

No. 24-2053

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.

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

ANSWERING BRIEF OF THE UNITED STATES

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STATEMENT OF RELATED CASES

This Court heard two appeals in *Jones v. United States*, Case Nos. 15-5148 and 20-2182, which were taken from the same underlying action in the Court of Federal Claims, Case No. 1:13-cv-227-RAH. The panel for the first appeal (Case No. 15-5148) consisted of Judges Lourie, O'Malley, and Taranto, and was decided on January 27, 2017. See *Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017). The panel for the second appeal (Case No. 20-2182) consisted of Judges Newman, O'Malley, and Taranto, and was decided on February 16, 2022. See *Jones v. United States*, No. 2020-2182, 2022 WL 473032, at *1 (Fed. Cir. Feb. 16, 2022). This appeal also relates to *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015).

INTRODUCTION

This suit concerns the death of Todd Murray, a Ute tribal member, who died from a close contact gunshot wound to the head. Murray's mother, Plaintiff-Appellant Debra Jones, contends that local police officer Vance Norton killed her son, and seeks to hold the United States financially liable for Norton's alleged crime under the "bad men" clause of an 1868 treaty between the United States and the Ute Indian Tribe. After more than a decade of litigation, the Court of Federal Claims ("CFC") held a three-day evidentiary hearing on spoliation where it found the United States negligently spoliated the .380 Hi-Point gun found near Murray (and which was the subject of an earlier appeal) and imposed a significant, but non-dispositive, sanction.

With the benefit of this sanction, Jones proceeded to a 7-day trial where she mustered no evidence to support her theory. By contrast, the United States presented abundant evidence that Murray, who was impaired by alcohol and drugs, shot himself after firing two shots at Norton. The CFC, relying on the evidence presented, found it was more likely than not that Murray died by a self-inflicted gunshot wound, that Norton did not kill Mr. Murray, and therefore no federal crime had been committed. *Jones v. United States*, 171 Fed. Cl. 576, 580 (Fed. Cl. 2024) ("*Jones VIP*"). Because there was no federal crime, Murray's death was not compensable by the United States.

On appeal, Jones objects to aspects of the CFC's spoliation ruling, and contests several of the CFC's factual findings reached after the trial. Ultimately, though, Jones

shows no flaw in the CFC's thorough and well-reasoned spoliation and merits decisions. This Court should affirm.

STATEMENT OF JURISDICTION

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

(b) The CFC's judgment was final because it resolved all the plaintiff's claims against the United States, the sole defendant. *See Jones VII*, 171 Fed. Cl. at 580; *Jones v. United States*, No. 1:13-cv-227, 2023 WL 2681819, at *1 (Fed. Cl. Mar. 29, 2023) ("*Jones VP*"); Appx1. This Court has jurisdiction over this appeal under 28 U.S.C. § 1295(a)(3).

(c) The CFC entered judgment on May 8, 2024. Appx1. Jones noticed her appeal on July 2, 2024, or 55 days later. SAppx619-20. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the CFC acted consistently with this Court's 2022 mandate when it (a) sanctioned the United States for its spoliation of the gun found near Murray by imposing a rebuttable adverse evidentiary inference that the gun did not have Murray's fingerprints, blood splatter, or DNA; and (b) determined that the United States did not spoliage Norton's clothing or gun, which the FBI did not collect.

2. Whether the CFC clearly erred when it found, based on copious evidence and testimony presented at a 7-day trial, that plaintiffs had failed to establish that Norton committed assault or homicide.

STATEMENT OF THE CASE

The facts described below derive from evidence admitted at the 2022 spoliation hearing and the 2023 trial, as well as the CFC's factual findings.

A. The events surrounding the shooting.

On April 1, 2007, Murray was the passenger in a car that was pursued by Utah State Trooper David Swenson for speeding. *Jones VII*, 171 Fed. Cl. at 584; SAppx284; SAppx 287; SAppx328. The high-speed pursuit began off tribal lands but ended on the Ute Indian Tribe's Reservation. *Jones VII*, 171 Fed. Cl. at 586 (citing SAppx286); SAppx665. After the car stopped, Murray and the driver, Uriah Kurip, fled despite Swenson's order to stop. *Jones VII*, 171 Fed. Cl. at 587 (citing SAppx287; SAppx664; SAppx314-15). Murray was wearing short pants, a white t-shirt, and a short-sleeved button-up shirt that was dark blue. *Jones VII*, 171 Fed. Cl. at 584 (citing SAppx287; SAppx661). Swenson pursued and detained Kurip. *Jones VII*, 171 Fed. Cl. at 587-88 (citing SAppx287; SAppx321; SAppx341-43; SAppx636-37; SAppx664).

Norton, who was a detective with the Vernal City Police Department, saw the car chase and called police dispatch. *Jones VII*, 171 Fed. Cl. at 588 (citing SAppx84-86; SAppx405-07; SAppx634). He was off-duty and dressed in plain clothes (a blue shirt and light-blue jeans), although he carried his department-issued .40 Glock service

weapon. *Jones VII*, 171 Fed. Cl. at 588 (citing SAppx662). Knowing the pursuit was heading into a remote area, Norton volunteered to stay close until back up arrived. *Jones VII*, 171 Fed. Cl. at 588; SAppx86. Norton was in his own car without a radio and could only communicate with dispatch via cell phone. *Jones VII*, 171 Fed. Cl. at 588 (citing SAppx407); SAppx86. His communications to dispatch were not audible to other officers and likewise he could not hear transmissions made by other officers over the radio. *Jones VII*, 171 Fed. Cl. at 588; SAppx638-39.

Norton arrived at Swenson's location (at the intersection of Seep Ridge Road and Turkey Track Road) shortly after Kurip was detained, between 11:23:20 a.m. and 11:24:00 a.m., according to police dispatch records and testimony. *Jones VII*, 171 Fed. Cl. at 588-89 (citing SAppx315; SAppx320-22; SAppx410-13; SAppx637; SAppx664). After speaking with Swenson, Norton drove a short distance down Turkey Track Road and left his car, *Jones VII*, 171 Fed. Cl. at 588-89 (citing SAppx411-12), to search for Murray, SAppx352.

Utah State Trooper Craig Young arrived at Swenson's location in time to see Swenson speaking with Norton. *Jones VII*, 171 Fed. Cl. at 588-91 (citing SAppx451-58; SAppx481-82). Swenson told Young that the passenger—later identified as Murray—had run “over the hill.” *Jones VII*, 171 Fed. Cl. at 590 (SAppx458-60). Young drove to Norton and they agreed to search in different directions. *Jones VII*, 171 Fed. Cl. at 590 (citing SAppx411-14; SAppx459-60; SAppx463-65, SAppx95-96).

Uintah County Deputy Sheriff Anthony Byron also arrived around the same time and saw Swenson, but did not speak to him, instead following Young in his car down Turkey Track Road to an oilfield service road that ended in a square concrete pad, likely arriving there at 11:25:30 a.m. *Jones VII*, 171 Fed. Cl. at 590-91 (citing SAppx482-83; SAppx413-14); SAppx501.

Utah Department of Natural Resources Officer Sean Davis arrived at Swenson's location between 11:25:00 a.m. and 11:29:38 a.m., and after speaking with Swenson drove to a different service road. *Jones VII*, 171 Fed. Cl. at 585, 591-92 (citing SAppx361-65; SAppx663; SAppx 377-78; SAppx383). Davis did not speak to Young or Byron until after shots were fired. *Id.* (citing SAppx663).

After Norton spoke with Young and saw Byron, Norton moved 50-175 yards away from the road to the edge of the hill. SAppx95; SAppx412-14. He did not see or hear any other officers arrive to the scene until after the shooting. *Jones VII*, 171 Fed. Cl. at 596 (citing SAppx413-14); SAppx98-99. After cresting the hill, Norton saw Murray about 120-130 yards away. *Jones VII*, 171 Fed. Cl. at 596 (citing SAppx99). Around 90 seconds elapsed between when Norton left the other officers and when he saw Murray. *Jones VII*, 171 Fed. Cl. at 596 (citing SAppx483-84; SAppx503-04; SAppx663; SAppx383-84); SAppx636-38.

Byron and Young left their cars at the concrete pad and saw Norton standing on the hill. *Jones VII*, 171 Fed. Cl. at 591-92 (citing SAppx483-84). Byron proceeded on foot north for around 75 yards across broken terrain and into a gully, with Young

taking a different route. *Jones VII*, 171 Fed. Cl. at 592 (citing SAppx483-85). As discussed below, pp. 39-43, Young saw Murray (the “runner in blue”) running around 11:26:00 a.m., as reflected in radio transmissions between Young and Byron. *Jones VII*, 171 Fed. Cl. at 593-94; SAppx637-39; SAppx664; SAppx669-71. Byron could see Murray several hundred yards away “for a minute” and then Murray “just kind of went down behind some brush that I couldn’t really see him very well.” SAppx485-86; *see also Jones VII*, 171 Fed. Cl. at 592. Byron could see Norton retreating up the hillside and testified that Norton’s location on the hill was “several hundred yards away” from where he saw Murray. SAppx503-04; SAppx483-85; SAppx584; SAppx666 (file 2007-04-01-11-31-54-002-Recorder.mp3).

B. The interaction between Norton and Murray.

From the hill, Norton saw Murray holding something black, and because Norton believed it was a gun, he drew his own gun and kept it at a low-ready position pointed in Murray’s direction but not directly at him. SAppx101; SAppx105; SAppx437; SAppx550. Norton, concerned for his own safety and that of Swenson, yelled “Police, get on the ground.” *Jones VII*, 171 Fed. Cl. at 598; SAppx101; SAppx105; SAppx115; SAppx437.

When Murray spotted Norton, he raised his arm and fired two shots at Norton; one of the bullets struck the ground below Norton. *Jones VII*, 171 Fed. Cl. at 598; SAppx105-06; SAppx415-16. Norton returned fire from his .40 Glock service weapon. *Jones VII*, 171 Fed. Cl. at 596; SAppx105-06; SAppx416-17. Both shots

missed Murray. *Id.* Norton estimated that Murray was 110 yards away from him when he returned fire. SAppx105; SAppx110. After being fired at, Norton retreated 30-40 yards up the hill to a safer distance of around 150-160 yards. *Jones VII*, 171 Fed. Cl. at 598; SAppx105-06; SAppx416-17.

Norton attempted to call dispatch but kept misdialing because of the stress of being shot at and having returned fire; when he finally reached dispatch, the audio reflects Norton's significant distress. *Jones VII*, 171 Fed. Cl. at 598; SAppx667 (file 2007-04-01-11-30-40-001-Recorder.mp3); SAppx107. After retreating, Norton shouted at Murray to put the gun down. *Jones VII*, 171 Fed. Cl. at 598 (citing SAppx106-07). Norton saw Murray put his own gun to his head, hold it there briefly, pull the trigger, and fall to the ground. *Jones VII*, 171 Fed. Cl. at 598; SAppx103-10; SAppx659.

After Murray shot himself, Norton holstered his weapon and called dispatch at 11:27:29 a.m. to report that the suspect was down after shooting himself in the head. *Jones VII*, 171 Fed. Cl. at 599; SAppx103-04; SAppx107; SAppx417-48; SAppx638-39. Norton also requested that the other officers come to his location along with an ambulance. *Jones VII*, 171 Fed. Cl. at 599 (citing SAppx638). Notably, Norton informed dispatch that the other officers on the scene "can see me right now." *Jones VII*, 171 Fed. Cl. at 599, 622 n.14 (citing SAppx638). Norton asked dispatch to "[t]ell Craig to come back to where he saw me and I talked to him." *Jones VII*, 171 Fed. Cl. at 599 (citing SAppx638).

Young and Byron arrived at Norton's location at about 11:29:29 a.m. (and no later than 11:31:29 a.m.). SAppx118; SAppx469-70; SAppx639-40; SAppx668 (file 2007-04-01-11-34-17-002-Recorder.mp3). There was at most five minutes between Murray being seen unharmed at 11:26:00 a.m. and Byron and Young arriving at Norton's location.

After the shooting, other officers arrived, including Gary Jensen, Norton's boss, and the Chief of the Vernal City Police Department. *Jones VII*, 171 Fed. Cl. at 600-03. Jensen took possession of Norton's service weapon, describing it as "pristine." SAppx527-28. Jensen did not observe blood on Norton and testified that he would have noticed blood given his 14 years of experience as a critical care paramedic. SAppx527-28. Davis stood watch over the gun—a Hi-Point .380—and .380 shell casings that were found near Murray, and subsequently took various GPS coordinates. SAppx370-94. Norton took photographs of the scene and the shell casings. *Jones VII*, 171 Fed. Cl. at 603.

An ambulance, summoned by law enforcement, transported Murray to a hospital, where he died. *Id.* at 604.

C. The investigation

FBI Special Agent Ashdown was called to the scene, although he arrived after Murray had been taken away in the ambulance, *Jones VII*, 171 Fed. Cl. at 604 (citing SAppx287-88; SAppx144); SAppx517; SAppx590. Ashdown collected the Hi-Point .380 gun and the .380 shell casings, which were near where Murray had been. *Jones*

VII, 171 Fed. Cl. at 604-05; SAppx288; SAppx147-49; SAppx157; SAppx166-68; SAppx188-89; SAppx592; SAppx605-06; SAppx653-57. The Hi-Point .380 contained a jammed shell casing from an expended round. *Jones VII*, 171 Fed. Cl. at 605 (citing SAppx166-68; SAppx288; SAoox592; SAppx605-06). Ashdown also collected two .40-caliber casings found up a slope about 110 yards away, consistent with Norton's testimony that he fired two shots from his .40-caliber service weapon. *Jones VII*, 171 Fed. Cl. at 605 (citing SAppx167-69; SAppx592-93; SAppx595; SAppx646-48; SAppx654). Ashdown recorded GPS coordinates and took photographs. *Jones VII*, 171 Fed. Cl. at 604 (citing SAppx144-48; SAppx157-60; SAppx288). Ashdown did not see signs that anyone had tampered with any of the evidence. *Jones VI*, No. 13-227, 2023 WL 2681819, at *12 (citing SAppx162).

Ashdown spoke to officers at the scene and interviewed Swenson. *Jones VII*, 171 Fed. Cl. at 604; SAppx145. He spoke to Norton and asked to schedule an interview; Norton asked for his attorney to be present, which Ashdown understood to be "pretty typical in the law enforcement community." *Jones VII*, 171 Fed. Cl. at 605 (citing SAppx149). Ashdown noted that Norton's clothing was "clean and pristine," and that he did not appear to have been "running or involved in any sort of altercation that was obvious from his clothes." *Jones VII*, 171 Fed. Cl. at 605 (citing SAppx150). This is confirmed by a photograph of Norton at the scene. SAppx662. The FBI did not conduct forensic testing of the Hi-Point because Ashdown did not believe there was anything to be learned from it. *Jones VI*, No. 13-227, 2023 WL

2681819, at *12 (citing SAppx171-72); *see also* SAppx249-57. Norton was interviewed later by FBI Special Agent David Ryan (who took over the investigation from Ashdown), SAppx52, SAppx182, and that interview did not raise any suspicions. SAppx183-85; SAppx201-03.

Utah Medical Examiner Dr. Edward Leis conducted the external examination of Murray's body and concluded that the cause of death was a contact gunshot wound to the head and that the manner of death was suicide. *Jones VII*, 171 Fed. Cl. at 608-09 (citing SAppx649; SAppx288-89); SAppx223; SAppx303. The entrance wound was on the left temple slightly above and behind his left ear, with an exit wound on the right. *Jones VII*, 171 Fed. Cl. at 609 (citing SAppx650). Dr. Leis decided not to perform an autopsy in part because "the significant injuries were limited to the head," and there was no "retained projectile." *Jones VII*, 171 Fed. Cl. at 608-09 (citing SAppx300-01; SAppx303-04). Blood tests showed that Murray was intoxicated and under the influence of drugs. SAppx229-30; SAppx292. The government's expert, Dr. Joseph Cohen, concurred with Dr. Leis's conclusion that the wound was caused by close contact and was self-inflicted. SAppx564-84. Ms. Jones' expert, Dr. Jonathan Arden, also testified that a "reasonable choice" for the cause of his death would have been suicide, *Jones VII*, 171 Fed. Cl. at 616, but that he would have marked Murray's manner of death as "undetermined," *id.* at 617; SAppx556-59.

The FBI traced the Hi-Point .380, finding that the gun had been illegally bought for Kurip, the driver of the car involved in the police pursuit, by Cody Shirley.

Jones VII, 171 Fed. Cl. at 609-11. In 2008, the United States prosecuted Shirley for the illegal gun purchase. *Id.* Ryan closed the investigation into both the illegal purchase of the .380 Hi-Point and Murray's death in September 2008 after Shirley was convicted for the illegal straw purchase of the Hi-Point. *Jones VI*, No. 13-227, 2023 WL 2681819, at *16 (citing SAppx131; SAppx209-10; SAppx213).

As part of Shirley's prosecution, the government sought forfeiture of the Hi-Point, which a district court granted in November 2008. *Jones VI*, No. 13-227, 2023 WL 2681819, at *16 (citing SAppx209-10). Followed its normal forfeiture procedures, the FBI turned over the Hi-Point to the U.S. Marshals Service which destroyed the gun. *Jones VI*, No. 13-227, 2023 WL 2681819, at *16. Ryan testified that when the Hi-Point was destroyed he was not thinking about civil litigation and did not contemplate the possibility that the Murray family would sue the United States. *Jones VI*, No. 13-227, 2023 WL 2681819, at *16 (citing SAppx212-13). In his view, "this was a clear-cut case" of suicide, with all the evidence "match[ing] up." *Jones VI*, No. 13-227, 2023 WL 2681819, at *16 (citing SAppx214).

D. Related proceedings in Utah

Jones brought civil rights claims, among other things, in Utah State court in July 2009 against state and local officers. *See* Notice of Removal, *Jones v. Norton*, No. 2:09-cv-730-TC-EJF (D. Utah Mar. 15, 2012), ECF 1. The suit was removed to federal district court. *See id.*; *Jones v. Norton*, 3 F. Supp. 3d 1170, 1186, 1189 (D. Utah 2014). The Utah district court granted summary judgment for the defendants,

concluding that no reasonable person could conclude Norton had murdered Murray. *Id.* at 1190; *see also Jones v. Norton*, 2014 WL 909569, *8 (Mar. 7, 2014). The Tenth Circuit affirmed. *Jones v. Norton*, 809 F.3d 564, 569-72 (10th Cir. 2015).

E. Prior decisions in this proceeding

In April 2013, Jones filed this suit in the Court of Federal Claims seeking compensation for Murray's death under the "bad men" provision in the 1868 Treaty with the Ute Bands. *See* SAppx1-21; SAppx22-44. The "bad men" provision obligates the United States to compensate individual Ute Indians for their loss if "bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong" upon their person or their property. *See* Treaty with the Ute, Mar. 2, 1868, 15 Stat. 619, 620; *Jones II*, 846 F.3d at 1353-56; *see also Richard v. United States*, 677 F.3d 1141, 1148-50 (Fed. Cir. 2012).

The United States moved to dismiss the complaint. *Jones v. United States*, 122 Fed. Cl. 490, 522, 529-30 (Fed. Cl. 2015) ("*Jones P*"). The CFC dismissed the claims as precluded by the Utah litigation, *id.* at 490, 523-25, 529-30, but this Court vacated and remanded. Among other things, this Court held that claims against the United States were not precluded, and that the CFC needed to determine whether the government had spoliated any evidence. *See Jones v. United States*, 846 F.3d 1343, 1346-47, 1361-64 (Fed. Cir. 2017) ("*Jones IP*").

On remand, Jones argued that the government had spoliated (1) the Hi-Point gun; (2) Murray's person and clothing; and (3) Norton's gun, clothing, person, and

vehicle, as well as other uncollected items at the shooting scene. *Jones v. United States*, 146 Fed. Cl. 726, 737 (Fed. Cl. 2020) (“*Jones III*”). The CFC held that the government had negligently spoliated only the Hi-Point gun and prohibited the government from relying affirmatively on any facts related to the Hi-Point to support the argument that Murray died by suicide. *Id.* at 743. The CFC subsequently granted summary judgment to the government. *Jones v. United States*, 149 Fed. Cl. 335 (Fed. Cl. 2020) (“*Jones IV*”). Among other things, the CFC held that the Utah district court’s decision precluded Jones from litigating many facts that would be necessary to establish that any crime was committed, and that Jones lacked evidence to show any criminal intent. *Id.* at 349.

This Court reversed. As to the spoliation of evidence other than the handgun, this Court held the CFC erred in applying a different standard of “control” to the government, explaining that the government, “[l]ike any other civil litigant,” has “control” over evidence when “it has a legal right to obtain or control that evidence.” *Jones V*, 2022 WL 473032, at *1, *4-*5, *8. But that control is “constrain[ed]” by the Fourth Amendment, which in turn “depend[s] on its suspicion of a crime.” *Id.* at *8. The “duty to preserve is further limited in scope to relevant evidence and limited in time to when litigation becomes reasonably foreseeable.” *Id.* This Court also directed the CFC to reconsider its sanction with respect to the Hi-Point gun considering the rationales underlying the spoliation doctrine. *Id.* at *10-*11. This Court vacated the grant of summary judgment to the United States and remanded for the CFC to reconsider its spoliation rulings. *Id.* at *8-*9, *12.

F. The CFC's decisions under review in this appeal

On remand, the CFC held a 3-day evidentiary hearing on spoliation. *Jones VI*, 2023 WL 2681819, at *2. The CFC heard testimony from state and local officers, Special Agents Ashdown and Ryan, Murray's family members, Dr. Cohen—the government's medical expert, and Special Agent Wes Fitzer, the government's expert on crime scene investigation. Jones sought sanctions for the alleged spoliation of only three items: (1) the Hi-Point that was found near Murray and was already found to have been spoliated; (2) Norton's gun; and (3) Norton's clothing. *Id.* at *3, *20 (citing SApxx268-72 and discussing Jones' abandonment of other arguments).

After considering the evidence, the parties' arguments, and this Court's decision, the CFC found the government negligently destroyed the .380 Hi-Point, *Jones VI*, 2023 WL 2681819, at *22-*24, and imposed a rebuttable adverse inference that the Hi-Point did not have Murray's blood, tissue, fingerprints, or DNA on it. *Jones VI*, 2023 WL 2681819, at *21-*22. This inference could be rebutted only with physical evidence or corroborating testimony from at least one witness other than Norton. If the inference were rebutted, the question of what the Hi-Point would have shown would be treated as unknowable. *Id.* at *21. Additionally, the government could not rely on any evidence about what may have been found on the gun or the unejected shell casing. *Id.* The government could, however, present physical evidence or testimony about the origin of the gun and to show that Murray was in possession of and used the gun. *Id.* The CFC explained that the adverse inference supported

Jones' assertion that Murray did not commit suicide and allowed Jones' claims to survive summary judgment by creating disputed facts; this ameliorated the prejudice caused to Jones by the spoliation, while not placing an unfair burden on the government in relation to its level of culpability. *Id.* at *22-*25; *see also id.* *25-26 (rejecting imposition of other sanctions).

As to Norton's gun and clothing—the CFC found that although litigation was reasonably foreseeable on April 1, 2007, *id.* at *26-*31, Ashdown had no probable cause to believe that Norton's clothing or gun was evidence of a crime, or that Norton had committed a crime, and therefore lacked control over those items for spoliation purposes, *id.* at *33-*35. The CFC accordingly denied Jones' request for spoliation sanctions with respect to Norton's clothing and gun. *Id.* at *42.

In November 2023, the CFC held a multi-day trial (which included a site visit) to determine the government's liability for an agreed-upon list of alleged crimes. The parties stipulated certain facts and agreed to admit certain evidence. *Jones VII*, 171 Fed. Cl. at 583. After trial, the parties proposed findings of fact and conclusions of law and the CFC held argument. *Id.*

The CFC analyzed the evidence and Jones' theories of the case and made extensive findings of fact in a lengthy opinion issued on May 7, 2024. The CFC found that the government rebutted the adverse presumption with evidence linking the Hi-Point to Murray and corroborating Norton's account. *Id.* at 610-12. The CFC held that Murray brought the Hi-Point to the scene, and that there was insufficient time

between when Murray was last seen alive and when Norton reported the shooting for Norton to have shot Murray and staged a cover-up, particularly given Norton's significant distress. *Id.* at 610-13. Deputy Byron's testimony on the distance between Norton and Murray also corroborated Norton's account. SAppx483-86; SAppx503-04; SAppx584. And it was unlikely that other officers would have conspired with Norton where there was no evidence of a cover-up, they worked for different agencies, and generally were merely professional acquaintances. *Jones VII*, 171 Fed. Cl. at 611-12.

The CFC found "little evidence to support" Jones' allegations that Norton shot Murray. *Id.* at 613-14. Norton had no motive, and there was no evidence that he was violent. *Id.* at 614. The idea that Norton would (or could in the time allowed) invent a complicated cover-up was also implausible. *Id.* The evidence—including the distances between the .380 Hi-Point and .40 Glock shell casings, the dispatch audio, and transcripts, the corroborating testimony of Byron and Young, and the expert medical testimony—all supported Norton's account. *Id.* at 614-18. Jones had the burden of proof to meet the elements required by the "bad men" provision of the Ute Treaty to recover money from the United States, *id.* at 618, and Jones failed to meet that burden, *id.* at 620-21. The CFC granted judgment to the United States.

Jones appealed.

SUMMARY OF ARGUMENT

1. The CFC sanctioned the United States for negligently destroying the Hi-Point by imposing a rebuttable adverse evidentiary inference against the United States. Jones contends that the sanction varied from this Court's mandate. *Jones V*, 2022 WL 473032, at *10. To the contrary, the CFC thoughtfully crafted a sanction that addressed Jones' primary claim of prejudice: that testing of the Hi-Point would have revealed that Murray did not shoot himself through the absence of his blood, fingerprints, or DNA on the Hi-Point. Jones now asserts that the CFC should have imposed case-dispositive sanctions against the government. But such sanctions are appropriate only upon a showing of bad faith and where no lesser sanction will suffice. The CFC found that the government destroyed the gun negligently, making a harsher sanction inappropriate. The CFC did not abuse its discretion in crafting the sanction, which permitted Plaintiffs to survive summary judgment and may have allowed them to win this case had the United States produced no other evidence. But the fact that the FBI negligently destroyed the .380 Hi-Point does not erase the other testimonial and physical evidence from April 1, 2007—evidence the United States marshalled to show, despite not having the burden to do so, that Norton did not kill Murray but rather that he died either accidentally or by suicide from a self-inflicted gunshot wound using the .380 Hi-Point.

Jones also contends that federal investigators' decision not to collect Norton's clothing and gun amounts to sanctionable spoliation. The CFC correctly held,

however, that federal investigators did not spoliage such evidence. There was no evidence that Norton had committed a crime, meaning that federal investigators lacked probable cause to seize his clothing or gun, and correspondingly lacked control over the evidence for spoliation purposes.

2. The CFC's factual findings—reached after exhaustively reviewing evidence—were not clearly erroneous. Jones challenges only two components of these findings. Jones first complains that the CFC erred in concluding that a person observed by Byron and Young and described as the “runner in blue” to dispatch was Murray, and not Norton. The CFC did not err in concluding that the runner in blue was Murray; one of the speakers in the dispatch recording said that the runner was probably the “passenger”—that is, the passenger in the vehicle that they were trying to find—and in any event, the officers on the dispatch had seen Norton before and would have been able to identify him. Identifying Murray as the runner in blue in the CFC's timeline permitted Norton only 90 seconds to shoot Murray and manipulate evidence, a feat that the CFC found implausible not only because of the timeline but also because all other evidence pointed to a finding that Murray committed suicide. Jones also complains that the CFC erroneously admitted evidence tying the Hi-Point to Murray, but Jones in fact agreed to admit such evidence at trial and cannot now seek to vacate the CFC's ruling on this basis.

The CFC’s spoliation rulings were correct, and the court did not err in finding that Norton did not kill Murray, and that the United States is therefore not financially liable to Jones.

ARGUMENT

I. The CFC’s spoliation rulings were correct and the sanction it applied fully addressed the rationales underlying the spoliation doctrine.

Jones makes two spoliation claims on appeal. Jones first claims that the CFC should have imposed a harsher sanction for the government’s negligent destruction of the Hi-Point. She next asserts that United States should have been sanctioned for failing to collect Norton’s clothing and gun. These arguments are easily rejected. The CFC’s sanction complied with this Court’s order given that it was carefully drawn to address Jones’ primary contention about the evidence the gun would have shown had it been retained and tested, while recognizing that the government’s destruction of the gun was negligent and not designed to affect potential litigation. The CFC also correctly held that the FBI did not spoliage Norton’s clothing and gun where it lacked probable cause to seize them, and therefore lacked legal control over those items for spoliation purposes.

A. Legal Standards and Standard of Review

Spoliation decisions are reviewed for abuse of discretion. *Jones V*, 2022 WL 473032, at *4. “Abuse of discretion is a deferential standard.” *In re Rembrandt Technologies LP Patent Litigation*, 899 F.3d 1254, 1267 (Fed. Cir. 2018) (citations

omitted); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (acknowledging that trial courts are better positioned to judge credibility of witnesses and make factual findings). To show an abuse of discretion, Jones must show that the CFC’s decision is “clearly unreasonable, arbitrary, or fanciful”; “based on an erroneous conclusion of the law” or clearly erroneous factual findings, or that the record lacks evidence on which the CFC “rationally could have based its decision.” *Jones V*, 2022 WL 473032, at *4.

“[S]poliation refers to the destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (citation omitted). 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.” *Jones V*, 2022 WL 473032, at *4; *Chapman Law Firm, LPA v. United States*, 113 Fed. Cl. 555, 609-10 (2013), *aff’d*, 583 F. App’x 915 (Fed. Cir. 2014) (per curiam).

Spoliation sanctions “should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine”; that is, to deter parties from engaging in spoliation, to place the risk of erroneous judgment on the party who wrongfully created the risk, and to restore the prejudiced party to the same position he would have been in without the spoliation, *Jones V*, No. 2020-2182, 2022 WL 473032, at *9 (citation omitted). Courts should also consider the degree of fault of the

spoliating party, and should narrowly craft any such sanctions to avoid substantial unfairness to the spoliating party. *Micron*, 645 F.3d at 1327, 1329; *Chapman*, 113 Fed. Cl. at 609-10. Any adverse inference instruction is extreme and not “given lightly.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003). And dispositive sanctions are only appropriate where no lesser sanction will suffice and where clear and convincing evidence shows both that the spoliation has seriously prejudiced the moving party’s ability to present its case *and* that the evidence was destroyed in bad faith, i.e., for purposes of hiding adverse information. *Micron*, 645 F.3d at 1326-30; *see also Calsep A/S v. Dabral*, 84 F.4th 304, 315 (5th Cir. 2023).

B. The CFC complied with this Court’s mandate when it imposed a rebuttable adverse inference for spoliation of the Hi-Point .380.

Jones asks this Court to remand with an instruction to hold the United States liable for Murray’s death to remedy the harm she suffered and deter the FBI from spoliating evidence. Opening Br. at 42-50 (Section V). In so doing, Jones vaguely asserts that the sanction did not comply with this Court’s mandate because it was “meaningless,” but she fails to address, much less rebut, the CFC’s explanation for crafting the sanction that it imposed. Opening Br. at 42-43.

1. The sanction was carefully crafted to address Jones’ prejudice.

Consistent with this Court’s order, the CFC imposed a more substantial sanction on remand: an adverse factual inference that the gun did not have Murray’s

blood, tissue, fingerprints, or DNA on it, which could be rebutted only through evidence other than Norton’s testimony. *Jones VI*, 2023 WL 2681819, at *21. This was one of the two gun-related sanctions that Jones requested (with the other being the inference that the Hi-Point was not operational). *See* SAppx270-71.¹ The CFC determined that the sanction would remedy the prejudice suffered by Jones by providing an evidentiary inference that would support her theory of liability, as Jones argued that preservation and testing of the Hi-Point would have shown it lacked Murray’s traces on it and was not used by Murray to commit suicide. *Jones VI*, 2023 WL 2681819, at *21-*22. The CFC placed on the government “the burden to show the .380 Hi-Point would not have provided evidence favorable to the plaintiffs” and the court further required that the government meet this burden through evidence other than Norton’s testimony. *Id.* at *22. The court explained that this requirement would ensure the risk of an erroneous judgment was placed on the government. *Id.* The CFC further prohibited the government from relying on any secondary evidence

¹ Jones passingly asserts that the CFC should have imposed the adverse inference that the Hi-Point was not operational. Opening Br. at 48. The CFC rejected this inference as “implausible” where two expended .380 cartridges were found nearby. *Jones VI*, 2023 WL 2681819, at *25-*26. Awarding an inference that contradicts evidence would “impose too severe a sanction on the defendant for its negligence and excessively risks an incorrect conclusion at trial.” *Id.* Such an inference was also improper because “it is not plausibly related to what testing of the weapon would have shown had it not been destroyed.” *Id.* Without a test showing when the jammed round was fired (which Jones did not assert existed), it would have been impossible to determine whether the gun was rendered inoperable on or before April 1, 2007. *Id.* at *26. Jones does not contend otherwise on appeal or explain how such an inference would serve the purpose of a spoliation sanction.

about the gun (such as the stove-piped or unejected shell casing inside it) to advance its case that Murray committed suicide. *Id.*

The CFC also explained why it declined to impose a harsher sanction. Jones took no steps of her own to request the preservation of the Hi-Point for use in litigation, even after she had retained an attorney and public notice of the Hi-Point's destruction was provided. *Jones VI*, 2023 WL 2681819, at *24. The government's negligence (rather than bad faith) in destroying the gun as part of its routine forfeiture proceedings also lessened the need for a more severe sanction. *Jones VI*, 2023 WL 2681819, at *23-24.² Imposition of a greater sanction—such as an irrebuttable adverse inference—would also have put Jones in a better position than she would have been had evidence not been spoliated. *Id.* It would contravene the sanction's purpose, which should be the “the least onerous sanction” that “correspond[s] to the willfulness of the destructive act and the prejudice suffered by the victim.” *Micron*, 645 F.3d at 1329 (internal quotation omitted). Moreover, the sanction was not “toothless” because it created sufficient disputes over material facts as to require a trial. *Id.* at *24-*25. This will deter the government from inadvertently spoliating evidence again. The

² Although the opening brief, pp. 6-7, states that the government “intentionally spoliated” Murray's gun, Jones presents no argument, pp. 32-38, that the government acted in bad faith, and is precluded from presenting such argument on reply, *see Gant v. United States*, 417 F.3d 1328, 1332 (Fed. Cir. 2005). Even so, that statement conflicts with the CFC's well-grounded findings. *See Jones VI*, 2023 WL 2681819, at *23-24.

sanction went beyond the CFC's prior sanction and remedied any prejudice suffered by Jones caused by her inability to test the Hi-Point. *Id.* at *23-*25.

2. The CFC properly applied the sanction.

Even Jones seems to suggest that the sanction might have been enough had the CFC required more evidence to rebut the inference. *See* Opening Br. at 42-43 (“Had the CFC applied [its spoliation order] as written, it would have come close to leveling the playing field with regard to the .380 gun”). Along these lines, Jones asserts that the CFC should not have considered Norton's testimony, and that the government should have produced evidence that someone besides Norton saw Murray holding the gun or that Murray's headwound came from the Hi-Point. Opening Br. at 42-44.

The CFC's determination that the government rebutted the inference was, however, reasonably grounded in “the testimony of multiple officers, the transcript of transmissions to and from dispatch, and Agent Ryan's investigation,” all of which corroborated Norton's account. *Jones VII*, 171 Fed. Cl. at 612. As discussed more fully below, pp. 45-46, the CFC found it significant that all available evidence showed that Murray brought the gun. The FBI's investigation showed that Shirley bought the gun for Kurip, the driver of the car in which Murray was riding, thereby connecting the gun to Murray. *Jones VII*, 171 Fed. Cl. at 611-13. By contrast, there was no evidence connecting the gun to Norton. *Id.* at 611. And if one of the officers had taken the gun from the crashed vehicle, Kurip likely would have known and testified to that effect, given his friendship with Murray. *Id.* at 612.

Other evidence also corroborated Norton's account. The dispatch transcripts showed that there was very little time between when Murray was last seen by other officers and when Norton notified dispatch that Murray was shot and asked other officers to respond. *Id.* at 611-12. Voice recordings also show that Norton was in significant distress when he placed the dispatch call. The CFC accordingly found that Norton was unlikely to have been able to shoot Murray, call dispatch, and devise and execute a plan to cover up the shooting, and there is no evidence supporting a theory of manipulation in any event. *Id.* Instead, all the available evidence (including Byron's testimony that Norton was far from Murray) supported the CFC's finding that Murray had the Hi-Point in his possession when he fled from the crash and there was no evidence supporting the opposite view. *Jones VII*, 171 Fed. Cl. at 613; *see infra* pp. 45-46. Jones demonstrates no defect in the CFC's conclusion that the adverse inference was rebutted. In any event, rebutting the inference caused the CFC to treat any information that could be obtained from Hi-Point as unknowable, and the government was still prohibited from relying on secondary evidence related to the Hi-Point, including the jammed shell casing. The sanction was therefore meaningful.

C. The government did not spoliage uncollected evidence.

Contrary to Jones' contentions, Opening Br. at 23-38 (Section II), the government's decision not to collect Norton's clothing and gun does not amount to spoliation because, as the CFC correctly held, the government did not have the legal right to seize them absent probable cause, which it lacked.

1. The government lacked probable cause to seize Norton’s clothing and gun, and therefore lacked control over such items.

In *Jones V*, this Court held that 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.” 2022 WL 473032, at *4. This Court remanded to the CFC to “clarify, as necessary, whether litigation was reasonably foreseeable while the government had control . . . over any allegedly spoliated evidence other than the spoliated Hi-Point .380 handgun.” *Id.* at *9. “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 As to control, this Court held that, “[l]ike any other civil litigant,” the government sufficiently “controls” evidence when it “it has a legal right to obtain or control that evidence.” *Id.*; *see also id.* at 6 (noting that control does not implicate any “legal requirements to obtain evidence”). The government’s ability to collect evidence (and thus its control over such evidence) is “constrain[ed]” by the Fourth Amendment of the United States Constitution. *Id.* at *8. The “extent of the government’s control over an investigation scene is [therefore] dependent on its suspicion of a crime.” *Id.*; *see also Jones VI*, 2023 WL 2681819, * 27.

On remand, after holding an evidentiary hearing that included testimony from Agent Ashdown, state and local officers, and experts put forward by both parties,

among other witnesses, the CFC correctly held that the government did not spoliage Norton's clothing and gun.

The CFC first held that litigation was reasonably foreseeable on April 1, 2007, because the situation concerned an officer-involved shooting on the Ute Reservation and there existed a litigious relationship between the Ute Tribe and the State of Utah. *Jones VI*, 2023 WL 2681819, *26-*31. This ruling was erroneous. The litigation between the Ute Tribe and the State of Utah concerns boundaries of the reservation and related jurisdictional issues; prior litigation over jurisdiction does not make it reasonably foreseeable that the Jones family would have brought litigation *against the United States* claiming Norton shot Murray, particularly when there was no evidence to support that claim. Even when Murray's family met with Ashdown in late April 2007 to question Murray's death, they did not alert Ashdown that they were contemplating filing a lawsuit against the United States. SAppx 58-79; SAppx121-22; SAppx173; SAppx177-79; SAppx213. It is also unreasonable to conclude that, objectively, the FBI should have been aware of the possibility the family could have brought a claim against the United States under the "bad men" clause, where the question of whether that clause created financial liability here was the subject of dispute and differing legal views. *Compare Jones I*, 122 Fed. Cl. at 490, 523-25, 529-30 *with Jones II*, 846 F.3d at 1361-64. It is not simply "unlikely" that FBI agents in Indian Country would have heard of the provision, *Jones VI*, No. 13-227, 2023 WL 2681819, at *31; it is that the existence of whether such a claim could have been brought had not yet been

determined. Here, it is objectively unreasonable to conclude the FBI should have been aware of the possibility of such a claim. That Jones did not name any federal agents as defendants in the Utah litigation, and did not file suit against the United States until 2013, six years after Murray's death, supports the government's argument that litigation against the United States was not reasonably foreseeable in 2007, and this provides an independent basis to affirm the CFC's ruling that the government did not spoliage Norton's clothing and gun.

In any event, the CFC ultimately reached the right outcome, correctly determining the government did not spoliage Norton's clothing or gun because the second requirement of control was not satisfied. The CFC held that Ashdown lacked probable cause under the Fourth Amendment to seize those items on, and after, April 1, 2007, where there was no evidence that those items had been used in a crime or that Norton had committed a crime. *Jones VI*, 2023 WL 2681819, *31-*42.

The Fourth Amendment "secures the persons, houses, papers and effects of the people against unreasonable searches and seizures, and requires the existence of probable cause before a warrant shall issue." *Texas v. Brown*, 460 U.S. 730, 735, 103 S. Ct. 1535, 1540, 75 L. Ed. 2d 502 (1983). Probable cause is the reasonable ground for belief of guilt that is "particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). One exception to the warrant requirement is the so-called plain view doctrine. This doctrine permits officers who see criminal evidence in plain view to seize it without a warrant when "its

incriminating character” is “immediately apparent.” *Horton v. California*, 496 U.S. 128, 136-37 (1990) (quotation and citation omitted); *Garrison v. Dep’t of Justice*, 72 F.3d 1566, 1569 (Fed. Cir. 1995). 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).

Applying these principles, the CFC correctly found that Ashdown lacked probable cause to search Norton, his person, or vehicle, or to seize his clothing or gun because there was no reasonable basis to conclude that Norton committed a crime.

There was no evidence that Norton committed a crime. *See generally* SAppx240-57. As Ryan and Dr. Cohen both testified, all available evidence pointed towards Murray committing suicide. SAppx203-07; SAppx579-86; SAppx249-66. Ashdown found Norton’s clothing “clean and pristine,” and there was accordingly nothing apparently incriminating about the clothing that would have justified its seizure. SAppx150; SAppx662. The CFC found Ashdown’s testimony to be credible and corroborated by the photograph taken on April 1, 2007, of Norton in his clothing. *Jones VI*, 2023 WL 2681819, *34.

Nor was there any evidence available to Ashdown suggesting Norton (who was off-duty) had a pre-meditated plan to murder Murray, and the exigent circumstances of the chase and Murray’s flight on foot supported Norton’s pursuit. *Jones VI*, 2023 WL 2681819, *37, *37 n. 27 (citing SAppx46; SAppx 83-86; *Ute V*, 790 F.3d at 1005-06). The physical evidence, such as the spent shell casings, footprints, and blood

spatter, also tracked Norton's account. *Jones VI*, 2023 WL 2681819, *38 (citing evidence). The government's expert testified that Ashdown's decision not to ask for Norton's gun was "reasonable" because "neither physical evidence nor witness testimony at the scene indicated that any of Norton's rounds had struck Murray." *Jones VI*, 2023 WL 2681819, at *18 (citing SAppx246). Indeed, as the CFC explained, "[f]or Agent Ashdown to have had probable cause that Norton assaulted or murdered 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 Norton attacked Murray." *Id.* at *38. This was "implausible" considering what Ashdown observed on the scene. *Id.* There was accordingly no probable cause for Ashdown to have seized Norton's gun.³

For the same reasons, and because the later investigation yielded only additional evidence that the wound was self-inflicted, the FBI continued to lack probable cause to seize Norton's clothing or gun after April 1, 2007.

³ Jensen had taken possession of Norton's gun by the time Ashdown arrived, and Ashdown did not inspect the gun. Jensen (who had many years of experience as law enforcement officer and paramedic) did, however, inspect the gun, 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." *Jones VI*, 2023 WL 2681819, *38.

2. The government’s jurisdiction over a crime scene or ability to obtain consent to gather evidence does not provide it with control over all potential evidence.

Disregarding the fact that this Court already considered and rejected such argument in *Jones V*, Jones asserts generally that the United States was obliged to preserve all potential evidence at the scene due to its investigative powers. Opening Br. at 24-25. Jones cites to two cases for the general proposition that “[a]ll law enforcement officers have a duty to ‘investigate, detect and secure evidence of a crime.’” Opening Br. at 24-25 (citing *Green v. United States*, 386 F.2d 953, 956 (10th Cir. 1967) (citing *Hollingsworth v. United States*, 321 F.2d 342, 352 (10th Cir. 1963))). But neither case involved the question whether officers were under a duty to collect certain evidence, let alone whether officers were under a duty to collect evidence that might be used in subsequent civil litigation. Both cases instead involved the question whether evidence obtained after an unlawful search could be used in subsequent civil litigation. *See Green*, 386 F.2d at 955-56; *Hollingsworth*, 321 F.2d at 352. And even for that question, the quoted language is dicta. *See Green*, 386 F.2d at 956; *Hollingsworth*, 321 F.2d at 352.

Indeed, the United States knows of no decision in which a court has imposed a legal duty upon investigators to collect every piece of potential evidence from a crime scene that might be used in future civil litigation. *Cf. Miller v. Vasquez*, 868 F.2d 1116, 1119 (9th Cir. 1989) (holding that while the due process clause of the Constitution requires the government “to preserve evidence after the evidence is gathered,” there is

no such “duty to obtain evidence”) (citing *California v. Trombetta*, 467 U.S. 479, 489 (1984)); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (“unless a criminal defendant can show bad faith on the part of the police, failure to *preserve* potentially useful evidence does not constitute a denial of due process of law”) (emphasis added). Indeed, courts have consistently described the FBI’s mandate to conduct investigations as discretionary. *Leisure v. FBI of Columbus, Ohio*, 2 F. App’x 488, 490 (6th Cir. 2001) (citing cases); *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982). Consistent with this, courts routinely dismiss lawsuits when the plaintiff alleges that an agency improperly failed to or negligently investigated a crime or wrongdoing. *See, e.g., Suter v. United States*, 441 F.3d 306, 311-12 (4th Cir. 2006) (discussing cases); *Smith v. United States*, 375 F.2d 243, 248 (5th Cir. 1967), *cert. denied*, 389 U.S. 841 (1967). In remanding to determine whether evidence had been spoliated, this Court was careful to explain that its ruling would not create “open-ended duty for law enforcement to investigate to future litigants’ standards.” *Jones V*, 2022 WL 473032, at *8.

Jones also suggests that the government could have requested and obtained consent to seize those items. Opening Br. at 27-28. To be sure, officers may search and seize evidence with consent. *Jones VI*, 2023 WL 2681819, at *31, *33 (citing cases). But Jones identifies no authority stating that the potential for consent gives the requesting party control over evidence or imposes a duty on the government to attempt to gain consent to avoid spoliation of evidence. *Id.* at *33. Jones’ expansive view would “mean that a party has control over any evidence over which it

could *potentially* get consent to access,” an outcome that would greatly expand the duty of parties to preserve evidence that they do not possess. *Id.* (emphasis in original). If anything, the need for consent suggests that the party lacks a right to obtain evidence in the first place. *Id.* Finally, Jones asserts that Norton and Jensen lacked authority to refuse to turn over Norton’s clothing or gun, Opening. Br. at 28, but Jones provides no support for this assertion and this Court has already held that the government’s legal right to obtain evidence here was constrained by the Fourth Amendment; Norton and Jensen therefore could have refused to consent because the FBI lacked probable cause to seize Norton’s clothing and gun.

3. The CFC correctly determined that the Fourth Amendment protected against seizure of Norton’s clothing and gun.

Jones newly asserts on appeal that Norton was not protected by the Fourth Amendment. Opening Br. at 25-28 (Section II.A). This argument may be easily rejected, either because it is forfeited, having not been presented to the CFC, *Gant*, 417 F.3d at 1332, or because it is incorrect on the merits. The Fourth Amendment guarantees that the “right of the *people* to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Constitution 4th am. (emphasis added). The plain text does not carve out an exception for law enforcement officers. And Jones points to no authority to the contrary. Caselaw instead suggests that Fourth Amendment protections apply broadly. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 113, 120 n.18 (1984) (concluding that a

Fourth Amendment seizure, though a reasonable one, occurred where a federal agent took a package in contravention of Federal Express's custody of it); *Mincey*, 437 U.S. at 390 (“The Fourth Amendment proscribes *all* unreasonable searches and seizures.”) (emphasis added).

Jones also newly asserts on appeal that Jensen had no protected possessory interest in Norton's gun. Opening Br. at 28-30 (Section II.B). Again, this Court should decline to consider this newly raised argument on appeal, as Jones had ample opportunity to but did not press this argument in her motion for sanctions, during the hearing, or in post-hearing submissions. *See, e.g.*, SAppx273 (renewing her 2019 request for sanctions).

Still, the CFC correctly decided that Jensen had a possessory interest in the gun that would have prevented Ashdown from seizing it without probable cause. *Jones VI*, 2023 WL 2681819, at *35. This Court has already held that the FBI's legal right to obtain evidence at the scene of Murray's death was constrained by the Fourth Amendment such that the FBI could not seize evidence if it lacked probable cause to do so. *Jones V*, 2022 WL 473032, at *8. “A ‘seizure’ of property” within the meaning of the Fourth Amendment “occurs when there is some meaningful interference with an individual's possessory interests in that property.” *Jacobsen*, 466 U.S. at 113. A “possessory interest” may be loosely defined as “[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner.” POSSESSORY INTEREST, Black's Law Dictionary (12th ed. 2024). Jensen

was the Chief of the Vernal City Police Department and Norton's service weapon was the property of the Vernal City Police Department. Jan. 22, 2014, Hearing Transcript at 215-16, *Jones v. Norton*, Civ. A. No. 2:09-0730 (D. Utah), ECF 421. The gun was in his possession when Agent Ashdown arrived. The CFC correctly concluded that, in his role as chief of the Vernal City Police Department, Jensen had a legitimate possessory interest in the gun protected by the Fourth Amendment. *Jones VI*, 2023 WL 2681819, at *35. Jones complains that the CFC cited only one case in support of its conclusion, but Jones has cited no cases before the CFC or this Court in support of her view. Opening Br. at 29. In any event, the case cited by the CFC stands for the unremarkable proposition that possession of an item includes a right to exclude others that may be reasonably understood to provide a basis for Fourth Amendment protection. *See Rakas v. Illinois*, 439 U.S. 128, 143, n.12 (1978).⁴

The CFC further held that even if Jensen did not have such an interest, it was possible that Vernal City would have had such a right, although the court ultimately declined to decide this issue as unnecessary. *Id.* at *35 n. 22. If this part of the CFC's decision or the judicial record was not developed, the blame falls on Jones' failure to

⁴ Because the gun was not in plain view, Jensen may have had a Fourth Amendment privacy right to protect him against a search for the gun along with a possessory right to protect the gun from seizure. *See Carpenter v. United States*, 585 U.S. 296, 304 (2018) (explaining that the Fourth Amendment protects certain expectations of privacy against unreasonable searches). This Court need not reach this issue, however, since there was no reasonable belief that a crime involving the gun had been committed.

press this issue in discovery, at the spoliation hearing, or in briefing before the CFC.⁵ Jones has been provided with ample opportunity to seek sanctions, including after *Jones V*, which made the parties aware that Fourth Amendment jurisprudence would apply. Jones should not be permitted to raise new arguments on appeal that she did not present to the CFC either during the spoliation sanction hearing or at trial.

In any event, this Court need not resolve the question of which entity had a possessory interest in Norton's service weapon, because there is no question that the FBI lacked such a possessory interest. The FBI would thus have had to establish probable cause to seize it. Because there was no probable cause that Norton committed a crime on April 1, 2007, or that the .40 Glock was evidence of any crime, the FBI did not have control over it for spoliation purposes. *Id.* at *36. This ruling is fact-bound and narrow, and will not, as Jones theorizes, create an open-ended opportunity for third parties to take evidence from crime scenes. Even where third parties may end up in possession of evidence of a crime, the government can seize it where it has probable cause to do so.

4. Jones' remaining arguments fail.

This Court should reject Jones' remaining arguments. Jones spends multiple pages asserting that the CFC erroneously imposed a requirement that, to seize Norton's clothing and gun, the government had to have probable cause to believe that

⁵ At trial, Jones also failed to ask Jensen about why he took the gun. *See Jones VII*, 171 Fed. Cl. at 606.

Norton committed a crime. Opening Br. at 31-36 (Section II.C). But Jones' theory of the case is that Norton killed Murray. It was therefore reasonable for the CFC to frame its analysis around the question of whether the government had probable cause to believe that Norton shot Murray. Jones also states that the parties "agree there was probable cause that a crime was committed on April 1, 2007," Opening Br. at 35, but in fact the United States does not agree that there was probable cause to believe anyone other than Kurip and Murray committed a crime that day.

Jones further asserts that Norton may have committed other crimes besides murder, and that this possibility could have supported a seizure of Norton's clothes under the plain view doctrine. But, as the CFC correctly held, Jones abandoned all alleged crimes except homicide and possibly assault, by failing to address them in her post-trial brief or explain how the elements of those crimes were met. *Jones VII*, 171 Fed. Cl. at 619. In any case, as explained above, pp. 26-30, the CFC did not err in concluding that the FBI lacked probable cause to seize Norton's clothing. *Jones VI*, 2023 WL 2681819, at *31-*34. This Court should reject Jones' argument.

Jones also asserts that the government should be sanctioned for declining to test the Hi-Point, declining to test Murray's hands for blowback, and for not requiring an autopsy of Murray's body. Opening Br. at 36-37 (Section II.D). These arguments have been forfeited. Although this Court remanded to the CFC to determine whether the government's failure to conduct these tests or require an autopsy constituted spoliation, Jones limited her post-hearing submission on sanctions to three items: (1)

Norton’s gun; (2) Norton’s clothing; and (3) the Hi-Point gun. *Jones VI*, 2023 WL 2681819, at *3 (citing SApxx268-72). Jones “further confirmed during” oral argument that she sought “spoliation sanctions for those three pieces of evidence.” *Jones VI*, 2023 WL 2681819, at *3. The CFC accordingly held that Jones “abandoned any argument for the imposition of spoliation sanctions based on any evidence other than these three items.” *Id.* Jones’ opening brief disregards the CFC’s ruling and instead repeats – sometimes verbatim – arguments that she raised in the second appeal. This Court should not provide Jones with yet another bite at the apple when she has had many opportunities to press these claims in the CFC but chose not to do so. And finally, the sanction imposed for the Hi-Point adequately addressed the government’s failure to order tests on the gun. *See supra* pp. 21-25.

* * * *

In sum, the United States lacked probable cause to believe a crime had been committed, and therefore lacked the legal right to seize Norton’s clothing and gun; it therefore did not have control over such items for spoliation purposes.

II. The CFC’s well-supported factual finding that Murray shot himself is not clearly erroneous.

The CFC’s factual finding that Murray shot himself is well supported by the record. Jones objects to only two components of the CFC’s thorough factual

findings.⁶ First, Jones asserts that the CFC wrongly found that the unnamed runner observed by officers at 11:25:46 a.m. was Murray, causing the CFC to erroneously find that Norton lacked sufficient time to kill Murray and manipulate the evidence. Opening Br. at 38-41 (Section III). Second, Jones asserts that the CFC impermissibly relied on inadmissible hearsay concerning the ownership of the Hi-Point that linked the gun to Kurip and, in turn, to Murray. Opening Br. at 41-42 (Section IV). Neither assertion provides a basis to disturb the CFC's well-supported factual findings.

A. Legal Standards and Standard of Review

This Court reviews the CFC's judgment to determine whether it hinges on errors of law or clearly erroneous factual findings. Conclusions of law are subject to full and independent review, with no deference owed. Factual findings, however, are owed "considerable deference," *Hendler v. United States*, 175 F.3d 1374, 1378 (Fed. Cir. 1999), particularly where the trial court is best situated to observe witnesses and make credibility determinations.

B. The CFC did not clearly err when it concluded that officers saw Murray alive a mere 90 seconds before Norton reported the shooting.

The CFC meticulously reviewed the evidence submitted as part of the trial record, as well as the parties' proposed factual findings and conclusions of law and

⁶ In her opening brief, Jones often provides no record citations to support her factual assertions or relies on prior deposition and hearing testimony that was not admitted into the record during the trial on the merits. This Court should only consider assertions supported by the record created at trial.

arguments presented during a post-trial hearing. The care taken by the court is evident throughout its 51-page opinion, which painstakingly details the evidence, inferences the evidence could support, and the theories that it considered. The CFC put together a timeline of the shooting based on the dispatch reports and other evidence, an abbreviated version of which is as follows:

11:20:47 a.m.	Swenson reports that he has “two runners out.” SAppx636; SAppx664.
11:23:20 a.m. – 11:24:00 a.m.	Norton arrives and speaks with Swenson. SAppx316; SAppx342-44; SAppx410-12; SAppx463-65.
11:23:45 a.m. – 11:24:15 a.m.	Young arrives and speaks with Swenson before driving to Norton’s location, speaking with him, and deciding to search in different directions. SAppx95-96; SAppx411-12; SAppx463-65.
11:24:00 a.m. – 11:24:30 a.m.	Byron arrives and sees Norton leaving Young. SAppx95-96; SAppx413; SAppx434; SAppx481-83; SAppx629.
11:25:30 a.m. – 11:26:00 a.m.	Byron and Young see Norton on top of a hill. SAppx483-84; SAppx503-04; SAppx629 (indicating Young identified Norton to Byron).
11:25:46 a.m. – 11:26:20 a.m.	Byron radios Young asking who the “runner in blue” is at 11:25:46 a.m. Young responds, initially being unsure who the runner is before identifying him as likely being the passenger (Murray). Young could therefore see Murray unharmed and running at 11:26:00 a.m. SAppx637; SAppx664; SAppx669-71.
11:26:00 a.m. – 11:27:29 a.m.	Norton and Murray encounter each other. SAppx638.
11:27:29 a.m.	Norton calls dispatch to report the shooting. SAppx638.

See Jones VII, 171 Fed. Cl. at 600.⁷

⁷ As the CFC explained, there is a discrepancy of three minutes and 11 seconds between the time stamps in Swenson’s dashcam footage and the police-dispatch transcript. *Jones VII*, 171 Fed. Cl. at 586 n. 8. The CFC relied on the dashcam stamp because it is always present. *Id.* Both the CFC’s timeframe and the transcript of the

Although the dispatch recording was not entirely clear, the CFC concluded, based on the evidence and through the process of elimination, that Byron was the person who asked about the identity of the runner in blue, and that Young is the person who responded that it was probably the passenger—that is, Murray. *Jones VII*, 171 Fed. Cl. at 593-94. Among other reasons, Norton did not have a police radio; Swenson was not searching for Murray; Davis could not have been the speaker as he did not know Young or know that he was on-scene until after the shooting; nor could the voice have been Trooper Young's, as he is the person who answered when the unidentified voice asked for "Officer Craig" and answered the other questions posed by the unidentified voice. *Jones VII*, 171 Fed. Cl. at 593-94.

The CFC further concluded that the runner in blue was Murray, and therefore the last time he was seen alive by someone other than Norton was 11:25:46 a.m. *Jones VII*, 171 Fed. Cl. at 593-94. Norton reported the shooting roughly 90 seconds later. Based in part on this time frame, the CFC found it unlikely that Norton would have killed Murray and manipulated evidence with less than 90 seconds to do so. *Id.* at 615. He was in significant distress and doing so would have been "extraordinarily risky" because other officers were in the immediate vicinity and Norton had requested them to come to his location. *Id.* at 611-12.

dispatch record show an approximately 90-second period between a voice asking about the runner in blue and Norton reporting the shooting. *See* SAppx637-38.

Jones makes three assertions to try to pick apart the CFC's time frame, all of which are easily rejected. Jones first complains that the CFC's finding that Murray was the runner in blue is based on a "convoluted string of inference." Opening Br. at 41. But Jones identifies no specific erroneous inference made by the CFC or identify evidence showing that the CFC clearly erred. "Judges are not like pigs, hunting for truffles buried in the record." *Olaplex, Inc. v. L'Oreal USA, Inc.*, 855 F. App'x 701, 712 (Fed. Cir. 2021) (quotations and citations omitted). This Court should decline to sift through the CFC's findings in search of potential flaws.

Jones next asserts that the witness and U.S. experts thought that the runner in blue was Norton. Opening Br. at 40. But Jones cites only to the Fitzer deposition, which was not admitted into evidence at trial. And the evidence shows otherwise. A voice in the transcript states that "[t]he blue is probably going to be the passenger," suggesting that the runner in blue is Murray, who was the passenger in the vehicle. SAppx637; SAppx671. And while it is true that both Murray and Norton were wearing blue, Swenson, Byron, and Young had seen Norton at the scene and would have been able to identify him. *Jones VII*, 171 Fed. Cl. at 594-95.

Jones also asserts that it could not have been Byron asking about the runner in blue because Byron could not identify his voice in the audio recording. Opening Br. at 39-40. But the CFC found it was "understandable" that Byron would "not recognize his voice from an almost-17-year-old recording of middling quality." *Jones VII*, 171 Fed. Cl. at 593 n.16; SAppx669-71. Jones also fails to explain why it would matter if

Byron were not the person asking about the runner in blue, or how the speaker being someone other than Byron would make it less likely that the runner in blue was Murray. In the face of ample evidence suggesting the speaker was Byron, and the extensive explanation for Byron not recognizing his voice, the CFC's finding was not clearly erroneous. *Jones VII*, 171 Fed. Cl. at 593.

Even so, any hypothetical error on the CFC's part in constructing this timeline would not warrant reversal, because the CFC's conclusion that it is most likely that Murray committed suicide did not turn exclusively on this time frame. *See, e.g., supra* pp. 15-16; *Jones VII*, 171 Fed. Cl. at 613-22. All the experts agreed that Murray died as a result of a close contact wound. Norton had no motive to kill Murray. *Jones VII*, 171 Fed. Cl. at 614. Even if Norton had been closer to Murray than the location at which his shell casings were found, Jones suggested no reason for Norton to invent a story that he was more than 100 yards away. *Id.* at 614-15. Even if Norton had more than 90 seconds between the time Murray was last observed and the time that he reported the shots, it would still have been less risky to invent and stage a story about a struggle, as other officers were nearby and could have seen him at any time. *Id.*

The physical evidence also corroborated Norton's account, with Norton's shell casing found more than 100 yards from Murray and Norton's clothing being clean, among other things. *Id.* at 615. And although the CFC did not expressly rely on this testimony to make its findings, Byron also testified that he saw Murray going down behind some brush and Norton retreating up the hill, far apart from each other. *See*

supra p. 6. There was also no evidence to support a conclusion that several officers from different agencies conspired to cover up the shooting.

The CFC also found that Jones’ best evidence that Murray did not shoot himself—the location of the entry wound on the left side of Murray’s head—tilted in favor of the government. *Id.* at 616. The government’s expert testified that the location of the wound was not atypical and that based on the evidence, his conclusion was that Murray committed suicide. *Id.* It is also possible that right-handed individuals such as Murray can use their left hands to perform certain activities. *Id.* at 617. Even Jones’ expert testified that a “reasonable choice” for the cause of death would have been suicide, *id.* at 616, and did not testify that homicide would have been the best manner of death certification—he would have marked Murray’s manner of death as “undetermined”, *id.* at 617; SAppx557-58.⁸ The evidence also showed that Murray was impaired on April 1, 2007, providing one possible explanation for why he shot himself. *Id.* The CFC also found that Norton’s “account of the shooting was credible” based on the testimony and the exhibits in evidence. *Id.* at 618; *see* SAppx273 (proposed exhibit list).

⁸ Citing unadmitted deposition testimony, Jones asserts that one of the government’s experts (Fitzer) developed an alternative timeline, but even Jones admits that under this alternate timeline, Norton did not have enough time to shoot Murray. Opening Br. at 40-41. In any case, Fitzer’s unadmitted deposition testimony is not properly before the Court. *See* Fed. R. App. P. 10(a); *In re Cygnus Telecommunications Tech., LLC, Pat. Litig.*, 536 F.3d 1343, 1353 (Fed. Cir. 2008) (declining to consider information not presented to the lower court).

By contrast, under Jones' theory, Norton would have had to run down the hill over 100 yards, press his gun against Murray's head (even though Murray was armed), shoot Murray at close range, collect his .40 caliber shell casing, fire three shots from the .380 Hi-Point, run back up the hill more than 100 yards, drop one .40 caliber shell casing, fire another .40 caliber shell casing, run back to his truck to change clothes and clean his gun and body, call dispatch, and run back to the top of the hill where he encountered Byron and Young at around 11:30 a.m. This theory is simply not plausible considering the evidence presented at trial and Jones provides no evidence that would support it.

In sum, Jones provides no reason to second-guess the court's finding that the runner in blue was Murray or, beyond that, its finding that Norton did not kill Murray.

C. The CFC appropriately considered evidence relating to the ownership of the Hi-Point that linked the gun to Murray.

Jones asserts that the CFC erroneously admitted evidence connecting the Hi-Point to Murray. Opening Br. at 41-42 (Section IV). Jones does not directly identify which evidence she objects to, instead citing to page 45 of the CFC's slip opinion (Appx 100), which cites to Ryan's spoliation hearing testimony. At the hearing, Ryan stated that his investigation revealed that Shirley had purchased the gun for Kurip. *Jones VII*, 171 Fed. Cl. at 612 (citing SAppx207-08). The CFC also considered Ryan's trial testimony that he learned during an interview with Shirley that the Hi-Point was provided to Kurip. *Jones VII*, 171 Fed. Cl. at 612 (citing SAppx609).

The admissibility of Ryan’s testimony has not been preserved for appeal. At trial, during Ryan’s direct examination, the government asked Ryan whether he had learned who Shirley had purchased the gun for, and Ryan answered that it was for Kurip. SAppx609-10. Jones’ counsel did not object. *Id.* Jones likewise did not object to similar testimony at the spoliation hearing. *See* SAppx207-08. Nor did Jones object in post-trial briefing to Ryan’s testimony or to the consideration of Hi-Point’s origin. *See, e.g.*, ECF 261 at 4-8; SAppx703. Because Jones failed to object to the government’s question at trial or to Ryan’s response, this Court should decline to entertain this argument on appeal. *See Ensco, Inc. v. Komar Indus., Inc.*, 91 F.3d 172 (Fed. Cir. 1996) (citing cases).

In any event, the CFC properly considered such testimony. The parties agreed that Ryan’s testimony at the spoliation hearing could be used as evidence at trial. *See* SAppx289-91 (stipulation that all of pages 399-400 from Volume 2, November 1, 2024, were admissible). Jones cannot now assert it was inadmissible. Additionally, Ryan appropriately testified at trial about what he had learned through his investigation. There was also other evidence tying the gun to Murray. A Bureau of Indian Affairs (“BIA”) report was admitted into evidence at trial (over objection) as a public record. SAppx611-16; SAppx672-75. The report documented an incident at Kurip’s residence in which Kurip had threatened family members with a gun and BIA officers recovered a casing and gun box for a Hi-Point .380. *Jones VII*, 171 Fed. Cl. at 609 (citing SAppx612-13; SAppx674). Jones does not challenge its admission on

appeal. The CFC had sufficient evidence to support the link between the Hi-Point and Murray. *Id.*

CONCLUSION

For these reasons, this Court should affirm the CFC's entry of judgment for the United States.

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January 14, 2025
DJ: 90-2-20-13949

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Circuit Rule 32(a). Excepting the portions of the brief described in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), the brief contains 12,284 words.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared using Microsoft Word 365 in 14-point Garamond, a proportionally spaced font.

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CERTIFICATE OF SERVICE

I certify that on January 14, 2025, I caused the foregoing brief to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the CM/ECF system, with service to all parties through that system.

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January 14, 2025