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

PLAINTIFFS-APPELLANTS' CORRECTED REPLY 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.

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SUMMARY OF THE ARGUMENT

This Court remanded for the CFC to impose a meaningful spoliation remedy. The CFC initially seemed to comply with that mandate, imposing a rebuttable presumption that the .380 gun did not contain Mr. Murray's blood, tissue, or DNA on it. But after the trial, and after the Murray Family presented its case based upon the spoliation order that had been issued, the CFC only imposed a rebuttable presumption on the merits of the case. In their opening brief, the Murray Family discussed that the remedy was meaningless, and was in fact less than the remedy the CFC imposed prior to the last appeal, and which this Court vacated as insufficient. The United States' primary response is that the error was not meaningless because the Murray Family was able to have a trial before the CFC issued a longer version of the order that this Court has now vacated twice.

This Court also remanded for the CFC to determine whether other key pieces of evidence had been spoliated. The CFC correctly held that litigation was foreseeable on April 1, 2007—the day Mr. Murray was shot to death. But the CFC wrongly created a "fourth amendment right" that when Norton gave his gun to his supervisor at the crime scene, Norton or the supervisor or perhaps a town 40 miles away had a "constitutional right" to refuse to give that key evidence to the FBI.

That decision is wrong on both law and policy. The United States argument in response is contrary to the numerous cases which the Murray Family cited, and

notably the United States does not even address the Murray Family's correct discussion of the right that the FBI actually has at a crime scene—to collect evidence, whether it be inculpatory, exculpatory, or of value to be determined later after further investigation.

The Murray Family will always believe that Norton killed Todd Murray on April 1, 2007. After 18 years of litigation, the Murray Family deserved a meaningful decision on its claims. Instead, the CFC committed multiple additional errors at trial and in its post-trial decision. It created a plainly erroneous timeline based upon its sua sponte incorrect conclusion that the "runner in blue" was Norton. The United States knows that conclusion is wrong, yet it now asks this Court to affirm based upon the erroneous timeline.

This Court must remand for meaningful spoliation sanctions for both guns, for Norton's clothing, and for faith to determine whether those items contained Mr. Murray's blood or genetic materials. It should also reverse the CFC's errors at trial.

REPLY REGARDING STATEMENT OF FACTS

1) As the United States knows, Norton was the "runner in blue." In his police report, Appx668, which was admitted into evidence, Officer Byron wrote that he initially saw an individual running up a hillside and that he did not know if that was

the "suspect," [sic![1]] or someone else. Appx676. As is at least implicit in Officer Byron's police report, and as Byron *expressly* discussed at trial, Byron subsequently learned that the runner in blue was Norton, whom Bryon met face-to-face a few minutes later. *E.g.*, Appx655 (T.255:18-257:57:22). Moreover, the United States knows Norton was the runner in blue because this has been consistently established in depositions and other documents going back over ten years now. *E.g.,* Appx434, Appx440 (Fitzer Dep.23:6-8; 74:1-5); Appx655 (T. 257:12-17); Appx284 (Byron Dep 85:11-16).[2]

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1 Mr. Murray was not suspected of having committed any crime when Norton, Young, and Byron went looking for him. While the United States incorrectly frets about possible violations of Jensen's "constitutional right" to come to a crime scene and take away key evidence, the United States never shows any concern for the violation of Mr. Murray's right, as a person not suspected of a crime, to be ordered to the ground at gunpoint by a city cop 40 miles from home.

2 The United States asserts there is a bright line rule that because the United States chose not to call Fitzer at trial, his report cannot be used for any purpose at this point. Fitzer's report is part of the Court file, and the United States relied upon the report and Fitzer's testimony at the spoliation hearing. *E.g.*, Appx22-24

The United States sole argument, that there is a bright line rule, is wrong. *United States v. Campbell*, 122 F.4th 624, 632–33 (6th Cir. 2024) (citing *Greer v. United States*, 593 U.S. 503, 510–11 (2021) (holding that for harmless error analysis, the Court can review documents in the record that were not used at trial). Fitzer's report is fair game for the limited purpose for which the Murray Family cited it for at least two reasons. First, Fitzer was an FBI employee when he wrote the report, and the United States used and adopted that report in prior filings and in the spoliation hearing. Fitzer's acknowledgment Norton was the runner in blue is an admission by a party opponent or at least very strong support for the Murray Family's discussion of the CFC's error and for discussion that the United States knows that the CFC erred when the CFC held that Mr. Murray was the runner in blue.

Second, the fact that after Fitzer was cross examined about his timeline, the United States did not even call him to present his assertion that Norton did not have time to

Notably, in its post-trial proposed findings and conclusions, the United States, properly, did not seek a finding that Murray was the runner. Despite that, and despite the clear testimony that Norton was the runner in blue, the Court constructed a series of inferences to conclude that the runner was Murray. Appx073-074. *See also* U.S. Br. at 41 (instead of discussing the direct testimony that Norton was the runner in blue, the United States cites some of the CFC's string of inferences that lead it to the exact opposite conclusion from the direct testimony)

Based upon its erroneous conclusion that Mr. Murray was the runner in blue, the CFC creates an erroneous timeline and asserts there were only about 90 seconds between when Mr. Murray was seen running over the hill and when he was shot. Appx082-083. That timeline, and the conclusions the CFC has drawn from it, are wrong. The United States, knowing the truth, improperly asks for affirmance based upon that erroneous timeline.[3] One could debate whether the United States is, in

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shoot Mr. Murray is highly relevant to the prejudice to the Plaintiffs from similar errors in the Court's timeline, and to the United States truncated assertion of harmless error. The United States does not want this Court to consider Fitzer's timeline precisely because it is highly relevant, and highly harmful to their attempt to hide their knowledge that Norton was the runner in blue.

3 In its response brief, the United States supports the CFC conclusion that Byron did not recognize his own voice on a recording. Vis-à-vis the "runner in blue," that CFC conclusion is of no benefit to the United States. As the CFC notes, the person asking over police radio about the "runner in blue" had to be Byron or Young. At trial, Byron testified about the runner in blue in more detail. The Murray Family raised the CFC's assertion that Byron did not recognize his own voice because it was relevant to a different factual issue related to Norton's inaccurate testimony.

fact, required to confess the error, because it knows that Norton was the runner in blue. R. Prof. Conduct 3.3. Regardless, this Court must vacate the finding and the related timeline based upon it, and then must vacate the CFC decision, which heavily relied upon those errors.

2) In its "summary of the argument," U.S. Br. at 1, and again in the body of its brief, U.S. Br. at 44, the United States improperly claims that "the evidence showed that Murray was impaired on April 1, 2007." The evidence showed no such thing. At trial in this matter, the United States sought to introduce evidence that Mr. Murray had alcohol and amphetamines or methamphetamines in his system, but that evidence was **not** admitted for the truth of the matter asserted. The reason it was not admitted is that the United States could not show a chain of custody for any of the blood samples. *E.g.*, Appx661-665 (T. 523:24-527:9) (after the Murray Family objected to references in Dr. Leis' report to the blood tests based upon lack of chain of custody, the United States agreed to "withdraw [Defendant's Exhibit 73 solely]

to the extent that it talks about toxicology.")[4] Despite this, the United States now submits and relies upon the exact portions of Dr. Leis' report that the United States, at trial, withdrew. SAppx294. Plaintiffs similarly objected to any use of alleged blood tests in Defendant's Exhibit 107 for the truth of the matter asserted unless Defendants established a chain of custody for those tests, Appx646 at n.3, and Defendant did not seek to establish that chain of custody. There was no competent evidence Mr. Murray had taken amphetamines, or methamphetamines, or had consumed alcohol. While this Court's resolution of either of the spoliation issues in the Murray Family's favor would eliminate the need for the Court to rule on the evidentiary issue related to alleged intoxication, the Murray Family asks the Court to rule on that issue.

4 As will be discussed in the discussion of law below, parties are not required to (and, at least in Plaintiff's view should not) interrupt testimony to request that the Judge give himself a limiting instruction. Here, because of the importance of the lack of competent evidence of any blood test, and because Defendant directly asked Plaintiff's expert to read into the record Dr. Leis' inadmissible conclusion regarding toxicology testing (which was not admissible for the truth of any toxicology testing), Plaintiff did interrupt testimony to clarify that although the document was admissible for purposes of questioning of the medical expert regarding a document he relied upon, the blood test and references to the blood test were not admissible for the truth of the matter asserted. Here, Defendants went one step further than Plaintiffs requested. They\withdrew the portions of the document which referenced toxicology.

ARGUMENT

I. STANDARD OF REVIEW FOR ISSUE RAISED BY THE UNITED STATES.

In its response brief, the United States argues that the CFC erred when the CFC held that litigation was reasonably foreseeable on April 1, 2007. This Court reviews that portion of the CFC decision under the "clear error" standard. *Micron Tech, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1321 (citing *Citizens Fed. Bank v. United States*, 474 F.3d 1314, 1321 (Fed. Cir. 2007); *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 315 (3d Cir. 1999); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995)).

II. THIS COURT SHOULD REMAND WITH INSTRUCTIONS TO IMPOSE SPOLIATION SANCTIONS REGARDING NORTON'S GUN AND CLOTHING AND TRACE EVIDENCE ON EACH.

In the prior appeal and in its opening brief, the Murray Family discussed that Norton's gun and clothing were significant pieces of evidence at the crime scene. This Court's decisions in the prior appeals regarding Norton's gun and clothing was premised on those pieces of evidence having sufficient importance for spoliation. *E.g.*, *Jones I* at 1363 ("But for the destruction of the cited evidence, Jones may have shown that Murray was, in fact, shot by Norton.").

After the most recent appeal, this Court remanded for the CFC to consider two other elements for spoliation: A) whether litigation was reasonably foreseeable at the time that other significant evidence was spoliated; and B) whether the FBI had

the right to obtain or control those significant pieces of evidence (as the Murray Family alleged) or did not (as the United States alleged).

The United States wisely does not dispute that these specific pieces of evidence were sufficiently important for spoliation purposes. Whether that evidence would have been inculpatory or exculpatory is unknown precisely because the FBI failed to collect it. But it was clearly significant evidence, which if spoliated would require a remedy. The United States continues to dispute the two other two elements for spoliation that were remanded for further consideration after the prior appeal.

A. THE CFC FINDING THAT LITIGATION WAS REASONABLY FORESEEABLE ON APRIL 1, 2007 SHOULD NOT BE VACATED ON APPEAL.

In Section I.C.1 of its response brief, the United States acknowledges that the CFC, "held that litigation was reasonably foreseeable on April 1, 2007." The United States asserts, "This ruling was erroneous." U.S. Br. at 27. This Court must reject the United States' argument for two independent reasons. First, the CFC holding is not erroneous. Second, the United States did not preserve the issue for appeal.

1. The CFC finding easily survives review under the applicable "clear error" standard.

Even if one assumed the United States preserved the issue for appeal, see ¶II.A.2, *infra*, this Court would review the CFC determination that litigation was reasonably foreseeable on April 1, 2007 under the "clear error" standard. *Micron Tech, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1321 (Fed. Cir. 2011). In *Micron Tech*,

Rambus argued that this Circuit should review the date upon which litigation is reasonably foreseeable as a mixed question of law and fact to be reviewed de novo. This Court provided a detailed analysis in response to Rambus' argument, and concluded that the date on which litigation is reasonably foreseeable is reviewed under the clear error standard. *Id.* (citing *Citizens Fed. Bank v. United States*, 474 F.3d 1314, 1321 (Fed. Cir. 2007); *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 315 (3d Cir. 1999); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995)).

"Clear error exists when the trial judge's interpretation of the facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence." *Wisc. Alumni Rsch. Found. v. Apple Inc.*, 112 F.4th 1364, 1378 (Fed. Cir. 2024) (cleaned up). The United States does not meet that high standard.

The CFC determination of the date litigation was reasonably foreseeable was not "clear error." In their proposed findings of fact after the spoliation hearing, the Murray Family provided a lengthy discussion of the facts which showed that litigation was reasonably foreseeable on April 1, 2007, Appx565-571, ¶¶30-61, and that in fact litigation was foreseen on that day. Appx570-71 ¶¶57-61.

For example, the Murray Family requested a finding that:

> Although the boundary of the Uncompahgre Reservation and the fact that all land within that boundary is Indian Country have been

> unchanged since 1882… Officers Norton and Campbell each testified that the boundary between Indian County and non-Indian Country was continuously in flux, with the boundary changing yearly or even more frequently.

Appx569, proposed finding 53. The Tribe also requested a finding regarding Norton's admission that he had been instructed he could arrest tribal members on the Uncompahgre Reservation and take them to the County jail. As then-Judge Gorsuch succinctly stated, "This, of course, the State had no business doing." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003 (10th Cir. 2015).

Based upon the information and arguments presented at that time, the CFC correctly concluded that litigation was reasonably foreseeable on April 1, 2007 because "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."* Appx035 (emphasis added). The CFC provided ample discussion of the facts which supported that finding. The CFC further noted that the District Court in Utah had similarly found litigation was reasonably foreseeable for the exact same reason.

Although the United States never mentions the applicable "clear error" standard, the United States sub silento asserts that the CFC finding should be vacated under that standard. In support of that argument, the United States now claims that

the dispute between the Tribe and Utah only "concerns boundaries of the reservation and related jurisdiction issues." U.S. Br. at 27. The CFC, not the United States, is correct regarding the scope of the long-running dispute, and the CFC discussion of the scope is not "clear error." As relates to the portion of the Reservation at issue here, those issues had been resolved in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1986 en banc), *cert denied*, 479 U.S. 994 (1986) (*Ute III*). The ongoing problem after that was that the State and County refused to comply, including that, as Norton admitted, they wrongly instructed Utah law enforcement officers that they could go onto the Uncompahgre Reservation and arrest tribal members—exactly as Norton attempted to do in this case. As the Murray Family also noted, Norton himself had "lawyered up" on April 1, and the Murray Family had retained an attorney within days of the shooting. The CFC holding that litigation was reasonably foreseeable on April 1, 2007 is not clear error.

2. The United States did not preserve the alleged error.

After the most recent appeal, this Court remanded for the CFC to clarify whether its finding of reasonable foreseeability applied at the time of alleged spoliation of key evidence. *Jones II* at *9.

In their proposed findings of fact after the spoliation hearing, the Murray Family provided a lengthy discussion of the facts which showed that litigation was reasonably foreseeable on April 1, 2007. Appx565-571, ¶¶30-61. In its response,

filed one month later, the United States did not respond *at all* to the Murray Family's discussion of that history or why that history was sufficient to show that litigation was reasonably foreseeable. Appx617-618, ¶¶7-11. Instead, the United States provided a cursory discussion in which it claimed that litigation was not reasonably foreseeable because, it claimed, the FBI "had no reason to suspect Detective Norton of any wrongdoing." Appx617, Proposed Finding 8. The United States' argument was not responsive to the Murray Family's discussion. More significantly, it was not responsive to the finding that the United States now challenges, based upon that history. The United States now belatedly and only nominally seeks to dispute the long history of the Tribe and the State/counties litigating over state officer's wrongfully seeking to arrest tribal members for on-Reservation activities. Its attempt to argue that finding comes too late. It did not preserve the issue. Appx617-618, ¶¶7-11.

B. THE FBI HAD THE RIGHT TO OBTAIN OR CONTROL NORTON'S GUN AND TRACE EVIDENCE ON IT AND NORTON'S CLOTHING OR TRACE EVIDENCE ON IT.

In *Jones II*, this Court provided a brief, correct discussion of the Fourth Amendment as part of its rejection of the CFC's prior decision that the United States did not have control over Norton's gun and clothing. In doing so, this Court stated,

> [T]he government may have control over evidence where it has jurisdiction to investigate an incident <u>if its jurisdiction gives it the right to obtain or control that evidence</u>. We stop short of holding that the government always controls all evidence on an investigation scene.

Id. at *8

In its opening brief to this Court, the Murray Family provided a thorough and correct discussion of the law which gives the FBI the right to obtain or control Norton's gun and clothing, key evidence at the crime scene. Ashdown admitted he was the lead officer at the crime scene, and was in control of the crime scene, U.S. Resp. at 4 (citing Spol. T. 361:17-18). But, dutifully seeking to support the CFC's erroneous Fourth Amendment analysis, the United States asserts that its own FBI lacks the right to obtain or control the key evidence of the crime scene because anyone at a crime scene can take and can refuse to surrender to the FBI investigator evidence that is at the scene. U.S. Resp. ¶I.C. 1, 3.

Vernal officer Jensen traveled to an FBI crime scene 40 miles from Vernal, in a non-investigative role, Appx657-658 (T.310:8-311:3), and took possession of a key piece of evidence by oddly swapping identical looking guns with Norton, Appx 658 (T. 311:2-25). The United States now asserts that Jenson or the town of Vernal had a "constitutional right" to refuse to provide that evidence in plain view to the FBI agent in charge. If this Court hears rumbling when it reads that argument by the United States, the rumbling is from J. Edgar Hoover turning over in his grave in the Congressional Cemetery.

The United States has no meaningful response to the Murray Family's argument, and it primarily seeks to distract.

First, the United States attempt to avoid discussion of the Murray Family's detailed and correct discussion of the power of officers to collect evidence at a crime scene by a patently incorrect assertion that the Murray Family did not cite any cases for its argument. The Murray family did cite cases. They cited *Texas v. Brown*, 460 U.S. 730 (1983); *Payton v. New York*, 445 U.S. 573 (1980); *Horton v. California*, 496 U.S. 128 (1990), *Harris v. United States*, 390 U.S. 234 (1968); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Warden v. Haden*, 387 U.S. 294 (1967); and U*nited States v. Delva*, 13 F. Supp. 3d 269 (S.D.N.Y. 2014)). Each of those cases contradicts the CFC decision and the United States' argument that police officers at a crime scene lack the right to obtain or control evidence at the scene. Evidence at the crime scene would include things which would make a fact relevant to a potential crime *more* or *less* likely to be true. *See* Fed. R. Evid. 401 (defining the narrower term for trials of "relevant evidence"). The United States' attempt to evade response to the Murray Family's detailed discussion of the applicable criminal procedural case law by claiming the Murray Family did not cite any cases is indicative that the United States has no meaningful response.

The United States next trots out the same strawman argument it made to this Court in the prior appeal and that this Court rejected: that this Court must choose between a precedent that the "United States was obliged to preserve all potential evidence at the scene due to its investigative powers," U.S. Resp. at 31, or a

precedent that the United States has no duty to preserve any evidence. While the United States seeks to attribute its strawman argument to the Muray Family, the Murray Family's brief, and the prior decision of this Court show this is not the Murray Family's argument. The Murray Family has consistently argued, and in the prior appeal this Court agreed that as applicable to this case, the evidence that must be preserved is defined by the civil standard from spoliation case law. That is simply not "all evidence." It is, though, at the very least Norton's gun (and examination of the same for Mr. Murray's blood or genetic material) and Norton's clothing (or examination of the same for blood or genetic material). Those items easily meet that civil standard.

The United States correctly rejects its own straw man argument—stating that it "knows of no decision in which a court has imposed a legal duty upon the investigators to collect every piece of potential evidence." U.S. Resp. at 31. Since the Murray Family is not, and never has, made that argument, the United States' defeat of that straw man is of no import.

The United States next makes an undeveloped and inexplicable assertion that the Murray Family has not preserved its argument that the FBI had authority to obtain or control Norton's gun and clothing. The Murray Family is at a loss to understand the United States assertion: the Murray Family has been making this exact assertion for over 10 years now in this case. For example, after the spoliation

hearing, the Murray Family proposed conclusions of law that "Officer Norton had no reasonable expectation of privacy or authority to prevent the United States from taking the [.40] gun;" that "The City of Vernal did not have a legal basis for refusing to turn the [.40] gun over to Agent Ashdown;" and that "There was no constitutional prohibition on the United States taking possession of that evidence." Appx586-587, Proposed Conclusions 22-25. The notice of appeal challenges the order in which the CFC rejected those conclusions, and the issue, therefore, is not waived.

The United States' next strawman argument is that the scope of the search or seizure under the Fourth Amendment to the United States Constitution "does not carve out an exception for law enforcement officers." The Murray Family, of course, never made that argument. Instead, as the Murray Family showed in its opening brief, there simply is no "constitutional right" to refuse to provide the type of significant evidence at issue here to the investigator at a federal crime scene. There is no "right of privacy" in that property/evidence, and the FBI's act of obtaining or controlling that evidence does not require a warrant or probable cause that Norton committed murder. Particularly for the .40 gun, there is no "constitutional right" for an outsider to come to a crime scene and take key evidence and then refuse to give it to the federal investigator in charge.

The CFC and the United States' primary confusion is based upon their failure to understand basic criminal procedure. When the FBI is at a crime scene, it has

authority to take possession of any evidence it sees. Here, for example, the experts all agreed that the FBI properly took possession of the casings that Norton claims came from his gun, regardless of whether the FBI had probable cause that the casings were evidence that Norton committed a crime. The exact same is true for Norton's gun. At a crime scene, the FBI has control over the evidence that is there, regardless of whether that evidence is inculpatory or exculpatory or of unknown value at the time.[5] The United States naïve understanding of the Fourth Amendment, discussed in their response brief, is both wrong and harmful.

The United States next argues that in its spoliation order, the CFC could not consider whether Norton committed crimes other than murder or assault because the Murray Family did not address other crimes in its post-trial brief. The United States'

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5 Throughout its brief, the United States repeatedly attempts to prevail by asking this court to "blame" the Murray Family's attorney for various things. On pages 35 and 36 of its brief, the United States goes too far—improperly asserting that this Court should "blame" the Murray Family's attorney for an alleged lack of development of the record which allegedly led to the CFC decision not to rule on whether Vernal City has a "constitutional right" to withhold the .40 gun from the FBI investigator in charge of the crime scene. As the CFC explained, it (correctly) decided not to rule on the legal issue because a municipality does not have greater Fourth Amendment rights than Jensen or Norton, and might have fewer rights. App044, n. 22. In some cases where a lower court decides not to rule on a legal issue because the lower court concluded that a ruling was not needed to resolve the ultimate issue before the lower court, this Court would remand for the lower court to resolve that issue in the first instance. Here, that is not necessary, because the CFC (correctly, and as also not challenged on appeal) held that Vernal did not have any greater rights than Jensen. *Id.* The FBI had the power to take the .40 gun from Jensen (as discussed in the body of this brief), and therefore, any authority Vernal had would not prevent the FBI from taking the .40 gun.

argument is illogical. The spoliation order was issued a year before the post-trial briefs.

The CFC holding that Norton, Jensen or Vernal had a constitutional right to withhold significant evidence at a crime scene from the FBI investigator was wrong. The FBI had the right to obtain or control those significant items, and this Court must vacate and remand for instructions to impose meaningful spoliation sanctions regarding those items.

III. THE COURT'S CONCLUSION THAT NORTON DID NOT HAVE TIME TO SHOOT MURRAY MUST BE VACATED BECAUSE IT WAS BASED UPON A CLEARLY ERRONEOUS TIMELINE GROUNDED IN THE CFC ERROR THAT MURRAY WAS THE RUNNER IN BLUE.

The CFC spent a significant portion of its merits opinion discussing the timeline it constructed, grounded on its erroneous decision that Mr. Murray was the "runner in blue," unharmed when he was seen running but shot 90 second later. In fact, the runner in blue was Norton. Byron and Young were initially uncertain who the "runner in blue" was, but as Byron testified, he later met up with Norton and realized the person he had seen running in blue was in fact Norton. *See* pp3-5, *supra*.

The CFC timeline, based upon its erroneous conclusion, is plainly incorrect. It is disappointing that the United States claims otherwise to this Court. In any case, the Court should reject the United States' argument.

The United States provides a cursory back-up argument. It appears to be asserting that the CFC's clear error is harmless because "the CFC's conclusion that

it is most likely that Murray committed suicide did not turn *exclusively on*" the CFC's erroneous timeline. The United States' cursory discussion is insufficient to present a harmless error issue to this Court. The United States' two paragraph discussion, that seems to be a harmless error argument, does not cite any case law. It does not discuss the applicable legal standard, nor does it discuss the standard of review that this Court would apply. U.S. Resp. 43-44.

Even if the issue were presented, the standard is not, as the United States seems to argue, whether the erroneous decision "turns exclusively" on the erroneous timeline.

> [E]videntiary rulings are subject to harmless error review, such that any error is harmless if we may say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."

Piehl v. Saheta, 602 F. App'x 111, 112 (4th Cir. 2015). A harmless error is one which the lower court did not substantially rely upon for its decision. *E.g.*, *Aguirre v. Dep't of Def.*, No. 2024-1349, 2024 WL 4562878, at *2 (Fed. Cir. Oct. 24, 2024); *Jarvis v. United States*, No. 2022-1006, 2022 WL 1009728, at *3 (Fed. Cir. Apr. 5, 292022). Here, the CFC very substantially relied upon its erroneous finding to

construct an incorrect timeline, which the CFR then used as support for its conclusion that Norton did not have time to shoot Mr. Murray. Appx073-083.[6]

In support of this "harmless error" argument, the United States seems to also suggest the error is not harmless because the Murray Family did not show a motive for Norton to kill Murray. Motive is not an element of the Murray Family's claim. Once cell phone cameras became ubiquitous, we have all seen videos of officers using excess force, but where the motive is unknown. Those officers are convicted or found civilly liable without proof of motive. The United States briefly references other facts that it claims would support its position. The Murray Family's view is that those pieces of evidence support, in varying degrees, their belief that Norton shot Mr. Murray. But as relevant here, those bits of evidence do not alter the fact that the CFC substantially relied upon the erroneous timeline, and that therefore, the error is not harmless.

6 In its opening brief, the Murray Family included an introductory paragraph stating that pages 19-29 of the CFC's merits decision were based upon a "convoluted string of inferences." In its response, the United States yet again wrongly attempts to chastise the Murray Family or its attorney, pretending the Murray Family's introductory paragraph was the whole of the Murray Family's discussion of the convoluted string of inferences. In reality, after the introductory paragraph, the Murray Family provided several pages fleshing out that introductory paragraph, discussing that string of inferences and multiple errors with those inferences.

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

As the Murray Family discussed, the United States attempted to use a substantively admissible statement on plea of guilty to prove that Kurip had possessed the .380 gun. It was only in the Murray Family's cross examination of Agent Ryan that the United States realized its error: the statement on plea of guilty did not implicate Kurip. Appx666-667 (T: 604:1-605:4).

In its response brief, the United States incorrectly asserts that the Murray Family did not preserve its argument that there was no competent evidence connecting the gun to Kurip, because the Murray Family did not object to a question by the United States in which the United States was seeking to set the foundation for a document it was going to try to have admitted. But when the United States attempted to use that document, the Murray Family did object on hearsay and the United States withdrew that document. The United States claim of failure to preserve misses the mark. Unlike the case which the United States cites, the trial was before a judge, not a jury. Ryan's testimony, based upon hearsay, that his view was that Kurip had come into possession of the gun was admissible for limited purposes to attempt to lay a foundation. But Ryan's testimony was not substantive evidence.

The rank hearsay was not admissible for the purpose for which the CFC later used it—to prove that the gun was possessed by Kurip. The United States' implicit

argument (for which it does not cite any case law) is that in a judge trial, if evidence is admissible only for a limited purpose, the party asserting it is only admissible for a limited purpose is required, in the middle of the testimony, *to ask the Judge to give himself a limiting instruction*. Case law does not support the United States argument. Requesting that the judge give the jury a limiting instruction is required, but in a judge trial, it is neither required nor in most situations good practice. Fed. R. Evid. 105 (if evidence is admissible for one purpose but not another, the *court* must restrict the evidence to its proper scope and [in a jury trial] instruct the jury accordingly upon a timely request).

An attorney is not required to interrupt testimony (and the attorney would usually be foolishly offensive to the judge if he or she did) to ask the judge to give *himself* a limited instruction. Judges are presumed to understand the limited purposes for which evidence is admitted and, under FRE 105, are required to consider it appropriately without the need for a limiting instruction. Plaintiff

followed the more respectful approach. The CFC erred when it failed to limit the evidence as required.[7]

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.

Through the Murray Family's brief and the United States' response, this Court has a single issue to resolve regarding the .380 gun. Did the United States rebut the presumption that the .380 gun did not contain Mr. Murray's blood, tissue, or DNA? The United States did not rebut that presumption, and therefore, under the CFC spoliation order, that gun must be viewed as not containing Mr. Murray's blood, tissue, or DNA. From there, the logical and evidentiary issues become simple. Because that presumption was not rebutted, the .380, **much more likely than not and to a virtual certainty**,[8] did not fire the fatal shot, and Norton had the only other gun at the scene at the time of the close-range shooting.

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7 The United States also attempt to rely upon a BIA report, for which Ryan lacked any person knowledge. That BIA police referenced that a BIA officer had recovered an empty gun box for a .380 gun in a house in which Kurip and others lived and/or the BIA officer's hearsay that someone had told the BIA officer that Kurip threatened a family member with some gun. For hearsay upon hearsay upon hearsay (and in part "upon hearsay" one more time), Plaintiff objected to its use for any purpose. The CFC admitted it for some purpose, but then improperly used it as substantive evidence linking the .380 found at the scene to Kurip.

8 The .380 gun did not contain Mr. Murray's DNA. Mr. Murray was not wearing gloves, and he did not wipe the gun down. Therefore, he did not handle the gun.

On appeal, the United States now ignores the wording of the CFC spoliation order and fails to respond to the Murray Family's discussion that the failure to rebut that presumption required the CFC to decide if the lack of Mr. Murray's blood, tissue, or DNA on the gun leads to a conclusion that, more likely than not, the .380 gun did not fire the fatal shot. Instead, the United States seeks to change the rebuttable presumption into a rebuttable presumption on the merits of the case.

This Court should reject their argument that the rebuttable presumption was on the merits. The rebuttable presumption was regarding the evidence that would have been found on the spoliated gun, as it should be. That presumption was not rebutted, and we therefore have to follow where the failure to rebut that presumption leads. It leads to judgment in favor of the Murray Family.

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. As the United States does not dispute, 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 rebuttable presumption that the CFC put in its spoliation order but then failed to apply after trial was logically related to the harm caused by the spoliation of the gun—the lack of evidence that would have been on that gun. At trial, the Murray Family scrupulously focused on the United States' failure to rebut that presumption, and then what that meant for the merits decision. First, as the Murray Family discussed in their opening brief, the United States did not provide any evidence that the gun contained Mr. Murray's blood, tissue, or DNA.

Second, the Murray Family showed that if the .380 did not contain Mr. Murray's blood, tissue, or DNA, then much more likely than not, that gun did not fire the fatal shot, and therefore Norton killed Mr. Murray. That meets Plaintiffs' burden of proof in a civil case, and results in judgment in Plaintiffs' favor. As explained in the CFC's own spoliation order, that is the correct methodology.

At trial, the United States simply returned to the same playbook it has done in the orders that were reversed in the two appeals. Instead of discussing what the consequences are from the lack of evidence that the .380 contained Mr. Murray's blood, tissue, or DNA, the United States attempted to "rebut" the presumption by ignoring it and discussing whether the CFC should believe Norton's story, and whether Norton's story is enough to rebut a presumption on the merits.

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.

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 13, 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
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2025, I caused the foregoing Plaintiffs-Appellants' Corrected Reply 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 13, 2025 */s/ Steven Bonham*
Steven Bonham
Legal Assistant

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 in Microsoft Word using a proportionally-spaced typeface, 14 point font, and includes 5,549 words.

March 13, 2024 */s/ Steven Bonham*
Legal Assistant