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

(1) ROBBIE EMERY BURKE, as the Special Administratrix of the Estate of Eric Harris, Deceased, Plaintiff, v. (1) STANLEY GLANZ, in his individual capacity, (2) ROBERT C. BATES, (3) MICHAEL HUCKEBY, (4) JOSEPH BYARS, (5) RICARDO VACA, and (6) RICHARD WEIGEL, in his official capacity as Acting Tulsa County Sheriff, Defendants.	)	Case No. 16-CV-007-JED-FHM ATTORNEY LIEN CLAIMED JURY TRIAL DEMANDED

PLAINTIFF'S EMERGENCY MOTION FOR ORDER COMPELLING THE TULSA COUNTY SHERIFF'S OFFICE TO PRODUCE BATES' REVOLVER FOR EXPERT TESTING

COMES NOW the Plaintiff, Robbie Emery Burke, as the Special Administratrix of the Estate of Eric Harris, Deceased, and asks this Court for an emergency order compelling Sheriff Vic Regalado and Tulsa County Sheriff's Office ("TCSO") to produce the gun used by Defendant Robert Bates to shoot and kill Eric Harris. Said gun is currently being held by the TCSO as evidence in the case *State of Oklahoma v. Robert Charles Bates*, Tulsa County Court Case No. CF-2015-1817, which is set for trial beginning Monday, April 18, 2016. Because the gun at issue will cease to be protected by the TCSO as evidence as soon as that trial concludes, an emergency order is necessary to prevent spoliation of evidence, as set forth herein.

STATEMENT OF RELEVANT FACTS

This case involves Plaintiff's claims that Defendants' unconstitutional and excessive use of force, and their subsequent callous indifference to his serious need for medical treatment, resulted in the wrongful death of Eric Harris. *See, generally,* Complaint (Dkt. # 1). Specifically, Plaintiff alleges that Defendant Bates – a Reserve Deputy of the TCSO – shot Mr. Harris in the back, at close range, with a .357 Smith & Wesson revolver (the gun at issue, hereafter "the Revolver"), at a time when Mr. Harris was unarmed, not fleeing arrest, ***and had already been subdued by as many as for (4) other deputies***. *Id*. at 1 (emphasis added).

In her Complaint, the Plaintiff has made specific and thorough allegations outlining the close relationship between Defendant Bates and former TCSO Sheriff Stanley Glanz. *See, generally,* Complaint, Dkt. #1. Bates contributed to Sheriff Glanz's political campaigns over the years and gave donations to the TCSO while Glanz was sheriff. *Id*. at 9-10. In return, Glanz knowingly allowed Bates to act as a Reserve Deputy in dangerous field operations despite not having the requisite training and certification, and over the express objections of Glanz's own officers. *Id*. at 10-21.

Bates killed Harris during the course of an "undercover sting operation" conducted by the TCSO's Violent Crimes Task Force on April 2, 2015. *Id*. at 2, 25. At the time of the shooting, Bates was a 73-year-old insurance executive moonlighting as a Reserve Deputy. *Id*. at 2. However, he lacked the requisite training, by hundreds of hours, to participate in such a field operation. *Id*. **In fact, he was not even certified to carry the Revolver as his service weapon while "in the field."** *Id*.; *see also* TCSO Weapons Training and Qualification ("WTQ") Policy, Chp. 4-06, §6.4(P.5) (Ex. 1, p. 8)

("Weapons, of any type, that have not been approved by the Sheriff, will not be carried or used by deputies of the Tulsa County Sheriff's Office during the course of law enforcement duties.")[1]. Bates' Revolver was **not approved by the TCSO**. *Id*.

During the sting operation, an undercover officer had arranged to purchase a firearm from Mr. Harris in the parking lot of a Dollar General Store in North Tulsa. *Id*. at 25. Video footage captured by the TCSO reveals that during the initial discussion between Harris and the undercover deputy, Harris made it clear that a single firearm, a 9 millimeter Luger which he handed over to the undercover deputy, was the *only* firearm in his possession. *Id*. After the gun was no longer in Harris' possession, an unmarked car sped into the parking lot and stopped next to the undercover deputy's trunk in which Mr. Harris was still sitting. *Id*. at 25-26. Realizing an arrest was likely imminent, Harris exited the truck and began to run north up a sidewalk and into the street. *Id*. Deputy Ricardo Vaca – himself without the requisite training to participate in such a dangerous field operation – pursued Harris. *Id*. at 26. Vaca was wearing video recording equipment that captured footage of the incident. *Id*. The footage shows Harris ran down the street at a jogger's pace for a short period of time. *Id*. Harris, wearing a t-shirt and gym shorts, was clearly unarmed. *Id*. Vaca quickly caught up to Harris, tackled him and brought him to the ground. *Id*.

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[1] The TCSO requires that reserve deputies only carry weapons that are authorized and registered with the Sheriff's Office. WTQ Policy, § 6.1 (Ex. 1 at 1). To be considered approved, a weapon must initially be issued to the deputy by the TCSO ***or approved by the Sheriff or a designee for use by the deputy in the performance of their assigned duties***. *Id*. at § 6.4(A.3)(b) (emphasis added) (Ex. 1 at 2). A "weapons specification sheet," reviewed annually, must be completed for each approved weapon and must be maintained by the Training Sergent and kept on file in the training office. *Id*. at § 6.4(C) (Ex. 1 at 2). This was not done with respect to the Revolver at issue in this case. Moreover, The WTQ Policy provides a list of approved firearms; Bates' .357 Smith & Wesson revolver is not on that list. *Id*. at § 6.4(D) (Ex. 1 at 3).

Even though as many as ***seven (7) deputies*** were already involved in the arrest, Reserve Deputy Bates deployed to the scene shortly after hearing that the arrest team was moving in. *Id*. Bates claims he saw Vaca pursuing Harris and grabbed his pepper ball launcher and exited his vehicle to assist in the pursuit. *Id*. at 26-27. By the time the 73-year old Bates got to the location where Vaca had tackled Harris, ***four (4) other deputies were already there***. *Id*. at 27. ***At least two (2) of these officers,*** and possibly all four (the video is unclear on this point), ***were physically holding Mr. Harris down on the pavement***. *Id*. One deputy was standing on Harris' leg, making it impossible for him to flee or actively resist. *Id*. ***Nonetheless, Bates then drew a Smith & Wesson .357 revolver ("the Revovler") from its holster on his hip****, id*. at 27-28, ***and shot Mr. Harris, at close range, in the back, under his right arm***." *Id*. at 28-29. Mr. Harris died shortly thereafter as a result of the gunshot wound inflicted by Defendant Bates. *Id*. at 31.

The Revolver at issue is particularly significant evidence in the case-at-bar for a number of reasons, including:

- ☞ The Revolver was Bates' own personal firearm; it was not issued to him by the TCSO, *id*. at 28;
- ☞ Bates was never trained or certified to use the Revolver as his service weapon, in violation of TCSO policy[2], *id*; and
- ☞ The Revolver was not on the list of approved firearms deputies can carry on duty, *id*. at 28; *see also* Grand Jury Report at 3.

In both public statements and in the criminal case against him, Mr. Bates and the TCSO claim that Mr. Bates "mistook" the Revolver for the Taser he carried with him.

[2] The Grand Jury that indicted Sheriff Glanz following Harris' death specifically found that "Reserve Deputy Bates was ***permitted*** by [TCSO] to wear and utilize firearms not approved for use by the Sheriff['s] Office ***in violation of TCSO policy***." Grand Jury Report at 3 (emphasis added).

That is, it is Defendants' position that Bates meant to grab his Taser and shoot *that* at Mr. Harris, intending only to stun him, but instead Bates *accidently* grabbed his Revolver and unwittingly shot Mr. Harris with a bullet. *Id*. at 27-29. Plaintiff maintains that Bates did not mistake the Revolver for his Taser and that, in any event, his conduct was objectively unreasonable as a matter or law.

Comments made during an April 12, 2016 hearing in Bates' criminal trial by Clark Brewster[3] - Bates' attorney - reveal that Bates' Revolver will be critical evidence in this case. **During said hearing, Mr. Brewster stated publically to Tulsa County District Court that he has dry-fired Bates' Revolver and "the trigger pull is just – I've never had a revolver with a trigger pull so light, *just so absolutely, unbelievably light.*"** *See* Transcript of Proceedings held April 12, 2016, attached as Ex. 2, p. 8. That means that the force necessary to shoot the weapon is lighter than a standard Smith & Wesson .357 revolver. *Id*. This is sometimes called a "hair trigger". This contention, if true, will support Plaintiff's claims of excessive force and deliberate indifference because it would mean that, even if Mr. Bates *did* confuse his Revolver with his Taser – which is an incredible claim that is certainly not admitted by Plaintiff – *he was only able to do so because the Revolver had been modified to allow an unintended discharge* (having a closer discharge weight to a Taser than a stock .357 Smith & Wesson). The fact that Sheriff Glanz and the TCSO knowingly allowed Bates to use a modified service weapon that had not been certified and approved by the TCSO – in direct violation of unequivocal TCSO policy – supports that Defendants were deliberately indifferent to Mr. Harris'

[3] Mr. Brewster, himself friends with both former Tulsa County Sheriff Stanley Glanz and Robert Bates – represents Mr. Bates in both this case and in the criminal case against Bates. He continues to represent Sheriff Glanz and the TCSO in several civil rights cases pending before this Court.

constitutional rights.

Additionally, we now know that Mr. Brewster actually had an "exemplar" Smith & Wesson .357 revolver *modified* for use in Bates' criminal case by changing the standard trigger to a hair trigger. Ex. 2; *see also* Affidavit of Michael L. Hardison[4], attached hereto as Ex. 3. According to Mr. Brewster's public comments during the April 12, 2016 hearing, the modified "exemplar" .357 was only intended for use at his office by his experts, although the same was listed on Mr. Bates' exhibit list in the criminal matter and was only excluded as evidence following the State's motion *in limine*. *See State v. Bates*, CF-2015-1817, State's Objection to Defendant's Witnesses and Exhibits List, attached as Ex. 4, p. 5. A reasonable inference, supported by Mr. Hardison's affidavit and Mr. Brewster's comments during the criminal hearing[5], is that Mr. Bates and his attorneys intended to introduce the modified weapon to the jury, hoping the jury would not understand the difference between a modified weapon and a stock weapon, and that

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[4] As set forth in the attached Affidavit, Mr. Hardison is a certified gunsmith and holds a federal firearms license. Ex. 3 at 1. Until recently, he worked as a gunsmith for 2A Shooting Center ("2A") in Tulsa, which is owned by Mr. Brewster. *Id*. In March of 2016, Hardison was asked by a manager at 2A to do a "trigger job" on Smith & Wesson .357 revolver that had been ordered by 2A for use in the criminal case against Mr. Bates. *Id*. at 1-2. Specifically, Mr. Hardison was asked to modify the gun by significantly reducing the amount of force required to discharge the weapon from its stock configuration of 11 to 12 ½ pounds. *Id*. Mr. Hardison was reluctant to modify the weapon for a number of reasons. *Id*. When he asked why Mr. Bates could not simply rely on the actual gun used to shoot Eric Harris as evidence in the trial, he was told that the jury would be "too stupid to figure it out." *Id*. at 2. Mr. Hardison believed that the requested modification was to fool or manipulate the jury and resigned instead of performing the modification. *Id*.

[5] Mr. Brewster advised the court that the gun was modified "to have the same kind of feel" as the "lighter trigger pull" on Bates' Revolver which would be available for the State to use if it wanted instead of bringing in the original. Ex. 2 at 8 ("[I]t's been used as an exemplar for us and our experts…so we don't intend to use that as an exhibit. Unless the State wanted to use it instead of getting the other one out of a bag or something. They're identical.").

they would believe that Mr. Bates honestly confused the Revolver with his Taser and easily pulled the light trigger without thinking.

In the case at bar, whether the trigger weight was modified to a hair trigger or not is important. If not, it would have been significantly more difficult for Mr. Bates to discharge his Revolver, supporting the theory that he did not "confuse" the Revolver with his Taser and that he actually *intended* to shoot Mr. Harris in the back. If the trigger *was* modified, as Mr. Brewster claimed publically during the April 12, 2016 hearing, it would have been significantly more *easy* for Mr. Bates to discharge his Revolver. Because modification of service weapons is a serious issue that can easily and obviously lead to constitutional violations, TCSO WTQ Policy absolutely requires that personal weapons be certified by the TCSO prior to use. *See* Ex. 1. **The fact that Sheriff Glanz and the TCSO knowingly allowed Mr. Bates to use a personal, non-certified weapon shows that they were deliberately indifferent to Mr. Harris' constitutional rights. That indifference is made all the more egregious if the Revolver Mr. Bates was allowed to carry had been modified to have a hair trigger.** For these reasons, the trigger weight of the Revolver used by Robert Bates to shoot and kill Eric Harris is materially relevant in this case.

As stated above, the Revolver is currently locked in the TCSO evidence room because it is evidence in the criminal case against Bates. *See, e.g.,* Ex. 4 at 5. While it is locked away, it is protected from tampering. That is, no one can alter the trigger weight of the Revolver at issue at this time. **However**, as soon as the trial against Bates is concluded, the Revolver will be released to Bates and his attorneys, who have the knowledge, resources and motive to tamper with the weapon. *See* Affidavit of Michael

Hardison, Ex. 3 at 2 (noting that when he indicated he was uncomfortable reducing the trigger weight on the standard .357 - based solely on the idea that a jury would be "too stupid" to understand trigger weights and other basic gunsmithing – Brewster's business partner, Rick Phillips interjected in the conversation to say "***Bob [Bates] shooting that guy was an accident***.") (emphasis added). Accordingly, the testing required by the Plaintiff in this case should take place *before* the criminal trial against Bates concludes and the Revolver is released to Bates and his attorneys.

The hearing in the criminal case that took place on Tuesday, April 12, 2016, was to hear the State's motion to continue the trial set for Monday, April 18, 2016, due to thousands of page of new documents that were only recently produced to the State by Bates's attorneys. After a three (3) hour hearing, the court ***denied*** the State's motion and ruled that trial would begin on Monday, April 18, 2016, as scheduled. Thus, an emergency order in this case is necessary to preserve and protect crucial evidence in this case.

The testing requested by Plaintiff is a simple "trigger weight" test, which can be performed by any qualified gunsmith. The test itself is simple, and involves using a scale mechanism similar to the scales used to weigh fish. Plaintiff has spoken with certified gunsmith Dean Doyle Arnold, who is qualified to perform the testing, and he has agreed to act as Plaintiff's expert witness in this case. Plaintiff is confident that if the Court orders the testing to take place before the Revolver is released from the evidence room by the TCSO, the Parties can coordinate a mutually convenient date, time and place for Mr. Arnold to perform the testing prior to the conclusion of Bates' criminal trial.

ARGUMENT

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…" Fed. R. Civ. P. 26(b). As set forth above, the "trigger weight" of Bates' Revolver used to shoot and kill Eric Harris is critically important to the issues in this case. As such, it is well within the permissible scope of discovery. Rule 34 permits parties to test physical evidence, as requested herein. Fed. R. Civ. P. 34(a)(2) (providing for entry onto designated property possessed or controlled by another party for purposes of testing the property or any designated objection thereon). Here, the property at issue, the Revolver, is in the control of the TCSO and the Sheriff, both of which are Defendants in this case.[6]

Traditionally, requests for testing such as the one Plaintiff is making, are made in writing to the party in control of the product to be tested. Fed. R. Civ. P. 34. The controlling party then has thirty (30) days to respond to the request and either allow the testing to occur, or provide an objection thereto. *Id*. Such requests cannot be made before the parties engage in a discovery conference pursuant to Rule 26(f) ***unless authorized by court order***. Fed. R. Civ. P. 26(d)(1) (emphasis added).

The Tenth Circuit has acknowledged that the district courts have the discretion to

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[6] Plaintiff brings this case against the Sheriff of Tulsa County, in his official capacity. It is well-established, as a matter of Tenth Circuit authority, that a § 1983 claim against a county sheriff in his official capacity "is the same as bringing a suit against the county." *Martinez v. Beggs*, 563 F.3d 1082, 1091 (10th Cir. 2009). *See also, Porro v. Barnes, 624 F.3d 1322, 1328 (10th Cir. 2010); Bame v. Iron Cnty*., 566 F. App'x 731, 737 (10th Cir. 2014). After a special election on April 5, 2016, Sheriff Vic Regadalo took office on April 11, 2016, replacing acting Sheriff Richard Weigel, who is named in the Complaint. However, Rule 25(d) of the Federal Rules of Civil Procedure provides that '[a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending," rather "[t]he officer's successor is automatically substituted as the party."

authorize and compel expedited discovery. *See, e.g., Washington v. Correia*, 546 Fed. App'x 786, 787 (10th Cir. 2013) (citing with approval *Arista Records v. Doe 3*, 604 F.3 110, 119 (2nd Cir. 2010))[7]. In *Arista Records*, the Second Circuit identified several principal factors: (1) the "concreteness" of the plaintiff's showing of a prima facie claim of actionable harm; (2) the specificity of the discovery requested; (3) the absence of alternative means to obtain the subpoenaed information; (4) the need for the information sought to advance the claim, and (5) the objecting party's expectation of privacy. *Arista Records*, 604 F.3d at 119. The issue in *Arista* involved a motion filed by an anonymous defendant to quash a subpoena that had been served on an Internet service provider for disclosure of the identities of internet users who had allegedly downloaded/distributed music online in violation of copyright law. However, as acknowledged by the Tenth Circuit in *Correia*, the factors are equally relevant to situations like the case at bar where expedited discovery is sought.

With respect to the first factor, Plaintiff claims that Defendants violated Eric Harris' constitutional right to be free from excessive force, as well as his right to reasonably necessary medical treatment, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiff's excessive force claim includes, but is not limited to, Mr. Bates' shooting and killing of Eric Harris. It is clearly established that "deadly force cannot be used when it is unnecessary to restrain a suspect or secure the safety of officers, the public, or the suspect himself…" *Weigel v. Broad*,

[7] In *Correia*, the plaintiff was seeking the defendant's address from the apartment manager of the defendant's former apartment. *Correia*, 546 Fed. App'x at 787. In denying his request for expedited discovery, the district court found that the plaintiff had failed explore other means to obtain the address, such as consulting phone directories and conducting Internet searches. *Id*.

544 F.3d 1143, 1155 (10th Cir. 2008). Further, "'there undoubtedly is a clearly established legal norm' precluding the use of violent physical force against a criminal suspect or detainee '***who already has been subdued and does not present a danger to himself or others***.'" *Estate of Booker v. Gomez*, 745 F.3d 405, 424-34 (10th Cir. 2004) (quoting *Harris v. City of Circleville*, 583 F.3d 356, 367 (6th Cir. 2009) (emphasis added). As set forth above and in Plaintiff's Complaint, the well-documented facts are more than sufficient to establish a concrete prima facie case against Defendant Bates.[8]

Regarding the second factor, the specificity of the discovery requested, Plaintiff seeks to have a very specific and standardized "trigger weight" test performed on Bates' Revolver by a certified and qualified gunsmith. Plaintiff is confident the test can be completed at a mutually agreeable date, place and time.

Regarding the third and forth factors of the *Arista Records* test – the absence of alternative means to obtain the subpoenaed information and the need for the information to advance the claim – as set forth above, there are *no* other means to obtain the trigger weight of Bates' Revolver other than by performing a trigger weight test on that particular Revolver. The trigger weight is a material piece of evidence in this case. As indicated by Mr. Brewster during the recent criminal hearing, the trigger weight of Bates' Revolver is significantly less than a standard Smith & Wesson .357, making it easier to discharge. Whether that is true, or whether the trigger weight on Bates' Revolver is the standard, 11-12 ½ pound trigger weight, will be extremely important to Plaintiff's claims that Bates was deliberately indifferent to Mr. Harris' rights by knowingly carrying a modified and non-certified weapon on duty. The evidence is also extremely important to

[8] Plaintiff further directs the Court to her responses to Defendants' motions to dismiss, Docket ## 15, 16.

Plaintiff's claims that former Sheriff Glanz and the TCSO were deliberately indifferent to Mr. Harris' rights by ***knowingly permitting Mr. Bates to carry a non-certified weapon while on duty.*** Plaintiff is entitled to test the truth of these assertions. That can only be accomplished by testing the trigger weight of the Revolver.

Finally, with respect to the fifth factor – expectation of privacy – neither Mr. Bates nor any of the other Defendants have any expectation of privacy in the trigger weight of the Revolver.

In this case, it is not possible to have the required discovery conference, issue a traditional discovery request, and wait thirty (30) days for a response from Defendants before conducting the necessary "trigger weight" testing before the Revolver is released from evidence and becomes subject to interference. All Defendants in this case, aside from Bates, have filed motions to dismiss which, although wholly without merit, are currently pending. Traditional discovery has not yet begun. Moreover, the need for the trigger weight testing was not made clear until the hearing in the criminal matter on April 12, 2016, during which Mr. Hardison's affidavit came to light and Mr. Brewster indicated – for the first time – that the trigger weight of the Revolver had been modified. As set forth above, the Plaintiff cannot wait for traditional discovery to conduct this necessary and critical testing. This Court has the authority to order the same and, under the circumstances presented herein, should compel the testing to occur in the interests of justice.

CONCLUSION

For the reasons set forth herein, Plaintiff asks the Court to enter an order compelling Sheriff Regalado and the TCSO to present the Bates' Revolver for trigger-

weight testing by Plaintiff's expert, at a mutually agreeable time and place, ***before*** the Revolver is released to Mr. Bates at the conclusion of his criminal trial in Tulsa County District Court case number CF-2015-1817.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2016, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and for transmittal of a Notice of Electronic Filing to all ECF registrants who have appeared in this case.

/s/Daniel E. Smolen