

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

BARBARA BARRICK, as Special)	
Administrator of the ESTATE OF)	
BOBBY DALE BARRICK, deceased,)	
)	
Plaintiff,)	
)	Case No. CIV-23-129-JFH-GLJ
v.)	
)	Magistrate Judge Gerald L. Jackson
)	
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.)	

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

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Defendants Matthew Kasbaum and Quentin Lee filed their Motion for Summary Judgment. (Doc. 165). The Plaintiff submitted her Amended Response. (Doc. 204). Defendants submit this Reply to confirm that the Plaintiff has failed to overcome Defendants' request for summary judgment.

I. The Plaintiff Has Admitted All Facts Necessary For Summary Judgment In Favor Of The Defendants Kasbaum And Lee

Plaintiff admits **Fact Nos. 1-16, 18, 20-24, 27, 30, 31, 45, 46, 9, 50, 52-55, and 60-68**. Plaintiff also admits significant portions of **Fact Nos. 19, 20, 25, 28, 29, 33-36, 38, 41, and 56**. Throughout her Response brief, Plaintiff denies a fact and references and cross-references vast ranges of their Additional Facts to support their denial. This is a purposeful attempt by the Plaintiff to obfuscate the issues so that it appears there is a properly supported dispute as to a material fact where none actually exists. Further, it is incumbent upon the responding party (here, Plaintiff) to marshal the facts and present them in a way that allows the Court to determine what is actually controverted. Plaintiff has not done this here. Thus, throughout their analysis of Plaintiff's purported denials, Defendants will seek to point out blatant misrepresentations and lack of evidence. Defendants do not undertake to analyze each of Plaintiff's references, cross-references, and references within cross-references, as to do so would be a near impossible feat, and certainly impossible to do so within this Court's rules.

17. As support for her denials, Plaintiff references her Additional Fact Nos. 95-101. However, factual allegations in unverified pleadings are not evidence, and cannot be considered in a factual inquiry. *United States v. Aguirre*, 245 F. App'x 801, 802–03 (10th Cir. 2007), citing *In re Grand Jury Subpoena*, 419 F.3d 329, 336 (5th Cir.2005); *Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1st Cir.2005); *Medina v. Pacheco*, 161 F.3d 18 (Table), 1998 WL 647784, at *3 n. 5 (10th Cir.1998)¹. Further, an examination of these Additional Facts finds they lack sufficient evidentiary support. By way of example, Additional Fact Nos. 95, 97, 98, 100, and 101, all cite to the deposition of Alicia Manning, which was not taken in this matter. Pursuant to Fed. R. Civ. P 56(1), the Court can only consider evidence that is in the record. Alicia Manning is not a party to this lawsuit, and the Defendants are not parties to that lawsuit. Her deposition taken in a completely different matter is not part of this record, and cannot be considered for purposes of summary judgment. Plaintiff's

¹ Throughout her Response in Opposition to Defendants' Motion for Summary Judgment, Plaintiff consistently cites to her Additional Facts as if they are evidence supporting her denial.

Additional Fact No. 99 refers to unverified pleadings as evidence. Further, the evidence cited by Defendants clearly indicates that the officers found a Choctaw Nation Membership Card in Barrick's pocket, and they were cross-commissioned officers with the Choctaw Nation. Plaintiff herself acknowledges this fact in her Additional "Fact" No. 95.

19. Here, Plaintiff denies that Kasbaum and Lee began acting within the scope of their cross-deputation by the Choctaw Nation Tribe of Oklahoma. However, this denial is illogical. Pursuant to *McGirt* and subsequent case law, Defendants would not have been permitted to take any action absent any cross-deputation. Therefore, to permit officers in the McCurtain County Sheriff's Office to respond to situations involving Native Americans, the Choctaw Nation of Oklahoma entered into a Deputation Agreement with the McCurtain County Sheriff's Office permitting responses to such situations. This fact is acknowledged by Plaintiff in her own Additional "Fact" 95. Plaintiff's denial that Kasbaum and Lee began acting within the scope of their cross-deputation fails to create a genuine dispute as to this Fact.

20, 29, 33, 39, 41, 51. Plaintiff repeatedly denies that Barrick was combative, fighting, violently kicking, and "offered any meaningful resistance" with the officers. But Plaintiff provides no evidentiary materials supporting her denial and instead vaguely cites to No. 33 of her Additional "Facts." Plaintiff argues that Barrick was not violent because he was handcuffed, and did not: threaten any officer, strike or attempt to strike any officers, attempt to grab any of the officers' weapons, or "violently" kick any officer. As support for this denial, Plaintiff refers to No. 27 of her Additional Facts in which Plaintiff repeatedly acknowledges evidence that Barrick was kicking at the officers. However, her argument appears to be that those kicks were not sufficiently violent, so they do not count. This is illogical. The evidence consistently shows that Hannah was "mule kicked" in his face by Barrick, and that he was later kicked hard enough to knock his glasses off of his face. Hannah testified that he sought medical treatment as a result of being kicked. *See* 195-9, 136:1-8. Notably, all EMTs and Officers on the scene declared in their written statements and testified Barrick resisted, was combative, and fought the officers. *See* Doc. 195-1, 86:11, 101:19-21; 103:11-25; 104:5-13; 105:14-16; 263:23-264:3; 272:2-6; *See* Doc. 195-2, pgs. 1-2; *See* Doc. 195-3, pg. 3; *See* Doc. 195-4, pgs. 53:8-54:2; *See* Doc. 195-5, pg. 1; *See* Doc. 195-6, pgs. 3, 7; *See* Doc. 195-7, 67:2-6; *See* Doc. 195-8, pg. 1; *See* Doc. 195-9, 76:6-9; 158:11-16; 159:2-18; 163:10-16; 177:12-14; 199:14-15; 235:8-19; *See* Doc. 195-10, pgs. 1-2; *See* Doc. 195-11, 19:10-11; 26:19-25; 27:1-24; 28:13-14; 29:10-23; 44:2-13; 131:14-20; *See* Doc. 195-12, pg. 1; *See* Doc. 195-14,

13:22-14:25; 23:12-20; 25:10-22; 40:12-15; 42:6-10 (“[Barrick] was fighting, he was fighting hard.”); *See* Doc. 195-15, pgs. 1-2; *See* Doc. 195-16, pg. 1.

Plaintiff’s own cited Additional Facts underscore this point. (Additional Fact No. 24: used his legs in an attempt to push the door of the truck open; Additional Fact No. 27: Kasbaum’s Response to Resistance Form indicated that Barrick kicked Hannah; Additional Fact No. 28: Barrick kicked Kasbaum while kicking at the door and struggling to push the door open; Additional Fact No. 31: Lee indicated that Barrick kicked Hannah in his Response to Resistance Form; Additional Fact No. 32: Lee testified that although he could not recall any specific kick, he was kicked by Barrick; and, Additional Fact No. 37: both Lee and Kasbaum reported Barrick kicking Hannah two times). In Additional Fact No. 41, Plaintiff cites deposition testimony by EMT Wyatt in which she testified that she did not remember observing anyone getting kicked. However, Plaintiff does not cite to EMT Wyatt’s testimony that:

- Barrick was kicking and just moving all around and trying to get out of the vehicle (18:5-10);
- Barrick was resisting, kicking, and being very combative (19:5-11);
- She thinks Mark Hannah did get kicked and he was fighting the whole time (28:10-14);
- Barrick was kicking and screaming and just kicking everybody (89:17-19); and,
- Barrick was fighting with the officers and she could not remember who he hit or kicked (131:6-20).

See 195-11, 18:5-10; 19:5-11; 28:10-14; 89:17-19; 131:6-20. Plaintiff attempts to take EMT Wyatt’s testimony that she could not remember who was specifically kicked by Barrick, and uses her lack of memory as support that Barrick was not kicking the officers. This position is contradicted by her testimony when you look at it in its entirety. Her testimony is clear that Barrick was very combative, resisting, kicking at the officers, and fighting with them. Finally, Plaintiff’s own rebuttal expert pointed out that Barrick was fighting. *See* 105-26, p. 3. Plaintiff has failed to support his denial of Fact No. 20 with any actual evidence.

25. Plaintiff admits that when the door was opened, Barrick pivoted on his seat, began to kick at the door, and was shouting that persons were trying to kill him. Plaintiff also admits that Barrick refused to allow paramedics to examine him. Plaintiff’s only dispute with regard to this fact appears to be whether Kasbaum opened the door. Whether or not Kasbaum or a different officer opened the door is not a material fact—there is no dispute that the door was opened.

28. Plaintiff denies that Lee used a baton to try to pry Barrick's legs away from the door jam. As support for this contention, Plaintiff points to the statement of Mark Hannah, in which he states that in an effort to restrain Barrick's foot, he used the baton by placing it across Barrick's shin. However, Plaintiff fails to acknowledge Hannah's sworn testimony in which he testified that he believed Lee attempted to do a baton strike during this incident while Barrick was still in the patrol vehicle. (Hannah 65:20-25; 66:1-13). Hannah further testified that his use of the baton took place later in the incident while the officers were attempting to place leg restraints on Barrick after he had already come out of the vehicle,. (Hannah 77:20-25; 78:1-4). When confronted with the timing in which Hannah used the baton, Hannah testified that his report was out of order, and the baton was used after Barrick had been pulled out from underneath the truck. *See* 195-9, 179:11-25; 180:1-25; 181:16-19. Thus, his testimony clarified that the chronology listed in his report was incorrect. Therefore, Plaintiff's reliance upon this error to support her denial of this fact is misplaced. Plaintiff next denies that Barrick was actively resisting the officers and kicking them. Defendants refer to their prior Response to Plaintiff's denial in Fact No. 20.

32, 40. Plaintiff has failed to produce any evidence which refutes these Facts. Plaintiff first takes issue with the statement that Barrick slid out of the truck and attempted to crawl under it. Instead, Plaintiff argues that Barrick was forcibly pulled out of the truck and onto the ground. To support this denial, Plaintiff refers to her Additional "Fact" Nos. 3 and 4. However, whether Barrick was pulled out of the vehicle or came out of the vehicle on his own is immaterial since all parties agree that Barrick ended up out of the vehicle and onto the ground. Plaintiff next denies that officers pulled Barrick out from under the truck due to a concern that he would be burned on the hot undercarriage. However, this denial is not a true denial because Plaintiff does not deny that Barrick did crawl under the truck. Instead, her argument appears to be that because he did not make it under the truck very far, there was no concern about Barrick being burned from the undercarriage. Defendants have never contended that Barrick made it significantly under the truck—only that he attempted to crawl under the truck and had to be pulled out from under it. Plaintiff has not cited to any evidence to contradict the officers' testimony that they were concerned that Barrick would be burned. Plaintiff finally takes issue with the allegation by Defendants that "the officers" pulled Barrick out from under the truck, and instead argues: "Hannah alone pulled Barrick" out from under the truck. Who pulled Barrick out from under the truck is completely immaterial, as Plaintiff admits that Barrick crawled under the truck and had to

be pulled out from under it. Thus, these so-called “denials” do not create genuine disputes.

34. Plaintiff does not dispute that Kasbaum and Hannah were trying to place leg restraints on Barrick. In fact, the only portion of this Fact Plaintiff appears to dispute is that Kasbaum was at Barrick’s feet. Plaintiff does not cite to any particular evidence, but instead cites to her Additional Fact No. 14, which argues that Kasbaum was lying across the top of Barrick such that his torso and arms were pressing down on Barrick’s hips. In her Additional Fact No. 14, Plaintiff cites to the deposition testimony of Hannah and EMT Powers. However, Plaintiff misrepresents to this Court what this evidence actually shows. Hannah said that he thinks Kasbaum was around Barrick’s hip area reaching across to grab his hips. He further testified that Kasbaum may have been laying on his hips, but he was not definitive on this point. Finally, Hannah testified that there was never any full mount of Barrick; and instead, they were to the sides of Barrick. *See* 195-9, 78:5-13; 79:22-25; 80:1-18; 182:19-25; 183:1-4. Similarly, EMT Powers does not support Plaintiff’s contention that Kasbaum was laying across Barrick’s hips. Instead, she testified that an officer (she did not recall who) may have been laying across Barrick just using their arms. In fact, Ms. Powers appears to be referencing the officer who was holding Barrick’s shoulders, which was not Kasbaum. Specifically, she testified she believes there was an officer who was to the side of Barrick who was either leaning over him, or just holding onto his shoulders. She testified she could not say how much weight the officer near his shoulders was placing on Barrick, if any, and she would be lying if she tried to estimate this. She also testified there were multiple officers down at his legs trying to control his legs, which supports Fact. No. 34. Importantly, she also testified that she was more focused on treating Barrick than she was on the specific placement of the officers. *See* Doc. 195-14, 20:21-22:1-9; 90:3-10. Plaintiff’s argument that Kasbaum was lying completely across Barrick’s hips is just not supported by the testimony. Thus, Plaintiff has failed to demonstrate that there is any genuine dispute as to this material fact. Plaintiff admits that Lee and Storey were at Barrick’s upper body, but states this Fact is incomplete because Lee had his legs wrapped around Barrick using a grapevine technique. However, this is immaterial because Plaintiff is not denying that Lee and Storey were at Barrick’s upper body—he is only adding to the fact. Further, Defendants have never alleged otherwise. In fact, Defendants stated as much in Fact No. 35. Therefore, this denial as incomplete does not aid in the Court’s analysis of this fact.

35, 36. Plaintiff first disputes Lee’s positioning and the amount of pressure Lee placed on Barrick’s back. Again, Plaintiff does not cite to any particular evidence, instead only referencing

her Additional “Fact” Nos. 8-10, 77, and 92. However, these Additional Facts do not provide the support Plaintiff alleges. Notably, Plaintiff argues that Hannah saw Lee mount Barrick’s back and attempt to control his head. But, his testimony does not say this. Instead, Hannah was asked about a certain portion of his report which indicates that Lee mounted Barrick’s back and attempted to control his head. However, during his deposition, Hannah clarified that there was never any full mount of Barrick, and the officers were to the sides of Barrick. *See* 195-9, 182:19-183:7. This is exactly what Fact No. 35 states—that Lee was: (1) lying on the ground beside Barrick acting as a wedge to prevent Barrick from crawling under the truck again; (2) his left shoulder and left side of his torso were on the ground; and, (3) his right side was in contact with Barrick’s torso, but he was mostly on the ground. Further, Plaintiff admits during this time Lee had his right leg wrapped around Barrick’s left leg to try to help control his legs. It is unclear how Lee could have fully mounted Barrick’s back while holding his head and simultaneously using the grapevine technique to control his legs. This is illogical.

Plaintiff suggests that EMT Wyatt saw Lee get on top of Barrick’s upper half and on top of his handcuffs. However, Plaintiff does not reference Wyatt’s testimony in which she states that she: (1) was not sure that it was Quentin Lee; and, (2) she does not remember how the officer was on top of Barrick or what portions of the officer’s body were on Barrick’s body, other than that he was up around Barrick’s shoulders. Specifically, she testified that she does not have any memory of this officer being anywhere other than with his torso on the upper part of Barrick’s back. *See* 195-11, 24:13-26:11; 139:16-24; 141:2-7. This is consistent with Fact No. 35’s description of Lee’s position. Next, Plaintiff admits Lee was trying to control Barrick’s head, but denies that Barrick was hitting his head on the asphalt, or head-butting any officer. Defendants have never contended that Barrick was head-butting any officer. Plaintiff appears to take issue with the fact in that it suggests Barrick was “hitting his head on the torn up asphalt.” However, whether Barrick actually hit his head as opposed to the possibility that he could have hit his head on the asphalt is not a material fact. The evidence clearly indicates Barrick was thrashing his head around while he was on the ground, there was a concern that he would bang his head on the asphalt, and Lee was doing the best he could to prevent this from happening. Thus, whether he actually hit his head during this thrashing or not is not a material fact. Because Plaintiff has failed to support her denial with actual evidence, Plaintiff has failed to create a genuine issue as to Fact Nos. 26 and 35.

37. Plaintiff denies this Fact, but does not cite to any particular evidence, instead citing to her

Additional “Fact” No. 13. In her Additional Fact, Plaintiff argues that Storey was lying on top of Barrick in something less than a full mount. However, this completely misstates the evidence. Plaintiff cites to the deposition of Hannah as supporting this idea. However, Hannah clearly stated that neither Storey, nor any other officer, was ever in a full mount of Barrick, and they were to the sides of Barrick. *See* 195-9, 182:19-183:7. Regardless, this Fact is not relevant or material to the claims against Defendants Kasbaum or Lee, and is directed toward other Defendants.

38. Plaintiff purports to deny that Barrick kicked Hannah in the face. However, Plaintiff only disputes the time at which Barrick kicked Hannah. She does not deny the fact that Barrick kicked Hannah. In the simplest terms, the exact moment at which Barrick kicked Hannah is not material to the claims against these Defendants. The record is clear that Hannah was kicked in the face by Barrick during the short altercation. Plaintiff next denies as incomplete that Kasbaum and Hannah placed leg restraints on Barrick’s legs. Plaintiff claims that this is incomplete because “Kasbaum and Hannah acted together to effectuate a prohibited ‘hog-tie’ configuration which, when used in combination with Lee’s 250 pounds of downward pressure on Barrick’s back caused Barrick to quit breathing.” Plaintiff does not cite to any particular evidence, instead referring to No. 18 of her Additional “Facts” which contain additional references to Additional “Facts.” Plaintiff’s additional narrative adds nothing to the analysis of this Fact since the only fact asserted by Defendants is that Kasbaum and Hannah placed leg restraints on Barrick’s legs. In her own material Facts, Plaintiff acknowledges that Kasbaum and Hannah placed the leg restraints on Barrick. *See* Plaintiff’s Additional Material Fact No. 63, which explicitly states that Kasbaum and Hannah worked together to place Barrick in leg shackles. Thus, Plaintiff’s denial is not a true dispute and does not create a genuine dispute as to this Fact.

Further, Plaintiff’s Additional Facts are not supported by the actual evidence in this matter. For instance, Plaintiff’s Additional Material Fact No. 62 states, “EMT Wyatt observed deputies lying on top of Barrick as other officers were cuffing his legs.” An examination of Ms. Wyatt’s testimony shows that Plaintiff mischaracterizes and leaves out vital portions of her testimony. First, Wyatt testified it was only one officer who was on top of Barrick. She further testified she was not sure that it was Quentin Lee, and she does not remember how the officer was on top of Barrick or what portions of the officer’s body were on Barrick’s body, other than that he was up around Barrick’s shoulders. Notably, she testified that she does not have any memory of this officer being anywhere other than with his torso on the upper part of Barrick’s back. Finally, she testifies that

the officer was trying to keep Barrick still. *See* 195-11, 24:13-26:17; 139:16-24; 141:2-7.

Again, in her Additional Fact No. 64, Plaintiff leaves out vital testimony. During his deposition, Hannah testified that at some point while fastening the leg cuffs, Barrick's legs were brought up closer to his buttocks, but testified that this was only for a second or two to fasten them together, and then another second or two before his legs were let back down into an extended position. *See* 195-9, 89:9-25. Plaintiff blatantly misrepresents the testimony of Kasbaum on this point. Kasbaum testified that Barrick's legs were held at an 80-degree angle when affixing the leg restraints. *See* 195-1, 92:6-93:6. Plaintiff next misrepresents the testimony of EMT Wyatt. EMT Wyatt testified that she witnessed the officers bring Barrick's legs up to his buttocks for approximately 30 seconds. However, she did not testify, as represented by Plaintiff, that the officers continued holding his legs in that position for another minute-and-a-half. Instead, she testified that his legs were held in that position for no more than 30 seconds until he stopped breathing. *See* 195-11, 81:13-82:1-3; 174:15-175:6. Importantly she testified that he was not subdued at the time that the officers were affixing the leg restraints and was fighting the entire time. *See* 195-11, 27:1-28:14.

Plaintiff again misrepresents the evidence in her Additional "Fact" No. 65. Plaintiff alleges that after Barrick's ankles were cuffed, Kasbaum and Hannah did not return Barrick's feet to the ground. However, this is a blatant misrepresentation of Kasbaum's testimony. Kasbaum testified that Barrick quit breathing simultaneously at the time that the second cuff was affixed, so they never had the chance to place his feet back down before the switch flipped. *See* 195-1, 136:15-20; 137:6-9. She again referred to EMT Wyatt's testimony to support her argument that Barrick's legs were held all the way back to his butt for approximately 30 seconds and remained in that position for an additional minute-and-a-half. However, again, as stated above, this is a misrepresentation. Plaintiff next refers to the testimony of EMT Powers to support this contention. However, again, EMT Powers did not testify to this alleged Fact. *See* 195-14, 26:2-29:11; 86:2-7.

In her Additional "Fact" No. 66, Plaintiff leaves out vital testimony from the EMTs. She asserts that EMT Wyatt testified that after Barrick had quit breathing, there was no reason for the officers to remain on top of Barrick. First, EMT Wyatt never testified that more than one officer was on top of Barrick, and she could not say in what way that officer was on top of Barrick or even which officer it was. *See* 195-11, 24:13-26:11; 139:16-24; 141:2-7. Second, EMT Wyatt testified that she thinks the officers did not get off of him the first couple of times she asked because of

how combative Barrick had been leading up to that point. *See* 195-11, 33:9-18. EMT Wyatt also testified that at no point did she feel like the officers were using too much force, and the officers were doing what they could to respond to Barrick's fighting and resistance. *See* 195-11, 44:2-13. Further, she testified that this period of time where she was asking the officers to get off of Barrick was no more than 10 seconds. *See* 195-11, 148:18-149:7. Similarly, EMT Powers testified that some of the officers were "afraid that he was going to become combative again," but it happened very quickly that they uncuffed him and flipped him over. *See* 195-14, 27:22-29:1.

The above discussion regarding Plaintiff's Additional Facts cited in support of their denial of Fact No. 38 is not meant to be exhaustive. Instead, it merely illustrates how in nearly every Additional "Fact" by Plaintiff, Plaintiff has twisted the testimony and evidence in such a way as to support their false narrative. But the evidence itself is clear and speaks for itself. Nobody has testified that any officer was completely on top of Barrick in any way. Nobody has testified that the officers used excessive force with regard to Barrick. Everyone has been consistent that if his legs were brought up at closer than a 90-degree angle, it was for a period of time no longer than 30 seconds, and it was only in an effort to affix leg restraints due to his continued and ongoing combativeness and resistance. No person has testified the officers ever placed Barrick in a hog-tie restraint. There remains no medical testimony, no medical record, nor medical finding of any kind showing Barrick died of asphyxia as opposed to methamphetamine toxicity.

42. Plaintiff denies that Hannah perceived that Barrick's respirations had slowed, and he told the officers this. However, she does not cite to any evidence to contradict this point or Defendants' previously submitted evidence. Further, this is not a point that is material for purposes of summary judgment. Plaintiff next denies that the officers rolled Barrick onto his side and removed the leg restraints. Defendants refer to their previous discussion of this in Fact No. 38.

43. Plaintiff denies that the officers backed off and called for EMTs to assess Barrick. However, this Fact is supported by the testimony of the EMTs. EMT Wyatt testified that after Barrick stopped resisting, she started to walk over to check on him, and the officers were also calling out for the EMTs to check on Barrick. *See* 195-11, 63:10-25; 195-14, 29:21-30:12. With regard to Hannah calling out for a bag valve mask, Plaintiff takes EMT Wyatt's testimony and misrepresents it. EMT Wyatt testified that she does not recall Hannah calling for a bag valve mask. She never says that he did not ask for it, only that she does not recall him asking for it. *See* 195-11, 73:6-10. Further, both of these points are immaterial for the purposes of summary judgment.

44. Here, Plaintiff denies that Kasbaum offered his Narcan to the paramedics because he perceived that Barrick was under the influence of an unknown intoxicant. Plaintiff cannot seriously dispute Kasbaum's state of mind as to whether he perceived Barrick to be under the influence or not. The only evidence that Plaintiff cites to is the deposition of EMT Wyatt. However, Ms. Wyatt's testimony does not contradict this Fact. Instead, EMT Wyatt testified that she does not recall the deputies trying to get Narcan to Barrick. This is different. She is not saying that it did not happen, only that she does not recall this. She further testified that she does not have any reason to dispute the officers' testimony that they asked for Narcan. Regardless of whether it was offered, EMT Wyatt testified that she would not have used Narcan on Barrick because his presentation did not indicate its use. *See* 195-11, 73:11-13; 77:8-14; 124:15-125:3. Further, whether or not Kasbaum offered his Narcan to paramedics is not a material fact. Thus, Plaintiff's denial of this fact would not preclude summary judgment.

47. It is not clear which portion of this Fact Plaintiff disputes, as she only has a denial followed by a reference to Dr. Sperry's 10-page report. Plaintiff does not identify what portion of Dr. Sperry's rebuttal report she is using to support her denial. In any event, Dr. Sperry's rebuttal report fails to properly support Plaintiff's denial of any portion of Fact. No. 47.

The first portion of this Fact states that defense experts have opined that methamphetamine toxicity was likely a contributing factor, if not THE factor, that caused Barrick's death. Plaintiff's rebuttal expert's report acknowledges this point. *See* 195-26 p. 9. Thus, Plaintiff has failed to support her denial of this fact.

Next, Plaintiff appears to deny that her rebuttal expert agrees that methamphetamine toxicity was a factor in Barrick's death, and his only dispute as to the opinion is with regard to the use of the term "excited delirium." In pages 4-9 of his report, Dr. Sperry outlines his disagreement with Dr. Graham's usage of excited delirium. Specifically, he stated that the "utilization of Excited Delirium as an element in the cause of death summary is inappropriate, as this terminology minimizes any actions and applications of force utilized by the officers who were restraining Mr. Barrick." *See* 195-26, p. 9. However, nowhere in the report does he discuss any of the restraint techniques or positions of the officers that allegedly contributed to Barrick's death, nor does he give the opinion that any of these techniques or positions played any role in Barrick's death. Instead, he just points out that the use of the term excited delirium does not include a full analysis of the causation of his death, but Dr. Sperry does not opine as to the cause of his death. Curiously,

Plaintiff did not cite to any of Dr. Sperry's deposition testimony. During his deposition, Dr. Sperry specifically testified, "Honestly, if he had not included the excited delirium in his report, then I don't know that you and I would necessarily be talking actually." He further testified, **"I don't disagree with methamphetamine toxicity being, you know, a reasonable opinion that Dr. Graham could - - would arrive at in relationship to this - - to this particular death. I think it's a reasonable opinion for him to state."**

The final portion of Fact No. 47 that Plaintiff could be denying is whether Dr. Sperry gave any other opinions as to the cause of Barrick's death or identified any restraints by the officers that led to his death. Dr. Sperry testified during his deposition that he was not going to offer any opinions as to whether any officers misapplied force on Barrick, or whether any officer used any particular form of restraint that led to the death of Barrick. He further testifies that he was not asked to reach an opinion as to Barrick's cause of death, and that he could not do so without looking at a lot more information. *See* Exhibit 1: Deposition Kris Sperry, M.D. 64:14-66:13; 67:11-70:11; 111:1-112:6.

Thus, despite the vagueness of Plaintiff's denial, Defendants have demonstrated that Plaintiff cannot seriously maintain a denial to any portion of Fact No. 47 because her own expert has testified under oath in accordance with this Fact. Thus, Plaintiff has failed to demonstrate a genuine dispute as to this Fact.

48. Plaintiff disputes Fact No. 48's contention that from the time that the door was opened until the time that Barrick went limp was a matter of minutes. Plaintiff has again failed to cite to any specific evidence to support her denials, citing instead to nine of her Additional "Facts." In these Additional Facts, Plaintiff purports to establish a timeline that consists mostly of speculation. However, taking Plaintiff's timeline at face value², it clearly concludes that from the time that the door was opened until the time that Barrick went limp was a matter of minutes. Plaintiff contends in her Additional Fact No. 83 that Lee opened the door to the truck at 7:51 p.m. She also contends in her Additional Fact No. 87 that EMT Wyatt conducted her assessment of Barrick at 7:58 p.m. Thus, taking Plaintiff's own timeline at face value, the time between the door opening and the time that EMTs assessed Barrick was a matter of seven minutes—i.e., "a matter of minutes." Thus, Plaintiff cannot genuinely deny this Fact, when their own timeline establishes it.

² By utilizing Plaintiff's timeline, Defendants do not concede that it is accurate. Instead, Defendants merely use it to illustrate that even if Plaintiff's timeline was accurate, it still does not controvert Fact No. 48.

56. Plaintiff admits that Lee was wearing his body worn camera during the initial encounter with Barrick, and he disengaged his camera after placing Barrick into his patrol vehicle. However, she denies the remainder of this Fact wherein it states that Lee did not re-engage his body worn camera when they opened the door to his patrol vehicle so that EMS could evaluate Barrick because he did not expect any of the events that ultimately transpired. Plaintiff's denial on this Fact is confusing in that he provides no evidentiary support for his denial. Instead, he only references two Facts in Kasbaum and Lee's Motion for Summary Judgment. However, nothing in either of these Facts contradict Fact No. 56.

57. Kasbaum testified that although he was wearing a body worn camera during this incident, it must have become unintentionally disengaged due to their bodies bouncing together in the struggle. Plaintiff cites to 18-pages of deposition testimony from Kasbaum, which explains how the body worn camera operates. Throughout the cited testimony, Kasbaum repeatedly testifies as to how he believes the camera became unintentionally disengaged. There is nothing in the cited testimony that contradicts this Fact, and Plaintiff does not reference any other evidence supporting his denial.

58. Whether or not Storey's body worn camera battery was "dead" or "ran down" is just an argument over semantics—it is the same thing. Thus, this is not a true denial and is of little consequence since all parties agree that his body worn camera was not filming at the time of this incident.

59. Although she denies this Fact, she provides no argument or evidentiary support to contradict it. Instead, she merely disputes it as incomplete and adds additional commentary about discipline imposed on Kasbaum following this incident. Kasbaum's disciplinary history has no bearing on the education and experience he received throughout his 30-years in law enforcement. Thus, Plaintiff's denial is of no consequence to this Fact.

B. Response to Plaintiff's "Additional Material and/or Disputed Facts"

As the moving parties, Defendants are not required by Fed. R. Civ. P. 56 or LCvR 56.1 to respond to Plaintiff's lengthy "Additional Material and/or Disputed Facts;" and, due to the limited number of pages allotted for this Reply, do not do so here. By not replying to same, Defendants does not concede the veracity or the relevance of any of Plaintiff's Additional Facts. In fact, Defendants contend that the narrative painted by the Plaintiffs is nothing more than a grossly exaggerated version of Defendants' LCvR 56.1(b) Statement, but without the evidentiary support

contained within Defendants' statement.

II. Plaintiff Cannot Establish that Defendants Were Acting Under the Color Of State Law

Plaintiff's argument that Defendants acted under the color of state law is unsupported by the case law upon which she relies. Most of Plaintiff's cases³ address private v. state conduct, which is not the issue here. The question here is whether Defendants acted under state or tribal authority. It is undisputed that these Defendants lacked state law enforcement authority over Barrick, an Indian, in Indian Country.

Plaintiff's reliance on *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), an out-of-circuit and non-binding case, is misplaced. *Evans* was decided at the Motion to Dismiss stage, where courts accept allegations as true. *Id.* at 1348. The issue was whether plaintiffs, who were non-Indian, sufficiently alleged that officers acted under the color of state law. The Ninth Circuit found that plaintiff's allegation that the officers were enforcing a City ordinance on reservation land was sufficient to state a potential § 1983 claim. *Id.*

This case differs significantly from *Evans*. On Summary Judgment, the Court need not accept the Plaintiffs' allegations as true, but instead must determine whether the undisputed facts show that Defendants were acting under the color of state law. Unlike the plaintiffs in *Evans*, Barrick was an Indian, and it is well established that that state law enforcement officers lack jurisdiction over Indians in Indian Country. *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990).

State and tribal police work under cross-deputation agreements, meaning their actions derive from tribal, not state, authority. Courts have held that officers acting under tribal authority are not subject to § 1983 claims. *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006); *McKinney v. Oklahoma*, 925 F.2d 363, 365 (10th Cir. 1991). While there is no question that tribal and federal officers may exercise law enforcement authority over Indians in Indian country, there is no authorization for state law enforcement officers to do the same. *See Neff*, 905 F.2d at 1353 ("states

³ These cases include: *Jackson-Gilmore v. Dixon*, 2005 WL 3110991 *10 (E.D.Pa.); *Hall v. Witteman*, 569 F.Supp.2d 1208, 1222 (D.Kan. 2008); *Azua v. Overman*, 2001 WL 37124914 *2 (D.N.M.); *Redwood v. Ferry*, 2006 WL 8445016 *8 & n. 5 (C.D.Ill.); *Screws v. U.S.*, 325 U.S. 91, 111 (1945); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Griffin v. State of Maryland*, 84 S.Ct. 1770, 1772-73 (1964); *Norton v. Liddel*, 620 F.2d 1375, 1379-80 (10th Cir. 1980); *Monroe v. Pape*, 365 U.S.167, 172 (1961); *Rivera v. La Porte*, 96 F.2d 691, 696 (2d Cir. 1990); *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980).

[lack] independent authority to enforce their own laws over Indians on Indian land.”). “Indian country is subject to exclusive federal or tribal criminal jurisdiction.” *Id.* at 1352 (citing 18 U.S.C. § 1152) (emphasis added). Since Barrick is an Indian and the encounter occurred in Indian Country, Defendants acted under tribal authority. Plaintiff has not, and cannot, establish a deprivation under color of state law.

III. Plaintiff Fails to Show That These Defendants Used Excessive Force

Plaintiff’s version of events is based entirely on the speculative, unsupported conclusion that Barrick was not a danger to himself and others, and was not resisting arrest. But Plaintiff’s version of the facts is not supported by any evidence, and thus, every single assertion she makes in order to argue that the force was unreasonable must fail. Plaintiff has not, and cannot, show that the officers’ use of force was objectively unreasonable, that the officers violated any clearly established right, or that the officers’ actions caused Barrick’s death.

A. Defendants Did Not Use Any Impermissible Restraint Techniques

All of Plaintiff’s claims regarding the so called “impermissible restraint techniques” are incorrect, but her misrepresentation of the use of the hog-tie is so egregiously false that it demands further correction. The Tenth Circuit defines a hog-tie as “the binding of the ankles to the wrist, behind the back, with 12 inches or less of separation.” *Cruz v. City of Laramie*, 239 F.3d 1183, 1188 (10th Cir. 2001) Here, the evidence shows that Barrick’s legs were never held at his buttocks for an extended period of time, nor were his ankles bound to his wrists. (Facts #). There is no testimony or proof that Barrick was ever hog-tied. In fact, Kasbaum testified that no hog-tie was ever accomplished after he arrived on the scene, and he had never used the hog-tie technique. (Facts #).

Plaintiff also claims there are glaring “internal inconsistencies,” but the only inconsistencies are ones created by Plaintiff with her false narrative. All eye witness accounts of the scene show: (1) Barrick continued to actively resist arrest; (2) the officers reasonably believed he posed a danger to them or others; and, (3) the officers used reasonable force to detain Barrick. (Facts #). Plaintiff cannot overcome this detrimental hurdle. This is paramount as it is reasonable for officers to use force when an arrestee is still resisting arrest, as Barrick was doing here.

B. The Defendants Did Not Violate Any Clearly Established Right

Plaintiff also fails to show that Defendants violated any clearly established right. Defendants have never disputed the law clearly establishes that continued use of significant force *after* a

subject has been subdued is excessive. (Doc. 165, p. 27). But again, the key difference here is Barrick was not subdued and was still resisting arrest at the time of the use of force. This very important factual distinction differentiates this case from those relied upon by Plaintiff such as *Weigel v. Broad*, 544 F.3d 1153 (10th Cir. 2008), and *Booker v. Gomez*, 745 F.3d 405, 424 (10th Cir. 2014). In both *Weigel* and *Booker*, the arrestee was clearly subdued and no longer resisting arrest. Such is not the case here. Plaintiff's comparison to *Cruz* is also irrelevant as no hog-tie was present in this case. *Cruz*, 239 F.3d at 1188. As such, these cases cannot be used to claim that these Defendants should have known they were violating a clearly established right.

Plaintiff also does not address any of the cases cited by Defendants that show when an arrestee continues to resist arrest, force is reasonable. *See, e.g., Edwards, Hinton, Giannetti, Cockrell, supra; see also Walker v. Anderson*, No. 23-CV-0008-CVE-JFJ, 2024 WL 3905733, at *8 (N.D. Okla. Aug. 22, 2024) (holding that officers were entitled to qualified immunity as Tenth Circuit precedent does not establish “that using force after an individual has been handcuffed automatically violates the Fourth Amendment”); *Stevenson v. City of Albuquerque*, 446 F. Supp. 3d 806 (D.N.M. 2020) (holding that an officer was entitled to qualified immunity because him striking a subject three times on the shoulder with his knee did not violate any clearly established law as the subject was a non-compliant felony suspect). Instead, Plaintiff doubles down on her belief that this case is similar to *Weigel v. Broad*, and *Estate of Booker v. Gomez*. But again, this entire comparison is based on Plaintiff's unsupported narrative that Barrick did not resist or fight the officers, and did not pose any threat to the safety of others. Such is not the case here. When one looks to the supported undisputed material facts, it is clear that Defendants use of force was reasonable and even if it was not reasonable, the Defendants are entitled to qualified immunity.

Plaintiff twists the facts, cherry-picking evidence and offering empty denials in a futile attempt to fabricate a version of events that never happened. However the undisputed evidence—including Plaintiff's own cited sources—make one thing clear: Barrick was actively resisting arrest and kicking at officers throughout the encounter. A reasonable officer in that situation would have believed force was necessary, just as these officers did. Plaintiff has no credible rebuttal to dispute this reality.

WHEREFORE, premises considered, Defendants respectfully request this Court grant summary judgment in their favor and dismiss all of Plaintiff's claims against them with prejudice to the re-filing thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this **11th day of February, 2025** I electronically transmitted the attached document to the Clerk of Court via the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to all counsel who have entered an appearance in this action.

s/ Sheila G. Jessee

Sheila G. Jessee