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 Support of the United States' Motion for Summary Judgment

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QUESTIONS PRESENTED

(1) Whether Plaintiffs are collaterally estopped from relitigating issues raised and decided in prior litigation where Plaintiffs had the full and fair opportunity to litigate those issues and where the evidentiary landscape remains the same.

(2) Whether lawful and justified law enforcement action can constitute a "wrong" under the "bad men" clause in the 1868 Treaty between the United States and the Ute Tribe of the Uintah and Ouray Reservation.

(3) Whether Plaintiffs can pursue claims for compensation under the "bad men" clause in the 1868 Treaty between the United States and the Ute Tribe of the Uintah and Ouray Reservation where the "wrongs" in question were not committed against the "person or property of the Indians."

(4) Whether "wrongs," as that term is used in the "bad men" clause in the 1868 Treaty between the United States and the Ute Tribe of the Uintah and Ouray Reservation, that occur off-reservation are cognizable where Plaintiffs cannot prove any on-reservation "wrong."

(5) Whether Plaintiffs can prove the necessary intent under criminal obstruction of justice statutes where the Court has already concluded that the actors in question did not intend to impact Plaintiffs' ability to bring their case.

INTRODUCTION

"The evidence clearly shows that Mr. Murray shot himself. * * * [N]o reasonable jury could find that Detective Norton shot Mr. Murray in the head at point-blank range." *Jones v. Norton (Jones Dist. Ct.)*, 3 F. Supp. 3d 1170, 1190, 1191 (D. Utah 2014), *aff'd,* 809 F.3d 564 (10th Cir. 2015). That was the federal district court's conclusion (affirmed by the Tenth Circuit) in an earlier suit by Plaintiffs Debra Jones and Arden Post against State and local law enforcement officials—including Vernal City Police Officer Vance Norton—relating to the death of their son, Todd Murray.

In reaching that and other conclusions, the district court considered and decided numerous factual issues. Among them were that: (1) neither Norton nor any other law enforcement officers were within 100 yards of Mr. Murray at the time of the shooting; (2) the officers acted lawfully in pursuing and eventually handcuffing Mr. Murray; (3) the officers never had Mr. Murray surrounded to the point of preventing his escape; and (4) there was no meeting of the minds that could substantiate a claim of conspiracy.

Plaintiffs had a full and fair opportunity to litigate in district court, and this Court's ruling on Plaintiffs' spoliation motion did nothing to change the evidentiary landscape. Consistent with the Federal Circuit's direction in the prior appeal in this case, Plaintiffs are therefore collaterally estopped from relitigating issues that the district court already resolved. That preclusive

effect, when combined with other undisputed facts, means Plaintiffs cannot prove their claim that the officers' actions were a "wrong upon the person or property" of Mr. Murray under the "bad men" clause in the 1868 Treaty between the Ute Tribe and the United States. Summary judgment should therefore be entered in favor of the United States.

BACKGROUND & UNDISPUTED FACTS

I. The "Bad Men" Clause

Plaintiffs seek damages based upon a provision in the 1868 Treaty between the United States and the Ute Tribe of the Uintah & Ouray Reservation. *See* Treaty with the Ute, Mar. 2, 1868, 15 Stat. 619, attached as Ex. US-SJ-1, ("1868 Treaty"); Am. Compl. ¶¶ 59–76, ECF No. 17. The Treaty arose from what had been "a particularly acrimonious relationship" between the two. *Jones v. United States (Jones Fed. Cir.)*, 846 F.3d 1343, 1348 (Fed. Cir. 2017). At the time, Congress had concluded that the "aggressions of lawless white men" were the cause of most "Indian" wars. *Id.* at 1355 (quotation omitted); *see Tsosie v. United States*, 825 F.2d 393, 396 (Fed. Cir. 1987); *Elk v. United States*, 87 Fed. Cl. 70, 80 (2009). The Treaty's aim was "peace between the Ute Tribe and white settlers." *Jones Fed. Cir.*, 846 F.3d at 1348 (citing *Tsosie*, 825 F.2d at 395); *see Garreaux v. United States*, 77 Fed. Cl. 726, 736 (2007). The focus here is the "bad men" clause in Article 6:

> If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

1868 Treaty, art. 6, 15 Stat. 619.

The "bad men" clause made the federal government "responsible for what white men do within the Indian's territory." *Janis v. United States*, 32 Ct. Cl. 407, 410 (1897). The hope was that the provision—and a mirroring provision relating to wrongs committed by Indians—would keep the peace.[1] *Id.*

II. Factual Background

The alleged "wrongs" here surround the death of Todd Murray, a member of the Ute Tribe. Mr. Murray died in April 2007 after an incident on the Tribe's reservation in northeastern Utah.[2] The circumstances of Mr. Murray's death have been summarized in at least five reported judicial opinions. *See Jones Fed. Cir.*, 846 F.3d at 1346–47; *Jones v. Norton (Jones 10th Cir.)*, 809 F.3d 564, 569–72 (10th Cir. 2015); *Jones Dist. Ct.*, 3 F. Supp.

[1] The mirroring provision, or "Indian bad men" clause, was effectively superseded by the Indian Depredations Act of 1891, 26 Stat. 851.

[2] It is undisputed that at least the shooting occurred on the Ute Tribe's Reservation.

3d at 1178–84; *Jones v. United States (Jones Fed. Cl. II)*, 146 Fed. Cl. 726, 729–33 (2020); *Jones v. United States (Jones Fed. Cl. I)*, 122 Fed. Cl. 490, 494–97 (2015), *vacated and remanded*, 846 F.3d 1343 (Fed. Cir. 2017). We nonetheless summarize them here for the Court's convenience, and list below (at 10–12) the undisputed facts supporting our motion for summary judgment.

Mr. Murray had been the passenger in a car that a Utah Highway Patrolman (Trooper David Swenson) pursued for speeding. The car eventually spun out, the driver (Uriah Kurip) and passenger (Mr. Murray) fled, and Trooper Swenson detained Mr. Kurip.

Vernal City Police Officer Vance Norton, off-duty and on his way to his father's house, had been passed by Mr. Kurip's and Trooper Swenson's cars. Officer Norton trailed the pursuit in support, arrived at the scene shortly after Trooper Swenson had detained Mr. Kurip, and pursued Mr. Murray. The next to arrive in support were Utah Highway Patrolman Craig Young and Uintah County Deputy Anthoney Byron, who also searched for Mr. Murray, though from a different route.

Officer Norton reported (and later testified under oath) that he and Mr. Murray eventually spotted one another from some distance, that Mr. Murray fired a gun at Officer Norton, and that Officer Norton returned fire in retreat. Officer Norton testified that he then saw Mr. Murray put a gun to his own

head and shoot himself. Trooper Young and Deputy Byron approached Mr. Murray, and Deputy Byron handcuffed him. Other State and local officers arrived.[3] None of the officers provided any on-scene medical aid to Mr. Murray, but an ambulance was already en route and transported Mr. Murray to the Ashley Valley Medical Center in Vernal, where he later died.

The on-scene investigation was led by FBI Special Agent Rex Ashdown, who arrived after Mr. Murray had been taken away in the ambulance. As part of his investigation, Agent Ashdown took photographs and collected the gun found on the ground beside Mr. Murray (a Hi-Point .380). He also collected two .40-caliber casings found up a slope about 110 yards away (Officer Norton's gun was a .40-caliber). Agent Ashdown collected GPS coordinates of the bullet casing locations, and interviewed Trooper Swenson. The FBI also later interviewed Officer Norton.

In the meantime, Deputy Byron had accompanied the ambulance to Ashley Valley Medical Center. After Mr. Murray died, Deputy Byron and

[3] The others to eventually arrive on-scene that day were Utah State Highway Patrolmen Jeff Chugg and Rex Olsen; Uintah County Sheriff Deputies Bevan Watkins and Troy Slaugh; Utah Division of Wildlife Resources investigator Sean Davis; Office of the Medical Examiner investigator Keith Campbell; U.S. Bureau of Indian Affairs Police Chief James Beck; U.S. Bureau of Indian Affairs Police Officer Terrence Cuch; and Vernal City Police Chief Gary Jensen. Plaintiffs also allege that Raymond Wissiup, a tribal employee, arrived to the scene. *See* Am. Compl. ¶ 38.

Vernal City Police Officer Ben Murray (no relation) removed Todd Murray's clothes and took additional photos of Mr. Murray's body. Deputy Byron also probed Mr. Murray's head wounds with a gloved finger. Deputy Byron reported that a U.S. Bureau of Indian Affairs police officer (Kevin Myore) was present at the hospital. Mr. Murray's body was then transported to Blackburn Mortuary (also in Vernal). There, trying to obtain a blood sample, a mortuary employee (Colby DeCamp) made an incision in Mr. Murray's neck and the local police chief (Gary Jensen) attempted to draw blood from Mr. Murray's heart.

Mr. Murray's body arrived at the Office of the Utah Medical Examiner in Salt Lake City on April 2, the day after his death. The FBI requested that the Medical Examiner perform an autopsy, though a full autopsy was not undertaken. The forensic pathologist on duty—Utah Deputy Medical Examiner Dr. Edward Leis—determined the "cause of death" to have been a gunshot wound to the head, and the "manner of death" to have been suicide.

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. 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 Uriah Kurip, the driver of the car in which Mr. Murray had been riding

immediately prior to his death. In prosecuting Mr. Shirley, the United States sought forfeiture of the Hi-Point .380. The district court entered a final forfeiture order in November 2008. Once forfeited, and consistent with federal policy, the FBI turned the gun over to the U.S. Marshals Service for destruction in December 2008.

Plaintiffs filed suit in Utah State court (later removed to federal district court) against the state and local officers and mortuary.[4] *See* Pls.' 3d Am. Compl., *Jones v. Norton*, No. 2:09-cv-730-TC-EJF (D. Utah Mar. 15, 2012), ECF No. 170, attached as Ex. US-SJ-2 ("Dist. Ct. 3d Am. Compl."). The suit included civil rights claims under 42 U.S.C. §§ 1983 and 1985 for unlawful seizure; unlawful use of excessive and deadly force; failure to intervene; violation of the 1868 Treaty; conspiracy; assault and battery and wrongful death; and intentional infliction of emotional distress. Dist. Ct. 3d Am. Compl. ¶¶ 55–214. The District Court, finding, among other things, that "[t]he evidence clearly shows that Mr. Murray shot himself," granted summary judgment in favor of the defendants, which the Tenth Circuit

[4] The defendants in that suit were State Troopers Chugg, Swenson, Young, and Olsen; Sheriff Deputies Watkins, Slaugh, and Byron; Davis, the Division of Wildlife Resources investigator; Officer Norton; the City of Vernal, Utah; and Uintah County. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1177. Blackburn Mortuary was originally a defendant, but that claim was dismissed. *See id.* at 1177 n.2 (referencing dismissal of a prior claim).

affirmed. *Jones Dist. Ct.*, 3 F. Supp. 3d at 1190, *aff'd*, 809 F.3d 564. Plaintiffs filed their complaint in this Court while their appeal before the Tenth Circuit was pending. *See* Compl., ECF No. 1. The operative complaint here is the Amended Complaint, ECF No. 17.

III. The Federal Circuit's Prior Ruling

The parties are presently before the Court on remand from the Federal Circuit. *See Jones Fed. Cir.*, 846 F.3d 1343. The Court of Federal Claims (Judge Horn) had dismissed the Amended 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 Judge Horn's dismissal, the Federal Circuit made three holdings that are relevant to our motion.

First, the court held that "only acts that could be prosecutable as criminal wrongdoing are cognizable" under the "bad men" clause. *Id.* at 1355. The Treaty phrase "any wrong" is "tied to the concept that the United States would at least have the authority to make an arrest with respect to such wrongs." *Id.* This federal authority would need to rest in either a federal criminal provision applicable to Indian country (18 U.S.C. § 1152), or in a

state criminal provision made federally punishable through the Assimilative Crimes Act (18 U.S.C. § 13).[5] *Jones Fed. Cir.*, 846 F.3d at 1356–57.

Second, the court held that an off-reservation "wrong" may be cognizable under the "bad men" clause, but only if it is a clear continuation of an on-reservation "wrong." *See id.* at 1360. The clause "contemplate[s] that the Indians shall be responsible for what Indians do within the white man's territory and that the Government will be responsible for what white men do *within the Indian's territory*." *Janis*, 32 Ct. Cl. at 410 (emphasis added). Thus, the clause only covers "wrongs" that occurred on the Tribe's reservation or "[w]rongs occurring off-reservation that occur as a direct result of wrongs occurring on-reservation." *Jones Fed. Cir.*, 846 F.3d at 1361. In the latter instance, the off-reservation "wrong" must have some connection to an on-reservation "wrong." *See id.*

Third, the Federal Circuit did not prohibit the application of issue preclusion in this case. The court merely held that, before this Court could consider the doctrine, it first needed to resolve Plaintiffs' spoliation assertions against the United States. *See id.* at 1361–64. The Federal Circuit directed that

[5] There are no common law crimes at the federal level or in Utah. *See United States v. Hudson & Goodwin*, 11 U.S. 32 (1812); UTAH CODE ANN. § 76-1-105.

> If [this Court] concludes on remand that spoliation sanctions are not appropriate, or that the appropriate sanctions 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).

IV. Procedural Posture

In January 2020, this Court resolved Plaintiffs' spoliation motion. *See Jones Fed. Cl. II*, 146 Fed. Cl. 726. The Court concluded that no spoliation had occurred other than with respect to the forfeited Hi-Point .380. *Id.* at 737–42. Even there, however, the Court found that the FBI had not destroyed the gun with any intent to impact litigation. *Id.* at 741–42. The Court therefore refused to grant Plaintiffs any evidentiary inference, instead issuing an evidentiary prohibition preventing the United States from relying upon "any evidence related to" the .380. *Id.* at 742–43. Thereafter, the Court directed the Parties into summary judgment briefing. *See* Jan. 23, 2020 Order, ECF No. 148.

V. Undisputed Material Facts

Of all the happenings surrounding Mr. Murray's death, there are only nine undisputed material facts that the Court need consider to resolve our motion:

(1) Trooper Swenson, Trooper Young, Deputy Byron, and Officer Norton were the only officers involved in the pursuit of Mr. Murray. Pls.' Resp. to Req. for Admis. No. 3, attached as Ex. US-SJ-3;[6] Am. Compl. ¶¶ 13, 26–29.

(2) Trooper Swenson, Trooper Young, Deputy Byron, and Officer Norton were all defendants in Plaintiffs' district court case. Dist. Ct. 3d Am. Compl., ¶¶ 7, 10, 11, 14.

(3) Mr. Murray's cause of death was a *contact* gunshot wound to the head. Pls.' Resp. to Req. for Admis. No. 1.

(4) No federal law enforcement officials were on-scene at the time of the shooting. Pls.' Resp. to Req. for Admis. No. 2.

(5) It was Deputy Byron who handcuffed Mr. Murray, with support from Trooper Young. Am. Compl. ¶ 33.

(6) Mr. Murray died at the Ashley Valley Medical Center. *See* Am. Compl. ¶ 41.

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[6] Plaintiffs did not respond to our January 24 Requests for Admission within thirty days. *See* Jan. 24, 2020, email from Kristofor Swanson to Jeffrey Rasmussen, attached as Ex. US-SJ-4; Pls.' Resps. to Req. for Admis., attached as Ex. US-SJ-3 (dated Mar. 3, 2020). Thus, Plaintiffs have admitted even those of our Requests to which they eventually responded with objections or denials. *See* RCFC 36(a)(3) ("A matter is admitted unless, ..."). We understand Plaintiffs plan to argue that their thirty-day clock did not begin until the United States filed its Answer on February 7. *See* ECF No. 149. But Rule 26(d) plainly allows discovery after the parties have conferred for purposes of a Joint Preliminary Status Report, or as ordered by the court. *See* RCFC 26(d)(1). Both circumstances apply here. The parties met and conferred and filed their JPSR on January 22—two days before we propounded our Requests for Admission. *See* ECF No. 147. And the Court adopted the Parties' proposed schedule and discovery plan on January 23—the day before we propounded our Requests. *See* ECF No. 148. Indeed, earlier discovery had already occurred in this case. May 10, 2018 Order, ECF No. 93. Plaintiffs' responses or objections were due (but were not provided by) February 24. The Requests are therefore admitted.

(7) Ashley Valley Medical Center is located in Vernal, Utah, outside the Ute Tribe's Reservation. *See* Am. Compl. ¶ 41; Dist. Ct. 3d Am. Compl., ¶ 78.

(8) The Blackburn Mortuary is located in Vernal, Utah, outside of the Ute Tribe's Reservation. Am. Compl. ¶ 43; Dist. Ct. 3d Am. Compl., ¶¶ 78, 193.

(9) The external examination of Mr. Murray's body was performed at the Utah Medical Examiner's office in Salt Lake City, which is outside of the Ute Tribe's Reservation. Dist. Ct. 3d Am. Compl., ¶ 193.

As explained in the argument section below, these undisputed facts, when combined with several others that the District Court already resolved and with this Court's spoliation ruling, mean Plaintiffs cannot prove the merits of their case.

STANDARD OF REVIEW

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). Where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial[,] . . . there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

"[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is "genuine" only when the evidence is such that a trier of fact could reasonably decide the issue in favor of the non-moving party. *Id.* Thus, in disputing a material fact for purposes of summary judgment, the opposing party "must point to an evidentiary conflict created on the record; mere denials or conclusory statements are insufficient." *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (en banc). Further, whether issue preclusion applies is a question of law and is therefore appropriately resolved on summary judgment. *See United States v. Gallardo-Mendez*, 150 F.3d 1240, 1242 (10th Cir. 1998) (issue preclusion a question of law).

ARGUMENT

Plaintiffs' case is based on their theory that law enforcement officers killed or otherwise injured Mr. Murray and conspired to destroy and manipulate evidence to cover up their actions. Plaintiffs allege that everyone involved that day committed every one of some sixty crimes. *See generally* Pls.' Resps. to U.S.'s 2d Set of Interrogs., attached as Ex. US-SJ-5. A large percentage of these crimes have absolutely nothing to do with the

circumstances here—including things like racketeering and trespass on Indian lands for hunting—and are not even plausibly included within the scope of the Amended Complaint. *See id.*; Am. Compl. We do not address those arbitrary allegations further.[7]

For the alleged crimes that are at least plausibly related to Plaintiffs' telling of events, Plaintiffs cannot prove any "wrong" that would be compensable under the "bad men" clause. First, Plaintiffs cannot prove that Officer Norton shot and killed Mr. Murray because they are collaterally

[7] These are: 18 U.S.C. § 1165 (hunting, trapping, or fishing on Indian lands); 18 U.S.C. § 286 (conspiracy to defraud the United States to obtain payment or allowance); 18 U.S.C. § 287 (false claims against the United States); 18 U.S.C. § 371 (conspiracy to commit offense against, or defraud, the United States); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1361 (injuries or depredation of federal property); 18 U.S.C. §§ 1962, 1963 (racketeering, which Plaintiffs cite as 25 U.S.C. Ch. 96); 18 U.S.C. § 1510 (obstruction of criminal investigations through bribery); 18 U.S.C. § 1511 (obstruction of state or local law enforcement to facilitate illegal gambling); 18 U.S.C. § 1503 (intimidation of jurors or judicial officers); 18 U.S.C. § 1506 (theft or alteration of judicial records); UTAH CODE ANN. § 76-6-106 (intentional destruction of property through criminal mischief); UTAH CODE ANN.. § 76-8-410 (doing business without a license); UTAH CODE ANN. § 76-9-102 (disorderly conduct in refusing a law enforcement order or causing public inconvenience); UTAH CODE ANN. § 76-9-108 (disruption of funeral or memorial service). Plaintiffs also identified unlawful arrest and general conspiracy. Pls.' Resps. to U.S. Interrog No. 5. When asked, however, Plaintiffs could not identify an independent statutory provision for those crimes. *See* Mar. 11, 2020 email from Jeff Rasmussen to Kristofor Swanson (referencing only 18 U.S.C. §§ 13, 1152), attached as Ex. US-SJ-6.

estopped from arguing that Officer Norton was within 100 yards of him at the time. This Court's spoliation ruling did nothing to change the evidentiary landscape. Second, collateral estoppel similarly precludes Plaintiffs from proving any of their other alleged on-reservation crimes that could be cognizable as a "wrong upon" Mr. Murray's "person or property." Third, because Plaintiffs cannot prove any on-reservation "wrong," they also cannot prove any off-reservation "wrong" resulting directly therefrom. Summary judgment should be granted in favor the United States.[8]

I. Plaintiffs Cannot Prove that Officer Norton Shot and Killed Mr. Murray

Summary judgment should be granted in favor of the United States primarily because Plaintiffs cannot prove the very heart of their case: that Officer Norton killed Mr. Murray. Plaintiffs have identified several alleged crimes relating to how Mr. Murray died. Specifically, they list the federal crimes of murder and manslaughter (18 U.S.C. §§ 1111, 1112), and State crimes of manslaughter (UTAH CODE ANN. § 76-5-205), criminal homicide

[8] Consistent with the Court's direction during the January 9, 2020, status conference, our motion focuses on resolution of the threshold, potentially-dispositive issues remanded by the Federal Circuit. Should this case proceed, the United States reserves its rights to move for summary judgment in advance of any trial.

(§ 76-5-201), aggravated murder (§ 76-5-202), negligent homicide (§ 76-5-206), and homicide by assault (§ 76-5-209).[9] Pls.' Resps. to U.S. Interrog. No. 5.

It is undisputed that Mr. Murray died from a *contact* gunshot wound. Pls.' Resp. to Req. for Admis. No. 1. Plaintiffs, however, cannot prove that Officer Norton was the one who administered that contact gunshot. That is because Plaintiffs are collaterally estopped from arguing that Officer Norton was within 100 yards of Mr. Murray at the time the shot was fired—they litigated and lost that issue before the District Court. And this Court's ruling on Plaintiffs' spoliation motion did not change the evidence that would be available to Plaintiffs' in this case; it did not change the evidentiary landscape.

A. Collateral Estoppel Prevents Plaintiffs from Arguing Officer Norton was Within 100 Yards of Mr. Murray at the Time of the Shooting

The Federal Circuit addressed the standard for issue preclusion (also called collateral estoppel) in Plaintiffs' prior appeal in this case. *See Jones Fed. Cir.*, 846 F.3d at 1361 (citing *Park Lake Res. Co. v. U.S. Dep't of Agric.*,

[9] Though not relevant to our argument here, the State-law crimes are likely not applicable because there are federal crimes for murder and manslaughter. *See Lewis v. United States*, 523 U.S. 155, 164–65, 168–72 (1998). Plaintiffs also identify the federal crime of accessory after the fact (18 U.S.C. § 3). But that would only be implicated if Plaintiffs could prove, among other things, commission of the underlying crime. *See United States v. Lepanto*, 817 F.2d 1463, 1467 (10th Cir. 1987).

378 F.3d 1132, 1136 (10th Cir. 2004)). "[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Estate of True v. Comm'r of Internal Revenue*, 390 F.3d 1210, 1222 (10th Cir. 2004) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

The circumstances here implicate non-mutual collateral estoppel, which requires that: (1) the issue in question is identical to the one already decided; (2) the prior action was finally adjudicated; (3) the party against whom the doctrine would apply was a party in that prior adjudication; and (4) there was a full and fair opportunity to litigate the issue in the prior action. *Jones Fed. Cir.*, 846 F.3d at 1361.

Plaintiffs conceded the second and third factors in their prior appeal. *See id.* at 1362. The first and fourth factors are also met when it comes to the issue of whether Officer Norton was within 100 yards of Mr. Murray at the time of the shooting.

As to the first factor, the issue is the same as that decided by the District Court. The question of Officer Norton's location is a key to Plaintiffs' current claim that Officer Norton killed Mr. Murray. *See* Am. Compl. ¶¶ 14, 69, 70. In order to apply a contact gunshot wound, Norton would had to have been standing right next to Mr. Murray. The same question of Officer

Norton's location was before the District Court with regard to Plaintiffs' claim that Norton had unconstitutionally seized Mr. Murray by shooting him. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1186, 1190–92. The seizure could not have occurred if Officer Norton was not near Mr. Murray to apply the shot. *See id.* at 1186, 1192. The District Court resolved that issue, concluding that "Detective Norton was more than 100 yards away when Mr. Murray was shot," and that "the actual evidence in the record (that is, testimony by Detective Norton and Deputy Byron) shows that Detective Norton was not right next to Mr. Murray when the fatal shot was fired." *Id.* at 1191.

Plaintiffs also had a full and fair opportunity to litigate the factual question of Officer Norton's location (the fourth factor). The District Court's opinion documents that opportunity. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1190–92. Plaintiffs deposed Officer Norton and the other officers that were on-scene. *See id.* at 1180–81 nn.16–20. And Plaintiffs presented argument in opposition to the summary judgment motion upon which the District Court was ruling. *See* Pls.' Mem. in Opp'n to Vance Norton's Mot. for Summ. J. at v–ix, *Jones v. Norton*, 2:09-cv-730-TC-EJF (D. Utah Apr. 8, 2013), ECF No. 321, attached as Ex. US-SJ-7. Plaintiffs are therefore collaterally estopped from relitigating the identical issue in this Court. *See Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009) ("[I]ssue preclusion[ ] is designed to prevent

needless relitigation and bring about some finality to litigation." (footnote omitted)).

B. This Court's Spoliation Sanction Did Not Change the Evidentiary Landscape

We expect Plaintiffs to argue that the evidentiary sanction this Court imposed with regard to the High-Point .380 means they cannot be collaterally estopped as to the question of Officer Norton's location. *See Jones Fed. Cir.*, 846 F.3d at 1361–64. The argument would be wrong for two reasons.

First, the Court concluded that spoliation had occurred only with respect to the Hi-Point .380. *See Jones Fed. Cl. II*, 146 Fed. Cl. at 741–42. The District Court, however, did not base its conclusion as to Officer Norton's location on any evidence coming from the .380. Instead, the court relied upon testimony from those on-scene and Plaintiffs' inability to point to any factual evidence to support their theory. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1191; *Jones 10th Cir.*, 809 F.3d at 574–75. Indeed, Officer Norton's motion for summary judgment (which the District Court granted) did not list evidence from the .380 among its undisputed material facts. *See* Detective Vance Norton's Mot. for Summ. J. & Mem. in Supp. at 5–11, *Jones v. Norton*, 2:09-cv-730-TC-EJF (D. Utah Mar. 1, 2013), ECF No. 270, attached as Ex. US-SJ-8.

Second, this Court refused to grant Plaintiffs any evidentiary inference, instead issuing an evidentiary prohibition preventing the United States from relying upon "any facts related to" the .380. *Jones Fed. Cl. II*, 146 Fed. Cl. at 742–43. Thus, the sanction did nothing to affect the evidence that *Plaintiffs* would be able to present regarding Officer Norton's location. The evidence available to Plaintiffs in this case is the same as that available to them in district court. The sanction has therefore "not change[d] the evidentiary landscape" as to the question of Officer Norton's location. *Jones Fed. Cir.*, 846 F.3d at 1363–64.

In sum, Plaintiffs admit that the fatal gunshot wound was a contact wound, and this Court's spoliation ruling did not change the evidentiary landscape that was before the District Court when it concluded that Officer Norton was 100 yards away from Mr. Murray at the time. Plaintiffs are therefore collaterally estopped from arguing that Officer Norton administered that fatal shot. As a result, summary judgment on the question of whether Officer Norton killed Mr. Murray should be entered in favor of the United States.

II. Plaintiffs Cannot Prove Any Other Alleged On-Reservation "Wrong"

Plaintiffs are also unable to prove any of the other alleged crimes that relate to actions at the shooting scene. These primarily are: assault (UTAH

CODE ANN. § 76-5-102); reckless endangerment (§ 76-5-112); various conspiracies (18 U.S.C. §§ 241, 242, 1117; UTAH CODE ANN. §§ 76-4-201, 76-4-202); kidnapping (18 U.S.C. § 1201; UTAH CODE ANN. § 76-5-301); and hate crimes (18 U.S.C. § 249).[10] *See* Pls.' Resps. to U.S. Interrog. No. 5. Plaintiffs also identify a host of other crimes relating to obstruction of justice or preservation of evidence. *See id.*

As an initial matter, a detailed analysis of any alleged assault, reckless endangerment, or kidnaping in the officers' pursuit and handcuffing of Mr. Murray is unnecessary. Lawful and justified law enforcement actions cannot be "wrongs" under the "bad men" clause. *See Hebah v. United States (Hebah II)*, 456 F.2d 696, 708–10 (Ct. Cl. 1972) (per curiam). In granting summary judgment to the local officers on Plaintiffs' claims of excessive force, the District Court concluded that the local officers acted reasonably in their pursuit of Mr. Murray. *Jones Dist. Ct.*, 3 F. Supp. 3d at 1193–95; *see Jones*

[10] Any "bad man" under the Treaty clause must be an individual. *See Hernandez v. United States*, 93 Fed. Cl. 193, 200 (2010). Claims against organizations or entities are not cognizable. *See id.* ("A court, however, is not a specific white man, and may not qualify as a 'bad man' . . . ."); *Garreaux*, 77 Fed. Cl. at 737 (rejecting on jurisdictional grounds a claim against a federal agency rather than "specified white men"). Plaintiffs improperly list several government entities and one company among the alleged "bad men." Pls.' Resps. to U.S. Interrog. No. 4. The alleged "wrongs," however, are all actions undertaken by individuals.

10th Cir., 809 F.3d at 575–76. Plaintiffs had a full and fair opportunity to litigate that issue. *Jones Dist. Ct.*, 3 F. Supp. 3d at 1193–95. Issue preclusion therefore bars Plaintiffs from arguing that the "bad men" clause is implicated because the local officers were not justified in their pursuit (including Officer Norton firing his gun in retreat).[11] In any event, Plaintiffs could not prove any of these or other crimes that are alleged to have occurred on-scene.

A. Plaintiffs Cannot Prove Criminal Assault or Reckless Endangerment

As best we can tell, Plaintiffs' allegations of assault and reckless endangerment stem from Officer Norton having fired his gun in retreat and from Deputy Byron having handcuffed Mr. Murray. *See* Am. Compl. ¶¶ 32, 33, 67; *accord Jones 10th Cir.*, 809 F.3d at 575 (noting allegations of excessive force are with regard to Norton, Young, and Byron). The criminal assault provision on which Plaintiffs rely requires "unlawful force or violence." UTAH

[11] The alleged federal "bad men" were not defendants in the district court litigation, but the only officers involved in the foot pursuit of Mr. Murray were Trooper Swenson, Trooper Young, Deputy Byron, and Officer Norton, all of whom were defendants in district court. Pls.' Resp. to Req. for Admis. No. 3; Am. Compl. ¶¶ 13, 26–29.

CODE ANN. § 76-5-102(1).[12] The Utah reckless endangerment statute makes it a crime to "recklessly engage[ ] in conduct that creates a substantial risk of death or serious bodily injury to another person." UTAH CODE ANN. § 76-5-112(1).

Utah law, however, justifies the use of "any force, except deadly force, which [the actor] reasonably believes to be necessary to effect an arrest or to defend himself or another from bodily harm while making an arrest." UTAH CODE ANN. § 76-2-403. And a peace officer is justified in using even deadly force if "the officer reasonably believes that the use of deadly force is necessary to prevent death or seriously bodily injury to the officer or another person." UTAH CODE ANN. § 76-2-404(1)(c). Further, to be guilty of reckless endangerment, Officer Norton would had to have made "a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Utah v. Carter*,

[12] The Utah assault statute is likely not applicable because there is a federal crime for assault (18 U.S.C. § 113). *See United States v. Eades*, 615 F.2d 617, 621–23 (4th Cir. 1980), *reargued,* 633 F.2d 1075 (4th Cir. 1980) (en banc); *United States v. Patmore*, 475 F.2d 752, 753 (10th Cir. 1973). Plaintiffs, however, have not included 18 U.S.C. § 113 on their list of alleged crimes. *See* Pls.' Resps. to U.S. Interrog. No. 5.

2005 UT App 232, No. 20040637-CA, 2005 WL 1177063, at *1 (Utah Ct. App. May 19, 2005) (quoting previous iteration of statute).

Plaintiffs already had a full and fair opportunity to litigate (and lost) the question of whether Officer Norton and Deputy Byron acted reasonably. The excessive force question before the District Court—like the assault and reckless endangerment questions that would be before this Court—considered the acting officer's subjective reasonableness. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1194 (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). The District Court determined that it was "reasonable under the circumstances for Detective Norton to fire his gun at Mr. Murray. Mr. Murray shot at Detective Norton first. Detective Norton was retreating to protect himself. . . . [The officers'] attempt[s] to apprehend Mr. Murray while protecting themselves—and the means they used to do so—were expected police behavior in light of the circumstances."[13] *Id.* at 1195. Plaintiffs are therefore collaterally estopped from arguing in this Court that Norton's or Byron's actions were unreasonable such that either could be guilty of assault or reckless endangerment.

[13] Trooper Young, for his part, "did not touch Mr. Murray and did not point his gun at Murray for longer than the time it took Deputy Byron to approach Mr. Murray and handcuff him." *Jones Dist. Ct.*, 3 F. Supp. 3d at 1193. "Trooper Swenson stayed at the crash scene with Mr. Kurip." *Id.* at 1180.

B. Plaintiffs Cannot Prove Criminal Conspiracy

Plaintiffs also claim the involved officers conspired to kill Mr. Murray and cover up their actions.[14] *See* Am. Compl. ¶¶ 17, 67, 70. To demonstrate criminal conspiracy, Plaintiffs would need to prove, among other things, that there was a meeting of the minds to undertake the murder and cover-up. *See United States v. Anderson*, 981 F.2d 1560, 1563–64 (10th Cir. 1992) (under federal law); UTAH CODE ANN. § 76-4-201 (applying where one "agrees with one or more persons to engage in or cause the performance of the conduct . . . ."). But Plaintiffs are precluded from making that showing with respect to the State and local officers because Plaintiffs litigated and lost the issue in district court. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1197–99, 1201–06. That preclusive effect would extend to the federal officers to the extent Plaintiffs are claiming that the federal officers were involved in the alleged conspiracy among the State and local officers.

Further, the federal law enforcement officials could not have conspired to murder Mr. Murray because none arrived prior to the shooting. *See* Pls.'

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[14] Among the criminal provisions Plaintiffs rely upon for the alleged conspiracy is 18 U.S.C. § 242. *See* Pls.' Resps. to U.S. Interrog. No. 5. But, rather than address conspiracy, that provision is the criminal analog to the constitutional claims Plaintiffs brought in district court under 42 U.S.C. § 1983. *See Berry v. City of Muskogee*, 900 F.2d 1489, 1501 n.17 (10th Cir. 1990). Plaintiffs are collaterally estopped from arguing that the state and local officers violated Mr. Murray's constitutional rights.

Resp. to Req. for Admis. No. 2. As to the alleged cover-up, any conspiracy to destroy or alter evidence, like the destruction or alteration of the evidence itself, would not constitute a "wrong upon" Mr. Murray's "person or property." *See infra* at 29–31. In any event, an overt act would be required for the alleged cover-up conspiracy. *See* UTAH CODE ANN. § 76-4-201 (requiring an overt act for conspiracy where offense in question is not a felony against a person). This Court has already concluded that there is no evidence to show that the federal officers destroyed or altered evidence at the shooting scene. *See Jones Fed. Cl. II*, 146 Fed. Cl. at 737–41.

C. Plaintiffs Cannot Prove Kidnapping

Plaintiffs also cannot prove that the State and local officers, in their pursuit and handcuffing of Mr. Murray, were guilty of kidnapping. *See* Pls.' Resps. to U.S. Interrog. No. 5 (citing 18 U.S.C. § 1201; UTAH CODE ANN. § 76-5-301). The federal statute in question establishes criminal penalties for anyone who, within certain territorial and other limitations, "*unlawfully* seizes" a person. 18 U.S.C. § 1201(a) (emphasis added). Similarly, the Utah kidnapping statute applies to anyone who "detains or restrains the victim" "without authority of law."[15] UTAH CODE ANN. § 76-5-301(1)(a).

[15] Again, because there is a federal crime for kidnapping, the State crime is likely inapplicable. *See Lewis*, 523 U.S. at 164–65.

Plaintiffs cannot prove unlawful action. The District Court already determined—after a full and fair opportunity to litigate the issue—that Officer Norton, Trooper Young, and Deputy Byron did not act unlawfully in pursuing or handcuffing Mr. Murray.[16] *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1194–95. Further, in deciding Plaintiffs' claim of unconstitutional seizure, the court was "not convinced from the record that a reasonable jury could conclude that the three officers actually formed a perimeter that surrounded Mr. Murray and prevented his escape. The officers were one to two hundred yards away from Mr. Murray and did not have him surrounded." *Id.* at 1188. Similarly, the officers could not have "seized" Mr. Murray for purposes of 18 U.S.C. § 1201, or "detain[ed] or restrain[ed]" him for purposes of UTAH CODE ANN. § 76-5-301, if Mr. Murray was not actually surrounded.

D. Plaintiffs Cannot Prove Homicide From Any Failure to Provide Medical Aid

Based upon prior allegations, we assume Plaintiffs will also argue that the officers involved in the pursuit (and those arriving before Mr. Murray was taken away in the ambulance) are guilty of some form of criminal

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[16] The federal statute also requires a showing of intent to gain a benefit (monetary or otherwise) from the kidnapping. *United States v. Crosby*, 713 F.2d 1066, 1070–71 (5th Cir. 1983), *superceded by statute on other grounds as noted by United States v. Sneezer*, 983 F.2d 920, 922–23 (9th Cir. 1992) (per curiam). It is unclear how the officers could have personally benefitted from "kidnapping" Mr. Murray.

homicide because they did not provide CPR or other on-scene medical aid. To prove that allegation, Plaintiffs would need to show both mens rea and proximate cause. *See United States v. Serawop*, 410 F.3d 656, 663–64 (10th Cir. 2005) (discussing mens rea); *United States v. Swallow*, 109 F.3d 656, 659 (10th Cir. 1997) (proximate cause).[17]

Here too, however, Plaintiffs are collaterally estopped as to the State and local officers' inaction. The District Court already decided issues of mens rea and proximate cause with respect to an alleged failure to provide medical aid. *Jones Dist. Ct.*, 3 F. Supp. 3d at 1208 (no evidence to support a conclusion that defendants were even "deliberately indifferent" or knew there was a substantial risk of harm); *id.* at 1208–09 (no evidence to support conclusion that aid at scene would have saved Mr. Murray's life). And the officers fulfilled any duty owed to Mr. Murray when they called the ambulance. *See id.* at 1207.

[17] State law is likely inapplicable given that federal law already criminalizes murder and manslaughter. *See Lewis*, 523 U.S. at 164–65, 168–72. But, in any event, Utah law has the same requirements. *See* UTAH CODE ANN. § 76-5-201(1)(a) (criminal homicide); § 76-5-202(1) (aggravated murder); § 76-5-205(2)(a) (manslaughter); § 76-5-206(1) (negligent homicide); § 76-2-103 (defining requirements for different mental states).

E. Plaintiffs Cannot Prove a Hate Crime

Plaintiffs also cannot prove that any hate crime occurred under 18 U.S.C. § 249. *See* Pls.' Resps. to U.S. Interrog. No. 5. The statute provides additional punishment for any actual or attempted bodily injury caused because of a person's actual or perceived race, color, religion, or national original. *See* 18 U.S.C. § 249. For the reasons explained above, however, Plaintiffs cannot prove any actual or attempted bodily injury to Mr. Murray. In any event, Plaintiffs are collaterally estopped from relitigating the issue of racially-motivated action. Plaintiffs made similar assertions in their district court case, and the court concluded that there was no evidence of racial animus. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1199–1201, 1203–04; *Jones 10th Cir.*, 809 F.3d at 578–79.

F. None of the Remaining Alleged Crimes Would Have Been a "Wrong Upon" Mr. Murray's "Person or Property"

The remainder of Plaintiffs' alleged crimes—to the extent Plaintiffs are alleging that they occurred on the reservation—fail as a matter of law because they would not constitute a "wrong" committed "upon the person or property" of Mr. Murray.[18] The focus on "person and property" is clear from

[18] Only Mr. Murray is relevant because neither of the individual Plaintiffs (Ms. Jones and Mr. Post) allege any crimes to have been committed against them. Thus, Ms. Jones is the only proper Plaintiff given her capacity as executrix of Mr. Murray's estate.

the Treaty language itself. 1868 Treaty, art. 6, 15 Stat. 619 ("any wrong *upon the person or property of the Indians*. . . " (emphasis added)); *see also Banks v. Guffy*, No. 1:10-cv-2130, 2012 WL 72724, at *6 (M.D. Pa. Jan. 10, 2012) (no viable "bad men" claim for property belonging to someone else). The inquiry focuses upon the individual—rather than the Tribe or some broader sense of societal harm—because Article 6, like the provision in other similar treaties, "concerns the rights of and obligations to individual Indians . . . ." *Hebah v. United States (Hebah I)*, 428 F.2d 1334, 1337 (Ct. Cl. 1970). The remainder of Plaintiffs' alleged on-reservation crimes fall outside this Treaty limitation.

For example, Plaintiffs identify numerous crimes relating to interference with government investigations or judicial proceedings, including witness tampering and retaliation, perjury, and interference with public servants. *See* 18 U.S.C. §§ 4, 1505, 1512, 1513, 1621, 1622; UTAH CODE ANN. §§ 76-8-301, 76-8-305, 76-8-306, 76-8-508.3, 76-8-502, 76-8-503, 76-8-504, 76-8-504.5, 76-8-504.6, 76-8-505, 76-8-506. But, even if they had occurred—there is no evidence that they did—these would be crimes against a public interest in achieving justice, not against Mr. Murray's "person or property." They also would not be peace-shattering crimes of "moral

turpitude" that the "bad men" provision was intended to cover.[19] *See Hernandez*, 93 Fed. Cl. at 199 & n.5 (citing *Ex parte Kan-gi-Shun-ca*, 109 U.S. 556, 567 (1883)); *Garreaux*, 77 Fed. Cl. at 736; *Janis*, 32 Ct. Cl. at 409. And, in any event, many, if not all, of these crimes include the mens rea element of intent, which Plaintiffs cannot prove. *See, e.g.,* 18 U.S.C. § 1519 ("Whoever knowingly alters, [or] destroys, . . . *with the intent to* impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . ." (emphasis added)).

The same points apply—again assuming incorrectly that any evidence supports the allegations—to Plaintiffs' alleged crimes relating to destruction or manipulation of judicial or government records, and abuse or unauthorized use of official power. *See* 18 U.S.C. §§ 1519, 2071, 2232; UTAH CODE ANN. §§ 76-8-201, 76-8-203, 76-8-412, 76-8-413, 76-8-510.5, 76-8-511, 76-8-512.

Plaintiffs also allege that criminal trespass occurred. *See* UTAH CODE ANN. § 76-6-206. But Mr. Murray's real property is not at issue here. We understand Plaintiffs to believe that the State and local officers did not have

[19] The two treaties between the Ute Tribe and the United States emphasize harms from robbery, violence, and murder. *See* Treaty with the Utah-Tabeguache Band, Oct. 7, 1863, art. 6, 13 Stat. 673, attached as Ex. US-SJ-9 ("1863 Treaty"); 1868 Treaty, art. 1, 15 Stat. 619 (incorporating terms of 1863 Treaty).

authority to be on the Ute Tribe's Reservation. But that is an alleged wrong *against the Tribe*, not against Mr. Murray. The Ute Tribe does not have standing to bring a claim under the Treaty's "bad men" clause. *See Hebah I*, 428 F.2d at 1337; *Hernandez*, 93 Fed. Cl. at 200. Judge Horn reached that conclusion in granting the United States' motion to dismiss. *See Jones Fed. Cl. I*, 122 Fed. Cl. at 528 n.31. And Plaintiffs conceded the point before the Federal Circuit. Pl-Appellants' Principal Br. at 37 n.8, *Jones v. United States*, Case No. 2015-5148 (Fed. Cir. Dec. 14, 2015), excerpt attached as Ex. US-SJ-10.

Plaintiffs cannot prove any on-reservation "wrong upon" Mr. Murray's "person or property." Summary judgment regarding any on-reservation actions should therefore be entered in favor of the United States.

III. Plaintiffs Cannot Prove Any Off-Reservation "Wrong"

Plaintiffs also cannot prove any cognizable off-reservation "wrong." In remanding this case, the Federal Circuit directed that an off-reservation wrong is only cognizable if it is a continuation of a wrong committed on-reservation. *See Jones Fed. Cir.*, 846 F.3d at 1360–61. The off-reservation wrong must be the "direct result of wrongs occurring on-reservation." *Id.* at 1361. Here, however—for the reasons explained above—Plaintiffs cannot prove any *on*-reservation wrong from which an *off*-reservation wrong could be "a direct result." *See id.*

Further, desecration of a corpse is the only one of Plaintiffs' alleged crimes that is even arguably cognizable as an off-reservation "wrong." The alleged shooting and on-scene cover-up all would have occurred on-reservation. And, as explained above, any obstruction of justice-related crimes (including those occurring off-reservation) would not have constituted a "wrong upon" Mr. Murray's "person or property." *See supra* at 29–31.

As to desecration of a corpse, Mr. Murray was not pronounced dead until he arrived at Ashley Valley Medical Center, which is outside the Ute Tribe's Reservation. *See* Am. Compl. ¶ 41. Thus, we assume Plaintiffs are referring to the treatment of Mr. Murray's body at the hospital, mortuary, and Office of the Medical Examiner. *See id.* ¶¶ 67, 69, 70. The mortuary and Office of the Medical Examiner are also located off the Ute Tribe's Reservation. *See supra* at 12 (undisputed facts 7, 8, and 9).

Plaintiffs' allegation of desecration, however, relies solely upon a Utah criminal provision. Pls.' Resps. to U.S. Interrog. No. 5 (citing UTAH CODE ANN. § 76-9-704). Thus, the actions—even if they rose to the level of "desecration" under the statute—would not be crimes under "the laws of *the United States*." *See Jones Fed. Cir.*, 846 F.3d at 1356–57 (emphasis added). The Assimilative Crimes Act does not make an off-reservation, state-law crime federally punishable. *See* 18 U.S.C. § 13; *Gov't of Virgin Islands v. Dowling*, 866 F.2d 610, 615 (3d Cir. 1989). The alleged crimes are therefore

not cognizable under the Treaty. *See Jones Fed. Cir.*, 846 F.3d at 1356–57. And, in any event, lawful actions by the Office of Medical Examiner are explicitly excluded from the criminal statute. *See* UTAH CODE ANN. § 76-9-704(3)(b).

Finally, we turn to destruction of the Hi-Point .380. Even if destruction of the gun could be considered a "wrong upon" Mr. Murray's "person or property," Plaintiffs could not prove criminal liability.[20] Plaintiffs identify five crimes that could relate to destruction of physical evidence. *See* 18 U.S.C. §§ 1519, 2071, 2232; UTAH CODE ANN. §§ 76-8-306; 76-8-510.5. Four of the five, however, require that the actor *intend* to obstruct justice. *See* 18 U.S.C. §§ 1519, 2232; UTAH CODE ANN. §§ 76-8-306; 76-8-510.5. This Court has already concluded that "[n]othing in the record supports a conclusion that federal agents destroyed the .380 handgun with the intent to deprive other parties of its use in litigation." *Jones Fed. Cl. II*, 146 Fed. Cl. at 741. Plaintiffs' fifth alleged crime only applies to *unlawful* destruction. *See* 18 U.S.C. § 2071(b). Here, however, the FBI turned the gun over to the U.S. Marshals in accord with federal policy and pursuant to a court order. *See*

[20] As explained above, any allegations of criminal conduct relating to the treatment evidence would not be a "wrong upon" Mr. Murray's "person or property." *See supra* at 29–31. We address the .380 further only because of the import Plaintiffs afford to it in their telling of events. Plaintiffs have not argued alleged that the .380 was Mr. Murray's "property."

JONES0010946–47;[21] JONES0041667 at 41728–30; JONES0041863 at 41948–51. Plaintiffs cannot prove any cognizable off-reservation "wrong upon" Mr. Murray's "person or property."

CONCLUSION

Plaintiffs cannot prove the very heart of their case: that Officer Norton killed Mr. Murray. Plaintiffs do not dispute that Mr. Murray died from a *contact* gunshot wound, and the District Court already concluded that Officer Norton was not within 100 yards of Mr. Murray at the time of the shooting. Because this Court's spoliation ruling did not change the evidentiary landscape from that which was before the District Court when it reached that conclusion, Plaintiffs are collaterally estopped from relitigating Officer Norton's location.

Plaintiffs also cannot prove any of the other alleged crimes that would have occurred on-reservation. Plaintiffs are collaterally estopped from relitigating facts or other conclusions that would be necessary for them to prove assault, reckless endangerment, conspiracy, kidnapping, or homicide resulting from an alleged failure to provide medical aid. And the remainder

[21] "JONESxxxxxxx" refers to the Bates numbers on the parties' Joint Appendix, ECF Nos. 117–122, 127, 128. The pages cited here were also cited in briefing on Plaintiffs' motion for spoliation sanctions and are thus included in the hard copy courtesy copies that the parties provided to the Court during that briefing.

of the alleged on-reservations crimes would not constitute a "wrong upon" Mr. Murray's "person or property," as required by the Treaty. Finally, because Plaintiffs cannot prove any on-reservation "wrong," they also cannot prove any off-reservation "wrong" that would have directly resulted therefrom. Summary judgment should be granted in favor of the United States.

Date: May 13, 2020

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