No. 20-2182

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEBRA JONES, as personal representative of the Estate of Todd R. Murray, deceased, for and on behalf of the heirs of Todd R. Murray, ARDEN C. POST, individually and as the natural parents of Todd R. Murray,
Plaintiffs-Appellants,

and

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
Plaintiff

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims
No. 1:13-cv-227-RAH (Hon. Richard A. Hertling)

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF RELATED CASES

This Court previously heard an appeal in *Jones v. United States*, Case No. 15-5148, which was taken from the same underlying action in the Court of Federal Claims, Case No. 1:13-cv-227. The panel for the prior appeal consisted of Judges Lourie, O'Malley, and Taranto, and was decided on January 27, 2017. *See Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017). This appeal is also directly affected by the decisions in the related case *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015).

INTRODUCTION

This suit concerns the 2007 death of Todd Murray, a member of the Ute Indian Tribe, after a pursuit by state and local police officers that ended on the Ute Indian Tribe's Reservation. The evidence showed that Mr. Murray shot himself, and the U.S. District Court for the District of Utah held that no reasonable person could have concluded otherwise. *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014). The Tenth Circuit affirmed that ruling. *Jones v. Norton*, 809 F.3d 564 (10th Cir. 2015).

Debra Jones and Arden Post are Mr. Murray's parents (collectively "Jones"). Jones asserts that Mr. Murray did not kill himself, and was instead shot and killed by a local police officer, Vance Norton. After the Utah district court ruled that Mr. Murray shot himself and dismissed Jones's wrongful death action against Officer Norton and other Utah officials, and while her appeal of that ruling was pending in the Tenth Circuit, Jones filed suit in the Court of Federal Claims ("CFC"), seeking to hold the United States financially liable for Mr. Murray's death under the "bad men" clause of a treaty between the United States and the Ute Indian Tribe. That clause requires the government to "reimburse the injured person for the loss sustained" whenever "bad men" "commit any wrong upon the person or property of the Indians." *See* ECF No. 150-2 (Treaty with the Ute, Mar. 2, 1868, 15 Stat. 619, 620 ("1868 Treaty")). Jones alleges that the police who pursued Mr. Murray are "bad men" who "committed a wrong" by shooting Mr. Murray and then covering up the shooting. *See* ECF No. 17, ¶¶ 59-76.

The evidence does not support Jones' theory. Jones argues that she cannot prove her theory only because evidence was spoliated by FBI agents. She asked the CFC, as a sanction for that alleged spoliation, to assume that the local police shot Mr. Murray and to enter a default judgment against the United States. The CFC found that the United States had negligently destroyed the Hi-Point .380 gun found beside Mr. Murray, but declined to enter the requested sanction. Instead, it merely precluded the government from relying affirmatively on any facts related to the gun. The CFC also held that the FBI's decision not to collect certain items at the scene of the shooting was not spoliation.

Even after applying that sanction, the CFC still found that Jones could not prove her claim that Mr. Murray was shot by the police because that claim is precluded by several factual findings made by the Utah district court. That court (without relying on any evidence connected with the spoliated gun) found that Mr. Murray died from a close-contact gunshot wound (a gun placed against his head) and that Officer Norton was nowhere near Mr. Murray when the fatal shot was fired. Jones had a full and fair opportunity to litigate these and other questions in the Utah district court and was unable to prove that Officer Norton was near Mr. Murray when he was shot. Because Jones could not prove that, she cannot prove that Officer Norton shot Mr. Murray—even once any evidence related to the spoliated gun is set aside. The CFC accordingly granted summary judgment to the United States.

The CFC's well-reasoned decisions should be affirmed.

STATEMENT OF JURISDICTION

(a) The CFC had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505.

(b) The CFC's judgment was final because it resolved all of the plaintiff's claims against the United States, the sole defendant. *See Jones v. United States*, 149 Fed. Cl. 335 (Fed. Cl. 2020). This Court has jurisdiction over this appeal under 28 U.S.C. § 1295(a)(3).

(c) The CFC entered judgment on July 8, 2020. *See* ECF No. 160. Jones noticed her appeal on July 17, 2020, or 9 days later. *See* ECF No. 161. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the CFC (a) correctly determined that the United States did not spoliate uncollected evidence and (b) acted within its discretion when it sanctioned the United States for its spoliation of the gun found near Mr. Murray by precluding the government from affirmatively relying on any facts related to the gun to support the argument that Mr. Murray died by suicide.

2. Whether the CFC was right to conclude that Jones could not establish that Officer Norton shot Mr. Murray due to the application of issue preclusion where the Utah district court previously found that Officer Norton was not near Mr. Murray (who died as a result of a close contact gunshot wound), Jones had a full and fair

opportunity to litigate that precise question, and the sanction did not change the evidence supporting the Utah district court's factual determination.

STATEMENT OF THE CASE

The background in this case has been summarized in numerous decisions. *See generally Jones v. Norton*, 3 F. Supp. 3d 1170, 1178-84 (D. Utah 2014), ("*Jones Dist. Ct.*"), *aff'd*, 809 F.3d 564, 569-72 (10th Cir. 2015) ("*Jones 10th Cir.*"); *Jones v. United States*, 122 Fed. Cl. 490, 494-97 (Fed. Cl. 2015) ("*Jones Fed. Cl. I*"), *vacated and remanded*, 846 F.3d 1343, 1346-47 (Fed. Cir. 2017) ("*Jones Fed. Cir. I*"); *Jones v. United States*, 146 Fed. Cl. 726, 729-33 (Fed. Cl. 2020) ("*Jones Fed. Cl. II*"); *Jones v. United States*, 149 Fed. Cl. 335 (Fed. Cl. 2020) ("*Jones Fed. Cl. III*"). This recitation of facts is drawn from those decisions and the record below.

A. Mr. Murray's death and the FBI's investigation

In April 2007, Todd Murray, a member of the Ute Indian Tribe, was the passenger in a car that was pursued by Utah State Trooper David Swenson for a speeding violation. ECF No. 113-3 at 193-95 (JONES0018265 at 18329-31) (sealed).[1] The pursuit began off tribal lands, but ended on the Ute Indian Tribe's Reservation. ECF No. 113-3 at 195 (JONES0018265 at 18331) (sealed).

[1] "JONESxxxxxxx" refers to documents in the Joint Appendix that was filed in the CFC. *See* ECF No. 117 at 1-124 (index); ECF No. 127-1 at 1-11 (index); *see generally* ECF Nos. 99-114, 117-122, 127, 128.

After the car stopped, both Mr. Murray and the driver, Uriah Kurip (a non-Indian), fled rather than complying with Trooper Swenson's order to stop. ECF No. 113-3 at 198-200 (JONES0018265 at 18334-36) (sealed). Trooper Swenson pursued and detained Mr. Kurip. ECF No. 113-3 at 198-200 (JONES0018265 at 18334-36) (sealed). Off-duty Vernal City Police Officer Vance Norton saw the car chase and called police dispatch. ECF No. 118-6 at 688 (JONES0018415). Upon learning that he was the closest officer that could assist, he decided to trail the cars. *Id.* He eventually arrived at the location where Trooper Swenson had detained Mr. Kurip. *Id.* Trooper Swenson pointed Officer Norton in the direction in which Mr. Murray had fled and Officer Norton drove towards that area and parked his car. *Id.*; *see also* ECF No. 106-2 at 102-33 (JONES0015119 at 15220-51) (sealed). Utah Highway Patrolman Craig Young and Uintah County Deputy Anthoney Byron arrived at Officer Norton's location and Officer Norton asked them to search for Mr. Murray, but along a different route. ECF No. 118-6 at 688-89 (JONES0018415-16).

Officer Norton reported (and later testified under oath) that he eventually spotted Mr. Murray from a distance and that, with his gun pointed at Mr. Murray, he started yelling "Police. Get on the Ground." ECF No. 118-6 at 689 (JONES0018416). As Officer Norton walked towards Mr. Murray, Mr. Murray fired a gun at Officer Norton. *Id.* Officer Norton started to back up to get to cover, and fired two rounds at Mr. Murray while he was retreating. *Id.* The rounds did not hit Mr. Murray. *Id.*; ECF No. 106-2 at 134-48 (JONES0015119 at 15252-66) (sealed); JONES0018415-17; ECF

No. 113-3 at 193-95 (JONES0018265 at 18329-31) (sealed). Officer Norton got to a safe location and started to try to call dispatch to get more help. ECF No. 118-6 at 689 (JONES0018416). He then saw that Mr. Murray placed his gun to his head and shot himself. *Id.*; *see also Jones Dist. Ct.*, 3 F. Supp. 3d at 1180-81; ECF No. 106-2 at 148-57 (JONES0015119 at 15266-75) (sealed); ECF No. 118 at 725-27 (JONES0008803 at 9046-47); ECF No. 113-3 at 208 (JONES0018344). Officer Norton saw Mr. Murray fall to the ground. ECF No. 118-6 at 689 (JONES0018416). He finally called into dispatch and advised them of what happened. *Id.* He also asked Trooper Young and Deputy Byron to get to his location. *Id.* Upon their arrival, Officer Norton told them what happened and they approached and handcuffed Mr. Murray. *Id.* Other officers arrived. ECF No. 118-6 at 689-90 (JONES0018416-17). Officer Norton took photographs of the scene and the shell casings. *Id.* An ambulance transported Mr. Murray to a hospital, where he later died. ECF No. 113-3 at 201-03, 206 (JONES0018265 at 18337-39, 18342) (sealed); ECF No. 110-2 at 814 (JONES0000269) (sealed).

These events all occurred before any FBI agents arrived on the scene. FBI Special Agent Rex Ashdown, who led the on-scene investigation, arrived after Mr. Murray had been taken away in the ambulance. ECF No. 77, ¶ 24; ECF No. 113-3 at 195-96 (JONES0018265 at 1833) (sealed). Agent Ashdown took photographs and collected the gun (a Hi-Point .380) that was on the ground where Mr. Murray had fired shots at Officer Norton and shot himself. *Id.* at 195; ECF No. 118 at 605, 609-

10 (JONES0008803 at 8926, 8930-31); ECF No. 77, ¶¶ 27-30. The gun contained a jammed but expended shell casing. ECF No. 77, ¶¶ 30, 36; ECF No. 113-3 at 195 (JONES0018265 at 18331) (sealed). Agent Ashdown collected two spent .380 casings from the ground within the expected ejection-radius of the Hi-Point .380. *See* ECF No. 77, ¶ 29; ECF No. 113-3 at 196 (JONES0018265 at 18332) (sealed). He also collected two .40-caliber casings found up a slope about 110 yards away; Officer Norton's gun was a .40-caliber. ECF No. 118 at 611-12 (JONES0008803 at 8932-33); ECF No. 77, ¶¶ 32-33; ECF No. 113-3 at 195 (JONES0018265 at 18331) (sealed). He collected GPS coordinates for the bullet casing locations and interviewed Trooper Swenson. ECF No. 77, ¶ 33; ECF No. 113-3 at 198-200 (JONES0018265 at 18334-36) (sealed). A different FBI agent later interviewed Officer Norton. ECF No. 113-3 at 193-95 (JONES0018265 at 18329-31) (sealed).

Deputy Byron accompanied the ambulance to the hospital. ECF No. 105-1 at 318, 325-27 (JONES0012461 at 12468-70) (sealed). After Mr. Murray died, Deputy Byron and Vernal City Police Officer Ben Murray (no relation to Mr. Murray) removed Mr. Murray's clothes and took additional photos of the body, and Deputy Byron (inappropriately) probed the head wounds with a gloved finger. ECF No. 105-1 at 318, 327 (JONES0012461 at 12470) (sealed); ECF No. 106-1 at 655-58, 725-35 (JONES0014890, at 14890-93, 14960-70) (sealed); ECF No. 105-1 at 79, 85, 188

(JONES0012176-79 at 12222, 12228, 12331) (sealed).[2] Mr. Murray's body was then transported to a mortuary. ECF No. 105-1 at 318, 327 (JONES0012461 at 12470) (sealed). There, trying to obtain a blood sample, a mortuary employee (inappropriately) made an incision in Mr. Murray's neck and the local police chief (also inappropriately) attempted to draw blood from Mr. Murray's heart. *See* ECF No. 111-1 at 350-52 (JONES0005398, at JONES0005399-400, ¶¶ 4-5) (sealed). This blood sample would have been in addition to the properly-taken blood sample referenced in the paragraph below.

Mr. Murray's body arrived at the Office of the Utah Medical Examiner in Salt Lake City a day later. ECF No. 128-3 at 1-15 (JONES0038259-73) (sealed). The FBI asked the Medical Examiner to perform an autopsy. ECF No. 105 at 70 (JONES0011375) (sealed). A full autopsy would have included the removal and examination of the internal organs, and an internal examination of the skull and brain. *See* ECF No. 139-1 at 4-5; ECF No. 118 at 552 (JONES0008803 at 8873). But the forensic pathologist on duty (Utah Deputy Medical Examiner Dr. Edward Leis) determined that only an external examination was necessary. ECF No. 103-1 at 80-83 (JONES0008188-90) (sealed); ECF No. 118 at 568-69 (JONES0008803 at 8889-90). Dr. Leis took an X-ray of Mr. Murray's skull, drew blood and urine for analysis, and

[2] The Utah Medical Examiner subsequently explained that this inappropriate conduct did not affect his cause and manner of death conclusions. *See* ECF No. 103-1 at 165 (JONES0008273) (sealed); ECF No. 118 at 539-40 (JONES00008803 at 8860-61).

documented Mr. Murray's characteristics and injuries via diagrams and photographs. ECF No. 103-1 at 80 (JONES0008188) (sealed); ECF No. 128-3 at 1-15 (JONES0038259-73) (sealed). Dr. Leis determined the "cause of death" to have been a gunshot wound to the head, and the "manner of death" to have been suicide. ECF No. 128-3 at 1 (JONES0038259) (sealed); *see also* ECF No. 139-1 at 6-7 (agreeing on cause and manner of death); ECF No. 144-1 at 11-15 (noting that suicide was a reasonable conclusion as to manner of death). The gunshot wound was a close contact wound, meaning that the barrel of the gun was either touching or very nearly touching Mr. Murray's head. *See* ECF No. 144-1 at 6.

B. The destruction of the Hi-Point .380

As part of its investigation, the FBI traced the Hi-Point .380 found next to Mr. Murray. Further investigation led the FBI to Cody Shirley, who had illegally purchased the gun for Mr. Kurip, the driver of the car involved in the police pursuit. ECF No. 113-3 at 187 (JONES0018265 at 18323) (sealed). In 2008, the United States prosecuted Mr. Shirley for the illegal gun purchase. As part of that prosecution, the United States sought forfeiture of the gun, which the court granted in November 2008. ECF No. 77, ¶¶ 38-41; ECF No. 113-3 at 188-89 (JONES0018265 at 18324-25) (sealed); ECF No. 118-3 at 64-67 (JONES0011039-42); ECF No. 118-3 at 48-49 (JONES0010946-47); ECF No. 127-11 at 1 (JONES0042443); ECF No. 127-12 at 1-2 (JONES0042444-45). Before the gun was forfeited, the United States notified the

public through a thirty-day posting on www.forfeiture.gov. *See* ECF No. 118-3 at 48-49 (JONES0010946-47); ECF No. 127-11 at 1 (JONES0042443).

An FBI memorandum dated September 2008 recommended closing the investigation of Mr. Murray's death. ECF No. 118-3 at 3-4 (JONES0010901-02). The memorandum described Mr. Murray's death as suicide, reported that the FBI had completed the prosecution of the gun's purchaser, and explained that the gun had been forfeited. *Id.* The memorandum further explained that, "[d]ue to an active civil suit involving [redacted] and the [Vernal City Police Department], items 1B1-1B4 have been removed from FBI evidence and provided to [the Vernal City Police Department]." *Id.*[3] Items 1B1 through 1B4 refer to the two .40-caliber and two .380 caliber shell casings that the FBI found at the scene. Aside from the Hi-Point .380, the memorandum stated that "[n]o other items remain in FBI evidence." *Id.*

Federal policy dictates that forfeited guns be turned over to the U.S. Marshals Service. *See* ECF No. 127-7 at 1, 62-64 (JONES0041667 at 41728-30); ECF No. 127-8 at 1, 86-89 (JONES0041948-51). The FBI turned the Hi-Point .380 over to the U.S. Marshals in December 2008, which was twenty months after Mr. Murray's death. ECF No. 128-1 at 6-7 (JONES0038087 at 38087-88) (sealed); ECF No. 77, ¶ 42. According to federal policy, forfeited guns are typically destroyed. ECF No. 127-7 at 1, 62-64

[3] Although Jones had notified the state and local officers in March 2008 that she intended to file suit, she did not actually do so until July 2009. *Compare Jones v. Norton*, No. 2:09-cv-730-TC-EJF (D. Utah Mar. 15, 2012), ECF No. 258-12 *with Jones v. Norton*, No. 2:09-cv-730-TC-EJF (D. Utah Mar. 15, 2012), ECF No. 1.

(JONES0041667 at 41728-30); ECF No. 127-8 at 87 (JONES0041949). Of the evidence that the FBI collected in its investigation of Mr. Murray's death, the Hi-Point .380 is the only piece of evidence that does not remain preserved today. *See* ECF No. 128-1 at 6-9, 12-25 (JONES0038087 at 38089-90, 38093-106) (sealed); ECF No. 127-4 at 1-6 (JONES0038274-79); ECF No. 77, ¶ 34.

C. Related proceedings in Utah

Ms. Jones, Mr. Post, and Mr. Murray's estate filed suit in Utah State court in July 2009 against the state and local officers, among others. *See* Notice of Removal, *Jones v. Norton*, No. 2:09-cv-730-TC-EJF (D. Utah Mar. 15, 2012), ECF No. 1. The suit was subsequently removed to federal district court. *See id.*; *see also* ECF No. 150-3. 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. ECF No. 150-3, ¶¶ 55-214. Among other things, Jones alleged that Detective Norton shot Mr. Murray and that this constituted an unlawful seizure in violation of the Fourth Amendment. *Jones Dist. Ct.*, 3 F. Supp. 3d at 1186, 1189.

The Utah district court denied spoliation sanctions, finding that none of the defendants had a duty to preserve the evidence. *Jones v. Norton*, 2014 WL 909569, *8 (Mar. 7, 2014) ("*Jones Dist. Ct. Spoliation*"). The court granted summary judgment in favor of the defendants, finding that Jones' evidence in support of her theory was "sparse, circumstantial, subject to more than one interpretation, and, at times, very

speculative," and that "[t]he evidence clearly shows that Mr. Murray shot himself." *Jones Dist. Ct.*, 3 F. Supp. 3d at 1190. The Tenth Circuit affirmed. *Jones 10th Cir.*, 809 F.3d 564.

D. Proceedings below

In April 2013, Jones filed this suit in the Court of Federal Claims seeking compensation for Mr. Murray's death under the "bad men" provision in the 1868 Treaty. *See* ECF No. 1; ECF No. 17. The "bad men" provision obligates the United States to compensate individual Ute Indians for their loss if "bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong" upon their person or their property. *See* ECF No. 10-2 (1868 Treaty, 15 Stat. at 620); *Jones Fed. Cir. I*, 846 F.3d at 1353-56 (discussing bad men clause); *see also Richard v. United States*, 677 F.3d 1141, 1148-50 (Fed. Cir. 2012).

The United States moved to dismiss the complaint for failure to state a claim, which the CFC granted in July 2015. *Jones Fed. Cl.*, 122 Fed. Cl. at 490, 522, 529-30. The CFC held that (1) Jones was barred by the doctrine of "issue preclusion" from relitigating the circumstances surrounding Mr. Murray's death because she had already litigated those issues (and lost) in the Utah District Court, and thus could not maintain her claims that state and local police were "bad men"; and (2) the United States could be liable only for "affirmative" criminal acts committed on the reservation. *Jones Fed. Cl.*, 122 Fed. Cl. at 490, 523-25, 529-30. Jones appealed.

This Court vacated the dismissal and remanded. Among other things, this Court held that, before the CFC could consider whether Jones was precluded from litigating certain issues, the CFC first needed to determine whether federal agents spoliated any evidence and, if so, whether sanctions were appropriate. *See Jones Fed. Cir. I*, 846 F.3d at 1361-64. This Court further held:

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

Id. at 1363-64 (footnote omitted).

On remand, Jones argued that the United States had spoliated (1) the Hi-Point .380 gun; (2) Mr. Murray's person and clothing; and (3) Officer Norton's gun, clothing, person, and vehicle, as well as other uncollected items at the shooting scene. *Jones Fed. Cl. II*, 146 Fed. Cl. at 737. Jones requested the entry of a default judgment as a sanction. *Id.*

The CFC held that the United States had spoliated the forfeited Hi-Point .380, but had spoliated no other evidence. *Jones Fed. Cl. II*, 146 Fed. Cl. at 737-42. With respect to the Hi-Point .380, the CFC held that federal agents negligently failed to disclose to the judge who ordered the gun's routine forfeiture and destruction that it could have been considered evidence in foreseeable litigation. *Id.* at 741-42. But because the FBI acted without intent to affect the litigation and because Jones could

not meet her burden of showing prejudice, the CFC held that the entry of default judgment or the application of adverse evidentiary inferences were inappropriate. I*d.* at 742-43. The CFC instead sanctioned the United States by prohibiting it from relying affirmatively on any facts related to the Hi-Point .380 (including the jammed third shell casing in the gun) to support the argument that Mr. Murray died by suicide. *Id.* at 743. The CFC found that Mr. Murray's person and clothing were not spoliated because the mishandling of his body did not affect evidence relevant to determining his cause of death. *Id.* at 747. The CFC also held that the federal agents' discretionary choices not to collect specific pieces of evidence did not constitute spoliation and that there was no evidence of a conspiracy to spoliate evidence. *Id.* at 737-41.

The case proceeded to summary judgment. In briefing, Jones identified 26 federal and state crimes that, in her view, constituted wrongs that should be compensated under the bad men provision. The CFC granted summary judgment to the United States. *Jones Fed. Cl. III*, 149 Fed. Cl. at 335. The CFC held that some of the alleged crimes were not plausibly relevant to Jones' allegations and others were not cognizable under the bad men provision because they were not federally-punishable or committed against the person or property of Indians, as required by the treaty. *Id.* at 348-49. The CFC further held that the Utah district court's decision precluded Jones from litigating many of the facts that would be necessary to establish that any crime was committed and that Jones lacked sufficient evidence for the court to find the necessary criminal intent. *Id.* at 349.

Jones appealed. *See* ECF No. 161.

SUMMARY OF ARGUMENT

1. A party spoliates evidence when it destroys or fails to preserve evidence for another's use in pending or reasonably foreseeable litigation. Jones contends that the government spoliated not only the Hi-Point .380, but also the evidence that it did not collect from the crime scene. In Jones' view, the government had both the ability to collect certain evidence at the crime scene (due to its jurisdiction over the investigation) and an affirmative duty to collect such evidence, and its decision not to collect that evidence amounts to sanctionable spoliation. There is a distinct difference, however, between failing to collect evidence and destroying already-collected evidence. No court has affirmatively required investigators to collect every piece of potential evidence that might be used in future civil litigation. There is no statute, regulation, or guidance that imposes such a duty, and the Court should not create new law to establish such a duty. The CFC correctly determined that the government spoliated only the Hi-Point .380, which it had in its physical possession but destroyed pursuant to routine forfeiture proceedings and agency policy.

As a sanction for spoliation of the gun, the CFC did not permit the government to rely on evidence involving the gun to prove that Mr. Murray committed suicide. Jones contends that the CFC should have imposed case dispositive sanctions against the government, but such sanctions are appropriate only upon a showing of bad faith and where no lesser sanction will suffice. Here, there was

no evidence that the government acted in bad faith and no evidence of substantial prejudice to Jones resulting from the destruction of the gun. The CFC found that any prejudice suffered by Jones as a result of the destruction of the gun was not commensurate to the requested remedy. The CFC's remedy was accordingly (and appropriately) narrow. The CFC did not abuse its discretion when it rejected as overbroad the application of the case dispositive sanctions requested by Jones.

2. Jones contends that the government's inability to rely on the Hi-Point .380 necessarily changed the evidentiary landscape and that the CFC was accordingly required to reevaluate all of the evidence concerning Mr. Murray's death. But the CFC's sanction only prevented the government from relying on facts related to the gun to prove that Mr. Murray committed suicide, and none of the facts related to the gun factored into the Utah district court's resolution of the factual issues that are central to Jones' case. It is undisputed that Mr. Murray died as a result of a close contact gunshot wound, meaning that his shooter had to be immediately next to Mr. Murray when the shot was fired. The Utah district court found, however, that none of the police officers were close to Mr. Murray when he was shot. It reached that finding based on testimony from Officers Norton and Byron and the evidence collected by Agent Ashdown, as well as Jones' inability to provide any evidence placing any of the police officers near Mr. Murray. Because the gun was not part of the evidence weighed by the Utah district court in reaching these findings, the inability of the

government to rely on the gun in the CFC proceedings did not change the evidentiary landscape for deciding this key factual question.

The CFC further found that this factual question—where Officer Norton was when Mr. Murray was shot—was the same question that was resolved by the Utah district court. The CFC found that Jones previously had the opportunity to fully and fairly litigate that question because she had the opportunity to depose witnesses and present argument on the matter. Because the Utah district court resolved the same factual question presented to the CFC and because Jones had a full and fair opportunity to litigate that question before the district court, the CFC found that Jones was precluded from re-litigating the question of Officer Norton's location anew. Without being able to establish that Officer Norton was next to Mr. Murray at the time of the shooting, Jones could not prove that Officer Norton shot Mr. Murray. The CFC's grant of summary judgment against Jones was therefore appropriate.

ARGUMENT

Jones asks this Court to reverse the CFC's judgment for two reasons. First, Jones claims that the CFC should have gone farther in its spoliation rulings. Second, Jones claims that the instance of spoliation found by the CFC changed the evidentiary landscape so much that she should be permitted to relitigate the facts surrounding Mr.

Murray's death and that the CFC should evaluate the evidence anew. Both of these arguments fail. The CFC's judgment should be affirmed.[4]

I. The CFC's spoliation rulings were correct and the sanction it applied was adequate to address the circumstance presented.

Jones makes two different arguments related to spoliation. Jones claims that the CFC erred when it held that the United States did not spoliate evidence that it did not collect. Jones also contends that, although the CFC correctly determined that the United States spoliated the Hi-Point .380, the CFC should have gone farther in sanctioning the United States. The CFC in fact carefully and properly applied the law of spoliation when it determined that the FBI spoliated no evidence other than the Hi-Point .380. The FBI had no duty to collect any particular evidence and so its decision not to collect such evidence could not amount to spoliation. And, having found spoliation of the Hi-Point .380, the CFC crafted an appropriate remedy by prohibiting the government from affirmatively relying on the gun to show that Mr. Murray committed suicide.

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[4] Jones lists five issues in the Statement of the Issues, *see* Opening Br. at 1-2, but fails to present any argument on issues four (whether the CFC misinterpreted the 1868 Treaty) and five (whether the CFC erred in applying the burden of proof on its motion for summary judgment). Failure to present any argument on those issues in her opening brief forfeits those issues, and they may not be raised in her reply brief. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319-20 (Fed. Cir. 2006); *Fuji Photo Film Co. v. Jazz Photo Corp.,* 394 F.3d 1368, 1375 n. 4 (Fed. Cir. 2005) (finding that an argument raised in a footnote in an opening cross-appeal brief and then more fully in the reply brief, was not properly raised).

A. Legal Standards and Standard of Review

When reviewing the CFC's spoliation ruling, this Court reviews findings of fact for clear error and legal conclusions de novo. *Mildenberger v. United States*, 643 F.3d 938, 944 (Fed. Cir. 2011); *Banks v. United States*, 314 F.3d 1304, 1307-08 (Fed. Cir. 2003). A lower court's "choice of [a] sanction" for a party's spoliation of evidence is, however, committed to the "sound discretion" of the court "in exercising its inherent authority and in assuring the fairness of the proceedings before it." *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1326 (Fed. Cir. 2011). A particular sanction is therefore "reviewed for an abuse of discretion." *Id.* To show an abuse of discretion, "the moving party must show that the district court has made a clear error of judgment in weighing relevant factors or in basing its decision on an error of law or on clearly erroneous factual findings." *In re Rembrandt Technologies LP Patent Litigation*, 899 F.3d 1254, 1266 (Fed. Cir. 2018) (citations omitted). "Abuse of discretion is a deferential standard." *Id.* at 1267.

"[S]poliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *See Micron*, 645 F.3d at 1320. The evidence must be within the party's control or possession. *Chapman Law Firm, LPA v. United States*, 113 Fed. Cl. 555, 609-10 (2013), *aff'd*, 583 F. App'x 915 (Fed. Cir. 2014) (per curiam). Courts may sanction a party who spoliates evidence to "minimize the evidentiary or financial damages caused by the spoliation." *United Medical Supply Co. v. United States*, 77 Fed. Cl.

257, 264 (2007). Courts should, however, apply any such sanctions as narrowly as possible to avoid substantial unfairness to the party who spoliated the evidence. *See Micron*, 645 F.3d at 1327, 1329. Courts should also consider the degree of fault of the party who spoliated the evidence, the degree of prejudice suffered by the moving party, and the public interest. *Id.*; *Chapman*, 113 Fed. Cl. at 609-10; *see also, e.g., SDI Operating Partnership, L.P. v. Neuwirth*, 973 F.2d 652, 654 (8th Cir. 1992) (affirming narrow spoliation sanction).

Dispositive sanctions, such as the entry of default judgment, are only appropriate where no lesser sanction will suffice and where clear and convincing evidence shows both that the spoliation has seriously prejudiced the moving party's ability to present its case and that the evidence was destroyed in bad faith. *Micron*, 645 F.3d at 1327-30. Even lesser sanctions, such as the imposition of an adverse evidentiary inference that does not result in a dispositive outcome, require a more "culpable state of mind" than mere negligence. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1375-76, and 1376 n.3 (Fed. Cir. 2007) (citation and internal quotation omitted); *see Micron*, 645 F.3d at 1326-29 (discussing bad faith and prejudice requirements).

B. The government's discretionary investigative decisions did not constitute spoliation of uncollected evidence.

Jones contends that the government spoliated Mr. Murray's body and clothing, Officer Norton's gun, clothing, person, and vehicle, and other potentially relevant items. Opening Br. at 16-18, 19-20. Unlike the Hi-Point .380, the government did not

collect any of these items as evidence. Jones nevertheless theorizes that the government had both the ability to collect such evidence (due to its jurisdiction over the investigation) and an affirmative duty to do so. In advocating this approach, Jones misstates the doctrine of spoliation. While courts have imposed a duty on parties to preserve evidence that is in their possession or control, no court has affirmatively required (under threat of sanction) law enforcement officers to collect evidence at a crime scene that might be relevant in possible future civil litigation. This Court should not impose such a far-reaching and impractical new obligation on federal law enforcement.

1. The government was not in possession of evidence that it did not collect.

Jones' argument concerning the uncollected evidence may be rejected for the simple reason that (unlike the Hi-Point .380) the government was never in physical possession of any of that evidence and therefore could not have spoliated it. Mr. Murray's body was "handled by local officials and brought to a state medical examiner before being turned over to Mr. Murray's family." *Jones Fed. Cl. II*, 146 Fed. Cl. at 738. The FBI did not take possession of Officer Norton's gun, which was collected by his superior. *Id.* The FBI did not collect any evidence from Officer Norton's person or clothing; "Agent Ashdown testified that he did not see a need to seize Officer Norton's clothes because he did not see blood on them." *Id.* Even Jones does not

appear to seriously contend that the government was ever in *physical possession* of these items. *See* Opening Br. at 18-19.[5]

2. The government was under no obligation to collect any particular evidence.

Jones contends that the government *should have* collected more evidence (and that it should be sanctioned for any failure not to do so). Opening Br. at 16-20. The FBI, however, was under no obligation to collect any particular evidence at the scene of the shooting or to conduct any particular tests. This is especially so where the FBI agent on scene had no reason to suspect that the shooting was anything other than a suicide and no reason to believe that Mr. Murray's family might bring civil litigation years later.

"A failure to collect potentially useful evidence is distinctly different than a destruction of evidence that is already extant." *United States v. Martinez-Martinez*, 369 F.3d 1076, 1087 (9th Cir. 2004); *see also Howell v. Earl*, No. 13-cv-48-BU-DWM-JCL, 2014 WL 2761352, at *1 (D. Mont. June 3, 2014), *report and recommendation adopted*, 2014 WL 2761342 (D. Mont. June 18, 2014) (finding that an officer's failure to properly

[5] The government is now in possession of Mr. Murray's clothing, which initially followed his body to the Office of the Medical Examiner, which then released them to the mortuary, who ultimately returned them to the FBI. *See* ECF No. 118 at 546-49 (JONES00008803 at 8867-70); ECF No. 128-3 at 8 (JONES0038266) (sealed); ECF No. 127-4 at 1-6 (JONES0038274-79). The FBI also again has possession of the casings that it had previously provided to the Vernal City Police Department. *See* ECF No. 128-1 at 6-9, 12-25 (JONES0038087 at 38089-90, 38093-106) (sealed); ECF No. 127-4 at 1-6 (JONES0038274-79).

record the entirety of his interaction with the plaintiff did not constitute spoliation of evidence). Parties have a duty not to destroy evidence in their control when litigation is reasonably foreseeable and the evidence is relevant to a potential claim. But the United States is aware of no decision in which a court has expanded this duty to require investigators to collect every piece of potential evidence that might conceivably be used in future civil litigation (which was not reasonably foreseeable at the time of the investigation). *Cf. Miller v. Vasquez*, 868 F.2d 1116, 1119 (9th Cir. 1989) (holding that while the due process clause of the Constitution requires the government "to preserve evidence after the evidence is gathered," there is no such "duty to obtain evidence") (citing *California v. Trombetta*, 467 U.S. 479, 489 (1984)); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that "unless a criminal defendant can show bad faith on the part of the police, failure to *preserve* potentially useful evidence does not constitute a denial of due process of law") (emphasis added). Nor does any "statute or regulation" "prescribe[] a course of action for the FBI and its agents to follow in the investigation of crime." *Gonzalez v. United States*, 814 F.3d 1022, 1028 (9th Cir. 2016). The decision how to investigate and which evidence to collect is within the discretion of the FBI. The FBI's discretionary good-faith decisions concerning which evidence to collect cannot amount to sanctionable conduct.[6]

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[6] *Cf. Cunningham v. City of Wenatchee*, 345 F.3d 802, 812 (9th Cir. 2003) (finding no due process violation in alleged failure to document interrogations or collect physical evidence); *United States v. Brown*, No. 2:17-cr-58-JCM-VCF-1, 2017 WL 8941247, at *17 (D. Nev. Aug. 14, 2017) (finding no case law to support the proposition that a

Jones cites various sources in an effort to show the existence of such a requirement, but none of the cited sources imposes an affirmative duty on law enforcement officers to collect evidence during a criminal investigation such that the failure to do so amounts to sanctionable spoliation in future civil litigation. *Jones Fed. Cl. II*, 146 Fed. Cl. at 740-41. Jones first cites to two cases for the general proposition that "[a]ll law enforcement officers have a duty to 'investigate, detect and secure evidence of a crime.'" *See* Opening Br. at 17 (citing *Green v. United States*, 386 F.2d 953, 956 (10th Cir. 1967) (citing *Hollingsworth v. United States*, 321 F.2d 342, 352 (10th Cir. 1963)). But neither case involved the question whether officers were under a duty to collect any particular evidence, let alone whether officers were under a duty to collect evidence that might be used in subsequent civil litigation. Both cases instead involved the question whether evidence obtained after an unlawful search could be used in subsequent civil litigation. *See Green*, 386 F.2d at 955-56; *Hollingsworth*, 321 F.2d at 352. And even as to that question, the quoted language is dicta. *See Green*, 386 F.2d at 956; *Hollingsworth*, 321 F.2d at 352.

Jones next contends that government policies imposed a duty on the FBI to collect additional evidence. Opening Br. at 19-20. Jones cites to (1) the Law Enforcement Standards section of the Indian Affairs Manual, ECF No. 139-3 (Bureau of Indian Affairs, Indian Affairs Manual, pt. 40, ch. 1, § 1.4); and (2) the Department

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

of Justice publication titled "Crime Scene Investigation: A Guide for Law Enforcement," ECF No. 127-10 at 30 (JONES0042414). Neither document imposes any legal duty on the FBI. The BIA Manual does not apply to the FBI. And the DOJ guide expressly states that its contents represent "a consensus of the authors and do not necessarily reflect the official position of the U.S. Department of Justice." ECF No. 127-10 at 4 (JONES0042385 at 42388). Regardless, both documents simply state that investigators should collect and preserve all evidence related to a suspected *crime*. The determination of what evidence to collect as part of a *criminal* investigation is left to the discretion of the investigator.[7] The guidance is silent as to whether investigators should collect evidence in anticipation of future *civil* litigation. Because Jones identifies no policies requiring the affirmative collection of any particular evidence, the circumstances here are distinguishable from *LaJocies v. City of N. Las Vegas*, No. 2:08-CV-00606-GMN, 2011 WL 1630331, at *1-*2 (D. Nev. Apr. 28, 2011) (cited at page

[7] *See, e.g.,* ECF No. 127-10 at 30 (JONES0042385 at 42414) (the investigator should make "the determination of the type of incident to be investigated and the level of investigation to be conducted."); *Sabow v. United States*, 93 F.3d 1445, 1451-53 (9th Cir. 1996) (holding that investigative activities are discretionary in nature); *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 762 (D.C. Cir. 2001) ("[T]he sifting of evidence, the weighing of its significance, and the myriad other decisions made during investigations plainly involve elements of judgment and choice"); *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 972-76 (10th Cir. 1994) (discretion in alleged failure not to investigate airplane crash, including alleged spoliation of evidence); *Pooler v. United States*, 787 F.2d 868, 870-71 (3d Cir. 1986) (discretion in decision on how to use informants), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50 (2013).

19 of Jones' Opening Brief), where the spoliator neglected to follow relevant procedures for the preservation of missing video footage and photographs.

Moreover, review of the record demonstrates that the FBI complied with agency protocol and made reasonable investigatory decisions. Expert testimony from Special Agent John Fitzer showed that the FBI properly followed agency procedure. *See* ECF No. 139-2 at 9-20; ECF No. 144-3 at 9-10, 18-20.[8] Agent Ashdown testified that everything on-scene pointed to a suicide; there was nothing inconsistent with what he had been told of the events and what he saw at the scene. ECF No. 118 at 603-04, 617-21, 644-49 (JONES0008803 at 8924-25, 8938-42, 8965-70); ECF No. 77-1 at 157-60; ECF No. 128-3 at 7 (JONES0038265) (sealed). Mr. Fitzer confirmed the reasonableness of Agent Ashdown's conclusion. *See* ECF No. 139-2 at 9-10, 14-20; ECF No. 144-3 at 28-29. Indeed, Mr. Fitzer testified that Agent Ashdown would not have had probable cause to search Officer Norton or his car. ECF No. 139-2 at 18-19. Neither Officer Norton nor his gun appeared bloodied. *See* ECF No. 113-2 at 2 (JONES0015112) (sealed); JONES0015112; ECF No. 118 at 697 (JONES0008803 at 9018); JONES0009018. The FBI nevertheless documented the scene, including blood

[8] Mr. Fitzer was an FBI Supervisory Senior Resident Agent in Oklahoma. ECF No. 139-2 at 1. He had been with the FBI since 1995, and began working in Indian Country in 1998. *Id.* Mr. Fitzer also had served as the Senior Team Leader for the FBI's Oklahoma City Evidence Response Team, overseeing all FBI crime scene investigations in Oklahoma—more than a thousand in his career. *See id.* at 1-2. He investigated hundreds of crimes in Indian Country, including officer-involved shootings. *Id.* at 2. Mr. Fitzer is also an enrolled member of the Choctaw Nation of Oklahoma. *See* ECF No. 144-3 at 29-30.

spatter it found.[9] *See supra* pp. 6-7; *see also, e.g.,* ECF No. 127-2 at 17-20, 50-52 (JONES0038124-27, 38157-59); *but see* ECF No. 118 at 643-44 (JONES0008803 at 8964-65). There is no support for Jones' suggestion that the FBI acted contrary to basic investigatory practices.[10]

3. The federal government's jurisdiction over the investigation did not provide it with control over the evidence for spoliation purposes.

Jones contends that the mere fact that the FBI had jurisdiction over the investigation provided it with the "legal right to control or obtain" evidence, and that this right in turn made *uncollected* evidence within the FBI's "control" for spoliation purposes. Opening Br. at 17. Jones cites two CFC decisions for this proposition. *See Chapman*, 113 Fed. Cl. at 610 and *K-Con Bldg. Sys., Inc. v. United States*, 106 Fed. Cl. 652, 664 (2012)). Neither case supports Jones' conclusion.

In *Chapman*, the CFC held that a contractor had control over its employees' emails held on a server that was maintained by a third party at the behest of the contractor. *Chapman*, 113 Fed. Cl. at 610-12. The court held that "[p]hysical possession is not necessary for a party to have control over evidence;" instead, a "legal

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[9] Mr. Fitzer determined that further blood spatter analysis would not have added anything valuable to the investigation. *See* ECF No. 139-2 at 19.

[10] Jones has nowhere alleged that the FBI conspired in bad faith not to collect evidence. *See generally* Opening Br.; *see also Jones Fed Cl. II*, 146 Fed. Cl. at 741-42. Even if Jones had made such an allegation, the CFC correctly found that there is no evidence of such a conspiracy in this case. *Id.*

right to control or obtain is sufficient." *Id.* (internal quotation omitted). In *K-Con*, the CFC similarly held that the government had control over documents that a non-government employee had physically removed from a government office and then unilaterally discarded. *K-Con Bldg. Sys.*, 106 Fed. Cl. at 657, 664-65. In both cases, the CFC rejected the spoliators' arguments that they should not be held liable for the loss of the evidence because they were not in physical possession of the evidence that third parties had destroyed. Instead, it was enough that the spoliators had the "legal right to control or obtain" the evidence. *Chapman*, 113 Fed. Cl. at 610; *K-Con Bldg. Sys.*, 106 Fed. Cl. at 657, 664-65.

The present case is wholly different. In *Chapman*, the contractor's e-mails were necessarily under its control, even if they were stored on off-site, because they were the contractor's; in *K-Con*, the documents were under the government's control because they were the government's and had been stored in a government office. Here, however, the evidence was not owned by the FBI in the first instance. Indeed, it never collected this evidence in the first place, so it was never under the FBI's "control" to begin with.

Moreover, in both *Chapman* and *K-Con*, the parties were involved in litigation at the time the evidence was destroyed and the spoliator knew that the evidence could be relevant to that litigation. *Chapman*, 113 Fed. Cl. at 611-12; *K-Con*, 106 Fed. Cl. at 655-58. The spoliators were therefore under an "affirmative duty to preserve" the documents "at the time they were destroyed." *K-Con*, 106 Fed. Cl. at 664-65. Here, by

contrast, the government was under no affirmative obligation to collect the evidence. *See supra* pp. 22-27. The purported "evidence" that Jones alleges was spoliated was in fact not evidence at all because the FBI did not determine that it was relevant to the investigation into Mr. Murray's death. *See Micron*, 645 F.3d at 1320 (evidence must be relevant to litigation). Moreover, when the FBI was at the scene and able to collect evidence, future civil litigation over the manner of Mr. Murray's death was not reasonably foreseeable. *Id.* (litigation must be reasonably foreseeable); *cf. Jones Dt. Ct. Spoliation*, 2014 WL 909569, at *6 (explaining that Detective Norton only learned of the litigation in April 2008, after he received a notice from Jones).[11] The ability of a spoliator to obtain from a third-party and thereby preserve information that it knows is relevant to ongoing litigation is substantively different from the ability of the FBI to obtain evidence in the course of a criminal investigation.[12]

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[11] The fact that future litigation was unforeseeable at the time provides an independent reason to find that the FBI did not spoliate evidence by failing to collect it at the crime scene. *Micron*, 645 F.3d at 1320.

[12] Jones also cites *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). Opening Br. at 17. *Silvestri* is unlike this case in every respect. Silvestri was injured in an accident while driving his landlady's car, and claimed that he suffered greater injuries due to faulty air bags in the car. 271 F.3d at 585-86. After the accident, however, Silvestri failed to notify the defendant of the potential suit and failed to preserve the car. *Id.* at 586-87. The car was sold and repaired before the defendant could inspect it, *id.*, destroying what the court referred to as "the sole piece of evidence" in the case, *id.* at 585. On the basis of Silvestri's spoliation, the district court dismissed the case, and the Fourth Circuit affirmed. 271 F.3d at 589-92.

4. Jones' other arguments fail.

This Court should reject Jones' remaining scattershot arguments. Jones suggests that because the Utah district court held that the United States was "in charge of documenting the physical evidence for the investigation," *Jones Dist. Ct. Spoliation*, 2014 WL 909569, at *8, it follows that the FBI had a duty to collect and preserve evidence at the crime scene. Opening Br. at 17. But, as explained above at pp. 22-29, the fact that the FBI had jurisdiction over the investigation did not impose upon it an affirmative duty to collect any evidence.

Jones also alleges that Officer Norton was "allowed to roam through the crime scene," "unmonitored and unaccompanied." Opening Br. at 24. The FBI cannot be held responsible for any actions that occurred before Agent Ashdown arrived on the scene. Agent Ashdown arrived sometime after the shooting, when Mr. Murray was being transported to a hospital. *See* ECF No. 77, ¶ 24. Once Agent Ashdown arrived and the FBI's jurisdiction was established, there is no indication that federal agents acted unreasonably in deciding not to detain Officer Norton. *See supra* pp. 6-7, 26-27.

Jones also contends that the government exercised control over Mr. Murray's body because the FBI requested an autopsy. Opening Br. at 18-19. Jones' contention fails at the outset, since the state medical examiner disregarded the FBI's request. The record shows that although the FBI requested that the state medical examiner perform an autopsy of the body, it did not have authority to order that such an autopsy be conducted. Both of the parties' experts testified that the state medical

examiner was entirely "responsible for preservation and maintenance of any evidence as received" and had exclusive authority decide what type of autopsy to perform. *See* ECF No. 144-1 at 16-17, 22-25; ECF No. 103-1 at 66-67 (JONES0008174-75) (sealed); ECF No. 118 at 567-68 (JONES8803 at 8888-89); *see also* UTAH CODE ANN. § 26-4-24(1).

The CFC separately held that the Utah officers' mishandling of Mr. Murray's body in the hospital and mortuary, while grossly inappropriate, could not constitute spoliation because (aside from the fact that the government did not control or possess Mr. Murray's body) the mishandling of the body did not affect evidence relevant to Jones' claims. *Jones Fed. Cl. II*, 146 Fed. Cl. at 737. For example, that mishandling did not affect the "observable characteristics of the wound" or subsequent toxicology tests. *Id.*; *see supra* pp. 8 n. 2. This finding provides an independent basis to affirm the CFC's ruling that there was no spoliation of evidence that could have been obtained from Mr. Murray's body.

* * * *

In sum, the United States did not spoliate evidence by failing to collect it. To rule otherwise would depart from well-established case law.

C. The CFC did not abuse its discretion when it declined to impose dispositive sanctions against the United States for its spoliation of the Hi-Point .380.

Jones argues that the CFC should have either entered default judgment or imposed every possible adverse evidentiary inference against the United States for its

spoliation of the Hi-Point .380. Opening Br. at 18, 20-24. Jones suggests that these dispositive sanctions were warranted to eliminate the harm she suffered and to deter the FBI from spoliating evidence. *See* Opening Br. at 20-24. The CFC, however, did not abuse its discretion when it only sanctioned the government by prohibiting it from presenting facts relating to the gun in support of its argument that Mr. Murray shot himself. The sanction was properly narrowly tailored, and Jones failed to establish by *any* evidence (let alone clear and convincing evidence) that the spoliation was committed in bad faith or that she suffered any prejudice. *See Micron*, 645 F.3d at 1328-29. Any greater sanction would be overly broad and contrary to law.

1. The government did not act in bad faith when it disposed of the Hi-Point .380.

Bad faith exists where the spoliating party intended to seek an advantage and impair the ability of the non-spoliating party to litigate. *See Micron*, 645 F.3d at 1326. The CFC correctly found that Jones presented no evidence that the FBI acted in bad faith when it disposed of the Hi-Point .380. Jones does not argue in her opening brief that the CFC clearly erred in making this factual finding and therefore any such argument is waived. *See SmithKline*, 439 F.3d at 1319.

In any event, the record fully supports the CFC's factual finding that the government did not act in bad faith when it disposed of the Hi-Point .380. The gun was destroyed pursuant to routine forfeiture proceedings. *See supra* pp. 9-11. There is no evidence that the government intended to destroy the gun to influence the

outcome of any litigation. Jones had not yet filed suit in the Utah district court when the gun was destroyed and had not provided any notice of claims to the United States. Nor did she ask the Marshal Service to preserve the gun after the agency gave public notice of its forfeiture. While it is true that the FBI's case closing memorandum suggests that the government was on notice that there might be civil litigation against state and local officers at the time the gun was turned over to the Marshal Service, *see* ECF No. 118-3 at 3-4 (JONES0010901-02), ECF No. 77, ¶¶ 34, 42, that alone does not show that the FBI intended to seek an advantage or impair Jones' ability to litigate. Indeed, in that same memorandum, the FBI documented the fact that it was turning evidence over to the Vernal Police Department so that it would be available in that litigation. At most, as the CFC held, the FBI acted negligently when it failed to disclose the Hi-Point .380's potential use as evidence in a future civil proceeding to the judge who ordered its disposal. *See Jones Fed. Cl. II*, 146 Fed. Cl. at 742. Negligence, however, is not bad faith and is not sufficient to warrant the imposition of the dispositive sanctions sought by Jones. *See Micron*, 645 F.3d at 1328-29.

2. Jones has not demonstrated any prejudice.

A party must show by clear and convincing evidence that spoliation of evidence materially affected her substantial rights and prejudiced the presentation of her case; any remedy must be tailored to address the degree of prejudice she suffered. *Micron*, 645 F.3d at 1328-29. The CFC declined to apply case dispositive sanctions here because Jones did not show prejudice commensurate with such a remedy. *Jones*

Fed. Cl. II, 146 Fed. Cl. at 742. Jones contends that she was in fact so prejudiced by the disposal of the Hi-Point .380 that it was an abuse of discretion for the CFC to do anything other than enter default judgment or impose every possible adverse evidentiary inference against the United States (making judgment in Jones' favor inevitable). Opening Br. at 21-24.

Jones asserts that the Hi-Point .380 was one of the most important pieces of evidence in this case. Opening Br. at 21. She fails, however, to explain why the gun itself was so important. She also fails to show, by clear and convincing evidence, that her inability to conduct further tests on the gun prejudiced her ability to present her case. The record in fact shows that testing of the Hi-Point .380 would have revealed little useful information. There was no need to test the gun to determine whether it was operational and had been fired, because a jammed casing was found in the gun and other .380 casings were found nearby. ECF No. 118 at 613-14, 648-49 (JONES0008803 at 8934-35, 8969-70); ECF No. 139-2 at 13. The casings could not have come from Officer Norton's .40-caliber gun. ECF No. 77, ¶¶ 29-33; ECF No. 118 at 615-16 (JONES0008803 at 8936-37); ECF No. 127-3 at 8-9 (JONES0038173-74) (.380 casing); ECF No. 127-3 at 27, 30 (JONES0038192, 38195) (.40-caliber casing). The record also shows that fingerprint testing would not have been useful, as fingerprints do not transfer well to gun surfaces. ECF No. 139-2 at 17-18; ECF No. 144-3 at 23-24.

While testing the gun for blowback (blood spatter or tissue) would have yielded some additional information, the lack of that information did not prejudice Jones because (as she acknowledges in her opening brief at p. 4) the only existing evidence consists of photos that show that the gun was free of blowback. ECF No. 127-2 at 50-52 (JONES0038157-59). But the fact that the gun was free of blowback has little bearing on Mr. Murray's cause of death, because blowback does not occur after all contact shootings. ECF No. 139-1 at 8-11; ECF No. 144-1 at 18-20; ECF No. 118 at 551 (JONES0008803 at 8872); ECF No. 139-2 at 12-14, 18. In light of the foregoing, the CFC did not clearly err when it found that Jones failed to show serious prejudice resulting from her inability to test the Hi-Point .380.

Jones alleges that she was harmed cumulatively because "almost all of the good evidence" was spoliated. *See* Opening Br. at 21. But only the Hi-Point .380 was spoliated, and there remained significant "other evidence, such as scene photographs, witness testimony, and medical examination results." *Jones Fed. Cl. II*, 146 Fed. Cl. at 742; *see supra* pp. 5-9.[13] That evidence just did not support Jones' claims. The absence of the gun accordingly caused no prejudice of significance to Jones.

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[13] The FBI's decision not to collect evidence did not amount to spoliation. *See supra* pp. 20-31. If this Court nevertheless finds that the government spoliated evidence by deciding not to collect it, it should remand to the CFC for a determination of whether such spoliation occurred in bad faith, whether there was prejudice to Jones, and whether sanctions are appropriate. *See Micron*, 645 F.3d at 1327 (remanding to the lower court to make the factual findings necessary to determine whether sanctions were appropriate).

3. The sanction was appropriately narrow.

Jones suggests that the CFC lacked the discretion to impose anything other than a case dispositive sanction. Opening Br. at 21-24. But courts have broad discretion to fashion spoliation sanctions. *See supra* pp. 19-20. When doing so, courts must "select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim" to avoid "substantial unfairness to the opposing party." *Micron*, 645 F.3d at 1329 (internal quotation omitted).

The CFC did so here. The CFC found that the government's spoliation of the Hi-Point .380 was "not sufficiently culpable" nor prejudicial to merit application of the extreme sanctions requested by Jones. *Jones Fed. Cl. II*, 146 Fed. Cl. at 742-43. Default judgment would have been inappropriate where the United States did not act in bad faith. Even the imposition of the so-called lesser adverse evidentiary inferences requested by Jones would have created substantial unfairness. Together, they would necessitate judgment against the United States, *see* Opening Br. at 21-24, when in fact testing of the gun for blowback could have supported the United States' argument if such testing showed (contrary to the photos) there was in fact blowback on the gun (because the presence of blowback would have indicated that the gun was used to shoot Mr. Murray). *See* ECF No. 139-1 at 11; ECF No. 144-1 at 18-20; ECF No. 139-2 at 13, 18. Rather than rebalancing the equities, an inference dictating that all further

investigation would have supported Jones' theory would tip the scales entirely in Jones' favor, tantamount to default judgment.

The narrow sanction applied by the CFC, in contrast, appropriately balanced the fact that Jones was unable to obtain additional testing of the Hi-Point .380 with the fact that such testing would not have yielded much relevant additional information. *Jones Fed. Cl. II*, 146 Fed. Cl. at 743. The CFC did not abuse its discretion when it declined to apply case dispositive sanctions against the United States for its spoliation of the gun.

II. The CFC correctly granted summary judgment to the United States.

This Court previously recognized that it was possible that spoliation sanctions (if applied) would change the evidentiary landscape in this case and require new consideration of Jones' claims. This Court accordingly directed the CFC to determine whether spoliation occurred, whether sanctions should be applied, and how any such sanctions might have changed the evidentiary landscape. *Jones Fed. Cir I.*, 846 F.3d at 1363-64. If sanctions would "not change the evidentiary landscape for particular issues," that were previously decided by the Utah district court, then the "CFC [could] reconsider the application of issue preclusion." *Id.*[14]

[14] In contending that the CFC failed to comply with this Court's mandate, Jones ignores the language stating that the CFC could reconsider the application of issue preclusion if its spoliation sanctions did not change the evidentiary landscape. *See* Opening Br. at 12-15.

Complying with this Court's direction on remand, the CFC determined that the sanction did "not change[] the evidentiary landscape for the central issues relevant in this case decided by the [Utah] district court, such as the cause of Mr. Murray's death." *Jones Fed. Cl. III*, 149 Fed. Cl. at 349. Key factual questions resolved by the Utah district court were identical to those presented below, and Jones had a full and fair opportunity to litigate these factual issues in the Utah case. Thus, Jones is precluded from relitigating them in this suit. Jones nevertheless asserts that the government's inability to rely on the Hi-Point .380 meant that the CFC should have considered anew her central allegation that Officer Norton shot Mr. Murray. Opening Br. 12-15. This Court should reject Jones' assertions and affirm the judgment of the CFC.[15]

A. Legal Standards and Standard of Review

A court should grant summary judgment where no material fact is in genuine dispute and the law entitles the moving party to judgment. *See* Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A defendant can show that no material fact is genuinely in dispute by showing that the plaintiff lacks sufficient evidence to prove an essential element of her claim. *See Celotex Corp. v.*

[15] Aside from her contention that Officer Norton killed Mr. Murray, Jones nowhere mentions (let alone challenges) the CFC's rulings on the remainder of the numerous wrongs that she previously alleged. *See, e.g., Jones Fed. Cl. III*, 149 Fed. Cl. at 348-62. Any such argument by Jones in her reply brief should be considered waived. *See SmithKline Beecham Corp.*, 439 F.3d at 1319.

Catrett, 477 U.S. 317, 322-23 (1986). The grant of summary judgment is a question of law that is reviewed de novo. *See Hoopa Valley Tribe v. United States*, 597 F.3d 1278, 1283 (Fed. Cir. 2010).

The doctrine of issue preclusion provides that "once 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, 1232 (10th Cir. 2004) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). To invoke the doctrine, a party must show that: (1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action has been finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *See Jones Fed. Cir. I*, 846 F.3d at 1361 n.7 (holding that the "elements of issue preclusion are essentially the same under Federal Circuit and Tenth Circuit law").

Jones has conceded that the second and third factors are met here: she agrees that the Utah district court action has been finally adjudicated on the merits and that she was the party in the prior adjudication. *Jones Fed. Cir. I*, 846 F.3d at 1362. Thus, only the first and fourth factors are in dispute. Whether issue preclusion applies is a

question of law that is reviewed de novo. *See United States v. Gallardo-Mendez*, 150 F.3d 1240, 1242 (10th Cir. 1998).

B. Jones cannot show that Officer Norton shot Mr. Murray.

The doctrine of issue preclusion prevents Jones from proving an essential element of her case—that Officer Norton killed Mr. Murray. It is undisputed that Mr. Murray died from a close-contact gunshot wound. *See* ECF No. 150-4 at 1. Proving murder (and Jones' other alleged wrongs) therefore requires proof that Officer Norton shot Mr. Murray at very close range, in turn requiring proof that Officer Norton was next to Mr. Murray when he was shot. The Utah district court previously decided this factual question and found that Officer Norton was not anywhere near Mr. Murray when he was shot. The Hi-Point .380 (and any evidence coming from the gun) did not factor into that ruling; therefore the CFC's sanction did not change the evidentiary landscape with respect to the CFC's resolution of this factual issue. Jones also had a full and fair opportunity to litigate the issue in the Utah district court. Jones is therefore precluded from relitigating this issue here.

The CFC's sanction "reduce[d] the evidence available to the United States to argue that Mr. Murray shot himself, but it [did] not augment the evidence that [was] available to" Jones. *Jones Fed. Cl. III*, 149 Fed. Cl. at 353-54; *Jones Fed. Cl. II*, 146 Fed. Cl. at 742-43. The evidence available to Jones to prove Officer Norton's location was therefore the same in both the CFC and the Utah district court. The CFC accordingly held:

> Finding that federal agents spoliated the .380 handgun has not changed the evidentiary landscape for the central issues relevant in this case decided by the district court, such as the cause of Mr. Murray's death. The district court's decision of these issues precludes relitigating them in this Court.

Jones Fed. Cl. III, 149 Fed. Cl. at 349.

Jones contends that the sanction changed the evidentiary landscape in the CFC because the gun was "one of the two most important pieces of physical evidence in this case." Opening Br. at 13-14. Jones appears to contend that a mere reduction in the evidence available to the United States necessarily changed the evidentiary landscape. *See generally* Opening Br. at 9, 12-15. This position, however, "is inconsistent with how courts typically use the term—to distinguish between harmless and prejudicial error affecting proof of a particular issue." *Jones Fed. Cl. III*, 149 Fed. Cl. at 353 & n.6 (citing cases). The question whether the evidentiary landscape has changed turns on whether the evidence at issue would have affected the resolution of any particular question.

The Utah district court finding did not depend on the Hi-Point .380. In the Utah district court, Jones argued that the officers had violated Mr. Murray's Fourth Amendment right against unreasonable seizure by shooting Mr. Murray. The district court denied Jones' claim because there was insufficient evidence for a reasonable jury to conclude that any officers (including Officer Norton) were ever closer than 100 yards from Mr. Murray at the time he was shot. *Jones Dist. Ct.*, 3 F. Supp. 3d at 1186-93, 1188, 1191 ("The officers were one to two hundred yards away from Mr. Murray

and did not have him surrounded. . . . Detective Norton was more than 100 yards away when Mr. Murray was shot."). The court continued "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; *see, e.g.,* ECF No. 113-3 at 216 (JONES0018352) (sealed); ECF No. 105-1 at 115-31 (JONES0012176-79 at 12258-74) (sealed); *see supra* pp. 5-6.

To reach this conclusion, the Utah district court relied on testimony from those on scene, physical evidence collected on scene, and Jones' inability to point to any factual evidence to support her theory. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1191. The court did not consider the Hi-Point .380 or any evidence deriving from the gun. Officer Norton's motion for summary judgment (which the Utah district court granted) did not even list evidence from the Hi-Point .380 among its undisputed material facts. *See* ECF No. 150-9 at 5-11.

The Tenth Circuit affirmed the district court's findings, holding that "this extensive record could only lead a reasonable jury to conclude that no other person, including Detective Norton, was within 100 yards of Murray when he was shot." *Jones 10th Cir.*, 809 F.3d at 574-75. In addition to Officer Norton's testimony, "Deputy Byron testified that he heard crackling and saw Murray fall to the ground immediately after seeing Detective Norton on a hill at a distance from Murray." *Id.* at 575. And "Agent Ashdown found two shell casings from Norton's gun 113 yards away from where Murray fell, and observed that Norton had no blood on him when he was seen

immediately after Murray was shot." *Id.*[16] Finally, Jones "fail[ed] to present any evidence that anyone else got close to Murray." *Id.* Like the district court, the Tenth Circuit did not consider the Hi-Point .380 when evaluating the question of Officer Norton's location. *Id.* at 574-75.

Because the Hi-Point .380 was not considered by the district court in determining Officer Norton's location, the inability of the government to rely upon it in the CFC could not change the evidentiary landscape on that issue. It was therefore appropriate for the CFC to consider whether the doctrine of issue preclusion prevented Jones from relitigating this question. This involved consideration of whether the issue resolved in the prior litigation and the issue presented here were identical. A court may decide a variety of issues that pave the way for its ultimate resolution of a case and any of those questions may constrain a party in future litigation. *See, e.g., Fenwick v. Pudimott*, 778 F.3d 133, 138 (D.C. Cir. 2015) (finding that a different court's earlier resolution of an ultimate question included resolution of predicate questions that constrained the litigant's position). For a factual question to be considered "identical," the issue in the latter case need only address the same events. *See Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F. Supp. 499, 518 n.66a (E.D. Mich. 1974), *judgment aff'd*, 519 F.2d 119 (6th Cir. 1975). The question of Officer

[16] Jones argues that Officer Norton's testimony was self-serving, but ignores that other evidence corroborated Officer Norton's testimony. *See* Opening Br. at 3-4, 12, 14, 16.

Norton's location meets this standard, because it involved the same events surrounding the shooting of Mr. Murray.

Jones also had a full and fair opportunity to litigate this issue in the Utah district court, as documented in that court's decision. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1190-92. Jones complains that Officer Norton has never testified (Opening Br. at 13), but Jones in fact deposed Officer Norton and the other officers that were on-scene. *See Jones Dist. Ct.*, 3 F. Supp. 3d at 1180-81 n.16-20. Testimony in these depositions was given under penalty of perjury. *See, e.g.,* ECF No. 106-2 at 210 (JONES0015119 at 15328) (sealed); ECF No. 106-1 at 797 (JONES0014890 at 15032) (sealed). Jones also presented argument in opposition to the summary judgment motion upon which the Utah district court ruled. *See* ECF No. 150-8 at 8-12 (pages v-ix). The evidence available to Jones in arguing in Utah district court that Officer Norton was next to Mr. Murray is no different than that which would be available to her in the CFC.

Issue preclusion "is designed to prevent needless relitigation and bring about some finality to litigation." *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009) (footnote omitted). In light of the foregoing, the CFC correctly held that Jones was precluded from relitigating Officer Norton's location. Mr. Murray was shot at close range, and it would have been impossible for Officer Norton to shoot Mr. Murray at close range unless he was next to Mr. Murray. Because Jones lacks any evidence supporting her theory that Officer Norton was next to Mr. Murray, Jones "lacks

sufficient evidence" to prove that Officer Norton shot Mr. Murray and to survive summary judgment. *See Celotex Corp.*, 477 U.S. at 317, 322-23.

CONCLUSION

For the foregoing reasons, this Court should affirm the CFC's entry of judgment in favor of the United States.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Circuit Rule 32(a). Excepting the portions of the brief described in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), the brief contains 11,985 words.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced font.

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CERTIFICATE OF SERVICE

I certify that on February 16, 2021, I caused the foregoing brief to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the CM/ECF system, with service to all parties through that system.

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