IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1)	MARGIE M. ROBINSON, as the Personal Representative of the Estate of Christina Dawn Tahhahwah, Deceased,	)	
	Plaintiff,	)	
vs.		)	Case No. CIV-16-869-F
(1)	THE CITY OF LAWTON, OKLAHOMA *et al.*,	)	
	Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS ADAMSON, QUISENBERRY, CARNEY, SELLERS, McMILLION, HALLAGIN, AND FISHER'S MOTION AND BRIEF FOR SUMMARY JUDGMENT

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Dated this 24th day of August, 2018.

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Plaintiff, Margie M. Robinson, as the Personal Representative of the Estate of Christina Dawn Tahhahwah, Deceased, submits the following Response in Opposition to Defendants Adamson, Quisenberry, Carney, Sellers, McMillion, Hallagin, and Fisher's Motion and Brief for Summary Judgment [Doc. 96].

Response to LCvR 56.1(b) Statement

1. Robinson admits that Christina called the City of Lawton Dispatch at approximately 1:37 a.m., 3:19 a.m., and 5:18 a.m. Robinson admits that officers responded to the scene and that they took absolutely no action before leaving the scene. Robinson disputes that the officers appropriately assessed the situation. See Plaintiff's Statement of Disputed or Omitted Material Facts at ¶ 2, below.

2. Admitted but incomplete. During the 7:24 a.m. call, Christina was advised "you can get in trouble for calling on 9-1-1," and she responded by saying "you can get in trouble because I'm a US marshal." She also puts her grandfather (Edward Jerome Tahhahwah) on the line, who tells dispatch that Christina is in a bipolar state.[1]

3. Robinson denies that Adamson did not observe Christina in distress. During her radio contact with dispatch at 8:13:39, Officer Adamson said "Okay, she's like way worse today than yesterday."[2] During her radio contact with dispatch just a few minutes later at 8:32:54, Officer Adamson said "she's worse. Like way, way worse today." Officer

[1] Appendix, Exhibit 28 at 22-30. This transcript, along with dispatch notes, indicate that "Jeremy Day" was on the line. However, it is undisputed that the person who told dispatch Christina was in a bipolar state was Jerome Tahhahwah.

[2] Appendix, Exhibit 28 at p. 4; and see Exhibit 6 at 180:20-181:22

Adamson also explained that Christina "can barely breathe just sitting there. Like, literally. She's talking to us and then you know, after a couple of words she has to take a big 'ole breath." Christina told Adamson that she could not afford her medications, but Adamson believed that she could afford it she just chose not to purchase her medications.[3]

4. Robinson admits that Adamson and Breaden left Christina without obtaining any medical help for her and that she called the Lawton Police Department requesting an ambulance.

5. Admitted.

6. Denied as immaterial. There is no indication that any of the defendants knew about the outcome of Christina's trip to the hospital. Therefore they could not have relied on the hospital's conclusions. Indeed, "reliance on a medical professional's opinion does not foreclose a finding of deliberate indifference to a prisoner's serious medical needs in all circumstances." Vega v. Davis, 673 Fed. Appx. 885, 890–91 (10th Cir. 2016) (unpublished) (citing Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

7. Admitted.

8. Denied as immaterial. "'[M]edical treatment for inmates' ... psychological or psychiatric care' is included as part of the medical care a State is constitutionally obligated to provide to incarcerated persons." Langford v. Grady Cty. Det. Ctr., 670 F. Supp. 2d 1213, 1232–33 (W.D. Okla. 2009) (citing Ramos v. Lamm, 639 F.2d 559, 574 (10th Cir. 1980)). The defendants had a constitutional obligation to provide medical and mental

[3] Appendix, Exhibit 28 at p. 4; and see Exhibit 6 at 180:20-181:22

health care to Christina once she was arrested; whether or not she filled a prescription prior to her arrest is immaterial.

9. Denied as immaterial. There is no indication that any of the defendants knew about the outcome of Christina's trip to the hospital. Therefore they could not have relied on the hospital's conclusions. Indeed, "reliance on a medical professional's opinion does not foreclose a finding of deliberate indifference to a prisoner's serious medical needs in all circumstances." Vega v. Davis, 673 Fed. Appx. 885, 890–91 (10th Cir. 2016) (unpublished) (citing Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

10. Robinson disputes two portions of this paragraph:

a. **Robinson disputes that Jerome Tahhahwah and Anna Chalepah had the intent to arrest Christina.** Jerome Tahhahwah testified that Defendants Turner and Short told him and Anna that the only way the officers could take Christina in to Taliaferro was if they filled out this form. Jerome Tahhahwah testified: "I told them that Christina was going into a bipolar state and that – and ask them if they could take her to Taliaferro. I told them that Taliaferro had all – knew all about – all about her and they would take her in. And one of the officers said – scratching his head, you know, and he said, well, we can't take her in. And he said, the only way we could take her in is you'll have to file charges against her. And I said, well, what kind of charges can I file against her? And he said, well, he said, you can file trespassing. Okay. And then they said, yeah, okay, well, we'll sign the trespassing charges for you to get her out. And I told them, would

you – would you please take her to Taliaferro."[4] He explained that Defendants Turner and Short did wrong by "not taking her to Taliaferro like I requested them to do."[5]

b. **Robinson disputes that Christina was transported to the Lawton City Jail "without incident."** According to Defendant Short, Tahhahwah was nonresponsive to his questions for a few minutes.[6] According to Defendant Short, she had also defecated on herself.[7] She urinated on herself on the way to the jail.[8] Edward Jerome Tahhahwah, Christina's grandfather, told the officers that Christina was bi-polar, was off her medications, and she needed to go to Taliaferro.[9]

11. Robinson disputes that Hallagin planned to complete her booking process at a later time or allow someone else to complete the booking. There is evidence which demonstrates that he deliberately chose to disregard a serious and obvious risk to Christina's medical and mental health issues.

a. Hallagin does not know if he knew what constitutional rights a pretrial detainee has while detainees are incarcerated at the Lawton City Jail.[10]

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[4] Appendix, Exhibit 7 at 76:21-77:12

[5] Appendix, Exhibit 7 at 88:14-19

[6] Appendix, Exhibit 9 at 45:2-24

[7] Appendix, Exhibit 9 at 45:2-24

[8] Appendix, Exhibit 20

[9] Appendix, Exhibit 7 at 76:18-25

[10] Appendix, Exhibit 5 at 162:1-10

b. When Christina arrived at the Lawton City Jail, she had urinated and defecated on herself.[11] Hallagin did not ask her any questions about it and didn't ask the transporting officer or the arresting officer any questions about it. He didn't know if she was drunk or not.[12]

c. When Christina was booked into the jail, she wouldn't answer Hallagin's questions; she just kept repeating "chlamydia, chlamydia, chlamydia."[13] Her responses to his questions were just "nonsense."[14]

d. Hallagin chose not to ask Christina any questions about her medications or mental health condition.[15]

e. Hallagin learned that Christina was crying and asking about her medications from jailer Stacey McMillion. McMillion told Hallagin that Christina said the police officers kept her medications. When he learned about this, he did not inquire any further.[16] Hallagin chose to let Ms. Tahhahwah's medical condition be someone else's problem.[17]

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[11] See ¶ 10(b), above

[12] Appendix, Exhibit 5 at 142:1-21

[13] Appendix, Exhibit 5 at 122:2-10

[14] Appendix, Exhibit 5 at 143:22-144:1-3

[15] Appendix, Exhibit 5 at 108:18-109:22

[16] Appendix, Exhibit 5 at 117:4-16 and 121:1-8

[17] Appendix, Exhibit 5 at 121:22-122:1

12. Admitted. Defendant Stacey McMillion told Hallagin "I don't even know how to cuff her down, she's so big."[18]

13. Admitted.

14. Disputed. Defendant Sellers' testimony is unreliable and can be rejected by the jury. See Response to ¶¶ 20 and 21, below. It is important to note that after Christina was restrained during this time frame (November 13, 2014 at approx. 2:30 p.m.), officers and jailers made fun of her on video. One of the officers or jailers asked what her problem was, and the response was "She's a Tahhahwah!"[19] According to Hallagin, this cannot be interpreted any way other than in a derogatory manner.[20] One officer said "I've got PTSD."[21] Lt. Terry Sellers and the Watch Commander were present.[22]

15. Disputed. See ¶ 14, above.

16. Admitted but the Defendants have omitted a material fact. When Christina was released from handcuffs at approximately 1:45 a.m., Lt. Carney gave a very clear reason why she was released: the handcuffs were "too tight."[23] Robinson admits that

[18] Appendix, Exhibit 12 at 0:29:00 – 0:31:00; see also Appendix, Exhibit 18

[19] Appendix, Exhibit 5 at 134:10-135:15; see also Appendix, Exhibit 12 at 0:36:30-0:37:30

[20] Appendix, Exhibit 5 at 134:10-135:15

[21] Appendix, Exhibit 5 at 138:17-22

[22] Appendix, Exhibit 5 at 148:14-22

[23] Appendix, Exhibit 13; see also Appendix, Exhibit 18

Christina was only handcuffed about 40 minutes during the 1:00 a.m. hour. Robinson also admits that Christina was only handcuffed about 45 minutes during the 3:00 a.m. hour.

17. Denied as immaterial. It had been several years since Christina was booked into the Lawton City Jail.[24] Lt. Carney and Lt. Sellers do not provide any details about any prior cuffing incident. For example, neither person identifies what year any such cuffing occurred, how long the cuffing lasted, what position Christina was cuffed in, whether she arrived at the jail covered in her own urine and feces, gave "nonsense" answers to questions, continually repeated the word "chlamydia," or cried and talked about the police having her medication. There is also no indication as to whether her hands had ever turned purple during these purported cuffing incidents.[25] There is no description to show that these past incidents were in any way similar to what occurred on November 14, 2014.

18. Denied as immaterial. See ¶ 17, above.

19. Disputed. It is not possible to hear what is said in the jail video. However, Terry Sellers' credibility is severely compromised (see ¶¶ 20 and 21, below) and his testimony about asking Christina if she was "comfortable" could reasonably be rejected by a jury. Furthermore, the video does not appear to show Sellers checking the tightness of the handcuffs.[26] The video also shows Lt. Troy Carney pointing a yellow device that

[24] Appendix, Exhibit 20 (City of Lawton's Response to Request for Admission No. 10)

[25] Doc. 96-10 at 20

[26] Appendix, Exhibit 23; see also Exhibit 18

appears to be a Taser towards Christina.[27] The jail's taser log does not reflect that a taser was fired.

20. Disputed. Robinson acknowledges that Sellers provided this testimony. However, the jail video totally contradicts his testimony. Shortly after the beginning of the 8:00 a.m. video, Stacey McMillion can be heard saying "Christina. She keeps shaking 'em and moving 'em where they're turning red."[28] She then returns to the cell run and observes Christina again; she comes back into the booking area and says "Hey LT [Lieutenant Sellers], we'll have to loosen Christina's a little bit . . . because [her hands are] turning colors." Sellers responds and says to let her out, but tell her if she does it again she'll be cuffed again.[29] McMillion and Stewart (black male jailer) then go and release Christina from her cuffs. Sellers does not participate.

21. Disputed. See ¶ 20, above.

22. Admitted.

23. Admitted.

24. Admitted.

25. Disputed. Defendants have cited to the affidavit of Darla Tosta. Darla Tosta is not identified as a witness on the Defendants' Final Witness List.[30] Accordingly, they

[27] Appendix, Exhibit 23; see also Exhibit 18

[28] Appendix, Exhibit 14 at 0:00:00 – 0:00:30; see also Appendix, Exhibit 18

[29] Appendix, Exhibit 14 at 0:03:10 – 0:03:35; see also Appendix, Exhibit 18

[30] See Doc. 85

cannot rely on her affidavit, which is inadmissible hearsay if she does not testify at trial. To the extent that this paragraph makes allegations based on Tosta's affidavit, those allegations are therefore disputed as inadmissible. Robinson admits that Tosta, an inmate, was assigned to monitor the area. Oklahoma jail regulations prohibit an inmate supervising another inmate. "A prisoner shall be prohibited from supervising, controlling, exerting or assuming any authority over another prisoner."[31]

26. Disputed. Defendants have cited to the affidavit of Darla Tosta. Darla Tosta is not identified as a witness on the Defendants' Final Witness List.[32] Accordingly, they cannot rely on her affidavit, which is inadmissible hearsay if she does not testify at trial. To the extent that this paragraph makes allegations based on Tosta's affidavit, those allegations are therefore disputed as inadmissible. Robinson admits that McMillion went into the cell run on three occasions. Before McMillion entered on the final occasion, the jail video shows Tosta massaging Christina's hands. Tosta and McMillion then appear to have an animated conversation.[33] This evidence contradicts McMillion's testimony Christina was not in any distress in the handcuffs.

27. Disputed. Defendants have cited to the affidavit of Darla Tosta. Darla Tosta is not identified as a witness on the Defendants' Final Witness List.[34] Accordingly, they

[31] Oklahoma Administrative Code ("OAC") 310:670-5-3(h).

[32] See Doc. 85

[33] Appendix, Exhibit 16 at 0:00:30 – 0:01:45; see also Exhibit 18

[34] See Doc. 85

cannot rely on her affidavit, which is inadmissible hearsay if she does not testify at trial. To the extent that this paragraph makes allegations based on Tosta's affidavit, those allegations are therefore disputed as inadmissible. Furthermore, Robinson disputes that Tosta "immediately notified the jailers" because it implies the jailers were paying attention. To the contrary, jail video shows that it took numerous attempts for Tosta to get anyone's attention.[35] Sellers takes nearly four minutes to respond to the cell run after Tosta first knocks on the jail door.[36] Robinson admits that once Sellers finally went back to the cell area, he "found that Christina had scooted her back away from the bars and was unresponsive." Robinson admits that McMillion was in the cell run approximately 20 minutes before the trustee notified jailers that Christina had stopped talking and her hands turned blue. However, the jail cell video shows that moments before McMillion entered the cell area at that time, Tosta was rubbing Christina's hands and Tosta appears to get into an animated conversation with McMillion when some comes into the cell area.[37]

28. Denied as irrelevant.

29. Admitted.

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[35] Appendix, Exhibit 17 at 0:03:10 – 0:06:50; see also Appendix, Exhibit 18

[36] Appendix, Exhibit 17 at 0:03:10 – 0:06:50; see also Appendix, Exhibit 18

[37] See ¶ 26, above

Plaintiff's Statement of Disputed or Omitted Material Facts

1. Christina Tahhahwah was 5'3" and weighed 374 pounds. She had a body mass index (BMI) of 66. She would be considered severely morbidly obese.[38]

2. Christina's phone calls to the City of Lawton Dispatch reflect her deteriorating mental and physical health condition. On November 13, 2014 at approximately 1:37 a.m., Christina stated that she was about to kill her aunt, Anna Chelepah.[39] On that same night at 3:19 a.m., Christina called crying and asking for her husband to come and pick her up.[40] The dispatcher noted that Christina was "not making sense."[41] Christina called again at about 5:18 a.m. and said she may need to go back to the hospital.[42] This evidence, when considered together with other evidence in the summary judgment record about Christina's behavior and complaints, contradicts the officers' testimony that Christina was coherent and in no distress.

3. According to the Oklahoma Department of Health Jail Standards, "Prisoners who are mentally ill shall be separated from other prisoners. Every effort shall be made to contact a local hospital, clinic or mental health facility for the detention of the mentally

[38] Appendix, Exhibit 2 at 2

[39] Doc. 92 at 7, ¶ 1

[40] Doc. 92 at 8, ¶ 4

[41] Appendix, Exhibit 29

[42] Doc. 92 at 10, ¶ 9

ill."[43] Christina was not separated from other prisoners and the defendants made *no effort* to contact a local hospital, clinic, or mental health facility after Christina was arrested.

4. The City of Lawton Police Department's Policies and Procedures on Mental Health Offenders states as follows: "If an officer takes a person who appears to be mentally ill into custody after that person has committed a misdemeanor crime where charges might be filed, he will take the person to Taliaferro, inform the staff at Taliaferro that charges are pending including what the charges are, complete an EOD form, and request that the person be evaluated as soon as possible."[44]

5. The Lawton City Jail Policy and Procedures state that "It is recognized by the Lawton Police Department that the Lawton City Jail is not designed or staffed to house the mentally ill."[45]

6. Despite the jailers' knowledge of Christina's need for medications,[46] their knowledge that she urinated and defecated on herself,[47] none of the jailers performed a medical or mental health screening of Christina Tahhahwah at the time she was booked into the jail on November 13, 2014.[48] None of the jailers performed a medical or mental

[43] OAC 310:670-5-5(6).

[44] Doc. 95-25 at 4

[45] Appendix, Exhibit 24

[46] See ¶ 11, above

[47] See ¶ 11, above

[48] Appendix, Exhibit 21, Request for Admission No. 2

health screening of Christina Tahhahwah ***after*** she was booked into the Lawton City Jail and before she was reported as unresponsive.[49]

7. Christina was restrained on five occasions, but on none of those occasions was she restrained for more than one hour *except* on the fifth (and final) occasion, when she was restrained for approximately 1 hour and 16 minutes (from 11:48 a.m. to 1:04 p.m.).[50]

8. The Lawton City Jail's policies and procedures state that "The use of restraint equipment shall not be a means of punishment or discipline. When such devices are used, the inmate will be properly supervised."[51] The Lawton City Jail's policies and procedures state that "The use of restraint equipment is prohibited except when: A. The inmate is being transferred. B. The inmate attempts to hurt himself or others. C. The inmate is destructive to property. D. A medical authority has given approval."[52] According to Oklahoma Department of Health Jail Standards, a restraint to prevent prisoner self-injury, injury to others, or injury to property is only appropriate "with the approval of the jail administrator or designee."[53]

[49] Appendix, Exhibit 21, Request for Admission No. 3

[50] Doc. 96-11

[51] Appendix, Exhibit 26

[52] Appendix, Exhibit 26

[53] OAC 310:670-5-2(24)

9. The Lawton City Jail's written policies and procedures do not define how long any particular restraint may be applied to a detainee or inmate. Sellers restrained Christina for the length of time that he did because his on-the-job training told him that he could restrain inmates anywhere from one to two hours.[54] Sellers does not recall if the training mentioned that an inmate's size has any bearing on the length of time restraint is appropriate.[55] He is sure that he has had classes on the use of restraints in 19 years, but he doesn't recall anything specific.[56] He cannot recall anything specific that has changed over the course of the last 19 years in how he is supposed to restrain people.[57]

10. According to W. Ken Katsaris, the use of handcuffs to restrain a person to the cell bars "is barbaric and not a recognized, trained or accepted corrections practice."[58] He testified: "This practice of cuffing to the bars has not been used anywhere in the country that I am aware of, and I've consulted with hundreds of jails throughout the country from the world's largest jail, Los Angeles County Jail, to the smallest lockup. And, I have trained thousands of jail officers, commanders, and sheriffs throughout the nation for over 30 years – and obviously being aware of this dangerous practice not being used, or trained. It is not

[54] Appendix, Exhibit 3 at 62:13-63:1

[55] Appendix, Exhibit 3 at 62:24-63:3

[56] Appendix, Exhibit 3 at 63:4-15

[57] Appendix, Exhibit 3 at 63:16-19

[58] Appendix, Exhibit 1 at 9

a practice that any of the professional correctional organizations, such as the American Corrections Association, endorse, recommend, or for that matter even mention."[59]

11. The restraint chair is "the only safe available mechanism to use for restraint under Christina's circumstances."[60] Jailer Daniel Hallagin testified that the jail had a restraint chair at the time that was sitting in the closet collecting dust.[61] Hallagin said there was no policy on the proper use of the restraint chair in place so it could not be used.[62] However, Lt. Sellers testified that the jail did not obtain a restraint chair until after Christina's death.[63]

12. Law enforcement personnel in Oklahoma who attend CLEET are trained on Sudden In-Custody Death Syndrome. They learn through CLEET that there are a number of predisposing factors associated with Sudden In-Custody Death Syndrome, including a history of alcoholism, bizarre behavior, aggressive behavior, shouting, intensive physical activity, obesity, "Big Bellies," and antipsychotic drug use.[64] Law enforcement officers are also taught that "Respiratory Compromise may cause death through Positional Asphyxia (Hypoxia) when the position of the subject's body interferes with the muscular or

[59] Appendix, Exhibit 1 at 10

[60] Appendix, Exhibit 1 at 9

[61] Appendix, Exhibit 5 at 112:5-8

[62] Appendix, Exhibit 5 at 112:5-13

[63] Appendix, Exhibit 3 at 113:11-15

[64] Appendix, Exhibit 27 at 2

mechanical elements of respiration. This interference can result from a compromise to the air way or from a combination of these factors."[65] Officers are also taught that one area for concern in positional asphyxiation "is the diaphragm and lungs. The primary concern with the lungs involves the ability for adequate expansion of the ribcage. . . .When the diaphragm is unable to perform properly by displacing abdominal viscera, there is an insufficient amount of air inhaled."[66]

13. Defendant Sellers and McMillion both have been trained about positional asphyxiation.[67]

14. Defendant Sellers knew that "any labored breathing . . . would have been a red flag for me."[68]

15. Defendants Sellers' and McMillion's biased, interested testimony that Christina did not have any labored breathing can be rejected. There is substantial evidence that Christina had labored breathing, not the least of which being that she weighed almost 400 pounds. There is more specific evidence than this. Just the day before, Defendant Lindsey Adamson observed Christina sitting in a chair at her home and noticed that Christina "can barely breathe just sitting there. Like, literally. She's talking to us and then

[65] Appendix, Exhibit 27 at 5

[66] Appendix, Exhibit 27 at 1

[67] Appendix, Exhibit 3 at 109:15-24; Appendix, Exhibit 4 at 122:16-19

[68] Appendix, Exhibit 3 at 53:17-19

you know, after a couple of words she has to take a big 'ole breath."[69] A reasonable jury could conclude that Christina's "literal" inability to breathe did not just go away after a few hours. Furthermore, Defendant Sellers and McMillion have proven to be completely untrustworthy witnesses as described herein. See ¶ 20-21, above.

16. The restraint of Christina for an hour and sixteen minutes by handcuffing her to the jail cell bars in a compromising position caused her death.[70]

Argument and Authorities

I. DEFENDANTS VIOLATED CHRISTINA TAHHAHWAH'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO BE FREE FROM EXCESSIVE FORCE.

Defendants assert that they are entitled to qualified immunity from Robinson's claim for excessive force. They assert that they did not violate Christina's constitutional rights and, even if they did, the rights that they violated were not clearly established. [Doc. 96 at 44]. Contrary to their assertions, Defendants used excessive force in violation of Christina's Fourth Amendment right to be free from unreasonable seizures. This constitutional right was clearly established in November 2014. Defendants are not entitled to qualified immunity.

In order to evaluate a claim arising under 42 U.S.C. § 1983, the Court must first identify the source of the constitutional right at issue. In this case, Robinson's claim of excessive force arises out of the Fourth Amendment. This is so because "the Fourth

[69] Appendix, Exhibit 28 at p. 4; and see Exhibit 6 at 180:20-181:22

[70] Appendix, Exhibit 2

Amendment, not the Fourteenth, governs excessive force claims arising from 'treatment of [an] arrestee detained *without a warrant*' and '*prior to* any probable cause hearing.'" Estate of Booker v. Gomez, 745 F.3d 405, 419 (10th Cir. 2014) (citing Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991) (emphasis added by Booker Court), *abrogated on other grounds by* Johnson v. Jones, 515 U.S. 304 (1995)); see also Frohmader v. Wayne, 958 F.2d 1024, 1026 (10th Cir. 1992) (holding that Fourth Amendment applies to excessive force claim of arrestee booked into jail without a judicial determination of probable cause). Christina was detained in the Lawton City Jail without a warrant and prior to any probable cause hearing.

"Under the Fourth Amendment, the question is whether the defendants' actions were 'objectively unreasonable' in light of the facts and circumstances confronting them, without regard to underlying intent or motivation." Frohmader, 958 F.2d at 1026. "Reasonableness must be viewed from the perspective of the defendants on the scene rather than with the '20/20 vision of hindsight.'" Id. The reasonableness test "is not capable of precise definition or mechanical application." Graham v. Connor, 490 U.S. 386, 396 (1989). "[I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [she] is actively resisting arrest or attempting to evade arrest by flight." Id.

The use of force to restrain an individual who, like Christina, has been arrested but has not yet been arraigned, cannot be unreasonable nor can it move into the realm of punishment without violating well established rights. It was unconstitutional in November

2014 to use restraints/force to punish a pretrial detainee. Bell v. Wolfish, 441 U.S. 520 (1979). It was also clearly established that Christina was not a pretrial detainee, such that her right to be free from excessive force arose from the Fourth Amendment.

All defendants are responsible for an excessive use of force in this case because they either participated, or failed to intervene, in the restraint of Christina Tahhahwah with handcuffs to the jail cell bars. This was patently unreasonable from an objective standard. The use of handcuffs to restrain a person to the cell bars "is barbaric and not a recognized, trained or accepted corrections practice," according to police expert W. Ken Katsaris. This practice "has not been used anywhere in the country that I am aware of, and I've consulted with hundreds of jails throughout the country from the world's largest jail, Los Angeles County Jail, to the smallest lockup. And, I have trained thousands of jail officers, commanders, and sheriffs throughout the nation for over 30 years – and obviously being aware of this dangerous practice not being used, or trained. It is not a practice that any of the professional correctional organizations, such as the American Corrections Association, endorse, recommend, or for that matter even mention."[71] The only safe way to restrain Christina was through a restraint chair.[72] The use of handcuffs in this manner was *never* constitutionally permissible, as it is not recognized in the corrections field and very dangerous, especially for individuals like Christina.

[71] Plaintiff's SOF at ¶ 10

[72] Plaintiff's SOF at ¶ 10

Beyond this, Defendants Sellers and McMillion are also specifically liable for their excessive force against Christina by leaving her restrained from 11:48 a.m. to 1:04 p.m. on November 14, 2014. It is well established that "unduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight." Cortez v. McCauley, 478 F.3d 1108, 1129 (10th Cir. 2007). In this case, the handcuffs were obviously too tight around Christina's wrists after about forty-fifty minutes. Defendant Carney recognized this overnight when Christina was released from the Second Restraint because the cuffs were too tight.[73] This was after about forty minutes. McMillion recognized that the cuffs were too tight at about 8:15 a.m. and that the blood flow to Christina's hands was altered. Christina was restrained on five occasions, but on none of those occasions was she restrained for more than one hour *except* on the fifth (and final) occasion, when she was restrained for approximately 1 hour and 16 minutes (from 11:48 a.m. to 1:04 p.m.).[74]

McMillion and Sellers were therefore "otherwise made aware" that Christina's handcuffs would be too tight after 40-50 minutes, but they left her restrained for an hour and sixteen minutes, without any justification. Cf. Bell v. Wolfish, 441 U.S. 520 (1979) (holding that pretrial detainees may not be punished). Worse than this, they left her unsupervised by trained staff at the critical time (after the 50-minute mark), with only

[73] SOF at ¶ 16

[74] Plaintiff's SOF at ¶ 7

another inmate to watch over her. Oklahoma jail regulations prohibit one inmate from supervising another.

Christina also suffered from an actual injury, in that she died from a result of the compromised position she was put in by Sellers and McMillion.[75] Sellers and McMillion certainly knew that there was a serious risk of harm to Christina and totally/unreasonably abdicated their responsibility to supervise her during the most critical point in time while she was restrained. See Argument and Authorities, § II-III, below.

A reasonable corrections officer would have known that Christina posed serious risk factors for death in this restraint position. Officers learn that there are a number of predisposing factors associated with Sudden In-Custody Death Syndrome, including a history of alcoholism, bizarre behavior, aggressive behavior, shouting, intensive physical activity, obesity, "Big Bellies," and antipsychotic drug use. Law enforcement officers are also taught that "Respiratory Compromise may cause death through Positional Asphyxia (Hypoxia) when the position of the subject's body interferes with the muscular or mechanical elements of respiration. This interference can result from a compromise to the air way or from a combination of these factors." They are also taught that one area for concern in positional asphyxiation "is the diaphragm and lungs. The primary concern with the lungs involves the ability for adequate expansion of the ribcage. . . .When the diaphragm is unable to perform properly by displacing abdominal viscera, there is an

[75] Plaintiff's SOF at ¶ 16

insufficient amount of air inhaled."[76] Defendant Sellers and McMillion both have been trained about positional asphyxiation.[77]

Christina's constitutional rights were clearly established in November 2014. In Fisher v. City of Las Cruces, 584 F.3d 888 (10th Cir. 2009), the Tenth Circuit confronted a situation where officers used force when the subject was "no longer a threat to himself, others, or the officers," and where the plaintiff was obviously injured from self-inflicted gunshot wounds. The Tenth Circuit held that "It is long established law of this and other circuits that a triable claim of excessive force exists where a jury could reasonably conclude that the officer handled a cooperating arrestee in a manner that the officer knew posed a serious risk of exacerbating the arrestee's injuries, which were themselves known to the officer." Id. at 901. This situation is very similar in that Sellers and McMillion knew the duration of handcuffing posed a serious risk to Christina, see id. at 894 (noting that "the justifiable initial use of handcuffs can become unreasonable if other factors, such as prolonged duration, affect the balance of interests under Graham"), because her hands hand previously turned purple and because of the risk factors she had for positional asphyxiation that a reasonable officer would have known about.

Defendants Sellers and McMillion are not entitled to qualified immunity. Robinson has established a triable claim of excessive force for their restraint of Christina from 11:48 a.m. to 1:04 p.m.

[76] Plaintiff's SOF at ¶ 12

[77] Plaintiff's SOF at ¶ 13

II. DEFENDANT HALLAGIN AND McMILLION VIOLATED CHRISTINA TAHHAHWAH'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO MEDICAL AND MENTAL HEALTH CARE WHILE A PRETRIAL DETAINEE – MENTAL HEALTH TREATMENT

"The Fourteenth Amendment's Due Process Clause entitles pretrial detainees to the same standard of medical care owed to convicted inmates under the Eighth Amendment." Rife v. Okla. Dep't of Pub. Safety, 854 F.3d 637, 647 (10th Cir. 2017).[78] "Thus, the Fourteenth Amendment is violated if state officials are deliberately indifferent to a pretrial detainee's serious medical needs." Id. There is a two-prong test for deliberate indifference claims. Farmer v. Brennan, 511 U.S. 825, 834 (1994). "Under this test, a plaintiff must satisfy an objective prong and a subjective prong." Rife, 854 F.3d at 647. "The objective prong concerns the severity of a plaintiff's need for medical care; the subjective prong concerns the defendant's state of mind." Id.

"The objective prong of the deliberate indifference test examines whether the prisoner's medical condition was 'sufficiently serious' to be cognizable under the Cruel and Unusual Punishment Clause." Al-Turki v. Robinson, 762 F.3d 1188, 1192 (10th Cir. 2014) (internal citation omitted). "A medical need is considered sufficiently serious to satisfy the objective prong if the condition 'has been diagnosed by a physician as mandating treatment or is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Id. at 1192-93.

[78] The Fourteenth Amendment applies to Robinson's claim for denial of medical/mental health care treatment even though a judge had not ever made a probable cause determination. Barrie v. Grand County, Utah, 119 F.3d 862 (10th Cir. 1997).

Here, Robinson alleges that Hallagin and McMillion denied Christina mental health care treatment for her bipolar disorder. Her bipolar disorder had been diagnosed by a physician as mandating treatment.[79] Just two days before, she had been treated by a physician who reported she was in a "fairly manic state."[80] The physician administered 20mg of an antipsychotic medication intramuscularly.[81] The physician also prescribed Risperdal for her bipolar disorder.[82] Under settled precedent, Christina's need for medication is clearly "sufficiently serious" under the Fourteenth Amendment. For example, in Olsen v. Layton Hills Mall, the Tenth Circuit held that the issue of "sufficiently serious" should be sent to a jury when the plaintiff had "a medically diagnosed condition of obsessive-compulsive disorder." 312 F.3d 1304, 1310 (10th Cir. 2002). The plaintiff suffered a panic attack on en route to the jail and was forced to remove his shoes and socks, despite his "fear of contamination from the dirty floor." Id.

Robinson's claim against Hallagin and McMillion is similar. In this case, Christina is not alive to testify about the suffering that she endured between the date of her incarceration and her death. However, there is record evidence establishing that she badly needed medication. For example, her grandfather Jerome Tahhahwah testified that she was

[79] SOF at ¶ 7

[80] SOF at ¶ 7

[81] SOF at ¶ 7

[82] SOF at ¶ 7

off of her medications and needed to go to Taliaferro because she was in a bipolar state.[83] She arrived at the jail after having defecated and urinated on herself, indicating she could not take care of her own basic needs.[84] When she arrived at the jail, she was spouting "nonsense" and repeatedly saying "chlamydia, chlamydia, chlamydia."[85] Shortly after she was booked in, she was crying and asking for her medication.[86] Her mood then apparently changed, as she started banging on the bunk so hard that the jailers thought she may hurt herself.[87]

Defendants Hallagin and McMillion attempts to insulate themselves from liability because Christina did not fill her own prescription and because her family did not fill her prescription.[88] This is immaterial. "'[M]edical treatment for inmates' ... psychological or psychiatric care' is included as part of the medical care a State is ***constitutionally obligated*** to provide to incarcerated persons." Langford v. Grady Cty. Det. Ctr., 670 F. Supp. 2d 1213, 1232–33 (W.D. Okla. 2009) (citing Ramos v. Lamm, 639 F.2d 559, 574 (10th Cir. 1980)) (emphasis added by the undersigned).

[83] SOF at ¶ 10

[84] SOF at ¶ 10

[85] SOF at ¶ 11

[86] SOF at ¶ 11

[87] Doc. 96-11

[88] Doc. 96 at 10, ¶ 8

Accordingly, under well settled precedent, Christina's medical condition—bipolar disorder—was sufficiently serious under the Fourteenth Amendment. The next step in this claim requires an assessment of Hallagin's and McMillion's subjective state of mind. "The subjective prong is satisfied only if the defendant knew of an excessive risk to the plaintiff's health or safety and disregarded that risk." Rife, 854 F.3d at 647. "In deciding whether this prong is satisfied, the factfinder may consider circumstantial evidence." Id. "[T]he existence of an obvious risk to health or safety may indicate awareness of the risk." Id.

Once again, Olsen is instructive. In Olsen, the Tenth Circuit held that material fact disputes existed on the question of the officer's subjective disregard of a serious medical need. "Appellant's allegation that he twice told Officer King that he was having a panic attack, coupled with Officer King's admission that Appellant mentioned prior health problems, together signify that Officer King *may have known of*—and disregarded—and excessive risk to Appellant's health. This is for a jury to decide." Olsen, 312 F.3d at 1317.

Here, there is substantial evidence that Hallagin and McMillion knew of and disregarded an excessive risk to Christina's health and safety. When Christina arrived at the Lawton City Jail, she had urinated and defecated on herself. Hallagin did not ask her any questions about it and didn't ask the transporting officer or the arresting officer any questions about it. He didn't know if she was drunk or not.[89]

When Hallagin booked Christina into the jail, she wouldn't answer Hallagin's questions; she just kept repeating "chlamydia, chlamydia, chlamydia." Her responses to

[89] SOF at ¶ 11

his questions were just "nonsense." Hallagin chose not to ask Christina any questions about her medications or mental health condition. Although he did not initially ask about medications, Hallagin later learned that Christina was crying and asking about her medications from jailer Stacey McMillion. McMillion told Hallagin that Christina was crying so hard and that the police officers kept her medications. When he learned about this, he did not inquire any further. Hallagin chose to let Ms. Tahhahwah's medical condition be someone else's problem.[90] McMillion did not take any action either.

Hallagin's and McMillion's mindset of deliberate indifference is also apparent from the hostile attitude of the jailers and officers who came in to restrain Christina on November 13, 2014. One of the officers or jailers asked what her problem was, and the response was "She's a Tahhahwah!"[91] According to Hallagin, this cannot be interpreted any way other than in a derogatory manner. One officer said "I've got PTSD." Lt. Terry Sellers and the Watch Commander were present.[92]

Hallagin and McMillion did not simply ignore Christina's serious medical needs, they "completely refused to assess" her mental health care condition. No person ever completed a mental health screening of Christina while she was incarcerated.[93] This exacerbating factor highlights their deliberate indifference. See, e.g., Mata v. Saiz, 427

[90] SOF at ¶ 11

[91] Hallagin testified that he wasn't sure if he said this or not, but it is clear from listening to the recording that it was Hallagin who did in fact make this response.

[92] SOF at ¶ 14

[93] Plaintiff's SOF at ¶ 6

F.3d 745, 758 (10th Cir. 2005) (noting that defendant "did not simply misdiagnose Ms. Mata; rather, she completely refused to assess or diagnose Ms. Mata's medical condition at all").

Hallagin and McMillion also argue that even if they violated Christina's constitutional rights, the law was not clearly established in November 2014. This position must be rejected. "The right to custodial medical care is clearly established." Olsen, 312 F.3d at 1315. Olsen is very similar to this case factually, and that case alone gave Hallagin and McMillion sufficient notice to know that he could not ignore Christina's obvious need for mental health treatment. See Ramos v. Lamm, 639 F.2d 559, 574–75 (10th Cir. 1980) (recognizing that jailers have "a constitutional obligation" to provide detainees with "routine and emergency . . . psychological or psychiatric care").

Robinson's evidence is sufficient to show that Christina had a sufficiently serious medical condition (bipolar disorder) for which a physician had mandated treatment (antipsychotic medication). Hallagin and McMillion denied her treatment for this condition and, as a result, she suffered mental and psychiatric pain until her death. Hallagin and McMillion knew of her condition and consciously chose to disregard it, concluding that her "problem" was that she was "a Tahhahwah!" Hallagin's and McMillion's motion for summary judgment as to this claim should be denied.

III. DEFENDANT SELLERS AND McMILLION VIOLATED CHRISTINA TAHHAHWAH'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO MEDICAL AND MENTAL HEALTH CARE WHILE A PRETRIAL DETAINEE - DEATH

In addition to her claim against Hallagin and McMillion for deliberate indifference to Christina's bipolar disorder, Robinson has also brought a claim against Sellers and McMillion for deliberate indifference to Christina's serious risk of death. It is clear that death satisfies the objective component of the deliberate indifference test. Thus, the question that must be addressed is whether Defendants Sellers and McMillion knew of a substantial risk of excessive harm to Christina from leaving her restrained in handcuffs for an hour and sixteen minutes. The evidence in the record would allow a reasonable jury to conclude that they did know of such a risk and deliberately disregarded it.

As stated above, in order to satisfy the subjective element of the deliberate indifference test, Robinson must show "that the prison official acted or failed to act despite his knowledge of a substantial risk of serious harm." Estate of Booker v. Gomez, 745 F.3d 405, 430 (10th Cir. March 11, 2014). "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in usual ways, including inference from circumstantial evidence." Farmer v. Brennan, 511 U.S. 825, 842 (1994). "Although not dispositive, an official's training may undermine his or her claim that he or she was unaware of such a risk." Estate of Booker, 745 F.3d at 430; see also Mata, 427 F.3d at 757-758 ("While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm."). Defendants also cannot

"avoid liability" by "fail[ing] to check . . . vitals" or take other steps to verify what they strongly suspect is true. Id. at 432. Furthermore, the fact that Defendants Sellers and McMillion ultimately rendered health care is immaterial. Id. at 433 ("the Defendants' eventual provision of medical care does not insulate them from liability").

In this case, there are material factual disputes that must be resolved by a jury about Defendants' Sellers and McMillion's knowledge about the risk that Christina faced of death. First, the training materials for law enforcement officers are relevant. Officers learn that there are a number of predisposing factors associated with Sudden In-Custody Death Syndrome, including a history of alcoholism, bizarre behavior, aggressive behavior, shouting, intensive physical activity, obesity, "Big Bellies," and antipsychotic drug use. Law enforcement officers are also taught that "Respiratory Compromise may cause death through Positional Asphyxia (Hypoxia) when the position of the subject's body interferes with the muscular or mechanical elements of respiration. This interference can result from a compromise to the air way or from a combination of these factors." They are also taught that one area for concern in positional asphyxiation "is the diaphragm and lungs. The primary concern with the lungs involves the ability for adequate expansion of the ribcage. . . .When the diaphragm is unable to perform properly by displacing abdominal viscera, there is an insufficient amount of air inhaled."[94] Defendant Sellers and McMillion both have been trained about positional asphyxiation.[95]

[94] Plaintiff's SOF at ¶ 12

[95] Plaintiff's SOF at ¶ 13

Christina had a number of predisposing factors associated with Sudden In-Custody Death Syndrome, including a history of alcoholism, bizarre behavior, aggressive behavior, shouting, intensive physical activity (banging the bed hard enough to break it), obesity, a "Big Belly," and antipsychotic drug use. These risk factors were obvious and apparent to Defendants Sellers and McMillion.

Defendants Sellers and McMillion also knew that Christina could not maintain a comfortable position in the restraint position for an hour and sixteen minutes. This is clear because they knew that, after about 50 minutes earlier on the morning of November 14, 2014, Christina's hands turned colors.[96] They therefore chose to leave Christina in a very vulnerable and dangerous position, one where there were obvious and serious risks to her hands, with the blood flow being cut off to her hands. The other jailers' experience is consistent and shows that ***it was obvious Christina could not physically handle being cuffed for more than an hour***. Indeed, as Lt. Troy Carney stated in the jail video after about 40 minutes, it was necessary to release the cuffs because they were "too tight."[97]

Lt. Sellers and McMillion have testified that they did not notice any problems with Christina's breathing while she was restrained. The jury is not required to believe this testimony even though there is no direct evidence that Christina was struggling to breathe. "Generally, a jury may not reject testimony that is uncontradicted and unimpeached (directly, circumstantially, or inferentially) unless credibility is at issue." Quintana-Ruiz v.

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[96] SOF at ¶ 20

[97] SOF at ¶ 16

Hyundai Motor Corp., 303 F.3d 62, 75-76 (1st Cir. 2002). "Juries, for instance, may reject uncontradicted, unimpeached testimony when it is improbable, inherently contradictory, riddled with omissions, or delivered in a manner giving rise to doubts." Id. "There must otherwise be some affirmative evidence in the record to put the witness's credibility in doubt." Id.

Here, the testimony that Christina did not have any labored breathing or any difficulties breathing can be rejected by the jury. First, the evidence is contradicted circumstantially. Christina Tahhahwah was 5'3" and weighed 374 pounds.[98] It is obvious that someone in her physical condition would have difficulty breathing. Furthermore, Defendant Adamson recognized that, just the day before, Christina could barely breathe just sitting there. She even emphasized that she meant "literally," Christina could barely breathe.[99] If she could barely breathe "just sitting there" the day before, it is highly likely she could not breathe "just sitting there" in the jail in restraints.

Second, Sellers' credibility is at issue because there is "affirmative evidence in the record" that he is not trustworthy. Sellers testified that he was present when Christina was released from her cuffs at about 8:15 am on November 14, 2014. He testified that he physically observed her, that he released her from her cuffs, and that he rubbed her hands to help restore blood flow.[100] This testimony is simply not true. Shortly after the beginning of the 8:00 a.m. video, Stacey McMillion can be heard saying "Christina. She keeps

[98] Plaintiff's SOF at ¶ 1

[99] SOF at ¶ 3

[100] Doc. 96 at 14-15, ¶ 20-21

shaking 'em and moving 'em where they're turning red."[101] She then returns to the cell run and observes Christina again; she comes back into the booking area and says "Hey LT [Lieutenant Sellers], we'll have to loosen Christina's a little bit . . . because [her hands are] turning colors." Sellers responds and says to let her out, but tell her if she does it again she'll be cuffed again.[102] McMillion and Stewart (black male jailer) then go and release Christina from her cuffs. Sellers does not participate.[103] He most certainly did not go inside the jail cell and rub Christina's hands.

Defendant Sellers and McMillion deliberately allowed Christina to remain in handcuffs in a physically compromising position, even though she displayed all of the risk signs for sudden in-custody death, for an hour and sixteen minutes. They left her under the supervision of a jail trustee *even though* state regulations prohibit one inmate from supervising another inmate.[104] McMillion observed Christina about 20 minutes before she became unresponsive; the jail video shows the inmate trustee massaging Christina shortly before McMillion enters the cell run. It also shows McMillion and the inmate trustee engaging in a somewhat animated conversation.[105] After this, neither Sellers nor McMillion observe Christina until she becomes unresponsive.

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[101] Appendix, Exhibit 14 at 0:00:00 – 0:00:30; see also Appendix, Exhibit 18

[102] Appendix, Exhibit 14 at 0:03:10 – 0:03:35; see also Appendix, Exhibit 18

[103] SOF at ¶¶ 20-21

[104] SOF at ¶ 25

[105] SOF at ¶ 26

Additionally, Sellers and McMillion were very slow to respond to the jail trustee's attempts to get their attention. The jail video shows that Sellers takes nearly four minutes to respond to the cell run after Tosta first knocks on the jail door.[106] "Even a brief delay may be unconstitutional." Mata, 427 F.3d at 755.

In light of the entire factual record, a reasonable jury could conclude that Defendants Sellers and McMillion knew of and disregarded an excessive risk of harm to Christina Tahhahwah by leaving her unsupervised, in a physically compromising position for an hour and sixteen minutes. Accordingly, their Motion and Brief for Summary Judgment on this claim must be denied.[107]

Conclusion

For the reasons set forth herein, Plaintiff Margie M. Robinson, as the Personal Representative of the Estate of Christina Dawn Tahhahwah, Deceased, respectfully requests that the Court deny the Motion and Brief for Summary Judgment [Doc. 96].

Dated this 24th day of August, 2018.

WARD & GLASS, L.L.P.

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[106] SOF at ¶ 27

[107] Robinson concedes her deliberate indifference claim as to every defendant other than Hallagin, Sellers, and McMillion.

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CERTIFICATE OF SERVICE

This is to certify that on this 24th day of August, 2018, a true and correct copy of the above has been delivered via ECF to all attorneys of record.

Kelea L. Fisher
Clay Hillis

s/Barrett T. Bowers