

'Poison' PR Campaign Has Biased Jury Pool, Say Dakota Access Protester's Lawyers

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Featured image: The defendant, Red Fawn Fallis, right, at her mother's memorial. (Source: FreeRedFawn Facebook Video)

As [tensions rose at Standing Rock](#) last fall, Red Fawn Fallis was one of many arrested at the scene of the [Dakota Access pipeline](#) (DAPL) protests near Cannon Ball, North Dakota. However, her charges stood apart: Attempted murder of police officers, an indictment [later dropped](#) for lesser charges.

Still, the claim that Fallis shot at police has stuck in the minds of North Dakotans who may have to judge her culpability and is one reason she could not get a fair trial in the area, her lawyers argue. Attorneys for Fallis, a 38-year-old Oglala Lakota Sioux woman from Colorado, have posited that the case should be moved to a different federal court district.

Their argument, made in a pair of recent pre-trial motions for a venue change, revolves around the public relations campaign waged by law enforcement, private security, and public relations firms hired by Dakota Access owner, Energy Transfer Partners. That campaign was headed by firms such as [TigerSwan](#), the National Sheriffs' Association, Delve and Off the Record Strategies, as reported by [The Intercept](#) and DeSmog.

The recent motions pushing for a venue shift cite as exhibits multiple documents and emails previously obtained and published by DeSmog and The Intercept, along with other law enforcement communications and media efforts.

The exhibits include [two emails](#) and a [talking points](#) memorandum written by the founder and owner of Off the Record Strategies, North Dakota native Mark Pfeifle, who led communications efforts for the Iraq War under the George W. Bush administration. These documents were [previously covered](#) in a story by DeSmog.

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 criminal⁹.

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)].

Source: U.S. District Court for the District of North Dakota, Western Division

“This email shows active attempts to influence public perception of Water Protectors in media markets throughout North Dakota in collaboration with ‘DAPL folks’ utilized to reinforce law enforcement narratives,” [reads one of the motion’s footnotes](#) about the Pfeifle communications. Many of those protesting the pipeline refer themselves as “water protectors.”

Though Morton County prosecutors dropped the attempted murder charge against her, Fallis still faces charges for possession of a firearm by a convicted felon, civil disorder, and discharge of a firearm during a crime of violence. She was involved in an incident in which she allegedly drew a gun on officers arresting her, while they subdued her on the ground, on October 27, 2016 at the protests against Dakota Access in North Dakota.

Fallis has [pled not guilty](#) to the charges and her supporters [describe her as a pacifist](#), though in 2003 [she was convicted](#) of being accessory to an attempted first-degree murder in Colorado, which is a felony.

‘Poison Their View’

Fallis’ legal team also points to recent surveys done by the National Jury Project in the counties housing the federal court district, which is based in Bismarck. The defense argues that those surveys — conducted in [Cass County](#), [Morton County](#), and [Burleigh County](#) — illustrate that a potential jury pool chosen in this federal court district could be heavily biased against its client.

“An attitudinal survey by the National Jury Project revealed that the vast majority of juror-eligible residents ... have been exposed to publicity about the anti-DAPL protesters, have formed a negative opinion about the protests and the protesters, believe that the arrested protesters are ‘guilty,’ and cannot be fair and impartial if selected as jurors for the trial of a protester,” [reads the](#)

[June 16 motion for venue transfer.](#)

The lawyers representing Fallis also make the explicit legal argument that the conduct of law enforcement and the role the media played in echoing its claims have made it nearly impossible to assemble an unbiased jury pool for the case going forward.

“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 [and] the protesters in general,” her legal team wrote.

“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 [National Jury Project] attitudinal surveys conducted in Morton, Burleigh, and Cass Counties, so prejudicially impacted the prospective [jury pool] 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.”

‘Best Interests of Justice’

Grounding its legal argument in the 5th and 6th Amendments — a citizen’s rights to due process, a fair and impartial jury, and a fair trial — Fallis’ legal team has said that a shift in venue would be in the “best interests of justice.”

According to the [Federal Rules of Criminal Procedure](#), a defendant has the right to transfer his or her trial for prejudice “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 survey results collected by the National Jury Project, contend Fallis’ attorneys, make the case for the trial being moved elsewhere under those rules.

“The NJP surveys found that as of mid-December 2016, approximately 75 percent of the juror-eligible population of Morton County and 77 percent of the juror-eligible population of Burleigh County stated that DAPL protesters who have been charged with crimes are probably or definitely guilty,” [wrote Fallis’ attorneys on June 16.](#)

“Moreover, approximately 88 percent 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.”

Though the surveys never asked about Fallis specifically, respondents cited her case in answering a question about the potential guilt of protesters.

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

Source: U.S. District Court for the District of North Dakota, Western Division

Department of Justice Responds

On the contrary, U.S. Department of Justice (DOJ) [responded](#) on July 28 to the motion to shift venues. The federal government suggested that this issue could be resolved during the jury selection process when attorneys for both sides can eliminate biased jurors from the pool, in the standard court procedure known as the [voir dire process](#). From there, if assembling a fair jury seems infeasible, then a motion for venue shift could still take place, argue the DOJ attorneys.

"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," the DOJ argues. "It is not a due process violation for a court to seat jurors who have heard something about the case."

The prosecutors also point to the 2001 U.S. Court of Appeals case, [U.S. v. Blom](#), a ruling which cautions against venue changes except under "rare and extreme cases."

"Because our democracy tolerates, even encourages, extensive media coverage of crimes such as murder and kidnapping, the presumption of inherent prejudice is reserved for rare and extreme cases," reads the ruling in that case.

Further, the DOJ says these surveys have already been cited in a different state-level case ([North Dakota v. Kelli Maria Peterson](#) in Morton County) and unsuccessfully, while also arguing that many other juries have been seated on this topic in the area. The DOJ contends that other tools already exist to ensure an unbiased jury.

"[M]ultiple juries have been seated in Morton County, North Dakota cases arising from charges related to pipeline protest activity, some resulting in not guilty verdicts," [it wrote](#).

"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 North Dakota federal court’s Western Division.

‘Among the Strongest’

But [Mykol Hamilton](#), a psychology professor at Centre College in Danville, Kentucky, and research director for the [American Society of Trial Consultants Foundation](#), told DeSmog that the motion for venue change was “among the strongest” she had seen in her entire career and a “slam dunk” decision.

“The most important thing I believe is the percentage of people that already assumed she’s guilty. And those were really high in Bismarck where she is supposed to be tried and not that much weaker than in Cass County,” said Hamilton. “So the guilt, and then I’ve never seen a case with 100 percent recognition either. The closest I’ve come with the recognition factor is 97 percent, and usually it’s in the 70 or 80 percentages, and often that’s enough to get a change of venue,” she says, while also mentioning, “in a lot of different ways the survey shows the prejudices there, which is the central issue.”

Hamilton was quick to say that success “depends 99 percent on the judge,” who has the final say in the motion for venue change. She also noted that voir dire is not a foolproof measure, as her research shows that it often serves to intimidate potential jurors into suppressing their actual beliefs.

She has come to call this phenomenon “[prehabilitation](#)” in her scholarship, wherein a judge, and often the attorneys, will inform prospective jurors they must be fair and impartial, and that it is their duty to put their biases aside. Instead of having people open up about their thoughts and feelings on the case, helping the judge and lawyers understand who would make for a good juror, it intimidates prospective jurors into burying their biases, Hamilton argues.

The DOJ attorneys and press team declined to comment for this story, as did attorneys for Fallis.

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