2015-5148

United States Court of Appeals for the Federal Circuit

DEBRA JONES, as personal representative of the Estate of Todd R. Murray, deceased, for and on behalf of the heirs of Todd R. Murray, ARDEN C. POST, individually and as the natural parents of Todd R. Murray, UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,

Plaintiffs – Appellants,

v.

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in Case No. 1:13-cv-0227, Judge Marilyn Blank Horn

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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April 25, 2016

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CERTIFICATE OF INTEREST

Counsel for Plaintiffs-Appellants certifies the following:

1. The full name of every party or amicus represented by me is:

   Debra Jones, for herself and as personal representative of the estate of Todd R. Murray (deceased) and on behalf of the heirs of Todd R. Murray;
   Arden C. Post;
   The Ute Indian Tribe of the Uintah and Ouray Reservation.

2. The name of the real parties in interest represented by me are the same as described in 1 above.

3. There exist no parent corporations or publicly held companies having any interest in the parties represented by me.

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me in the trial court or agency or are expected to appear in this court are:

   Frederick Peebles & Morgan LLP and its attorneys Frances C. Bassett (Attorney of Record), Sandra L. Denton and Todd K. Gravelle appeared in the trial court.

   Frederick Peebles & Morgan LLP and its attorneys Frances C. Bassett (Principal Attorney) and Matthew J. Kelly have filed appearances in this Court.

Dated: April 25, 2016 *_/s/ Frances C. Bassett_*
Frances C. Bassett

cc: James A. Maysonett, Counsel for Defendant-Appellee

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Robert B. Sykes & James W. McConkle, *Spoliation in Utah–A Problem in Search of a Remedy*, Utah B.J., March 2, 2004 23

The Plaintiffs/Appellants, the Murray family—referred to as "the Tribe members" in the United States' brief—respectfully submit their Reply Brief.[1]

SUMMARY OF THE REPLY

The Murray family will confine its Reply to two issues, the applicability of collateral estoppel under the circumstances of this case, and whether the federal courts can judicially rewrite the terms of the Ute Treaty of 1868, replacing the words "any wrong" with the phrase "any affirmative criminal act," thus substantially nullifying the remedy provided under the Bad Man clause.

INTRODUCTION

"Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice."[2] Professor Moore states the rule as follows:

> Although on the whole, the doctrines of res judicata and collateral estoppel are strictly applied, they have been occasionally rejected or qualified in cases in which an inflexible application would have violated an overriding public policy or resulted in manifest injustice to a party.[3]

---

[1] Although the Ute Tribe was a plaintiff in the case, the Tribe has not appealed from the Court of Claims' dismissal of the Tribe's claim. The Tribe's name was erroneously included in the caption of the opening brief as an appellant; the Appellants will file a notice of errata and motion to correct caption to clarify that the Tribe is not an appellant.

[2] *Tipler v. E.I. DuPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971) (citations omitted).

[3] 1B J. Moore, Federal Practice, P O.405(11) (1974).

> * * * *
>
> Res judicata is a sound and salutary principle that deserves to be respected and applied. But at times there is considerable truth in the observation that res judicata renders white black, and the crooked straight.[4]

Such is the case here. Dismissal of the Murray family's claims against the United States would be manifestly unjust because it would permit the United States to benefit from the United States' own destruction of critical evidence in the Todd Murray shooting death—and that anomalous result would, in turn, completely negate the United States' statutory responsibilities and trust obligations to the Murray family as tribal members.[5]

Dismissal of the Murray family's claims against the United States would also contravene the important public policies of maintaining the integrity of the judicial process by holding spoilators responsible for their destruction of evidence. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) ("It is has long been the rule that spoliators should not benefit from their wrongdoing."). As

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[4] *Id.*, P 0.405(12).

[5] Under the Ute Treaties and other federal statutes (e.g., 18 U.S.C. §§ 1151, 1152, 25 U.S.C. §§ 11321-1326), the United States has exclusive criminal jurisdiction over (*i*) felony crimes committed by Indians within the Uintah and Ouray Reservation, and (*ii*) both felony and misdemeanor crimes committed by non-Indian offenders against Indian victims. No Indian tribe in Utah has consented to state jurisdiction over its reservations, *United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985).

the Plaintiffs detail in their complaint,[6] in the minutes, hours, and days following Todd Murray's shooting death, the Federal Bureau of Investigation (FBI) failed to conduct any real investigation into Murray's shooting death; more specifically, the FBI failed to collect, document, forensically test, and otherwise properly preserve critical evidence. Had that critical evidence been preserved, it may have enabled the Murray family to prove their claims in *Jones v. Norton*, and more critically, it may have enabled the Murray family to refute the State officers' asserted defenses.[7] There is a legal term for the FBI's failure to collect, document, forensically test, and otherwise properly preserve critical evidence and that term is "spoliation"—in plain English, spoliation means the "destruction" of evidence:

> [*D*]*estruction of evidence* means rendering discoverable matter permanently unavailable to the court and the opposing party. Such a broad definition is necessary because of the great many contexts in which courts and commentators have considered destruction of evidence. . . . *destruction* is defined to mean rendering evidence permanently unavailable to the court and opposing party. (emphasis in original)

JAMIE D. GORELICK, STEPHEN MARZEN, LAWRENCE SOLUM, DESTRUCTION OF EVIDENCE, p. 4 (1989). In a normal case, when critical evidence has been destroyed, as happened in Todd Murray's shooting death, the courts strive to level

[6] A 72-77, ¶¶ 28-43.

[7] No. 2:09-cv-00730, U. S. District Court for the District of Utah. For convenience, Appellants will refer to the Utah state, county and local law enforcement officers collectively as "the State officers."

"the playing field"—courts level the playing field by imposing one or more spoliation sanctions that aim to restore "the prejudiced party to the position it would have been in without the spoliation." *Mosaid Technologies Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332, 225 (D.N.J. 2004).

However, that never happened in *Jones v. Norton*; the playing field in *Jones v. Norton* was never leveled because the District Court and the Tenth Circuit both concluded that it was *not* the State officers, *but the FBI agents*, who were primarily responsible for the destruction of evidence:

> Once [FBI] Agent Ashdown arrived, the FBI had exclusive jurisdiction over the investigation, and was entirely responsible for preserving the .380 caliber weapon as evidence and preventing its ultimate destruction.

Jones v. Norton, 809 F.3d 564, 581 (10th Cir. 2015).

> As part of his investigation, Agent Ashdown possibly should have taken Detective Norton's firearm to have necessary tests performed. But Agent Ashdown is not a named Defendant.

Jones v. Norton, 2:09-cv-730-TC, 2014 WL 90569 at *7. The United States was not a party to *Jones v. Norton*, and therefore, no spoliation sanctions were imposed.[8] As a result, the Plaintiffs in *Jones v. Norton* were left with no physical

[8] *See Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 189 (D.D.C. 1984) ("If the defendant in this litigation were the United States, plaintiffs would have succeeded" in their request for spoliation sanctions), *modified on reconsideration*, 593 F. Supp. 388 (D.D.C. 1984), *aff'd*, 746 F. 2d 816 (D.C. Cir. 1984).

evidence—only Detective Norton's version of what happened.[9] This means the Murray family did not have a full and fair opportunity to litigate their claims in *Jones v. Norton*, and for that reason it would be manifestly unjust to give the findings in *Jones v. Norton* preclusive effect in the Court of Claims.

The case at bar, *Jones v. United States*, is one of those rare cases in which the "inflexible application" of collateral estoppel not only violates public policy but also results in a manifest injustice. *See, e.g., Montana v. United States*, 440 U.S. 147, 155 (1979) ("to determine the appropriate application of collateral estoppel in the instant case" requires a consideration of whether "special circumstances warrant an exception to the normal rules of preclusion"); *Commodity Futures Trading Comm'n v. Commodity Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1485-86 (10th Cir. 1983) (due process requires that issue preclusion be applied only against those litigants who have had a full and fair opportunity to litigate); *United States v. Pueblo of Taos*, 515 F.2d 1404, 1406 (Fed. Cir. 1975) (same).

RESPONSE TO STATEMENTS IN THE DEFENDANT'S BRIEF

The Murray family's undersigned counsel is one of the attorneys who represented the family in *Jones v. Norton*, and as such, undersigned counsel is

[9] As explained *infra*, it is incorrect, as the United States asserts in its brief, p. 6, that Murray's shooting was witnesses by multiple state and local officers.

thoroughly familiar with the record in that case. It is essential to correct a substantial misstatement and error in the United States' brief. The United States' brief is flatly wrong in representing to this Court that multiple state and local officers testified in *Jones v. Norton* "that Mr. Murray shot himself". U.S. Brief, pp. 6-7. To the contrary, based on the State and local officers' official incident reports, there were no witnesses to the shooting other than off-duty Vernal City Police Detective Norton, who claims he exchanged gunfire with Murray. One of the Uintah County Sheriff's Deputies, Anthoney Byron, subsequently testified in his deposition that he saw Murray fall to the ground; however, Deputy Byron's testimony was confusing and contradictory, and Deputy Byron was emphatic that he never saw Murray actually shoot himself, or even have a gun in his hand for that matter. In addition, Deputy Byron admitted that his later claim of seeing Murray fall to the ground was contradicted by the original account he had provided in his official police report.[10] Most significantly, Deputy Byron's deposition account was contradicted by a third officer, State Trooper Craig Young, who was with Deputy Bryon during the time Deputy Byron says he saw Murray fall to the ground. Contrary to Deputy Byron's deposition account, Trooper Young testified that he and Deputy Byron were not in a position to have visual contact with either

[10] Deposition of Anthoney Byron, *Jones v. Norton*, Dkt. 274-8, Case No. 2:09-cv-00730, U. S. District Court for the District of Utah. When Deputy Byron was asked, "Did it appear to you that [Todd Murray] was pointing a firearm at anybody?" Deputy Byron answered, "No." Dkt. 328-3, p. 21.

Murray or Detective Norton at the time of the shooting; Trooper Young also testified that he believes the shooting may have occurred while he and Deputy Bryon were still in their vehicles travelling *away* from the shooting scene at the time of the shooting, to a location about a quarter mile south of where the shooting happened—a drive that took Trooper Young and Deputy Byron out of visual range of both Detective Norton and Todd Murray at the time of the shooting, according to Trooper Young.[11] Trooper Young testified that he and Deputy Byron had only been at location to the south for a short time, "[a]nywhere from 30 seconds to a minute," before "we either heard a gunshot or it was on the (police) radio that shots were fired."[12] The men then got in their vehicles and returned the quarter mile north back to the intersection of Seep Ridge Road and Turkey Track Road, and eventually made their way to Detective Norton who told them that he had exchanged gunfire with Murray. Significantly, when asked by the Murray family's attorney, "So Officer Norton never told you that the suspect [Murray] shot himself, did he?" Trooper Young answered, "No."[13] It must be emphasized that apart from

[11] Deposition of Craig Young, *Jones v. Norton*, Dkt. 264-15, p. 5, Dkt. 328-15, pp. 7-8, Case No. 2:09-cv-00730, U. S. District Court for the District of Utah.

[12] *Id*. Dkt. 328-15, pp. 5, 8.

[13] *Id*., Dkt. 328-15, p. 12.

Detective Norton, Deputy Byron, and Trooper Young, there were no other State or local officers in the area of the shooting at the time of the shooting.[14]

LEGAL ARGUMENT

I. THIS COURT SHOULD REVERSE THE COURT OF CLAIMS' DISMISSAL BASED ON COLLATERAL ESTOPPEL

The case at bar, *Jones v. United States*, is one of the rare cases in which the "inflexible application" of collateral estoppel not only violates public policy but also results in a manifest injustice. As mentioned above, the playing field in *Jones v. Norton* was never leveled because both the District Court and the Tenth Circuit concluded that it was *not* the State officers, *but the FBI agents*, who were primarily responsible for the destruction of evidence related to Todd Murray's shooting. Because the United States was not a party to *Jones v. Norton*, no spoliation sanctions were imposed. And as a result, the Plaintiffs in *Jones v. Norton* were left with no physical evidence—only Detective Norton's version of what happened. This means the Murray family was denied a full and fair opportunity to litigate

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[14] The shooting occurred on an escarpment that was surrounded to the north and east by steep embankments. Trooper David Swenson, the officer who had initiated the police pursuit of the Kurip vehicle, had remained with the handcuffed driver on the eastern side of the eastern embankment and thus was out of visual sight of Detective Norton and Murray. Similarly, Deputy Byron and Trooper Young drove on a road that traversed the eastern side of the eastern embankment to get to the location about a quarter mile south of the shooting site. Deposition of Anthoney Byron, *Jones v. Norton*, Dkt. 264-14, p. 6.

their claims in *Jones v. Norton*, and for that reason it would be manifestly unjust to give the findings in *Jones v. Norton* preclusive effect in the Court of Claims.

It is critical for this Court to understand the breadth and importance of the destroyed evidence because only then will the Court appreciate the imperative of a spoliation inference, or other spoliation sanction, as a means of according even a small modicum of justice to the Murray family. The decedent, Todd Murray, was a right-handed individual; the entry wound to his head was in the back of his head, above and behind his *left* ear. Therefore, if Detective Norton's account is to be believed, the right-handed Murray—who Detective Norton testified was running—would had to have reached with his right hand around to the left side of his head—above and behind his left ear—and pulled the trigger, causing the fatal wound. The Plaintiffs' expert in police procedures, Dr. William T. Gaut, Ph.D., opined that:

> A gunshot wound to the left side of the head by a right-handed person is viewed with a degree of suspicion, which must be satisfied through further investigation, including a forensic examination of trace evidence. In the instant case, there appears to have been no further investigation, no examination or analyses of trace evidence, and improper destruction of evidence which might have answered investigative questions.[15]

[15] Dr. Gaut Expert Report in *Jones v. Norton*, Dkt. 328-7, Case No. 2:09-cv-00730, U. S. District Court for the District of Utah.

Even the Deputy Utah Medical Examiner, who conducted a visual examination of Murray's body (in lieu of an autopsy), admitted under oath that he could not rule out the possibility that Murray had been shot from behind, execution style.[16]

Because the fatal gunshot was a contact wound, all experts agreed there would have been "blowback"—blood and human tissue—blown away from Murray's head upon impact; some of the blowback would have been inside of the gun barrel and other blowback on the outside of the gun that discharged the bullet; additional blowback likely would have settled on Murray's clothing and on the clothing of the person who shot Murray (if we allow for the possibility that Murray did not shoot himself).[17] Therefore, it was critical for the FBI and other federal law enforcement officer to take custody of, and forensically examine, the two guns that Murray and Detective Norton are alleged to have used, as well as each man's clothing. But that did not happen. Enumerated below is a list of the evidence that was spoliated—or destroyed—in this case.

A. The .380 Firearm

1. The FBI and other federal officers did not prevent the destruction of the .380 firearm purportedly used by Murray and found near his body (Parenthetically,

[16] Deposition of Dr. Edward A. Leis, Deputy Utah Medical Examiner in *Jones v. Norton*, Dkt. 328-8, pp. 3-4.

[17] Trace amounts of blood and human tissue not visible to the human eye possibly could have been detected with the chemical Luminol, and further attributed through DNA testing.

photographs of the .380 gun at the scene do *not* show any blow or blowback tissue on the gun.)

2. The .380 handgun purportedly used by Todd Murray was destroyed eight months after the FBI was notified of anticipated litigation by the Murray family's Notice of Claim under UTAH CODE ANN. §63G-7-402.
3. The FBI and other federal officers did not forensically test the firearm before it was destroyed.
4. Because the .380 was destroyed the Murray family will never be able to determine:
   a. If it was an operable firearm;
   b. If it contained blowback (blood/tissue) which would have been present if the gun had been pressed up against Murray's head when it was fired;
   c. If it fired the shell casings that were found at Murray's feet; and
   d. If it contained fingerprints.

B. Detective Norton's Firearm

1. The FBI and other federal officers did nothing to protect and preserve the 40 caliber gun that Detective Norton admittedly fired during the incident.
2. Norton's gun was never tested or examined for trace evidence, and was returned to him after three days.

3. Because Detective Norton's 40 caliber gun was never forensically tested, the Murray family will never be able to determine:
   a. If it contained blowback (blood/tissue) which would have been present if the gun had been pressed up against Murray's head when it was fired;
   b. If it fired the shell casings that were found where Norton claimed he fired back; and
   c. If it contained fingerprints.

C. Critical Evidence

1. The FBI and other federal officers failed to swab either Murray's or Norton's hands for Gun Shot Residue (GSR) or for DNA from blow back blood or tissue. Such testing would have been critical in determining if Murray in fact fired a gun, committed suicide, or was murdered execution-style.
2. The FBI and other federal officers failed to forensically examine either Norton's or Murray's clothing for the presence of blood or tissue. Such testing would have been dispositive of the issue of Norton's proximity to Murray at the time of the incident.
3. The FBI and other federal officers failed to adequately document the shooting scene, which made it impossible for experts retained by the Murray family to to reconstruct or verify the scene described by the State officers:

a. Federal officers made no effort to search for fired bullets. The recovery of the fired bullets would have been dispositive of the issue of the relative positions of the parties during the alleged exchange of gunfire; and

b. Federal officers failed to adequately document the blood spatter. Had the blood spatter evidence been properly documented, the Murray family would be able to reconstruct the scene and potentially develop dispositive evidence on the question whether Murray committed suicide or was murdered execution-style.

4. The FBI and other federal officers failed to conduct a search of Defendant Norton's person and failed to search, process and photograph Norton's personal automobile.

D. Ashley Valley Medical Center

1. The Federal officers that were present with Murray's body in the emergency room (ER) at AVMC, tacitly allowed, or participated in various actions that altered and potentially destroyed critical evidence in that:

a. Murray's body was compromised during photographs by the manipulation of the wound by State officers. In fact, Deputy Anthoney Byron went so far as to insert a finger into Murray's gunshot wound to the horror of a fellow officer standing nearby.

b. Murray was prematurely and improperly disrobed by the State and Federal officers in the ER which hindered or destroyed the possibility of collection of trace evidence; and the State and Federal officers did not prepare chain of custody documents for the extraction of a blood sample at the ER, making it impossible for the Murray family to determine if the sample was properly preserved.

E. Blackburn Mortuary

The Federal officers present at the Mortuary allowed the State officers to improperly handled and tamper with Murray's body at Blackburn Mortuary which altered and potentially destroyed critical evidence in that:

a. Although a blood draw had been taken from Todd Murray's body at AVMC, the Federal officers present at the Mortuary allowed Vernal City Police Chief Gary Jensen to insert a needle with syringe into Murray's heart, purportedly to draw blood. Chief Jensen then allegedly directed a mortuary employee to make an unauthorized incision to Murray's jugular vein, from which two vials of blood were purportedly drawn, although neither State nor Federal officers have ever accounted for the blood vials reportedly taken from Murray's body at the Mortuary. The foregoing actions obviously contaminated Murray's body and, consequently, invalidate the toxicology results;

b. Federal officers failed to prepare chain of custody documents for the events at the Mortuary, including: 1) no photographs were taken; 2) there is no evidence Murray was placed in a sealed body bag; 3) no evidence log was made; 4) no personnel log was compiled; and

c. Federal officers failed to prepare chain of custody documents for the extracted blood sample at Blackburn Mortuary, making it impossible for the Murray family to determine if the sample was properly preserved.

F. Office of Medical Examiner

1. No federal officer was present at the Utah Office of the Medical Examiner (OME) during the OME's examination, and federal officers otherwise failed to insure that the OME perform a full forensic autopsy as statutorily mandated under UTAH CODE ANN. § 26-4-13(1).

2. The OME's failure to perform more than an external, *visual* exam of Murray's body constitutes spoliation of evidence in that:

a. The Murray family is unable to confirm if the external features of the gunshot wound are the same as internal features of the wound. A detailed examination of the brain would have been relevant in assessing the likely effects of the wound and for comparisons to any witness accounts of the shooting. Bullet fragments that may have been missed by the x-ray would

have been recovered enabling the Murray family to potentially discover the caliber of the weapon that caused the wound;

b. The Murray family is unable to confirm the question of an altercation with law enforcement or the use of restraints due to the OME's failure to dissect the soft tissues of the torso or extremities;

c. The Murray family is unable to determine the validity of the toxicology results as Defendants allowed for the use of heart blood for postmortem toxicologic testing which distorted the concentration of drugs allegedly found in Murray's system. Peripheral blood would have been the preferred specimen for testing because it is more accurately reflective of the blood concentration that existed at the time of death; and

d. Federal officers did not require, or insure, a chain of custody for the blood sample extracted by the OME making it impossible for the Murray family to determine if the sample was properly extracted and preserved.

G. Trace Evidence

1. Federal officers failed to preserve critical trace evidence thereby affecting the Murray family's ability to secure legal redress, specifically:

   a. Murray's hands. Hands are bagged after death to preserve any trace evidence that may be deposited on them as well as to prevent subsequent contamination by extraneous material. The mishandling of

Murray's body at the ER contaminated Murray's hands and potentially destroyed any trace evidence. Murray's hands are bagged in some photos but not in others. No evidence exists to document (1) who bagged Murray's hands or when or where it was done, and (2) who removed the bags. The bags were not submitted into evidence nor were they examined by the OME; and

b. Body Bag. When a body is placed in a body bag for storage and transportation, that bag should be sealed with a uniquely identifiable device, and the seal should be broken in the presence of the OME at the time of examination, thus ensuring that the body/evidence has remained undisturbed during transport and storage. Murray's body was not properly preserved in the body bag thus contaminating or destroying potential evidence. Deputy Chief Medical Examiner Leis verified that the body bag was not sealed when he received the body for examination. There is no evidence or documentation to establish who placed Murray's body into the body bag, nor of when and where that occurred.

i. ISSUE PRECLUSION IS NOT LEGALLY REQUIRED OR JUSTIFIED UNDER THE CIRCUMSTANCES OF THIS CASE

The circumstances of this case satisfy several of the criteria enumerated under the Restatement (Second) of Judgments, Section 29, which states:

A party precluded from relitigating an issue with *an opposing party*, in accordance with §§ 27 and 28, is also precluded from doing so with *another person* unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

1) Treating the issue as conclusively determine would be incompatible with an applicable scheme of administering the remedies in the action involved;

2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

3) The person seeking to … avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Restatement (Second) of Judgments § 29 (1982) (emphasis added). The circumstances of this case qualify under the criteria set forth under 1, 2, 3, 5 and 8 above. As to the first factor, the District Court's factual findings in *Jones v. Norton* were made in reference to the legal issue of whether Todd Murray was seized in violation of the Fourth and Fourteenth Amendments to the U. S. Constitution. To treat the findings in *Jones v. Norton* as conclusive in this case would be incompatible with the treaty guarantees that were made to the Ute Indians under the Ute Treaties of 1863 and 1868, as well as the remedy that is afforded under the Bad Man clause. As to the second factor, the forum in the Court of Claims affords the Murray family the opportunity to seek spoliation sanctions against the United States based on the spoliation that happened as a result of the FBI's "exclusive jurisdiction" to investigate the circumstances of Todd Murray's shooting death—sanctions that were not available in the District Court based on the District Court and the Tenth Circuit's determination that the United States had "exclusive" jurisdiction over the shooting investigation and that federal officers were responsible for the most significant spoliation.[18] As to the third and

[18] Both the District Court and the Tenth Circuit discuss in *Jones v. Norton* that perhaps Vernal City and/or Vernal City Police Chief Gary Jensen should have had Norton's 40 caliber handgun forensically examined and tested; however, the FBI—the agency responsible for conducting a criminal investigation into Murray's

fifth factors, federal law precluded the Murray family from litigating their Bad Man claim and joining the United States in *Jones v. Norton*; further, because Murray's shooting death occurred within the U&O Reservation, the District Court and Tenth Circuit determined that the State officers were divested of criminal jurisdiction over Murray's shooting, whereas the United States possessed *exclusive* criminal jurisdiction over the shooting; hence, the Murray family was not allowed any spoliation sanctions against the State and local law enforcement officers. Finally, under the eighth factor, the destruction of evidence on the wholesale scale that occurred in this case demands that the United States—the entity that had exclusive jurisdiction over the criminal investigation of Murray's shooting death be held responsible for the spoliation: to quote the familiar maxim, UBI JUS IBI REMEDIUM—"There is no wrong without a remedy." As the Fifth Circuit so aptly noted in one of its cases:

> [W]hen as here private litigation has extensive implications of public import, the rule of res judicata or estoppel is not allowed to stultify reassessment of the prior decision. The public interest supersedes the private interest.
>
> This court is well aware of the value that the [res judicata] bar and estoppel doctrines serve in achieving a finality to litigation and in preventing harassment of a party and a waste of the court's resources through multiplicitous law suits. We are unwilling to hold, however, that they constitute an absolute from which we must never stray, even when a mechanical application would result in manifest injustice.

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death—had the first, last, and ultimate responsibility for examining and testing Norton's handgun.

> Rather, we believe that the occasional adoption of an exception to the finality rule when public policy so demands does not undermine its general effectiveness.

*Moch v. East Baton Rouge Parish School Bd.*548 F.2d 594, 596-98 (5th Cir. 1977) (and cases cited therein) (remanding case to the district court for a determination of whether "application of traditional res judicata principles would cause a manifest injustice"); *see also Blonder-Tongue Lab., Inc. v. Univ. of Ill. Foundation*, 402 U.S. 313, 350 (1971) (same approach).

ii. <u>APPLICATION OF ISSUE PRECLUSION HERE WOULD BE MANIFESTLY UNJUST AND CONTRARY TO PUBLIC POLICY</u>

In a case that the Murray family believes is analogous to the case at bar, the Fifth Circuit rejected a preclusion bar, saying:

> [A]s we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. Whatever might be the usual consequences of res judicata, collateral estoppel or doctrines akin to them, we reject them here. They are not a bar or defense here or below.

Kinnear-Weed Corp. v. Humble Oil & Refining Corp., 403 F.2d 437, 439-40 (5th Cir. 1968). The transcendent issue in *Kinnear-Weed* was an issue that went to the very heart and integrity of the adversarial process—the disqualification of the trial judge in the prior proceeding for a financial interest in the litigation. The spoliation of evidence is a transgression on a par with judicial conflict of interest. Spoliation "is akin to perjury or suborning perjury. Like perjury, spoliation

involves the alteration or suppression of relevant evidence in a cause of action or potential cause of action. And, like perjury, spoliation should carry with it serious consequences."[19] In *Defenders of Wildlife v. Andrus*, the district court rejected collateral estoppel with a rationale that is equally applicable here:

> While collateral estoppel technically applies, its application would be inequitable in the instant case *and would set a dangerous precedent in cases in which the federal government is a defendant*. (emphasis added)

Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 454 (D.D.C. 1978). The same can be said with equal force here because application of collateral estoppel to the facts of this case will establish a precedent for allowing the United States a free pass in cases where, as here, there has been wanton spoliation of critical evidence.

Other cases that support the Murray family's position include *United States v. LaFatch*, 565 F.2d 81, 83-84 (6th Cir. 1977) (reversing the district court's application of res judicata on the ground that it resulted in a manifest injustice); *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544 (7th Cir. 1977) (reversing the district court's application of issue preclusion because there was "under the peculiar circumstances herein a fundamental and unique difference in the evidence which could be admitted only because of the difference in identity of the party plaintiffs"); *Tipler v. E.I. DuPont deNemours and Co., Inc.*, 443 F.2d 125, 128-130

[19] Robert B. Sykes & James W. McConkle, *Spoliation in Utah–A Problem in Search of a Remedy*, Utah B.J., March 2, 2004.

(6th Cir. 1971) (judgment on plaintiff's NLRB claim did not have preclusive effect on plaintiff's civil rights claim because the "purposes, requirements, perspective and configuration of different statutes ordinarily vary"); *Spilder v. Hankin*, 188 F.2d 35, 38-40 (D.C. Cir. 1951) (reversing the trial court's application of res judicata, saying "[d]ecisions of this sort demonstrate that res judicata, as the embodiment of a public policy, must, at times, be weighed against competing interests, and must, on occasion yield to other policies.").

Because the United States should not be allowed to evade responsibility for its spoliation of critical evidence in the Todd Murray shooting—and because application of collateral estoppel under the facts of this case would cause a manifest injustice—the Murray family prays that this Court will reverse the Court of Claims' dismissal on the ground of collateral estoppel.

II. FEDERAL COURTS CANNOT JUDICIALLY REWRITE THE 1868 UTE TREATY TO REPLACE THE WORDS "ANY WRONG" WITH THE PHRASE "ANY AFFIRMATIVE CRIMINAL ACT"

It is for Congress, not the courts, to rewrite a statute. *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 368-69 (1971). Separation of powers under the U. S. Constitution prohibits the federal courts from rewriting a statute so that the statute covers only what the court thinks is necessary to achieve what the court thinks Congress really intended. *Lewis v. City of Chicago*, 560 U.S. 205,

215-16 (2010); *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984).

> Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. (citation omitted) Only when a literal construction of a statute yields results so manifestly unreasonably that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. (citation omitted)

United States v. Rutherford, 442 U.S. 544 (1979). That exacting standard most certainly is not met here. As the Murray family argued in its opening brief, the Court of Claims' ruling effectively rewrites the Bad Man clause to delete the broadly worded phrase "any wrong" with the cribbed phrase "any affirmative criminal act." Such judicial rewriting (*i*) disregards the plain meaning of the words "any wrong," (*ii*) relies improperly on modern definitions of "wrong," rather than on how the term was understood when the Treaty was negotiated in 1868, (*iii*) ignores the historical context in which the 1863 and 1868 Ute Treaties were negotiated, and (*iv*) judicially nullifies the justifiable expectations of the Ute Tribe and its tribal members. Appellants Op. Brief, pp. 17-27. As the Murray family further noted, the legal precedent relied upon by the Court of Claims[20] relies in turn

[20] *Hernandez v. United States*, 93 Fed. Cl. 193 (2010); *Garreaux v. United States*, 77 Fed. Cl. 726 (2007).

upon a Supreme Court decision that nowhere even considers the scope of actionable wrongs under a Bad Man clause.[21] *Id.* at 26-27.

Based on the ordinary meaning of the words "any wrong," and how Ute leaders who negotiated the Treaty would have understood the term, the words "any wrong" in the Bad Man clause both "says. . .what it means and means. . .what is says," *Carcieri v. Salazar*, 555 U.S. 379, 392 (2009), and consequently, it applies to losses resulting from "any wrong," not simply those resulting for "any affirmative criminal act."

CONCLUSION

Based on the facts and the arguments and authorities cited in the Murray family's opening brief, and this reply brief, the Murray family requests that the Court reverse the Court of Federal Claims' dismissal of the individual Plaintiffs' claim for damages under the Bad Man clause of the 1868 Ute Treaty (based on the Court of Claims' erroneous application of issue preclusion to the circumstances of this case, and the Court of Claim's attempt to rewrite the Bad Man clause under the guise of statutory interpretation). In addition, the Murray family requests that the Court reverse the Court of Federal Claims' dismissal of the individual Plaintiffs' breach of trust claim based on lack of jurisdiction, or alternatively, on the ground

[21] *Ex parte Kan-gi-shun-ca*, 109 U.S. 556 (1883).

that the general terms of 28 U.S.C. § 516 nullify the specific terms of the 1868 Ute Treaty, Art. 6, 15 Stat. 619.

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United States Court of Appeals
for the Federal Circuit
Jones v. US, 2015-5148
CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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On **April 25, 2016**, counsel has authorized me to electronically file the foregoing **Reply Brief for Appellants** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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