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

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

DEFENDANTS SHORT AND TURNER'S MOTION AND BRIEF FOR SUMMARY JUDGMENT

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Plaintiff Margie M. Robinson, as the Personal Representative of the Estate of Decedent, Christina Tahhahwah (hereinafter, "Christina" or "Tahhahwah"), has sued Defendants Lawrence Turner and Kurt Short in their individual capacities for allegedly violating Tahhahwah's constitutional rights during the course of said Defendants' contact with Tahhahwah in November, 2014. This Motion seeks Summary Judgment as to all claims asserted against Defendants Turner and Short pursuant to Fed. R. Civ. P. 56(a).

LCvR 56.1(b) STATEMENT

Pursuant to LCvR 56.1(b), Defendants Turner and Short assert that there is no genuine dispute as to the following material facts:

1. On November 13, 2014 at approximately 1:37 a.m., Tahhahwah called City of Lawton Dispatch (hereinafter, "dispatch") on a non-emergency administrative line and asked if several officers were on duty. Tahhahwah stated she was about to kill her aunt, Anna Berry Chalepah, and when asked by the dispatcher if it had been physical, she

stated "yeah, but it's gonna get more physical if I gotta pull my gun on her." The dispatcher told Tahhahwah "well don't do anything like that" to which Tahhahwah responded "No, I'm not." (Exibit 1 – Affidavit of Jessica Carter)

2. In response to Tahhahwah's call on November 13, 2014 at approximately 1:37 a.m., Officers Daniel Harter and Jackie Long were dispatched to the residence located at 1006 SW 42nd Street, Lawton, Oklahoma. The dispatcher advised Harter and Long that the call was a domestic between Tahhawah and her aunt, there were no weapons and no "signal 87" (which means no intoxicated person). (Exhibit 1 – Affidavit of Jessica Carter)
3. Officers Harter and Jackie Long arrived at the residence at approximately 1:49 a.m. Officer Harter found Tahhahwah in the garage. The garage had a mattress and a dresser and Tahhahwah appeared to be in a safe environment. Tahhahwah was coherent and did not make any statements indicating she had any intention to harm herself or anyone else and did not otherwise appear to have the means to do so. Officer Harter left the scene and purchased a hot dog and soda for Tahhahwah and brought it back to her. The officers cleared the call at approximately 2:05 a.m., advising dispatchers there was no domestic. (Exhibit 1 – Affidavit of Jessica Carter; Exhibit 2 – Affidavit of Officer Daniel Harter)
4. On November 13, 2014 at approximately 3:19 a.m., Tahhahwah called a dispatch non-emergency administrative line and asked the dispatcher to find her husband, who she identified as Officer Luis Pagan. Tahhahwah was crying and stated that her "daddy" was kicking her out of her house. Tahhahwah requested Officer Pagan be sent to pick

her up. (Exhibit 1 – Affidavit of Jessica Carter) Tahhahwah referred to her grandfather, Edward Jerome Tahhahwah (who lived at 1006 SW 42nd Street) as her "daddy". (Exhibit 3 – Excerpts of the Deposition of Edward Tahhahwah taken on April 5, 2018, pg. 63, lines 20-23)

5. In response to Tahhahwah's call on November 13, 2014 at approximately 3:19 a.m., Officers Chelsey Gordon and Daniel Harter were dispatched to the residence at 1006 SW 42nd Street. A dispatcher informed the officers they should make contact with Tahhahwah for a welfare check and it was unknown if there was a domestic or what the situation was. (Exhibit 1 – Affidavit of Jessica Carter)
6. Officer Gordon and Officer Harter arrived at the residence at approximately 3:25 a.m. Officers Gordon and Harter made contact with Tahhahwah in the garage of the residence. Tahhahwah stated she was living in the garage, which had a bed and a dresser. Tahhahwah stated she had "gotten into it" with her grandparents and she was in the garage because her family did not want to talk to her. Gordon tried to make contact with someone inside the residence but no one answered the door. Tahhahwah made sexual advances towards Officer Harter while in the garage, asking him if he wanted to get in bed with her. Both Gordon and Harter observed that Tahhahwah was in a safe environment. Tahhahwah was coherent and responsive to the officers' questions. Neither Gordon nor Harter saw or heard Tahhahwah say or do anything that would indicate Tahhahwah had any intent to harm herself or anyone else or any means to do so. Gordon asked Tahhahwah if she intended to harm herself or anyone else and Tahhahwah said no. Gordon believed Tahhahwah was just having a bad night

with her family. (Exhibit 2 – Affidavit of Officer Daniel Harter; Exhibit 4 – Affidavit of Officer Chelsey Gordon)

7. Officers Gordon and Harter cleared the scene at approximately 3:42 a.m. by calling out "10-8" (back in service) over the radio. Upon clearing the call, a dispatcher logged in the system "does not meet EOD [Emergency Order of Detention], no one else in need." (Exhibit 1 – Affidavit of Jessica Carter)
8. On November 13, 2014, at approximately 5:18 a.m., Tahhahwah again called a dispatch non-emergency administrative line, asked for an "Officer Pagan", and asked if "Officer Pagan" could take her to Memorial (local hospital) because she was "feeling hot." Tahhahwah also asked if Officer Gordon was working and if Officer Gordon could "come see her again". (Exhibit 1 – Affidavit of Jessica Carter)
9. In response to Tahhahwah's call on November 13, 2014 at approximately 5:18 a.m., Officers Gordon and Harter were again dispatched to the residence located at 1006 SW 42nd Street. The dispatcher advised the officers the situation was a 10-90 (officer welfare contact) and told the officers that Tahhahwah stated she wants to speak with officers about going back to Memorial because she is not feeling well. (Exhibit 1 – Affidavit of Jessica Carter)
10. Officers Gordon and Harter arrived at the residence at approximately 5:26 a.m. Officers Gordon and Harter again made contact with Tahhahwah in the garage of the residence. Both Gordon and Harter observed Tahhahwah in a safe environment. Tahhahwah was coherent and responsive to the officers questions. Tahhahwah continued to make sexual advances towards Officer Harter. Neither officer observed

anything about Tahhahwah's physical appearance that indicated Tahhahwah needed to be taken to a hospital nor did Tahhahwah ask Gordon or Harter to take her to a hospital. Tahhahwah did not make any statements or exhibit any behavior that would indicate to Gordon or Harter that Tahhahwah had any intent to harm herself or anyone else or any means to do so or that Tahhahwah otherwise needed to be taken into protective custody. Officers Gordon and Harter cleared the call at approximately 5:42 a.m. (Exhibit 2 – Affidavit of Officer Daniel Harter; Exhibit 4 – Affidavit of Officer Chelsey Gordon)

11. On November 13, 2014 at approximately 7:24 a.m., Tahhahwah called a dispatch non-emergency administrative line and asked for officers to "come see her and call her." During the call, Tahhahwah put her grandfather, Edward Jerome Tahhahwah, on the phone at the request of the dispatcher. Mr. Tahhahwah told the dispatcher "just disregard the call". The dispatcher asked Mr. Tahhahwah to confirm the location and he responded "Why? What's your reason for that?"; the dispatcher then stated "Sir, because she's called multiple times and we need to make sure she's alright, can you confirm the location for me please?"; Mr. Tahhahwah responded "She is bipolar and is in bipolar state right now and there's no reasoning with her"; the dispatcher asked him to confirm the location again and Mr. Tahhahwah states "OK, she's at 165 Little Bear Loop in Elgin" (which was the wrong address); the dispatcher says "That's not where she's at sir" to which Mr. Tahhahwah responds "Well, that's where she lives"; Mr. Tahhahwah finally gave the correct address of 1006 SW 42nd Street, and a female voice (Anna Chalepah) can be overheard in the background stating "Can't they arrest

her for harassment?"; Mr. Tahhahwah then states "Just disregard her calls from now on" and the dispatcher responds "Well sir, she's tying up 911 lines and it's actually breaking the law because she doesn't have a police fire or medical emergency so she can actually be taken to jail or be fined" to which Mr. Tahhahwah responds "Come pick her up and take her to jail." (Exhibit 1 – Affidavit of Jessica Carter; Exhibit 3 – Excerpts of the Deposition of Edward Tahhahwah taken on April 5, 2018, pg. 67, lines 8-20, pg. 71, lines 16-24)

12. In response to Tahhahwah's call on November 13, 2014 at approximately 7:24 a.m., Officers Lindsey Adamson and Dan Breaden were dispatched to the residence located at 1006 SW 42nd Street. Adamson made contact with Tahhahwah in the garage of the house. It appeared to Adamson that Tahhahwah had been sleeping or staying in the garage because the garage had a bed in it. Tahhahwah introduced herself as "Cuda Bang" and told Adamson she used that name because she was promiscuous. Adamson observed Tahhahwah breathing heavily, but nothing out of the ordinary. Adamson asked Tahhahwah if she was "OK" and Tahhahwah responded something to the effect of "It's just because I'm fat." Officer Adamson observed Tahhahwah in a physically safe environment and Tahhahwah did not make any statements indicating that she intended to harm herself or others and did not appear to have the means to do so. Tahhahwah was coherent and responsive to Officer Adamson's questions. Tahhahwah stated she had "e.coli" in her kidneys but did not request to be taken to a hospital. (Exhibit 1 – Affidavit of Jessica Carter; Exhibit 5 – Affidavit of Officer Lindsey Adamson)

13. Before Officers Adamson and Breaden could clear the call, Tahhahwah called a dispatch non-emergency administrative line and asked a dispatcher to send an "Officer Alvarez" to her house. Tahhahwah also said "Your two officers left me here. I need to go to the hospital because my kidneys still hurt." The dispatcher asked Tahhahwah if she needed an ambulance and Tahhahwah responded "Yes ma'am." The dispatcher then asked why her kidneys hurt and Tahhahwah responded "I have e.coli in my kidney." (Exhibit 1 – Affidavit of Jessica Carter)
14. While Adamson was still on scene responding to the 7:24 a.m. call, Adamson was advised by dispatch that Tahhahwah called back requesting an ambulance because she had "e.coli" in her kidneys. Adamson advised the dispatcher to send Tahhahwah an ambulance to the residence. An ambulance was dispatched to the residence and Tahhahwah was taken from the residence to Comanche County Memorial Hospital. Edward Tahhahwah did not talk to any police officers or any ambulance personnel at the scene to give them any information relating to Tahhahwah's physical or mental health condition prior to Tahhahwah being transported to the hospital. (Exhibit 5 – Affidavit of Officer Lindsey Adamson; Exhibit 3 – Excerpts of the Deposition of Edward Tahhahwah taken on April 5, 2018, pg. 72 lines 15-25 and pg. 73, lines 1-9).
15. Tahhahwah was transported by ambulance to Comanche County Memorial Hospital and arrived at 8:38 a.m. Tahhahwah was seen by medical professionals at Comanche County Memorial Hospital for reported "abdominal pain and psychiatric history." The records state that Tahhahwah was "negative for suicidal or homicidal ideation and not hearing voices, not seeing things." The record further indicates that Tahhahwah was

"awake, alert, oriented, following commands, and cooperative." Tahhahwah was discharged from the hospital at 9:45 a.m. with instructions to fill a prescription for medication for a urinary tract infection and for her bipolar disease. (Exhibit 6 – Tahhahwah Medical Records 11.13.14)

16. Tahhahwah's medical records also indicate that on November 12, 2014, prior to any of the above-listed calls, Tahhahwah presented to Comanche County Hospital's Emergency Room at 10:11 p.m. complaining of "syphilis in [her] urine." The record indicates Tahhahwah came to the hospital in a "fairly manic state" and was given 20 mg of an antipsychotic medication intramuscularly. Tahhahwah was discharged in "stable condition" and given a prescription for medication for a urinary tract infection and bipolar disease. (Exhibit 7 – Tahhahwah Medical Records 11.12.14)
17. There is no record of Tahhahwah or any of her family members ever filling her prescriptions from her visits to Comanche County Memorial Hospital on November 12 or 13, 2014 as advised by hospital staff. Edward Tahhahwah states he was unaware that Tahhahwah was given any prescriptions and he did not ask any doctor or nurse at the hospital if Tahhahwah had any prescriptions to fill. (Exhibit 3 – Excerpts of the Deposition of Edward Tahhahwah taken on April 5, 2018, pg. 74 lines 1-7)
18. There is no record indicating that the physicians and medical staff who came into contact with Tahhahwah at Comanche County Memorial Hospital on November 12, 2014 or November 13, 2014, tried to have Tahhahwah taken into protective custody or otherwise have her admitted for psychiatric treatment after her visits to the hospital.

(Exhibit 6 – Tahhahwah Medical Records 11.13.14; Exhibit 7 – Tahhahwah Medical Records 11.12.14)

19. Neither Defendant Turner nor Defendant Short were aware of the dispatch calls made by Tahhahwah on November 13, 2014 at 1:37 a.m., 3:19 a.m., 5:20 a.m., or 7:24 a.m nor were they aware that other officers responded to said calls or the nature of the calls. Neither Defendant Turner nor Defendant Short was aware that Tahhahwah had been treated and discharged from Comanche County Memorial Hospital on November 12, 2014 and November 13, 2014. (Exhibit 8 – Affidavit of Defendant Turner; Exhibit 9 – Affidavit of Defendant Short)

20. On November 13, 2014 at approximately 1:20 p.m., Anna Chalepah (Edward Jerome Tahhahwah's wife) called dispatch and reported the following:

> Chalepah: I know you've had several reports from Christina Tahhahwah, you've had several calls from her last night and today, I guess, she came in the house rambling on, she had a cup of milk, and my husband is Jerome, I was on the bed behind him and she came in the bedroom and asked for her cell phone charger, and then she got up and I said we did not have it and she got up and she had a small cup of milk and she threw it at me.
>
> Dispatcher: Is that her in the background?
>
> Chalepah: Yes ma'am.
>
> Dispatcher: How do you know Christina?
>
> Chalepaeh: My husband, we've been together 20 years, that's her grandpa.
>
> Dispatcher: Does she have any weapons?
>
> Chalepah: Not so far, she's threatened to kill some people at the tribe. I just feel like I shouldn't have to take nothing like that, she threw that cup of milk on me.

> Dispatcher: We're going to have officers en route, ok? Has Christina been drinking or anything like that?
>
> Chalepah: She's on drugs, she's bipolar, and she's on drugs, I don't know what she's on…she came back worse…the officers that came last night did see two pieces of marijuana in the garage.
>
> Dispatcher: OK, alright, we have them en route OK?

(Exhibit 1 – Affidavit of Jessica Carter)

21. In response to the call on November 13, 2014 at approximately 1:20 p.m., Defendants Turner and Short were dispatched to the residence located at 1006 SW 42nd Street. The dispatcher informed the officers there was a domestic at the residence, to make contact with "Anna" who says Christina Tahhahwah is there and is throwing cups of milk at her and making threats to kill people, no weapons." (Exhibit 1 – Affidavit of Jessica Carter)

22. While Turner and Short were en route to the residence, Tahhahwah called a dispatch non-emergency line and stated that she is in trouble and her grandpa kicked her out. (Exhibit 1 – Affidavit of Jessica Carter)

23. Defendants Turner and Short arrived at the residence at approximately 1:30 p.m. Defendant Turner made contact with Edward Tahhahwah and Anna Chalepah inside the residence. Anna Chalepah told Turner that they wanted Tahhahwah "gone" from the residence but Tahhahwah would not leave. Turner spoke with Tahhahwah and she was alert and did not appear to be in any type of distress. Turner observed Tahhahwah sitting at a table eating food from a styrofoam container. Tahhahwah's speech was not slurred and Turner was able to understand Tahhahwah when she spoke. Upon inquiry,

Tahhawah confirmed she had been asked to leave the residence but stated she "had nowhere else to go." Tahhahwah did not agree to leave the residence. (Exhibit 10 – Excerpts of the Deposition of Defendant Turner taken June 6, 2018 pg 42, lines 1-23, pg. 54, lines 8-25, pg. 55, lines 1-25, pg. 56 lines 1-25)

24. Defendant Short made contact at the residence with Edward Tahhahwah and Anna Chalepah (who he identified as "Christina's grandparents"). Edward Tahhahwah and Anna Chalepah stated Tahhahwah was there causing a problem, was not taking her medication and needed to go to Taliaferro. Defendant Short did not observe Tahhahwah make any statements indicating that Tahhahwah had an intent to harm herself or anyone else and Tahhahwah did not appear to have the means to do so. (Exhibit 11 – Defendant Short's Response to Interrogatory No. 14)

25. Neither Anna Chalepah nor Edward Tahhahwah made any statements to Defendants Short or Turner that would indicate that Tahhahwah was in any physical danger or had expressed any intent to harm herself or anyone else or had the means to do so. Edward Tahhahwah has confirmed that Tahhahwah did not have access to a weapon to his knowledge and did not have access to anyone else's weapon in the home. (Exhibit 8 – Affidavit of Lawrence Turner; Exhibit 9 – Affidavit of Kurt Short; Exhibit 3 – Excerpts of the Deposition of Edward Tahhahwah taken on April 5, 2018, pg. 75, lines 7-12, pg. 62, lines 1-3)

26. Defendant Short attempted to make contact and speak to Tahhahwah but she would not respond to him. Defendant Short observed Tahhahwah sitting calmly outside on the sidewalk. Defendant Short observed that Tahhahwah had defecated on herself but

Short did not consider this unusual because he has encountered other people who have defecated on themselves due to a variety of reasons. Defendant Short also did not think it was unusual for Tahahahwah not to respond to him because he has encountered numerous people on domestic disturbance calls who chose not to talk to the police. Based on his observation of Tahhahwah, Defendant Short believed Tahhahwah was suffering from mental illness and could be seen at Taliaferro (local mental health facility) for treatment but did not believe Tahhahwah should be involuntarily taken into protective custody under an emergency order of detention. Defendant Turner did not believe that Tahhahwah was a danger to herself or anyone else and did not otherwise observe or hear anything that would cause him to believe Tahhahwah should be taken into involuntary protective custody. (Exhibit 12 – Excerpts of the Deposition of Defendant Short taken June 11, 2018 pg. 44, lines 1-13, 23-25, pg. 45, lines 1-3, 19-21, pg. 46, lines 6-19, pg. 47, lines 18-25, pg. 53, lines 2-10; Exhibit 8 – Affidavit of Defendant Turner; Exhibit 9 – Affidavit of Defendant Short; Exhibit 3 – Excerpts of the Deposition of Edward Tahhahwah taken on April 5, 2018 pg. 75, lines 7-12, pg. 61, lines 21-25, pg. 62 lines 1-3)

27. Anna Chalepah filled out a Citizen's Arrest Form and placed Tahhahwah under arrest for Trespassing. The form, signed by Anna Chalepah, states: Jerome Tahhahwah and Anna Chalepah invited Christina Tahhahwah to come stay with us while our house is being worked on. She came into our room asking for her charger. I said we did not have it then she got up out of the chair and threw a small cup of milk on me. It got on my clothes. We asked her to leave and she refused. The form clearly states that Anna

Chalepah has arrested Christina Tahhahwah for a public offense and she delivers the arrested person to the custody of the Lawton Police Department for the purpose of taking said arrested person before a magistrate. There is no language on the form indicating that either Anna Chalepah or Edward Tahhahwah wanted Tahhahwah to be taken to Taliaferro and no language referring to Tahhahwah being in an alleged "bipolar state." (Exhibit 13 - Citizens Arrest Form)

28. Edward Tahhahwah confirms that Anna Chalepah asked Christina to leave and Christina refused to leave. He also confirms that Chalepah had the right to tell people who could come and go at the house. (Exhibit 3 – Excerpts of the Deposition of Edward Tahhahwah taken on April 5, 2018, pg. 82, lines 16-22 and pg. 119 lines 8-11)

29. Lawton City Code 16-3-1-316 (2016) defines Trespassing as "each and every actual entry or remaining upon the premises of another owner or person in possession of real property, whether the property is public or private, without the owner's or occupant's consent, express or implied."(Exhibit 14 - Certified copy of Lawton City Code Section 16-3-1-316)

30. After Chalepah placed Tahhahwah under arrest for Trespassing, Officer Turner assumed custody of Tahhahwah. Turner contacted another officer (Officer James Julian) to transport Tahhahwah to the jail because he did not believe that Tahhahwah would fit into either his vehicle or Short's vehicle due to her size. (Exhibit 10 – Excerpts of the Deposition of Defendant Turner taken June 6, 2018 pg. 66, lines 7-17, pg. 72, lines 5-15)

31. Although Tahhahwah was placed under arrest and being transported to the jail, neither Defendant Turner nor Defendant Short handcuffed Tahhahwah because of her size and because Tahhahwah was not exhibiting any behavior that led either Defendant to believe she was potentially violent or resistant. Tahhahwah had not been violent or resistant at any point during Defendants' contact with her. (Exhibit 10 – Excerpts of the Deposition of Defendant Turner taken June 6, 2018 pg. 70, lines 19-25, lines; Exhibit 12 – Excerpts of the Deposition of Defendant Short taken June 11, 2018 pg. 51, lines 5-7; Exhibit 8 – Affidavit of Defendant Turner; Exhibit 9 – Affidavit of Defendant Short)
32. Defendants Turner and Short do not believe the Lawton City Jail is equipped to treat people that suffer from mental illness. However, both Defendants Turner and Short are aware that jailers can send detainees to a local hospital or to Taliaferro (or any other mental health treatment facility) if a detainee requires treatment from a medical or mental health professional while in the custody of the jail. (Exhibit 8 – Affidavit of Defendant Turner; Exhibit 9 – Affidavit of Defendant Short)
33. Defendant Turner followed Officer Julian to the jail. Upon arrival at the jail, Turner escorted Tahhahwah into the jail. Prior to entering the jail, Tahhahwah stopped and talked to another officer for approximately 5-10 minutes with no incident. (Exhibit 10 – Excerpts of the Deposition of Defendant Turner taken June 6, 2018 pg. 73, lines 11-25)
34. Defendant Turner's last contact with Tahhahwah was during the booking process at the jail. Defendant Short did not have any contact with Tahhahwah during the

booking process at the jail. Neither Defendant had any contact with Tahhahwah while she was detained at the jail. (Exhibit 8 – Affidavit of Defendant Turner; Exhibit 9 – Affidavit of Defendant Short)

35. Tahhahwah was booked into the jail and was later found unresponsive in her cell on November 14, 2014, approximately 24 hours after she was booked into the jail and over 24 hours since either Defendant had contact with her. Tahhahwah was then transported to a local hospital. Tahhahwah died on November 17, 2014. (Exhibit 15 – Affidavit of Terry Sellers)

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Rule 56(a) of the Federal Rules of Civil Procedure provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Summary judgment is not a disfavored procedural shortcut, but an integral part of the federal rules as a whole. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), the Supreme Court held that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." The Court further held that "if the evidence is merely colorable, or not significantly probative, summary judgment may be granted." *Id.* In addition, the *Anderson* Court stated that "the mere existence of a scintilla of evidence in support of a plaintiff's position will be insufficient; there must be evidence on which a jury could reasonably find for the plaintiff." *Id.* A movant's summary judgment burden may properly be met by reference to the lack of evidence in support of plaintiff's position. *See*

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671(10th Cir. 1998) (citing *Celotex*, 477 U.S. at 325).

Furthermore, as described by the court in *Cone v. Longmont United Hosp. Ass'n.*,14 F.3d 526 (10th Cir. 1994), "Even though all doubts must be resolved in (the nonmovant's) favor, allegations alone will not defeat summary judgment." *Cone* at 530(citing *Celotex*, 477 U.S. at 324). *See also Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991); *Roemer v. Pub. Serv. Co. of Colo.*, 911 F. Supp. 464, 469 (D. Colo. 1996). Moreover, "(i)n response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988).

PROPOSITION I:
DEFENDANTS TURNER AND SHORT ARE ENTITLED TO SUMMARY JUDGMENT WITH REGARD TO PLAINTIFF'S 42 U.S.C. § 1983 CLAIMS

Plaintiff asserts two claims against Defendants Turner and Short under 42 U.S.C. § 1983: false arrest and failure to provide medical and psychological care. As set forth in detail below, Defendants Turner and Short are entitled to summary judgment on both claims.

Section 1983 creates no substantive civil rights, but rather only provides a procedural mechanism for enforcing rights established elsewhere. *See Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); *Gallegos v. City and County of Denver*, 984 F. 2d 358, 362 (10th Cir. 1993). *See also Miller v. Hawver*, 474 F. Supp. 441, 442 n.1 (D. Colo. 1979)(§ 1983 is not a general or common law tort claims statute).

To show a constitutional violation by Defendants Turner and Short in their individual capacities under § 1983, Plaintiff "must establish [Defendants] acted under color of state law and caused or contributed to the alleged violation." *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996) (citing *Ruark v. Solano*, 928 F.2d 947, 950 (10th Cir. 1991), *overruled on other grounds*, *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 2179-82, 135 L.Ed.2d 606 (1996)); *see also Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990) Plaintiff must demonstrate "a deliberate, intentional act" by [Defendants] to violate constitutional rights."*Jenkins*, at 994-95. "'[L]iability under §1983 must be predicated upon a 'deliberate' deprivation of constitutional rights by the defendant and not upon mere negligence.'" *Murrell v. Sch.Dist.No.1, Denver, Colo.*, 186 F. 3d 1238, 1250 (10th Cir. 1999) (citing *Woodward v. City of Worland*, 977 F. 2d 1392, 1399 (10th Cir. 1992)).

A. PROBABLE CAUSE EXISTED TO CONTINUE THE ARREST EFFECTED BY ANNA CHALEPAH AND TAKE TAHHAHWAH INTO DETENTION

The Tenth Circuit looks to the common law as a "starting point" to define false arrest for purposes of Section 1983. *Pierce v. Gilchrist*, 359 F.3d 1279, 1287-89 (10th Cir. 2004). The term "common law" refers to "general principles of common law among the several states." *Id.* at 1288. Nonetheless, the Tenth Circuit has "considered the state law formulation" for false arrest. *McCormick v. Farrar*, 147 Fed.Appx. 716, 721 (10th Cir. 2005) (unpublished) (citations omitted). The common-law tort of false arrest has a single element in Oklahoma: that the defendant-officer arrested the plaintiff without probable cause. *Overall v. State ex rel. Dep't of Pub. Safety*, 910 P.2d 1087, 1091 (Okla.Ct.App.1995).

Under the Fourth Amendment, a warrantless arrest is permissible if the officer has probable cause to believe a person committed a crime. *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir.1995). "'Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense.' "*Romero,* 45 F.3d at 1476 (quoting *Jones v. City & County of Denver,* 854 F.2d 1206, 1210 (10th Cir.1988)). "This is an objective standard, and thus the subjective belief of an individual officer as to whether there was probable cause for making an arrest is not dispositive. Whether a reasonable officer would believe that there was probable cause to arrest in a given situation is based on the totality of the circumstances." *Koch v. City of Del City*, 660 F.3d 1228, 1239; *see Keylon v. City of Albuquerque*, 535 F.3d 1210, 1219 (10th Cir.2008) ("an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause") (internal quotation omitted). "The validity of the arrest does not depend on whether the suspect actually committed a crime" or whether an ordinance is valid or later declared unconstitutional. *See Michigan v. DeFillippo*, 443 U.S. 31, 36, 37–38, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). "[A]n officer's reasonable mistake of fact [or law] can still justify a probable cause or reasonable suspicion determination." *United States v. Nicholson*, 721 F.3d 1236, 1238 (10th Cir.2013), *abrogated in part by Heien v. North Carolina*, —— U.S. ——, 135 S.Ct. 530, 534, 190 L.Ed.2d 475 (2014).

In a case in which a private citizen placed another individual under citizen's arrest and a police officer then took the arrested individual into custody, the Tenth Circuit held that the court must focus on whether [the officer] had probable cause to continue the arrest effected by [the private citizen] and to take the [arrested citizen] into detention. *Olsen v. Layton Hills Mall,* 312 F.3d 1304, 1312 (10th Cir.2002) *citing Romero*, 45 F.3d at 1476. Although the court may determine whether probable cause existed at the time of the arrest by taking into account factors such as whether the officer reasonably interviewed witnesses readily available at the scene, whether he investigated basic evidence or whether he inquired if a crime had been committed at all before invoking the power of warrantless arrest and detention – none of these factors is dispositive or indeed necessary to the inquiry. Rather, the primary concern is whether a reasonable officer would have believed that probable cause existed to arrest the defendant based on the information possessed by the arresting officer. *Id.*

In the case at bar, there is ample evidence to show a reasonable officer would have believed that probable cause existed for Anna Chalepah to arrest Tahhahwah for Trespassing. The information possessed by the Defendants was that Anna Chalepah had asked Tahhahwah to leave the residence and Tahhahwah had refused to leave. (Fact Nos. 23, 28) Defendant Turner heard Edward Tahhahwah state he wanted Tahhahwah "gone" from the residence. (Fact No. 23) Edward Tahhahwah further confirms that Anna Chalepah asked Tahhahwah to leave and Tahhahwah refused. Edward Tahhahwah also states that Anna Chalepah had the right to tell people to leave the house. (Fact No.28) More importantly, Anna Chalepah signed a citizen's arrest form stating that both she and

Edward Tahhahwah asked Christina to leave and Christina refused.(Fact No.11) Given these factors, there was probable cause for the officers to believe Tahhahwah was trespassing in violation of Lawton City Code. (Fact No. 29)

Edward Tahhawah now alleges Christina was an invited guest who he did not want taken to jail. [Doc.1, ¶ 43] He further states he "asked the officers if they could take her [Tahhahwah] to Taliaferro and that one of the officers said "well, we can't take her in, she hasn't done nothing (sic) for us to take her in." He also states that an officer told him "the only way we could take her in is you'll have to file charges against her" and after he asked what charges, the officers stated "trespassing" and he responded "yeah, okay, well, we'll sign the trespassing charges for you to get her out." (Exhibit 3 – Excerpts from the Deposition of Edward Tahhahwah taken April 5, 2018, pg. 76, lines 21-25, pg. 77, line 12)

Despite Edward Tahhahwah's attempt to recreate the events in an effort to nudge a baseless false arrest claim forward, there is ample undisputed evidence that contradicts his newfound recollection of events. Prior to the call that led to Tahhahwah's arrest, Edward Tahhahwah told a dispatcher to come pick Tahhahwah up and take her to jail. (Fact No. 11) Prior to the call that led to Tahhahwah's arrest, Tahhahwah called dispatch crying and stating that her "daddy" (Edward Tahhahwah) had kicked her out of the house. (Fact No. 4) Prior to the call that led to Tahhahwah's arrest, Anna Chalepah is overheard on a dispatch call asking "Can't they arrest her for harassment?" (Fact No. 11) There is ample evidence to show that the intentions of Edward Tahhahwah and Anna

Chalepah were to have Tahhahwah arrested and removed from their home – which is exactly what occurred. Furthermore, even if Edward Tahhahwah informed the officers that he wanted Christina taken to Taliaferro, he acknowledges that the officers told him she did not meet the criteria and they would not take her to Taliaferro. According to Edward Tahhahwah, the trespassing charges were then filed so that they could "get her (Tahhahwah) out" [of the residence].

Based upon the undisputed facts, a reasonable officer in Defendants Turner's and Short's position would have believed that probable cause existed for Defendants to continue the arrest of Christina for Trespassing and therefore, Defendants Turner and Short are entitled to summary judgment on Plaintiff's False Arrest claim.

B. THERE IS NO EVIDENCE DEFENDANTS TURNER AND SHORT ACTED WITH DELIBERATE INDIFFERENCE TO CHRISTINA TAHHAHWAH'S MEDICAL OR PSYCHOLOGICAL NEEDS

The constitutional protection against deliberate indifference to a prisoner's serious medical needs, as announced in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 351 (1976)(Eighth Amendment shields prisoners after adjudication), applies to pretrial detainees through the due process clause of the Fourteenth Amendment. *Garcia v. Salt Lake County*, 768 F.2d 303, 307 (10th Cir. 1985). As such, under the Fourteenth Amendment's Due Process Clause, pretrial detainees are entitled to the same degree of protection against denial of medical care as that afforded to convicted inmates under the Eighth Amendment. *Estate of Hocker v. Walsh*, 22 F.3d 995, 998 (10th Cir. 1994). Thus, Plaintiff's claim for inadequate medical attention must be judged against the "deliberate

indifference to serious medical needs" test of *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285 (1976); *See also Gaston v. Ploeger*, WL 5672294 (2008).

The *Estelle* test to establish a "deliberate indifference to serious medical needs" is comprised of an objective and subjective component. *Estelle*, 429 U.S. 97. Plaintiff must meet both the objective and subjective components constituting the test for deliberate indifference in order to maintain a cause of action against a defendant. *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006). Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment. *Estelle*, 429 U.S. 97. It must be a deprivation that results in the denial of the "minimal civilized measure of life's necessities." *Farmer v. Brennan*, 511 U.S. at 834, 114 S.Ct. 1970 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 Ed.2d 59 (1981)).

Therefore, the initial question is whether there is evidence of 'serious medical needs.' The Tenth Circuit established a "medical need is sufficiently serious' if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005). A constitutional violation *only* occurs when a government official's "deliberate indifference is exhibited toward such needs." *Frohmader v. Wayne*, 766 F.Supp. 990. (D.Colo. 1991), quoting *Estelle v. Gamble*, 429 U.S. 97.

In the instant case, it is undisputed that neither Defendant Turner nor Defendant Short was aware that Tahhahwah had made several calls to dispatch prior to the call they responded to. (Fact No. 19) Defendant Turner, in his interaction with Tahhahwah, described her as alert and responsive to his questions, and not in any type of distress. (Fact No. 23) Defendant Short believed Tahhahwah suffered from some type of mental illness and may have needed treatment, but did not observe anything that would cause him to take Tahhahwah into protective custody involuntarily. (Fact No 26) Neither officer believed Tahhahwah presented an immediate danger to herself or anyone else at the residence or that she was otherwise in any physical danger or otherwise met the criteria to be taken involuntarily into protective custody (Fact No. 26)

Neither officer was aware that Tahhahwah was seen by medical professionals at Comanche County Memorial Hospital before their interaction with her, however, it is important to note that despite the fact that the records indicate that Tahhawah presented at the hospital in a "fairly manic state" – there is no record to indicate that her behavior was alarming enough for said medical professionals to involuntarily commit her to a psychiatric institution. (Fact Nos. 16,17,18,19) On November 13, 2014, Tahhahwah was discharged from the hospital at 9:45 a.m., roughly 3 hours and 45 minutes before Defendants Turner and Short came into contact with her. There is no evidence to suggest that Defendants Turner and Short should have made some "medical assessment" of Tahhahwah's need to be taken into involuntary protective custody that medical professionals did not make 3 hours before. Furthermore, both Turner and Short were aware that jailers can send detainees to a local hospital or to Taliaferro (or any other

mental health treatment facility) if a detainee requires treatment while in the custody of the jail. (Fact No. 32) Neither Turner nor Short had any reason to believe that these measures would not be taken if necessary by jailers if Tahhahwah's situation required it while she was in jail.

Additionally, there is no record indicating that Tahhahwah's family members attempted to take her to a psychiatric institution for her "bipolar state" – instead, her grandfather told dispatchers to "come take her to jail." According to Edward Tahhahwah, he requested Tahhahwah be taken to Taliaferro, a local mental health facility and was told by an officer that Tahhahwah had not "done anything" to be taken to Taliaferro. Rather than take Tahhahwah to Taliaferro themselves for treatment, the family then chose to arrest her to "get her out." There is simply no evidence that either Defendant Turner or Defendant Short acted with deliberate indifference to Tahhahwah's medical needs nor did the actions on the part of either Defendant constitute a violation of Tahhahwah's constitutional rights.

With respect to the subjective component of the *Estelle* test, Plaintiff must also show that Defendants acted with a culpable state of mind. *Farmer v. Brennan*, 511 U.S. at 834, 114 S.Ct. 1970. Meaning, Plaintiff must present evidence that must show that Defendants knew Tahhahwah faced a substantial risk of harm and disregarded that risk, by failing to take reasonable measures to abate it. *Martinez v. Beggs*, 563 F.3d 1089 (10th Cir. 2009); *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006). This standard requires a higher degree of fault than negligence or even gross negligence. *Barrie v. Grand County, Utah*, 119 F.3d 862 (10th Cir. 1997). Under the subjective component, the

relevant question is "were the symptoms such that a prison employee knew the risk to the prisoner and chose (recklessly to disregard it?)" *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005). Further, an obvious risk cannot conclusively establish an inference that the official subjectively knew of the substantial risk of serious harm to a prisoner, as required to satisfy the subjective component of the test for deliberate indifference to serious medical needs because a prison official may show that the obvious escaped him. *Farmer*, 511 U.S. at 834.

In *Berry v. Muskogee*, 900 F.2d 1489 (10th Cir. 1990) the Tenth Circuit held that in order to establish deliberate indifference to an inmate's safety, the plaintiff must show (1) "actual knowledge of the specific risk of harm [to the detainee]…or that the risk was so substantial or pervasive that knowledge can be inferred"; (2) "fail[ure] to take reasonable measures to avert the harm"; and (3) that "failure to take such measures in light of the knowledge actual or inferred, justifies liability for the attendant consequences of [the] conduct, even though unintended. Applying the standards in *Berry* for measuring whether the individual defendants exhibited deliberate indifference, Plaintiff has failed to show that either Defendant had any knowledge of any specific risk of harm to Tahahhwah or that Defendants failed to take any measures to avert any potential harm.

Both Defendants observed Tahhahwah's behavior at the scene as calm – so much so that neither Defendant had Tahhahwah handcuffed after she was arrested by Anna Chalepah. (Fact No. 31) After Tahhahwah was arrested and transported to jail, Defendant Turner observed Tahhawah carry on a 5-10 minute conversation with another officer en route to the jail as further evidence that her behavior did not warrant medical or

psychological intervention at the time. (Fact No. 33) Despite Edward Tahhahwah's self-serving assertions that he "just wanted Tahhahwah taken to Taliaferro" – the undisputed facts show that Defendants Turner and Short encountered a family whose primary concern was to arrest Tahhahwah and "get her out" as opposed to having her treated at Taliaferro. In fact, according to Edward Tahhahwah, once one of the officers told him they would not take Tahhahwah to Taliaferro because she had not done anything, he opted to proceed with arrest as opposed to taking her to Taliaferro himself. (Exhibit 3 – Excerpts from the Deposition of Edward Tahhahwah taken April 5, 2018, pg. 76, lines 21-25, pg. 77, line 12)

In short, it cannot be shown that Defendants Turner or Short acted with deliberate indifference to Tahhahwah's medical or psychological needs. Defendants' decision to take Tahhahwah to jail (after her arrest by her family member) rather than some other facility did not directly cause Tahhahwah to suffer serious injury, nor can it be shown that Defendants' decision directly caused Tahhahwah's death over 24 hours later. There is a lack of evidence of a direct causal connection between the actions of Defendant Turner and Short and Tahhahwah's death. Accordingly, Defendants are entitled to summary judgment on this claim as well.

PROPOSITION II:
DEFENDANTS TURNER AND SHORT ARE ENTITLED TO QUALIFIED IMMUNITY

Defendants sued in their individual capacities in an action under § 1983 "are entitled to qualified immunity unless it is demonstrated that their conduct violated clearly

established constitutional rights of which a reasonable person in their positions would have known." *Murrell v. Sch. Dist. No. 1,* 186 F.3d 1238, 1251 (10th Cir. 1999). Qualified immunity is therefore an affirmative defense that provides immunity to suit in a § 1983 action. *Adkins v. Rodriguez,* 59 F.3d 1034, 1036 (10th Cir.1995). When the defense is raised in a motion for summary judgment, the plaintiff bears the burden to show the defendant's actions violated a constitutional right, and that the allegedly violated right was clearly established at the time of the conduct at issue. *Mick v. Brewer,* 76 F.3d 1127, 1134 (10th Cir. 1996). Qualified immunity gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant,* 502 U.S. 224, 112 S.Ct 532, 537, 116 L.Ed.2d 589 (1991). The issue of qualified immunity is for the courts and not the trier of fact. *Id*. Summary judgment based on qualified immunity is available when a defendant's actions are objectively reasonable. *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir. 1993).

As a threshold matter, if no constitutional right on the facts alleged would have been violated, no further inquiry is required, and the defendant is entitled to dismissal. *Saucier v. Katz,* 533 U.S. 194, 200-01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If a constitutional right could be made out, then "[t]he relative, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official in the defendant's position] that his conduct was unlawful in the situation he confronted." *Id.* at 202; *see also Brousseau v. Haugen*, 125 S.Ct. 596, 599,

160 L.Ed.2d 583 (2004) (emphasizing inquiry should be conducted in light of the specific context of the case.)

As shown above, Plaintiff has failed to show that Defendants Turner and Short violated Tahhahwah's constitutional rights. Accordingly, Defendants are entitled to qualified immunity and Plaintiff's § 1983 claims against Defendants should be dismissed. *See Hinton v. City of Elwood, Kan*., 997 F.2d 774, 783 (10th Cir. 1993) (citing *Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)) (officer entitled to qualified immunity if their conduct did not violate the law).

In *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the U.S. Supreme Court explained that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." (Internal citations omitted). *See also Gomes v. Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006) ("The law is clearly established if a reasonable official in the defendant's circumstances would understand that her conduct violated the plaintiff's constitutional right.").

The legal principle that a warrantless arrest without probable cause is a violation of an arrestee's Fourth Amendment rights is well established. Likewise, the legal principle that pre-trial detainees are to be provided adequate medical care is indeed well established. However, the qualified immunity analysis in this regard is analyzed "in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640. Specifically, "[t]he contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right." *Id. See also Saucier*, 533 U.S. at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). The question is not whether Tahhahwah had such rights, but whether it was clearly established that Defendants Turner's and Short's alleged actions violated those rights. *Id.*

Before the Court can determine the law was clearly established, it has to identify a case where an individual acting under similar circumstances as Defendants Turner and Short was held to have violated the Fourth, Eighth, or Fourteenth Amendments under a theory of individual liability. *Id.* The particularized facts of this case show that Defendants Turner and Short were called to a domestic disturbance; had no information regarding any prior contact between Tahhahwah and dispatch or any other officers; arrived at the scene and spoke with Tahhahwah's family members, who indicated that they had asked Tahhahwah to leave the residence and she refused; and Tahhahwah was then arrested on a citizen's complaint by a family member. According to one family member, he requested that Tahhahwah be taken to a mental health facility and was told by Turner or Short that she had not "done anything" to be taken to a mental health facility. Neither Defendant believed she met the statutory criteria to be taken involuntarily into protective custody and Plaintiff can produce no evidence to suggest otherwise, other than the grandfather's statement that Tahhahwah was in a "bipolar state."

Even if she was in a bipolar state, the undisputed facts show that a hospital had seen and released her twice before she came into contact with Defendants and, more importantly, when the grandfather was told she did not meet the criteria for protective

custody, the family opted to arrest her rather than to take her for treatment themselves. *See Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 993-994 (6th Cir. 2017)(Sixth Circuit Court of Appeals grants qualified immunity to officers and jailers who encounter bipolar individual and take him to jail where detainee later dies of a heart attack; Court finds no case clearly established that the officers at the scene immediately need to seek medical treatment and had no reason to doubt that in delivering detainee to the jail, reasonable procedures would be used and even if jailers had reason to know detainee was bipolar, no case alerted the jailer that mental instability of this sort required immediate medical attention). There is no published decision of the United States Supreme Court or the Tenth Circuit Court of Appeals which would have placed Defendants on notice that their acts or omissions in with respect to Tahhahwah, were in violation of Tahhahwah's clearly established constitutional rights. Accordingly, Defendants Turner and Short are entitled to qualified immunity.

CONCLUSION

For the reasons set forth herein, Defendants Turner and Short respectfully request the Court to grant summary judgment in their favor.

Respectfully submitted this 30th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2018, I electronically transmitted the attached 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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