UNITED STATES DISTRICT COURT
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.	)	
DEPUTY MATTHEW KASBAUM, DEPUTY QUENTIN LEE, and WARDEN MARK HANNAH,	)	
Defendants.	)	

PLAINTIFF'S OBJECTION
TO REPORT AND RECOMMENDATION [DKT. #224]

Plaintiff Barbara Barrick ("Barrick" or "Plaintiff"), Special Administrator of the Estate of Bobby Dale Barrick, deceased ("Decedent"), pursuant to FED.R.CIV.P. 72(b) and 28 U.S.C. § 636(b)(1)(B), hereby objects to the *Report and Recommendation* issued by U.S. Magistrate Gerald L. Jackson on July 9, 2025 **[Dkt. #224]**, and requests that the same be set aside by the District Court. In support of her *Objection*, Plaintiff would show the Court as follows:

STANDARD OF REVIEW

Under FED.R.CIV.P. 72(b), a party may serve and file objections to a magistrate judge's recommended disposition regarding a pretrial matter dispositive of a claim or defense if the objection is filed within fourteen (14) days after service of the order. Thereafter:

> The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to.[1] The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED.R.CIV.P. 72(b)(3); *Gordanier v. Montezuma Water Co.*, 2010 WL 935665 *1 (D.Colo.) (holding that "[t]imely objections to magistrate judge recommendations are reviewed *de novo* pursuant to Rule 72(b), rather than under the clearly erroneous/contrary to law standard applied to magistrate judge orders by Rule 72(a)").

"*De novo* review requires the district court to consider relevant evidence of record and not merely review the magistrate judge's recommendation." *Kazarinoff*, 2024 WL 98385 at *2; *citing In re Griego*, 64 F.3d 580, 584 (10th Cir. 1995); *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir. 1987) (district court "abuses its discretion" by adopting a magistrate's recommendation "without [conducting an independent review of the record and] providing a *de novo* determination as to objections to the magistrate's report"). As part of this review, the district court may, but is not required to, "receive further evidence." *Id.*; *citing Perkins v. Suzuki Motor Corp.*, 2021 WL 5629067 *7 (D.Colo.); and FED.R.CIV.P. 72(b).

ARGUMENTS AND AUTHORITIES

In the *Report and Recommendation* issued on July 9th, Magistrate Jackson found "that

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[1] "An objection is 'proper' if it is both timely and specific." *Kazarinoff v. Wilson*, 2024 WL 98385 *2 (D.Colo.); *citing U.S. v. One Parcel of Real Prop. Known as 2121 E. 30th St.*, 73 F.3d 1057, 1059-61 (10th Cir. 1996). "A specific objection 'enables the district judge to focus attention on those issues – factual and legal – that are at the heart of the parties' dispute.'" *Id.*; *citing One Parcel*, 73 F.3d at 1059.

[Defendants Matthew] Kasbaum, [Quentin] Lee, and [Mark] Hannah **were not acting under color of state law** when they responded to this incident[2] and attempted to place [Decedent Bobby] Barrick in custody." **[Dkt. #224, p. 6]** Based upon this finding, Magistrate Jackson recommended that summary judgment be entered in favor of the aforementioned Defendants on the claims Plaintiff brought against them under 42 U.S.C. § 1983. **[Dkt. #224, pp. 15 - 16]** As set forth below, Plaintiff objects to the Magistrate's above-quoted finding and resulting recommendation.

APPLICABLE LAW

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). Therefore:

> [T]he only proper defendants in a Section 1983 claim are those who represent the state in **some** capacity[.] … The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have **exercised power possessed by virtue of state law** and **made possible only because the [defendant] is clothed with the authority of state law**.

Ouart v. Fleming, 2010 WL 1257827 *7 (W.D.Okla.); *citing E.F.W. v. St. Stephen's Indian H.S.*, 264 F.3d 1297, 1305 (10th Cir. 2001).

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,

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[2] The referenced "incident" took place "at Lori's Corner Store in Eagletown, [Oklahoma,] which is within the boundaries of the Choctaw Reservation[,]" in the store parking lot, and on Highway 70. **[Dkt. #224, p. 4]** Although omitted by Magistrate Jackson's summary of the incident **[*see id.*]**, the summary judgment record establishes that before the arrival of law enforcement, Decedent was severely assaulted by one or more individuals (who were using boards as weapons) and appeared to be "pretty injured." Once on scene, Deputy Kasbaum placed Decedent in the back of Deputy Lee's marked vehicle **for Decedent's own protection**, to "deescalate the anger towards [Decedent] from the large crowd" nearby (who, according to Lee, were "threatening to be violent" to Decedent), and to keep the crowd from being able to get to [Decedent]." **[Dkt. #203, p. 4, ¶ 1; *see also* Dkt. #195-1, 115:18 – 117:5; 163:17 – 164:7; Dkt. #195-4, 176:2-25]**

2251, 2254 & 2258 (1988) (reiterating that "generally, a public employee acts under color of state law while acting in his official capacity"[3] **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 § 1983 claim], 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); *Screws v. U.S.*, 325 U.S. 91, 111 (1945) (holding "[i]t is clear that under 'color' of law means under 'pretense'[4] of law").[5]

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, where -- as here -- a defendant "is **possessed of state authority** and **purports**[6] **to act under that authority**, his authority is state action," and "[i]t 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 Maryland*, 84 S.Ct. 1770, 1772-73 (1964).

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)[7]; *see also Monroe v.*

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[3] "[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.).

[4] "Pretense" means "mak[ing] something that is not the case appear true." *See* https://www.scribd.com/doc/307402072/Word-Meanings. "Thus, one who is without actual authority, but who purports to act according to official power, may also act under color of state law." *Barna v. City of Perth Amboy*, 42 F.3d 809, 816 (3rd Cir. 1994); *citing Screws*, 325 U.S. at 111.

[5] The Magistrate erred in holding (or otherwise implying) that this rule only applies in cases "distinguishing **private action** from state action." *See, e.g., Romero v. Peterson*, 930 F.2d 1502 (10th Cir. 1991).

[6] "Purport" means "to have the often specious appearance of being." *See* https://www.merriam-webster.com/dictionary/purport.

[7] 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 & n. 4; *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**, **identified himself as such**, and **showed his**

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*, 2005 WL 3110991 at *10; *citing Griffin*, 378 U.S. at 135.[8]

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 officer **invoked police authority**." *Id.*; *citing Barna*, 42 F.3d at 818; *David v. City & Cnty of Denver*, 101 F.3d 1344, 1353 (10th Cir. 1996) (holding "[t]he under color of law determination **rarely depends on a single identifiable fact**"); *Barreto-Rivera v. Medina-Vargas,* 168 F.3d 42, 45 (1st Cir. 1999) (warning that "courts must avoid simplistic solutions," and that "[n]o single, easily determinable factor will control" determination); *Lugar*, 457 U.S. at 939 (holding that color

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police identification). "Manifestations of police authority may [also] include **flashing a police badge**, … **indicating that the officer is on official police business**, attempting to make an arrest[,] **placing an individual under arrest**[,]" or "**use of a police car**." *Jackson-Gilmore v. Dixon*, 2005 WL 3110991 *10 (E.D.Pa.); *Rivera v. La Porte*, 96 F.2d 691, 696 (2d Cir. 1990); and *Barna*, 42 F.3d at 816; *citing Lusby*, 749 F.2d 1423). Other factors one may consider when assessing whether an officer was acting "under color of state law" include the **existence of a regulation** addressing when officers are considered to be on duty or functioning as a department employee, the officer's **garb**, **duty status**, **use of police radio**, or **use of a service arm**, **weapon**, **handcuffs**, or **other traditional law-enforcement tools**. 14 C.J.S. Civil Rights § 403 & n. 6 (2025); *citing Gueits-Colon v. De Jesus*, 177 F.Supp.2d 128, 135 (D.P.R. 2001). *See also U.S. v. Sawyer*, 92 P.3d 707, 710 (Okla.Crim.App. 2004) (**asking a member of the public to sign form with police division name on it**); *Phipps v. State*, 841 P.2d 591, 593-94 & n. 1 (Okla.Crim.App. 1992) (**subjective belief of suspect** based on outward indicia); *see also Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980) (same).

[8] 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 part 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.

of law determination is a "necessarily fact-bound inquiry").

The issue of whether Defendants acted under color of state law presents a "mixed question of fact and law." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1156 (10th Cir. 2016). Where -- as here -- a rational juror could resolve the factual component of the "color of law" issue either way, summary judgment is improper. *Luke v. Hospital Shared Services, Inc.*, 2013 WL 1136937 *1 (10th Cir.); *citing* FED.R.CIV.P. 56(a). *Crowe v. ADT Sec. Servs., Inc.*, 649 F.3d 1189, 1194 (10th Cir. 2011).[9]

I. THE MAGISTRATE'S FINDING THAT DEFENDANTS "WERE NOT ACTING UNDER COLOR OF STATE LAW" WAS NOT THE PRODUCT OF AN INTENSELY "FACT-BOUND INQUIRY." RATHER, IT RELIED ON A SINGLE "DETERMINATIVE FACTOR," AND COMPLETELY IGNORED OVER TWO DOZEN HIGHLY-PERTINENT FACTS.

In responding to Defendants' summary judgment motions, Plaintiff separately set forth thirty-two (32) additional facts that bear upon the specific issue of whether Defendants Kasbaum, Lee, and Hannah (and former Defendant Kevin Storey) were acting under color of state law when they responded to the incident at Lori's Corner Store, conducted an investigation into what they purportedly suspected were violations of state law, and used constitutionally unreasonable force upon Decedent. **[Dkt. #203, pp. 16-21, ¶¶ 95-126; Dkt. #204, pp. 20-24, ¶¶ 95-126; *see also* Ex. 1]** Defendants did not dispute **any** of these facts. FED.R.CIV.P. 56(c). **[*See* Dkt. #214, p. 4, ¶ III; Dkt. #217, p. 12, ¶ B]** Nevertheless, in finding that Defendants "were not acting under color of state law," the Magistrate considered only five (5) of the above-referenced facts **[*see* Dkt. #224, p. 5; *citing* Fact Nos. 109, 118, 119, 124 & 125)]**, inexplicably ignoring the other twenty-seven (27) (rather than accepting Plaintiff's properly supported facts as true).[10] The Magistrate also

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[9] **Even if there were no material facts in dispute,** summary judgment must still 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, "the drawing of legitimate inferences from the facts [is a] jury function[], not th[at] 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).

[10] *See, e.g., Reed v. Nellcor Puritan Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002) (holding that courts must "accept as true all material facts asserted and properly supported in the summary judgment motion").

failed to draw all reasonable inferences in Plaintiff's favor[11] **[*see, e.g.*, Ex. 1, ¶ 103]**, impermissibly made credibility determinations **[*see, e.g.*, Ex. 1, ¶¶ 100, 101 & 122]**, and otherwise weighed and disregarded material evidence. [12] **[*See, e.g.*, Ex. 1, ¶¶102]**

Moreover, the finding that Defendants "were not acting under color of state law" focused exclusively on a single "determinative factor": The perceived interplay between Decedent's "status as a member of the Choctaw Nation" and Defendants' status as cross-commission holders. **[Dkt. #224, p. 13]** In adopting this blanket rule, the Court failed to conduct an intensely fact-bound, totality of the circumstances-style examination of the issue (as required by the U.S. Supreme Court and the Tenth Circuit). *See, e.g., Lugar,* 457 U.S. at 939; *David*, 101 F.3d at 1353. It also completely disregarded facts which, in the aggregate, clearly give rise to a triable issue. **[*See. e.g.*, Ex. 1, ¶¶ 96-103, 107-126; *see also* Dkt. #195-1, 111:24 – 112:2; Dkt. #195-9, 169:3-18]** Additionally, the Magistrate's perception of the interplay between Decedent's tribal membership and Defendants' status as cross-commission holders is out of step with the law, as described more fully below.

II. THE MAGISTRATE'S FINDING THAT DEFENDANTS "WERE NOT ACTING UNDER COLOR OF STATE LAW" ERRONEOUSLY RELIES UPON THE PREMISE THAT "STATE COURTS GENERALLY HAVE NO JURISDICTION TO TRY INDIANS FOR CONDUCT COMMITTED IN INDIAN COUNTRY."

This premise **[Dkt. #224, p. 6]** relies on *Ross v. Neff.* In *Oklahoma v. Castro v. Huerta*, 597 U.S. 629 (2022), however, the U.S. Supreme Court held that "a state has jurisdiction over all of its territory, including Indian country." It also **leaves unresolved** whether the State;s jurisdiction to prosecute Indians for crimes under the General Crimes Act is preempted. *State v. Brester*, 531 P.3d 125, 137-38 (Okla. Crim.App. 2023).

III. THE MAGISTRATE ERRED IN FINDING THAT ANY LAW ENFORCEMENT AUTHORITY EXERCISED BY DEFENDANTS IN RESPONDING TO THE INCIDENT AT LORI'S CORNER STORE WAS "DERIVED FROM THE CHOCTAW NATION, NOT THE STATE OF OKLAHOMA."

This premise **[Dkt. #224, p. 13]** erroneously presupposes that the existence of any tribal color necessarily results in the removal of all state color. This is not the case. **[*See* ¶ 5, *infra.*]**

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11 *See, e.g., Hiner v. Deere & Co.*, 340 F.3d 1190, 1192-93 (10th Cir. 2003).

12 *See, e.g., National American Ins. Co. v. American Re-Insurance Co.*, 358 F.3d 736, 742 (10th Cir. 2004) (holding that "on a motion for summary judgment we cannot evaluate credibility nor can we weigh evidence").

IV. THE MAGISTRATE'S HOLDING THAT DEFENDANTS CANNOT "WEAR TWO HATS" SIMULTANEOUSLY IS ERRONEOUS, BOTH FACTUALLY AND LEGALLY.

The Magistrate effectively held that Defendants cannot "wear two hats" (*i.e.*, state color and tribal color) simultaneously. **[Dkt. #224, pp. 10-11]** This holding disregards the factual evidence presented by Plaintiff. **[*See* Ex. 1, ¶¶ 96, 100 & 101; *see also* Dkt. #195-39, p. 4** (providing that when a McCurtian County deputy is providing assistance to other law enforcement agencies, "that officer will **[still] be governed** and protected by the policies and procedures of [MCSO]**]".**

The Magistrate's holding also runs afoul of the widespread understanding that "[c]ross deputization can give officers in the field authority under state, tribal, and federal law all at the same time," and that "a cross-deputized officer can have authority to simultaneously act as an officer under the state's law, the tribe's law, and the federal government's law. **[*See* Ex. 2]**

V. THE MAGISTRATE ERRED IN HOLDING THAT "NEITHER KASBAUM, LEE, OR HANNAH WERE EXERCISING POWER POSSESSED BY VIRTUE OF STATE LAW AND MADE POSSIBLE ONLY BECAUSE [THEY WERE] CLOTHED WITH THE AUTHORITY OF STATE LAW."

The Magistrate effectively held that if Defendants exercised any tribal authority, it result in the total absence of state color. **[Dkt. #224, p. 14]** The very nature of the cross-deputation, however, is that state and tribal authority must mutually co-exist. Defendants could not be cross-deputized with the tribe if they were not already state law enforcement officers.**[*See* Ex. 1, ¶ 96]** In other words, in order to exercise **any** tribal authority temporarily, Defendants had to simultaneously and consistently maintain their powers state law enforcement officers – powers conferred onto them by state law. **[*See* Dkt. #195-20, p. 6, n. 1; Dkt. #195-39, p. 4 (quoted in ¶ IV, *supra*); *see also* Ex. 1, ¶¶ 102 & 104]** *See also, generally,* 11 O.S. § 34-103(C).

Additionally, the cross-deputation agreement in this case is to be applied in accordance with the State-Tribal Relations Act. 74 O.S. § 1221. **[Dkt. #195-28, p. 2; Dkt. #195-38, p. 5]** A state law enforcement officer may enforce tribal law on lands within tribal jurisdiction pursuant to a tribal-state cooperative agreement under the STRA without offending Art. II, § 12 of the Oklahoma Constitution, though, only because it creates no new tribal office but only increases the authority of the state officer to enforce tribal laws. 1990 OK AG 32, 1991 WL 567868 * 8; *see also* 2000 OK AG 58, ¶ 14.

Moreover, a cross-deputation agreement alone is insufficient to transform a state officer into a tribal actor. *See Ouart 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").

Respectfully submitted:

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CERTIFICATE OF DELIVERY

I hereby certify that on July 23, 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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