UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

UNITED STATES OF AMERICA,	)	
	)	**CR 17-00016-DLH**
Plaintiff,	)	
	)	**MEMORANDUM OF LAW**
- vs -	)	**IN SUPPORT OF**
	)	**MOTION FOR TRANSFER**
RED FAWN FALLIS,	)	**OF VENUE**
	)	
Defendant.	)	

I. INTRODUCTION.

The undeviating rule of the Supreme Court was expressed by Mr. Justice Holmes over a century ago in *Patterson v. Colorado*, 205 U.S. 454 (1907):

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) (quoting *Patterson*, 205 U.S. at 462).

Because she has been subjected to massive, pervasive, and prejudicial publicity, the Defendant, Red Fawn Fallis, moves this Court, pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure, for a transfer of venue from the

District of North Dakota in order to ensure that she receives a fair trial "induced only by evidence and argument in open court, and not by any outside influence" as guaranteed to her by the Sixth Amendment to the U.S. Constitution.

Red Fawn Fallis, a Lakota from the Pine Ridge Indian Reservation of South Dakota, is part of an indigenous-led grassroots movement ["Water Protectors"] that sought to protect ancient and sacred sites and water resources of the Lakota People of the Standing Rock Reservation that were endangered by the construction of the Dakota Access Pipeline. Many of the Water Protectors suffered highly publicized arrests during the demonstrations in opposition to the DAPL.

Fallis is charged in the Superseding Indictment herein with Civil Disorder, Discharge of a Firearm During A Crime of Violence, and Possession of a Firearm and Ammunition by A Felon. Trial is scheduled to take place in the District of North Dakota at Bismarck, North Dakota. Transfer from the District of North Dakota is required by F.R.Cr.P. 21(a) because so great a prejudice against the Defendant exists in the transferring district that she cannot obtain a fair and impartial trial there.

II. MASSIVE, PERVASIVE AND PREJUDICIAL PRE-TRIAL PUBLICITY ATTENDED THE DAPL PROTESTS.

Fallis cannot receive a fair trial in North Dakota as a result of the massive, pervasive and prejudicial pre-trial publicity that has attended the pipeline protests

and, specifically, her arrest and prosecution.

The National Jury Project ("NJP"), a jury-consulting firm with four decades of experience in jury research, conducted attitudinal surveys in the Bismarck/Mandan area in order to explore the impact of pre-trial publicity on community sentiment and its impact on Water Protectors' – including Fallis' – ability to obtain a fair trial. As the prime population center for central North Dakota, the Bismarck/Mandan area would provide much of the overall pool of prospective jurors for her case. A similar survey was conducted in Cass County – the seat of the Fargo Division of the District Court. The surveys, conducted by and under the supervision of Diane Wiley, President of the NJP-Midwest and a long-time jury consultant,[1] were "designed in accordance with accepted survey research principles, and followed the same basic format which has been accepted in numerous state and federal courts." [Wiley Affidavit, attached hereto as Exhibit A (Ex-A), pp. 8-9)].

The NJP surveys concluded that it is "highly likely that the defendant protesters will not be able to receive fair trials from petit jurors impaneled in Morton and Burleigh or surrounding counties" and the Bismarck Division generally in DAPL protest cases. [Ex-A, p. 2]. While there is comparatively less

[1] Ms. Wiley's *curriculum vitae* is attached as Ex-A, App. 1.

prejudice in the Fargo Division, the survey found that "a substantial majority of those interviewed in Cass County have prejudged the protesters as guilty as well" and the NJP President concluded that "there is a high risk that Ms. Fallis cannot receive a fair trial in the Fargo Division either" – although the likelihood of a fair trial would be higher than in the Bismarck Division [Ex-A, pp. 2-3].

A. There Was Massive and Pervasive Pre-Trial Publicity In North Dakota.

The National Jury Project reviewed and analyzed DAPL-related media coverage to which the prospective venire was subjected between March and December 23, 2016 in the Bismarck media market and between August and January 11, 2017 in the Fargo media market. It found that the Bismarck Tribune, undisputedly the region's leading newspaper with statewide distribution, published 647 articles related to DAPL protests between August and December 23 alone – averaging more than four articles per day - that have, by and large, been "extremely damaging to the defendant protesters, portraying them as violent and as 'paid professionals' and 'outside agitators'", and otherwise reinforcing negative public perception of Water Protectors. [Ex-A, p. 28, 30, 32-33]. The television coverage was "similarly intense", and 99% of Morton County respondents reported that they had seen media coverage of the protests. [Ex-A, pp. 28-29]. The Fargo Forum, which is the second most distributed newspaper in the state, had a

total of 579 articles between June 2016 and January 11, 2017 – an extraordinary amount of coverage in seven months. The NJP review found that much of the coverage "included statements from law enforcement, politicians and other opinion leaders talking about how many protesters had been arrested, how most were from out-of-state, and that many were 'violent' and had past criminal arrests. Protesters were characterized by these opinion leaders as violent and a threat to the community." [Ex-A, p. 34].

The NJP surveys found that residents in the potential venire areas had strong feelings regarding the pipeline and its protesters: 74% of Morton County and 68% of Burleigh County responders believe the Dakota Access pipeline should be built [Ex-A., p. 26], and "58% of Morton County and 53% of Burleigh County respondents indicated that they, or someone they know, has some kind of personal connection to the protests and/or have been affected by the protests." [Ex-A, p. 12].

Pro-DAPL demonstrators - including an individual outside a January, 2017 jury trial who campaigned for Water Protectors to "go the f___home", labeled them "terrorists", and urged "somebody", presumably the jurors and/or court officials, to "send them all to prison" – have had a visible and well publicized presence in the Bismarck-Mandan area. [Photograph of Morton County

Courthouse Protester, 1/31 attached hereto as Exhibit B]. A series of recently leaked and publicized Situation Reports generated by TigerSwan, a private security firm employed by Energy Transfer Partners and apparently working in close cooperation with law enforcement officials, acknowledges the hostile attitude toward Water Protectors prevalent among residents of the Bismarck-Mandan area. *See* Nov. 21 TigerSwan Situation Report, p. 1 ("[l]ocal residents have started their own social media pages to spread pro-DAPL & pro-LE sentiment") [attached hereto as Exhibit C]; Nov. 13 TigerSwan Situation Report, p. 1 ("...local residents are growing increasingly frustrated with the illegal actions of the protesters as well as the actions taken by out of state agitators. Most locals are now carrying weapons to protect themselves...") [attached hereto as Exhibit D]; Nov. 18 TigerSwan Situation Report, p. 1 (referencing organization of local residents entitled "Defend Bisman" which "supports local law enforcement and DAPL workers", "counter[s] the #NoDAPL protesters in Bismarck/Mandan", and "update[s] their members and LE of protester locations and activities") [attached hereto as Exhibit E].

The surveys further reflected the existence of an "extremely high level of knowledge of the protests" in the Bismarck/Mandan area [Ex-A, p. 9], and predicted that panels of jurors can be expected to "have strong emotional feelings

about the protesters, the protests and their impact on the community." [Ex-A, p. 5]. The surveys' chief researcher said that, in her 43 years of jury pool research, this case is the only time she has found "100% recognition of the issues involved in a court case." [Ex-A, p. 6].

The impact of such a blizzard of media coverage and resulting community discussion was revealed during the attitudinal surveys. A substantial number of surveyed eligible jurors in Morton and Burleigh Counties indicated that they perceive DAPL protesters as a threat to community safety, claiming that: "they are shooting at the police", "[t]hey've disrupted our whole lives", "they're protesting and totally disrespecting our law enforcement", "they were slashing law enforcement's tires", "they've caused too much damage", "they are violent", and "I think they're terrorists." [Ex-A, pp. 50-51].[2]

B. The Pre-Trial Publicity Tainted the Prospective Venire.

The NJP surveys found that as of mid-December 2016, approximately 75% of the juror-eligible population of Morton County and 77% of the juror-eligible population of Burleigh County stated that DAPL protesters who have been

[2]All the respondents' verbatim responses to the survey questions are in Appendices 4 (Morton County), 5 (Burleigh County) and 6 (Cass County) to the Affidavit of Diane Wiley. [Attached hereto as Ex-A, App. 4, Ex-A, App. 5, and Ex-A, App 6]. The verbatim responses provide a powerful window into the extent of vitriol and hostility toward Water Protectors such as the Defendant among members of the jury pool statewide.

charged with crimes are probably or definitely guilty. [Ex-A, pp. 16-17]. Moreover, approximately 88% of the juror-eligible population of Morton and Burleigh Counties indicated strong signs of prejudice by declaring one or more of the following: that they could not be fair and impartial jurors, that they had previously expressed their opinion that the arrested protesters were guilty, and/or that they thought that most of the protesters charged with crimes are probably or definitely guilty. [Ex-A, p. 18].

To ascertain the prejudicial impact of such negative publicity on attitudes outside the Bismarck Division jury pool, an attitudinal survey was also conducted of the prospective venire of Cass County, including Fargo, North Dakota. The survey found that 61% of the juror-eligible population of Cass County stated that arrested protesters are definitely or probably guilty [Ex-A, p. 16], and that 73% of the juror-eligible population answered one or more of the three above questions strongly indicating signs of prejudice. [Ex-A, p. 18].

The NJP's surveys revealed that extensive exposure to news coverage and other extra-evidentiary material about the protests, combined with the large percentage of the population personally affected, or familiar with others personally affected, by the protests, and the high rate of prejudgment that arrested protesters are guilty "makes[s] it very difficult, if not impossible, for jurors to presume the

protesters are innocent and to impartially review the evidence as to the charges against them." [Ex-A, pp. 58-59].

C. The Government Itself Contributed To, And Exacerbated, the Widespread, Prejudicial Publicity.

Government agents and authorities exacerbated the existing community prejudice by generating widespread publicity both about Water Protectors in general and about Fallis' case in particular.

As early as August 2016, Morton County Sheriff Kirchmeier, based in Mandan, North Dakota, began to publicly characterize protesters as dangerous and violent, stating on Prairie Public Radio that protests had "turned unlawful and that some protestors had pipe bombs and fireworks." [Ex-A, p. 31]. Subsequently, his Department utilized both traditional and social media outlets to portray DAPL demonstrators in a negative light, including the release of a "Know the Truth Morton County" video series with titles such as "Protesters harass female officers" and "Protester arrested trying to locate law enforcement operations base." [Ex-A, p. 33]. Videos entitled "A Time-Line Of Recent Unlawful Protestor Activity" and "Protestors Violate Law Enforcement Conditions" were posted on the Morton County Sheriff's Department Facebook page in January, 2017 and, as of May 17 2017, had been viewed approximately 50,000 and 20,000 times, respectively. [Screenshot attached hereto as Exhibit F]. These videos were among

more than forty DAPL-related videos posted to the Facebook page, including numerous press conferences featuring Sheriff Kirchmeier, Governor Dalrymple, and other law enforcement officers and public officials.[3]

Some of the publicity specifically targeted Fallis. On October 31, 2016, the Morton County Sheriff's Department posted a video on its Facebook account featuring N.D. Highway Patrol Captain Bryan Niewand's "first hand account" of the actions allegedly committed by Fallis on October 27, 2016. In this video, Captain Niewand states that "[i]t is unbelievable that a law enforcement officer was not shot" and that the lack of casualties "wasn't because [Fallis] was trying to aim away from law enforcement." The accompanying post, which has been viewed approximately 37,000 times and shared 353 times as of June 12, 2017, named Fallis as the shooter and indicated that she was facing prosecution for the now long-dismissed State attempted murder charge. [*See*, Screenshot of "Officer gives first hand account of protester shooting 10/27/16, attached hereto as Exhibit G; copy of Niewand's video account attached hereto as Exhibit H].

Further reflecting the State and District-wide law enforcement generated publicity about the protest and resistance to the DAPL pipeline, the Cass County

[3]These videos are viewable online at https://www.facebook.com/pg/MortonCountySD/videos/?ref=page_internal

(Fargo, N.D.) Sheriff was quoted in an article entitled: "Cass County Sheriff Says Intense North Dakota Pipeline Protests Haunted His Dreams Nightly" in which he described the DAPL protests as "the mecca for every eco-terrorist." [Jan. 14, 2017 Bismarck Tribune, attached hereto as Exhibit I]. On Feb. 6, 2017, a KVRR article contained a transcript of an extensive television interview of the Sheriff wherein he detailed alleged violence and threats against officers. [Attached hereto as Exhibit J].

Moreover, recently released government email threads generated by local, state, and federal officials, as well as Daily Intelligence Updates developed by TigerSwan and obtained from the North Dakota Department of Emergency Services through Open Records requests, suggest a coordinated law enforcement effort – at times involving members of the United States Attorney's Office – to propagate media narratives favorable to law enforcement and prejudicial to Water Protectors.

The "Public Relations" slides contained within the October 19 and 20 Daily Intelligence Updates, for example, proclaim: "Positive – Sheriff's Association continues to publish positive news stories. Local news media is highlighting the negative effects the protestors are having to the area." These slides contain sample screen shots of North Dakota news articles including one entitled "Authorities

highlight criminal histories of some pipeline protesters" as well as articles suggesting that Water Protectors threaten children and attack livestock. Oct. 20 Daily Intelligence Update, p.4 [attached hereto as Exhibit K]; Oct. 19 Daily Intelligence Update, p.4 [attached hereto as Exhibit L]. *See also* Nov. 5 Daily Intelligence Update, p. 4 [attached hereto as Exhibit M] ("Sheriff's Association continues to publish positive news stories and show that the protest movement is no longer peaceful or prayer full"); Oct. 12 "Intel Group" Email Thread, p. 6 [attached hereto as Exhibit N] (email from National Security Intelligence Specialist Terry Van Horn of the United States Attorney's Office stating: "Sheriff K will be meeting with Concerned residents and ranchers in St. Anthony, KYFR will be there too"); Nov. 22 Email Thread, p. 1-7 [attached hereto as Exhibit O] (conversation between North Dakota National Guard Public Information Officer and North Dakota Department of Emergency Services Public Information Officer regarding efforts to "get [the] story out" in reference to article, circulated by Mr. Van Horn of the United States Attorney's Office, asserting that Water Protector Sophia Wilansky's arm was grievously injured when a vehicle chain snapped; note also that article circulated by Mr. Van Horn contradicted an alternative explanation for Ms. Wilansky's injury contained in an email, also sent by Mr. Van Horn, distributed nine minutes prior to the aforementioned article); Oct. 5

Operations Briefing, p. 3 [obtained from North Dakota Department of Emergency Services through Open Records request, attached hereto as Exhibit P] (DAPL operations briefing signed by Morton County Sheriff Kirchmeier listing strategic goal of "[b]alanc[ing] all public information (traditional/social) coverage to ensure support of strategic goals through active engagement and messaging.").

D. Much of the Pre-Trial Publicity Specifically Targeted Fallis.

Much of the prejudicial pretrial publicity throughout North Dakota included specific references to Fallis. A November 18, 2016 article on the West Fargo Pioneer site entitled "Port: #NoDAPL Demands Release Of Woman Charged With Attempted Murder, Here's What She Did" describes how Fallis is "the woman who was arrested at a #NoDAPL riot last month and charged with attempted murder for allegedly firing shots at law enforcement officers." [Attached hereto as Exhibit Q]. The article links to a blog post [Nov. 17, 2016 "Say Anything Blog", attached hereto as Exhibit R] which hosts a PDF of the attempted murder complaint against Fallis – and later dismissed – as well as a link to a video of Fallis' arrest with the following commentary: "based on this video it seems ridiculous that anyone would dispute the validity of the charges against her." The Cass County Sheriff's office Facebook page also contains a link to this blog post, and a multitude of prejudicial and conclusory allegations, claiming to "show[] why

[Fallis] was charged with attempted murder." [Screenshot of Nov. 17, 2016 post, attached hereto as Exhibit S].

Nearly a month later, another article published on the West Fargo Pioneer website contained video footage from Fallis' arrest. [Dec. 12, 2016 West Fargo Pioneer Article, "Three Spent Casings Found In Protester's Revolver, ATF Agent Testifies" (originally published in Bismarck Tribune), attached hereto as Exhibit T]. At least five (5) additional radio, television, and newspaper stories in the Fargo area, several prominently featuring Fallis' mugshot, reported her attempted murder charge and characterize her as having fired gunshots at law enforcement officers. [Oct. 31, 2016 West Fargo Pioneer article, "Pipeline Protester, Accused Of Shooting At Officers, Charged With Attempted Murder", attached hereto as Exhibit U; Oct. 31, 2016 KFGO article, "North Dakota Pipeline Protester Charged With Attempted Murder", attached hereto as Exhibit V; Oct. 31, 2016 Valley News Live article, "Pipeline Protester Charged with Attempted Murder of a Law Enforcement Officer", attached hereto as Exhibit W; Oct. 31, 2016 Mix Fargo article, "DAPL Protester Charged With Attempted Murder", attached hereto as Exhibit X; and Nov. 1, 2016 KVRR article, "DAPL Protester Charged With Attempted Murder Of Police Officer", attached hereto as Exhibit Y].

Grand Forks, North Dakota, where the North Dakota District Court sits

furthest from the Bismarck/Mandan area, has also been infected by prejudicial publicity directed at Fallis. A cursory analysis of the Grand Forks Herald website, www.grandforksherald.com, reveals substantial overlap with the Bismarck media market, and at least three articles published on its website specifically address Fallis' case – two of which include references to the now-dismissed attempted murder charge. [Jan. 4, 2017 Grand Forks Herald article, "Port: #NoDAPL Activists Protest Federal Grand Juries In Bismarck Today", attached hereto as Exhibit Z; Dec. 12, 2016 Grand Forks Herald article, "Three Spent Casings Found In Protester's Revolver, ATF Agent Testifies" (originally published in Bismarck Tribune), attached hereto as Exhibit AA; and Oct. 31, 2016 Grand Forks Herald article, "Pipeline Protester, Accused Of Shooting At Officers, Charged With Attempted Murder", attached hereto as Exhibit BB].

Prejudicial pre-trial publicity regarding Fallis extends to numerous other locations within North Dakota, including Dickinson and Williston. [*See*, Nov. 18, 2016 Dickinson Press article, "Port: If North Dakota's Tribes Want Respect They should Call Off Rioters" ("one of the protesters, a woman named Red Fawn Fallis, was arrested and charged with attempted murder after she allegedly fired a handgun at police officers") attached hereto as Exhibit CC; Nov. 1, 2016 Williston Herald article, "Dakota Access Protester Charged With Attempted Murder",

attached hereto as Exhibit DD]. Additionally, news stories regarding DAPL protesters in general, and Fallis specifically, have been published by the Mid-West Electronic Forum News Service, and thereby circulated in media markets across the State. [*See*, *e.g.*, Oct. 31, 2016 article, "Pipeline Protester, Accused Of Shooting At Officers, Charged With Attempted Murder"), attached hereto as Exhibit EE**].**

Publicity in the Bismarck-Mandan area also often specifically targeted Fallis – alleging her guilt for various crimes of which she has never been convicted and is no longer even accused. One Bismarck Tribune article entitled "Female Protester Charged With Attempted Murder" describes her as facing "the most serious charge of any Dakota Access Pipeline protester so far." [Oct. 31, 2016 Bismarck Tribune article, attached hereto as Exhibit FF]. *See also* "Arrests Made In Downtown Bismarck, Rally Held In Mandan For Female Protester", [Nov. 17, 2016 Bismarck Tribune article, attached hereto as Exhibit GG]; "Three Spent Casings Found In Protester's Revolver, ATF Agent Testifies" [Dec. 12, 2016 Bismarck Tribune article, attached hereto as Exhibit HH (characterizing the accusations against Fallis as "firing a gun three times toward police officers" and publishing inculpatory comments allegedly made by Fallis)].

On October 31, 2016, the Morton County Sheriff's Department posted a

video on its Facebook account featuring N.D. Highway Patrol Captain Bryan Niewand's "first hand account" of the actions allegedly committed by Fallis on October 27, 2016. [*See*, Section C, supra.] The accompanying post, which names Fallis as the shooter and continues to suggest, now incorrectly, that she is facing attempted murder charges in state court, was viewed approximately 37,000 times and shared 353 times as of June 12, 2017. [*See* Exhibits G, H]. Such widely disseminated accounts by law enforcement contributed to the highly prejudicial public perception that Fallis is guilty of attempted murder, even though the State charge against her was dismissed.[4]

Notably, while the intent of the surveys conducted by the NJP was not to specifically ask about Ms. Fallis' charges and while they contained no questions or prompts designed to elicit discussion of her case, more than twenty respondents in the Bismarck/Mandan area went beyond general statements about violent protesters and threats against law enforcement, and referred to allegations specific to Fallis' case when asked "[w]hat do you remember reading or hearing about arrested protesters." Responses referencing Fallis' case included: "they are shooting at the police", "I heard about the one who was shooting at the police

[4]11/28/17 Motion to Dismiss, *State v. Red Fawn Fallis*, 30-2016-CR-001696 ("so the Defendant may be taken into federal custody") [attached hereto as Exhibit II]; Order Dismissing Complaint, *Fallis, Ibid.* [attached as Exhibit JJ].

officers, she should be put under the jail", "[t]he one with the red fawn had the gun and fired it", "[t]here is a woman charged with murder", "I remember a woman pulling a pistol from her purse and shooting at police", "one woman shot at the cops and was arrested", "[o]ne shot at police", "[a] woman who is a felon shot at a cop", "[o]ne had a gun", "I heard somebody tried to shoot at cops", "pulling gun out on the cops", "[o]ne woman from another state fired a weapon towards a police officer", "one gal [from a Denver tribe] went to Federal Court for pulling a gun on a police officer", "attempted murder, 3 shots fired", "[an] out-of-stater who had a warrant against her [had a gun]", "[t]here was a gun fired at police", "[o]ne lady is now charged federally for pointing and firing a gun at an officer", "one gal charged for attempted murder for pulling a gun at law enforcement", "[o]ne woman was arrested for threatening the life of a cop", "attempted murder", "shot at police officers", and "[o]ne of the them shot at the cops." [Ex-A, App. 4, p. 6, 11, 16, 19, 21, 26, 31, 61, 66; App. 5, p. 6, 26, 56, 61, 71, 76, 91, 96]. When asked to explain why he or she felt the protesters are guilty, one respondent replied: "Well the woman who had the gun and fired it. She was charged in Federal court." [Ex-A, App. 4, p. 19]. The Cass County survey also elicited comments which specifically referenced Fallis. [Ex-A, p. 52].

The surveys also revealed that the bias against Water Protectors is further

exacerbated by provincial attitudes against Fallis since she is not a resident of North Dakota. *See* Ex-A, p. 47, 50 ("[a] large number of respondents felt very negatively about many of the protesters being from out of state," and "[t]he anger in Cass County was primarily towards 'out of state', 'paid' and/or 'professional protesters'". Although Red Fawn Fallis is a Lakota, whose family is from the Pine Ridge Indian Reservation (South Dakota), the surveys of the potential jury pool in the Bismarck/Mandan area generated unsolicited statements that she was "from another state", "from a Denver tribe", and an "out-of-stater." [Ex-A, App. 4, p. 66; App. 5, p. 6, 26].

As the National Jury Project President explains, this pre-trial atmosphere of discussion, rumor, and speculation "results in potential jurors being exposed to extra-evidentiary material which, when brought into the jury room, seriously compromises a defendant's right to a fair trial based only on the evidence presented in the courtroom." [Ex-A, p. 38].

E. The District Court Itself Recognized the Difficulty of Seating a Fair and Unbiased Jury in DAPL Cases in Light of the Pre-Trial Publicity.

The Hon. Judge Daniel Hovland, during a January 26, 2017 Status Conference in *Dundon v. Kirchmeier*, 1:16-cv-406 (D.N.D.) [the 42 U.S.C §1983 action by Water Protectors], acknowledged that he was "not sure how we are *ever*

going to be able to pick a jury in *North Dakota*" [Transcript of Telephonic Status Conference; *see*, *Fallis*, Docket No. 46, Attachment 3, p. 6 (*emphasis added*)]. The Court explained that the difficulty in empaneling a jury was "...because *almost everybody has seen* not only what went on on November 20th, but *what went on in October* and the months leading up to that." [*Fallis*, Docket No. 46, Attachment 3, p. 6 (*emphasis added*)]. And as to the extent of negative publicity, the Court acknowledged that: "*Everybody in the state* has seen videos and has personally seen protests that have gone on in Bismarck, outside the federal courthouse, blocking traffic, closing streets, ignoring requests to retreat, disperse. *It was almost a daily occurrence in the fall*." [*Fallis*, Docket No. 46, Attachment 3, pp. 6-7 (*emphasis added*)]. In noting the widespread extent of the media coverage of events at Highway 1806 near the Backwater Bridge, where Fallis was arrested, Judge Hovland said:

> [T]hat *bridge was the topic of every news report, every TV report that came out on almost a daily basis* that it had been closed for quite some time because of all the problems that were occurring on Highway 1806. And Highway 1806 was closed for a long time down there and still is closed, I believe. That subject was discussed by every member of the Congressional delegation, the governor's office *on almost a daily basis, law enforcement officers that were speaking to the press.... I saw myself on the TV, video of so-called leaders* of the different protest camps that were being interviewed by the press on TV that were talking about their displeasure about the bridge and Highway 1806 being closed.

[*Fallis*, Docket. No 46, Attachment 3, pp. 10-11 (*emphasis added*)].

Finally, in its Order Dissolving a Temporary Restraining Order issued against protest actions which interfered with DAPL construction in *Dakota Access v. Archambault, et al,* Case No.: 1:16-cv-296 (D.N.D.) [*see*, *Fallis*, Docket No. 46, Attachment 2], as well as in a subsequent Order Denying Preliminary Injunction against the use of excessive force against Water Protectors in *Dundon* [*Dundon*, Docket No. 99], the Court wrote:

> With respect to the assertion the movement has been a peaceful protest, one need only turn on a television set or read any newspaper in North Dakota. There the viewer will find countless videos and photographs of 'peaceful' protestors...verbally taunting, harassing, and showing disrespect to members of the law enforcement community... *Nearly every day, the citizens of North Dakota are inundated with images of 'peaceful' protesters engaging in mindless and senseless criminal mayhem.*

[Order Dissolving TRO, *Dakota Access*, *supra*, pp. 3-4 (*emphasis added*); Order Denying Preliminary Injunction, *Dundon , supra,* p. 4].

The extensive, inflammatory and prejudicial pre-trial publicity referenced herein has so impacted the community that a fair and impartial jury cannot be seated in Fallis' case.

III. ARGUMENT AND AUTHORITY.

A. Red Fawn Fallis Is Entitled To A Fair And Impartial Jury.

The Sixth Amendment to the United States Constitution guarantees Red Fawn Fallis a fair trial by an impartial jury: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

A criminal defendant cannot be deprived of her life, liberty, or property "until there ha[s] been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power." *Chambers v. State of Florida*, 309 U.S. 227, 236-237 (1940). Thus, "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences."). *Sheppard v. Maxwell*, *supra*, 384 U.S. at 362.

The presence of pervasive prejudicial publicity can create a presumption that an accused cannot receive a fair trial from an impartial jury in the state or district in which the crime is alleged to have been committed. The right to be tried before an impartial jury is a "fundamental element of due process" and "pretrial publicity may have [ ] such an impact upon the populace from which the jury is drawn as to create a probability....that this right of impartiality has been violated." *United States v. Crow Dog*, 532 F.2d 1182, 1187 (8th Cir. 1976). The proposition

that a "presumption of prejudice" may exist in a community and within a jury pool due to massive pretrial publicity was articulated in *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).[5]

A criminal defendant is entitled to a change of venue for trial where this "*probability of unfairness*" exists [*Estes v. Texas*, 381 U.S. 532, 542-543 (1965) (*emphasis added*)], or even where there is a "*reasonable likelihood* that prejudicial news prior to a trial will prevent a fair trial...." *Sheppard v. Maxwell, supra*, 384 U.S. at 363 (*emphasis added*).

The constitutional right to a fair trial, implemented by a change of venue pre-trial, is provided for in the federal courts by Rule 21(a) of the Federal Rules of Criminal Procedure which states, in pertinent part, that "upon motion of the defendant", the Court "*shall* transfer the transfer the proceedings" if the Court "is satisfied" that there exists "so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial" in the present venue. (*Emphasis added*).

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[5]Subsequent Supreme Court cases declined to extend *Irvin* because of various factors, including four years passing between the extensive publicity and trial, by which time "community sentiment had softened" (*Patton v. Yount*, 467 U.S. 1025, 1031-332 (1984)); a far lower percentage of the jury pool having a poisoned viewpoint of the accused (*Murphy v. Florida*, 421 U.S. 794, 803 (1975)); the large size of the community from which the jury pool was drawn and the nature of the media coverage, much of which was policy-oriented (*Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991)); and reduced media saturation levels in a large metropolitan area as opposed to a rural community (*Skilling v. U.S.*, 561 U.S. 358, 394 (2010)).

A change of venue from the District of North Dakota is necessary to secure a fair trial by an impartial jury for Red Fawn Fallis given the massive amount of inflammatory pre-trial publicity surrounding both the anti-DAPL protests and Fallis' individual prosecution and the negative sentiment pervading the community from which her jury pool is to be selected. A change of venue is required by F.R.Cr.P. 21(a) and by the Sixth Amendment to the U.S. Constitution.

B. Prejudicial Pre-Trial Publicity and Hostile Community Attitudes Against Red Fawn Fallis and the DAPL Protest Movement Raises a Presumption of Unconstitutional Unfairness That is Confirmed by Attitudinal Surveys Revealing a Severely Biased Jury Pool Within the District of North Dakota.

The Eighth Circuit has held that a court should grant a change of venue motion where pre-trial publicity has "so pervaded the proceedings as to give rise to a presumption of prejudice against the defendant." *United States v. Faul*, 748 F.2d 1204, 1211 (8th Cir. 1984). *See*, *United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001) (questioning whether the pretrial publicity was "so extensive and corrupting" as to give rise to a presumption of "unfairness of constitutional magnitude"); *Pruett v. Norris*, 153 F.3d 579, 585 (8th Cir. 1998) (distinguishing those cases where the pre-trial publicity is extensive, but not especially inflammatory or prejudicial).

In *Irvin v. Dowd, supra*, the Supreme Court found the record showed a

"pattern of deep and bitter prejudice" against the defendant charged with murder, due to intense and inflammatory pre-trial publicity surrounding the homicide and that the publicity pervaded the community where he was tried. *Ibid*, 366 U.S. at 720, 727. The *Irvin* trial court granted the defendant's initial motion for change of venue, transferring venue to a neighboring county, but denied a subsequent motion for a second change of venue, necessitated by ongoing publicity that created a renewed danger of a biased jury pool. In support of his argument, Irvin provided the trial court with 46 exhibits of articles from newspapers delivered to 95% of the residences, showing widespread negative media exposure. *Ibid*, 366 U.S. at 725. The motion was denied. *Ibid*, 366 U.S. at 720. During *voir dire*, approximately 62% of the prospective jurors were excused by the trial court for cause after they articulated a fixed opinion as to the defendant's guilt. *Ibid*, 366 U.S. at 727. Irvin was subsequently tried and convicted of murder. *Ibid.*, 366 U.S. at 718. A post-conviction examination of the *voir dire* record showed that almost 90% of those examined "entertained some opinion as to guilt – ranging from mere suspicion to absolute certainty." *Ibid*, 366 U.S. at 727.

In considering whether the state trial court had deprived the defendant of due process by refusing to transfer the case, the *Irvin* court acknowledged that it is not required that "jurors be totally ignorant of the facts and issues involved" and

"it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Ibid*, 366 U.S. at 722-723. The Supreme Court noted that each of the jurors who served indicated that they could render an impartial verdict, despite whatever opinion he or she had developed after being exposed to the pre-trial publicity. *Ibid*, 366 U.S. at 724. The Court recognized that these statements were likely sincere, but found that "[w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Ibid*, 366 U.S. at 728. Together with "the force of [the] continued adverse publicity," which sustained excitement and fostered a strong prejudice among the jury venire, the Court held the trial court made a manifest error in finding the requisite impartiality for each juror had been met [*Ibid*, 366 U.S. at 723-724, 726] and vacated the judgment of conviction [*Ibid*, 366 U.S. at 728].

The prospective venire facing Red Fawn Fallis is strikingly similar to the venire impaneled in *Irvin v. Dowd, supra*. Like the incident in *Irvin*, where local newspapers and other media outlets barraged the potential venire with pervasive and negative publicity about that case, the North Dakota press in general, and to a greater extent the press within Morton and Burleigh Counties, published voluminous stories about the protests by Water Protectors in general and about

Fallis' arrest in particular. Between August and December 23, 2016 alone, the Bismarck Tribune published 647 articles related to DAPL protests – averaging more than four articles per day - which were, by and large, "extremely damaging to the defendant protesters, portraying them as violent and as 'paid professionals' and 'outside agitators'", and reinforcing negative public perception of Water Protectors [Ex-A, p. 28, 30, 32-33].

In *Irvin*, approximately 95% of the local residences received newspapers reporting on the case. *Ibid*, 366 U.S. at 725. In Fallis' case, 99% of those surveyed in Morton County, 94% in Burleigh County, and 93% in Cass County reported that they had seen media coverage of the protests. [Ex-A, p. 29].

In *Irvin*, 90% of those surveyed "entertained some opinion as to guilt." *Ibid,* 366 U.S. at 727. In Fallis' case, based on the NJP survey results, "[w]hen the answers to [ ] various questions are combined, 73% of Cass County, 88% of Morton County and 88% of Burleigh County respondents say they can't be fair and/or have prejudged the protesters," therefore including Fallis. [Ex-A, p. 18].

In addition to the many inflammatory stories described and cited in Section II, infra, there has also been a purported eye-witness account by a N.D. Highway Patrol Captain published on the Morton County Sheriff's Department's website,

viewed by tens of thousands.[6]

It is not simply the amount of negative press coverage that is disconcerting here, although the volume alone is prodigious. It is the extent of the resulting vitriol and hostility toward Fallis and other DAPL protesters that is truly alarming. The jury surveys found that numerous Morton and Burleigh County residents made inflammatory statements about the protesters including: "[t]hey've disrupted our whole lives", "[t]hey are violent", "I think they're terrorists", and in Fallis' case, that "she should be put under the jail instead of in jail." [Ex-A, pp. 50-51; Ex-A, App. 4, p. 11].

Notably, the NJP surveys revealed that such negative statements were common even among those who believed, and, indeed said, that they could be fair jurors in a DAPL related case, including a large majority of the self-declared "fair jurors" (76% in Cass County, 81% in Morton County, and 85% in Burleigh County) who expressed an opinion as to the guilt of Water Protectors. [Ex-A, pp. 41-42]. While statements from the Cass County survey were generally less inflammatory than those from Morton and Burleigh County residents, a substantial number of Cass County residents nonetheless demonstrated prejudice and hostile

[6]Viewable online at: httsp://facebook.com/MortonCountySD/videos/348089298876748 – *see also* Exhibits G, H.

attitudes with statements such as: "those that were arrested are guilty", "[t]hey are breaking the law and being destructive", "[n]ot one person agrees with the protesters.... They are just troublemakers", "[w]e are all just sick and tired of them being here", "[n]one of the protests are peaceful and all of the protesters are unlawful criminals", "I totally disagree with all of them and I would want them all to get charged with the maximum for what they've done", and "[a]s far as I'm concerned they should all be arrested." [Ex-A, pp. 52-55].

References to the incident with which Fallis is charged were prevalent among prospective Cass County jurors – again, in the absence of any questions specifically eliciting information about her case – and included statements such as: "I happen to know of one case where the woman brought a weapon across state borders, fired it twice and she is a felon already", "[o]ne was a shooting", "some woman was down there shooting a gun", and "there was a shooting." [Ex-A, 53-55].

Critically, in Fallis' case, potential jurors – again, including some of those who indicated that they could be fair – focused much of their animosity on their perception that protesters posed a violent threat to police officers, stating, for example: "[t]hey were doing wrong to law enforcement", "I've heard of aggression towards law enforcement", "I...remember quite a few threats being thrown at law

enforcement people", and "[t]hey have been...attacking some law enforcement." [Ex-A, pp. 22, 44-46]. Such prejudice, combined with a prospective juror's reluctance or inability to recognize and admit bias, will prevent Fallis from obtaining twelve jurors who can truly be fair and impartial.

In *United States v. Blom, supra*, the Eighth Circuit found that the trial court did not abuse its discretion in denying a pretrial motion for change of venue. *Ibid*, 242 F.3d at 803-804. The defendant in that case was charged with a high-profile kidnap and murder of a local teenage girl, amidst significant pre-trial media coverage of the case. *Ibid*, 242 F.3d at 802-803. Following Blom's arrest, local media published his criminal record, publicized the discovery of human remains found on his property, and speculated that the defendant was also involved in a series of unsolved kidnappings and murder. *Ibid*.

In denying the defendant's motion for change of venue in *Blom*, the federal district court noted that the defendant's argument "rests exclusively on the *quantum* of publicity that his State and Federal Court charges have received. He has not directed us to any specific portions of the media reports, or to any other evidence, which would require a finding of unconstitutional unfairness." *Blom*, 242 F.3d at 803 (*emphasis added*). Despite the lack of specificity in his motion, the district court moved the trial from Duluth to Minneapolis and excluded all

jurors from the Fifth Division, where the girl was abducted. *Ibid.* The Eighth Circuit upheld the defendant's conviction, stating that "the pretrial publicity in this case did not establish a presumption of inherent prejudice." *Ibid.* at 804.

Although the media coverage in Blom's case was extensive, it was not – unlike Fallis' case – "so inflammatory or accusatory as to presumptively create 'a trial atmosphere that had been utterly corrupted by press coverage'." *Blom*, 242 F.3d at 804 [quoting, *Murphy v. Florida*, 421 U.S. 794, 798 (1975)]. The Eighth Circuit, in affirming Blom's conviction, also noted approvingly that the district court moved the trial to a less affected portion of the district, excluded any jurors from the division where the kidnapping happened, tripled the typical jury pool size, mailed pretrial questionnaires to prospective jurors about exposure to pretrial publicity, and increased the number of peremptory strikes, thereby providing some additional safeguards against undue prejudice. *Ibid*.

Fallis' situation stands in stark contrast to the factors underlying the Eighth Circuit's analysis in *Blom*. In Blom's case, there was no jury survey or other evidence indicating that members of the community had predisposed opinions about the his guilt and he merely relied on the extent of the publicity surrounding his case, without singling out any portions that were especially objectionable. *Ibid*, 242 F.3d at 803. In this case the National Jury Project conducted extensive

pre-trial surveys of the juror-eligible populations in Morton and Burleigh Counties where the case is centrally venued, as well as Cass County on the far-east side of North Dakota. From the results of the surveys, the Jury Project's President concluded that it is "highly likely that the defendant protesters will not be able to receive fair trials from petit jurors impaneled in Morton, Burleigh or surrounding counties" in DAPL-related trials. [Ex-A p. 2]. From the Cass County survey, Ms. Wiley concluded that while hostility is lower than in Morton and Burleigh Counties, "the high likelihood of being unable to select a fair and impartial jury for Ms. Fallis also exists in Cass County." [Ex-A, p. 58].

Additionally, contrary to *Blom*, a Highway Patrol Captain recorded a purported "eyewitness" account of the events involving Fallis, and the Morton County Sheriff's Department published the account on its well viewed website. This added to the frequent and already well-publicized, negative press conferences held by the Sheriff or his subordinates over months, law enforcement allegations of attempted murder against Fallis published on forums such as the Cass County Sheriff's Office Facebook page, and the concerted media strategy promulgated by numerous branches of law enforcement to instill negative perceptions of Water Protectors and pro-law enforcement attitudes among North Dakota residents. [*See* Exhibits K-P]. Courts have long condemned government influenced publicity

affecting criminal cases in particular.[7]

The scathing and denigrating rhetoric targeting the Water Protectors is exactly the kind of "inflammatory [and] accusatory" pre-trial publicity that the *Blom* Court said was absent in that case. *Ibid*, 242 F.3d at 804. The NJP surveys demonstrate the kinds of negative attitudes potential jurors have with respect to Fallis and other Water Protectors after reading and viewing the news coverage, combined with discussions with family members, friends, neighbors, and co-workers. Unlike *Blom*, the political climate around the DAPL cases is saturated with antagonism and derision toward Water Protectors accused of crimes, including Fallis in particular. This has created "a trial atmosphere that ha[s] been utterly corrupted by press coverage", *Ibid.,* as was condemned in *Blom*.

As noted above, the District Court itself, based upon the nature and extent of the pervasive and negative publicity expressed how it was "not sure how we are

[7]Note the long-standing view that has condemned government influenced publicity infecting a criminal case, on both Due Process and supervisory power grounds. *See*, *e.g.*, *Henslee v. United States*, 246 F.2d 190, 193 (5th Cir. 1957) (reversing conviction based on prejudicial publicity and noting "[w]here, as here, unwanted publicity resulted from action taken by the Assistant United State Attorney in connection with something entirely apart from the proper conduct of the trial, however innocent he may have been of any wilful purpose to influence the jury, a much higher standard prevails"); *Rosenberg v. Mancusi*, 445 F.2d 613, 617 (2nd Cir. 1971) (noting that "the role of police in fueling inflammatory news coverage creates an even more substantial risk of a denial of a fair trial.... Not only do official statements engender a greater reliance by the public as to the credibility of the officers making the statements, but they also suggest an official disregard of safeguards inherent in a fair trial"); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 373 (2nd Cir. 1963) (en banc) (prosecutorial source; habeas corpus granted).

ever going to be able to pick a jury in *North Dakota*." (*Emphasis added*). As the Court stated in *Mu'Min v. Virginia*, 500 U.S. 415 (1991), when pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sit in the locale where the publicity is said to have had its effect" and may "base his evaluation [on] his own perception of the depth and extent of news stories that might influence a juror." *Ibid.*, 500 U.S. at 427.[8]

Accordingly, pursuant to the reasoning and analysis of both the *Irvin* and *Blom* Courts, and based on the principles of fundamental fairness and the rights guaranteed her under the Sixth Amendment, this Court should grant Defendant Fallis' Motion for Change of Venue and order that, pursuant to F.R.Cr.P. 21(a), her trial be transferred to a venue outside the District of North Dakota.

C. The Hostile Community Attitudes in This Case are Vastly More Damaging and Prejudicial Than in Most Cases because They Target an Entire Social Movement.

Courts are frequently reluctant to presume inherent prejudice in a community and thereby conclude that the entire jury pool is considered incapable of rendering a fair verdict, and the Eighth Circuit has stated that this presumption

[8]In upholding the District Court's denial of change of venue, the *Mu'Min* Court implicitly found that the size of the jury pool and "kind of community" it exists within can mitigate against the impact of inflammatory publicity, particularly in counties located within large urban areas populated by millions of people. *Ibid.*, 500 U.S. at 429. As the Court knows, North Dakota does not have a city of even one million people, which is a greater number than the population of the entire State and District.

should be reserved for "rare and extreme cases." *United States v. Blom, supra,* 242 F.3d at 803. *See*, *also*, *Snell v. Lockhart* 14 F.3d 1289, 1293 (8th Cir. 1994).[9] Notably, the majority of cases generating Opinions that address the legal standard for granting a change of venue involve an individual defendant outside the context of a larger social movement of which he or she is a part. *See*, *e.g.*, *United States v. Blom, supra*; *United States v. Eagle*, 586 F.2d 1193, 1195 (8th Cir. 1978) (noting that, in contrast to Wounded Knee-related trials, the case "was the result of a family squabble, with no political or racial overtones, and media coverage was minimal" and venue had already been transferred nearly 400 miles).

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[9] In *United States v. Rodriguez*, the Eighth Circuit denied a motion to change venue, in spite of the defendant's citations of two public opinion polls purportedly demonstrating widespread community prejudice. 581 F.3d 775, 785-786 (8th Cir. 2009). The Court held that, in fact, the two public opinion polls did not demonstrate prejudice. *Ibid.* at 786. The two polls that the defendant relied on to demonstrate prejudice in Rodriguez can be distinguished from the NJP polls that are the subject of much of the discussion in this brief. The first of the two polls from the Rodriguez case was not considered to be an accurate measure of public opinion because the survey was conducted in 2004, whereas the trial took place in 2006. *Ibid.* A significant period of time had elapsed, allowing community prejudice to fade. *Ibid.* In contrast, NJP conducted its polls on Standing Rock through December 2016 – mere months ago. The second poll dismissed by the Court in Rodriguez, which took place six months before the trial, revealed that only "42 percent of the respondents strongly held an opinion of Rodriguez's guilt." *Ibid.* As was such, the Court determined "that special voir dire protocols would screen out prejudiced jurors." *Ibid.* The NJP polls cited in this brief demonstrate that a much higher percentage of potential jurors believe that DAPL protesters are probably or definitely guilty. Polls reveal the percentages of respondents either admitting they cannot be fair jurors or expressing, either at the time of the polling or in the past, that arrested DAPL protesters are definitely or probably guilty, is 88 percent in both Morton County and Burleigh County. Note also that the District Court in *Rodriguez* transferred the trial from Grand Forks to Fargo, assembled a jury pool twelve times the normal size, required prospective jurors to answer a 121-question form, spent 21 days conducting voir dire, and granted Rodriguez additional peremptory strikes. *Ibid.* at 785.

Cases involving DAPL defendants and, specifically, this defendant – who faces the "most serious charge" of all DAPL protesters arrested – are distinct from those involving only the conduct of a single defendant with respect to a jury's ability to evaluate evidence fairly and impartially, as Wounded Knee-era courts within the Eighth Circuit recognized. Although jurors who are exposed to pretrial publicity regarding an individual defendant may be able to "lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court" [*Irvin v. Dowd, supra*, 366 U.S. at 723], too many of North Dakota's prospective jurors especially in Morton, Burleigh, and the surrounding counties "hav[e] been...either personally affected by the protests or know[] others who have been personally affected by the protests." [Ex-A, p. 59]. DAPL defendants, including Fallis, are viewed by the residents as part of a larger threat, not just to an individual victim, but to the community and the social fabric at large.

As one NJP survey respondent replied when asked if he or she could be fair and impartial: "Maybe at first I could have been an impartial juror but it has gone on too long." [Ex-A, App. 5, p. 70]. Even the most heinous of crimes, however widely publicized, rarely have a direct impact on such a large percentage of a community as have the DAPL protests and counter-protests impacting Fallis' case.

It is in cases which "touch[] the life of a community" [Ex-A, p. 40], such as

those arising out of the previous large-scale Native American protests at Wounded Knee, SD, that courts have been most inclined to grant an inter-District transfer of venue or, at a minimum, to grant transfer to another Division within the District to ensure that defendants are able to receive a fair trial as required by the Sixth Amendment to the U.S. Constitution. *See*, *e.g.*, *United States v. Crow Dog, supra,* 532 F.2d at 1186 (District Court originally transferred venue from South Dakota to St. Paul, Minnesota, in an attempt to avoid the high level of prejudice amongst the potential venire against American Indian Movement (AIM) protesters; after original indictments were dismissed and superseding indictments were returned, the District Court again transferred venue, this time to the Northern District of Iowa); *United States v. Bear Runner*, 502 F.2d 908, 913 (8th Cir. 1974) (finding trial judge's voir dire insufficient to ensure an impartial jury for the Native defendant, noting that "[t]he feelings of the local citizenry ran high" following the events of Wounded Knee and "tak[ing] judicial notice of the fact that the criminal charges against those American Indians involved in Wounded Knee were moved by the court out of the Deadwood [S.D.] locale."). *See*, *also*, *United States v. Means*, 409 F.Supp. 115, 117-118 (D.N.D. 1976) (although the court denied defendant's motion for change of venue, it transferred a post-Wounded Knee protest case to Fargo a full three years after the protest had ended, finding that

"substantial racial prejudice exists in the Southwestern Division of the District of North Dakota, and the Indian people are the objects of that prejudice" and that the existence of prejudice requires "special attention by the court to assure that Indian people receive fair trials").

Fallis' case, involving an acknowledged anti-DAPL Water Protector, like the Wounded Knee and post-Wounded Knee cases involving members of AIM, is inextricably tied to the indigenous-led anti-DAPL protest movement, both as a result of her well-recognized identity as a Native American and by virtue of the fact that the allegations against her stem from a highly publicized arrest that occurred during a pivotal confrontation between law enforcement and Water Protectors. The wisdom of the Wounded Knee-era courts led to the transfer of those cases and others that, by their very nature, invoked matters of both racial and political prejudice amongst the prospective venire. The courts frequently found that those cases were best tried outside the District of South Dakota in order to guarantee the defendants a fair trial by a fair and impartial jury.

Like the earlier South Dakota defendants, Fallis has presented the Court with substantial evidence of massive, pervasive and negative media reports, often generated by law enforcement, which have aroused negative community sentiment about the anti-DAPL protests, Water Protectors, the protesters in general and

about Fallis in particular. These stories and reports, together with personal citizen encounters with anti-DAPL protests and police activities and the resulting community involvement have, as evidenced by the NJP attitudinal surveys conducted in Morton, Burleigh, and Cass Counties, so prejudicially impacted the prospective venire as to poison their view of protesters, including Fallis, and make it impossible for her to empanel a fair and impartial jury and thereby obtain a fair trial within the District of North Dakota.

IV. CONCLUSION.

> More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

Mr. Justice Frankfurter's concurrence in *Irvin v. Dowd*, 366 U.S. at 729-730.

Red Fawn Fallis respectfully requests, pursuant to F.R.Cr.P. 21(a) that this Court transfer her case outside the District of North Dakota, in order to reasonably protect her fundamental right to a fair trial by a fair and impartial jury as guaranteed her by the Sixth Amendment to the U.S. Constitution.

Dated this 16th day of June, 2017.

Respectfully submitted,

/s/ Bruce Ellison

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