is insufficient to transform a state officer into a tribal actor. *See Quart v. Fleming*, 2010 WL 1257827 *7 (W.D.Okla.) (holding that “the existence of a cross-commission agreement with a state agency, without more, does not transform a tribal officer into a state actor”).

Accordingly, the question of whether a law enforcement officer acted under color of state law turns on “the nature of the act being performed,” and whether “the acts [in question were] **related** to the performance of police duties”); *Azua v. Overman*, 2001 WL 37124914 *2 (D.N.M.); citing *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1429 (10th Cir. 1984)⁶; see also *Hall v. Witteman*, 569 F.Supp.2d 1208, 1221 (D.Kan. 2008) (holding “it is ... when [a] sheriff exercises power granted by the state that his actions become state actions”); citing *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (holding that the Fourteenth Amendment was enforceable “against those who carry a badge of authority of a State and represent it in **some** capacity”); and *Norton v. Liddel*, 620 F.2d 1375, 1379-80 (10th Cir. 1980). Put another way, to determine if an officer was cloaked with the state’s authority when he engaged in a particular act, “courts ask whether the officer’s actions are consistent with actions generally taken by a police officer.” *Jackson-Gilmore v. Dixon*, 2005 WL 3110991 *10 (E.D.Pa.); citing *Griffin v. State of Maryland*, 378 U.S. 130, 135 (1964).⁷

As such, “[c]ourts [must] look to all of [an] officer’s acts, and to no one act in particular, in context, to determine whether [the] officer was acting in his official capacity and whether the

⁶ In *Lusby*, the Tenth Circuit cited several cases that treat police-type duties and actions as sufficient evidence that a defendant, though not on duty for the police department at the time of his actions, was acting as an on-duty police officer under color of law. 749 F.2d at 1430; citing *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980) (action under color of state law when bank guard **responded to problem as police officer by identifying himself as such and showing his police identification**).

⁷ In *Griffin*, the U.S. Supreme Court held that that a county deputy sheriff, who also worked as a security guard for a private amusement park, “**purported to exercise the authority of a deputy sheriff**” because, *inter alia*, “[h]e wore a sheriff’s badge and consistently identified himself as a deputy sheriff rather than as an employee of the park,” and following the arrest, “filled out a form titled ‘Application for Warrant by Police Officer’ [which] stated ... [t]hat he is a member of the Montgomery deputy sheriff Department.” *Id.* at 1771-73. The Supreme Court further held that “[t]hough an amended warrant was filed stating that petitioners had committed an offense because they entered the park after an ‘agent’ of the park told them not to do so, this change has little, if any, bearing on the **character of the authority which [the deputy] initially purported to exercise.**” *Id.* at 1772-73. The concurring opinion joined in this holding, reasoning that at the very least, under the facts presented, “the State must be recognized as a **joint** participant in the challenged activity.” *Id.* at 1884.

officer **invoked police authority.**” *Id.*; citing *Barna v. City of Perth Amboy*, 42 F.3d 809, 818 (3rd Cir. 1994). “Manifestations of police authority may include flashing a police badge, identifying oneself as a police officer, indicating that the officer is on official police business, attempting to make an arrest[,], or placing an individual under arrest.” *Id.*; *Barna*, 42 F.3d at 816; citing *Lusby*, 749 F.2d 1423; *Rivera v. La Porte*, 96 F.2d 691, 696 (2^d Cir. 1990).

Proposition I of Kasbaum and Lee’s *Motion for Summary Judgment* focuses on two facts - namely, that (1) Decedent Bobby Barrick (who Defendants encountered in Eagletown, Oklahoma, on March 13, 2022) was a member of the Choctaw Nation, and (2) Eagletown (an unincorporated community located in McCurtain County) falls within Choctaw Nation tribal boundaries. Kasbaum and Lee argue that those two facts alone establish that they were “not acting under 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.” [Dkt. #165, p. 18] However, the additional facts presented by Plaintiff (which the Court must accept as true) clearly establish that during their encounter with Barrick on March 13, 2022, Kasbaum and Lee were acting within the scope of their employment -- and, thus, in their “official capacity” -- as MCSO deputies.

Specifically, on the evening of March 13th, Kasbaum and Lee were both working their scheduled shifts as MCSO deputies when the MSCO dispatcher sent them to Eagletown to investigate possible violations of Oklahoma law. [Additional Fact Nos. 108 & 117; Dkt. #195-35] According to Defendants’ expert witness, the information communicated to Kasbaum and Lee caused them to suspect that Barrick had violated several state criminal statutes, including 21 O.S. §§ 1362, 1435 & 1760 and 37 O.S. § 37-8. [Dkt. #195-20, pp. 6-8, ¶¶ 1-3; Additional Fact Nos. 108 & 117] With his emergency lights engaged, Lee arrived on the scene in the Ford F-150 issued to him by MCSO (conspicuously marked with MCSO and “Sheriff” decals). Kasbaum separately arrived on the scene in his MCSO-issued vehicle. [Additional Fact Nos. 109 & 118; Dkt. #195-32, pp. 183 - 184] Kasbaum was wearing a black shirt (on the front of which was embroidered an MCSO badge) and an overvest with “Sheriff Special Response Team” prominently written across the front and back. Similarly, Lee wore a uniform shirt with MCSO patches on each shoulder, and an outer carrier with “Sheriff” across the chest. [Additional Fact Nos. 109 & 119; Dkt. #195-32, p. 185] After placing Barrick in the back of Lee’s MCSO patrol vehicle, Kasbaum and Lee began conducting their own investigation of Barrick’s suspected crimes and, in so doing, asked witnesses to provide handwritten statements on pre-printed MCSO forms. [Additional Fact

Nos. 110, 111 & 120] After Barrick was removed from Lee’s patrol vehicle, his ankles were fastened together using the leg irons that Kasbaum carried with him while on duty as a MCSO deputy (which, in turn, he was trained to use during state CLEET training). **[Dkt. #195-1, 68:9-19; 74:16-17; Dkt. #195-4, 128:12-17]** At all times during the arrest of Barrick and related on-site investigation, Kasbaum and Lee (a) held themselves out as exercising the authority of a McCurtain County Sheriff deputies. **[Additional Fact Nos. 110 & 120]**; (b) were conducting “departmental business” (because they responded to the call and effectuated Barrick’s arrest “us[ing] Department time, equipment, and personnel”) **[Additional Fact No. 103; see also Additional Fact Nos. 102, 105, 108, 109, 117 & 118]**; and (c) were performing their duties as MCSO deputies (which are expressly enumerated in MCSO’s policy and procedure manual). **[Additional Fact Nos. 101-105]**

Following the encounter, Kasbaum and Lee both prepared formal, narrative incident reports (one of which was typed on official MCSO letterhead) in which they identified themselves as MCSO deputies, and that they signed as MCSO deputies. **[Dkt. #195-2; Dkt. #195-5; see also Additional Fact No. 121]** Likewise, MCSO Lt. Richard Williamson conducted a supplemental investigation (which he memorialized on an official *MCSO Investigator Supplement* form) **[Dkt. #195-17]**, and filled out an MCSO “Response to Resistance” form **[Dkt. #195-17]** (which MCSO’s written policies required him to complete since an MCSO deputy used “reportable force ... to compel compliance from [Barrick] in conformance with the [deputy]’s official duties”). **[Additional Fact No. 107]**

Neither Kasbaum nor Lee made an official determination of jurisdiction at the time of Barrick’s arrest; indeed, none of the law enforcement officers who effectuated Barrick’s arrest (including Kasbaum and Lee) were even permitted to make such a determination. **[Additional Fact Nos. 97, 98, 100 & 101]** According to the sworn testimony of MCSO Cpt. Alicia Manning, Kasbaum and Lee “w[ore] both hats” (*i.e.*, “the state’s hat” and “the tribe’s hat”) at the time of Barick’s arrest, and did not “even have to worry about whose hat [they were] wearing.” **[Additional Fact No. 101]** Moreover, seventeen (17) months after Bobby Barrick’s death, Defendants expressly stated that they still “lack[ed] sufficient information to either admit or deny” whether Kasbaum, Lee, and Storey (or any of them) were “acting under color of state law” during their arrest of Barrick on March 13, 2022. **[Additional Fact No. 99]**

Clearly, the foregoing facts preclude summary judgment on Defendants' argument that "they were not acting under the color of state law" because -- at the very least -- such facts raise a triable issue as to whether Defendants' use of force upon Decedent Bobby Barrick was cloaked in any pretense of state authority. *See Romero v. Peterson*, 930 F.2d 1502 (10th Cir. 1991) (remanding excessive force case for further fact finding as to whether cross-deputized officers were federal actors or tribal actors, and recommending that the district court consider, *inter alia*, the source of funding for the officers' law enforcement activities, whether the officers were wearing federal uniforms, carrying federal weapons, using a federal vehicle, or acting pursuant to the authority of federal badges, who was responsible for supervising the officers, and whether cross-deputized officers acted in a "dual capacity"); *see also Haines v. Fisher*, 82 F.3d 1503, 1509 (10th Cir. 1996) (holding that the determination of whether one is acting within the scope of employment is generally a question of fact).

Finally, even if the Court were to accept Defendants' bald claim that they were "acting within the scope of their cross-deputation by the Choctaw Nation Tribe of Oklahoma when they interacted with Barrick," summary judgment would be inappropriate. It is well-established that where -- as here -- police officers are cloaked in multiple jurisdictions, and the totality of the circumstances raises an inference that the officers' actions were **not** clearly delineated as tribal [*see, e.g., Additional Fact Nos. 98 & 101*], the **display of state authority** by a tribal officer will permit the Court to exercise jurisdiction over the subject matter. *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989).⁸

⁸ In *Evans*, the plaintiffs brought Section 1983 claims against individual police officers arising out of the execution of orders of the Blackfoot Tribal Court. "The tribal court orders were executed, however, by police officers of the City of Browning who also happen[ed] to be agents of the Bureau of Indian Affairs," and who were "empowered ... to provide law enforcement protection to the residents of the City and to enforce city ordinances." *Id.* at 1347-48. Initially, the lower court found that "the Section 1983 claims against the individual police officers ... were beyond the jurisdiction of the federal courts ... because any alleged deprivation of the [plaintiffs'] civil rights were accomplished under the color of tribal law." *Id.* at 1347. The Court of Appeals, however, reversed the lower court's ruling, holding:

The allegedly unconstitutional arrests were made **pursuant to a City of Browning ordinance** prohibiting the obstruction of justice. While these law enforcement officers may be said to have been acting pursuant to Tribal Court orders during the incidents in question, **they were also allegedly and arguably acting in their capacity as City of Browning police officers.** ... In their third amended complaint, the [plaintiffs] expressly

Plaintiff's Section 1983 claim against Defendants Kasbaum and Lee arise out of a warrantless arrest by state law enforcement officials who (a) were dispatched by MCSO to investigate possible violations of **state law** [Additional Fact Nos. 108 & 117; Dkt. #195-35], (b) at all times held themselves out as – and purported to exercise the authority of – county deputies [Additional Fact Nos. 103, 109-111 & 117-121], and (c) made **no** determination of tribal jurisdiction at **any** time during their encounter with Decedent.⁹ [Additional Fact Nos. 97-101] The degree of state involvement in Barrick's arrest presents a triable issue of fact precluding summary judgment. *Haines*, 82 F.3d at 1509; *Romero*, 930 F.2d at 1506-08.

II. DEFENDANTS QUENTIN LEE AND MATTHEW KASBAUM ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' 42 U.S.C. § 1983 EXCESSIVE FORCE CLAIM.

A. Applicable Law

1. 42 U.S.C. § 1983 - Generally

Under 42 U.S.C. § 1983, a federal cause of action may be brought against state or local officials who, while acting under the color of state law, deprive a person of a federal right. 42 U.S.C. § 1983. In excessive force cases, the federally protected rights are well-established: The Fourth Amendment to the U.S. Constitution prohibits the use of unreasonable force in effecting a seizure of a suspect. *Graham v. Connor*, (1989) 490 U.S. 386, 394-95, (1989); *Tennessee v. Garner*, 471 U.S. 1, (1985) (holding that apprehension by use of deadly force is a seizure, subject to the reasonableness requirement of the Fourth Amendment). Similarly, the Fourteenth Amendment to the U.S. Constitution prohibits the use of excessive force against an arrestee or pre-trial detainee. *Bell v. Wolfish*, 441 U.S. 520, 539 & n. 21 (1979).

2. Standards Governing Whether an Officer's Use of Force Was "Objectively Unreasonable"

Reasonableness of officer's use of deadly force depends, *inter alia*, on whether officer was

alleged that "[t]he city police acted under color of state law in arresting [Plaintiffs] without a warrant." Given this explicit allegation of official state authority, coupled with the "peculiar" law enforcement situation as it exists on the reservation, we conclude that the [plaintiffs] have sufficiently pleaded [an] action under color of state law[.]

⁹ Even if Defendants could conclusively establish that some tribal authority was mixed with the state authority (or any pretense of state authority) under which Defendants conducted themselves, that fact would still be irrelevant. *Griffin*, 84 S.Ct. at 1772-73; *Ouart*, 2010 WL 1257827 at *7; *see also Evans*, 869 F.2d 1341.

in danger at precise moment that he used force. *Stewart v. City of Prairie Village, Kan.*, 904 F.Supp.2d 1143, 1154 (D.Kan. 2012); *see also Luna v. Mullenix*, 773 F.3d 712, 719 (5th Cir. 2014) (holding that “[w]hen deadly force is used, it is clear that the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis”). Hence, “[a]n officer’s use of force is **unreasonable** from a constitutional point of view if, judging from the totality of circumstances at the time of the arrest, the officer used greater force than was **reasonably** necessary to make the arrest.” 3B FED. JURY PRAC. & INSTR. § 165:24 (6th ed.); *citing Gonzalez v. City of Elgin*, 578 F.3d 526, 539 (7th Cir. 2009). For example, it is objectively unreasonable under the Fourth Amendment for officers to continue using force against an individual after they have already brought the individual under control. *See, e.g., Smith v. Wampler*, 108 Fed.Appx. 560, 564 (10th Cir. 2004) (holding that where there is no longer reasonable cause to believe that person poses a danger to the officer or to others, “the continued use of threatening force may be excessive and unreasonable”); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1188 (10th Cir. 2001).

Indeed, the Tenth Circuit has repeatedly found the gratuitous use of force on an arrestee who has already been brought under control to be unreasonable. *See, e.g., Gouskos v. Griffith*, 122 Fed.Appx. 965, 975–77 (10th Cir. 2005) (finding unreasonable force where officer threw to the ground a man who was picking up his daughter from a rowdy party, then choked the man almost to unconsciousness and continued to step on his back so he could not breathe after he was handcuffed and subdued); *Eberle v. City of Newton*, 289 F.Supp.2d 1269, 1278 (10th Cir. 2003); *see also Ornelas v. Lovewell*, 2013 WL 3271016 *10 & n. 65 (D.Kan.); *citing Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901 (6th Cir. 2004) (unreasonable for officers to use pepper spray on suspect who was handcuffed on the ground but continued to squirm and kick his feet in the air).¹⁰ Accordingly, since force is reasonable only when exercised in proportion to the threat posed, force that is initially reasonable may become unreasonable.¹¹

¹⁰ Other cases have produced similar holdings. *See, e.g., Green v. Chvala*, 567 Fed.Appx. 458, 459 (7th Cir. 2014) (holding that complaint plausibly stated claim for excessive force where it alleged that officer kneed plaintiff and applied significant force after plaintiff was handcuffed, motionless on the ground, and no longer capable of resisting, and reversing district court’s finding that continued use of force was justified because officer anticipated further resistance based on plaintiff’s earlier attempt to flee); *Holmes v. Vill. of Hoffman Estates*, 686 (7th Cir. 2007) (finder of fact could conclude that once two officers had suspect on ground and in handcuffs, officer’s act of grinding knee into suspect’s face was unnecessarily and excessively violent).

¹¹ *See, e.g., Cyrus v. Town of Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010) (holding that

3. Standards Governing “Unconstitutionality” of Physical Force Under “Clearly Established Law”

The Tenth Circuit has articulated the following test for determining whether the violation upon which a plaintiff’s Section 1983 claim is based involves a “clearly established right about which a reasonable person would have known”:

Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.” The plaintiff is not required to show, however, that the very act in question previously was held unlawful in order to establish an absence of qualified immunity.

Weigel v. Broad, 544 F.3d 1153 (10th Cir. 2008); *citing Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir.1992). “This is not to say that an official action is protected by qualified immunity unless the [exact] action in question has previously been held unlawful.” Rather, it means that “in light of pre-existing law the unlawfulness must be apparent.” *Id.*; *citing Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

In that regard, the Tenth Circuit has “clearly established that putting substantial or significant pressure on a suspect’s back while that suspect is in a face-down prone position after being subdued and/or incapacitated [e.g., handcuffed] constitutes excessive force.” *Estate of Booker v. Gomez*, 745 F.3d 405, 424 (10th Cir. 2014); *citing Weigel*, 544 F.3d 1143; *citing McQuarter v. City of Atlanta, Ga.*, 572 F.Supp. 1401, 1414 (N.D.Ga. 1983) (use of chokehold was “excessive and malicious” when used after victim was “manacled” and “effectively restrained”). The Tenth Circuit has also expressly held that “officers may not apply the hog-tie technique¹² when an individual’s diminished capacity is apparent” due to the significantly increased risk of “positional asphyxiation.” *Cruz v. City of Laramie*, 239 F.3d 1183, 1188 (10th Cir. 2001). “In such

“[a]s the threat changes, so too should the degree of force”); *Meyers v. Baltimore County, Md.*, 2013 WL 388125, 7 (4th Cir. 2013) (holding that “force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated”); *Lamont v. New Jersey*, 637 F.3d 177, 184 (3rd Cir. 2011) (holding that “[e]ven where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force has vanished.”); *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 413 (5th Cir. 2009) (observing that “an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased”).

¹² In *Cruz*, the Tenth Circuit expressed its understanding that a “hogtie” involves affixing one’s ankles and wrists behind the back, with twelve (12) inches or less of separation.

situations, an individual's condition mandates the use of less restrictive means for physical restraint." *Id.* Finally, the Tenth Circuit has held that "any reasonable officer [should know] that failing to check [a suspect's] vital signs, perform CPR, or seek medical care for three minutes when he was limp and unconscious as a result of [the officers'] use of force could violate the Constitution." *Booker*, 745 F.3d at 434; *Weigel*, 544 F.3d at 1154-55.

By virtue of these holdings, law enforcement personnel in the State of Oklahoma have been put on notice that utilizing any of the aforementioned techniques on a person who is restrained, handcuffed, no longer capable of meaningfully resisting, and/or exhibiting signs of respiratory distress may constitute a disproportionate use of force, result in significant injury, including death, and be "unconstitutional under clearly established law." *Booker*, 745 F.3d at 428-29.¹³

B. Lee and Kasbaum directly participated in objectively unreasonable force that immediately preceded, resulted in, and continued following the cardiac and respiratory arrest of Bobby Barrick.

In the instant matter, Defendants Lee and Kasbaum have moved for summary judgment on the claim brought by Plaintiff under 42 U.S.C. § 1983, arguing that "there was no use of excessive force" on Decedent Bobby Barrick. [**Dkt. #165, p. 18**] On the contrary, Plaintiff has produced eyewitness evidence that Lee and Kasbaum applied weight, respectively, to Barrick's back/upper torso and hips/lower torso for between 3 minutes and 57 seconds and 4 minutes and 27 seconds, during the entirety of which Barrick was laying prone on his stomach, completely immobilized, with his hands tightly cuffed behind his back. Additionally, for as long as the final 1 minute and 58 seconds of this period, Kasbaum and Defendant Mark Hannah were holding Barrick's shackled feet against his buttocks (*i.e.*, far less than the 90-degree-angle limit) in very close proximity to his wrists. The evidence in this case is that Barrick posed no danger to anyone at that time. Lee and Kasbaum's actions were a blatant violation of the Tenth Circuit's clear prohibition against the continued use of deadly force after an arrestee has already been restrained. *See Weigel* (holding that "applying pressure to a person's upper back once he was handcuffed and his legs restrained,

¹³ The cases on which the *Booker* decision relies include, *inter alia*, *Richman v. Sheahan*, 512 F.3d 876, 880 (7th Cir. 2008) (holding that hypoxia "can also be induced by compressing the lungs, which the weight of several persons on one's back can do," so "police are warned not to sit on the back of a person they are trying to restrain"); and *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) (holding that the police, and "any reasonable person" should have known that squeezing the breath from a prone, handcuffed individual pleading for air "involves a degree of force that is greater than reasonable").

was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions”).

Additionally, the plethora of **internal inconsistencies** in the officers’ various versions of events (as well as the failure of all four officers to engage -- or, in the case of Kasbaum, to refrain from disengaging -- their body worn cameras) cannot be overlooked. In the aggregate, these glaring inconsistencies tend to **highly discredit** any notion (a) that Barrick posed any danger to the officers at **any** time, (b) that Barrick posed any meaningful resistance after officers “mounted” his back or during the approximately 4- to 4 ½-minute period that Lee and Kasbaum (and possibly Storey) continued to apply significant weight and pressure to Barrick’s torso, hips, and upper and lower back, (c) that Lee, Kasbaum, and the other officers dismounted Barrick and put him in the recovery position “immediately” after he went into cardiac and respiratory arrest, or (d) that Kasbaum, Lee, and the other officers promptly heeded EMT’s repeated directives to dismount Barrick. *See Elix*, 2011 WL 4497145 at *6; *Pauly*, 814 F.3d at 1079-80; *quoting Scott*, 39 F.3d at 915. Indeed, the innumerable inconsistencies detailed hereinabove provide a more than sufficient basis upon which a rational jury could disbelieve Lee and Kasbaum’s versions of events. *Id.*

Further, it is undisputed that after acting in concert to effectuate and permit a **combination** of constitutionally-impermissible restraint techniques (in violation of the *Cruz* and *Weigel* standards), which **coincided precisely** with, and no doubt caused, Barrick’s respiratory and cardiac arrest, Lee and Kasbaum, along with the other officers, **maintained** their impermissible restrains, doing nothing to loosen the “hogtie” hold, dismount Barrick’s torso, or conduct any kind of meaningful resuscitative effort for approximately 1 ½ to 2 minutes. Even then, Barrick was released and placed in the recovery position **only** at the insistence of EMT Wyatt, and **not** at the initiative of any of Lee, Kasbaum, or the other two officers. Lee and Kasbaum’s collaboration with Defendants Hannah and Storey in their excessive, cardiac arrest-inducing restraint of Bobby Barrick, along with their casual **inaction** during the **critical** minutes that followed, was constitutionally impermissible under the Tenth Circuit’s clearly established standards. *See Booker*, 745 F.3d at 434 (finding constitutional violation where officer failed to perform resuscitative efforts or seek medical care for nearly three minutes after the arrestee had gone limp and unconscious as a result of the officer’s use of force); *see also Weigel*, 544 F.3d at 1154-55; *Cruz*, 239 F.3d at 1188. Based on Lee and Kasbaum’s direct participation in clearly-prohibited excessive conduct, they are not entitled to qualified immunity, and their motion for summary judgment on

Plaintiffs' Section 1983 claim should be denied.¹⁴

WHEREFORE, premises considered, Plaintiff Barbara Barrick prays that this Court enter an order (a) denying Defendants Matthew Kasbaum and Quentin Lee's *Motion for Summary Judgment* in its entirety, and (b) granting Plaintiff all other relief (whether legal, equitable, or both) to which she is entitled and/or that the Court deems is just and proper.

Respectfully submitted:

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¹⁴ According to Defendants, Plaintiff “must prove that [the use of constitutionally excessive force by] Defendants w[as] both the cause-in-fact and the proximate cause of Barrick’s death.” [Dkt. #165, pp. 25-26] This argument lacks merit. It is well established that “[i]f the force used was unreasonable and excessive, [a] plaintiff may recover even if the injuries inflicted were not permanent or severe.” *Burris v. Nassau County D.A.*, 2017 WL 9485714 *14 (E.D.N.Y.) (collecting cases); *Davis v. Thillman*, 1994 WL 14620 *4 (N.D.Ill.) (holding “it is not necessary for the use of force to ... cause severe injuries to rise to the level of excessive force”); *Norris v. D.C.*, 737 F.2d 1148, 1150-52 (D.C.Cir. 1984) (collecting cases); *see also Wilkins v. zgaddy*, 130 S.Ct. 1175, 1178-80 (2010) (holding prisoner’s excessive force claim should not be dismissed solely because the plaintiff’s injuries were *de minimis*; focus should be on the nature of the force used, not whether certain quantum of injury was sustained); *Saunders v. Duke*, 766 F.3d 1262, 1270 (11th Cir. 2014); *Velius v. Township of Hamilton*, 754 F.Supp.2d 689 (D.N.J. 2010) (Fourth Amendment excessive force claim does not require showing of physical injury).

CERTIFICATE OF DELIVERY

I hereby certify that on January 6, 2025, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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