No. 2024-2053

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEBRA JONES, individually, as natural parent of Todd R. Murray, and as personal representative of Estate of Todd R. Murray, ESTATE OF ARDEN C. POST, as successor to claims of Arden C. Post, individually, as natural parent of Todd R. Murray,
Plaintiffs-Appellants

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
Plaintiffs

v.

UNITED STATES,
Defendant-Appellee

On Appeal from the United States Court of Federal Claims
in Case No. 1:13-cv-00227, Judge Richard A. Hertling

CORRECTED PLAINTIFFS-APPELLANTS' PRINCIPAL BRIEF

Jeffrey S. Rasmussen
Jeremy J. Patterson
Patterson Real Bird & Wilson LLP
1900 Plaza Drive
Louisville, CO 80027
T: 303.926.5292; F: 303.926.5293
Attorney for Plaintiffs-Appellants

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, individually, as natural parent of Todd R. Murray, and as personal representative of Estate of Todd R. Murray, Estate of Arden C. Post, as successor to claims of Arden C. Post, individually, as natural parent of Todd R. Murray.

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 LLP and its attorneys Jeffrey S. Rasmussen (Attorney of Record).

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: March 24, 2025

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

US SUPREME COURT CASES

FEDERAL CASES

STATUTES

FEDERAL RULES

Federal Rules of Appellate Procedure

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*, 20-2082, Dkt. 162 (Fed. Cir. 2022) (*Jones II*) and *Jones v. United States* 846 F.3d. 1343 (Fed. Cir. 2017) (*Jones I*). 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 May 8, 2024. Appellants' Notice of Appeal was timely filed on July 2, 2024. *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

Did the CFC violate this Court's mandate or otherwise commit legal error when it held that the FBI did not control the significant evidence at the crime scene and when it refused to impose any spoliation sanction for the significant evidence at the crime scene which the FBI failed to gather?

Did the CFC violate this Court's mandate or otherwise commit legal error when it did not provide a meaningful remedy for the FBI's spoliation of the .380 gun?

Did the CFC err by basing trial court decisions on inadmissible hearsay?

Are the CFC timeline of events and related decisions arbitrary and capricious?

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. *Jones II* at 3; Appx534 (Stipulation Regarding Spoliation ¶¶3, 8 (hereinafter Spol. Stip.)).

Mr. Murray had been a passenger in a car and the driver of the car was an Indian who had committed traffic crimes that day. *Jones II* at 3; Appx534 (Spol. Stip. ¶6). Mr. Murray had not committed, and was not suspected of having committed, any crime that day. Appx538 (Spol. Stip. ¶¶35-36). He had only one prior minor and closed criminal conviction, and there were no warrants for his arrest from any jurisdiction. Appx532-34.

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. *Jones II* at 3.

Norton quickly found Mr. Murray. Norton admitted that, with weapon drawn, he ordered Mr. Murray to lie down on the ground. 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.

The shooting occurred on non-public tribal trust lands on the Ute Indian Tribe's Uncompahgre Reservation. Norton did not have authority to enter those lands, and did not obtain a search warrant from any court to enter those non-public lands. Appx537 (Spol. Stip. ¶¶23, 24); Appx355; Appx695.

Litigation was reasonably foreseeable on April 1, 2007. Appx059. The Ute Indian Tribe's Uncompahgre Reservation is a contiguous area of over 1,900,000

acres of Reservation lands.[1] Its boundaries have been in place and have not moved since 1882. *Ute Indian Tribe v. United States*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*). From at least 1975 until about 2016, the State of Utah and Uintah County (for which Officer Norton has been employed, including as County Sheriff) had been claiming that the Uncompahgre Reservation did not exist, and that the State had jurisdiction over most of the land on the Uncompahgre Reservation. Its officers continued to act based upon the State's claim even after the United States Court of Appeals repeatedly rejected the argument in cases in which both the Tribe and the State were parties. *See generally Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*), *e.g., id.* at 1003-4. Although the Uncompahgre Reservation is a large contiguous tract with a boundary that has not moved for over 140 years, Norton and other State and County officers testified at the spoliation hearing that they did not know where the boundary was, and claimed that the maps they used to show the boundary changed frequently. Appx553-554 (Spol. T. 144-145); Appx558 (Spol. T 228:14-21).

---

1 The discussion regarding the acrimonious history between the Uintah County and the Tribe is primarily related to whether litigation was reasonably foreseeable. The Murray Family does not expect that the United States will challenge reasonable foreseeability from April 1 onward as part of this appeal, and it therefore only provides a truncated discussion of the history that has led multiple courts to conclude that litigation was reasonably foreseeable. Appx59; *Jones v. Norton*, 2014 WL 909569, at *7 (D. Utah Mar. 7, 2014), aff'd, 809 F.3d 564 (10th Cir. 2015). If it were to unexpectedly be needed, the Murray Family will provide additional discussion in its reply brief.

While still at the crime scene, Norton called his attorney. Appx550 (Spol. T. 118:8-10). The Murray Family searched for evidence at the crime scene on April 2, 2007, and had retained and met with their attorney by April 11, 2007. Appx546-48 (Spol. T.46:7-10, 19-52; 55:15, 64:8-15). The United States was informed of the car chase by at least 11:04 a.m. on April 1, about half an hour before the shooting, and at about 11:45, FBI Agent Ashdown was notified that a shooting of a tribal member on the Reservation had occurred. Appx539 (Spol. Stip. 48); Appx681. Federal investigators were called to the scene once there was a shooting of a tribal member, which required an investigation.

FBI Agent Ashdown was "the decider" on what evidence the United States would take into custody. Appx560 (Spol. T. 361:17-18). He decided not to test Norton's hands for blood or tissue, and he decided not to inspect Norton's gun. He decided not to seek Norton's clothing. Appx540 (Spol. Stip. ¶¶ 53-55).

As the Murray Family's expert correctly stated:

> This case can't be closed, we can't prove this is a suicide just because we have one officer who says it was a suicide
> …
> Q: So at bottom your problem is that there wasn't forensic evidence, as you describe it, to corroborate the -- Dr. Leis's determination of cause and manner of death?
> A. I would rather put it I didn't see any evidence to corroborate or to refute. Because, remember, the evidence might show that exactly what was alleged to happen did, but we can't know the answer to that because all of the evidence went away.

Appx432 (Gaut Dep. 150:13-15; 151:16-24).

Norton is the only living witness to the shooting. Appx450; Appx538 (Spol. Stip. ¶¶36-37). Norton stated that he saw Mr. Murray before Mr. Murray saw him, and that he then saw Mr. Murray shoot at him *one time*. At the spoliation hearing, Norton again testified to one shot at him: that he "saw *the bullet* [allegedly fired by Mr. Murray] hit the ground and that Mr. Murray then shot himself. Appx551 (Spol T. 112:13-15).

Norton stated that while Norton *was standing still*, Norton shot twice in rapid succession at Mr. Murray, and that Norton then ran in the opposite direction, keeping his eye on Mr. Murray. He claimed he then saw Mr. Murray shoot himself in the head. *Id.*

The number of bullet casings and the pictures of the bullet casings—one of the few meager pieces of evidence that does exist—are directly contrary to Norton's claims. Appx669. Norton was not telling the truth. After Norton was on record asserting that Mr. Murray only shot at him once, Norton learned that in addition to the two bullet casings found near the .380 gun, there was a third bullet casing stovepiped into the gun. Appx551 (Spol. T. 110:18-111-9). He now sometimes claims that Murray shot at him twice.

Norton claimed that he was standing still when he shot twice in quick succession at Mr. Murray. Appx550 (Spol. T. 94:7-10: (Q: And those [two shots by Norton] were in quick succession. A: very quick, yes. Q: Very quick, right, A:

Yeah, it was just boom, boom.)). But Norton's bullet casings were far apart. Appx669.

In what would be comical if not for the stakes involved, the United States attorney attempted to rehabilitate Norton's testimony, to account for the fact that Norton's casings were far apart. He tried to lead Norton to say he was running when he fired and that there was time between his shots, but Norton firmly reiterated that he was standing still and that he shot, bang, bang, in quick succession. Appx555 (Spol. T. 172).

Norton claimed that he later found his own shell casings. Those shell casings were found a significant distance from each other. Appx699.

Other than Norton's own self-serving 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 trial member on an Indian Reservation, the United States had, and acknowledged, legal responsibility for the investigation of the officer-involved shooting. *Jones II* at 4. Agent Ashdown arrived after Mr. Murray had been taken away by ambulance. He therefore had not seen Mr. Murray. He did not yet know if Mr. Murray's body was bruised. (Mr. Murray had multiple bruises. Appx701; Appx678-679; Appx697-698; Appx700. He did not have any information

on entry or exit location for the bullet, or blood or tissue spatter on Mr. Murray's hands or clothing. (Subsequent photos showed no blood or tissue spatter on Mr. Murray's left hand and the autopsy showed that the wound was a close contact wound from the left side of the head. Appx656 (T. 259:2-12)).

Agent Ashdown does not even know who told him that Norton had said Mr. Murray shot himself. He knows someone other than Norton told him, because he knew Norton was invoking his right to remain silent while still being allowed to roam the crime scene, but Ashdown does not know if the report he received was second hand, third hand, or even more distant. While at the scene on April 1, without anything more than a hearsay assertion that Norton said Mr. Murray shot himself, Ashdown concluded it was a suicide: case closed.

Norton claimed that Murray had shot himself with a .380 caliber handgun. The United States intentionally spoliated that gun after it knew there was civil litigation pending. *Jones II* at 5-6. One of the primary issues in this appeal is the spoliation sanction that should have been applied to the gun which the United States intentionally destroyed. In *Jones II*, this Court affirmed the CFC decision that the United States spoliated the .380 gun. It further held that the CFC had not imposed a meaningful sanction for the spoliation, and it remanded for imposition of an appropriate sanction. *Jones II* at 26. As discussed in the discussion of law below, in the latest remand, the CFC has not imposed a meaningful spoliation sanction.

Instead, it imposed even less of a spoliation sanction in this round of this litigation than it had imposed in the prior appeal.

The .380 handgun was lying about four 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. Appx447.

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 three-fourths of the cases of close contact wounds, the weapon used would have blood or tissue. Appx446.

Mr. Murray is right-handed, Appx467; Appx545 (Spol. T. 27:9-10), but pictures of his left-hand show that it did not have blood or tissue on it, Appx472, and it is unlikely that Mr. Murray could have shot himself on the upper left side of his head with his right hand. Appx472, Appx475 (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 the .380 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 matched the gun, failed to test the gun to see if it had fingerprints of Norton, of any other officers, or of Murray. Appx540 (Spol. Stip. ¶51-55).

Then the United States intentionally destroyed the gun. Appx473; Appx476.

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. Appx443-444. He also admitted that the uncollected or destroyed evidence was evidence, *id.*, and that some of it would have been very substantial evidence. Appx438 (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. Appx441-443. He similarly admitted that if Norton were 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. Appx435-439. 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. Appx441-443. 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. Appx473.

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. Appx349-351 (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. Appx472. 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;* Appx539 (Spol. Stip ¶¶ *56, 58)*.

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. Appx286 (Arden Expert Rep. at 4).

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. Appx474. 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[2]

Utah Federal District Court case

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.[3] First, the Court decided that because the United States was responsible for the investigation of the shooting, the state

[2] In all, there are at least thirteen different case numbers associated with this matter. Utah State 090800340; D. Utah cases 09-730, 15- 00300, 22-0683; 10th Cir. cases 14-4040, 14-4144, 15-4170; CFC case 13-227; Fed. Cir. 15-5148, 20-2182, 24-2053; U.S. Sup. Case 17-855; and Ute Tribal Court case 15-093. The death was on April 1, 2007, and cases have been ongoing since 2009, often in multiple courts simultaneously.

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

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.*

Federal Court of Claims case and First Appeal to this Court

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.[4]

[4] 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.

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.

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.

Proceedings on First Remand

On January 18, 2018, Plaintiffs filed a motion for spoliation sanctions, which included a ten-page statement of facts, memorandum in support, and hundreds of

pages of exhibits, including prior deposition testimony, pictures, and discovery responses. Dkt. 78. The United States submitted a response and additional exhibits. Dkt. 85. The parties then submitted a voluminous joint appendix. Dkts. 103-120; (Dkt. 117 states that the appendix included 1,638 documents). The parties conducted expert discovery focused on spoliation issues, and then submitted an additional voluminous appendix. While that discovery was ongoing, the matter was reassigned to Judge Hertling.

At Judge Hertling's request, the Murray family submitted a renewed motion for spoliation sanctions. Appx357 (Sept 10, 2019). That motion was based upon all of the prior documents submitted in support of the Docket 78 motion for spoliation sanctions, and included additional expert deposition testimony. App365 at n.1; 137-1; 137-2. The United States submitted a response, which included reports from its experts, Dr. Cohen, and Mr. Fitzer. The parties then submitted additional discovery documents. Appx424, 427.

In short, the parties jointly submitted nearly all of the record and discovery from the prior district court suit and additional discovery from the current suit as the "record" for the motion for spoliation sanctions.

In responses to the motion for spoliation sanctions, the United States made the exact same argument that it had lost in *Jones I*—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[5] claimed they had not expected litigation until after December 2008. Unfortunately for the United States, the Murray Family had located the proverbial needle in a haystack—in the thousands 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." Appx475 (citing ECF 118-3 at JONES 0010902). Items 1B1-1B4 were shell casings, but not the gun. Appx476 at n.2. 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.

[5] *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).

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. Murry 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. Appx478 (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 presented the same argument the United States had previously made to this Court, that it made a second time 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. 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.

Second Appeal to this Court

The Murray Family timely appealed from that order.

In that appeal, the Murray Family made two primary arguments.

First, the Murray Family argued that the CFC erred when it held the FBI could not be liable for spoliation of the vast and significant evidence that the FBI failed to collect. The United States provided a shotgun response, and this Court rejected each of the United States responses. This Court remanded for the CFC to re-decide whether to impose spoliation sanctions for evidence that was readily available but that the FBI failed to collect.

Second, the Murray Family argued that the CFC had correctly held that the .380 gun had been spoliated, but that the CFC had not imposed any meaningful

sanction for spoliation. This Court agreed, and it remanded for imposition of a meaningful sanction.

Proceedings on Second Remand

On second remand, the CFC determined that it would first hold an evidentiary hearing on spoliation sanctions, issue a spoliation order, and then would hold a trial.

As the evidentiary hearing neared, the United States asserted that the prior voluminous stipulated record on the pending motion for spoliation sanctions could not be used. The Murray Family disagreed. It understood that the evidentiary hearing would supplement the prior voluminous stipulated record—which was also the record that this Court used when it issued its own decisions on spoliation and its order of remand. The Murray Family filed a motion in limine. Appx528. The Murray Family's motion in limine is a legally permissible inverse of the more common motion in limine seeking to exclude evidence. As was undisputed, a party can bring a motion in limine to admit evidence. Here the Murray Family was seeking to "admit" evidence which had already been admitted by stipulation as the record for the motion for spoliation sanctions. The United States responded that the documents which it had previously stipulated to were hearsay, and it asserted that when the Court set the matter for an evidentiary hearing, that somehow voided the United States prior stipulation to the evidence. Appx648.

By order issued less than a week before the spoliation evidentiary hearing, the

CFC denied the Murray Family's motion in limine, holding that the only evidence it would consider was evidence submitted at the approaching hearing. Appx532 (Unnumbered Dkt. Entry (Oct. 25, 2022)).

The Court held the spoliation hearing during the week of October 31, 2022, then obtained post-hearing briefs and issued its decision on May 7, 2024.

The two most significant parts of that decision, discussed in detail in the legal discussion below, were that:

1) As it had in the decision that was vacated in *Jones II*, the Court held that the United States had no duty to obtain any evidence from Norton's gun or Norton's clothing. The Murray Family's position, as discussed below, is that this is a violation of this Court's prior mandate.
2) The Court would impose a rebuttable presumption that the .380 gun did not have Mr. Murray's blood, tissue, or DNA on it, and the Court set out specific evidentiary conditions the United States would have to overcome in order to rebut that presumption. The Murray Family's position is that, as that order was later interpreted by the CFC, the order violated this Court's mandate to impose a meaningful sanction. In fact, as applied, it imposed even less of a sanction than the prior sanction which this Court held was insufficient.

Trial was held beginning November 6, 2023. The parties then submitted proposed findings of fact and conclusions of law, and the Court issued a lengthy decision which in substantial part does not track either side's proposed findings of fact. As will be discussed below, the Murray Family's position is that the Court committed additional reversible errors in its findings and conclusions.

The Murray Family timely appealed.

SUMMARY OF THE ARGUMENT

Borrowing for a second time 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 after *Jones I*, the Murray Family had to come back to this Court to relitigate the exact same primary issue on appeal that it litigated, and won, in *Jones I*. Now almost three years after that, the Murray Family has to come back again, to again argue the same primary issues it has now won twice. It now has to convince another panel of this Court that it should prevail on the issue that the Murray Family prevailed on in the prior appeals.

The only difference is that its argument is now much stronger than it was three years ago or eight years ago. On remand after its first appeal, the Murray Family prevailed on its motion for spoliation sanctions. It 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. But, yet again, the CFC held that Mr. Murray used the spoliated gun to shoot himself.

The current appeal also presents the other primary issue that was resolved in *Jones II*—the standard that applies to claims that the United States spoliated evidence. In *Jones II*, the United States brought every argument it could think of for asserting that a different spoliation standard applied to the United States. This Court rejected all of those arguments. On second remand, the United States reiterated several of the five arguments that this Court had rejected in *Jones II*, and it raised a sixth argument—that it does not have a duty to collect evidence because a state police officer who collects or possesses evidence at a federal crime scene has a constitutional right to not provide the evidence to the lead federal investigator!! The CFC bought that silly argument.

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. The Murray Family's position is that this Court should remand with instructions that the CFC hold that the United States is liable. The Murray Family does not want to have to litigate for another 3-5 years and then come back to this Court yet again.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews 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)). It also reviews compliance with a mandate and issue preclusion 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).

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

In the CFC order that this Court vacated in *Jones II*, the CFC incorrectly applied a lower spoliation standard against the United States than it or other courts

apply to non-federal parties. In *Jones II*, this Court discussed in detail, and rejected, all five of the arguments which the United States made for affirming the CFC.

Most significantly, the United States argued that the United States did not have control over Norton's clothing, the gun, and other evidence at the scene.

On remand, the CFC again held that the United States—the investigative agency at a homicide in Indian Country—did not have control over the key evidence that was at the scene. Common sense tells us the CFC yet again erred in holding the FBI did not have control of the evidence, but since courts generally want to cite something more than "common sense," the Murray Family will provide a discussion of the legal precedents that confirm the common sense result.

The United States had the duty to preserve evidence because it was the investigative law enforcement agency. *Jones II.* 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. *Jones II* at 9; *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. *Jones II* at 9; *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 CFC's conclusion that the United States did not have "control" over Norton, Norton's weapon, or other evidence at the scene of a homicide is legally erroneous for multiple reasons.

A. THE UNITED STATES HAD CONTROL OF THE EVIDENCE AT THE CRIME SCENE, AND THEREFORE HAD CONTROL OF NORTON'S GUN AND CLOTHING.

Norton was a police officer, far outside of his own jurisdiction, at a crime scene. Vernal Chief of Police Jensen came to the scene, far outside of his jurisdiction and took possession of one of the two most important pieces of evidence—a gun owned by Vernal City but which Norton had used to fire upon Mr. Murray. Ashdown was the superior officer at that crime scene. Ashdown was "the decider." Appx560 (Spol. T. 361:17-18). Ashdown was in legal control of the crime scene. As such, he had the right and duty to collect the evidence at the crime scene. *Jones II*.

Norton's clothing and gun are evidence that were at the crime scene. They therefore were within Ashdown's control.

Where that evidence was of such quality that it had to be preserved under the civil standard for spoliation, Ashdown's failures to collect that evidence is spoliation. *Jones II*.

The CFC believes it found a way to get to its same prior result—that Ashdown (1) did not have control of Norton's gun or possible evidence of blood literally on Norton's hands and clothing (as control was clearly defined in *Jones II*) because Jensen or Vernal City had a *constitutional right* to have Jensen come to a crime scene outside his jurisdiction and collect the gun and then refuse to turn the gun over to the FBI and (2) that Norton had a constitutional right to refuse inspection or possession of his hands or clothing.

The CFC's holding regarding the gun is particularly stunningly wrong. The CFC holds that someone who has no law enforcement authority whatsoever on the non-public Indian lands, can come to a crime scene, during an active investigation, and then take possession of one of the two most important pieces of evidence at that scene, and then refuse to provide that evidence to the FBI investigator in charge of the crime scene.[6] There is no case which supports the CFC holding. None, from any jurisdiction. There is no "constitutional right" for an outsider to come to a

6 Norton had given up possession of the gun, and was not the owner of the gun, and therefore Norton had no claim to fourth amendment protection of the gun. *E.g.*, *Hoffa v. United States*, 385 U.S. 293 (1966).

federal crime scene, let alone to take possession of evidence at the scene, let alone to then refuse to give it to the investigator upon request.

Equally stunning is that the FBI is making the argument to begin with. If a Defendant were to make that argument against the FBI—that someone can come to a federal crime scene and take away the evidence and that the FBI cannot stop them, the FBI would, properly, be livid. If Ashdown had asked Jensen to turn over the gun (as he had the duty to do, since the gun was significant evidence) and Jensen had refused, one would expect the FBI would assert that Jensen's acts constituted evidence tampering or interference with a government officer. *E.g.*, 18 U.S.C. § 1512(c) ("altering, destroying, mutilating or concealing an object with intent to impair the object's availability for use in an official proceeding is evidence tampering"). 18 U.S.C. § 1512(f); *United States v. White Horse*, 35 F.4th 1119, 1121 (8th Cir.), *cert. denied*, 143 S. Ct. 283 (2022). In *White Horse*, the defendant hid an item that he believed was evidence under a porch, in an ill-fated attempt to protect his father from a homicide charge. Defendant was convicted of evidence tampering.

Of course, the Murray Family does not have to show that Jensen's act was criminal or would have been criminal if Jensen had refused to turn over the evidence that Jensen took. Instead, it has to show that the second most significant piece of evidence in this matter—Norton's gun—was at the crime scene and that Jensen took

the gun. *Jones II*. This Court should save the FBI from itself. It should hold that Jensen had the duty to turn over the gun upon request.

The holding regarding Norton's clothing is only slightly less stunning. The clothing is evidence that is at the crime scene. If the FBI neither tests nor takes possession of the clothing, the evidence is gone. Here, that is exactly what happened. The FBI agent allowed the evidence to leave his crime scene, and the evidence was thereafter gone.

Norton and Jensen were police officers who were at a crime scene, and they were in possession of evidence regarding the crime. They did not have authority to refuse to turn over evidence at that scene to the acknowledged lead investigator. This case does not present any "plain view" issue or any "constitutional right." It presents a standard spoliation issue—the FBI was in control of the crime scene, and its failure to preserve evidence is subject to the same standard as every other civil litigant in this Country. *Jones II.* Here, it failed to preserve the key evidence, and spoliation sanctions regarding that failure were required.

B. JENSEN'S ACT OF TAKING POSSESSION OF NORTON'S GUN DOES NOT GIVE JENSEN ANY CONSTITUTIONAL RIGHT TO WITHHOLD THE GUN FROM THE LEAD FBI INVESTIGATOR.

Contrary to the above, the FBI argues that people in this country have a "constitutional right" to come to federal crime scene and take away the evidence, and that the FBI cannot stop them. In a short paragraph beginning on page 44 of its

spoliation opinion, Appx044, the CFC agreed. It held that because Jensen had taken possession of the gun from Norton, Jensen had a "possessory interest" in the gun, and that therefore Ashdown lacked authority to take control of the gun unless Ashdown had "probable cause." The CFC's sole citation for that legal holding was a benign footnote in *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). The footnote, footnote twelve, does not, in the slightest, support the CFC conclusion. The Murray Family contends the footnote is directly contrary to the CFC decision.

The central issue in *Rakas* was whether defendants had standing to challenge an alleged unlawful search of a vehicle. The defendants had been arrested in the vehicle and were charged and ultimately convicted of armed robbery. Defendants argued they had standing to challenge the alleged unlawful seizure of a sawed-off rifle and shells from the vehicle. The Court held that they lacked standing because neither defendant owned the vehicle and neither defendant claimed ownership of the gun or shells.

In footnote twelve to the majority opinion in *Rakas*, the Court discusses that *most* people who possess or occupy real property have a reasonable expectation of privacy in that property, but the thrust of footnote twelve is that there is not a bright line. Ownership or possession often do not create the requisite "reasonable expectation of privacy."

While Jensen may have taken the gun from Norton at the crime scene, he did not have a reasonable expectation of privacy in the key evidence which he took at the crime scene. He also never claimed that he had any expectation of privacy. He neither would have nor could have refused to give the evidence to Ashdown. Ashdown was in "control" of the evidence, but failed to comply with his duty to preserve the evidence.

After erroneously citing *Rakas* for the proposition Ashdown had to have "probable cause," the CFC greatly compounded that error a few paragraphs later. Contrary to case law, the CFC added the large qualifier that probable cause that the gun was evidence was not sufficient—that Ashdown had to probable cause that *Norton committed a crime with the gun.* Appx045. The CFC's error on this point is identical to its erroneous assertion that the plain view doctrine prevents the FBI investigator from taking control of evidence at the scene. As is discussed in more detail below, the required probable cause is solely that a crime occurred. The FBI investigator does not have to determine *who* the alleged criminal is before taking control of evidence.

C. THE FBI AND THE CFC'S ATTEMPT TO USE THE PLAIN VIEW DOCTRINE TO DENY THE FBI AUTHORITY TO TAKE POSSESSION OF EVIDENCE AT THE CRIME SCENE IS LEGALLY ERRONEOUS. THE FBI HAD CONTROL OVER EVIDENCE AT A CRIME SCENE THAT IS IN PLAIN VIEW, REGARDLESS OF WHETHER THE CRIME IS BY NORTON, MURRAY, OR OTHERS.

To seize an object that is in plain view, an FBI officer must: (1) be lawfully in the location from which he sees the evidence, and (2) the officer must recognize the item as evidence.[7] As will be discussed below, the CFC misread the case law and created a third requirement which is contrary to the case law.

The first of the two elements is plainly met.

> The question whether property in plain view of the police may be seized therefore must turn on the legality of the intrusion that enables them to perceive and physically seize the property in question.

Texas v. Brown, 460 U.S. 730, 737 (1983).

The FBI had authority to be at the crime scene. The United States FBI was investigating a shooting and a homicide in Indian Country. It had full investigative powers at that crime scene.

The second element is also plainly met.

> We recognized in *Payton v. New York*, 445 U.S. 573 (1980), the well-settled rule that "objects such as weapons or contraband found in a

---

7 Some federal courts break the two elements discussed above into three elements. *None* of those tests includes an element that the item in plain view must be evidence of probable cause that someone in Norton's shoes was the suspect. *E.g.*, *United States v. Delva*, 13 F. Supp. 3d 269 (S.D.N.Y. 2014)(adding a first element, which seems to be redundant of the first element discussed above, that "the evidence must, in fact, be in plain view").

> public place may be seized by the police without a warrant. The seizure of property in plain view *involves no invasion of privacy* and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."

Id. at 738. The Court in *Brown* discussed the underlying rationale for the plain view exception, and that underlying rational shows why the authority to seize items is not dependent on whether the owner is the accused:

> The principle is grounded on the recognition that when a police officer has observed an object in "plain view," the *owner's* remaining interests in the object are merely those of possession and ownership.

Id. at 739. *See also (Horton v. California,* 496 U.S. 128, 133 (1990)) ("If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy."); *Harris v. United States*, 390 U.S. 234 (1968) (seizure of victim's ID card that did not belong to the suspect upheld under plain view doctrine); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Often the item that is seized under plain view is contraband, but the Supreme Court has repeatedly noted that the plain view doctrine is not restricted to contraband. Plain view also permits seizure of evidence regarding a crime, even when there is not the type of formal major crime investigation that was occurring in this case. *E.g., Coolidge v. New Hampshire*, 403 U.S. 443 (1971) ("Of course, the distinction between an 'instrumentality of crime' and 'mere evidence' was done away with by *Warden v. Hayden*, 387 U.S. 294."); *Harris*, 390 U.S. at 236.

Perhaps the CFC error stems from the fact that nearly all of the cases which involve "plain view" seizures are motions to suppress, and therefore they are only brought for property to which the criminal defendant has standing.

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.

Alderman v. United States, 394 U.S. 165, 171-72 (1969). *See also United States v. Salvucci*, 448 U.S. 83 (1980) (overruling an exception to *Alderman* which had provided automatic standing in possession crimes). And, of course, a defendant would not move to suppress exculpatory evidence that was seized from a third party. There are, therefore, few if any cases challenging a police officer's taking of evidence of a crime which does not belong to the primary suspect. But it is an everyday occurrence in criminal investigations—taking a victim's blood from a crime scene, taking the remnants of a vase that was smashed by the defendant in an assault on a victim, taking a bloody bat to later determine what evidence it contains and who that evidence points to, taking fingerprints, taking all of the shell casings in this very case, etc.

The error which led to the CFC's contrary holding is succinctly captured in its statement that the legal rule is that:

> the government must establish probable cause that [the possessor of the firearm] had committed, or was committing, a crime involving the

> firearm. *See United States v. Chavez*, 985 F.3d 1234, 1246 (10th Cir. 2021) (citing *Texas v. Brown*, 460 U.S. 730, 738 (1983)).

Appx39.

The CFC's quote is from an application of *Brown* to the specific facts in *Chavez.* In *Chavez,* the evidence was in the possession of the accused (which, as noted above, is usually the scenario when there is a motion to suppress, because a defendant cannot challenge the alleged seizure unless the defendant has standing). But the *holding* from *Brown* that *Chavez* cites is quoted above—the evidence can be seized *if it is at the crime scene and it is evidence regarding a crime*. The CFC addition, in the guise of a "constitutional right"—that the weapon can only be seized if it is the eventually charged Defendant's weapon, is incorrect.

As also noted above, it is odd that in this case, the federal attorneys, whose client is the FBI, seek to impose a debilitating and legally unsupported limit on law enforcement authority to collect evidence from a crime scene. One of the most common defenses in criminal cases is an argument that the police jumped to a conclusion and then only gathered the evidence that supported their premature decision. The FBI now seeks to codify the requirement that the police *must* jump to that conclusion even earlier, and then can *only* collect the evidence supporting their position.

The argument that the FBI can only collect items in plain view if they are from the eventual Defendant is just the latest of these curious arguments where the FBI

has cut off their nose to spite their face, pulling out stops to attempt to avoid paying the Murray Family for the events on April 1, 2007. As the Murray Family has repeatedly noted to this Court and to the CFC, the Murray Family, more than anyone else, wishes the FBI had not spoliated the evidence. Though the meager evidence they see points to Norton shooting Todd, they will never actually know.

The parties to this case agree that there was probable cause that a crime had been committed on April 1, 2007. Norton's gun, his clothing, and testing of his hands would provide evidence regarding that crime. On April 1, 2007, one could still debate what that criminal activity was—was it a murder by Norton, use of excessive force by Norton, reckless endangerment by Norton, an attempted shooting of Norton. But a crime had occurred, and Norton's gun was a key piece of evidence regarding that crime. The gun was at the crime scene. The FBI therefore could take the gun. Norton's clothing was at the crime scene. The FBI could take the clothing and test it for Mr. Murray's blood or brain tissue. Those pieces of evidence would have almost assuredly told us who committed a crime. The FBI failure to take the key evidence at the scene was, to the Murray family, a huge and harmful error. They have been fighting now for over 18 years. The FBI should admit its error and pay for its error, instead of trying to gut federal investigative powers to attempt to prevail in the current case. Since the FBI apparently will never admit its error, this Court should now save the FBI's investigative powers from the FBI's attorneys.

This Court must vacate the CFC holding denying spoliation sanctions on the trove of evidence the United States chose not to collect.

D. 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.*, Appx430 (Gaut Dep. 31:14-20). The United States spoliated that evidence. The United States did not preserve that evidence through its own forensic testing or investigation, and it went further. 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.

The United States destroyed the gun—virtually the only evidence it actually collected—even though it knew litigation was planned.

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.*, Appx431 (Gaut Dep. 88:16-21).

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

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.

III. THE CFC'S TIMELINE OF EVENTS AND ITS DISCUSSION OF THE "RUNNER IN BLUE," IS ARBITRARY AND CAPRICIOUS.

The CFC builds a timeline that is incorrect, and from that incorrect timeline it claims that it would have been difficult for Norton to have killed Mr. Murray under the CFC's timeline. The CFC discussion is contrary to all of the witness testimony, contrary to the United States experts, and contrary to the dispatch records.

At 11:23:47 a.m., Officer Swenson reported that he had "two runners out. Both tribal male." Appx685. Based upon Swenson' report, none of the state officers had probable cause to believe that they had any jurisdiction, whether on roadways or on public lands. They do not have jurisdiction over tribal members, and they

cannot go roaming on non-public lands based upon a theory that maybe Swenson's report was wrong. That is the core of the probable cause standard.

At 11:25:21, Officer Swenson reported that he did not yet have either the driver or passenger in custody, and that he had removed the keys from the suspect vehicle. At 11:26:39, Officer Swenson reported that he had the driver in custody. Norton arrives after the driver is in custody. Appx686; Appx68.

By the time Officer Norton arrives, nearly three minutes after Swenson, Mr. Murray is not visible. He has gone around a hill, away from the roadway. He is, of course, trying not to be seen by the non-Indians who were unlawfully looking for him on the Tribe's non-public lands.

Norton drives and then jogs over a hill. Officers Byron and Young arrive soon after Norton, and they begin to drive to a different location.[8] At 11:28:45, one of them asks who is the "runner in blue" –someone running over a hill near the roadway. The United States experts and witnesses understand that the "runner in blue" was Norton. *E.g.*, Appx434, Appx440 (Fitzer Dep.23:6-8; 74:1-5); Appx655 (T. 257:12-17); Appx284 (Byron Dep 85:11-16).

8 Much of the Court's analysis of the scene and sightlines was based upon a site visit more than 15 years after the incident. The CFC apparently assumes that an oilwell pad that is there now was there 15 years ago and was the oil pad that Byron and Young drove to. There was no testimony that the well pad was there 15 years ago, or that it was the well pad to which Byron or Young drove.

By a convoluted string of inferences, the CFC reasoned that Mr. Murray was the runner in blue, heading up over the hill just a short distance from the crash site, about five minutes after Mr. Murray had run away from the area. Appx073-082. The CFC reached that inference in part based upon a timeline that is contrary to the stipulated dispatch record. Appx680.

That led to the CFC's further inference that Deputy Byron does not recognize his own voice. Deputy Byron listened to the recording of the "unknown voice" on the dispatch recording, who asked about the runner in blue and Byron (correctly) stated "That's –that's not me." He stated he believed it was Officer Young's voice. Appx655 (T. 257:12-17). *See also* Appx284 (Byron Dep. at 85:11-16) (Byron testified that when he first saw the "runner in blue" he did not know who it was, but that he later determined it was Norton). The CFC said that "by a process of elimination," it was Byron's voice, and that Byron was mistaken when Bryon said it was not his own voice.

Based upon that inference, the Court made an even stranger inference—that the "runner in blue" was Todd Murray. Again, the witness and the U.S. experts disagree. They understood that the "runner in blue" was Norton. *E.g.*, Appx434, Appx440 (Fitzer Dep. 23:6-8; 74:1-5).

Then, based upon the Court's inference that the "runner in blue" was Mr. Murray and the Court's timeline that is contrary to the stipulated dispatch log, the

Court shortens the timeline. And from that inference, the Court concludes that Norton did not have time to kill Mr. Murray by 11:27:29 a.m. Appx82. But Norton did not call in the shooting until *11:30:40.* Appx287 (Dispatch log: 11-30-40. Norton: "Kim…I got shots fired.").

After 15 years of litigation, the Murray family deserves something more than a bunch of inferences, each dependent on the prior inference that lead the Court to a conclusion that is contrary to the dispatch record, to the witnesses testimony, to the maps, and that requires one to assume that Byron does not recognize his own voice.

The Murray Family notes that one of the United States "experts," Mr. Fitzer also attempted to construct a timeline of events which he also claimed did not give Norton time to kill Mr. Murray. His timeline fell apart on deposition examination and the United States wisely chose not to call him at the trial to try to support that timeline. Now the CFC creates an even more incorrect timeline.

IV. THE CFC DISCUSSION OF OWNERSHIP OF THE .380 GUN MUST BE VACATED BECAUSE THE DISCUSSION IS NOT BASED UPON ANY ADMISSIBLE EVIDENCE.

In its decision, the CFC asserts that the .380 gun was connected to Kurip. Appx99. It was not connected to Kurip by admissible evidence. The Court solely relies on a hearsay statement that had been introduced at the spoliation hearing (where it was not objectionable on hearsay grounds).

The Court cited that hearsay, over the Murray Family's objection, to save the United States from the United States massive trial blunder. The U.S. had planned to

use the felon's statement on plea of guilty to a federal gun charge to link the gun to Kurip, but the statement on plea of guilty did not contain an allegation that the felon had given the gun to Kurip. Appx666-667 (T: 604:1-605:4). When that document failed, the United States cited back to the prior hearsay statements from the spoliation hearing.

V. THE CFC SPOLIATION ORDER REGARDING THE .380 GUN, AS LATER INTERPRETED BY THE CFC, IS CONTRARY TO THIS COURT'S MANDATE TO IMPOSE A MEANINGFUL SPOLIATION SANCTION.

In *Jones I*, this Court held:

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

Jones I at 1363 (emphasis added).

In *Jones II*, this Court held that the CFC failed to impose a meaningful spoliation sanction.

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).

On remand, the CFC issued a new spoliation order. Parts of its scope and meaning are unclear, and one could interpret that text to mean that the CFC was going to provide a meaningful spoliation remedy. But as the findings of fact and conclusions of law show, the CFC's later interpretation of its order renders the spoliation order utterly meaningless.

In its spoliation order, Appx27, the CFC 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 than Defendant Norton.

Had the CFC applied that decision as written, it would have come close to releveling the playing field with regard to the .380 gun. As the Murray Family argued in its post-trial findings, the United States did not even attempt to offer any evidence to rebut the adverse inference that the .380 did not have blood, tissue, fingerprints, or DNA on it, and that therefore, by its own spoliation order, the CFC *was required to conclude that the gun did not have Mr. Murray's blood, tissue, fingerprints or DNA on it.* The United States did not offer a single witness, other than Norton, who claimed to have seen Mr. Murray touch the gun or who claimed to have seen any blood or tissue on the gun. It did not provide any medical testimony claiming that the wound to Mr. Murray's head must have come from a .380 gun

instead of Norton's gun. It did not offer any testimony that any of the bullet casings showed blood or DNA from anyone.

The Murray Family further established that given the lack of blood, tissue, fingerprints or DNA, the .380 gun, much more likely than not, was not the murder weapon. That is where the evidence leads once the spoliation sanction is applied.

Instead of applying the requirement that the United State had to *rebut the presumption that Mr. Murray's DNA, blood, and tissue were not on the gun, and then seeing where that leads,* the CFC returned to its prior analysis—that Norton claimed that Mr. Murray had shot himself, and therefore Mr. Murray had shot himself.

In the prior appeal, the United States argued that this Court should not reverse because "the only existing evidence consists of photos that show that the gun was free of blowback," and that therefore the CFC order at issue in that appeal 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).

This Court disagreed, even under the deferential standard of review, and it vacated the CFC order and remanded. But under the current record, the United States necessarily asserts that the .380 gun did have Mr. Murray's blood on it (since lack of blood would satisfy the Murray Family's preponderance of the evidence standard on the merits of this case), and did have Mr. Murray's DNA on it. The

spoliation sanction, as interpreted and applied by the CFC in the current case was less than in the prior case. It was not a sanction at all. Reversal in the prior case requires reversal in the current case.

This Court's decision on that appeal has consequences to the United States. This Court must now remand, yet again, to impose those consequences. This Court should remand with an instruction that the CFC must 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. The overarching goal of a spoliation sanction 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).

The two main potential spoliation sanctions here lead to the same result. The reason they both lead to the same remedy is that the 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 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. Because the .380 gun did not have Mr. Murray's DNA, blood, tissue, or fingerprints on it, we are left with the fact that Norton shot at Mr. Murray, and Mr. Murray ended up dead from a gunshot wound. Norton's assertion that Mr. Murray shot himself is impossible because if Mr. Murray had touched that gun, it would have had his DNA, and if Mr. Murray had shot himself with the gun, the gun, far more likely than not, would have had Mr. Murray's blood and tissue on it.

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 the 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

For all of the reasons discussed above, this Court should vacate the judgement and remand for imposition of judgment of liability against the United States.

ORAL ARGUMENT STATEMENT

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

Dated: March 24, 2025

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen
Jeremy J. Patterson
Patterson Real Bird & Wilson LLP
1900 Plaza Drive
Louisville, CO 80027
T: 303.926.5292; F: 303.926.5293
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 13th of March, 2025, I caused the foregoing Plaintiffs-Appellants' Corrected 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.

March 24, 2025 */s/Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen
Attorney for Appellants

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 11,979 words.

March 24, 2025 */s/ Jeffrey S. Rasmussen*
Attorney for Appellants

In the United States Court of Federal Claims

No. 13-227
Filed: May 8, 2024

DEBRA JONES, *et al.*,	*	
Plaintiffs,	*	
	*	**JUDGMENT**
v.	*	
	*	
THE UNITED STATES,	*	
Defendant.	*	

Pursuant to the court's Memorandum Opinion and separate Order, both filed May 7, 2024,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor defendant. No costs are awarded.

Lisa L. Reyes
Clerk of Court

By: s/ Ashley Reams
Deputy Clerk

In the United States Court of Federal Claims

No. 13-227
Filed: March 29, 2023
NOT FOR PUBLICATION

DEBRA JONES, et al.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

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

J. Scott Thomas, Environment & Natural Resources Division, U.S. Department of Justice, Washington, D.C., and *Christopher C. Hair*, Department of Justice, of counsel, for the defendant.

MEMORANDUM OPINION AND ORDER

***HERTLING*, Judge**

This case returns following its second remand from the U.S. Court of Appeals for the Federal Circuit. *See Jones v. United States*, No. 2020-2182, 2022 WL 473032 (Fed. Cir. Feb. 16, 2022) ("*Jones V*"). The Federal Circuit reversed the grant of summary judgment in favor of the defendant, the United States, and against the plaintiffs, who are the parents, estate, and tribe of the deceased Ute Tribe-member Todd R. Murray. In its opinion, the Federal Circuit clarified the standards for determining whether the defendant spoliated evidence, including when the defendant controls evidence. The Circuit also vacated the limited spoliation sanction that had been awarded and clarified what the Court needs to consider in fashioning an effective spoliation sanction. The Court applies the standards elaborated by the Federal Circuit to the plaintiffs' renewed motion for spoliation sanctions.

On remand, the plaintiffs have limited the items for which they now seek sanctions. The plaintiffs now seek spoliation sanctions for the defendant's failure to collect and retain only three pieces of evidence: (1) the .380 Hi-Point handgun, found near Mr. Murray, which was already determined to have been spoliated; (2) the .40 Glock handgun carried by the officer involved in the shooting that preceded Mr. Murray's death; and (3) the clothing the officer wore that day.

For its spoliation of the .380 Hi-Point, the Court imposes on the defendant a sanction of a rebuttable adverse inference.

The plaintiffs have not shown, however, that the defendant had a duty to preserve the .40 Glock or the officer's clothing. The duty to preserve only arises when litigation is reasonably foreseeable, and the supposed spoliator had "a legal right to obtain or control [the supposedly spoliated] evidence." *Jones V*, *supra*, at *4. Although litigation was reasonably foreseeable on the day of the shooting that preceded Mr. Murray's death, April 1, 2007, the defendant had no legal right to control the evidence, and no sanction is appropriate for the failure to collect these items.

I. PROCEDURAL HISTORY

This opinion assumes familiarity with this case's protracted history. *Jones v. United States*, 122 Fed. Cl. 490 (2015) ("*Jones I*"); *Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017) ("*Jones II*"); *Jones v. United States*, 146 Fed. Cl. 726 (2020) ("*Jones III*"); *Jones v. United States*, 149 Fed. Cl. 335 (2020) ("*Jones IV*"); *Jones V*, 2022 WL 473032. This opinion also assumes familiarity with the related litigation in the District of Utah and the subsequent appeal. *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015).

In *Jones I*, a judge of this court dismissed the plaintiffs' claims, but the Federal Circuit in *Jones II* vacated the dismissal to allow the plaintiffs to present their argument that the defendant, by failing to collect and preserve evidence, had spoliated that evidence.

In *Jones III*, the plaintiffs' motion for spoliation sanctions was granted in part and denied in part. The plaintiffs had sought spoliation sanctions for the defendant's supposed failure to collect and preserve evidence in 11 respects. *Jones III*, 146 Fed. Cl. at 735-36. In addition to the defendant's supposed failure to preserve the three pieces of evidence currently at issue, the plaintiffs argued that the defendant had failed to preserve Mr. Murray's clothing, that the shooting scene was not properly documented and possibly tampered with, that Mr. Murray's body had been improperly handled, and that authorities should have performed an autopsy on Mr. Murray, among other complaints. *Id.* Except for the .380 Hi-Point, the Court denied sanctions for all the spoliation allegations, finding that the mishandling of Mr. Murray's body was "not an independent basis for spoliation sanctions" and that the other items of supposedly spoliated evidence were not within the defendant's control. *Id.* at 737-42. The defendant's destruction of the .380 Hi-Point handgun that was found near Mr. Murray, however, was found to have constituted spoliation. Based on that determination, the defendant was forbidden from "rely[ing] 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 [defendant's] conclusion that Mr. Murray died by suicide." *Id.* at 742-43.

The defendant was then granted summary judgment in *Jones IV*. The Court found that issue preclusion applied to the plaintiffs' claims, notwithstanding the spoliation sanction imposed for the destruction of the .380 Hi-Point. *Jones IV*, 149 Fed. Cl. at 348-54. The Court also rejected claims based on the plaintiffs' alleged wrongs that were not punishable under federal criminal law or that only implicated off-reservation conduct because these were not cognizable as "wrongs" under the bad men provision of the treaty between the United States and the Ute Tribe. *Id.* at 354-57. Finally, the Court found that the plaintiffs had not alleged sufficient facts

to show that some of the claimed federal crimes had occurred, and that issue preclusion estopped the plaintiffs from re-arguing issues relating to all other alleged federal crimes. *Id.* at 357-62.

In *Jones V*, the Federal Circuit held that the Court in *Jones III* had applied the "wrong standard in its spoliation opinion" regarding whether the defendant had "control" of any of the supposedly spoliated evidence. *Jones V*, 2022 WL 473032, at *1, *4. In doing so, the Federal Circuit held that the defendant, like any other party, has "control" over evidence when "it has a legal right to obtain or control that evidence." *Id.* at *8.

The Federal Circuit also rejected the sanction imposed for the defendant's destruction of the.380 Hi-Point handgun in *Jones III* as "futile." *Id.* at *9-11. Specifically, the Federal Circuit held that "[a]lthough a sanction preventing the spoliator from relying on the evidence they destroyed might be appropriate in other cases, it is not appropriate in this case because it serves none of the rationales underlying the spoliation doctrine." *Id.* at *11. According to the Federal Circuit, "[c]onsidering the import of the Hi-Point .380 handgun to Mr. Murray's parents' case, a harsher sanction is required." *Id.* at *9.

The Federal Circuit therefore remanded the case to determine: (1) whether the defendant controlled and spoliated evidence relating to the defendant's supposed failure "to enforce its request for an autopsy and failure to bag Mr. Murray's hands," *id*., at *8; (2) "whether litigation was reasonably foreseeable while the government had control (as we define it here) over any allegedly spoliated evidence other than the spoliated Hi-Point .380 handgun," and therefore whether any such evidence was spoliated, *id.* at *9; and (3) "to determine the exact bounds of the appropriate remedy, such as an adverse inference or inferences, that should apply to any spoliated evidence in this case," including "whether the government should be permitted to rely on secondary evidence related to the spoliated [.380 Hi-Point handgun]," *id.* at *11.

Having vacated the ruling on spoliation, the Federal Circuit reversed the *Jones IV* ruling on issue preclusion and the grant of summary judgment to the defendant. The Federal Circuit held that issue preclusion did not apply based on the change in the evidentiary landscape and remanded for further consideration of the plaintiffs' substantive allegations of violations of the bad men provision of the treaty between the Ute Tribe and the defendant. *Id.* at *12.

Following remand from the Federal Circuit, the Court held an evidentiary hearing at which it heard testimony from October 31, 2022, through November 2, 2022, in Salt Lake City, Utah, regarding spoliation. (ECF 198-200.) Before the hearing, the parties submitted joint stipulations of fact for use in resolving the spoliation issues. (ECF 189.)[1] On January 6, 2023, and February 3, 2023, the plaintiffs and the defendant submitted their respective proposed

[1] The joint stipulations contain a list of the exhibits that the parties agreed to admit into evidence. (ECF 189 at ¶ 17.) The plaintiffs' stipulated exhibits were subsequently renumbered. (ECF 198 at 4.) This opinion cites the plaintiffs' exhibits by the numbering used at the evidentiary hearing and not by the numbering used in the joint stipulations.

findings of fact, based on the stipulations and the hearing evidence, and their proposed conclusions of law. (ECF 201, 203.) Closing arguments were heard on February 14, 2023.

In their post-hearing submission, the plaintiffs limited their motion for spoliation sanctions to three items: (1) the handgun of the officer who shot at Mr. Murray, a .40 Glock handgun; (2) the clothing worn by that officer at the scene of the events that led to Mr. Murray's death; and (3) the .380 Hi-Point handgun that was found near Mr. Murray and has already been found to have been spoliated by the defendant. (ECF 201 at 23-27.) The plaintiffs further confirmed during their closing summation that they are only seeking spoliation sanctions for those three pieces of evidence. Accordingly, notwithstanding the Federal Circuit's directive concerning the autopsy and the bagging of Mr. Murray's hands, *Jones V*, 2022 WL 473032, at *8, the plaintiffs have abandoned any argument for the imposition of spoliation sanctions based on any evidence other than these three items.

II. FINDINGS OF FACT

For purposes of deciding the plaintiffs' spoliation motion only, the Court makes the following findings of fact based on the joint stipulations (ECF 189),[2] the proposed findings of fact submitted by the parties (ECF 201, 203), and the testimony and evidence submitted in connection with the evidentiary hearing between October 31, 2022, and November 2, 2023 (ECF 198-200).[3]

A. Persons Involved with the Shooting on April 1, 2007, and the Subsequent Investigation

"Todd Rory Murray was a member of the Ute Tribe. He died on April 1, 2007, at the age of 21." (ECF 189 at ¶ 3.) "Debra Jones and Arden Post are the natural parents of Mr. Murray; and Ms. Jones is the personal representative of the Estate of Mr. Murray, for and behalf of the heirs of Mr. Murray." (*Id.* at ¶ 4.) "The Ute Tribe is a federally recognized Tribe, with a Reservation in northeastern Utah." (*Id.* at ¶ 5.)

[2] The parties agreed that any statements in the joint stipulations of fact are "solely for purposes of the spoliation issue to be briefed by the [p]arties" and that "[f]or any statements that a person 'testified to . . .' the parties are stipulating that the person so testified, but do not agree to the truth of any such testimonies." (ECF 189 at ¶¶ 1-2.)

[3] It is a party's responsibility to support its proposed findings of fact with relevant citations to the evidence in the record. *Cf. Phillips & Jordan, Inc. v. United States*, 158 Fed. Cl. 313, 326 (2022) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("But the significance of sufficient citation to the evidentiary record cannot be overstated. Failure to accurately cite to case law and the record invokes the oft-repeated adage: '[j]udges are not like pigs, hunting for truffles buried in briefs.'")). Inadequately supported or irrelevant proposed findings of fact have been disregarded unless necessary to this decision.

"Uriah Kurip was the driver of a car involved in the high[-]speed car pursuit with Utah State Patrol officers. Although Mr. Kurip was not an enrolled Ute tribal member on April 1, 2007, he was enrollable as an Indian and was an 'Indian' as that term is used to define a political classification under federal law on April 1, 2007." (*Id.* at ¶ 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. 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." (*Id.* at ¶ 7.)[4]

"Vance Norton was, on April 1, 2007, a Vernal City police officer. [Officer] Norton was not on duty on April 1, 2007. Vernal City is a municipality located wholly within the State of Utah and wholly outside the Ute Indian Reservation. [Officer] Norton was not cross-deputized by the United States o[r] the Ute Indian Tribe on April 1, 2007, to exercise law enforcement authority on the Ute Reservation." (*Id.* at ¶ 8.) Officer Norton first began working in law enforcement in 1993 in Utah. (ECF 198 at 69:7-8.)

On April 1, 2007, Gary Jensen was the chief of the Vernal City Police Department. (ECF 199 at 233:20-21, 278:1-2.) Chief Jensen was not cross-deputized as a tribal officer or an officer of the United States Bureau of Indian Affairs ("BIA"). (*Id.* at 350:22-24.)

On April 1, 2007, Dylan Rooks was a detective with the Vernal City Police Department. (*Id.* at 298:2-5.)

On April 1, 2007, Officer Ben Murray was an officer with an unspecified law enforcement agency. (*See id.* at 307:15-20; 364:16.)

"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, 200[7]. 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." (ECF 189 at ¶ 9.)

"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." (*Id.* at ¶ 10.) More specifically, in 2007, Mr. Campbell was the Chief Deputy of the Uintah County Sheriff's Department (ECF 199 at 222:11-14), and a medical examiner investigator working in Uintah County (*id.* at 215:21-217:6). Mr. Campbell was at the scene of the shooting in his role as a medical examiner investigator. (*Id.* at 231:14-22.) In that role, he was responsible for investigating the mechanics as well as the likely cause and manner of Mr. Murray's death. (*Id.* at 225:5-9.)

[4] To avoid any confusion in the roles the witnesses had in investigating the shooting on April 1, 2007, all witnesses are referred to by the job titles they had on that date.

"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." (ECF 189 at ¶ 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." (*Id.* at ¶ 12.) Agent Ashdown is an experienced investigator, having served with the FBI from 1985 until his retirement. (ECF 199 at 269:16-22.)

"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, [ ] Agent Ryan was assigned to the Vernal Resident Agency. [ ] Agent Ryan took over the investigation of Todd Murray's death after [ ] Agent Ashdown retired on May 31, 2007." (ECF 189 at ¶ 13.) Agent Ryan and Agent Ashdown were the only two agents working in the FBI's Vernal Resident Agency on April 1, 2007. (ECF 199 at 275:16-19.) The Vernal Resident Agency had no support staff. (*Id.* at 273:18-24.)

"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 and testified at a June 6, 2013, evidentiary hearing in the Utah District Court [l]itigation." (ECF 189 at ¶ 14.)

Officer Norton knew Agent Ashdown professionally because they had worked "a couple cases together and stuff like that." (ECF 198 at 183:9-15.) Officer Norton considered Agent Ashdown a friend, although no closer a friend than any of his other colleagues, noting that they "never went to lunch or dinner or anything like that." (*Id.* at 183:8-184:6.) Investigator Campbell and Officer Norton are friends who have known each other since junior high school. (*Id.* at 132:19-22.)

Officer Norton described his relationships with Deputy Byron and Trooper Young as follows:

> Deputy Byron, he was with the sheriff's office when I was working there, and Trooper Young just – I mean, he was working at the same time. We had interaction as far as maybe having a drink or something if we were working the same shift or something like that, but that was about it.

(*Id.* at 84:18-23.)

Officer Norton did not know Todd Murray and had not met him before April 1, 2007. (*Id*. at 106:19-22, 169:18-20.) Officer Norton did not know any members of Mr. Murray's family or Mr. Kurip before April 1, 2007. (*Id*. at 120:13-18, 169:21-22.)

B. Background Litigation Involving the Ute Tribe

Since 1975, the Ute Tribe and the State of Utah have engaged in substantial litigation concerning the boundaries of the Uintah and Ouray Reservation and state and local law enforcement's jurisdiction to enforce state law within those disputed boundaries. *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072 (D. Utah 1981) ("*Ute I*"); *Ute Indian Tribe v. Utah*, 716 F.2d 1298 (10th Cir. 1983) ("*Ute II*"); *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc) ("*Ute III*"), *cert. denied*, 479 U.S. 994 (1986); *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473 (D. Utah 1996) ("*Ute IV*"); *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) ("*Ute V*"), *cert. denied*, 522 U.S. 1107 (1998); *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015) ("*Ute VI*"), *cert. denied*, 577 U.S. 1216 and 577 U.S. 1229 (2016); *Ute Indian Tribe v. Myton*, 835 F.3d 1255 (10th Cir. 2016) ("*Ute VII*").

The Tenth Circuit has ruled favorably for the Ute Tribe in each of the *Ute* cases before it. The most relevant of these decisions is *Ute VI*, involving an attempted state prosecution of an Indian for, among other things, driving without an ignition interlock. *Ute VI*, 790 F.3d 1007 n.1. The decision in *Ute VI* postdates the events giving rise to this suit. The Tenth Circuit held that "prosecut[ing] tribal members in state court for conduct occurring within the tribal boundaries recognized by *Ute III*" is something "the State had no business doing." *Id.* at 1003. The Tenth Circuit directed the district court to enter "appropriate preliminary injunctive relief forthwith" to halt the prosecution. 790 F.3d. 1011-13. In doing so, the Tenth Circuit noted that it had already decided the boundaries of the Uintah and Ouray Reservation in *Ute V*, almost 20 years previously. *Id.* The decision in *Ute V* predates the events giving rise to this case by approximately 10 years.

Despite the line of *Ute* cases extending back more than two decades at the time of Mr. Murray's death, Officer Norton testified that during his 13 years as a law enforcement officer in Uintah County the maps his agency used for Indian reservation land changed "from time to time," and that he would arrest tribal members on tribal land based on the directions he was given. (ECF 198 at 142:24-145:7.)

C. The Vehicle Pursuit

"On April 1, 2007, Utah State Patrol Officer Dave Swenson began a high-speed car pursuit of a vehicle driven by Uriah Kurip." (ECF 189 at ¶ 18.) During the chase, "[Trooper] Swenson activated the dashboard camera in his police vehicle on Highway 88." (*Id.* at ¶ 19.) "[Trooper] Swenson contacted police dispatch to inform them that he was in pursuit while he was on Highway 88." (*Id.* at ¶ 20.) "[Trooper] Swenson stated to dispatch that there were two occupants in the car that he was pursuing—one driver and one passenger. He later stated to dispatch that the driver was male and appeared to be tribal." (ECF 189 at ¶ 21.) The BIA was notified of the high-speed chase by at least 11:04 a.m. on April 1, 2007. (Def. Ex. 43 at 2 (Jones0011445).)

Officer Norton was not part of the chase. (ECF 198 at 74:25-75:2.) Officer Norton was off duty on April 1, 2007, a Sunday, driving his personal, unmarked vehicle when he saw Trooper Swenson in pursuit of a vehicle. (*Id.* at 72:20-21, 73:6-8, 81:5-10.) Officer Norton

called dispatch with his cellphone, "found out what was going on," and chose to assist Trooper Swenson "as a backup officer . . . until somebody else . . . could actually get there and take over . . . ." (*Id.* at 73:21-74:24.) Trooper Swenson did not request that Officer Norton assist with the pursuit of Mr. Kurip's vehicle. (Def. Ex. 43.) According to Agent Ashdown, there was nothing unusual about Officer Norton's assisting Trooper Swenson because officers in the sparsely populated Uintah Basin area would often assist officers from other jurisdictions. (ECF 199 at 289:6-14.)

"The car that [Trooper] Swenson was pursuing crashed at the intersection of Seep Ridge Road and Turkey Track Road, on the Ute Indian Reservation." (ECF 189 at ¶ 22.) "The two occupants of the vehicle got out of the vehicle. The driver, subsequently identified as Uriah Kurip, exited the driver['s] seat. Todd Murray, the passenger, exited the front passenger seat." (*Id.* at ¶ 23.) "Both Uriah Kurip and Todd Murray ran away from the car in different directions." (*Id.* at ¶ 24.) "[Trooper] Swenson notified dispatch that the two occupants appeared to be tribal males." (*Id.* at ¶ 25.) At that time, Mr. Murray was on Ute Reservation land. (Pl. Ex. 18 at 12-13 (Jones 0011223, Jones0011462).)

"[Trooper] Swenson previously testified that he visually checked Mr. Murray's hands and waistband for weapons, and that he did not see any weapon." (ECF 189 at ¶ 26.) "Mr. Murray was wearing short pants with short socks, a t-shirt and short-sleeved button up shirt." (*Id.* at ¶ 27.) "[Trooper] Swenson did not put Mr. Murray under arrest on April 1, 2007." (*Id.* at ¶ 28.) "[Trooper] Swenson did not pursue Mr. Murray on foot." (*Id.* at ¶ 29.) "[Trooper] Swenson did pursue, and catch up to, Mr. Kurip, and he placed Mr. Kurip under arrest." (*Id.* at ¶ 30.) "After he began his pursuit of Mr. Kurip, [Trooper] Swenson did not see Mr. Murray again." (*Id.* at ¶ 31.) "[Trooper] Swenson did not see or hear any interaction between Officer Norton and Mr. Murray." (*Id*. at ¶ 36.)

D. Officer Norton's Pursuit of Mr. Murray

"After [Trooper] Swenson had Mr. Kurip in handcuffs but before he made it back to Mr. Kurip['s] and [Trooper] Swenson's vehicles, Officer Norton arrived at the scene." (*Id.* at ¶ 32.) Officer Norton arrived in his personal vehicle and was wearing jeans and a short sleeve shirt. (ECF 198 at 81:5-10, 90:3-4; Pl. Ex. 2 at 13.)

"[Trooper] Swenson pointed out to Officer Norton where Mr. Murray had gone and provided a general description of Mr. Murray." (ECF 189 at ¶ 33.) "[Trooper] Swenson did not tell Officer Norton that he had witnessed Mr. Murray commit any crime on April 1, 2007." (*Id.* at ¶ 34.) "Prior to the time that Officer Norton talked to [Trooper] Swenson, Officer Norton had not witnessed Mr. Murray commit any crime on April 1, 2007." (*Id.* at ¶ 35.)

Officer Norton drove a short distance away, parked on the side of a road, and exited his vehicle in search of Mr. Murray. (ECF 198 at 82:1-83:19.) Trooper Young and Deputy Byron arrived shortly after Officer Norton exited his vehicle. (*Id.* at 83:25-84:15.) The officers then split up and went in different directions in search of Mr. Murray. (*See id.* at 83:25-84:15, 90:7-24 (referring to a Trooper Troy Marks), 90:25-91:12 (Officer Norton admitting he might have confused Trooper Marks with Trooper Young).)

Officer Norton moved to the highest point he could to "visualize" where Mr. Murray could have run. (*Id.* 83:3-6.) To do so, Officer Norton walked 50-75 yards to the west from the road to reach the edge of a hill. (*Id*. at 83:14-15.) Officer Norton then first observed Mr. Murray when he looked "west down over the hill" and saw Mr. Murray about 120-130 yards away. (*Id*. at 87:18-21.)

Officer Norton was holding his weapon, a .40 Glock handgun, at "low ready" position as he observed Mr. Murray running "around the hill" towards Officer Norton's location. (*Id*. at 93:5-14.) Officer Norton observed "something black in [Mr. Murray's] hands," specifically in Mr. Murray's left hand. (*Id*. at 89:15-17, 95:24-96:8.) Officer Norton thought it was a gun but was not certain "because of the distance." (*Id.* at 93:5-14.) Officer Norton grew concerned for his own safety, so he drew his weapon and yelled "Police, get on the ground[!]" (*Id*. at 89:15-21.) Officer Norton suspected Mr. Murray may have been "coming back to actually kill [Trooper Swenson] knowing that there [were] . . . no other officers out there." (*Id*. at 93:5-14.)

Officer Norton testified that he was uncertain whether Mr. Murray heard his yells and acknowledged that he was not in uniform, although he testified that he had his badge on. (*Id*. at 89:22-90:4.) Photographs of Officer Norton taken after the shooting show that his badge was on his belt. (Pl. Ex. 2 at 13.) According to Officer Norton, when he was yelling toward Mr. Murray, Trooper Young and Deputy Byron were located "off to [Officer Norton's] left down a little ways," indicating they were to Officer Norton's south. (*Id*. at 90:7-91:12.)

E. The Shooting[5]

According to Officer Norton, when Mr. Murray saw Officer Norton, Mr. Murray raised his arm and fired one shot at Officer Norton, which hit the ground below him. (*Id*. at 93:15-21.) Officer Norton lacked any cover. (*Id.* at 93:19-20.) Officer Norton fired two shots at Mr. Murray in rapid succession while facing Mr. Murray. (*Id.* at 94:4-10, 172:7-9.) Officer Norton saw the impact of his two shots on the sandstone rocks, with neither shot hitting Mr. Murray. (*Id*. at 170:4-8.) Officer Norton then turned around and ran 30-40 yards up the hill to a location where he thought he was safer. (*Id*. at 93:19-25.)

Officer Norton testified that, with his cellphone in his left hand and his gun in his right hand, he then attempted to call dispatch via his cellphone "to let them know what was going on."

[5] The plaintiffs' entire case disputes Officer Norton's account of the shooting and rests on the premise that Officer Norton's account is false. The dispute over whether Mr. Murray shot himself or was shot at close range by Officer Norton lies at the heart of the case and will be determined at a trial on the merits. These findings are based on the evidence submitted solely for the plaintiffs' spoliation motion and are supported by the testimony and physical evidence submitted by the parties. These findings do not and are not intended to reflect any determinations with respect to the merits of the plaintiffs' claim as to what occurred on April 1, 2007, leading to Mr. Murray's death. The plaintiffs remain free to challenge Officer Norton's account and credibility, as well as the official cause of Mr. Murray's death, at trial on the merits.

(*Id.* at 94:1-3, 95:2-7.) Officer Norton kept misdialing "because of stress and what was going on," while watching Mr. Murray and "scream[ing] at him to put the gun down." (*Id.* at 95:5-7.)

Officer Norton testified that he then saw Mr. Murray put the gun to his head. Mr. Murray held the gun against his head long enough for Officer Norton to give "3-4 commands before" Mr. Murray pulled the trigger, whereupon he immediately fell to the ground. (*Id*. at 91:21-92:6, 93:23-94:3, 95:8-14; Def. Ex. 8 at 3 (Jones0018844).) Officer Norton was about 150-160 yards away from Mr. Murray at that time. (*Id*. at 98:16-21.) Officer Norton claimed that he did not know he was on an Indian reservation. (*Id.* at 136:16-20.)

F. Officer Norton's Subsequent Actions

Officer Norton re-holstered his weapon and eventually got through to dispatch on his phone and let dispatch know that "shots had been fired and [the] suspect was down[.]" (*Id*. at 95:8-17.) Officer Norton asked that dispatch send Trooper Young and Deputy Byron to his location and requested an ambulance. (*Id*.) Officer Norton also requested that dispatch send his supervisors. (*Id.* at 97:3.)

Officer Norton testified that he did not believe that anyone else had observed the shooting but thought that Deputy Byron may have seen him on the hill. (*Id*. at 92:7-93:1.) Officer Norton admitted that he could not view things from the other officers' perspectives and did not read other officers' reports of the incident. (*Id.*)

After the shooting and a few minutes after Officer Norton had spoken with dispatch, Trooper Young and Deputy Byron arrived at Officer Norton's location. (*Id*. at 173:4-12.) After Trooper Young and Deputy Byron approached him, Officer Norton "explained to them exactly what took place." (*Id*. at 102:12-15.) Trooper Young and Deputy Byron then approached Mr. Murray to "secur[e] the suspect." (*Id*.) Trooper Young and Deputy Byron moved towards Mr. Murray, gave him commands not to move, and handcuffed him. (*Id*. at 102:25-103:2.) Meanwhile, Officer Norton remained on the hill, where he was joined by Deputy Slaugh. (*Id*. at 103:3-10.)

When Officer Norton initially talked to other officers after the shooting, he told them that Mr. Murray had fired at him once and that he had heard only one shot. (*Id.* at 109:18-20, 110:8-10.) Officer Norton "saw the bullet [supposedly fired at him by Mr. Murray] hit the ground" before Mr. Murray shot himself. (*Id*. at 112:13-15.) Later, after observing two shell casings and one "stovepiped" casing in the .380 Hi-Point handgun near where Mr. Murray lay, Officer Norton changed his belief about the number of rounds that Mr. Murray had fired at him.[6] (*Id*. at 109:15-110:7.)

[6] A "stovepiped" round is when "the round has gone off, but the casing itself is actually stuck in the chamber. And sometimes they're partially out . . . ." (ECF 198 at 182:16-24.) The resulting stuck casing jams the firearm. (*See* ECF 199 at 294:15-25.) Agent Ashdown testified

"Mr. Murray was unconscious and bleeding from his head when officers at the scene handcuffed Mr. Murray." (ECF 189 at ¶ 45; Pl. Ex. 2 at 8-11.) "Shortly after Mr. Murray was shot, an ambulance arrived and he was provided with medical assistance. No officer provided medical assistance to Mr. Murray before or during his treatment by ambulance personnel." (ECF 189 at ¶ 44.) Mr. Murray was handcuffed for approximately 30 minutes before an ambulance arrived. (Def. Ex. 43 at 8 (Jones0011451) (shooting reported by Officer Norton at approximately 11:30 a.m.), 13 (Jones0011456) (ambulance reported it was a couple of minutes away at 11:59 a.m.).)

"After Mr. Murray was shot, Officer Norton walked through the crime scene and took pictures." (ECF 189 at ¶ 38.) Specifically, after Mr. Murray was handcuffed, Officer Norton went down the hill to evaluate the scene and suggested to Deputy Byron that they take some photographs of the "pristine" scene before the ambulance arrived and moved any evidence. (ECF 198 at 108:11-14, 191:19-192:10.) After Officer Norton came down from the hill, Officer Davis arrived on the scene. (*Id.* at 104:11-19.) Officer Davis volunteered to stand at Mr. Murray's location to "protect the evidence" by ensuring that nothing was moved. (*Id*. at 108:14-18.) Officer Norton then went back up the hill and borrowed Deputy Slaugh's newer camera to take photographs. (*Id*. at 108:19-109:1.) Deputy Slaugh did not take the photographs because "he wasn't real familiar with the camera." (*Id.*)

While taking photographs, Officer Norton observed a .380 caliber handgun, later determined to be a Hi-Point brand handgun, near Mr. Murray. (*Id*. at 110:15-20.) Officer Norton testified that "[n]obody touched" that handgun. (*Id.* at 111:16-19.) Officer Norton also observed two bullet casings near Mr. Murray, and one that was visibly "stovepiped" in the .380 Hi-Point's chamber. (*Id*. at 109:14-17, 110:11-111:19.) A "stovepiped" round occurs when a "round has gone off, but the casing itself is actually stuck in the chamber." (*Id*. at 182:16-24.) Officer Norton did not move anything at the scene or touch any of the evidence. (*Id*. at 175:8-14.) At all times other than during the shooting and the immediate aftermath before other officers arrived, Officer Norton was either accompanied by or within the sight line of other law enforcement officers at the scene, including when Officer Norton went back to his vehicle at some point and when he was asked at some other unspecified point to help search for any evidence Mr. Kurip may have discarded. (*Id*. at 177:9-23.)

After Officer Norton had completed taking the photographs and while returning to the location of the patrol vehicles, Deputy Slaugh suggested putting up police tape around the scene to establish a perimeter around any evidence; officers on the scene then placed police tape around the site. (*Id*. at 176:9-19; 177:3-8; *see also id.* at 54:7-9, 64:7 (referring to left-over

that "[a] stovepipe[d] round happens for a variety of reasons. The two most common would maybe be the gun is dirty and uncared for and the slide action is gritty, so the slide doesn't move smoothly back and forth, so the gun doesn't operate correctly. The other most common reason for a stovepipe[d] round would be a -- a weak grip or lack of support for the gun when the gun's fired, which -- which again hinders the full action of the -- the slide to eject a round and reload another round." (*Id.* at 294:19-295:5.)

crime-scene tape at the scene the next day); ECF 199 at 233:20-25 (referring to a perimeter).) At some time, likely after having taken the photographs, Officer Norton and Deputy Slaugh conducted a search for the shell casings from Officer Norton's firearm. (*Id*. at 170:19-171:10.) At no point did any "officer instruct[] Officer Norton to remove himself from the scene." (ECF 189 at ¶ 46.)

"Officer Norton was left in possession of his own handgun after he admittedly shot at Mr. Murray, and then he exchanged guns with his supervisor." (*Id.* at ¶ 39.) At some unspecified point, Chief Jensen, Officer Norton's superior, arrived at the scene and took Officer Norton's weapon. (ECF 198 at 116:24-25.) Officer Norton testified that he was told Chief Jensen conducted a visual inspection of the weapon and did not observe anything on it. (*Id.* at 122:14-18.) Officer Norton's weapon was his department-issued and owned Glock-brand .40 caliber handgun. (*Id*. at 130:18, 131:10-23.) Officer Norton is unsure whether he ever received that handgun back from Chief Jensen. (*Id*. at 156:3-8.) In accordance with departmental "custom," however, Chief Jensen gave his own service weapon to Officer Norton in return; Chief Jensen's weapon was "the same model and everything" as Officer Norton's. (*Id.* at 130:1-25.)

Additionally, at some unspecified point between the shooting and Officer Norton's brief interaction with Agent Ashdown, Officer Norton returned to his car and called his attorney. (*Id.* at 118:8-10.) Officer Norton's attorney told him not to talk to anyone without the attorney being present. (*Id*. at 154:11-13.) Officer Norton does not remember ever going to his car to retrieve anything or put anything away. (*Id*. at 185:24-186:2.) Officer Norton, however, spent a significant amount of time by his car. (*Id.* at 120:22-121:2.)

A few days after the incident, Officer Norton authored a police report. (*Id*. at 133:24-134:4.)

G. Agent Ashdown's Investigation of the Scene

"The FBI had exclusive jurisdiction to investigate the incident because it occurred on the Ute reservation and because it was determined by law enforcement after Mr. Murray was shot that he was an enrolled member of a federally recognized tribe." (ECF 189 at ¶ 47.) The FBI Vernal Resident Agency was notified of the shooting at about 11:45 a.m. (Pl. Ex. 17 at 1.)

On April 1, 2007, Agent Ashdown was informed that "there had been a car chase and a shooting and that a tribal member had been involved." (ECF 199 at 274:22-275:2.) Agent Ashdown "left from [his] home in [his] government vehicle and dr[o]ve straight to the scene." (*Id*. at 275:3-4.) Based on the "word-of-mouth confirmation from BIA officers that were at the scene with – that had – maybe had personal knowledge of [Mr. Murray] being there," Agent Ashdown thought that it was "pretty well assured" that the FBI would have jurisdiction over the investigation, even before a certificate of membership could be obtained from the Tribe to confirm Mr. Murray's tribal status. (*Id*. at 276:8-21.) Agent Ashdown would spend a couple of hours at the scene. (*Id.* at 299:13-15.)

"Agent Ashdown was the only FBI employee to arrive on the scene on April 1, 2007, and he did not arrive to the scene until after the shooting had occurred and until after Mr. Murray had been transported to the hospital." (ECF 189 at ¶ 48.) Agent Ashdown arrived at the scene at

approximately 12:30 p.m., about 15 minutes after the ambulance carrying Mr. Murray had departed for the hospital emergency room. (*Id.*; ECF 199 at 277:9-12; Pl. Ex. 17 at 1-2; Def. Ex. 43 at 14 (Jones0011457).) "[Trooper] Swenson was still at the scene of the incident when Agent Ashdown arrived, along with other state and local law enforcement officers." (ECF 189 at ¶ 49.) When Agent Ashdown arrived at the scene, he observed vehicles from the BIA, the Vernal City Police Department, the Utah Highway Patrol, and the Uintah County Sherriff's Office; he also observed other, unspecified vehicles. (ECF 199 at 277:18-22.)

Consistent with his general practice when arriving at a crime scene, Agent Ashdown believed he received a briefing on what had occurred from the most senior officers present, Chief Jensen of the Vernal City Police Department and Sergeant Chugg of the state police. (*Id*. at 277:16-278:13, 348:18-349:9.) While testifying, however, Agent Ashdown did not remember speaking to these officers, and instead relied on a photograph that shows them together. (*Id.* at 278:9-13, 348:18-349:9.) Agent Ashdown also recalls seeing Detective Rooks and Investigator Campbell at the scene. (*Id.* at 297:24-299:6.) Agent Ashdown is certain that he interacted with Investigator Campbell, although he has no specific recollection of his interaction. (*Id.* at 298:10-14.) While at the scene on April 1, 2007, Agent Ashdown did not interview any of the officers who had witnessed the shooting and its immediate aftermath. (*Id.* at 304:25-305:2.) "On April 1, 2007, no other officer reported to the FBI that they had seen Mr. Murray being shot." (ECF 189 at ¶ 37.) The FBI did not interview Officer Norton until one month after the shooting, on May 1, 2007. (Pl. Ex. 8.)

Agent Ashdown recalled speaking with Trooper Swenson, who showed Agent Ashdown the route that Trooper Swenson had taken to apprehend Mr. Kurip and the location where the shooting had occurred. (ECF 199 at 278:16-279:1.) Agent Ashdown did not place any markers in the area where Mr. Kurip's car was located. Agent Ashdown believed that the Highway Patrol would investigate the high-speed chase because the chase was within its purview. (*Id*. at 279:23-280:5.) Agent Ashdown nonetheless took photographs of the wrecked car Mr. Kurip had been driving and its skid marks. (*Id*. at 280:15-22.)

After examining the scene around Mr. Kurip's vehicle, Agent Ashdown went to the area from which he had been told Officer Norton had fired his shots. (*Id*. at 282:4-12.) Agent Ashdown observed Officer Norton standing nearby. (*Id*.) He also observed two expended shell casings that had already been marked by state or local law enforcement officers with evidence markers. (*Id*.) The shell casings from the .40 Glock were found at a noticeable distance from each other. (Def. Ex. 45DD (Jones0011742).) Later, Agent Ashdown collected the shell casings, which he verified were .40 caliber shell casings. (*Id*. at 300:22-301:4; Def. Ex. 4 at 8 (Jones0038089) (listing two .40 caliber casings as items #39 and #40).) Agent Ashdown knew that Officer Norton's handgun was .40 caliber based on his knowledge of the caliber of the standard-issue firearm for Vernal City officers. (ECF 199 at 301:4-11.)

Agent Ashdown observed Officer Norton's demeanor to be normal and that his clothes were "clean and pristine[.]" (*Id*. at 283:4-11.) Agent Ashdown testified that Officer Norton "hadn't been running or involved in any sort of altercation that was obvious from his clothes." (*Id*.; see Pl. Ex. 2 at 13 (photograph of Officer Norton).) "Agent Ashdown did not perform any testing of Officer Norton's clothing." (ECF 189 at ¶ 55.)

"The FBI is unaware of any state or local officer at the scene requesting permission to search Officer Norton's vehicle." (*Id.* at ¶ 40.) "Agent Ashdown did not request permission to search Officer Norton's vehicle, and did not search Officer Norton's vehicle; and the FBI is unaware of any search having been performed by local or state law enforcement." (*Id.* at ¶ 52.) Agent Ashdown did not believe there was any investigative need to search Officer Norton's car because he did not suspect Officer Norton of having done anything wrong. (ECF 199 at 288:18-25.)

Agent Ashdown had a brief conversation with Officer Norton and requested an interview. (*Id.* at 282:13-23.) Officer Norton advised that he wanted his attorney present for an interview. Agent Ashdown considered that request to be "typical" for a law enforcement officer involved in a shooting. (*Id.*) Agent Ashdown testified that, although he would have liked to interview Officer Norton on April 1, 2007, it was not unusual to wait until later so that Officer Norton's attorney could be present. (*Id.* at 305:6-22.)

"Agent Ashdown did not examine Officer Norton's gun, nor did he request that Officer Norton's gun be tested for blood or tissue." (ECF 189 at ¶ 54.) "Agent Ashdown [also] did not request that Officer Norton's hands be tested for blood or tissue, and did not test Officer Norton's hands." (*Id.* at ¶ 53.) Notwithstanding Officer Norton's request that an attorney be present for any questioning, Agent Ashdown believed that he could have asked to examine Officer Norton's handgun, but he did not do so. (ECF 199 at 360:6-12.) Agent Ashdown saw no reason to request that Officer Norton hand over his weapon. Instead, Agent Ashdown permitted Chief Jensen, who commanded Officer Norton's department (the Vernal City Police Department), to retain Officer Norton's handgun in accordance with its own protocol. (*Id.* at 288:9-17.) Further, Agent Ashdown did not have access to a DNA testing kit at the scene on April 1, 2007.[7] (*Id.* at 281:14-17.)

Ultimately, "[n]o officer at the scene tested Officer Norton's gun" or his "hands for blood or tissue." (ECF 189 at ¶¶ 41-42.) In any case, Agent Ashdown was "the decider" as to what evidence was taken into custody. (ECF 199 at 361:14-18.) Agent Ashdown did not ask anybody else at the scene to collect any evidence on his behalf. (*Id.* at 295:18-21.)

After talking to Officer Norton, Agent Ashdown traveled to the area where Mr. Murray had lain. (*Id.* at 290:11-14.) While there, "Agent Ashdown inspected the scene and laid down his own evidence markers." (ECF 189 at ¶ 50; *see also* ECF 199 at 290:17-291:7; Def. Ex. 45V (Jones0011733).) "Agent Ashdown independently photographed the scene, including photographing some of the blood and blood splatter [*sic*] that could be identified as blood."

[7] Wes Fitzer, a retired FBI agent and one of the defendant's expert witnesses, thought it was "odd" that Agent Ashdown did not have a DNA testing kit. In his experience, "[t]ypically within Indian country, [FBI agents] have the supplies necessary" to collect blood spatter and submit it for DNA testing. That said, Mr. Fitzer noted he would not have collected any blood spatter because Mr. Murray was the only one at the scene with an apparent injury, meaning any blood at the scene had to have been his. (ECF 200 at 525:15-526:23.)

(ECF 189 at ¶ 51.) Agent Ashdown took photographs of blood spatter because he believed the spatter provided an indication of what had happened at the scene. (ECF 199 at 292:5-9.) He did not collect any samples of the blood spatter because he had been told that only one person (Mr. Murray) had been injured at the scene. There was therefore, according to Agent Ashdown, no question of whose blood it was and no reason to do any scientific testing on the blood. (*Id*. at 301:16-302:3.) While at the scene, Agent Ashdown did not have any information about which side of Mr. Murray's head the bullet had entered. (*Id.* at 259:2-5.)

Agent Ashdown also observed a handgun at the scene, near where he had been told Mr. Murray had lain; that handgun was later determined to be a .380 Hi-Point. (*Id*. at 292:17-293:24, 300:5-21; Def. Ex. 45OO (Jones0011753).) Agent Ashdown observed an "expended round that [was] jammed into the action" of the handgun, *i.e.*, the stovepiped round. (ECF 199 at 293:1-2.)

Agent Ashdown later collected the gun, took the live rounds out of the magazine, and cleared the action. He observed five rounds in the magazine, a spent round in the chamber, and two spent shell casings in the area (for a total of eight rounds). (*Id*. at 294:5-14; Def. Ex. 4 at 8 (Jones0038089) (listing two .380 caliber casings as items #1 and #3).) Upon collecting the handgun, Agent Ashdown identified it as a .380 caliber Hi-Point. He also identified the two spent casings in the vicinity and the stovepiped round as .380 caliber, based on the writing on the rim of each cartridge. (ECF 199 at 300:5-21.) The .380 Hi-Point handgun did not appear to have any visible blood or tissue on it. (Pl. Ex. 2 at 12, 15-16.)

The FBI never conducted any forensic testing of the .380 Hi-Point because Agent Ashdown did not believe there was anything to be learned from it. (ECF 199 at 321:25-322:6.) A few days following the shooting, after he had received a courtesy call from the medical examiner to inform him that Mr. Murray's death would be ruled a suicide, Agent Ashdown concluded that "[i]t was at that point pretty obvious of what we had as far as the cause of death, manner of death." (*Id.* at 320:20-322:6.)

In total, "Agent Ashdown collected the following physical evidence from the scene: (a) a .380 Hi[-]Point pistol; (b) the magazine with five rounds of ammunition from the .380 highpoint [*sic*] pistol; (c) an expended round shell that was jammed in the .380 pistol; (d) two .380 caliber shell casings; and (e) two .40 caliber shell casings." (ECF 189 at ¶ 51.) Agent Ashdown did not observe any signs that anyone had moved or tampered with any of the evidence near where Mr. Murray had been. (ECF 199 at 295:9-12.) Agent Ashdown did not conduct a search for any of the fired rounds because he did not reasonably expect that the rounds could be located, calling such a search "nigh on impossible."[8] (ECF 199 at 290:4-10.)

[8] On April 2, 2007, the day after these events, Mr. Murray's family searched the area for expended rounds without success. (ECF 198 at 28:17-29:2.)

H. Investigator Campbell's Investigation of the Scene

Before his arrival on scene, Investigator Campbell recalled Officer Norton calling him on April 1, 2007, and informing him of the events, including how Officer Norton had followed Mr. Kurip's car to serve as backup. He also recalled that Officer Norton had informed him that Mr. Murray had shot at Officer Norton and then shot himself. (ECF 199 at 232:2-233:8.)

When Investigator Campbell arrived at the scene, he spoke with Officer Norton and told him to stay at his location on the hill while Investigator Campbell walked down the hill to where Mr. Murray had lain. (*Id*. at 233:20-234:4.) Investigator Campbell was instructed to enter the scene through a perimeter law enforcement had set up to preserve evidence. (*Id*. at 249:4-13.) According to Investigator Campbell, he and Agent Ashdown were at the scene at the same time and spoke with one another. (*Id*. at 235:11-17.)

Along with Agent Ashdown, Investigator Campbell observed the scene where Mr. Murray had been shot, the Hi-Point .380 handgun near that location, the two spent .380 casings, and the stovepiped round in the handgun. (*Id*. at 241:10-242:16, 260:7-14.)

Based on the direction of the blood spatter and brain matter on the sandstone, Investigator Campbell determined the direction of the bullet he believed had killed Mr. Murray. (*Id*. at 258:18-259:1.) Specifically, the blood spatter indicated that the shot that killed Mr. Murray traveled from north to south, at a right angle from where spent bullet casings indicated that Officer Norton was standing. (*Id.* at 258:18-259:1, 260:16-18, 262:4-24; Def. Ex. 41 at 2 (Jones0011385).) He also determined the number of shots that had been fired from the .380 Hi-Point gun by observing the number of shell casings on the ground and the stovepiped round in the weapon itself. (ECF 199 at 260:1-14.)

Investigator Campbell also observed the location from where Officer Norton stated he had fired his shots. Investigator Campbell saw the shell casings from Officer Norton's .40 Glock while viewing that location with Agent Ashdown. (*Id.* at 249:15-23, 264:6-9.) Investigator Campbell confirmed Officer Norton's location at the time of the shooting based on foot tracks and spent shell casings. (*Id*. at 262:11-24, 263:13-22.) Investigator Campbell specifically noted the absence of tracks in the "crusty, yellow clay and sand" between where Mr. Murray had been and where Officer Norton said he had been during their exchange of gunfire. (*Id*.)

Investigator Campbell conveyed a summary of his findings to the Medical Examiner in a report, which consisted of a handwritten summary narrative about his observations. (*Id*. at 252:10-16; Def. Ex. 41.) Investigator Campbell's report states that "[b]lood spatter at the scene was clearly at a right angle to the location of [Officer Norton], and consistent with a self[-] inflicted gunshot to the head." (Def. Ex. 41 at 2 (Jones0011385).) Investigator Campbell did not speak with the Medical Examiner beyond submitting his handwritten report. (ECF 199 at 254:10-21.)

I. The Forensic Examinations

After leaving the scene of the shooting, Agent Ashdown went to Blackburn Mortuary, where Mr. Murray's body had been taken following his death at a hospital. (ECF 199 at 255 12-17, 307:5-13.) While at the mortuary, Agent Ashdown observed Mr. Murray's body and spoke with the state and local officers gathered there, including Investigator Campbell, Deputy Byron, Officer Ben Murray, and Detective Rooks. (*Id*. at 298:2-5, 307:15-20.)

While at the mortuary, and in Agent Ashdown's presence but not at his request, Officer Byron placed a gloved finger inside the entrance wound into Mr. Murray's skull to feel for beveling.[9] (ECF 199 at 309:11-310:13; Pl. Ex. 2 at 2-4.) Because Agent Ashdown could not himself determine which wound was the entry wound and which the exit wound, he decided to wait for the results from the Medical Examiner's examination of the body. (ECF 199 at 307:21-25.)

Agent Ashdown did not see or collect Mr. Murray's clothing at the mortuary. (*Id.* at 311:22-312:2.) Agent Ashdown assumed that any clothing had been removed at either the hospital or the mortuary before Agent Ashdown's arrival. (*Id*. at 311:25-312:8.) Agent Ashdown did not believe the clothing would have added anything to the FBI's investigation. (*Id.* at 312:9-13.) Agent Ashdown observed that Mr. Murray's hands had been bagged, although he did not know who had requested that they be bagged or who had bagged them. (*Id*. at 312:14-23.) Agent Ashdown did not test Mr. Murray's hands for gunshot residue because the FBI did not conduct gunshot residue tests at that time. (*Id*. at 322:7-14.) Ultimately, Agent Ashdown did not collect any evidence at the mortuary. (*Id.* at 313:10-15.) Officer Ben Murray offered Agent Ashdown a vial of Todd Murray's blood, that Agent Ashdown assumed had been collected to test for alcohol or drugs, but Agent Ashdown rejected the offered vial both because he anticipated receiving blood-testing results from the Medical Examiner and because he had chain-of-custody concerns. (*Id*. at 313:10-315:1.)

"The FBI requested that the Utah State Office of Medical Examiner perform an autopsy on Mr. Murray on April 1, 2007." (ECF 189 at ¶ 56; Pl. Ex. 11.) Specifically, Agent Ashdown requested an autopsy be performed. (ECF 199 at 318:2-4; Def. Ex. 39.)

[9] Beveling refers to "a sort of cone shaped bone erosion in the direction of the bullet path through the cranial vault." Lorenzo Gitto, M.D. & Robert Stoppacher, M.D., *Autopsy & Forensics*, *Types of Injuries*, *Gunshot Wounds*, Pathology Outlines (Aug. 24, 2021), https://www.pathologyoutlines.com/topic/forensicsgunshotwounds.html#:~:text=Beveling%20is%20a%20sort%20of,Sci%201991%3B36%3A1592) (last visited Mar. 23, 2023). Dr. Joseph Cohen, one of the defendant's expert witnesses, described "the best example of [beveling] that I can think of is if one has seen a BB gun defect in a window, one side is very flat and the other side has the beveling. And the beveling occurs on the opposite side of the window from where the BB came from." (ECF 200 at 442:24-443:4.)

Agent Ashdown recalled receiving a courtesy call from the Medical Examiner's office within a day or two of the shooting. (ECF 199 at 320:20-321:4.) During that call he was informed that the Medical Examiner was "going to call [the incident] a self-inflicted wound, close-contact, self-inflicted wound, suicide;" a full report from the Medical Examiner was to follow. (ECF 199 at 321:3-13.) Agent Ashdown retired before the FBI received the Medical Examiner's written report. (*Id.* at 361:25-362:3.)

Despite Agent Ashdown's request for an autopsy, "Dr. Leis, a medical examiner for the Utah State Office of Medical Examiner, [only] performed an external examination of Mr. Murray's body." (ECF 189 at ¶ 57.) "Dr. Leis did not perform an autopsy." (*Id.* at ¶ 58.) Dr. Leis's report from that examination noted that Mr. Murray's left hand was clean, and his right hand was "caked" in blood. (Def. Exs. 51-52.) "Mr. Murray's wound has been described by Medical Examiner Leis and Plaintiffs' and Defendant's expert witnesses, Dr. Arden and Dr. Cohen, as a 'contact wound.'" (ECF 189 at ¶ 43.)

"The FBI did not request that the Office of Medical Examiner perform any additional testing on Mr. Murray's clothing." (*Id.* at ¶ 60.) "The FBI did not request that the Office of Medical Examiner turn over to it Mr. Murray's clothes after the examination of Mr. Murray's body. Dr. Leis [previously had] testified that had the FBI made such a request, the Office[] of the Medical Examiner would have turned the clothing over to the FBI." (*Id.* at ¶ 59.)

J. Subsequent Investigations

"Agent Ashdown interviewed Trooper Dave Swenson on April 2, 2007." (*Id.* at ¶ 61.)

Deanna Aguilar-Ramirez, Mr. Murray's aunt, visited the scene of the shooting on April 2, 2007, to search for evidence and take photographs and videos of the scene. (ECF 198 at 44:5-7, 46:4-47:5.) Ms. Aguilar-Ramirez found two cigarettes or cigarette butts, band aids, bandages, tapes, gloves, three large pools of blood, yellow glasses, crime scene tape, and empty beer bottles at or near the scene; she did not find any bullets. (*Id.* at 49:16-52:7, 63:17-64:7; *see also id.* at 28:17-29:2 (Ms. Jones stating that neither she nor her family members found or have possession of any bullets).)

Ms. Jones grew suspicious about the cause of Mr. Murray's death when she saw his body at the mortuary with a cut in his throat. (*Id.* at 25:17-26:5.) Ms. Jones was also suspicious because of the location of Mr. Murray's wounds. Ms. Jones believed her son had been "shot in the back of his head," based on her belief regarding the location of the entry wound. (*Id.* at 26:24-27:4.) Ms. Jones testified that her son was right-handed (*id.* at 27:9-10) but admitted that she had never seen him fire a gun and did not know whether he used his right or left hand to fire a gun. (*Id.* at 32:19-23.) Ms. Jones believed it was impossible for her son to have shot himself in the back of the head with his right hand. (*Id.* at 27:5-8.)

After Mr. Murray's funeral, Mr. Murray's family contacted the Ute Indian Tribe's Business Committee ("Business Committee") to pursue a lawsuit regarding Mr. Murray's death. The Business Committee provided an attorney, who met with Mr. Murray's family on April 11, 2007. (*Id.* at 17:24-18:18, 55:15, 64:8-15.) Although Mr. Murray's family knew that no autopsy

had been performed before Mr. Murray's body was released to the family, the family did not retain an independent forensic pathologist to conduct an autopsy. (*Id*. at 29:3-30:1.)

Mr. Murray's family met with Agent Ashdown towards the end of April 2007, during the week after their initial meeting with their attorney. (*Id*. at 40:21-23, 54:10-17.) The family's attorney was not present for the family's meeting with Agent Ashdown. (*Id*. at 65:2-7.) Agent Ashdown also recalled meeting with five or six members of Mr. Murray's family during, as far as he recalls, an unannounced visit approximately a couple of weeks after April 1, 2007. (ECF 199 at 323:2-22.)

Ms. Jones testified that she and her family told Agent Ashdown during their meeting that they disagreed with the conclusion that Mr. Murray's wound was self-inflicted, and that the family would be "pursuing this." (ECF 198 at 23:1-3.) Ms. Jones could not remember the exact words that she or her family members had used to express their dissatisfaction with Agent Ashdown's conclusion of a suicide, but she testified that someone informed Agent Ashdown at the meeting that the family was going to file a lawsuit. (*Id*. at 30:2-16.) Ms. Jones' sister, Martha Cornpeach, who also attended this meeting, testified that Agent Ashdown told the family that the investigation "was still ongoing" and that he was "gonna try his best to get our questions answered and try his best to follow through with the investigation." (*Id*. at 36:16-21.)

That meeting in late April 2007 was the only time the Murray family met with someone from the FBI. (*Id.* at 27:21-28:9.) The Murray family did not contact the FBI again after the meeting in 2007 until the family's attorney filed a notice of claim in March 2009. (*Id.*)

Agent Ashdown viewed the meeting as one with an upset, but respectful family that did not believe Mr. Murray had committed suicide. (ECF 199 at 324:24-325:20.) Agent Ashdown does not recall Mr. Murray's family providing him with any additional evidence, and nothing about the meeting changed Agent Ashdown's existing belief that the totality of the evidence supported the conclusion that Mr. Murray had committed suicide.[10] (*Id*. at 329:3-17.)

On April 12, 2007, Agent Ashdown prepared a summary report of the incident. That report contained the GPS locations Agent Ashdown had recorded for Officer Norton's location and Mr. Murray's location, based on what he had been told and the locations of physical evidence. (*Id.* at 316:9-16; *see also* Def. Ex. 6.) Agent Ashdown approximated the distance between those two GPS locations as 113 yards. (Def. Ex. 6 at 1 (Jones 0006858).)

"Agent David Ryan interviewed Officer Norton in the presence of Officer Norton's lawyer on May 3, 2007." (ECF 189 at ¶ 62.) Agent Ryan's notes of the interview do not indicate that he asked Officer Norton any questions concerning Officer Norton's inconsistent

[10] During the meeting, Ms. Jones, her family, and Agent Ashdown together watched dash camera footage of the car chase leading up to the shooting on April 1, 2007. (ECF 198 at 20:4-21:25, 56:14-22; ECF 199 at 327:12-19.) No party has proffered dashboard camera video, and none has been admitted into evidence or reviewed by the Court.

statements about the number of shots Mr. Murray had fired; Officer Norton having initially stated that Mr. Murray fired one shot at him but later stated that he had fired two shots. (Pl. Ex. 8.) At the conclusion of the interview, Agent Ryan did not suspect Officer Norton of any wrongdoing. (ECF 199 at 392:20-395:4.) Agent Ryan did not believe there was probable cause to arrest Officer Norton or that there was any legal basis to request a search warrant for Officer Norton's person or property. (*Id*. at 394:11-395:4.)

Agent Ryan received the Medical Examiner's final report on Mr. Murray's death in July 2007 (*id*. at 395:21-23), and he did not notice or question the Medical Examiner's decision to conduct only an external examination rather than an autopsy on Mr. Murray. (*Id*. at 398:12-25.) The Medical Examiner's final report determined that the manner of death was suicide, and the cause of death was a contact gunshot wound to the left side of the head. (Def. Ex. 52.) After receiving the Medical Examiner's report, Agent Ryan did not think further investigation into Mr. Murray's death was necessary because the Medical Examiner's conclusion of suicide was corroborated by the evidence at the scene and Officer Norton's account. (ECF 199 at 399:4-13.)

K. Initiation of Legal Actions

Officer Norton did not learn that he was being accused of any wrongdoing related to the April 1, 2007, incident until about "a year or so later[.]" (ECF 198 at 190:7-13.) At some time in the spring or summer of 2008, Agent Ryan learned that Mr. Murray's family would be suing the local and state police officers and their employers over Mr. Murray's death. (ECF 199 at 405:11-19.)

Agent Ryan investigated the purchase of the .380 Hi-Point. That investigation revealed that that weapon had been illegally purchased for Uriah Kurip. (*Id*. at 399:17-401:12.) Agent Ryan closed the investigation into both the illegal purchase of the .380 Hi-Point and Mr. Murray's death in September 2008, after a conviction against a third party related to the illegal straw purchase of the .380 Hi-Point for Mr. Kurip. (*Id.* at 242:17-21, 326:9-13, 401:6-402:7, 405:6-10; Def. Ex. 19.)

Following the conviction of the straw-purchaser and the closure of the FBI case file, a United States District Judge issued an order of forfeiture for the .380 Hi-Point on November 14, 2008. (ECF 199 at 401:6-402:7; Def. Ex. 19.) Pursuant to this order, the .380 Hi-Point was removed from the FBI's evidence locker in late November 2008 and handed over to the U.S. Marshals Service in December 2008. (ECF 199 at 406:20-25.) "The Marshals Service destroyed the handgun, as is its routine practice." *Jones III*, 149 Fed. Cl. at 344. According to Agent Ryan's review of the case file and his familiarity with the general contours of the forfeiture process, the FBI followed its normal procedures for turning property over to the U.S. Marshals Service after an order of forfeiture has been entered. (*Id.* at 402:18-404:11.)

Agent Ryan was not thinking about civil litigation at the time the .380 Hi-Point was forfeited to the U.S. Marshals Service and destroyed, and to his knowledge, neither was anyone else involved in the forfeiture process. (*Id*. at 404:12-405:2.) Agent Ryan also did not contemplate the Murray family suing the United States because "this was a clear-cut case" of suicide and "[e]verything matched up from the [ ] statements[,] to the evidence that was found[,]

to the autopsy report. It just matched up." (*Id.* at 406:4-15.) Agent Ryan did not contemplate litigation against the United States over Mr. Murray's death until March 2009, when the family served the FBI with a notice of claim. (*Id*. at 405:20-406:3; Def. Ex. 50.)

L. Expert Witness Evidence

1. The Plaintiffs' Expert Witnesses

"Dr. Jonathon Arden and William Gaut are experts retained by the Plaintiffs, and they have been deposed once in the Utah District Court [l]itigation and once by the United States in this case." (ECF 189 at ¶ 15.) The parties stipulated to portions of prior deposition testimony for use in resolving the motion for spoliation sanctions.[11] (*Id*. at ¶ 16.) Neither Dr. Arden nor Dr. Gaut testified at the evidentiary hearing, and neither was qualified as an expert witness.

Dr. Gaut, an expert in police practices, opined that "this case can't be closed, we can't prove this is a suicide just because we have one officer who says it was a suicide." (ECF 144-2 at 150:13-15.) He also opined that he "didn't see any evidence to corroborate or to refute [Dr. Leis's determination of cause and manner of death]. Because, remember, the evidence might show that exactly what was alleged to happen did, but we can't know the answer to that because all of the evidence went away." (*Id.* at 151:16-24 (apparently referencing the blood spatter, Officer Norton's clothes, and the lack of testing of one or more guns, including whether the.380 Hi-Point was functional).) In reference to an unspecified checklist, Dr. Gaut opined that: "You can't, for instance, choose not to collect a gun, or choose not to identify a blood stain. Those are things that are not discretionary. They become -- evidence becomes part of the crime scene, and it has to be protected, collected, analyzed." (*Id.* at 31:7-20.)

Dr. Gaut acknowledged that the FBI could properly conclude that a death was a suicide when it receives a certification of death by suicide from a forensic pathologist and there exists "even a slight bit" of corroborating forensic evidence. (*Id*. at 151:10-15.)

Dr. Arden, a widely recognized medical examiner, opined:

> There should have been further inquiry and examination, should have been further documentation of critical facts. . . . I'm not saying affirmatively this was not a suicide. I'm certainly not saying it could not have been a suicide. I am saying that the totality of the investigation and the examination were not adequate and leave questions open.

[11] Specifically, "[t]he parties stipulate that the following pages of deposition transcripts are considered as testimony for purpose of Plaintiff[s'] renewed motion for spoliation sanctions. Deposition of Jonathan Arden: pages 13, 54–55, 57, 61–64, 77–78, 82–84, 124–29, and 163–65 [available at ECF 144-1]. Deposition of William Gaut: pages 10, 14–20, 31, 87–88, 134, 146–47, and 150–51 [available at ECF 144-2]." (ECF 189 at ¶ 16.)

(ECF 144-1 at 57:10-19.) Dr. Arden also opined that the gunshot wound to Mr. Murray's head was "atypical for a self-inflicted gunshot wound," and that the location of the head wound was "unusual" and the supposed trajectory of the bullet "a little unusual." (*Id.* at 55:4-11.)

In reference to suicides by gunshot, Dr. Arden also opined that "there probably is some spattering in every one of these cases but it doesn't create visible identifiable spatter or blow-back in a hundred percent of the cases." (*Id.* at 82:3-7.) He added that only a minority of suicide-by-gunshot cases lack visible blow-back on the hand or gun, "[b]ut is it something that can occur, yes." (*Id.* at 82:8-16.) Dr. Arden opined that the absence of blow-back on Mr. Murray's hand:

> would raise the question to me about whether it was actually a suicide. And it would cause me to make sure I'd investigated very thoroughly and make sure that the other evidence is sufficient if I were going to certify that case as a suicide. It would not by itself absolutely exclude a suicide, no.

(*Id.* at 83:6-19.)

Finally, Dr. Arden opined that "a complete autopsy should have been performed rather [than] an external examination . . . to confirm that the external features" of the gunshot wound were consistent with the internal features, to examine the brain injury further, and to compare this information with witness accounts of the shooting. (*Id.* at 126:16-127:14.)

2. The Defendant's Expert Witnesses

a. Mr. John W. Fitzer

Mr. John W. Fitzer is a retired FBI agent with extensive experience and specialized training in conducting criminal investigations in Indian country and in evidence-gathering procedures. (ECF 200 at 482-96.) He has processed more than a thousand crime scenes throughout his career. (*Id*. at 496:2-10.) Mr. Fitzer was designated "as an expert in crime scene investigations or crime scene processing and criminal investigations in Indian country" and testified at the evidentiary hearing. (*Id.* at 496:17-497:17.) Mr. Fitzer reviewed the evidence, police reports, photographs, and deposition testimony of the responding law enforcement officers related to the death of Mr. Murray. (*Id*. at 498:2-11.) In August 2008, he also visited the scene where the incident had taken place. (*Id.*)

Mr. Fitzer explained that FBI guidance limits the FBI's investigative jurisdiction to crimes based on specific violations of federal laws. (Def. Ex. 16 at 8 (Jones0042228).) He also explained that an FBI agent typically begins an investigation by identifying the legal authority for the FBI's presence at the scene and determining that there is a potential criminal violation of law that would confer authority on the FBI to conduct a criminal investigation. (ECF 200 at 503:16-504:14.)

Mr. Fitzer explained that the FBI processes crime scenes using a 12-stage process, which is taught to all FBI agents. (*Id*. at 501:18-22.) The 12 stages include, among other things, the

securing and protection of a scene, evaluation of evidence possibilities, documentation of the scene with photographs, a detailed search, and collection and recordation of evidence. (Def. Ex. 18 at 22 (Jones0038326) (admitted as a demonstrative exhibit only).) Mr. Fitzer did not see any evidence that Agent Ashdown had failed to follow that 12-stage process in processing the scene of Mr. Murray's death. (ECF 200 at 515:15-516:1.)

With regards to the scene of the shooting on April 1, 2007, Mr. Fitzer opined that the non-federal law enforcement officers appropriately acted to preserve and protect the scene until the FBI arrived. (*Id*. at 507:21-508:3.) The responding law enforcement officers stood near items of potential evidentiary value, including fired rounds, to ensure that those items were neither touched nor moved. (*Id*. at 508:4-25.) According to Mr. Fitzer, Officer Norton's participation in the investigation by taking photographs of the scene was not improper because it was done in the presence of other law enforcement officers and did not disturb any evidence. (*Id*. at 513:9-514:17.)

Mr. Fitzer opined that, upon arrival, Agent Ashdown appropriately took responsibility for documenting and gathering evidence at the scene. (*Id*. at 509:1-5.) First-hand information is not available for every incident, so investigators must take all evidence into consideration to include testimonial evidence and physical evidence. (*Id.* at 552:22-553:9.) In Mr. Fitzer's opinion, Agent Ashdown reasonably relied on some second-hand information because it corroborated evidence at the scene. (*Id*. at 553:10-25.) Agent Ashdown also properly located, documented, and collected all the spent bullet casings at the scene (*id*. at 510:23-511:9); recorded GPS coordinates to identify the location of Officer Norton's shell casings and the location where Mr. Murray had fallen after being shot (*id*. at 512:8-15); and took possession of the .380 Hi-Point handgun (*id*. at 511:16-512:5).

In Mr. Fitzer's opinion, Agent Ashdown had "zero" information at the scene that Officer Norton was ever near Mr. Murray prior to the gunshot wound to Mr. Murray's head. (*Id*. at 518:19-519:14.) Based on the information and evidence gathered by Agent Ashdown at the scene, Mr. Fitzer opined there was neither reasonable suspicion nor probable cause for the FBI to search Officer Norton's car or collect his clothing or his .40 Glock. (*Id*. at 520:13-521:13.) Additionally, the FBI's decision to photograph, but not collect, blood spatter evidence was reasonable because no one other than Mr. Murray had been injured, and there was therefore no doubt that the blood on the scene had come from Mr. Murray. (*Id*. at 525:9-527:12.)

Further, Mr. Fitzer opined that there was no need to collect Officer Norton's .40 caliber service weapon to tie it to the spent shell casings found at Officer Norton's location, because there were other methods to connect that gun to the spent casings. (*Id.* at 519:4-6.) Although not specified by Mr. Fitzer, one apparent method was reading the listed caliber of the bullets written on the rim of the spent shell casings. (ECF 199 at 300:5-301:9.) The FBI's decision not to collect Officer Norton's weapon was therefore reasonable, in Mr. Fitzer's opinion, because neither physical evidence nor witness testimony at the scene indicated that any of Officer Norton's rounds had struck Mr. Murray. (ECF 200 at 518:4-18.)

In any case, Mr. Fitzer opined that Chief Jensen's inspection of Officer Norton's weapon was equivalent to any inspection the FBI would have performed, except for not confirming the

gun's make, model, and serial number. (*Id.* at 560:5-20.) Because there were only two weapons fired at the scene on April 1, 2007, a .40 caliber and a .380 caliber, Mr. Fitzer opined that there was no reason to conduct further testing to tie those weapons to the shell casings found at the scene because those casings were clearly identified by their caliber. (*Id*. at 528:1-10.)

Mr. Fitzer also explained that the FBI had stopped conducting gunshot residue tests before April 1, 2007, because they had proven unreliable due to an unacceptable number of false negatives and false positives. (*Id*. at 522:1-16.) Mr. Fitzer also opined that gunshot residue testing would not have added any evidentiary value because the testimonial and physical evidence at the scene showed that both Officer Norton and Mr. Murray had fired weapons on April 1, 2007. (*Id*. at 522:17-24.)

Mr. Fitzer concluded that the FBI properly identified, preserved, collected, and analyzed the physical evidence from the scene. (*Id*. at 499:6-11.) Mr. Fitzer added that crime scene investigations cannot operate in a vacuum; instead, an investigator must assimilate all available information and apply it to what the investigator observes at the scene. (*Id*. at 499:20-500:2.) Mr. Fitzer opined that the FBI maintained a proper chain of custody for the evidence that was collected. (*Id*. at 516:11-23.)

In Mr. Fitzer's opinion, a search for any fired bullets was unnecessary due to the exorbitant effort that would have been required to find them, and because all the evidence at the scene supported the conclusion that Mr. Murray had suffered a self-inflicted gunshot wound to his head. (*Id*. at 523:6-525:8.) When asked if the FBI should have searched for the projectiles fired at the scene, Mr. Fitzer testified that "[t]he amount of effort that would have been needed to even undertake searching for the rounds would have been exorbitant and beyond reasonable given the facts and circumstances known." (*Id.* at 522:25-523:11.) With regards to the projectiles from the .380 Hi-Point, Mr. Fitzer described the effort involved as searching an area of approximately 240,000 square yards, or 37 football fields, to find objects "roughly twice the size of a pencil eraser." (*Id.* at 523:12-525:8.)

b. Dr. Joseph Cohen

The Court qualified Dr. Joseph Cohen as an expert in forensic pathology, and he testified at the evidentiary hearing. (*Id.* at 426-34.) He has performed 7,000 autopsies, 15,000 external examinations, and 15,000 to 20,000 medical record reviews during his career. (*Id*. at 430:24-431:8.)

According to Dr. Cohen, forensic pathologists or medical examiners generally perform three levels of service: (a) medical record review, (b) external examination, and (c) autopsy. When performing a medical record review, the medical examiner only reviews medical charts to determine the cause and manner of death. When performing an external examination, the medical examiner examines the outside of the body, documents injuries, and draws biological fluids. When performing an autopsy, the medical examiner performs an external examination but also makes incisions on the body and removes organs one-by-one. All three "levels of service are for the same purpose, for cause and manner of death certification." (*Id.* at 429:21-430:21.)

In Dr. Cohen's opinion, Mr. Murray's gunshot wound was a contact wound, meaning that the weapon that fired the fatal shot was very near Mr. Murray's skull. (*Id*. at 440:21-443:12.) More specifically, a contact wound is "when the muzzle of the gun . . . abuts, it's touching the skin surface or the scalp." (*Id*. at 444:4-7.) Dr. Cohen noted that Dr. Leis, who conducted the external examination of Mr. Murray's body, reported finding soot in the wound track, which is consistent with a contact wound. (*Id*. at 436:13-15, 442:7-10, 443:14-445:7.)

Dr. Leis determined that Mr. Murray's entrance wound was near his left temple slightly above and behind his left ear. (*Id*. at 440:21-441:7; *see also* Def. Exs. 29 and 32.) According to Dr. Cohen, Dr. Leis also determined that the exit wound was in the back-right portion of Mr. Murray's head, behind and above his right ear. (ECF 200 at 446:6-16; Def. Exs. 30 and 31.) By knowing the locations of the entrance and exit wounds, Dr. Leis could deduce the bullet's path through Mr. Murray's brain, which, according to Dr. Cohen, was "left to right, slightly upward, and slightly front to back." (ECF 200 at 446:19-447:10.)

According to Dr. Cohen, a third party sticking a finger into the entrance wound in the form of "a simple prod [of] the wound, [to] palpate or touch inside of the wound . . . would not alter the [evidentiary] landscape significantly." (*Id*. at 445:9-21.) Likewise, Dr. Cohen opined that a post-mortem cut in Mr. Murray's neck would not have affected the ability of a medical examiner to determine the cause and manner of death. (*Id*. at 478:18-21.)

Dr. Cohen noted that Dr. Leis also took an x-ray of Mr. Murray's brain, which in Dr. Cohen's opinion revealed no discernible projectiles or projectile fragments. (*Id*. at 449:8-450:1.) According to Dr. Cohen, an internal examination of Mr. Murray's skull and brain would not have changed Dr. Leis's determinations regarding cause and manner of death. (*Id*. at 452:3-8.) The x-ray revealed no bullet fragments that were large enough to be seen, so even if an autopsy had been conducted, Dr. Cohen opined that no "reasonable forensic pathologist would [have] search[ed] for" any minute fragments that were not visible on the x-ray. (*Id*. at 455:17-456:7.) Dr. Cohen also noted that Dr. Leis took blood samples from Mr. Murray's body, and that these samples revealed that Mr. Murray was under the influence of alcohol and methamphetamine when he died. (*Id*. at 447:13-448:4.)

According to Dr. Cohen, Dr. Leis had noted in his Medical Examiner's report that Mr. Murray's right hand was "caked in blood." (*Id.* at 448:5-11.) Reviewing the photographs of Mr. Murray's right hand, Dr. Cohen opined that the blood on Mr. Murray's right hand came from the effects of the discharge of the weapon, or from Mr. Murray's hand lying in a pool of his own blood, or from both causes. (*Id*. at 448:5-449:7.) Dr. Cohen also opined that the blood could have been transferred to Mr. Murray's hand when Mr. Murray was moved prior to the paramedics arriving or after he was moved into the ambulance and later into the hospital. (*Id.*)

Dr. Cohen agreed that the physical information could only reveal that Mr. Murray had suffered a close contact wound and not who had inflicted it. (*Id.* at 477:24-478:6.) Dr. Cohen opined that the manner of death had to be either suicide or by a shot from someone else holding a firearm that was in contact with Mr. Murray's head at the time it was fired. (*Id.* at 478:22-479:13.)

III. ANALYSIS[12]

As noted above, the plaintiffs have narrowed their requests for spoliation sanctions. They now seek sanctions for the spoliation of only three pieces of unavailable evidence: (1) the .380 Hi-Point, (2) Officer Norton's clothing, and (3) the .40 Glock.

A. Spoliation Sanctions for the .380 Hi-Point

Jones III previously held that the defendant had negligently spoliated the .380 Hi-Point; based on that finding, the Court imposed a sanction that limited the defendant's use of that weapon as evidence to support the theory that Mr. Murray had committed suicide with it. *Jones III*, 146 Fed. Cl. at 741-43. The Federal Circuit reversed the spoliation sanction and remanded for a redetermination of "the exact bounds of the appropriate remedy, such as an adverse inference or inferences, that should apply to any spoliated evidence in this case." *Jones V*, 2022 WL 473032, at *11.

As a sanction for the defendant's spoliation of the .380 Hi-Point, the plaintiffs seek an irrebuttable adverse inference that "the .380 gun did not have Mr. Murray's blood, tissue, fingerprints, or DNA on it" and "that the .380 gun was not operational." (ECF 201 at 25-26.)[13] If the Court were to award the plaintiffs their requested sanction of several adverse, irrebuttable inferences, the defendant would not be allowed to offer any evidence or argument against any adverse inference imposed, and the Court would have to accept any such adverse inferences as fact.

The defendant, after reasserting that no sanction should have been imposed and that the original sanction was sufficient, argues that "the Court should limit any sanction to a permissive negative inference related to [the .380 Hi-Point]." (ECF 203 at 2, 29 n.8, 42.) Specifically, the defendant argues that the appropriate sanction for the FBI's negligent destruction of the .380 Hi-Point is a "rebuttable, permissive inference" that "'the .380 gun did not have Mr. Murray's blood, tissue, fingerprints, or DNA on it.'" (*Id.* at 42, 48 (quoting ECF 201 at 26).) The defendant opposes the plaintiffs' requested adverse inference that the .380 Hi-Point was not operational because such an inference "does not fill an evidentiary gap, but instead contradicts credible testimonial and physical evidence that the Hi-Point .380 was fired at the scene on April 1, 2007." (*Id.* at 48-49.) Importantly, other than "re-assert[ing] that the Court's original sanction" imposed in *Jones III* "was sufficient," a position the Federal Circuit rejected in *Jones V*, the defendant has not argued that any sanction less than an adverse inference is appropriate for the spoliation of the .380 Hi-Point. The defendant, however, has argued that it should not be

[12] The Court's analysis contains additional findings of fact, as well as conclusions of law predicated on the facts found.

[13] Although not clear from the plaintiffs' filings, the plaintiffs clarified during their closing summation that they were seeking *irrebuttable* adverse inferences as sanctions for the alleged spoliation.

precluded from presenting secondary evidence related to the .380 Hi-Point because Agent Ashdown, Investigator Campbell, and Officer Norton can credibly testify about their observations of the weapon and because such a sanction would be "a highly punitive, default judgment-type sanction" when combined with an adverse inference.[14] (*Id.* at 47-48.)

The Federal Circuit specifically held that an appropriate sanction for the destruction of the .380 Hi-Point "should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Jones V*, 2022 WL 473032, at *9 (cleaned up). The appropriate sanction must "(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." *Id.* at *10 (cleaned up). The Federal Circuit also noted that an appropriate sanction might include "an adverse inference or inferences." *Jones V*, 2022 WL 473032, at *11.

Because the imposition of a spoliation sanction for the destruction of the .380 Hi-Point is levied pursuant to the Court's inherent power, "restraint and discretion" are necessary. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). "[G]iven the potential harshness of negative inferences, the discretion of the court must be exercised in a common sense manner." *Chapman Law Firm, LPA v. United States*, 113 Fed. Cl. 555, 611 (2013), *aff'd*, 583 F. App'x 915 (Fed. Cir. 2014).

To accomplish the goals set out by the Federal Circuit, the imposition of a rebuttable adverse inference is warranted because any lesser sanction would be ineffective, *see Jones V*, 2022 WL 473032, at *9-11, and because the parties have both argued that some form of adverse inference is an appropriate sanction.

With the "prophylactic, punitive, and remedial rationales underlying the spoliation doctrine" in mind, *Jones V*, 2022 WL 473032, at *9 (cleaned up), the following two sanctions are imposed on the defendant for the spoliation of the .380 Hi-Point:

1. A rebuttable adverse inference 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 than Officer Norton. If the defendant rebuts this adverse inference, the question of what the .380 Hi-Point would have shown will be treated as unknowable.

2. To prevent circumvention of the first sanction, the defendant may not rely on any secondary evidence as to what may have been found on the .380 Hi-Point or secondary evidence concerning the un-ejected (or stovepiped) shell casing found in the destroyed handgun to support its arguments on the merits that Mr. Murray

[14] Here, secondary evidence refers to "evidence related to the spoliated gun in the form of photographs and testimony . . . ." *Jones V*, 2022 WL 473032, at *11.

> died by a self-inflicted gunshot wound. The defendant may on the merits, however, present physical evidence or testimony from witnesses to corroborate Officer Norton's testimony to show that Mr. Murray was in possession of and used the .380 Hi-Point on April 1, 2007, and to provide evidence concerning the origin, ownership, and destruction of the weapon.

These sanctions provide the plaintiffs with an adverse inference that the .380 Hi-Point would have produced evidence favorable to their assertion that Mr. Murray did not commit suicide. These sanctions also prevent the defendant from benefiting from any evidence that might have been found on the .380 Hi-Point, other than to rebut the adverse inference and render the question of blood, tissue, fingerprints, or DNA on the handgun unknowable. These sanctions ameliorate the prejudice done to the plaintiffs by placing upon the defendant the burden to show the .380 Hi-Point would not have provided evidence favorable to the plaintiffs. They prevent the defendant from using whatever evidence would likely have been found or had been missing on the .380 Hi-Point, even if the defendant rebuts the adverse inference favorable to the plaintiffs, because the defendant was negligently culpable in the destruction of the .380 Hi-Point.

To ensure that the risk of an incorrect judgment is placed on the defendant, commensurate with its negligence, and to deter future spoliation, the defendant will face limitations on the evidence it may use to rebut the adverse inference. The defendant will not be able to rely solely on the testimony of Officer Norton to overcome the adverse inference. Instead, the defendant will have to provide physical evidence or credible corroborating testimony from at least one witness other than Officer Norton to rebut the adverse inference being imposed with respect to the .380 Hi-Point.

These limitations are necessary to prevent prejudice to the plaintiffs. Officer Norton is the only surviving eyewitness to the actual shooting of Mr. Murray. If the defendant were allowed to rebut the adverse inference by relying simply on his testimony, the plaintiffs would not be able to mount a meaningful rebuttal except by undercutting Officer Norton's credibility.

To rebut the adverse inference being imposed, the defendant will therefore have to rely on physical evidence from the scene or from the testimony of other officers who were present near the shooting or who investigated the scene. Officer Norton will be permitted to testify about the events, but that testimony will not be sufficient to rebut the adverse inference. If the evidence produced by the defendant is sufficient to rebut the adverse inference, any evidence that would or would not have been found on the .380 Hi-Point will be treated as unknowable.

These sanctions permit the defendant to use secondary evidence to rebut the adverse inference but not to prove or to argue what testing of the .380 Hi-Point may have revealed to support its theory of the case. As the Federal Circuit noted, allowing the defendant to present secondary evidence regarding the .380 Hi-Point to support its theory of the case could render a spoliation sanction meaningless. *See Jones V*, 2022 WL 473032, at *10-11. The gravamen of the plaintiffs' claimed spoliation concerning the .380 Hi-Point is that the plaintiffs were denied an opportunity to test that weapon for blood, tissue, fingerprints, and DNA (*see* ECF 201 at 25-26), evidence that plausibly could have been on the gun but not visible to the naked eye (*see* ECF 144-1 at 82:3-7). Allowing the defendant to rely on secondary evidence to support its theory of

the case would undermine the effectiveness of the rebuttable adverse inference sanction. Therefore, secondary evidence related to what was on the gun can only be used to rebut the adverse inference being imposed but may not be used affirmatively by the defendant to argue that Mr. Murray committed suicide.

In other words, if the defendant rebuts the adverse inference, what may have been found on the .380 Hi-Point will be treated as unknowable. To do otherwise would allow the defendant to use secondary evidence to show what may have been on the .380 Hi-Point for use in support of arguments on the merits. To allow the defendant to make such arguments on the merits would allow the defendant to circumvent the spoliation sanction with secondary evidence and benefit from its destruction of the primary evidence, *i.e.*, the .380 Hi-Point. That outcome would be inconsistent with the Federal Circuit's direction.

As the .380 Hi-Point was undisputedly present at the scene of the shooting, however, the defendant may still present evidence to corroborate Officer Norton's testimony, that the .380 Hi-Point was present and operable on April 1, 2007. The plaintiffs have offered no arguments that the destruction of the .380 Hi-Point somehow led to the prejudicial loss of evidence related to the presence, origin, or ownership of the .380 Hi-Point. Questions about the ownership and origin of the .380 Hi-Point were also the subject of other federal court proceedings, and the plaintiffs have presented no reason to question the reliability of previous conclusions related to that weapon. (ECF 199 at 401:15-402:7; Def. Ex. 19.) Therefore, the defendant may rely on secondary evidence, in addition to Officer Norton's testimony, to show the origins of the .380 Hi-Point and how it came to be at the scene of the shooting. The defendant will also be able to introduce physical evidence, such as photographs of the .380 Hi-Point, to show that it was found at the scene of the shooting but may not rely on any evidence to argue on the merits that the weapon was free of blood, tissue, fingerprints, and DNA.

Because the defendant's destruction of the .380 Hi-Point was at most negligent, the adverse inference imposed will be rebuttable.[15] The evidence shows that the defendant

[15] There is a circuit split as to whether negligence alone suffices for the imposition of an adverse inference as a sanction for spoliation of evidence, or whether a state of mind more culpable than negligence, such as bad faith, is required. *See Jandreau v. Nicholson*, 492 F.3d 1372, 13776 n.3 (Fed. Cir. 2007) (noting that the Second and Sixth Circuits permit an adverse inference for "mere negligence," while the First, Third, Fifth, Ninth, Tenth, and Eleventh Circuits do not). The Federal Circuit held in *Jandreau* that the "general rules of evidence law" require that the spoliated evidence be "destroyed with a culpable state of mind" before a court may impose an adverse inference. *Id.* at 1375; *Burns v. McDonough*, No. 2021-1878, 2022 WL 2899087, at *3 n.4 (Fed. Cir. July 22, 2022); *Alexce v. Shinseki*, 447 F. App'x 175, 178 (Fed. Cir. 2011) (quoting *Jandreau*, 492 F.3d at 1375). The Federal Circuit, however, has never specified what level of culpability is required for the imposition of an adverse inference. *Burns*, 2022 WL 2899087, at *3 n.4; *Kirkendall v. Dep't of Army*, 573 F.3d 1318, 1327 n.6 (Fed. Cir. 2009) (noting that *Jandreau* "presented . . . the question of whether negligent, as opposed to bad

destroyed the .380 Hi-Point pursuant to a forfeiture order signed by a federal district judge. (ECF 199 at 401:15-402:7; Def. Ex. 19.) As was noted in *Jones III*, the weapon was destroyed only after public notice of its forfeiture and impending destruction were provided. 146 Fed. Cl. at 733 (citing ECF 77 at ¶ 40). That public notice undercuts any claim that the defendant's employees were acting in secrecy and bad faith to destroy useful evidence. Further, no evidence has been presented that the defendant destroyed the weapon to prevent its usage as evidence in this or any other case arising from Mr. Murray's death. There is no evidence that the defendant or any of its employees, including agents and employees of the FBI or the Marshals Service, acted with bad faith or with an improper motive.

Additionally, although litigation was reasonably foreseeable as early as April 1, 2007, the plaintiffs apparently took no steps themselves to request that the defendant preserve the .380 Hi-Point for use in the litigation the plaintiffs were contemplating at the time the weapon was destroyed, following public notice of that impending action. *See Jones III*, 146 Fed. Cl. at 742 n.8. This is not a case in which the plaintiffs notified the defendant of their need for the .380 Hi-Point or requested that the defendant preserve the weapon, and the defendant subsequently ignored any such notice or request and destroyed the weapon. Instead, the evidence shows that the .380 Hi-Point was destroyed in accordance with routine FBI procedures. (ECF 199 at 402:18-404:11). Although those procedures proved inadequate for preserving evidence for the reasonably foreseeable litigation in this civil case, the plaintiffs are not entirely blameless, having taken no action to request that the defendant preserve the .380 Hi-Point.

The plaintiffs also did not offer any evidence indicating that the FBI's routine procedures that were relied upon here have previously resulted in the spoliation of evidence such that relying on them was reckless or grossly negligent. While the plaintiffs have questioned Agent Ashdown's motives and investigation methods, Agent Ashdown had been retired for more than a year by the time the .380 Hi-Point was destroyed in December 2008. (ECF 189 at ¶ 12; ECF 199 at 406:20-25); *Jones III*, 149 Fed. Cl. at 344. Therefore, as was previously found, *Jones III*, 146 Fed. Cl. at 741-42, the .380 Hi-Point was spoliated due to negligence and not a more culpable mental state.

faith, destruction of documents can give rise to an adverse inference" and that the issue "was not decided in that case"); *Advanced Powder Sols., Inc. v. United States*, 160 Fed. Cl. 575, 582 n.10 (2022), *reconsideration denied*, No. 20-137C, 2022 WL 2720193 (Fed. Cl. July 13, 2022). Both parties to this case have argued that some form of adverse inference is appropriate; based on the defendant's concession that its negligent spoliation of the .380 Hi-Point supports the imposition of an adverse inference, the Court need not decide whether mere negligence is a sufficiently culpable state of mind for the imposition of an adverse inference as a spoliation sanction. (ECF 203 at 2, 42, 44-49 (the defendant conceding that negligence can support a rebuttable adverse inference after noting that "the FBI, at most, acted negligently," and arguing "[a]nything more than a permissive, rebuttable adverse inference would be 'disproportionate to the offense,'" (quoting *Cencast Servs., L.P. v. United States*, 94 Fed. Cl. 425, 444 (2010))).)

The adverse inference imposed for the negligent destruction of the .380 Hi-Point will therefore not be irrebuttable, as that degree of sanction would be a greater punishment than necessary and appropriate given the defendant's culpability. *See Cencast Servs., L.P. v. United States*, 94 Fed. Cl. 425, 444 (2010) (noting that "[u]nder any applicable test, the level of culpability is relevant to the propriety of a sanction"), *aff'd*, 729 F.3d 1352 (Fed. Cir. 2013). The Court must also "'construct a sanction that is just and proportionate in light of the circumstances underlying the failure to preserve relevant evidence, as well as the punitive, prophylactic, remedial and institutional purposes to be served by such sanctions.'" *Id*. (quoting *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 270 (2007)).

An irrebuttable adverse inference would put the plaintiffs in a better position than they would have been in had the evidence not been spoliated because the significance and accuracy of any favorable evidence and related testing could normally be subject to challenge and cross-examination. The defendant's negligence lessens the need for a more severe prophylactic sanction to deter or punish the defendant. An irrebuttable adverse inference therefore would excessively and unfairly place on the defendant the burden of an incorrect determination of the claims at trial beyond what is necessary and appropriate based on the facts of this case.

Additionally, the defendant has conceded that "a permissive inference sanction is not toothless in that it may create a genuine dispute sufficient to preclude summary judgment." (ECCF 203 at 46.) These sanctions therefore will further deter the defendant because they will likely prevent a complete disposition of this case on summary judgment and allow the plaintiffs to test their theory of the case at a trial. As the Federal Circuit noted:

> If absence of blowback on Officer Norton is evidence that he did not shoot Mr. Murr[a]y, it is a plausible and concrete suggestion that absence of blowback on the Hi-Point .380 handgun is evidence that it was not used to shoot Mr. Murray. Had the government not destroyed the gun, these suggestions may have been evidence that constituted a key part of Mr. Murray's parents' case.

Jones V, 2022 WL 473032, at *11.

The adverse inference being imposed will likely create disputes over material facts regarding who fired the shot that killed Mr. Murray because it is unlikely that the .380 Hi-Point would have been clean of blood and tissue if Mr. Murray had used it on himself in a contact shooting. (ECF 144-1 at 82:3-16.) A permissive inference concerning the .380 Hi-Point and the evidence that the Court will infer was on it when it was recovered on April 1, 2007, will provide an effective sanction that will likely require a trial on the merits.

The plaintiffs' requested sanction concerning the inoperability of the .380 Hi-Point is denied. That proposed adverse inference is counterfactual to such an extent as to render it implausible.

The plaintiffs' request for the sanction that the .380 Hi-Point was not operational appears to be based on the stovepiped round and Agent Ashdown's testimony regarding that round. (*See*

ECF 201 at 25-26.) Specifically, the plaintiffs rely on Agent Ashdown's testimony that the round was stovepiped in the .380 Hi-Point due either to the shooter gripping the weapon weakly when firing or to the weapon not being properly maintained. (ECF 199 at 294:19-295:5.)

The conclusion that the .380 Hi-Point was not operable after the stovepiped round was fired would be supported because such a blockage would prevent the proper action of the gun. (*See* ECF 198 at 182:16-24; ECF 199 at 294:15-25.) The plaintiffs, however, request an inference that the gun was not operable *at all* on April 1, 2007. (*See* ECF 201 at 25-26.)

That inference is implausible. Two expended .380 caliber cartridges were found very close to where Mr. Murray had lain. This evidence reflects that a .380 caliber firearm had been fired at that location. While a stovepiped round would have prevented the .380 Hi-Point from firing *subsequent* rounds, the existence of the stovepiped round indicates that the weapon had in fact been fired in the first place. (*See id.* at 294:19-25; Pl. Ex. 2 at 12, 15-16.) The plaintiffs argue those cartridges did not come from a firearm carried by Mr. Murray, and they remain free to attempt to prove that point.

Only a couple of scenarios could account for expended .380 cartridges being at the scene of the shooting so close to Mr. Murray's location if the .380 Hi-Point was not operable. One would be that someone else fired a .380 weapon at that precise location at some time in the past, and the spent cartridges had remained there. This scenario appears exceedingly unlikely, given the remote location of the shooting. (Def. Ex. 45 at E-I (Jones0011716-20), M-P (Jones0011724-27), V-Y (Jones0011733-36), DD-JJ (Jones0011742-48, WW-ZZ (Jones0011761-64).) Another would be that one of the officers planted them or manipulated the evidence at the scene. There is no evidence to show or even suggest that the physical evidence at the scene of the shooting was manipulated, let alone fabricated. (ECF 198 at 175:8-14; ECF 199 at 295:9-12; ECF 200 at 514:12-17.) Given that multiple officers were involved in securing the scene (ECF 198 at 99:7-12, 102:12-103:2, 104:13-18, 173:7-12), manipulating the evidence would have required a conspiracy among several officers. The record is devoid of any evidence of such a conspiracy, and the plaintiffs have neither attempted to show the existence of such a conspiracy nor proffered any proposed finding of fact or conclusion of law regarding such a conspiracy.

Awarding an adverse inference against the physical evidence of expended cartridges of the same caliber as the .380 Hi-Point would therefore impose too severe a sanction on the defendant for its negligence and excessively risks of an incorrect conclusion at trial.

In addition, any inference that the .380 Hi-Point was not operable before the shooting on April 1, 2007, would be improper because it is not plausibly related to what testing of the weapon would have shown had it not been destroyed. *See Jones V*, 2022 WL 473032, at *11 (cleaned up) (emphasis added) (noting "a party may satisfy its burden to show prejudice by coming forward with *plausible, concrete* suggestions as to what the destroyed evidence *might have been*"). The plaintiffs have not provided any evidence that a test exists that could identify when the stovepiped round was fired. Without such a test, even had the .380 Hi-Point not been destroyed, it would be impossible to determine if the weapon was rendered inoperable before or on April 1, 2007. Without some reason to think such a test exists, the plaintiffs cannot plausibly

suggest that they could have shown that the .380 Hi-Point was inoperable had the weapon not been spoliated.

B. Standards for Spoliation

Having imposed sanctions for the destruction of the .380 Hi-Point handgun, the Court turns to the remaining question of whether Officer Norton's .40 Glock and his clothing were spoliated, based on the Federal Circuit's guidance on spoliation standards.

"Spoliation is the breach of the duty to preserve evidence, either through destruction of evidence or through failure to properly preserve it." *Id.*, at *4. "A duty to preserve evidence arises when a party knows or reasonably should know that evidence in its control may be relevant to a reasonably foreseeable legal action." *Id.*

"Reasonable foreseeability 'is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.'" *Id.*, at *9 n.5 (quoting *Micron Tech., Inc. v. Rambus Inc*., 645 F.3d 1311, 1320 (Fed. Cir. 2011)).[16]

Control is the "right to obtain or control that evidence." *Id* at *4. The defendant is held to the same standard as "any other civil litigant," and therefore "'controls' evidence under the duty to preserve where it has a legal right to obtain or control that evidence." *Id.* "[C]ontrol requires only a legal right to obtain evidence, not a legal requirement to obtain evidence." *Id.* at *6.

In cases involving law enforcement, "the extent of the government's control over an investigation scene is dependent on its suspicion of a crime." *Id.* at *8. "[L]aw enforcement's

[16] During their closing argument, the plaintiffs argued that the defendant should not be allowed to argue that reasonable foreseeability is a claim-specific inquiry that must consider whether the claim was foreseeable against a specific defendant. The plaintiffs argued that if the defendant had wanted to preserve this argument, the defendant should have appealed the *Jones III* decision. The defendant could not, however, have appealed *Jones III*, because the defendant had succeeded on the merits and was not aggrieved by the collateral ruling on spoliation. *See Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980) ("Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."); *SkyHawke Techs., LLC v. Deca Int'l Corp*., 828 F.3d 1373, 1375 (Fed. Cir. 2016) ("Even if the prevailing party alleges some adverse impact from the lower tribunal's opinions or rulings leading to an ultimately favorable judgment, the matter is generally not proper for review.") Therefore, the defendant was free to make new arguments concerning the proper scope of the reasonable-foreseeability analysis when the case was remanded for reconsideration of the spoliation issue.

'control' over an investigation scene is not unlimited and, therefore, neither is its duty to preserve evidence on that investigation scene." *Id.*

"The Fourth Amendment . . . constrains the government's legal right to obtain or control evidence in an investigation." *Id.; see also Mincey v. Arizona*, 437 U.S. 385, 395 (1978) (holding that the fourth and fourteenth amendments do not contain a "murder scene exception"). Generally, law enforcement officers who are legally present and have lawful access to criminal evidence in plain view may seize it without a warrant when "its incriminating character" is "immediately apparent." *Horton v. California*, 496 U.S. 128, 136-37 (1990) (cleaned up). Underpinning the plain view doctrine is that an officer has probable cause that whatever he searches or seizes is evidence of a crime. *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987); *see United States v. Soussi*, 29 F.3d 565, 572 (10th Cir. 1994) (describing *Horton*'s "immediately apparent" incriminating character requirement as being "*i.e.* did the agents have probable cause to believe that the items were evidence of a crime or illegal contraband").

In general, probable cause is loosely defined as "reasonable ground for belief of guilt, and [ ] the belief of guilt must be particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (cleaned up). Probable cause "depends on the totality of the circumstances." *Id.*

The plain view doctrine does not authorize anything other than plain view searches of evidence to find probable cause. *See Hicks*, 480 U.S. at 323-25, 328-29 (holding that moving stereo equipment even a few inches to find its serial number, as opposed to reading a serial number already in view, to confirm whether something is stolen property was an unconstitutional search in the absence of existing probable cause to seize the stereo equipment).

If probable cause exists to arrest someone, further searches and seizure of evidence may be authorized as searches incident to arrest or inventory searches. *Illinois v. Lafayette*, 462 U.S. 640, 643-44 (1983) (noting that "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him"). As applied to the question of control, if law enforcement has probable cause to detain someone, then law enforcement has a legal right to control the evidence on the detainee. *Jones V*, 2022 WL 473032, at *8.

In short, for the defendant to spoliate evidence for purposes of civil litigation, evidence relevant to objectively reasonably, foreseeable litigation must have been lost or destroyed, and the government must have had a legal right to obtain or control the relevant evidence. In cases involving evidence at a crime scene, the key question as to control is whether the defendant had the legal right to obtain or control the evidence in compliance with the fourth amendment.

C. Reasonable Foreseeability

In *Jones III*, the Court found that litigation was reasonably foreseeable by the time the .380 Hi-Point was destroyed, but the question of precisely when litigation became reasonably foreseeable was left unresolved. The Federal Circuit remanded for a resolution of the question of

when litigation became reasonably foreseeable. In resolving that issue, the Circuit required the consideration of "all information the federal officers gleaned from their observations at the scene, morgue, and coroner's office, including the coroner's failure to carry out the ordered autopsy." *Jones V*, 2022 WL 473032, at *9 n.5.

"When litigation is 'reasonably foreseeable' is a flexible fact-specific standard" that considers "whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." *Micron Tech., Inc.*, 645 F.3d at 1320, *quoted in part in Jones V*, 2022 WL 473032, at *9 n.5. A determination of reasonable foreseeability is an objective one, not dependent on the subjective awareness of the relevant participants. *Jones V*, 2022 WL 473032, at *9 n.5 (quoting *Micron Tech., Inc.*, 645 F.3d at 1320).

The extensive and extended litigation over the boundaries of the Ute reservation on which Mr. Murray was fatally injured and over the authority and activities of state and local law enforcement agencies on the reservation lands outside their jurisdiction, as well as the seriousness of an incident resulting in death combine to weigh in favor of a finding that litigation was reasonably foreseeable relatively early in the case. *See Jones III*, 146 Fed. Cl. at 741. The existence of the bad men provision of the treaty between the defendant and the Ute Tribe leads to the conclusion that litigation against the United States was also reasonably foreseeable as early as April 1, 2007.

Any reasonable person involved in law enforcement in Indian country in northeastern Utah should have been familiar with the long-running litigation about the boundaries of the Ute reservation and the jurisdiction thereon of state law enforcement. *See Ute I-V*. The district court in the earlier litigation against the state and local actors arising from Mr. Murray's death found 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," although the district court did not clearly specify that litigation was reasonably foreseeable on April 1, 2007. *Jones v. Norton*, No. 2:09-CV-730-TC, 2014 WL 909569, at *7 (D. Utah Mar. 7, 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015).

In accordance with the Federal Circuit's directive to examine the facts available to Agent Ashdown based on the scene of the shooting and the mortuary, a short summary of those facts follows.

Agent Ashdown arrived on the scene of the shooting. At the scene, consistent with his practice in such cases, he spoke to the highest-ranking officers to get a sense of what had happened. (ECF 199 at 277:16-278:13, 348:18-349:11.) During that briefing, Agent Ashdown likely would have been informed of the version of events that Officer Norton had provided to other officers about how the shooting occurred. (ECF 198 at 102:12-15; ECF 199 at 259:18-23, 261:24-262:3, 279:2-16, 281:5-11, 281:25-282:12.) Agent Ashdown would have likely heard through second- or third-hand sources that Officer Norton was on a hill when he spotted Mr. Murray, that Mr. Murray appeared to have a gun in his hand, that Officer Norton raised his gun towards Mr. Murray and commanded him to surrender, that Mr. Murray then fired twice at Officer Norton (*id.* at 259:18-260:14), and that Officer Norton returned fire (*id.* at 282:4-12) before retreating to the top of the hill he had been standing on. (ECF 198 at 93:3-94:3; ECF 199

at 316:11-16; *see also* Def. Ex. 6.) Agent Ashdown also would have indirectly been made aware of Officer Norton's claim that he saw Mr. Murray put his firearm to his head and shoot himself. (ECF 199 at 259:18-260:14; Def. Ex. 6.)

Agent Ashdown investigated the scene and found a .380 Hi-Point handgun along with two matching spent casings near where he was told Mr. Murray had lain; that location was confirmed by the blood at that site. (ECF 199 at 291:1-7, 294:5-14; Def. Ex. 4 at 1 (Jones0038082), 3-5 (Jones0038084-86).) Agent Ashdown also found two bullet casings, whose caliber matched the .40 Glock that he knew Officer Norton used, approximately 113 yards from Mr. Murray's location. (ECF 199 at 281:6-11, 300:22-301:11; Def. Exs. 4 at 9-13 (Jones0038089-93), 6.) Agent Ashdown also observed Officer Norton and saw nothing to indicate that he had been in a physical altercation with Mr. Murray or that there was any blood, viscera, or anything else noteworthy on Officer Norton's clothing, describing it as "clean and pristine." (ECF 199 at 283:4-11; *see* Pl. Ex. 2 at 13 (photograph of Officer Norton).) Agent Ashdown should also have seen from the blood spatter that the shot that killed Mr. Murray traveled north to south at a right angle from where the spent .40 caliber bullet casings indicated was the location from which Officer Norton had fired. (ECF 199 at 258:18-259:1, 260:16-18, 262:4-24; Def. Ex. 41 at 2 (Jones0011385).)

It should have been apparent at the scene that Officer Norton "was not cross-deputized by the United States o[r] the Ute Indian Tribe on April 1, 2007, to exercise law enforcement authority on the Ute Reservation." (ECF 189 at ¶ 8.) Further, it should have been apparent to Agent Ashdown that Officer Norton's jurisdiction as a Vernal City police officer was "wholly outside the Ute Indian Reservation." (*Id.*) It also should have been apparent that the only witness to Mr. Murray's shooting was Officer Norton himself, a fact that should have made Agent Ashdown seek to corroborate the hearsay telling of Officer Norton's potentially self-interested account. (*Id.* at ¶ 37.)

Based on the testimony of Investigator Campbell, there were no tracks that connected where Officer Norton had been standing to where Mr. Murray was found. (ECF 199 at 262:11-24, 263:13-22.) Investigator Campbell's testimony also indicates that an officer would have been able to determine that the bullet that killed Mr. Murray was fired at a right angle from where Officer Norton stood on the hill. (*Id.* at 258:18-259:1, 262:4-24; Def. Ex. 41 at 2 (Jones0011385).) That said, Officer Norton did, by his own admission, approach Mr. Murray to take photographs of the crime scene. (ECF 189 at ¶ 38; ECF 198 at 108:11-14, 191:19-192:10.) Therefore, there should have been footprints connecting Officer Norton to sites close to Mr. Murray, even if these footprints did not reach Mr. Murray directly. Further, it is not evident how an observer at the scene could have differentiated Officer Norton's footprints from those of Deputy Byron and Trooper Young, who went from Officer Norton's location on the hill down to Mr. Murray and placed him in handcuffs. (ECF 198 at 95:8-17, 102:12-15, 102:25-103:2, 173:7-22.)

After finishing with the scene, Agent Ashdown went to the mortuary to examine Mr. Murray's body. (ECF 199 at 307:5-13.) At the mortuary, he was unable to determine the entrance and exit wounds (ECF 199 at 307:21-25), and he did not collect any evidence (*id.* at 311:22-24, 312:24-313:15). Agent Ashdown would have been able to see that Mr. Murray's

right hand was "caked in blood" and that his left hand was clean. (ECF 200 at 448:5-10; Def. Ex. 51.) Agent Ashdown was offered vials of Todd Murray's blood by Officer Ben Murray but rejected them due to "a questionable chain of custody" and a lack of a way to properly store the blood. (ECF 199 at 313:12-25, 364:11-18.) Officer Byron also inappropriately handled Mr. Murray's body to examine it for beveling, although Agent Ashdown did not believe that improper handling would have altered any evidence. (*Id.* at 309:5-311:21.)

Taken together, a reasonable person presented with this information should have anticipated litigation. Mr. Murray died after a shooting involving an officer who was not authorized to engage in law enforcement activities vis-à-vis Indians on a reservation where that officer was the only witness to the shooting. While the evidence at the scene, particularly the direction of the blood spatter and the location of the expended shell casings, strongly suggests that Mr. Murray shot himself, it did not conclusively establish a suicide as the only possible scenario. For example, the .380 Hi-Point was apparently clean of any visible signs of blood or viscera, despite having allegedly been used by Mr. Murray to commit suicide by a contact shooting. Further, the evidence at the scene did not clearly establish who fired the first shot such that it was clear that Officer Norton was acting in self-defense by shooting at Mr. Murray. Understanding much of the evidence also requires Officer Norton's explanation, whose presumptive reliability as a witness a reasonable person might find questionable, given his role in events.

There is no doubt that Agent Ashdown's investigation left evidentiary gaps resulting in some unanswered questions. Agent Ashdown did not interview any officer who had been present at or near the shooting, leaving him without contemporaneous evidence as to what those officers saw and heard. (*Id.* at 304:25-305:2.) While Officer Norton had refused to speak with Agent Ashdown (*id.* at 282:13-23), Agent Ashdown could have spoken with Deputy Byron and Trooper Young to learn what they had seen and heard. Agent Ashdown never asked to look at Officer Norton's gun, even though it had been involved in a shooting. (*Id.* at 360:6-12.) Agent Ashdown never tested the .380 Hi-Point for blood. (*Id.* at 321:25-322:6.) Even though no blood was observable on it (Pl. Ex. 2 at 12, 15-16; Def. Ex. 45OO (Jones0011753)), testing the weapon for any residue might have confirmed its likely use in the close-contact shooting.

A reasonable person living and working near the Ute reservation should also have been aware that there had been frequent litigation involving the exact boundaries of the reservation and the authority of state and local law enforcement officers thereon before the shooting. *See Ute I-V*. Those cases should have put any reasonable person on notice that infringement of tribal sovereignty was not likely to be ignored, especially where it involved the death of a tribal member.

Further, litigation did in fact occur. While this fact cannot bootstrap the plaintiffs' argument that litigation was reasonably foreseeable into proving that argument, the eventual litigation notably found a substantive violation of Mr. Murray's rights. Specifically, the Utah district court found that Deputy Byron's handcuffing of Mr. Murray "was a *per se* violation of Mr. Murray's Fourth Amendment right, albeit a technical violation." *Jones*, 3 F. Supp. 3d at

1192 (citing *Ross v. Neff*, 905 F.2d 1349, 1353-54 (10th Cir.1990)).[17] While Deputy Byron's actions were protected by qualified immunity because "[e]ven if the rule of law regarding an officer's jurisdiction was clearly established in *Ross*, that decision did not address how or when a police officer must determine the tribal status of the suspect." *Id.* at 1192-93. That said, the facts that led to this litigation were readily apparent from the scene: state and local officers had seized Mr. Murray, a tribal member, on reservation land without being cross-deputized. Even if litigation should only have been anticipated as to Deputy Byron's actions, his act of placing Mr. Murray in handcuffs would inevitably implicate questions of what led to that handcuffing. Therefore, litigation concerning Deputy Byron would necessarily involve litigation about Officer Norton's actions.

The defendant argues that before it can be held liable for spoliating evidence, litigation had to be reasonably foreseeable against the United States and not simply the state and local officers. Litigation involving Mr. Murray's death would be based on the allegedly illegal acts of law enforcement. Illegal acts involving the use of force by law enforcement could easily constitute crimes, even if only of a technical nature. For example, an unlawful use of force, either by unlawfully shooting at Mr. Murray or placing him in handcuffs, could at least arguably constitute assault under 18 U.S.C. § 113 or a criminal deprivation of rights under color of law under 18 U.S.C. § 242, depending on the officers' *mens rea*.

A reasonable person should have expected a tribal decedent's family would seek to hold the defendant liable for such crimes pursuant to a "bad men" treaty claim. *See Tsosie v. United States*, 825 F.2d 393, 400 (Fed. Cir. 1987) ("In addition, the 'bad men' provision is not confined to 'wrongs' by government employees. The literal text of article I and the 'legislative history' of the treaty show that any 'white' can be a 'bad man' . . . ."); *see also Richard v. United States*, 677 F.3d 1141, 1150-53 (Fed. Cir. 2012) (reaffirming *Tsosie*); *Jones II*, 846 F.3d at 1353 (noting *Richard*'s "holding that bad men need not be agents of the federal government.").

It appears that claims under treaty "bad men" provisions were rare prior to 2007. Neither party has cited to any case raising such claims. It is unlikely that even FBI agents working in Indian country were informed of the existence of such provisions, although there is no evidence on that point in the record. That said, the infrequency of "bad men" claims against the United States and the lack of awareness of such provisions by Agent Ashdown or others is not relevant to a determination of whether litigation against the United States was reasonably foreseeable.

[17] The district court's opinion suggests that any seizure of an Indian on tribal land by state and local law enforcement when those officers do not have jurisdiction is a *per se* violation of an Indian's Fourth Amendment rights. *Jones*, 3 F. Supp. 3d at 1192 (citing *Ross v. Neff*, 905 F.2d 1349, 1353-54 (10th Cir.1990)). This issue was not disputed on appeal. *Jones v. Norton*, 809 F.3d 564, 573 n.1 (10th Cir. 2015). The Tenth Circuit, however, also has suggested that temporarily detaining Indians on tribal land to inquire into their tribal status, as opposed to arresting and prosecuting them, is lawful, citing the *Jones* district opinion as evidence that law enforcement was already following this practice in 2007. *Ute VI*, 790 F.3d at 1006-07 (citing *Jones*, 3 F. Supp. at 1192).

Because reasonable foreseeability is an objective standard, a person's subjective ignorance of the law is no defense to reasonable foreseeability. *Cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581-83 (2010) (cleaned up) ("We have long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.")

The facts available on April 1, 2007, at the scene of the shooting made litigation reasonably foreseeable to a reasonable person. The facts available to Agent Ashdown at the mortuary did not diminish the reasonable foreseeability of litigation. If anything, the "grossly inappropriate" acts of state and local officers in obtaining a blood draw with a questionable chain of custody and their manipulation of Mr. Murray's body made litigation more foreseeable. *Jones III*, 146 Fed. Cl. at 737; (ECF 199 at 309:5-311:21, 313:10-25, 364:11-18.) The existence of the "bad men" provision of the treaty between the Ute Tribe and the United States meant that any reasonable prospect of litigation against the officers also made litigation against the defendant reasonably foreseeable on April 1, 2007.

D. Control of Evidence

For the plaintiffs to show spoliation of evidence, the plaintiffs must first show that the defendant had "a legal right to obtain or control that evidence." *Jones V*, 2022 WL 473032, at *4.

As relevant to the current case, Agent Ashdown may have had the legal right to seize evidence at the scene of Mr. Murray's shooting without a warrant in three ways. First, if a weapon or other evidence is in plain view, to seize such evidence, "the government must establish probable cause that [the possessor of the firearm] had committed, or was committing, a crime involving the firearm." *See United States v. Chavez*, 985 F.3d 1234, 1246 (10th Cir. 2021) (citing *Texas v. Brown*, 460 U.S. 730, 738 (1983)). Second, officers may search and seize evidence with consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (noting that a consent search is one of the "well settled . . . specifically established exceptions to the requirements of both a warrant and probable cause"). Third, evidence may also be searched incident to an arrest and may be seized as part of an inventory of an arrestee's property. *Lafayette*, 462 U.S. at 643-49 (permitting warrantless inventory searches of "the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police stationhouse incident to booking and jailing the suspect"); *United States v. Robinson*, 414 U.S. 218, 224-26 (1973) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.")

For evidence to be seized without a warrant under the plain view doctrine, an officer must satisfy the three-prong *Horton* test. *See Soussi*, 29 F.3d at 572 (describing how the government must "scrupulously adhere[] to the three-prong *Horton* test" to seize evidence in plain view without a warrant). The *Horton* test requires that:

> (1) the officer was lawfully in a position from which to view the object seized in plain view; (2) the object's incriminating character was immediately apparent-*i.e*. the officer had probable cause to

> believe the object was contraband or evidence of a crime; and (3) the officer had a lawful right of access to the object itself.

Id. at 570 (citing *Horton*, 496 U.S. 128 at 136-37; *United States v. Dixon*, 1 F.3d 1080, 1084 (10th Cir. 1993)).[18]

For warrantless arrests, "'[p]robable cause to arrest exists only when the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.'"[19] *Cortez v. McCauley*, 478 F.3d 1108, 1116 (10th Cir. 2007) (quoting *United States v. Valenzuela*, 365 F.3d 892, 896 (10th Cir. 2004)).

[18] The first prong of the *Horton* test was met because Agent Ashdown was lawfully present on the Ute reservation as an FBI agent investigating a tribal death on a reservation. The third prong was met because Officer Norton's clothing and .40 Glock were both also present and in view such that Agent Ashdown could examine them "at least cursorily." *Soussi*, 29 F.3d at 527; *see also United States v. Naugle*, 997 F.2d 819, 823 (10th Cir. 1993) (describing the *Horton* lawful access requirement as being "implicated in situations such as when an officer on the street sees an object through the window of a house, or when officers make observations via aerial photography or long-range surveillance").

[19] Despite reasonable foreseeability and probable cause both being standards that involve an objective test of reasonableness, they have important differences, traceable to their roles as a civil and a criminal standard, respectively. These differences mean that the finding that litigation was reasonably foreseeable does not require a parallel finding that probable cause must have existed to seize Officer Norton's .40 Glock or his clothing.

Reasonable foreseeability of civil litigation only requires that a reasonable person anticipate litigation, even if the reasonable person might think that litigation is ultimately meritless. To that end, understanding whether similar circumstances or issues led to litigation in the past is relevant to reasonable foreseeability but not probable cause. Unanswered questions involving a person's death also significantly increase the foreseeability of litigation, even if those unanswered questions might weigh against success on the merits and ultimately cause litigation to fail. Civil litigation often begins before many facts are developed, with complaints being held to a low plausibility standard and allegations filed on information and belief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007)). The discovery process is also fundamentally different in civil cases versus criminal cases. *Compare* Fed. R. Civ. Pro. 26 *with* Fed. R. Crim. Pro 16. In civil cases, discovery frequently provides key information necessary for a party to prove its case many months or years after the case is filed. In contrast, probable cause requires something significantly more than plausibility. Probable cause requires "'facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, [that] are sufficient in themselves to

The Tenth Circuit has explained "probable cause itself is a relatively low threshold of proof." *Valdez v. McPheters*, 172 F.3d 1220, 1227 n.5 (10th Cir. 1999).[20] "Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *United States v. Pollack*, 895 F.2d 686, 691 (10th Cir. 1990) (citing *Draper v. United States*, 358 U.S. 307, 311-12 (1959)). "The officer's belief that he is presented with evidence of a crime need not be certain or even more likely true than false; 'a practical, nontechnical probability that incriminating evidence is involved is all that is required.'" *United States v. Padilla*, 819 F.2d 952, 962 (10th Cir. 1987) (quoting *Brown*, 460 U.S. at 742) (partially cleaned up).

> In determining whether an officer has sufficient reasonably trustworthy information to constitute probable cause, clearly established case law requires officers to look at the totality of the circumstances. While officers may weigh the credibility of witnesses in making a probable cause determination, they may not ignore *available and undisputed* facts. *Cf. Romero* [*v. Fay*, 45 F.3d [1472,] 1476-77 & n. 2 [(10th Cir. 1995)] (noting that while officers do not have [the] duty to interview alleged alibi witness once probable cause is established, the probable cause standard "requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of a warrantless arrest and detention") . . . .

Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1259 (10th Cir. 1998) (partially cleaned up) (emphasis in original).

1. Officer Norton's Clothing on April 1, 2007

The plaintiffs argue that the defendant had control over Officer Norton's clothing because he could have been expected to consent to a seizure of it. (ECF 201 at 27.) The plaintiffs further

warrant a man of reasonable caution in the belief that an offense has been or is being committed.'" *Cortez*, 478 F.3d at 1116 (quoting *Valenzuela*, 365 F.3d at 896).

In short, not knowing how or why certain events occurred might prompt a civil lawsuit to find an answer, and the likelihood of such a lawsuit may be influenced by the identity of the potential plaintiff(s). But neither a lack of information, nor likelihood of potential civil litigants filing suit, can form the basis of probable cause that would allow the government to exercise its criminal powers to seize evidence.

[20] In its determination of the existence of probable cause, the Court relies on decisions from the Supreme Court and the Tenth Circuit that predate April 1, 2007, because those cases would have governed the acts of Agent Ashdown and others on the scene of the shooting on that date.

developed this argument during their closing argument by relying on *Gardner v. Broderick*, 392 U.S. 273 (1968), to argue that Officer Norton in fact could not have refused to give Agent Ashdown his clothing because he had a duty to assist with any investigation into crimes he may have committed. The plaintiffs also argue that this evidence is relevant because it was never tested for blood or tissue that might have indicated that Officer Norton approached Mr. Murray and shot him at close range.

The Federal Circuit made clear that the defendant has control over evidence only if it has "a legal right to obtain or control that evidence." *Jones V*, 2022 WL 473032, at *4. The plaintiffs have not identified any legal authority for the proposition that the *potential* for consent gives a party control over evidence or requires a party to attempt to gain consent to avoid spoliation of evidence. In fact, the plaintiffs acknowledge that "if the United States had asked [Officer Norton] to turn over his clothing, he could have asserted a right not to do so without a warrant." (ECF 201 at 27.) If anything, the need for consent to obtain a piece of evidence indicates that the party requesting access to the evidence did not have a legal right to obtain or control the evidence.

The plaintiffs' argument also would greatly expand when a party had control over evidence. Taken to its logical extreme, the plaintiffs' position would mean that a party has control over any evidence over which it could *potentially* get consent to access. Such an argument would impose a dramatic expansion of the duty on parties to preserve evidence that they do not actually possess. The plaintiffs' argument might be persuasive if Officer Norton had proactively offered Agent Ashdown his clothing, but there is no evidence that such an offer was made. (*See* ECF 199 at 352:3-15, 410:21-23.) As such, any claim that the defendant could have gotten Officer Norton's consent to take his clothing is irrelevant to whether the defendant had control over the clothing.[21]

The plaintiffs' reliance on *Gardner* is not helpful to their argument. That case involved a police officer who had been subpoenaed to appear before a grand jury; the officer had been made aware of his right against self-incrimination but was asked to sign a "waiver of immunity" on pain of being fired if he refused. *Gardner*, 392 U.S. at 274-76. The officer refused to sign the waiver and was fired. *Id.* The Supreme Court held that the officer's employer could not fire him for refusing to waive his immunity to testify. *Id.* at 278-79. The Supreme Court did note, however, that the department could have fired him for refusing to "answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to

[21] Even if it were proper to rely on the possibility of consent, Officer Norton's consent was highly unlikely here. When asked by Agent Ashdown if he would be willing to talk, Officer Norton invoked his right to an attorney, with whom he had already spoken on the phone. (ECF 198 at 153:25-154:13, 184:7-18; ECF 199 at 282:13-17.) This fact militates strongly in favor of finding that Officer Norton would not have consented to undressing and providing his clothing to Agent Ashdown on April 1, 2007, if he had been asked to do so.

waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself." *Id.* at 278.

Notably absent from this language or any part of *Gardner* is anything supporting the proposition that law enforcement officers surrender their constitutional rights when they are under investigation. *Gardner* was a case involving the fifth amendment, and the Supreme Court held that a police officer could not be forced to give up his fifth amendment right against self-incrimination. The decision cannot be read to require Officer Norton to give up his rights under the fourth amendment against unreasonable searches and seizures.

In the absence of consent or a requirement to assist, the plaintiffs have not argued that probable cause existed to seize Officer Norton's clothing under the plain view doctrine. Nevertheless, the Court considers whether probable cause existed for Agent Ashdown to have seized Officer Norton's clothing, and since the clothing was in public view, whether the plain view doctrine applied.

Because Agent Ashdown had no probable cause to believe that the clothing was evidence of a crime or that Officer Norton had committed a crime for which the clothing was evidence, the plain view doctrine does not apply. The doctrine requires that to seize evidence its "incriminating character" must be "immediately apparent." *Horton*, 496 U.S. at 136 (cleaned up). At the very least, this means that Agent Ashdown must have had probable cause that the clothing was evidence of a crime without anything more significant than a minimal search. *See Hicks*, 480 U.S. at 326-27. Agent Ashdown, however, testified that he visually inspected Officer Norton's clothing and saw no blood or other viscera on it, calling it "clean and pristine." (ECF 199 at 283:4-11; *see* Pl. Ex. 2 at 13 (photograph of Officer Norton).) This credible testimony, corroborated by the photograph taken on April 1, 2007, of Officer Norton in his clothing, makes clear that there was no immediately apparent incriminating character to the clothing, and therefore no probable cause to seize it as evidence of a crime. And, as addressed below, no probable cause otherwise existed to arrest Officer Norton, and thus there was no possibility of searching and seizing his clothing incident to an arrest.

In the absence of probable cause, the defendant did not have control over Officer Norton's clothing on April 1, 2007.

2. The .40 Glock on April 1, 2007

The second piece of evidence that the plaintiffs argue was spoliated is Officer Norton's .40 Glock service weapon, which was owned by the Vernal City Police Department. (ECF 198 at 131:10-23.) The plaintiffs argue that the .40 Glock was evidence of the shooting that occurred on April 1, 2007. The plaintiffs also argue that the City of Vernal "did not have a legal basis for refusing to turn the gun over to Agent Ashdown" because there "was no constitutional prohibition on the United States taking possession of that evidence." (ECF 201 at 26.) The plaintiffs argue that Agent Ashdown could have obtained consent from the City of Vernal and that obtaining evidence by consent is common. (*Id.* at 27.)

The defendant responds by arguing that it did not have the right to seize the .40 Glock, that there is no evidence that the City of Vernal would have consented to a seizure, and that the FBI's ability to ask for consent is insufficient to establish a legal right to obtain evidence. (ECF 203 at 34-36.)

The Court has already rejected the plaintiffs' argument that the possibility of consent grants a party control over evidence because the mere possibility of obtaining consent does not provide a legal right to control evidence.

The .40 Glock was in Chief Jensen's possession by the time Agent Ashdown arrived on the scene. Chief Jensen, as the chief of the Vernal City Police Department, had a legitimate possessory interest in the .40 Glock such as to exclude Agent Ashdown from searching and seizing it in the absence of probable cause.[22] *See Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a

[22] Even if Chief Jensen's possessory rights were not sufficient, Vernal City itself may have had fourth amendment rights against Agent Ashdown seizing the weapon. To be sure, the Supreme Court has not addressed whether municipal corporations have fourth amendment rights. When addressing searches under the fourth amendment generally, however, the Supreme Court has noted that "[t]he Fourth Amendment proscribes *all* unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Mincey*, 437 U.S. at 390 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)) (emphasis added); *see also Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018) (cleaned up) ("[I]n the main, one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude.").

Municipalities have other constitutional rights. For example, the Supreme Court has recognized the rights of municipalities under the Takings Clause of the fifth amendment when property is condemned by the United States. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). Other courts have also noted a municipality's rights under the seventh amendment, *Dr. John's, Inc. v. City of Sioux City, Iowa*, 467 F. Supp. 2d 925, 927 (N.D. Iowa 2006), and to due process, *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 290-91 (4th Cir. 2013). When courts have found that municipalities do not have rights under the Constitution, those conclusions tend to be with respect to constitutional rights against their own state government and not against the federal government. *See, e.g., Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.").

Given the finding that probable cause to seize the .40 Glock did not exist, the Court need not determine whether Vernal City had a right under the fourth amendment.

legitimate expectation of privacy by virtue of this right to exclude."), *quoted in Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018).

Accordingly, the defendant's "control" over the .40 Glock on April 1, 2007, depends on whether Agent Ashdown had probable cause to seize the .40 Glock from Chief Jensen. *See Hicks*, 480 U.S. at 326-27 (noting that the seizure of evidence under the plain view doctrine requires probable cause); *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 66 (1992) ("[I]n the absence of consent or a warrant permitting the seizure of the items in question, such [plain-view] seizures can be justified only if they meet the probable-cause standard."); *Brown*, 460 U.S. at 738 (cleaned up) (emphasis added) (recognizing "the well-settled rule that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, *assuming that there is probable cause* to associate the property with criminal activity.").

Regardless of whether the right that Agent Ashdown would have to overcome to seize the .40 Glock on April 1, 2007, belonged to Chief Jensen, Vernal City, or both, there was no probable cause that Officer Norton committed a crime on April 1, 2007. The absence of probable cause on that date that Officer Norton had committed a crime means that there was no probable cause to seize the .40 Glock as evidence of any crime. In other words, Agent Ashdown did not have "reasonable trustworthy information" that was "sufficient to warrant a prudent man in believing that [Officer Norton] had committed . . . an offense." *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964); *see also Valenzuela*, 365 F.3d at 896 (discussing *Beck* and the differences between probable cause and reasonable suspicion); *Baptiste*, 147 F.3d at 1259 (cleaned up) (noting that the probable cause standard requires an officer "to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of a warrantless arrest and detention").

The plaintiffs have asserted violations of more than 40 federal and state criminal statues by state and local law enforcement officers as the basis for their bad men claim against the defendant. (ECF 150-6 at 3-5.)[23] During their closing argument, the plaintiffs argued that, at least with respect to some of these alleged crimes, probable cause existed on April 1, 2007, such that Agent Ashdown could have seized the .40 Glock. The statutes are addressed in turn.

To begin, the plaintiffs cite statutes involving the actual or planned unlawful use of force. (ECF 150-6 at 3-5.) Under Title 18, these statutes include deprivation of rights under color of law (§ 242), hate crimes (§ 249), murder (§ 1111), manslaughter (§ 1112), conspiracy to murder (§ 1117), and kidnapping (§ 1201). Under the Utah Code, these statutes include assault (§ 76-5-102), reckless endangerment (§ 76-5-112), criminal homicide (§ 76-5-201), aggravated murder

[23] The amended complaint is not clear as to the specific criminal statutes alleged as bad men treaty violations. (*See* ECF 17 at ¶¶ 67, 69.) The Court relies on the list of crimes and corresponding statutes that the plaintiffs contend, in their responses to the defendant's interrogatories, the various state and local law enforcement officers each committed. (ECF 150-6 at 3-5.)

(§ 76-5-202), manslaughter (§ 76-5-205), negligent homicide (§ 76-5-206), homicide by assault (§ 76-5-209), kidnapping (§ 76-5-301), and disorderly conduct (§ 76-9-102).

On April 1, 2007, there was no probable cause to suspect that Officer Norton's use of force was anything other than lawful. Based on the evidence available that day at the scene, there was no reason a prudent investigator would think that Officer Norton either approached Mr. Murray and shot him at close range, that Officer Norton's shots hit Mr. Murray from more than 100 yards away, or that Officer Norton assaulted Mr. Murray by firing at Mr. Murray without lawful cause.

Starting with the circumstantial evidence, Officer Norton was off duty when he decided to assist another officer in a pursuit; this fact undercuts any inference that Officer Norton had a pre-meditated plan to commit a crime. (ECF 189 at ¶ 8; ECF 198 at 71:22-74:24). Until Officer Norton knew that Mr. Murray was a tribal member, Officer Norton could reasonably believe that he was lawfully in hot pursuit of a person who, as far as he knew, had unlawfully resisted arrest when he fled from Trooper Swenson.[24] *See United States v. Shareef*, 100 F.3d 1491, 1503 n.4 (10th Cir. 1996) (citing *United States v. Hensley*, 469 U.S. 221, 231 (1985)) ("It is well-established that when an order to stop or arrest a suspect is communicated to officers in the field, the underlying facts constituting probable cause or reasonable suspicion need not be communicated, so long as the individual or agency issuing the order can justify the intrusion on Fourth Amendment rights."); Utah Code § 76-8-305 (1990) (interference with peace officer) (amended 2017); § 305.5 (2005) (failure to stop at the command of a peace officer) (amended 2018).

Officer Norton had the authority to detain Mr. Murray, at least temporarily, to determine his tribal status. *Ute V*, 790 F.3d at 1005-06 (10th Cir. 2015) (cleaned up) (emphasis in original) ("The Tribe's position, they say, would require state officers patrolling [on reservation] rights-of-way to engage in racial profiling because they would have to hazard a guess about whether a driver is or isn't an Indian before pulling her over. But even assuming the relevance of this concern, it is misplaced. After all, officers could just as easily (and lawfully) inquire into a motorist's tribal membership after she is stopped for a suspected offense. Indeed, it seems Utah's law enforcement agencies are *already* doing just that."); *see also Brendlin v. California*, 551 U.S. 249, 254-56 (2007) (holding that a passenger in a car stop is seized for purposes of the

[24] The parties agree that Trooper Swenson did not inform Officer Norton that Trooper Swenson had seen Mr. Murray commit any crime. (ECF 189 at ¶ 34.) Although neither party asked Officer Norton why he pursued Mr. Murray, it is a commonsense inference that Officer Norton understood Mr. Murray had resisted arrest by fleeing. Trooper Swenson had "pointed out to Officer Norton where Mr. Murray had gone and provided a general description of Mr. Murray," indicating that Trooper Swenson wanted Officer Norton to chase Mr. Murray and arrest him. (*Id.* at ¶ 33.) Officer Norton also observed that Trooper Swenson had been in pursuit of a vehicle with two occupants and saw that vehicle crashed on the side of the road with Trooper Swenson having one person in handcuffs, suggesting the other occupant had fled. (ECF 198 at 74:25-77:17.)

fourth amendment and may challenge whether an officer had reasonable suspicion to initiate the traffic stop).[25] The record includes no evidence to suggest that Officer Norton knew Mr. Murray was an enrolled tribal member.

As for the physical evidence, none of it indicates who fired the first shot. The physical evidence indicates that Officer Norton could not have been close enough to Mr. Murray to inflict a close-contact wound to the head. While there is some doubt as to the value of the evidence concerning footprints between Officer Norton's and Mr. Murray's locations, this evidence does not support an inference or finding that Officer Norton got close to Mr. Murray outside the presence of other officers. (ECF 198 at 175:8-14; ECF 199 at 262:11-24, 263:13-22, 295:9-12; ECF 200 at 514:12-17.) Further, the blood spatter indicates that the lethal shot traveled from north to south, at a right angle from where Officer Norton was apparently standing. (ECF 199 at 258:18-259:1, 260:16-18, 262:4-24; Def. Ex. 41 at 2 (Jones0011385).) There also were expended .40 caliber shell casings approximately 110 yards from where Mr. Murray fell, near where the expended .380 caliber shell casings and the .380 Hi-Point were found.

Officer Norton was the only apparent eyewitness to the shooting. (*See* ECF 189 at ¶ 37.) Yet Officer Norton's account, while admittedly provided to Agent Ashdown second- or third-hand (ECF 198 at 102:12-15; ECF 199 at 259:18-23, 261:24-262:3, 279:2-16, 281:5-11, 281:25-282:12), was consistent with the physical evidence at the scene. This physical evidence included footprints, bullet casings, and the direction of the blood spatter. Mr. Murray was also found in the possession of a gun, and no evidence indicates that Officer Norton had approached Mr. Murray outside the presence of other officers such that he could have manipulated the scene.[26] (ECF 198 at 175:8-14; ECF 199 at 262:11-24, 263:13-22, 295:9-12; ECF 200 at 514:12-17.)

[25] If Mr. Murray had not been a tribal member, then state criminal laws would have unquestionably applied to Mr. Murray for any state crime not involving an Indian victim, such as resisting arrest. *United States v. McBratney*, 104 U.S. 621, 622-24 (1881). In such a case, Officer Norton could have arrested Mr. Murray pursuant to that state criminal law jurisdiction, even though Officer Norton was outside his usual jurisdiction. Section 77-9-3 of the Utah Code defines four cases in which a Utah police officer can exercise jurisdiction beyond his usual jurisdiction; two of those situations likely apply to Officer Norton's conduct. First, under subsection 1(a), Officer Norton was in "fresh pursuit of [Mr. Murray] for the purpose of arresting and holding [Mr. Murray] in custody or returning [Mr. Murray] to the jurisdiction where the offense was committed." Second, under subsection 1(d), Officer Norton was "called to assist peace officers of another jurisdiction" when he contacted dispatch and when Trooper Swenson effectively indicated he wanted Officer Norton to pursue and arrest Mr. Murray. (*See* ECF 189 at ¶ 33.)

[26] To be clear, none of this evidence proves that Mr. Murray shot himself or that Officer Norton did not shoot Mr. Murray; it is relied on here not to resolve the merits of the plaintiffs' claim but merely to determine the existence of probable cause to seize Officer Norton's service weapon on April 1, 2007.

For Agent Ashdown to have had probable cause that Officer Norton assaulted or murdered Mr. Murray, and thus that the .40 Glock was evidence of a crime, Agent Ashdown would have needed to disregard the circumstantial and physical evidence surrounding the shooting to conclude that a prudent person would have found that there was a fair probability that Officer Norton attacked Mr. Murray. Further, Agent Ashdown would have had to have thought that Officer Norton attacked Mr. Murray for no apparent reason for Officer Norton to have committed assault by firing first. And the only way Officer Norton could have approached Mr. Murray and inflicted a close-contact wound on him when Mr. Murray had a gun is if Mr. Murray had surrendered and Officer Norton then approached and shot him, again for no apparent reason. This latter scenario is implausible given what Agent Ashdown could observe at the scene on April 1, 2007.

Although the plaintiffs may argue that the .40 Glock could have provided evidence to contradict the apparent positions of Mr. Murray and Officer Norton during the shooting, the plaintiffs cannot bootstrap their argument that relevant evidence would have been found on the .40 Glock because probable cause existed to seize the .40 Glock. That analysis is only appropriate once a court has already determined that a sanction is appropriate. *See Jones V*, 2022 WL 473032, at *11 (quoting *Micron*, 645 F.3d at 1328 (emphasis in original)) ("A party may satisfy its burden to show prejudice by coming forward 'with plausible, concrete *suggestions* as to what [the destroyed] evidence *might have been.*'"). Furthermore, the available evidence suggests that Chief Jensen at least visually inspected the .40 Glock and saw nothing of note on it, meaning that even if Agent Ashdown had visually inspected the weapon, no reasonable observer would have seen anything suspicious on it. (ECF 198 at 122:14-18.) Although that evidence comes from Officer Norton, it is undisputed that Chief Jensen took possession of the .40 Glock, and there has been no suggestion that he told Agent Ashdown that he had noted anything suspicious about it.

At best, the plaintiffs can argue that it was odd that the .380 Hi-Point had no blood or viscera on it if it had been used by Mr. Murray to shoot himself at close range; they can also argue that there is no evidence as to whether Officer Norton or Mr. Murray fired the first shot. The absence of evidence, however, is not itself evidence. Further, the .40 Glock also apparently lacked any observable blood or viscera on it. The absence of blood on the .380 Hi-Point alone is not sufficient to create probable cause that Officer Norton improperly used force against Mr. Murray.

The only other use of force against Mr. Murray at the scene was when Trooper Young and Deputy Byron placed him in handcuffs. (ECF 198 at 102:25-103:2.) Thus, any claim predicated on the use of the handcuffs would not give rise to probable cause to seize Officer Norton's .40 Glock, because that action did not directly involve Officer Norton or his service weapon.

Other crimes the plaintiffs assert require Officer Norton to have committed perjury, destroyed evidence, or failed to report a crime. (ECF 150-6 at 3-5 (citing 18 U.S.C. §§ 4 (misprision of felony), 1361 (depredation of government property), 1503 (influencing or injuring officer or juror), 1505 (obstruction), 1506 (theft or alteration of records), 1510 (obstruction of criminal investigations), 1511 (conspiracy to obstruct state or local law enforcement regarding

gambling), 1512 (victim or witness tampering), 1513 (retaliation against a witness or victim), 1519 (destruction, alteration, or falsification of records), 1621 (perjury), 1622 (subornation of perjury), 2071 (concealment, removal or mutilation of court records), 2232 (destruction or removal of property to prevent seizure); Utah Code §§ 76-6-106 (criminal mischief), 76-8-201 (official misconduct), 76-8-301 (interference with public servant), 76-8-305 (interference with peace officer), 76-8-306 (obstruction of criminal investigation), 76-8-412 (now 8-413) (theft or destruction of public records), 76-8-502-506 (false statement and perjury), 76-8-510.5, (tampering with evidence), 76-8-511 (falsification or alteration of government records)).)

The plaintiffs, however, have not introduced any evidence that shows that Agent Ashdown could have found evidence of such crimes on April 1, 2007. To the contrary, Agent Ashdown found nothing to suggest that anyone had tampered with the evidence (ECF 199 at 295:9-12), that Officer Norton's account was false, or that Officer Norton had conspired with others to lie about what happened or mislead Agent Ashdown.

The plaintiffs have also not provided any evidence that Agent Ashdown could have found evidence of a conspiracy on April 1, 2007. (ECF 160-6 at 3-5 (citing 18 U.S.C. §§ 2 (aiding and abetting), 3 (accessory), 241 (conspiracy against rights), 286 (conspiracy to defraud government with respect to claims), 371 (conspiracy to commit offense against or defraud the United States), 1961-68 (The Racketeer Influenced and Corrupt Organizations Act)).) Furthermore, several crimes that the plaintiffs contend form the basis for their bad men treaty claim seem to have no connection to Officer Norton or the events that occurred at the scene of the shooting on April 1, 2007. (*Id.* (citing 18 U.S.C. §§ 287 (false, fictitious or fraudulent claims), 1343 (wire fraud); Utah Code §§ 76-8-410 (doing business without a license), 76-8-508.3 (retaliation against a witness, victim, or information), 76-9-108 (disrupting a funeral or memorial service); 76-9-704 (abuse or desecration of a human being)).)

As for any offenses concerning Officer Norton's lack of jurisdiction (*id.* (citing Utah Code §§ 76-8-203 (unofficial misconduct), 512 (impersonation of officer))), Officer Norton had, as previously noted, the authority to stop Mr. Murray to determine his tribal status, even if he did not have jurisdiction to arrest him. *See Ute V*, 790 F.3d at 1005-06.[27] Further, Officer Norton, even if outside of his jurisdiction, was still a police officer, and therefore was not acting with an intent to deceive regarding his status as a police officer.

Finally, the plaintiffs argue that Officer Norton had committed criminal trespass. Criminal trespass is defined under Utah Code § 76-6-206 (2006) (amended 2010, 2014, 2015,

[27] The Tenth Circuit had held at the time that an arrest outside of an officer's jurisdiction "is analogous to a warrantless arrest without probable cause," but clarified that only in cases "[a]bsent exigent circumstances, [is] such an arrest [ ] presumptively unreasonable." *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990). Given the circumstances involved in the pursuit of Mr. Kurip's vehicle, in which Mr. Murray was a passenger, and Mr. Murray's flight on foot, exigent circumstances supported Officer Norton's initial pursuit and would have supported a brief detention to determine Mr. Murray's tribal status.

and 2017).[28] Assuming *arguendo* that the statute applies to reservation land under the Assimilative Crimes Act, 18 U.S.C. § 13, and the General Crimes Act, 18 U.S.C. § 1152, there is no evidence that Officer Norton's actions constituted criminal trespass under Utah law.[29]

Under Utah law,[30] Officer Norton could have committed a criminal trespass in one of two ways. First, he could have trespassed under subsection 2(a) of § 76-6-206 if he "enter[ed] or

[28] The plaintiffs also rely on 18 U.S.C. § 1165 and article 2 of the 1868 Treaty between the defendant and the Ute Tribe to claim that Officer Norton and other state and local officers committed a criminal trespass. (ECF 150-6 at 4.) Section 1165 of Title 18 does not apply, however, as it only applies when a person trespasses "for the purpose of hunting, trapping, or fishing . . . or the removal of game, peltries, or fish" from Indian land. As for article 2 of the 1868 Treaty (in the record as Def. Ex. 1), while it does include a provision that forbids unauthorized persons from "pass[ing] over, settl[ing] upon, or resid[ing] in the" Ute reservation, it does not provide any penalty against a private actor for the violation of the treaty. The treaty is not a criminal statute, even assuming this portion of it has not been abrogated. *Cf. Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (declining to read a statute as imposing criminal liability when doing so would criminalize a variety of commonplace activities); 25 U.S.C. § 311 (allowing the Secretary of the Interior to grant permission to state and local authorities to open public highways through Indian reservation or lands). Violation of the treaty could not have created probable cause for Agent Ashdown to seize any evidence.

[29] The Court has already held that criminal trespass cannot form a basis of the plaintiffs' bad men claim because such a wrong would only be against the Ute Tribe, which does not have standing to bring a bad men claim. *See Jones I*, 122 Fed. Cl. at 528 n.31; *Jones IV*, 149 Fed. Cl. at 360; *Hebah v. United States*, 428 F.2d 1334, 1337 (Ct. Cl. 1970); *Hernandez v. United States*, 93 Fed. Cl. 193, 200 (2010). As noted in *Jones IV*, "the plaintiffs conceded the point before the Federal Circuit." 149 Fed. Cl. at 360 (citing Pl.-Appellants' Principal Br. at 37 n.8, filed Dec. 14, 2015, Jones Fed. Cir., No. 2015-5148.) The Federal Circuit did not disturb this portion of *Jones IV* in *Jones V*. That said, if there was probable cause to arrest for criminal trespass, Agent Ashdown could have arrested Officer Norton and seized evidence on his person and evidence relating to his crime, making it relevant to the question of control.

[30] Section 76-6-206 of the Utah Code, as it read in 2007, lays out two possible ways Officer Norton could have been guilty of trespass. The statute provides:

> (1) As used in this section, "enter" means intrusion of the entire body.
>
> (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in Section 76–6–202, 76–6–203, or 76–6–204 or a violation of Section 76–10–2402 regarding commercial terrorism:

remain[ed] unlawfully on property" and "intend[ed] to cause annoyance or injury," was "reckless with regards to if his presence would cause fear for the safety of another," or "intend[ed] to commit any crime, other than theft or a felony." Utah Code § 76-6-206(2)(a) (2006). Alternatively, he would have criminally trespassed under subsection 2(b) if he had notice that his presence was unlawful by communication from the owner or someone with their authority, if there was fencing or another enclosure, or if there were signs warning against trespass. Utah Code § 76-6-206(2)(b) (2006).

> (a) he enters or remains unlawfully on property and:
>
> > (i) intends to cause annoyance or injury to any person or damage to any property, including the use of graffiti as defined in Section 76–6–107;
> >
> > (ii) intends to commit any crime, other than theft or a felony; or
> >
> > (iii) is reckless as to whether his presence will cause fear for the safety of another;
>
> (b) knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:
>
> > (i) personal communication to the actor by the owner or someone with apparent authority to act for the owner;
> >
> > (ii) fencing or other enclosure obviously designed to exclude intruders; or
> >
> > (iii) posting of signs reasonably likely to come to the attention of intruders; or
>
> (c) he enters a condominium unit in violation of Subsection 57–8–7(7).
>
> (3) (a) A violation of Subsection (2)(a) or (b) is a class B misdemeanor unless it was committed in a dwelling, in which event it is a class A misdemeanor.
>
> (b) A violation of Subsection (2) (c) is an infraction.
>
> (4) It is a defense to prosecution under this section that:
>
> > (a) the property was open to the public when the actor entered or remained; and
> >
> > (b) the actor's conduct did not substantially interfere with the owner's use of the property.

There is no evidence that the requirements of either subsection 2(a) or subsection 2(b) of section 76-6-206 were met. The plaintiffs have not introduced any evidence that there was any enclosure or signage against trespass. The plaintiffs' record citations do not adequately support their claim that the land in question was not open to the public. (*See* ECF 201 at 4.) Although some photographs of the scene of the shooting suggest there may have been some fencing in the area (Def. Ex. 45 at M-P (Jones0011724-27)), other photographs (Def. Ex. 45 at A-I (Jones0011712-20), WW-ZZ (Jones0011761-64)) and the only testimony regarding fencing indicate that there was no fencing between the road and the scene of the shooting (*see* ECF 199 at 382:23-383:7 ("And at that time - - there's not a fence saying 'This is the Ute Reservation.'")). Further, there is no evidence that Officer Norton intended to commit a crime or an injury when he entered the reservation land searching for Mr. Murray.

Finally, and most fundamentally, Officer Norton was in hot pursuit of someone he reasonably believed he had probable cause to detain; Officer Norton did not know that Mr. Murray was a tribal member. *See Ute V*, 790 F.3d at 1005-06; Utah Code §§ 76-8-305 (1990), 305.5 (2005). Officer Norton's presence on the reservation to arrest Mr. Murray, even assuming the land was non-public, did not violate Utah's criminal trespass law. *See* Utah Code §§ 76-6-201(3) (1973) (clarifying that privileged and licensed actors are lawfully present on land), 206(a) (2006); Restatement (Second) of Torts § 204 (1965) (describing the privilege to enter private land to make an arrest).[31]

Given that all available evidence on April 1, 2007, either indirectly supported Officer Norton's description of the shooting or, at least, did not contradict it, there was no reason for a prudent person to suspect that Officer Norton had committed a crime through unlawfully using force against Mr. Murray. There also was no reason to suspect from the scene of the shooting that Officer Norton had committed any other crime, let alone that probable cause existed that he had done so. Absent any reason to believe Officer Norton had committed any crime, there was no probable cause that the .40 Glock was evidence of any crime. Agent Ashdown and the defendant therefore did not have the legal right to seize the .40 Glock as of April 1, 2007.

3. Control After April 1, 2007

Probable cause for a seizure did not exist on April 1, 2007, and it did not develop at any time thereafter. Dr. Leis's report concerning Mr. Murray's death concluded that it was a suicide. (Def. Ex. 52.) Agent Ryan's interview with Officer Norton did not note any new information or inconsistencies with evidence the FBI previously had collected. (Pl. Ex. 8.) While the plaintiffs have suggested that there was a video from Trooper Swenson's dashcam that might have shed

[31] Utah courts have relied on the Restatement (Second) of Torts regarding trespass, although not § 204. *See Colosimo v. Gateway Cmty. Church*, 424 P.3d 866, 871-78 (Utah 2018) (discussing §§ 334-335, 339 of the Restatement (Second) of Torts); *Whipple v. Am. Fork Irr. Co.*, 910 P.2d 1218, 1220-22 (Utah 1996) (discussing §§ 329, 333-39 of the Restatement (Second) of Torts); *Purkey v. Roberts*, 285 P.3d 1242, 1247-48 (Utah App. 2012) (discussing §§ 158, 163-64 of the Restatement (Second) of Torts).

light on Mr. Murray's appearance before the shooting, no such video has been presented. (*See* ECF 189 at ¶ 19; ECF 198 at 20:4-21:25, 56:14-22; ECF 199 at 327:1412-19.)

Further, even if probable cause had arisen after April 1, 2007, that probable cause would not necessarily have given the defendant legal control over the .40 Glock or Officer Norton's clothing.

Those pieces of evidence were removed from the scene on April 1, 2007 (ECF 198 at 28:17-29:2, 46:4-10, 49:16-52:7, 63:17-64:7 (describing the evidence left at the scene of the shooting on April 2, 2007, without noting Officer Norton's clothing or the .40 Glock)) and presumably were not kept anywhere in plain view. With the items no longer in plain view, the plain view doctrine would not have applied. *See Brown*, 460 U.S. at 738.. As such, the FBI would have needed consent or a warrant to seize such evidence. *Mincey*, 437 U.S. at 390 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)) ("The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) ("The plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity.").

If the defendant would have needed a warrant to seize the .40 Glock and Officer Norton's clothing after April 1, 2007, then the defendant no longer had the legal right to seize the evidence absent such a warrant founded on probable cause.

Even if the defendant had obtained a legal right to control the .40 Glock and Officer Norton's clothing at any time after April 1, 2007, the plaintiffs have not provided any evidence that the .40 Glock or Officer Norton's clothing had been preserved in the same condition as they existed on April 1, 2007; in other words, the items may have been altered or cleaned by third parties by the time the defendant accrued the legal right to control those items (assuming *arguendo* the defendant had obtained them). *See Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007) (cleaned up) ("The burden is on the party seeking to use the evidence to show the existence of each criterion" including that "the party having control over the evidence had an obligation to preserve it at the time it was destroyed.") Instead, the record is silent as to whether Officer Norton washed his clothes and whether Chief Jensen cleaned Officer Norton's service weapon or issued it to another officer. At best, Officer Norton is unsure if he ever received the .40 Glock back or if he was issued a new 9-millimeter handgun when his department switched service weapons shortly after April 1, 2007. (ECF 198 at 131:19-23, 156:1-12.)

Without at least some showing that the evidence existed in an undisturbed state from April 1, 2007, until some other, later date on which probable cause could be shown to have existed, the plaintiffs cannot demonstrate that there was evidence for the defendant to take control of after April 1, 2007. Without such a showing, the plaintiffs cannot demonstrate that there was evidence which the defendant had a duty to preserve.

IV. CONCLUSION

The plaintiffs' motion for spoliation sanctions (ECF 204) is **GRANTED** in part, with respect to the .380 Hi-Point handgun, and **DENIED** in part, with respect to Officer Norton's clothing and the .40 Glock handgun.

The parties are **DIRECTED** to file a joint status report by **May 15, 2023**, setting forth a proposed schedule for further proceedings.

It is so **ORDERED**.

s/ Richard A. Hertling
Richard A. Hertling
Judge

Corrected

In the United States Court of Federal Claims

No. 13-227
Filed: May 7, 2024
FOR PUBLICATION

DEBRA JONES, et al.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

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

J. Scott Thomas, Environment & Natural Resources Division, U.S. Department of Justice, Washington, D.C., with *Christopher C. Hair* and *Amanda K. Rudat*, Department of Justice, of counsel, for the defendant.

MEMORANDUM OPINION

***HERTLING*, Judge**

On April 1, 2007, Todd Murray, a member of the Ute Tribe, died from a contact gunshot wound to his head inflicted while he was on the Ute Reservation in Utah. The factual question at the heart of this case is simple: who is the more likely person to have shot Mr. Murray? The plaintiffs, who are Debra Jones, Mr. Murray's mother, and the Estate of Arden Post, Mr. Murray's father, allege that Officer Vance Norton, a local police officer, fired the shot and thereby committed homicide. If true, the plaintiffs are entitled to damages under the "bad men" provision of the treaty between the Ute Tribe and the federal government.[1] The defendant counters that it was Mr. Murray, who either accidentally or purposefully fired the fatal shot after

[1] The "bad men" provision is found in Article VI of the 1868 Treaty with the Ute Indians. Treaty with the Ute, Mar. 2, 1868, 15 Stat. 619 (the "Ute Treaty"). It 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, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained."

first firing two shots at Officer Norton, and argues that no federal crimes necessary for liability under the Ute Treaty were committed that day by any state or local officers.

This case has been extensively litigated, and the plaintiffs, in particular Ms. Jones, have demonstrated great stamina, fortitude, and resolve in vigorously pursuing their claims. It began in 2009 with a civil rights suit under 42 U.S.C. §§ 1983 and 1985 in the District of Utah. The district court entered summary judgment against the plaintiffs, and the Tenth Circuit affirmed. *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015). The plaintiffs also filed suit in this court in 2013. After more than 10 years of litigation, with two appeals to the Federal Circuit, the plaintiffs' claims were tried in November 2023.

This opinion, written more than 17 years after the events giving rise to this suit occurred, does not and cannot definitively resolve what occurred on April 1, 2007. This decision can only resolve whether the plaintiffs have met their required burden under the law, based on the evidence presented, to impose liability on the defendant. Many documents were received into evidence and extensive testimony was taken at trial and at a separate, earlier evidentiary hearing on an appropriate sanction for the defendant's spoliation of evidence. Even so, memories have faded. Evidence has been lost to time, was never collected, or has even been destroyed, including a .380 Hi-Point handgun that was found near Mr. Murray and seized by the defendant.

Because the defendant's destruction of the .380 Hi-Point was found to have been negligent, the defendant was sanctioned with a rebuttable adverse evidentiary presumption that the .380 Hi-Point did not have Mr. Murray's blood, tissue, DNA, or fingerprints on it. That sanction enabled the plaintiffs to avoid summary judgment and reach trial. The sanction also enabled the plaintiffs to overcome the defendant's motion for judgment on partial findings under Rule 52(c) of the Rules of the Court of Federal Claims ("RCFC"), because the presumption made it unlikely that Mr. Murray had ever touched or used the destroyed firearm.

The issue of who fired the shot that killed Todd Murray was tried and is now ripe for resolution. The questions to be determined from trial are whether the defendant has met its burden to overcome the adverse evidentiary presumption, and whether the plaintiffs have met their burden of proof to prevail on the merits.

This decision constitutes the findings of fact and conclusions of law required by RCFC 52(a)(1). Based on the evidence, the defendant has rebutted the adverse presumption imposed for its destruction of evidence by showing that it is more likely than not that Mr. Murray possessed and brought the .380 Hi-Point to the scene of the shooting on April 1, 2007. With the adverse presumption rebutted, the evidence shows that it is more likely than not that Mr. Murray died by a self-inflicted gunshot wound. Consistent with this factual finding, the plaintiffs cannot show that a federal crime was committed by any of the responding or investigating state or local officers. Because no federal crime was committed, Mr. Murray's death is not compensable by the defendant under the Ute Treaty. Judgment will be entered in favor of the defendant.

I. PROCEDURAL HISTORY

A. Prior Rulings

This opinion assumes familiarity with this case's extensive history. *See Jones v. United States*, 122 Fed. Cl. 490 (2015) ("*Jones I*"); *Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017) ("*Jones II*"); *Jones v. United States*, 146 Fed. Cl. 726 (2020) ("*Jones III*"); *Jones v. United States*, 149 Fed. Cl. 335 (2020) ("*Jones IV*"); *Jones v. United States*, No. 2020-2182, 2022 WL 473032 (Fed. Cir. Feb. 16, 2022) ("*Jones V*"); *Jones v. United States*, No. 13-227, 2023 WL 2681819 (Fed. Cl. Mar. 29, 2023) ("*Jones VI*"). This opinion also assumes familiarity with the related litigation in the District of Utah and the subsequent appeal. *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015).

In *Jones I*, a judge of this court dismissed the plaintiffs' claims. In *Jones II*, the Federal Circuit vacated the dismissal and remanded for consideration of the plaintiffs' argument that the defendant had spoliated evidence by failing to collect and preserve certain alleged pieces of evidence. *Jones II*, 846 F.3d at 1363-64.

In *Jones III*, the plaintiffs' motion for spoliation sanctions was granted in part and denied in part. The plaintiffs sought sanctions for the defendant's supposed spoliation by failing to collect and preserve evidence in 11 respects. *Jones III*, 146 Fed. Cl. at 735-36. Except for the .380 Hi-Point, no evidence was found to have been spoliated. *Id.* at 737-43. Based on the determination that the .380 Hi-Point had been negligently spoliated, the defendant was forbidden from "rely[ing] 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 [defendant's] conclusion that Mr. Murray died by suicide." *Id.* at 742-43.

The defendant was granted summary judgment in *Jones IV* because issue preclusion applied to the plaintiffs' claims, notwithstanding the spoliation sanction imposed for the destruction of the .380 Hi-Point. *Jones IV*, 149 Fed. Cl. at 348-54. In addition, two sets of the plaintiffs' claims were determined not to have been "wrongs" under the "bad men" provision of the Ute Treaty. First, the plaintiffs' claims based on alleged wrongs that were not punishable under federal criminal law were rejected. *Id.* at 354-56. Second, the claims that only implicated conduct that occurred solely off-reservation were rejected. *Id.* at 356-57. The plaintiffs were found not to have provided sufficient proof to show even on summary judgment that certain alleged federal crimes had occurred, and the plaintiffs were estopped from re-arguing issues relating to certain other alleged federal crimes due to issue preclusion arising from the summary judgment in the Utah district court litigation. *Id.* at 357-62.

In *Jones V*, the Federal Circuit held that the decision in *Jones III* had applied the "wrong standard" in evaluating whether the defendant had "control" of any of the evidence in deciding whether the defendant had spoliated that evidence. *Jones V*, 2022 WL 473032, at *1, 4. In so doing, the Federal Circuit held that the defendant, like any other party, has "control" over evidence when "it has a legal right to obtain or control that evidence." *Id.* at *4, 8. The Federal Circuit also rejected the sanction imposed for the defendant's destruction of the .380 Hi-Point

handgun in *Jones III* as "futile." *Id.* at *9-11. Specifically, the Federal Circuit held that "[a]lthough a sanction preventing the spoliator from relying on the evidence they destroyed might be appropriate in other cases, it is not appropriate in this case because it serves none of the rationales underlying the spoliation doctrine." *Id.* at *11. According to the Federal Circuit, "[c]onsidering the import of the Hi-Point .380 handgun to Mr. Murray's parents' case, a harsher sanction is required." *Id.* at *9.

The Federal Circuit therefore remanded the case to determine: (1) whether the defendant controlled and spoliated evidence relating to the defendant's supposed failure "to enforce its request for an autopsy and failure to bag Mr. Murray's hands," *id*. at *8; (2) "whether litigation was reasonably foreseeable while the government had control (as we define it here) over any allegedly spoliated evidence other than the spoliated Hi-Point .380 handgun," and, accordingly, whether any such evidence was spoliated, *id.* at *9; and (3) "to determine the exact bounds of the appropriate remedy, such as an adverse inference or inferences, that should apply to any spoliated evidence in this case," including "whether the government should be permitted to rely on secondary evidence related to the spoliated [.380 Hi-Point handgun]," *id.* at *11.

Having vacated the rulings on spoliation, the Federal Circuit reversed the *Jones IV* ruling on issue preclusion and vacated the summary judgment for the defendant. The Federal Circuit held that issue preclusion did not apply based on the change wrought by its decision to the evidentiary landscape and remanded for further consideration of the plaintiffs' substantive allegations of violations of the bad men provision of the Ute Treaty. *Id.* at *12.[2]

[2] Notably, the plaintiffs did not appeal the holding in *Jones IV* dismissing the plaintiffs' claims as to wrongs that were not cognizable under federal criminal law, that implicated only off-reservation conduct, or that suffered from other defects unrelated to the spoliation of evidence or issue preclusion. Brief for Plaintiffs-Appellants, *Jones V*, 2020 WL 7642010, at *1-2 (making no mention of these aspects of *Jones IV*). Because the plaintiffs never raised them, the Federal Circuit's decision did not mention these aspects of *Jones IV*. *See Jones V*, 2022 WL 473032, at *4 (emphasis added) ("[The plaintiffs] appeal *aspects* of both the Claims Court's spoliation decision and its summary judgment decision."), 12 (addressing the *Jones IV* summary judgment opinion in a section entitled "Issue Preclusion"). Federal Circuit "law is well established that arguments not raised in the opening brief are forfeited." *Rueter v. Dep't of Com.*, 63 F.4th 1357, 1367 n.4 (Fed. Cir. 2023) (cleaned up). As the Federal Circuit has noted, "[t]he scope of the issues presented to [the Federal Circuit] on appeal must be measured by the scope of the judgment appealed from, not by the arguments advanced by the appellant. . . . An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived. Unless remanded by [the Federal Circuit], all issues within the scope of the appealed judgment are deemed incorporated within the mandate and thus are precluded from further adjudication." *Engle Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382-83 (Fed. Cir. 1999) (cleaned up). To similar effect, the Federal Circuit has held that "[a]n issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on

Following remand from the Federal Circuit, the Court held an evidentiary hearing from October 31, 2022, through November 2, 2022, regarding the spoliation issues remanded by the Federal Circuit. (Transcripts available at ECF 198 through ECF 200.) The opinion on spoliation was issued on March 29, 2023. *Jones VI*, 2023 WL 2681819. The plaintiffs' request for sanctions for the alleged failure by the Federal Bureau of Investigation ("FBI") to seize Officer Norton's .40 Glock handgun and clothing was denied.[3] Although litigation was reasonably foreseeable on April 1, 2007, the evidence presented showed that the FBI lacked legal control over these items because it did not have probable cause to seize them. *Id.* at *27-42.

As regards the .380 Hi-Point, the defendant was sanctioned as follows:

> 1. A rebuttable adverse inference 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 than Officer Norton. If the defendant rebuts this adverse inference, the question of what the .380 Hi-Point would have shown will be treated as unknowable.
>
> 2. To prevent circumvention of the first sanction, the defendant may not rely on any secondary evidence as to what may have been found on the .380 Hi-Point or secondary evidence concerning the un-ejected (or stovepiped) shell casing found in the destroyed handgun to support its arguments on the merits that Mr. Murray died by a self-inflicted gunshot wound. The defendant may on the merits,

appeal may properly be deemed waived." *Bannum, Inc. v. United States*, 779 F.3d 1376, 1382 (Fed. Cir. 2015) (cleaned up). Based on these precedents, the Court adopted the view that the plaintiffs had forfeited any objections to those aspects of the *Jones IV* summary judgment ruling not addressed in their opening appellate brief. Accordingly, those aspects were not disturbed by the Federal Circuit reversal of the summary judgment and are the law of the case. The defendant shares this view of the effect of the plaintiffs' failure on appeal to address aspects of the summary judgment ruling. (ECF 219 at 4-6.) The plaintiffs disagree with this position. (*See, e.g.*, ECF 215; ECF 219 at 1 n.1, 6-7.) That said, it is ultimately the province of the Federal Circuit to determine on appeal the extent to which it vacated *Jones IV*, and whether any issues related to *Jones III* or *Jones IV* not raised by the plaintiffs' appeal in *Jones V* remain appealable. While continuing to object to the Court's position to reserve their rights on appeal (ECF 215; ECF 219 at 1 n.1, 6-7), the plaintiffs agreed to proceed to trial on their claims that were necessarily revived by the Federal Circuit's ruling in *Jones V* (ECF 219 at 2-3).

[3] Although the Federal Circuit instructed the Court to consider on remand potential spoliation sanctions for other uncollected items of evidence, the plaintiffs voluntarily abandoned their request for spoliation sanctions for anything other than Officer Norton's .40 Glock handgun, his clothing, and the .380 Hi-Point. *Jones VI*, 2023 WL 2681819, at *3.

> however, present physical evidence or testimony from witnesses to corroborate Officer Norton's testimony to show that Mr. Murray was in possession of and used the .380 Hi-Point on April 1, 2007, and to provide evidence concerning the origin, ownership, and destruction of the weapon.

Id. at *21.[4]

B. Pre-Trial and Trial Proceedings

After the *Jones VI* spoliation opinion was issued, and in anticipation of trial, the plaintiffs were instructed to file a more definite statement as to the remaining crimes they alleged could form the possible basis on which to recover damages under the Ute Treaty. (ECF 214.) The plaintiffs filed a list that included crimes that they had not previously alleged or relied on in opposing the defendant's prior summary judgment motion, most notably claimed violations of Ute tribal law. (ECF 215 at 1-3.)

At a status conference on June 27, 2023, the Court informed the parties of its view that many of the plaintiffs' claimed offenses were not viable for trial because they were unaffected by the spoliation sanctions imposed by *Jones VI*. As the plaintiffs correctly understood (ECF 219 at 1, 6-7), the Court viewed the *Jones V* ruling as not having completely displaced the *Jones IV* summary judgment ruling. Further, the plaintiffs were precluded from arguing that Ute tribal law provided a basis for recovery under the "bad men" provision of the Ute Treaty. The plaintiffs had never previously cited a violation of Ute law as a possible wrong under the Ute Treaty. Ute criminal law is not federal law and is only applicable to Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."); 25 U.S.C. § 1301(2) (recognizing and affirming "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians"). In addition, there was no evidence that any of the officers alleged by the plaintiffs to have committed "wrongs" under the treaty were Indians. Noting that the plaintiffs had preserved the claimed crimes listed in the plaintiffs' more definite statement (ECF 215) for purposes of appeal, the Court instructed the parties to confer and agree on a narrower list of offenses for purposes of trial. The parties agreed to proceed to trial on a narrower list of crimes supporting potential "bad

[4] "A 'stovepiped' round is when 'the round has gone off, but the casing itself is actually stuck in the chamber. And sometimes they're partially out . . . . ' (ECF 198 at 182:16-24 [(Testimony of retired FBI Agent Rex Ashdown)].) The resulting stuck casing jams the firearm. (*See* ECF 199 at 294:15-25.) Agent Ashdown testified that '[a] stovepipe[d] round happens for a variety of reasons. The two most common would maybe be the gun is dirty and uncared for and the slide action is gritty, so the slide doesn't move smoothly back and forth, so the gun doesn't operate correctly. The other most common reason for a stovepipe[d] round would be a — a weak grip or lack of support for the gun when the gun's fired, which — which again hinders the full action of the — the slide to eject a round and reload another round.' (*Id*. at 294:19-295:5.)" *Jones VI*, 2023 WL 2681819, at *8 n.6.

men" liability. (ECF 219 at 2-3.) The plaintiffs also asserted to preserve the issue for appeal that, notwithstanding its mandate, the Federal Circuit in *Jones V* had reversed or vacated all aspects of the *Jones IV* summary judgment ruling. (*Id.* at 1-4, 6-7.) On July 18, 2023, an order bifurcated the issues of liability and damages for trial and set a schedule for trial on liability in November 2023. (ECF 220.)

The parties subsequently stipulated to certain facts for trial. These stipulations concerned the background of most witnesses and the basic facts as to what occurred on April 1, 2007, and during the subsequent investigation of Mr. Murray's death. (ECF 232 at 1-6.) The parties also agreed to admit as evidence certain defense exhibits (*id.* at 8-10) and most of the testimony taken at the 2022 evidentiary hearing on spoliation (*id.* at 6-8); a part of the stipulation covering certain portions of the spoliation-hearing testimony was subsequently withdrawn (ECF 251 at 1). Due to the death of Dr. Edward Leis, the medical examiner who examined Mr. Murray's body and made the official determinations as to the cause and manner of death, the parties also agreed to admit his prior deposition testimony, his testimony in the Utah district court case, and his written report. (ECF 219 at 8; *see also* ECF 234-1 (deposition testimony), ECF 234-2 at 43-117 (trial testimony), ECF 234-3 (medical examiner's report).)

Regarding trial testimony, the parties agreed the defendant could begin its direct examination of the plaintiffs' witnesses immediately following the plaintiffs' own direct examination to speed up the presentation of evidence and avoid the need to recall witnesses. (ECF 243 at 2.) At trial, the parties further stipulated to the admission of parts of the deposition transcript of Colby DeCamp, as well as the admission of certain demonstrative exhibits as evidence. (ECF 251.)

Trial was held from November 6, 2023, to November 14, 2023, with closing arguments heard on November 14, 2023. (Trial transcripts available at ECF 254 through ECF 259.) At the end of the plaintiffs' presentation of evidence, the defendant moved for judgment on partial findings under RCFC 52(c); a ruling on that motion was deferred until a post-trial hearing in January 2024. (ECF 258 at 502:16-505:1.) The trial included a site visit on November 9, 2023, to the approximate location of the shooting and the surrounding area.[5] As noted in the parties'

[5] "[T]he decision to conduct a site visit is a matter that is subject to the discretion of the trial court. Having conducted such a visit in the exercise of its discretion and without objection from counsel, the court [is] free to make use of its observations, to the extent relevant, in its decision of the case." *Arkansas Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1380 (Fed. Cir. 2013) (quoting 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 403.07[4] (J.M. McLaughlin ed. 2013) ('"[T]he modern position is that the view does provide independent evidence.'"); *Snyder v. Massachusetts*, 291 U.S. 97, 121 (1934) ("the 'inevitable effect [of a site visit] is that of evidence, no matter what label the judge may choose to give it'")). "Absent an objection or insistence on some limitation on the court's use of information obtained during the site visit, [a party] waive[s] its right to object to the court's use of any relevant information obtained in that fashion." *Arkansas Game & Fish Comm'n*, 736 F.3d at

stipulations regarding the site visit, no testimony or argument from counsel was accepted during the site visit, but the parties agreed in advance to the admission of photographs of the site taken on April 1, 2007. (ECF 242 at 1.)

After the trial concluded, the parties filed proposed findings of fact and conclusions of law on January 8, 2024. (ECF 260; ECF 261.) On January 18, 2024, a hearing was held to address questions about the parties' filings and to resolve the defendant's RCFC 52(c) motion. The defendant's motion was denied. (ECF 262.)

C. Dismissal of the Ute Tribe and Substitution for Arden Post

On October 19, 2023, the Ute Tribe's claims were dismissed with prejudice based on the parties' consent to dismissal. (ECF 241; *see also* ECF 219 at 1 (noting the parties' agreement that "the Ute Tribe can be dismissed as a party").)

At a status conference on September 6, 2023, the defendant orally notified the Court of the death of Mr. Post. The plaintiffs were ordered to file a formal notification of the death pursuant to RCFC 25(a)(1) by October 17, 2023 (ECF 233); the plaintiffs did so (ECF 238). On May 1, 2024, the Estate of Arden Post filed an unopposed motion to substitute as a plaintiff in place of Mr. Post. (ECF 265.) Attached to the motion was an order from the Ute Tribal Court authorizing the substitution of the Estate of Arden Post as a party. (ECF 265-1.) The motion was granted on May 2, 2024. (ECF 266.)

II. FINDINGS OF FACT[6]

A. Background of Key Persons and Witnesses

1. Mr. Murray, the Plaintiffs, and Mr. Kurip

Mr. Murray was a member of the Ute Tribe who died on April 1, 2007, at the age of 21. (ECF 232 at ¶ 2.) The Ute Tribe is a federally recognized tribe, with a reservation in northeastern Utah. (*Id.* at ¶ 4.) On the day of the shooting, Mr. Murray was wearing short pants with short socks, a white t-shirt, and a short-sleeved button-up shirt. (*Id.* at ¶ 22; Def. Ex. 70; Def. Ex. 102.) A photograph of Mr. Murray taken at the scene of the shooting on April 1, 2007, shows the button-up shirt to have been navy or dark blue. (Def. Ex. 102.) Mr. Murray was right-

1379-80. Neither party objected to the site visit or proposed any limitations on its usage by the Court; indeed, the parties agreed that "the purpose of the site visit is for the Court to independently survey the site where the crash took place and where Mr. Murray was mortally wounded on April 1, 2007." (ECF 242 at 1.) Findings of fact predicated on the Court's impression of the scene of the shooting will be cited as "(Site Visit)."

[6] This section constitutes the findings of facts required by RCFC 52(a).

handed. (ECF 198 at 27:9-10.) He died on April 1, 2007, from a contact gunshot wound to the left lateral scalp. (Def. Ex. 73 at 1-3.)

Debra Jones and Arden Post are the natural parents of Mr. Murray. Ms. Jones is the personal representative of the Estate of Mr. Murray, for and on behalf of the heirs of Mr. Murray. Arden Post died on December 16, 2022. (ECF 232 at ¶ 3.) As noted above, Mr. Post's estate is now a plaintiff, in place of Mr. Post. (ECF 266.)

Uriah Kurip was the driver of a car involved in the high-speed pursuit with a Utah State trooper. Although Mr. Kurip was not an enrolled Ute tribal member on April 1, 2007, he was enrollable as an Indian and was an "Indian" as that term is used to define a political classification under federal law on April 1, 2007. (ECF 232 at ¶ 5.)

2. State and Local Officers

Vernal City is a municipality located within Uintah County in the State of Utah and wholly outside the Ute Indian Reservation. (*Id.* at ¶ 7.)

Vance Norton was, on April 1, 2007, a Vernal City detective with approximately 14 years of experience working in law enforcement. (ECF 254 at 118:4-15.) Officer Norton was not on duty on April 1, 2007. (ECF 232 at ¶ 7.) His call sign on that date was Whiskey 17. (ECF 198 at 100:9-11, 101:18-20; Def. Ex. 31 at 4.)

Gary Jensen was the Vernal City Chief of Police on April 1, 2007. He did not arrive at the scene until after an ambulance had taken Mr. Murray to the hospital. (ECF 232 at ¶¶ 7-8.)

Dave Swenson and Craig Young were Utah State Troopers on April 1, 2007, and were employed by the State of Utah. Anthoney Byron, Bevan Watkins, and Troy Slaugh were Uintah County Deputy Sheriffs on April 1, 2007, and were employed by Uintah County. Sean Davis was a Utah Department of Natural Resources officer on April 1, 2007, and was employed by the State of Utah. All these officers were on duty on April 1, 2007, and responded to the scene of Mr. Murray's fatal shooting on that date. (*Id.* at ¶¶ 6, 9, 11; *see* ECF 254 at 78:21-80:1 (Officer Davis testifying that he "heard some radio traffic" about a "high-speed pursuit in progress" that was "kind of in my area," suggesting he was on duty).)

None of the aforementioned state and local officers was cross-deputized by the United States or the Ute Tribe on April 1, 2007, to exercise law enforcement authority on the Ute Reservation. (ECF 232 at ¶¶ 6-7, 9, 11.)

On April 1, 2007, Trooper Swenson's call sign was 135 and Trooper Young's call sign was 372. (ECF 254 at 48:25-49:2; ECF 255 at 196:14-19.) Deputy Byron's call sign that day included the number 18. (Def. Ex. 31 at 9 (after Trooper Young reported that he would be "just west with [Deputy Byron]," dispatch replied "copy, just west with [undecipherable] 18").)

On April 1, 2007, Keith Campbell was Chief Deputy Sheriff of Uintah County and was employed by Uintah County. (ECF 255 at 272:18-25.) He and Vance Norton were long-time friends. (ECF 198 at 132:19-22; ECF 199 at 218:5-21; ECF 255 at 271:2-6.) On April 1, 2007,

Mr. Campbell was also a contract employee for the Utah State Medical Examiner as an investigator. (ECF 232 at ¶ 10.) This role involved investigating deaths and reporting any findings that would help the medical examiner's officer determine the cause and manner of death. (ECF 199 at 218:22-219:9; ECF 255 at 271:7-17, 272:11-17, 279:10-280:2.)

3. Federal Agents

On April 1, 2007, Rex Ashdown was employed as an FBI Special Agent at the Vernal (Utah) Resident Agency, which reports to the Salt Lake City Division of the FBI. Agent Ashdown was experienced and had served in Indian country for many years. (ECF 199 at 269:16-272:19 (Agent Ashdown testifying that he joined the FBI in 1985, spent seven years working on white collar crimes in Dallas, Texas, and then spent five years on the "Mexican drug trafficking squad" before transferring to the Vernal Resident Agency), 276:2-3.) He was assigned to investigate the death of Mr. Murray on the Ute Reservation and responded to the scene of Mr. Murray's shooting on April 1, 2007. He supervised the investigation into Mr. Murray's death until the date of his retirement on May 31, 2007. (ECF 232 at ¶ 12.)

David Ryan is employed as an FBI Special Agent at the FBI Academy at Quantico, Virginia. From April 1, 2007, until his transfer to the FBI Academy in August 2023, Agent Ryan was assigned to the Vernal Resident Agency. Agent Ryan took over the investigation of Mr. Murray's death after Agent Ashdown retired on May 31, 2007. (*Id.* at ¶ 13.)

4. Dr. Leis and Expert Witnesses

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 and testified at a June 6, 2013, evidentiary hearing in the Utah district court litigation. Dr. Leis died on April 30, 2023. (*Id.* at ¶ 14.)

The plaintiffs retained two experts, Dr. Jonathan Arden and Dr. William Gaut. Dr. Arden is a forensic pathologist. (*Id.* ¶ 40.) Dr. Gaut is a board-certified forensic examiner and criminal-justice consultant, with a doctorate in criminal justice. (ECF 256 at 342:19-345:14.) Both experts were both deposed in the Utah district court litigation and by the defendant in this case. (ECF 232 at ¶¶ 15, 40.)

Dr. Joseph Cohen is a forensic pathologist, retained by the defendant in this case. (*Id.* at ¶ 40.)

All three experts were qualified as expert witnesses at trial. (ECF 256 at 353:4-5; ECF 257 at 460:10-15; ECF 258 at 506:5-13.)

B. The Vehicle Pursuit and Crash
10:52:49 a.m. – 11:23:40 a.m.

On April 1, 2007, Trooper Swenson of the Utah Highway Patrol was on duty on U.S. Route 40 in Uintah County. (ECF 254 at 20:3-11; *see* ECF 232 at ¶ 17.) Using his radar, Trooper Swenson observed that a vehicle, eventually found to have been driven by Mr. Kurip,

was going 74 miles-per-hour on a road with a 65 miles-per-hour speed limit. (ECF 254 at 20:6-21:1.) Trooper Swenson attempted to pull over the vehicle, but Mr. Kurip did not stop. Trooper Swenson began a high-speed pursuit of Mr. Kurip.[7] (ECF 232 at ¶ 16.) Trooper Swenson activated his police vehicle's dashboard camera ("dashcam"). (*Id.* at ¶ 17.) The dashcam footage shows that the pursuit began at approximately 10:53 a.m.[8] (Def. Ex. 134 at 0:00.)

Less than two minutes into the chase, Mr. Kurip made a left turn. (*Id.* at 1:12-1:24.) Trooper Swenson then informed police dispatch that he was pursuing a vehicle on Highway 88. (ECF 232 at ¶ 18.) During the pursuit, Trooper Swenson and Mr. Kurip drove up to 125 miles per hour. (ECF 254 at 35:10-17.) About seven minutes into the pursuit, Trooper Swenson reported to dispatch that the driver "appears to be tribal." (Def. Ex. 31 at 3.)

Almost 30 minutes after the pursuit began, the vehicle Mr. Kurip was driving crashed at the intersection of Seep Ridge Road and Turkey Track Road (or simply the "Turkey Track"), on the Ute Reservation. (ECF 232 at ¶ 19.) Seep Ridge Road is a paved road, while the Turkey Track was an unpaved, dirt road on April 1, 2007. (Def. Ex. 134 at 28:50-29:30.) The time of the crash was approximately 11:20:25 a.m. (*Id.* at 27:27-27:43.)

Following the crash, Mr. Kurip exited the driver's seat of the crashed vehicle and Mr. Murray exited the front passenger seat. (ECF 232 at ¶¶ 20-21.) Trooper Swenson arrived at the scene of the crash, stopped, and exited his vehicle approximately 20-30 feet away from Mr. Murray. (Def. Ex. 134 at 27:42-27:47 (the dashcam footage showing Mr. Murray to be about 20 to 30 feet away from the camera). *But see* ECF 254 at 30:4-6 (Trooper Swenson estimating he

[7] At various times during the litigation, the plaintiffs have suggested that the pursuit began on the Ute Reservation. (*See, e.g.*, ECF 223 ("Plaintiffs expect[ ] to show that Trooper Swenson believed he was attempting to stop a vehicle containing two tribal males, and that the alleged cause for the stop arose on the Reservation.").) The plaintiffs, however, neither raised this claim nor presented evidence supporting it, either at trial or in their proposed findings of fact and conclusions of law. (ECF 261.) As the plaintiffs have either not made or abandoned any claims based on alleged crimes relating to the start or course of the pursuit (*see infra*, footnote 17; Section III B), no findings as to whether the chase started on- or off-reservation are necessary.

[8] There is a time discrepancy between the dashcam footage and the transcript of the police-dispatch audio. (*Compare* Def. Ex. 134 *with* Def. Ex. 31.) Based on the portions of the dispatch transcript that are audible in the footage, the time noted on the dashcam footage runs approximately three minutes and 11 seconds early compared to the time reflected in the audio transcript. No party presented any evidence or testimony to explain which time stamps are more accurate. Because the transcript shows time stamps based on file names that may have been manually generated, whereas the dashcam footage provides an always-present time stamp, all times have been adjusted to match the timing provided in the dashcam footage. When audible, the actual time any transmission is heard in the dashcam footage based on the timestamp therein is used. If any audio from the transcript is not audible in the dashcam footage, it is assumed to take place three minutes and 11 seconds earlier than the time noted on the transcript.

was 60 to 70 feet away).) Trooper Swenson drew his service weapon, keeping it pointed at the ground, and ordered Mr. Murray and Mr. Kurip to "lie on the ground, now!" (Def. Ex. 134 at 27:42-27:47; *see* ECF 254 at 30:12-15, 31:13-32:7 (Trooper Swenson recalling that he had ordered the occupants of the vehicle "to put their hands up").) Neither complied. Instead, Mr. Kurip ran southeast, while Mr. Murray ran southwest. (Def. Ex. 134 at 27:43-28:03; Def. Ex. 135.)[9] Although Trooper Swenson did not see Mr. Murray with a weapon before he ran away (ECF 254 at 33:18-20), Trooper Swenson only had a few seconds to observe Mr. Murray and did not recall seeing the entirety of his waistband. (ECF 254 at 54:10-22; Def. Ex. 134 at 27:42-28:03.) Trooper Swenson testified that he had not observed Mr. Murray commit any crimes. (ECF 254 at 35:7-9, 35:21-22, 36:6-8.) Although Trooper Swenson acknowledged that fleeing from the police was illegal, he declined to label Mr. Murray's actions a crime.[10] (*Id.* at 55:2-8.)

At approximately 11:20:47 a.m., Trooper Swenson reported to dispatch that he had "two runners out. Both tribal males." (Def. Ex. 31 at 6; Def. Ex. 134 at 27:35-28:13.) Trooper Swenson did not pursue Mr. Murray, opting instead to pursue Mr. Kurip. (ECF 232 at ¶¶ 23-24.) After he began his pursuit of Mr. Kurip, Trooper Swenson did not see Mr. Murray again. (*Id.* at ¶ 25.) Trooper Swenson initially pursued Mr. Kurip on foot but then turned around to remove the keys from the crashed vehicle. (ECF 254 at 31:1-4.) Trooper Swenson then got back into his own vehicle, drove it a short distance down Turkey Track Road, made a U-turn, and returned to Seep Ridge Road, heading south. (*Id.* at 57:15-58:9; Def. Ex. 134 at 28:52-29:43.)

While driving, Trooper Swenson reported to dispatch at approximately 11:22:16 a.m. that he had removed the keys from the crashed vehicle and that he saw one occupant, whom he was pursuing, heading north, and another occupant heading south. (Def. Ex. 31 at 6; Def. Ex. 134 at

[9] Although Trooper Swenson testified that Mr. Kurip headed north and Mr. Murray headed south after exiting the vehicle (ECF 254 at 30:16-17) and marked a map at trial to indicate a more east/west direction of flight (Def. Ex. 135), the most reliable evidence is the dashcam footage. The footage shows that Mr. Murray fled in a southwesterly direction, given that Trooper Swenson's vehicle was facing south. (Def. Ex. 134 at 27:40-28:03). As for Mr. Kurip, the dashcam footage shows that Trooper Swenson returned to his vehicle and pursued him by driving south on Seep Ridge Road before exiting his vehicle. Because the footage does not show Trooper Swenson crossing Seep Ridge Road to head west on foot, the dashcam footage reflects that Mr. Kurip fled in a southeasterly direction. (Def. Ex. 134 at 28:52-29:47.)

[10] Mr. Murray's flight from Trooper Swenson may not have been a crime because he was a tribal member on a reservation fleeing from a state trooper. *See Jones ex rel. Murray v. Norton*, No. 2:09-CV-00730-TC-SA, 2010 WL 2990829, at *4 (D. Utah July 26, 2010) ("While disobeying a lawful order of a law enforcement officer violates Utah Code section 41-6a-209, Mr. Murray was not subject to Utah law at the time the order was given, and therefore the order for him to submit to law enforcement authority was not lawful."). A reasonable officer might have suspected, but could not have known, that Mr. Murray was a tribal member simply by looking at him. Therefore, probable cause existed to pursue Mr. Murray even if he had not technically committed a crime by running. *Jones VI*, 2023 WL 2681819, at *37.

29:20-29:51.) At approximately 11:22:35 a.m., Trooper Swenson halted and exited his vehicle to pursue Mr. Kurip on foot off-road heading west. (Def. Ex. 134 at 29:40-29:48; ECF 254 at 57:15-58:1.) At trial, Trooper Swenson estimated that Mr. Kurip had run about a quarter to half a mile from the crash site. (ECF 254 at 37:23-38:1.) At 11:23:40 a.m., Trooper Swenson reported to dispatch that he had apprehended Mr. Kurip. (Def. Ex. 31 at 7; Def. Ex. 134 at 30:50-30:56.)[11]

C. Officers Arrive On-Scene and Search for Mr. Murray

Four other state and local officers arrived on-scene after the crash but before Mr. Murray was shot. In order of arrival, these are: Officer Norton of the Vernal City Police Department, Trooper Young of the Utah Highway Patrol, Deputy Byron of the Uintah County Sheriff's Office, and Officer Davis of the Utah Department of Natural Resources.

1. Officer Norton's Arrival 11:23:20 a.m. – 11:24:00 a.m.

On April 1, 2007, Officer Norton was off duty, driving in his personal vehicle when he observed Trooper Swenson in pursuit of the vehicle driven by Mr. Kurip. (ECF 198 at 72:20-21; ECF 254 at 121:11-123:9.) Although he was off duty, Officer Norton called dispatch on his cell phone to ask if there was a chase in progress. (ECF 254 at 122:14-17.) Despite being told that other officers were en route (*id.* at 122:17-24), Officer Norton volunteered to stay close to the chase until other officers arrived to back up Trooper Swenson.[12] (ECF 31 at 4.)

Because Officer Norton was off duty, he was dressed in plain clothes, specifically a blue shirt and light-blue jeans. (Def. Ex. 103.) He had a 3-inch by 3-inch police badge affixed to his belt (*id.*; ECF 254 at 162:9-16), and he was carrying his department-issued .40 Glock service weapon (ECF 254 at 130:13-17). Because he was in his personal vehicle, Officer Norton did not have a police radio with him and could only communicate with dispatch via his cell phone. (*Id.* at 123:10-16.) These cell phone communications between dispatch and Officer Norton were not audible to other officers, and Officer Norton could not hear any transmissions made by other

[11] The exact words that Trooper Swenson used were "I'm 10-82 with the driver." (Def. Ex. 31 at 7.) Although it was never clarified at trial what "10-82" meant, context indicates that Trooper Swenson had Mr. Kurip in custody as an unknown speaker replies to this update saying, "go ahead and cancel 13 as long as we have the driver." (*Id.*) This understanding is confirmed by Trooper Swenson's testimony that he "notified dispatch that [he] had [Mr. Kurip] secure." (ECF 254 at 66:2-4.)

[12] Technically, Officer Norton was checked in and considered to have been on duty once he spoke to dispatch and decided to assist in the pursuit. (ECF 254 at 121:11-23.) Nevertheless, the key point is that Officer Norton was not on duty when he decided to assist and had no plans to assist with any police pursuit or perform any official duties that day; he was on his way to visit his father when he observed the pursuit of Mr. Kurip and Mr. Murray. (*Id.* at 121:24-122:8.)

officers over the radio. (*See* ECF 31 at 8-9 (Officer Norton reporting the shooting to dispatch, yet no officers respond in the transcript to the report of the shooting until dispatch informed the officers that there were "shots fired").) Dispatch used Officer Norton's call sign, Whiskey 17, to refer to him when communicating with other officers. (ECF 198 at 101:18-20; Def. Ex. 31 at 4, 9.)

Officer Norton was the first officer to arrive on the scene after Trooper Swenson. (ECF 254 at 36:20-25 (Trooper Swenson referring to other officers arriving after Officer Norton), 127:23-128:17, 129:7-23 (Officer Norton testifying that Trooper Young and Deputy Byron arrived after him).)

When Officer Norton arrived near the intersection of Seep Ridge Road and Turkey Track Road, he drove towards Trooper Swenson, who indicated the direction in which Mr. Murray had fled. Trooper Swenson testified that he told Officer Norton something along the lines of "I'll take the driver," that is Mr. Kurip, "if you want to see if you can find the passenger." (*Id.* at 32:8-20.) Officer Norton similarly recalls asking Trooper Swenson "where the other guy went," and Trooper Swenson telling him "'[g]o look over that way. He went over that way,' something of that nature." (*Id.* at 126:14-18.)

The testimony of Trooper Swenson and Officer Norton establishes that Trooper Swenson had Mr. Kurip in custody when Officer Norton arrived. Although Trooper Swenson initially testified that Officer Norton had arrived before he had Mr. Kurip in custody (*id.* at 31:7-11), he clarified on cross-examination after having his memory refreshed with his written incident report that he had already apprehended Mr. Kurip and had him handcuffed when Officer Norton arrived. (*Id.* at 58:25-60:24.) Trooper Swenson's report, which he began writing only two to three hours after the incident (*id.* at 69:13-18), is in evidence as Defense Exhibit 120. That report confirms that Trooper Swenson's testimony on cross-examination is correct: Officer Norton arrived after Trooper Swenson had Mr. Kurip in handcuffs. This conclusion aligns with Officer Norton's testimony that he arrived just as Trooper Swenson was picking Mr. Kurip up off the ground after placing him in handcuffs. (ECF 254 at 126:9-13.)

Because Officer Norton arrived close in time to when Trooper Swenson was picking Mr. Kurip off the ground, Officer Norton likely arrived near the intersection of Seep Ridge Road and Turkey Track Road sometime between 11:23:20 a.m. and 11:24:00 a.m. Trooper Swenson reported to dispatch that he had apprehended Mr. Kurip at 11:23:40 a.m., only about one minute after exiting his vehicle to pursue Mr. Kurip on foot at 11:22:35 a.m. (Def. Ex. 31 at 7; Def. Ex. 134 at 29:40-30:56.) Trooper Swenson estimated that Mr. Kurip had fled between a quarter to a half mile from the crash scene. (ECF 254 at 37:23-38:1.) Because the dashcam video does not show Mr. Kurip fleeing (Def. Ex. 134 at 29:40-30:56), it is apparent that Mr. Kurip fled cross-country, away from Seep Ridge Road. It is unlikely that Trooper Swenson communicated to dispatch about his apprehension of Mr. Kurip after he had returned with Mr. Kurip to his vehicle because there was not enough time. Given the distance Mr. Kurip fled, one minute would not have been enough time for Trooper Swenson to pursue Mr. Kurip off-road on foot, catch him, handcuff him, presumably pat him down for weapons, and return with him to his vehicle before reporting Mr. Kurip's arrest to dispatch. This sequence indicates the Trooper Swenson's report to dispatch was made when he away from his vehicle, but likely not long after securing Mr.

Kurip or picking him up off the on the ground. This timeline provides a basis to infer that Officer Norton arrived close to the time that Trooper Swenson was making his report, with Officer Norton likely being in his car on the road some distance away from Trooper Swenson when they spoke. The evidence therefore suggests that Officer Norton arrived close in time to Trooper Swenson's report to dispatch, meaning he arrived on the scene between 11:23:20 a.m. and 11:24:00 a.m.

After speaking with Trooper Swenson, Officer Norton turned around, drove back up Seep Ridge Road, turned onto Turkey Track Road, drove down it for a short distance, pulled off to the side, and exited his personal vehicle. (ECF 254 at 127:23-128:8.)

At an unspecified point after Officer Norton arrived at the scene, Trooper Swenson returned to the crashed vehicle to search it. This search by Trooper Swenson probably took place after Mr. Murray had been shot, based on Trooper Swenson's written report. (Def. Ex. 120 at 3 (referring to searching the vehicle after a passing motorist advised Trooper Swenson that he had heard gunshots).) Trooper Swenson found "some drug paraphernalia, . . . some marijuana, a BB gun, and some beer bottles" in the vehicle. (ECF 254 at 67:21-68:2.)

2. Trooper Young's Arrival
11:23:45 a.m. – 11:24:15 a.m.

On April 1, 2007, Trooper Young was an officer with the Utah Highway Patrol. He was in uniform and on duty in his police cruiser in the Vernal area. (ECF 255 at 192:19-21, 195:5-13.) His call sign on April 1, 2007, was 372. (*Id.* at 196:14-19.) On that same day, Deputy Byron was a deputy with the Uintah County Sheriff's Department on patrol duty in the Ballard City area. (*Id.* at 231:22-24, 233:21-234:3, 234:12-17.) Both Trooper Young and Deputy Byron heard of the high-speed chase of the vehicle driven by Mr. Kurip over the radio in their police vehicles and proceeded to assist Trooper Swenson. (*Id.* at 194:22-195:4, 234:4-11.)

Guided by information shared on the police radio, Trooper Young and Deputy Byron arrived separately at the scene by the intersection of Seep Ridge Road and Turkey Track Road, near the site of the crashed vehicle. (*Id.* at 196:2-8, 197:11-17, 238:4-19.) Upon arrival, Trooper Young spoke briefly with Trooper Swenson. (*Id.* at 197:22-198:7, 198:24-199:4, 199:13-17.) By then, Trooper Swenson had Mr. Kurip in custody and was walking him back towards his police vehicle. (*Id.* at 199:5-12.) Trooper Swenson informed Trooper Young that another individual had been in the crashed vehicle and had run off "over the hill." (*Id.* at 199:2-4, 201:14-19.)

Trooper Young drove west down Turkey Track Road in search of Mr. Murray. (ECF 254 at 127:23-128:8; ECF 255 at 200:8-201:15.) Stopping shortly after having turned onto Turkey Track Road, Trooper Young encountered Officer Norton, who had just exited his vehicle near the intersection of Seep Ridge Road and Turkey Track Road. (ECF 254 at 127:23-128:8; ECF 255 at 204:4-11 (Trooper Young testifying "[w]hen I got there," referring to his arrival at the scene, "Vance Norton was there" near the right side of the road), 205:17-206:16; Def. Ex. 31 at 8; Def. Ex. 136 (near the "Tu" in the northernmost reference to "Turkey Track" noted on the exhibit).)

Based on Officer Norton's testimony, he and Trooper Young briefly spoke and agreed to search for Mr. Murray in different directions. (ECF 198 at 83:25-84:7; ECF 254 at 127:23-128:17, 129:7-14.) Although Trooper Young testified that he did not recall such a conversation, he testified that he did remember seeing Officer Norton when he first arrived at the scene. (ECF 255 at 203:15-204:11.) The dispatch transcript also supports the conclusion that Officer Norton and Trooper Young spoke to each other before the shooting. After the shooting, Officer Norton would ask dispatch to direct "Craig to come back to where he saw me and I talked to him," indicating they had spoken beforehand. (Def. Ex. 31 at 8.)

Given that Trooper Young both saw Trooper Swenson returning to his police vehicle with Mr. Kurip and spoke with Officer Norton on Turkey Track Road, Trooper Young likely arrived at the scene sometime between 11:23:45 a.m. and 11:24:15 a.m.

3. Deputy Byron's Arrival
11:24:00 a.m. – 11:24:30 a.m.

Deputy Byron saw Trooper Swenson upon arriving at the scene but did not speak to him. (ECF 255 at 239:23-240:3.) Instead, Deputy Byron proceeded to the location where he saw Trooper Young, who had arrived at "about the same time" as Deputy Byron. (*Id.* at 238:23-240:10; *see also* ECF 198 at 84:5-7 (Officer Norton testifying that Deputy Byron arrived "just like seconds later" than Trooper Young).) Deputy Byron also saw Officer Norton's parked vehicle at Trooper Young's location. (ECF 255 at 239:18-22.)

Officer Norton had started jogging over to the edge of a hill near the site at which he had spoken to Trooper Young when Deputy Byron arrived at the scene. Officer Norton and Deputy Byron saw each other but did not speak. (ECF 254 at 129:15-130:1 (Officer Norton testifying that "I know that Deputy Byron showed up, but I think I was actually already jogging over to the edge of the hill when he actually pulled up."), 150:18-20 (Officer Norton testifying that the first time he encountered Deputy Byron was after the shooting); ECF 255 at 257:20-22.) Deputy Byron's written report of the incident also indicates that he observed "an individual running up a hillside"—Officer Norton—when he arrived. (Def. Ex. 2 at 9.) Deputy Byron's report aligns with Officer Norton's account and with the fact that Mr. Murray had already left the scene of the crash several minutes prior to Deputy Byron's arrival. Deputy Byron also testified that he later learned that the individual whom he had observed running up the hill was Officer Norton. (ECF 255 at 255:18-256:8.) Deputy Byron spoke briefly with Trooper Young on the side of Turkey Track Road. (*Id.* at 240:4-10.)

The record reflects that Deputy Byron arrived very shortly after Trooper Young had spoken with Officer Norton, but that he did not speak with Trooper Swenson. Instead, he seems to have proceeded directly to Trooper Young's location and arrived just after Officer Norton started jogging towards a hill. This sequence places Deputy Byron's arrival sometime between 11:24:00 a.m. and 11:24:30 a.m.

4. Trooper Young and Deputy Byron Proceed to the Oilfield-Service Pad 11:24:30 a.m. – 11:25:30 a.m.

After speaking with Deputy Byron, Trooper Young proceeded in his vehicle further down the unpaved Turkey Track Road and made a right onto an unpaved oilfield-service road; the service road dead-ended in a square concrete pad. (*Id.* at 200:8-201:13, 220:17-221:3; Def. Ex. 136 (near the location marked "CY2").) Deputy Byron drove in the same direction as Trooper Young, and they both reached the concrete pad at the end of the service road. (ECF 255 at 201:20-23, 240:6-17, 258:1-12, 261:10-262:14.) During the site visit, the Court made the same drive in a van that seemed unsuited to dirt-road conditions and drove the same route at a relatively slow speed in no more than two minutes. (Site Visit.) Given that the officers were in pursuit of a fleeing suspect, it likely took them no more than 60 seconds to make the same drive. Based on these estimates, Trooper Young and Deputy Byron would have arrived at the pad at the end of the service road at approximately 11:25:30 a.m.

5. Officer Davis Arrives and Drives to a Different Location 11:25:00 a.m. – 11:29:38 a.m.

Officer Davis was an officer with the Utah Department of Natural Resources who was on duty near Myton, Utah on April 1, 2007, when he heard chatter on the radio about a high-speed chase and decided to assist. (ECF 254 at 77:10-80:1.) He did not participate in the chase but arrived at the intersection of Seep Ridge Road and Turkey Track Road to assist. When he arrived, Trooper Swenson already had Mr. Kurip in custody. (*Id.* at 80:23-25; Def. Ex. 132.)

Officer Davis knew that at least one officer other than Trooper Swenson had already arrived before him because another officer had passed him on the road. (ECF 254 at 81:13-24.) As Officer Norton was in his civilian vehicle and civilian clothes (*id.* at 121:13-14; Def. Ex. 103), the officer who passed him must have been either Deputy Byron or Trooper Young. It was probably Deputy Byron, because Officer Davis recalled only one police vehicle passing him, and Deputy Byron arrived after Trooper Young (ECF 255 at 238:23-239:13), with all three having arrived from the same direction (ECF 254 at 80:2-16; ECF 255 at 196:24-197:13, 237:18-238:3).

Because Officer Davis did not see Officer Norton, Deputy Byron, or Trooper Young in or near their vehicles at the scene, Officer Davis likely arrived at the scene sometime between 11:25:00 a.m. and 11:26:00 a.m., after Deputy Byron and Trooper Young had started proceeding towards the pad at the end of the oilfield-service road.

Upon arriving, Officer Davis spoke briefly with Trooper Swenson, who, according to Officer Davis, "pointed to a dirt road and said he went down - - the other person went down that dirt road." (ECF 254 at 80:12-81:12.) Officer Davis then proceeded in his vehicle down Turkey Track Road. (*Id.* at 81:7-12, 82:10-20.) As he drove down the road, he saw Officer "Norton on a hill just west of the Turkey Track [R]oad." (Def. Ex. 132; *see also* ECF 254 at 93:25-94:13, 99:5-15.) Officer Davis eventually stopped at an unspecified "oil location." (Def. Ex. 132.) This location was apparently not near Trooper Young and Deputy Byron's location, as neither

they nor Officer Davis testified that they encountered each other before the shooting.[13] Officer Davis remained at or near this location until at least 11:29:38 a.m. (Def. Ex. 132 (noting that Officer Davis was at an "oil location" when he heard "Trooper Swenson" report shots had been fired); Def. Ex. 31 at 9 (Trooper Swenson's report that shots had been fired); Def. Ex. 134 at 36:50-37:00); *see also* ECF 254 at 83:20-84:16 (Officer Davis describing hearing the report of shots fired).)

6. Trooper Young Searches Near the Concrete Pad; Deputy Byron Enters the Gully
11:25:30 a.m. – 11:26:00 a.m.

Upon stopping at the concrete pad at the end of the oilfield-service road, Deputy Byron and Trooper Young exited their vehicles and saw Officer Norton standing on a hill. (ECF 255 at 240:18-241:6; Def. Ex. 2 at 9.)[14] Because Trooper Young identified Officer Norton for Deputy Byron (Def. Ex. 2 at 9), but there is no radio transmission about this identification (Def. Ex. 31), Deputy Byron and Trooper Young must have spoken with each other briefly in person upon arriving at the concrete pad.

After speaking, Deputy Byron proceeded on foot northward for approximately 75 yards across broken terrain in search of Mr. Murray. This direction took Deputy Byron downhill into a gully, approximately 75 to 100 yards away from where he and Trooper Young had parked their vehicles, and towards where he had seen Officer Norton on a hill. (ECF 255 at 240:18-242:2; Site Visit.) The gully, also referred to by witnesses as a "wash," into which Deputy Byron

[13] From the site visit, it was evident that there were multiple oilfield-service locations and associated access roads along Turkey Track Road. (Site Visit.) Officer Davis probably proceeded down Turkey Track Road to a different oilfield-service road from Deputy Byron and Trooper Young, as this scenario would explain why Officer Davis did not recall encountering those officers before he saw them at the location at which Mr. Murray had been shot.

[14] Deputy Byron referred to seeing Officer Norton on his phone while Deputy Byron and Trooper Young were "working our way up through a wash area [the gully] back in the direction of . . . Officer Norton." (ECF 255 at 240:21-241:6.) While Deputy Byron should have seen Officer Norton from the concrete pad upon first arriving, Deputy Byron should only have seen Officer Norton on his phone after the shooting. While in the gully, Deputy Byron likely would not have been able to see Officer Norton on the hill. (*Id.* at 242:16-21; Site Visit.) This evidence suggests that Deputy Byron saw Officer Norton both upon entering and exiting the gully but is confusing the exact time with when he saw Officer Norton on his phone; Deputy Byron must have seen Officer Norton on his phone while leaving, rather than entering, the gully. (Def. Ex. 31 at 8 (Officer Norton referring to how other officers "can see me right now" during his report of the shooting to dispatch).) Deputy Byron's testimony does not suggest that he arrived at the concrete pad after the shooting, however, because he had to have been by the concrete pad at approximately 11:25:30 a.m. to observe the "runner in blue," as discussed in Section C7, immediately below.

proceeded was quite deep, with steep slopes on both sides, making for rough going. (Site Visit; *see* ECF 255 at 241:7-14 (Deputy Byron testifying "it was rough getting up through" the gully).) Deputy Byron testified that Trooper Young had also exited his vehicle and left the service road to search for Mr. Murray on foot, and more specifically that he and Trooper Young had been at both sides of the gully, but that they were both moving towards the location where they had seen Officer Norton on the hill. (ECF 255 at 240:21-242:2.) Deputy Byron never fully crossed the gully or climbed out on the other side. (*See id.* at 241:23-242:2 (Deputy Byron testifying to going "up and downhill" but never testifying he fully crossed the gully).) At some point after entering the gully, Deputy Byron, who could no longer see Officer Norton, briefly saw Mr. Murray before he disappeared behind some brush. (*Id.* at 242:13-243:5.)

Trooper Young did not recall getting out of his vehicle, walking anywhere, or speaking with any other officers; instead, he recalled driving halfway down the oilfield-service road off Turkey Track Road to search visually for Mr. Murray. (ECF 255 at 200:9-204:3, 220:17-221:2; Def. Ex. 136 (the location marked "CY2").)

Trooper Young's recollection is faulty or incomplete. During the site visit, the Court stopped along the service road at the location at which Trooper Young testified he had stopped his vehicle to scan for Mr. Murray. The view from that location was blocked by a rise and a protruding boulder. Trooper Young cannot have seen anything from the location at which he testified he had stopped his vehicle. (Site Visit.) Trooper Young's message to dispatch concerning the "runner in blue" (see Section C7, immediately below), however, reflects that Trooper Young must have had a clear view to the west of wherever he stopped. Even if Trooper Young did stop midway down the service road, he ultimately proceeded to the concrete pad at the dead-end of the service road, near where Deputy Byron had stopped, from which he would have had a clear view to the west and north. On these facts, Trooper Young would have had time to speak with Deputy Byron in person; this conclusion also explains the later radio communications he had with Deputy Byron about the "runner in blue," indicating that Trooper Young and Deputy Byron must have separated. Given that Trooper Young later would twice radio dispatch about moving downwards or towards the gully (Def. Ex. 31 at 7, 9), it is likely he did not immediately enter it; rather, he likely first searched the area immediately adjacent to the concrete pad. In any case, he did not simply remain in his vehicle either on the oilfield-service road or at the concrete pad.

7. The "Runner in Blue"
11:25:46 a.m. – 11:26:20 a.m.

While searching for Mr. Murray, Deputy Byron and Trooper Young had access to their radios and could speak with each other and with dispatch. (ECF 255 at 202:12-24, 242:3-12.) One of these transmissions reflects the last time someone other than Officer Norton saw Mr. Murray before the shooting. This conclusion is contrary to the plaintiffs' assertion that the transmission reflected that Deputy Byron and Trooper Young were observing and referring to Officer Norton during their radio communications.

At 11:25:46 a.m., an unidentified voice, per the dispatch transcript, asked on the radio "the runner in blue – who is that?"[15] (Def. Ex. 31 at 7; Def. Ex. 134 at 32:58-33:04.) At 11:25:58 a.m., the same unidentified officer asked for "Officer Craig," who responded, "go ahead." The unidentified voice then asked again "[w]ho's the runner on foot in blue?" (Def. Ex. 31 at 7; Def. Ex. 134 at 33:09-33:15.) A person identified by the transcript as "Craig" responded "I don't know. He's off to the west side of the road. I'll circle around down below." (Def. Ex. 31 at 7; Def. Ex. 134 at 33:15-33:23.) A further transmission was made at 11:26:20 a.m. by an "[u]nknown voice," per the dispatch transcript, stating "[t]he blue is probably going to be the passenger." (Def. Ex. 31 at 7; Def. Ex. 134 at 33:30-33:35.)

These transmissions raise four questions. Who was the "unidentified voice" that asked at 11:25:46 a.m. about the "runner in blue," who answered that person, who was the "unknown voice" who commented at 11:26:20 a.m. that the runner was likely the passenger, and finally who was the "runner in blue"? If it was Mr. Murray, these radio transmissions would indicate the last time someone other than Officer Norton saw Mr. Murray unharmed and unhindered.

The unidentified voice must have been Deputy Byron, as he was the only other person who could have seen a "runner in blue" and asked about him. Officer Norton was off duty and did not have a police radio with him, so he could not have been the speaker. Trooper Swenson was not searching for Mr. Murray and was not near the shooting scene, so he would not have seen a "runner in blue." (ECF 254 at 65:24-67:3 (Trooper Swenson explaining his investigation of the crash scene); *see also* Def. Ex. 31 at 10 (Trooper Swenson asking after the shooting if the other officers "need my assistance where you're at" and Trooper Young replies "[n]egative").) Trooper Swenson also likely would have asked for Trooper Young or used Trooper Young's call sign; as a fellow trooper, he would not have asked for "Officer Craig." Although Officer Davis did at one point see Officer Norton, who was also in blue, at the top of a hill, he cannot have been the speaker. (Def. Ex. 132; *see also* ECF 254 at 93:25-94:13, 99:5-15.) There is no indication that Officer Davis knew that Trooper Craig Young was on-scene until after the shooting. Additionally, Officer Davis "didn't know" Trooper Young, so he would not have recognized Trooper Young's call sign if he heard it used over the radio. (ECF 254 at 87:14-21, 111:14-16.) Without knowing Trooper Young was on-scene, Officer Davis would have had no reason to ask for "Officer Craig" on the radio. Additionally, if Officer Davis asked about a runner in blue and was told the runner was likely to be the passenger he was pursuing, it would not have made sense for him to have kept driving down the oil service road and away from the scene. Finally, the "unidentified voice" cannot have been Trooper Young, as Trooper Young, as outlined below, was the person that answered the question posed. Although Deputy Byron listened to the recording and testified that he did not believe it was his voice on the recording

[15] While the transcript identifies the 11:25:46 a.m. voice as an "[u]nknown voice" and the 11:25:58 a.m. speaker as an "[u]nidentified voice," the audio of the two transmissions reflects that these two transmissions were made by the same speaker. (Def. Ex. 31 at 7; Def. Ex. 134 at 32:58-33:15.) This single speaker is therefore referred to as the "unidentified voice" to differentiate him from the 11:26:20 a.m. speaker, whom the transcript also identifies as an "[u]nknown voice." (Def. Ex. 31 at 7; Def. Ex. 134 at 33:30-33:35.)

(ECF 255 at 256:9-257:17), process of elimination leads to the conclusion that the unidentified voice asking about the "runner in blue" was Deputy Byron.[16]

The person who answered the "unidentified voice" must have been Trooper Young. Deputy Byron had asked for "Officer Craig," and "Craig" responded "go ahead." (Def. Ex 31 at 7.) The only Craig at the scene was Trooper Craig Young. Further, the parties have stipulated that the "dispatch transcript[ ] is a true and accurate transcription of the dispatch audio from April 1, 2007." (ECF 232 at ¶ 46.) That transcript reflects that it was "Craig" who answered the question about who the "runner in blue" was. The most likely conclusion is that it must have been Trooper Young who answered the question about the "runner in blue," meaning he cannot have been the unidentified voice who asked the question.

The "[u]nknown voice" that stated "[t]he blue is probably going to be the passenger" also most likely was Trooper Young. The unknown voice most resembles the speaker identified in the transcript as "Craig." It is notably different from the prior unidentified voice, who had inquired about the "runner in blue" and differs from the recorded voice of Trooper Swenson, identified in the transcript by his call sign, 135. While the voice might have belonged to Officer Davis, it would seem odd for him to comment on this one point when the only person he has ever claimed to have seen before the shooting, other than Trooper Swenson, is Officer Norton. (Def. Ex. 132.) Further, although Officer Davis's call sign is unknown, no officer with an unidentified call sign was commenting on the pursuit at this time (Def. Ex. 31 at 6-9), and it would have been odd for Officer Davis to chime in solely to make this one point when he never saw Mr. Murray before the shooting. For similar reasons, it is unlikely that some other, unknown officer who was listening to the radio suddenly voiced an opinion as to who the "runner in blue" likely was.

Despite this finding that the unknown voice was Trooper Young's, the 11:26:20 a.m. transmission does not indicate if Trooper Young could still see the "runner in blue." While it is possible Trooper Young still saw the "runner in blue" at 11:26:20 a.m., the last time the evidence reflects for certain that someone saw the "runner in blue" was shortly after 11:26:00 a.m. (Def. Ex. 134 at 33:15-33:23.)

[16] Deputy Byron appeared to testify that "Trooper Young" was the voice in the 11:25:58 a.m. portion of the transcript asking about the "runner in blue." (ECF 255 at 256:9-257:19.) Trooper Young, however, is already identified in the transcript as responding, "go ahead" to the unidentified voice asking for "Officer Craig?" (Def. Ex. 31 at 8.) Although Deputy Byron's attention was drawn to the unknown voice portion of the transcript, it is possible that Deputy Byron was explaining who he thought had said "I don't know. He's off to the west side of the road. I'll circle around down below," rather than testifying as to who he thought the "[u]nidentified voice" was. Notably, Deputy Byron was never directly asked who he thought the unknown voice was or who he thought the speaker asking for "Craig" was, despite the relevant audio clip and transcript containing two different and distinct voices. (ECF 255 at 256:9-257:19; Def. Ex. 31 at 7; Def. Ex. 134 at 33:09-33:25.) It would also be understandable for Deputy Byron not to recognize his own voice from an almost-17-year-old recording of middling quality.

Left for resolution is the question of who was the "runner in blue." The evidence shows that it was Mr. Murray, who was therefore last seen unharmed and unhindered by someone other than Officer Norton at approximately 11:26:00 a.m.

The plaintiffs have argued that the "runner in blue" is Officer Norton because "he was wearing blue, and Mr. Murray was not." (ECF 261 at 6.) The plaintiffs provide no citation to the record to support their assertion that Mr. Murray was not wearing blue. Contrary to the plaintiffs' assertion, a photograph of Mr. Murray taken at the scene after the shooting shows him wearing a dark blue or navy button-up shirt. (Def. Ex. 102.) Based on their mistaken premise, the plaintiffs argue that Officer Norton and Trooper Young cannot have spoken before the shooting, as Trooper Young would otherwise have had no reason to ask who the "runner in blue" was if he had just spoken to and observed Officer Norton in his blue clothing. (ECF 261 at 6 n.4.) The plaintiffs also argue that, because Deputy Byron did not recognize the voice of the person asking, "who's the runner in blue," as his own the voice must have been Trooper Young's. (*Id.* (citing ECF 255 at 256:19-257:17).) As explained, however, the "unidentified voice" asking about the "runner on foot in blue" was Deputy Byron, not Trooper Young.

The transmission from Trooper Young indicates that the "runner in blue" was Mr. Murray. Trooper Young spoke with Officer Norton just minutes earlier (ECF 198 at 83:25-84:7; ECF 254 at 127:23-128:17, 129:7-14; Def. Ex. 31 at 8), so he should have recognized the runner as Officer Norton if it was Officer Norton. He did not, instead saying they are "probably going to be the passenger." (Def. Ex. 31 at 7.)

The conclusion that the "runner in blue" was Mr. Murray is also further confirmed by Deputy Byron's written police report. (Def. Ex. 2.) In that report, Deputy Byron noted that he had asked Trooper Young after arriving at the concrete pad at the end of the oilfield-service road who the person in view standing on a hill was, and Trooper Young had identified the person as Officer Norton. (*Id.* at 9.) The dispatch transcript contains no radio communication in which anyone identifies Officer Norton on the hill, indicating that Deputy Byron asked Trooper Young two questions: one in-person about a man he observed on a hill, and a second on the radio about a "runner in blue." It would have been odd for Deputy Byron to have asked Trooper Young twice about the same person when Trooper Young had identified the first as Officer Norton (*id.*), and the other as "probably" the passenger. (Def. Ex. 31 at 7.) This evidence indicates that the "runner in blue" and the person on the hill were two different people, *i.e.*, Mr. Murray and Officer Norton.

At 11:26:00 a.m., the "runner in blue" was unharmed, running, and not near an officer. Neither Deputy Byron nor Trooper Young indicated over the radio that they observed anyone else standing next to or close to Mr. Murray at the time they observed him. Neither indicated, either over the radio that day or since that day, that Officer Norton, whom they both knew (ECF 198 at 84:16-23), and to whom Trooper Young had already spoken, was close to the "runner in blue." In addition, neither Trooper Young nor Deputy Byron reported over the radio that either observed Officer Norton and the "runner in blue" to have been close to each other. The reference to Mr. Murray as a "runner" indicates that Mr. Murray was running and not being held at gunpoint, lying on the ground, or using a firearm. Based on the term Deputy Byron and

Trooper Young used to describe him, a "runner," Mr. Murray was apparently still seeking to evade capture and flee the scene.

The evidence reflected in the dispatch transcript shows conclusively that Mr. Murray was unharmed and not close to or interacting with any officer as late as 11:26:00 a.m.

After observing the "runner in blue," Trooper Young proceeded on foot in the direction of the gully. (Def. Ex. 31 at 7; Def. Ex. 134 at 33:15-33:23 (Trooper Young's 11:26:02 a.m. report that he was going to "circle around down below").) This conclusion is confirmed by Trooper Young's transmission at 11:27:38 a.m. that he was "gonna [ ] be on foot. I'll be just west with [Deputy Byron]." (Def. Ex. 31 at 9; Def. Ex. 134 at 34:50-35:12.) At that time, Trooper Young reported that he could no longer see Mr. Murray because he had "a big gully here" blocking his view. (ECF 255 at 224:25-225:6; Def. Ex. 134 at 34:50-35:12.)

Based on the terrain at the scene, the gully could only have obstructed Trooper Young's view if he had already entered it. (Site Visit.) If he had remained at the concrete pad or its immediate vicinity, which was elevated above the terrain and the gully, Trooper Young should have had a clear view of Officer Norton and probably could have observed Mr. Murray. Because Trooper Young did not report to dispatch that he saw Mr. Murray when he was shot, he must have been in the gully at the approximate time of the shooting.

Deputy Byron must also have been in the gully at the time of the shooting. Deputy Byron's testimony was that he remained in the gully until he briefly saw Mr. Murray from several hundred yards away; Mr. Murray then disappeared behind some brush. (ECF 255 at 242:13-243:5.) At that time, Deputy Byron could no longer see Officer Norton. Based on the terrain, Deputy Byron's inability to see Officer Norton only makes sense if Deputy Byron was in the gully. (*Id.*; Site Visit.) Because he thought "it was just an unknown situation at that point," Deputy Byron decided to back out of the gully. (ECF 255 at 243:3-5.) At around the same time he decided to back out of the gully, Deputy Byron testified that he also thought that he may have heard either a radio report of "shots fired" or the shots themselves being fired. (*Id.* at 243:6-13, 258:14-21.) In either case, Deputy Byron did not observe the shooting of Mr. Murray. Given the terrain, Deputy Byron's failure to observe the shooting makes sense only if Deputy Byron was, like Trooper Young, still in the gully when Mr. Murray was shot.

8. Officer Norton's Actions Before the Shooting 11:24:30 a.m. – 11:26:00 a.m.

Having examined where every on-scene officer was before the shooting, the question remains as to where Officer Norton was and what he did. After speaking with Trooper Young and seeing Deputy Byron arrive at approximately 11:24:30 a.m., Officer Norton continued to jog up and over a hill looking for Mr. Murray; he did not thereafter see or hear any other officers arrive to the scene until after the shooting. (ECF 254 at 129:15-130:1.)

Officer Norton was proceeding towards the site where the shooting would take place. (*Id.* at 130:2-8.) After cresting the hill, Officer Norton would eventually see Mr. Murray, but it

is unclear from his testimony how much time elapsed before he observed Mr. Murray. (ECF 198 at 87:4-8, 16-22.)

The shooting cannot have occurred before 11:26:00 a.m. because, as noted, Deputy Byron and Trooper Young saw Mr. Murray unharmed at that time. The events of the shooting also must have been completed by 11:27:29 a.m., as the parties agree that Officer Norton notified dispatch of the shooting after it occurred. (ECF 260 at ¶¶ 41-50; ECF 261 at 8 (emphasis added) (noting that "[*a*]*fter the shooting*, Norton telephoned dispatch to report a shooting").)

Officer Norton's account suggests that he encountered and was fired at by Mr. Murray soon after he crested the hill. Although Officer Norton initially estimated that he encountered Mr. Murray after jogging 75 yards away from where he had spoken to Trooper Young, he testified that he later used Google Earth to estimate that the distance from his vehicle to where his shell casings would be found was approximately 161 yards. (ECF 198 at 82:25-83:15; ECF 254 at 130:2-8.)

This chronology leaves a blank space in Officer Norton's account as to what he was doing for the at-least 90-second-long period after he had left the other officers, but before Mr. Murray could have encountered Officer Norton, just after 11:26:00 a.m. at the earliest.

Part of this time would have been simply taken up by Officer Norton jogging the approximately 160 yards from near his vehicle to where he first saw Mr. Murray. Especially given the rough terrain in the area, jogging 160 yards would have taken longer than jogging it over a flat and hard surface. (Site Visit.) Further, Officer Norton is likely to have jogged more than his estimate of 161 yards, because, given the uneven terrain, there is no reason to think he would have jogged in a straight line directly to the crest of the hill and down to where he would first spot Mr. Murray. (Site Visit.)

An additional portion of the unaccounted-for time was probably consumed by Officer Norton standing at the crest of the hill and surveying the area from that high point. He may alternatively have moved briefly south along a ridgeline before returning to the crest of the hill and heading down over the crest. If Officer Norton had briefly paused at or near the crest of the hill, it would explain why Deputy Byron and Officer Davis saw Officer Norton on the hill sometime between 11:25:30 a.m. and 11:26:00 a.m. (ECF 255 at 240:21-241:6, 260:15-261:5 (Deputy Byron testifying he saw Officer Norton on the hill); Def. Ex. 132 (Officer Davis's report stating he saw Officer Norton on a hill); *see also* ECF 254 at 99:5-15 (Officer Davis testifying "I guess I would have s[een Officer Norton] as I was going out to the dead-end road," *i.e.*, before the shooting).)

The gap in the chronology as to Officer Norton's location and actions is further explained by the fact that Officer Norton was never asked about his actions during this period. The questions to him focused on his actions from when he crested the hill and first observed Mr. Murray; he was not questioned about the initial aspects of his search for Mr. Murray before he saw him and whether he paused, even briefly, on the hill. (ECF 198 at 82:25-83:15; ECF 254 at 130:2-10.) The gap may also be explained by the stress and demands of the situation. Officer Norton was searching for the fleeing passenger; he was not paying close attention to the time.

Thereafter, he was involved in a shooting, so the timeline of his search for Mr. Murray would not have been foremost in his recollection of the events surrounding the shooting; in retrospect it could easily have seemed to Officer Norton as if he was involved in the shooting immediately after cresting the hill.

D. The Shooting
11:26:00 a.m. – 11:27:29 a.m.

Because the events described in this subsection go to the heart of the dispute in the case, the findings of fact made in this section reflect those on which the parties agree or summarize the parties' respective contentions; they do not reflect a determination as to what occurred or who shot Mr. Murray. To preserve the chronological account of the events, this section presents the parties' explanations of what occurred but does not make any findings of fact based on Officer Norton's testimony. The parties' disagreements over the events of the shooting of Mr. Murray are resolved *infra* at 47-53. To contextualize the parties' contentions, however, the distance between the location at which shell casings from Officer Norton's .40 Glock would later be found and the location at which Officer Norton left his vehicle was approximately 161 yards. (ECF 254 at 130:2-8.) The distance between where the .40 shell casings were found and where Mr. Murray had fallen was approximately 113 yards. (*Id.* at 162:19-24; Def. Ex. 137.) Sound carried well between those two locations, such that Mr. Murray should have been able to hear clearly any commands or instructions yelled by Officer Norton during their encounter, regardless of how far apart they were. (Site Visit.) The distance between the location at which Mr. Kurip had crashed and the location of the .40 shell casings was approximately 256 yards. (Def. Ex. 137.)

Mr. Murray suffered a contact gunshot wound to the head on April 1, 2007. (ECF 232 at ¶ 27.) The shooting occurred, based on the findings above, sometime after 11:26:00 a.m. The plaintiffs do not dispute that the shooting took place before Officer Norton reported to dispatch at 11:27:29 a.m. that shots had been fired. (ECF 261 at 8 (emphasis added) (stating that "[*a*]*fter the shooting*, Norton telephoned dispatch to report a shooting"); *see* Def. Ex. 31 at 8 (transcript of Officer Norton's report).) The defendant also agrees that the shooting took place before Officer Norton reported the shooting to dispatch. (ECF 260 at ¶¶ 41-50.)

In short, based on the prior findings, Mr. Murray was unhurt at 11:26:00 a.m. Both parties agree that Mr. Murray was shot before 11:27:29 a.m. The parties otherwise disagree as to what happened after Officer Norton saw Mr. Murray.

The plaintiffs have proposed almost no findings or conclusions about how the shooting occurred, let alone how Officer Norton and Mr. Murray encountered one another. (ECF 261 at 8-9.)[17] According to the plaintiffs' proposed findings of fact, Officer Norton's pursuit of Mr.

[17] The plaintiffs' proposed findings effectively forfeit the entirety of their claims preserved for (*see* footnote 2, *supra*) and presented at trial. The plaintiffs failed to propose any findings as

Murray was improper because officers had no reason to suspect that Mr. Murray had committed a crime. (*Id.* at 4-6.) The plaintiffs implicitly assert that, after initiating the improper pursuit, Officer Norton confronted Mr. Murray and shot him in the head. The plaintiffs have proposed no finding as to how Mr. Murray and Officer Norton encountered each other. (*Id.* at 4-8.) The plaintiffs clarified at the hearing on January 18, 2024, that they are contending, without reference to specific evidence to support their view, that Officer Norton and Mr. Murray encountered each other on foot at a close distance after Mr. Murray had rounded a hill. Although they are not explicit about what then occurred, implicit in the plaintiffs' contention is that Officer Norton either simply approached Mr. Murray and shot him in the head with his .40 Glock handgun or that Officer Norton and Mr. Murray had an altercation during which Officer Norton put his .40 Glock handgun to Mr. Murray's head and fatally shot him, in either case without just cause.

The plaintiffs rely on the spoliation sanction that the .380 Hi-Point found at the scene on the ground close to Mr. Murray to argue that that weapon was not used to fire the fatal shot, meaning that shot could only have come from Officer Norton's .40 Glock. (*Id.* at 8, 14-20.) Even as they point to the alleged *actus reus* by Officer Norton in shooting Mr. Murray, the plaintiffs have made no allegations and proposed no findings as to Officer Norton's *mens rea* or any elements related to Officer Norton's state of mind in shooting Mr. Murray. Other than relying on the spoliation sanction to argue that the .380 Hi-Point was not used by Mr. Murray (*id.* at 16-20), the plaintiffs do not suggest or explain how the .380 Hi-Point or the associated shell casings came to be found at the scene of the shooting.

to how and why the shooting of Mr. Murray came about, or even a finding that Officer Norton shot Mr. Murray. These facts are essential to the allegation that Officer Norton is culpable for Mr. Murray's death. The plaintiffs' proposed findings even omit any reference to what is, arguably, their best evidence: that Mr. Murray was right-handed but was shot in the left side of his head (although the plaintiffs did indirectly mention that point during their closing argument (ECF 259 at 642:14-20)). These omissions are not isolated events. The plaintiffs' proposed findings of fact (ECF 261) and their closing summary (ECF 259 at 633:11-644:22, 659:18-668:18), in line with their pre-trial contentions (ECF 223), were vague, at best, on many of the details as to when the shooting occurred, how Mr. Murray and Officer Norton came upon each other, and how the shooting actually occurred. The plaintiffs have failed to show how the facts demonstrate the elements required for the commission of any specific offense as required for liability under the bad men provision of the Ute Treaty. Instead, as has been their consistent approach throughout this case, the plaintiffs contend that the absence of facts proves their case. The plaintiffs' case is largely predicated on the spoliation sanction and on innuendo that the failure by the FBI to conduct a thorough investigation left evidence of criminality by Officer Norton unrecovered. Because an allegation of homicide is implicit in the plaintiffs' case and has been their central contention throughout both this case and the civil rights case in the District of Utah, their failure to present proposed findings on the facts necessary to prove all the elements of the claims of homicide and assault will not prevent a resolution of those claims. The plaintiffs' failure will not be overlooked, however, as to crimes other than assault and homicide, as will be detailed below.

The defendant, by contrast, argues that events occurred in line with Officer Norton's testimony. According to the defendant, after Officer Norton crested the hill near the intersection of Turkey Track and Seep Ridge Roads, he saw Mr. Murray about 120-130 yards away from him to the west, down the hill. (ECF 260 at ¶ 34 (citing ECF 198 at 87:18-21).) Officer Norton saw Mr. Murray holding something black in his hands, causing Officer Norton to draw his gun, keep it at a low-ready position pointed in Mr. Murray's direction but not directly at him. Officer Norton, concerned about his own safety, then yelled "Police, get on the ground[!]" (*Id.* at ¶¶ 35-36 (citing ECF 198 at 89:15-21, 93:5-14, 153:20-22; ECF 254 at 153:20-25).) Mr. Murray continued to jog towards Officer Norton, causing him to fear that Mr. Murray may have been heading back towards Trooper Swenson to harm him. (*Id.* at ¶¶ 37-38 (citing ECF 198 at 93:5-14; ECF 254 at 90:5-12).) Mr. Murray then spotted Officer Norton, raised his arm, and fired two shots at Officer Norton. One of the bullets struck the ground below Officer Norton. (*Id.* at ¶¶ 41-42 (citing ECF 198 at 93:19-94:3; ECF 254 at 131:11-21).) Officer Norton returned fire, shooting two shots from his .40 Glock at Mr. Murray. He observed that his shots missed Mr. Murray and hit sandstone rocks. Officer Norton then turned and retreated 30-40 yards back, away from Mr. Murray to the reverse slope of the hill, a location he thought was a safer distance of approximately 150-160 yards and provided some cover against Mr. Murray at the bottom of the hill. (*Id.* ¶¶ 43-44 (citing ECF 198 at 93:19-94:3; ECF 254 at 132:4-8, 132:18-133:14).)

After retreating, Officer Norton attempted to call dispatch on his cell phone but kept misdialing the number due to the stress of events. He was also shouting at Mr. Murray to put the gun down. (*Id.* at ¶¶ 46-47 (citing ECF 198 at 94:2-3, 95:2-7).) From about 150 to 160 yards away, Officer Norton saw Mr. Murray put his own gun to his head, hold it there briefly, pull the trigger, and fall to the ground. (*Id.* at ¶¶ 46, 48-49 (citing ECF 198 at 91:25-92:6, 94:2-3, 95:8-17, 98:16-17); Def. Ex. 101 at 2.) Officer Norton holstered his weapon and successfully called dispatch to report that shots had been fired and the suspect was down after shooting himself in the head." (ECF 260 at ¶¶ 49-50 (citing ECF 198 at 91:25-92:6, 95:8-14); *see also* ECF 31 at 8.)

According to the parties' agreed-upon dispatch transcript, in addition to reporting what happened, Officer Norton requested the other officers at the general location and his "supervisor, chief, and everybody" come to his location along with an ambulance. (Def. Ex. 31 at 8.) Notably, Officer Norton informed dispatch that the other officers on the scene "can see me right now." (*Id.*) Officer Norton described where his vehicle was parked and asked dispatch to "[t]ell Craig to come back to where he saw me and I talked to him." (*Id.*)

E. Timeline of Key Events Leading up to the Shooting

The evidence outlined above establishes the following timeline for events leading up to the shooting that occurred on April 1, 2007:

10:52:49 a.m.	Trooper Swenson begins pursuing the vehicle driven by Mr. Kurip. (Def. Ex. 134 at 0:00.)
11:20:25 a.m.	The vehicle driven by Mr. Kurip crashes at the intersection of Seep Ridge Road and Turkey Track Road. (Def. Ex. 134 at 27:27-27:43.)

11:20:47 a.m.	Trooper Swenson contacts dispatch to report that he had "two runners out. Both tribal males." (Def. Ex. 31 at 6; Def. Ex. 134 at 27:35-28:13.)
11:22:16 a.m.	Trooper Swenson reports to dispatch that he had removed the keys from the crashed vehicle and that he was pursuing a person (Mr. Kurip) who was fleeing north from the crashed vehicle, and that another person (Mr. Murray) was fleeing south. (Def. Ex. 31 at 6; Def. Ex. 134 at 29:20-29:51.) At this time, Trooper Swenson was in his vehicle in pursuit of Mr. Kurip. (Def. Ex. 134 at 29:20-29:28.)
11:22:35 a.m.	Trooper Swenson exits his vehicle on Seep Ridge Road south of the intersection with the Turkey Track to pursue Mr. Kurip on foot off-road heading west. (ECF 254 at 57:15-58:9; Def. Ex. 134 at 29:40-29:48.)
11:23:40 a.m.	Trooper Swenson reports to dispatch that he has apprehended Mr. Kurip. (Def. Ex. 31 at 7; Def. Ex. 134 at 30:50-30:56.)
11:23:20 a.m. – 11:24:00 a.m.	Officer Norton arrives and speaks briefly with Trooper Swenson before exiting his vehicle on the Turkey Track, just past the intersection with Seep Ridge Road. (ECF 254 at 32:8-20, 58:25-60:24, 126:9-18, 127:23-128:8; ECF 255 at 204:4-11, 205:17-206:16; Def. Ex. 136 (near the location marked "Tu" in the northernmost reference to "Turkey Track" noted on the exhibit).)
11:23:45 a.m. – 11:24:15 a.m.	Trooper Young arrives and speaks with Trooper Swenson before driving to Officer Norton's location, speaking with him, and deciding each to search in different directions. (ECF 198 at 83:25-84:7; ECF 254 at 127:23-128:17; ECF 255 at 204:4-11, 205:17-206:16; Def. Ex. 31 at 8 (indicating Officer Norton and Trooper Young spoke before the shooting); Def. Ex. 136 (near the location marked "Tu" in the northernmost reference to "Turkey Track" noted on the exhibit).)
11:24:00 a.m. – 11:24:30 a.m.	Deputy Byron arrives and sees Officer Norton jogging away from Trooper Young. Deputy Byron and Trooper Young speak briefly and drive down the Turkey Track. (ECF 198 at 83:25-84:7; ECF 254 at 129:15-23, 150:18-20; ECF 255 at 238:23-240:10, 255:18-256:5, 257:20-22; Def. Ex. 2 at 9 (Deputy Byron's report indicating he saw "an individual running up a hillside" as he was arriving on scene, before he arrived at the concrete pad.)
~11:25:30 a.m.	Trooper Young and Deputy Byron, having made a right onto a service road, arrive at a concrete pad with a good view of where the shooting would take place, but that has a deep wash or gully between the two locations. (ECF 255 at 200:8-201:13 (Trooper Young referring to the service road as "an okay road"), 201:20-23, 220:17-221:3, 240:6-17, 258:1-13, 261:10-262:14; Def. Ex. 136; Site Visit.)
11:25:00 a.m. – 11:26:00 a.m.	Officer Davis arrives, speaks with Trooper Swenson, and proceeds down the Turkey Track. He does not see Deputy Byron or Trooper Young before the shooting, driving past the service road they turned onto. At some point while driving, Officer Davis sees Officer Norton on a hill. (ECF 254 at 80:12-81:12, 82:3-20, 93:25-94:13, 99:5-15; Def. Ex. 132.)

11:25:30 a.m. – 11:26:00 a.m.	Deputy Byron and Trooper Young see Officer Norton on top of a hill. (ECF 255 at 240:18-241:6, 260:15-261:5; Def. Ex. 2 at 9 (indicating Trooper Young identified Officer Norton to Deputy Byron).) Trooper Young searches near the concrete pad while Deputy Byron enters the gully. Deputy Byron never fully crossed the gully or climbed out on the other side. (ECF 255 at 240:18-242:2; Def. Ex. 31 at 7, 9.)
11:25:46 a.m. – 11:26:20 a.m.	Deputy Byron radios Trooper Young asking who the "runner in blue" is. Trooper Young responds, initially being unsure who the person was before identifying them as likely being the passenger (Mr. Murray). Trooper Young could see Mr. Murray unharmed and running at 11:26:00 a.m. (Def. Ex. 31 at 7; Def. Ex. 134 at 32:58-33:35.) Trooper Young enters the gully in pursuit. (Def. Ex. 31 at 7, 9; Def. Ex. 134 at 33:15-33:23, 34:50-35:12.)
11:26:00 a.m. – 11:27:29 a.m.	Officer Norton and Mr. Murray encounter each other. Mr. Murray either shoots himself or is shot by Officer Norton. (ECF 260 at ¶¶ 41-50; ECF 261 at 8; Def. Ex. 31 at 8.)
11:27:29 a.m.	Officer Norton calls dispatch to report the shooting. (Def. Ex. 31 at 8.)

F. The Immediate Aftermath of the Shooting

1. Deputy Byron and Trooper Young Return to the Scene 11:28:27 a.m. – ~11:33 a.m.

At 11:28:27 a.m., dispatch reported "shots fired" and advised that Officer Norton "needs officers." (Def. Ex. 31 at 9; Def. Ex. 134 at 35:33-35:46.) Upon either hearing the report of "shots fired" or hearing the shots themselves, Deputy Byron and Trooper Young returned to their vehicles. (ECF 255 at 203:3-10, 242:13-243:18; Def. Ex. 2 at 9.)

At 11:29:09 a.m., dispatch informed Trooper Young that Officer Norton "advises [you] to go back where you talked to him and you'll see him." (Def. Ex. 31 at 9; Def. Ex. 134 at 36:21-27.) Trooper Young acknowledged the transmission, responding to dispatch, "we have a visual of him on the hill. Did you say shots fired?"[18] (Def. Ex. 31 at 9; Def. Ex. 134 at 36:27-36:33.) Deputy Byron and Trooper Young then proceeded separately in their vehicles back to

[18] At trial, Trooper Young listened to the recording of this transmission and testified that it was not his voice, but that it might have been Deputy Byron's. (ECF 255 at 225:15-24.) Nevertheless, the parties stipulated to the accuracy of the transcript, and that stipulation is accepted here when the speaker is in doubt. (ECF 232 at ¶ 46.) Regardless, although not noted on the transcript, the speaker on the recording says, "*we* have a visual." (Def. Ex. 134 at 36:27-36:33 (emphasis added).) This use of the first-person plural indicates that the speaker was close enough to a second individual to employ the plural. Thus, even if the speaker was Deputy Byron and not Trooper Young, the speaker contemporaneously knew that they were both able to observe Officer Norton from their location.

the location where Trooper Young had seen Officer Norton when he first arrived at the scene. (ECF 255 at 206:17-21, 243:22-244:9; Def. Ex. 9.)

At 11:29:38 a.m., Trooper Swenson, after being asked for an update on the location by an unidentified speaker, responded "this is at the Turkey Trail [*sic*] where it divides. Out on foot. A motorist did stop and there has [*sic*] been shots fired." (Def. Ex. 31 at 9; Def. Ex. 134 at 36:50-36:58.)

After hearing Trooper Swenson's 11:29:38 a.m. report that shots had been fired, Officer Davis also began to return by car to the intersection of Turkey Track Road and Seep Ridge Road. (ECF 254 at 83:20-84:16; Def. Ex. 132 (noting that Officer Davis heard Trooper Swenson report that shots had been fired); Def. Ex. 31 at 9; Def. Ex. 134 at 36:50-36:58.)[19]

Deputy Byron and Trooper Young arrived at the location at which Trooper Young had spoken to Officer Norton, near the scene of the crash. According to Deputy Byron, at this point Officer Norton was "down off the hillside." (ECF 255 at 243:22-244:3.) According to Trooper Young, Officer Norton was "up there" on a hill, but the general location he identified may have been a small hill near the crash site and was not the hill overlooking the site where the shooting of Mr. Murray had occurred. (*Id.* at 221:9-22; *compare* Def. Ex. 136 (the location marked "VN"), *with* Def. Ex. 137 (approximately 30 yards north of the location marked "Norton"); Site Visit.) The three officers spoke among themselves at a location just off the Turkey Track Road after Deputy Byron and Trooper Young had exited their vehicles. Mr. Murray was not visible from the site of the conversation. (ECF 255 at 244:10-245:1.) The officers then proceeded to the hill on which Officer Norton had been. From that location they could see Mr. Murray's body fallen on the ground more than 100 yards away. (Def. Ex. 137 (noting Mr. Murray was approximately 113 yards southwest of where Officer Norton's shell-casings were found); *see also* ECF 255 at 206:17-207:18, 222:7-23 (Trooper Young recalling that Mr. Murray was approximately 100 yards away from the top of the hill), 245:2-17 (Deputy Byron testifying that he and Trooper Young "worked our way around and we made our way down to where [Mr. Murray] was").) According to Trooper Young, Officer Norton told him that Mr. Murray had

[19] Although Officer Davis testified that he spent 15 to 30 minutes driving or being parked on Turkey Track Road, his testimony in this regard is unreliable, as even he appeared to acknowledge. (ECF 254 at 100:3-19.) Officer Norton arrived no earlier than 11:23:20 a.m.; he began reporting that shots had been fired by 11:27:29 a.m., and that report was shared by dispatch at 11:28:27 a.m. (Def. Ex. 31 at 8-9; Def. Ex. 134 at 35:33-35:46.) Even assuming, contrary to the evidence, that Officer Davis arrived right after Officer Norton and had taken almost five minutes to drive down Turkey Track Road and the oilfield-service road to search for Mr. Murray before hearing the report of shots fired, it cannot have taken him more than another five minutes (and probably far less time) to drive back up Turkey Track Road, for a total of 10 minutes maximum, well short of his 15 to 30 minute estimate.

fired two shots and then put his own gun to his head and shot himself.[20] (ECF 255 at 207:12-208:11.) Trooper Young communicated with dispatch at 11:31:19 a.m. to make sure that an ambulance was on the way. Based on this communication to dispatch, Trooper Young and Deputy Byron arrived at the top of the hill from which they had a view of Mr. Murray at approximately 11:31:00 a.m., some two and a half minutes after the initial report that shots had been fired. (ECF 255 at 207:12-18, 226:1-14 (Trooper Young testifying that he was "just coming over the hill" when he told dispatch to "[r]oll the ambulance"); Def Ex. 31 at 10 ("we've got a man down. Roll the ambulance"); Def. Ex. 134 at 38:30-38:37.)

Trooper Young and Deputy Byron then proceeded on foot down the hill with their guns drawn to secure Mr. Murray. (ECF 255 at 207:2-18, 208:12-16, 245:6-22.) Officer Norton did not accompany them. (ECF 254 at 138:18-22; ECF 255 at 207:7-8.) Mr. Murray was unconscious and bleeding from his head but was still breathing at this time. (ECF 232 at ¶ 29; ECF 255 at 208:17-23, 244:23-245:24.) Upon reaching Mr. Murray, Deputy Byron handcuffed him. Neither Deputy Byron nor Trooper Young rendered any first aid to Mr. Murray. (ECF 232 at ¶ 28; ECF 255 at 208:21-209:7, 246:5-247:2.) Close to Mr. Murray's side, Trooper Young and Deputy Byron observed two spent, copper-colored shell casings and a stovepiped handgun.[21] (ECF 255 at 223:4-21, 245:18-22.) After Deputy Byron handcuffed and frisked Mr. Murray, no one would disturb or move anything at the scene immediately near Mr. Murray until the ambulance arrived and its crew moved Mr. Murray. (ECF 255 at 247:3-248:4.)

Based on the distance of at least 113 yards, and perhaps as many as 140-150 yards, between where Trooper Young and Deputy Byron saw Mr. Murray from near the hill where Officer Norton had been and where Mr. Murray was lying, it likely did not take more than one and a half to two minutes, if even that long, for Trooper Young and Deputy Byron to approach

[20] Officer Norton testified that he had initially thought on April 1, 2007, that Mr. Murray had fired one shot at him and then put his own gun to his head and shot himself, and only later realized that Mr. Murray must have first fired two shots at him after seeing the physical evidence at the scene. (ECF 198 at 109:18-110:10; ECF 254 at 131:2-21.) Even if Officer Norton initially mistook the number of shots Mr. Murray fired at him, this mistake is not relevant and does not suggest that Officer Norton was lying. Importantly, Officer Norton has always been candid about his confusion regarding the number of shots fired; he has never testified that Mr. Murray fired only one shot. (*See* ECF 198 at 109:18-110:10; ECF 254 at 131:2-21.) A reasonable inference would be that Officer Norton did not notice one of the shots fired at him while returning fire and withdrawing from his exposed position, provided his testimony is otherwise credible.

[21] Given the spoliation sanction imposed on the defendant for its negligent destruction of the .380 Hi-Point handgun, *Jones VI*, 2023 WL 2681819, at *21, the Court does not at this time rely on the firearm, other than noting its presence at the scene, for any findings; the reference here and elsewhere to the stovepiped or jammed round in the handgun merely notes what the officers observed when they arrived at Mr. Murray's location.

and secure Mr. Murray. The scene of the shooting would have been secured by approximately 11:33 a.m.

2. Officer Davis Returns to the Scene 11:29:38 a.m. – ~12:20 p.m.

Meanwhile, Officer Davis was returning to the intersection of Turkey Track Road and Seep Ridge Road. He observed two police vehicles parked at the top of a small rise on Turkey Track Road and parked next to them. (ECF 254 at 84:9-21.) At this point, Officer Davis encountered Deputy Troy Slaugh by the vehicles, who told him that "it was all over." (*Id.* at 84:22-85:2, 86:15-87:10.) The record does not reflect when Deputy Slaugh arrived at the scene or how he knew anything about the shooting; Deputy Slaugh did not testify at trial.

Officer Davis exited his vehicle and proceeded on foot to the area where he had previously observed Officer Norton. (Def. Ex. 132.) Officer Davis "went over a rise" and saw Trooper Young and Deputy Byron from a couple of hundred yards away bent over the still-breathing Mr. Murray. (ECF 254 at 85:6-23, 86:15-87:12, 88:15-89:10; Def. Ex. 132.) Officer Davis did not recall seeing Officer Norton at that time and was unsure when he next saw Officer Norton. (ECF 254 at 85:6-8, 94:14-95:5.) According to Officer Norton, Deputy Slaugh encountered and spoke with him at the crest of the hill overlooking Mr. Murray's location. (*Id.* at 135:21-136:8, 140:1-8.) Officer Norton was uncertain whether Deputy Slaugh arrived at the scene of the shooting before or after Officer Davis. (*Compare id.* at 135:21-236:8 (Officer Norton testifying "Deputy Slaugh arrived shortly after" Officer Davis), *with id.* at 140:1-14 (referring to Officer Davis coming "into the scene" after Deputy Slaugh.)

Officer Davis proceeded down the hill to Mr. Murray's location. At that site, he observed a jammed handgun and two spent shell casings, which he stood by to protect until after the ambulance came and he was relieved. (*Id.* at 90:6-16, 105:10-13, 109:18-20; Def. Ex. 132.) Officer Davis did not touch or see anyone else touch the shell casings. (ECF 254 at 105:14-18.) Officer Davis estimated that he spent a total of 45 minutes at the scene by Mr. Murray. (*Id.* at 105:10-13.) After Mr. Murray was evacuated by ambulance, Officer Davis took GPS coordinates of where Mr. Murray had been lying, where the vehicle driven by Mr. Kurip had crashed, and the location at which he was told Officer Norton had been when Mr. Murray was shot. (*Id.* at 109:18-111:1, 112:17-113:12; Def. Ex. 132.)

3. Officer Norton Photographs the Scene ~11:33 a.m. – ~12:15 p.m.

After Mr. Murray was handcuffed, Officer Norton spoke briefly with Deputy Slaugh and possibly Officer Davis. (ECF 254 at 135:21-136:8, 140:1-14.) Officer Norton then went down to Mr. Murray's location to see what weapon Mr. Murray had allegedly used to shoot at him. (*Id.* at 140:1-8.) At this time, Officer Norton decided to photograph the scene before the ambulance arrived, because he thought the paramedics would possibly disturb evidence while treating and evacuating Mr. Murray. (*Id.* at 140:15-25.) Officer Norton returned to either the location of Deputy Slaugh or the site where Deputy Slaugh's vehicle was parked to retrieve Deputy Slaugh's digital camera to photograph the scene. While he photographed, Officer

Norton walked within a few feet of Mr. Murray. (*Id.* at 140:15-141:20.) After Trooper Young and Deputy Byron arrived, however, Officer Norton was never alone with Mr. Murray. Officer Davis stood by the evidence near Mr. Murray until the ambulance arrived. (*Id.* at 90:6-16, 101:13-24, 109:12-21.) Deputy Byron also stayed with Mr. Murray until he was removed by paramedics. (ECF 255 at 247:18-250:3.) Officer Norton took photographs of the .380 Hi-Point handgun with a stovepiped round found near Mr. Murray, of the bullet casings near Mr. Murray, and of Mr. Murray himself. (ECF 254 at 141:24-142:14, 158:21-159:11.) Deputy Slaugh may also have taken some photographs. (*Id.* at 142:3-10; ECF 255 at 282:19-283:4.)

Thereafter, Officer Norton returned with Deputy Slaugh to the location on the hill from which he had allegedly exchanged gunfire with Mr. Murray to look for the shell casings from his .40 Glock handgun. (ECF 254 at 161:20-162:2.) They found two shell casings on the ground, approximately 113 yards away from Mr. Murray. (*Id.* at 162:17-24.) The shell casings from Officer Norton's .40 Glock were silver colored and visually distinct from the copper-colored shell casings located near the .380 Hi-Point found near Mr. Murray. (*Id.* at 156:21-157:4; *compare* Def. Ex. 34, Def. Ex. 91, *and* Def. Ex. 92 (pictures of .40 shell casings), *with* Def. Ex. 96, *and* Def. Ex. 97 (pictures of .380 shell casings).)

4. Trooper Young Leaves the Scene of the Shooting for the Crash Scene 11:37:21 a.m. – ~12:45 p.m.

At 11:37:21 a.m., Trooper Young advised dispatch that Mr. Murray was unconscious but still breathing. (Def. Ex. 31 at 11; Def. Ex. 134 at 44:25-44:38.) At some point thereafter, but before the ambulance arrived, Trooper Young left the scene of the shooting and returned to the scene of the crashed vehicle to conduct an accident reconstruction, called "photogrammetry." Performing photogrammetry was standard practice at the time for vehicular police pursuits that ended in crashes. (ECF 255 at 210:6-212:11.) This process would typically take Trooper Young approximately one hour, although it could take more or less time. (*Id.* at 213:10-18.) Trooper Young was thereafter not involved with any of the documentation of the scene of the shooting. (*Id.* at 213:7-9.) Trooper Young does not recall where he went or what he did after completing the photogrammetry, but he eventually left the scene. (*Id.* at 213:19-25, 214:7-13.)

Crediting Trooper Young's testimony as to the accident reconstruction, it appears likely that Trooper Young completed the photogrammetry by approximately 12:45 p.m., and possibly even earlier based on the fact Trooper Young's incident report reflects that it was signed at 12:41 p.m. on April 1, 2007. (Def. Ex. 118 at 2.)[22]

[22] The timestamp for Trooper Young's signature may be wrong. His report notes that he had arrived at the scene at 11:32 a.m. (Def. Ex. 118 at 1.) Unless this timestamp refers approximately to when Mr. Murray was placed in handcuffs, this reference cannot be correct. As previously discussed, the dashcam footage and dispatch transcript show that Trooper Young must have arrived several minutes before 11:32 a.m. It therefore may be that the timestamp reflecting Trooper Young's completion of his report is also incorrect.

Although the record does not reflect when Trooper Young left the scene, there is no indication that Trooper Young saw or did anything of relevance after he completed the photogrammetry, other than prepare and sign his report.

5. The Ambulance Arrives and Deputy Byron Leaves the Scene ~11:56 a.m. – ~12:15 p.m.

An ambulance arrived at approximately 12:00 p.m., as it was reported to be a "couple minutes out" at 11:56:09 a.m. (Def. Ex. 31 at 13; Def. Ex. 134 at 1:03:00-1:03:25.) According to Deputy Byron, who helped evacuate Mr. Murray to the ambulance, when the ambulance crew arrived at Mr. Murray's location, no one moved or disturbed any of the objects at the scene. (ECF 255 at 248:22-249:6, 249:18-25.) Officer Davis was also still present at the scene when the ambulance arrived. (ECF 254 at 105:12-13.)

Deputy Byron then left the scene at the instruction of his sergeant, Bevan Watkins, who told him to escort the ambulance and to remain with Mr. Murray at the hospital. (ECF 255 at 250:4-24.) Sergeant Watkins's arrival and departure times from the scene are not noted in the record. A "voice" reported at 12:10:52 p.m. that "we're going [to be] transporting the subject momentarily." (Def. Ex. 31 at 14; Def. Ex. 134 at 1:18:05-1:18:18.) There is no evidence as to when exactly the ambulance departed, but given the transmission, it is likely that Deputy Byron and Mr. Murray left the scene no later than 12:15 p.m. Deputy Byron proceeded to escort the ambulance to Ashley Valley Medical Center. (Def. Ex. 77; Def. Ex. 112.)

G. The Investigation on April 1, 2007

1. Agent Ashdown

On April 1, 2007, Rex Ashdown was a special agent of the FBI assigned to the Vernal Resident Agency out of the Salt Lake division. His partner at the Vernal Resident Agency was Special Agent David Ryan. Although Agent Ashdown began the investigation into the shooting and related events, he retired on May 31, 2007. As a result, the investigation was completed by Agent Ryan. (ECF 258 at 557:1-14, 579:14-15.) The FBI had exclusive jurisdiction to investigate Mr. Murray's death because it occurred on the Ute Reservation, and it had been determined after Mr. Murray was shot that he was an enrolled member of the Ute Tribe. (ECF 232 at ¶ 30.)

Agent Ashdown was the only FBI employee to arrive at the scene on April 1, 2007, and he did not arrive until after the shooting had occurred and Mr. Murray had been evacuated by ambulance. (*Id.* at ¶ 31.) Agent Ashdown arrived approximately 10 minutes after the ambulance transporting Mr. Murray had left the scene, meaning he arrived at approximately 12:25 p.m. (ECF 199 at 277:6-15.)

Upon arrival, Agent Ashdown spoke to the on-scene senior officers to get their "briefing of what had happened there at the scene." (*Id.* at 277:16-278:5.) He also spoke with Trooper Swenson. (*Id.* at 278:14-279:1.) After speaking with Trooper Swenson, Agent Ashdown proceeded to investigate the scene of the shooting, lay down his own evidence markers, and take

GPS coordinates of where "Officer Norton was reported to have shot towards Mr. Murray" and "where Mr. Murray's body had been." (*Id.* at 278:14-279:1, 281:5-11; ECF 232 at ¶ 32.) He also independently photographed the scene of the crash and the scene of the shooting, including photographing the blood spatter left on the ground by the gunshot wound to Mr. Murray's head. (ECF 199 at 280:8-22, 290:22-293:11; ECF 232 at ¶¶ 32-33.)

Agent Ashdown also spoke with Officer Norton, asking to set up an interview. Officer Norton pointed out where the .40 spent shell casings from his handgun were near him on the ground and told Agent Ashdown that he would want his attorney to be present for the interview. (ECF 199 at 282:13-17, 351:25-352:15.) According to Agent Ashdown, wanting an attorney present is "pretty typical in the law enforcement community that if you're involved in some sort of shooting, that it's recommended to have an attorney present with you." (*Id.* at 282:18-23.) During their conversation, Agent Ashdown observed that Officer Norton's clothing was "clean and pristine," and that it was not obvious that he had been "running or involved in any sort of altercation that was obvious from his clothes."[23] (*Id.* at 283:4-11.) In other words, "[t]here was nothing to raise any red flags just by looking at him." (*Id.*) After speaking with Officer Norton, Agent Ashdown moved to where Mr. Murray's body had been. (*Id.* at 290:11-14.)

Agent Ashdown collected the following physical evidence from the scene of the shooting: (a) a .380 Hi-Point handgun; (b) a magazine with five rounds of ammunition from the .380 Hi-Point handgun; (c) a shell casing from an expended round jammed, or "stovepiped," in the .380 handgun; (d) two .380-caliber shell casings; and (e) two .40-caliber shell casings. (ECF 199 at 299:16-301:15; ECF 232 at ¶ 34; ECF 258 at 591:19-592:6.) The serial number of the .380 Hi-Point was P849978.[24] (ECF 258 at 569:8-570:4.) The .380 Hi-Point handgun, jammed shell casing, and ejected .380 shell casings were collected from near where Mr. Murray had lain. (*Id.* at 560:5-17; Def. Ex. 93; Def. Ex. 96; Def. Ex. 97; Def. Ex. 110.) The .40-caliber shell casings were found where Agent Ashdown was told Officer Norton had been when he exchanged fire with Mr. Murray. Their location was approximately 113 yards away from where Mr. Murray had fallen. (ECF 199 at 300:22-301:4; ECF 258 at 560:5-7, 561:8-563:21; Def. Ex. 33; Def. Ex. 55; Def. Ex. 92.) The actual projectiles from the spent .380 and .40 shell casings were not found.

[23] The absence of blowback (*i.e.*, blood spatter) on Officer Norton's clothing suggests that Officer Norton was not close to Mr. Murray when Mr. Murray was shot. While the absence of blowback on Officer Norton's clothing is suggestive, it is not conclusive, as addressed in footnote 31, *infra*.

[24] Despite the spoliation sanction, the defendant was still permitted to "present physical evidence or testimony from witnesses . . . to provide evidence concerning the origin, ownership, and destruction of the weapon." 2023 WL 2681819, at *21. The sanction against the use of secondary evidence regarding the .380 Hi-Point therefore does not apply to its serial number, because the testimony and documentation about this physical evidence go to proving the origin and ownership of the handgun.

(ECF 199 at 289:25-290:10.) Agent Ashdown did not see any signs that any evidence had been tampered with or moved. (*Id.* at 295:6-12.)

2. Investigator Campbell

On April 1, 2007, Investigator Keith Campbell was an investigator for the Utah medical examiner's office. On that date, he also was employed by the Uintah County Sheriff's Office as the chief deputy. He arrived at the scene to "investigate the cause and manner of" Mr. Murray's death. (*Id.* at 218:22-219:9 (Investigator Campbell describing himself as "the research person basically" who assists the state medical examiner's office in determining cause and manner of death); ECF 255 at 271:7-17, 272:11-25, 279:10-280:2.)

Investigator Campbell first learned of the shooting from either a phone call from Officer Norton or dispatch. (ECF 255 at 271:21-272:3.) It is unclear when Officer Norton called Investigator Campbell. Officer Norton testified that it was "way after" he called dispatch about the shooting, but also that it was when he was "just up on the hill milling around." (ECF 254 at 137:9-19.) It is likely that Officer Norton called Investigator Campbell after Mr. Murray had been placed in handcuffs, but it remains unclear whether Officer Norton made the call before or after he photographed the scene. As previously noted, Officer Norton and Investigator Campbell are "good friends" who have known each other since junior high or high school. (ECF 198 at 132:19-22; ECF 199 at 218:5-21; ECF 254 at 137:4-6; ECF 255 at 271:2-6.)

By the time Investigator Campbell arrived, Mr. Murray had already been evacuated by ambulance. (ECF 255 at 273:25-274:2.) Investigator Campbell briefly spoke with Officer Norton but claims he neither asked about nor discussed what had happened. (ECF 199 at 233:15-234:19.) Investigator Campbell spoke with Agent Ashdown and proceeded to where Mr. Murray had fallen. (ECF 255 at 274:3-11, 278:21-279:9.) He also examined the area on the hill where he understood Officer Norton to have been during the shooting, by the location of the .40 shell casings. (*Id.* at 278:21-279:9; ECF 199 at 237:1-13, 241:25-242:4, 249:14-15, 249:21-23, 262:4-24.)

While on the scene, either the local Bureau of Indian Affairs ("BIA") chief of police, whose arrival is not noted in the record, or Agent Ashdown told Investigator Campbell that Mr. Murray had shot himself. (ECF 255 at 280:25-281:10, 301:9-15.) Investigator Campbell examined the scene for the directionality of the blood spatter. (*Id.* at 285:1-13, 287:6-288:25.) Based on his understanding of where Officer Norton had been at the time Mr. Murray and Officer Norton had reportedly exchanged fire, close to where the shell casings from the .40 Glock were found, Investigator Campbell wrote in his report to the medical examiner that the "[b]lood spatter at the scene was clearly at a right angle to the location of [Officer Norton], and consistent with a self[-]inflicted gun shot to the head." (Def. Ex. 28 at 2; ECF 199 at 262:9-24.) More specifically, Investigator Campbell testified that the blood spatter from the shot that went through Mr. Murray's head was traveling southeast, perpendicular to where the .40-caliber shell casings were located; these were in a northeast direction. (ECF 255 at 294:1-297:9; Def. Ex. 28 at 2; Def. Ex. 137.) As Investigator Campbell put it in his testimony during the spoliation proceedings, "once I knew where [Officer Norton] was when it occurred, it's literally impossible

for a round to have come at that direction and done what you could see in the blood spatter." (ECF 199 at 249:24-250:8.)

Investigator Campbell did not observe any blowback from the bullet that struck Mr. Murray at the scene. (ECF 255 at 289:12-20, 290:13-24.) He also did not collect any evidence. (ECF 199 at 219:20-22.)

3. Chief Jensen

Chief Jensen, the Vernal City Chief of Police on April 1, 2007, arrived at the scene of the shooting after the ambulance had taken Mr. Murray to the hospital. (ECF 232 at ¶¶ 7-8.) At the scene, Chief Jensen spoke with Officer Norton and Agent Ashdown. (ECF 255 at 307:18-22.) Based on what he had been told and had observed, Agent Ashdown gave Chief Jensen an explanation of his understanding of where the shooting had taken place, and where Mr. Murray and Officer Norton had been during the shooting but did not explain the source of this information. (*Id.* at 309:1-23.) Chief Jensen did not walk around the scene or investigate the shooting, leaving that to the FBI. He did examine and then take Officer Norton's .40 Glock; in return, he gave Officer Norton his own handgun, which was an identical model. (*Id.* at 309:18-20, 310:22-311:4, 311:13-25.) No party asked Chief Jensen at trial to explain why he exchanged firearms with Officer Norton.

Chief Jensen had the opportunity to look closely at Officer Norton's firearm and his person. According to Chief Jensen, Officer Norton's firearm was "pristine," without any observable blood on it. (*Id.* at 314:12-25.) Chief Jensen also did not see any blood on Officer Norton's clothing or body or any injuries on Officer Norton, although he did not specifically examine Officer Norton to try and find blood. (*Id.* at 315:1-315:15, 317:23-318:12; *see also* Def. Ex. 103.) "[H]aving been a critical care paramedic for 14 years," Chief Jensen testified that he would have been "relatively sensitive" to seeing even a small amount of blood on Officer Norton's person, especially given that Officer Norton was wearing blue/light-blue clothing. (ECF 255 at 315:6-9, 318:25-319:9; Def. Ex. 103.) Chief Jensen did see that, even several hours after the shooting, Officer Norton was upset. (ECF 255 at 315:10-15, 317:14-22.)

Chief Jensen took Officer Norton's handgun back to Vernal City. It is unclear what happened with it thereafter, but it was not tested for any blood residue or other evidence that it might have been used in a contact shooting. Chief Jensen eventually returned the handgun to Officer Norton. (*Id.* at 312:6-21.)

4. Mr. Murray's Body at the Hospital and Mortuary

At 1:17 p.m., Mr. Murray arrived at the Ashley Valley Medical Center. He was pronounced dead shortly after arrival. (Def. Ex. 77; Def. Ex. 112; *see also* ECF 255 at 250:25-251:8.) The emergency department physician ordered a blood-alcohol test and a urine drug screen. (Def. Ex. 112.) The samples for these tests were collected that day at 1:53 p.m. and submitted for analysis. (Def. Ex. 107 at 1.) The analysis was performed on April 9, 2007. (*Id.*) The results showed positive results for amphetamine, tetrahydrocannabinol (THC) (the principal psychoactive component of marijuana), and a blood-alcohol content of 234 mg/dL. (*Id.* at 2-3.)

After Mr. Murray was pronounced dead, Deputy Byron and two other officers proceeded to photograph and "package" Mr. Murray's body, likely referring to bagging Mr. Murray's hands. (Def. Ex. 64 at 3.)

At some point on April 1, 2007, Investigator Campbell arrived at the hospital and arranged for Mr. Murray's body to be transported to a mortuary. (ECF 199 at 244:11-245:19, 251:25-252:9; ECF 255 at 274:14-275:3.) Mr. Murray's body was transported that day to the Blackburn Mortuary by Colby DeCamp, an employee of the mortuary. (ECF 199 at 307:7-9; Def. Ex. 64 at 3.)

Agent Ashdown went to the Blackburn Mortuary to look at Mr. Murray's body and attempt to determine entry and exit wounds. (ECF 199 at 307:10-13.) Several other state and/or local officers, including Investigator Campbell, were present at the mortuary when Agent Ashdown arrived. (*Id.* at 307:14-20; ECF 251-1 at 48:19-49:6, 49:22-25, 56:7-9 (a deposition transcript of Colby DeCamp testifying that he recalled seeing Chief Jensen, Investigator Campbell, and Officer Norton "there," although the admitted portion of the transcript is vague as to what "there" is referencing); ECF 255 at 274:17-275:3 (Investigator Campbell testifying he "do[esn]'t think" he went to the mortuary but also testifying that he "honestly can't remember if [he] did go to the mortuary or not.").) Officer Norton denied having gone to either the hospital or the mortuary (ECF 198 at 188:8-16; ECF 254 at 143:22-144:1), and Agent Ashdown did not recall seeing him there (ECF 199 at 307:14-20). Neither Deputy Byron nor Trooper Young, the only two other officers who were asked if they went to mortuary, remembered going there, but Deputy Byron's recollection is faulty.[25] (ECF 255 at 214:22-215:1 (Trooper Young testifying he did not recall if he went to the mortuary), 252:13-14 (Deputy Byron testifying that he did not go to the mortuary); Def. Ex. 64 at 3 (Deputy Byron writing in his report that he accompanied Mr. Murray's body to the mortuary).)

After observing Mr. Murray's wounds, Agent Ashdown was unable to distinguish the entry wound from the exit wound. (ECF 199 at 307:21-25.) Unprompted by Agent Ashdown,

[25] Agent Ashdown recalled that Deputy Byron was also present at the mortuary, although he erroneously referred to him as "another detective." (ECF 199 at 307:14-20.) Deputy Byron denies having gone to the mortuary (ECF 255 at 252:13-14), but his testimonial denial is contradicted by his written report. (Def. Ex. 64 at 3.) Deputy Byron's memory as to whether he was at the mortuary is faulty. As for whether Officer Norton and Chief Jensen were at the mortuary, the Court makes no findings. Having previously held that the plaintiffs' claims for any alleged crimes that occurred at the mortuary are off-reservation crimes that cannot give rise to liability under the "bad men" provision, *Jones IV*, 149 Fed. Cl. at 356-57, there is no need to resolve the parties' disagreements over who was or was not present at the mortuary on April 1, 2007. To the extent the plaintiffs seek to undermine the credibility of Officer Norton and Chief Jensen by relying on evidence that they were at the mortuary despite their denials, the Court will rely on whether the entirety of the evidence supports or undercuts the parties' respective versions of the events and not on evidence going to one minor aspect of the events of the day.

Deputy Byron attempted to assist by examining the wounds for beveling with his gloved fingers. (*Id.* at 309:5-25, 310:2-14.)

At some point, an unknown officer or several officers tampered with Mr. Murray's body by cutting a small hole into Mr. Murray's neck and drawing blood from the hole. (ECF 198 at 16:21-17:6; ECF 199 at 245:7-14.) This action probably occurred before Agent Ashdown arrived, as he was offered "a couple of vials of blood" that were not drawn in Agent Ashdown's presence and which an officer claimed had been drawn while Mr. Murray was at the hospital emergency room. (ECF 199 at 313:10-15, 364:19-22.) Agent Ashdown refused to accept the vials because he had no chain-of-custody for them, and he lacked a means of storing the blood properly.[26] (*Id*. at 313:10-25.) Investigator Campbell testified that the tampering did not affect his investigation. (*Id.* at 257:22-258:10.) There is no evidence to suggest the improper actions by officers at the hospital and mortuary manipulated or altered evidence in a way that could mislead the medical examiner.

Agent Ashdown otherwise did not observe any injuries other than the bullet wound on Mr. Murray's body and did not recall seeing any blood on the body, although he did recall that Mr. Murray's hands had been put into "brown paper sacks" by an unknown person. (*Id.* at 312:14-313:6.) Agent Ashdown ultimately did not collect any evidence at the mortuary and left 30 to 40 minutes after his arrival. (*Id.* at 313:7-11.)

H. The Investigation after April 1, 2007

1. Interviewing Officer Norton

On May 3, 2007, Agent Ryan interviewed Officer Norton in the presence of Officer Norton's attorney. (ECF 232 at ¶ 42.) According to Agent Ryan, Officer Norton did not say anything suspicious, and Agent Ryan thought there was no basis to arrest Officer Norton or request a search warrant for his personal vehicle, his clothing, or his .40 Glock. (ECF 199 at 394:9-395:4.)

2. The Medical Examiner's Report

On April 1, 2007, Agent Ashdown requested that the Utah medical examiner perform an autopsy on Mr. Murray; he did not request any testing on Mr. Murray's clothes or request that his clothes be turned over to the FBI. (*Id.* at 318:2-4; ECF 232 at ¶¶ 35-38.) Within a few days of the request being made, Agent Ashdown received a courtesy call from the medical examiner's

[26] The actions of the officer(s) in cutting a hole in Mr. Murray's neck and drawing blood from it and of Deputy Byron in fingering the wounds in Mr. Murray's head were inappropriate. They served no legitimate law-enforcement interest, could not result in the collection of evidence, and ultimately reflected grossly unprofessional behavior. While these actions were egregious and offensive, for the reasons detailed in *Jones IV*, 149 Fed. Cl. at 354-57, they all occurred off the reservation and cannot form the basis for liability under the "bad men" provision. As a result, no further findings as to the lawfulness of the acts are necessary.

office informing him that "they were going to call this a self-inflicted wound, close-contact, self-inflicted wound, suicide." (ECF 199 at 321:3-16.) The report itself, however, was not completed until after he retired on May 31, 2007. (ECF 232 at ¶ 12; Def. Ex. 73 at 1.) Although Agent Ashdown could not close the case until he received the medical examiner's report or while the investigation into the origin of the .380 Hi-Point was ongoing, Agent Ashdown's opinion after talking to the medical examiner's office was that Mr. Murray had died by suicide, considering the matter a "settled issue." (ECF 199 at 326:6-18, 368:20-369:16, 370:6-19.)

Dr. Edward Leis of the Utah Office of the Medical Examiner completed his report into the cause of Mr. Murray's death in July 2007. (This report is in evidence as Def. Ex. 73 (also available as ECF 234-3) but certain portions of the report regarding toxicology were withdrawn by the defendant (ECF 258 at 526:14-527:9).) Rather than perform an autopsy, the report reflects that Dr. Leis conducted only an external examination. (ECF 232 at ¶ 36.) He decided not to perform a full autopsy given what he had learned from Investigator Campbell's report on the incident, the fact that "the significant injuries were limited to the head," and "the lack of a retained projectile." (ECF 234-1 (transcript of Dr. Leis's deposition testimony) at 23:2-24, 35:3-36:12.)[27] As its name connotes, an external examination, unlike an autopsy, does not involve any invasive procedures. (*Id.* at 35:7-17.) In line with the usual practices of the medical examiner's office, Investigator Campbell never spoke to the medical examiner regarding Mr. Murray's death, only submitting his written report. (*Id.* at 23:2-12, 25:19-26:3.)

Dr. Leis concluded that the cause of Mr. Murray's death was a contact gunshot wound to the head and that the manner of death was suicide. (Def. Ex. 73 at 1; ECF 232 at ¶ 39.) The gunshot wound was noted as having an entrance "on the left scalp with an exit defect on the upper posterior right scalp." (Def. Ex. 73 at 2.)

More specifically, the entry wound was described as a "contact gunshot wound of entrance," which was located:

> 7 cm below the vertex of the head and 14 cm curvilinearly to the left of the anterior midline . . . . This large, stellate defect lies 8.5 cm. superior to the external auditory meatus on the left. The wound has a central 1.5 X 1.1 cm penetrating defect with triangular-shaped tears at the 12:00, 4:00, 5:00, 10:00, and 11:00 positions. The longest tear, at 12:00, measures up to 2.1 cm in length. There is abundant soot noted at the inferior margin on the defect and some marginal abrasion is noted at the inferior margin. Palpitation of the underlying skull is consistent with a sharp margin at the point of perforation of the skull.

[27] The page numbers of Dr. Leis's deposition transcript and the page numbers generated by the court's electronic filing system for the submitted exhibit do not match because of the cover page. For clarity, citations to Dr. Leis's deposition transcript are to the page numbers in the transcript itself, rather than the page numbers generated by the electronic filing system.

> Radiographic examination discloses no significant retained projectile fragments.

(*Id.* at 2-3.)

The exit wound was described as:

> Located on the upper posterior right scalp, 1 cm below the vertex of the head and 5 cm to the right of the posterior midline . . . . It consists of a few small lacerations intertwined and measuring up to 1 cm in greatest length. The margins of the laceration readily appose. No soot or stippling is associated with this defect.
>
> The projectile path is left to right, upward, and slightly front to back.

(*Id.* at 3.)

Dr. Leis's report also described Mr. Murray's other injuries and notable features. The cut to Mr. Murray's neck was described as "[a] 6 cm incised wound, with a string protruding from the defect, [ ] located on the lower midline of the neck, above the suprasternal notch." (*Id.* at 2.) Mr. Murray's hands were noted as having been "received bagged," with a clean left hand, and "an abundance of caked blood on the posterior aspect of the right hand" which when cleaned featured "a small, circular abrasion on the posterior aspect of the hand. No soot was noted on either hand." (*Id.*; *see* ECF 234-1 at 44:14-24 (Dr. Leis explaining that he removed the bags and examined Mr. Murray's hands).) Dr. Leis's report otherwise noted a few other injuries including: "an abrasion on the left bridge of the nose without palpable fracture of the nasal bones"; "a large, light red-based abrasion on the posterior right elbow"; and "[a] small area of bruising is noted on the anterior-medial aspect of the distal left thigh." (Def. Ex. 73 at 3.) Mr. Murray's back had "no abrasions." (*Id.*)

3. Tracing the .380 Hi-Point

On April 2, 2007, Agent Ashdown filed a request with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") using the serial number of the .380 Hi-Point found at the scene, P849978, to trace who had purchased the handgun and where it had been purchased. (ECF 258 at 569:12-570:10, 571:16-572:4, 573:11-574:24; Def. Ex. 61.) That same day, Agent Ashdown received a response from ATF indicating that a weapon with that serial number had been purchased as part of a multiple-handgun purchase on March 13, 2007, by Cody Allen Shirley in Roosevelt, Utah. (ECF 258 at 575:1-579:9; Def. Ex. 62 at 1-2.)[28] Roosevelt is a town on the Ute Reservation, not very far from the site of the shooting. (Site Visit.)

[28] Although omitted by the court reporter from the November 13, 2023, transcript's list of admitted exhibits (ECF 258 at 491, 628), Defense Exhibits 61 and 62 were admitted into

Because of Agent Ashdown's retirement on May 31, 2007, Agent Ryan would complete the investigation. (ECF 258 at 579:10-15.)

As part of the investigation into the .380 Hi-Point, Agent Ryan later received a case report dated May 25, 2007, from the BIA Division of Law Enforcement Services regarding a March 19, 2007, incident involving Mr. Kurip. (*Id.* at 598:3-599:17; Def. Ex. 141.)[29] According to that report, Mr. Kurip was suspected of committing "Simple Assault ([Domestic Violence]), Aggravated Weapons Offense." The report stemmed from an incident that occurred at Mr. Kurip's residence involving alleged threats to shoot several other people. A consent search of the residence by a BIA officer had found "a .380 Caliber white [g]un box, which the gun was sold in, along with a black hard plastic gun case. Also located was a .380 caliber brass bullet casing . . . ." (Def. Ex. 141 at 3.) The BIA incident report noted that the investigating officers were not able to find the actual firearm, despite two witnesses claiming to have seen Mr. Kurip with one. (*Id.*) As of the report's date, the investigation was noted as pending with no charges yet filed against Mr. Kurip. (*Id.* at 3-4.)

Agent Ryan's investigation would eventually lead to an indictment of Mr. Shirley for a straw-purchase offense. Mr. Shirley pleaded guilty to that offense. (ECF 258 at 592:16-22.) In Mr. Shirley's "Statement by Defendant in Advance of Plea of Guilty," dated May 27, 2008, he acknowledged that on March 13, 2007, he had been "purchasing [ ] handguns for other people who gave me money to buy handguns for them." (Def. Ex. 22 at 3.)[30] The statement did not specifically identify who those persons were, but it did identify the handguns as a "Hi[-]Point 9mm handgun and a Hi[-]Point .380 handgun from" a store in Roosevelt, Utah on March 13, 2007. (*Id.*) That same store was noted on the firearms trace of the .380 Hi-Point found at the scene of the shooting as the store that sold that weapon to Mr. Shirley on March 13, 2007. (Def. Ex. 62 at 2.) In other words, Mr. Shirley's statement (Def. Ex. 22 at 3) indirectly acknowledged that he had purchased the .380 Hi-Point found at the scene of the shooting. (ECF 258 at 569:8-570:4.)

During an interview with Agent Ryan, Mr. Shirley also acknowledged that Mr. Kurip had asked him to acquire a gun for him. (ECF 199 at 399:22-400:8.) Mr. Shirley admitted that he had done so and had given Mr. Kurip the .380 Hi-Point that was later found next to Mr. Murray at the scene of the shooting. (*See* id; ECF 258 at 596:14-21.) Mr. Shirley's admission of acquiring the .380 Hi-Point handgun on March 13, 2007, for Mr. Kurip, especially when

evidence over the plaintiffs' objections (*id.* at 574:11-24 (Def. Ex. 61), 577:6-579:6 (Def. Ex. 62)).

[29] Defense Exhibit 141 consists of four pages of Plaintiffs' Exhibit 15, specifically the four pages marked JONES0018374-77. (ECF 258 at 602:6-22.)

[30] Although omitted by the court reporter from the November 13, 2023, transcript's list of admitted exhibits (ECF 258 at 491, 628), Defense Exhibit 22 was admitted into evidence without objection (*id.* at 595:1-13).

combined with the firearms trace and his written statement, is more than enough evidence to tie the .380 Hi-Point purchased by Mr. Kurip through Mr. Shirley to the scene of Mr. Murray's shooting.

I. The Defendant Has Overcome the Adverse Inference

The factual findings made thus far have generally avoided any conclusions about who fired the shot that killed Mr. Murray. The findings have avoided the central issue in the case because the defendant has faced the burden of overcoming the evidentiary presumption that was imposed in *Jones VI* as a sanction for its negligent spoliation of the .380 Hi-Point handgun. The defendant's failure to overcome the evidentiary presumption would necessarily influence the effect of the evidence and testimony adduced at trial, especially Officer Norton's testimony.

Before the key issue in the case is reached, the impact of the spoliation sanction on the evidence must be addressed. The first step in resolving who shot Mr. Murray is to resolve whether the defendant has overcome the presumption imposed in *Jones VI*.

Because the defendant had negligently destroyed the .380 Hi-Point after the successful prosecution of Mr. Shirley, the spoliation decision in *Jones VI* imposed a "rebuttable adverse inference that the .380 Hi-Point did not have Mr. Murray's blood, tissue, fingerprints, or DNA on it." *Jones VI*, 2023 WL 2681819, at *21. The defendant was permitted to rebut this adverse inference, but "only with physical evidence or corroborating testimony from at least one witness other than Officer Norton. If the defendant rebuts this adverse inference, the question of what the .380 Hi-Point would have shown will be treated as unknowable." *Id.*

The analysis of whether the defendant has met its burden to overcome the adverse inference begins with a straightforward question: how did the .380 Hi-Point come to be found by Mr. Murray's body? If it was brought there by Mr. Murray, its presence at the scene would support Officer Norton's account. If it was brought by someone else, its presence at the scene would indicate that evidence had been manipulated, undercutting Officer Norton's account and the official version of the shooting.

There are four realistic scenarios by which the .380 Hi-Point and its shell casings could have been brought to the scene of the shooting on April 1, 2007. Three of these scenarios would preserve the adverse inference, and one would rebut it. The first three are: (1) Officer Norton brought the weapon himself and planted it at the scene; (2) another officer brought it to the scene and planted it; and (3) the .380 Hi-Point was left in the vehicle driven by Mr. Kurip at the time of the crash, and it was then planted at the scene by an officer. In these cases, Mr. Murray's DNA or blood may not have been found on the Hi-Point, in line with the adverse inference. The fourth scenario is that Mr. Murray himself brought it to the scene, in which case the .380 Hi-Point must have had Mr. Murray's DNA on it, which would rebut the presumption (although even if the presumption is rebutted, the sanction would still treat the existence of DNA or fingerprints on the .380 Hi-Point as unknowable).

The fourth scenario is most likely because there is substantial evidence connecting Mr. Murray through Mr. Kurip to the .380 Hi-Point found at the scene. This fact makes the first two

scenarios unlikely because there is no evidence that suggests either Officer Norton or one of the other officers owned or possessed any .380 Hi-Point, let alone the specific handgun connected to Mr. Kurip, found at the scene.

Specific to the first scenario, Officer Norton was off duty on April 1, 2007, and on his way to see his father. (ECF 254 at 121:11-12, 121:24-122:8.) Because he was not on duty and did not expect to be on duty on April 1, 2007, Officer Norton was not prepared for official duties that day. There is no evidence that, even when he was on duty, he routinely carried a second firearm, but even if he had, it is unlikely he would have done so on a day he did not expect to be on duty.

The shooting also occurred in a less-than-90 second window between the last time Mr. Murray was observed to have been unharmed and the time Officer Norton notified dispatch that Mr. Murray had been shot. (ECF 260 at ¶¶ 41-50; ECF 261 at 8; Def. Ex. 31 at 8; Def. Ex. 134 at 32:58-33:35.) Among the options as to how the .380 Hi-Point came to be at the scene, it is less likely that Officer Norton could have shot Mr. Murray with his .40 Glock, as the plaintiffs contend, and then manipulated the scene to plant a .380 Hi-Point, with a shell casing jammed in the action, along with two spent shell casings within that brief timeframe. Although Officer Norton could have manipulated the scene between when he reported the shooting to dispatch and when Deputy Byron and Trooper Young arrived at his location, any such effort to manipulate the evidence would have been extraordinarily risky. Once Officer Norton reported the shooting and requested that dispatch send the other officers to his location, he knew the other officers would appear at any moment and could observe his effort to alter the scene of the shooting. Reporting the shooting before the scene was prepared would have posed a grave risk to Officer Norton of being caught committing a crime. In fact, according to his report to dispatch, Deputy Byron and Trooper Young could see Officer Norton while he was reporting the shooting to dispatch, making it even less likely that Officer Norton could rush down and manipulate the scene without being observed and getting caught. (Def. Ex. 31 at 8.)

In addition, the recording of Officer Norton's call to dispatch reflects that he was in significant distress at the time he placed the call. (Def. Ex. 138 at file 2007-04-01-11-30-40-001.) It is unlikely that Officer Norton could have shot Mr. Murray, placed the call to dispatch, and in the brief time before other officers arrived at the scene, devised and effected a plan to cover up that shooting by planting the .380 Hi-Point and .380 shell casings near Mr. Murray while under such evident distress. Further, there is no evidence that connects Officer Norton with the .380 Hi-Point.

The second scenario is even less likely because it would require at least two officers to have conspired with Officer Norton, given that Deputy Byron and Trooper Young arrived at Officer Norton's location at the same time and went down to the scene to secure Mr. Murray together. (ECF 255 at 206:17-24, 243:22-244:9.) Most importantly, there is no evidence of a conspiracy among these officers. Although the plaintiffs alleged the existence of a conspiracy to violate Mr. Murray's civil rights, they presented no evidence of such a conspiracy and did not propose any factual findings concerning the existence of one. Such a conspiracy is unlikely. Deputy Byron, Trooper Young, and Officer Norton worked for three different law enforcement agencies. (ECF 232 at ¶¶ 6-7, 9.) While these officers knew each other, Deputy Byron and

Trooper Young were not friends with Officer Norton. (ECF 198 at 84:16-23.) To have assisted Officer Norton in manipulating evidence would have rendered these other officers liable for crimes; it is unlikely they would have put their careers at risk and incurred possible prison sentences by helping Officer Norton to cover up a homicide by planting the .380 Hi-Point handgun. In any event, there is no evidence to hint that these officers were complicit in a conspiracy to manipulate evidence at the scene.

The third scenario is also unlikely because it requires expanding the participants in the conspiracy implied by the scenario to include Trooper Swenson and Officer Davis; it would also require Mr. Kurip to remain silent. If the .380 Hi-Point was in the vehicle Mr. Kurip crashed but not taken by Mr. Murray when he fled, Trooper Swenson would have had to have been involved in the conspiracy as he remained in the area in view of the crashed vehicle. (ECF 254 at 65:24-67:7, 67:21-68:2 (Trooper Swenson explaining his investigation of the crash scene and reporting what he found without noting the presence of any weapons); *see also* Def. Ex. 31 at 10 (Trooper Swenson asking if the other officers "need my assistance where you're at" and Trooper Young replies "[n]egative").) Officer Davis arrived at the scene of the shooting shortly after Deputy Byron and Trooper Young and would have observed Trooper Swenson or another officer remove the .380 Hi-Point from the crashed vehicle to plant it as evidence to manipulate the scene. (ECF 254 at 84:9-85:22.) If the .380 Hi-Point had been left in the crashed vehicle when Mr. Murray and Mr. Kurip fled, Mr. Kurip would likely have been aware of this fact and could have testified that Mr. Murray never possessed the .380 Hi-Point. Mr. Kurip never offered such testimony, and it seems particularly unlikely Mr. Kurip would have remained silent for more than 17 years concerning any conspiracy about how his friend died if he knew it to have been based on a falsehood. (ECF 198 at 21:9-11 (Mr. Murray's mother testifying that he and Mr. Kurip were friends).)

Proving the accuracy of Occam's razor, the most likely explanation for how the .380 Hi-Point came to be found at the scene is the simplest: Mr. Murray brought the .380 Hi-Point himself. This scenario does not require Officer Norton to have been carrying an extra weapon on his day off or to have concocted and effected a plan to cover up a homicide soon after killing Mr. Murray while summoning other officers. Similarly, this scenario does not require a conspiracy among at least three law enforcement officers from three different agencies or Mr. Kurip's silence.

This scenario is also supported by the fact that the evidence connects the .380 Hi-Point found at the scene to only one person involved with the events on April 1, 2007: Mr. Kurip. (ECF 199 at 399:22-400:8; ECF 258 at 596:14-21.) Given this connection to Mr. Kurip, it is a reasonable inference that he could have given the .380 Hi-Point to his friend, Mr. Murray, or that Mr. Murray could have grabbed it out of the vehicle before fleeing the scene of the crash. Either version is substantially more likely than a conspiracy involving multiple officers, of which there

is no evidence. If Mr. Murray had the .380 Hi-Point and carried it to the scene, his fingerprints and DNA likely would have been found on it if the handgun had been tested.[31]

The evidence reflects that the .380 Hi-Point was associated with Mr. Kurip. Officer Norton had no connection to the weapon before April 1, 2007, and no evidence connects him to that weapon at the scene prior to Mr. Murray getting shot. There is no evidence of a conspiracy among officers from different departments to manipulate the evidence at the scene by planting the .380 Hi-Point on Mr. Murray. The most logical conclusion from these basic facts is that Mr. Murray had the .380 Hi-Point in his possession when he fled from the crash. This conclusion is based on the testimony of multiple officers, the transcript of transmissions to and from dispatch, and Agent Ryan's investigation. These testimonies and evidence constitute "physical evidence or corroborating testimony from at least one witness other than Officer Norton," as required by *Jones VI* to overcome the spoliation sanction. 2023 WL 2681819, at *21.

The Court therefore finds that the defendant has overcome the adverse inference imposed as a sanction because the evidence reflects that Mr. Murray brought the .380 Hi-Point to the

[31] The parties offered extensive testimony from several expert witnesses as to the likelihood of the presence of blowback (blood and viscera ejected out from the force of the penetrating bullet and back towards the muzzle of the weapon firing the bullet) on a handgun used in a contact shooting. This testimony is the Hitchcockian MacGuffin of the case, being of limited relevance to resolving the question of whether the defendant has rebutted the presumption imposed as a spoliation sanction, even as the parties focused attention on the issue. When blowback is present, it may not always be visible to the naked eye, and neither the .40 Glock nor the .380 Hi-Point was tested for traces of blowback. (ECF 256 at 358:25-360:19.) Blowback is not always present on a firearm used in a contact shooting or on the hands of the shooter. (ECF 234-1 at 124:19-125:1 (Dr. Leis testifying that one would "[n]ot necessarily" find blood spatter on the hand of the person who fired a handgun in a contact shooting to the head); ECF 257 at 479:23-480:14 (according to the literature reviewed by Dr. Arden, around 50 percent of cases showed blowback on firearms used in contact shootings and about 75 percent of cases showed blowback on the hands); ECF 258 at 518:18-520:12, 522:4-523:6, 541:15-542:5 (Dr. Cohen discussing literature showing an absence of blowback on firearms in contact shootings in 23 to 33 percent of cases).) As a result, the absence of blowback on either weapon may have been probative but not dispositive. Of greater relevance to the issue of who fired the fatal shot would have been testing for fingerprints and DNA. The .380 Hi-Point should have been tested for blowback and DNA by the FBI. The scene reflected an officer-involved shooting. The only surviving witness to the shooting was Officer Norton. If the .380 Hi-Point had inflicted the fatal wound and did not have Officer Norton's fingerprints or DNA on it, then either the .40 Glock was used to shoot Mr. Murray or Mr. Murray shot himself. Given the other evidence, it is likely the parties would have concluded early on that Mr. Murray shot himself. Had the .380 Hi-Point been tested for blowback and DNA, Mr. Murray's family, Officer Norton, the other officers sued in the Utah district court, and the defendant here could have been spared many years of litigation and the attendant uncertainty and expense.

scene. In accordance with the sanction set forth in *Jones VI*, the question of what would have been found on the .380 Hi-Point had it not been destroyed will be treated as unknowable. *Id.*[32]

J. The Plaintiffs Have Failed to Prove Mr. Murray was Shot by Officer Norton

The plaintiffs, as previously noted, did not propose any findings as to how the shooting occurred, neglecting also to mention their best evidence: Mr. Murray was right-handed but died from a contact gunshot wound to the left lateral scalp. (ECF 198 at 27:9-10; Def. Ex. 73 at 1-3.) Instead, their case requires the inference that the events did not occur as Officer Norton testified. During the hearing on January 18, 2024, they clarified their theory of events. The plaintiffs contend that Officer Norton and Mr. Murray encountered each other on foot at a close distance after Mr. Murray had rounded a hill and that Officer Norton shot Mr. Murray using the .40 Glock. While this scenario is physically possible, there is little evidence to support it. Instead, it is more likely that Officer Norton was close to the crest of the hill, more than 100 yards away, when Mr. Murray shot himself, as the defendant argues.

To start, the plaintiffs' theory of the case does not explain why Officer Norton would shoot Mr. Murray unlawfully. Indeed, the plaintiffs have all along failed to posit any explanation for Officer Norton's alleged acts. Crucially, they have never sought to explain his motive, means, and opportunity, all elements that often go to explaining the commission of a homicide, for shooting Mr. Murray.[33]

Officer Norton had no motive to kill Mr. Murray on April 1, 2007. Officer Norton was off duty on April 1, 2007, and had intended to visit his father. (ECF 254 at 121:11-12, 121:24-122:8.) There is no evidence that Officer Norton expected to be involved in a shooting. The plaintiffs have offered no evidence that Officer Norton had any bias against tribal members or a

[32] The spoliation sanction restricted the types of evidence on which the defendant could rely to overcome the presumption but did not impose a heightened burden of proof. *Jones VI*, 2023 WL 2681819, at *21. Even though the defendant only had to overcome the sanction by preponderant evidence, the defendant would have overcome the presumption even under a heightened burden. The defendant has presented clear and convincing evidence to rebut the adverse inference imposed as a spoliation sanction.

[33] "[M]otive is a factor which may be considered in connection with other evidence as tending to connect [an] accused with [a] crime." *State v. Sinclair*, 389 P.2d 465, 468 n.7 (Utah 1964). Although "not a necessary element in the offense of homicide," *In re Peterson*, 386 P.2d 726, 727 (Utah 1963), the existence or absence of motive may be considered by a finder of fact. "'Evidence of motive is sometimes of assistance in removing doubt, and completing proof which might otherwise be unsatisfactory, and that motive may either be shown by positive evidence, or gleaned from the facts and surroundings of the act. The motive then becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally a circumstance in favor of the accused, to be given such weight as it deems proper.'" *State v. Woods*, 220 P. 215, 217 (Utah 1923) (quoting *People v. Durrant*, 48 P. 75, 82 (Cal. 1897)).

history of allegations of excessive force or civil rights abuses. Although there are limitations on evidence to prove a person's propensity for violence, the plaintiffs have not presented any evidence to suggest Officer Norton had a violent or angry character. In fact, the plaintiffs suggested the exact opposite during their closing remarks at trial, arguing that Officer Norton's actions "may be out of character with his other behaviors throughout his life" and calling his alleged shooting of Mr. Murray a "terrible mistake." (ECF 259 at 636:18-22.) There is no evidence that Officer Norton either knew or had a particular animus towards Mr. Murray. The offense that prompted Officer Norton to become engaged in official duty that day, speeding and a resulting high-speed pursuit, was not one that would likely make an experienced officer angry, let alone angry enough to commit a homicide. While the failure of Mr. Kurip to stop for Trooper Swenson and attempt to flee might have prompted suspicion of other possible criminal activity, speeding is a common offense, and ultimately no one was injured during the pursuit; Officer Norton had no reason to pursue Mr. Murray with the intent to do him harm.

As for means and opportunity, even if Officer Norton had been closer to Mr. Murray than the location at which his shell casings were found, the plaintiffs have not suggested any reason why Officer Norton would invent a story that he was more than a hundred yards away when Mr. Murray killed himself. If Officer Norton did get close to Mr. Murray to kill him with a contact shot to his head, Officer Norton could have simply told the other officers that Mr. Murray had reached for Officer Norton's handgun or his own, or the two had been engaged in a struggle during which Mr. Murray was shot. Given the finding that Mr. Murray is substantially more likely to have brought the .380 Hi-Point to the scene of the shooting, such a story would have been supported by the evidence at the scene.

Officer Norton inventing a story that he was more than 100 yards away when Mr. Murray shot himself makes little sense when such a story would have been so complicated to stage. Staging this explanation would have required Officer Norton to plant spent shell casings on a hill more than 100 yards away from Mr. Murray while knowing there were other officers in the area searching for Mr. Murray. If any of these other officers had observed Officer Norton running away from Mr. Murray's location to plant the shell casings, it would have exposed such a plan. Such staging after Officer Norton had used his .40 Glock to shoot Mr. Murray would also have required Officer Norton to discharge Mr. Murray's firearm, the .380 Hi-Point, for the expended .380 shells to have been found at the scene, as there is little reason why a person would carry around expended shells from a weapon of a different caliber than his usual one. Firing that weapon would have attracted the attention of the other officers, prompting questions as to why Officer Norton would fire a handgun three times, presumably into the distance as no projectiles were found near Mr. Murray (ECF 199 at 289:25-290:10), while standing over Mr. Murray's prone body. Additionally, the recording of Officer Norton's call to dispatch reflects that Officer Norton was in emotional distress when he called dispatch to report that Mr. Murray had shot himself. (Def. Ex. 138 at file 2007-04-01-11-30-40-001.) An officer in such a mental state would be unlikely to invent and then implement a complicated story to explain the shooting in the limited time before other officers would arrive at the scene. Such an officer would be more likely to explain the shooting by simply saying it was justified because the suspect either was reaching for a weapon or had attacked him.

Instead, the evidence shows that it is far more likely that the shooting occurred exactly as Officer Norton has consistently testified over many years it did. (ECF 198 at 93:5-96:15; ECF 254 at 130:9-134:16) The evidence shows that he was more than 140 yards away from Mr. Murray when Mr. Murray shot himself. (ECF 198 at 93:19-94:3 (Officer Norton indicating he retreated 30 to 40 yards up the hill after exchanging fire with Mr. Murray); ECF 254 at 132:16-22 (Officer Norton indicating he retreated 40 yards up the hill after exchanging fire); Def. Ex. 137 (noting a distance of 113 yards between Officer Norton's shell casings and Mr. Murray)

To start, this scenario comports with the motives an off duty and apparently unbiased officer would have had when volunteering on his day off to assist in the pursuit of a suspect fleeing from the scene of a car crash after attempting to evade the police. It does not require Officer Norton in the span of less than 90 seconds to invent and execute a complicated plan to manipulate evidence to explain his activities immediately preceding and during the shooting.

The physical evidence also corroborates Officer Norton's account. The .40 spent shell casings were found more than 100 yards from Mr. Murray. (ECF at 254 at 130:2-8, 162:17-21; Def. Ex. 55; Def. Ex. 137.) The blood spatter from the shot to Mr. Murray's head was at a right angle to where the .40 casings from Officer Norton's firearm were found. (Def. Ex. 28 at 2; ECF 199 at 262:9-24.) Agent Ashdown described Officer Norton's clothing as "clean and pristine" and Chief Jensen did not note any blood on Officer Norton's handgun. (ECF 199 at 283:4-11; ECF 255 at 314:19-315:15, 317:23-318:12; *see also* Def. Ex. 103.) These facts are more consistent with Officer Norton being far away from Mr. Murray when he shot himself than with a scenario in which Officer Norton was close enough to Mr. Murray to inflict a contact gunshot wound to the head. Finally, it is the most likely explanation for why two firearms were discharged at the scene.[34]

[34] The plaintiffs have never advanced a theory that Mr. Murray fired at Officer Norton, Officer Norton fired back, and Mr. Murray then surrendered, allowing Officer Norton to approach Mr. Murray before shooting him at close range. This alternative scenario would explain why two firearms were discharged at the scene, but it is difficult to fit into the less-than-90-seconds during which these events could have taken place. (ECF 260 at ¶¶ 41-50; ECF 261 at 8; Def. Ex. 31 at 8; Def. Ex. 134 at 32:58-33:35.) If Officer Norton was approximately 113 yards away when the two first exchanged gunfire, it would have taken him a considerable amount of time to approach Mr. Murray while keeping his gun pointed at him, shoot Mr. Murray at contact range, and then retreat onto the hill afterwards to report the shooting to dispatch. (*See* ECF 255 at 240:21-241:6 (Deputy Byron testifying he saw Officer Norton on the hill on his phone).) It is also unlikely that Officer Norton was closer than 113 yards to Mr. Murray when the two exchanged gunfire, and that Officer Norton then manipulated the evidence at the scene within 90 seconds. If the two had been closer than 113 yards, it becomes less likely that both Officer Norton and Mr. Murray would miss each other with their shots, and it would make it less likely for Officer Norton to turn around and retreat from Mr. Murray, giving him an opportunity to surrender; instead, Officer Norton probably would have kept shooting to ensure Mr. Murray

Further, Agent Ashdown, who viewed the scene within hours of the shooting, did not see anything to suggest that evidence had been manipulated. Instead, based on the evidence at the scene and the medical examiner's determination, Agent Ashdown believed that the question of whether Mr. Murray had shot himself was a "settled issue." (ECF 199 at 295:6-12, 326:6-18, 370:6-19.) As noted *supra* in footnote 31, however, Agent Ashdown should have had the .380 Hi-Point tested for any evidence that Officer Norton had touched it, even though FBI protocols did not require such testing. (ECF 258 at 603:14-20, 605:17-606:5.)

The plaintiffs' best evidence that Mr. Murray did not shoot himself is the location of the entry wound on the left side of Mr. Murray's head, even though Mr. Murray was right-handed. The expert testimony about whether the location of the shot was suspicious for a self-inflicted gunshot wound, however, was mixed and ultimately tilted against the plaintiffs.

Dr. Arden, the plaintiffs' expert on forensic pathology, testified the "totality of that gunshot wound is mostly uncommon or atypical for a suicidal gunshot wound to the head," except for the fact that it was a contact wound, which he testified is "common." (ECF 257 at 463:24-464:7.) Specifically, he testified that the location "above and behind the left ear is an atypical location," although he noted the "trajectory going across the head by itself is not . . . particularly typical or atypical." (*Id.* at 464:8-20.) On cross-examination, Dr. Arden was asked if he still agreed with his deposition testimony, in which he stated "'[c]ertainly one of the reasonable choices was this was a suicide. The undetermined [*sic*] would have been a better way to certify it given the gaps in the evidence – in the investigation in the evidence." He confirmed that he was still of the opinion that finding the manner of death to be undetermined would have been the best conclusion, but that the finding of suicide was reasonable.[35] (*Id.* at 470:4-11.) Further, when asked, Dr. Arden agreed that he would have marked Mr. Murray's manner of death as undetermined. (*Id.* at 470:12-15.) Notably, after having reviewed the facts surrounding Mr. Murray's death, including the lack of testing of the .380 Hi-Point, Dr. Arden did not testify that he would have certified the death as a "homicide," or that "homicide" would have been the appropriate manner of death to specify. (*Id.* at 478:1-19.) In other words, the location of the entry wound to Mr. Murray's head was not so atypical that Dr. Arden thought it made homicide the most likely manner of death, and that the determination of suicide was a reasonable choice.

Dr. Cohen, the defendant's expert on forensic pathology, testified that the location of the wound was "not atypical at all," and that the location of the entry wound was "within range of not atypical . . . . It's a little bit higher and a little bit backward, but it is definitely within range.

was disabled. This scenario is also problematic because it requires Officer Norton to collect his shell casings after shooting Mr. Murray and plant them a substantial distance away from Mr. Murray, all in a very short timeframe.

[35] Dr. Arden agreed that medical examiners use the term undetermined "when you either have insufficient evidence on which to base a conclusion or you have more than one choice that have such close probabilities that you can't reasonable rank order as much more probable than the other." (ECF 470:23-471:7.)

It's not atypical." (ECF 258 at 518:5-17.) He further opined that, based on the evidence he reviewed, the manner of Mr. Murray's death was suicide. (*Id.* at 506:25-508:3.)

To be sure, Mr. Murray was right-handed (ECF 198 at 27:9-10) and was shot in the left side of the head, slightly behind the left ear. Yet Dr. Cohen testified that, while it would be uncommon, it would not be rare for Mr. Murray, a right-handed person, to have used his right hand to inflict this wound to his left side of the head, contrary to Dr. Arden's opinion. (ECF 258 at 539:7-18.) Dr. Leis also testified that Mr. Murray using his right hand to inflict this wound would have been consistent with the trajectory of the injury, although he acknowledged it would be "very rare." (ECF 234-1 at 129:11-130:13, 136:14-22.)[36]

The evidence does not reflect clearly whether Mr. Murray used his right or left hand to inflict the gunshot wound. Officer Norton believed the .380 Hi-Point was in Mr. Murray's left hand but was unsure; he apparently based his recollection in part on his belief that the dashcam footage showed Mr. Murray holding a gun in his left hand. (ECF 198 at 95:24-96:15.) While this is a possible interpretation of the footage, it is by no means clear, as the quality of the footage is poor. (Def. Ex. 134 at 27:40-28:03.)

Right-handed individuals can sometimes use their left hands to perform certain activities. (*See* ECF 234-1 at 134:15-21 (Dr. Leis agreeing that "it's not written" that a right-handed person has to shoot himself with his right hand).) Mr. Murray's mother, who attested that Mr. Murray was right-handed, had never seen him shoot a handgun and could not testify as to which hand he used for that activity. (ECF 198 at 32:15-23.) In addition, under the stress of being pursued by police following a car crash and given the high blood-alcohol level and the presence of other intoxicants in his system (*see* Def. Ex. 107 at 2-3), Mr. Murray may have been panicking and acting rashly, disregarding his favored hand in carrying the handgun.

While the expert testimony is conflicting on whether the location of the entry wound was atypical for a self-inflicted head wound, no expert testified that "homicide" would have been the best manner of death certification. Even the plaintiffs' expert witness Dr. Arden opined that the manner of death should have been labeled as "undetermined," rather than homicide, but agreed that suicide was "reasonable." (ECF 257 at 470:4-15, 478:1-19.) In effect, the plaintiffs' own

[36] A question to Dr. Leis in this portion of the deposition transcript prompted an objection for lack of foundation from an attorney representing various localities and officers, who are not parties in this case, in the district court proceedings. (ECF 234-1 at 136:14-22.) The parties' stipulation concerning Dr. Leis's deposition testimony does not address how objections therein should be treated. (ECF 232 at ¶ 44.) The objection noted was made by counsel for a non-party here in response to questioning by plaintiffs' counsel. Neither party renewed or requested a ruling on the objection. Any objection by any party in this case to the question and to Dr. Leis's answer is considered to have been waived. In any event, the objection would be overruled on the merits, as Dr. Leis was expressing a view based on his experience as a medical examiner.

expert opined that the plaintiffs are unable to satisfy their burden to prove that it was more likely than not that Officer Norton killed Mr. Murray.

As to why Mr. Murray shot himself and why he did so in an unusual location, there is substantial evidence to suggest that Mr. Murray was impaired on April 1, 2007. A blood test taken after Mr. Murray died showed the presence of alcohol, and a urine drug screen showed amphetamine and THC in Mr. Murray's system.[37] (Def. Ex. 107 at 2-3.) These impairments may have contributed to a purposeful decision to shoot himself or an unwitting, accidental shooting; Dr. Arden testified that such impairments could have caused Mr. Murray to shoot himself accidentally. (ECF 257 at 462:10-23, 471:8-20, 472:13-473:7.)

Although the plaintiffs raised the possibility that there were issues with the chain of custody with the blood sample, the plaintiffs never actually identified what those issues were. (ECF 232 at 9 n.3; ECF 257 at 465:7-466:19.) The plaintiffs cannot simply rely on vague suggestions of improprieties with the chain of custody, especially after stipulating to the admission of the relevant records. (ECF 232 at 9.) Admittedly, there is evidence of law enforcement officers improperly drawing blood from Mr. Murray. (ECF 199 at 313:10-15.) There is no evidence, however, that this improperly drawn blood was ever tested, and Agent Ashdown refused to accept the proffered vials with the blood. (*Id.* at 313:10-25.) If that blood was tested, the results of that testing are not in evidence.

On the other hand, there is no evidence to suggest that the blood or urine drawn at Ashley Valley Medical Center was tampered with or that the law enforcement officers injected Mr. Murray with drugs or alcohol. Such tampering seems particularly unlikely as Mr. Murray's urine and blood both returned positive results for different intoxicants. (Def. Ex. 107 at 2-3.) Trooper Swenson also found "some drug paraphernalia, . . . some marijuana, a BB gun, and some beer bottles" in the crashed vehicle, corroborating the results of the tests that Mr. Murray was under the influence of marijuana and alcohol on April 1, 2007. (ECF 254 at 67:21-68:2.)

Based on the testimony and the exhibits in evidence, the Court concludes that Officer Norton's account of the shooting was credible and supported by the available physical and audio evidence. It is most likely that Mr. Murray shot himself in the head while Officer Norton was more than 140 yards away. Because Officer Norton's testimony as to the events of the shooting otherwise aligns with the evidence, the Court also credits Mr. Norton's testimony that he only

[37] While the evidence concerning Mr. Murray's intoxication supports the finding, based on preponderant evidence, that Mr. Murray shot himself, it is not necessary to that finding. The evidence as to how the .380 Hi-Point was brought to the scene, the physical evidence at the scene, the dispatch transmissions, the testimony of the other officers, and the resulting timeline for the events leading up to the shooting are sufficient to show that it is more likely than not that Officer Norton did not shoot Mr. Murray. Therefore, even if the evidence concerning Mr. Murray's intoxication is disregarded, the conclusions reached in this opinion would remain the same.

fired at Mr. Murray in response to Mr. Murray first shooting at Officer Norton. (ECF 198 at 93:3-94:3; ECF 254 at 131:11-21, 132:16-133:14, 153:7-2.)

III. DISCUSSION

A. Burden of Proof

The plaintiffs bring suit under the "bad men" clause of the Ute Treaty. The plaintiffs have the burden of proving that they meet the elements required by the treaty to recover. *See Hebah v. United States*, 456 F.2d 696, 704 (Ct. Cl. 1972) (noting that, under a substantively identical "bad men" provision of a different treaty between the United States and another tribe, "plaintiff has the burden of proving" the requisites for recovering under the treaty). "To state a claim for relief under the bad men provision [of the Ute Treaty] requires the identification of particular 'bad men,' and an allegation that those men committed a wrong within the meaning of the treaty." *Jones II*, 846 F.3d at 1352; *see also Hebah*, 456 F.2d at 703-04; *Elk v. United States*, 87 Fed. Cl. 70, 78 (2009).

B. Claims Abandoned by the Plaintiffs

The amended complaint never identified specific criminal statutes whose violation it alleged constituted wrongs against Mr. Murray, although it did use terms such as "murder," "assault," and "conspiracy." (ECF 17 at ¶¶ 16-17, 67, 69.) The *Jones IV* decision on the defendant's motion for summary judgment had to rely on the plaintiffs' response to one of the defendant's interrogatories to determine which criminal statutes the plaintiffs were alleging had been violated. *Jones IV*, 149 Fed. Cl. at 346-48 (citing ECF 150-6 at 3-4). The *Jones VI* opinion again relied on the same interrogatory response to identify the alleged crimes committed against Mr. Murray. *Jones VI*, 2023 WL 2681819 at *36 n.23.

In response to an order (ECF 214), the plaintiffs filed a more definite statement (ECF 215) of the crimes they allege constituted the wrongs necessary to support recovery under the "bad men" provision of the Ute Treaty. The plaintiffs identified several offenses, including, for the first time, claims under Ute law. As explained *supra* footnote 2 and page 6, the Court instructed the parties on its view of the proper scope of claims that were still viable after the *Jones IV* summary judgment ruling and the Federal Circuit's partial reversal in *Jones V*. Noting the plaintiffs' objections, the parties agreed to proceed to trial on a narrower list of crimes supporting potential "bad men" liability. (ECF 219 at 1-3, 6-7.) This list included:

- murder of Todd Murray, or negligent or reckless homicide, battery, and any lesser included offenses of these crimes: 18 U.S.C. §§ 13, 1111, 1112, 1117, 1152; Utah Criminal Code §§76-5-202 (e), (f), (k), (s); 76-5-201 76-5-205, 206, 209.
- Conspiracy against rights, 18 U.S.C. §§ 13, 1152, 241, 242.
- Assault, Utah Criminal Code §76-5-102.
- Obstruction of justice, 18 U.S.C. §§ 13, 1152, 1503, 1505, 1512, 1519.

- Making false statements to federal investigators, 18 U.S.C. §§ 13, 1001, 1152.
- Destruction of records or evidence, 18 U.S.C. §§ 13, 1152, 2071, 2232.
- Interference with public servant or peace officer, Utah Criminal Code §§76-8-301; 76-8-305.
- Official or unofficial misconduct, Utah Criminal Code §§76-8-201, 203.
- Obstruction of criminal investigation, Utah Criminal Code §76-8-306.
- Tampering with evidence, falsification or alter[a]tion of government record, Utah Criminal Code §§76-8-510.5, 511.
- False claims and conspiracy to defraud United States, 18 U.S.C. §§ 13, 1152, 287, 371.

(ECF 219 at 2-3.)

Despite including this lengthy list of crimes on which they intended to prove liability at trial, the plaintiffs' proposed findings of fact and conclusions of law do not address explicitly the elements required to prove any officer committed any of the above offenses. The failure to spell out in their proposed findings the elements of any offenses they intended to prove and how specific evidence proves those elements were met is consistent with the plaintiffs' failure to adduce evidence on almost all the offenses they had identified as potential bases for liability.

In their proposed conclusions of law, the plaintiffs focused almost entirely on the spoliation sanction that was imposed as the basis for imposing liability on the defendant. (ECF 261 at 15-20.) The sanction was an evidentiary one; it did not identify and does not support an effort to identify the specific offense on which liability could be imposed. At best, the evidentiary sanction imposed for spoliation could have on its own implicitly helped the plaintiffs show that Officer Norton committed homicide or assault against Mr. Murray, but the presumption has been successfully rebutted.

The only proposed finding or conclusion that addresses a possible basis for liability is the plaintiffs' last one, in which they propose that "[t]he United States is liable under the bad man clause for the death of Todd Murray." (*Id.* at 20.) That proposed finding limits the potential basis for liability to the crime of killing Mr. Murray.

Even the plaintiffs' closing argument at the end of trial was vague as to what crimes had been proven from the evidence to form the basis for liability under the "bad men" provision. At best, the plaintiffs argued in their closing rebuttal "that the Court must conclude that there is evidence of crimes that resulted in the death of Mr. Murray. Whether they are murder, whether they are homicide, what it would be, whether it's negligent homicide, any of those sorts of things." (ECF 259 at 660:10-14.) This quote is the *only* portion of the plaintiffs' closing

argument that even implicitly referenced any specific crimes committed by law enforcement; those crimes again are limited to homicide and perhaps assault, as a lesser included offense.

The plaintiffs have forfeited their claims based on all offenses aside from homicide and assault, as a lesser-included crime, by failing to argue or show how the evidence satisfies the required elements of any of the alleged offenses. *See Rodriguez v. Dep't of Veterans Affs.*, 8 F.4th 1290, 1305 (Fed. Cir. 2021) ("An issue that is merely alluded to and not developed as an argument in a party's brief is deemed waived."); *Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 1250 n.2 (Fed. Cir. 2008) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)) ("'A skeletal "argument", really nothing more than an assertion, does not preserve a claim.'"); *cf. Kistler Instrumente AG. v. United States*, 628 F.2d 1303, 1304 (Ct. Cl. 1980) (per curiam) (concluding that when a defendant had "asserted a host of defenses to the plaintiff's action" but "no findings of fact have been proposed with respect" to two of those defenses, that the "defendant is deemed to have abandoned these defenses"); *Jones v. Kirchner*, 835 F.3d 74, 83 (D.C. Cir. 2016) (cleaned up) ("We apply forfeiture to unarticulated legal and evidentiary theories not only because judges are not like pigs, hunting for truffles buried in briefs or the record, but also because such a rule ensures fairness to both parties."). This rule is particularly applicable to the alleged state offenses; it is not obvious that all the asserted violations of state law are incorporated by the Assimilative Crimes Act, 18 U.S.C. § 13. *See Jones IV*, 149 Fed. Cl. at 355-56 (discussing whether specific federal statutes preclude incorporation of state statutes under the Assimilative Crimes Act).

Even if the plaintiffs had not forfeited their claims by abandoning them, the evidence necessary to support a finding that any offenses, aside from homicide and assault, were committed is entirely lacking. Evidence that would support many of the offenses alleged at some time during the long history of this case was never presented at trial. For example, the record is devoid of any evidence to support the plaintiffs' alleged conspiracy offenses. No officer has been shown to have colluded in any way with Officer Norton either in connection with the shooting or with a cover-up. Similarly, the plaintiffs never identified what specific acts could constitute obstruction of justice, obstruction of a criminal investigation, or misconduct. There is no evidence to show which public records were tampered with or destroyed, aside from the only negligent, rather than bad faith or intentional, destruction of the .380 Hi-Point handgun, for which the defendant was sanctioned. For none of the crimes alleged, at one time or another by the plaintiffs as a basis for liability, is there evidence connecting specific officers to specific crimes. Thus, aside from Officer Norton, accused of killing Mr. Murray, none of the other officers has been accused of being a "bad man" under the Ute Treaty.

The plaintiffs were advised in *Jones VI* that it was each "party's responsibility to support its proposed findings of fact with relevant citations to the evidence in the record," and that a party's failure to do so could result in that party's proposed findings being disregarded in part or in full. *Jones VI*, 2023 WL 2681819, at *3 n.3. It is not the Court's job to invent the plaintiffs' arguments, and the plaintiffs have failed both to propose specific findings of criminal behavior on April 1, 2007, and to tie the evidence to their generic proposed findings. The plaintiffs' meager proposed findings are facially inadequate for every criminal act, aside from homicide and assault, they had intended at one point or another to prove.

The only bases for liability the plaintiffs have not forfeited by failing to propose adequate findings are those related to homicide of Mr. Murray, and any related assault on him, by Officer Norton. These offenses have always been at the heart of the plaintiffs' claims: that Officer Norton unlawfully killed Mr. Murray. The plaintiffs also indirectly asserted these offenses through their proposed conclusion of law that "[t]he United States is liable under the bad man clause for *the death* of Todd Murray." (ECF 261 at 20 (emphasis added).) The plaintiffs' claims based on these offenses are the only ones not forfeited, and they are addressed on the merits.

C. The Plaintiffs Failed to Prove that Officer Norton Committed Assault or Homicide

The plaintiffs have failed to meet their burden on their remaining claims that Mr. Murray was the victim of an assault or a homicide.

Officer Norton's actions constituted neither assault under federal or Utah law, as incorporated by the Assimilative Crimes Act, 18 U.S.C. § 13, nor any form of homicide under Utah or federal law. The evidence reflects that Mr. Murray fired two shots at Officer Norton in an unprovoked use of deadly force. Officer Norton fired two shots at Mr. Murray only in response to Mr. Murray's use of deadly force because he was in fear for his life.

Under Utah law, a person "is justified in using force against another person when and to the extent that the [person] reasonably believes that force is necessary to defend [himself] . . . against another person's imminent use of unlawful force." Model Utah Crim. Jury Instr. 2d § 530; *see also Ray v. Wal-Mart Stores, Inc.*, 359 P.3d 614, 621 (Utah 2015) ("The right of self-defense is enshrined in the Utah Constitution, Utah's self-defense statute, and our common law decisions."). A person "does not have a duty to retreat from another person's use or threatened use of unlawful force before using force to defend [himself] . . . as long as the [person] is in a place where [he] has lawfully entered or remained." Model Utah Crim. Jury Instr. 2d § 533. Officer Norton was lawfully present at the scene because he was a sworn law enforcement officer in hot pursuit of a person who he reasonably believed may have committed a criminal offense, namely fleeing from arrest.[38] *See* Utah Code §§ 76-8-305 (1990), 305.5 (2005). He therefore could enter private land in pursuit of Mr. Murray. *See* Utah Code §§ 76-6-201(3) (1973) (clarifying that privileged and licensed actors are lawfully present on land), 206(a)

[38] No evidence at trial undermines the conclusion reached in the *Jones VI* spoliation opinion that Officer Norton's actions did not constitute trespass and that his presence on the land was privileged under Utah law. *See Jones VI*, 2023 WL 2681819 at *40-41. Even if Officer Norton was a trespasser, he still likely would have had the right under Utah law to use deadly force to protect himself against the unprovoked use of deadly force. *See State v. Tuckett*, 13 P.3d 1060, 1061-62 (Utah App. 2000) (noting that, in a case in which a trespasser refused a request to leave but did not otherwise use force, the trespasser could "use force to defend himself against any use of force [ ] that would have caused death or serious bodily injury.")

(2006); Restatement (Second) of Torts § 204 (1965) (describing the privilege to enter private land to make an arrest); *Jones VI*, 2023 WL 2681819 at *41 n.31.

Under federal law, "[a] person may resort to self-defense if he reasonably believes that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind response. Self-defense thus requires both (1) a perception of danger that is objectively reasonable, even if inaccurate; and (2) a necessary response that is proportional to the perceived danger." *United States v. Kepler*, 74 F.4th 1292, 1313 (10th Cir. 2023) (cleaned up).

Officer Norton drew his handgun only after he spotted Mr. Murray with what appeared to be a handgun in his hand and kept his gun in the low-ready position, pointed towards, but not directly at Mr. Murray. (ECF 198 at 89:13-21, 93:3-14; ECF 254 at 153:7-154:2.) Officer Norton had identified himself as a police officer to Mr. Murray, yelling "Police, get on the ground[!]" (ECF 198 at 89:15-21.) Mr. Murray should have heard those commands. (Site Visit.) Mr. Murray continued to approach Officer Norton with a gun in hand and then fired at Officer Norton without provocation before Officer Norton returned fire. (ECF 198 at 93:3-94:10; ECF 254 at 131:11-132:15.) In such circumstances, Officer Norton's conduct cannot constitute assault. Officer Norton drawing his weapon in the face of an approaching person having an unholstered weapon was a reasonable response, and Officer Norton had the right to use deadly force in response to Mr. Murray's own, unprovoked use of deadly force. *See Kepler*, 74 F. 4th at 1313; Model Utah Crim. Jury Instr. 2d §§ 530-533.

As for homicide, there is no evidence that Officer Norton possessed the necessary *mens rea* to commit any degree of homicide. Even presuming, contrary to the evidence, that Officer Norton did possess a required *mens rea*, his actions could not have constituted homicide. Officer Norton's shots did not hit Mr. Murray. (ECF 198 at 170:4-8; ECF 254 at 132:2-8.) Mr. Murray was fatally wounded by a contact gunshot wound that was fired by Mr. Murray while Officer Norton was approximately 140 yards away.

The evidence shows that it is more likely than not that Mr. Murray fired the fatal shot.[39] Officer Norton's actions did not constitute any form of homicide under Utah or federal law because he did not kill Mr. Murray, and any attempt to do so was only part of Officer Norton's lawful use of force in self-defense.

IV. CONCLUSION

As noted at the outset, civil trials do not prove what really occurred. They can only prove what the evidence reflects is most likely to have happened. The shortcomings of any trial are magnified when so much time has elapsed between the event and the trial. The plaintiffs are to

[39] Although Mr. Murray fired the fatal shot, there is no proof of the medical examiner's conclusion that Mr. Murray died by suicide. It is very possible, as Dr. Arden acknowledged, that the self-inflicted wound was accidental, given the stress Mr. Murray was under and his impairment by alcohol and drugs. (ECF 257 at 462:10-23, 471:8-20, 472:13-473:7.)

be commended for their tenacity in bringing and pursuing their claims and marshaling the record in the face of these difficulties.

Nevertheless, the plaintiffs have not shown by preponderant evidence that Officer Norton's use of deadly force to defend himself against Mr. Murray's use of deadly force was unlawful; therefore, Officer Norton did not unlawfully assault Mr. Murray. The plaintiffs have failed to prove by preponderant evidence that Officer Norton fired the fatal shot or otherwise killed Mr. Murray on April 1, 2007. The plaintiffs have failed to prove that Officer Norton committed homicide or assault on April 1, 2007. The evidence fails to show that Officer Norton committed any crimes against Mr. Murray on April 1, 2007, and, therefore, the plaintiffs have failed to prove the elements necessary to impose liability against the defendant under the "bad men" provision of the Ute Treaty for Officer Norton's actions.

In addition, the plaintiffs have forfeited any other possible basis they have at one time or another advanced as a basis for imposing liability on the defendant under the "bad men" provision of the Ute Treaty for the acts that took place during the pursuit of the crashed vehicle or on the reservation following the pursuit on April 1, 2007. And for the reasons previously provided in *Jones IV*, the offenses alleged to have occurred at the hospital and the mortuary on April 1, 2007, cannot support the imposition of liability against the defendant.

All the plaintiffs' claims fail either for insufficient evidence or as a matter of law. A separate order filed concurrently with this opinion will direct the entry of judgment in favor of the defendant.

s/ Richard A. Hertling
Richard A. Hertling
Judge