IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVSION

UNITED STATES OF AMERICA, Plaintiff, v. REDFAWN FALLIS, a/k/a REDFAWN JANIS, a/k/a REDFAWN X. MARTIN, Defendant.	Case No. 1:17-cr-16 **UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR CHANGE OF VENUE**

The United States of America, by Christopher C. Myers, United States Attorney for the District of North Dakota, and David D. Hagler, Assistant United States Attorney, hereby submits this response in opposition to the Motion for Change of Venue filed June 16, 2017. (DCD 60).

I. BACKGROUND

On November 9, 2016, the defendant was charged with possession of a firearm by a convicted felon by way of federal criminal complaint. A federal grand jury returned an Indictment on January 5, 2017, charging her with civil disorder, in violation of 18 U.S.C. § 231(a)(3) and 2; discharge of a firearm in relation to a felony crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and 2; and possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). A superseding Indictment with no additional charges was handed down on March 1, 2017.

II. FACTS

In mid-2016, Dakota Access, LLC, a division of Energy Transfer Partners, of Houston, Texas, began construction of a 1,172-mile pipeline between North Dakota and

Illinois, known as the Dakota Access Pipeline (DAPL). During the summer of 2016, anti-pipeline activists began anti-pipeline demonstrations at the construction site in Morton County, North Dakota. Hundreds of people were arrested by local authorities for various offenses. There was extensive media coverage of the events over the months that the protests took place.

On October 27, 2016, law enforcement was attempting to remove individuals who were trespassing on private land on the east side of Highway 1806, where the pipeline was supposed to be laid. Several individuals were arrested that day for engaging in conduct that was obstructive to law enforcement efforts. A female who was later identified as Red Fawn Fallis was being an instigator and acting disorderly. As law enforcement attempted to arrest her, she resisted and she ultimately fired two rounds from a handgun.

III. DISCUSSION

A. Venue is Proper in the District of North Dakota.

"Proper venue is required by Article III, § 2 of the United States Constitution and by the Sixth Amendment, as well as Rule 18 of the Federal Rules of Criminal Procedure." United States v. Morales, 445 F.3d 1081, 1084 (8th Cir. 2006). Rule 18 of the Federal Rules of Criminal Procedure provides:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.

"'[T]he locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" United States v. Cabrales, 524 U.S. 1, 6-7 (1998) (quoting United States v. Anderson, 328 U.S. 699, 703 (1946)). "In performing this inquiry,

a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." Rodriguez-Moreno, 526 U.S. 275, 279 (1999); United States v. Aiken, 76 F. Supp.2d 1346, 1350 (S.D. Fla. 1999) (quoting Rodriguez-Moreno). As the alleged acts occurred in North Dakota, venue in North Dakota is proper.

General Rule 1.1 of the Local Rules of Court for the District of North Dakota provides that North Dakota constitutes one judicial district comprised of two divisions. Because the offenses occurred in Morton County, North Dakota, which is in the Western Division, the matter is venued in the District of North Dakota, Western Division.

Fed. R. Crim. P. 18 "allows a court to consider 'the prompt administration of justice' in fixing the place of trial, and 'matters of security clearly fall within that consideration.'" United States v. Harris, 25 F.3d 1275, 1278 (5th Cir. 1994) (quoting United States v. Afflerbach, 754 F.2d 866, 869 (10th Cir. 1985)). In addition, "the prompt administration of justice includes more than the case at bar; the phrase includes the state of the court's docket generally. The court must balance not only the effect of the location of the trial will have upon the defendants and their witnesses, but it must weigh the impact the trial location will have on the timely disposition of the instant case and other cases." Harris, 25 F.3d at 1278 (quoting In re Chesson, 897 F.2d 156, 159 (5th Cir. 1990)).

B. The Defendant Has Not Been Prejudiced by Pre-Trial Publicity.

Rule 21 allows for a transfer of venue if a court is satisfied that "so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21(a). When pretrial publicity is the issue, the Eighth Circuit engages in a two-tiered analysis. "At the first tier, the question is whether

'pretrial publicity was so extensive and corrupting that a reviewing court is required to presume unfairness of constitutional magnitude.'" United States v. Blom, 242 F.3d 799, 803 (8th Cir. 2001) (citation omitted); United States v. Allee, 299 F.3d 996, 1000 (8th Cir. 2002).

It is preferable for the trial court to await voir dire before ruling on motions for a change of venue. Blom, 242 F.3d at 804 (citing United States v. Green, 983 F.2d 100, 102 (8th Cir. 1992)). The second tier[1] of the analysis is a determination of whether the jury-selection process established an inference of actual prejudice. Id. "The existence of prejudice among prospective jurors does not necessarily mean that an impartial jury cannot be impaneled." United States v. Mercer, 853 F.2d 630, 633 (8th Cir. 1988).

When pretrial publicity is the basis for relief, a defendant must show that "the publicity inflamed the jury pool, pervasively prejudiced the community against the defendant, probatively incriminated [her], or exceeded the sensationalism inherent in the crime." United States v. Lipscomb, 299 F.3d 303, 340 (5th Cir. 2002). Qualified jurors need not be totally ignorant of the facts and issues involved. Murphy v. Florida, 421 U.S. 794, 799-800 (1975). When pretrial publicity is about the event, rather than directed at the defendant, this may lessen any prejudicial impact. Skilling v. United States, 561 U.S. 358, 384 (2010). That is really the situation we have with the case at hand. A majority of people in Burleigh and Morton Counties were exposed to media coverage of the protest activities in general, but have had very little exposure to the incident involving the defendant in this case.

[1] The second tier, analysis and determination of whether the jury selection process established an inference of actual prejudice, will not be addressed because such process has not even begun in this case.

It is not a due process violation for a court to seat jurors who have heard something about the case. "The mere existence of press coverage, however, is not sufficient to create a presumption of inherent prejudice and thus warrant a change of venue. To create a presumption, the coverage must be inflammatory or accusatory." Allee, 299 F.3d at 1000; see United States v. Tsarnaev, 157 F. Supp. 3d 57, 71 (D. Mass. 2016) (in Boston Marathon bombing case, court concluded that the defendant failed to demonstrate that "this is one of the rare and extreme cases where prejudice must be presumed so as to override the constitutional norms requiring criminal trials to be held in the State where the crimes were committed). "Because our democracy tolerates, even encourages, extensive media coverage of crimes . . . the presumption of inherent prejudice is reserved for rare and extreme cases." Blom, 242 F.3d at 803. "[E]xtensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair." Dobbert v. Florida, 432 U.S. 282, 303 (1977) (citing Murphy v. Florida, 421 U.S. 794, 798 (1975)). The United States Supreme Court has further addressed the issue:

> But the question we decide today is not whether the jurors who ultimately convicted Mu'Min had previously read or heard anything about the case; everyone agrees that eight of them had. Nor is the question whether jurors who read that Mu'Min had confessed to the murder should have been disqualified as a matter of law. See post, at 1913-1914, 1915. This claim is squarely foreclosed by Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), where we upheld a trial court's decision to seat jurors who had read about the case notwithstanding that the defendant's written confessions, which were not admissible at trial, were widely reported in the press. See id., 467 U.S., at 1029, 104 S.Ct., at 2887; id., at 1047, 104 S.Ct., at 2897 (STEVENS, J., dissenting). The only question before us is whether the trial court erred by crediting the assurances of eight jurors that they could put aside what they had read or heard and render a fair verdict based on the evidence.

Mu'Min v. Virginia, 500 U.S. 415, 432 (1991) (O'CONNOR, J., concurring). The Court noted that "[v]oir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." Id. at 431. The Court affirmed the capital murder conviction. Id. at 432. Therefore, a defendant is not entitled to a transfer of venue simply because potential (even actual) jurors have heard something about the case.

Procedure provides for the transfer of a case for trial in another district "if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." The burden of persuasion belongs to the defendant on such a motion and she has failed to meet that burden in this case.

As has been the rule since the 1966 Amendments to Rule 21: "The defendant is given the right to a transfer only when he can show that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district. Transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial as provided in the amendments to Rule 18." Advisory Committee Notes, 1966 Amendments to Rule 21. Defendant, however, has not shown a persuasive due process or Rule 21 basis upon which a change of venue could be granted for this trial.

Defendant supports her contention with a study reported by affidavit of Diane Wiley, President of the National Jury Project, Midwest. A similar study and affidavit were submitted in Morton County District Court in the matter of State of North Dakota v. Kevin Frank Decker, et. al., Case No. 30-2016-CR-0943. In that case, ten defendants who were charged with offenses related to the pipeline protest were joined for trial. One of the defendants, Kelli Maria Peterson (Case No. 30-2016-CR-0937), filed a motion for change of

venue (Doc. ID #78) along with multiple exhibits, including an affidavit of Diane Wiley (Doc. ID #79). The court denied the motion for change of venue (Doc. ID #95) and a jury was seated on January 31, 2017 as to nine defendants.[2] Eight defendants[3] were convicted and one defendant[4] was acquitted.

In denying the venue motion in Decker, et. al. the court noted that other juries had been seated in Morton County in protester-related cases. On December 20, 2016, a jury was seated and rendered verdicts in the case of State of North Dakota v. Steven Voliva (Case No. 30-2016-CR-1187) and State of North Dakota v. Benjamin Shapiro (Case No. 30-2016-CR-1190). Shapiro had filed a motion for change of venue (Doc. ID #17) which was denied (Doc. ID #22).

In State of North Dakota v. Alex Wilson (Case No. 30-2016-CR-1337), a jury was seated and trial held. Before submission to the jury, the court entered an order of dismissal. Similarly, on February 17, 2017, a jury was seated, but before submission, the court entered orders of dismissal in the cases of State of North Dakota v. Emily Weisberg (Case No. 30-2016-CR-1090), State of North Dakota v. Brittany Johnson (30-2016-CR-1093), and State of North Dakota v. Eli Damm (30-2016-CR-1125).

On May 31, 2017, a jury was selected and rendered not guilty verdicts in the cases of State of North Dakota v. David Leon Archambault, II (Case No. 30-2016-CR-00951), State

[2]Trial as to Defendant Kelli Maria Peterson was subsequently rescheduled to a later date.
[3] Kevin Frank Decker (Case No. 30-2016-CR-0943); Joseph Haythorn (Case No. 30-2016-CR-0938); Malia Hulleman (Case No. 30-2016-CR-0935); Sara Juanita Jumpingeagle (Case No. 30-2016-CR-0977); Aaron Neyer (Case No. 30-2016-CR-0954); Donald Strickland (Case No. 30-2016-CR-0932); Jordan Christopher Walker (Case No. 30-2016-CR-0934); and Valerie Dawn Wolfnecklace (Case No. 30-2016-CR-0941).
[4] Isaac Weston (Case No. 30-2016-CR-0933).

of North Dakota v. Dana Edward Yellowfat (Case No. 30-2016-CR-00949), and State of North Dakota v. Alayna Lee Eagleshield (Case No. 30-2016-CR-00956).

Therefore, multiple juries have been seated in Morton County, North Dakota cases arising from charges related to pipeline protest activity, some resulting in not guilty verdicts. This anecdotal evidence leads one to question the accuracy of the numbers cited in the defendant's study used to support the theory that a fair and impartial jury cannot be seated in this case.

In United States v. Eagle, 586 F.2d 1193, 1195 (8th Cir. 1978), the defendant sought a change of venue and in support submitted over 50 newspaper articles and "the results of a 1976 public opinion survey by the National Jury Project alleged to reveal 'the extraordinary level of community prejudice against, and prejudgment of, the Defendant within the state of South Dakota.'" The trial had been moved within district from the Western Division of the District of South Dakota to the Southern Division, a distance of approximately 400 miles. Id. at 1194. The Eighth Circuit affirmed the conviction, finding that "[t]he geographical separation of the Southern from the Western Division, and the hiatus between the date of the cited publicity and the date of jury selection, were sufficient to mitigate the potentially harmful effects of the publicity." Id. at 1195.

There is precedent in the District of North Dakota for moving the location of trial within district to address publicity concerns.

In United States v. Means, 409 F. Supp. 115, 116 (D.N.D. 1976), Defendants filed a motion for change of venue and filed a statistical survey done by the National Jury Project of New York City that cited reasons why the defendants could not receive a fair trial in western North Dakota, including, "pretrial publicity and the impact of AIM and Russell Means as a

symbol of AIM, and its prejudicial impact, more than 9/10 of the sample identified Means, Wounded Knee and AIM and related them one to another." While the District Court held that the defendants could not receive a fair trial in the Southwestern Division of the District of North Dakota, it ordered that the trial be moved to the Southeastern Division. Id. at 117. The Court also ordered other special provisions, including increased peremptory challenges and limited counsel voir dire. Id. at 118.

There are many tools available to the Court to help ensure a fair and impartial jury, including: juror questionnaires; potential individualized voir dire; jury instructions; assembling a larger than normal jury pool; an increased number of peremptory strikes; and importing jurors from outside the Western Division. The United States Supreme Court has recognized that various tools can be used to provide safeguards adequate to ensure an impartial jury. Skilling v. United States, 561 U.S. 358, 372–73, (2010) (questionnaires and voir dire provided safeguards adequate to ensure an impartial jury); see Allee, 299 F.3d 996, 1000 (8th Cir. 2002) (even when there is a risk of presumed prejudice, there are certain measures a court can take to assure the selection of an unbiased jury, such as holding the trial a year after the initial, intense press coverage and assembling a larger-than-average jury pool).

In Blom, 242 F.3d at 804, the court moved the case from Duluth, Minnesota to Minneapolis, assembled a jury pool three times the normal size, excluded the division where the crime occurred from the jury pool, required jurors to answer a questionnaire about their exposure to pretrial publicity, and increased the number of peremptory strikes for each side.

In United States v. Faul, 748 F.2d 1204, 1212 (8th Cir. 1984), North Dakota's United States Marshal and a Deputy United States Marshal were killed on the outskirts of Medina,

North Dakota. Another Deputy United States Marshal, a county sheriff, and a city police officer were also injured in the armed confrontation. The United States charged Scott Faul, Yorie Kahl, and others with conspiracy and murder, among other charges. Media coverage was extensive and the trial was held in North Dakota just three-and-one-half months after the crimes. The district court called a substantial number of venirepersons, increased the number of peremptory challenges for the defendants, emphasized to the jury the importance of impartiality, questioned each prospective juror individually, and sequestered the jury to prevent exposure to media publicity during the trial. Id. at 1214. The defendants' venue change request in that case was denied and trial was held in Fargo, North Dakota, the Southeastern Division of the District of North Dakota. The Eighth Circuit upheld the district court's refusal to grant the change of venue motion. Id. at 1216.

As was done in the Faul case, this Court can utilize procedures to ensure a fair and impartial jury within the district. Also, to the defendant's benefit, but unlike the Faul case, where the trial took place a few short months following the murders, trial in this case is set to begin more than a year after her alleged crimes.

In United States v. Rodriguez, 581 F.3d 775, 785–86 (8th Cir. 2009), the Court moved the case from Grand Forks to Fargo, assembled a jury pool more than twelve times the normal size, excluded the division where the kidnapping occurred, had potential jurors answer a questionnaire about their exposure to pretrial publicity, and increased the number of peremptory strikes for the defendant. The defendant cited "extensive North Dakota media coverage, including 241 articles about the case in the Fargo Forum (some allegedly inflammatory); statements by public officials about the case; two public opinion polls, from September 2004 and February 2006; statements by 98 of 214 examined venirepersons

indicating a belief in Rodriguez's guilt; and, statements by serving jurors about public animosity toward Rodriguez." Id. at 785. The Circuit cited Blom and Allee, and noted a "significant distinction between this case and Blom or Allee is the public opinion data." However, the Circuit noted that it:

> . . . has expressed doubts about the relevance of such polls when reviewing rejected change-of-venue motions. See Shapiro v. Kauffman, 855 F.2d 620, 621 (8th Cir. 1988) (declining, in a civil case, to attach significance to poll indicating defendant's local popularity); United States v. Eagle, 586 F.2d 1193, 1195 (8th Cir. 1978) (finding public opinion survey about attitudes toward Native Americans charged with high-profile killings irrelevant to unrelated case involving Native American defendants); United States v. Long Elk, 565 F.2d 1032, 1041 (8th Cir. 1977) (noting the district court considered but declined to rely on a public opinion poll). At least three other circuits have declined to rely on public opinion polls when reviewing denials of motions for change of venue in criminal cases. See United States v. Campa, 459 F.3d 1121, 1145–46 (11th Cir. 2006) (en banc) (district court did not err by refusing to rely on public opinion poll when it had methodological problems); United States v. Malmay, 671 F.2d 869, 875–76 (5th Cir. 1982) (district court did not err by denying change-of-venue motion when public opinion poll revealed only general public awareness of the crime rather than widespread belief about defendant's guilt); United States v. Haldeman, 559 F.2d 31, 64 n. 43 (D.C. Cir. 1976) (trial judge had discretion to ignore "a poll taken in private by private pollsters and paid for by one side," given adequacy of voir dire procedures). This court's precedents do not require a district court to consider public opinion polls when ruling on change-of-venue motions.

Id. at 785-86. It held that "[t]he district court did not abuse its discretion by denying the motion for change of venue based on presumed prejudice." Id. at 786.

IV. CONCLUSION

Based on the analysis herein, this Court should deny the defendant's motion for change of venue and should employ the tools necessary to seat a jury in the District of North Dakota. Alternatively, the Court may consider summoning jurors from the Eastern Division

of the District of North Dakota to Bismarck, or moving the location of the trial to the Eastern Division in Fargo, North Dakota.

Dated: July 28, 2017.

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