UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	**No. 17 CR 16-DLH**
- vs -	)	
	)	**REPLY TO GOVERNMENT'S**
RED FAWN FALLIS,	)	**RESPONSE TO MOTION**
Defendant.	)	**FOR TRANSFER OF VENUE**

Defendant RED FAWN FALLIS, by counsel, files the following Reply to the Government's Response to her Motion for Transfer of Venue.

I. Introduction

The Government argues initially that "venue is proper in the District of North Dakota." Red Fawn Fallis [hereinafter, "Fallis"] agrees that venue is proper in this District, but directs the Court's attention to Fed. R. Crim. P. 21 and a long line of cases interpreting the Rule which hold that, regardless of where venue is properly sited, where pre-trial publicity has generated such prejudice among the prospective venire that an impartial jury cannot be impaneled, a transfer of venue is warranted—and, indeed, necessary—to ensure the defendant a fair and impartial trial. *United States v. Mercer*, 853 F.2d 630, 633 (8th Cir. 1988).

Fallis asserts that the extensive pre-trial publicity of the anti-DAPL protests and her arrest have generated sufficient negative attitudes in the community to taint the prospective jury pool and make it impossible for her to obtain a fair trial and that, despite the postponement of the trial until December 2017, the Government has not shown that the prejudice against the protesters in general, and Fallis in particular, has dissipated to the extent that a fair trial is possible.

Fallis further contends that government-sanctioned public relations strategies are largely responsible for the prejudicial attitudes now prevalent amongst the jury pool and warrant a change of venue from the District.

Finally, the remedies suggested by the Government[1]—transfer to the Eastern Division (Fargo), summoning a larger jury pool, increasing the number of peremptory challenges and permitting a more extensive or individualized voir dire—are insufficient.

I. Negative Community Attitudes Among the North Dakota Jury Pool Have Not Dissipated to the Extent Necessary to Enable Fallis to Obtain a Fair Trial.

The Government fails to address the statewide barrage of publicity specifically regarding Red Fawn Fallis documented in Defendant's Memorandum. [Docket No. 63, pp. 13-19 (hereinafter, Dkt.__, p.__)]. This publicity includes widely-viewed and currently available Facebook posts from both the Morton and Cass County Sheriff's Offices suggesting that Fallis committed attempted murder. [Dkt. 63, pp. 13-14, 16-17; Exhibits C, G, H, S].[2] The media not only focused attention on Fallis' case in particular, but characterized it as the "most serious" of all DAPL charges. [Dkt. 63, p. 16; Exhibit FF]. A National Jury Project (NJP) jury survey of twenty survey respondents in the Bismarck-Mandan area referenced Fallis' case, sometimes in specific detail, in response to general questions about DAPL protesters. [Dkt. 63, pp. 17-18]. This exceeds the attention shown any other individual DAPL case. It is fair to conclude that an even greater portion of the jury pool than those respondents polled have developed a negative opinion about the person accused of the single "most serious" charge.

The Government asserts, but presents no evidence to support its allegation, that the empanelled state juries have been "fair and impartial." Yet, out of the four DAPL-related trials that have resulted in jury verdicts, three juries have found a total of twelve defendants guilty[3] and

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[1] Government Response, Dkt. 75, p. 11.

[2] These posts are still viewable online as of August 11, 2017 on the Morton and Cass County Sheriff's Offices' respective Facebook pages.

[3] *See North Dakota v. Steven Voliva* (Case No. 30-2016-CR-1187); *North Dakota v. Benjamin Shapiro* (Case No. 30-2016-CR-1190); *North Dakota v. Kevin Frank Decker, et. al.*, Case No. 30-2016-CR-0943; *North Dakota v. Emmalyne Garrett* (Case No. 30-2016-CR-01435); *North Dakota v. Dakota Luke* (Case No. 30-2016-CR-01444).

a single jury[4] rendered two not guilty verdicts. *See North Dakota v. David Leon Archambault, II* (Case No. 30-2016-CR-00951); *North Dakota v. Dana Edward Yellowfat* (Case No. 30-2016-CR-00949).[5] However, there are three critical distinctions between the *Archambault* and *Yellowfat* trials and Fallis' case. First, a misdemeanor jury requires that only six jurors be seated and it is more difficult to seat an impartial jury with twice as many individuals who each risk bringing improper bias into the decision-making process. Second, Archambault and Yellowfat were charged with Disorderly Conduct, a nonviolent class B misdemeanor – a minor accusation compared to the "most serious charge" leveled against Fallis. Third, Archambault and Yellowfat are Chairman and Councilman of the Standing Rock Sioux Tribe, respectively. Responses to the surveys reveal a trend of greater sympathy amongst the jury pool to local tribal members. [Dkt. 63, Ex-A, p. 43 ("The Native Americans from ND don't want the problems but Native Americans from outside ND are causing the most trouble"); p. 44 ("Protestors are out of control…. Not the local Natives but the protestors that were brought in.")].

Conversely, the surveys show an aggravated level of hostility towards defendants such as Ms. Fallis who are not from North Dakota and who are perceived as "outside agitators." [Dkt. 63, pp. 18-19; Dkt. 63, Ex-A, p. 46 ("The ones from out-of-state, they should bulldoze the hell outa here"); p. 46 ("[M]any protesters are from out-of-state. I don't like that.")]. One six-person jury's acquittal in the case of local and well-known tribal members charged with a nonviolent misdemeanor does not mean that a twelve-person jury is likely to be "an impartial jury free from

[4] Contrary to the United States' suggestion, Issac Weston was acquitted not by the jury, but by the Honorable Judge Cynthia Feland following a Motion for Judgment of Acquittal. *See* Exhibit A. The other eight defendants in *Decker, et. al*. were convicted by the jury.

[5] The Government is likewise incorrect that the third defendant in this case, Alayna Eagleshield, was found not guilty by the jury. Eagleshield was acquitted by The Honorable Judge Allan Schmalenberger midtrial following a Motion for Judgment of Acquittal. *See* Exhibit B.

outside influences," *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966), where an out-of-state defendant is accused of a violent act, with rampant publicity sensationalizing the allegations.

The Government cites *United States v. Rodriguez*, 581 F.3d 775 (8th Cir. 2009) for the proposition that a district court is within its discretion to grant little weight to public opinion polls;[6] yet, this study is not such a poll. NJP's surveys explicitly deal with prospective jurors' belief in the innocence or guilt of DAPL defendants such as Fallis – the principal issue that jurors will assess at trial. In contrast, the NJP surveys regarding the DAPL demonstrators reveal a blanket attribution of guilt amongst the venire in pipeline cases generally, as well as a heightened degree of public scrutiny and attention to Fallis' case in particular. While this Court need not accept the validity of the NJP surveys at face value, it should look to the attached data, including the vitriolic and hostile rhetoric in verbatim responses of potential jurors, to help guide its evaluation of the pretrial environment in North Dakota. A private security briefing produced in February, shortly after interviews for the Cass and Morton/Burleigh County jury surveys, indicates that "[l]ocal pro-DAPL sentiment, as well as expansion of anti-protestor groups, is growing." Feb. 10 Situation Report. [Exhibit C]. Numerous social media comments regarding Fallis, in response to Bismarck Tribune and KFYR-TV articles[7] regarding this Court's June

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[6] The *Rodriguez* Court pointed to two other cases in which the Eighth Circuit discounted public opinion polls entirely. *Id.* at 785-86 (citing *Shapiro v. Kauffman*, 855 F.2d 620, 621 (8th Cir. 1988); *United States v. Eagle*, 586 F.2d 1193, 1195 (8th Cir. 1978)). It is clear these cases have no application here. The *Shapiro* case is inapposite in that it dealt with a plaintiff in a civil case who introduced a public opinion poll demonstrating the popularity of the defendant. 855 F.2d at 620-21. In *Eagle*, where the defendant was accused of assaulting a relative, he introduced a survey of community opinions about an entirely unrelated murder trial. 586 F.2d at 1195. The Court noted that, unlike the trials for which the survey was commissioned, the case "was the result of a family squabble, with no political or racial overtones, and [minimal] media coverage" and that venue had *already* been transferred nearly 400 miles. *Id.*

[7] Facebook threads available online at: https://www.facebook.com/BisTrib/posts/10155616823221564 and https://www.facebook.com/KFYRtv/posts/10154702959034103.

pretrial release Order, demonstrate a hostile and inflammatory environment that persists in response to ongoing legal events in Fallis' case.[8]

The nature of the allegations and a generalized bias against Water Protectors and in favor of the Government deleteriously impacts Fallis' ability to receive a fair trial even from jurors who have no knowledge of her specific case. Under 18 U.S.C. § 231(a)(3), the Government must prove the existence of a civil disorder at the time of Fallis' arrest, as well as the lawfulness of the actions of those officers Fallis is alleged to have obstructed. *United States v. Casper*, 514 F.2d 1275, 1276 (8th Cir. 1976). With a venire drawn from a pool in which this Court acknowledges "almost everybody has seen…what went on in October," it is difficult to fathom all twelve members of a jury fully setting aside negative biases. While a jury need not be fully ignorant of a case, Fallis' prospective jury pool has been exposed to "countless videos and photographs [that] [n]early every day…inundated [the jury pool] with images of 'peaceful' protesters engaging in mindless and senseless criminal mayhem." [Dkt. 63, pp. 19-21.] Given such frequent, negative, and intensely visceral exposure to protestors in general, and to Fallis in particular, it is doubtful that an entire jury could truly "lay aside [their] impression[s] or opinion[s]" as due process requires. *See Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

II. Government-sanctioned public relations strategies are largely responsible for the prejudicial attitudes now prevalent amongst the jury pool and warrant a change of venue from the District.

The Government does not contest the extensive influence exerted by local, state, and federal law agencies upon news media throughout North Dakota. Operations Briefings, private

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[8] Several commentators suggest that Fallis is a "terrorist." [Exhibit D]. One commentator, a self-identified safety representative for a North Dakota-based company, insinuated that Fallis should be waterboarded. [Exhibit E]. Another commentator chided "out of state idiots" and argued that Fallis should be imprisoned for life. [Exhibit F].

security reports, and Government email chains by DAPL security, the Morton and Cass County Sheriff's Offices, and National Security Intelligence Specialist Terry Van Horn, among others, reveal a concerted public relations campaign to propagate media narratives favorable to law enforcement and prejudicial to DAPL defendants including Fallis. [Dkt. 46, pp. 9-13]. The National Sheriffs' Association (NSA), in collaboration with the public relations firm Off The Record Strategies (OTR), was active in efforts to discredit Water Protectors by portraying them as violent and criminal[9].

The emails and attached press conference script for the Morton and Cass County Sheriffs confirm that law enforcement, as part of a coordinated media strategy, cast special blame on "[o]utsiders" and "outside agitators," *id.* at pp. 1, 3, contributing to the bias of potential jurors in Cass County and statewide against "out of state protesters" with whom Fallis is associated. [Dkt. 63, pp. 18-19]. A draft NSA "Talking Points" document affirms the centrality of emphasizing "[o]ut of state agitators" to law enforcement's media strategy and indicates the NSA's interest in examples of "*people seen with guns*" (emphasis in original) at the camp. [ND Talking Points – Draft, pp. 1, 2 (attached as Exhibit H); ND Talking Points (attached as Exhibit I)].

Public records indicate Fallis was an explicit focus of government publicity statewide, beyond the already documented social media activity of Morton and Cass County law enforcement.[10] Consistent with the NSA's proposed talking points, governmental officials frequently describe Fallis as an "agitator" (*see*, *e.g.*, ATF Agent Hill's description of Fallis as an "agitator" published in Bismarck Tribune [attached as Exhibit HH, Dkt. 63]) or, as in the

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[9] *See* Mark Pfeifle Email, p. 1 [Exhibit G] (email thread including OTR staff and law enforcement such as Cass County Sheriff Paul Laney). This email shows active attempts to influence public perception of Water Protectors in media markets throughout North Dakota[9] in collaboration with "DAPL folks" utilized to reinforce law enforcement narratives. *Id.*

[10] *See* 11/3 PIO Email Chain [Exhibit J] (state officials including three governmental Public Information Officers (PIOs) discussing video clips of "[s]hots fired by female" as high priority); 11/4 PIO Email Chain [Exhibit K] (notes for media brief leading with reference to protesters shooting at officers).

Government's Response, an "instigator" (*see* Dkt. 75, p. 2). The hostile pretrial environment facing Fallis results in part from law enforcement's explicit objective of discrediting those deemed to be agitators through active public relations efforts.

Due Process concerns are heightened when the right to an impartial jury is compromised by state-generated publicity. In *Henslee v. United States*, 246 F.2d 190 (5th Cir. 1957), the Court reversed a conviction when "unwanted publicity resulted from action taken by the Assistant United States Attorney" and ruled that "however innocent he may have been of any willful purpose to influence the jury, a much higher standard prevails." *Id.* at 193. Emails indicate the U.S. Attorney's Office's involvement in conversations about public relations and media coverage of DAPL-related incidents. *See* Dkt. No. 63, p. 12. In *United States ex rel. Rosenberg v. Mancusi*, 445 F.2d 613 (2d. Cir. 1971), the Court noted that "the role of the police in fueling inflammatory news coverage creates an even more substantial risk of a denial of a fair trial" and that "[n]ot 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 safeguard inherent in fair trial. *Id.* at 617. The *Rosenberg* court affirmed that under certain circumstances, "*pre-trial* publicity can just as easily deprive a defendant of a fair trial." *Id.* at 617-18. *Rosenberg* did not involve a concerted public relations campaign, coordinated between a boutique public relations firm and numerous branches of law enforcement, as is present in Fallis' case. In *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d. Cir. 1963), the court found that the trial judge was clearly erroneous in denying transfer of venue, noting that the pre-trial publicity was "inflammatory", had "reached and entered the consciousness of the overwhelming majority of available talesman", and, crucially, that "much of the prejudicial matter" impacting the jury pool "came from the prosecution." *Id.* at 372. In *Calo v. United*

States, 338 F.2d 793 (1st Cir. 1964), the court held that when negative publicity emanates from the prosecution, doubts regarding the publicity's possible influence on a jury should be resolved in the defendant's favor. *Id.* at 796.

Governmental agencies with a vested interest in the successful prosecution of Fallis must not be permitted to utilize their public stature and credibility to undermine the protections of the Due Process clause and the right to a fair trial. Consequently, doubts about the impact on the generalized law enforcement campaign to sway North Dakota public opinion regarding DAPL-related incidents on the jury pool should be resolved in favor of Fallis.

III. While Hostility Towards Ms. Fallis Appears Most Concentrated in the Bismarck-Mandan Area, Prejudicial Government-Sanctioned Publicity Has Tainted the Jury Pool Throughout North Dakota, Including Fargo.

The Cass County jury survey indicated that 73% of eligible Cass County jurors polled declared 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 and even 76% of self-declared "fair jurors" also expressed an opinion as to the guilt of Water Protectors. [Dkt. 63, p. 8, 28]. In response to generalized questions about hundreds of DAPL defendants, numerous respondents expressed views about Fallis. [Dkt. 63, Ex-A, pp. 53-55]. Further, two thirds of Cass County residents who knew individuals affected by the DAPL demonstrations were connected through relationships to law enforcement officers [Dkt. 63, Ex-A, p. 13], suggesting that the poisoning of the local jury pool may be higher in Fallis' case than in DAPL cases not involving allegations of violence against law enforcement.

This Court has acknowledged the massive statewide pretrial exposure to issues surrounding DAPL cases and its corresponding impact on jury selection. [Dkt. 63, pp. 19-21].

The media efforts of NSA and other state and corporate public relations officers were also directed statewide,[11] including the Fargo area. Cass County Sheriff Laney has played a central role in law enforcement's public relations campaign against Fallis and other DAPL defendants. A webinar featuring Sheriff Laney includes a several minute segment[12] specifically dedicated to Fallis in which the Sheriff makes materially false statements that Fallis "that day had been very confrontational; she'd been walking the line the whole time, getting in people's faces; very militant, very confrontational, very riotous"[13] and that law enforcement first pulled Fallis behind the police line and then "assisted her down to the ground" after she started to fight with arresting officers.[14]

The National Jury Project affidavit, recognized a "high likelihood of being unable to select a fair and impartial jury for Ms. Fallis…in Cass County", [Dkt. 63, Ex-A, p. 58,] even prior to Sheriff Laney's leading role in public relations efforts coming to light. The influence of an outspoken and well-respected Sheriff on the Fargo-area community should not be underestimated. Due Process requires that Fallis be tried by jury uninfluenced by inflammatory and accusatory pre-trial accusations, especially those promulgated by local law enforcement.

IV. Conclusion

The United States implicitly acknowledges the exceptional nature of this case by asking this Court to "employ the tools *necessary* to seat a jury in the District of North Dakota," [Dkt.

[11] While there was certainly national publicity surrounding the DAPL demonstrations, it is clear that the primary target of the NSA and other public relations efforts was North Dakota residents, and that the atmosphere of pretrial hostility and presumption of guilt facing Fallis is specific to North Dakota. See, e.g., Exhibit G; *see also* Cass County Sheriff Facebook #DAPLRIOTS Screenshots (attached as Exhibit L); Dkt. 63, Exhibits Q-Y.

[12] The webinar is viewable online in its entirety at: https://vimeo.com/226584421. The segment in question begins at approximately 45:20.

[13] Video provided by the United States in discovery unambiguously show Fallis' arrival in the general vicinity of the police line only minutes prior to her arrest.

[14] Discovery materials provided by the United States dispute this account.

75, p. 11 (*emphasis added*)], suggesting that this Court consider such resource-intensive measures as assembling a larger jury pool, extending voir dire, awarding additional peremptory challenges and even importing jurors from outside the Division. *Id.* at 9. Nevertheless, such remedies are insufficient.

In short, negative community attitudes have not dissipated, governmental agencies invited prejudicial attitudes against the defendant and Water Protectors generally, and such hostility has tainted the jury pool in North Dakota.

While transfer of venue is reserved for exceptional and rare circumstances, it is exceptional and rare for a trial judge to express doubt on a Court's ability to "*ever*…pick a fair jury" (emphasis added) throughout an entire state on grounds of extensive exposure to pretrial publicity.[15] And it is even rarer that such publicity results from an intentional media strategy involving a Fortune 500 corporation and a national public relations firm working in coordination with local media sources and local, state, and federal law enforcement officials.

WHEREFORE, for the foregoing reasons, Ms. Fallis respectfully requests that the Motion for Transfer of Venue to a district outside North Dakota be granted.

Dated: August 15, 2017

Respectfully submitted,

/s/ Molly Armour
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[15] *See* Docket No. 63, pp. 19-20 (stated in the course of a civil case regarding, similarly to Fallis' case, a controversial and violent confrontation between law enforcement and No DAPL demonstrators).