IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Debra Jones, et al., Plaintiffs, v. **United States,** Defendant.	Case No. 13-227 L Judge Richard A. Hertling

Memorandum in Opposition to Plaintiffs' Renewed Motion for Spoliation Sanctions

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US-3	Bureau of Indian Affairs, Indian Affairs Manual, pt. 40, ch. 1

INTRODUCTION

This case involves the death of Todd Murray, a member of the Ute Indian Tribe. In 2007, Mr. Murray died from a gunshot wound to the head. A local police officer testified that Mr. Murray shot himself, and two federal courts have held that no reasonable person could conclude otherwise. Plaintiffs here (Mr. Murray's parents) nonetheless believe that the local officer killed Mr. Murray. They filed this suit against the United States and have moved for spoliation sanctions related to the FBI investigation of his death.

But neither the tragedy of Mr. Murray's death nor Plaintiffs' apparent dissatisfaction with the investigation is a legitimate basis for sanctions. Instead, Plaintiffs must first demonstrate that the FBI actually spoliated evidence. They fail to do so for two reasons.

First, the United States did not have a duty to preserve the evidence in question. The present litigation (filed in 2013) was not reasonably foreseeable when the alleged spoliation would have occurred (in 2007 and 2008).

Second, even assuming litigation were reasonably foreseeable, the FBI did not spoliate any evidence. The only thing seriously at issue is a gun: a Hi-Point .380 found by Mr. Murray. Twenty months after Mr. Murray's death—and more than four years before Plaintiffs filed this suit—the FBI turned the .380 over to the U.S. Marshals Service for destruction. But it did not do so with a "culpable state of mind," as would be required for a finding of spoliation. To the contrary, the FBI turned the gun over in accordance with existing policies, pursuant to a court order, and after public notice. All the remaining evidence at issue in Plaintiffs' motion

either: (1) was not within the FBI's control; (2) could not have been "spoliated" because law enforcement decisions on whether to pursue certain types of evidence are within the investigator's discretion; (3) was not destroyed; (4) would not have provided any support for Plaintiffs' claims on the merits; or (5) does not prejudice Plaintiffs' case in its absence.

In addition, even if Plaintiffs had demonstrated spoliation, they would not be entitled to the dispositive and punitive sanction of a default judgment. Such a sanction would require clear and convincing evidence of bad faith and prejudice. Plaintiffs have not shown either.

FACTUAL BACKGROUND

This case involves the "bad men" clause in the Ute Indian Tribe's treaty with the United States. *See Jones v. United States ("Jones V")*, 846 F.3d 1343, 1348 (Fed. Cir. 2017); Am. Compl. ¶ 65, ECF No. 17. The clause states that "[i]f bad men among the whites . . . commit any wrong upon the person or property of the Indians, the United States will . . . reimburse the injured person for the loss sustained." Treaty with the Ute Tribe art. 6, Mar. 2, 1868, 15 Stat. 619; *see Garreaux v. United States*, 77 Fed. Cl. 726, 735 (2007) (Tucker Act jurisdiction over properly brought "bad men" clause claims).

I. The Shooting

The alleged wrongs here surround the death of Todd Murray, a member of the Tribe. Mr. Murray died in April 2007 after an incident on the Tribe's reservation in northeastern Utah. It is undisputed that Mr. Murray's "cause of

death" was a contact gunshot wound—the gun was against or nearly against Mr. Murray's head when fired. *See* Expert Rep. of Dr. Joseph Cohen 5–6, attached as Ex. US-1 ("Cohen Rep."); Arden Dep. 13:5–13:16. What would be disputed at any trial is the "manner of death," which the Utah Medical Examiner determined to be suicide. *See* JONES0038259.[1] Plaintiffs' theory is that a local policeman (Vernal City Police Officer Vance Norton) shot Mr. Murray. Plaintiffs speculate that there could have been evidence supporting their theory, but that it was spoliated.

The incident in question occurred after a Utah Highway Patrolman (Trooper David Swenson) pursued a speeding car. JONES0018334. The car eventually spun-out, the driver and passenger fled, and Trooper Swenson detained the driver (Uriah Kurip). JONES0018335–36. Officer Norton, off-duty and on his way to his father's house, had been passed by Mr. Kurip's and Trooper Swenson's cars. JONES0015119 at 15221–22, 15226–27 (Norton deposition). Officer Norton trailed the pursuit in support, arrived at the scene shortly after Trooper Swenson had detained Mr. Kurip, and pursued the passenger. *Id.* at 15239, 15244–46, 15249,

[1] "JONESxxxxxxx" refers to the Bates numbers on the Joint Appendix, comprised of documents from a prior district court case (the United States was not a party). ECF Nos. 117–122. The parties supplemented the Appendix with additional materials collected or exchanged during spoliation-focused discovery in this case. ECF Nos. 127, 128. Judge Horn ordered the parties to submit the Appendix after concluding prior spoliation briefing did not provide the Court enough information to rule in either side's favor. *See* May 10, 2018 Order, ECF No. 93; Apr. 12, 2018 Oral Argument Tr. 80:4–81:10, ECF No. 92-1; *id.* 81:6–81:8. Plaintiffs' renewed motion is nearly verbatim of their original, and largely relies on their original exhibits. *Compare* Pls.' Renewed Mot., ECF No. 137, *with* Pls.' Mot., ECF No. 78; *see* Pls.' Renewed Mot. 5 n.1. Thus, just as Judge Horn concluded, Plaintiffs have failed to carry their burden.

15252–53; JONES0018415–16. That passenger turned out to be Todd Murray. JONES0015119 at 15253.

The details of what immediately followed would be in dispute on the merits—and need not be resolved for the present motion—but the short of it is that shots were fired and Officer Norton reported (and later testified under oath) that he had witnessed Mr. Murray put a gun to his head and shoot himself.[2] Parties' Joint Stipulations Regarding Spoliation ¶¶ 21–23, ECF No. 77 ("Jt. Stips."); JONES0015119 at 15256–67; JONES0018416. Other local law enforcement (Trooper Craig Young and Deputy Sheriff Anthoney Byron) approached and handcuffed Mr. Murray. JONES0018416. Additional local officers arrived, and Officer Norton took photographs. JONES0018416–17. An ambulance transported Mr. Murray to a hospital, where he later died. JONES0018337–39; JONES0018342; JONES0000269.

II. The FBI's Investigation

But all of the above occurred *before* the FBI—the agency ultimately charged with investigating the shooting—arrived on the scene. FBI Special Agent Rex Ashdown arrived *after* Mr. Murray had already departed in the ambulance. Jt. Stips. ¶ 24. Once on-scene, Agent Ashdown led the investigation, assisted by the

[2] In Plaintiffs' prior suit against the state and local officers and agencies, the Tenth Circuit upheld the district court's conclusion that no reasonable jury could conclude anything other than that Mr. Murray had killed himself. *See Jones v. Norton*, 809 F.3d 564, 574–75 (10th Cir. 2015). Plaintiffs—without any citation or explanation—now incorrectly state that "existing physical evidence shows that Vance Norton has not told the truth" and that "[t]he evidence which does exist points to Norton as the person who shot Mr. Murray." Pls.' Renewed Mot. 3.

local officers. *See* JONES0018331–32. He took additional photographs and collected the gun found by Mr. Murray (a Hi-Point .380), which contained a jammed but expended shell casing. Jt. Stips. ¶¶ 27, 29, 30. Agent Ashdown also collected two more .380 casings found near Mr. Murray and two .40-caliber casings found up a slope about 110 yards away (Officer Norton's gun was a .40-caliber). *Id.* ¶¶ 22, 29, 32. Ashdown collected GPS coordinates of the bullet casing locations, and interviewed Trooper Swenson. *Id.* ¶ 33; JONES0018334–36. He then documented all this in his scene report, and the FBI later interviewed Officer Norton.[3] JONES0018331–32; JONES0018329–30. Special Agent John "Wes" Fitzer—in unrebutted expert testimony—has testified that the FBI's investigation and decisions complied with the agency's protocols.[4] *See* Fitzer Rep. 9–19.

III. Treatment of Mr. Murray's Body

While Agent Ashdown was at the scene, Mr. Murray's body was at the hospital. He had been accompanied there by Deputy Sheriff Byron. JONES0012468–70 at 12470. Deputy Byron and Vernal City Police Offer Ben

[3] Agent Ashdown retired on May 31, 2007, at which point Special Agent David Ryan took over the investigation. *See* JONES0008803 at 8976, 8993–94.

[4] Mr. Fitzer is an FBI Supervisory Senior Resident Agent in Oklahoma. Expert Rep. of John W. Fitzer 1, attached as Ex. US-2 ("Fitzer Rep."). He has been with the FBI since 1995, and began working in Indian Country in 1998. *Id.* Mr. Fitzer previously served as the Senior Team Leader for the FBI's Oklahoma City Evidence Response Team, overseeing all FBI crime scene investigations in Oklahoma—more than a thousand in his career. *See id.* at 1–2. He has investigated hundreds of crimes in Indian Country, including officer-involved shootings. *Id.* at 2. Mr. Fitzer is also an enrolled member of the Choctaw Nation of Oklahoma. *See* Fitzer Depo. 150:25–151:5.

Murray (no relation) removed Todd Murray's clothes and took additional photos of Mr. Murray's body, and Deputy Byron—the parties agree, inappropriately—probed Mr. Murray's head wounds with a gloved finger.[5] JONES0012470; JONES0012176 at 12222, 12228, 12237–39 (Byron deposition); JONES0014890 at 14961, 14969–70 (Ben Murray deposition); *see also* JONES0008153 at 8273, JONES0008803 at 8860–61 (testimony from Deputy Medical Examiner that knowledge of the finger probing would not have affected his cause and manner of death determinations). Mr. Murray's body was then transported to a mortuary. JONES0012470. There, trying to obtain a blood sample, a mortuary employee made—inappropriately, the parties again agree—an incision in Mr. Murray's neck and a local officer attempted to draw blood from Mr. Murray's heart. *See* JONES0005398–402 at 5399–400 (Decl. of Colby DeCamp ¶¶ 4–5). This blood sample would have been in addition to the properly-taken sample referenced in the paragraph below.

Mr. Murray's body arrived at the Office of the Utah Medical Examiner on April 2, the day after his death. JONES0038259–73. The FBI requested that the Medical Examiner perform an autopsy. JONES0011375. A full autopsy would have included the removal and examination of the internal organs, and an internal examination of the skull and brain. *See* Cohen Rep. 4; JONES0008803 at 8873 (Leis testimony). The forensic pathologist on duty, however—Utah Deputy Medical Examiner Dr. Edward Leis—determined that only an external examination would

[5] Deputy Byron reported that a U.S. Bureau of Indian Affairs police officer was present at the hospital. JONES0012470; JONES0012176 at 12239, 12322–25.

be necessary. JONES0008153 at 8188, 8190 (Leis deposition). Dr. Leis took an x-ray of Mr. Murray's skull, drew blood and urine for analysis, and documented Mr. Murray's characteristics and injuries via diagrams and photographs. JONES0008153 at 8188; *see* JONES0038260–62, JONES0038267. This included shaving Mr. Murray's head in places to better examine and measure his head wounds. *See* JONES0008153 at 8219. Dr. Leis determined the "cause of death" to have been a gunshot wound to the head, and the "manner of death" to have been suicide. JONES0038259; *see also* Cohen Rep. 5–6 (agreeing on cause and manner of death); Arden Dep. 13:5–13:11, 54:10–55:3, 57:6–57:19, 61:16–62:21, 63:12–64:3 (agreeing on cause of death and noting that suicide was a reasonable conclusion as to manner of death). Dr. Leis certified the death certificate on April 2. JONES0038271–72.

IV. Subsequent FBI Actions & the Hi-Point .380

As part of its investigation into Mr. Murray's death, the FBI also pursued the Hi-Point .380 found by Mr. Murray. A trace of that gun and further investigation led the FBI to Cody Shirley. JONES0018323. The United States prosecuted Mr. Shirley for an illegal "straw purchase"—claiming to have bought the gun for his personal use, he had actually purchased it for someone else. *See* Jt. Stips. ¶ 38. This someone else was Uriah Kurip, the driver of the car in which Mr. Murray had been riding immediately prior to his death. *See* JONES0018324–25.

In its prosecution of Mr. Shirley, the United States sought forfeiture of the Hi-Point .380. Jt. Stips. ¶¶ 38–41; JONES0011039–42. The district court entered a

preliminary forfeiture order and, after a requisite public notice period, a final forfeiture order in November 2008. JONES0010946–47; JONES0042443–45. As noted in the forfeiture order, public notice occurs through a thirty-day posting on www.forfeiture.gov. *See* JONES0010946. Public notice for the .380 was posted between August 16 and September 14, 2008. JONES0042443.

Once forfeited, federal policy dictates that guns be turned over to the U.S. Marshals Service. *See* JONES0041667 at 41728–30 (2007 Asset Forfeiture Policy Manual); JONES0041863 at 41948–51 (2008 Asset Forfeiture Policy Manual). The FBI turned the .380 over to the U.S. Marshals in December 2008—twenty months after Mr. Murray's death. JONES0038087–88; Jt. Stips. ¶ 42. According to federal policy, forfeited guns are typically destroyed. JONES0041728; JONES0041949. Of the evidence the FBI collected in its investigation of Mr. Murray's death, the Hi-Point .380 is the only piece of evidence that does not remain preserved today. *See* JONES0038089–90; JONES0038093–106; JONES0038274–79.

V. Prior and Present Litigation

Plaintiffs filed suit (later removed to federal court) in Utah against the state and local officers and mortuary in March 2009—nearly two years after Mr. Murray's death. *See* JONES0041644–66; Jt. Stips. ¶ 3. The United States was not a party to that suit. *See* JONES0041644. Plaintiffs made spoliation allegations before the Utah federal district court similar to those raised here, but as to the state and local defendants. After an evidentiary hearing, the district court concluded that those defendants had not spoliated any evidence. *See* JONES0008803–9064

(transcript of evidentiary hearing); JONES0002161–80 (opinion).[6] The court then granted summary judgment in favor of the defendants, which the Tenth Circuit affirmed. *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015) (also affirming spoliation ruling).

While the district court proceedings were ongoing, Plaintiffs filed suit against the United States in this Court in April 2013. *See* Compl., ECF No. 1. The parties are presently before the Court on remand from the Federal Circuit. *See Jones V*, 846 F.3d 1343. Judge Horn had dismissed the complaint as, among other reasons, precluded by non-mutual collateral estoppel based upon the district court's grant of summary judgment. *Id.* at 1350–51. In reversing that dismissal, the Federal Circuit concluded that, before this Court could consider issue preclusion, it first needs to resolve Plaintiffs' spoliation assertions as against the United States. *See id.* at 1361–64. The Federal Circuit directed that

> If [this Court] concludes on remand that spoliation sanctions are not appropriate, or that the appropriate sanction would not change the evidentiary landscape for particular issues, the [Court] may reconsider the application of issue preclusion. If it determines that sanctions are appropriate and do change the evidentiary landscape, the [Court] should independently consider [Plaintiffs'] substantive allegations of bad men violations.

Id. at 1363–64 (footnote omitted).

Plaintiffs have identified a wide-array of allegedly-spoliated evidence, essentially asserting that anything the state, local, or federal authorities touched or undertook somehow resulted in tainted or missing evidence. *See* Pls.' Renewed Mot.

[6] Also at *Jones v. Norton*, No. 2:09-cv-730, 2014 WL 909569 (D. Utah Mar. 7, 2014).

25. As a sanction, Plaintiffs request that a default judgment be entered in their favor. *See id.* at 1.

STANDARD OF REVIEW

Spoliation is "the destruction or material alteration of evidence or . . . the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (internal quotation omitted). While the court's inherent power to issue sanctions is broad, it "must be exercised by judges cautiously, based on the specific facts of the case presented" and "with restraint and discretion." *Chapman Law Firm, LPA v. United States*, 113 Fed. Cl. 555, 609–10 (2013) (internal quotations and citations omitted), *aff'd*, 583 F. App'x 915 (Fed. Cir. 2014) (per curiam).

To establish sanction-warranting spoliation, Plaintiffs hold the burden to show: (1) the FBI had control over the evidence; (2) there was an obligation to preserve at the time of destruction; (3) the evidence was "destroyed with a culpable state of mind"; and (4) "the destroyed evidence was relevant to" Plaintiffs' claims and "that a reasonable trier of fact could find that it would support that claim." *Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007) (citation and internal quotation omitted); *see also K-Con Bldg. Sys., Inc. v. United States*, 106 Fed. Cl. 652, 664 n.19 (2012) (citing *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 266–67 (2007)) (discussing culpable state of mind requirements in Federal Circuit).

Importantly, "[a] determination of bad faith is normally a prerequisite to the imposition of *dispositive* sanctions," which is what Plaintiffs seek here. *Micron*, 645 F.3d at 1327 (emphasis added). In such cases, a movant must show bad faith and prejudice by clear and convincing evidence. *Id.* at 1328–29. And, as we explain below, if federal investigators were under a duty to pursue certain evidence in a given case (they are not), and if a failure to make that collection could be considered spoliation (it cannot be), any sanction—whether dispositive or not—would similarly require a showing of bad faith. *See infra* at 23–25.

Only after spoliation has been established should a court turn to the question of sanctions. *Accord Micron*, 645 F.3d at 1328. Sanctions are only appropriate where the absence of the spoliated evidence has prejudiced the moving party's ability to present its case. *See id.* If bad faith is shown, the spoliator holds the burden to demonstrate a lack of prejudice. *Id.* Absent a showing of bad faith, however, the burden to demonstrate prejudice remains with the party seeking to impose the sanction. *See id.*

ARGUMENT

Plaintiffs have not met their burden to demonstrate that the FBI spoliated evidence. First, there is no evidence to support a conclusion that the FBI could have reasonably anticipated litigation when the spoliation allegedly occurred in April 2007 and December 2008. Second, even if litigation had been reasonably foreseeable, no spoliation occurred under the Federal Circuit's standard in *Jandreau*. Finally, even if Plaintiffs had demonstrated that spoliation occurred and

sanctions were warranted, Plaintiffs have not made a clear and convincing showing of bad faith and prejudice, as would be required for the dispositive and punitive sanction of default judgment.[7]

I. The United States Had No Obligation to Preserve Evidence Until March 2009 When It Received a Notice of Potential Claims

Plaintiffs have not met their burden to show that the FBI, at the relevant time periods, was under an obligation to preserve the evidence in question. An obligation to preserve is triggered when litigation becomes reasonably foreseeable. *Micron*, 645 F.3d at 1320. Whether litigation is reasonably foreseeable is an objective, fact-specific standard. *Id.* Neither "the distant possibility of litigation" nor "the mere existence of a potential claim" is enough. *Id.* (citation omitted).

Plaintiffs allege that spoliation occurred before, during, and immediately after the FBI's April 2007 investigation, and when the FBI turned the Hi-Point .380 over to the U.S. Marshals in December 2008. Plaintiffs posit that litigation was reasonably foreseeable because: (1) the incident was fatal for Mr. Murray; (2) the Utah district court found that "litigation could reasonably be expected;" and (3) there is a "history of litigation between the Tribe and the State and local law enforcement over their respective jurisdictional boundaries." Pls.' Renewed Mot. 23 & n.4 (emphasis and internal quotation omitted).

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[7] Plaintiffs purport to bring their motion under Rule 37. *See* Pls.' Renewed Mot. 1. But Rule 37 governs compliance with the Court's discovery orders. *See* RCFC 37. There is no discovery order in this case and, even if there were, all the supposed spoliation is alleged to have occurred years before Plaintiffs filed suit. Thus, the motion is more properly treated as one brought under the Court's inherent authority. *See United Med. Supply*, 77 Fed. Cl. at 263–64.

But nothing Plaintiffs offer meets their burden. As to Plaintiffs' first assertion—and while the shooting was unquestionably serious—they identify no information that would have reasonably put the FBI on notice of a suit against the United States bringing into question the manner of Mr. Murray's death. Agent Ashdown cannot reasonably have been expected—in the middle of investigating a shooting—to turn his attention to the possibilities of a future "bad men" civil suit against the United States under a provision in an 1868 treaty. Further, Agent Ashdown testified that everything on-scene pointed to a suicide. JONES0008803 at 8925, 8940–42, 8965–70. And Mr. Fitzer—in unrebutted expert testimony—confirmed the reasonableness of that conclusion. *See* Fitzer Rep. 8–9, 13–19; Fitzer Depo. 149:14–150:14. The theory Plaintiffs have developed after years of hindsight is irrelevant to what was reasonably foreseeable at the time of Mr. Murray's death.

As to Plaintiffs' second assertion, the district court's conclusion was as to some (not all) evidence and only with respect to the defendants in that suit. *See* JONES0002173. Given the fact-specific nature of the foreseeability inquiry, that conclusion cannot be applied to the United States in this suit.[8] *See Micron*, 645 F.3d at 1320. As to their third assertion, Plaintiffs do not explain how a history of

[8] Plaintiffs claim—without any citation—that the district court concluded "the United States . . . had the duty to preserve evidence." Pls.' Renewed Mot. 4 (emphasis omitted). The district court made no such holding. The court found that the FBI was "in charge of documenting the physical evidence for the investigation," but did not conclude the FBI had a duty to preserve evidence. JONES0002176. In any event, the United States was not a party to that litigation and the district court's rulings have no preclusive effect as to the United States. *See In re Trans Tex. Holdings Corp.*, 498 F.3d 1290, 1296–98 (Fed. Cir. 2007).

litigation between the Tribe and state and local authorities made the present suit *against the United States* foreseeable.

The FBI also could not have reasonably anticipated litigation in December 2008 when, pursuant to policy and a court order, it turned the Hi-Point .380 over to the U.S. Marshals. Plaintiffs do not identify any post-2007 event or information that would have made litigation foreseeable for the FBI in advance of the forfeiture proceedings. Special Agents Ashdown and Ryan both testified that they did not believe litigation to be a possibility. Jt. Stips. ¶¶ 50, 51; JONES0008803 at 8973–74, 8990–91. Indeed, the FBI had closed its investigation file in September 2008. *See* JONES0010901–02. The suit against the state and local officers was not filed until four months *after* the FBI had disposed of the gun. *See* JONES0041644–66 (filed in March 2009). The district court concluded that even the state and local officers and agencies (other than Officer Norton) could *not* have anticipated litigation for purposes of preserving the Hi-Point .380. *See* JONES0002169–71.

The earliest the United States could have reasonably foreseen the present litigation—thus triggering a preservation obligation—was March 2009. That was when Plaintiffs sent the United States a letter noticing potential claims under the Federal Tort Claims Act. *See* JONES0010127–33. But, as the letter itself makes clear, this too was *after* the Hi-Point .380 had been turned over to the U.S. Marshals. JONES0010130. The United States did not receive notice of the potential "bad men" suit until March 2013, six years after Mr. Murray's death. *See* JONES0041641–43. Litigation against the United States was not reasonably

foreseeable at the time of Mr. Murray's death, while the FBI was conducting its investigation, or when the FBI turned the gun over for destruction. Plaintiffs' motion should be denied.

II. Even if Litigation Had Been Reasonably Foreseeable, Federal Investigators Did Not Spoliate Evidence

Even if litigation had been reasonably foreseeable, no spoliation occurred for five reasons. First, any evidence alleged to have been spoliated at the scene before Agent Ashdown arrived was not under FBI "control" for spoliation purposes. Second, federal investigators' decisions not to pursue certain kinds of evidence in the course of an investigation are discretionary and, therefore, there was no obligation to collect the evidence Plaintiffs now claim to be missing. Third, the evidence the FBI did collect either remains preserved or, in the case of the gun found near Mr. Murray's feet, was not destroyed with a culpable state of mind. Fourth, the evidence allegedly spoliated at the hospital and the mortuary is not relevant to Plaintiff's claims, and the absence of that evidence does not prejudice their case. Fifth, decisions made by the Office of the Medical Examiner were also not within the FBI's "control."

A. Any Spoliation Occurring Prior to Agent Ashdown Arriving on the Scene Cannot Be Attributed to the FBI

The Court should deny those of Plaintiffs' spoliation allegations that relate to actions occurring before Agent Ashdown arrived on the scene. Specifically, Plaintiffs allege the FBI to have spoliated evidence by allowing Officer Norton to walk around the scene; by not providing "medical intervention" to Mr. Murray at

the scene; and because (according to Plaintiffs) there was a conspiracy to "usurp" the shooting scene.[9] *See* Pls.' Renewed Mot. 1, 2, 25, 32. But a party can only have spoliated evidence if it had control over that evidence at the time of the alleged spoliation. *See Jandreau*, 492 F.3d at 1375.

FBI "control" is governed by two factors. The first is a question of legal control over the evidence. *See Chapman Law Firm*, 113 Fed. Cl. at 610 (citation omitted). Under the circumstances here, this is a question of jurisdiction: at what point did the investigation become a federal one, rather than a local one. The second factor is one of practicality: when did the FBI actually arrive on scene such that it could exercise its jurisdiction and, practically speaking, take control of any evidence. *See Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 514–16 (D. Md. 2009) (practicality as a component of "control"); *see* JONES0011503 at 11558–59 (Ashdown deposition).

As to jurisdiction, Mr. Fitzer (the FBI Supervisory Senior Resident Agent)—again in unrebutted testimony—concluded that the FBI did not have jurisdiction until those on-scene determined that Mr. Murray was an enrolled member of the Ute Tribe. *See* Fitzer Rep. 19–20. Mr. Fitzer, in reviewing the record, concluded that Mr. Murray's enrollment status was confirmed at some point between him being handcuffed and being loaded into the ambulance. *Id.* at 19; Fitzer Depo.

[9] Plaintiffs do not cite to any evidence showing anyone tampered with the scene. Thus, in addition to the lack of control, Plaintiffs fail to meet their burden to show that any evidence was actually altered or destroyed.

60:16–61:13; JONES0012176 at 12318–19 (Byron deposition). Mr. Murray's enrollment status is critical because, within Indian Country, state jurisdiction extends to state-law crimes committed by non-Indians against other non-Indians.[10] *See Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990); *United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977) ("[A] non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law"). "Indian" in these circumstances is defined through enrollment in a federally-recognized tribe, rather than as a racial classification. *See Antelope*, 430 U.S. at 646 n.7. Thus, even assuming Plaintiffs' theory regarding Officer Norton—a non-Indian—were correct, the matter was not within federal jurisdiction until those on the scene confirmed that Mr. Murray was an "Indian." *See* 18 U.S.C. § 1153(b); Fitzer Rep. 20.

As to practicality, it is undisputed that the FBI (Agent Ashdown) did not arrive on-scene until after Mr. Murray had left in the ambulance. Jt. Stips. ¶ 24. Even Plaintiffs' expert, William Gaut, acknowledges that an investigatory agency cannot be held responsible for things occurring at the scene before that agency arrives. Gaut Dep. 87:5–87:21. Plaintiffs' other expert, Dr. Jonathan Arden, appears to hold a similar opinion, having testified that a medical examiner cannot be held responsible for what happens to evidence before it comes under her control. Arden Dep. 77:8–78:10. Because the FBI did not have "control" over the evidence,

[10] "Indian Country" is a statutorily-defined term and, among other things, includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . . ." 18 U.S.C. § 1151. The parties do not dispute that the location at which Mr. Murray suffered the fatal gunshot wound was within Indian Country.

the Court should reject those of Plaintiffs' spoliation allegations that relate to conduct at the scene before Agent Ashdown's arrival.

B. Discretionary Law Enforcement Decisions Regarding What Evidence to Pursue Cannot Amount to "Spoliation"

Plaintiffs' main focus is the FBI's decision-making regarding the collection of evidence. In Plaintiffs' view, the FBI should have done more investigating. *See* Pls.' Renewed Mot. 21. This would have included testing the Hi-Point .380 found by Mr. Murray; collecting and testing Officer Norton's .40-caliber; testing Mr. Murray's and Officer Norton's hands and clothes for blood and trace and DNA evidence; searching Officer Norton's car;[11] searching the desert for bullets; and further documenting blood spatter.[12] *See* Pls.' Renewed Mot. 1–2, 11–14.

These allegations stand apart from the others in Plaintiffs' motion. They allege spoliation in the FBI's decision(s) not to pursue certain evidence, rather than in a failure to preserve documents or evidence otherwise obtained. "A failure to collect potentially useful evidence is distinctly different than a destruction of evidence that is already extant." *United States v. Martinez-Martinez*, 369 F.3d 1076, 1087 (9th Cir. 2004). Other than an unsupported statement that the United

[11] Mr. Fitzer concluded that the FBI would not have had probable cause to search Officer Norton or his car. Fitzer Rep. 17–18. Neither Officer Norton nor his gun appeared bloodied. *See* JONES0015112; JONES0008803 at 9018.

[12] The FBI did document the blood spatter, as did the Office of the Medical Examiner's investigator. JONES0038124–27; JONES0038265; JONES0008803 at 8933 (Ashdown testimony); *but see* JONES0008803 at 8964–65. Mr. Fitzer also concluded that further blood spatter analysis would not have added anything valuable to the investigation. *See* Fitzer Rep. 18.

States is "[t]urning the law of spoliation on its head," Plaintiffs provide no support (and we are aware of none) for the assertion that law enforcement decisions on which evidence to pursue in an investigation can amount to spoliation. Pls.' Renewed Mot. 22. Indeed, the entire premise of Plaintiffs' argument, if carried to its logical conclusion, is troubling: law enforcement investigations would need to be conducted not based upon the case's investigatory needs, but upon a duty to collect all evidence that could be relevant in a limitless universe of potential future civil suits against the investigatory body. Policy considerations aside, however, Plaintiffs' argument fails for three other reasons.

First, Plaintiffs have not shown that the FBI was under an obligation to collect the evidence in question. *See Jandreau*, 492 F.3d at 1375 (requiring an existing obligation). "We know of no statute or regulation—and [Plaintiffs have] not directed us to any—that prescribes a course of action for the FBI and its agents to follow in the investigation of a crime." *Gonzalez v. United States*, 814 F.3d 1022, 1028 (9th Cir. 2016). Absent such a requirement, an alleged failure to gather and collect evidence cannot amount to sanctionable conduct. *See Howell v. Earl*, No. 13-cv-48-BU-DWM-JCL, 2014 WL 2761352, at *1 (D. Mont. June 3, 2014), *report and recommendation adopted*, 2014 WL 2761342 (D. Mont. June 18, 2014); *cf. Cunningham v. City of Wenatchee*, 345 F.3d 802, 812 (9th Cir. 2003) (finding no due process violation in alleged failure to document interrogations or collect physical evidence); *United States v. Brown*, No. 2:17-cr-58-JCM-VCF-1, 2017 WL 8941247, at *17 (D. Nev. Aug. 14, 2017) (finding no case law to support the proposition that a

failure to collect evidence is sanctionable conduct in the criminal context), *report and recommendation adopted*, 2018 WL 451556 (D. Nev. Jan. 16, 2018).

The FBI's policies and protocols do not require the collection of the evidence Plaintiffs desired. Instead, such decisions are left to each investigator's discretion under the circumstances of a given case. For example, the FBI's Manual on Investigative Operations and Guidelines, which includes guidelines for preliminary and criminal inquiries, does not prescribe such collections. JONES0042154 at 42227–45. It directs that an agent *"may* use any lawful investigative technique." JONES0042243 (emphasis added). Similarly, a Department of Justice-published "Crime Scene Investigation" guide leaves to the investigator "the determination of the type of incident to be investigated and the level of investigation to be conducted."[13] JONES0042385 at 42414.

Plaintiffs allege that the FBI was required to collect the evidence "under laws, policies, or standard homicide investigation procedures or procedures for 'officer involved shootings.'" Pls.' Renewed Mot. 27. But Plaintiffs do not support that statement with any citation, and do not detail the law, policies, or standards to which they are referring. Mr. Fitzer, by contrast—again, in unrebutted expert testimony—concluded that the FBI properly followed the agency's processes. *See*

[13] Even if that were not the case, the guide—which Plaintiffs also reference on pages 23 to 24 of their motion—is outward facing. "Opinions or points of view expressed in [the] document are a consensus of the authors and do not necessarily reflect the official position of the U.S. Department of Justice." JONES0042385 at 42388. Plaintiffs also cite to the Indian Affairs Manual. *See* Pls.' Renewed Mot. 23. But that is a Department of the Interior manual, not an FBI one. *See* Bureau of Indian Affairs, Indian Affairs Manual, pt. 40, ch. 1, § 1.4, attached as Ex. US-3.

Fitzer Rep. 9–19; Fitzer Rep. attach. 1 ("Stages of a Crime Scene Search"); Fitzer Depo. 61:24–62:24, 108:13–110:2.

The only thing Plaintiffs cite in support of their argument is a 1967 case from the Tenth Circuit. Pls.' Renewed Mot. 20 (citing *Green v. United States*, 386 F.2d 953, 956 (10th Cir. 1967)). But *Green* was a case about unlawful searches and the "fruit of the poisonous tree" doctrine. *See* 386 F.2d at 955–56. It says nothing about a duty to pursue the types of evidence at issue here.

The Federal Tort Claims Act's discretionary function exception illustrates the problem with Plaintiffs' argument. In a case also involving allegations of an ineffective federal investigation into a suicide, the Ninth Circuit concluded that, absent some binding prescription of specific action, investigative activities are discretionary in nature. *Sabow v. United States*, 93 F.3d 1445, 1451–53 (9th Cir. 1996).[14] The Ninth Circuit is not alone in that conclusion. *See, e.g., Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 762 (D.C. Cir. 2001) ("[T]he sifting of evidence, the weighing of its significance, and the myriad other decisions made during investigations plainly involve elements of judgment and choice"); *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 972–76 (10th Cir. 1994) (discretion in alleged failure not to investigate airplane crash, including alleged spoliation of

[14] The plaintiffs in *Sabow* alleged that "the crime scene was not secured, important evidence was moved and manipulated before pictures of the scene were taken, [and] no effort was made to securely handle critical evidence—including the shotgun found at the scene (on which, curiously, no prints of [the decedent] were ever found) . . . ." 93 F.3d at 1449 n.2. The court concluded that discretion governed despite the fact that the allegations, "if true, represent alarming instances of poor judgment and a general disregard for sound investigative procedure . . . ." *Id.* at 1454.

evidence); *Pooler v. United States*, 787 F.2d 868, 870–71 (3d Cir. 1986) (discretion in decision on how to use informants), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50 (2013); *Jahr v. United States*, 259 F. Supp. 3d 1158, 1165–66 (W.D. Wash. 2017) (discretion in choosing which leads to investigate); *Carter v. Bell Helicopter Textron, Inc.*, 52 F. Supp. 2d 1108, 1114, 1116–17 (D. Ariz. 1999) (discretion in decisions to inspect or test physical evidence); *McElroy v. United States*, 861 F. Supp. 585, 591–92 (W.D. Tex. 1994) (federal investigation was "clearly guided by judgment and choices and not by any federal rule or policy"); *Hobdy v. United States*, 762 F. Supp. 1459, 1461–62 (D. Kan. 1991) (discretion in challenge to thoroughness of investigation), *aff'd*, 968 F.2d 20 (Table) (10th Cir. 1992).

Second, absent binding FBI policy requiring collection of the evidence, the duty for which Plaintiffs advocate would be in conflict with law. The judiciary has refused to extrapolate law enforcement's constitutional duty to *preserve* potentially-exculpatory evidence into a duty to *collect* evidence. In *California v. Trombetta*, the Supreme Court held that the due process clause requires the government to preserve exculpatory evidence on behalf of criminal defendants. 467 U.S. 479, 489 (1984). But, while "the government may have a duty to *preserve* evidence after the evidence is gathered . . . *Trombetta* did not impose a duty to *obtain* evidence." *Miller v. Vasquez*, 868 F.2d 1116, 1119 (9th Cir. 1989) (internal citation omitted).[15]

[15] The plaintiff in *Miller* alleged a failure to test blood found on the victim's jacket and a failure to photograph the victim's injuries. *See* 868 F.2d at 1117, 1119.

Nor do the police have a constitutional duty to use a particular investigative technique or to perform any particular tests. *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988).

Third, even if there were a constitutional duty to collect a certain type of evidence, Plaintiffs would need to show bad faith in the FBI's failure to do so.[16] In *Youngblood*, the Supreme Court considered whether the due process clause "requires [the government] to preserve evidentiary material that *might* be useful to a criminal defendant." *Id.* at 52 (emphasis added). While good or bad faith is irrelevant when it comes to exculpatory evidence, the test is different where, as would be the case here, the evidence in question only "could have been subjected to tests, the results of which might have [been favorable to the movant]." *Id.* at 57. In those circumstances, a due process violation occurs only if a police failure to preserve is grounded in bad faith. *Id.* at 58. Negligence is not enough. *Id.* And, "[s]ince, in the absence of bad faith, the police's failure to *preserve* evidence that is only potentially exculpatory does not violate due process, then . . . neither does the good faith failure to *collect* such evidence . . . ." *See Miller*, 868 F.2d at 1120.[17]

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[16] Paradoxically, any such constitutional duty here would be owed to Officer Norton—the criminal defendant under Plaintiffs' theory—and not Mr. Murray.

[17] "[I]n *Miller*, the court held that a 'bad faith failure to collect potentially exculpatory evidence would violate the due process clause.' *Miller*, 868 F.2d at 1120. This decision is an aberration and the law only in the Ninth Circuit." *White v. Tamlyn*, 961 F. Supp. 1047, 1062 n.12 (E.D. Mich. 1997). "No published decisions from any other circuit have gone so far as to hold that a failure to gather exculpatory evidence, even in bad faith, could be a constitutional violation." *May v. Dir., TDCJ-CID*, No. 6:06-cv-326, 2007 WL 708580, at *22 (E.D. Tex. Mar. 5, 2007).

Government officials are presumed to discharge their duties in good faith. *Road & Highway Builders, LLC v. United States*, 702 F.3d 1365, 1368 (Fed. Cir. 2012). To overcome this burden, a party must present clear and convincing evidence to the contrary. *Id.*; *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002).

Here, Plaintiffs do not seriously argue that the FBI acted in bad faith. The closest they come is a statement—without any supporting citation to the record—that Agent Ashdown's friendship with Officer Norton drove his decision-making. *See* Pls.' Renewed Mot. 25. But that is simply not true. Agent Ashdown described his relationship with Officer Norton as "Cordial. I mean, we weren't going to lunch buddies or hanging out buddies, but we were cordial." JONES0011503 at 11531 (Ashdown deposition). At the district court's evidentiary hearing on spoliation, Agent Ashdown testified that he "had a professional relationship with Vance Norton. I did not have a personal relationship with Vance Norton." JONES0008803 at 8959; *see id.* at 8958–60.

In any event, bad faith would turn on the FBI's knowledge of the evidence's value in April 2007—Plaintiffs would need to show that the FBI knew the evidence would contradict a conclusion of suicide and, on that basis, decided not to collect it. *See United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) (citing *Youngblood*, 488 U.S. at 56–57 n.*); *accord Micron*, 645 F.3d at 1326 (spoliating party must have intended to gain an unfair advantage). Plaintiffs do not even attempt to make that showing. For good reason: Agent Ashdown testified that nothing about that day

pointed toward anything other than a suicide. JONES0008803 at 8925, 8940–42, 8965–70. Mr. Fitzer, in his review of the record, agreed. *See* Fitzer Rep. 8–9, 13–19; Fitzer Dep. 149:14–150:14. And a day after the incident, the Utah Medical Examiner—upon whose conclusions the FBI properly relied (Fitzer Rep. 13–14)—certified the death as a suicide. JONES0038271–72. There are no facts supporting bad faith.

There was no duty to pursue the evidence Plaintiffs desire. Those portions of Plaintiffs' motion relating to evidence not collected should therefore be denied.

C. The Evidence Federal Investigators Did Collect Either Remains Preserved or, in the Case of the Hi-Point .380, Was Not Destroyed With a Culpable State of Mind

Plaintiffs' motion also implicates the evidence the FBI did collect. The FBI collected the Hi-Point .380 found by Mr. Murray (and the five remaining bullets and jammed shell casing contained therein); two expelled .380 casings found near Mr. Murray; and two .40-caliber casings near where Officer Norton testified to have fired his gun. *See* Jt. Stips. ¶¶ 29, 31, 32; JONES0018331–32. In addition, the Vernal City Police Department had collected and maintained Mr. Murray's shoes and socks, pants and belt, underwear, a pack of cigarettes, and a vial of Mr. Murray's blood.[18] *See* JONES0038277.

[18] Plaintiffs are thus incorrect to the extent they argue that no one could have tested the casings or Mr. Murray's clothes. *See, e.g.,* Pls.' Renewed Mot. 14, 28. The two shirts Mr. Murray was wearing followed his body to the Office of the Medical Examiner, which then released them to the mortuary. *See* JONES00008803 at 8867–70; JONES0038266; JONES0038235 (picture showing shirts under body). The shirts are therefore more properly addressed in Section II.E below.

With respect to everything other than the .380, no collected evidence has been destroyed. After it had closed its case file, the FBI turned the casings and unfired .380 cartridges over the Vernal City Police Department. *See* JONES0038089–90, JONES0038093–106 (FBI chain of custody); JONES0038278–79 (Vernal City chain of custody). That evidence, however—along with Mr. Murray's clothing—is now back with the FBI. *See* JONES0038274–79.

The FBI turned the .380 over to the U.S. Marshals for destruction in December 2008—more than four years before Plaintiffs commenced this suit. JONES0038087–88. Plaintiffs argue the FBI therefore spoliated the .380. Pls.' Renewed Mot. 11, 21, 27, 30. But destruction alone is not enough to show spoliation. Plaintiffs must also show, among other things, that "the [evidence was] destroyed with a culpable state of mind." *Jandreau*, 492 F.3d at 1375 (internal quotation omitted). Because Plaintiffs seek the dispositive sanction of default judgment—and because we are talking about only potentially exculpatory evidence—they must make that showing through clear and convincing evidence of bad faith. *Micron*, 645 F.3d at 1326–29; *see Youngblood*, 488 U.S. at 57–58. They must show the FBI disposed of the gun with the intent of making it unavailable to Plaintiffs. *Micron*, 645 F.3d at 1326–27.

Plaintiffs do not argue, let alone present clear and convincing evidence, that the FBI destroyed the .380 with the intent of impairing Plaintiffs' case. Indeed, in December 2008, the FBI was not even aware of any litigation. JONES0008803 at 8997; Jt. Stips.¶¶ 50, 51.

And if negligence were the standard, Plaintiffs still would not have met their burden. It is federal policy, with limited exceptions not applicable here, to destroy forfeited firearms. JONES0041667 at 41728–30; JONES0041863 at 41948–51; *see* Fitzer Dep. 116:11–117:9 (describing FBI protocol); JONES0011503 at 11632–33 (Ashdown deposition). Following that policy, and unaware of any existing litigation or threat of future litigation, the FBI transferred the gun to the U.S. Marshals in conjunction with a court-ordered forfeiture. *See* Jt. Stips. ¶¶ 40, 41, 50, 51. That is not negligent conduct. More importantly, however—and as confirmed by the court ordering the forfeiture—the FBI *provided public notice* that the gun would be forfeited, posting notice on www.forfeiture.com for thirty days. *Id.* ¶¶ 40, 41; JONES0010946; JONES0042443–45. That notice requested that any party claiming an interest in the gun file a petition. JONES0042444–45. Plaintiffs failed to do so.

The only evidence Plaintiffs plausibly offer to support an argument that the FBI acted negligently is the deposition of William Gaut, their proffered expert in law enforcement investigations. *See* Pls.' Renewed Mot. 21. But Mr. Gaut does not appear to be familiar with the relevant FBI policies. *See* Gaut Depo. 10:5–10:20 (confirming that he never worked for the FBI). For example, Mr. Gaut claims "FBI protocols" required the agency to retain the gun when, in fact, federal forfeiture policies set forth the opposite. *Compare* Gaut Dep. 146:8–147:4 *with* JONES0041667 at 41728–30, JONES0041863 at 41948–41951, *and* Fitzer Dep. 116:11–117:9. Mr. Gaut also misunderstands, or was not provided, the relevant

facts: he believes the .380 to have been destroyed "a week or two" after Mr. Murray's death. Gaut Dep. 150:16–151:3. But the FBI turned the gun over to the U.S. Marshals *twenty months* after the April 2007 shooting and pursuant to a court order. *See* JONES0038087–88; Jt. Stips. ¶ 42.

Finally, even if the FBI could be deemed to have spoliated the .380, no sanction would be warranted because Plaintiffs' case has not been prejudiced. Plaintiffs present three possible evidentiary contributions from the .380. *See* Pls.' Renewed Mot. 11. None illustrate prejudice.

First, Plaintiffs assert that the .380 could have been tested to determine if it was operational and had been fired. But there is no question that it was fired: a jammed casing was found in the gun and other .380 casings were found nearby. JONES008803 at 8934–35, 8969–70; Fitzer Rep. 12. There can be no confusion about which casings came from which gun—the casings from the .380 and those from Officer Norton's .40-caliber are easily distinguishable. Jt. Stips. ¶ 29; JONES008803 at 8936–37; JONES0038173–74 (.380 casing); JONES0038192, 38195 (.40-caliber casing).

Second, Plaintiffs argue that the .380 could have been tested for blowback.[19] But, if there were blowback on the .380, it would only demonstrate that it had been the gun used to make the contact wound. Fitzer Rep. 12, 17. It would not provide

[19] Under the circumstances here, "blowback" or "back spatter" refers to the "deposition of blood, tissue, [or] skull fragments on the muzzle or barrel of the firearm" or Mr. Murray's hands. Cohen Rep. 10.

any evidence as to who pulled the trigger, and, if anything, would be evidence *supporting* Officer Norton's telling. Conversely, if the .380 did not contain blowback, it would add nothing new; there is presently no evidence suggesting blowback on the .380 and none is apparent on the scene photographs of the gun.[20] *See* JONES0038157–59.

Third, Plaintiffs complain that the .380 could have been tested for fingerprints. Presumably, Plaintiffs believe that such testing could have shown if Officer Norton handled the gun. But Mr. Fitzer—in unrebutted testimony—has explained why fingerprint analysis of the .380 would not provide useful evidence. Fitzer Rep. 16; Fitzer Dep. 135:8–136:23. Fingerprints do not transfer well to gun surfaces. Fitzer Rep. 16.

In sum, Plaintiffs have not met their burden to demonstrate spoliation with respect to the evidence the FBI collected. The only piece of evidence that does not remain preserved is the Hi-Point .380. But Plaintiffs have not shown that the FBI acted in bad faith in turning the gun over for destruction.

D. The Treatment of Mr. Murray's Body at the Hospital and the Mortuary Does Not Amount to Spoliation

The treatment of Mr. Murray's body at the hospital and the mortuary does not amount to spoliation because the actions did nothing to affect relevant facts

[20] Blowback does not uniformly occur on the gun in contact gunshot wounds. *See* Cohen Rep. 10; Arden Dep. 82:8–82:16, 83:6–84:7. Thus, while the presence of blowback on the .380 could be evidence that it had been the gun that shot Mr. Murray, a lack of blowback would not provide "absolute and definitive proof" of anything. *See* Pls.' Renewed Mot. 11.

going to the question of whether Mr. Murray killed himself. In order to find sanctionable spoliation, the destroyed or altered evidence must have been "relevant to [Plaintiffs'] claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Jandreau*, 492 F.3d at 1375 (internal quotation omitted). Plaintiffs allege that spoliation occurred in not securing Mr. Murray's body in a body bag; in not bagging his hands; in removing Mr. Murray's clothes at the hospital; in the local officer inserting his finger into Mr. Murray's head wounds; and in the efforts to draw blood at the mortuary through an attempted heart puncture and a neck incision. *See* Pls.' Renewed Mot. 2, 12, 13, 14, 15.

As an initial matter, we want to be clear that probing Mr. Murray's wounds and the efforts to draw blood at the mortuary were inappropriate. And, while it was not federal officers who undertook either action, we do not condone the conduct.

But that inappropriateness does not equate to spoliated evidence. Plaintiffs allege that the attempted blood draws at the mortuary invalidated the Medical Examiner's toxicological results. *Id.* at 15. But they provide no evidence supporting that conclusion. Evidence is actually to the contrary: those blood draws did not impact—and are ultimately irrelevant because of—the blood sample taken by the

Medical Examiner.[21] *See* Cohen Rep. 7. More importantly, however, the parties' experts agree that the toxicological results should not have been considered as part of the cause and manner of death determinations. *See* Cohen Rep. 7; Rep. of Dr. Jonathan Arden 4, ECF No. 78-18 ("Arden Rep."). Even Plaintiffs' expert, Dr. Arden, stated that nothing about the neck incision would affect a determination on suicide. Arden Dep. 164:5–165:3. In other words, the attempted blood draws and the neck incision are not relevant to whether Mr. Murray committed suicide and, thus, do not meet the standard for spoliation.[22] *See Jandreau*, 492 F.3d at 1375.

The same is true for the finger in the wounds. Plaintiffs allege that this conduct amounted to spoliation because it impacted a determination as to the entry and exit points and whether the gunshot wound was a contact wound. Pls.' Renewed Mot. 14. But the parties' experts and the doctor who performed Mr. Murray's external examination all concluded the opposite: the probing would not

[21] In any event, Plaintiffs would be free to present evidence at trial of the alleged inaccuracy in the toxicology results. Plaintiffs appear to be confusing (or equating) spoliation with what would be foundation and relevancy objections at trial. The same is true for Plaintiffs' references to allegedly-lacking chains of custody. *See* Pls.' Renewed Mot. 12, 13, 15, 16. A lacking chain of custody—if it is, in fact, lacking—may hinder a party's (including the United States) ability to properly lay foundation for a blood test result. But it is not affirmative evidence—as Plaintiffs must have for spoliation purposes—that the blood sample was altered or destroyed. Plaintiffs' expert, Dr. Arden, testified that the allegedly-lacking chain of custody on the blood drawn by the Medical Examiner would not impact the cause of death determination. *See* Arden Dep. 124:9–124:18.

[22] Plaintiffs' claim—without citation—that Dr. Arden explains how the events at the mortuary "altered and potentially destroyed critical evidence." Pls.' Renewed Mot. 15. But his report does not include that explanation. *See* Arden Rep. 5–6.

have affected any of those determinations. *See* Cohen Rep. 9; JONES0008153 at 8260–61, 8273 (Leis deposition); Arden Dep. 163:16–164:4. The probing is not relevant to the question of whether Mr. Murray committed suicide and therefore cannot constitute spoliation.

The alleged failures to bag Mr. Murray's hands and properly maintain a body bag also do not amount to spoliation.[23] For one, Plaintiffs do not detail what evidence was destroyed by these alleged failures. *See* Pls.' Renewed Mot. 13. They have therefore failed to meet their burden. Presumably, they believe Mr. Murray's hands, if bagged and tested, would have been shown not to contain any blowback, thus making it less likely he shot himself. But this just restates the argument that the FBI should have tested Mr. Murray's hands. As we explained above, such discretionary decisions cannot amount to spoliation. *See supra* at 18–22. In any event, Mr. Fitzer concluded the FBI's decision not to conduct such testing was appropriate.[24] *See* Fitzer Rep. 15, 17, 19.

[23] Dr. Leis testified that, at the time of Mr. Murray's death, it was not the policy of the Medical Examiner's Office to require sealed body bags. JONES0008803 at 8856.

[24] Mr. Gaut appears to state an opinion to the contrary. *See* Pls.' Renewed Mot. 21–22. But Mr. Gaut acknowledged that the materials he relied upon for his supposed standard of conduct relate to *how* to undertake certain investigatory steps, not *whether* to undertaken them. Gaut Dep. 134:4–134:23. And he was again misinformed on the facts: he believes Mr. Murray to have died on-scene, not at the hospital some seventy-five minutes later. *See id.* at 87:25–88:3; JONES0000275 (ambulance arrives at 12:02pm); JONES00188342 (arrives at hospital at 1:17pm); JONES0000269 (death at 1:19pm). Thus, any bagging would have been done after more than an hour of medical intervention.

Further, even if the alleged failure to bag Mr. Murray's hands amounted to spoliation, no sanction would be warranted because Plaintiffs are not prejudiced by the alleged failure to test Mr. Murray's hands for blowback. *See Micron*, 645 F.3d at 1328 (requiring prejudice to ability to present case). There is already no evidence of blowback on Mr. Murray's hands. His left hand appears to have been free of blood, and his right hand, while containing blood, appears to have been resting in a pool of blood at the scene. *See* Fitzer Rep. 18. A test showing an *absence* of blowback would simply be duplicative of the present evidence. Thus, even if a test for blowback would be something that a trier of fact could conclude supports Plaintiffs' claims, Plaintiffs are not prejudiced by its absence.[25] Plaintiffs have not met their burden to demonstrate that the treatment of Mr. Murray's body at the hospital or the mortuary constituted sanctionable spoliation.

E. The FBI Had No Control Over the Medical Examiner, Including the Decision Not to Perform an Autopsy

The alleged spoliation at the Office of the Medical Examiner cannot be attributed to the FBI. Plaintiffs allege spoliation to have occurred in the decision to conduct an external examination rather than an autopsy (including searching for bullet fragments and analyzing the soft tissue); in alleged, but unspecified,

[25] Plaintiffs are incorrect to the extent they argue that a lack of blowback would be dispositive evidence that Mr. Murray did not commit suicide. Pls.' Renewed Mot. 12. As with guns, blowback does not uniformly occur on the hands with contact gunshot wounds. *See* Cohen Rep. 10; JONES0008803 at 8872 (Leis testimony). Plaintiffs are similarly incorrect to the extent they are arguing that, as an allegedly-right-handed individual, Mr. Murray would have had to shoot himself with his right hand. *See* Cohen Rep. 9–10.

"improper handling" of Mr. Murray's body with the Medical Examiner; and in a failure to maintain a proper chain of custody for a blood sample taken by the Medical Examiner. *See* Pls.' Renewed Mot. 2, 16–17.

Even if these actions and decisions could be deemed spoliation of evidence, such spoliation could not be attributed to the FBI because the FBI had no control over the Medical Examiner's actions or decisions. *See Jandreau*, 492 F.3d at 1375 (requiring control over the evidence in question). Plaintiffs' forensic pathologist, Dr. Arden, testified that, once a medical examiner's office takes physical possession of a body, that office "is responsible for preservation and maintenance of any evidence as received." Arden Dep. 77:8–78:10. Dr. Leis testified to the same. *See* JONES0008153 at 8174. And it is the medical examiner who holds the ultimate authority on whether to conduct an autopsy or external examination. Arden Dep. 127:15–129:7; JONES0008803 at 8889 (Leis testimony); Jt. Stips. ¶ 44. Mr. Fitzer concluded the FBI properly relied upon the Medical Examiner's decision. Fitzer Rep. 14.

Utah statutes support the conclusion that the FBI had no control. The Utah Medical Examiner—not the FBI—holds the authority in the state to "conduct investigations and pathological examinations," "perform autopsies," and "conduct or authorize necessary examinations on dead bodies." UTAH CODE ANN. § 26-4-4(2)(b)(ii)–(iv) (West 2019). The FBI took an appropriate step in *requesting* that the Medical Examiner perform an autopsy. Arden Depo. 125:18–126:15. In Utah, however, autopsies can only be *authorized* by the Labor Commissioner, a will, the

decedent's next of kin, the county or district attorney or judges, or the medical examiner. UTAH CODE ANN. § 26-4-24(1) (West 2019).

Plaintiffs' only argument appears to be that the FBI should have ensured that its autopsy request was followed. *See* Pls.' Renewed Mot. 16. But Plaintiffs provide no further explanation or citation as to how the FBI could have compelled an autopsy or what policy or law would have required it to do so. Because the FBI had no practical or legal control over the Office of the Medical Examiner, the latter's actions and decisions cannot be attributed to the United States for purposes of spoliation. *Cf. Chapman Law Firm*, 113 Fed. Cl. at 611–12 (email server maintained by a third party); *accord* JONES002179 (district court spoliation ruling).

III. Even If Spoliation Had Occurred, Plaintiffs Would Not Be Entitled to a Default Judgment, Nor the Requested "Lesser" Sanctions

Even if spoliation had occurred, Plaintiffs are not entitled to a default judgment. Dispositive sanctions like default judgments require "clear and convincing evidence of both bad-faith spoliation and prejudice . . . ." *Micron*, 645 F.3d at 1328–29.[26] Courts must also consider the spoliating party's degree of fault, the degree of prejudice, and whether a lesser sanction would avoid substantial unfairness to the spoliating party. *Id.* at 1329.

[26] In their prior spoliation briefing, Plaintiffs relied on *United Medical Supply*, 77 Fed. Cl. at 267–68, for the proposition that dispositive sanctions could issue absent a showing of bad faith. Even if *United Medical Supply* stood for that proposition, it predates the Federal Circuit's holding in *Micron*.

A showing of bad faith requires more than just the intentional destruction of evidence. *Id.* at 1327. Instead, as Plaintiffs themselves state, "[b]ad 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." Pls.' Renewed Mot. 24 (emphasis added) (citing *Micron*, 645 F.3d at 1326–27). "The fundamental element of bad faith spoliation is advantage-seeking behavior by the party with superior access to information necessary for the proper administration of justice." *Micron*, 645 F.3d at 1326.

Here, there is no evidence the FBI intended to impair Plaintiffs' ability to make their case, let alone clear and convincing evidence of such intent. There was no lawsuit at the time of the alleged spoliation and the FBI was not anticipating one. *See* Jt. Stips. ¶¶ 50, 51; JONES0008803 at 8973–74, 8990–91, 8997. The only effort Plaintiffs make to show bad faith is their allegation that Agent Ashdown admitted his investigatory decision-making was driven by his friendship with Officer Norton. Pls.' Renewed Mot. 25. But, as we explained above, the record does not support that allegation: Agent Ashdown's relationship with Officer Norton was strictly professional. *See supra* at 24.

Perhaps recognizing the lack of bad faith, Plaintiffs alternatively seek a "lesser" sanction: an evidentiary inference that Officer Norton killed Mr. Murray.[27]

[27] The narrative at the end of Plaintiffs' brief subtly acknowledges what they are truly after: sanctions preventing the United States from mounting any defense to allegations that Officer Norton shot Mr. Murray, including testimony from those on-scene that day. *See* Pls.' Renewed Mot. 31. The Federal Circuit has instructed that

See Pls.' Renewed Mot. 3, 27. But this "lesser" sanction equates to a ruling in Plaintiffs' favor on the very factual question that would be at issue on the merits. Thus, Plaintiffs would still need to show something nearing bad faith; they have failed to do so. *See United Med. Supply*, 77 Fed. Cl. at 270 ("When considering the most powerful of the available sanctions, particularly those that might lead to a determination other than on the merits, the court must use an additional measure of restraint, which ordinarily requires that the offending party's conduct evinces serious fault, willfulness or bad faith.").

In attempting to explain why the "lesser" sanction is appropriate, Plaintiffs identify some more-narrowly-tailored evidentiary inferences. *See* Pls.' Renewed Mot. 27–29. But, even there, Plaintiffs have failed to demonstrate that any of those inferences are appropriate.

First, Plaintiffs would likely still need to show something more than negligence on the part of the FBI. Though the Federal Circuit has not conclusively addressed the question, the majority of circuits have concluded that mere negligence is insufficient to trigger a negative evidentiary inference. *See Jandreau*, 492 F.3d at 1376 & n.3; *K-Con Bldg. Sys.*, 106 Fed. Cl. at 664 n.19; *United Med. Supply*, 77 Fed. Cl. at 266–67.

Second, courts "should always impose the least harsh sanction that can provide an adequate remedy." *Lab. Corp. of Am. v. United States*, 108 Fed. Cl. 549,

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the "substantial unfairness" of such an outcome needs to be considered. *Micron*, 645 F.3d at 1329.

562 (2012) (internal quotation omitted) . Many of Plaintiffs' desired inferences would not meet that standard, instead imposing substantial prejudice on the United States. Assume, for example, Plaintiffs were correct that the FBI spoliated evidence by not forensically testing Officer Norton's gun. Plaintiffs request an inference that the gun contained blowback from Mr. Murray's head wound. *See* Pls.' Renewed Mot. 27. But the United States, like Plaintiffs, does not have the benefit of those unknown forensic results to potentially support *its* case. Thus, rather than re-balancing the equities, an inference dictating what those results would have been tips the scale heavily in Plaintiffs' favor.[28]

But that is all hypothetical because, for the reasons explained above, no spoliation has occurred. And Plaintiffs have certainly not made a requisite showing of bad faith that would justify their requested sanctions.

CONCLUSION

Plaintiffs have not met their burden to demonstrate that the FBI spoliated evidence. Litigation against the United States was not reasonably foreseeable. And, even it had been, the FBI did not spoliate anything. The agency had no control over the scene of the shooting until Agent Ashdown arrived, which was after Mr. Murray had already departed in the ambulance. The FBI's law enforcement

[28] Officer Norton's gun is not the only example of Plaintiffs' overreach. They also request inferences that: Officer Norton's hands and clothes contained Mr. Murray's blood and brain tissue; the Hi-Point .380 was not operational; the .380 casings contained Officer Norton's fingerprints and DNA; an autopsy would have recovered fragments of bullets from Officer Norton's gun; and Mr. Murray's body contained Officer Norton's DNA and fingerprints. *See* Pls.' Renewed Mot. 27, 28, 29.

decisions regarding which evidence to pursue are discretionary and therefore cannot amount to sanctionable conduct in a civil suit filed six years later. Of the evidence the FBI did collect, the only evidence that does not remain preserved is the Hi-Point .380 found by Mr. Murray. But the FBI properly disposed of that gun—nearly four years before this suit—in accord with federal policy, after public notice, pursuant to a court order, and without any culpable state of mind. Though the treatment of Mr. Murray's body by non-federal actors at the hospital and the mortuary was inappropriate, it had no effect on any evidence that could have supported Plaintiffs' claims and, in any event, Plaintiffs have not been prejudiced by its absence. Finally, the FBI had no control over the Utah Office of the Medical Examiner and cannot be held accountable for that office's actions, including the decision not to conduct a full autopsy. Plaintiffs' motion should be denied.

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