No. 20-2182

IN THE 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

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
Plaintiff

v.

UNITED STATES,
Defendant-Appellee

On Appeal from the United States Court of Federal Claims
in Case No. 1:13-cv-0227, Judge Richard A. Hertling

PLAINTIFFS-APPELLANTS' CORRECTED PRINCIPAL BRIEF

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Oral Argument Requested.

CERTIFICATE OF INTEREST

Counsel for Plaintiffs-Appellants certifies the following:

1. The full name of every party or amicus represented by me is:

   Debra Jones, for herself and as personal representative of the estate of Todd R. Murray (deceased) and on behalf of the heirs of Todd R. Murray; Arden C. Post.

2. The name of the real parties in interest represented by me are the same as described in 1 above.

3. There exist no parent corporations or publicly held companies having any interest in the parties represented by me.

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me in the trial court or agency or are expected to appear in this court are:

   Patterson Earnhart Real Bird and Wilson and its attorneys Jeffrey S. Rasmussen (Attorney of Record), Frances C. Bassett and Katie Frayler

   Fredericks Peebles & Morgan LLP and Fredericks Peebles & Patterson LLP, through its attorneys Jeffrey S. Rasmussen, Frances C. Bassett, Katie Frayler, Matthew J. Kelly, Sandra Denton, and Todd Gravelle

5. There are no related cases known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

6. There are no organizational victims and bankruptcy cases as required under Fed. R. App. P. 26.1(b) and (c).

Dated: April 21, 2021

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen

cc: Thekla Hansen-Young, Counsel for Defendant-Appellee

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STATEMENT OF RELATED CASES

This appeal is directly related to and Appellant asserts that it presents one of the exact same issues as was decided by the mandate of this Court in *Jones v. United States*, 846 F.3d. 1343 (Fed. Cir. 2017). It is also related to *Jones v. Norton*, No. 2:09-cv-0730-TC-BCW (D. Utah), *aff'd* 809 F.3d 564 (10th Cir. 2015).

JURISDICTIONAL STATEMENT

Jurisdiction in the U.S. Court of Federal Claims was invoked under 28 U.S.C. §§ 1491(a)(1) and 1505.

Jurisdiction in the U.S. Court of Appeals for the Federal Circuit is invoked pursuant to 28 U.S.C. §1295(a)(3). A final judgment was entered below on July 8, 2020, granting a motion to for summary judgment. Appellants' Notice of Appeal was timely filed on August 20, 2020. *See* Fed. R. App. P. 4(a)(1)(B). This appeal is from a final judgment disposing of all Appellants' claims below.

STATEMENT OF THE ISSUES

1) After the Court of Federal Claims (CFC) held that spoliation sanctions against the United States were required, and that the United States could not rely upon a gun that the United States had intentionally destroyed without prior testing, did the CFC violate this Court's mandate and the instructions from case 15-5148 and/or the law of the case when the CFC issued an order for summary judgment based upon findings and conclusions of the U.S. Court for the District of Utah, including

that Court's conclusion that Mr. Murray had shot himself with the intentionally destroyed gun?

2) Did the CFC err when it held that because the United States failed to collect evidence, the United States was not in "control" of that evidence for purposes of spoliation sanctions?

3) Did the CFC err in its decision to not impose spoliation regarding the numerous other items that the United States failed to collect or destroyed, and when it refused to hold the United States liable for the death of Mr. Murray or impose other sanctions?

4) Did the CFC misinterpret the treaty between the Tribe and the United States?

5) Did the CFC err in its application of the burden of proof and/or persuasion on a motion for summary judgment?

STATEMENT OF THE CASE

Todd Murray was a 21-year-old member of the Ute Indian Tribe on April 1, 2007. He died that day in an "officer involved shooting." The officer involved, Vance Norton, was an off-duty Vernal city police officer on April 1, 2007. All of Vernal is outside the Ute Indian Reservation, and the shooting site was about 40 miles from Vernal and about 25 miles inside the Ute Indian Reservation. Norton was not cross-deputized to provide law enforcement to either the United States or the Ute Indian Tribe on April 1, 2007. Appx24.

Mr. Murray had been a passenger in a car and the driver of the car had committed traffic crimes that day. *Id.* Mr. Murray had not committed, and was not suspected of having committed, any crime that day. He had only one prior minor and closed criminal conviction, and there were no warrants for his arrest from any jurisdiction. ECF 121-3 at 44-46.

Norton had not participated in the chase of the vehicle in which Mr. Murray was a passenger. The primary officer giving chase was Utah Highway Patrol Officer Swenson. After the car in which Mr. Murray was a passenger had stopped, Mr. Murray and the driver both got out. After briefly hesitating, the driver ran to the west and Mr. Murray ran to the southeast. By the time Norton arrived on the scene, Swenson had arrested the driver. Norton was in his private vehicle and was not in uniform. Norton decided to draw his weapon and go out onto non-public Ute tribal land, to attempt to capture Mr. Murray. Appx24.

Norton quickly found Mr. Murray. Norton admitted that, with weapon drawn, he ordered Mr. Murray to lie down on the ground. *Id.* Less than two minutes later, Mr. Murray had been fatally wounded. How Mr. Murray was fatally wounded is unknown because the United States failed to collect or destroyed all of the evidence that would have been dispositive and nearly all of the other strong evidence.

Norton is the only living witness to the shooting. *Id.* (citing ECF 77-1 at 251). Norton claims that Mr. Murray shot at him, and that Norton returned fire but did not

hit Mr. Murray. Norton claims that Mr. Murray then shot himself. *Id.* Other than Norton's own self-servicing statement, the remaining evidence supports that Norton simply shot Mr. Murray and then lied about it; but as noted the best pieces of evidence, the ones that would have proved that Norton killed Mr. Murray were not collected or were destroyed, as will be discussed in detail below.

Because the death was of a tribal member on an Indian Reservation, the United States had, and acknowledged, legal responsibility for the investigation of the officer-involved shooting. Appx25.

Norton claimed that Murray had shot himself with a .380 caliber handgun. But because the United States intentionally spoliated that gun after it knew there was civil litigation pending, the United States is barred from using the gun as evidence for summary judgment purposes. Appx21.

The .380 handgun was lying about 4 feet away from Mr. Murray's body, but the United States' own expert, Mr. Matty, noted studies show that in 90% of suicides, a gun used in a suicide is touching or within one foot of the deceased. Appx532 (Matty Dep. at 54).

Pictures of the gun that Norton claimed Mr. Murray had used do not visibly show any "blowback" blood or tissue. United States expert Matty acknowledged that police officers should examine the alleged homicide weapon for blood and tissue and that in 3/4 of the cases of close contact wounds, the weapon used would have

blood or tissue. Appx531 (Matty Dep. at 44).

Mr. Murray is right-handed. Pictures of his left-hand show that it did not have blood or tissue on it. Appx25. The vast majority of right-handed suicide victims end up with blowback blood or tissue on their right hand. Part of Mr. Murray's right hand was solidly covered with blood, but there was no evidence of blowback on his left hand, *id.*, and it is unlikely that Mr. Murray could have shot himself on the upper left side of his head with his right hand. Appx27 (The FBI agent attempted to position a gun in his right hand to recreate the entry location and angle and found that he could not replicate it.).

The United States took possession of that gun on April 1, 2007. It then failed to test the gun for blood or tissue, failed to test the gun to see if it was in working order, failed to test the gun and two shells found near the gun, and a spent shell found in the gun to see if they match the gun, failed to test the gun to see if it had fingerprints of Norton, of any other officers, or of Murray.

Then the United States intentionally destroyed the gun. Appx26, 29.

Another primary piece of evidence that was at the scene on April 1, 2007, was the gun that Norton admitted he had fired at Mr. Murray. The United States' own expert, Mr. Fitzer, admitted that if that gun had fired the fatal shot, it would be very likely that it would have had blowback blood or tissue on it. Appx525-26 (Fitzer Dep. at 140-141). He also admitted that the uncollected or destroyed evidence was

evidence, *id.*, and that some of it would have been very substantial evidence. Appx514 (Fitzer Dep. at 69) (admitting that if the FBI had tested Norton's gun and it had shown Murray's blood on it that "would lead him to believe that Norton was not telling the truth."). He further admits that forensic testing of the murder weapon, more likely than not, would have revealed Todd Murray's blood or tissue on or inside the gun. Appx515-16, 525 (Fitzer Dep. at 105-106, 140). He similarly admitted that if Norton was the shooter, forensic testing of Norton's person and clothing would have, much more likely than not, revealed the presence of Todd Murray's blood or tissue. *Id.* He admitted that if Mr. Murray's blood or tissue had been found on Norton, his clothing, or his gun, then Norton's story was false, and Norton had very likely killed Mr. Murray. Appx532, 510-14 (Fitzer Dep. at 65-69). Fitzer also admitted that if the gun allegedly used to shoot Mr. Murray was not functional or had not fired the casings, then Mr. Murray had not shot himself. Appx515-16, 525 (Fitzer Dep. at 105-106, 140). On the other hand, if Norton's story were true, the gun Norton shot that day would not have had Mr. Murray's blood or tissue on it. The United States, as the investigative agency, chose not to take that gun into evidence, or to test the gun to see if it had Mr. Murray's blood or tissue on it. Appx26.

The United States also allowed Norton to roam through the crime scene unattended, to return without escort to his private vehicle, and to talk to his

friends/fellow officers who were potential witnesses. Appx731, 737-742 (Norton Dep. 164:14-16; 170-175).

After Mr. Murray died, officers inexplicably disrobed Mr. Murray and took multiple dehumanizing pictures of his naked body. Appx25. One officer inexplicably and sickeningly put his finger into the entrance wound hole in Mr. Murray's head. *Id.* The United States ordered an autopsy, but it did not ensure that its order was carried out, and in fact, no autopsy was completed. *Id.*

Numerous vials of blood were taken from Mr. Murray's body. No chain of custody was maintained for any of those vials. To obtain one of the vials, a mortuary employee, at police direction, cut Mr. Murray's neck open and removed blood. No one knows, or at least no one will admit, why that was done. Those vials of Mr. Murray's blood never even made it to an evidence room. Appx25, Appx491 (Arden Dep., citing prior report).

Soon after the shooting, United States FBI Agent Ashdown promised the Murray Family that the United States would conduct a thorough investigation of the crime. But the United States did not conduct any investigation. Appx27. Agent Ashdown subsequently testified that by the time he made those promises to the Murray Family, he had already decided not to conduct an investigation. *Id*.

Procedural History

Plaintiffs previously brought wrongful death and related claims against the state officers in the Utah State Court. The state parties removed that suit to the Federal District Court for the District of Utah. After completion of discovery, the Federal District Court granted summary judgment in favor of the state parties. That decision was based upon a two-part holding.[1] First, the Court decided that because the United States was responsible for the investigation of the shooting, the state parties could not be sanctioned for the spoliation of evidence during the "investigation" of that shooting. Then, and expressly dependent upon the inability to impose spoliation sanctions against the state parties, the District Court held that there was simply not enough evidence from which a jury could reject Norton's self-serving testimony that Mr. Murray shot himself.

The District Court readily concluded that litigation was foreseeable because of the long pattern of litigation between the Tribe/Tribal members and local police regarding the officers' refusal to respect the Reservation boundaries and tribal legal authority. *Jones v. Norton*, 2014 WL 909569, at *7 (D. Utah Mar. 7, 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015). The District Court also found that the United States, not the state officers, had the duty to preserve evidence. *Id.*

[1] After it dismissed the federal claims, the District Court dismissed the remaining claims, which were state common law claims, without prejudice.

While the District Court suit was proceeding, Plaintiffs initiated suit in the Court of Federal Claims against the United States based upon a provision in the Treaty between the Tribe and the United States. The Court of Claims dismissed this suit, holding, *inter alia* and wrongly, that the Utah District Court's summary judgment conclusion was preclusive of the Plaintiffs' claims in this case.[2]

This Court reversed. It correctly explained that the Court of Claims had wrongly relied upon the district court's ultimate conclusion, without first deciding whether to grant the Plaintiffs' request for spoliation sanctions against the United States. This Court held:

> The District Court explained that the local officers could not be liable for several alleged acts of spoliation because the duty to preserve the evidence was not on them, but on the non-party federal officers.

Jones v. United States, 846 F.3d 1343, 1362 (Fed. Cir. 2017). In fact, as noted above, the District Court decision not to impose spoliation sanctions against the state supports, not defeats, spoliation sanctions against the United States. This Court then concluded:

> But for the destruction of the cited evidence, Jones may have shown that Murray was, in fact, shot by Norton.

[2] The Court of Claims' decision was also based upon erroneous decisions of law related to the Treaty provision at issue. The Federal Circuit reversed the Court of Claims on that issue as well.

Id. at 1363. This Court remanded for the CFC to determine whether to impose spoliation sanctions against the United States, and if so, then what spoliation sanctions to impose. And this Court further mandated that if spoliation sanctions changed the evidentiary landscape, the CFC was required to conduct its own independent review of the evidence. It could not rely upon the conclusions, made under a different evidentiary record, in the prior Utah proceeding.

After the matter was remanded, there were numerous delays, not attributable to Judge Hertling.

Once the matter was assigned to Judge Hertling, the Murray Family renewed their motion for spoliation sanctions. In response, the United States made the argument that it had made to this Court but which this Court had rejected—that spoliation sanctions cannot be imposed because the Utah District Court had held that the Murray Family could not prevail on a wrongful death claim before a jury under the evidentiary record in that court.

The United States also asserted that the United States did not reasonably foresee litigation until after the FBI destroyed the .380 handgun around December 2008. The United States based that assertion upon statements under oath by its FBI agents, who implausibly[3] claimed they had not expected litigation until

[3] *See* 2014 WL 909569, at *7 (the District Court in Utah determined, based in part upon the history between the Tribe and the State, that litigation was foreseeable).

after December 2008. Unfortunately for the United States, the Murray Family had located the proverbial needle in a haystack—in the thousands of pages of records in this case, there was an FBI evidence transfer document which proved that the United States actually knew about the litigation in September 2008, and that it understood that the gun and shell casings were evidence in that litigation. That document said "due to an active civil suit involving [redacted] and the VPD [Vernal Police Department] items 1B1-1B4 have been removed from FBI evidence and provided to VPD." Appx29 (citing Appx362). Items 1B1-1B4 were shell casings, but not the gun. Appx.29 at n.8. The FBI still had the gun and chose to have it destroyed, without ever having it tested in any way. It did so with actual knowledge that the gun was evidence in the civil matter.

On January 6, 2020, the Court of Federal Claims issued an order imposing spoliation sanctions. Based upon the facts discussed above, it had no choice but to hold that the United States had spoliated the gun that Norton claimed Mr. Murray had used. But the Court of Claims distinguished that item from all of the other evidence that was not collected or was destroyed. Other than the .380 gun, the Court held that spoliation could not apply to evidence that was not collected, or to the failure to forensically examine and test the evidence that was collected, because the United States does not have a duty to investigate and collect the available evidence of the murder of an Indian on an Indian Reservation. Appx31 (Summarizing that it

had previously "held that the federal agents' discretionary choices not to collect specific pieces of evidence did not constitute spoliation.").

After the CFC issued its spoliation order, the United States moved for summary judgment. The United States' motion was expressly dependent upon the United States' assertion that the spoliation order did not alter the evidence at all, and that therefore the CFC should hold that the Utah District Court order estopped the Murray Family's claim against the United States. The Murray Family responded that the United States' motion was the same argument it had previously made to this Court, and that the United States had then made again in its spoliation motion response, and that the United States' third attempt to obtain a bite of that apple had to be rejected. The Murray Family argued that because the CFC had held that the United States cannot rely upon the spoliated gun, the evidence in the CFC was different from the evidence in the Utah District Court, and that therefore, based upon this Court's ruling on the prior appeal, collateral estoppel could not apply against the Murray Family. Instead, collateral estoppel and the appellate mandate required that the Court deny the United States' motion for summary judgment.

To the Murray Family's great surprise, the CFC granted the United States' motion for summary judgment. The CFC re-adopted the findings of the Utah District Court, holding that Mr. Murray had shot himself with the gun that cannot even be used as evidence—that is not evidence-- in the CFC. The CFC did not explain how

that summary judgment order can be squared with its own order that the United States cannot rely upon that gun.

The Murray Family timely appealed from that order.

SUMMARY OF THE ARGUMENT

Borrowing from the start of a decision by then-Judge Gorsuch's opinion in another case involving the Ute Tribe, "We're beginning to think we have an inkling of Sisyphus's fate. Courts of law exist to resolve disputes so that both sides might move on with their lives." *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1257 (10th Cir. 2016). In that decision, Judge Gorsuch explained the importance of mandates, and of lower courts following the instructions on remand.

That same discussion applies here. Five years have elapsed, but the Murray Family now has to relitigate the exact same primary issue on appeal that they litigated, and won, in this Court five years ago. They now have to convince another panel of this Court that they should prevail on the issue that the Murray Family prevailed on in the prior appeal.

The only difference is that their argument is now much stronger than it was five years ago. On remand after their first appeal the Murray Family prevailed on their motion for spoliation sanctions. They showed that the United States had taken possession of a gun, had known the gun was evidence in pending litigation, and that

the United States then intentionally destroyed that gun. The United States had spoliated the gun, and could not use that gun.

The current appeal also presents one other primary issue: does the United States' wholesale failure to collect and preserve evidence of a potential murder constitute spoliation of evidence. The case law establishes that spoliation sanctions do apply for the failure to collect the evidence and/or the destruction of evidence. The United States' decision to not collect or to not preserve evidence now makes it that no one can ever inspect that evidence and no one can conduct forensic testing that would likely have been dispositive in this matter.

This Court, therefore, must vacate the CFC's summary judgment order and remand with instructions to the CFC, expanding the narrow spoliation order, and that the CFC must then issue orders consistent with this Court's mandates.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the order of summary judgment de novo. *E.g.*, *Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1075 (Fed. Cir. 2005). The application of issue preclusion is also reviewed de novo. *Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1338 (Fed. Cir. 2003), *cert denied*, 540 U.S. 1046. *See also Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 93 (2d Cir. 2005) (issue preclusion is an affirmative defense that may turn either on pure questions of law or on the

application of law to undisputed facts, for which reason it is generally reviewed de novo).

This Court reviews all other questions of law de novo. *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986); *Richard v. United States*, 677 F.3d 1141, 1145 (Fed. Cir. 2012)). That includes the arguments regarding treaty interpretation. The U.S. Supreme Court has made clear that while the court should look first to a treaty's text, it should also consider the larger context that frames the treaty, including "its history, purpose and negotiations," *Richards*, 677 F.3d at 1145, citing *Elk v. United States*, 87 Fed.Cl. 70, 79 (2009) (internal quotes omitted), while bearing in mind that treaties should be construed liberally in favor of the Indians. *Id*. (citing *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465–466 (1995)).

II. THE CFC ORDER GRANTING SUMMARY JUDGMENT IS CONTRARY TO THE APPELLATE COURT MANDATE, AND CONTRARY TO THE LAW OF COLLATERAL ESTOPPEL, AND THEREFORE MUST BE VACATED

In its response brief in the prior appeal in this case, the United States started its "Summary of Argument" as follows:

> "Todd Murray died after he shot himself in the head. . . .The only witnesses to that shooting were state and local police officers involved

> in the pursuit. Those officers [sic][4] testified that Mr. Murray shot himself.

Jones v. United States, Fed. Cir App., Resp. Brief at *6-7. In that appeal, the United States asserted that the CFC could not weigh the evidence for itself, that it was required to conclude that Mr. Murray had shot himself because a court in Utah had reached that conclusion after it had denied any spoliation sanctions against Norton and his friends and colleagues.

The Murray Family disagreed with Defendant's collateral estoppel argument.

This Court agreed with the Murray Family. It held:

> *But for the destruction of the cited evidence, Jones may have shown that Murray was, in fact, shot by Norton.*

Jones v. United States, 846 F.3d 1343, 1363 (Fed. Cir. 2017) (emphasis added)

This Court provided a clear mandate to the CFC.

> 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. (emphasis added). This Court's mandate was a simple and logical "if . . . then" directive.

The CFC simply violated the mandate. It correctly followed the mandate to first determine whether evidentiary spoliations sanctions should apply, and it held

[4] Only one officer testified that Mr. Murray shot himself and only one officer was a witness to the shooting. That officer was Norton, the person that the Court of Appeal, in this case, noted may have been shown to have killed Mr. Murray but for the destruction of evidence. Appx24 (citing ECF 77-1 at 251).

that evidentiary spoliation sanctions were required. It held the United States could not rely upon one of the two most important pieces of physical evidence in this case—the gun that Norton claims Mr. Murray had used to shoot himself. But after it issued the ruling that the Murray Family had satisfied the "if" premise of the remand order, the CFC refused to independently consider the evidence; and its summary judgment decision is heavily dependent upon its discussion of the spoliated gun. *E.g.*, Appx24, 26, 27, 28. The CFC erred when it accepted the United States' invitation to issue the same decision that the CFC had issued five years ago. This Court must vacate that order and remand with instructions to follow the prior mandate. The "if" premise has been satisfied, and the CFC now must conduct the require independent evaluation, solely based upon the evidence that is admissible before the CFC.

Dispositively, and making short work for this Court on Defendant's misguided motion for summary judgment, Defendant's argument was wholly dependent upon its return to its prior, rejected, collateral estoppel argument. U.S. Sum. Judg. Br. §1. Defendant instead argued, just as it did in the prior appeal, that the CFC cannot assess the evidence. *Id.*

Ever since this Court remanded this case to the CFC, the United States has been fighting to prevent the CFC from independently considering the evidence. The United States is, for good reason, scared of a court conducting that independent

review. It is, for good reason, scared to have Norton, at long last, testify in an open court, and to have he and his friends and colleagues try to explain away their contradictory testimony regarding what happened on April 1, 2007. It is, for good reason, not wanting the federal investigator who chose not to investigate the shooting (and then lied to the Murray Family after making that decision not to investigate) testify. Norton's story depends on Norton's credibility. He was the only witness. His story is contrary to other's stories. His story is contrary to Mr. Murray's bloodless left hand.

There were two separate reasons why the CFC was required to conduct an independent review of the evidence after it imposed an evidentiary spoliation sanction.

First, the CFC is required to scrupulously follow the appellate court mandate. *E.g.*, *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014) (citation omitted) (quoting *Briggs v. Pa. R. Co.*, 334 U.S. 304 (1948) ("The mandate rule ... dictates that 'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.' Once a question has been considered and decided by an appellate court, the issue may not be reconsidered at any subsequent stage of the litigation, save on appeal."). *See also Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1257 (10th Cir. 2016).

This Court's prior mandate is quoted above. It is clear.

In its argument below, the United States made the oxymoronic argument that the evidentiary spoliation sanction on a central and potentially dispositive piece of evidence did not change the evidence. While the parties vastly disagree about how *much* the order changed the evidentiary landscape, there is no good faith argument that the landscape is unchanged. That, by itself, as a matter of law, required that the CFC deny the United States' motion for summary judgment, and requires this Court to reverse and remand with instructions to conduct the required independent evaluation.

Second, this Court's mandate was based upon this Court's underlying review of the application of collateral estoppel to the facts of this case. As this Court explained, the CFC is not bound by the Utah court's analysis unless the evidence in the two courts is the same. The evidence is not the same. Therefore, the CFC was not bound by the Utah court's analysis and it was, instead, bound by this Court's mandate. This Court therefore must vacate the summary judgment order and remand with the same instructions as before—ordering the CFC to conduct its own review of the evidence, now that the one gun cannot be used.

III. THIS COURT SHOULD REMAND WITH INSTRUCTIONS TO IMPOSE SPOLIATION SANCTIONS REGARDING NORTON'S GUN, BLOWBACK TESTING, AND BLOOD SAMPLES

As discussed above, the United States asserted that its FBI agents did not know of civil litigation before they destroyed the gun, but the Murray Family

defeated that argument by finding the written document which showed that the United States did know of the litigation, but chose to intentionally destroy the gun. Appx31. Based upon that, the CFC correctly held that the United States could not "rely upon any facts related to the .380 handgun [] to support the United States' conclusion that Mr. Murray died by suicide." Appx19.

But then the CFC denied any additional spoliation sanctions because it "held that the federal agents' discretionary choices not to collect specific pieces of evidence did not constitute spoliation." Appx31 (succinctly summarizing its reasons for holding that uncollected evidence had not been spoliated).

This Court must vacate the CFC holding denying spoliation sanctions on the trove of evidence the United States chose not to collect. The CFC's holding is legally wrong on two fronts, and it is terribly wrong as a matter of policy.

Before turning to the former, the Murray Family briefly discusses the latter.

The CFC held that federal agents have "discretion" to not investigate an officer involved homicide of an Indian. The CFC then expansively interpreted that "discretion" to mean that the police also have the discretion to take possession of evidence and then destroy that evidence so that no one else can later conduct forensic investigation of the evidence. The CFC gives the FBI that discretionary authority to turn a blind eye under one of the worst fact scenarios available—the officer who was involved was 25 miles outside his jurisdiction, the officer is the sole living witness

to the shooting, and there is no video or audio of the shooting. As a matter of policy, police cannot have discretionary authority to choose to preserve, to not preserve, or to take and then destroy the basic evidence in a homicide of a human being.

Turning now to the law, the law is that: 1) every person, whether police or not, has a duty to preserve evidence within their control; and 2) FBI agents have a duty to investigate homicides of Indians.

A. THERE WAS A DUTY TO PRESERVE EVIDENCE OF THE OFFICER INVOLVED HOMICIDE

"Spoliation is the destruction or significant alteration of evidence, *or failure to preserve evidence for another's use* in pending or reasonably foreseeable litigation." *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263 (2007) (internal citations omitted; emphasis added). "Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence." *Id.* at 258.

The United States, like any other litigant, is subject to imposition of spoliation sanctions. *M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1183–84 (Fed. Cir. 1993). "It is the duty of the United States, no less than any other party before this Court, to ensure, through its agents, that evidence relevant to a case is preserved." *United Med. Supply*, 77 Fed. Cl. at 274. This is a duty that every person or entity owes to society in general—to the United States' court system, and to the litigants in that system.

Courts, including the CFC, possess "the inherent power to control the judicial process and litigation, a power that is necessary to redress conduct which abuses the judicial process," including through spoliation sanctions. *United Med. Supply Co.,* 77 Fed. Cl. 257, 263–64.

In the present case, the United States also had the duty to preserve evidence because it was the investigative law enforcement agency. All law enforcement officers have a duty to "investigate, detect and secure evidence of crime." *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)). In determining whether a party bears responsibility for spoliation of evidence, the key inquiry is identifying who had control over the evidence. *Chapman Law Firm, LPA v. United States,* 113 Fed. Cl. 555, 610 (Fed. Cl. 2013). If a party having control over evidence allows that evidence to be discarded, then the disposal of that evidence is attributable to that party, regardless of who actually discarded the evidence. *Chapman Law Firm,* 113 Fed. Cl. at 610*; K-Con Building Systems, Inc. v. United States*, 106 Fed. Cl. 652, 664 (Fed. Cl. 2012). Physical possession is not necessary for a party to have control over evidence, and a "legal right to control or obtain" is sufficient. *Chapman Law Firm,* 113 Fed. Cl. at 610 (internal citations omitted). *See also Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

The United States stipulated in this case that it had the investigative duties regarding the interaction between Norton and Mr. Murray. Appx25. As the investigative agency, the United States had the right and the power to collect evidence at the scene. Based upon the same facts which led to the United States' stipulation that it was responsible, the District Court in Utah concluded that because the United States was responsible for the investigation of the shooting, the state parties could not be sanctioned for the spoliation of evidence during the "investigation" of that shooting. *Jones v. United States*, 846 F.3d 1343, 1349-1350 (Fed. Cir. 2017).

The United States therefore had the duty to preserve evidence within its control, and because the United States was the investigative agency, the crime scene and the evidence at that scene was within the United States' control. The United States had the power to take possession of the guns and any blood or blowback evidence on those guns. It had the power to take possession of Mr. Murray's body and any evidence on that body. Further, and contrary to the CFC's spoliation order, the United States actually took possession or control of the .380 gun and all evidence on that gun, and of Mr. Murray's body and all evidence on that body.

B. THE UNITED STATES DESTROYED EVIDENCE WITHIN ITS POSSESSION AND WITHIN ITS CONTROL

One of the key pieces of evidence was blood or tissue on the gun that Mr. Murray supposedly used to shoot himself. *E.g.*, Appx422 (Gaut Dep. 31:14-

20). The CFC correctly held that the United States spoliated the gun. But the CFC did not go far enough. When it took possession of the gun, the United States also took possession of any blood or tissue on that gun, and any other evidence that could be obtained from that gun. The United States then did not preserve that evidence through its own forensic testing or investigation, and the CFC held that the United States had discretionary authority not to do that basic testing. But the CFC decision fails to account for the fact that the United States did not merely fail to do its own testing. It went the next step in spoliation—taking action that *every case* would hold is spoliation. It physically destroyed all of the evidence on the gun when it destroyed the gun, which now makes it that no one can forensically test or investigate the evidence. The United States admits that it never conducted any testing on that gun, and further admits that now that the gun has been destroyed, no one else can go back and do the testing that the United States chose not to do. It is indisputable that tests of the gun for Mr. Murray's blood or tissue would constitute strong evidence in this case against the United States.

Another key piece of evidence was Mr. Murray's hands, to determine if his hands had blowback blood or tissue on them, and if so, where that blowback was located. *Id*. As the agency investigating the death, the United States had jurisdiction over Mr. Murray's body, and the United States actually exercised authority over the body, ordering an autopsy. When the United States took control over the body, it

also took possession of all of the evidence on the body, including all evidence that would have been obtained from an autopsy. Although the United States had possession of that evidence, it did not preserve that evidence. *E.g.*, Appx424 (Gaut Dep. 88:16-21).

C. THE UNITED STATES FAILED TO PRESERVE KEY EVIDENCE THAT WAS WITHIN ITS CONTROL

Other key pieces of evidence would have been the gun that Norton fired that day, and the clothing he wore that day, primarily to determine whether either had Mr. Murray's blood or tissue in them. Unlike the .380 gun and unlike Mr. Murray's body, the United States chose not to take physical control of Norton's gun or clothing. Therefore, unlike the body and the .380 gun, this Court must directly confront the CFC's holding that the investigative agency cannot spoliate evidence that it chooses not to collect. As discussed above, the CFC's holding is erroneous and this Court therefore must hold that the FBI spoliated Norton's gun and clothing and all evidence on that gun and clothing. As the investigative agency, the United States had the authority to take and preserve that evidence. It is undisputable that Norton's gun, and any blood or tissue on that gun, was evidence. In fact, it may have been, and the Murray Family believes it would have been, dispositive evidence. If testing of Norton's gun had shown Mr. Murray's blood, then it would have proven beyond any reasonable doubt that Norton shot Mr. Murray at close range.

Independently, when protocols exist to collect and preserve evidence, officers are put on immediate notice that the evidence could be relevant to both claims of a plaintiff as well as the officer's own defenses in future litigation. *LaJocies v. N. Las Vegas*, 2:08-CV-00606-GN, 2011 WL 1630331 (D. Nev. Apr. 28, 2011). The Law Enforcement Standards Section of the Indian Affairs Manual, Part 40, Chapter 2 Subsection 2.11, requires that all evidence related to a suspected crime is to be professionally collected, processed, and handled according to chain of custody standards. Describing the duties of investigating officers in charge, such as Agent Ashdown, the Department of Justice's own manual on crime scene procedure states that officers should initially "[e]stablish a secure area for temporary evidence storage in accordance with rules of evidence/chain of custody…" and "[e]nsure preliminary documentation/photography of the scene, injured persons, and vehicles." DEPARTMENT OF JUSTICE, CRIME SCENE INVESTIGATION: A GUIDE FOR LAW ENFORCEMENT at 19-20 (2000). The manual also states that such officers should "[p]repare preliminary documentation of the scene as observed…," and "[e]nsure that all evidence that may be compromised is immediately documented, photographed, and collected." *Id*. at 21. Therefore, the federal officers had a duty to preserve any and all evidence related to the shooting of Mr. Murray, and could have reasonably foreseen litigation would result from Mr. Murray's death.

Based upon the above, the CFC erred when it held that the United States did not spoliate evidence that was contained on the .380 gun and on Mr. Murray's body, and the CFC also erred when it held that the United States' FBI has discretion to choose not to collect basic evidence in an officer-involved homicide.

IV. THIS COURT SHOULD REMAND WITH INSTRUCTIONS THAT THE CFC BAR THE UNITED STATES FROM RELYING UPON ANY OF THE SPOLIATED EVIDENCE, AND THAT THE UNITED STATES IS LIABLE FOR THE DEATH OF MR. MURRAY

In their motion for spoliation sanctions, the Murray Family argued that the CFC was required to hold that the United States was liable for the death of Mr. Murray, and the only remaining issue should be damages from the wrongful death. This Court should remand with instructions to impose that remedy. The overarching goal of spoliation sanctions is to eliminate the harm to the non-spoliating party, although as noted below, deterrence is also a relevant consideration. "It has long been the rule that spoliators should not benefit from their wrongdoing." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

In its order vacating and remanding this matter, this Court directed the CFC to determine whether to impose spoliation sanctions. The two main spoliation sanctions here lead to the same result. The reason they both lead to the same remedy is that Defendant failed to collect or destroyed all of the dispositive evidence and nearly all of the good evidence as well. Inferring that the missing evidence would have been favorable to the non-spoliating party is based upon the underlying

rationale for spoliation sanctions. It puts harm to fact-finding caused by spoliation on the spoliator, instead of on the non-spoliator.

Regardless of whether the FBI only spoliated the .380 gun (as the CFC held and as is not challenged by the United States on cross-appeal) or spoliated all of the other crucial evidence, the only possible remedy in this case is to hold the United States liable for the death of Mr. Murray. The United States destroyed one of the two most important pieces of evidence in this case, and it is therefore barred from using any evidence regarding the alleged .380 gun. Because the United States cannot rely upon the .380 gun, we are left with the fact that Norton shot at Mr. Murray, and Mr. Murray ended up dead from a gunshot wound. Norton's prior assertion that Mr. Murray shot himself is impossible because the United States cannot rely upon the .380 gun. There is simply no way to "level the playing field." The key evidence is gone.

In this case, the spoliated evidence is not a single piece of evidence. It is almost all of the good evidence, and the spoliated evidence was of obvious evidentiary value and was required to be collected under laws, policies, or standard homicide investigation procedures or procedures for "officer involved shootings." The inference from the missing evidence is therefore not an inference based upon a single piece of evidence. It is an inference based upon all of the spoliated pieces of evidence.

For example, if Defendants had only spoliated the gun that Norton admits he used to shoot at Mr. Murray and tests of the same, but had not also spoliated the gun that Norton claimed Murray used and tests of the same, Norton's clothing and tests of the same, and tests of Murray and Norton's hands for blood/tissue, then we could turn to those other pieces of evidence to prove some, and maybe all, of the material facts that could have been shown if the United States had merely collected and tested Norton's gun. The inference from some of the individual spoliated items might have been minimal. But here, all of the other items were spoliated.

The inference from the missing evidence is plain and simple, that Norton killed Mr. Murray. The inference is that Norton's gun had Murray's brain tissue and blood on and in it, in a back-spatter pattern that shows it fired the fatal shot. The inference is that Norton's hands literally had Todd Murray's blood and brain tissue on them. The inference is that Murray's hands did not. The inference is that .380 gun did not. The inference is that Norton's clothing had Mr. Murray's blood on it. Etc.

With that basic inference against the United States because of the United States' failure to take possession of and test Norton's gun, Norton was in contact with Mr. Murray, not 100 yards away as he self-servingly claimed, his gun fired the fatal shot, and he then picked up his two bullet casings and went 100 yards away and dropped them, then later "found them" and pointed them out to other officers. That

inference from the spoliated evidence then dramatically changes the minimal pieces of evidence that the United States chose to collect, and that Norton, in the District Court suit, used to "corroborate" his testimony. For example, based upon the required inference that Norton's gun was in contact with or at least within a few feet of Mr. Murray's head at the time of the shooting, the location of the casings does not corroborate Norton's self-serving story, and instead proves that Norton was trying to cover up the fact that he had been right next to Mr. Murray when Mr. Murray was shot at point blank range.

Here, the inference from the failure to test the gun Norton claimed Mr. Murray had includes an inference that the gun was not even operational, and was therefore not the gun that killed Mr. Murray, and that Mr. Murray had been killed by Norton (or some other Utah State, County, or local law enforcement officer.)

The inference is that the bullet casings had Norton's fingerprints and DNA on them, which dispositively proves that Norton was the killer.

The inference is the .380 gun did not have Mr. Murray's blood or tissue on them, which by itself is strong evidence that Norton's story was more likely than not false.

The inference is that Mr. Murray's hands did not have blood or tissue on them after the shooting. This, by itself, is further evidence that Norton's story was more likely than not false.

The inference is that Norton's gun, bullet casings, and clothing all had Mr. Murray's blood or tissue on them, each of which, standing alone definitively proves that Norton killed Murray.

The inference from the fact that all of the blood samples were spoliated would depend on what other evidence was spoliated. Again, the inference is that the evidence would have been favorable to Mr. Murray. What would have been favorable cannot be determined prior to determining what other evidence was spoliated.

The inference from the failure to conduct an autopsy is that the autopsy would have shown that Mr. Murray's injuries would not have been fatal, that there were parts of bullet jackets from Norton's gun in Mr. Murray's brain tissue, and that Mr. Murray could not have fired the fatal shot.

The inference from the failure to maintain the integrity of the body after death is that it contained other evidence of Norton's guilt (e.g. Norton's DNA or fingerprints in blood, back spatter showing that Mr. Murray was trying to defend himself, etc.) that was spoliated before the body reached the coroner.

The whole of the crime scene was spoliated because Norton himself was allowed to roam through the crime scene, and allowed to go to his own car and was allowed to be unmonitored and unaccompanied. If the United States had collected the other primary and obvious evidence, this, by itself, may have had minimal

impact, but because it did not collect the other evidence, the inference from Norton's free range after the shooting eliminates the value of all of the remaining evidence.

Some of the pieces of evidence, all by themselves, would have definitively shown whether Norton's story was true or false. Other pieces of evidence would not have been definitive but would have been very strong on one side or the other. Other pieces of evidence were of limited value, or were not of value without other related pieces of evidence. But the inference here is based upon all of the spoliated evidence, not individual pieces. The required inference from all of the spoliated evidence, taken together, is that Norton killed Mr. Murray on April 1, 2007.

CONCLUSION

Based upon the discussion of law above, this Court must reiterate its prior mandate: The CFC order that the .380 gun was spoliated changes the evidence. The CFC did not impose merely non-evidentiary remedies. It barred the United States from relying on the spoliated gun. Under this Court's prior mandate, the CFC is therefore required to independently evaluate the evidence that is usable in the CFC, and cannot rely upon the findings made based upon a different evidentiary record in the Utah District Court.

This Court should also review and vacate the CFC's legal holding that the United States cannot spoliate evidence that it chooses not to collect, and the Court should remand with instructions that all of the evidence on the spoliated gun were

also spoliated; and that Norton's gun and clothing, and Mr. Murray's body, and all evidence thereon were also spoliated.

ORAL ARGUMENT STATEMENT

Due to the significance of the issues raised, oral argument is requested.

Dated: April 21, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2021, I caused the foregoing Plaintiffs-Appellants' Corrected Principal Brief to be filed with the Clerk of Court for the United States Court of Appeals for the Federal Circuit using the CM/ECF System, with service to all parties through that system.

April 21, 2021 */s/ Jeffrey S. Rasmussen*
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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of the federal rules of civil procedure and the federal circuit rules because it was prepared using a proportionally-spaced typeface and includes 7,836 words.

April 21, 2021 */s/ Jeffrey S. Rasmussen*
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In the United States Court of Federal Claims

No. 13-227L
Filed: January 6, 2020

DEBRA JONES and ARDEN C. POST individually and as the natural parents of Todd R. Murray;

DEBRA JONES as personal representative of the Estate of Todd R. Murray, deceased, for and on behalf of the heirs of Todd R. Murray; and

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Keywords: Sanctions, Spoliation, Adverse Inference

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MEMORANDUM OPINION AND ORDER

***HERTLING*, Judge**

This case returns to the Court on remand from the U.S. Court of Appeals for the Federal Circuit. *Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017). The plaintiffs, the parents, estate, and tribe of deceased Ute Tribe-member Todd R. Murray, claim that the United States is liable to compensate them for Mr. Murray's death on the Tribe's reservation under an 1868-treaty provision requiring the United States to compensate the victims and the Tribe for the acts of "bad men." To establish the United States' liability for Mr. Murray's death under the bad-men provision, the plaintiffs must prove that Mr. Murray's death by a gunshot wound to the head—ruled a suicide by the Federal Bureau of Investigation ("FBI")—amounts to a prosecutable, arrestable crime under the "laws of the United States" committed by a non-tribe-

member against a tribe member, starting on the reservation.[1] *Jones v. United States*, 846 F.3d at 1360-61.

Now that their complaint has survived the United States' motion to dismiss, the plaintiffs have renewed their motion for sanctions against the defendant for its spoliation of evidence. In their renewed motion, the plaintiffs allege that the United States destroyed or failed to preserve the physical evidence that could have proven that Mr. Murray's death was an officer-involved shooting by off-duty Vernal City, Utah, police officer Larry "Vance" Norton, rather than a suicide. (ECF 137.) As a sanction for this alleged spoliation, the plaintiffs request that the Court hold the United States liable for Mr. Murray's death.

I. BACKGROUND

The apparent facts of Mr. Murray's death are described in a federal district court decision granting summary judgment for the local officers involved in a federal civil rights case. *Jones v. Norton*, 3 F. Supp. 3d 1170, 1178 (D. Utah 2014), *aff'd,* 809 F.3d 564 (10th Cir. 2015). Those facts, as they relate to the United States, are summarized in this Court's earlier opinion dismissing this case and the Federal Circuit opinion reversing that dismissal. *See Jones v. United States*, 122 Fed. Cl. 490 (2015) (Horn, J.), *vacated and remanded*, 846 F.3d 1343 (Fed. Cir. 2017).

For the purpose of deciding the plaintiffs' motion for spoliation sanctions against the United States, the Court primarily draws its factual findings from the parties' Joint Stipulations Regarding Spoliation (ECF 77), the transcript of the district court's evidentiary hearing on spoliation, (ECF 77-1), and the Supplemental Joint Appendix of documents from the district court litigation (ECF 127). The parties also agreed to submit as evidence the depositions of their respective experts (ECF 144). The Court references the plaintiffs' allegations from the Amended Complaint (ECF 17) for contextual facts that are not covered by the Stipulations or testimony in the district court hearing transcript.[2]

On April 1, 2007, a Utah state trooper radioed the state Central Police Dispatch advising that he was pursuing a car containing "two tribal males" for a speeding violation. (ECF 17 ¶ 21.) Mr. Murray was the passenger in the vehicle being pursued. (ECF 77 ¶ 5.) The vehicle eventually stopped within the boundaries of the Ute reservation, where Mr. Murray and the driver exited and stood on either side of the vehicle. (ECF 17 ¶ 26.) The trooper approached the driver and Mr. Murray, ordering them to the ground multiple times. (*Id.* ¶ 26.) Mr. Murray and

[1] The Federal Circuit's decision in this case left open the issue of whether the bad-men provision is geographically limited, holding only that any limit this Court finds must include "off-reservation[] activities that are a clear continuation of activities that took place on-reservation." *Jones v. United States*, 846 F.3d 1343, 1360 (Fed. Cir. 2017).

[2] Although the Court characterizes some contextual facts as "allegations," those facts may be supported by testimony or other documents found within the district court record filed in this case as the Revised Joint Appendix (ECF 117-122).

the driver ran away in opposite directions. (*Id.* ¶ 26.) The trooper pursued and apprehended the driver. (*Id.*)

As the trooper returned to his patrol car with the handcuffed driver, off-duty Vernal City police officer Norton arrived on the scene wearing plain clothes and driving his personal car. (*Id.* ¶ 27.) The trooper asked Officer Norton to pursue Mr. Murray. (*Id.*). Another state trooper and county deputy arrived next and joined the search for Mr. Murray. (*Id.* ¶ 29.) The parties stipulated that none of the state, county, or municipal officers involved could lawfully exercise authority over Mr. Murray on the Ute reservation. (*See* ECF 77 ¶¶ 8-10.)

Officer Norton testified that, after a foot chase, Mr. Murray fired at Officer Norton. (*Id.* ¶ 21). Officer Norton testified that he then fired two shots back at Mr. Murray with a .40-caliber handgun before turning around and running back up a hill to a location where he believed Mr. Murray could not shoot him. (*Id.* ¶ 22.) Officer Norton testified that "Murray put a gun to his head as Officer Norton shouted at Mr. Murray to put it down, that Mr. Murray then pulled the trigger, and [that Mr. Murray] collapsed." (*Id.* ¶ 23.) Officer Norton was the only witness to the gunshot that killed Mr. Murray. (*See* ECF 77-1 at 251.)

A. Federal Investigation

The FBI had jurisdiction to investigate Mr. Murray's death on the reservation. (*Id.* ¶ 25.) Agent Rex Ashdown of the FBI's Vernal Resident Agency arrived on the scene after an ambulance had transported Mr. Murray to a hospital. (*Id.* ¶¶ 13, 24.) The parties' stipulated version of Agent Ashdown's investigation of the shooting scene is described first, followed by the handling and examination of Mr. Murray's body.

1. The Shooting Scene

Agent Ashdown testified that, on his arrival at the scene of the shooting, someone he only remembered as a "senior supervisory officer" told him that Mr. Murray had shot himself. (ECF 77 ¶ 26.) Agent Ashdown documented the scene and collected evidence. The parties stipulated that "some or all of" the evidence collected was ultimately entered into the FBI Salt Lake City Division's evidence room. (*Id.* ¶ 37.) The parties further stipulated that the collected evidence included photographs and GPS coordinates documenting the scene and the relative location of its elements, a .380 handgun found near Mr. Murray's body, two spent .380-caliber shell casings found near the .380-caliber handgun (".380 handgun"), and two spent .40-caliber shell casings found 113 yards from the location of Mr. Murray's body (*Id.* ¶ 34).

a. *Documenting the Scene*

Agent Ashdown "took photographs of various angles of the scene[,] . . . identified photos, marked exhibits, and photographed the exhibits in place from various positions, . . . collected those items he believed had evidentiary value[,] . . . [and] placed yellow evidence placards . . . to mark [at least some of] the evidence he observed for later purposes to identify what he was looking at." (*Id.* ¶¶ 27-28.) Agent Ashdown "marked and photographed some of the blood and blood splatter that could be identified as blood." (*Id.* ¶ 29.) Agent Ashdown took GPS measurements of the location of found shell-casings and Mr. Murray's body. (*Id.* ¶ 33.)

b. *.380 Handgun*

Agent Ashdown collected as evidence a .380 handgun found next to Mr. Murray's body. (*Id.* ¶¶ 29-30.) Agent Ashdown photographed a spent shell-casing "jammed" inside the .380 handgun that apparently had failed to eject properly. (*Id.* ¶ 36.) The FBI retained possession of the .380 handgun. (*Id.* ¶ 31.) Agent Ashdown did not request a test fire of the .380 handgun, later testifying that the only purpose of test firing it would have been to confirm that it functioned and that it had been fired. (*Id.* ¶ 35.)

c. *Shell Casings*

Agent Ashdown testified that he also collected two spent .380 shell casings from the ground from within the expected ejection-radius of the .380 handgun's location. The FBI retained possession of the .380 shell casings. (*Id.* ¶ 34.)

Agent Ashdown also photographed and collected Officer Norton's two .40-caliber shell casings approximately 113 yards from where Mr. Murray's body had been. (*Id.* ¶ 32.)

d. *Officer Norton's Gun, Person, Clothes, and Vehicle*

The parties stipulated that Agent Ashdown "testified that he did not perform or request any testing of Officer Norton's clothing because he did not observe anything on Officer Norton's body and did not see any blow back blood or blood splatter type evidence on the clothes." (*Id.* ¶ 48.) Officer Norton's supervisor, Chief Gary Jensen of the Vernal City Police Department, also testified to not seeing any blood or tissue on Officer Norton when Chief Jensen arrived at the scene. (ECF 77-1 at 215-16.)

Chief Jensen testified that he took custody of Officer Norton's .40-caliber handgun at the scene and saw no blood or tissue on the gun. (*Id.* at 215-16.) The weapon was later returned to Officer Norton. (*See id.* at 238.) When the district court asked about his motivation for believing that it was not necessary to test Officer Norton's gun or clothing, Chief Jensen responded:

> The motivation is that, with all due respect, Vance Norton was a very good Detective. Vance Norton was involved in a situation. He described the situation. The scene appeared to be as he described it. It appeared to be a suicide and it was believable. I didn't feel it was necessary.

(*Id.* at 222.)

e. *Reliance on Officer Norton's Account*

Agent Ashdown testified that he spoke with Officer Norton at the scene to arrange an interview and the conversation ended after Officer Norton stated that he would want an attorney present. (ECF 77-1 at 159-60.) Agent Ashdown did not remember receiving an account directly from Officer Norton at the scene. (*Id*. at 158-59.) Agent Ashdown testified that his partner later

conducted an interview with Officer Norton and his attorney while Agent Ashdown was out of town. (*Id.* at 159-60.)

Agent Ashdown testified that he had a professional but not a personal relationship with Officer Norton and that he "knew him to be a credible officer in all of the interactions I ha[d] during the past 10 years prior to this, and I had no reason to discount the story I had been given as I approached that scene." (*Id.* at 157.)

During the district court's spoliation hearing, Agent Ashdown was asked if he had neglected to document the location of various elements at the scene of Mr. Murray's death to a degree that would allow a recreation of that scene due to reliance on Officer Norton's account. Agent Ashdown testified that he had not, stating:

> Because I took the information received regarding what Officer Norton had reported. I had gone down to the crime scene, reviewed the crime scene and everything had been consistent with what I had been told. There was nothing inconsistent that I could see, and it had been determined at that time it was a suicide, and the FBI office and the FBI lab don't have the resources or does any department have the resources to take a suicide investigation to an Nth degree to prove something that we already know.

(*Id.* at 164.)

2. Handling of Mr. Murray's Body

After Mr. Murray was shot, while he was still alive, officers handcuffed him. (ECF 17 ¶ 33; ECF 139 at 4.) The plaintiffs allege that, half an hour after Mr. Murray was reported shot, an ambulance arrived and took Mr. Murray—who was still alive—to a hospital, where he was declared dead shortly after arriving. (ECF 17 ¶¶ 39, 41.)

At the hospital, the plaintiffs allege, state, county and municipal officers removed Mr. Murray's clothes, unnecessarily photographed and manipulated his nude remains, and photographed one officer "sticking a finger into Murray's head wound." (*Id.* ¶ 42.) U.S. Bureau of Indian Affairs Officer Kevin Myore was allegedly also present at the hospital. (*Id.*)

State, county, and municipal officers then transported Mr. Murray's body to a mortuary to store it overnight until it could be transported to the state medical examiner's office the next day. (*Id.* ¶ 43.) At the mortuary, the plaintiffs allege, the officers drew two vials of blood from Mr. Murray's body by inserting a needle into Mr. Murray's heart and asking a mortuary employee to make an incision in Mr. Murray's neck. The plaintiffs allege that Agent Ashdown arrived at the mortuary and was "informed that a sample of Mr. Murray's blood had been drawn earlier at the [hospital]," but did nothing to stop the officers from drawing more blood. (*Id.* ¶ 44.)

3. Examination of Mr. Murray's Body

The next day, Mr. Murray's body was moved to the state medical examiner's office in a body bag. (ECF 17 ¶ 48; *see* ECF 77-1 at 54.)

a. *Mr. Murray's Hands*

The plaintiffs alleged that Mr. Murray's hands were not constantly protected with bags to preserve trace evidence because his hands were bagged in some photos but not in others. (ECF 137 at 12.) The medical examiner reported that Mr. Murray's remains arrived with hands bagged. (ECF 17 ¶ 52.) He found no soot on either hand. (*Id.*) Mr. Murray's left hand was "clean and free of any debris or blood." (*Id*.) Mr. Murray's right hand was "caked in blood." (*Id.*)

Agent Ashdown testified that he did not request a gunshot-residue test of Mr. Murray's or Officer Norton's hands because the FBI laboratory had ceased doing gunshot residue tests prior to the April 1, 2007, investigation because the tests were inherently unreliable with too many false positives and false negatives. (ECF 77 ¶ 45.)

b. *Failure to Conduct Autopsy*

The FBI requested that the medical examiner perform an autopsy. (ECF 77 ¶ 43.) The state medical examiner performed an external examination of Mr. Murray but did not conduct an autopsy. (*Id.* ¶ 44.) In the district court the medical examiner later testified that the decision of what type of examination is conducted is the responsibility of the examining physician and is made on a case-by-case basis. (*Id.*) The medical examiner testified that he considered the lack of any indication of a struggle, the contact gunshot wound, and the relative position between the two individuals in deciding to perform only an external examination and not an autopsy. (ECF 77-1 at 88.)

The medical examiner concluded that the bullet had entered Mr. Murray's head on the left side and exited on the right side. (ECF 17 ¶ 50.) The plaintiffs allege that Mr. Murray was right-handed. (*Id.* ¶ 51.) The medical examiner listed Mr. Murray's cause of death as suicide. (*Id.* ¶ 56.)

c. *Mr. Murray's Clothing*

The medical examiner testified that he did not test clothing but would bag it and provide it to a requesting party. (ECF 77 ¶ 49.) Agent Ashdown testified that he did not request that any testing be performed on Mr. Murray's clothing because, based on the information given to him at the scene and his observations, there was no information inconsistent with a suicide and he did not expect to find anything on Mr. Murray's clothing except Mr. Murray's blood. (*Id.* ¶ 47.)

4. Notice of Claims and Destruction of the .380 Handgun

After Agent Ashdown's May 2007 retirement, FBI Special Agent David Ryan took over the investigation of Mr. Murray's death. (ECF 77 ¶ 14.) Agent Ryan investigated the purchase of the .380 handgun and assisted in the criminal prosecution of the handgun's straw purchaser.

(*Id.* ¶¶ 14, 38.) This investigation linked the gun to the driver of the vehicle in which Mr. Murray was a passenger. (*See* ECF 118-6 at JONES0018324-25) (FBI memorandum recording straw purchaser's account that a man he later knew as the driver of the car in which Murray had been a passenger before his death had asked the straw purchaser to purchase a handgun for him).

The .380 handgun's straw-purchaser was indicted in January 2008, and the indictment contained a notice of intent to seek forfeiture of the gun. (ECF 77 ¶ 38.)

On March 2, 2008, plaintiff Debra Jones sent a "Notice of Claims" to the Vernal City police department, state highway patrol, county sheriff, Uintah County, and Officer Norton. *See Jones v. Norton*, No. 2:09-CV-730-TC, 2014 WL 909569, at *4 (D. Utah Mar. 7, 2014) (describing the Notice). Officer Norton testified that he received the Notice on April 1. (ECF 77-1 at 240.) The Notice summarized the facts of Mr. Murray's death from the police pursuit to the examination of Mr. Murray's body. (*Id.*) The Notice indicated that Ms. Jones intended to bring claims against the recipients for violations of Fourth Amendment protections against unreasonable search and seizure, Fourteenth and Fifth Amendment guarantees of due process, the Fourteenth Amendment guarantee of equal protection, and the Fifth Amendment right not to be compelled to be a witness against oneself, violation of the equivalent state constitutional provisions, assault and battery, intentional and/or negligent infliction of emotional distress, negligence, and wrongful death. *Jones v. Norton*, 2014 WL 909569, at *4-5. The first paragraph of the Notice provided "[t]his notice should not be deemed to waive any cause of action that Debra Jones may have against any individual or entity, governmental or otherwise, who may later be determined to be ultimately responsible for the damages she has sustained." *Id.*

The .380 handgun's straw purchaser pleaded guilty and the district court entered a preliminary forfeiture order in May 2008. (ECF 77 ¶¶ 38-40.) Pursuant to this preliminary forfeiture order, the United States published a notice on www.forfeiture.gov for anyone to claim an interest in the gun within 30 days. (*Id.* ¶ 40.)

An FBI memorandum dated September 17, 2008, recommended closing the investigation of Mr. Murray's death, describing it as a suicide, and reporting the completed prosecution of the .380 handgun's straw purchaser. (ECF 118-3 at JONES0010902.) It further reported that "[t]he firearm recovered from Murray after he shot himself has been forfeited" and continued "[d]ue to an active civil suit involving [redacted] and the [Vernal City Police Department], items IBl - 1B4 have been removed from FBI evidence and provided to VPD. No other items remain in FBI evidence."[3] (*Id.*)

On November 14, 2008, the district court found that adequate notice had been given and no one had claimed an interest in the .380 handgun. (ECF 77 ¶ 41.) The court ordered the .380 handgun forfeited to the United States to be "disposed of according to law." (*Id.*)

[3] The Court understands "items IB1-1B4" to refer to the two .40-caliber and two .380-caliber shell casings that the FBI had collected at the shooting scene. (*See* ECF 77 ¶ 34.)

The FBI took the .380 handgun "out of evidence" on November 26, 2008 (*id.* ¶ 42), and provided it to the U.S. Marshals Service on December 2, 2008. The Marshals Service destroyed the handgun, as is its routine practice.

The FBI turned over the two .380-caliber shell casings and two .40-caliber shell casings to a Vernal City police detective on December 15, 2008, "because of the Utah District Court litigation." (*Id.* ¶ 34.)

B. Litigation

In July 2009, the individual plaintiffs and the estate filed federal-law civil rights claims in state court against Uintah County, Vernal City, the state troopers, the county sheriff deputies and Officer Norton, along with state-law "assault and battery" and wrongful death claims against Officer Norton individually. In August 2009, the defendants removed the case to the United States District Court for the District of Utah. (ECF 117-2 at JONES001018-87.) The plaintiffs argued that Officer Norton killed Mr. Murray by shooting him in the head at point-blank range either with Officer Norton's own gun or with the .380 handgun found near Mr. Murray's body and that the state, county, and municipal officers spoliated the evidence of Officer Norton's act. *Jones v. Norton*, 3 F. Supp. 3d at 1191.

While the district court litigation was still pending, the plaintiffs, in February 2012, notified the Bureau of Indian Affairs and the Department of Justice of Mr. Murray's death. (ECF 17 ¶ 75.) They sent a Statement of Claim for damages, typically a required precursor to filing suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, in March 2013. (*Id.* ¶ 76.) The plaintiffs never pursued a FTCA action for Mr. Murray's death.

The plaintiffs, on April 1, 2013, filed suit against the United States in this court. (*See* ECF 1.)

In 2014, the district court granted summary judgment for the defendant state, county, and municipal officers and Vernal City, holding that there was insufficient evidence for a reasonable jury to conclude that Officer Norton shot Mr. Murray in the head at point-blank range. *Jones v. Norton*, 3 F. Supp. 3d at 1192, 1213. In a separate decision denying spoliation sanctions against the defendants in that case, the district court found that certain elements of spoliation were met as to some evidence, but, in part because the FBI had the jurisdiction to investigate Mr. Murray's death, the state, county and municipal defendants did not have a duty to preserve the allegedly spoliated evidence. *See Jones v. Norton*, 2014 WL 909569, at *8 ("None of the named Defendants [except possibly Vernal City] can be held liable for these alleged misdeeds, because Agent Ashdown and Keith Campbell were in charge of the investigation."); *Jones v. Norton*, 2014 WL 4825894, at *1 n.6 (D. Utah Sept. 25, 2014) (noting that the district court denied the motion for spoliation sanctions against Vernal City after the opportunity for additional briefing). The plaintiffs appealed. *Jones v. Norton*, 809 F.3d at 568.

While the plaintiffs' appeal was still pending at the U.S. Court of Appeals for the Tenth Circuit, this Court granted the United States' motion to dismiss for failure to state a claim. 122 Fed. Cl. at 490, 522, 529-30. This Court held that the United States could only be liable for "affirmative" criminal acts committed on the reservation and that the plaintiffs were collaterally

estopped from relitigating "the factual circumstances of Todd Murray's death, and the allegations of the destruction of evidence." *Id.*

The plaintiffs appealed, and the Court of Appeals for the Federal Circuit vacated the decision and remanded the case. 846 F.3d at 1364. The Federal Circuit agreed that federal liability under the bad-men treaty provision is limited to crimes but rejected this Court's reasons for limiting the liability to affirmative acts on the reservation. *See id.* at 1355-57. The Federal Circuit further found that the plaintiffs had not identified the alleged omissions with specific crimes and left this Court to reconsider the provision's application to omissions in the context of specific crimes in the event that any of the alleged omissions could be established by the plaintiffs as cognizable crimes under the "laws of the United States." *Id.* The Federal Circuit left this Court to determine, "in the first instance, whether any of the[] off-reservation acts demonstrate the alleged continuation of on-reservation acts so as to be cognizable under the bad men provision." *Id.* at 1361.

The Federal Circuit also held that the plaintiffs were not collaterally estopped from litigating whether Mr. Murray shot himself and whether evidence was spoliated. "The culpability of the federal officers for spoliation has never been decided." The Federal Circuit instructed:

> If the [Court of Federal Claims ("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.

Accordingly, the Court now considers the plaintiffs' Renewed Motion for Spoliation Sanctions.[4]

C. Spoliation Allegations

The plaintiffs allege that the defendant's destruction of the .380 handgun found near Mr. Murray's body and the federal agents' failure to collect other forensic evidence in their investigation of Mr. Murray's death breached—either intentionally or with gross negligence—the United States' duty to preserve relevant evidence. The federal agents, the plaintiffs allege, should have known that the plaintiffs would need this evidence in litigation over Mr. Murray's death, and that such litigation was reasonably foreseeable.

[4] After the Federal Circuit remanded the case, it was reassigned to this judge. (ECF 131.)

The plaintiffs allege that they were "extremely prejudiced by the United States' spoliation of evidence" in 11 respects:

1. The firearm Defendant alleges Mr. Murray fired during his encounter with Vance Norton was destroyed by law enforcement, and the firearm was not forensically tested before it was destroyed;
2. The firearm Defendant alleges Vance Norton fired during the incident was never taken into evidence and was not forensically tested;
3. Neither Todd Murray's person nor his clothing were ever subjected to forensic testing;
4. Neither Vance Norton's person nor his clothing were ever subjected to forensic testing;
5. Law enforcement officers on the scene did not sequester Officer Norton but, astonishingly, allowed Norton to roam freely around the shooting site in possession of the alleged murder weapon for over half an hour; giving him ample opportunity to destroy and tamper with the physical evidence;
6. Even though Norton was permitted to return to his personal vehicle (which he had driven to the on-Reservation scene) and to other locations unaccompanied after he admittedly was involved in a shooting, Norton's vehicle was never searched, processed, or preserved by law enforcement;
7. The scene of the shooting that makes up the subject matter of this civil action was not adequately documented;
8. Law Enforcement officers improperly handled and tampered with Mr. Murray's body in the Emergency Room of Ashley Valley Medical Center, and these actions significantly altered and potentially destroyed critical evidence;
9. Law Enforcement officers improperly handled and tampered with Mr. Murray's body at Blackburn Mortuary, and these actions significantly altered and potentially destroyed critical evidence;
10. Mr. Murray's body was improperly handled by the Utah Office of the Medical Examiner, and the improper handling potentially altered and/or destroyed critical evidence; and
11. The Utah Office of the Medical Examiner failed to perform an autopsy on Mr. Murray's body, and this failure constitutes spoliation of critical evidence.

(ECF 137 at 1-11.) More generally, the plaintiffs allege that Agent Ashdown's investigative decisions were influenced by his "friendship" with Officer Norton. (*Id.* at 25.)

To simplify its analysis, the Court groups the plaintiffs' 11 separate allegations of spoliation in terms of their alleged relevance as proof of the plaintiffs' theory that Officer Norton murdered Mr. Murray. The plaintiffs allege that the federal agents should have:

1. Forensically tested or preserved for the plaintiffs to test Officer Norton's gun, clothing, person, or vehicle for blood and tissue "blowback" from Mr. Murray's wound because evidence from these sources could have proven that Officer Norton shot Mr. Murray at close range.

2. Forensically tested or preserved for the plaintiffs to test Mr. Murray's person or clothing for gunpowder residue and blowback because such testing could have supported or undercut the claim that Mr. Murray pulled the trigger.

3. More thoroughly documented the blood patterns at the shooting scene.

4. Disclosed to the federal court handling the criminal case for the straw-purchase of the .380 handgun that that handgun, found near Mr. Murray's body, was relevant to then-noticed claims for damages before a judge ordered its forfeiture authorizing the U.S. Marshals Service to destroy it. The FBI thus failed to preserve the gun for fingerprint testing that could have revealed whether Officer Norton or Mr. Murray held it or for testing for blowback that could have revealed whether this gun inflicted the fatal wound at close range.

5. Examined Mr. Murray's body with an autopsy because it could have shown signs that Officer Norton made physical contact with Mr. Murray before his death.

The plaintiffs supplement their spoliation allegations with expert testimony that the forensic evidence, had it been preserved, would have been probative of their theory that Officer Norton killed Mr. Murray. Even if the spoliated evidence would not have conclusively proven murder, the plaintiffs argue, it might have contradicted Officer Norton's account of Mr. Murray's shooting, diminishing Officer Norton's credibility as the only witness to the shooting. The defendant responds with expert testimony that forensic phenomena like blowback in a gun's barrel do not always occur with contact-gunshot wounds.

II. SPOLIATION STANDARD

Potential litigants must preserve evidence that is in their control when litigation is reasonably foreseeable and the evidence is relevant to a potential claim.[5] Breaching this duty to preserve evidence with a culpable state of mind is spoliation. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007). Federal courts have inherent authority to sanction spoliation by parties before them to "ensure that [the party] does not benefit from its misdeeds; to deter future misconduct; to remedy, or at least minimize, the evidentiary or financial damages caused

[5] "Preserve" is used as an umbrella term that includes preventing the destruction or material alteration of evidence and preserving it for another party's use. *See Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011).

by the spoliation; and . . . to preserve the integrity of the judicial process and its truth-seeking function." *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263 (2007); *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-56 (1991) (affirming federal courts' inherent authority to sanction). The United States, like any other litigant, is subject to spoliation sanctions. *M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1183–84 (Fed. Cir. 1993).

Some circuits, when considering culpability, require a finding of bad-faith intent to deprive other parties of the use of the evidence before finding spoliation. *United Med. Supply*, 77 Fed. Cl. at 265-271 (surveying cases). The Federal Circuit has required "bad faith" when applying the law of other circuits in patent cases but has not addressed the issue in its own right. This Court has not required bad faith before finding spoliation. *See id.* (rejecting a strict requirement of bad faith for a finding of spoliation and holding that "repeated acts of gross negligence, particularly if accompanied by inaccurate representations to the court that serve to mask and perpetuate the spoliation, can be met with the same or a more severe sanction than a single act of bad faith"). Finding (1) control over the destroyed evidence, (2) the reasonable foreseeability of litigation, (3) relevance of the evidence, and (4) a culpable (but not necessarily bad faith) intent establishes spoliation.

Generally, the courts sanction a spoliator by inferring that the spoliated evidence, if considered, would have proven facts adverse to the spoliator—"an adverse inference." Courts might also require the spoliator to pay other parties' discovery costs and attorneys' fees resulting from the spoliation. For particularly egregious spoliation, courts may either dismiss the spoliator's claim or grant default judgment against the spoliator. *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011). The form and severity of the sanction depend on "'(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.'" *Id.* at 1329 (quoting *Schmid v. Milwaukee Elec. Tool Corp.,* 13 F.3d 76, 79 (3d Cir.1994)).

III. DISCUSSION

This Court must decide whether the following evidence was spoliated: Murray's person and clothing, Officer Norton's gun, clothing, person and vehicle, other uncollected items at the shooting scene, and the .380 handgun.

The Court, first, analyzes whether any of the evidence was spoliated considering which evidence federal agents controlled, when litigation was reasonably foreseeable, whether the evidence is relevant to the plaintiffs' claims in this case, and the federal agents' culpability. The Court then considers the appropriate sanction considering the degree of culpability, the degree of prejudice to the plaintiffs, and the effectiveness of lesser sanctions.

As explained more fully below, the Court finds spoliation of the .380 handgun, but no other evidence. The Court determines that the gross mishandling of Mr. Murray's body does not amount to spoliation because the officer's actions did not affect evidence relevant to determining Mr. Murray's cause of death. The Court finds that the government did not control Officer Norton's gun, clothing, person and vehicle, or other uncollected items at the shooting scene.

These items were not spoliated. The .380 handgun, however, was spoliated because it was relevant to foreseeable litigation and was negligently destroyed by the United States. Accordingly, the Court limits the United States' use the .380 handgun as a sanction.[6]

A. The mishandling Mr. Murray's body is not an independent basis for spoliation sanctions.

The local officers' mishandling of and tampering with Mr. Murray's body in the hospital emergency room and at the mortuary were grossly inappropriate. These actions support a factual finding that the federal agents did not preserve Mr. Murray's hands and clothing for forensic testing.

The mishandling and mistreatment of Mr. Murray's remains—while grossly inappropriate—did not otherwise affect evidence relevant to the plaintiffs' claims about the cause of Mr. Murray's death. Nothing in the record suggests that the local officers' insertion of fingers into Mr. Murray's head wound affected the observable characteristics of the wound. Similarly, it is unclear how a local officer drawing blood from Mr. Murray's heart and neck could have affected later-performed toxicology tests. Toxicology was not at issue in determining the cause of Mr. Murray's death. The mishandling and mistreatment of Mr. Murray's remains, however wrong, are not an independent basis for spoliation sanctions because they did not affect evidence relevant to the plaintiffs' claims.

B. Except for the .380 handgun, the allegedly spoliated evidence was not in the United States' "control."

Sanctions are appropriate against a party who, in control of the evidence, allows that evidence to be discarded. *See K-Con Bldg. Sys., Inc. v. United States*, 106 Fed. Cl. 652, 664 (2012) ("If a party having control over evidence allows that evidence to be discarded, then the disposal of that evidence is attributable to that party, regardless of who actually discarded the evidence.").

In this case, neither side disputes that the .380 handgun found near Mr. Murray was evidence and that the federal agents controlled it. The federal agents possessed the gun after the shooting. Had they continued to possess it undisturbed, the plaintiffs could have tested it for blowback and fingerprints. The United States bears responsibility for the disposal of the .380 handgun. As for the other possible evidence—Officer Norton's gun, clothing, person or vehicle, Mr. Murray's person or clothing, and the shooting scene—nothing in the record suggests that

[6] The duty to preserve evidence has traditionally been enforced against parties to litigation as a sanction or, in some jurisdictions, against non-parties through a separate state-law tort action. While neither federal nor Utah law recognizes a cause of action in tort by which the duty to preserve evidence might be enforced against a third party, the lack of an independent enforcement mechanism in tort against non-parties is not implicated in the narrow set of circumstances when the non-party is now a party, litigation was reasonably foreseeable at the time of the spoliation, and another doctrine (like collateral estoppel) does not preclude the claim to which the spoliated evidence is relevant.

federal agents ever possessed the other allegedly-spoliated shooting-scene elements in the same way they possessed the .380 handgun. Officer Norton's gun was seized by his superior, but federal agents never took possession of it. Nothing in the record suggests that federal agents examined Officer Norton's person. Agent Ashdown testified that he did not see a need to seize Officer Norton's clothes because he did not see blood on them. 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.

1. Power to investigate is not control.

The plaintiffs argue that the federal agents' duty to preserve evidence extended beyond evidence the United States actually possessed to evidence the agents had "a legal right to control or obtain." (ECF 137 at 21 (citing *Chapman Law Firm, LPA v. United States*, 113 Fed. Cl. 555, 610 (2013), *aff'd*, 583 F. App'x 915 (Fed. Cir. 2014).) Federal agents, the plaintiffs argue, had the legal right to obtain or control all of the allegedly spoliated evidence because they had exclusive authority to investigate Mr. Murray's death on the reservation.

The United States responds that practicality is an element of control, and that the federal agents' decisions to collect or not to collect certain kinds of evidence in their investigation of Mr. Murray's death were discretionary—and therefore fall outside of any spoliation-related duty to preserve evidence.

This Court has found that a party's legal right to obtain or control the destroyed evidence that it did not possess was sufficient to impose on that party a duty to preserve the documents. For instance, a contractor was found to have had control over its employees' emails when it allowed the third party that maintained the server to reuse the server without preserving the emails stored on the server. *Chapman*, 113 Fed. Cl. at 610, 612. Similarly, a government contracting officer had control over documents that a non-government-employee witness asked to see and then unilaterally discarded. *K-Con Bldg. Sys*., 106 Fed. Cl. at 657, 664. The fact that the contracting officer had not examined the documents was held not to have diminished her control over them. *Id.*

In both *Chapman* and *K-Con Building Systems*, however, the spoliators had a property-like right to obtain or control the destroyed evidence independent of its character as evidence. The contractor in *Chapman* (through its employees) created the email messages on the server, used the server, and had presumably paid the possessor of the server to operate it for the firm. *See Chapman Law Firm*, 113 Fed. Cl. at 612 ("[The CEO] recognized his rights to control the email server when he testified with respect to the [provider's] use of the email server for another purpose: 'He converted my property to his use.'"). The document-destroying witness in *K-Con Building Systems* specifically asked the contracting officer if he could "look at" the documents and "take them with him," suggesting that his access to the documents was subject to the contracting officer's control. *K-Con Bldg. Sys.*, 106 Fed. Cl. at 657.

In this case, the plaintiffs' argument that federal agents had a right to obtain or control items, including Officer Norton's gun, clothing, person or vehicle, Mr. Murray's person or clothing, and the shooting scene itself conflates the federal agents' limited authority to investigate and collect evidence of a crime with the property-like right-to-control sufficient to

find spoliation in *Chapman* and *K-Con Building Systems*. The plaintiffs have failed to identify a source of the legal duty they seek to impose on the defendant.

In this case, federal agents exercised law enforcement authority on the Ute Tribe's reservation. In this sense, as compared to the municipal or state officers who lacked this authority, the federal agents had "jurisdiction" over the shooting scene. (*See* ECF 77 ¶ 25.) While investigating whether Mr. Murray's death was a crime, the federal agents could have searched or collected elements of the shooting scene. Subject to constitutional requirements and limits, they could have seized Officer Norton's gun and clothes for testing and searched Officer Norton's vehicle for Mr. Murray's blood. They might even have detained Officer Norton to prevent him from tampering with other shooting-scene elements.

Any right-to-control the federal agents had over this allegedly-spoliated evidence was dependent on agents suspecting that Mr. Murray's death was a crime and on the item's character as a piece or source of evidence of that crime. The federal agents had a right to obtain or control evidence of a suspected crime precisely because it was evidence of a suspected crime, not for any independent reason. The federal agents' investigative jurisdiction over the shooting scene did not impose on them a duty to collect a particular piece or source of evidence for its own or another party's use in foreseeable civil litigation.

Taken to its limit, the plaintiffs' conflation of the authority to investigate a crime with control over certain evidence of a crime yields a circular result that renders *any* potential evidence of the cause of Mr. Murray's death evidence controlled by the government merely *because it is* evidence. Under such a rule, the plaintiffs need only offer expert testimony to identify elements that, if tested or collected might have shown that Officer Norton killed Mr. Murray, call those shooting-scene elements "evidence," and argue that the federal agents investigating the event controlled them as part of the scene and failed to preserve them for the plaintiffs' use. Such a broad definition of "control" and "evidence" transforms spoliation-doctrine's duty-to-preserve into an open-ended duty for law enforcement to investigate to future litigants' standards. This Court will not define "control" so broadly as to transform federal agents' *power* to investigate crimes into a mandatory *duty* to investigate crimes and collect and preserve relevant evidence that would be enforceable by civil plaintiffs. To do as the plaintiffs urge would stretch the judicial role too far.

2. Federal investigators had no legally enforceable duty to collect particular evidence.

Implicit in the plaintiffs' arguments is the point that all items at the scene should have been collected—and thus preserved—because the federal government has a duty to investigate. This duty to investigate, they argue, creates a duty to preserve all possible relevant evidence. The Court disagrees.

This Court's refusal to equate the federal agents' power to investigate with a generally enforceable duty to collect particular evidence is consistent with the Supreme Court's refusal to "impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution" when the Supreme Court held that Due Process only prohibits the *bad faith* failure to preserve

exculpatory evidence in a criminal prosecution. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Tchatat v. O'Hara*, 249 F. Supp. 3d 701, 709 (S.D.N.Y. 2017), *objections overruled,* No. 14 CIV. 2385 (LGS), 2017 WL 3172715 (S.D.N.Y. July 25, 2017), *aff'd sub nom. Tchatat v. City of New York*, No. 18-404, 2019 WL 6998892 (2d Cir. Dec. 20, 2019) (applying *Youngblood* to limit the application of spoliation sanctions to law enforcement in a civil case).

Allegations that law enforcement's noncollection of evidence might be punishable as spoliation have mostly arisen in criminal cases. Courts have rejected the spoliation allegations by concluding that the investigators' failure to collect the evidence might have been negligent, but nevertheless did not show the bad faith intent that other circuits' spoliation or *Youngblood*'s Due Process standard requires. *See, e.g., United States v. Greenberg*, 835 F.3d 295, 303 (2d Cir. 2016).

One Sixth Circuit decision, however, emphasizes the conceptual and legal distinction between a failure to preserve evidence that was collected, which would be spoliation, and investigators' discretionary choices not to collect evidence. The Sixth Circuit rejected the argument of a person convicted of bribery that the government's failure to show more direct evidence of his bribes entitled him to an adverse inference. The Sixth Circuit concluded that "this is not a spoliation-of-evidence case. A *failure to collect evidence that may or may not have been available* for collection is very different from the intentional destruction of evidence that constitutes spoliation." *United States v. Greco*, 734 F.3d 441, 447 (6th Cir. 2013) (emphasis added).

The few courts that have squarely considered in follow-on civil litigation whether spoliation-doctrine's duty to preserve evidence limited police discretion in an earlier criminal investigation have denied spoliation sanctions. Courts find no bad-faith destruction of evidence or refuse to use spoliation sanctions to impose on law enforcement a duty to collect evidence.

For example, when prison officials were accused of finding an inmate in the process of hanging himself and letting him die, the Tenth Circuit affirmed the trial court's holding that the prison officials' next-day cleaning and repainting of the inmate's cell did not constitute intentional destruction of evidence that could be sanctioned as spoliation. *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 861-62 & n.15 (10th Cir. 2005) ("Although we agree with the district court that the government's handling of evidence in this case deviated from standard investigative practices, on the evidence before us we cannot conclude that the court erred in finding that prison officials did not intentionally destroy relevant evidence.")

When a man was arrested for but then acquitted of robbery, the court hearing the man's later civil rights suit against the arresting officers held that the Supreme Court's limits on law enforcement's *Brady* obligations in *Youngblood* precluded the court from finding a spoliation-related duty for the officers to collect store video surveillance and the allegedly stolen merchandise as part of their shoplifting investigation:

> [T]here is no free-floating obligation to preserve evidence in a criminal prosecution and [the plaintiff] cites to no case that so holds. Obviously, there are potentially serious consequences to the viability of the prosecution if relevant evidence is lost. But the

> court-imposed obligation is only to make available evidence favorable to the accused, and thus, obviously, to preserve it. The Brady obligation applies to evidence that is actually favorable to the accused, not to "preliminary, challenged, or speculative information. In *Arizona v. Youngblood*, the Supreme Court specifically refused to "impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."

Tchatat, 249 F. Supp. 3d at 709-10 (citations omitted).

The plaintiffs maintain that although the question of which specific pieces of evidence investigators collect may be discretionary, investigators had a duty to collect at least some physical evidence of the cause of Mr. Murray's death and could not rely solely on Officer Norton's testimony.

Asked to assume that the evidence in plaintiffs' spoliation allegations was uncollected rather than destroyed, the plaintiffs had the opportunity at oral argument to identify some source of law that creates a judicially enforceable duty to the plaintiffs to collect the evidence of the cause of Mr. Murray's death. The plaintiffs could not identify the source of a legally enforceable duty on law enforcement officers to collect physical evidence of Mr. Murray's death. Neither the bad-men provision nor any other source—aside from the nature of the job of law enforcement officers and appealing to the general duty to preserve relevant evidence in foreseeable litigation under the spoliation doctrine—could be identified by the plaintiffs as potential sources of the duty the plaintiffs seek to impose, and the Court could likewise find none.[7] A general duty affirmatively requiring federal law enforcement to investigate deaths and collect physical evidence of their cause must have some source other than this court's inherent power to prevent abuses of the judicial process.

3. There is no evidence of a conspiracy not to collect evidence.

Despite these limitations on the definitions of "control" and "evidence" and the absence of any duty to collect specific evidence, the Court leaves open the question, not presented here, of whether evidence of a conspiracy *not to collect evidence* could be sanctioned as spoliation. In such a case, a spoliation claim would in effect be a claim for violations of constitutional and civil rights. There is neither an allegation nor evidence of such a conspiracy in this case. The plaintiffs only allege that Agent Ashdown and Officer Norton were friends. Agent Ashdown and Officer Norton both testified that their relationship was professional, not social. The Court will not infer a conspiracy from the fact of their professional friendship alone. There are no specific

[7] The Court rejects the plaintiffs' argument that FBI or U.S. Bureau of Indian Affairs policy manuals create a judicially enforceable duty to collect particular evidence in this case. Those policies are for the agency itself, not this Court, to enforce. They do not give rise to rights enforceable by third parties against the United States.

allegations and no evidence in the record to support an inference of a conspiracy to violate Mr. Murray's civil rights involving the federal agents.

C. The United States spoliated the .380 handgun.

The United States had control of the .380 handgun found near Mr. Murray's body. The federal agents collected the handgun and kept it as evidence. The state, county, and municipal defendants received a Notice of Claims from one of the plaintiffs. The FBI agent responsible for investigating Mr. Murray's death pursued the prosecution of the handgun's straw purchaser. The district court ordered the forfeiture of the handgun after the defendant gave notice of the gun's forfeiture on the forfeiture.gov website. The FBI memorandum closing the investigation of Mr. Murray's death mentioned a request for evidence from Vernal City for the previously-noticed civil litigation. The FBI removed the .380 handgun from evidence and provided it to the U.S. Marshals Service for destruction.

Litigation involving the gun was reasonably foreseeable when the gun was destroyed. First, the Court agrees with the district court's finding that, "in light of the seriousness of the incident and the involvement of officers on the Reservation where they did not have jurisdiction, litigation could reasonably be expected." *Jones v. Norton*, 2014 WL 909569, at *7 (D. Utah Mar. 7, 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015). Further, the FBI's September 17, 2008 case-closing memo mentions "an active civil suit" for which bullet casings were provided to the city police department. (ECF 118-3 at JONES0010902; *see* ECF 77 ¶ 34.)

The United States, citing *Micron*, argues that the reasonably-foreseeable standard, although objective, is fact-specific enough to account for the fact that although litigation was reasonably foreseeable or pending against the local officers or state, litigation against the United States was not reasonably foreseeable in late-2008. Nothing in the facts of *Micron*, which addressed a plaintiff's destruction of evidence, supports the proposition that the foreseeability inquiry is defendant-specific. Further, the United States was not entirely uninvolved in the anticipated litigation, because it had already removed the bullet casings from evidence to provide to the Vernal City Police Department.

The .380 handgun was and remains relevant to the plaintiffs' claim that Officer Norton shot Mr. Murray. Although the United States' expert testified that blowback is not left on a gun by every contact-shooting, the absence of blowback could, in conjunction with other evidence, lead a reasonable fact finder to question Officer Norton's account.

The United States argues that it was not culpable for destroying the .380 handgun because it did so pursuant to a court order after public notice. The plaintiffs reply that the federal agents should have disclosed the handgun's character as evidence to the judge who ordered its forfeiture.

Nothing in the record supports a conclusion that federal agents destroyed the .380 handgun with the intent to deprive other parties of its use in litigation. The plaintiffs did not send the Notice of Claims to any of the federal agents, the FBI or the U.S. Bureau of Indian Affairs. The Notice did not specifically request the .380 handgun's preservation, even when the Marshals Service gave public notice of its imminent destruction. The Court cannot find any

evidence that the FBI intended in bad faith to prevent the .380 handgun's use in future litigation, so this court cannot find bad faith.

Nonetheless, the FBI's apparent failure to disclose the .380 handgun's character as evidence to the judge who ordered its disposal was sufficiently negligent to warrant a sanction for its spoliation. The gun was stored in an evidence room as evidence. It was unlike routine business records stored in an office file cabinet, rough interview notes in someone's desk, photos stored in a multifunction electronic device, video stored on reusable media, or other evidence whose intentional destruction pursuant to normal business processes was not sufficiently culpable to amount to spoliation in other cases.

The federal agents' destruction of the gun was sufficiently negligent to support a spoliation sanction. The item was collected as evidence and litigation had been noticed and was impending in which other items from the same collection, the bullet casings, were being used as evidence. The United States spoliated the .380 handgun.

D. Appropriate Sanction

As a sanction for spoliating the .380 handgun in this case, the United States will not be allowed to rely on any evidence related to that gun, including the presence of an unejected shell casing in the destroyed handgun and the presence or absence of fingerprints or blowback on the handgun, to support the United States' conclusion that Mr. Murray died by suicide.

The Court determines a sanction for spoliation by considering (1) the degree of the United States' culpability, (2) the degree of prejudice to the plaintiffs, and (3) whether any lesser sanction might be sufficient. *See Micron*, 645 F.3d at 1329. When the Court exercises its inherent authority to sanction, it also has discretion to determine the appropriate sanction. *Id.* at 1326; *see also Chambers*, 501 U.S. at 55.

The plaintiffs argue for entry of a default judgment as a sanction, but the defendant's spoliation was not sufficiently culpable to merit this dispositive sanction. The Court does not find the United States destroyed the .380 handgun in bad faith, so the Court will not grant default judgment. *See Micron*, 645 F.3d at 1328.

The plaintiffs have the burden to show the prejudice they suffered from the .380 handgun's destruction because the United States did not destroy the gun in bad faith. *Id.* Prejudice requires a "showing that the spoliation 'materially affect[s] the substantial rights of the adverse party and is prejudicial to the presentation of his case.'" *Id.* (quoting *Wilson v. Volkswagen of Am., Inc.,* 561 F.2d 494, 504 (4th Cir.1977)). "In satisfying that burden, a party must only 'come forward with plausible, concrete *suggestions* as to what [the destroyed] evidence *might have been.*'" *Id.* (emphasis in original) (quoting *Schmid*, 13 F.3d at 81).

As a lesser sanction, the plaintiffs argue for an inference that Officer Norton killed Mr. Murray. The plaintiffs did not show prejudice commensurate to their requested remedy. The plaintiffs support their request for this broad inference by arguing that the spoliation was so broad that it makes it impossible to prove conclusively the cause of Murray's death—that the FBI destroyed "nearly all of the evidence." (ECF 142 at 17). The spoliation was not so broad.

Only the .380 handgun was spoliated and there remains other evidence, such as scene photographs, witness testimony, and medical examination results.[8]

The Court has considered whether the plaintiffs showed prejudice sufficient to support a narrower inference specific to forensic testing of the .380 handgun. The Court finds that the plaintiffs failed to establish their suggestions of what forensic testing might have revealed as more than speculation. For example, the plaintiffs argued that forensic testing of the .380 handgun could have shown Officer Norton's fingerprints on the handgun. The plaintiffs support the plausibility of such fingerprints with what they perceive as inconsistencies in Officer Norton's account of Mr. Murray's shooting, like the unlikelihood of the right-handed Mr. Murray reaching the gun to the left side of his head. The plaintiffs argue that these observations, combined with the fact that Officer Norton was the only other person present when Mr. Murray was shot, make plausible that testing of the .380 handgun could show that Officer Norton handled the gun. The plaintiffs, however, offer no basis sufficient for the Court to distinguish their theory from other possibilities that incorporate these same facts.

Any sanction for the spoliation of the .380 handgun must be narrowly tailored to remedy the prejudice caused by the handgun's destruction. *See, e.g.*, *SDI Operating P'ship, L.P. v. Neuwirth*, 973 F.2d 652, 654 (8th Cir. 1992) (affirming district court's further narrowing of a magistrate judge's already-narrow sanction for defendant's destruction of wiring that prevented plaintiff's own more precise testing). The United States may not rely affirmatively on any facts related to the .380 handgun, including the fact that the third shell casing was not ejected from the destroyed handgun and the presence or absence of fingerprints or blowback on the handgun, to support the United States' conclusion that Mr. Murray died by suicide.[9]

[8] Although the plaintiffs were not specifically notified of the government's intention to destroy the .380 handgun, nothing prevented the plaintiffs from discovering who controlled the gun and requesting its preservation for forensic testing before its destruction, especially given the public notice of the gun's impending destruction. The plaintiffs' failure in this regard must be held against them.

[9] The Court reserves for later decision, if necessary, whether to permit the defendant to use the .380 handgun defensively, in rebuttal, in the event the plaintiffs attempt to construct an argument based on that firearm.

IV. CONCLUSION

The plaintiffs' motion for spoliation sanctions is GRANTED in part and DENIED in part. The motion is granted as to the defendant's destruction of the .380 handgun. The motion is denied in all other respects. As a sanction for the defendant's spoliation of the .380 handgun, the defendant will not be permitted to rely on any facts related to the .380 handgun, including the fact that the third shell casing was not ejected, as evidence supporting the claim that Mr. Murray shot himself with that handgun.

It is so **ORDERED**.

s/ Richard A. Hertling
Richard A. Hertling
Judge

In the United States Court of Federal Claims

No. 13-227L
Filed: July 8, 2020
FOR PUBLICATION

DEBRA JONES and ARDEN C. POST individually and as the natural parents of Todd R. Murray;

DEBRA JONES as personal representative of the Estate of Todd R. Murray, deceased, for and on behalf of the heirs of Todd R. Murray; and the

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,

***Plaintiffs*,**

v.

UNITED STATES,

***Defendant*.**

Keywords: Summary Judgment, Sufficiency of Evidence, Issue Preclusion, "Bad Men" Provision

Jeffrey S. Rasmussen, Patterson Earnhart Real Bird & Wilson LLP, Louisville, Colorado, for the plaintiffs.

Kristofor R. Swanson with *Terry Petrie*, Natural Resources Section, Environment & Natural Resources Division, U.S. Department of Justice, for the defendant. *Christopher R. Donovan*, Office of the General Counsel, Federal Bureau of Investigation, and *James W. Porter*, Office of the Solicitor, U.S. Department of the Interior, of counsel.

MEMORANDUM OPINION

***HERTLING*, Judge**

Todd Murray, a member of the Ute Indian Tribe, died of a close-contact gunshot wound after he and the driver of the car in which he rode were pursued by state and local police officers acting without law-enforcement jurisdiction on the tribe's reservation in northeastern Utah. One of the pursuing officers reported seeing Mr. Murray shoot himself while the officer stood about 100 yards from Mr. Murray. Another officer standing farther away saw significant distance between the first officer and Mr. Murray shortly before seeing Mr. Murray fall to the ground. A state medical examiner found Mr. Murray's head wound consistent with suicide.

Mr. Murray's parents brought both a district-court civil rights action against the state and local officers and this case, a treaty claim against the United States. In both actions, Mr. Murray's parents have argued that the officers murdered Mr. Murray and conspired to destroy any evidence that the plaintiffs could have offered to prove the alleged homicide. In both actions, the plaintiffs have attributed a lack of conclusive evidence to the success of officers' and federal agents' alleged cover-up. The plaintiffs have, therefore, sought to prove their allegations by obtaining an evidentiary inference or default judgment against the local officers or the United States as a sanction for the respective defendants' alleged spoliation of evidence.

In the civil-rights action, the district court found that the officers' and state medical examiner's testimony supporting suicide were uncontroverted because the plaintiffs offered only speculation, not evidence, and the state and local officers could not be sanctioned for spoliating evidence in a federal investigation. The district court found insufficient evidence for a reasonable fact-finder to conclude that Mr. Murray's death was not a suicide. The district court considered the officers' liability for other parts of the pursuit and their conduct after the shooting but granted summary judgment for the officers and their employing municipalities on all claims.

This Court found the plaintiffs' treaty claims non-cognizable or precluded by the district court's decision. The Federal Circuit reversed and remanded the case for this Court to reconsider, after first considering whether sanctions for the federal agents' alleged spoliation of evidence might affect the preclusive effect of the district court's decision.

On remand, the case was transferred to this judge, and the Court found no intentional cover-up involving federal agents. This Court found, however, that federal agents negligently spoliated the alleged suicide weapon that investigators had found near the spot where Mr. Murray was shot. As a sanction, this Court prohibited the defendant from relying on the gun or on any inferences favorable to the defendant that could be drawn from it.

With the spoliation issue resolved, the defendant has moved for summary judgment under Rule 56 of the Rules of the Court of Federal Claims ("RCFC"). The Court finds that the Utah district court's decision precludes the plaintiffs from proving facts essential to their treaty claims. Moreover, some of the plaintiffs' claims are not cognizable under the treaty's "bad men" provision, or are inadequately supported by evidence to conclude that crimes had been committed against Mr. Murray, a predicate to recovery under the treaty's "bad men" provision. Accordingly, the defendant's motion for summary judgment is granted.

I. FACTS

The apparent facts of Mr. Murray's death are described in the district court's decision granting summary judgment for the local authorities. *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014) [hereinafter *Jones D. Ct. Merits*], *aff'd,* 809 F.3d 564 (10th Cir. 2015) [hereinafter *Jones 10th Cir.*]. Those facts, as they relate to the United States, are summarized in this Court's earlier opinion dismissing this case and the Federal Circuit opinion reversing that dismissal, *see Jones v. United States*, 122 Fed. Cl. 490 (2015) [hereinafter *Jones Fed. Cl. Dismissal*], *vacated and remanded*, 846 F.3d 1343 (Fed. Cir. 2017) [hereinafter *Jones Fed. Cir.*], and in this Court's opinion granting-in-part and denying-in-part the plaintiffs' motion for spoliation sanctions, 146 Fed. Cl. 726 (2020) [hereinafter *Jones Fed. Cl. Spoliation*].

The Court draws its recitation of the facts from these previous opinions, the parties' Joint Stipulations Regarding Spoliation (ECF 77), the transcript of the district court's evidentiary hearing on spoliation (ECF 77-1), and the Supplemental Joint Appendix of documents from the district court litigation (ECF 127).[1] The parties also agreed to submit as evidence the depositions of their respective experts (ECF 144). The Court references the plaintiffs' allegations from the Amended Complaint (ECF 17) for contextual facts that are not covered by the Stipulations or undisputed elements of the testimony before the district court.

A. On-Reservation Events: Pursuit, Gunshot Wound, and Handcuffing

On April 1, 2007, a Utah state trooper radioed the state Central Police Dispatch advising that he was pursuing a car containing "two tribal males" for a speeding violation. (ECF 17 ¶ 21.) Mr. Murray was the passenger in the vehicle being pursued. (ECF 77 ¶ 5.) The vehicle eventually stopped within the boundaries of the Ute reservation, where Mr. Murray and the driver exited and stood on either side of the vehicle. (ECF 17 ¶ 26.) The trooper approached the driver and Mr. Murray, ordering them to the ground multiple times. (*Id.* ¶ 26.) Mr. Murray and the driver ran off in opposite directions. (*Id.* ¶ 26.) The trooper pursued and apprehended the driver. (*Id.*)

As the trooper returned to his patrol car with the handcuffed driver, off-duty Vernal City police officer Larry "Vance" Norton arrived on the scene wearing plain clothes and driving his personal car. (*Id.* ¶ 27.) The trooper asked Officer Norton to pursue Mr. Murray. (*Id.*). Another state trooper and a county deputy arrived next and joined the search for Mr. Murray. (*Id.* ¶ 29.) The parties stipulated that none of the state, county, or municipal officers involved could lawfully exercise authority over Mr. Murray on the Ute reservation. (*See* ECF 77 ¶¶ 8-10.)

Officer Norton testified that, after a foot chase, Mr. Murray fired at Officer Norton. (*Id.* ¶ 21). Officer Norton testified that he then fired two shots back at Mr. Murray with a .40-caliber handgun before retreating while watching Mr. Murray over his shoulder. (*Id.* ¶¶ 21-22, *as clarified by* ECF 152 at 2.) Officer Norton testified that "Mr. Murray put a gun to his head as Officer Norton shouted at Mr. Murray to put it down, that Mr. Murray then pulled the trigger, and . . . collapsed." (ECF 77 ¶ 23.) Officer Norton was the only witness to the gunshot that killed Mr. Murray. (*See* ECF 77-1 at 251.)

After Mr. Murray was shot, while he was still alive, the deputy, Anthoney Byron, handcuffed him. (ECF 17 ¶ 33; ECF 139 at 4.) The plaintiffs allege that, half an hour after Mr.

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[1] Because the Joint Stipulations Regarding Spoliation (ECF 77) had been submitted for the limited purpose of the plaintiffs' motion for spoliation sanctions, the Court ordered (ECF 151) the parties to advise if they disavowed any of those stipulated facts and informed the parties that any facts not specifically disavowed would be accepted as true for purposes of the defendant's summary judgment motion. The defendant filed a notice (ECF 152) disavowing or clarifying several of the stipulated facts, but the notice does not put into dispute any facts material to the resolution of the motion for summary judgment; the plaintiffs did not file any notice disavowing any of the previously stipulated facts.

Murray was reported shot, an ambulance arrived and took Mr. Murray—who was still alive—to a hospital, where he was declared dead shortly after arriving. (ECF 17 ¶¶ 39, 41.)

B. Off-Reservation Events: Hospital, Mortuary, and Medical Examiner's Office

At the hospital, the plaintiffs allege, state, county, and municipal officers removed Mr. Murray's clothes, unnecessarily photographed and manipulated his unclothed remains, and photographed one officer "sticking a finger into Murray's head wound." (*Id.* ¶ 42.) U.S. Bureau of Indian Affairs ("BIA") Officer Kevin Myore was allegedly also present at the hospital. (*Id.*)

State, county, and municipal officers then transported Mr. Murray's body to a mortuary to store it overnight until it could be transported to the state medical examiner's office the next day. (*Id.* ¶ 43.) At the mortuary, the plaintiffs allege, the officers drew two vials of blood from Mr. Murray's body by inserting a needle into Mr. Murray's heart and asking a mortuary employee to make an incision in Mr. Murray's neck. The plaintiffs allege that Federal Bureau of Investigation ("FBI") Agent Rex Ashdown arrived at the mortuary and was "informed that a sample of Mr. Murray's blood had been drawn earlier at the [hospital]," but did nothing to stop the officers from drawing more blood. (*Id.* ¶ 44.)

The next day, Mr. Murray's body was moved to the state medical examiner's office in a body bag. (ECF 17 ¶ 48; *see* ECF 77-1 at 54.) The medical examiner reported that Mr. Murray's remains arrived with hands bagged. (ECF 17 ¶ 52.) He found no soot on either hand. (*Id.*) Mr. Murray's left hand was "clean and free of any debris or blood." (*Id.*) Mr. Murray's right hand was "caked in blood." (*Id.*)

The FBI requested that the medical examiner perform an autopsy. (ECF 77 ¶ 43.) The state medical examiner performed an external examination of Mr. Murray but did not conduct an autopsy. (*Id.* ¶ 44.)

C. Federal Investigation

The FBI had jurisdiction to investigate Mr. Murray's death on the reservation. (*Id.* ¶ 25.) Agent Ashdown of the FBI's Vernal Resident Agency arrived on the scene after the ambulance had transported Mr. Murray to the hospital. (*Id.* ¶¶ 13, 24.)

Agent Ashdown testified that, on his arrival at the scene of the shooting, someone he only remembered as a "senior supervisory officer" told him that Mr. Murray had shot himself. (ECF 77 ¶ 26.) Agent Ashdown documented the scene and collected evidence. The parties stipulated that "some or all of" the evidence collected was ultimately entered into the FBI Salt Lake City Division's evidence room. (Id. ¶ 37.) The parties further stipulated that the collected evidence included photographs and GPS coordinates documenting the scene and the relative location of its elements, a .380-caliber handgun found near Mr. Murray's body, two spent .380-caliber shell casings found near the .380 handgun, and two spent .40-caliber shell casings found 113 yards from the location of Mr. Murray's body (*Id.* ¶ 34).

a. Documenting the Scene

Agent Ashdown "took photographs of various angles of the scene[,] . . . identified photos, marked exhibits, and photographed the exhibits in place from various positions, . . . collected those items he believed had evidentiary value[,] . . . [and] placed yellow evidence placards . . . to mark [at least some of] the evidence he observed for later purposes to identify what he was looking at." (*Id.* ¶¶ 27-28.) Agent Ashdown "marked and photographed some of the blood and blood splatter that could be identified as blood." (*Id.* ¶ 29.) Agent Ashdown took GPS measurements of the location of found shell-casings and Mr. Murray's body. (*Id.* ¶ 33.)

b. .380 Handgun

Agent Ashdown collected as evidence the .380 handgun found next to Mr. Murray's body. (*Id.* ¶¶ 29-30.) Agent Ashdown photographed a spent shell-casing that apparently had failed to eject properly, "jammed" inside the .380 handgun. (*Id.* ¶ 36.) The FBI retained possession of the .380 handgun. (*Id.* ¶ 31.) Agent Ashdown did not request a test firing of the .380 handgun, later testifying that the only purpose of test firing it would have been to confirm that it functioned and had been fired. (*Id.* ¶ 35.)

c. Shell-Casings

Agent Ashdown testified that he also collected two spent .380 shell-casings from the ground from within the expected ejection-radius of the .380 handgun's location. The FBI retained possession of the .380 shell casings. (*Id.* ¶ 34.)

Agent Ashdown also photographed and collected Officer Norton's two .40-caliber shell-casings approximately 113 yards from where Mr. Murray had fallen. (*Id.* ¶ 32.)

d. Officer Norton's Gun, Person, Clothes, and Vehicle

The parties stipulated that Agent Ashdown "testified that he did not perform or request any testing of Officer Norton's clothing because he did not observe anything on Officer Norton's body and did not see any blow back blood or blood splatter type evidence on the clothes." (*Id.* ¶ 48.) Officer Norton's supervisor, Chief Gary Jensen of the Vernal City Police Department, also testified he did not see any blood or tissue on Officer Norton when Chief Jensen arrived at the scene. (ECF 77-1 at 215-16.)

Chief Jensen testified that he took custody of Officer Norton's .40-caliber handgun at the scene and saw no blood or tissue on the gun. (*Id.* at 215-16.) The weapon was later returned to Officer Norton. (*See id.* at 238.) When the district court asked about his motivation for believing that it was not necessary to test Officer Norton's gun or clothing, Chief Jensen responded:

> The motivation is that, with all due respect, Vance Norton was a very good Detective. Vance Norton was involved in a situation. He described the situation. The scene appeared to be as he described it. It appeared to be a suicide and it was believable. I didn't feel it was necessary.

(*Id.* at 222.)

e. Reliance on Officer Norton's Account

Agent Ashdown testified that he spoke with Officer Norton at the scene to arrange an interview, and the conversation ended after Officer Norton stated that he would want an attorney present. (ECF 77-1 at 159-60.) Agent Ashdown did not remember receiving an account directly from Officer Norton at the scene. (*Id*. at 158-59.) Agent Ashdown testified that his partner later conducted an interview with Officer Norton and his attorney while Agent Ashdown was out of town. (*Id.* at 159-60.)

Agent Ashdown testified that he had a professional but not a personal relationship with Officer Norton, and that he "knew him to be a credible officer in all of the interactions I ha[d] during the past 10 years prior to this, and I had no reason to discount the story I had been given as I approached that scene." (*Id.* at 157.)

During the district court's spoliation hearing, Agent Ashdown was asked whether, due to his reliance on Officer Norton's account, he had neglected to document the location of various elements at the scene of Mr. Murray's death to a degree that would allow a recreation of that scene. Agent Ashdown testified that he had not:

> Because I took the information received regarding what Officer Norton had reported. I had gone down to the crime scene, reviewed the crime scene and everything had been consistent with what I had been told. There was nothing inconsistent that I could see, and it had been determined at that time it was a suicide, and the FBI office and the FBI lab don't have the resources or does any department have the resources to take a suicide investigation to an Nth degree to prove something that we already know.

(*Id.* at 164.)

D. Alleged Meeting with the Family and Promise to Investigate

One of the plaintiffs, Ms. Jones, Mr. Murray's mother, submitted a declaration recounting a meeting with Agent Ashdown on April 25, 2007, together with other members of Mr. Murray's family. (ECF 14-3 ¶¶ 5-8.) Ms. Jones explains that she "understood [her] son [had] died from a gunshot wound to the head," however, "when his body was returned to the family for burial, we were shocked to see that his neck had been slashed and then stitched together in a horrific, unsightly manner." (*Id.* ¶ 10.)

Ms. Jones alleges that, in this meeting with Agent Ashdown, she "pleaded" with him to investigate the circumstances of Mr. Murray's death. (*Id.* ¶ 7.) Agent Ashdown, she declared, "promised" the victim's family and her that he would conduct a "full investigation." (*Id.* ¶ 8.)

In this same meeting, Ms. Jones recounts, family members told Agent Ashdown that Mr. Murray was right-handed and asked Agent Ashdown to demonstrate on himself how a right-handed person could have shot himself on the left-side of his head above and behind his left ear.

(*Id.* ¶ 6.) Ms. Jones recounts that Agent Ashdown was "unable to position a gun in a manner consistent with the bullet trajectory that was reported by the medical examiner." (*Id.*)

E. Forfeiture of the .380 Handgun

After Agent Ashdown's May 2007 retirement, FBI Special Agent David Ryan took over the investigation of Mr. Murray's death. (ECF 77 ¶ 14.) Agent Ryan investigated the purchase of the .380 handgun and assisted in the criminal prosecution of the handgun's straw purchaser. (*Id.* ¶¶ 14, 38.) This investigation linked the gun to the driver of the vehicle in which Mr. Murray had been a passenger. (*See* ECF 118-6 at JONES0018324-25). The .380 handgun's straw-purchaser was indicted in January 2008, and the indictment contained a notice of intent to seek forfeiture of the gun. (ECF 77 ¶ 38.)

On March 2, 2008, Ms. Jones sent a "Notice of Claims" to the Vernal City police department, state highway patrol, county sheriff, Uintah County, and Officer Norton. *See Jones v. Norton,* No. 2:09-CV-730-TC, 2014 WL 909569, at *4 (Mar. 7, 2014) [hereinafter *Jones D. Ct. Spoliation*] (describing the Notice). Officer Norton testified that he received the Notice on April 1. (ECF 77-1 at 240.) The Notice summarized the facts of Mr. Murray's death from the police pursuit to the examination of Mr. Murray's body. (*Id.*) The Notice indicated that Ms. Jones intended to bring claims against the recipients for violations of Fourth Amendment protections against unreasonable search and seizure, Fourteenth and Fifth Amendment guarantees of due process, the Fourteenth Amendment guarantee of equal protection, and the Fifth Amendment right not to be compelled to be a witness against oneself, violation of the equivalent state constitutional provisions, assault and battery, intentional and/or negligent infliction of emotional distress, negligence, and wrongful death. *Jones D. Ct. Spoliation*, 2014 WL 909569, at *4-5. The first paragraph of the Notice provided "[t]his notice should not be deemed to waive any cause of action that Debra Jones may have against any individual or entity, governmental or otherwise, who may later be determined to be ultimately responsible for the damages she has sustained." *Id.*

The .380 handgun's straw purchaser pleaded guilty, and the district court entered a preliminary forfeiture order in May 2008. (ECF 77 ¶¶ 38-40.) Pursuant to this order, the United States published a notice on www.forfeiture.gov for anyone to claim an interest in the gun within 30 days. (*Id.* ¶ 40.)

An FBI memorandum dated September 17, 2008, recommended closing the investigation of Mr. Murray's death. (ECF 118-3 at JONES0010902.) The memorandum described Mr. Murray's death as a suicide and reported that the FBI had completed the prosecution of the .380 handgun's straw purchaser. (*Id.*) The memorandum further reported that "[t]he firearm recovered from Murray after he shot himself has been forfeited" and continued "[d]ue to an active civil suit involving [redacted] and the [Vernal City Police Department], items 1Bl - 1B4

have been removed from FBI evidence and provided to VPD. No other items remain in FBI evidence."[2] (*Id*. (redaction in original)).

On November 14, 2008, the district court found that adequate notice had been given and that no one had claimed an interest in the .380 handgun. (ECF 77 ¶ 41.) The court ordered the .380 handgun forfeited to the United States and "disposed of according to law." (*Id*.) The FBI took the .380 handgun "out of evidence" on November 26, 2008, and provided it to the U.S. Marshals Service on December 2, 2008. (*Id.* ¶ 42.) The Marshals Service destroyed the handgun, as is its routine practice.

The FBI turned over the two .380-caliber shell-casings and two .40-caliber shell-casings to a Vernal City police detective on December 15, 2008, "because of the Utah District Court litigation." (*Id.* ¶ 34.)

II. PROCEDURAL HISTORY

A. Civil Rights Claims Against Local Authorities

In July 2009, the individual plaintiffs and Mr. Murray's estate filed federal-law civil rights claims in state court against Uintah County, Vernal City, the state troopers, the county sheriff's deputies, and Officer Norton, along with state-law "assault and battery" and wrongful death claims against Officer Norton individually. In August 2009, the defendants removed the case to the United States District Court for the District of Utah. (ECF 117-2 at JONES001018-87.) The plaintiffs argued that Officer Norton killed Mr. Murray by shooting him in the head at point-blank range either with Officer Norton's own gun or with the .380 handgun found near Mr. Murray's body, and that the state, county, and municipal officers spoliated the evidence of Officer Norton's act. *Jones D. Ct. Merits*, 3 F. Supp. 3d at 1191.

In 2014, the district court granted summary judgment for the defendant state, county, and municipal officers and Vernal City, holding that there was insufficient evidence for a reasonable jury to conclude that Officer Norton shot Mr. Murray in the head at point-blank range. *Jones D. Ct. Merits*, 3 F. Supp. 3d at 1192, 1213. In a separate decision denying spoliation sanctions against the defendants in that case, the district court found that certain elements of spoliation were met as to some evidence, but, in part because the FBI had the jurisdiction to investigate Mr. Murray's death, the state, county, and municipal defendants did not have a duty to preserve the allegedly spoliated evidence. *See Jones D. Ct. Spoliation*, 2014 WL 909569, at *8 ("None of the named Defendants [except possibly Vernal City] can be held liable for these alleged misdeeds, because Agent Ashdown and Keith Campbell were in charge of the investigation."); *Jones D. Ct. Spoliation*, 2014 WL 4825894, at *1 n.6 (D. Utah Sept. 25, 2014) (noting that the district court denied the motion for spoliation sanctions against Vernal City after the opportunity for additional briefing).

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[2] The Court understands "items 1B1-1B4" to refer to the two .40-caliber and two .380-caliber shell casings that the FBI had collected at the shooting scene. (*See* ECF 77 ¶ 34.)

The plaintiffs appealed to the U.S. Court of Appeals for the Tenth Circuit, which affirmed the district court's decisions. *See Jones 10th Cir.*, 809 F.3d at 568.

B. Treaty Claim Against the United States

While the civil rights action against the local officers was still pending before the district court in February 2012, the plaintiffs notified the BIA and the Department of Justice of Mr. Murray's death. (ECF 17 ¶ 75.) They sent a Statement of Claim for damages, typically a required precursor to filing suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, in March 2013. (*Id.* ¶ 76.) The plaintiffs never pursued a FTCA action for Mr. Murray's death.

The plaintiffs, on April 1, 2013, filed suit against the United States in this Court. (ECF 1.) The plaintiffs' claims were founded on the "bad men" provision of the 1868 Treaty between the United States and the Ute Tribe.

1. The "Bad Men" Provision

By 1868, Congress had concluded that the "aggressions of lawless white men" were the cause of most "Indian" wars. *Jones Fed. Cir.*, 846 F.3d at 1348. That year, the United States entered into a treaty with the Ute Tribe of the Uintah & Ouray Reservation aimed at "peace between the Ute Tribe and white settlers." *Id.* at 1348. The treaty provides:

> If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

See Treaty with the Ute, art. 6, Mar. 2, 1868, 15 Stat. 619. The "bad men" clause made the federal government "responsible for what white men do within the Indian's territory." *Janis v. United States*, 32 Ct. Cl. 407, 410 (1897).

2. Court of Federal Claims Dismissal

While the appeal of the civil rights action was still pending at the Tenth Circuit, this Court granted the United States' motion to dismiss for failure to state a claim. 122 Fed. Cl. at 490, 522, 529-30. Judge Horn held that the United States could only be liable under the treaty's "bad men" provision for "affirmative" criminal acts committed on the reservation, and, further, that the plaintiffs were collaterally estopped from relitigating "the factual circumstances of Todd Murray's death, and the allegations of the destruction of evidence." *Id.*

3. Federal Circuit's Reversal and Remand

The plaintiffs appealed the dismissal to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit vacated the dismissal and remanded the case. The Federal Circuit's opinion provides standards for this Court to determine which specific crimes are cognizable as wrongs under the "bad men" provision. *See Jones Fed. Cir.*, 846 F.3d at 1357 ("Jones has not yet

explained what particular crimes each alleged omission constituted, so we do not have concrete criminal-law duties to analyze.") The Court of Appeals also directed this Court to consider whether federal agents spoliated evidence, and whether that spoliation affected the plaintiffs' full and fair opportunity to litigate otherwise precluded issues decided by the district court in the civil rights action. *Id.* at 1363-64. The Federal Circuit's holding and instructions are discussed more fully below in the relevant portions of the Court's analysis.

4. Spoliation Sanctions

On remand, this Court found that the United States had spoliated the .380 handgun. Federal agents failed to disclose to the judge who ordered the illegally purchased handgun's routine forfeiture and destruction that handgun's character as potential evidence in what was then foreseeable litigation. The Court found no evidence of a spoliation conspiracy and further held that the federal agents' discretionary choices not to collect specific pieces of evidence did not constitute spoliation.

As a sanction for the spoliation of the .380 handgun, the Court prohibited the United States from relying on any evidence related to the .380 handgun, "including the presence of an unejected shell casing in the destroyed handgun and the presence or absence of fingerprints or blowback on the handgun, to support the United States' conclusion that Mr. Murray died by suicide." *Jones Fed. Cl. Spoliation*, 146 Fed. Cl. at 742.

The Court declined to infer that testing of the spoliated handgun would have proven that Officer Norton killed Mr. Murray, finding that conclusion to be speculation based largely on the perceived unlikelihood that Mr. Murray would use his non-dominant hand to discharge the firearm and Officer Norton's circumstance as the lone witness. *Id.* at 742-43. The Court found "no basis sufficient for the Court to distinguish [the plaintiffs'] theory from other possibilities that incorporate the same facts." *Id.* at 743.

5. Discovery and Motion for Summary Judgment

Following the Federal Circuit's mandate to apply the "bad men" provision to specific crimes and to consider the effect of any spoliation sanctions on the preclusion of specific issues, the Court directed limited discovery as to specific crimes the plaintiffs allege as "wrongs." (ECF 148.) On January 24, 2020, the defendant served the plaintiffs with requests for admission and interrogatories (ECF 150-5), noting a 30-day deadline to respond. The defendant requested that the plaintiffs identify the specific individuals that they allege to be "bad men" under the treaty provision, the crimes each is alleged to have committed, and citations to the federal or Utah criminal statutes for each crime. On February 7, the defendant filed its answer.

The plaintiffs served the defendants with their responses on March 3, 2020, 39 days after the defendant served its requests, and 25 days after the defendant served its answer.[3] The

[3] The defendant argues that its requests for admissions are admitted because the plaintiffs responded nine days late. *See* RCFC 36(a)(3). The plaintiffs argue that their responses were six

plaintiffs qualified their responses with objections that the requests and interrogatories called for legal conclusions and that their responses are protected work product. The responses allege that Officer Norton committed murder, negligent or reckless homicide, battery, and any lesser included offenses against Mr. Murray.[4] (ECF 150-6 at 3.)

As additional "bad men," the plaintiffs identify 21 individuals, mostly law enforcement officials, who were presumably present or supervised others who were present at the shooting scene, hospital, mortuary, or medical examiner's office; they also identify eight government entities and a private business related to the individuals:

FBI Agent Rex Ashdown

FBI Agent David Ryan

United States Federal Bureau of Investigations

United States Bureau of Indian Affairs

Vance Norton, Uintah County Sheriff's office

Craig Young, Utah Highway Patrol

Anthony Byron, Uintah County Sheriff's Department

Jeff Chugg, Utah Highway Patrol

Troy Slaugh, Uintah County Sheriff's Department

Sean Davis, Utah Division of Wildlife Resources

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days early because the 30-day clock to respond to the defendant's requests started when the defendant filed its Answer on February 7, not when the requests were served. *See* RCFC 26(d)(1) (providing the Joint Preliminary Status Report conference as the start of discovery); RCFC Appendix A ¶ 3 (providing that parties confer on the Joint Preliminary Status Report ("JPSR") after the Answer is filed). The defendants maintain that the 30-day clock started at service of the requests because the parties had already conferred on a JPSR and some discovery had already occurred in this case before the defendant served the requests for admission.

The Court deems the plaintiffs' argument regarding the deadline as a timely request to withdraw and amend its deemed admissions. *See United States v. Petroff-Kline*, 557 F.3d 285, 294 (6th Cir. 2009) ("Despite its failure to have filed a formal motion to withdraw its claimed admissions, the Government's filing of a slightly overdue response effectively served as such a withdrawal."). The defendant has not been prejudiced by the nine-day delay, and permitting withdrawal promotes the resolution of this case on the merits. See RCFC 36(b); *Gwynn v. City of Philadelphia*, 719 F.3d 295, 299 (3d Cir. 2013) ("The prejudice contemplated by Rule 36(b), however is not simply that the party who obtained the admission now has to convince the [fact finder] of its truth. Something more is required.") (citation omitted).

[4] The plaintiffs listed the relevant statutory provisions as 18 U.S.C. §§ 13, 1111, 1112, 1117, 1152 and Utah Code §§ 76-5-202 (e), (f), (k), (s); 76-5-201 76-5-205, 206,209.

Gary Jensen, Logan Police Department, Logan, Utah

Rex Olsen, Utah Highway Patrol

Bevan Watkins, Uintah County Sheriff's Department

Keith Campbell, Vernal City Police Department

Ben Murray, Vernal City Police Department

Dave Swenson, Utah Highway Patrol

James Beck, . . . Bureau of Indian Affairs

("BIA") Police Chief at the time

Terrance Cuch

Kevin Myore

Colby Decamp, . . . St. George, Utah

Mitch Blackburn, Vernal, Utah, owner of Blackburn Mortuary

Dr. Edward Leis, M.D., Office of Medical Examiner, State of Utah

Vernal City Police Department

Uintah County Sheriff's office

Uintah County, Utah

State of Utah Office of Medical Examiner

State of Utah Highway Patrol

State of Utah

Blackburn Mortuary

(ECF 150-6 at 1-2.)

The plaintiffs intend to assert that all these alleged "bad men," along with Officer Norton, conspired to commit the following crimes defined by federal statute:

Criminal trespass, 18 U.S.C. §§ 13, 1152, 1165[;] 1868 Treaty Art[.] 2.

Obstruction of justice, 18 U.S.C. §§ 13, 1152, 1503, 1505, 1506, 1510, 1511, 1512, 1513, 1519.

Unlawful arrest and detention, [18 U.S.C.] §§ 13, 1152.

Kidnapping, 18 U.S.C. § 13, 1152, 1201.

Conspiracy against rights, 18 U.S.C. §§ 13, 1152, 241, 242.

Hate crimes, 18 U.S.C. §§ 249.

False claims and conspiracy to defraud United States, 18 U.S.C. §§ 13, 1152, 286, 287, 371.

Wire fraud, 18 U.S.C. § 1343.

Injury to government property, 18 U.S.C. §§ 13, 1152, 1361.

Pe[r]jury and subornation of perjury, 18 U.S.C. §§ 13, 1152, 1621, 1622.

Destruction of records or evidence, 18 U.S.C. §§ 13, 1152, 2071, 2232.

RICO, [18] U.S.C. Ch. 96. [§§ 1962, 1963(a)]

Conspiracy to commit each of the above, §§13, 1152.

Accessory after the fact for all of the above and for Norton's crimes, 18 U.S.C. §§ 3, 13, 1152.

Misprision of felony related to all of the above and related to Norton's crimes, 18 U.S.C. §§ 4, 13, 1152.

(ECF 150-6 at 3-4, *as amended by* ECF 150-7 at 1-2.)

Further, the plaintiffs intend to prove that the alleged "bad men," including Officer Norton, committed the following crimes defined by Utah statute and incorporated into federal law, 18 U.S.C. § 13, 1152, or, alternatively directly under general principles of Utah criminal law, Utah Code §§ 76-2-101; 76-2-202; 76-2-204; 76-2-205, and the Utah conspiracy and attempt statutes, §§ 76-4-201; 76-4-202; 76-4-101:

Assault, §76-5-102.

Reckless endangerment §76-5-112.

Kidnapping, §76-5-301.

Criminal mischief, §76-6-106.

Criminal Trespass, §76-6-206.

Official or unofficial misconduct §§76-8-201, 203.

Interference with public servant or peace officer, §§76-8-301; 76-8-305.

Obstruction of criminal investigation, §76-8-306.

Doing business without a license, §76-8-410.

Destruction of government property §76-8-412 or 413.

False statement and pe1jury; §§76-8-502 to 506.

Retaliation against a witness, victim, or information, § 76-8-508.3.

Tampering with evidence, falsification or alternation of government record, §§76-8-

510.5, 511.

Impersonation of officer, §76-8-512.

Disorderly conduct §76-9-102.

Disrupting a funeral or memorial service, §76-9-108.

Abuse or desecration of a dead human being, §76-9-704.

(ECF 150-6 at 4, *as amended by* ECF 150-7 at 1-2.)

The defendant moves for summary judgment on all the plaintiffs' claims. The defendant argues that for the plaintiffs to prove the elements of many of the crimes they cite, they would be required to relitigate factual findings and legal conclusions previously litigated and resolved by the district court. According to the defendant, the doctrine of issue preclusion forbids the plaintiffs from relitigating these claims, now that the Court has refused to grant the plaintiffs' request for adverse evidentiary inferences against the defendant based on the defendant's alleged spoliation of evidence. The defendant further argues that the crimes the plaintiffs allege occurred that were not resolved by the district court are not cognizable under the "bad men" provision.

The motion has been fully briefed. (*See* ECF 150, 156, 157.)

III. ANALYSIS

Summary judgment is appropriate when no material fact is in genuine dispute and the law entitles the moving party to judgment. *See* RCFC 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). One way a defendant can demonstrate that no material fact is genuinely disputed is by showing that the plaintiffs lack sufficient evidence to prove an essential element of their claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.") If the plaintiffs respond to such a motion by pointing to sufficient evidence for the Court reasonably to find an essential element of the plaintiffs' claim, the Court will find a genuine dispute, deny summary judgment, and allow the plaintiffs a chance to prove their claim at trial. *See Anderson*, 477 U.S. at 248. The plaintiffs' response "must point to an evidentiary conflict created on the record; mere denials or conclusory statements are insufficient." *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (*en banc*).

In this case, for the plaintiffs to prevail, they must prove that a non-Indian committed one or more federally punishable crimes against Mr. Murray's person or property on the reservation or as a direct result of actions on the reservation. The plaintiffs identify 26 federal- and state-law crimes (or categories of crimes) that they intend to prove were committed as "wrongs" compensable under the "bad men" provision by the 30 officials or entities the plaintiffs have identified.

The defendant's motion for summary judgment exhaustively demonstrates, on a crime-by-crime and fact-by-fact basis, how issue preclusion, the terms of the "bad men" provision, or a complete lack of evidence prevents the plaintiffs from proving each identified crime at trial. For many of the crimes, the defendant identifies multiple bases for summary judgment in its favor.

The plaintiffs respond that issue preclusion is inapplicable but otherwise do not comprehensively rebut all the defendant's more specific arguments regarding proof of specific

crimes that the plaintiffs have identified. The plaintiffs' response argues in essence that they do not need to respond. They argue that the defendant has the burden on summary judgment, and that the defendant's motion tries impermissibly to shift the burden to the plaintiffs. The plaintiffs have failed to meet the defendant's demonstration of specific material facts by pointing to evidence that tends to contravene or put those facts into dispute.

Even having accepted some of the plaintiffs' more specific legal objections and rejected some of the defendant's arguments, the Court finds that the defendant is entitled to judgment as a matter of law on other bases suggested in its motion, and the plaintiffs point to no genuine issue of material fact that would preclude summary judgment.

Some of the identified crimes are not plausibly relevant to the allegations in the amended complaint, and the plaintiffs have not clarified their relevance. Others are not cognizable under the "bad men" provision because they are not federally punishable or were not committed "against the person or property of the Indians," as the treaty provision's language requires. Summary judgment is appropriate for all these claims.

Establishing liability for the remaining, cognizable crimes requires the plaintiffs to prove that the bad men they have identified committed arrestable, prosecutable criminal acts with the intent specified in the federal or state statute defining each crime. The plaintiffs made clear when amending their complaint that they based their claims on the action or inaction of "individual federal officers," not their employing federal agencies. *See Fed. Cl. Dismissal*, 122 Fed. Cl. at 501. The state of Utah, its agencies, and political subdivisions listed by the plaintiffs are not arrestable, and thus cannot be "bad men" under a provision that is limited to arrestable wrongs. *See Jones Fed. Cir.*, 846 F.3d at 1356 (relying on the provision's reference to the arrest of "bad men" as a basis to limit cognizable wrongs to arrestable conduct or omissions, and rejecting broader, less literal interpretations of the word "arrest"). Summary judgment is therefore appropriate as to these claims.

As for the officials that the plaintiffs identify as "bad men," the district court's decision precludes the plaintiffs from litigating many of the facts relevant to their acts or intent. For the crimes addressing conduct based on stipulated facts, the plaintiffs lack sufficient evidence for this Court—as a trier of fact—to find reasonably the necessary criminal intent. Accordingly, summary judgment is also appropriate as to these claims.

A. Issue Preclusion and Spoliation

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.

Whether issue preclusion applies is a question of law and is therefore appropriately resolved on summary judgment. *See United States v. Gallardo-Mendez*, 150 F.3d 1240, 1242

(10th Cir. 1998). The Court continues to apply Tenth Circuit issue-preclusion precedent in this case.[5]

To invoke issue preclusion, a party must show four elements:

> 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.

Jones 10th Cir., 846 F.3d at 1361 (citing *Park Lake Res. Ltd. Co. v. U.S. Dep't of Ag.*, 378 F.3d 1132, 1136 (10th Cir. 2004)).

As between this case and the district-court action, the plaintiffs conceded the second and third elements to support issue preclusion before the Federal Circuit. *Id.* at 1362. Accordingly, the Court need only consider the first and fourth elements: (1) whether an issue raised in this case is identical to an issue decided in the district court, and (2) whether the plaintiffs had a full and fair opportunity to litigate the issue in the district court.

The Federal Circuit held that the plaintiffs were not, as Judge Horn had held for this Court, collaterally estopped from litigating whether Mr. Murray had shot himself, and whether federal agents had spoliated evidence. The Federal Circuit explained that collateral estoppel, or "issue preclusion," requires, among other things, identical issues and a full and fair chance to litigate the issues that were decided in the prior action. *Jones Fed. Cir.*, 846 F.3d at 1362-64. The Federal Circuit held that "[t]he culpability of the federal officers for spoliation" could not

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[5] Following Judge Horn's decision to apply Tenth Circuit issue-preclusion law, the Federal Circuit concluded that "[t]he elements of issue preclusion are essentially the same under Federal Circuit and Tenth Circuit law," and that choice of law was thus not dispositive of the issues it decided on appeal. *Jones Fed. Cir.*, 846 F.3d at 1361 n.7. Unlike *res judicata* between courts of different states, there appears to be no clear choice-of-law rule for a federal court measuring the preclusive effect of an earlier federal-court decision. At least one other circuit has applied the Federal Circuit's issue-preclusion precedent to measure the preclusive effect of a patent-infringement action. *See Matter of Provider Meds, L.L.C.*, 907 F.3d 845, 852 & n.21 (5th Cir. 2018), cert. denied, 139 S. Ct. 1347, 203 L. Ed. 2d 570 (2019); Edward H. Cooper, *Res Judicata Between Federal Courts*, 18B Fed. Prac. & Proc. Juris. (Wright & Miller) § 4466 (2d ed. 2020). This approach is consistent with the rule proposed by legal scholars, that "[a]ny court, state or federal, must ascribe to the judgment of any other state or federal court the res judicata effects that would be recognized by the court that rendered the judgment." Edward H. Cooper, *Res Judicata Between Federal Courts*, 18B Fed. Prac. & Proc. Juris. (Wright & Miller) § 4466 (2d ed. 2020).

have been precluded by the district court's resolution of the plaintiffs' civil rights suit because the issue "[had] never been decided." *Id.* at 1363. The Federal Circuit noted that the district court had denied spoliation sanctions not because it found no spoliation, but merely because it found that the named-defendant local authorities could not have been responsible for any spoliation by federal investigators who were not named defendants in the district-court action. *Id.* at 1362-63.

Additionally, the Federal Circuit held that this Court could not determine that the plaintiffs had had a full and fair chance to litigate the substantive issues decided in the district court without first deciding how any spoliation might have affected the evidence available to prove various elements of the plaintiffs' discrete claims. The Federal Circuit instructed:

> If the [Court of Federal Claims ("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.

In their task to prove that the "bad men" they identify committed the crimes they identify, the plaintiffs do not start with a clean slate. Many of the act and intent requirements of the crimes they identify implicate facts that were decided against them by the district court. Principles of issue preclusion prohibit relitigating these facts in this Court.

The plaintiffs in this case, by needing to prove acts and intent inconsistent with the district court's factual findings, raise issues identical to those decided in their district court case. Although the district court's ultimate legal conclusions used the legal standards for civil rights violations, the district court explicitly described the facts that it found and applied to those standards as insufficient evidence to prove the alternative explanation of Mr. Murray's death alleged by the plaintiffs. Relitigating those same facts on the basis of the same evidence, even if applying them to a different legal standard, raises issues identical to those already decided by the district court. Further, the federal agents' spoliation did not deprive the plaintiffs of a full and fair opportunity to litigate these identical issues in the district court.

1. "Identical" Issue

The issue resolved in the prior litigation and the issue presented in this case must be identical for issue preclusion to apply. When an earlier decision addresses a purely factual question, such as what happened, the issue in the later case need only address those same events to be considered "identical." *See Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F. Supp. 499, 518 n.66 (E.D. Mich. 1974), *judgment aff'd*, 519 F.2d 119 (6th Cir. 1975). When an earlier decision addresses the legal significance of a fact, such as whether what happened was reasonable or constituted a criminal act or tort, the issue in the later case must implicate the same legal standards and tests that the earlier decision applied in order to be considered "identical."

Id.; s*ee also Bobby v. Bies*, 556 U.S. 825, 834-35 (2009) (considering a defendant's "mental retardation" under a newly decided legal standard for Eighth Amendment purposes even though the sentencing court had already considered mental retardation as a mitigating factor).

The body of issues that the earlier court decides is not strictly limited to the ultimate questions the earlier court answers but may include other issues necessarily decided along the way, including issues necessarily implied in the definition of a claim or defense. For example, in *Fenwick v. Pudimott*, the D.C. Circuit held that a civil rights plaintiff's assault conviction in D.C. superior court for the same incident in which the plaintiff alleged that police used excessive force "constrained[ed]" how the court viewed the facts in deciding whether the defendant-officers were entitled to qualified immunity. 778 F.3d 133, 138 (D.C. Cir. 2015) ("[T]he Superior Court Judge, in finding that Fenwick committed felony assault on [the officer], necessarily determined that [the plaintiff-driver] created 'a grave risk of causing significant bodily injury' to [the officer] when, 'without justifiable [and] excusable cause,' he drove the car forward in a manner that put the deputy in danger of being hit.") (citation omitted, quoting the relevant assault statute); *see also Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1273 (10th Cir. 1995) (rejecting claims alleging facts that were "inconsistent with facts underlying the prior judgment").

The district court's grant of summary judgment to the local officers and municipalities necessarily decided the following issues that constrain this Court's view of facts the plaintiffs must prove to prevail on their "bad men" claims:

a. The Officers' Distance from Mr. Murray

In the district court, the plaintiffs argued that the officers had violated Mr. Murray's Fourth Amendment right against unreasonable seizure by surrounding him with a "perimeter" of police officers, shooting Mr. Murray in the head, or handcuffing Mr. Murray at gunpoint after the shooting—all without any law-enforcement jurisdiction to pursue or arrest a tribe member on the reservation. Except for the extra-jurisdictional handcuffing of Mr. Murray after he was shot, the district court found no seizure. *See Jones D. Ct. Merits*, F. Supp. 3d at 1186-93. Specifically, the district court found that there was insufficient evidence for a jury reasonably to conclude that any officers, including Officer Norton, were ever less than 100 yards from Mr. Murray in terms of surrounding him to prevent his escape. *Id.* at 1187, 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.").

b. The Cause of Mr. Murray's Death

The district court found insufficient evidence that Officer Norton had shot Mr. Murray in the head. *Id.* at 1192 ("Because direct evidence (unrefuted by admissible evidence) that Mr. Murray's gunshot wound was self-inflicted, it could not be a physical restraint imposed by Detective Norton. Consequently, the fatal shot was not a seizure by a law enforcement officer."). The district court concluded, "[b]ased on the evidence in the record, no reasonable jury could find that Detective Norton inflicted the mortal blow to Mr. Murray." The district court noted that the plaintiffs had offered mere "speculation" that Officer Norton shot Mr. Murray in the head at point-blank range, "not evidence." *Id.* at 1191.

c. No Harm from Handcuffing

The plaintiffs' excessive force claim, as it related to handcuffing, required the district court to find some physical or emotional harm to Mr. Murray caused by the alleged use of force. *Id.* at 1194. The district court found "no evidence of physical harm or emotional harm to Mr. Murray" from the handcuffing. It noted that "[t]he manner in which Deputy Byron handcuffed Mr. Murray was simple and the least intrusive way to secure the scene for the EMTs."

d. The Officers' Motives

The civil-rights-specific, ultimate questions of fact that the district court answered are not, themselves, identical to the criminal act and intent elements that the plaintiffs must prove to prevail on their "bad men" claims. While deciding whether Deputy Byron was entitled to qualified immunity for handcuffing Mr. Murray without jurisdiction, whether the officers used excessive force, and whether the officers acted with racial animus, however, the district court considered and accepted as uncontroverted the officers' explanations of the knowledge and motives driving their conduct. For example, when finding that Deputy Byron was entitled to qualified immunity, the district court considered what Deputy Byron knew and when he knew it. The district court supported its conclusion that Deputy Byron's actions were reasonable with these facts:

> Here, Deputy Byron did not know the identity of Mr. Murray or anything about him other than his involvement in the high-speed chase, his flight from a police officer, subsequent exchange of gun shots, and a gun on the ground next to Mr. Murray. He rushed onto the scene and had little time to assess the situation before he handcuffed Mr. Murray. He knew he had a wounded suspect and that emergency personnel were on the way. He secured the scene, as he was trained to do. Securing the scene, no matter what it might present, is a reasonable response by a police officer.

Id. at 1194. To defeat Deputy Byron's motion for summary judgment, the plaintiffs could have pointed to evidence that Deputy Byron knew more or was acting based on an impermissible motive. The district court's grant of summary judgment for Deputy Byron relying on these facts precludes, or at least severely limits, the plaintiffs' ability in this case to prove criminal knowledge and intent without relitigating what Deputy Byron knew and why Deputy Byron took the actions that he did.

The district court's grant of summary judgment for the local officers on the plaintiffs' excessive-force claim required a similar examination of the state of mind of each officer when pursuing Mr. Murray. For the plaintiffs to prove that the officers' pursuit amounted to excessive force under the Due Process Clause, the plaintiffs needed to point to evidence that the officers' conduct was "arbitrary, or conscience shocking, in a constitutional sense," in that it could be characterized as the "most egregious official conduct." *Id.* at 1195. The district court found that "[a]ll of the Plaintiffs' claims of egregious behavior stem from their complaint that the actions took place on the Reservation and were aimed at an enrolled member of the tribe." The district court then relied on the officers' accounts to find the pursuit was not egregious but "reasonable

under the circumstances." The district court described the state-of-mind facts underlying its reasonableness finding:

> Mr. Murray was part of a high speed chase and fled from Trooper Swenson. This information created sufficient concern in the officers' minds about Mr. Murray's motives for the flight and the danger he posed, if any. They reasonably believed he had committed at least one crime (flight from a police officer) and pursuing him for that was reasonable. Even though the BIA police had been called as a precaution, no BIA police officer was there at the time. It was completely reasonable to apprehend the fleeing suspect so they could fully investigate and turn him over to the proper authorities, if necessary. There is no evidence that the officers were acting like a posse to capture the "Indian," as Plaintiffs have argued. Although Plaintiffs paint it that way, they do so without evidence to support their theory.

Id.

The district court further concluded that Officer Norton's firing his gun at Mr. Murray was reasonable because "Mr. Murray shot at [Officer] Norton first," and Officer Norton "was retreating to protect himself when he shot back." *Id.* The district court concluded that "[n]one of the officers' actions were egregious or conscience shocking," and that "[t]heir attempt to apprehend Mr. Murray while protecting themselves—and the means they used to do so—were expected police behavior in light of the circumstances." *Id.*

Finally, the district court's grant of summary judgment for the officers on the plaintiffs' hate-crimes conspiracy claims directly considered the officers' motives, not only as a supporting fact but as an ultimate question of fact. After considering the perspective and information available to each officer involved, the district court concluded that "no reasonable jury could find that the facts offered by the Plaintiffs amount to invidious racial animus toward Native Americans generally, or Mr. Murray in particular." *Id.* at 1201. With the plaintiffs' having presented some evidence of racial tension between law enforcement and Native Americans, *see id.* at 1201 n.89, this issue offered the plaintiffs their best opportunity to present evidence of the criminal knowledge or intent that they must prove to prevail in this case. The plaintiffs failed to do so.

Despite answering different ultimate questions than those presented in this case, these and the district court's other reasonableness findings rely on state-of-mind facts that include the officers' knowledge and motives for the officers' conduct. These knowledge-and-intent issues are identical to those at stake in this case. This Court applies these and other examples from the district court's factual findings as it considers the factual issues raised by the *actus reus* and intent requirements of each alleged crime identified by the plaintiffs as having been committed in violation of the "bad men" provision. Overall and with respect to their particular elements, the crimes that the plaintiffs have alleged and must prove in this case raise issues identical to those decided by the district court.

2. Full and Fair Opportunity to Litigate

The Federal Circuit overturned this Court's earlier application of issue preclusion because this Court had not considered whether the alleged spoliation of evidence by federal agents had deprived the plaintiffs of evidence that they might have used to litigate their factual contentions fully and fairly before the district court. The Federal Circuit explained:

> Though the district court did ultimately decide that Murray shot himself and that there was no conspiracy, the preclusive effect of that conclusion is explicitly limited to situations where no additional evidence (possibly in the form of spoliation sanctions) arises out of the federal officers' actions with respect to the evidence.
>
> The culpability of the federal officers for spoliation has never been decided, and to assume the resolution of such a central issue *ipse dixit* without substantive consideration "depriv[es] litigants of their first chance[ ] to litigate an issue," and is an improper application of issue preclusion.

Jones Fed. Cir., 846 F.3d at 1363 (citation omitted) (quoting *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1371 (Fed. Cir. 2013)).

The Federal Circuit's mandate on remand instructed this Court to consider the plaintiffs' spoliation allegations in the first instance and the appropriate sanction for such spoliation, if any. *Id*. at 1363-64. It then provided that if "the appropriate spoliation sanctions would not change the evidentiary landscape for particular issues, the [Court of Federal Claims] may reconsider the application of issue preclusion." *Id.*

The evidentiary prohibition this Court imposed for the United States' spoliation of the .380 handgun reduces the evidence available to the United States to argue that Mr. Murray shot himself, but it does not augment the evidence that is available to the plaintiffs now—or was available in the district court—to prove that Officer Norton shot Mr. Murray. As the defendant notes, Officer Norton's motion for summary judgment in the district court did not rely on the gun this Court found had been subject to spoliation by the defendant.

This Court's spoliation sanction changes the evidence, but does not change the evidentiary "landscape" for any particular question at issue. The plaintiffs argue that a reduction in the evidence available to the defendants in this Court versus that available to them in the district court is necessarily a change in the evidentiary landscape. That view is inconsistent with how courts typically use the term—to distinguish between harmless and prejudicial error affecting proof of a particular issue.[6]

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[6] Courts have consistently described changes or differences in an "evidentiary landscape" as "material" or otherwise legally or factually determinative. The Court finds it unlikely that the

The district court's finding of insufficient evidence of an execution-style shooting, racial animus, or a conspiracy did not depend on the .380 handgun that federal agents spoliated. This Court has prohibited the defendant from relying on the .380 handgun as evidence in this case, but that prohibition adds nothing to the evidence available to the plaintiffs to prove their factual contentions of homicide, conspiracy, and cover-up. The sanction applied for the spoliation of the gun also does not affect the evidentiary landscape as to the police pursuit or the existence of a cover-up or other alleged conspiracy.

The federal agents' spoliation did not deprive the plaintiffs of a full and fair opportunity to litigate whether Officer Norton shot and killed Mr. Murray or whether local authorities and federal agents conspired to destroy evidence of Mr. Murray's homicide before the district court. Accordingly, the district court's decision precludes relitigating identical issues raised in this case.

B. Cognizable Claims

Summary judgment for the defendant is proper for any of the crimes that the plaintiffs identify as "wrongs" that are not federally punishable because they are preempted by federal statute or implicate only off-reservation conduct.

The Federal Circuit affirmed that a "wrong" cognizable under the treaty's "bad men" provision must be an arrestable, prosecutable crime. *Id.* at 1356. Further, cognizable wrongs under "the laws of the United States" include state criminal offenses made federally punishable by the Assimilative Crimes Act, 18 U.S.C. § 13, "which makes federally punishable any act or omission committed on '[a]ny lands reserved or acquired for the use of the United States, and

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Federal Circuit's concise omission of "material," "essential," "determinative," or another similar legally descriptive term was meant to depart from the uniform sense in which courts have referred to a "change" in the "evidentiary landscape." *See, e.g.*, *Musladin v. Lamarque*, 555 F.3d 830, 850 (9th Cir. 2009) (finding no violation of a criminal defendant's due process rights, reasoning that the trial was not "fatally infected" by the exclusion of evidence when "the essential evidentiary landscape—that the only evidence of Musladin's self-defense was his own statements—would remain the same had the proffered testimony been allowed"); *see also United States v. Ribota*, 792 F.3d 837, 841 (7th Cir. 2015) (discussing substitution of charges in response to a "materially altered evidentiary landscape"); *United States v. LaDeau*, 734 F.3d 561, 571 (6th Cir. 2013) (finding that the government failed to demonstrate that the "evidentiary landscape has materially altered" for substitution of charges); *Griffin v. Johnson*, 350 F.3d 956, 959 (9th Cir. 2003) (describing a fingerprint expert's reversal of his earlier conclusion that would have exculpated the defendant as a "sudden shift in the evidentiary landscape [that compromised the] defense strategy"); *United Elec. Radio & Mach. Workers of Am. (UE) v. 163 Pleasant St. Corp.*, 987 F.2d 39, 47 (1st Cir. 1993) (finding "perceived voids in the evidentiary landscape" that required finding a lack of jurisdiction); *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 784 (9th Cir. 2002) (distinguishing case from precedent as presenting a "decidedly different evidentiary landscape").

under the exclusive or concurrent jurisdiction thereof,' where that act or omission would be punishable under state law if committed within the state's jurisdiction." *Id.* at 1357 (quoting 18 U.S.C. § 7 (defining the territorial jurisdiction to which 18 U.S.C. § 13 applies)).

The Federal Circuit rejected, however, some of this Court's conclusions as to the nature of cognizable wrongs and the territorial applicability of the "bad men" provision. The Federal Circuit rejected this Court's requirement that a "wrong" be an affirmative act. *See id.* at 1355-57. Instead, the Federal Circuit held that an omission, *i.e.,* the failure to act, could also constitute a "wrong" under the "bad men" provision. *Id.* Finding that the plaintiffs had, however, failed to identify the alleged omissions with specific crimes, the Federal Circuit left this Court to reconsider the "bad men" provision's application to omissions in the context of specific crimes, in the event that the plaintiffs could establish any of the omissions they alleged to be cognizable crimes under the "laws of the United States." *Id.*

Additionally, the Federal Circuit rejected the requirement from this Court's dismissal of the plaintiffs' claims that the conduct constituting a wrong must occur entirely on the reservation. *Id.* at 1361. The Federal Circuit cautioned that it was not rejecting the existence of a geographic limitation. *Id.* Rather, it specified that this Court had "erred in summarily dismissing Jones's allegations of off-reservation wrongs without considering the connection those alleged wrongs had, if any, to the alleged on-reservation wrongs." *Id.* The Federal Circuit left to this Court to determine, "in the first instance, whether any of the[] off-reservation acts demonstrate the alleged continuation of on-reservation acts so as to be cognizable under the bad men provision." *Id.* at 1361.

Some of the state-law crimes identified by the plaintiffs implicate conduct outside of the reservation's boundaries. The defendant acknowledges that the Assimilative Crimes Act makes state-law crimes, such as desecration of a corpse, federally punishable when committed on the reservation, but argues that any assimilated state-law offenses are not federally punishable, cognizable wrongs when committed outside of the reservation's boundaries.

Some of the federal-law crimes identified by the plaintiffs also implicate off-reservation conduct. The defendant argues that, for off-reservation conduct like the destruction of the .380 handgun to constitute a cognizable wrong under the treaty's "bad men" provision, the wrong must be a clear continuation of an on-reservation wrong. Thus, according to the defendant, even if the local officers' or federal agents' off-reservation conduct can be established as independently-punishable federal crimes, those crimes are not cognizable wrongs under the treaty's "bad men" provision because they do not clearly continue an on-reservation wrong.

The defendant argues that some of the identified state-law crimes are preempted by analogous federal crimes or only implicate off-reservation conduct not federally punishable, and thus not cognizable as a "bad men" claim. The defendant further argues that the plaintiffs' failure to prove an on-reservation wrong precludes them from proving off-reservation wrongs.

1. State-Law Crimes

Conduct must be criminally punishable under federal law in order to constitute a wrong under the "bad men" provision. State-law crimes can only be cognizable wrongs under the "bad

men" provision if they are not preempted by federal law and were committed on the reservation. Otherwise, state-law crimes are not punishable under federal law and, thus, not cognizable wrongs under the "bad men" provision.

a. Preemption of State-Law Crimes

As explained above, the Federal Circuit held that the universe of crimes cognizable as "wrongs" under the "bad men" provision includes state-law crimes made federally punishable within federal enclaves by the Assimilative Crimes Act, 18 U.S.C. § 13, and applied to Indian reservations by the Indian Country Crimes Act, 18 U.S.C. § 1152. The Assimilative Crimes Act does not, however, assimilate into federal law state-law crimes consisting of conduct that Congress punishes under an independent federal statute. *Lewis v. United States*, 523 U.S. 155, 159-66 (1998); *see Jones Fed. Cir.*, 846 F.3d at 1357. The plaintiffs identify several state-law crimes with obvious federal analogs, like murder, manslaughter, assault, kidnapping, attempt, and conspiracy. The defendant argues that the Court should not consider these state-law crimes as cognizable wrongs because they are preempted by their federal-statute analogs.

When deciding whether federal law makes punishable the same conduct prohibited by a state criminal statute, the Supreme Court has rejected both a broad reading of the Assimilative Crimes Act's exception that would let "*any*" federal crime, like assault, preempt even a qualitatively different state crime, like murder. *See Lewis*, 523 U.S. at 162. The Supreme Court also has rejected a narrower reading of the Act's exception that would make an additional element or a different definition in a state offense sufficient to displace Congress's considered approach to punishing the same harm. *Id.* at 164. Instead, the Court has provided a specific test that accounts for both the Assimilative Crimes Act's language and its gap-filling purpose.

A court must focus on the "act or omission" prohibited by the state statute. If (literally) "*any*" federal statute punishes that "act or omission," a court must ask whether the applicable federal statutes preclude application of the state law in question because the state law would "interfere with the achievement of a federal policy" by "effectively rewrit[ing] an offense definition that Congress carefully considered or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue." *Id.* at 164-65 (citations omitted).

The Supreme Court rejected a one-size-fits-all answer to the question of Assimilative Crimes Act preemption but offered three rules of thumb. First, the Act does not apply when both statutes "seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional, or other technical, considerations, or where differences amount only to those of name, definitional language, or punishment." *Id.* at 165.

Second, "assimilation may not rewrite distinctions among the forms of criminal behavior that Congress intended to create." *Id.* "[O]rdinarily, there will be no gap for the [Assimilative Crimes] Act to fill where a set of federal enactments taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amount to different ways of committing the same basic crime." *Id.* (citation omitted).

"At the same time, a substantial difference in the kind of wrongful behavior" covered by the federal versus the statute statutes "will ordinarily indicate a gap for a state statute to fill—unless Congress, through the comprehensiveness of its regulation, or through language revealing a conflicting policy, indicates to the contrary in a particular case." *Id.* at 165-66. The Supreme Court emphasized that "[t]he primary question . . . is one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defendant's to the exclusion of the particular state statute at issue?" *Id.*

This issue raises a list of complex questions as long as the list of state-law crimes identified by the plaintiffs. In this case, it raises these questions in an uncommon context, far less concrete than the appeal of an individual criminal conviction. Although the Court might have held some of the identified state-law crimes preempted by their obvious federal analogs, harmonizing those conclusions with the scores of other decisions to consider these issues in criminal prosecutions would delay decision and add complexity to a case that can be resolved fairly on other grounds. The application of issue preclusion and consideration of analogous intent requirements in both the federal and state versions of the crimes the plaintiffs identify eliminate the need for the Court to consider whether the identified state-law crimes are preempted by their analogous federal statutes.

b. Off-Reservation State-Law Crimes

The state-law crimes that are made federally punishable by the Assimilative Crimes Act and applied to Indian reservations by the Indian Country Crimes Act are not federally punishable, as a general matter, outside of the reservation's boundaries. *See* 18 U.S.C. § 13; *Gov't of Virgin Islands v. Dowling*, 866 F.2d 610, 615 (3d Cir. 1989) (rejecting a defendant's argument based on the Assimilative Crimes Act because the defendant acted outside of a federal enclave and within the jurisdiction of the local legislature). As a result, state-law crimes committed outside of the reservation cannot be wrongs under the "bad men" provision.[7]

The plaintiffs' allegations that Mr. Murray's corpse was desecrated rely solely on provisions of Utah criminal law. Mr. Murray was not pronounced dead until he arrived at the hospital, which was located outside of the reservation. The mortuary and medical examiner's office were also outside of the reservation. State-law desecration of a corpse might be a federally punishable crime, and thus a cognizable wrong under the "bad men" provision, if committed on the reservation. The treatment of Mr. Murray's body at the hospital, mortuary, and state medical examiner's office, however, fall outside of the geographical reach of the

[7] While it may be possible to commit some of an assimilated state-law crime's elements within the reservation while committing other elements outside of the reservation, all of the state-law crimes at issue in this case other than conspiracy include a location-based element that would likely be jurisdictionally determinative if, in other circumstances, the same crime were committed partially in-state and partially out-of-state. In any case, the plaintiffs do not allege these types of crimes here.

Assimilative Crimes Act. Accordingly, these state-law crimes do not constitute federal crimes in this case and, therefore, are not "wrongs" under the "bad men" provision.

2. Federal-Law Crimes Committed Outside of the Reservation

To be cognizable as wrongs under the "bad men" provision, independently-punishable federal crimes (those not dependent on the Assimilative Crimes Act for their application) committed outside of the reservation's boundaries must be a clear continuation of on-reservation conduct. *See Jones Fed. Cir.*, 846 F.3d at 1360-61.

The defendant argues that the Federal Circuit set a narrower standard, that an off-reservation wrong must be a clear continuation of an entirely on-reservation "wrong"—a complete on-reservation crime. Examination of the language of the Federal Circuit's opinion shows ambiguity as to this point. This Court concludes, however, that the defendant's reading of the Federal Circuit's decision as requiring an independently sufficient on-reservation predicate crime misconstrues the Federal Circuit's holding.

The Federal Circuit's opinion referred to on-reservation "wrongs," "acts," and "activities" interchangeably when discussing the predicate condition for a cognizable off-reservation wrong. *See Jones Fed. Cir.*, 846 F.3d at 1361. Its use of "wrong," strictly construed, suggests that a complete crime must occur on the reservation and then continue off the reservation or result in a separate off-reservation crime. Other sentences in the opinion, however, referred to "acts" or "activities" that must be directly continued for an off-reservation wrong. The use of "acts" or "activities" suggests that a single crime, with on-reservation conduct satisfying some elements and off-reservation conduct satisfying the remaining elements, might constitute a cognizable "wrong" under the "bad men" provision.

Moreover, the need to consider off-reservation conduct at all suggests that on-reservation conduct insufficient to constitute a complete crime is cognizable under the "bad men" provision when considered together with off-reservation conduct that is a clear continuation of the on-reservation conduct. If the Federal Circuit's rejection of this Court's prior holding that ignored off-reservation conduct was meant to ensure that a plaintiff could prove two completed wrongs instead of one, then the defendant's interpretation makes sense. If, on the other hand, the Federal Circuit's rejection of a strictly territorial application of the "bad men" provision was meant to allow a plaintiff to prove a single completed wrong when the plaintiff could otherwise prove none, then this Court's interpretation rejecting the defendant's reading of the Federal Circuit's decision is more appropriate.

Although the Court disagrees with the defendant's reading of the Federal Circuit's ruling, the Court nevertheless reaches the result the defendant urges. Even without considering the location where specific acts occurred, the plaintiffs have failed otherwise to prove the act or intent requirements for the identified, federally-punishable crimes that reach and implicate their allegations of off-reservation conduct, like conspiracy, perjury, false statements, or destruction of evidence or official records. The Court addresses the insufficiency of the evidence for each category of crime below.

C. Proof of Particular Crimes

As a preliminary matter, the defendant argues that the following crimes alleged by the plaintiffs do not plausibly fit within the allegation of the amended complaint and therefore cannot form the basis for liability under the "bad men" provision: hunting, trapping, or fishing on Indian lands; conspiracy to defraud the United States to obtain payment or allowance; false claims against the United States; conspiracy to commit an offense against or defraud the United States; wire fraud (requiring intent to obtain money or property); injuries to or depredation of federal property; racketeering; obstruction of criminal investigations through bribery; obstruction of state or local law enforcement to facilitate illegal gambling; intimidation of jurors or judicial officers; theft or alteration of judicial records; intentional destruction of property through criminal mischief; doing business without a license; disorderly conduct in refusing a law enforcement order or causing public inconvenience; and disruption of a funeral or memorial service. (S*ee* ECF 150-1 at 15.)

With the exception of "conspiracy to commit an offense against or defraud the United States," which serves as the general federal conspiracy provision, the Court agrees that the relevance of these identified crimes is unclear. The plaintiffs fail to clarify how their allegations of these crimes and the evidence they can present are sufficient to prove the act and intent elements of these crimes; indeed, the plaintiffs merely accuse the defendants of impermissibly shifting the burden of production to the plaintiffs. (ECF 156 at 5-6.) The Court has independently reviewed the record in the case, with no assistance or guidance from the plaintiffs, and has found the allegations of these offenses identified by the plaintiffs unsupported by any facts. Accordingly, the Court finds no issue of material fact as to these potential wrongs that would preclude summary judgment for the defendant.

The Court considers the other crimes identified by the plaintiffs as the basis for liability under the "bad men" provision as they relate to the plaintiffs' allegations and the facts before the Court.

1. Homicide

The crux of this case is the plaintiffs' allegation that Officer Norton murdered Mr. Murray. The parties agree that Mr. Murray died from a close-contact gunshot wound to the head. Proving murder or any of the other homicide crimes identified by the plaintiffs requires proof that Officer Norton caused this close-contact gunshot wound. The district court found that none of the officers was closer than 100 yards from Mr. Murray before Mr. Murray was shot. The district court decision finding that Mr. Murray shot himself precludes the plaintiffs from litigating this fact.

The plaintiffs may also contend that the officers involved in the pursuit (and those arriving before Mr. Murray was taken away in the ambulance) are guilty of some form of criminal homicide because they did not provide appropriate on-scene medical aid. To prove that allegation, the plaintiffs would need to show both intent and proximate cause. *See United States v. Serawop*, 410 F.3d 656, 663–64 (10th Cir. 2005) (discussing *mens rea*); *United States v. Swallow*, 109 F.3d 656, 659 (10th Cir. 1997) (proximate cause).

Here too, the plaintiffs are collaterally estopped as to the State and local officers' inaction. The district court already considered the questions of the officers' state of mind and whether the alleged failure to provide medical aid was a proximate cause of Mr. Murray's death. *Jones D. Ct. Merits*, 3 F. Supp. 3d at 1208 (finding no evidence to support a conclusion that the defendants were "deliberately indifferent" or knew there was a substantial risk of harm); *id.* at 1208–09 (finding no evidence to support conclusion that aid at scene would have saved Mr. Murray's life). The district court also held that the officers fulfilled any duty owed to Mr. Murray when they called the ambulance. *See id.* at 1207.

Because the alleged commission of a homicide or related criminal behavior was fully and fairly litigated before the district court by the plaintiffs in reliance on the same evidentiary landscape before this Court, the plaintiffs are precluded from pursuing their "bad men" claim by proving a homicide crime.

2. Assault and Reckless Endangerment

The plaintiffs' allegations of state-law assault and reckless endangerment appear to stem from Officer Norton having fired his gun in retreat and from Deputy Byron having handcuffed Mr. Murray. *See* Am. Compl. ¶¶ 32, 33, 67; *accord Jones 10th Cir.*, 809 F.3d at 575 (noting allegations of excessive force allegedly committed by Officer Norton, Trooper Young, and Deputy Byron). The plaintiffs do not dispute the defendant's supposition that these claims rest on the actions cited in the amended complaint in the referenced paragraphs.

The plaintiffs did not identify the federal assault statute as a potential wrong they intend to prove at trial. *See* 18 U.S.C. § 113. Without deciding whether the federal assault statute preempts the Utah assault statute, the Court nevertheless finds that the plaintiffs would not be able to prove criminal liability under the Utah statute if this claim were to proceed to trial. Utah law justifies the reasonable use of force by Officer Norton and Deputy Byron, and the district court's decision precludes the plaintiffs from arguing that these officers' use of force was not reasonable.

The Utah criminal-assault provision on which the plaintiffs rely requires "unlawful force or violence." Utah Code Ann. § 76-5-102(1). The Utah reckless endangerment statute makes it a crime to "recklessly engage[ ] in conduct that creates a substantial risk of death or serious bodily injury to another person." Utah Code Ann. § 76-5-112(1). This standard requires proof that the officers' conduct was "a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *State v. Robinson*, 63 P.3d 105, 107 (Utah Ct. App. 2003) (stating the general standard for criminal recklessness); *Utah v. Carter,* 2005 UT App. 232, No. 20040637-CA, 2005 WL 1177063, at *1 (Utah Ct. App. May 19, 2005) (unpublished) (applying general recklessness standard to reckless endangerment offense).

Utah law, however, justifies the use of "any force, except deadly force, which [the actor] reasonably believes to be necessary to effect an arrest or to defend himself or another from bodily harm while making an arrest." Utah Code Ann. § 76-2-403. A peace officer is justified in using even deadly force if "the officer reasonably believes that the use of deadly force is

necessary to prevent death or serious bodily injury to the officer or another person." Utah Code Ann. § 76-2-404(1)(c).

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

3. Kidnapping

The plaintiffs cannot prove that the officers kidnapped Mr. Murray when they pursued and handcuffed him. *See* Pls.' Resp. to U.S. Interrog. No. 5 (citing 18 U.S.C. § 1201; Utah Code Ann. § 76-5-301). The federal kidnapping statute punishes anyone who, within certain territorial and other limitations, "unlawfully seizes" a person. 18 U.S.C. § 1201(a). As with assault, the existence of a federal kidnapping statute may preclude the Assimilative Crimes Act from incorporating into federal law the state-law kidnapping offense identified by the plaintiffs. Without deciding that issue, however, the Court finds that the plaintiffs would not be able to prove either the federal- or state-law elements of kidnapping at trial.

The defendant argues that the officers did not "unlawfully" seize Mr. Murray because the district court found that most of the officers' conduct did not amount to a seizure for Fourth Amendment purposes, and the one act that did—handcuffing Mr. Murray without law-enforcement jurisdiction—was reasonable. This argument takes the district court's reasonableness finding out of its qualified-immunity context.

The district court first concluded that, under binding Tenth Circuit precedent, Deputy Byron's handcuffing of Mr. Murray without law-enforcement jurisdiction was *per se* unlawful as an unreasonable seizure that violated Mr. Murray's Fourth Amendment rights. *Jones Dist. Ct. Merits*, 3 F. Supp. 3d at 1192 (citing *Ross v. Neff*, 905 F.2d 1349, 1353–54 (10th Cir.1990)). The district court then considered whether Deputy Byron was entitled to qualified immunity, finding him immune from suit for the Fourth Amendment violation. Finding Deputy Byron's actions reasonable for qualified immunity did not excuse, justify, or render the handcuffing "lawful" so as to preclude proof of an "unlawful[ ]" seizure under the federal kidnapping statute.

Nevertheless, both the federal and Utah kidnapping statutes require that the unlawful seizure, detention, or restraint be intentional or knowing. While considering the reasonableness of Deputy Byron's conduct, the district court found that the officers did not learn that Mr. Murray was a Ute Tribe member until the EMTs retrieved Mr. Murray's identification card while tending to him, 30 minutes after the shooting and after Mr. Murray had been handcuffed. *See*

Jones Dist. Ct. Merits, 3 F. Supp. 3d at 1183. Thus, the officers did not know that they lacked jurisdiction to arrest him when Deputy Byron handcuffed him. Relatedly, the district court found no evidence of racial animus and no evidence of intent to "hunt" an Indian. *Id.* at 1199-1201. The plaintiffs had the full and fair opportunity to litigate these facts and thus are precluded from relitigating them here. Although Deputy Byron seized Mr. Murray "without authority of law," the plaintiffs are precluded from proving that Deputy Byron did so intentionally or knowingly. The plaintiffs cannot prove the federal- or state-law crime of kidnapping.

4. Criminal Trespass

The defendant ascribes the plaintiffs' identification of criminal trespass, Utah Code Ann. § 76-6-206, as a potential "wrong," to the officers' lack of law-enforcement authority on the Ute Tribe's reservation. Criminal trespass in this context, however, would be an alleged wrong against *the Tribe*, not against *Mr. Murray*. The Ute Tribe does not have standing to bring a claim under the treaty's "bad men" provision. *See Hebah v. United States*, 428 F.2d 1334, 1337 (Ct. Cl. 1970); *Hernandez v. United States*, 93 Fed. Cl. 193, 200 (2010). This Court reached that conclusion in granting the United States' motion to dismiss. *See Jones Fed. Cl. Dismissal*, 122 Fed. Cl. at 528 n.31. Additionally, the plaintiffs conceded the point before the Federal Circuit. Pl.-Appellants' Principal Br. at 37 n.8, filed Dec. 14, 2015, *Jones Fed. Cir.*, No. 2015-5148.

5. Conspiracy

The plaintiffs allege that the officers conspired to kill Mr. Murray and cover up their actions. *See* Am. Compl. ¶¶ 17, 67, 70. To prove a conspiracy, the plaintiffs would need to prove an agreement or "meeting of the minds" to murder Mr. Murray and cover it up. *See United States v. Anderson*, 981 F.2d 1560, 1563–64 (10th Cir. 1992) (under federal law); Utah Code Ann. § 76-4-201 (conspiracy is when one "agrees with one or more persons to engage in or cause the performance of the conduct. . . ."). With respect to the State and local officers, the plaintiffs litigated and lost this exact issue in the district court. *See Jones D. Ct.*, 3 F. Supp. 3d at 1197–99, 1201–06. The district court found no direct evidence of a "meeting of the minds." The district court then considered whether the plaintiffs had produced any circumstantial evidence of a conspiracy to violate Mr. Murray's rights. It considered whether the officers decided not to provide CPR to Mr. Murray after the shooting so that he would not survive to contradict Officer Norton's version of events and rejected the claim.

That finding leaves no conspiracy for the federal agents to have joined, and the plaintiffs offer no evidence of a purely federal conspiracy to cover up the local officers' alleged conduct. The federal agents also could not have conspired to murder Mr. Murray because no federal agents arrived at the scene until after the shooting. *See* Pls.' Resp. to Req. for Admis. No. 2.

6. Obstruction of Justice, Perjury, False Statements, and Destruction of Evidence

The defendant argues that crimes related to interference with government investigations or judicial proceedings, including witness tampering and retaliation, perjury, and interference with public servants are not cognizable under the specific language of the "bad men" provision. 1868 Treaty, art. 6, 15 Stat. 619 ("any wrong *upon the person or property of the Indians* . . ."

(emphasis added)); *see also Banks v. Guffy*, No. 1:10-cv-2130, 2012 WL 72724, at *6 (M.D. Pa. Jan. 10, 2012) (no viable "bad men" claim for property belonging to someone else). The "bad men" provision's language, the defendant argues, focuses on the individual tribal victim rather than on the tribe or some "broader sense of societal harm" because Article 6 of the treaty "concerns the rights of and obligations to individual Indians. . . ." *Hebah*, 428 F.2d at 1337. The procedural crimes identified by the plaintiffs, the defendant further argues, "would be crimes against a public interest in achieving justice, not against Mr. Murray's "person or property." Nor would these crimes, the defendant concludes, be "peace-shattering crimes of 'moral turpitude' that the 'bad men' provision was intended to cover." ECF 150-1 at 30-31 (quoting *Hernandez*, 93 Fed. Cl. at 199 & n.5).

The Court is skeptical that perjury or other procedural offenses can fairly be construed as categorically victimless crimes when committed in the course of an investigation or judicial proceeding to determine whether an individual's constitutional rights were violated. The Court, however, need not decide whether these crimes can be wrongs "against the person or property of the Indians" because all these crimes include an intent element that the plaintiffs cannot prove. *See, e.g.,* 18 U.S.C. § 1519 ("Whoever knowingly alters, [or] destroys, . . . *with the intent to* impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . ." (emphasis added)). The same points apply to the identified crimes relating to destruction or manipulation of judicial or government records, and abuse or unauthorized use of official power. *See* 18 U.S.C. §§ 1519, 2071, 2232; Utah Code Ann. §§ 76-8-201, 76-8-203, 76-8-412, 76-8-413, 76-8-510.5, 76-8-511, 76-8-512.

This Court found no intent to destroy or withhold evidence on the part of federal agents, s*ee Jones Fed. Cl. Spoliation*, 146 Fed. Cl. at 737–41, and the record is bereft of any evidence of any such intent. If the plaintiffs had evidence that federal or local officers engaged in a cover-up or destroyed evidence, they ought to have presented it to support their motion for spoliation sanctions. The plaintiffs offered no such evidence when they had both the chance to present it and the maximum incentive to convince the Court that anything beyond the federal agents' negligent destruction of the .380 handgun occurred. Likewise, the plaintiffs offered no evidence of a conspiracy involving federal or local officers to destroy evidence. Having failed to bring forth such evidence on their motion for spoliation sanctions, the plaintiffs fail to point to any evidence sufficient to create a genuine issue of material fact in response to this motion for summary judgment.

The Court finds no disputed material facts with respect to the obstruction of justice, false statements, and destruction of evidence or government records crimes identified by the plaintiffs. Without evidence of the requisite intent on the part of any federal or local officer to commit these crimes, summary judgment for the defendant on these claims is appropriate.

7. Criminal Civil Rights Violation

The defendant argues that the plaintiffs are precluded from seeking to prove that the state and local officers violated Mr. Murray's constitutional rights under § 1983's criminal analog, 42 U.S.C. § 242. The plaintiffs may be precluded from relitigating the same civil rights allegations rejected by the district court, but it is unclear why the similarity in subject matter between the

two statutes, by itself, would preclude the plaintiffs from proving violations of Mr. Murray's civil rights not considered by the district court.

Moreover, the district court found that Deputy Byron violated Mr. Murray's Fourth Amendment rights by handcuffing Mr. Murray without enforcement jurisdiction. Deputy Byron escaped liability for that violation by asserting qualified immunity. Deputy Byron's personal immunity from civil suit for the violation, however, does not extend to the United States, should it be found liable for his conduct that would otherwise amount to a crime via the "bad men" provision. The Tenth Circuit appears to have erred in recognizing that Deputy Byron's extra-jurisdictional handcuffing of Mr. Murray was a seizure violating Mr. Murray's rights, but treating the finding of qualified immunity for Deputy Byron as if it had found that no violation had occurred—effectively imputing Deputy Byron's immunity from suit for the violation to Uintah County.[8] *See Owen v. City of Indep., Mo.*, 445 U.S. 622, 638 (1980) ("[T]the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.").

The Court respects the Tenth Circuit's decision as to Uintah County but will not accept the defendant's argument and perpetuate the error by imputing Deputy Byron's qualified immunity from civil suit for the seizure to the United States. Deputy Byron's good-faith belief that he had enforcement jurisdiction over Mr. Murray garners Deputy Byron immunity from civil suit, but it does not make the handcuffing at gunpoint any more lawful.

Although the district court's qualified immunity holding does not preclude "bad men" liability for the United States, the district court's subsidiary finding that the officers' actions were reasonable relies on state-of-mind facts inconsistent with the intent that § 242 requires. A criminal violation of civil rights must be "willful." *Screws v. United States*, 325 U.S. 91, 101-04 (1945) (plurality opinion) ("[Willful] generally means an act done with a bad purpose. . . . [M]ore is required than the doing of the act proscribed by the statute. . . . [T]he specific intent required by the Act is an intent to deprive a person of a right. . . ."), *narrowed on other grounds by United States v. Lanier*, 520 U.S. 259, 259-60 (1997).

The district court's finding that the officers' actions were reasonable, based on its examination of the officers' knowledge and motives, precludes the plaintiffs from both relitigating and proving that Deputy Byron's handcuffing, or any other potential constitutional

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[8] The Tenth Circuit cited *Apodaca v. Rio Arriba County Sheriff's Department,* 905 F.2d 1445, 1447-48 (10th Cir.1990), which cites *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). In those cases, unlike in the *Jones* civil rights action, however, no constitutional violation was found. Indeed, in *Ross v. Neff*, 905 F.2d 1349, 1353–54 (10th Cir.1990), the precedent that required the district court and Tenth Circuit panel to acknowledge that the extra-jurisdictional handcuffing was a *per se* Fourth Amendment violation, the Tenth Circuit granted the arresting officer qualified immunity but remanded the case for a trial against the County, citing *Owen v. City of Indep., Mo.*, 445 U.S. 622 (1980).

violations not already precluded, were willfully criminal. Accordingly, summary judgment for the defendant is appropriate on this claim.

IV. CONCLUSION

The Court **GRANTS** the United States' motion for summary judgment on all the plaintiffs' claims. An order is being issued concurrently with this Memorandum Opinion directing the entry of judgment for the defendant on all counts.

s/ Richard A. Hertling

Richard A. Hertling
Judge