

United States Court of Federal Claims

**1:13-CV-227-MBH**

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DEBRA JONES, et al

*Plaintiffs,*

v.

UNITED STATES OF AMERICA

*Defendant*

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**PLAINTIFF'S RENEWED MOTION FOR SPOILIATION SANCTIONS  
AND MEMORANDUM IN SUPPORT**

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September 9, 2019

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## MOTION

Plaintiffs move for spoliation sanctions based upon the attached memorandum of law and supporting documents and the Court file in this matter. Plaintiffs make this request pursuant to this Court's inherent powers and duty to protect the judicial process from spoliators and based upon Rule of Civil Procedure Court Rule 37.

Plaintiffs request spoliation sanctions in the form of default judgment because of the extreme prejudice to Plaintiffs caused by the United States' spoliation of evidence.

The FBI and BIA officers failed to investigate, to properly preserve critical evidence, and to conform to standard police protocol in allowing State officers with no authority to usurp the shooting scene. This has prejudiced Plaintiffs and impaired their ability to have a full and fair opportunity to test their claims and refute defenses. The spoliated evidence would have established federal liability and the scope of damages cause by federal officers and Utah officers who qualify as "bad men among the whites."

The Plaintiffs were extremely prejudiced by the United States' spoliation of evidence in the following respects:

1. The firearm Defendant alleges Mr. Murray fired during his encounter with Vance Norton was destroyed by law enforcement, and the firearm was not forensically tested before it was destroyed;
2. The firearm Defendant alleges Vance Norton fired during the incident was never taken into evidence and was not forensically tested;
3. Neither Todd Murray's person nor his clothing were ever subjected to forensic testing;

4. Neither Vance Norton's person nor his clothing were ever subjected to forensic testing;
5. Law enforcement officers on the scene did not sequester Officer Norton but, astonishingly, allowed Norton to roam freely around the shooting site in possession of the alleged murder weapon for over half an hour; giving him ample opportunity to destroy and tamper with the physical evidence;
6. Even though Norton was permitted to return to his personal vehicle (which he had driven to the on-Reservation scene) and to other locations unaccompanied after he admittedly was involved in a shooting, Norton's vehicle was never searched, processed, or preserved by law enforcement;
7. The scene of the shooting that makes up the subject matter of this civil action was not adequately documented;
8. Law Enforcement officers improperly handled and tampered with Mr. Murray's body in the Emergency Room of Ashley Valley Medical Center, and these actions significantly altered and potentially destroyed critical evidence;
9. Law Enforcement officers improperly handled and tampered with Mr. Murray's body at Blackburn Mortuary, and these actions significantly altered and potentially destroyed critical evidence;
10. Mr. Murray's body was improperly handled by the Utah Office of the Medical Examiner, and the improper handling potentially altered and/or destroyed critical evidence; and
11. The Utah Office of the Medical Examiner failed to perform an autopsy on Mr. Murray's body, and this failure constitutes spoliation of critical evidence.

If default judgment is not entered, the Plaintiffs alternatively request lesser sanctions for the spoliation of critical evidence, and Plaintiffs seek attorney fees related to this motion.

### **INTRODUCTION**

On April 1, 2007, Todd Rory Murray ("Todd Murray" or "Mr. Murray") was a 21-year-old enrolled member of the Ute Indian Tribe. He died that day in an "officer involved shooting," after being shot in the back of his head, above and behind his left ear. That much is undisputed. The question of who shot him is strongly disputed.

The officer involved, Vance Norton, was an off-duty Vernal city police officer on April 1, 2007. All of Vernal is outside the Ute Indian Reservation, and the shooting site was about 40 miles from Vernal and about 25 miles inside the Ute Indian Reservation. Norton was not cross-deputized to provide law enforcement to either the United States or the Ute Indian Tribe on April 1, 2007.

The existing physical evidence shows that Vance Norton has not told the truth about what happened on April 1, 2007: his story is contrary to the physical evidence. The evidence which does exist points to Norton as the person who shot Mr. Murray at point blank range. Norton claims that Mr. Murray shot himself.

Unfortunately, because the United States failed to collect and preserve physical evidence, the existing physical evidence, although it points at Norton as a murderer, is far from complete. It is not dispositive. But if the United States had not spoliated evidence, the evidence would have been dispositive, one way or the other. Mr. Murray's family's firm belief is that the evidence that was spoliated would have further corroborated the physical evidence which was collected—that Norton was the killer. But they also understand that because the United States did not collect and preserve the evidence, and because Vance Norton will never be honest regarding what happened that day, they will never know for sure how and why their son died.

That is not right or fair, and while there is nothing the Court can do about that now, it can

and must impose spoliation sanctions. It is, the Murray Family believes, a small price for the United States to pay for its dereliction of its duties and the resultant lack of evidence which would show what actually happened on April 1, 2007. It is what is required based upon the core purpose for spoliation sanctions—to eliminate the harm to the non-spoliating party. It is the logical, and legally required, consequence imposed on the spoliator—one that the spoliator could have and should have avoided through the collection of the basic evidence in this matter.

In a prior proceeding in the Utah District Court, the state officers asserted, and the district court agreed, that the state officers were not responsible for the wholesale failure to preserve evidence and destruction of evidence. The district court readily concluded that litigation was foreseeable because of the long pattern of litigation between the Tribe/Tribal members and local police regarding the officers' refusal to respect the Reservation boundaries and tribal legal authority. *Jones v. Norton*, 2014 WL 909569, at \*7 (D. Utah Mar. 7, 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015). The District Court also found that the United States, not the state officers, had the duty to preserve evidence. And once the Utah District Court decided not to impose spoliation sanctions against the State officers, the District Court concluded that the existing, incomplete, physical evidence did not provide a sufficient basis for a reasonable jury to conclude that Norton was lying to protect himself from a murder conviction.

The issue now before this Court is whether to impose spoliation sanctions against the United States because the United States was responsible for the wholesale spoliation of evidence. The answer to that question is plainly that strong spoliation sanctions must be imposed.

#### **FACTS**

1. On April 1, 2007, Utah State Trooper Dave Swenson sent a radio dispatch from his patrol car advising the Utah Central Police Dispatch that he was following a car in which there



“two tribal males.” Ex. 2, Swenson Dep. 104:4-11<sup>1</sup>; Ex. 12, Dispatch Trans. 11:2-3, 26:1. Swenson testified that he clocked the car going 74 mph (miles per hour) in a 65 mph speed zone. Ex. 2, Swenson Dep., 95:4-6, 22.

2. Swenson claimed that he began his pursuit of the car outside of the Ute Indian Reservation, Ex. 2, Swenson Dep., 104:4-11, but that assertion is contradicted by his video recording which shows that he activated his emergency lights around the intersection of U.S. 40 and State Road 88. Ex. 14 at 00:00:30. That intersection is located more than two miles within the exterior boundary of the Uncompahgre Indian Reservation. *Jones v. United States*, 122 Fed. Cl. 490, 494 (2015), *vacated and remanded*, 846 F.3d 1343 (Fed. Cir. 2017).
3. Other than his dubious claim that he had clocked the vehicle for speeding outside the Reservation, Officer Swenson did not have reasonable suspicion of any wrongful act by either occupant of the vehicle until the vehicle turned off of U.S. 40 and headed south on State Road 88. Ex. 2, 197:16-25 - 198:1-5. It was then that Swenson notified Utah Central Police Dispatch that he was in pursuit of the vehicle and that he activated his emergency lights. Ex. 12, Police Audio Dispatch Recording and Transcript at 2:7-8; Ex. 14 at 00:00:30.
4. The driver of the vehicle was Uriah Kurip. Mr. Kurip was a minor who was eligible for enrollment in a federally recognized tribe on April 1, 2007 and who was subsequently enrolled, Ex. 15, Kurip Aff., and is therefore an “Indian” as that term is used to determine federal criminal jurisdiction.

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<sup>1</sup> Plaintiff’s filing in this case is substantially similar to its prior filing on January 10, 2018. Although over 20 months have elapsed since that filing, the additional expert discovery and other actions have not substantially changed the basic legal and factual status of this case. Plaintiff’s citations to exhibits are to the exhibits to that January 10 filing, except as noted.

5. The passenger of the vehicle was Todd Murray, a 21 year-old enrolled member of the Ute Tribe. Parties' Joint Stipulations Regarding Spoliation (hereinafter "JS") 5; Ex. 1. Mr. Murray's criminal record consisted of a single misdemeanor offense for providing false information to a police officer, for which he was fined \$250, and which was closed prior to April 1, 2007. Ex. 16. On April 1, 2007, there was no warrant, from any jurisdiction, for the arrest of Mr. Murray. *Id.*
6. The pursuit of Kurip's vehicle ended more than 25 miles south of the intersection of U.S. 40 and State Road 88, at the intersection of Seep Ridge Road and Turkey Track Road, a location far inside the boundary of the Uncompahgre Reservation. *Jones*, 122 Fed. Cl at 494; Ex. 21, Ex. 18.
7. The relevant boundaries of the Uncompahgre Reservation have been in continuous and stable location since they were established by President Arthur in 1882. Executive Order (Jan. 5, 1882). Therefore, all State, County, municipal and federal officers identified above knew or should have known as of April 1, 2007 that the location was on the Reservation.
8. Because the Tribe has never consented to state jurisdiction, *United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985), Utah State and local officers have no jurisdiction over Indians inside the Ute Indian Reservation. Instead, general police services on the Ute Reservation are provided by the United States Bureau of Indian Affairs; and FBI agents investigate higher level crimes.<sup>2</sup>

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<sup>2</sup> On some reservations, the United States has contracted with the local tribe for the tribe to provide general police services (as augmented by FBI investigation of more serious crimes), but the United States and the Ute Tribe have not entered into any such contract.

9. The United States was notified of the on-Reservation pursuit while it was occurring. Ex. 12, Dispatch Trans. 5:17-18; 8:15; 31:17-18.
10. At the intersection of Seep Ridge Road and Turkey Track Road, Kurip and Murray got out of Kurip's car. Ex. 2, Swenson Dep. 100:25-101:13. Swenson then got out of his patrol car with his gun drawn and approached Kurip and Murray. He ordered Kurip and Murray to get on the ground. *Id.* at 101:8-10 and 118:16-23.
11. Swenson visually inspected Mr. Murray and Mr. Kurip and concluded that both appeared to be unarmed. *Id.* at 118:24-119:4. The video of the stop is consistent with the conclusion that Murray was not armed. Ex. 14 at 00:26:48-00:27:07. Further, Mr. Murray was wearing short pants, short socks, a tee shirt and a short-sleeved button-up shirt. He did not have a holster, bag, or any other item on him in which he could have been carrying a gun. Ex. 14 at 00:26:48-00:27:07; Ex. 19.
12. Swenson repeated his order for Kurip and Murray to get on the ground, at which point Kurip and Murray exchanged looks with one another and then looked back at Swenson, but made no threatening moves. Ex. 2, Swenson Dep. 119:5-9, 1-8; 125:2-6.
13. Swenson again repeated his command that Murray and Kurip get on the ground, at which point Kurip began running north and Murray running south. *Id.* at 101:11-13. Swenson quickly caught and apprehended Kurip and took possession of the keys to Kurip's car. *Id.* at 52:8-9; 125:7-14 and 132:3-4. As Swenson was leading the handcuffed Kurip back to his patrol car, off-duty Vernal City Police Officer Vance Norton arrived on the scene dressed in street clothes and driving his personal vehicle. Ex. 2, Swenson Dep. 134:5-9. Swenson requested that Norton pursue the passenger, Mr. Murray, and Norton returned to his vehicle to pursue Murray. *Id.* at 134:13-2, 135:20-22, and 134:18-24.

14. The passenger, Mr. Murray, had not committed any crime, nor did Officer Swenson claim to Norton that Mr. Murray had committed any crime. Ex. 2, Swenson Dep. 134:5-24. Norton knew at the time that Murray was the passenger. Ex. 4, Reit Dep. 114:15-116:3.
15. Norton drove south, then got out of his vehicle and began searching for Murray with his gun drawn. Ex. 7, Norton Dep., 131:4-5. Utah Highway Patrol Trooper Craig Young and Uintah County Deputy Anthony Byron also arrived, drove south of Norton's location and also started searching for Murray, Young armed with a shotgun and handgun, and Byron armed with a handgun and an AR-15 rifle. Ex. 8, Byron Dep., 86:11-17, 96:4-15; Ex. 9, Young Dep. 35:1-3; 77:16-22.
16. Although Norton, Byron and Young lacked jurisdictional authority and lacked probable cause, they acted in concert to establish a police perimeter to trap and apprehend Murray. Ex. 12, Dispatch Trans. 28:13; Ex. 2, Swenson Dep. 135:20-22, 136:3-8; Ex. 7, Norton Dep. 128:22 to 129:12; Ex. 8, Byron Dep. 94:17-20; Ex. 9, Young Dep. 35:5-9.
17. Exhibits 3 and 20 to Byron's deposition, and Mr. Byron's testimony relating to the exhibits, show that perimeter. Ex. 8, Byron Dep. 82:9 – 83:1, 89:15 - 90:15, 90:25 – 91:21, 94:17-20, 116:13 to 119:4, and Dep. Exs. 3 and 20.
18. Exhibits 20 and 22 to Deputy Byron's deposition accurately depict the open, remote, and unpopulated terrain in which the Officers pursued Murray. *Id.*
19. None of the State, County, or municipal officers that entered the Reservation on April 1, 2007 in relation to the shooting of Todd Murray were cross-deputized by the Tribe or by the United States to provide law enforcement on the Reservation, and the State, County, and municipal officers were all acting outside of their jurisdiction by purporting to exercise authority within the Reservation. *Jones v. Norton*, 2014 WL 909569, at \*7 (D. Utah Mar.

7, 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015); JS ¶ 8-12; Ex. 4. The officers all knew that they were not cross-deputized. *E.g.*, Exs. 3, 5, 6 10, 11.

20. Norton spotted Murray before Murray saw Norton. Norton admits that, with his gun drawn, he ordered Murray to the ground. Ex. 7, Norton Dep., 133:3-5; 135:12-24; 142:1-4. Norton fired two shots at Murray. JS, ¶ 21 and 22.

21. At 11:30 a.m., Norton advised the Utah Central Police Dispatch that Murray was “down.” Ex. 12, Dispatch Trans. 31:17-18. Norton claimed that Murray had a gun, and that Murray shot the gun twice—first shooting one time at Norton and then shooting himself in the head. Ex. 7, Norton Dep. 140, 14-15. After Norton had made those factual statements to other officers at the scene, and after police “found” two spent shell casings on the ground, a third spent shell casing was found in the gun that Murray had allegedly used. Ex. 7, Norton Dep. 162:11-12; 163 22-25; 175. JS, ¶ 23.

22. The FBI had jurisdiction over the investigation into the shooting and the death of Mr. Murray. JS, ¶ 25.

23. After shooting at Mr. Murray, Norton was permitted unobstructed access to the crime scene. Ex. 7, Norton Dep. 164: 14-16; 170-175. He was left in possession of his own handgun for over half an hour after he admittedly shot at Mr. Murray. Ex. 20, Jensen Dep. 33:5-7; 61:9.

24. Norton also was allowed to return to his own personal vehicle and to other locations without supervision. *Id.* Law enforcement did not search Norton’s vehicle, nor did it forensically test his hands or clothing. JS, ¶ 45. Likewise, no tests were conducted on Norton’s clothing for the presence of blood or tissue. JS, ¶ 48.

25. Because Norton's 40 caliber gun and bullet casings were never forensically tested, Plaintiffs 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 (which would have definitively shown that Norton's story was a lie and that Norton in fact murdered Mr. Murray);
  - b. If it fired the shell casings found where Norton claimed he fired; and
  - c. If Norton had handled the bullet casings after they were expelled from the gun.
26. Examination of Norton's gun would have shown whether or not the gun had been used to shoot Mr. Murray, as the Murray family believes, or whether it had not been, as Norton claims. Ex. 24, Reit Rep.<sup>3</sup>
27. By the time the FBI agent arrived, there was a Hi-Point .380 caliber handgun next to the location where Mr. Murray had been shot. JS, ¶ 30. The gun was photographed, and the photographs do not show any human blood or tissue on the gun. Ex. 19. That is inconsistent with Norton's story.
28. The FBI took possession of the .380 caliber handgun following the incident. JS, ¶ 31. The FBI never requested a test fire of the .380 caliber handgun or any forensic testing. The United States subsequently destroyed the handgun without ever having it tested for blood, fingerprints, or human tissue. JS, ¶ 38-42.

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<sup>3</sup> Dr. Reit was Defendants' expert witness in *Jones*. He explained that the shooter would have "blowback" blood or tissue on his shooting hand. While Reit argued this would preclude Norton as the shooter because there was no blood or tissue on Norton's hands, Reit failed to account for the fact that Norton's body was never tested for blood or tissue and that Norton had time and ample opportunity to clean up his own hands.

29. If the firearm had been forensically tested, it would have provided absolute and definitive proof of whether that firearm had been used to kill Mr. Murray, because the weapon used to shoot Mr. Murray would have contained blowback blood and tissue from Mr. Murray's head. Ex. 24, Reit Rep.
30. If the firearm had been tested, it may have provided other definitive proof that Norton's story was false. Testing would have shown:
- a) whether the gun had been fired, as Norton, without corroboration, claims;
  - b) whether the gun had Mr. Murray's fingerprints on it, and if so, which hand (if fingerprints were from Mr. Murray's left hand, that would clearly show the crime scene had been staged);
  - c) whether the gun had Norton's fingerprints on it (which would have been inconsistent with Norton's story); and
  - d) whether the gun was operational. If it was not operational that would have been inconsistent with Norton's story.
31. Because Defendant destroyed the .380 gun without ever conducting such tests, Plaintiffs will never be able to determine any of the above.
32. As a result of the destruction of this key evidence, the Plaintiffs have been severely prejudiced in this case.
33. Defendant failed to collect or preserve standard trace evidence from the shooting. Defendant failed to swab either Murray's or Norton's hands for blood, tissue, DNA, or gunshot residue. If Norton had any of Mr. Murray's blood or tissue anywhere on his person, clothing or gun, or if there were any on shell casings from that gun or any items in Norton's vehicle (as Mr. Murray's family believes would have been shown if testing were

done), that would have definitively proven that Norton's version of events was false. Similarly, if any of Norton's blood, tissue, or DNA were on Murray, that would also show that Norton was lying.

34. Such testing would have been critical in determining if Murray in fact fired a gun, committed suicide, or was murdered execution-style.
35. Mr. Murray was shot on the left side of his head, but the available evidence strongly indicates that he did not shoot himself in that location, because if he had, his left hand would have been covered in blowback blood and tissue. Ex. 21, Leis Dep. 124:16-22; Ex. 24, Reit Rep. Photographs of his left hand taken after the shooting do not show blood or tissue, Ex. 19, but Defendant did not conduct or require further testing which likely would have confirmed what the photographs show--that Mr. Murray did not have blowback blood or tissue on his left hand.
36. Defendant also did not take steps to maintain the integrity of the evidence of the body pending an autopsy. 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. Ex. 17. Defendant's failure to secure the body, and then to allow the officers whose actions were being investigated to mishandle the 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. Ex. 19. No evidence exists to document (1) who bagged Murray's hands or when or where it was done, and (2) who removed the bags.
37. Photographs of Mr. Murray's right hand show blood on that hand, but it is unlikely, and arguably physically impossible, for him to have shot with his right hand at the location on the left side. And if he had, his right hand would have been covered in human tissue. Ex.



24, Reit Rep. As noted, Mr. Murray's right hand was not properly bagged to protect any evidence on it. Nor was his right hand tested for tissue.

38. Defendants also spoliated evidence by failing to have Mr. Murray's body properly bagged for storage and transportation. For that purpose, the body is to be placed in a body bag and then sealed with a uniquely identifiable device, and the seal should be broken in the presence of the Medical Examiner at the time of examination, thus ensuring that the body/evidence has remained undisturbed during transport and storage. This is, in essence, the requirement for chain of custody for evidence on the body. Murray's body was not properly preserved in a sealed 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. Ex. 21 at 42:9-25, 44:4-9. There is no evidence or documentation to establish who placed Murray's body into the body bag, nor when and where that occurred, nor whether Norton or others continued to tamper with the body after their unlawful activities at the funeral home.

39. Defendant's failure to adequately document the scene eliminated any possibility for Plaintiffs to reconstruct the scene or to provide additional evidence showing that Norton's story was not true:

- a. Defendant 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. Defendant did not preserve critical evidence in that it failed to adequately document the blood spatter. Had the blood spatter evidence been properly documented, Plaintiffs would be able to reconstruct the scene and potentially develop dispositive

evidence on the question of whether Murray committed suicide or was murdered execution-style.

- c. Defendant did not preserve critical evidence in that it failed to conduct a search of Defendant Norton's person and failed to search, process and photograph Norton's personal automobile.
40. After Mr. Murray died at Ashley Valley Medical Center, Defendant failed to prevent Norton and other officers from tampering with Murray's body in the emergency room, and Mr. Murray's body was tampered with by state and local officers. Ex. 4, Reit Dep. 57:18-58:10; Ex. 17, Arden Expert Witness Report at 5; Ex. 19; Ex. 22, Campbell Dep. 130:2-131:7 Officer Bryon went so far as to insert a finger into Murray's gunshot wound, to the horror of a fellow officer standing nearby. Ben Murray Dep. 79:12-81:3, Ex 25. BIA Officer Kevin Moore, who was present at the medical center during this time, either condoned, participated in, or failed to prevent the desecration of Mr. Murray's remains and the spoliation of evidence at the medical center. The State and local officers then unlawfully tampered with Mr. Murray's body, leading to the destruction or possible destruction of critical evidence:
- a. Murray's body was compromised during photographs by the manipulation of the wound by Officer Byron. Such manipulation may have affected the determination of entrance vs. exit wound and whether or not it was a contact wound;
  - b. Murray was inexplicably prematurely and improperly disrobed by officers in the ER, Ex. 19, Ex. 17, Arden Expert Report, which hindered or destroyed the possibility of collection of trace evidence; and

- c. Defendant failed to collect and maintain a chain of custody for the blood. Ex. 17, Arden Expert Report at 4.

41. Evidence was interfered with at the Blackburn Mortuary.

42. After Mr. Murrays' body was taken to Blackburn Mortuary, Defendant failed to prevent tampering with Murray's body at that location, and the same local group of police again unlawfully tampered with Mr. Murray's body. As explained in Arden's report, this altered and potentially destroyed critical evidence in that:

- a. Although a blood draw had been taken from Todd Murray's body at Ashley Valley Medical Center, the officers transported Murray's body to Blackburn Mortuary where they inexplicably drew additional blood. Vernal City Police Chief Gary Jensen admits he inserted a needle with syringe into Murray's heart to draw a vial of blood. Ex. 20, Jensen Dep. 95:7-14, 95:25-96:22. Chief Jensen or some other officer then, also inexplicably, directed a mortuary employee to cut Murray's neck open and remove blood from his neck. Ex. 20, Jensen Dep. 98:17-25-99:10, 99:23-100:1.
- b. The foregoing contaminated Murray's body and, consequently, invalidated the toxicology results;
- c. The blood draw at the mortuary was unlawful and there was no law enforcement purpose for that blood draw. *Id.* Defendant failed to preserve that blood. That blood was never logged into evidence in any location, and no officer claims to know what happened to it after it was unlawfully taken.

43. Defendant destroyed or did not 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.

44. Defendant destroyed or did not prepare chain of custody documents for the extracted blood sample at Blackburn Mortuary, making it impossible for Plaintiffs to determine if the sample was properly preserved.

45. Defendant directed that an autopsy be performed. Ex. 23.

46. Defendant did not ensure that its direction was followed, and in fact its direction was not followed. No autopsy was conducted. JS, ¶ 43-44. The failure to conduct an autopsy further violated UTAH CODE ANN. § 26-4-13(1).

47. The failure to conduct an autopsy resulted in spoliation of evidence. Utah State Medical Examiner Dr. Edward Leis testified that, had an autopsy been performed, it could have potentially revealed signs of a pre-death altercation, which would have been inconsistent with Norton's story. JS, ¶ 46.

48. Defendant's failure to have more than an external exam of Murray's body constitutes spoliation of evidence in that:

- a. Plaintiffs are 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 Plaintiffs to potentially discover the caliber of the weapon that caused the wound;
- b. Plaintiffs are unable to confirm whether there had been an altercation with law enforcement or the use of restraints prior to Mr. Murray being shot because the

Medial Examiner did not dissect the soft tissues of the torso or extremities as he would have done in an autopsy.

49. Plaintiffs are unable to determine the validity of the toxicology results because there is no admissible blood sample from Mr. Murray; and because the blood sample which was drawn (and for which there was not a chain of custody) was allegedly heart blood, which would not accurately reflect alcohol or drug concentration. Ex. 17, Arden Report at 4.

## LEGAL ARGUMENT

### I. SPOILIATION STANDARD

Spoilation is the destruction or significant alteration of evidence, or failure to preserve evidence for another's use in pending or reasonably foreseeable litigation. *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263 (2007) (internal citations omitted). “Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence.” *Id.* at 258.

The courts apply a multi-factor test to determine the remedy for spoliation. The primary overarching factor in that analysis is to eliminate the harm to the non-spoliating party, although as noted below deterrence is also a relevant consideration. “It has long been the rule that spoliators should not benefit from their wrongdoing.” *W. v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Failures to produce relevant evidence fall along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality, and the severity of a sanction may, depending on the circumstances of the case, correspond to the party's fault. *Adkins v. Wolever*, 554 F.3d 650, 652-53 (6th Cir. 2009). A proper sanction should serve both fairness and punitive functions, and may include dismissing a case, granting summary judgment, or instructing a jury that it may infer a fact based on lost or destroyed evidence. *Id.* See also *W. v. Goodyear Tire & Rubber Co.*, 167 F.3d at 779 (sanctions should be molded to serve the prophylactic,

punitive, and remedial rationales underlying the spoliation doctrine); *United Med. Supply Co.*, 77 Fed. Cl. at 263.

The United States, like any other litigant, is subject to imposition of spoliations sanctions. *M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1183–84 (Fed. Cir.1993).

Courts, including the Court of Federal Claims, possess the inherent power to control the judicial process and litigation, a power that is necessary to redress conduct which abuses the judicial process, including through spoliation sanctions. *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263–64 (2007). Spoliation sanctions seek to remedy or minimize the evidentiary damages caused by spoliation, to ensure the spoliator does not benefit from its misdeeds, to punish and deter future spoliation, and of course to preserve the integrity of the judicial process and its truth-seeking function. *Id.* at 264. If spoliation has occurred, the court should design sanctions to: (1) deter parties from engaging in spoliation; (2) place the risk of erroneous judgment on the party who wrongfully created the risk; and (3) restore ‘the prejudiced party to the same position he [or she] would have been in absent the wrongful destruction of evidence by the opposing party.’ *Consol. Edison Co. of N.Y. v. United States*, 90 Fed. Cl. 228, 257 (2009), *rev'd and remanded sub nom. Consol. Edison Co. of N.Y. & Subsidiaries v. United States*, 703 F.3d 1367 (Fed. Cir. 2013).

The general rules of evidence law create an adverse inference when evidence has been destroyed and (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007) (internal citations omitted).

A duty to preserve evidence must exist for a party to be sanctioned for spoliation of the evidence. *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). The duty to preserve evidence begins when litigation is “pending or reasonably foreseeable.” *Id.* (internal citation omitted). When litigation is “reasonably foreseeable” is a flexible fact-specific standard that allows a court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry. *Id.* The standard is objective, asking whether a reasonable party in the same circumstances would have reasonably foreseen litigation, not whether a party in fact foresaw litigation. *Id.* An “empty head, white heart” defense is therefore not applicable.

Courts differ as to the level of culpability required to warrant spoliation sanctions. *Chapman Law Firm, LPA v. United States*, 113 Fed. Cl. 555, 610–11 (2013), *aff'd*, 583 F. App'x 915 (Fed. Cir. 2014). This Court has determined that the culpability requirement need not be met by a showing of intentionality or bad faith, and that ordinary negligence can meet the test. *Northrop Grumman Sys. Corp. v. United States*, 126 Fed. Cl. 602, 605 (2016); *United Med. Supply*, 77 Fed. Cl. at 268-69 (“Requiring a showing of bad faith as a precondition to the imposition of spoliation sanctions means that evidence may be destroyed willfully, or through gross negligence or even reckless disregard, without any true consequences....imposing sanctions only when a spoliator can be proven to have acted in bad faith defenestrates three of the four purposes underlying such sanctions”). However, the level of intentionality can inform the severity of the sanction. *Northrop*, 126 Fed. Cl. at 605. Repeated acts of gross negligence can be met with the same or more severe sanction than a single act of bad faith. *United Med. Supply*, 77 Fed. Cl. at 271.

Sanctions are warranted when the spoliated evidence was relevant and may have supported a party’s claim. *Jandreau*, 492 F.3d at 1375. A party is obligated to preserve evidence that may

be relevant to future litigation or useful to an adversary. *Consol. Edison Co. of N.Y.*, 90 Fed. Cl. 228, 256 (2009).

Once a showing of spoliation has been established, the burden shifts to the party against which the motion was made to show that the destruction of the evidence and failure to produce the documents did not prejudice the opponent. *Id.* A party is prejudiced by spoliation when it materially affects the substantial rights of the party and is prejudicial to the presentation of its case. *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011). Fairness and justice necessitate that a party should not bear the burden of another's negligence in losing critical evidence. When there has been an act of bad faith, the spoliator bears the heavy burden to show a lack of prejudice to the opposing party because a party who is guilty of intentionally destroying evidence should not easily be able to excuse the misconduct by claiming that the evidence was of minimal import. *Micron Tech.*, 645 F.3d at 1328 (citing *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir.1988)).

## **II. THERE WAS A DUTY TO PRESERVE EVIDENCE**

The federal officers had a duty to preserve evidence and litigation was reasonably foreseeable at the time spoliation occurred.

It is the duty of the United States, no less than any other party before this Court, to ensure, through its agents, that evidence relevant to a case is preserved. *United Med. Supply*, 77 Fed. Cl. at 274. All law enforcement officers have a duty to “investigate, detect and secure evidence of crime.” *Green v. United States*, 386 F.2d 953, 956 (10th Cir. 1967) (citing *Hollingsworth v. United States*, 321 F.2d 342, 352 (10th Cir. 1963)). In determining whether a party bears responsibility for spoliation of evidence, the key inquiry is identifying who had control over the evidence. *Chapman Law Firm*, 113 Fed. Cl. 555, 610. If a party having control over evidence allows that evidence to be discarded, then the disposal of that evidence is attributable to that party, regardless



of who actually discarded the evidence. *Chapman Law Firm*, 113 Fed. Cl. at 610; *K-Con Building Systems, Inc. v. United States*, 106 Fed. Cl. 652, 664 (Fed. Cl. 2012). Physical possession is not necessary for a party to have control over evidence, and a “legal right to control or obtain” is sufficient. *Chapman Law Firm, LPA*, 113 Fed. Cl. at 610 (internal citations omitted). *See also Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

The United States has stipulated in this case that it had the investigative duties regarding the interaction between Norton and Mr. Murray. As the investigative agency, the United States had the right and the power to collect evidence at the scene. Based upon the same facts which led to the United States’ stipulation that it was responsible, the district court in Utah conclude that because the United States was responsible for the investigation of the shooting, the state parties could not be sanctioned for the spoliation of evidence during the “investigation” of that shooting. *Jones v. United States*, 846 F.3d 1343, 1349-1350 (Fed. Cir. 2017).

Here, the United States simply chose not to collect the available physical evidence which would have either confirmed or refuted that Norton had killed Mr. Murray.

One of the key pieces of evidence was blood or tissue on the gun that Mr. Murray supposedly used to shoot himself. *E.g.*, Gaut Dep. 31, 14-20. (Ex. A hereto). For that piece of evidence, the United States admits that it took possession of the gun, and that it never conducted any testing on that gun. It is indisputable that tests of the gun for Mr. Murray’s blood or tissue would constitute strong evidence in this case the United States indisputably did not collect that evidence.

Another key piece of evidence was Mr. Murray’s hands, to determine if his hands had blowback blood or tissue on them, and if so, where that blowback was located. *Id.* As the agency

investigating the death, the United States had jurisdiction over Mr. Murray's body, but it did not preserve the evidence. *E.g.*, Gaut Dep.88, l.16-21.

Another key piece of evidence would have been testing of the gun that Norton fired that day, to determine whether it had Mr. Murray's blood or tissue in or on it. If that testing had shown Mr. Murray's blood (as the Murray family believes it would have) then it would have proven beyond any reasonable doubt that Norton shot Mr. Murray at close range. Testing of the gun for blood or tissue therefore was evidence. As the investigative agency, the United States had the authority to take that gun, and test it to determine if it was the murder weapon, but it spoliated that evidence.

In addition to having "control over the evidence" at the scene because it was the investigative agency, the United States had actual control over the gun that Norton claimed Mr. Murray used; had jurisdiction over Mr. Murray's body, had the right to take possession of Norton's gun and to perform testing on that gun; and had the right to test Norton's hands and clothing to determine if Norton had Mr. Murray's blood or tissue on his hands or clothing.

Turning the law of spoliation on its head, the United States has taken the position in this case that because it did not collect the evidence, it did not spoliolate the evidence—that instead it would only spoliolate evidence if it had actually investigated the shooting of Mr. Murray, collected the blood and tissue evidence and then destroyed the results of those tests. Here, notably, we are not talking about subtle or questionable failures to investigate—we are talking about the basic failure to collect the basic evidence which would have proven what happened on April 1.

As the Federal District Court in Utah also held, litigation was reasonably foreseeable at the time spoliation occurred. The duty to preserve material evidence is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those

obligations to employees in possession of discoverable materials. *Id.* Imminent litigation is not required; it must only be reasonably foreseeable. *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1346–47 (Fed. Cir. 2011).

Litigation was reasonably foreseeable because of the fatal nature of the incident, and the fact that there were state and local officers involved who were not cross-deputized and did not have jurisdiction on the reservation, and because the United States was investigating the death. As the Utah District Court, which is keenly aware of the contentious relationship between local law enforcement and the Tribe/its members, correctly summarized: “In light of the seriousness of the incident and the involvement of officers on the Reservation where they did not have jurisdiction, litigation could reasonably be expected.” *Jones v. Norton*, 2014 WL 909569, at \*7 (D. Utah Mar. 7, 2014), *aff’d*, 809 F.3d 564 (10th Cir. 2015) (emphasis added).<sup>4</sup>

Independently, when protocols exist to collect and preserve evidence, officers are put on immediate notice that the evidence could be relevant to both claims of a plaintiff as well as the officer’s own defenses in future litigation. *LaJocies v. N. Las Vegas*, 2:08-CV-00606-GN, 2011 WL 1630331 (D. Nev. Apr. 28, 2011). The Law Enforcement Standards Section of the Indian Affairs Manual, Part 40, Chapter 2 Subsection 2.11 requires that all evidence related to a suspected crime is to be professionally collected, processed, and handled according to chain of custody standards. Describing the duties of investigating officers in charge, such as Agent Ashdown, the

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<sup>4</sup> In light of the forty-year history of litigation between the Tribe and State and local law enforcement over their respective jurisdictional boundaries in relation to the Reservation, which continues today, no veteran local law enforcement official could credibly claim that litigation arising from Todd Murray’s death in police custody was unforeseeable. *See generally Ute Tribe v. Utah*, 773 F.2d 1087, 1093 (10th Cir. 1986) (en banc) (“*Ute III*”), *subsequently modified*, 114 F.3d 1513, 1519 (10th Cir. 1997) (“*Ute V*”), *reaffirmed*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*), *cert denied*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1451 (2016) (Judge Gorsuch for the panel rebuked Utah and its local governments for their refusal to respect the settled law regarding the Tribe’s reservation boundaries and jurisdiction); *reaffirmed*, 835 F.3d 1255 (10th Cir. 2016) (*Ute VII*).

Department of Justice's own manual on crime scene procedure states that officers should initially "[e]stablish a secure area for temporary evidence storage in accordance with rules of evidence/chain of custody..." and "[e]nsure preliminary documentation /photography of the scene, injured persons, and vehicles." DEPARTMENT OF JUSTICE, CRIME SCENE INVESTIGATION: A GUIDE FOR LAW ENFORCEMENT at 19-20 (2000). The manual also states that such officers should "[p]repare preliminary documentation of the scene as observed..." and "[e]nsure that all evidence that may be compromised is immediately documented, photographed, and collected." *Id.* at 21. Therefore, the federal officers had a duty to preserve any and all evidence related to the shooting of Mr. Murray, and could have reasonably foreseen litigation would result from Mr. Murray's death.

### **III. THE FEDERAL OFFICERS ACTED WITH A CULPABLE STATE OF MIND IN SPOILIATING EVIDENCE**

The actions of the federal officers were negligent, willful, and culpable, warranting severe spoliation sanctions. In this Circuit, bad faith is not required to warrant spoliation sanctions, and this Court may grant the requested relief without a determination of bad faith. *Northrop*, 126 Fed. Cl. at 605. However, the facts here support the conclusion that spoliation indeed occurred in bad faith. Bad faith exists when the spoliating party intended to impair the ability of the opposing party to make its case, or for the purpose of hiding adverse information. *Micron Tech.*, 645 F.3d at 1326-27.

The federal officers failed in their duties both at the scene of the shooting and then during the transport and examination of Mr. Murray's body. The federal officers failed to secure the scene, collect forensic evidence, separate or search the officers involved in the shooting or their person or vehicles. The guns allegedly involved in the shooting were not processed, tested, photographed or preserved. There was inadequate documentation of the scene of the shooting, and a failure to

properly preserve Mr. Murray's remains. A needle was used to draw blood from Mr. Murray's heart and Mr. Murray's jugular vein was cut to draw more blood. These blood samples have never been accounted for. Mr. Murray's body was manipulated and prodded at the hospital. All of these failures should have been avoided or prevented by the BIA and FBI officers.

Essentially, all dispositive evidence for which the federal officers had responsibility was spoliated: either not collected, altered, or destroyed. As discussed throughout this brief, the United States failure to investigate and collect evidence and its destruction of evidence covered the gamut, from the most basic evidence to secondary evidence. Here we are not dealing with the destruction of a few pieces of evidence: we are dealing with a federal officer who simply decided not to collect evidence which could have shown that another officer's uncorroborated story was simply a lie.

Without this evidence, the case against the local officers was greatly prejudiced. The prejudice should be undisputed, because it is established in the Utah District Court's order dismissing the Murray Family's complaints against the alleged murderer. That case was dismissed because the District Court concluded that the physical evidence was insufficient to overcome Norton's self-serving testimony.

Agent Ashdown admitted under oath that it was largely because of his friendship with Vernal City Police Officer Norton that the FBI conducted no investigation into Mr. Murray's shooting. Plaintiffs' position is that the federal officers conspired with or allowed the state officers to concoct a false account regarding how Mr. Murray died on April 1, 2007 in order to cover up the fact that Mr. Murray was shot in the head by Officer Norton. The spoliation of relevant evidence is key to a successful cover-up. The facts support a finding that the spoliation occurred in bad faith. At the very least, spoliation was due to pervasive gross negligence on the part of the federal officers, which warrants spoliation sanctions.

**IV. THE DESTROYED AND LOST EVIDENCE, AS WELL AS THE EVIDENCE THE FEDERAL OFFICERS FAILED TO COLLECT OR PRESERVE, WAS HIGHLY RELEVANT TO PLAINTIFFS' CLAIMS**

The spoliation by the federal officers resulted in very substantial prejudice to Plaintiffs. Physical evidence is the most eloquent and impartial witness as to what actually happened. Because evidence in this case was not preserved, all we are left with is the state officers' testimony and their account of what happened. The spoliation of evidence germane "to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

As discussed above, the Murray family's complaint against Norton was dismissed because that court concluded that there was not sufficient physical evidence to overcome the testimony of the only surviving eyewitness to Mr. Murray's death.

When evidence destroyed was material to an issue that is both contested and essential to the verdict, then prejudice should be assumed, because the missing evidence could have determined the outcome. *Duquesne Light Co. v. Woodland Hills School Dist.*, 700 A.2d 1038, 1051 (Penn. 1997); DESTRUCTION OF EVIDENCE, 2013 cum. supp. § 2.22I. The lengthy statement of undisputed facts above provides a detailed discussion of the prejudice, and of how the spoliated evidence would have established what happened on April 1, so that the Murray Family would have been able to rebut Norton's self-serving and dubious testimony. Prejudice is plainly apparent.

In its order vacating and remanding this matter, the Circuit Court directed this Court to determine whether to impose spoliation sanctions. The two main spoliation sanctions here lead to the same result. The reason they both lead to the same remedy is that Defendant failed to collect or destroyed all of the dispositive evidence and nearly all of the good evidence as well. Inferring that the missing evidence would have been favorable to the non-spoliating party is based upon the

underlying rationale for spoliation sanctions. It puts harm to fact finding caused by spoliation on the spoliator, instead of on the non-spoliator.

In this case, the spoliated evidence is not a single piece of evidence. It is almost all of the good evidence, and the spoliated evidence was of obvious evidentiary value and was required to be collected under laws, policies, or standard homicide investigation procedures or procedures for “officer involved shootings.” The inference from the missing evidence is therefore not an inference based upon a single piece of evidence. It is an inference based upon all of the spoliated pieces of evidence.

For example, if Defendants had only spoliated the gun that Norton admits he used to shoot at Mr. Murray and tests of the same, but had not also spoliated the gun that Norton claimed Murray used and tests of the same, Norton’s clothing and tests of the same, and tests of Murray and Norton’s hands for blood/tissue, then we could turn to those other pieces of evidence to prove some, and maybe all, of the material facts that could have been shown if the United States had merely collected and tested Norton’s gun. The inference from some of the individual spoliated items might have been minimal. But here, all of the other items were spoliated.

The inference from the missing evidence is, plain and simple, that Norton killed Mr. Murray. The inference is that Norton’s gun had Murray’s brain tissue and blood on and in it, in a back spatter pattern that shows it fired the fatal shot. The inference is that Norton’s hands literally had Todd Murray’s blood and brain tissue on them. The inference is that Murray’s hands did not. The inference is that Murray’s gun did not. The inference is that Norton’s clothing had Mr. Murray’s blood on it. Etc.

With that basic inference against the United States because of the United States’ failure to take possession of, and test Norton’s gun, Norton was in contact with Mr. Murray, not 100 yards

away as he self-servingly claimed, his gun fired the fatal shot, and he then picked up his two bullet casings and went 100 yards away and dropped them, then later “found them” and pointed them out to other officers. That inference from the spoliated evidence then dramatically changes the minimal pieces of evidence that the United States chose to collect, and that Norton, in the district court suit, used to “corroborate” his testimony. For example, based upon the required inference that Norton’s gun was in contact with or at least within a few feet of Mr. Murray’s head at the time of the shooting, the location of the casings does not corroborate Norton’s self-serving story, and instead proves that Norton was trying to cover up the fact that he had been right next to Mr. Murray when Mr. Murray was shot at point blank range.

Here, the inference from the failure to test the gun Norton claimed Mr. Murray had includes an inference that the gun was not even operational, and was therefore not the gun that killed Mr. Murray, and that Mr. Murray had been killed by Norton (or some other Utah State, County, or local law enforcement officer.)

The inference is that the bullet casings had Norton’s fingerprints and DNA on them, which dispositively proves that Norton was the killer.

The inference is the gun did not have Mr. Murray’s blood or tissue on them, which by itself is strong evidence that Norton’s story was more likely than not false.

The inference is that Mr. Murray’s hands did not have blood or tissue on them after the shooting. This, by itself, is further evidence that Norton’s story was more likely than not false.

The inference is that Norton’s gun, bullet casings, and clothing all had Mr. Murray’s blood or tissue on them, each of which, standing alone definitively proves that Norton killed Murray.

The inference from the fact that all of the blood samples were spoliated would depend on what other evidence was spoliated. Again, the inference is that the evidence would have been



favorable to Mr. Murray. What would have been favorable cannot be determined prior to determining what other evidence was spoliated.

The inference from the failure to conduct an autopsy is that the autopsy would have shown that Mr. Murray's injuries would not have been fatal, that there were parts of bullet jackets from Norton's gun in Mr. Murray's brain tissue, and that Mr. Murray could not have fired the fatal shot.

The inference from the failure to maintain the integrity of the body after death is that it contained other evidence of Norton's guilt (e.g. Norton's DNA or fingerprints in blood, back spatter showing that Mr. Murray was trying to defend himself, etc.) that was spoliated before the body reached the coroner.

The whole of the crime scene was spoliated because Norton himself was allowed to roam through the crime scene, and allowed to go to his own car and was allowed to be unmonitored and unaccompanied. If the United States had collected the other primary and obvious evidence, this, by itself, may have had minimal impact, but because it did not collect the other evidence, the inference from Norton's free range after the shooting eliminates the value of all of the remaining evidence

Some of the pieces of evidence, all by themselves, would have definitively shown whether Norton's story was true or false. Other pieces of evidence would not have been definitive but would have been very strong on one side or the other. Other pieces of evidence were of limited value, or were not of value without other related pieces of evidence. But the inference here is based upon all of the spoliated evidence, not individual pieces. The required inference from all of the spoliated evidence, taken together, is that Norton killed Mr. Murray on April 1, 2007.

The medical examiner, without conducting an autopsy, concluded that the bullet that killed Mr. Murray entered his head on the lateral left scalp and exited on the upper posterior right scalp.

Mr. Murray was right handed. Plaintiffs contend that Todd Murray could not have and did not shoot himself. It would be impossible for Murray to have shot himself in the back of the head above and behind his left ear with his right hand, and yet his left hand is not covered in blood as it would have been if he had shot himself with his left hand.

The medical examiner reported that Mr. Murray's remains arrived "bagged" and with no soot on either hand, although the right hand was caked in blood. The only evidence obtained from the scene of the shooting consisted of spent bullet casings and two guns, one of which was purportedly used by Mr. Murray. The firearm that Todd Murray allegedly fired during his encounter with Officer Vance Norton was destroyed by the FBI, and the firearm was not forensically tested before it was destroyed. Again, the photographs of that gun do not show any blood or human tissue on the gun. In fact, the gun looks remarkably clean. Ex. 19. It was not the murder weapon, as Norton claims, because the murder weapon would have been covered in blood and tissue.

The firearm that Vance Norton allegedly fired during the incident was never taken into evidence and was not forensically tested. Neither the bullet nor bullet fragments were recovered, and any other evidence related to the two guns was not collected, was lost, or was destroyed. Neither Todd Murray's person nor his clothing was ever subjected to forensic testing. Neither Vance Norton's person nor his personal vehicle nor his clothing was ever searched, processed, or preserved. Law enforcement officers on the scene did not sequester Officer Norton but, astonishingly, gave Officer Norton a camera and allowed Norton to roam freely around the shooting site, providing Norton with the opportunity to tamper with the physical evidence. They did not even take his gun from him, the one he admitted he used to shoot at Mr. Murray. That gun was likely the murder weapon, since the evidence is that there were at most two guns at the scene,

and the gun Murray had was not the murder weapon. The scene of the shooting that makes up the subject matter of this civil action was not adequately documented. Todd Murray's body was improperly handled and tampered with in the Emergency Room of Ashley Valley Medical Center and these actions significantly altered and potentially destroyed critical evidence. Todd Murray's body was improperly handled and tampered with at the Mortuary and these actions significantly altered and potentially destroyed critical evidence. Todd Murray's body was improperly handled at the Utah Office of the Medical Examiner's office and the improper handling potentially altered and/or destroyed critical evidence.

A proper investigation of Mr. Murray's remains, both guns, and Officer Norton's person and clothing may have revealed a different story than the one recounted by the local and state officers. We cannot say for sure, because the United States failed to collect the evidence against Norton and the other officers. All the evidence Plaintiffs would have relied on to make their case and refute defenses is unavailable due to spoliation by the federal officers. Plaintiffs have been prejudiced by the actions of the federal officers to an extent that is obvious, immense, and incurable. The Court therefore should impose spoliation sanctions against the United States, so that it cannot do what the State officers did in the Federal District Court: claim that there is not enough physical evidence to overcome Norton's self-serving testimony. Norton is a Bad Man among the whites, as are his co-defendants in the federal court suit, as is Ashdown, who chose not to collect evidence against his friend. The United States is responsible for that spoliation.

### **CONCLUSION**

The federal officers clearly engaged in spoliation of evidence that has prejudiced Plaintiffs. They were investigating a homicide, and litigation was reasonably foreseeable. They were responsible for the evidence.

Now, 12 years after it chose not to investigate the on-Reservation death of a tribal member in an officer-involved shooting, the United States' experts incorrectly assert that if the United States had tested the guns, the testing would most likely have shown that Norton's gun did not contain Todd Murray's blood or tissue; that the 380 gun would have; that Norton's hands would not have contained Todd Murray's blood or tissue; that Todd Murray's hands most likely would have contained back-spatter; that Todd Murray would not have ever regained consciousness if police had provided any medical intervention; that even though Norton returned to his vehicle unsupervised, there would not have been any evidence in or near his vehicle; that an autopsy would not have shown anything of interest; that back spatter on the ground would not have shown anything of interest; that testing of the 380 gun would have shown that the gun was capable of firing a bullet on April 1.

Mr. Murray's family believes otherwise. But as noted before, his family will never know, because the United States chose not to investigate the homicide. That is exactly why spoliation sanctions must be imposed.

Therefore, Plaintiffs respectfully request this Court impose spoliation sanctions against Defendant of default judgment of liability or, alternatively, lesser spoliation sanctions, an award of attorney's fees, and any other spoliation sanctions that the Court deems appropriate.

RESPECTFULLY SUBMITTED this 9th day of September 2019.

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**CERTIFICATE OF VIRUS CHECK**

The undersigned counsel hereby certifies that the foregoing **PLAINTIFFS' MOTION FOR SPOILIATION SANCTIONS AND MEMORANDUM IN SUPPORT** has been scanned for computer viruses with Webroot Antivirus Software, updated September 9, 2019, and that the document is virus free.

September 9, 2018.

*s/ Jeffrey S. Rasmussen* \_\_\_\_\_  
Jeffrey S. Rasmussen

**CERTIFICATE OF FILING**

I hereby certify that on the 9th day of September copy of the foregoing **PLAINTIFFS' RENEWED MOTION FOR SPOILIATION SANCTIONS AND MEMORANDUM IN SUPPORT** was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*s/ Jeffrey S. Rasmussen* \_\_\_\_\_

Jeffrey S. Rasmussen