

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

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DEBRA JONES, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Civil Action No. 13-227L
v.)	
)	Judge Richard A. Hertling
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
)	

UNITED STATES’ MEMORANDUM OF CONTENTIONS OF FACT AND LAW

INTRODUCTION

After hearing testimony and seeing the physical and documentary evidence in the forthcoming merits trial, this Court must resolve the central question in this long-running litigation: whether a preponderance of the evidence supports Plaintiffs’ theory that, on April 1, 2007, Vernal City Detective Vance Norton murdered Mr. Todd Murray. To the contrary, the evidence will show that—just as the Utah Medical Examiner, Federal Bureau of Investigation, and Utah federal district court have already concluded—Mr. Murray took his own life. Plaintiffs will therefore be unable to meet their evidentiary burden to prove that Detective Norton murdered Mr. Murray or committed any other crimes.

At least four pillars of evidence (or lack thereof) will buttress this conclusion:

First, not a single witness will dispute that Mr. Murray died of a contact gunshot wound to the head—meaning that he either shot himself (purposefully or accidentally) or Detective Norton was standing right next to Mr. Murray at the time shots were exchanged.

Second, the physical evidence found at the scene will corroborate Detective Norton’s expected testimony that Mr. Murray fired two shots at Detective Norton, Detective Norton returned

two shots from over 100 yards away, and then Mr. Murray killed himself. None of the physical or testimonial evidence will support Plaintiffs' theory that something else occurred, or that Officer Norton was within 100 yards of Mr. Murray at the time shots were exchanged.

Third, testimony from Federal Bureau of Investigation ("FBI") Special Agent David Ryan will show that the .380 Hi-Point pistol found beside Mr. Murray had been purchased and given to Uriah Kurip—Mr. Murray's friend and the driver of the vehicle in which Mr. Murray was a passenger. This evidence will foreclose Plaintiffs' unsupported speculation that Detective Norton brought the .380 Hi-Point to the scene.

Fourth, there will no evidence that local, state, and federal law enforcement officers – most of whom were simply professional acquaintances – conspired to move, destroy, or plant evidence at the scene. Because Plaintiffs will present no evidence that Detective Norton altered the evidentiary landscape or that other officers conspired to do the same, Plaintiffs cannot prove their alleged, evidence-based crimes (*e.g.* obstruction, destruction of evidence, conspiracy) and the Court has no reason to doubt the clear story painted by the physical evidence in this case.

In advance of trial, the United States respectfully submits the following memorandum of contentions of facts and law pursuant to Appendix A, Section VI.15(b), of the Rules of the Court of Federal Claims, and in response to Plaintiffs' pre-trial submission, *see* Pls.' Contention of Fact and Law 1-3, ECF No. 223 ("Pls.' Mem."). Based on the parties' mutual understanding of the claims to be tried, the United States limits the following submission to contentions related to: murder, negligent or reckless homicide, battery, assault, conspiracy, obstruction of justice, false statements, destruction of evidence, official and unofficial misconduct, and other similar crimes. *See* Joint Status Report 2-3, ECF No. 219. Because the evidence will show that Mr. Murray killed himself, there will not be a preponderance of evidence showing that a non-Indian committed any

of these crimes against Mr. Murray on the Uintah & Ouray Reservation on April 1, 2007. Therefore, the “bad man” provision in the 1868 Treaty between the United States and the Ute Tribe is inapplicable and judgment must be entered in favor of the United States.

CONCISE STATEMENT OF FACTS EXPECTED AT TRIAL

The United States expects to rely on the following facts at trial. The United States also uses this section to respond, as appropriate, to Plaintiffs’ three-page contentions of fact.¹ *See* Pls.’ Mem. 1-2, ECF No. 223.

I. The Car Pursuit

1. On April 1, 2017, Utah State Trooper David Swenson observed a black vehicle heading westbound on Utah SR40, near mile marker 134, traveling above the posted 65-mile per hour speed limit. Trooper Swenson activated his emergency lights and attempted to make a police-stop of the vehicle.

2. The vehicle immediately accelerated and continued westbound at a high rate of speed.

3. Trooper Swenson pursued the vehicle and notified dispatch.

4. The vehicle contained two occupants: (1) a driver, Uriah Kurip, who was not, at the time, an enrolled member of the Ute Tribe; and (2) a passenger, Todd Murray, who was an enrolled member of the Ute Tribe. Contrary to Plaintiffs’ contentions, *see* Pls.’ Mem. 1, Trooper Swenson did not know whether either of the occupants were enrolled members of a tribe at the time he initiated the pursuit.

¹ Plaintiff’s pretrial contentions of fact are incomplete and intermingled with legal conclusions. *See* ECF No. 223.

5. After a high-speed pursuit, the car driven by Mr. Kurip spun out and crashed near Turkey Track road in Vernal, Utah, within the boundaries of the Ute Tribe reservation. Trooper Swenson did not know he was on the reservation.

6. Mr. Kurip and Mr. Murray fled in different directions, but Trooper Swenson was able to detain Mr. Kurip.

II. The Search for Murray

7. Detective Norton, then off-duty and having trailed Trooper Swenson's pursuit in support, arrived at the scene shortly after Trooper Swenson detained Mr. Kurip. After Trooper Swenson pointed out the direction Mr. Murray had fled, Detective Norton searched for Mr. Murray.

8. At the time, Detective Norton did not know the identity of the individual for whom he was searching, whether the individual was the driver or passenger of the car, whether the individual was Indian by observation (much less an enrolled tribal member), whether the individual was injured, or whether the individual had committed a crime.² Detective Norton was also unaware that he was on tribal land.

9. Shortly after Detective Norton's arrival, Utah State Trooper Craig Young and Uintah County Deputy Anthony Byron also arrived and began searching for Mr. Murray, though from a different route than Detective Norton had taken.

III. Detective Norton's Encounter with Mr. Murray

10. Detective Norton eventually encountered Mr. Murray, who he did not know, as Detective Norton crested a nearby hill and observed Mr. Murray more than 100 yards away,

² Plaintiffs' contention that Detective Norton "knew . . . that [Murray] had not committed any crime" is incorrect. *See* Pls.' Mem. 1. To the contrary, Detective Norton assumed that Mr. Murray may have been involved in a crime, but was not certain.

traveling towards him. Detective Norton made verbal attempts to identify himself as a police officer and observed what Detective Norton thought was a firearm in Mr. Murray's hand.

11. Detective Norton suspected that Mr. Murray was attempting to return to Trooper Swenson's location, perhaps to do Trooper Swenson harm. Detective Norton was holding his service weapon at the "low ready" position.

12. Having identified himself as a police officer, Detective Norton shouted commands at Mr. Murray to get to the ground.

13. However, rather than complying with these instructions, Mr. Murray fired two shots at Detective Norton with the .380 Hi-Point.

14. Detective Norton retreated and fired two shots in Mr. Murray's direction with his .40 Glock service firearm. Neither of these shots—which were fired from more than a football field away—hit Mr. Murray.

15. Detective Norton then observed Mr. Murray put a firearm, which turned out to be the .380 Hi-Point, to his own head. Detective Norton yelled at Mr. Murray to put the gun down, but Mr. Murray did not respond. Instead, Mr. Murray shot himself in the head and immediately fell to the ground.

16. Detective Norton called dispatch to inform them of what had occurred. Within about five to ten minutes of the first shot being fired, Trooper Young and Deputy Byron arrived at Detective Norton's location. Then, Trooper Young and Deputy Byron approached Mr. Murray and secured him.

17. Detective Norton did not leave his location and was eventually joined by Deputy Troy Slaugh of the Uintah County Sheriff's Office and Sean Davis, a Utah Wildlife Officer.

18. Within about thirty minutes of the first shot being fired, an ambulance arrived and transported Mr. Murray to the Ashley Valley Medical Center in Vernal, where he later died. At the hospital, a blood test was performed and showed that Mr. Murray was intoxicated and on drugs.

19. Detective Norton's supervisor, Chief Gary Jensen of the Vernal City Police Department, later arrived at the scene and took Detective Norton's weapon. Chief Jensen did not observe anything unusual on Detective Norton's service weapon or on Detective Norton himself. Chief Jensen—a veteran law enforcement officer and paramedic—would have noticed if blood or any other bodily fluid had been on Detective Norton or Detective Norton's .40-caliber service weapon.

IV. The Investigation

20. Because Mr. Murray was an enrolled tribal member—a fact discovered only after the exchange of shots—and his death occurred on reservation, the on-scene investigation was led by the FBI.

21. Specifically, FBI Special Agent Rex Ashdown arrived after the ambulance took Mr. Murray to the hospital and received a briefing of what happened at the scene from the other supervisory officers on-site. Agent Ashdown also talked to Trooper Swenson, who took Agent Ashdown on the route that he had taken to apprehend Mr. Kurip and then started moving toward where Mr. Murray and Detective Norton had exchanged fire.

22. As part of his investigation, Agent Ashdown took photographs and collected the gun found on the ground beside Murray – a .380 caliber Hi-Point, which had a stove-piped round inside. He also collected two spent .380 caliber shell casings found near where Mr. Murray's body had been. Agent Ashdown also collected two .40-caliber casings found up a slope about 110 yards away (Norton's service weapon was a .40-caliber).

23. Agent Ashdown collected GPS coordinates of the bullet casing locations, showing the distance between where the .380 shell casings and the .40 shell casings had been found.

24. Agent Ashdown observed Detective Norton standing in the area where Detective Norton had fired his shots. Agent Ashdown had a brief conversation with Detective Norton and requested to interview Detective Norton. Detective Norton advised that he wanted an attorney present during the interview, a position that did not surprise Agent Ashdown given the circumstances.

25. Agent Ashdown observed Detective Norton's demeanor to be normal and his clothes to be clean.

26. Numerous other local and state police officers also observed Detective Norton's demeanor to be normal and his clothes to be clean.

27. Agent Ashdown also traveled to the area where Mr. Murray was shot and laid evidence markers in the vicinity.

28. Agent Ashdown took photographs of blood spatter at Mr. Murray's location because he believed it provided an indication of what happened at the scene.

29. Agent Ashdown did not observe any signs that any evidence had been tampered with or moved. Also, Agent Ashdown did not ask anybody else at the scene to collect any evidence on his behalf.

30. On April 12, 2007, Agent Ashdown prepared a summary report of the April 1st incident, which contained the GPS locations Ashdown recorded for the site of Detective Norton's location and Mr. Murray's location based on what he had been told and the location of physical evidence. The distance between those two GPS locations was recorded to be approximately 114 yards away from each other.

V. The Medical Examiner's Investigation and Conclusion

31. As part of its investigation, the FBI requested an autopsy of Mr. Murray's body.

32. The Uintah County Medical Examiner, Dr. Edward Leis, performed an external examination of Mr. Murray's body. Dr. Leis, who is now deceased, also received an investigatory report from Investigator Keith Campbell, which consisted of a handwritten summary of Investigator Campbell's observations at the scene on April 1, 2007.

33. Based on the direction of the blood spatter at the scene and brain matter on the sandstone, Investigator Campbell opined on the direction of the bullet he believed had killed Mr. Murray. Specifically, Investigator Campbell found that the line formed by the blood spatter from Mr. Murray's body scene was clearly at a right angle to a line from Murray's body to the location of Detective Norton and was consistent with a self-inflicted gunshot to the head.

34. Dr. Leis observed that Mr. Murray's entrance wound was located near his left temple slightly above and behind his right ear. Dr. Leis also determined that Mr. Murray's exit wound was in the back right portion of Mr. Murray's head, behind and above his right ear.

35. By knowing the locations of the entrance and exit wounds, Dr. Leis could deduce the bullet's path through Murray's brain, which was "left to right, slightly upward, and slightly front to back."

36. Due to the stellate shape of the entrance wound, the presence of soot inside the wound tract and the presence of beveling (which is the impression a bullet makes in a skull) inside the skull, Dr. Leis could determine Mr. Murray suffered from a contact wound.

37. Dr. Leis also took blood samples from Mr. Murray's body which showed that at the time of his death he was under the influence of alcohol and methamphetamine. The results of the Medical Examiner's toxicology test were consistent with the results of toxicology tests performed on Mr. Murray at Ashley Regional Medical Center.

38. Dr. Leis also took an X-Ray of Mr. Murray's brain, which did not reveal any discernable projectiles or projectile fragments in Mr. Murray's brain. Because the X-Ray did not reveal any bullet fragments that were large enough to be seen and recovered, Dr. Leis concluded that cutting into Mr. Murray's brain would not have yielded any additional information.

39. Based on all of this information, Dr. Leis determined that a full autopsy was not necessary.

40. Based on all of the evidence from his external examination and the information he reviewed from Investigator Campbell's report, Dr. Leis found that the manner of death was suicide and the cause of death was a contact gunshot wound to the head. In other words, the muzzle of the weapon that fired the fatal shot was fired near Mr. Murray's skull.

41. Dr. Joseph Cohen, the United States' medical examiner expert, reviewed the relevant evidence and agrees with Dr. Leis's conclusion that the cause of death was a close contact gunshot wound. Dr. Cohen therefore reports that Mr. Murray either had to have shot himself, or someone else had to shoot Mr. Murray (who was armed) by holding a gun against Mr. Murray's head and pulling the trigger.

VI. The FBI's Closure of the Investigation

42. FBI Special Agent David Ryan interviewed Detective Norton on May 1, 2007, and found no reason to suspect Detective Norton of any wrongdoing.

43. After receiving the Medical Examiner's final report in July 2007, Agent Ryan concluded that the Medical Examiner's conclusion of suicide was corroborated by the evidence at the scene and Detective Norton's account.

44. Agent Ryan investigated the purchase of the .380 Hi-Point, which revealed that the weapon had been illegally purchased for Mr. Kurip as part of a straw purchase. Agent Ryan's

investigation resulted in the eventual conviction of the straw purchaser, who identified Mr. Kurip as the felon for whom he who he had illegally purchased the weapon.

45. Pursuant to a forfeiture order by the U.S. District Court for the District of Utah, the .380 Hi-Point was taken out of the FBI's evidence locker by its forfeiture team in November 2008 and the gun was handed over to the U.S. Marshals to be destroyed in December 2008.

46. At no point between April 1, 2007, and December 2008 did anyone from the Murray family ask the FBI to preserve any evidence for a potential civil lawsuit, even though the Murray family contemplated a civil lawsuit as early as the day of Mr. Murray's funeral in April 2007.

47. The FBI retained possession of the stove-piped round, the two .380 caliber shell casings, and the two .40 caliber shell casings, with the exception of a period of time when the evidence was lent to local and state law enforcement officers to assist them in a separate civil proceeding.

ISSUES OF FACT AND LAW

The following is a statement of the issues of fact and law to be resolved by the court:

1. Whether Plaintiffs have proven, by a preponderance of the evidence, that Detective Norton "shot Mr. Murray in the head at close range" on April 1, 2007, *see* Pls.' Mem. 2, where no testimony or physical evidence shows the distance between them was any closer than 100 yards and the time between their first encounter and the arrival of other law enforcement officers consisted of only several minutes.

2. Whether Plaintiffs have proven, by a preponderance of the evidence, that Detective Norton engaged in any other of the alleged criminal activity, including whether: (1) all required

elements of the crimes they allege to have been committed have been satisfied; and (2) those crimes are actionable under the treaty's "bad men" provision.

3. If either of the above is proven, whether Plaintiffs have proven, by a preponderance of the evidence, that Detective Norton, Special Agent Ashdown, or any other state or local law enforcement officers, committed crimes that are actionable under the treaty's "bad man provision" by engaging in any actions to cover up the criminal actions otherwise proven.

DISCUSSION OF LEGAL PRINCIPLES

I. Plaintiffs' Case Arises Under the Treaty's "Bad Men" Provision

1. Plaintiffs seek damages based upon a provision in the 1868 Treaty between the United States and the Ute Tribe of the Uintah & Ouray Reservation. *See* Treaty with the Ute, Mar. 2, 1868, 15 Stat. 619 ("1868 Treaty").

2. The Treaty arose from what had been "a particularly acrimonious relationship" between the United States and the Tribe. *Jones v. United States (Jones Fed. Cir.)*, 846 F.3d 1343, 1348 (Fed. Cir. 2017). At the time, Congress had concluded that the "aggressions of lawless white men" were the cause of most "Indian" wars. *Id.* at 1355 (quotation omitted); *see Tsosie v. United States*, 825 F.2d 393, 396 (Fed. Cir. 1987); *Elk v. United States*, 87 Fed. Cl. 70, 80 (2009).

3. The Treaty's aim was "peace between the Ute Tribe and white settlers." *Jones Fed. Cir.*, 846 F.3d at 1348 (citing *Tsosie*, 825 F.2d at 395); *see Garreaux v. United States*, 77 Fed. Cl. 726, 736 (2007).

4. The focus here is the "bad men" clause in Article 6:

If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

1868 Treaty, art. 6, 15 Stat. 619.

5. The “bad men” clause made the federal government “responsible for what white men do within the Indian’s territory.” *Janis v. United States*, 32 Ct. Cl. 407, 410 (1897). The hope was that the provision—and a mirroring provision relating to wrongs committed by Indians—would keep the peace. *Id.*

6. The Federal Circuit has held in this case that “only acts that could be prosecutable as criminal wrongdoing are cognizable” under the “bad men” clause. *Jones Fed. Cir.*, 846 F.3d at 1355. The Treaty phrase “any wrong” is “tied to the concept that the United States would at least have the authority to make an arrest with respect to such wrongs.” *Id.* This federal authority would need to rest in either a federal criminal provision applicable to Indian country (18 U.S.C. § 1152), or in a state criminal provision made federally punishable through the Assimilative Crimes Act (18 U.S.C. § 13). *Id.* at 1356–57.

II. Plaintiffs Cannot Establish the Elements of Murder, Negligent or Reckless Homicide, Battery, Assault, or Conspiracy.

7. Plaintiffs fail to meet the required elements of the primary alleged crimes in this lawsuit, *i.e.*, murder, negligent or reckless homicide, battery, assault, and conspiracy.

A. Elements of Murder, Negligent or Reckless Homicide, Battery, Assault, and Conspiracy

a) Murder

8. Murder in the first degree is the “unlawful killing of a human being with malice aforethought.” 18 U.S.C. § 1111(a). “Every murder perpetrated by . . . willful, deliberate, malicious, and premeditated killing . . . or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed” constitutes murder in the first degree. *Id.* (noting that “[a]ny other murder is murder in the second degree”).

9. Plaintiffs appear to claim a violation of Utah’s aggravated murder statute and lesser included offenses including Utah’s criminal prohibition against manslaughter. But because these state offenses are not assimilated into federal law, the Court should not consider them. As this Court has already correctly found, the Assimilative Crimes Act does not “assimilate into federal law state-law crimes consisting of conduct that Congress punishes under an independent federal statute.” *Jones v. United States*, 149 Fed. Cl. 335, 355 (2020), *rev’d and remanded on other grounds*, No. 2020-2182, 2022 WL 473032 (Fed. Cir. Feb. 16, 2022). Both murder and manslaughter, among other of Plaintiffs’ alleged crimes, are punishable under independent federal statutes.

10. However, if the Court considers Utah’s crime of aggravated murder, Plaintiffs have still failed to prove the elements of that crime. An individual is guilty of aggravated murder under Utah law “if the actor intentionally or knowingly causes the death of another individual” under certain circumstances. UTAH CODE ANN. § 76-5-202(2)(a). An affirmative defense to such a charge exists where the individual held a “reasonable belief that the circumstances provided a legal justification or excuse for the conduct” even where the conduct “was not legally justifiable or excusable under the circumstances.” *Id.* § 76-5-202(4)(a).

b) Manslaughter

11. “Manslaughter is the unlawful killing of a human being without malice.” 18 U.S.C. § 1112(a). Voluntary manslaughter is a killing “[u]pon a sudden quarrel or heat of passion.” *Id.*

12. If the Court considers Utah’s crime of manslaughter in addition to the federal prohibition against manslaughter, Plaintiffs have still failed to prove the elements of state manslaughter. Under Utah law, an individual is guilty of manslaughter if the individual both “recklessly causes the death of an[] individual” or “commits a homicide” that would otherwise

constitute murder but reasonably believed that the conduct was legally justified. UTAH CODE ANN. § 76-5-205(2)(a), (c).

c) Negligent Homicide

13. Utah also defines negligent homicide as where “[a]n actor commits negligent homicide if the actor, acting with criminal negligence, causes the death of another individual.” *Id.* § 76-5-206(2). It is criminally negligent to act if one should be aware of the risk. Model Utah Jury Instructions- Criminal at Cr 307, <https://legacy.utcourts.gov/committees/criminaljury/model%20utah%20jury%20instructions.pdf> (last visited Sept. 25, 2023).

d) Assault

14. Under Utah law, an assault is “(a) an attempt, with unlawful force or violence, to do bodily injury to another; (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.” UTAH CODE § 76-5-102(1)(a)-(c) (2003).

e) Reckless Endangerment

15. The Utah reckless endangerment statute makes it a crime to “recklessly engage[] in conduct that creates a substantial risk of death or serious bodily injury to another person.” UTAH CODE ANN. § 76-5-112(2). Further, to be guilty of reckless endangerment, Officer Norton would had to have made “a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.” *Utah v. Carter*, No. 20040637-CA, 2005 WL 1177063, at *1 (Utah Ct. App. May 19, 2005) (quoting previous iteration of statute).

f) Criminal Conspiracy

16. To demonstrate a criminal conspiracy, there must be a meeting of the minds to undertake a crime (*e.g.*, murder) and cover-up. *See United States v. Anderson*, 981 F.2d 1560, 1563–64 (10th Cir. 1992); *see* 18 U.S.C. § 1117 (federal murder conspiracy statute). Specifically, to show a criminal conspiracy, there must be (1) an agreement to violate the law; (2) the alleged conspirator must have known the essential objectives of the conspiracy; (3) the alleged conspirator must have knowingly and voluntarily taken part in the conspiracy; and (4) the coconspirators must have acted interdependently. *United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992).

17. Plaintiffs must show both *mens rea* and proximate cause. *See United States v. Serawop*, 410 F.3d 656, 663–64 (10th Cir. 2005) (discussing *mens rea*); *United States v. Swallow*, 109 F.3d 656, 659 (10th Cir. 1997) (proximate cause).

18. If the Court considers Utah’s crime of conspiracy in addition to the federal prohibition—which it need not because conspiracy is independently prohibited under federal law—Plaintiffs still cannot demonstrate the elements of the crime. *See* UTAH CODE ANN. § 76-4-201 (applying where one “agrees with one or more persons to engage in or cause the performance of the conduct”); *See id.* (requiring an overt act for conspiracy where offense in question is not a felony against a person).

B. Plaintiffs’ Bad Man Claims Fail Because They Cannot Prove the Above-Mentioned Crimes Were Committed.

19. Because Plaintiffs are unable to prove any criminal act by Detective Norton—or any subsequent cover up by Detective Norton, Agent Ashdown, or other law enforcement officers—they cannot prove the relevant elements of their alleged crimes.

20. Plaintiffs will provide no evidence – beyond mere supposition – to prove the elements of murder or any other lesser included offense. This dearth of evidence – which cannot

be rescued by the spoliation sanction standing alone—³ defeats any bad man claim based on murder or any lesser included offense. And even though the United States does not bear the burden of proof in this case and is not required to prove Mr. Murray committed suicide, Detective Norton will testify that Mr. Murray fired at Detective Norton, Detective Norton returned fire, and that Mr. Murray turned the Hi-Point .380 on himself and pulled the trigger. That testimony will be corroborated by the presence and location of the physical evidence in this case, as documented and collected by Special Agent Ashdown. Moreover, the forensic medical experts will agree that Mr. Murray died from a close-contact gunshot wound, a fact that makes it more likely than not that Detective Norton’s testimony is truthful – Mr. Murray committed suicide (or at least accidentally discharged his weapon next to his head).

21. Regarding the least of Plaintiffs’ alleged “physical” crimes related to Mr. Murray’s encounter with Detective Norton, criminal assault, Utah’s assault statute requires proof of “unlawful force or violence” or the threat of force. UTAH CODE ANN. § 76-5-102(1)(a)-(c) (2003).

22. None of Detective Norton’s actions constitute “unlawful force or violence.” Importantly, lawful and justified law enforcement actions cannot be “wrongs” under the “bad men” clause. *See Hebah v. United States (Hebah II)*, 456 F.2d 696, 710 (Ct. Cl. 1972) (per curiam).

23. Detective Norton’s actions were lawful. First, Norton did not threaten Mr. Murray with any force or violence when they first encountered each other on April 1, 2007. Rather, Mr. Murray acted unreasonably by firing upon Detective Norton. Even if Mr. Murray believed Detective Norton lacked jurisdiction on the reservation, he had no right to use deadly force against

³ Even if the United States fails to rebut the permissive inference that the .380 Hi-Point pistol had no blood, DNA, blowback or fingerprints on it, those facts, standing alone, do not establish Mr. Murray was murdered by Vance Norton or any other non-Indian.

Detective Norton. Indeed, the Utah Supreme Court has made clear that “[w]here the officer is not acting wholly outside the scope of his or her authority, the police action may not be resisted.” *State v. Gardiner*, 814 P.2d 568, 574 (Utah 1991). In interpreting the language “scope of authority,” the Court looks to whether the officer is doing what he or she was employed to do or is “engaging in a personal frolic of his [or her] own.” *Id.* (quoting *United States v. Heliczzer*, 373 F.2d 241, 245 (2d Cir. 1967)). As a Vernal City police officer, Detective Norton was well within the scope of his employment to aid other law enforcement officers executing a traffic stop and then securing the scene to ensure the safety of all officers and suspects.

24. Moreover, if the Court were to find that Detective Norton assaulted Mr. Murray by simply holding his gun in low ready position and shouting orders, the Court would gravely undermine law enforcement’s ability to pursue criminal suspects onto a reservation—including suspects who are not tribal members.

25. Moreover, Detective Norton’s return of cover fire as he retreated from Mr. Murray was not unlawful. As relevant here, a peace officer is justified in using even deadly force if “the officer reasonably believes that the use of deadly force is necessary to prevent death or seriously bodily injury to the officer or [another person].” UTAH CODE ANN. § 76-2-404(1)(c). Norton’s actions were reasonably calculated to prevent Mr. Murray from killing him while he sought additional distance and cover. Such actions were subjectively reasonable. *See Jones v. Norton*, 3 F. Supp. 3d 1170, 1194 (D. Utah 2014), *aff’d*, 809 F.3d 564 (10th Cir. 2015)(quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

26. Indeed, the Utah District Court determined that it was “reasonable under the circumstances for Detective Norton to fire his gun at Mr. Murray. Mr. Murray shot at Detective Norton first. Detective Norton was retreating to protect himself [The officers’] attempt[s] to

apprehend Mr. Murray while protecting themselves—and the means they used to do so—were expected police behavior in light of the circumstances.” *Id.* at 1195. Even if that finding does not work a preclusive effect here, as the government has consistently argued it should, the same conclusion is warranted.

27. For similar reasons, Plaintiffs are unable to show that Detective Norton’s actions were reckless. Nor can Plaintiffs point to any other evidence to show that Detective Norton harmed Mr. Murray in any way; therefore, any greater crimes such as murder or manslaughter are foreclosed.

28. Finally, no evidence demonstrates any cover up. Indeed, this Court has already concluded that there is no evidence to show that the federal officers destroyed or altered evidence at the shooting scene. *See Jones v. United States (Fed. Cl. II)*, 146 Fed. Cl. 726, 737–41 (2020); *see also* Spoliation Order 32, ECF No. 209 (“There is no evidence to show or even suggest that the physical evidence at the scene of the shooting was manipulated, let alone fabricated.”). This Court’s previous findings are further bolstered by the District of Utah’s factual finding that “Plaintiffs have not established the existence of a conspiracy.” *Jones v. Norton*, 3 F. Supp. 3d at 1206.

III. Plaintiffs’ Bad Man Claims Based on the Alleged Crimes of Obstruction of Justice, False Statements, Destruction of Evidence, and Official Misconduct Fail.

A. Plaintiffs’ Remaining Claims Based on Alleged “Public” Crimes Are Not Actionable Under the “Bad Men” Clause.

1. Plaintiffs identify numerous crimes relating to obstruction of justice, false statements, destruction of evidence, and official misconduct.

2. Any “bad man” under the Treaty clause must be an individual. *See Hernandez v. United States*, 93 Fed. Cl. 193, 200 (2010). Claims against organizations or entities are not cognizable. *See id.* (“A court, however, is not a specific white man, and may not qualify as a ‘bad

man'"); *Garreaux*, 77 Fed. Cl. at 737 (rejecting on jurisdictional grounds a claim against a federal agency rather than "specified white men").

3. The focus on "person and property" is clear from the Treaty language itself. 1868 Treaty, art. 6, 15 Stat. 619 ("any wrong upon the person or property of the Indians. . . ."); *see also Banks v. Guffy*, Civ. A. No. 1:10-2130, 2012 WL 72724, at *6 (M.D. Pa. Jan. 10, 2012) (no viable "bad men" claim for property belonging to someone else). The inquiry focuses upon the individual—rather than the Tribe or some broader sense of societal harm—because Article 6, like the provision in other similar treaties, "concerns the rights of and obligations to individual Indians[.]" *Hebah v. United States (Hebah I)*, 428 F.2d 1334, 1337 (Ct. Cl. 1970).

4. Here, even if Plaintiffs' remaining alleged crimes had occurred—and there is no evidence that they did—they would be crimes against a public interest in achieving justice, not against Murray's "person or property." Put differently, these crimes are ones that, when committed, harm the government or the public; they are not acts that cause harm to Indians as envisioned by the Treaty and they are not harms that specifically injured Mr. Murray.

5. Moreover, the alleged crimes would not be peace-shattering crimes of "moral turpitude" that the "bad men" provision was intended to cover. *See Hernandez*, 93 Fed. Cl. at 199 & n.5 (citing *Ex parte Kan-gi-Shun-ca*, 109 U.S. 556, 567 (1883)); *Garreaux*, 77 Fed. Cl. at 736; *Janis*, 32 Ct. Cl. at 409.

6. In light of the above, Plaintiffs' alleged crimes of obstruction of justice, false statements, destruction of evidence, official misconduct, and other similar crimes, are not actionable under the "bad men" provision of the Treaty.

B. Plaintiffs Will Produce No Evidence to Establish the Elements of Obstruction of Justice, False Statements, Destruction of Evidence, and Official Misconduct.

7. Even if obstruction of justice, false statements, destruction of evidence, and official misconduct were actionable under the Bad Man provision, which they are not, each alleged crime (with a single exception discussed below) includes an intent element that Plaintiffs cannot prove. *See, e.g.*, 18 U.S.C. § 1505 (“Whoever . . . *willfully* withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material” (emphasis added)); 18 U.S.C. § 2232 (“Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, *knowingly* destroys, damages, wastes, disposes of, transfer[s], or otherwise take[s] any action, or *knowingly* attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, *for the purpose of preventing or impairing the Government's lawful authority* to take such property into its custody or control or to continue holding such property under its lawful custody and control” (emphasis added)); 18 U.S.C. § 1519 (“Whoever knowingly alters, [or] destroys, . . . *with the intent to* impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States” (emphasis added)).

8. The same points apply to Plaintiffs’ citations to the Utah criminal code. *See* UTAH CODE ANN. § 76-8-306 (“An actor commits obstruction of justice if the actor, with *intent* to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense” (emphasis added)); UTAH CODE ANN. § 76-8-510.5(2) (“A person is guilty of tampering with evidence if, believing that an official proceeding or investigation is pending or about to be instituted, or with the *intent* to prevent an official proceeding or investigation or to prevent the production of any thing or item which reasonably would be anticipated to be evidence in the official proceeding or investigation,

the person knowingly or intentionally” (emphasis added)); UTAH CODE ANN. 76–8–301 (1998) (“A person is guilty of interference with a public servant if he (a) uses force, violence, intimidation, or engages in any other unlawful act *with a purpose to interfere* with a public servant performing or purporting to perform an official function”); UTAH CODE ANN. § 76-8-201 (providing that a public servant is guilty of official misconduct if he, “with an *intent* to benefit himself or another or to harm another, [] knowingly commits an unauthorized act which purports to be an act of his office, or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.” (emphasis added)); UTAH CODE ANN. § 76-8-511 (same).

9. The only crime that does not expressly include an element of intent is Utah’s unofficial misconduct statute, UTAH CODE ANN. § 76-8-203, which is inapplicable for other reasons. That law applies where a “person exercises or attempts to exercise any of the functions of a public office when the person . . . has not taken and filed the required oath of office.” *Id.* As established above, whether a law enforcement officer is acting within the scope of their authority depends on whether the officer is “doing what he or she was employed to do.” *State v. Gardiner*, 814 P.2d 568, 574 (Utah 1991). That clearly applies here where the law enforcement officers who assisted Trooper Swenson on April 1, 2007, and assisted with the investigation were acting well within the scope of their duties. Plaintiffs’ assertions regarding the reservation boundaries, which are relevant only to the jurisdictional handoff required in this case once tribal enrollment was confirmed, do not eviscerate the fact that each law enforcement officer was acting within the scope of their duties.

10. Moreover, as previously noted, this Court has already concluded that there is no evidence to show that those present destroyed or altered evidence at the shooting scene. *See Fed.*

Cl. II, 146 Fed. Cl. at 737–41; *see also* Spoliation Order 32, ECF No. 209 (“There is no evidence to show or even suggest that the physical evidence at the scene of the shooting was manipulated, let alone fabricated.”). If Plaintiffs could not prove the destruction or alteration of evidence during the spoliation phase of this case, they cannot now establish that evidence was criminally destroyed or altered.

OBJECTIONS TO PLAINTIFFS’ WITNESSES AND EXHIBITS

As required by Appendix A, Section VI.15(b), of the Rules of the Court of Federal Claims, the United States respectfully lodges the following objections to Plaintiffs’ activated witnesses and exhibits at trial:

1. Defendants object to Plaintiffs’ anticipated witnesses they intend to call regarding actions taken at Blackburn Mortuary, which pertain only to off-reservation conduct that the Court has ruled is not actionable based on the Court’s prior summary judgment order, which the parties agreed remains effective as to this issue. These witnesses include Colby Decamp and Mitchel Blackburn.
2. Defendants object to Raymond Wissiup, who was not disclosed by Plaintiffs during discovery.
3. Defendants object to Plaintiffs’ exhibit list, which does not properly identify the documents by Bates number range.⁴

Respectfully submitted this 26th day of September, 2023.

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division

⁴ Defendants have conferred with Plaintiffs and believe they are working in good faith to resolve this issue. Nonetheless, Defendants must preserve this objection until the issue is resolved.

s/ J. Scott Thomas
Jeffrey Scott Thomas
J. SCOTT THOMAS, Trial Attorney
CHRISTOPHER C. HAIR, Trial Attorney
AMANDA K. RUDAT, Trial Attorney
Natural Resources Section
150 M Street NE
Washington, DC 20002
202-305-0294 (Thomas)
202-305-0420 (Hair)
202-305-0575 (Rudat)
Jeffrey.Thomas2@usdoj.gov
Christopher.Hair@usdoj.gov
Amanda.Rudat@usdoj.gov

Counsel for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2023, a copy of the foregoing memorandum of contentions of fact and conclusions of law was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ J. Scott Thomas
Jeffrey Scott Thomas,
Trial Attorney