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

United States' Reply in Support of Summary Judgment

PRERAK SHAH
Deputy Assistant Attorney General
Envt. & Natural Resources Div.
U.S. Department of Justice

KRISTOFOR R. SWANSON
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0248
Fax: (202) 305-0506
kristofor.swanson@usdoj.gov
Attorney of Record

TERRY PETRIE
Natural Resources Section
Denver, CO

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INTRODUCTION

Summary judgment should be granted in favor of the United States because Plaintiffs cannot prove any "wrong" that would be compensable under the "bad men" clause in the 1868 Treaty with the Ute Tribe. Plaintiffs have not disputed that, if available, collateral estoppel bars relitigation of issues necessary for them to prove crimes alleged to have occurred during and immediately after the shooting. Consistent with the Federal Circuit's remand, collateral estoppel is available here because this Court's spoliation sanction did not change the evidentiary landscape in any relevant way—the evidence available to Plaintiffs to prove the relevant issues in this Court is the same as that available to them in district court. The remaining alleged crimes either have nothing to do with the circumstances here, or would not have been on-reservation crimes "upon" Mr. Murray's "person or property," as required by the "bad men" clause's plain language.

ARGUMENT

The motion before the Court is one for summary judgment. Plaintiffs, in places, make factual assertions in arguing that the Court should deny the motion. *See, e.g.*, Pls.' Resp. to Mot. for Summ. J. ("Pls.' Resp.") 3, ECF No. 156 (stating the State and local officers' testimony is contradictory); *id.* at 6 (asserting the alleged crimes "are very well-supported by the evidence"); *id.* at 9 ("[I]t appears that the other officers at the scene either did not believe

Norton or knew Norton was lying. They did not want to gather the evidence that they knew, or were concerned would or might, disprove Norton's uncorroborated story. They chose not to investigate."); *id.* (asserting Agent Ashdown's knowledge and intent).[1]

Contrary to the standard for summary judgment, however, Plaintiffs do not provide any evidentiary support for these statements (and none exists). *See SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (en banc). More importantly, Plaintiffs have not disputed any of the United States' material facts. *See* Pls.' Resp. at 1 n.1. Thus, there is no factual dispute for present purposes, and resolving questions of whether collateral estoppel applies and whether the crimes in question fall within the scope of the Treaty are entirely appropriate to resolve on summary judgment. *United States v. Gallarado-Mendez*, 150 F.3d 1240, 1242 (10th Cir. 1998) (collateral estoppel); *Pablo v. United States*, 98 Fed. Cl. 376, 380–82 (2011) (granting summary judgment based upon interpretation of a "bad men" clause); *see Strong v. United States*, 518 F.2d 556, 563 (Ct. Cl. 1975) (holding that treaty interpretation "is a question of law not a matter of fact"), *cert. denied*, 423 U.S. 1015 (1975).

[1] Plaintiffs also continue to inaccurately state that the District Court found the FBI responsible for some wrongdoing. *See* Pls.' Resp. at 10.

Plaintiffs' opposition to summary judgment generally rests on two points. First, Plaintiffs argue this Court's spoliation sanction changed the evidentiary landscape such that collateral estoppel cannot be applied. *See* Pls.' Resp. at 1–4. Second—and regardless of any applicable collateral estoppel—Plaintiffs argue that asserted crimes relating to the alleged cover-up should proceed. *See id.* at 4–13. Plaintiffs are incorrect on both counts, and summary judgment should be granted in favor of the United States.

I. The Spoliation Sanction Did Not Change the Evidentiary Landscape and Collateral Estoppel Bars Relitigation of Issues Decided in District Court.

The primary basis of Plaintiffs' suit has always been their unsupported theory that Officer Norton shot and killed Mr. Murray. *See* Pls.' Renewed Mot. for Spoliation Sanctions 3, ECF No. 137. It is undisputed that Mr. Murray died from a contact gunshot wound to the head. *See* U.S. Mem. in Supp. of Summ. J ("U.S. Mem.") 11 (undisputed material fact No. 3), ECF No. 150-1. We have explained how that undisputed fact—when combined with the doctrine of collateral estoppel (also called issue preclusion) as to Officer Norton's location—means that Plaintiffs cannot establish that Officer Norton fired the contact shot. *Id.* at 15–20. Similarly, we explained how collateral estoppel as to other issues decided in Plaintiffs' district court litigation—when combined with the factors necessary to prove the crimes—means Plaintiffs cannot succeed on their allegations of assault, reckless

endangerment, conspiracy, kidnapping, criminal homicide (by failing to provide aid), or hate crimes. *See id.* at 20–29. Plaintiffs do not dispute the standard for collateral estoppel or the United States' analyses of the doctrine in the context of the relevant criminal provisions.

Instead, Plaintiffs' only response is to argue that the Federal Circuit effectively barred the application of collateral estoppel because this Court's spoliation sanction "change[d] the evidentiary landscape." Pls.' Resp. at 2–4. But Plaintiffs do nothing more than make that bare and conclusory statement. They do not explain what about that evidentiary landscape is different. Nor do they detail what evidence (or inference) they can now present that was unavailable to them in district court. And for good reason: nothing has changed.

This Court's sanction was an evidentiary prohibition preventing the United States from "rely[ing] affirmatively on any facts related to the .380 handgun" found my Mr. Murray's feet. *Jones v. United States (Jones Fed. Cl. II)*, 146 Fed. Cl. 726, 743 (2020). That sanction did not change the evidentiary landscape in a manner that precludes the application of collateral estoppel. For one, the district court conclusions that prevent Plaintiffs from proving the alleged assault, reckless endangerment, conspiracy (as to the State and local officers), kidnapping, criminal homicide (by failing to provide

aid), and hate crimes have nothing to do with the .380. *See* U.S. Mem. at 20–29. The Court's sanction is wholly irrelevant for those alleged crimes.

With respect to allegations that Officer Norton shot Mr. Murray, the sanction did nothing to change the evidence available *to Plaintiffs* to prove Officer Norton's location. If there were any available evidence from the Hi-Point .380 that could speak to Officer Norton's location, that evidence was similarly available to Plaintiffs in district court. Neither Plaintiffs nor Officer Norton relied upon anything about the .380 in litigating the latter's location. *See* Pls.' Mem. in Opp'n to Vance Norton's Mot. for Summ. J., *Jones v. Norton*, 2:09-cv-730-TC-EJF (D. Utah Apr. 8, 2013) ECF No. 321 (attached to our motion in this case as ECF No. 150-8); 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 to our motion in this case as ECF No. 150-9). Similarly, the District Court did not rely upon anything about the .380 in deciding the issue. *See Jones v. Norton*, 3 F. Supp. 3d 1170, 1190 (D. Utah 2014), *aff'd,* 809 F.3d 564 (10th Cir. 2015). And this Court's sanction did not grant Plaintiffs any evidentiary inference with respect to the .380. Thus, should this case proceed, Plaintiffs would be relitigating, based upon the same available evidence, the same issue (Officer Norton's location) that was presented to, and decided by, the District Court. The doctrine of collateral estoppel prevents that second bite at the apple. *See In re Corey*,

583 F.3d 1249, 1251 (10th Cir. 2009) ("Generally speaking, it is not unfair to deny a litigant a second bite at the apple, and preclusion conserves resources and provides consistency in judicial decisions.").

Because there has been no relevant change in the evidentiary landscape, Plaintiffs are incorrect that this Court is "required, as a matter of appellate mandate, to independently consider the Murray Family's argument." Pls.' Resp. at 2 (emphasis altered). The Federal Circuit did not hold that *any* evidentiary sanction would automatically preclude the application of collateral estoppel. To the contrary, the Federal Circuit plainly stated—in the sentence immediately prior to the one Plaintiffs quote—that, if this Court "concludes that . . . the appropriate sanctions would not change the evidentiary landscape *for particular issues*, the [Court] may reconsider the application of issue preclusion." *Jones v. United States (Jones Fed. Cir.)*, 846 F.3d 1343, 1363–64 (Fed. Cir. 2017) (emphasis added). Thus, after comparing the evidentiary landscape for the issues in question, the Court may (and should) return to collateral estoppel. And Plaintiffs have not disputed that collateral estoppel, if available, would bar relitigation of issues decided by the District Court. Their silence on that point largely ends this case.

Later in their brief, Plaintiffs make two additional points related to the crimes alleged to have occurred during, and immediately after, the pursuit and shooting. Neither has merit.

First, Plaintiffs posit that the conspiracy claims against the alleged federal "bad men" (FBI Agents Ashdown and Ryan, and Bureau of Indian Affair officers Cuch and Myore) should proceed because the federal officers could have conspired independently of the State and local officers, or could be held liable for a broader conspiracy regardless of any collateral estoppel. *See* Pls.' Resp. at 9, 10. Our opening brief, however, already addressed any alleged conspiracy by or between the federal agents. *See* U.S. Mem. at 25–26. The federal agents could not have conspired to murder Mr. Murray because, as Plaintiffs do not dispute, federal law enforcement was not on-scene at the time of the shooting. *See id.* at 11 (undisputed material fact No. 4).

Any conspiracy related to Plaintiffs' alleged "cover-up" would have required an overt act, a point Plaintiffs similarly do not dispute. *See* U.S. Mem. at 26 (citing Utah Code § 76-4-201). Yet Plaintiffs do not identify any facts (on-reservation or otherwise) demonstrating such an act. Nor could the FBI turning the Hi-Point .380 over to the U.S. Marshals for destruction constitute one. As we elsewhere explained, the turnover occurred off-reservation (eighteen months later), and the Court has already concluded that the FBI did not act with any intent to affect Plaintiffs' claims. *See* U.S.

Mem. at 34–35; *Jones Fed. Cl. II*, 146 Fed. Cl. at 741; *see also id.* (refusing to infer a conspiracy in the absence of evidence). The "complete failure of proof concerning an essential element" of Plaintiffs' alleged conspiracy by or among the federal agents warrants summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–33 (1986).[2]

Second, Plaintiffs reason that collateral estoppel cannot be applied because the District Court was assessing constitutional claims rather than potential criminal liability. *See* Pls.' Resp. at 10. But the *claim* before the court is irrelevant. Non-mutual collateral estoppel applies where "an *issue* is actually and necessarily determined by a court," and the doctrine works to make "that determination 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, 1232 (10th Cir. 2004) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)) (emphasis added).

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[2] As to off-reservation crimes, Plaintiffs' only response is to say they "disagree" with our argument. *See* Pls.' Resp. at 6 n.3; U.S. Mem. at 32–35. But they offer nothing that could justify denial of our motion with respect to those alleged, but unsupported, crimes. *Accord Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013) ("[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are deemed waived." (internal citations and quotation marks omitted)). Further, and contrary to Plaintiffs' assertion (at 13), we did not "concede" that the treatment of Mr. Murray's body (though certainly inappropriate) constituted desecration under the Utah statute. *See* U.S. Mem. at 33 ("Thus, the actions—*even if* they rose to the level of 'desecration' . . . ." (emphasis added)).

The Court's spoliation sanction did not change the evidentiary landscape in any relevant way. For that reason, and the others stated in our opening brief, summary judgment should be granted in favor of the United States on the alleged crimes of murder, manslaughter, criminal homicide, negligent homicide, homicide by assault, assault, reckless endangerment, conspiracy, kidnapping, criminal homicide (by failing to provide aid), and hate crimes.

II. Plaintiffs' Alleged Obstruction of Justice-Related Crimes Are Either Inapplicable to the Circumstances or Would Not Constitute Crimes "Upon" Mr. Murray's "Person or Property."

Tacitly recognizing the implications of collateral estoppel, Plaintiffs focus their response primarily on their alleged "cover-up." *See* Pls.' Resp. at 4–13. Plaintiffs are critical of the United States for what they see as "attempts to reduce this case down to whether Norton shot Mr. Murray" and claim that we "did not provide any argument for summary judgment on most of the crimes" that Plaintiffs identified. *Id.* at 4, 5; *see also id.* at 9. To the contrary, however, our brief categorized every one of the sixty some criminal provisions that Plaintiffs identified, and we presented detailed argument on more than forty-five, including analysis of the factors necessary to prove them. *See* U.S. Mem. at 14 n.7, 16–35. This included Plaintiffs' alleged obstruction of justice-related crimes; we explained that—even if they could be

proven—those types of crimes would not constitute "wrongs upon" Mr. Murray's "person or property," as the "bad men" clause plainly requires. *See id.* at 29–32, 34 n.20.

Rather than dispute any of our legal analysis or material facts, Plaintiffs attempt to avoid summary judgment by focusing on footnote 7 in our opening brief. *See* Pls.' Resp. at 5–9. In the footnote, we listed sixteen statutes that, despite being identified by Plaintiffs in response to discovery, have absolutely nothing to do with the circumstances here. *See* U.S. Mem. at 14 n.7. The sixteen crimes are representative of what can only be an effort by Plaintiffs to list as many crimes as possible in hopes of finding one that sticks. Indeed, Plaintiffs largely do not dispute the point we made in the footnote. Plaintiffs, for example, do not attempt to defend their claims as being about things like illegal hunting or fishing on tribal lands, or obstructing law enforcement in order to facilitate illegal gambling. The Court need not dwell any further on those crimes in footnote 7 for which Plaintiffs do not dispute their inapplicability.

Plaintiffs identify three of the crimes in footnote 7 as being related to the alleged obstruction of justice. *See* Pls.' Resp. at 7–8 (referencing "obstruction of a criminal investigation," "Defrauding the government," and "wire fraud"). We assume from their word choice and case law citations that Plaintiffs are referring to 18 U.S.C. §§ 371, 1343, and 1510. *See* Pls.' Resp. at

7–8. Their point about these crimes potentially relating to obstruction of justice is fair enough. The problem is that Plaintiffs do not point to any evidence suggesting that any of these three crimes actually occurred. *See Celotex*, 477 U.S. 322–33 (summary judgment appropriate where a "complete failure of proof" means a plaintiff cannot prove an essential element of her case). Speculation and bare assertions are insufficient to overcome summary judgment. *See Gonzales-McCaulley Inv. Group, Inc. v. United States*, 101 Fed. Cl. 623, 629 (2011) (citation omitted).

In any event, the re-categorization does not save Plaintiffs' case. The conduct criminalized in 18 U.S.C. §§ 371, 1343, and 1510, like the others of Plaintiffs' alleged obstruction of justice-related crimes, would not constitute "wrong[s] upon the person or property of the Indians." *See* Treaty with the Ute, Mar. 2, 1868, art. 6, 15 Stat. 619, 620 ("1868 Treaty"), ECF No. 150-2. The relevant question is not, as Plaintiffs seem to assume, what charges a federal prosecutor could decide to bring. *See* Pls.' Resp. at 6 (claiming an analysis of each crime's specific factors is necessary); *id.* at 9. Instead, the question is whether the crimes, regardless of whether they occurred or would be chargeable, are compensable under the Treaty. We explained this argument in section II.F of our opening brief, noting that it applied to "[t]he remainder of Plaintiffs' alleged on-reservation crimes," including the

"numerous crimes relating to interference with government investigations or judicial proceedings." U.S. Mem. at 29–32.[3]

Plaintiffs' only response regarding the Treaty's limitation to "wrongs upon the person or property of the Indians" is to argue that the Court cannot interpret the Treaty on its face. *See* Pls.' Resp. at 11–13. The argument is wrong.

First, courts routinely interpret Indian treaties based on their plain language. The Federal Circuit did just that in the prior appeal in this case to identify whether non-criminal "wrongs" are cognizable. *See Jones Fed. Cir.*, 846 F.3d at 1355–56. The Court of Federal Claims has elsewhere undertaken similar analyses. *See, e.g., Pablo*, 98 Fed. Cl. at 380–82 (interpreting the "bad men" clause in the Navajo Treaty to determine whether a claim for compensation could arise when the victim lived, and the alleged "wrong" occurred, outside reservation boundaries).

[3] We do not intend to retreat from the placement of 18 U.S.C. §§ 371, 1343, and 1510 in footnote 7. For example, § 1510 prohibits "'endeavors to obstruct communication' through the *use of bribery*." *United States v. Stafford*, 831 F.2d 1479, 1483 (9th Cir. 1987) (emphasis added). Plaintiffs (even now) have not alleged—and certainly have not pointed to facts demonstrating—that any State or local officer attempted to bribe one of their colleagues to make misrepresentations to the FBI. Additionally, we note that 18 U.S.C. § 371 criminalizes *conspiracy* to defraud. Thus, that provision would also fall under the umbrella of our arguments as to Plaintiffs' alleged conspiracy. *See* U.S. Mem. at 25–26.

Courts have done so because they "must honor any unambiguous language in the treaty." *Jones Fed. Cir.*, 846 F.3d at 1352 (citations omitted). Indeed, the very Supreme Court case upon which Plaintiffs rely goes beyond the treaty's text only after concluding it to be ambiguous on the question before the Court. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195–96 (1999); *see also Jones Fed. Cir.*, 846 F.3d at 1355 (citing *Mille Lacs*, 526 U.S. at 206, for proposition that "[w]e turn first to the text of the 1868 Treaty itself"). Where the text is clear, a court never reaches the doctrines requiring liberal construction in favor of the Indians. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) ("But liberal construction cannot save the Tribe's claim, which founders on a clear geographic limit in the Treaty."); *Nw. Band of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) ("We stop short of varying [a treaty's terms] to meet alleged injustices."); *Jones Fed. Cir.*, 846 F.3d at 1356.

Second, the 1868 Treaty unambiguously limits the scope of the "bad men" clause to "wrong[s] *upon the person or property* of the Indians." 1868 Treaty, art. 6, 15 Stat. at 620 (emphasis added). As was recognized in the 19th century—not solely, as Plaintiffs posit (at 12), by we "21st century attorneys"—the Treaty was intended to halt the "Indian" wars and keep the peace. *See Janis v. United States*, 32 Ct. Cl. 407, 410 (1897). The two treaties between the Ute Tribe and the United States emphasized harms

from robbery, violence, and murder; that is, harms "upon" a person or property. *See* Treaty with the Utah-Tabeguache Band, Oct. 7, 1863, art. 6, 13 Stat. 673, ECF No. 150-10; 1868 Treaty, art. 1, 15 Stat. 619 (incorporating terms of 1863 Treaty).[4] Further, the 1868 Treaty requires the United States to "reimburse the injured person *for the loss sustained*." 1868 Treaty, art. 6, 15 Stat. at 620 (emphasis added). Plaintiffs' alleged obstruction of justice-related wrongs—things like wire fraud and filing false police reports—are simply not "wrongs upon," nor "loss[es] sustained" by, a person. They therefore do not fit within the rubric of the Treaty. "Even if the Ute leaders may not have appreciated the complex distinction . . . , [the court] may not interpret the 1868 Treaty in a way that the United States would not reasonably have agreed to adopt at the time of the signing." *Jones Fed. Cir.*, 846 F.3d at 1356. Summary judgment should be granted in favor of the United States as to the alleged crimes relating to obstruction of justice.

CONCLUSION

Collateral estoppel bars Plaintiffs from relitigating issues necessary for them to prove that Office Norton killed Mr. Murray or the various other crimes Plaintiffs alleged to have been committed during and immediately

[4] Contrary to Plaintiffs' assertion (Pls.' Resp. at 13), our opening brief set forth, citing case law, the origins of the "bad men" clauses. *See* U.S. Mem. at 2–3. Plaintiffs have not disputed any of it.

after the shooting. And Plaintiffs cannot recover under the 1868 Treaty for their alleged "cover-up" because the Treaty is plainly limited to "wrong[s] upon the person or property of the Indians." Summary judgment should be granted in favor of the United States.

Date: July 1, 2020

PRERAK SHAH
Deputy Assistant Attorney General

s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON
(Colo. Bar No. 39378)
Senior Attorney
Natural Resources Section
Envt. & Natural Resources Div.
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0248
Fax: (202) 305-0506
kristofor.swanson@usdoj.gov

TERRY PETRIE
Natural Resources Section
Denver, CO

Of Counsel:

CHRISTOPHER R. DONOVAN
Assistant General Counsel
Office of the General Counsel
Federal Bureau of Investigation
Richmond, VA

JAMES W. PORTER
Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior
Washington, DC

Certificate of Service

I hereby certify that on July 1, 2020, I filed a copy of the above pleading with the Court's electronic filing system, which caused notice to be sent to:

Jeffrey Rasmussen
Patterson, Earnhart, Real Bird, & Wilson LLP
jrasmussen@nativelawgroup.com

/s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON