IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DEBRA JONES, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendants.	Case No. 13-227 Judge Richard A. Hertling **PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

General Background[1]

1. Todd Rory Murray was a member of the Ute Indian Tribe. He died on April 1, 2007, at the age of 21. Spoliation ¶3 (hereinafter Stip.)

2. Debra Jones is Todd Murray's mother; and Ms. Jones is the personal representative of the Estate of Mr. Murray, for and on behalf of the heirs of Mr. Murray. Stip. ¶4.

3. Aarden Post was Todd Murray's father. He is now deceased, and Leander Post (who is Todd Murray's brother) is the personal representative of the Estate of Arden Post.[2]

4. On April 1, 2007, Vance Norton was an off-duty police officer for the city of Vernal Utah. All of Vernal City is outside of the Ute Reservation. Norton was not cross-deputized as a police officer by the Tribe or by the United States. Stip. ¶8.

5. Norton was not in a police uniform. In photos of him later that day, he was in jeans and a short sleeve shirt, and he had a small badge attached to his belt. Norton was in his unmarked personal vehicle. T.121:13-14.

6. Dave Swenson, Craig Young, Jeff Chugg, and Rex Olson were Utah State Troopers on April 1, 2007, and were employed by the State of Utah. Each was on duty on April 1, 2007.

1 Plaintiffs' proposed findings of fact are, where noted, based in part on the spoliation order.
2 As of the time of submitting these proposed findings of fact, Leander Post has not yet been appointed, but Plaintiffs expect the letter of appointment will issue soon.

They were not cross-deputized by the United States or the Ute Indian Tribe on April 1, 2007, to exercise law enforcement authority on the Ute Reservation. Stip. ¶ 7.

7. Anthoney Byron, Bevan Watkins, and Troy Slaugh were Uintah County Deputy Sheriffs on April 1, 2007, and employed by Uintah County. Each was on duty on April 1, 2007. They were not cross-deputized by the United States or the Ute Indian Tribe on April 1, 2007, to exercise law enforcement authority on the Ute Reservation. Stip. ¶ 9.

8. On April 1, 2007, Keith Campbell was a Uintah County Deputy Sheriff and employed by Uintah County. On April 1, 2007, Mr. Campbell was also a contract employee for the Utah State Medical Examiners and employed by the State of Utah. Stip. ¶10.

9. Officers Campbell and Norton are close friends, and have known each other since Junior High School. T.33:19-22.

10. Sean Davis was a Utah Department of Natural Resources officer on April 1, 2007, and was employed by the State of Utah. He was not cross-deputized by the United States or the Ute Indian Tribe on April 1, 2007, to exercise law enforcement authority on the Ute Reservation. Stip. ¶11.

11. On April 1, 2007, Rex R. Ashdown was employed as a Special Agent with the United States Federal Bureau of Investigation ("FBI") with duty in the Vernal Resident Agency out of the Salt Lake Division. He was assigned to investigate the death of Todd Murray on the Reservation through the date of his retirement on May 31, 2007. Stip. ¶12.

12. David Ryan is employed as a Special Agent with the FBI with duty in the Vernal Resident Agency out of the Salt Lake Division. On April 1, 2007, and thereafter, Special Agent Ryan was assigned to the Vernal Resident Agency. Special Agent Ryan took over the investigation of Todd Murray's death after Special Agent Ashdown retired on May 31, 2007. Stip. ¶13.

13. In April of 2007, Dr. Edward A. Leis was employed as the Deputy Chief Medical Examiner for the State of Utah Medical Examiner's Office. Dr. Leis conducted the examination of Mr. Murray's body. Stip. ¶14. Dr. Leis is now deceased.

14. Dr. Jonathon Arden and William Gaut are experts retained by the Plaintiffs. Each testified at trial in this case.

15. Dr. Cohen was an expert retained by Defendant. He testified at trial.

16. Mr. Matty was an expert on blood evidence and police procedures retained by Defendant. Defendant did not call him at trial and did not call him at the prior spoliation hearing.

17. On April 1, 2007, Mr. Murray was the passenger in a car involved in the high speed car pursuit. Stip. ¶6. The driver of the vehicle, Uriah Kurip, was not enrolled in an Indian tribe on April 1, 2007, but was enrollable and therefore was an "Indian" as that term is used in federal law. *Id.*

18. Trooper Swenson was the primary officer involved that pursuit. Stip. ¶18; Pl. Ex. 5, *passim* (Dispatch Transcript). Trooper Swenson did not request that Officer Norton assist with the pursuit, Pl. Ex. 5, passim,[3] and Norton did not engage in the pursuit. T.74:25-75:1.

19. At about 11:23 a.m., the high speed car ended at the intersection of Seep Ridge Road and Turkey Track Road, on the Uncompahgre Reservation. Swenson announced through police radio, recorded by police dispatch that there were two occupants of the vehicle, and both were tribal males. Dispatch transcript 2007-04-01 at 11:23:47. At trial, Swenson testified he did not know for certain at that time that both were tribal males, but his communication through dispatch did not express uncertainty.

[3] Based upon the available evidence, all of Trooper Swenson communicated during the pursuit were through dispatch and recorded, and are transcribed in Plaintiffs' Exhibit 5.

20. Mr. Kurip got out of the vehicle's driver's seat, and Mr. Murray got out of the vehicle's front passenger seat. Stip. ¶23.

21. Mr. Murray was wearing short pants with short socks, a t-shirt and short-sleeved button up shirt. Stip. ¶27.

22. Officer Swenson visually checked Mr. Murray's hands and waistband for weapons, and that he did not see any weapon, and did not believe Mr. Murray was armed. Stip. ¶26.

23. Mr. Murray had not committed any crime on April 1, 2007. T.35:7-22; 36:6-8 (Swenson Dir.); 54:23-5 (Swenson cross: in cross examination, the United States attempted to lead Swenson into saying Mr. Murray had committed a crime by leaving the scene, but Swenson reiterated that as the sole officer with direct knowledge, he did not view Mr. Murray to have committed any crime).

24. There is no competent evidence that there was an active arrest warrant for Mr. Murray on April 1, 2007, and the sole evidence of a criminal record for Mr. Murray was a minor matter for which he received a fine.

25. Trooper Swenson did not put Mr. Murray under arrest and did not pursue Mr. Murray on foot. Stip. ¶¶28, 29.

26. Mr. Kurip and Mr. Murray ran in opposite directions, and Trooper Swenson chased after and caught Mr. Kurip, and placed Mr. Kurip under arrest. Stip. ¶30. At 11:26:29, Swenson announced over police radio that he had caught the driver.

27. Norton arrived at the scene before Swenson had Kurip in custody. Swenson told Norton that Swenson would go after the driver. T.33:15-20.

28. As between Swenson and Norton, Swenson was in charge. (Norton Direct). Swenson did not ask Norton to arrest Mr. Murray. T. 36:9-11.

29. Trooper Swenson did not state to dispatch or to Norton that he had witnessed Mr. Murray commit any crime. Stip. ¶34. Stip. ¶35; T. 126-127 (Norton Direct).

30. Norton left the roadway and entered non-public lands of the Ute Indian Tribe, searching for Mr. Murray. T.82:6-83:15.

31. At the time that he went searching for Mr. Murray, Norton did not have any evidence that Mr. Murray had committed any crime, and that he did not ask Trooper Swenson whether Mr. Murray was suspected of committing any crime. T. 143:10-19.

32. Norton drove away from Swenson's location, to an area where he and Swenson could no longer see each other. Because Norton did not have a police radio, he also could not communication with Swenson or other officers who arrived at the scene after Norton.

33. Norton's decision to go looking for Mr. Murray and to go to an area where he did not have sight of Swenson was directly contrary to officer safety. For officer safety, Norton would have stayed near Trooper Swenson. T:68:10-11 (Swenson cross) (Q: Did you have any concern for your own safety: A. Yes); T:70:18-20 (Swenson redirect: Q: If you were concerned about your own safety, you would have had [Norton] stay with you, wouldn't you: A. Yes.); T.71:3-8 (Swenson recross) (United States attempts to lead Swenson to claim that searching for Murray was based upon officer safety but Swenson reaffirms his testimony from redirect exam: Q: So, you mentioned earlier you were concerned for your own safety; is that right? A. Yes: Q Is there a reason you would have had Officer Norton look for the passenger instead of stay with you. A: If I was concerned about my own safety: Q: Yes. A. No.).

34. Norton got out of his vehicle and jogged or ran over a hill and downward. T:129:21; 130:4 (Norton repeatedly states that he jogs over hill and begins to jog down the hill).

35. After Norton left the Swenson's vicinity, Officers Young and Byron arrived at the Swenson's location and one or both of them talked to him briefly. They arrived in separate patrol vehicles at about the same time. T.239:1-4.

36. One or more officers who arrived after Norton noticed a runner in blue clothing. At the time, an officer states that the runner in blue was "probably going to be the passenger." Dispatch recordings at 11:28-45, 11:29:09 and 11:29:28. The runner in blue was actually Norton, as he was wearing blue, and Mr. Murray was not.

37. Young and Byron drive separately from where they talk to Swenson to an oil well pad further to the south.

38. Neither Byron nor Young had a conversation with Norton before the shooting, but Officer Young saw Norton running over a hill.[4]

39. By this point, officers know or should know that they lack probably cause to detain or arrest Mr. Murray because Swenson knew, and had communicated through police radio that the driver was in custody and the passenger was an Indian, and because there was no indication that the passenger had committed any crime.

[4] Norton testified that he had a conversation with Young after Young left Swenson's location and before Young went to oil pad. Based upon the contemporaneous dispatch recordings, the Court concludes they did not converse at that time. Instead, at that time, Young asked "who's the runner in blue? He would not have asked that question if he had talked to Norton. T.256:19-257:17 (Byron listened to the dispatch recording of a person asking "who's the runner in blue?, he testified that was not his voice on the recording and that he believes it was Young's voice. Further, by process of elimination, it had to be Young, since it was not Byron and not Swenson. Swenson knew Norton was in blue and Murray was not, and Swenson testified that after Norton left Swenson's location, Swenson did not see Norton again). Therefore, Young asked who the runner in blue was, and he would not have asked that if he had already talked to that person.

40. During a site visit by the Court, there is an oil pad to the south, but no witness testified to whether that oil pad was there on April 1, 2007 and no witness identified that location as the oil pad that they had gone to. T. 262:21-263:1.

41. Young and Byron's testimony differ sharply regarding their actions while at the oil pad.

42. Young testified that the two officers were only at the well pad for a short period of time, that they did not move from the well pad and may not have even gotten out of their cars before they heard dispatch say that shots were fired. T. 201:20-2022: 8; 204:2-3 ("if I did get out of the car, it would have been right there. I didn't really walk anywhere.")

43. On the dispatch recording, Young was asked "do you have a visual," and he responses. "Negative. Got a big gully here." He testified he was in or near his car at the time he said that. T. 224:19-225)11 and dispatch recording 2007:04-01 at 11:30:49.

44. Byron testified Young and he got out of their cars and went approximately 75 yards into a wash, and that it was "pretty rough terrain," T:240-18-241:14, up and down hill. T.242:2. He testified that at some point during that, he saw someone on a hill, which he later learned was Norton. T.240:22-2411. He further testified that at some unidentified point, "I could see the individual that we were looking for, I though, walking on," and that later he saw that person "kind of went down behind some brush." T. 24222-243.[5] He testified that at some point, Young and he decided to go back through the 75 yards of rough terrain, to their cars, and then to drive to

[5] The Court is aware that in the District of Utah case, the Court cited Officer Byron's 2012 deposition testimony, where Byron arguably claimed that he had seen Mr. Murray shot himself, and the Court is aware that plaintiff in that case sought to impeach Byron by noting that there was no mention of that alleged sighting in Byron's 2007 police report, and that Byron would have discussed the alleged sighting in his 2007 police report if it were true. Because Byron did not offer such testimony in this Court, and does not claim that he saw Mr. Murray at the time of the shooting, his testimony does not corroborate that Mr. Murray shot himself.

Swenson's location. When they were doing that, they saw Norton and went to his location. T.243:16-244-3. Byron testified that the reason they decided to go back to Swenson's location was "it was just an unknown situation at that point. So we decided to just back out and go back around." He was not sure if he had heard that shots had been fired at that time, T.243:3-11. He stated that he was not the person who asked dispatch, "did you say shots fired? T.259:3-7.

45. After Officers Young and Byron left Swenson's vicinity, Officer Davis arrived at that location. He talked to Swenson, T. 81:4-6, and then proceeded on an oil road to the west. At some point while he was going down that road or coming back he saw Norton in the distance. T.94: 1-13.

46. Norton found Mr. Murray. At some point on April 1, 2007, Norton claimed to some unidentified person or persons that after he and Mr. Murray exchanged gunfire, Mr. Murry shot himself. T.89:9-12; 91:21-92:1.

47. The gun that Norton claimed Mr. Murray used to shoot himself did not have any of Mr. Murray's blood, tissue, fingerprints or DNA on it.

48. It is highly unlikely, if not impossible, for the .380 Hi-point to have fired the fatal shot.

49. No other person witnessed the shooting.

Post-shooting

50. After the shooting, Norton telephoned dispatch to report a shooting. Norton's breathing, voice, and other indicia show that he was discomposed by the shooting, but the Court notes that this would be the case under both parties' theories of the case.

51. Norton requests that dispatch contact his supervisor and asked that other officers come to his location. He did not state that he or Mr. Murray had shot at each other, but did not state that Mr. Murray shot himself.

52. Norton initially claimed that Mr. Murray shot **one** shot toward Norton. Norton admitted that he changed his story, to say that Mr. Murray had actually fired at him twice, only after he learned that in addition to two shell casings on the ground near Mr. Murray, there was a third, stovepiped casing in the gun. T. 27-23 (Norton admits that he changed his story after he learned of the stovepiped casing). *See also* T.131:24 (Norton is asked if he say where shots from Mr. Murray hit the ground, and he answers ty referring to a shot, in the singular; 133:7-8 (Norton again claims he only saw and heard one shot from the gun he claimed Mr. Murray used prior to Mr. Murray allegedly shooting himself).

53. At trial, Norton testified that he fired his .40 caliper gun twice at Mr. Murray in rapid succession that he was still looking down the hill at the time, and that he saw where his two shots hit the ground. T.132:2-15. He claimed he ran up the hill, that he then turned around and saw Mr. Murray shoot himself.

54. Officers Young and Byron went to Norton's location. They disagree about the time it took them to return to the location, T.221:23-222:3, but their testimony is not in conflict after that point.

55. Norton told Officers Byron and Young that he will "stay where I was so I didn't lose sight of where I was when the shooting happened."

56. Officers Young and Byron drew their guns and went down the hill slowly. When they arrived at Mr. Murray, they placed handcuffs on Mr. Murray.

57. Officer Davis arrived at the top of the hill and he saw Officers Young and Byron down the hill near Mr. Murray and he saw officer Slaugh. He did not see Norton at that time. T.85:6-15; (Q: And did you at that point in time see Officer Norton? A: No."); T: 20-22 Q: when you first got back to the area, was he [Norton] one of the officers you say? A: No.")

58. Neither Officer Young nor Byron, nor any other officer who arrived later provided any medical assistance to Mr. Murray.

59. Officers Young and Byron displayed shocking indifference to Mr. Murray after the shooting. They each testified that they handcuffed Mr. Murray because of concerns that he would get up, but they contradictorily testified that Mr. Murray's injuries were so great that it was obvious, without even doing an assessment, that injury was beyond their ability to provide any beneficial medical care. Similarly, although Mr. Murray was lying on a rocky outcrop with a wound to the head, neither Young nor Byron nor any other officer provided any comfort to Mr. Murray.

60. In every available picture, the officer all stand at a distance from Mr. Murray, while Mr. Murray is bleeding from the head wound and while Mr. Murray is approaching death.

61. At some unidentified time after the shooting, officers photograph two 40 caliber shell casings. Photographs of those casings show that they are a significant distance apart, but no one measured the exact distance apart.

62. The two shell casings are the sole physical evidence relied upon by the United States in support of the United States' assertion that Norton was over 100 yards from Mr. Murray when Mr. Murray was shot.

Evidence and expert testimony on blowback

63. All witnesses who testified regarding blowback agreed that it is substantially more likely than not that the gun that fired the fatal shot would have Mr. Murray's blood or tissue on it. The witnesses disagreed on how likely.

64. Plaintiff called Dr. William Gaut, who is highly qualified on murder investigations, firearms death, and blowback. T. 349-352.

65. He testified that in his substantial experience he would expect to find blowback on the gun that fired a fatal close contact shot to the head 100% of the time. T. 356; T.394:16-20. He also explained the physics underlying blowback, and why blowback would occur in every gunshot wound to the head.

66. Defendant's medical expert, Dr. Cohen, stated that the chances of finding blowback blood or tissue in a gunshot suicide would have been above 75%, T.523:2-6; T541, but he ultimately did not know how much greater than 75% it would be for a fatal gunshot to the head. He did not testify based upon personal experience, and instead cited to a longitudinal study of 1200 suicides by gunshot from Dalla County, Texas in the 1990s. He also referred to a textbook, but he did not have any knowledge of the studies or other factual basis for any statements in the textbook.

67. Dr. Cohon acknowledged that the likelihood of blowback would differ if the fatal shot had gone through clothing and would differ based upon the location of the fatal shot. T.538-39. He also acknowledged that in the 1990 study, more than 300 of the 1200 cases were from the factually distinguishable category of gunshots to parts of the body other than the head.

68. In summary, Dr. Cohen's testimony was that around 1990, the likelihood of blowback blood or tissue being found, under an unknown methodology used in Texas at that time, was over 75%, but he did not provide evidence from either his own experience or other studies specific to the likelihood for gunshot wounds to the head.

Evidence and limitations on FBI knowledge at the crime scene on April 1, 2007.

69. The United States Bureau of Indian Affairs law enforcement was notified of the high-speed chase by at least 11:04 a.m. on April 1, 2007. Ex. 5 at 2.

70. The FBI had exclusive jurisdiction to investigate the incident Mr. Murray's shooting. Stip. 47.

71. While at the crime scene on April 1, 2007, Agent Ashdown did not see any pictures which showed Mr. Murray at the crime scene. Agent Ashdown observed a pool of blood which he believed came from Mr. Murray's head, and which provided the approximate location of where Mr. Murray had fallen after being shot. Pl. Ex. 17, p. 1.

72. While at the crime scene, Agent Ashdown did not have any information on whether Mr. Murray had bruising or other injuries.

73. While at the crime scene on April 1, 2007, Agent Ashdown did not have any information on whether Mr. Murray was right-handed or left-handed.

74. While at the crime scene on April 1, 2007, Agent Ashdown did not have any information on whether Mr. Murray had any blood or tissue spatter on either of his hands.

75. While at the crime scene on April 1, 2007, Agent Ashdown did not have any information on the trajectory of the bullet through Mr. Murray's head.

76. While at the crime scene on April 1, 2007, Agent Ashdown did not have information on the length of time between Mr. Murray leaving Kurip's vehicle and being shot.

77. No one other than Norton claimed to have seen or heard the shooting, either on April 1, 2007 or at any time prior to 2012. Stip. ¶¶36, 37.

78. While at the crime scene on April 1, 2007, Agent Ashdown did not obtain any statement from any witness to the shooting, and it was not until May 1, 2007 that the FBI interviewed Norton. Pl. Ex. 8

79. While at the crime scene on April 1, 2007, Agent Ashdown was told by someone that Norton had shot at Mr. Murray and that that Mr. Murray shot himself. He does not know who told him that. Agent Ashdown was aware that any statement that Mr. Murray shot himself was not based upon first-hand knowledge, but he did not know if it was based upon secondhand, thirdhand, or yet more distant knowledge.

80. While at the crime scene on April 1, 2007, Agent Ashdown was informed that Officer Norton had invoked his right to remain silent, and to confer with an attorney before determining whether to talk about the killing. Officer Norton then did not come in for questioning until about 1 month later.

81. Agent Ashdown did not request that Officer Norton's hands be tested for blood or tissue, and he did not test Officer Norton's hands. Stip. ¶53. No other officer tested Officer Norton's hands for blood or tissue. Stip. ¶41.

82. The gun that Norton admitted he used to shoot at Mr. Murray was still at the scene when Agent Ashdown was there. Agent Ashdown did not request that the gun be tested for blood or tissue, and he did not test Officer Norton's gun. Stip. ¶54. No other officer tested Officer Norton's service weapon for blood or tissue. Stip. ¶42.

83. Agent Ashdown did not request or demand to conduct any field testing of that clothing for blood or tissue, nor did he request or demand to take the clothing into evidence. Stip. ¶55.

84. In summary, there was substantial and obvious evidence at the officer-involved shooting crime scene, and when the FBI was at the scene it did not know much of what we now know. It had a secondhand or even more distant statement from an unknown source that Norton shot at Mr. Murray and that Norton said to someone that Mr. Murray then shot himself, but no other witness to that alleged shooting. It had no evidence regarding the gun that Norton admittedly shot. It had the gun that someone said Murray had fired, but that gun did not have blood on it and therefore was likely not used to shoot Mr. Murray.

85. In its interview with Officer Norton, the FBI did not ask Norton any questions regarding that discrepancy between his initial statement that he saw Mr. Murray fire at him once and his later account that Mr. Murray fired at him twice. Pl. Ex. 8.

.40 gun

86. On April 1, 2007, Norton possessed a .40 caliber gun. The gun was not his personal property, and it had been issued to him by his employer.

87. Agent Ashdown never asked to have testing done on the gun or bullet casings that Norton found, to determine if the casings were fired by his gun, to determine if there was blood, tissue, or DNA on any of the items.

88. Although Norton claims to have seen where his bullets hit the ground, and where the bullet alleged shot at him hit the ground, Agent Ashdown never looked for those bullets.

89. Although Norton claimed to have seen where the bullet Mr. Murray alleged shot at Norton hit the ground, Agent Ashdown did not look for that bullet.

Evidence of concerning state and local officer and FBI behavior on April 1, 2007

90. After Mr. Murray was shot, he was unconscious and bleeding from a head wound. Although he was unconscious, officers handcuffed his hands behind his back. Stip. ¶45, Pl. Ex. 2.

Mr. Murray was lying on the ground, handcuffed for about 30 minutes before an ambulance arrived. Pl. Ex. 5 at 8, (shooting reported at about 11:30 a.m., ambulance arrived at 12:02 p.m.). No officer provided medical assistance to Mr. Murray before or during his treatment by ambulance personnel. Stip. ¶44.

91. Although there are numerous pictures of Mr. Murray lying on the ground, there is no picture that shows any state or local officer offering any near Mr. Murray, and no other evidence of them seeking to offer any comfort to him. Pl. Exs. 1, 2, 4.

92. At the hospital, state/local officers removed all of the clothing from Mr. Murray's body, and then took pictures of his naked body. These included pictures where they moved his body into odd poses. Pl. Ex 2.

93. Also on April 1, 2007 Officer Byron officer stuck his finger inside of the entrance wound in Mr. Murray's skull. Pl. Ex. 2. Also on April 1, 2007, someone at the mortuary cut Mr. Murray's neck open. In its brief to the Court of Appeals, the United States admitted these acts were wrongful. *Jones II*, U.S. Br. (App. Dkt. 26)

CONCLUSIONS OF LAW

1. Much of the law applicable in this case is determined by the prior appeals and appellate court mandates. 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).

2. For law that has not been determined by appellate court mandates, the pivotal issue was decided by this Court in its spoliation order, Dkt. 209.

3. *Jones II* also agreed with this Court's prior conclusion "that federal agents had jurisdiction over the investigation into Mr. Murray's death and, '[s]ubject to constitutional requirements and limits,' could have 'searched or collected elements of the shooting scene,' 'seized Officer Norton's gun and clothes for testing and searched Officer Norton's vehicle for Mr. Murray's blood,' or 'detained Officer Norton to prevent him from tampering with evidence.'" *Id.* at 9 (quoting *Jones v. United States*, 146 Fed. Cl. 726, 739 (Fed. Cl. 2020)).

4. In its first spoliation order, this Court concluded 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." The Appellate Court agreed with and did not reverse this Court's conclusion on that point, Jones II, Slip Op at 18, and the Court's prior holding is therefore the law of this case and this Court reiterated that holding after the spoliation hearing that it held in October and November of 2022.

5. In *Jones I*, the Appellate Court determined that, "But for the destruction of the cited evidence, Jones may have shown that Murray was, in fact, shot by Norton.

6. Although the United States and its witnesses have continuously disagreed with the above statement of the Appellate Court, this Court must follow the Appellate Court's determination, and must reject the testimony which is contrary to the Appellate Court conclusion.

7. In its spoliation order, Dkt. 209, this Court imposed:

> a rebuttable adverse interference that the .380 Hi-Point did not have Mr. Murray's blood, tissue, fingerprints, or DNA on it. The Defendant may rebut this adverse inference only with physical evidence or corroborating testimony from at least one witness other that Defendant Norton. Dkt. 209 at 27.

8. In reaching this result, the Court rejected the positions advocated by both parties. Plaintiffs had asked for an irrebuttable presumption, while Defendant asserted that any inference should solely be permissive. The Court explained its reasons for its decision in detail in its order and it adheres to that order here.

9. Defendant did not attempt to rebut the presumption. Therefore, the Court is required to conclude that the .380 gun did not have Mr. Murray's blood, tissue, fingerprints, or DNA on it.

10. The central issue at the trial in this case is the consequence of the unrebutted presumption that the .380 gun did not have Mr. Murray's blood, tissue fingerprints or DNA on it. Although the evidence presented by the parties differs somewhat, it does not differ regarding on the central question—if the .380 had been the gun that fired the fatal shot, would it have Mr. Murray's blood, tissue, fingerprints, or DNA on it if it had been tested. The answer is that it would have, at a likelihood of over 75% and up to an absolute 100%.

11. To counter the physical evidence/spoliation sanction that strongly supports that Mr. Murray did not shoot himself the United States responds with the uncorroborated testimony of Officer Norton, and two bullet .40 caliber casings that officers photographed well after the shooting where Mr. Murray was shot. The testimony was that Officer Norton had decided to remain in the area where those bullet casings were later found while other officers left that area to handcuff Mr. Murray, that Officer Davis did not even see officer Norton in the area when he returned to the area soon afterward, that there was no physical evidence the bullets came from Officer Norton's gun, and no evidence that the distance between those two bullet casings was consistent with Officer Norton's testimony or consistent with the ejection range of the gun he had that day. Even though the Court did not impose spoliation sanctions against the United States

regarding the .40 gun, it is required to consider the lack of readily available physical evidence for the United States attempt to overcome the physical evidence supporting Plaintiff's case.

12. Given the very high likelihood that the .380 did not fire the fatal shot, Defendant would have to come forward with something more than the uncorroborated testimony of Norton and two bullet casings which Norton or others could have easily dropped on the ground over 100 yards from where Mr. Murray was shot. This is presumably exactly why the United States had itself previously argued that if the Court had imposed an irrebuttable presumption, the Plaintiff would prevail—that the other problematic evidence would not be enough in the face of the strong likelihood from the primary evidence—the gun without blood, tissue, fingerprints, or DNA—to get the needle back down below a preponderance.

13. The Court also concludes that its decision in docket 209, and independently the United States' arguments to this Court on the motion that led to that order, now precludes the United States argument that the United States can prevail when it has failed to overcome the rebuttable presumption that the Court imposed in its spoliation order. In opposing the motion for spoliation order, the United States argued to this Court that an irrebuttable presumption would be functionally equivalent to a directed verdict in favor of Plaintiffs, and it argued that case law did not permit a directed verdict on these facts. *E.g.*, United States proposed conclusions of law ¶¶ 69-70

14. In its prior order, this Court gave the United States an opportunity to rebut, precisely because this Court held, at the United States urging, that an irrebuttable presumption of what testing would have shown would have effective decided this case in favor of the Plaintiff.

15. Now that the United States has failed to rebut the presumption and in fact did not even attempt to rebut the presumption, the Court is left without any leeway. For the same reason

the Court held that an irrebuttable presumption would have decided the case in Plaintiff's favor the unrebutted presumption leads to the same result.

16. The Court further notes that the evidence and testimony which was provided at trial further supports the Court's prior analysis that an irrebuttable presumption would have been the equivalent of directing a verdict in Plaintiff's favor. Dkt. 203.

17. In the prior appeal, the United States argued that his Court's prior order did not contain reversible error because "the only existing evidence consists of photos that show that the gun was free of blowback," and that therefore this Court's first spoliation order was already based upon "the fact that the gun was free of blowback." *Jones II*, U.S. Br. at 33-34 (App. Dkt. 26) (emphasis added)). Plaintiff contends that under the law of the case, the Defendant would have been barred from attempting to rebut the presumption based upon Defendants' prior admission to the Court of Appeals that the .380 gun did not contain blowback, but the Court does not have to decide that legal issue, because the United States did not rebut the presumption.

18. In the prior appeal, the United States asserted that the fact that the gun was free of blowback was of no importance because there, under the deferential standard of review applicable in that appeal, the other alleged evidence was sufficient to affirm this Court's first spoliation order. The Appellate Court disagreed, and it vacated this Court's order.

19. The Appellate Court's decision on that appeal has consequences to the United States. But the United States proposed findings and conclusions are based upon the same argument it lost in the prior appeal, where the United States had the sizeable benefit, that it does not have now, of deferential review.

20. In reaching this conclusion the Court wants to reiterate that its decision is very significantly impacted by the spoliation order, and that nothing in this order should be read as

expressing a view on the result that would have occurred if the United States had not spoliated the primary piece of evidence, had not argued that an irreputable presumption would have been the equivalent of a directed verdict for Plaintiff. In fact, this Court has previously, twice, held that if there were not a significant spoliation order, Plaintiff would not have been able to prevail. But the Court of Appeals directed this Court to impose a more significant spoliation remedy, and under that order, this is the result.

21. It is unfortunate for the United States, but more unfortunate still for Mr. Murray's family, that the United States did not collect or preserve evidence which would have proven what actually happened on April 1, 2007.

22. The United States is liable under the bad man clause for the death of Todd Murray.

23.

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