IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DEBRA JONES, et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:13-cv-00227
	)	Judge Richard A. Hertling
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF RENEWED MOTION FOR SPOLIATION SANCTIONS

Jeffrey S. Rasmussen (Attorney of Record)
FREDERICKS PEEBLES & PATTERSON LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jrasmussen@ndnlaw.com

Counsel for the Plaintiffs

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INTRODUCTION

Defendant's response in opposition to Plaintiffs' renewed motion for spoliation sanctions asks this Court to disregard and to defy the decision of the United States Court of Appeals for the Federal Circuit. Its response is an only very slightly repackaged (and weaker) brief from that which Defendant presented to Judge Horn, and which Judge Horn adopted, but which the Court of Appeals rejected.

Defendants also ask this Court to ignore the contemporaneous evidence that shows that the Murray Family easily meets the "reasonably foreseeable" trigger for spoliation sanctions.

The Murray Family's opening brief discusses the applicable law, and it will not repeat that discussion here. It will respond in detail to show that the United States' arguments are contrary to that law. The Court should reject Defendant's argument and impose spoliation sanctions which re-level the playing field and which impose the harm from spoliation on the spoliator—the United States.

DISCUSSION OF LAW

I. THE UNITED STATES' REVISIONIST HISTORY THAT IT DID NOT ANTICIPATE LITIGATION PRIOR TO 2009 MUST BE REJECTED, AS IT IS CONTRARY TO THE CONTEMPORANEOUS DOCUMENTS AND INFORMATION.

The parties agree that the United States had the duty not to spoliate evidence once litigation was "reasonably foreseeable." The United States now claims that litigation was not reasonably foreseeable until March 2009. U.S. Arg. §I.

The United States' argument has numerous fatal flaws. The Murray family discussed most of those flaws in its opening brief. The United States responsive argument is: Ashdown and Ryan testified that they did not anticipate litigation until March 2009. Therefore, litigation was not reasonably foreseeable until March 2009.

The United States is wrong on both the facts and the law. First, from a broad overview: Of course the United States reasonably anticipated litigation. It was conducting a criminal investigation regarding an officer-involved shooting where there was no witness other than the officer, and the officer admitted that he had shot at the deceased. The fact that FBI agents later implausibly claimed that they subjectively did not anticipate litigation says something about their honesty or memory and/or other failing. Because it is contrary to contemporaneous records and basic knowledge of Utah and the Ute Reservation, it says virtually nothing regarding how the objective legal standard, "reasonably foreseeable," applies in this case.

It appears that the United States is attempting to make an "empty head, white heart" argument—that these FBI agents somehow, but subjectively, did not expect litigation even though any even semi-reasonable person involved in police services on or near the Reservation reasonably expected litigation. That is, after all, why investigators took blood from Mr. Murray's body,[1] why

[1] The police and medical examiner took multiple vials of blood. For at least one of those, neither they nor anyone else was willing to provide an explanation for why they took it, or what they did with it. Similarly, neither they nor anyone else would explain why an officer stuck his finger inside Mr. Murray's brain after Mr. Murray had died. Similarly, they could not explain why they had immediately taken his clothing off after he died, and held him in various poses which bring to mind dead big game. Similarly, they could not provide any reasonable explanation for which they went in a pack to the mortuary and cut his neck open. Similarly, neither they nor anyone else would explain why they stood at a distance, without even attempting to comfort or concern to Mr. Murray as Mr. Murray as he lay dying alone on the rocky outcrop, or why one of the officers appears in the photo to be smiling, or why another of Norton's friends and colleagues came up with a story, not in his contemporaneous police report, five years after the death, that he had seen Mr. Murray wave his hands in the air and then fall to the ground, nor how the FBI agents could claim that they did not foresee litigation prior to December 2008 when they had said, three months earlier that they were actually aware of active civil litigation regarding Mr. Murray's death, nor why the first officer on the scene reported that Mr. Murray appeared to be unarmed, but Norton's friends and colleagues all immediately accepted Norton's claim that Mr. Murray had shot himself.

This case is troubling. They –including the United States--treated Mr. Murray and his body worse than any normal person would treat an injured animal. The utter lack of respect for the dying and then dead tribal member is troubling, and the Murray Family believes this clear record of them dehumanizing Mr. Murray is part of what led to the United States' wholesale spoliation of evidence.

they took pictures, why the United States immediately requested an autopsy, why the Murray Family and their attorneys made repeated contacts with the United States, etc. The United States not only reasonable expected, litigation, but they actually knew litigation was coming. Then they chose to only gather the evidence that would not contradict their friend and colleague's claim that Mr. Murray shot himself—which would protect their friend and colleague when that litigation did come. They did an exceptionally good job of spoliation the evidence for their colleague—so good that the Murray family's firm belief is that Norton has literally gotten away with murder, and that the sanctions which the United States richly deserves for its efforts will ultimately result in a judgment of liability for wrongful death—its agents chose to take on that risk when they spoliated evidence, with knowledge that it was highly relevant in planned or active litigation, and its more recent agents' attempt to revise history is without merit and then some.

A. THE UNITED STATES' CLAIM THAT IT DID NOT FORESEE LITIGATION WHEN IT DESTROYED THE GUN THAT NORTON CLAIMED MURRAY USED IS DISPROVEN BY THEIR CONTEMPORANEOUS STATEMENTS, AND REDUNDANTLY BY OTHER EVIDENCE.

As Mr. Murray discussed in detail in his opening brief, one of the most important pieces of evidence in this case was the gun that Norton claimed Todd Murray used to shoot himself.

The United States admits that forensic testing and other testing of the gun would have produced very substantial evidence. Assuming that Norton's story is false (as it appears to be), testing of the gun may have been 100% absolute proof that Norton killed Mr. Murray: it could have proven that the gun was not even functional, or it could have shown that the casings had not come from that gun at all, or it could have shown if Norton's fingerprints were on the gun. Even if the evidence had not been dispositive, it would at the very least have provided evidence that

more likely than not Norton had killed Mr. Murray, i.e. definitive evidence that Mr. Murray's blood and tissue were not on the gun.[2]

The United States further admits that it took that gun into evidence and retained the gun until December 2008, that it never tested the gun, and that it intentionally destroyed the gun in December, 2008.

Placed in this unenviable position of having all other elements for spoliation on that gun established, the United States has only remaining argument. It asserts that litigation was not reasonably foreseeable in December 2008. For this incorrect assertion, it cites to the fact that its two FBI agents testified, under oath to before a federal judge, that they did not believe litigation was reasonably foreseeable in December 2008.

The United States, and its FBI agents who provided that testimony to help Vance Norton and other Utah officers, apparently forget, or hope that Mr. Murray's family has forgotten, that the FBI stated, in writing prior to December 2008, that they were aware of an "active civil suit" regarding Mr. Murray's death. For example, in its memo requesting to close its "investigation" regarding Mr. Murray's death, dated September 17, 2008, the FBI wrote:

> **Due to an active civil suit involving** _____ [redacted, believed to be the Murray family] and the VPD [Vernal Police Department], items 1B1-1B4 [bullet casings] have been removed from FBI evidence and provided to VPD. No other items remain in FBI evidence.

Dkt. 118-3 at 4 (emphasis and bracketed noted added).[3] The United States gave the shell casings to the town of Vernal, i.e. the party that the United States knew was opposed to the dead tribal

[2] All witnesses agreed that the gun that shot Mr. Murray would have been near Mr. Murray's head, and that in the substantial majority of cases, the testing of the exterior and interior of the gun that caused the death would have "blowback" blood or tissue on it.

[3] The only versions of the document that appear to be in the Court file are redacted.

member's family in that active civil litigation. It then had the gun destroyed,[4] with actual knowledge that the gun was evidence in the civil matter![5]

That admission in writing, by itself, defeats the United States' argument against spoliation sanctions regarding the gun that the United States chose to destroy despite its knowledge that there was "an active civil suit." It also effectively eliminates any claim to credibility that Ashdown and Ryan had, because they later falsely testified under oath to help their colleague and to harm the tribal member's family—asserting that they did not know that litigation was foreseeable. It is therefore small wonder that Judge Campbell found that, despite their testimony, litigation was foreseeable.

But the United States' contemporaneous written admission is far from the only piece of evidence showing that the FBI agents' testimony to Judge Campbell in the Utah federal court was incorrect. In fact, Agent Ashdown had met with the Murray family on April 25, 2007, less than a month after Mr. Murray was killed. The family explained to Agent Ashdown that they did not believe that Mr. Murray had shot himself. As one part of that meeting, they explained that one of the reasons they did not believe Mr. Murray had killed himself was that Mr. Murray was shot in the left side of his head, but he was right handed. Agent Ashdown tried, and found that he was

[4] In its response brief, the United States attempts to hide behind the federal court judge who signed the order forfeiting the gun. One would assume and hope that the federal court judge would be very upset with the United States argument, because in its filings with that Judge the United States failed to disclose to him that the United States knew the gun was evidence in "active civil litigation" regarding a wrongful death claim. Under the law, if the United States had disclosed that fact as it should have, the federal court judge would not have issued an order of forfeiture.

[5] As the Murray Family previously discussed, the shell casings would have had substantial evidentiary value if the gun had not been destroyed, but little evidentiary value without the gun. Any experienced FBI officer who would be turning the shell casings over while having the gun destroyed would know that.

unable to position a gun in his right hand in a way which would have caused the fatal shot.[6] Todd Murray's mother "pleaded with Agent Ashdown to investigate the circumstances surrounding" Todd Murray's death, and she testified that "Agent Ashdown promised me and my family he would conduct a 'full investigation' as the FBI had jurisdiction over the case." Jones Dec. ¶¶5-8 (Dkt. 14-3).

The Murray Family's attorneys also contacted federal law enforcement officers multiple times in 2007. Similar to the message Todd Murray's motion received from Agent Ashdown, those other communications claimed that the FBI was investigating. *E.g.*, Ex. A. Additionally, FBI Spokesman Trent Pederson was quoted in a newspaper article on April 2, 2007 as stating "We're going to make sure it was a suicide and not something else." Ex. B. The United States new argument, made by those who were not around in 2007, that if only the Murray family had spoken up earlier, the United States would have preserved the evidenced, is sickeningly laughable.

We now know that the FBI did not even gather the basic evidence, and did not fulfill their promise to the Murray Family. Now, years after the fact it, through an FBI agent who was not involved in the matter in 2007 and attorneys who also were not involved in 2007, faced with the fact that the FBI spoliated all of the evidence, create the new argument that it had no need to even investigate the death of the tribal member and had no expectation that there would be litigation regarding that death, because it could immediately determine, on April 1, 2007, based upon Norton's uncorroborated statement, that Mr. Murray had killed himself. The contemporaneous

[6] Ashdown did not interview Norton until May 1, 2007, one month after the officer-involved shooting, and after he had met with the Murray family. When he did interview him, he apparently did not even ask Norton was claiming that Mr. Murray had used his left or right hand, or apparently any other question which could have revealed that Norton was not being honest. It also appears, that Ashdown, like the other officers at the scene did not want to gather the evidence which would show whether or not their friend and colleague, Norton, was a murderer.

federal officer statements, as well as common sense, are directly to the contrary. Unless the FBI was lying to the Murray family and the public throughout 2007, the FBI understood that the matter required investigation. Their years-after-the fact rationalization is incorrect, and reflects poorly on their credibility.

The fact that litigation was reasonably foreseeable is also a conclusion which would be reached by any reasonable person who has knowledge of the lengthy and substantial litigation between the Tribe and the State/State subdivisions. While the United States pejoratively claims that Utah Federal Court Judge Campbell's conclusion that litigation was reasonably foreseeable is wrong, she was actually, and plainly correct. The United States' experts and attorneys from outside of Utah are just as plainly wrong. As then-Judge Gorsuch discussed in one of his significant Tenth Circuit opinions, "Nearly forty years ago the Ute Tribe filed a lawsuit alleging that Utah and several local governments were unlawfully trying to displace tribal authority on tribal lands. . . . This , of course, the State had no business doing." *Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1004 ("*Ute VI"*). Judge Gorsuch provided a detailed history of that 40-year history of the State's recalcitrance. *See also Ute Indian Tribe v. Utah*, 835 F.3d 1255 (*Ute VII*) (Judge Gorsuch writing "here we are. . .still addressing the same arguments we have addressed so many times before.").

The United States' argument that because its agents, years later, claimed and perhaps even thought that they subjectively did not anticipate litigation does not defeat the clear record that everyone, including the United States, knew that the Murray Family believed their son had been murdered by Norton, and that, as with nearly any family, the Murray Family was not going to literally let Norton get away with murder. The Court must reject the United States primary argument opposing substantial spoliation sanctions. Its attorneys are commended for their effort, but they cannot overcome the contemporaneous record.

B. THE UNITED STATES REASONABLY FORESAW LITIGATION PRIOR TO APRIL 4, 2007.

Another primary piece of evidence is the gun that Norton had, that the Murray Family believes he used when he killed Todd Murray. Norton's supervisor testified that he swapped guns with Norton at some time, on April 1, after the shooting, but that because the United States did not request the gun, he returned it to Norton. Jensen Dep. 61-62. (Dkt. 118-5 at 639-40). He could not recall when he returned it, but Norton testified that it was returned about three days later. Norton Dep. p. 176 (Dkt. 121-2 at 104).

Before those three days had elapsed, the United States was aware that Norton's story was uncorroborated by any other witnesses. It knew that Mr. Murray had been shot on the left side of his head, but that Mr. Murray's left hand did not appear to have blood on it, and that the gun that was found near him also did not appear to have blood on it. Norton initially claimed that Mr. Murray had only shot twice—once at Norton and once at himself, accounting for the two shell casings on the ground. But then after Norton because aware that a third shell casing "stovepiped" in the gun, Norton began claiming that Mr. Murray had actually shot the gun three times. The physical evidence was not backing Norton's uncorroborated story. The only piece of evidence that fit with Norton's narrative were the two shell casings that Norton "found" 100 yards away at some time after the shooting. As is readily apparent and as the experts in this case agreed, Norton could have easily moved those shell casings to where he later "found" them.

Prior to the gun being returned to Norton, a reasonable person would know that litigation was going to take place. In fact, at that time, the United States should have reasonable expected that with the evidence that was pointing that Norton had lied about the shooting, that criminal or civil litigation was going to occur, and as discussed in the Murray Family's opening brief, it was

obvious that the gun had potentially dispositive and at least substantial evidentiary value. The United States spoliated that evidence.

C. LITIGATION WAS FORESEEABLE ON APRIL 1, 2007.

The United States also asserts that it did not reasonably foresee litigation on April 1, 2007. That assertion is logically and factually impossible to accept. On April 1, the United States knew that Norton, an off-duty small town officer who was 40 miles from that town, and he had chosen to go onto an Indian Reservation where he lacked police powers. With weapon drawn and in street clothing, Norton had gone hunting to find an Indian who was on his own Tribe's land, and who was not suspected of having committed a crime. The tribal member ended up dead, with no witnesses other than Norton. The United States admits it had the legal duty to investigate that homicide. The duty to investigate is per se because one foresees litigation, and is done in anticipation of litigation.

To support its illogical contrary claim, the United States relies upon Ashdown and Ryan's testimony that they did not anticipate litigation. As discussed above, that testimony is demonstrably false. They anticipated litigation.

II. MOST OF THE UNITED STATES' ARGUMENTS IN SECTION II OF ITS BRIEF ARE BASED UPON ITS REQUEST THAT THIS COURT VIOLATE THE APPELLATE COURT MANDATE, AND THE REMAINDER OF THE UNITED STATES' ARGUMENTS IN SECTION II ARE WITHOUT MERIT.

The United States' primary arguments on spoliation are based upon the United States having its paid experts opine that the Court of Appeals was wrong, that instead the United States' rejected argument to the Court of Appeals was correct. The Court must reject that argument for obvious reasons. Lower courts are required to comply with the mandate of superior courts. In its pre-appeal argument to Judge Horn, and in its appeal brief, Defendant asserted that there should be no spoliation sanctions because the District Court in Utah had determined that because the

United States was responsible for the spoliation of evidence, spoliation sanctions could not be imposed against the State of Utah and its subdivisions. Based upon the Utah District Court's conclusion, that Court concluded that Todd Murray's family could not overcome the testimony of the sole surviving witness—Vance Norton.

The Court of Appeals for the Federal Circuit correctly rejected the United States' argument. It noted that because the Utah District Court's ultimate conclusion was premised upon its decision not to impose spoliation sanctions against the State of Utah and because the United States had the responsibility for the investigation and preservation of evidence, the Utah Court's ultimate conclusion could not be applied in this case.

As the Court of Appeals held in its key conclusion, "But for the destruction of the cited evidence, Jones may have shown that Murray was, in fact, shot by Norton." Jones v. United States, 846 F.3d 1343, 1363. Then, as now, Defendant argues that this holding by the Court of Appeals was wrong, and it asks this Court to violate that holding and the related mandate on remand.

The United States' slight repackaging is to now have its experts disagree with the Court of Appeals' decision and have its experts make the exact same argument that their attorneys made, and lost, in the prior appeal. The United States had its experts opine on whether, if Norton's story were true, Todd Murray killed himself. For example, everyone agrees that Todd Murray was shot at close range. The United States medical expert concluded that because Norton stated he had not been in close range to Murray, Norton was not the shooter. *E.g.*, Dkt. 139-1 at 7. That medical expert had absolutely no medical evidence that supported that Norton was too distant. Instead his conclusion was based upon Norton's self-serving, uncorroborated claim. "But for the destruction of the cited evidence, Jones may have shown that Murray was, in fact, shot by Norton." 846 F.3d at 1363. The Court is required to determine spoliation sanctions, and then turn to whether the

remaining evidence and conclusively assumed facts or presumptions stemming from spoliation law results in the United States having liability. Once the Court makes that prerequisite spoliation decision, then, to the extent they speak to the new evidentiary environment, the expert reports and testimony might be of use at that point,[7] but their opinion based upon their conclusive assumption that Norton's story is true is currently of no value.

Similarly, the United States notes that its FBI employee opined that Todd Murray killed himself. That FBI employee's opinion, like the argument that the Court of Claims rejected, was premised on the assumption that this Court will not impose spoliation sanctions—i.e. the exact assumption that the Court of Appeals held was improper and got the law of spoliation backward in this case. Fitzer Dep., passim, *e.g. id.* at 67-68 (Fitzer concluded that testing of Norton's clothing for blood was not needed because, he decided, the clothing would not have contained blood because Norton had not killed Murray.); *id.* at 137 (making same circular assertion regarding the gun that Norton claimed Murray had used); *id.* at 135 (acknowledging that his arguments that there was no need to investigate was based upon his assertion that because Norton claimed that Mr. Murray had fired a gun, there was not even a dispute on that issue; but being force to admit that he was "certainly" aware that the Murray family disputed the issue). The FBI employee then argued[8] that if there is no spoliation sanction, we are left with Norton's uncorroborated testimony.

[7] The Murray Family's experts' written opinions and depositions analyze various potential spoliation remedies, and then why the evidentiary environment after the Court imposes the required spoliation remedies results in the United States being liable.

[8] "Argued" is the proper term for that expert. In this regard he was unlike the other four experts in this case. Depositions, *passim*. *E.g.*, Fitzer Dep. at 66-69 (after Fitzer argued that Plaintiff was wrong on an issue because, he conjected, testing of Norton's clothing would have shown that there was no blood on that clothing, he then disagreed with Plaintiff's very next question, arguing that blood on Norton's clothing would not have been dispositive, because Norton's' clothing may have somehow gotten blood on it while Norton was allowed to wander through the crime scene).

The FBI employee then circularly argued that the FBI failure to conduct any meaningful investigation was acceptable because Norton said that Mr. Murray had shot himself.

But even the United States' argumentative witness was forced to admit that the United States failed to collect, or failed to preserve, nearly all of the physical evidence. Fitzer Dep. at 140-141. He also admitted that the uncollected or destroyed evidence was evidence, *id.*, and that some of it would have been very substantial evidence. Fitzer Dep. at 69 (admitting that if the FBI had tested Norton's gun and it had shown Murray's blood on it that "would lead him to believe that Norton was not telling the truth.") For example, he was forced to admit that forensic testing of the murder weapon more likely than not would have revealed Todd Murray's blood or tissue on or inside the gun. Fitzer Dep. at 105-6, 140. He was forced to admit that if Norton was the shooter, forensic testing of Norton's person and clothing would have, much more likely than not, revealed the presence of Todd Murray's blood or tissue. *Id.* He was forced to admit that if Mr. Murray's blood or tissue had been found on Norton, his clothing, or his gun, then Norton's story was false, and Norton had very likely killed Mr. Murray. Fitzer Dep. at 65-69.[9] Fitzer was also forced to admit that that if the gun alleged used to shoot Mr. Murray was not functional or had not fired the casings, then Mr. Murray had not shot himself. *Id.* at 105-106, 140.

[9] As a relatively minor issue, but indicative of the United States' circular argument and attempt to stand the law of spoliation on its head, the United States claims that there was no spoliation of evidence from Norton's vehicle because there was not ground to obtain a search warrant of that vehicle. Implicit in Fitzer's argument is that if Norton had been asked to consent to a search of his vehicle, to see if when Norton admittedly went to that vehicle after the shooting, he had he had left blood or other evidence in or on the vehicle, Norton would have refused to consent. Then, putting aside Fitzer's erroneous belief that a search warrant would have been required, *e.g., Maryland v. Dyson*, 527 U.S. 465 (1999) and instead focusing on probable cause, Fitzer claimed that the FBI could not search the vehicle because it did not have sufficient evidence that Norton had committed a crime. Fitzer Dep. at 69. The reason there was not sufficient evidence, however, is the point of the current spoliation motion. If, for example and as should happen, the Court conclusively presumes that Norton's gun had Todd Murray's brain tissue on it, then there would, obviously, have been probable cause to search his vehicle, to analyze his clothing and hands, etc.

Federal expert Matty was much more straightforward that Fitzer. He readily admitted the obvious--that the guns, and testing of the guns for blood and tissue would have provided strong evidence one way or the other. *E.g.*, Matty Dep. at 34 (admitting that Murray's blood on Norton's gun would have been "strong evidence" of Norton's guilt and would have disproven Norton's story). He admitted that a police officer should examine alleged homicide weapons for blood or tissue, *id.* at 38, and that it is found in or on over 3/4 of handguns used in close contact wounds. He admitted that because the United States destroyed the gun that Murray allegedly used, he could not do ballistic testing to determine if the bullet jackets that the United States had given to Norton's police department came from that gun. *Id.* at 44. He noted that studies show that in 90% of suicides, the gun ends up held by, touching or within one foot of the person committing suicide, but that here the gun was about four feet away from where Mr. Murray fell. *Id.* at 54.[10]

In compliance with the Court of Appeals decision, this Court must reject the United States' argument that the Court determine if Murray killed himself and then determine if there are spoliation sanctions. This Court is required to determine whether to impose spoliation sanctions against the United States. As the Court of Appeal held, the United States' argument on spoliation sought to put the cart before the horse. The Court of Appeals put the horse back in front and remanded with instructions to keep it there. The United States' argument that the Court should not impose sanctions because, they, now via their experts, claim that Todd Murray killed himself

[10] In attempting to rehabilitate the testimony on this point, the United States only dug the hole deeper—showing that some of the remaining 10% of cases, where the gun ends up more than a foot away, are caused by the shooter stumbling or flailing after the shooting. But in this case, Norton's testimony was that Mr. Murray fell like a sack of potatoes after he was shot. The United States cross-examination showed that if Norton's story were true, there is an even greater than 90% chance the gun would have been within one foot.

tries to put the cart back in front. That is exactly why the Court of Appeals rejected the United States, argument, and why this Court must reject it yet again.

The only other arguments the United States makes in Section II of its response brief are without merit.

In Section II.A of its reply, the United States asserts it cannot be held responsible for the spoliation that occurred prior to Agent Ashdown arriving on the scene.[11] The United States does not cite any case for that proposition, and, like most of the United States' arguments, its argument here is wrong on both the facts and the law.

First on the facts, the United States was put on notice at about 11:01 a.m. At 11:01 a.m. on April 1, Trooper Swenson requested that dispatch notify BIA, and dispatch responded, "Copy, advising BIA." Dispatch Trans. p.5. (Dkt. 120-7 at 414). *See also id.* at 8 (at 11:04, Officer 513 responds notes that "BIA has been notified."), *id.* at 23 (at 11:21, Trooper Swenson asks dispatch to notify BIA ambulance to standby); *id.* at 47 (noting that prior to Mr. Murray being removed from the scene, a BIA officer was present). Contrary to the United States' argument, the relevant inquiry for spoliation against the United States is not based upon when a specific federal officer arrived at the scene. It is based upon the whole of the United States' government, and its agents, knowledge and authority.

Second, as discussed in more detail in the Murray Family's renewed motion for spoliation sanctions, the United States argument is also wrong on the law, the United States admits that it

[11] The Court could determine that it does not need to determine whether the United States is responsible for spoliation before Ashdown arrived or for spoliation because of the failure to conduct an autopsy. The spoliated evidence at those two points should be moot if the Court, as it should re-levels the field by assuming that the evidence from the spoliated gungs and testing of guns would have been favorable to the Murray Family. That is, the proper spoliation remedy from the guns and testing of guns would, by itself result in the Murray Family recovering for the wrongful death caused by the bad men among the whites.

was the investigative agency. It had the legal responsibility. While the United States claims that it lacked control, its argument is directly contrary to the very case that it cites for that argument, *Goodman v. Praxair Services*, 632 F. Supp. 2d 464, 514-15. *Goodman* analogized "control" for spoliation purposes to "control" under Federal Rule of Civil Procedure 34, and it notes that under Rule 34, documents are considered to be under a party's control when that party has 'the right, authority, or practical ability to obtain the documents from a non-party to the action." *Id.* at 515 (citations omitted). The United States had, and admits that it had, the right and the authority. The offense was on land for which BIA and the FBI were the only authorized law enforcement. Because it cannot dispute that it had the right and authority, the United States craftily argues that it also had to have "practical ability" to stop the state officers from spoliating evidence. It did have that authority—in fact it could have and should have told the State officers to stay off of the Tribe's trust lands where they were hunting Mr. Murray. But additionally and independently, the United States is incorrectly attempting to change "or" in the quote from *Goodman* to "and." If it chose to allow others to perform investigative functions, or if it did not take control to prevent spoliation, then it has liability. Additionally, even if the United States could push responsibility to the State officers, that responsibility flows right back to the United States because, as also resolved in the prior appeal in this matter, the United States has the treaty responsible for the harm caused by "bad men among the whites."

The United States' argument in Section II.E. is similar to its argument in Section II.A. In Section II.E. it claims it has "no control over the medical examiner," and that therefore if the medical examiner failed to perform he autopsy, the relatively obvious spoliation caused thereby is attributable to the medical examiner. Again the United States is cleverly trying to convince this Court to frame the issue incorrectly. The spoliation issue is not whether the United States can

require Utah's medical examiner to perform an autopsy. The failure to conduct an autopsy spoliated evidence regarding the cause of Mr. Murray's death. The United States admits that it was the agency responsible for investigating that death, and the contemporaneous records definitively show that it concluded that an autopsy was appropriate as part of its investigation. It then failed to obtain the autopsy it had determined was appropriate, resulting in spoliation. It is responsible for that spoliation of the evidence in its investigation.

III. THE UNITED STATES' ARGUMENT IN SECTION III DOES NOT RESPOND TO THE MURRAY FAMILY'S PRIMARY ARGUMENT REGARDING THE SCOPE OF SPOLIATION SANCTIONS.

As the Murray Family discussed in its opening brief, a primary and overarching purpose of spoliation sanctions is to place the harm from spoliation on the spoliator. Because of the wholesale spoliation, re-leveling the playing field necessarily results in judgment in favor of the Murray family. Whether that is done in two steps (spoliation sanctions and then summary judgment) or one (default judgment), the end result is the same. The scope of the spoliation in this case—the wholesale failure to gather evidence in the death of a human being—is breathtaking and disgusting. The United States argues against default judgment, but the same end result will apply if this is done in two steps. It is precisely because both paths lead to the same end that this case is one of the rare cases where default is appropriate. The Murray Family's positon is that the Court should "cut to the chase" by directing a verdict on liability. If the Court decides to adopt the more conservative two step approach, the Murray's Family's opening brief, regarding the inference and presumptions that would be required to re-level the playing field are thoroughly and correctly discussed in the Murray Family's opening brief.

CONCLUSION

As anyone knows, if Todd Murray had come away from that rocky outcrop on April 1, 2007 and claimed, without corroboration that Vance Norton had shot himself, and Mr. Murray

then claimed he had found two bullet casings 100 years away which "proved" his story, and Norton's hands and gun did not have his own blood on them, etc., the United States would have investigated. If all of those gathered around as Norton was dying were smiling and taking pictures, and later taking blood from the corpse without any discernable reason, the United States would have investigated. Despite everything the United States argues, the same should have applied to Mr. Murray. He was a human being, a father, a son, a member of the Ute tribal community, whose death should have been investigated. The United States was the investigative agency. It chose to spoliate nearly all of the evidence. As the Murray family previously noted, the failures here were not nuanced—they were the most basic pieces of evidence—including the guns and their son's blood and tissue. Because the United States spoliated nearly all of the evidence, the Murray Family will never know. They will, until they too die, be left without answers. They believe they know exactly why the FBI agents chose not to gather evidence on their colleague, but they also again recognize that they will never know for sure, and more importantly will never know what actually happened to Todd on April 1, 2007. This is not fair; it is not just. It is also not what the United States, our government, should be arguing as a way of attempting to avoid what is, for the United States, a very small liability for its obvious wrongful actions. It is exactly why the Court must relevel the playing field by imposing spoliation sanctions against the United States.

RESPECTFULLY SUBMITTED this 24th day of October, 2019.

FREDERICKS PEEBLES & PATTERSON LLP

/s/ Jeffrey S. Rasmussen

Jeffrey S. Rasmussen (Attorney of Record)
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jrasmussen@ndnlaw.com

Counsel for the Plaintiffs

CERTIFICATE OF FILING

I hereby certify that on the 24th day of October, 2019 a copy of the foregoing REPLY IN SUPPORT OF RENEWED MOTION FOR SPOLIATION SANCTIONS 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