IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DEBRA JONES, et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:13-cv-00227
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

UNITED STATES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

To prevail on their claims under Article 6 of the 1868 Treaty between the United States and the Ute Tribe of the Uintah & Ouray Reservation (the "bad men" clause), Plaintiffs have the burden of proving that a crime punishable under federal law was committed against Todd Murray on the Uintah and Ouray Reservation on April 1, 2007. Plaintiffs had the benefit of the Court's spoliation sanction—a rebuttable factual inference that the Hi-Point .380 pistol found at the scene did not have Mr. Murray's blood, tissue, DNA, or fingerprints on it. The sanction, however, was neither a dispositive nor burden-shifting sanction. The inference under the sanction, even if not rebutted by the United States (which it was), cannot be viewed in isolation from all the other evidence produced at trial showing that Mr. Murray shot himself. Ultimately, even with the spoliation sanction to aid their case, Plaintiffs failed to meet their burden of showing that Vance Norton or another non-Indian killed Mr. Murray or that any other crimes were committed against Mr. Murray.

Tellingly, at no point during the trial on the merits did Plaintiffs identify the crime(s) they believe were committed, much less produce evidence as to how those crimes were committed.

Plaintiffs' most pointed accusation during trial was that Detective Norton "made a terrible mistake." ECF No. 259, Hr'g Tr., Vol. 6, 636:18-22, Nov. 14, 2023 (hereinafter, "11/14/23 Tr."). But this vague and nebulous statement by Plaintiffs' counsel reflects the dearth of evidence to support any "bad men" claim. Standing in stark contrast to Plaintiffs' lack of evidence, the Court heard ample, credible, and unrebutted testimony from multiple law enforcement officers about what happened on April 1, 2007. This included Detective Norton's testimony that Mr. Murray shot himself and Deputy Byron's testimony that he saw Mr. Murray fall and that Detective Norton was nowhere near him. The dispatch audio and the physical evidence at the scene further corroborate the law enforcement officers' testimony. Notably, the Court also heard the testimony of Plaintiffs' own expert witness Dr. Jonathan Arden, who all but conceded that Mr. Murray likely committed suicide or died of an accidental self-inflicted wound—neither of which is a crime. Considering all the evidence presented at trial—not just the spoliation sanction's adverse inference alone in a vacuum—the Court must reach the inescapable conclusion that Plaintiffs have not proven Detective Norton or any of the responding law enforcement officers committed a crime on April 1, 2007. Accordingly, judgment should be entered in favor of the United States.

II. EVIDENCE PRESENTED AT TRIAL

Plaintiffs called six fact witnesses during their case-in-chief: former State Trooper David Swenson, former Fish and Wildlife Officer Sean Davis, Detective Vance Norton, former State Trooper Craig Young, former Deputy Anthoney Byron, and Medical Examiner Investigator Keith Campbell. They also called two expert witnesses, Dr. William Gaut and Dr. Jonathan Arden. Plaintiffs moved the admission of only two exhibits during the entire trial—Dr. Gaut's supplemental expert report and a photograph of blood spatter from the scene. Plaintiffs rested after questioning these eight witnesses and adducing no evidence of criminal activity. The

United States moved for judgment on partial findings under Rule 52(c) of the Rules of the Court of Federal Claims, which the Court took under advisement, and then called three more witnesses as part of its case-in-chief: Dr. Joseph Cohen—an expert in forensic pathology, former FBI Special Agent Rex Ashdown, and FBI Special Agent David Ryan. Plaintiffs called no rebuttal witnesses, although Plaintiffs' counsel read a few lines of deposition testimony into the record from former mortuary employee Colby Decamp. As shown below, the evidence adduced by and through these witnesses does not show that Mr. Murray was murdered on April 1, 2007, or that any other crimes were committed by local, state, or federal officers on that day.

A. The High-Speed Chase on April 1, 2007; the Police Response; and Mr. Murray's Suicide

1. On April 1, 2007, Trooper Swenson initiated a stop of a vehicle driven by Uriah Kurip, in which Todd Murray was the passenger. ECF No. 254, Hr'g Tr., Vol. 1, 20, 29:23-25, Nov. 6, 2023 (hereinafter, "11/6/23 Tr."). Trooper Swenson did not know the identities of the individuals in the car. *Id.* at 49:14-16.

2. Trooper Swenson "was on patrol on Highway 40 in Uintah County and [] observed Mr. Kurip's vehicle speeding. [He] radared it and it was – [he] believe[d] it was 74 in a 65, is what [his] radar indicated. [His] visual was also close to that." *Id.* at 20:8-11*; see also id.* at 20:24–21:1.

3. Trooper Swenson was heading eastbound, while Mr. Kurip and Mr. Murray were heading westbound. *Id.* at 20:21-22.

4. Trooper Swenson activated his emergency lights before Mr. Kurip and Mr. Murray passed him, and Trooper Swenson then made a U-turn to pursue them. *Id.* at 21:2-7.

5. Trooper Swenson's dashcam video automatically activated one to two seconds after he turned on his emergency lights. *Id.* at 21:16-22:2.

6. Trooper Swenson was at approximately mile marker 134.5 when he initiated the stop, which was "off of the reservation." *Id.* at 23:1-4; 43:11-12.

7. Mr. Kurip and Mr. Murray fled Trooper Swenson rather than complying with the stop, and a circuitous high-speed chase ensued which reached speeds of 125 miles per hour and lasted for approximately twenty-eight minutes. *Id.* at 24:3–29:17; *see also* Def.'s Ex. 134 (chase begins at 10:52 and the vehicle crashes at 11:20).

8. Trooper Swenson testified that he had participated in multiple high-speed chases before April 1, 2007, and that in his experience, individuals do not flee the police because of a traffic stop. They flee because "they're running from something. They're afraid to be caught. And it's not the traffic incident. It's something else . . .." 11/6/23 Tr. at 44:15-21.

9. Mr. Kurip and Mr. Murray's vehicle wrecked at the intersection of Seep Ridge and Turkey Track Roads, concluding the roughly twenty-eight-minute chase. *Id.* at 28:21-29:2; *see also* Def.'s Ex. 134 (chase begins at 10:52 and the vehicle crashes at 11:20); Def.'s Ex. 135. Mr. Murray exited the car and fled west across Turkey Track, and Mr. Kurip fled east across Seep Ridge Road. 11/6/23 Tr. at 52:8-53:24; Def.'s Ex. 135.

10. Trooper Swenson's dashcam captured the moment Mr. Kurip and Mr. Murray fled their vehicle. *See* Def.'s Ex. 134 at approximately 11:20:15.

11. Trooper Swenson's dashcam video shows that Mr. Murray fled the vehicle before Trooper Swenson's vehicle stopped and before Trooper Swenson had an opportunity to get out of his vehicle and issue any commands or draw his gun. *Id.*; *see also* 11/6/23 Tr. at 52:9-54:22.

12. Trooper Swenson had mere seconds to observe Mr. Murray as he fled the vehicle, ran away from Trooper Swenson, and ultimately crested a hill out of sight. 11/6/23 Tr. at 54:6-22;

see also id. at 32:21–33:10. Trooper Swenson could not see the entirety of Mr. Murray's waistband and could not testify with any certainty whether Mr. Murray had a weapon on him or not. *Id.* at 54:6-22

13. Trooper Swenson did not know who Mr. Murray was or whether he was a victim of Mr. Kurip's or whether he was injured from the car crash; however, Trooper Swenson did have concern that Mr. Murray may double back to cause Trooper Swenson harm. *Id.* at 55:9-19; 68:3-11.

14. Trooper Swenson turned around and drove to Seep Ridge Road, parked, got out of his car, and pursued Mr. Kurip. *Id.* at 57:3-59:7; *see also* Def.'s Ex. 135.

15. Vance Norton, a Vernal City detective, 11/6/23 Tr. at 118:4-7, was off-duty and traveling in his personal vehicle on April 1, 2007, when he saw Trooper Swenson pursuing the vehicle driven by Mr. Kurip. *Id.* at 121:11-122:24.

16. Detective Norton's call-sign was Whiskey 17. *Id.* at 119:12-16.

17. Detective Norton observed the vehicle Mr. Kurip was driving with Nevada plates and thought there were two Hispanic males driving. *Id.* 145:21–146:1.

18. Detective Norton called into central dispatch on his cell phone to confirm whether a chase was going on and whether Trooper Swenson needed assistance. *Id.* at 122-123.

19. Detective Norton was automatically "checked on duty" by virtue of talking to dispatch and following the chase as a back-up officer. *Id.* at 121:11-23.

20. Detective Norton communicated with dispatch via his cell phone and could not hear the dispatch radio in his personal vehicle. *Id.* at 146:6-17.

21. When Detective Norton arrived at the intersection of Seep Ridge and Turkey Track where Mr. Kurip and Mr. Murray's vehicle had crashed, he observed Trooper Swenson arresting Mr. Kurip and pulled his vehicle along Seep Ridge Road. *Id.* at 126:4-13.

22. Trooper Swenson pointed in the direction where Mr. Murray had fled and provided a general description of Mr. Murray to Detective Norton. ECF No. 198, H'rg Tr., Vol. 1, 77:4-11, 79:22-80:3, Oct. 31, 2022 (hereinafter "10/31/22 Tr."). Trooper Swenson asked Detective Norton to look for Mr. Murray because he "didn't know what the situation was with [Mr. Murray], why he had ran, if he was a -- a willing participant in this . . . It was for his safety." 11/6/23 Tr. at 68:6-9. He did not ask Detective Norton to arrest Mr. Murray. *Id.* at 127:13-15. Trooper Swenson testified that he could not recall whether he told Detective Norton that Mr. Murray was the passenger of the crashed car, *id.* at 61:9-11, and Detective Norton testified that he did not know whether the individual he was looking for was the passenger or the driver. *Id.* at 143:2-7.

23. Detective Norton testified that, at the time, he did not know that he was on an Indian reservation. 10/31/22 Tr. at 136:16-20.

24. Detective Norton drove his car in the direction that Trooper Swenson had indicated, *id.* at 81:5-10, parked, *id.* at 82:6-9, and then proceeded on foot to the highest point to "visualize" where the occupant had travelled, *id.* at 83:4-6.

25. Around the time Detective Norton exited his car at the second location, Trooper Craig Young (Utah Highway Patrol) and Deputy Anthoney Byron (Uintah County Sheriff's Office) arrived. *Id.* at 84:3-13; ECF No. 255, Hr'g Tr., Vol. 2, 239:1-22, Nov. 7, 2023 (hereinafter, "11/7/23 Tr."). Detective Young's call-sign was 372. 11/7/23 Tr. at 196:14-19. Trooper Young testified that when he arrived at the intersection of Seep Ridge Road

and Turkey Track, Trooper Swenson pointed out where Mr. Murray had run, and that Trooper Young saw Detective Norton. *Id.* at 195-201:19, 204:4-21. Trooper Young testified that Trooper Swenson did not give him any directions. *Id.* at 200:5-7. Deputy Byron did not speak to Trooper Swenson when he arrived at the scene. *Id.* at 239:23-240:3.

26. Utah Department of Wildlife Resources Officer Sean Davis also arrived at the scene shortly after Detective Norton, Deputy Byron, and Trooper Young, but before any shots were fired. 11/6/23 Tr. at 81-82, 84.

27. Officer Davis testified that, given the rural nature of the area, he assisted local and state law enforcement officers, which is why he responded after hearing Trooper Swenson was in a high-speed chase. *Id.* at 78:1-12; 78:25–79:5.

28. Trooper Swenson directed Officer Davis to a dirt road to the north of Trooper Swenson's location and that went in the direction of where Mr. Murray had fled. *Id.* at 81:4-82:15. Officer Davis did not recall Trooper Swenson giving him any other directions or information. *Id.* at 82:13-15. Officer Davis proceeded to drive down that road and was on that road until he heard over the radio that shots had been fired. *Id.* at 82:19-20; 84:9-12.

29. Detective Norton recalled having a brief conversation with Trooper Young to the effect of "saying, 'Hey, if you go down here, I'll go over this way and we'll see if we can find him.'" 11/6/23 Tr. at 129:12-14. Detective Norton did not recall speaking to Deputy Byron before going over the hill to look for Mr. Murray. *Id.* at 129:12-23; 150:18-20.

30. Deputy Byron arrived around the same time as Trooper Young. *See* 11/7/23 Tr. at 201:20-23, 239:1-13.

31. For their part, Trooper Young and Deputy Byron drove in separate vehicles further up Turkey Track Road to a turnoff, which was the first possible righthand turn. 11/7/23 Tr. at 219:6-221:3.

32. Trooper Young and Deputy Byron stopped at a well site—i.e., an open pad with some oil facilities. *Id.* at 258:1-6, 261:15-262:14.

33. After Detective Norton briefly spoke with Trooper Young, Detective Norton walked fifty to seventy-five yards away from the road to the edge of a hill. 10/31/22 Tr. at 83:14-15; 11/6/23 Tr. at 128:1-130:10.

34. When Detective Norton crested the hill near the intersection of Turkey Track and Seep Ridge Roads, he observed Mr. Murray "west down over the hill" about 120-130 yards away. 10/31/22 Tr. at 87:18-2.

35. Detective Norton stated that Mr. Murray had "something black in [Mr. Murray's] hands" that gave Detective Norton concern for his own safety and prompted him to draw his gun to the "low ready" position and yell "Police, get on the ground[!]" 10/31/22 Tr. at 89:15-21; 11/6/23 Tr. at 153:20-25. In the "low ready" position, the gun would be pointed "down below [Mr. Murray], like towards his feet[.]" 11/6/23 Tr. at 153:20-22; *see also* ECF No. 256, Hr'g Tr., Vol. 3, 415:7-15, Nov. 8, 2023 (hereinafter, "11/8/23 Tr."). Plaintiffs' expert on crime scene processing, Dr. William Gaut, testified that it would be reasonable for Detective Norton to draw his gun and hold it at the low ready position once he "had reason to believe that Mr. Murray was approaching him with a firearm." 11/8/23 Tr. at 410:11-17; 415-416.

36. Detective Norton thought the black object in Mr. Murray's hand may be a gun; although he was not certain about the gun "because of the distance." 10/31/22 Tr. at 93:5-14.

37. For his own safety, Detective Norton held his gun at the "low ready" position and observed Mr. Murray jogging towards his location. *Id.* At the time Detective Norton issued his commands to Mr. Murray, Mr. Murray was approximately 120 yards from Detective Norton. 11/6/23 Tr. at 90:5-12.

38. Detective Norton suspected Mr. Murray may be "coming back to actually kill [Trooper Swenson] knowing that there [were] . . . no other officers out there." 10/31/22 Tr. at 93:5-14.

39. Deputy Byron testified that while he and Trooper Young were at the oil-well site, they went down a gorge and that Deputy Byron saw both Detective Norton and Mr. Murray, and that Detective Norton was nowhere near Mr. Murray. 11/7/23 Tr. at 260:15-262:18. This is further corroborated by the dispatch audio, where Deputy Byron reports having a visual on Detective Norton on the hill. *See* Def.'s Ex. 138 (file 2007-04-01-11-31-54-002-Recorder.mp3).[1]

40. Deputy Byron observed Mr. Murray go down behind some brush, after which Deputy Byron could not see him very well. 11/7/23 Tr. at 242:17-243:5. At the time, Deputy Byron observed the distance between Mr. Murray and Detective Norton to be "several hundred yards away." *Id.* at 260:25-261:5.

41. When Mr. Murray saw Detective Norton, Mr. Murray raised his arm and fired two shots at Detective Norton. 11/6/23 Tr. at 131:11-21.

42. Detective Norton lacked any cover and one of the rounds fired by Mr. Murray hit the ground below Detective Norton. 10/31/22 Tr. at 93:19-94:3.

[1] In the background of Deputy Byron's discussion with dispatch, discerning listeners will hear Detective Norton's phone call to dispatch reporting the shooting immediately before Deputy Byron reports having a visual of Detective Norton on the hill.

43. Detective Norton fired back twice, turned around, and retreated 30-40 yards up the hill to a location where he felt safer. *Id.*; 11/6/23 Tr. at 132:18-133:14. Plaintiffs' expert, Dr. Gaut, testified that it would be acceptable police procedure to fire at a suspect once the suspect pointed a gun at the officer. 11/8/23 Tr. at 411:1-8.

44. Detective Norton saw the impact of his two shots on the sandstone rocks; neither shot struck Mr. Murray—a fact that is confirmed by the nature of Mr. Murray's wound. 11/6/23 Tr. at 132:4-8.

45. From the gorge, Deputy Byron could see Detective Norton retreating up the hillside. 11/7/23 Tr. at 240:22-241:17, 255:18-256:8.

46. Detective Norton attempted to call dispatch via his cellphone to inform them of what had happened, at which point he observed Mr. Murray "put the gun to his head." 10/31/22 Tr. at 94:2-3.

47. Detective Norton kept misdialing the number "because of stress and what was going on[,]" while watching Mr. Murray and screaming at him to put the gun down." *Id.* at 95:2-7.

48. When Detective Norton saw Mr. Murray put the gun to his own head, Detective Norton estimated he was approximately 150-160 yards away from Mr. Murray. *Id.* at 98:16-17.

49. When Mr. Murray pulled the trigger of the gun against his head, he immediately fell to the ground. *Id.* at 91:25-92:6; 95:8-17. Detective Norton has consistently testified that Mr. Murray shot himself in the head. 10/31/22 Tr. at 91:25-92:6.

50. At that point, Detective Norton re-holstered his gun and finally got through to dispatch to let them know that "shots had been fired and [the] suspect was down[.]" *Id.* at 95:8-14. Detective Norton also requested that Trooper Young and Deputy Byron head to his location and asked for an ambulance. *Id.* at 95:8-17.

51. When Detective Norton was yelling toward Mr. Murray, Trooper Young and Deputy Byron were located off Detective Norton's left "a little ways." *Id.* at 90:7-20.

52. Detective Norton did not know Mr. Murray and had never met him before April 1, 2007. *Id.* at 106:19-22. Detective Norton did not know any members of Mr. Murray's family. *Id.* at 120:13-18.

53. Trooper Young did not remember whether he got out of his vehicle near the gully or not, but either heard shots or heard "shots fired" called over the radio, and he and Deputy Byron circled back to the intersection of Seep Ridge and Turkey Track. 11/7/23 Tr. at 202:6-203:2, 206:17-21.

54. Trooper Young and Deputy Byron arrived at Detective Norton's specific location after only a few minutes of Detective Norton calling dispatch after Mr. Murray shot himself. 10/31/22 Tr. at 173:7-12.

55. From the time Trooper Young learned shots had been fired (either by hearing the shots or hearing "shots fired" on the radio) it took him approximately two minutes (but no more than four minutes) to make it back to Detective Norton's location from the oil-well site where he and Deputy Byron had been. 11/7/23 Tr. at 221:23–222:3. This timing is confirmed by the dispatch transcript and audio. *See* Def.'s Ex. 31 at 9-10; and Def.'s Ex. 138 (files 2007-04-01-11-31-32-002-Recorder.mp3; 2007-04-01-11-34-17-002-Recorder.mp3).

56. Deputy Byron and Trooper Young proceeded to the area where Mr. Murray was after briefly speaking with Detective Norton, who told them that Mr. Murray had fired at Detective Norton and then shot himself. 10/31/22 Tr. at 102:12-15; 11/6/23 Tr. at 135; 11/7/23 Tr. at 206:23-208:23.

57. After he discussed the incident with Trooper Young and Deputy Byron, Detective Norton continued to stand on the hill and was ultimately joined by Deputy Troy Slaugh (Uintah County Sheriff's Office). 10/31/22 Tr. at 103: 1-10.

58. Deputy Byron secured Mr. Murray, who was still breathing, by handcuffing him. 11/7/23 Tr. at 245:20-250:3. Deputy Byron did not know the severity of Mr. Murray's injuries and initially saw some movement from Mr. Murray. *Id.* at 245:18-246:23. Trooper Young also saw that Mr. Murray was breathing and they "[did]n't know what he could or couldn't do, get up, whatever happens." *Id.* at 208:19-23.

59. Deputy Byron testified that until a suspect is secured, a suspect is still an active threat to the police officers. *Id.* at 245:18-246:1. Detective Norton likewise testified that it was "standard protocol that – anytime something like that happens, you want to secure the person and make sure they can't harm you." 11/6/23 Tr. at 135:12-15.

60. Trooper Young called dispatch to check on the status of the ambulance both before heading down the hill and after Deputy Byron secured Mr. Murray. 11/7/23 Tr. at 207:15-18, 209:1-7, 226:1-14, 227.

61. Neither Trooper Young nor Deputy Byron administered first aid to Mr. Murray because he was still breathing, the ambulance was on its way, and neither of them had first aid supplies or equipment. *Id.* at 209:1-7; 246:2-13. Specifically, Trooper Young testified that because Mr. Murray was still breathing "sometimes it's better that you don't do more damage than good." *Id.*

62. While standing near Mr. Murray, Trooper Young observed a Hi-Point .380 pistol, two shell casings and a "stove-piped" round stuck inside the .380 pistol. *Id.* at 216:2-21, 223:4-10.

Trooper Young also observed shell casings at Detective Norton's location on the hill either on his way down to or back up from Mr. Murray's location. *Id.* at 216:15-21.

63. Officer Davis—who, after speaking with Trooper Swenson, had traveled down a dirt road, which he described as an oilfield road—also returned to the intersection of Turkey Track and Seep Ridge Roads after he heard "shots fired" on the radio. 11/6/23 Tr. at 82:16–84:25.

64. When Officer Davis arrived back at the intersection of Turkey Track and Seep Ridge Road, he saw several police vehicles and pulled up next to them. *Id.* at 86:15-87:4. Officer Davis spoke with Deputy Slaugh, who had also recently arrived at the scene, and Deputy Slaugh told Officer Davis that it was "all over." *Id.* Officer Davis also saw Deputy Byron and Trooper Young some distance away and standing next to who he subsequently learned was Todd Murray. *Id.* at 88:1-89:10.

65. When Officer Davis arrived at where Mr. Murray was lying, he was asked to stand near one of the .380 shell casing to ensure no evidence was misplaced. *Id.* at 90:9-16.

66. Officer Davis stood by the .380 shell casing for about 45 minutes until Mr. Murray was transported to the hospital and he was relieved by another officer. *Id.*; *see also id.* at 105:10-13.

67. Officer Davis also saw the .380 Hi-Point and two shell casings near Mr. Murray. *Id.* at 101:21-102:21; 108:2-10.

68. Officer Davis was standing over evidence when the ambulance arrived, and he did not see anyone touch the gun or shell casings while he was at the scene. *Id.* at 105:12-19; 109:12-25. Deputy Byron also did not see anyone touch evidence at the scene. 11/7/23 Tr. at 249:18-20.

69. Officer Davis took GPS coordinates of where Mr. Murray was lying and where he was told Detective Norton was standing near the time shots were fired. 11/7/23 Tr. at 110.

70. Detective Norton suggested to Deputy Byron that they take some pictures of the "pristine" scene before the ambulance arrived and evidence may be moved. 10/31/22 Tr. at 108:11-14.

71. Detective Norton borrowed Deputy Slaugh's camera to take pictures since Deputy Slaugh was not familiar with the new camera. *Id.* at 108:19-23.

72. As he walked the scene where Mr. Murray was located, Detective Norton observed two bullet casings, plus a third bullet casing that was visibly "stovepiped" in the .380 Hi-Point's chamber. *Id.* at 108:19-110:7.

73. Detective Norton explained that a "stovepiped" round is one where the bullet "has gone off, but the casing itself is . . . stuck in the chamber." *Id.* at 182:19-24. Trooper Young also explained his use of the term "stovepiped" round, noting that "when the gun doesn't action all the way, it can -- instead of ejecting the bullet all the way out, the bullet will get caught in the half action and be stuck in the ejection port." 11/7/23 Tr. at 223:9-14.

74. Detective Norton also observed the Hi-Point .380 caliber handgun at the scene, 10/31/22 Tr. at 110:15-23, and "[n]obody touched it." *Id.* at 111:16-19. The Hi-Point .380 was the gun that had the "stovepiped" round. *Id.* at 110:11-111:19.

75. Detective Norton's supervisor, Chief Gary Jensen (Vernal City Police), arrived at the scene and took Detective Norton's gun. *Id.* at 116:24-25. The gun was Detective Norton's department-issued firearm. *Id.* at 131:10-18. Detective Norton was unsure whether he ever received the gun back from Chief Jensen. *Id.* at 156:3-4.

76. Chief Jensen confirmed that Detective Norton's .40 caliber service gun was "pristine" and had no blood on it. 11/7/23 Tr. at 314:16-25.

77. Chief Jensen did not see any blood or tissue on Detective Norton's clothing or body, and was extremely sensitive to blood, bodily fluid, and tissue given his 14 years of experience as a critical care paramedic. *Id.* at 315:1-9.

78. Chief Jensen further testified that if Defendant's Exhibit 131 was an accurate depiction of how Vance Norton was dressed on April 1, 2007, "blood would have been very easy to see," on his clothing. *Id.* at 319:4-9.

79. Detective Norton conducted a search for the shell casings from his firearm with Deputy Slaugh. 10/31/22 Tr. at 171:1-8.

80. Deputy Slaugh used police tape around the scene to establish a perimeter around any evidence. 11/7/23 Tr. at 176:9-19.

81. Trooper Swenson investigated the site where Mr. Kurip and Mr. Murray's car had crashed, and he found drug paraphernalia, marijuana, and beer bottles inside the vehicle where Mr. Murray had been a passenger. 11/6/23 Tr. at 67:4-8, 23-24.

B. Special Agent Ashdown's Investigation into the Death of Todd Murray

82. Retired Federal Bureau of Investigation ("FBI") Special Agent Rex Ashdown is an experienced investigator, having served with the FBI from 1985 until his retirement in 2007, and testified credibly to the events surrounding the investigation into Mr. Murray's April 1, 2007, death. ECF No. 199, H'rg Tr., Vol. 2, 269:16-21, Nov. 1, 2022 (hereinafter, "11/1/22 Tr.").

83. During the events in question, Special Agent Ashdown was employed at the FBI resident agency in Vernal, Utah. *Id.* at 272:15-19; ECF No. 258, Hr'g Tr., Vol. 5, 557:1-5,

November 13, 2023 (hereinafter, "11/13/23 Tr."). Special Agent David Ryan was Special Agent Ashdown's only partner in Vernal. 11/1/22 Tr. at 275:13-19; 11/13/23 Tr. at 557:6-11.

84. On April 1, 2007, Special Agent Ashdown was informed that "there had been a car chase and a shooting and that a tribal member had been involved." 11/1/22 Tr. at 274:22-275:2. At that point, it was all but assured the FBI would have jurisdiction over the investigation based on knowledge of the responding Bureau of Indian Affairs ("BIA") officers (before a certificate of membership could be obtained from the Tribe). *Id.* at 276:8-21.

85. Special Agent Ashdown left from his home in his government vehicle and drove straight to the scene. *Id.* at 275:3-4.

86. When Special Agent Ashdown arrived at the scene, Mr. Murray was no longer there as he had been taken away via ambulance to the emergency room. *Id.* at 277:9-12. Special Agent Ashdown observed vehicles from the BIA, Vernal City Police, highway patrol, Uintah County Sherriff's Office, and others there. *Id.* at 277:18-22.

87. Special Agent Ashdown proceeded to receive a briefing of what happened at the scene from Vernal City Police Chief Gary Jensen and Sergeant Jeffrey Chugg. *Id.* at 278:1-13. Special Agent Ashdown also talked to State Trooper Swenson, who took Special Agent Ashdown on the route that he had taken to apprehend Mr. Kurip, and then started moving toward where the shootings had occurred. *Id.* at 278:16-279:1.

88. Special Agent Ashdown did not place any markers in the area where the cars were located because he believed that was within the purview of the highway patrol. Specifically, Special Agent Ashdown believed that highway patrol would ultimately handle the issues dealing with the high-speed chase. *Id.* at 279:23-280:5.

89. Special Agent Ashdown took photographs of the wrecked car and skid marks. *Id.* at 280:15-22.

90. Special Agent Ashdown was accompanied down to the scene and shown where he was told Detective Norton had fired his shots and observed two expended shell casings that had already been marked by a state or local law enforcement agency with evidence markers. *Id.* at 282:4-12; *see also* 11/13/23 Tr. at 559:16-20.

91. Special Agent Ashdown had a brief conversation with Detective Norton during which time Special Agent Ashdown requested to interview Detective Norton. Detective Norton advised that he wanted an attorney for the interview, which Special Agent Ashdown considered to be "typical" for a law enforcement officer involved in a shooting. 11/1/22 Tr. at 282:13-23.

92. Special Agent Ashdown observed Detective Norton's demeanor to be normal, with his clothes to be "clean and pristine[.]" It was obvious to Special Agent Ashdown from Detective Norton's clothes that Detective Norton had not been involved in any sort of altercation. *Id.* at 283:4-11.

93. Special Agent Ashdown saw no reason to request Detective Norton hand over his gun. Instead, Special Agent Ashdown permitted Detective Norton's department (the Vernal City Police) to handle any relevant protocol. 11/1/22 Tr. at 288:9-17.

94. Special Agent Ashdown did not believe there was any investigative need to search Detective Norton's car because he did not suspect Detective Norton of having done anything wrong. *Id.* at 288:18-25.

95. Special Agent Ashdown did not have any DNA testing kits available to him on scene on April 1, 2007. *Id.* at 281:17.

96. After inspecting and photographing the two shell casings where Detective Norton claimed to have been standing, Special Agent Ashdown traveled to the area where Mr. Murray had been located. *Id.* at 290:11-14. Special Agent Ashdown laid evidence markers in the vicinity of that location. *Id.* at 290:17-291:7.

97. Special Agent Ashdown took photographs of blood spatter because he believed it provided an indication of what happened at the scene. *Id.* at 292:5-9. He did not collect any of the blood spatter because he had been told only one person (Mr. Murray) had been injured at the scene and there was therefore no question of whose blood it was—and, therefore, no reason to do any scientific testing on the blood. *Id.* at 301:16-302:5.

98. Special Agent Ashdown observed a handgun at the scene where he had been told Mr. Murray had been located. *Id.* at 292:17-22; *see also* 11/13/23 Tr. at 560:7-8.

99. Special Agent Ashdown also observed two spent shell casings in the vicinity of where he was told Mr. Murray had been. 11/13/23 Tr. at 560:7-16.

100. Special Agent Ashdown also observed an expended round that was jammed into the action of the gun, which was the condition of the gun at the time Special Agent Ashdown took possession of it. 11/1/22 Tr. at 293:1-294:8; 11/13/23 Tr. at 560:16-17.

101. Based on his conversations with local and state officers, Special Agent Ashdown believed the gun had not been moved before Special Agent Ashdown first observed it. 11/1/22 Tr. at 294:1-2.

102. Special Agent Ashdown eventually collected the gun, took the live rounds out of the magazine, and cleared the action. He collected the five rounds in the magazine, the spent round in the chamber, and the two spent shell casings in the area (for a total of eight rounds). *Id.* at 294:5-14.

103. Upon collection, Special Agent Ashdown identified the gun that was near where Mr. Murray had been as a Hi-Point .380 caliber. *Id.* at 300:12-21. He also determined that the two spent casings in the vicinity and the stovepiped round were .380 caliber. *Id.*

104. Special Agent Ashdown also collected the rounds where he had observed Detective Norton when Special Agent Ashdown arrived, which Special Agent Ashdown verified were .40 caliber shell casings. *Id.* at 301:1-4.

105. Special Agent Ashdown knew that Detective Norton's gun was a .40 caliber because he was previously made aware of the issued firearm for Vernal City. *Id.* at 301:4-11.

106. Special Agent Ashdown did not observe any signs that any evidence had been tampered with or moved. *Id.* at 295:9-12. Special Agent Ashdown did not ask anybody else at the scene to collect any evidence on his behalf. *Id.* at 295:18-21.

107. After leaving the scene, Special Agent Ashdown went to Blackburn Mortuary where Mr. Murray's body was then located. *Id.* at 307:5-13.

108. Special Agent Ashdown could not determine for himself which wound was the exit wound and which was the entry wound, so he decided to wait for the results from the medical examiner's examination of the body. *Id.* at 307:21-25.

109. On April 12, 2007, Special Agent Ashdown prepared a summary report of the April 1 incident, which contained the GPS locations Special Agent Ashdown recorded for Detective Norton's location and Mr. Murray's location. Those locations were based on what Special Agent Ashdown had been told and based on the location of physical evidence. *Id.* at 316:11-16. The distance between those two GPS locations was recorded to be approximately 113 yards. 11/13/23 Tr. at 568:20-569:7; *see also* Def.'s Ex. 55.

110. Special Agent Ashdown also requested that the State Medical Examiner conduct an autopsy of Mr. Murray's body. 11/1/22 Tr. at 318:2-4.

111. Special Agent Ashdown recalled receiving a courtesy call from the Medical Examiner's office within a day or two of the incident and that the Medical Examiner was "going to call [the incident] a self-inflicted wound, close-contact . . . suicide" with the full report to follow afterwards. *Id.* at 321:3-13. Special Agent Ashdown retired before the FBI received the Medical Examiner's written report. *Id.* at 361:25-362:3.

112. Special Agent Ashdown did not conduct forensic testing of Mr. Murray's gun because it was apparent to him from Detective Norton's eyewitness account and the physical evidence that Mr. Murray had committed suicide, which is not a crime. *Id.* at 321:20-322:6; *id.* at 326:17-18.

113. The FBI took into custody Mr. Murray's pistol, a magazine with five rounds of ammunition, an expended .380 shell casing jammed in the pistol at the time of seizure, and two .380 caliber casings (listed as #1 & #3), and two .40 caliber castings (listed as items #39 & #40). 11/13/23 Tr. at 592:1-6; *see also* Def.'s Ex. 55.

114. Special Agent Ashdown reviewed Defendant's Exhibit 103 and testified that the picture reflected how Detective Vance Norton appeared on April 1, 2007. 11/13/23 Tr. at 558:23-559:9.

115. Agent Ashdown did not test the .380 Hi-Point for fingerprints; however, Dr. Gaut admitted that Mr. Murray's sweat could have obliterated any fingerprints on the .380 Hi-Point. *See* 11/8/23 Tr. at 415:3-6 ("Sweat could affect fingerprints, yes. It could dilute the print and smear it to the point to where it was either not detectable or not identifiable.").

C. Keith Campbell's Investigation Corroborates Special Agent Ashdown's Investigation of the Scene.

116. In 2007, Keith Campbell was employed by the Uintah County Sheriff's Department as the Chief Deputy. 11/1/22 Tr. at 214:18-20.

117. For the incident involving Mr. Murray, Keith Campbell served as the Medical Examiner Investigator. *Id.* at 215:21-216:9. In that role, he was responsible for investigating the likely cause and manner of death and reporting his review of the evidence back to the Medical Examiner. *Id.* at 225:5-9.

118. Investigator Campbell recalled Detective Norton calling him on April 1, 2007, and informing him of the events of April 1, 2007, including that Mr. Murray shot at Detective Norton and then shot himself. *Id.* at 232:24-233:8.

119. When Investigator Campbell arrived at the scene after the shooting, he was instructed to enter the scene through a perimeter law enforcement had set up to preserve evidence. *Id.* at 249:4-13. Investigator Campbell and Special Agent Ashdown were at the scene at the same time and communicated with one another. *Id.* at 235:11-17.

120. Investigator Campbell told Detective Norton to stay at Detective Norton's location while Investigator Campbell walked the route down the hill to where Mr. Murray had been. *Id.* at 233:20-234:4.

121. Along with Special Agent Ashdown, Investigator Campbell observed the scene where he was informed where Mr. Murray had lain and observed the Hi-Point .380 pistol near that location, along with the two spent .380 shell casings and the stovepiped round. *Id.* at 242: 9-16; 249:15-23.

122. Investigator Campbell also observed where Detective Norton stated he had fired his shots and the shell casings from Detective Norton's .40 caliber service gun. *Id.*

123. Investigator Campbell confirmed Detective Norton's location at the time of the shooting by observing his tracks and spent shell casings. *Id.* at 262:11-24; 263:13-22.

124. Investigator Campbell conveyed these findings to the Medical Examiner in a report, which consisted of a handwritten summary narrative about his observations. *Id.* at 252:10-16. The Medical Examiner would have had Investigator Campbell's report to assist him in determining Mr. Murray's cause and manner of death, and the Medical Examiner's final report was ultimately provided to the FBI. 11/7/23 Tr. at 295:14-296:13.

125. Investigator Campbell did not speak with the Medical Examiner beyond submitting his handwritten report. 11/1/22 Tr. at 254:10-21.

126. Investigator Campbell testified that James Beck, the Chief of the BIA police, was present at the scene. 11/7/23 Tr. at 301:9-15.

D. Special Agent David Ryan Reasonably Questioned Detective Norton, Received the Medical Examiner's Report, and Closed Both the Death and Straw Purchase Investigations.

127. FBI Special Agent David Ryan interviewed Detective Norton in the presence of Detective Norton's attorney on May 1, 2007, and at the conclusion of the interview Special Agent Ryan did not suspect Detective Norton of any wrongdoing. 11/1/22 Tr. at 392:20-395:4.

128. Based on Special Agent Ryan's review of the file and his interview with Detective Norton, Special Agent Ryan did not believe there was probable cause to arrest Detective Norton or that there was any legal basis to request a search warrant for Detective Norton's person or property. *Id.* at 394:11-395:4.

129. Special Agent Ryan received the Medical Examiner's final report in July 2007, *id.* at 395:21-23, and did not notice or question the Medical Examiner's decision to conduct an external examination of Mr. Murray's body. *Id.* at 398:12-25.

130. After receiving the Medical Examiner's final report in July 2007, Special Agent Ryan did not think there was anything left to investigate regarding Mr. Murray's death because the Medical Examiner's conclusion of suicide corroborated the evidence at the scene and Detective Norton's account. *Id.* at 399:4-13.

131. The FBI investigated the origins of the .380 Hi-Point pistol by submitting a firearms trace to the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). 11/13/23 Tr. at 592:10-13.

132. The FBI's investigation into the purchase of the .380 Hi-Point revealed that the gun had been illegally purchased by an individual named Cody Shirley for Uriah Kurip – the driver of the vehicle Mr. Murray was in before he fled on foot. 11/1/22 Tr. at 399:23-401:12; 11/13/23 Tr. at 592:14-22, 595:16-21, 596:14-22.

133. Special Agent Ryan's investigation into the illegal ("straw") purchase of the .380 Hi-Point resulted in the conviction of Mr. Shirley, which in turn resulted in a United States District Judge entering an order of forfeiture of the Hi-Point .380 pistol. 11/1/22 Tr. at 401:15-402:7; 402:15-17.

134. When asked what affect his straw-purchase investigation had on his investigation into Mr. Murray's death, Special Agent Ryan testified that "[i]t tied the two together because the firearm purchased by Mr. Shirley was provided to Mr. Kurip as -- Mr. Kurip was the one who received that firearm, and Mr. Kurip and Mr. Murray were together just preceding the death of Mr. Murray." 11/13/23 Tr. at 596:14-21.

135. The FBI followed its normal procedures for turning property over to the U.S. Marshals after an order of forfeiture has been entered, 11/1/22 Tr. at 402:18-404:11, and 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. *Id.* at 406:20-25. The court-ordered forfeiture and subsequent destruction of the Hi-Point .380 pistol is the precipitating event leading to this Court's imposition of a spoliation sanction, which will be discussed in more detail below.

136. Contrary to the testimony of Dr. Gaut's, 11/8/23 Tr. at 402:9-15, 405:21-406:7, who has never worked for the FBI, *id.* at 343-347, Special Agent Ryan testified that the Trace Evidence Recovery Guidelines do not require FBI agents to forensically test every gun that is involved in a shooting. 11/13/23 Tr. at 603:14-20.

E. The Medical Evidence "[T]ilts" Heavily Towards Mr. Murray Having Committed Suicide.

137. Forensic pathologists or medical examiners generally perform three levels of service – (a) medical record review; (b) external examination; and (c) autopsy. When performing a medical record review, the medical examiner only reviews medical charts to determine cause and manner of death. When performing an external examination, the medical examiner examines the outside of the body, documents injuries, and draws biological fluids. When performing an autopsy, the medical examiner performs an external examination, but also dissects the body and removes organs one-by-one. ECF No. 200, H'rg Tr., Vol. 3, 429:15-430:21, Nov. 2, 2022 (hereinafter, "11/2/22 Tr.").

138. Medical examiners have five options when determining manner of death—natural, accident, suicide, homicide, and undetermined—and they must select one of those options when completing a death certificate. 11/13/23 Tr. at 528:16-530:3.

139. The Court has twice qualified Dr. Joseph Cohen as an expert in forensic pathology without any objection from Plaintiffs. 11/2/22 Tr. at 430:24-431:8; 11/13/23 Tr. at 506:5-13. He

has performed 7,000 autopsies, 15,000 external examinations, and 15,000 – 20,000 medical record reviews during his career. 11/2/22 Tr. at 430:24-431:8.

140. The parties stipulated that Plaintiffs' expert, Dr. Jonathan Arden, is an expert in forensic pathology. ECF No. 257, Hr'g Tr., Vol. 4, 460:10-14, Nov. 9, 2023 (hereinafter, "11/9/23 Tr.").

141. Mr. Murray's gunshot wound was a contact wound, meaning that the gun that fired the fatal shot was near Mr. Murray's skull. 11/2/22 Tr. at 440:21-443:12; 11/13/23 Tr. at 514:3-8. More specifically, a contact wound is "when the muzzle of the gun . . . abuts, it's touching the skin surface or the scalp." 11/2/22 Tr. at 444:4-7.

142. Utah State Medical Examiner Edward Leis, who conducted the external examination of Mr. Murray's body, reported finding soot in the wound tract, which is consistent with a contact wound. *Id.* at 436:13-15; 442:7-10; 443:14-445:7; 11/13/23 Tr. at 511:18-512:2. Additionally, the wound was "splitting of the margins," there was a "star or stellate-shaped defect" and there was beveling on the inside of the entrance wound, all of which indicates Mr. Murray suffered a contact wound. 11/13/23 Tr. at 514:9-515:11.

143. Mr. Murray's entrance wound was located near his left temple slightly above and behind his left ear. 11/2/22 Tr. at 440:21-441:3; 11/13/23 Tr. at 509:1-510:21; 513:19-514:2.

144. Dr. Leis also determined that Mr. Murray's exit wound was located in the back right portion of Mr. Murray's head, behind and above his left ear. 11/2/22 Tr. at 446:6-13. Dr. Cohen concurred with Dr. Leis's determinations about entrance and exit wounds. 11/13/23 Tr. at 513:19-514:2

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

slightly front to back." 11/2/22 Tr. at 446:19-447:10; 11/13/23 Tr. 513:19-514:2, 516:15-518:4.

146. Dr. Leis also noted in his Medical Examiner's report that Mr. Murray's right hand was caked in blood. Reviewing the photographs of Mr. Murray's right hand, Dr. Cohen noted that the blood on Mr. Murray's right hand could have come from the time the gun was discharged or from his hand lying in a pool of his own blood, or both. 11/2/22 Tr. at 448:5-449:7.

147. The Medical Examiner found that the manner of death was suicide, and the cause of death was a contact gunshot wound to the head. 11/1/22 Tr. at 397:4-25; 11/13/23 Tr. at 527:13-528:1, 528:16-18; *see also* Def.'s Ex. 73 at 1.

148. Dr. Cohen opined that Mr. Murray's cause of death was a perforating contact gunshot wound. 11/13/23 Tr. at 506:21-24. Dr. Cohen also noted that the manner of death either had to be suicide or someone else had to shoot Mr. Murray by holding a gun against Mr. Murray's head and pulling the trigger. 11/2/22 Tr. at 478:22-479:13; 11/13/23 Tr. at 506:21-507:2. Specifically, Dr. Cohen testified that whoever fired the fatal shot had to be within "arm's reach [] or closer," of Mr. Murray's head. 11/13/23 Tr. at 515:13-17.

149. Dr. Cohen testified that Deputy Byron's trial testimony that Deputy Byron observed Mr. Murray and Detective Norton on April 1, 2007, and they were several hundred yards apart before shots were fired, supports Dr. Cohen's ultimate opinion that Mr. Murray died by suicide because "we're dealing with a contact gunshot wound to the head, which means that if anybody else fired a gun that caused that wound, they would have had to be within several feet of Todd Murray." 11/13/23 Tr. at 552:8-25. Because there is no evidence to

suggest Detective Norton was within several feet of Todd Murray at the time of the shooting, as corroborated by Deputy Byron, suicide is the most likely manner of death. *Id.*

150. Dr. Cohen also testified that his opinion that Mr. Murray committed suicide is supported by the physical evidence the FBI collected from the scene, noting that the physical evidence "supports that Todd Murray fired two shots, that Detective Norton fired two shots back, that he thought hit the dirt, and then there was -- there had to have been a third shot by Todd Murray associated with the casing that got caught up in the gun. That would be the bullet that was used to commit suicide." *Id.* at 549:5-14.

151. Dr. Arden agrees that Mr. Murray died from a contact gunshot wound to the head. 11/9/23 Tr. at 469:14-21; however, unlike Drs. Leis and Cohen, who believe Mr. Murray's manner of death should have been marked as a suicide, Dr. Arden opined that while suicide was "[c]ertainly one of the reasonable choices . . . [,] undetermined would have been a better way to certify it." *Id.* at 470:4-15.

152. Dr. Arden's opinions were based on a "reasonable degree of medical certainty," which he defined as nothing more than the "more likely than not standard." *Id.* at 469:4-9.

153. Dr. Arden testified that undetermined should be used for manner of death when "you either have insufficient evidence on which to base a conclusion or you have more than one choice that have such close probabilities that you can't reasonably rank order on as much more probable than the other." *Id.* at 470:23-471:7. Dr. Cohen agreed with Dr. Arden's definition of undetermined, noting that undetermined means "that two or more of the other options are up for grabs." 11/13/23 Tr. at 529:21-24. Forensic pathologists use "undetermined" as the manner of death when how the decedent died is a "toss-up." *Id.*

154. Dr. Arden testified that he believed Mr. Murray's death should have been marked as undetermined, in part, because it was possible that Mr. Murray accidentally shot himself. 11/9/23 Tr. at 471:10-20. Specifically, Dr. Arden testified that because of the toxicology result in this case—which showed a potential effect of drugs—"it opens the door [] to whether Mr. Murray intended to kill himself or not, especially with a gunshot wound in a very atypical location. It could have been—if he were truly intoxicated as the toxicology report indicates, then he could have shot himself accidentally too." *Id.*

155. A blood test performed at Ashley Valley Medical Center following Mr. Murray's death showed that his blood contained alcohol, THC, and amphetemine. *See* Def.'s Ex. 107.

156. Dr. Cohen testified that, in his nearly thirty years of experience as a forensic pathologist, Mr. Murray's entrance-wound and wound path were not atypical for suicide. 11/13/23 Tr. at 518:12-17 ("Dr. Arden did mention some of the other more common sites of entrance with suicide gunshot wounds, underneath the chin, the middle of the forehead, the left temple. This is within range of not atypical, the entrance wound. It's a little bit higher and a little bit backward, but it is definitely within range. It's not atypical.").

157. Dr. Arden opined that there "was a substantial likelihood that Mr. Murray committed suicide," but that suicide was not more likely than not unless there was independent corroboration of Vance Norton's account of what happened on April 1, 2007. 11/9/23 Tr. at 472:1-6.

158. Dr. Arden testified that if someone independently corroborated that Detective Norton and Mr. Murray were roughly 100 yards apart at the time of the shooting, then the scales would "tilt toward a suicide," and away from a homicide. *Id.* at 472:13-473:7.

159. Directly contradicting Plaintiffs' other expert, Dr. Gaut, who testified (beyond the scope of his report and beyond the scope of his expertise) that you would have blowback on a gun 100% of the time with a contact shooting, 11/8/23 Tr. at 394:16-24,[2] Dr. Arden testified that "[t]here is no 100 percent certainty in medical or in anything else in life. So I don't accept the idea that somebody say, 'I'm a hundred percent certain of this or that.'" 11/9/23 Tr. at 474:21-475:2.

160. Specifically, Dr. Arden admitted to being familiar with scientific literature that says that with a contact gunshot wound one would expect to find blowback on the gun "50 percent of the time and blowback on the hands around 75 percent of the time." *Id.* at 479:23-480:14. Dr. Cohen also cited three scholarly studies he was aware of that considered blowback with close range shootings. 11/13/23 Tr. 522:4-523:6. At least one of those studies considered close range shootings by pistols or revolvers and found no blowback on the firearm (either externally or inside the barrel) between 23% and 24% of the time. *Id.*

161. Dr. Cohen also discussed the article cited by Dr. Gaut, which studied contact gunshot wounds to the heads of calves and formed the only articulated basis for Dr. Gaut's (improper) testimony about blowback.[3] Dr. Cohen rebutted Dr. Gaut's testimony that the

[2] Dr. Gaut (again testifying beyond the scope of his expert report and his expertise as a crime scene processor) acknowledged that many factors, including the angle at which the gun is held, can affect where one might expect to find blowback, 11/8/23 Tr. at 393:14-394:15; however, based on his misunderstanding of a study involving contact gunshot wounds and calves, he doubled-down on his prior testimony that with contact gunshot wounds you will find blowback on the gun 100% of the time. *Id.* at 354:21-355:5.

[3] The United States continuously objected to Dr. Gaut testifying beyond the scope of his disclosed opinion and beyond the scope of his expertise as a crime scene investigator (and especially a crime scene investigator who primarily investigated financial crimes like bank robberies). 11/8/23 Tr. at 356:18-25. The Court partially agreed with the United States that Dr. Gaut was not qualified to opine on the physics and biomechanics of blowback. *Id.* at 357:6-13. However, the Court then allowed Dr. Gaut to offer testimony about the likelihood of blowback

calf study showed blowback 100% of the time with contact gunshot wounds. To the contrary, the study showed that when calves were shot in the head at close range there was no blowback on the gun 33% of the time, there was no blowback on the hands 66% of the time, and there was no blowback on the shooter's arm or sleeve 66% of the time. *Id.* at 519:1–520:12.

162. The absence of blowback in this case—either on the .380 Hi-Point or Mr. Murray's hands—does not affect Dr. Cohen's conclusion that Mr. Murray died by suicide. *Id.* at 523:7-13.

163. Dr. Arden further testified that in his own experience there will not be "demonstrably visible blowback," on the gun in most suicide cases where the decedents shoot themselves in the head. 11/9/23 Tr. at 480:20-481:19.

164. Dr. Arden also testified that in cases where someone has died by gunshot wound to the head, he would visibly inspect the gun for blowback, but would not order forensic testing of the gun in all cases. *Id.* at 481:23-482:22.

F. The Murray Family's Investigation and Accusations

165. Debra Jones is Todd Murray's mother and the administrator of her son's estate. 10/31/22 Tr. at 25:6-16.

---

with contact gunshot wounds—an issue well outside the scope of his expert report, which only discussed what Dr. Gaut perceived to be inadequacies in the FBI's investigation of the scene on April 1, 2007, and his own experience as a police officer in Alabama in the 1970s and 1980s. The United States asked the Court to review Dr. Gaut's expert report and to strike any testimony that was outside the scope of those disclosed opinions. 11/13/23 Tr. at 499:7-13. The Court rejected the United States' request and allowed Dr. Gaut's testimony about blowback into evidence. *Id.* at 14-21. The United States continues to object to Dr. Gaut's improper testimony about blowback and does not waive that objection by referring to Dr. Gaut's testimony in these proposed findings of fact and conclusions of law.

166. Mrs. Jones believed her son was shot in the back of his head and that is part of the reason she was suspicious. *Id.* at 26:24-27:4.

167. Based on her belief of where the entrance wound was, Mrs. Jones believes it is impossible for her son to have shot himself with his right hand. *Id.* at 27:5-8.

168. Mrs. Jones believes her son was right-handed. *Id.* at 27:9-10.

169. However, Mrs. Jones never saw Mr. Murray fire a gun and does not know whether he fired a gun using his right or left hand. *Id.* at 32:19-23.

170. The Murray family went to the tribal business counsel shortly after Todd Murray's funeral and asked the tribal business counsel to retain an attorney. *Id.* at 26:6-14. An attorney was retained the week after Mr. Murray died, *id.* at 55:11-15, but the only contact the Murray family had with the FBI, its employees, or any other agency of the United States was: (1) a single meeting with Rex Ashdown in late-April 2007, and (2) a notice of claim submitted in March 2009. Between April 2007 and March 2009—despite having an attorney that entire time—the family never sent a notice of claim, requested the United States to preserve any evidence, or otherwise communicated with the FBI or any other agency of the United States. *Id.* at 27:21-28:9; 11/1/22 Tr. at 414:9-12.

171. Mr. Murray's family met with Special Agent Ashdown towards the end of April 2007—a few weeks after Mr. Murray died, 10/31/22 Tr. at 40:21-23; however, the attorney they had already retained was not present. *Id.* at 27:21-28:9; 65:2-4.

172. When Mr. Murray's family met with Special Agent Ashdown in April 2007, Mrs. Jones claims to have told him that the family was "going to pursue this further," but Mrs. Jones could not remember what words her family used to express their dissatisfaction. *Id.* at 30:2-12. Mrs. Jones' sister, Martha Cornpeach, also attended this meeting and stated that

Special Agent Ashdown told the family that the investigation "was still ongoing" he was "gonna try his best to get our questions answered and try his best to follow through with the investigation." *Id.* at 36:13-21.

173. The day after Mr. Murray's death, his family investigated the scene and they found nothing of evidentiary value because everything of evidentiary value had already been collected by the FBI. *Id.* at 28:17-29:2; 46:4-12; 49:16-52:8; 63:17-64:7.

174. Mrs. Jones accuses Detective Norton of murdering her son Todd Murray; however, she admitted to having no evidence that Detective Norton shot her son. *Id.* at 31:16-22; 41:17-23.

G. Admitted Exhibits

1. Admitted by Defendant

175. Defendant's Exhibit 22 is a Statement by Defendant in Advance of Plea of Guilty from the District of Utah case of *United States v. Cody Allen Shirley* filed on May 27, 2008. This exhibit was admitted by the Court on November 13, 2023. *See* 11/13/23 Tr. at 595:5-13.

176. Defendant's Exhibit 24 is a photograph of the entrance wound on Todd Murray's head taken by the Medical Examiner. This exhibit was admitted by the Court on November 13, 2023. *See id.* at 555:12-18.

177. Defendant's Exhibit 25 is a photograph of the exit wound on Todd Murray's head taken by the Medical Examiner. This exhibit was admitted by the Court on November 13, 2023. *Id.* at 555:12-18.

178. Defendant's Exhibit 26 is a photograph of the exit wound on Todd Murray's head taken by the Medical Examiner. This exhibit was admitted by the Court on November 13, 2023. *Id.* at 555:12-18.

179. Defendant's Exhibit 28 is a Report of Investigation from the Office of the Medical Examiner for the State of Utah prepared by Keith Campbell on April 1, 2007. This exhibit was admitted by the Court on November 7, 2023. *See* 11/7/23 Tr. at 296:12-17.

180. Defendant's Exhibit 34 is a photograph of a .40 caliber bullet casing from Vance Norton's service gun at the location it was found by Rex Ashdown, identified by evidence marker 39. This exhibit was admitted by the Court on November 6, 2023. *See* 11/6/23 Tr. at 157:14-18.

181. Defendant's Exhibit 61 is an ATF Gun Information Request Form filled out and faxed by Rex Ashdown on April 2, 2007, requesting a trace of the .380 Hi-Point. This exhibit was admitted by the Court on November 13, 2023. *See* 11/13/23 Tr. at 574:11-24.

182. Defendant's Exhibit 62 is a return fax to Rex Ashdown from ATF on April 2, 2007, with the results of the firearms trace showing the purchaser information for the .380 Hi-Point. This exhibit was admitted by the Court on November 13, 2023. *Id.* at 577:6-579:6.

183. Defendant's Exhibit 68 is a photograph of Sean Davis standing at the location where a .380 bullet casing was found adjacent to where Mr. Murray had been lying. This exhibit was admitted by the Court on November 6, 2023. *See* 11/6/23 Tr. at 109:7-11.

184. Defendant's Exhibit 69 is a photograph of the .380 Hi-Point handgun and a .380 bullet casing at the location where they were found. This exhibit was admitted by the Court on November 6, 2023. *Id.* at 109:7-11.

185. Defendant's Exhibit 91 is a photograph of two .40 caliber bullet casings from Vance Norton's service gun at the location they were found by Rex Ashdown, identified by evidence markers 39 and 40. This exhibit was admitted by the Court on November 6, 2023. *Id.* at 156:16-20.

186. Defendant's Exhibit 92 is a photograph of two .40 caliber bullet casings from Vance Norton's service gun at the location they were found by Rex Ashdown, identified by evidence markers 39 and 40. This exhibit was admitted by the Court on November 6, 2023. *Id.* at 155:18-22.

187. Defendant's Exhibit 96 is a photograph of a .380 bullet casing at the location it was found by Rex Ashdown, identified by evidence marker 1 (evidence marker 36 is also shown). This exhibit was admitted by the Court on November 13, 2023. *See* 11/13/23 Tr. at 567:13-18.

188. Defendant's Exhibit 97 is a photograph of a .380 bullet casing at the location it was found by Rex Ashdown, identified by evidence marker 3 (evidence marker 35 is also shown, along with blood spatter). This exhibit was admitted by the Court on November 13, 2023. *Id.* at 567:13-18.

189. Defendant's Exhibit 103 is a front-facing photograph of Vance Norton taken at the scene on April 1, 2007. This exhibit was admitted by the Court on November 7, 2023. *See* 11/7/23 Tr. at 316:25-317:5.

190. Defendant's Exhibit 110 is a photograph of the .380 Hi-Point showing a jammed bullet casing in the location it was found by Rex Ashdown, identified by evidence marker 2. This exhibit was admitted by the Court on November 13, 2023. *See* 11/13/23 Tr. at 568:6-10.

191. Defendant's Exhibit 134 is the dash camera video from Dave Swenson's patrol vehicle from April 1, 2007, which shows him initiating the stop of Mr. Kurip and Mr. Murray's vehicle, the ensuing high-speed chase, Mr. Kurip and Mr. Murray crashing at the intersection of Turkey Track and Seep Ridge roads, and both Mr. Kurip and Mr. Murray

fleeing the vehicle in opposite directions. This exhibit was admitted by the Court on November 6, 2023. *See* 11/6/23 Tr. at 65:18-23.

192. Defendant's Exhibit 135 is the large demonstrative map showing the route of the car chase, which was drawn on by Dave Swenson. This exhibit was admitted by the Court on November 8, 2023. *See* 11/8/23 Tr. at 338:21-339:1.

193. Defendant's Exhibit 136 is the small demonstrative map of Turkey Track and the side road, which was drawn on by Craig Young. This exhibit was admitted by the Court on November 8, 2023. *Id.* at 339:2-8.

194. Defendant's Exhibit 137 is the large demonstrative map of the Turkey Track intersection, which was drawn on by Keith Campbell. This exhibit was admitted by the Court on November 8, 2023. *Id.* at 339:9-15.

195. Defendant's Exhibit 138 is the collection of 117 .mp3 files of dispatch audio from April 1, 2007. This exhibit was admitted by the Court on November 8, 2023. *Id.* at 339:16-340:4.

196. Defendant's Exhibit 141 is a BIA Officer's Case Report for a domestic violence incident involving Uriah Kurip with a gun on March 19, 2007, prepared by BIA Officer Terrance Cuch. This is a portion of Plaintiffs' Exhibit 15, including only the last four pages, bates stamped Jones0018374-77. This exhibit was admitted by the Court on November 13, 2023. *See* 11/13/23 Tr. at 601:8-602:22.

2. Admitted by Plaintiffs

197. Plaintiffs' Exhibit 29 is the Supplemental Report to Plaintiffs' expert, Dr. William Gaut's Expert Report. This exhibit was admitted by the Court as an expert opinion, limited to the testimony provided, on November 8, 2023. *See* 11/8/23 Tr. at 424:21-426:1, 450:8-18.

198. Defendant's Exhibit 43 is a photograph of the scene showing pooled blood, blood spatter, and various evidence, identified by evidence markers 5-11 and 34. This exhibit was admitted by the Court on November 13, 2023. *See* 11/13/23 Tr. at 589:9-590:2.

3. Admitted by Joint Stipulation

199. Various portions of testimony from the Evidentiary Hearing in this case, that took place from October 31 to November 2, 2022, were admitted by the parties' Joint Stipulations. *See* ECF No. 232 ¶ 43.

200. Joint Exhibit 1 is the prior deposition testimony of the Medical Examiner who conducted Todd Murray's autopsy, Dr. Edward Leis, from his deposition on June 7, 2012. This exhibit was admitted by the parties' Joint Stipulations. *Id.* ¶ 44.

201. Joint Exhibit 2 is the prior hearing testimony of the Medical Examiner who conducted Todd Murray's autopsy, Dr. Edward Leis, from the evidentiary hearing on June 6, 2013. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

202. Defendant's Exhibit 2 is a follow-up report prepared by Anthoney Byron on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.* ¶ 47.

203. Defendant's Exhibit 3 is a photograph of the scene on April 1, 2007, with the ambulance, Todd Murray, and EMTs/officers in the distance. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *See* ECF No. 242 at 1.

204. Defendant's Exhibit 9 is an Intake Report for Todd Murray from the Emergency Department of Ashley Valley Medical Center on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *See* ECF No. 232 ¶ 45.

205. Defendant's Exhibit 31 is the transcript of police dispatch calls on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.* ¶ 46.

206. Defendant's Exhibit 33 is a photograph showing the area where Todd Murray was found, looking towards the location where Detective Norton had been standing on the hill. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *See* ECF No. 242 at 1.

207. Defendant's Exhibit 38 is a wide-angle photograph of blood spatter and evidence, with evidence markers 1, 2, and 3 in the background. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *Id.*

208. Defendant's Exhibit 55 is an FBI form FD-302 Crime Scene Report prepared by Rex Ashdown on April 12, 2007. This exhibit was admitted by the parties' Joint Stipulations. *See* ECF No. 232 ¶ 47.

209. Defendant's Exhibit 64 is a case narrative prepared by Anthoney Byron. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

210. Defendant's Exhibit 70 is a photograph of the scene from the approximate location where Detective Norton testified he had been standing on the hill looking down toward Todd Murray and EMTs/officers in the distance. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *See* ECF No. 242 at 1.

211. Defendant's Exhibit 73 is the Medical Examiner's Report prepared by Dr. Edward Leis on July 2, 2007. This exhibit was admitted by the parties' Joint Stipulations. *See* ECF No. 232 ¶ 44.

    a. In the parties' Joint Stipulations, the Medical Examiner's Report was mislabeled as Defendant's Exhibit 76.

    b. Only portions of the Medical Examiner's Report were admitted: "Then the document will be received into evidence with the exception that the

portions of the document that will not be in evidence are the second section of this document. I'm reading three -- I'm going to break this into three sections. The first is Report of Examination, the second is Final Pathologic Diagnoses, the third is Opinion. In the second section, Final Pathologic Diagnoses, Roman II and Roman III are not received into evidence. And in the Opinion section, the last sentence of that section will not be received into evidence." 11/13/23 Tr. at 526:20-527:5.

212. Defendant's Exhibit 77 is the Emergency Department Report of Todd Murray from Ashley Valley Medical Center on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *See* ECF No. 232 ¶ 45.

213. Defendant's Exhibit 80 is a photograph of the rear of Uriah Kurip's wrecked car at the Turkey Track intersection with law enforcement vehicles in the background. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *See* ECF No. 242 at 1.

214. Defendant's Exhibit 84 is a photograph of the area where Todd Murray was found, along with evidence markers 2–11. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *Id.*

215. Defendant's Exhibit 90 is a long-distance photograph of the left side of Uriah Kurip's wrecked car at the Turkey Track intersection. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *Id.*

216. Defendant's Exhibit 93 is a photograph of the area where Todd Murray was laying, showing evidence markers 1, 2, 4, & 5. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *Id.*

217. Defendant's Exhibit 101 is a Vernal Police Department case narrative prepared by Vance Norton following the incident on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *See* ECF No. 232 ¶ 47.

218. Defendant's Exhibit 102 is a photograph showing Todd Murray, blood spatter, the .380 Hi-Point, and views uphill towards the location where Detective Norton testified he had been standing when Mr. Murray fired upon him and Detective Norton returned fire. This exhibit was admitted by the parties' Joint Notice Regarding the Court's Site Visit. *See* ECF No. 242 at 1.

219. Defendant's Exhibit 107 are Lab Reports from Ashley Valley Medical Center showing that Mr. Murray's blood tested positive for alcohol, THC, and amphetamine. This exhibit was admitted by the parties' Joint Stipulations. *See* ECF No. 232 ¶ 45.

220. Defendant's Exhibit 112 is a Physician's Report from Ashley Valley Medical Center from April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

221. Defendant's Exhibit 113 is a Report Review Form prepared by Dave Swenson on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.* ¶ 47.

222. Defendant's Exhibit 114 is a Report Review Form prepared by Rex Olsen on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

223. Defendant's Exhibit 115 is a Utah Highway Patrol Crash Report prepared by Rex Olsen on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

224. Defendant's Exhibit 116 is a Field Sketch Form of the crash drawn by Rex Olsen. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

225. Defendant's Exhibit 117 is a Report Review Form prepared by Craig Young on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

226. Defendant's Exhibit 118 is a Utah Highway Patrol Department of Public Safety Incident Report prepared by Craig Young on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

227. Defendant's Exhibit 119 is a Utah Highway Patrol Department of Public Safety Incident Report prepared by Rex Olsen on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

228. Defendant's Exhibit 120 is a Utah Highway Patrol Department of Public Safety Incident Report prepared by Dave Swenson. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

229. Defendant's Exhibit 121 is an Accident Report Form for Dave Swenson's patrol vehicle. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

230. Defendant's Exhibit 131 is a Utah Highway Patrol Department of Public Safety Incident Report prepared by Jeff Chugg on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

231. Defendant's Exhibit 132 is a Utah Division of Wildlife Resources Investigative Report prepared by Sean Davis on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

232. Defendant's Exhibit 133 is a Uintah County Sheriff's Office Supplemental Report prepared by Troy Slaugh on April 1, 2007. This exhibit was admitted by the parties' Joint Stipulations. *Id.*

III. LEGAL STANDARDS

Plaintiffs seek damages based upon Article 6 of the 1868 Treaty between the United States and the Ute Tribe of the Uintah & Ouray Reservation, which provides:

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

Treaty with the Ute, Mar. 2, 1868, art. 6, 15 Stat. 619 ("1868 Treaty"). 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.* 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 v. United States.*, 846 F.3d 1343, 1355 (Fed. Cir. 2017) ("*Jones Fed. Cir.*"). 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.

As in almost all civil cases, Plaintiffs here bear the burden of production and proof, and that burden is the traditional more likely than not standard. *See, e.g.*, *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992) (noting the preponderance standard applies in civil cases); McCormick on Evidence, *Burdens of Proof and Presumptions*, § 340 (3d Ed.1989). The spoliation sanction imposed on the United States in this case did not alter or shift the burden of proof.

IV. ARGUMENT

A. The United States Rebutted the Adverse Inference Based on Spoliation and Plaintiffs Have Otherwise Failed to Show that the Inference Alone Proves the Commission of an Alleged Crime.

As an initial matter, the spoliation sanction is far from the "key" to this case, as Plaintiffs suggest. *See* 11/14/23 Tr. at 634:8-10. During their closing arguments, Plaintiffs urged the Court to consider *only* the spoliation sanction in deciding whether Plaintiffs had met their burden of proof. *Id.* at 644:16-22 (arguing that "based upon the spoliation sanctions [the Court] is required to find in favor of the Murray family"). While the United States agrees with Plaintiffs that the spoliation sanction represents their entire merits case, the United States disagrees that Plaintiffs' exclusive reliance on the adverse inference—even if unrebutted—is sufficient for them to meet their evidentiary burden. As discussed more thoroughly below, the United States rebutted the adverse inference at trial; but even if the factual inference remains intact, the weight of the other evidence does not support a conclusion that Mr. Murray died by anything other than suicide. In any event, there is no evidence that Mr. Murray died as a result of a crime allegedly committed by Detective Norton or any other law enforcement officer.

1. The Adverse Inference

This Court previously concluded after an evidentiary hearing that the United States negligently spoliated the Hi-Point .380 handgun recovered by the FBI next to Mr. Murray's location at the scene of the shooting. *See* Memo. Op. & Order, ECF No. 209 (Mar. 29, 2023). As a sanction, the Court imposed a "rebuttable adverse inference that the .380 Hi-Point did not have Mr. Murray's blood, tissue, fingerprints, or DNA on it." *Id.* at 27. To prevent circumvention of the sanction, the Court cautioned that the United States may rebut the inference "only with physical evidence or corroborating testimony from at least one witness other than

Officer Norton[.]" *Id*. The Court also limited the United States from relying on "any secondary evidence as to what may have been found on the .380 Hi-Point or secondary evidence concerning the un-ejected (or stovepiped) shell casing found in the destroyed handgun[.]" *Id*. But the United States was permitted to "present physical evidence or testimony from witnesses to corroborate Detective Norton's testimony to show that Mr. Murray was in possession of and used the .380 Hi-Point on April 1, 2007, and to provide evidence concerning the origin, ownership, and destruction of the weapon." *Id.* at 28. If the United States rebuts the adverse inference, "what may have been on the .380 Hi-Point will be treated as unknowable." *Id.* at 29.

2. The United States Rebutted the Adverse Inference.

At trial, the United States presented uncontroverted evidence that tied the Hi-Point .380 to Mr. Murray and showed that Detective Norton never came close enough to Mr. Murray to either take control of the gun or shoot Mr. Murray at point-blank range. Specifically, Special Agent David Ryan testified that he investigated the purchase of the Hi-Point. 380 and uncovered that an individual named Cody Shirley had illegally purchased that gun. FOF ¶ 132. Then, Special Agent Ryan found that Mr. Shirley had given the gun to Uriah Kurip. *Id.* So Mr. Murray had access to the gun since he was the only passenger in the car driven by Mr. Kurip on April 1, 2007, and there is no evidence that anyone else had access to or possessed the gun.

Additionally, there is no evidence linking the Hi-Point .380 to Detective Norton. That is, Plaintiffs failed to show that Detective Norton ever had access to the inside of the car driven by Mr. Kurip or otherwise had the means or opportunity to possess the Hi-Point .380. Indeed, as discussed more fully below, the uncontroverted evidence shows that Detective Norton was never close enough to Mr. Murray before the shooting occurred to have taken the Hi-Point .380 from him—much less close enough to have shot Mr. Murray at point-blank range. Importantly, none

of the evidence regarding the origin of the Hi-Point .380 or Detective Norton's whereabouts requires the Court to exclusively rely on Detective Norton's testimony to overcome the adverse inference. *See Jones v. United States*, Civ. A. No. 13-227, 2023 WL 2681819, at *22 (Fed. Cl. Mar. 29, 2023). Rather, the corroborating evidence includes both physical evidence (e.g., the location of shell casings from the .380 Hi-Point, the location of the shell casings from Detective Norton's gun, the dispatch audio recording, etc.) and "credible corroborating testimony" from both Trooper Young and Deputy Byron. *Id.* On the existing evidence, the only way the Hi-Point .380 could have made it to Mr. Murray's location was for him to have carried it there. There is also ample evidence that the only way Mr. Murray died was by a self-inflicted gunshot wound using the Hi-Point .380.

Accordingly, the Court should find that the United States successfully rebutted the adverse inference because: (1) the United States proved that Mr. Kurip (and by extension Mr. Murray) had access to the Hi-Point .380; (2) Plaintiffs failed to show that anyone else had access to the Hi-Point .380; (3) the physical evidence at the scene, including the location of the .380 caliber and .40 caliber shell casings and the dispatch audio recordings, corroborate Detective Norton's account that Mr. Murray fired shots at Detective Norton, Detective Norton returned fire, and then Mr. Murray shot himself; and (4) Deputy Byron and Trooper Young's testimony confirms that Detective Norton was never close enough to shoot Mr. Murray at close-range nor would have had time to commit the crime and alter the evidence at the scene to cover-up his misdeed.

3. Even if Unrebutted, Plaintiffs Have Still Failed to Meet Their Burden.

Even if the United States failed to rebut the adverse inference, which it did not, Plaintiffs have otherwise failed to carry their evidentiary burden. Recall, Plaintiffs stated in advance of

trial that they "expect[ed] to show . . . that Officers [sic] Norton was the bad man who shot Mr. Murray in the head at close range[.]" Pls.' Contentions of Fact and Law, ECF No. 223 at 2. The spoliation sanction, which helped Plaintiffs survive summary judgment, provided them with a level playing field upon which to attempt to make their ultimate showing—that Mr. Murray was killed by a non-Indian on April 1, 2007. *See Jones,* 2023 WL 2681819, at *31 ("These sanctions therefore will further deter the defendant because they will likely prevent a complete disposition of this case on summary judgment and allow the plaintiffs to test their theory of the case at a trial."). But, even with the benefit of the adverse inference, Plaintiffs failed to prove their case for several reasons.

For starters, the spoliation sanction did not—and cannot—relieve Plaintiffs of their evidentiary burden of proof at trial.[4] That is because an inference, standing alone, cannot substitute for Plaintiffs' burden to show that Detective Norton or any other law enforcement officer committed any of the crimes alleged in this action. *See* 29 Am. Jur. 2d *Evidence* § 252 ("The presumption against a person who has damaged or destroyed evidence does not relieve the other party of the obligation to meet a burden of proof."). Indeed, "many decisions have supported the general doctrine that the inference from obstructive conduct will not satisfy the

[4] To the extent Plaintiffs assert that the sanction, standing alone, requires this Court to find in their favor, that would be tantamount to a dispositive sanction. But Plaintiffs did not request a dispositive sanction after the spoliation hearing, *see generally* Pls.' Findings of Fact and Conclusions of Law, ECF No. 201, nor is one warranted. *See Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) ("[C]ourts select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim." (quoting Jamie S. Gorelick et al., Destruction of Evidence § 3.16 p. 117 (1989))). More importantly, in crafting the rebuttal adverse inference, this Court expressly declined to issue a harsher sanction. *See* ECF No. 209 at 31 (noting, for example, that "[a]n irrebuttable adverse inference . . . would excessively and unfairly place on the defendant the burden of an incorrect determination of the claims at trial beyond what is necessary and appropriate based on the facts of this case").

need for proof of a particular fact essential to the proponent's case." *See* McCormick on Evidence § 265 (citing cases); *see also Kammerer v. Sewerage and Water Bd. of New Orleans*, 633 So.2d 1357 (La.Ct. App. 1994) (noting that "[t]he traditional rule at common law will not substitute the adverse inference for plaintiff's proof of an essential element of his or her case"); *Maszczenski v. Myers*, 212 Md. 346, 355 (1957) ("Although an inference arises from the suppression of evidence by a litigant that this evidence would have been unfavorable to his cause, it is well settled that this inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case" (internal citations omitted)). [5]

Here, without any evidence beyond a mere adverse inference, Plaintiffs cannot meet their burden required to prove the crimes alleged under a "bad men" cause of action. *See 3M v. Pribyl*, 259 F.3d 587, 606 n.5 (7th Cir. 2001) (ruling that in the absence of specific suggestion by a party as how evidence destroyed by spoliation would have assisted the claim, court would not

[5] At trial, Plaintiffs appeared to argue that a crime may simply be inferred—perhaps suggesting that the Court apply a doctrine similar to *res ipsa loquitur* in negligence cases. *See* 11/14/23 Tr. 644:1-8 ("[O]ur view is the Court should not be discussing this in anything other than in this specific context of given the spoliation sanctions. *It should not be saying Officer Norton shot Mr. Murray*." (emphasis added)). *Res ipsa* in wholly inapplicable here, as this is not a torts case. But even if it were applicable, it would still not hand Plaintiffs a favorable judgment. *See Maroules v. Jumbo, Inc.*, 452 F.3d 639, 643 (7th Cir. 2006). That is because such an inference "is just that—a plaintiff does not win her case merely because she has met the *res ipsa loquitur* requirements. A successful *res ipsa loquitur* showing simply creates an inference [of negligence] which the trier of fact may choose to accept or not." *Id.* at 642-43 (internal citations omitted). Further, Plaintiffs cannot show that "the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care" or stated differently that "the incident [wa]s 'more probably than not caused by negligence.'" *Warenski v. Advanced RV Supply*, 257 P.3d 1096, 1101 (Utah App. 2011). Plaintiffs also failed to prove that "the agency or instrumentality causing the accident was at the time of the accident under the exclusive management or control of" Detective Norton or another non-Indian. To the contrary, the evidence shows that the Hi-Point .380 was most likely under Mr. Murray's control and was used in a likely suicide. The Court need not tarry long with this point since simple negligence (as opposed to criminal negligence) is not an element of any of the crimes alleged by Plaintiffs.

allow the party to prevail in absence of other sufficient evidence); *see also Martinez v. Brink's, Inc.*, 171 F. App'x 263, 268 (11th Cir. 2006) ("In the absence of any record evidence which would permit the jury to reasonably conclude that the state lacked probable cause, the adverse inference that the district court's instruction permitted the jury to draw cannot alone carry Martinez's burden on the issue of probable cause."). Especially in the absence of any facts to show a conspiracy (of which there are none), there is an obvious disconnect between the negligent actions of the United States in destroying an item nearly two years after the incident occurred pursuant to normal government records schedules (not to mention a court order), *see* FOF ¶ 135, and the actions of Utah-based law enforcement officers at the scene of Mr. Murray's shooting. *See Parsons v. Ryan*, 340 Mass. 245, 249 (1960) (noting that an implied admission "forms an insufficient foundation for the erection of an entire case by mere inference without other evidence" (citation omitted)). Thus, Plaintiffs' attempt to prove up their alleged crimes on the strength of the adverse inference alone must fail.

What is more, Plaintiffs fail to explain how the adverse inference works with any competent evidence to show that Mr. Murray died by any means other than suicide. That failure dooms their case because an inference that the Hi-Point .380 was clean of any blood, tissue, or DNA does not somehow prove that Detective Norton—or anyone else for that matter—shot Mr. Murray. At most, such an inference may be used to cast doubt on whether Mr. Murray used the Hi-Point .380 to shoot himself. *See Jones v. United States*, Civ. A. No. 20-2182, 2022 WL 473032, at *11 (Fed. Cir. Feb. 16, 2022) (noting that "it is a plausible and concrete suggestion that absence of blowback on the Hi-Point .380 handgun is evidence that it was not used to shoot Mr. Murray"). But, on the existing record after Plaintiffs' opportunity to develop facts, the inference does equate to liability for three primary reasons.

First, Plaintiffs failed to demonstrate how the adverse inference dovetails with any direct or circumstantial evidence to meet their burden of proof. As noted, more is required than a mere negative inference related to the Hi-Point .380 to demonstrate a crime and a violation of the "bad men" treaty provision. As expanded upon below, an inference that the Hi-Point .380 was clean does not show that any other gun was used to kill Mr. Murray. Importantly, the record is devoid of any direct or indirect evidence to show that Detective Norton's gun (i.e., the only other gun that was discharged on April 1, 2007) was used to kill Mr. Murray. To the contrary, Chief Jenson's uncontroverted testimony established that he saw no signs of blood or tissue on Detective Norton's gun. In addition, no evidence exists of any other gun being discharged on April 1, 2007. FOF ¶¶ 76-77. For similar reasons, the inference related to the Hi-Point .380 does not show that an individual other than Mr. Murray pulled the trigger. Such a claim would require factual support, which is entirely lacking from the trial record. Thus, the Court can only speculate as to who—other than Mr. Murray—inflicted the mortal wound. But Plaintiffs cannot rely on speculation to meet their burden.

Second, Plaintiffs' own expert witness further demonstrated why the adverse sanction does not automatically meet Plaintiffs' burden of proof. Specifically, Dr. Arden testified that he was aware of scientific literature indicating that that blowback evidence in cases involving a close contact gunshot would be found about half the time. FOF ¶ 160; 11/9/23 Tr. at 479:23-480:14. That means that the likelihood that blowback evidence would have been found on the Hi-Point .380 is no better than chance. Dr. Arden further testified that, in his own experience, there will not be "demonstrably visible blowback" on the gun in most cases involving a gunshot to the head. FOF ¶ 163; 11/9/23 Tr. at 480:20-481:19. Dr. Cohen corroborated this testimony by

noting that blowback evidence was not guaranteed to appear on the gun in close range shootings. FOF ¶¶ 160-61; 11/13/23 Tr. 522:4-523:6.

To be sure, Plaintiffs' crime scene processing expert, Dr. Gaut, testified that blowback would be found on the gun 100% of the time for close contact gunshot wounds, FOF ¶ 159; 11/8/23 Tr. at 394:16-24. But this aspect of Dr. Gaut's testimony is not credible for several reasons. For starters, Dr. Gaut's testimony impermissibly exceeded the scope of his expert report. Indeed, the term "blowback" was mentioned only once in Dr. Gaut's supplemental report and was confined to his opinion that, when investigating a contact gunshot wound, the inside of a gun's barrel should be examined for evidence of blowback and, if found, "may be considered conclusive that the gun was used in a contact, or near-contact, gunshot to the head." Pls.' Ex. 29 (Gaut Suppl. Rep.) at 41. However, Plaintiffs never disclosed any opinion by Dr. Gaut regarding how *often* one would expect to find blowback on a firearm used in a contact wound to the head. *See generally id.* Tellingly, Dr. Gaut's report failed to reference a single scientific study regarding this topic. Not only is Dr. Gaut's testimony rendered unreliable on that basis, *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (noting that the trial judge must ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"), it also flouts this Court's rules requiring the complete disclosure of the basis for Dr. Gaut's testimony, *see* RCFC 26(a)(2)(B) (requiring disclosure of "a complete statement of all opinions the [expert] witness will express and the basis and reasons for them"). Accordingly, this Court should set aside Dr. Gaut's testimony on the frequency of blowback evidence. *See* RCFC 37(c)(1) ("If a party fails to provide information or identify a witness as required by RCFC 26(a) . . . the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial[.]"). Further, because Dr.

Gaut inappropriately testified beyond the scope of his stated expertise as a crime scene investigator, his testimony should be discounted. *See Am. Auto. Inc. Co. v. Omega Flex, Inc.*, 783 F.3d 720, 724 (8th Cir. 2015); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001). The Court made clear that Dr. Gaut was not qualified on the "physics and biomechanics of blowback" but permitted Plaintiffs with the opportunity to establish his understanding at a later point. 11/8/23 Tr. at 357:6-17. But Plaintiffs never took the Court up on that opportunity and otherwise failed to establish that Dr. Gaut had any specialized expertise in the biomechanics of blowback beyond his understanding of blowback in general. And just because Dr. Gaut was qualified as an expert in crime scene processing "does not *ipso facto* qualify him to testify as an expert in all related areas." *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 391 (D. Md. 2001) (citing cases).

Third, even if the Court considers Dr. Gaut's testimony, the foundation for his opinion regarding the frequency of blowback is seriously flawed. Dr. Gaut testified that, although his report did not cite to any scientific studies, he was aware of one study related to close-contact gunshot wounds administered to calves destined for slaughter. However, as established through Dr. Cohen's rebuttal, Dr. Gaut misapprehended and mischaracterized that study's central findings. Although Dr. Gaut conveyed that the calves study found blowback 100% of the time in close-contact shootings, the study concluded no such thing. To the contrary, the study found when calves were shot in the head at close range, no evidence of blowback was found on the gun 33% of the time. FOF ¶ 161; 11/13/23 Tr. at 519:1–520:12. At most, Dr. Gaut's testimony represents a view (albeit a distorted one) of a single study that is in apparent conflict with the other scientific studies reviewed by both Dr. Arden and Dr. Cohen. Such apparent selectivity—without any acknowledgment of contrary scientific evidence identified by the other experts—

further undercuts the reliability of Dr. Gaut's testimony. *See In re Rezulin Products Liab. Litig.*, 369 F. Supp. 2d 398, 425 (S.D.N.Y. 2005) ("[I]f the relevant scientific literature contains evidence tending to refute the expert's theory and the expert does not acknowledge or account for that evidence, the expert's opinion is unreliable.").

In sum, the United States successfully rebutted the adverse inference, and Plaintiffs have otherwise failed to show that the adverse inference alone proves their case. Because the Court imposed a permissive adverse inference, it is "free to accept or reject the inference based on the reasons provided for the destruction of evidence and *based on any other evidence that is presented that contradicts the inference*." *Vitamins Online, Inc. v. Heartwise, Inc.*, No. 2:13-CV-982-DAK, 2016 WL 3747582, at *4 (D. Utah July 11, 2016) (emphasis added). As discussed further below, the Court should reject any inference that the Hi-Point .380 was not the suicide gun because the United States offered evidence "contradict[ing] all or a portion of the inference," and Plaintiffs otherwise failed to carry their burden of proof to establish that any alleged crimes were committed. *Id.*

B. Plaintiffs Failed to Prove the Elements of Any Actionable Crimes under the "Bad Men" Provision.

1. Homicide-Based Crimes

Although Plaintiffs did not explicitly articulate any alleged homicide-based crimes at trial, previous pleadings indicate they are accusing Detective Norton of committing first degree murder, second degree murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide. *See* Pls.' Statement of Crim. Violations of the Bad Man Clause, ECF No. 215; Joint Status Report, ECF No. 219. To prove any of these crimes, Plaintiffs had to show that Detective Norton or another non-Indian caused Mr. Murray's death. Plaintiffs would also need to establish varying mental states for each of these alleged crimes. Plaintiffs failed to meet their burden on

both accounts. The evidence presented at trial does not support a conclusion that anyone other than that Mr. Murray shot Mr. Murray. And Plaintiffs failed to elicit any evidence that would support the other elements of the criminal provisions on which they rely. Plaintiff have therefore failed to prove any "bad men" claim premised on homicide.

a. Murder in the First Degree

To prove first-degree murder, Plaintiffs needed to show by a preponderance of the evidence that Detective Norton or another non-Indian: (1) unlawfully caused the death of Mr. Murray (who was an enrolled member of the Ute Tribe); (2) 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.*

To satisfy the malice aforethought element, Plaintiffs needed to prove that Mr. Murray was killed deliberately, intentionally, or by actions exhibiting a callous and wanton disregard for human life. *See* 10th Circuit Criminal Jury Instruction 2.52.[6] To establish the premeditation element, Plaintiffs needed to prove that the killing was the result of planning or deliberation. *Id.* Plaintiffs failed to establish every element of first-degree murder.

Plaintiffs' case stumbles at the starting block because they have not submitted any evidence (let alone proven) that anyone other than Mr. Murray caused the wound to Mr. Murray's head. Both parties' medical experts agreed with the Medical Examiner's conclusion

[6] Criminal Pattern Jury Instructions (10th Cir.) (2021 ed.) https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20revised%207-14-23.pdf, last visited Jan. 5, 2024 (hereinafter, "10th Circuit Criminal Jury Instructions").

that Mr. Murray died of a contact gunshot wound to the head. FOF ¶¶ 147-148, 151. But Detective Norton testified, and Deputy Byron corroborated, that Detective Norton and Mr. Murray were at least 100 yards apart at the time shots were fired. FOF ¶¶ 34-49. Deputy Byron had taken a different route to look for Mr. Murray and, from his location near the oil platform, could see Detective Norton on the hill. FOF ¶¶ 31-32, 45. Deputy Byron also saw Mr. Murray fall and testified that Detective Norton was not near Mr. Murray when that happened. FOF ¶ 40. Plaintiffs made no attempt to challenge these officers' description of events at trial and did not submit any evidence to the contrary. The distance established by the officers' testimony precludes homicide because Mr. Murray died of a contact wound and no one else was within an arm's-length of him at the time. FOF ¶ 148.

The officers' testimony as to what happened is corroborated by the physical evidence at the scene. After the shooting, Trooper Young observed bullet casings on the hill where Detective Norton testified he had been standing and two .380 casings, the .380 Hi-Point, and a third casing jammed in the .380 Hi-Point at Mr. Murray's location. FOF ¶ 62. Special Agent Ashdown collected this evidence and took GPS coordinates showing there were 113 yards between the casings where Detective Norton had been, which Special Agent Ashdown determined were .40 caliber casings, FOF ¶ 104 (matching Detective Norton's service weapon, 11/6/23 Tr. at 130:14), and the evidence found at Mr. Murray's location. FOF ¶¶ 102-106, 109; Def.'s Ex. 55. The testimony from these individuals as to the location of evidence at the scene is corroborated by photographs taken of the scene. *See, e.g.*, Def.'s Exs. 33, 70. Additionally, Vernal Chief of Police Gary Jensen—a former paramedic who was acutely aware of blood—looked over Detective Norton's .40 caliber service gun at the scene and did not observe any blood or other materials on it, describing it as "pristine." FOF ¶¶ 76-77. Chief Jensen also did

not see any blood or anything else unusual on Detective Norton or his clothing. FOF ¶ 77. Special Agent Ashdown also described Detective Norton's clothes as "clean and pristine[,]" and testified that Exhibit 103 depicted how Detective Norton appeared at the scene. FOF ¶¶ 92, 114. Plaintiffs again did not elicit any evidence contradicting the officers' testimony or the physical evidence.

Additionally, the timeline of events established by the evidence makes it implausible that Detective Norton could have shot Mr. Murray at point-blank range and covered up his crime by manipulating the evidence at the scene. Trooper Young testified that it was a matter of minutes between he and Deputy Byron hearing shots or hearing "shots fired" on the radio and meeting back up with Detective Norton on the top of the hill. FOF ¶ 55. The dispatch transcript and audio confirm that it was approximately two minutes from the time Deputy Byron confirmed shots were fired to the time he and Trooper Young arrived back at Detective Norton's location. *See* Def.'s Ex. 31 at 9-10; Def.'s Ex. 138 (files 2007-04-01-11-31-54-002-Recorder.mp3; 2007-04-01-11-34-17-002-Recorder.mp3). Plaintiffs did not offer any evidence to the contrary. Thus, Plaintiffs' theory would have to be that Detective Norton—in a matter of two minutes and unseen by Deputy Byron or anyone else—ran to Mr. Murray's location, shot Mr. Murray, concocted a cover-up plan, executed that plan by altering and planting physical evidence across the scene, and returned to his location on the hill. This strains credulity. The only explanation for what happened that enjoys any evidentiary support is exactly what Detective Norton testified under oath happened—Mr. Murray fired two shots at Detective Norton, Detective Norton fired two shots back from over 100 yards away, and then Mr. Murray shot himself. FOF ¶¶ 34-49.

Against this evidentiary background, each party offered an expert forensic pathologist to opine on how Mr. Murray died. Plaintiffs offered Dr. Jonathan Arden and the United States

offered Dr. Joseph Cohen. Dr. Arden opined that he uses the "more likely than not" standard when determining causes and manners of death, FOF ¶ 152. Dr. Arden testified that the most likely manners of Mr. Murray's death were suicide or accident, although neither of these manners of death met Dr. Arden's "more likely than not" standard. FOF ¶¶ 154, 157. Therefore, he believed Mr. Murray's death should have been marked as undetermined because neither suicide, accident, or—critically—homicide, met his "more likely than not" standard. *Id.* At no point did Dr. Arden, who was called by Plaintiffs to make their best case, opine that there was any evidence that someone else caused Mr. Murray's death. Dr. Arden did *not* opine that Mr. Murray was murdered. And he admitted that if there was independent corroboration of the distance between Detective Norton and Mr. Murray, then the evidence would "tilt" towards suicide given that Mr. Murray suffered a contact wound. FOF ¶¶ 157-158. As discussed above, Deputy Byron provided that independent corroboration at trial, and given that corroboration, Plaintiffs' own expert offered an opinion that Mr. Murray's death "tilted" toward suicide.

Dr. Cohen largely agreed with Dr. Arden's evaluation of the physical evidence, including that Mr. Murray died from a contact gunshot wound to the head. FOF ¶ 147. However, Dr. Cohen's opinion was that even without independent corroboration of Detective Norton's story, it was still more likely than not that Mr. Murray committed suicide. FOF ¶¶ 147-149. Like Dr. Edward Leis, the Utah Medical Examiner who determined Mr. Murray's manner of death was suicide, Dr. Cohen opined that if he had been the medical examiner for Mr. Murray, he would have concluded that Mr. Murray shot himself. *Id.* Dr. Cohen testified that the nature of Mr. Murray's wounds, Detective Norton's account of the events, and the corroborating physical evidence at the scene are collectively sufficient to tilt the scale from undetermined to suicide. *Id.*; *see also* 11/13/23 Tr. at 530:4–531:21.

Rather than challenge the officers' testimony as to what happened, the location of the physical evidence at the scene, the timeline established by the dispatch audio, or the medical testimony presented by both expert witnesses, Plaintiffs rely on the Court's spoliation sanction to make their case for them. Plaintiffs' apparent theory is that the absence of Mr. Murray's blood, tissue, DNA, or fingerprints on the Hi-Point .380 would prove, implicitly, that Mr. Murray was killed by the only other person who was nearby—Detective Norton. As previously discussed, though, the United States rebutted the adverse inference, so Plaintiffs' entire case evaporated when the adverse inference went away. But even if the United States did not rebut the adverse inference, what Plaintiffs are left with is a factual inference that the Hi-Point .380 did not have Mr. Murray's blood, DNA, tissue, or fingerprints on it. But this inference, while adding support to Plaintiffs' case, is not dispositive when considered (as it must be) with the other evidence presented at trial, *see supra* at 45-47. When considering the evidence as a whole, the inference does not prove by a preponderance of the evidence that Mr. Murray was the victim of a homicide.

Drs. Arden and Cohen both testified that there is not blowback in every contact gunshot wound and that the presence and amount of blowback depends on many factors, including how the shooter was holding the gun. FOF ¶¶ 159-62. Dr. Gaut testified that sweat and other liquids could obliterate fingerprints. FOF ¶ 115. With that testimony, Plaintiffs have simply not demonstrated that a gun free of blowback and fingerprints necessarily means the Mr. Murray was not shot by the .380 Hi-Point.[7] To the contrary, all of the other evidence adduced at trial makes suicide the only plausible conclusion. Thus, regardless of their assertions to the contrary,

[7] Indeed, the undisputed evidence shows that Detective Norton's service weapon was pristine, so under Plaintiffs' theory that gun could not have been used to inflict Mr. Murray's contact wound.

Plaintiffs cannot establish that someone else caused Mr. Murray's death by simply relying on the adverse factual inference.

In addition to having not proven that anyone caused Mr. Murray's death other than himself, Plaintiffs have failed to adduce any evidence of malice aforethought or premeditation, both of which are essential elements to proving the crime of first-degree murder. *See* 18 U.S.C. § 1111. Assuming there was even a shred of evidence that Detective Norton caused Mr. Murray's death, which there is not, there is no evidence that Detective Norton or anyone else killed Mr. Murray deliberately, intentionally, or by actions exhibiting a callous and wanton disregard for human life. There is also no evidence that anyone planned or premediated to kill Mr. Murray. Detective Norton did not know Mr. Murray or his family and had no motive to kill him. FOF ¶ 52. Detective Norton's obvious shock and distress in his call to dispatch from the scene is entirely inconsistent with someone who just murdered a person execution-style, much less someone who planned to do so ahead of time. Def.'s Ex. 138 (file 2007-04-01-11-30-40-001-Recorder.mp3). Because Plaintiffs have adduced no evidence to prove the second and third elements of first-degree murder, their "bad men" claim predicated on first-degree murder necessarily fails.

b. Murder in the Second Degree

Plaintiffs have also accused Detective Norton of committing second degree murder. *See* ECF No. 215; FOF ¶ 174. To prove second-degree murder, Plaintiffs needed to prove that Detective Norton or another non-Indian: (1) caused the death of Todd Murray; (2) killed him with malice aforethought; and (3) the killing took place on the reservation, which is within the jurisdiction of the United States. 18 U.S.C. § 1111(a); *see also* 10th Circuit Criminal Jury Instruction 2.53. Unlike first-degree murder, second-degree murder does not require proof of

premeditation or deliberation. *See United States v. Pearson*, 203 F.3d 1243, 1271 (10th Cir. 2000). Instead, it is a "general intent crime" that only requires malice aforethought. *See United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000).

Plaintiffs failed to prove a second-degree murder for the same reasons they failed to prove a first-degree murder. They did not prove by a preponderance of the evidence that anyone other than Todd Murray caused his death or that the person they accuse of killing Mr. Murray acted deliberately, intentionally, or exhibited a callous and wanton disregard for human life. Therefore, Plaintiffs have not proven second-degree murder as the basis of their "bad men" claim.

c. Voluntary Manslaughter

Plaintiffs also accuse Detective Norton of committing voluntary manslaughter. ECF No. 215. 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.* To establish a "bad men" claim predicated on voluntary manslaughter, Plaintiffs were required to prove that Detective Norton or another non-Indian: (1) caused Mr. Murray's death; (2) acted unlawfully in doing so; (3) acted (a) while in a sudden quarrel or heat of passion, (b) with the general intent to kill, (c) with the intent to cause serious bodily injury, or (d) while acting with a depraved heart, that is, recklessly with extreme disregard for human life; and (4) Mr. Murray was killed on the reservation, which is within the territorial jurisdiction of the United States. *See* 10th Circuit Criminal Jury Instruction 2.54.

Again, Plaintiffs cannot prove involuntary manslaughter because they have not shown by a preponderance of evidence that anyone other Mr. Murray caused his death. Moreover, Plaintiffs adduced no evidence that would establish the requisite *mens rea* for voluntary

manslaughter. They offered no evidence that Detective Norton or anyone else shot Mr. Murray in the heat of passion, with the general intent to cause death, with the intent to cause serious bodily injury, or while acting with a depraved heart. Therefore, even if the Court were to find it possible that someone else had caused Mr. Murray's death, which it should not, Plaintiffs' failure to produce any evidence that would support the *mens rea* element of voluntary manslaughter is still dispositive in favor of the United States.

d. Involuntary Manslaughter

Plaintiffs alternatively claim that involuntary manslaughter was committed on April 1, 2007. For Plaintiffs to establish a "bad men" claim predicated on involuntary manslaughter, they were required to prove that Detective Norton or another non-Indian: (1) caused the death of Mr. Murray while committing an unlawful act not amounting to a felony or while committing a lawful act in an unlawful manner; (2) knew that his conduct was a threat to the lives of others or it was foreseeable to him that his conduct was a threat to the lives of others; and (3) the killing took place within the territorial jurisdiction of the United States. 18 U.S.C. § 1112; *see also* 10th Circuit Criminal Jury Instruction 2.54.1. To prove involuntary manslaughter, it is insufficient to prove that someone acted negligently or failed to use reasonable care. *Id.* Rather, it must be shown that they acted grossly negligently, which amounted to wanton and reckless disregard for human life. *Id.*

Plaintiffs have not proven involuntary manslaughter was committed for the same reason they cannot prove that any other type of homicide was committed—they have not proven that someone other than Mr. Murray caused his death. Nor have Plaintiffs established the second factor for involuntary manslaughter. Although the involuntary manslaughter statute "does not expressly include a particular *mens rea* as an element of the crime," it does require proof that the

killer "acted grossly negligently . . . with a wanton or reckless disregard for human life, knowing that his conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject others." *United States v. Bolman*, 956 F.3d 583, 586 (8th Cir. 2020). Gross negligence is "a far more serious level of culpability than that of ordinary tort negligence, but still short of the extreme recklessness, or malice required for murder." *Id.* (quoting *United States v. One Star*, 979 F.2d 1319, 1321 (8th Cir. 1992)). The "how" is critical to establishing whether the killer acted with "gross negligence." But Plaintiffs' evidentiary showing is silent on the subject. Without the "how," Plaintiffs cannot prove that involuntary manslaughter was committed.

e. Negligent Homicide

Unlike the Federal Code, the Utah Code possesses the crime of negligent homicide. Utah Code § 76-5-206(2).[8] Utah defines negligent homicide as: "[a]n actor commits negligent homicide if the actor, acting with criminal negligence, causes the death of another individual." *Id.* A person's conduct is "criminally negligent" when: "he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint."[9] Utah Code Ann. § 76–2–103.

[8] The United States maintains its position that state-law crimes are not applicable where analogue federal crimes exist. *See Lewis v. United States*, 523 U.S. 155, 164-65, 168-72 (1998). As relevant here, there are federal crimes for both murder and manslaughter.

[9] "[P]erception of the risk . . . marks the difference between criminal negligence [negligent homicide] and recklessness [involuntary manslaughter]." *State v. Robinson*, 63 P.3d 105, 108 n.2 (Utah App. 2003). "The difference between the culpable mental states for involuntary manslaughter and criminally negligent homicide is appreciation of the risk. Recklessness requires that one perceive the risk and disregard it; in criminal negligence the actor simply does

As with all of the other homicide-based crimes, Plaintiffs failed to produce any evidence showing that Mr. Murray's death was "caused by another individual." But even if the Court were to find it possible that someone else caused Mr. Murray's death, Plaintiffs have not presented any evidence of how that death took place. After a multi-day trial, eleven witnesses, and over one hundred exhibits, Plaintiffs have not proven the who or the how. And as noted, *supra* n.5, an inference based on *res ipsa loquitur* cannot supply the how. Without the how, Plaintiffs cannot show that anyone acted in a criminally negligent way. For these reasons, Plaintiffs have not met their burden to demonstrate negligent homicide.

2. Assault

As an apparent alternative theory for liability if they cannot prove Detective Norton killed Mr. Murray (which they did not), Plaintiffs allege that various actions by officers at the scene constituted criminal assault. However, none of the officers' actions—including Detective Norton drawing his service gun, his return of fire at Mr. Murray, and Deputy Byron handcuffing Mr. Murray—meet the elements of assault.

a. Elements of Assault

Under Utah law in effect in 2007, assault was defined as "(a) an attempt, with unlawful force or violence, to do bodily injury to another; or (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

---

not perceive the risk that an ordinary person would recognize." *Id.* (quoting *Saunders v. State*, 871 S.W.2d 920, 924 (Tex. App. 1994), *aff'd*, 913 S.W. 2d 564 (Tex. Crim. App. 1995)).

bodily injury to another." Utah Code § 76-5-102(1) (2003).[10] A threat is an "expression of an intention to inflict injury on another." *Layton City v. Carr*, 336 P.3d 587, 591 (Utah Ct. App. 2014) (quoting *State v. Hartmann*, 783 P.2d 544, 546 (Utah 1989)).

Assault also has a *mens rea* requirement. Section 76-2-102 of the Utah Code sets recklessness as the default *mens rea* requirement for crimes that do not specify a mental state, and that requirement applies to assault. *State v. Hutchings*, 285 P.3d 1183, 1186 (Utah 2012); *Broadbent v. United States*, No. 2:16-cv-00569, 2016 WL 5922302 (D. Utah Oct. 11, 2016). A person acts recklessly when they are "aware of but consciously disregard[] a substantial and unjustifiable risk" that a certain circumstance exists or result will occur. Utah Code § 76-2-103(3) (1974).[11] "The risk must be of such a nature and degree that its disregard constitutes 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." *Id.*

Even where the elements of assault would otherwise be met, reasonable actions taken for self-defense are not unlawful. "A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force." Utah Code § 76-2-402(1) (1994).[12] Even the use of deadly force is justified where the person "reasonably

[10] Utah's assault statute was amended in 2015 and 2022. The current assault statute removes subsection (b) of the provision in effect in 2007. Utah Code § 76-5-102(2) (2022). Subsections (a) and (c) of the 2007 statute, while re-labeled, remain substantially the same. *Id.*

[11] Section 76-2-103(3) was amended, effective April 30, 2007, to remove the word "malicious." It otherwise remains substantively the same.

[12] The version of Section 76-2-402 enacted in 1994 was the version in effect in 2007. The section has been amended several times since 2010 but in relevant part remains substantially the same.

believes" that such force is "necessary to prevent death or serious bodily injury" to themself or someone else "as a result of [] imminent use of unlawful force . . . ." *Id.*

b. Plaintiffs Have Not Identified an Assault.

Plaintiffs appear to be alleging that three separate actions constituted assault in this case: 1) Detective Norton unholstering his gun and shouting commands at Mr. Murray; 2) Detective Norton firing shots at Mr. Murray; and 3) Deputy Byron handcuffing Mr. Murray. But these were all reasonable, lawful actions taken to protect the safety of the officers at the scene. Plaintiffs have therefore failed to establish the elements of criminal assault.

i. Detective Norton Unholstering His Gun and Shouting Commands at Mr. Murray Was Not an Assault.

Detective Norton holding his gun at the low ready position and ordering Mr. Murray to get on the ground was not an assault. Detective Norton only unholstered his gun and held it at the low ready position after seeing Mr. Murray approaching him with what Detective Norton believed could be a gun, which gave Detective Norton concern for his safety. FOF ¶¶ 35-36. Because Detective Norton was only holding his gun at the low-ready position, there was no use of "unlawful force of violence," as required by subsections (a) and (c) of the assault statute or a "show of immediate force or violence" as would be required by subsection (b). With respect to subsections (a) and (b), Detective Norton was also not attempting or "expressing an intent" to injure Mr. Murray, as he was commanding Mr. Murray to get on the ground, which would de-escalate the situation. FOF ¶ 35. Nor did Detective Norton holding his gun at the low ready cause any bodily injury to Mr. Murray or create a substantial risk of such injury as required by subsection (c). Only Mr. Murray shooting at Detective Norton prompted Detective Norton to fire back at him, and Mr. Murray was the only one who inflicted any actual bodily injury to himself that day. Even if the elements of assault had otherwise been met, though, Detective Norton

drawing his gun was lawful because it was a reasonable measure taken in self-defense. Utah Code § 76-2-402(1) (1994).

Plaintiffs also failed to establish assault's *mens rea* requirement because they did not produce any evidence that Detective Norton acted recklessly. It was reasonable for Detective Norton to draw his gun and hold it in the low ready position to protect himself once he saw Mr. Murray coming at him with what Detective Norton believed could be a gun. According to Plaintiffs' own expert, Dr. Gaut, Detective Norton unholstering his gun was in line with accepted police practices:

> Q: . . . [I]f Detective Norton had reason to believe that Mr. Murray was approaching him with a firearm, it would comport with your understanding of police practices for Detective Norton to then draw his weapon, at least at the low ready?
>
> A: At that point in time, yes.

FOF ¶ 35 (11/8/23 Tr. at 410:11-17). Dr. Gaut further clarified that the individual would not need to be pointing the gun at the officer for it to be acceptable for the officer to draw their own gun and hold it in a low ready position. *Id.* (11/8/23 Tr. at 415:16-416:2). Because Detective Norton's unholstering and commands complied with accepted police practices as described by Plaintiffs' own expert, Plaintiffs have failed to establish the reckless mental state required for assault.

ii. Detective Norton Firing Shots at Mr. Murray Was Not an Assault.

Detective Norton firing at Mr. Murray was justified because it was done in self-defense. Mr. Murray fired shots at Detective Norton first, FOF ¶ 41, and this use of deadly force was unlawful. Detective Norton had identified himself as a police officer at that point and ordered Mr. Murray to get on the ground. FOF ¶¶ 35-37. Even if Mr. Murray believed Detective Norton

was outside of his jurisdiction, Mr. Murray did not have the right to shoot at (and potentially kill) Detective Norton. In fact, the Utah Supreme Court has held that "[w]here [an] 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 "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. Heliczer*, 373 F.2d 241, 245 (2d Cir. 1967)). Detective Norton, who was automatically checked on-duty after contacting dispatch, FOF ¶ 19, was at the scene in his capacity as a police officer to assist Trooper Swenson, and therefore was not engaging in a personal frolic. Even if Mr. Murray did not hear Detective Norton and did not believe that he was a police officer—a conclusion that would defy logic given that Mr. Murray had just fled from a high-speed chase in a remote area where the presence of pedestrians would be extremely unlikely—he still would not have had the right to shoot a random pedestrian who had wandered off the road in his direction. Once Mr. Murray shot at Detective Norton, Detective Norton had no cover to use as protection and believed that firing shots back at Mr. Murray was necessary to protect himself. FOF ¶ 42.

On a similar note, Plaintiffs have failed to prove the *mens rea* requirement of assault because Detective Norton's return of fire was reasonable. The District of Utah found that "[i]t was [] reasonable under the circumstances for Detective Norton to fire his gun at Mr. Murray." *Jones v. Norton*, 3 F. Supp. 3d 1170, 1195 (D. Utah 2014) ("*Jones Dist. Ct.*"). Additionally, Dr. Gaut (Plaintiffs' own expert) testified that if an individual "drew a firearm and pointed it at the officer, then it would be acceptable procedure for the officer to draw his weapon and point it at the individual, even up to and including firing a shot." FOF ¶ 43 (11/8/23 Tr. at 411:5-8). It

stands to reason, then, that if the individual actually shoots at the officer, it is acceptable police practice to fire shots back.

And regardless of whether Mr. Murray believed Detective Norton was a police officer, whether Detective Norton acted recklessly is analyzed under "the circumstances as viewed from [Detective Norton's] standpoint." Utah Code § 76-2-103(3) (1974). Again, Plaintiffs have failed to show that Detective Norton deviated from the standard of care that would have been exercised by a typical police officer in his situation, much less that he acted with the reckless mental state required for assault. Detective Norton's actions also therefore meet the definition of self-defense under Utah law—he "reasonably believe[ed]" that his use of deadly force was "necessary to prevent [his] death or serious bodily injury . . . as a result of the [] imminent use of unlawful force" by Mr. Murray. Utah Code § 76-2-402(1) (1994).

iii. Deputy Byron Handcuffing Mr. Murray Was Not an Assault.

Deputy Byron handcuffing Mr. Murray to secure the scene was not an assault. Plaintiffs have not produced any evidence that handcuffing Mr. Murray caused any bodily injury to Mr. Murray beyond the gunshot wound he had already suffered, or that the handcuffing created any risk of injury. Deputy Byron handcuffed Mr. Murray for safety reasons; it was not an attempt or threat to injure him. FOF ¶ 58. Because Plaintiffs have not shown that Deputy Byron caused, created a substantial risk of causing, threatened, or attempted to cause any injury to Mr. Murray, they have not shown that an assault occurred. Utah Code § 76-5-102(1) (2003).

Additionally, Plaintiffs have failed to show that Deputy Byron acted recklessly. Trooper Young described how, as he and Deputy Byron approached Mr. Murray, they saw that Mr. Murray was breathing and "[didn't] know what he could or couldn't do, get up, whatever happens." FOF ¶ 58. Deputy Byron, who did not know the severity of Mr. Murray's injuries,

initially saw some movement from Mr. Murray and handcuffed him for safety reasons. *Id.* Detective Norton testified that it was "standard protocol that – anytime something like that happens, you want to secure the person and make sure they can't harm you." FOF ¶ 59. Plaintiffs have not produced any evidence to the contrary. They have therefore failed to show any deviation from the standard of care that typical law enforcement officers would have exercised in this situation, much less the sort of "gross deviation" that would constitute recklessness. Utah Code § 76-2-103(3) (1974).

Further, like Detective Norton's firing of shots at Mr. Murray, the District of Utah found Deputy Byron's handcuffing of Mr. Murray to be reasonable:

> Here, Deputy Byron did not know the identity of Mr. Murray or anything about him other than his involvement in the high-speed chase, his flight from a police officer, subsequent exchange of gun shots, and a gun on the ground next to Mr. Murray. He rushed onto the scene and had little time to assess the situation before he handcuffed Mr. Murray. He knew he had a wounded suspect and that emergency personnel were on the way. He secured the scene, as he was trained to do. Securing the scene, no matter what it might present, is a reasonable response by a police officer.

Jones Dist. Ct., 3 F. Supp. 3d at 1194. This finding is not impacted by the spoliation sanction imposed with respect to the Hi-Point .380 and should have preclusive effect here. *Jones v. United States*, 149 Fed. Cl. 335, 350 (2020), *rev'd and remanded*, No. 2020-2182, 2022 WL 473032 (Fed. Cir. Feb. 16, 2022) (this Court correctly noting that the Federal Circuit's previous ruling limiting the preclusive effect of the District of Utah's decision only applied to Plaintiffs' ability to "litigat[e] whether Mr. Murray had shot himself, and whether federal agents had spoliated evidence."). In any case, the same conclusion reached by the District of Utah is warranted here. Without proving recklessness, Plaintiffs have failed to prove that an assault occurred.

3. Reckless Endangerment

Plaintiffs have failed to show that any responding law enforcement officer engaged in reckless endangerment. 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 § 76-5-112(2). Further, to be guilty of reckless endangerment, Detective 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). As the District of Utah found, the officers' "attempt to apprehend Mr. Murray while protecting themselves—and the means they used to do so—were expected police behavior in light of the circumstances." *Jones Dist. Ct.*, 3 F. Supp. at 1195. Plaintiffs failed to prove recklessness for the sake of Utah's reckless endangerment statute for the same reasons they failed to establish that any of the officers acted with the reckless mental state required for assault.

4. Conspiracy and Obstruction Crimes

Plaintiffs next allege that the officers at the scene engaged in a criminal conspiracy, destroyed evidence, and obstructed the FBI's investigation to protect Detective Norton. ECF No. 219. These alleged crimes are not "wrong[s] upon the person or property" of Mr. Murray and are thus not actionable under the "bad men" provision. 1868 Treaty, art. 6. Even if they were actionable, though, Plaintiffs have not proven that any of the alleged crimes occurred.

a. Plaintiffs' Alleged Conspiracy and Obstruction Crimes Are Not Actionable Under the "Bad Men" Clause.

Not every crime committed by a non-Indian on the Ute Reservation is actionable under the "bad men" provision. Rather, only "wrong[s] upon the person or property of the Indians" can

provide a basis for liability. *Id.* The inquiry under the "bad men" clause focuses on the individual—rather than the Tribe or some broader sense of societal harm—because Article 6, like similar provisions in other treaties, "concerns the rights of and obligations to individual Indians[.]" *Hebah v. United States (Hebah I)*, 428 F.2d 1334, 1337 (Ct. Cl. 1970). The "bad men" provision also focuses on "reimburs[ing]" individuals for the harm done to their own person or property. 1868 Treaty, art. 6; *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). If crimes beyond those causing actual injury to person or property were actionable under the "bad men" provision, damages would go beyond the "reimburs[ement]" contemplated by the treaty. 1868 Treaty, art. 6.

Plaintiffs' alleged conspiracy crimes—as opposed to their alleged substantive crimes—would not have caused injury to Mr. Murray's "person or property" and are therefore not actionable under the "bad men" provision. *Id.* Conspiracy is an agreement between two or more people to violate the law. *See infra* (III)(4)(b)(i). Conspiracy is a distinct offense from the crime the conspirators agreed to commit and does not require that the substantive offense actually be committed. *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975). An agreement to commit a crime does not itself cause harm to person or property. Only the distinct, substantive offense the conspirators agreed to—if actually committed—would cause any injury to person or property and thus be actionable under the "bad men" provision.

Plaintiffs also identify numerous crimes relating to obstruction of justice, false statements, destruction of evidence, and official or unofficial misconduct that would be crimes against a public interest in achieving justice, not against Mr. Murray's "person or property." 1868 Treaty, art. 6. 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 would have specifically injured Mr. Murray. Without actual injury to Mr. Murray's person or property, there is no injury from which to "reimburse" him (or his family), and it is not clear how damages stemming from those alleged crimes could even be calculated. Moreover, the alleged crimes would not be peace-shattering crimes of "moral turpitude" that the "bad men" provision was intended to cover. *See Hernandez v. United States*, 93 Fed. Cl. 193, 199 & n.5 (2010) (citing *Ex parte Kan-gi-Shun-ca*, 109 U.S. 556, 567 (1883)); *Garreaux v. United States*, 77 Fed. Cl. 726, 736 (2007). In light of the above, Plaintiffs' alleged crimes of conspiracy, 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. Even If They Were Actionable, There Is No Evidence to Support Plaintiffs' Alleged Conspiracy and Obstruction Crimes.

i. Conspiracy

Even if conspiracy (as opposed to the underlying substantive offense) was actionable under the "bad men" provision, Plaintiffs have not proven a criminal conspiracy existed. Plaintiffs allege the officers at the scene violated 18 U.S.C. § 1117, which prohibits conspiracy to commit murder, and 18 U.S.C. § 241, which prohibits conspiracy against rights. Proving conspiracy requires showing that 1) "two or more persons agreed to violate the law," 2) the alleged conspirator "knew at least the essential objectives of the conspiracy," 3) the alleged conspirator "knowingly and voluntarily became a part of [the conspiracy]," and 4) "the alleged coconspirators were interdependent." *United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992); *see also United States v. Cushing*, 10 F.4th 1055, 1065 (10th Cir. 2021). The conspirators must have "reach[ed] an agreement with the 'specific intent that the underlying crime be

committed' by some member of the conspiracy." *Ocasio v. United States*, 578 U.S. 282, 288 (2016).

There is no evidence to support Plaintiffs' allegation of a conspiracy to shoot Mr. Murray. The only officers who were at the scene before shots were fired were Trooper Swenson, Detective Norton, Trooper Young, Deputy Byron, and Officer Davis. FOF ¶¶ 21, 25-26. Plaintiffs have produced no evidence of a "meeting of the minds" among any of these officers where they agreed to shoot Mr. Murray. *United States v. Anderson*, 981 F.2d 1560, 1563 (10th Cir. 1992). Trooper Swenson's communications with these officers, to the extent he spoke to them at all, were limited to pointing out the direction where Mr. Murray had run. FOF ¶¶ 22, 28-29; FOF ¶ 25. Detective Norton and Trooper Young simply agreed to go in different directions to look for Mr. Murray, FOF ¶¶ 25, 29, and Detective Norton did not speak to Deputy Byron at all before encountering Mr. Murray, FOF ¶ 29. Officer Davis only briefly spoke to Trooper Swenson before driving off on his own. FOF ¶ 28. There is no way to reasonably infer from these brief conversations that any of the officers agreed to a common purpose of murdering Mr. Murray. There is also a dearth of evidence that these law enforcement officers—many of whom barely knew one another—agreed to alter or destroy evidence to cover-up a murder. Plaintiffs therefore have not proven that a conspiracy existed.

Likewise, Plaintiffs have not established the elements of 18 U.S.C. § 241, which prohibits conspiracy against rights. Plaintiffs appear to be alleging the officers at the scene conspired to deprive Mr. Murray of his Fourth Amendment right to be free from unconstitutional seizures. The Supreme Court has interpreted 18 U.S.C. § 242, which is the substantive provision prohibiting deprivation of rights under color of law, as "requir[ing] more than a 'generally bad purpose,' but also the specific 'purpose to deprive the [victim] of a constitutional right.'" *United*

States v. Kim, 857 F. App'x 375, 375 (9th Cir. 2021) (quoting *Screws v. United States*, 325 U.S. 91, 107 (1945)). "The Court later read the same 'specific intent' element into section 241." *Id.* (citing *Anderson v. United States*, 417 U.S. 211, 223 (1974)). This demanding *mens rea* requirement is linked to the breadth of sections 241 and 242, which "incorporate constitutional law by reference" and could otherwise be seen as unconstitutionally vague. *United States v. Lanier*, 520 U.S. 259, 265-267 (1997). "[T]he specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Id.* at 104. This serves the same purpose qualified immunity does in the civil context, *Lanier*, 520 U.S. at 270-71, and prevents the statute from "becom[ing] a trap for law enforcement agencies acting in good faith." *Screws*, 325 U.S. at 104.

Plaintiffs have not shown that the officers at the scene acted in concert with "a specific intent to interfere" with Mr. Murray's Fourth Amendment rights. *Anderson*, 417 U.S. at 223. First, with respect to the initial pursuit of Mr. Murray, Plaintiffs have not produced evidence that there was a meeting of the minds to arrest Mr. Murray as opposed to simply locating him to question him or ensure his safety and/or the officer's safety. Trooper Swenson, for example, described how he asked the other officers to look for Mr. Murray because he "didn't know what the situation was with [Mr. Murray], why he had ran, if he was a -- a willing participant in this . . . It was for his safety." FOF ¶ 22 (11/6/23 Tr. at 68:6-9). Trooper Swenson did not ask Detective Norton to arrest Mr. Murray, and none of the officers recalled Trooper Swenson giving them directions beyond asking them to look for Mr. Murray. FOF ¶¶ 22, 25, 28. The conversations between the other officers, described above, were very brief and did not reveal a plan to arrest Mr. Murray. This failure of proof precludes Plaintiffs' conspiracy claim.

Plaintiffs have also failed to establish the exacting *mens rea* requirement for criminal civil right violations. The officers at the scene "were responding to a rapidly-unfolding and unpredictable situation," and "[s]ecuring the scene, no matter what it might present, is a reasonable response by a police officer." *Jones Dist. Ct.*, 3 F. Supp. 3d at 1194, 1204. Mr. Murray had just fled from police in a remote area after a high-speed chase. The officers could not know his tribal membership status before stopping him, and Detective Norton did not know whether he was the passenger or driver of the suspect driver. FOF ¶ 22. The District of Utah stated the following with respect to the initial search for Mr. Murray:

> The pursuit was reasonable under the circumstances. Mr. Murray was part of a high speed chase and fled from Trooper Swenson. This information created sufficient concern in the officers' minds about Mr. Murray's motives for the flight and the danger he posed, if any. They reasonably believed he had committed at least one crime (flight from a police officer) and pursuing him for that was reasonable. Even though the BIA police had been called as a precaution, no BIA police officer was there at the time. It was completely reasonable to apprehend the fleeing suspect so they could fully investigate and turn him over to the proper authorities, if necessary.

Jones Dist. Ct., 3 F. Supp. 3d at 1195. The District of Utah also found that Deputy Byron and Trooper Young approaching and handcuffing Mr. Murray was reasonable and that they were both entitled to qualified immunity for those actions. *Id.* at 1192-93. The District of Utah's findings regarding the reasonableness of the officers' search for and eventual handcuffing of Mr. Murray are not impacted by the sanction in this case and should have preclusive effect on Plaintiffs in this Court. In any case, the same conclusion is warranted here. As this Court held at summary judgment, the finding that "the officers' actions were reasonable relies on state-of-mind facts inconsistent with the intent that § 242 requires." *Jones v. United States*, 149 Fed. Cl. 335, 362 (2020), *rev'd and remanded on other grounds*, No. 2020-2182, 2022 WL 473032 (Fed. Cir. Feb.

16, 2022). It is likewise inconsistent with the intent Section 241 requires.[13] *Kim*, 857 F. App'x at 375.

ii. Destruction of Evidence, Obstruction of Justice, and Misconduct

Plaintiffs allege that the officers at the scene violated a long list of federal and state criminal provisions concerning tampering with evidence, obstruction of justice, and official and unofficial misconduct. These include the following:

- Evidence-Based Crimes: Destruction of records or evidence, 18 U.S.C. §§ 13, 1152, 2071, 2232; Tampering with evidence, falsification or alternation of government records, Utah Criminal Code §§ 76-8-510.5, -511.

- Obstruction-Related Crimes: Obstruction of justice, 18 U.S.C. §§ 13, 1152, 1503, 1505, 1512, 1519; Making false statements to federal investigators, 18 U.S.C. §§ 13, 1001, 1152; False claims and conspiracy to defraud United States, 18 U.S.C. §§ 13, 1152, 287, 371; Obstruction of criminal investigation, Utah Criminal Code §76-8-306; Interference with public servant or peace officer, Utah Criminal Code §§ 76-8-301, -305.

- Misconduct: Official or unofficial misconduct, Utah Criminal Code §§ 76-8-201, -203.

ECF No. 219. For the reasons explained above, none of these crimes are actionable under the "bad men" clause of the 1868 Treaty. Regardless, Plaintiffs did not show that any of these statutes were violated.

First, all of Plaintiffs' alleged evidence-based crimes require actions and mental states that Plaintiffs failed to establish at trial. Both 18 U.S.C. § 2232 and Utah Code § 76-8-510.5

[13] Even if Plaintiffs had somehow shown that the initial search for Mr. Murray met the elements of a conspiracy under Section 241, that "conspiracy" did not cause any harm to Mr. Murray's person or property. The District of Utah found that no police perimeter was formed around Mr. Murray during the initial search and that the only seizure of Mr. Murray occurred when Deputy Byron handcuffed him, *Jones Dist. Ct.*, 3 F. Supp. 3d at 1186-93, which this Court found at summary judgment was not a criminal act, *Jones*, 149 Fed. Cl. at 362. Plaintiffs would have therefore still failed to state a claim under the "bad men" clause of the Ute Treaty.

require some sort of destruction or other manipulation of evidence. After the spoliation hearing in this case, "[t]here [was] no evidence to show or even suggest that the physical evidence at the scene of the shooting was manipulated, let alone fabricated." Spoliation Order at 32, ECF No. 209. That remains unchanged after trial. In fact, the evidence produced at trial only further supports the conclusion that no evidence at the scene was altered. Officer Sean Davis, for example, testified that he was at the scene soon after Trooper Young and Deputy Byron handcuffed Mr. Murray, stood over a shell casing until the ambulance arrived to make sure no one disturbed it, and that no one touched the shell casings or Hi-Point .380 during that time. FOF ¶¶ 64-65, 68. Deputy Byron likewise testified that he did not see anyone touch evidence at the scene. FOF ¶ 68. 18 U.S.C. § 2071 and Utah Code § 76-8-511 concern the manipulation or fabrication of records or items filed with the government. But Plaintiffs have not produced any evidence that any records were falsified or manipulated nor identified what records they believe to have been tampered with. Further, all of these statutes have a knowledge or intent requirement for which Plaintiffs have not produced any supporting evidence. 18 U.S.C. §§ 2071, 2232; Utah Code § 76-8-510.5 (2005); Utah Code § 76-8-511.

Second, Plaintiffs' alleged obstruction-related crimes fail for the same reason—Plaintiffs did not show that any prohibited actions took place or that the officers acted with the required mental states. It is unclear how Plaintiffs believe many of the statutes they cite apply to the facts of this case. At base, though, the claims all fail because Plaintiffs have not offered any evidence that the officers sought to interfere with the FBI's investigation, lied to investigators, tried to influence each other's or anyone else's cooperation with the investigation, concealed or manipulated evidence, or did anything else deceptive or improper. And again, all of the statutes relating to obstruction of justice on which Plaintiffs rely have a knowledge or intent requirement

that there is no evidence to support. *United States v. McHugh*, No. 21-453, 2022 WL 1302880, at *10 n.19 (D.D.C. May 2, 2022) ("Courts have uniformly construed 'corruptly' in [18 U.S.C.] § 1503(a) as a *mens rea* term requiring specific intent."); *United States v. Little*, 753 F.2d 1420, 1443 (10th Cir. 1984) ("18 U.S.C. § 371 is, by definition, a specific intent crime."); 18 U.S.C. §§ 287, 1505, 1519; 18 U.S.C. § 1512 (2002); Utah Code § 76-8-305 (1990); Utah Code § 76-8-301 (1998); Utah Code § 76-8-306 (2005).

Finally, none of the officers violated Utah's official or unofficial misconduct statutes. With respect to the official misconduct statute, Plaintiffs have not shown that any of the officers, with the *intention* of benefiting themselves or harming someone else, "*knowingly* commit[ed] an unauthorized act which purports to be an act of his office." Utah Code § 76-8-201 (emphasis added). Similarly, Utah's unofficial misconduct statute was clearly not violated. That statute is only implicated where a person "exercises or attempts to exercise any of the functions of a public office when the person" has not taken the oath of office, has not filed a required bond, was not elected or appointed, has remained in office past their term or after their office has been removed, or withheld or destroyed items belonging to their successor. Utah Code § 76-8-203 (1996). None of those circumstances are present here.

To summarize, Plaintiffs' alleged conspiracy, destruction of evidence, and obstruction crimes are not actionable under the "bad men" provision because they would not be crimes against Mr. Murray's "person or property" for which Mr. Murray could be "reimburs[ed]." 1868 Treaty, art. 6. But even if these alleged crimes were actionable, Plaintiffs have not produced any evidence that they were committed. They therefore do not provide a basis for liability on Plaintiffs' "bad men" claim.

V. CONCLUSION

Plaintiffs' allegations that Mr. Murray was murdered and assaulted on April 1, 2007, and that local and state officers worked in concert to cover-up those crimes remain completely unfounded after trial. Indeed, Plaintiffs largely failed to adduce any evidence to support their case. Plaintiffs did not meaningfully challenge the officers' testimony of what happened at the scene; they did not seriously question or challenge the physical evidence or timeline of events; and their own expert opined that Mr. Murray's death was likely a suicide or accident. Because Plaintiffs have failed to demonstrate by a preponderance of the evidence that the alleged crimes were committed against Mr. Murray on April 1, 2007, the Court should enter judgment in favor of the United States.

Respectfully submitted this 8th day of January, 2024,

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division

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 January 8, 2024, a copy of the foregoing Proposed Findings of Fact and Conclusions of Law was filed through the Court's CM/ECF system, which will automatically send email notifications to the attorneys of record.

s/ J. Scott Thomas
Jeffrey Scott Thomas