**UNITED STATES DISTRICT COURT**
**DISTRICT OF NORTH DAKOTA**

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| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff,** | ) | **DEFENDANT'S POST-HEARING** |
| | ) | **MEMORANDUM IN SUPPORT OF** |
| **- vs -** | ) | **MOTION TO SUPPRESS** |
| | ) | **EVIDENCE AND STATEMENTS** |
| **RED FAWN FALLIS,** | ) | |
| **Defendant.** | ) | **No. 17 CR 16-DHL** |

Defendant Red Fawn Fallis, by her counsel, files the following Post-Hearing Memorandum in support of her Motion to Suppress Evidence and Statements obtained following the October 27, 2017 seizure of her person that was constitutionally unlawful and violated her rights under the First and Fourth Amendments to the U.S. Constitution.

For purposes of this Memorandum, Ms. Fallis incorporates the factual assertions and arguments set forth in her Memoranda in Support of Motion to Suppress Evidence and Statements [Docket Entries 94 and 96],[1] her Reply to the Government's Response to Motions to Suppress Evidence and Statements [Dkt. 121] and the Exhibits filed in support of each.

## I. The Initial Seizure of Ms. Fallis Was Unlawful and Violated Her Rights Under the First and Fourth Amendments to the U. S. Constitution[2] as Law Enforcement Officers Lacked Probable Cause to Arrest Ms. Fallis Who Was Engaging in Constitutionally Protected Activity and Had Not Committed a Crime Prior to Her Seizure.

### A. The Events of October 27, 2016

During the early morning hours of October 27, 2016, law enforcement officers from numerous agencies, both within and outside North Dakota, in collaboration with private security

[1] The Docket will be cited hereinafter as Dkt. __. Dkt. 96 was eventually re-docketed at Dkt. 101.

[2] Ms. Fallis incorporates herein the Introduction set forth in her Memorandum in Support of Motion to Suppress Evidence and Statements [Dkt. 94]

firms contracted by Energy Transfer Partners,[3] undertook a large-scale paramilitary-style action to evict a group of water protectors, including tribal members, from an encampment known as the "North Camp," whose occupants were allegedly blocking construction of the Dakota Access Pipeline. During the days preceding this action, officers had attending daily briefings. [B. Niewind, T. Schmit][4]

On the morning of October 27, officers received "operational orders" governing the action scheduled for that day. According to Officer Schmit, some law enforcement officers advised him that technically "everyone [of the protesters] was violating the law" and was subject to arrest. Law enforcement had targeted "leaders and agitators" for arrest during DAPL-related law enforcement actions. [B. Niewind] Officers understood that the goal of the police action that day was to move protesters out of the North Camp in a southerly direction and to "take agitators" not complying with orders to move South. [J. Buehre]

During the late afternoon of October 27, after moving occupants out of the North Camp, a line of law enforcement officers was stationed in front of water protectors along Highway 1806. Officers, who had gathered by 7:30 a.m. that morning [B. Bitz], and some of whom had been on duty for almost 24 hours by that time, acknowledged having a "high level of stress" and fatigue. [J. Jones]

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[3] The North Dakota Private Investigative and Security Board has alleged that TigerSwan, the lead security contractor, was operating illegally during the joint law enforcement/private security operation which resulted in Fallis' arrest. Bismarck Tribune, "Dakota Access Security Firm Operated In ND Without License, Board Says" ("Exhibit K"); see also *North Dakota Private Investigative and Security Board v. TigerSwan, LLC and James Patrick Reese*, "Verified Complaint and Request for Injunction" available online at: https://assets.documentcloud.org/documents/3880181/TigerSwan-Complaint.pdf.

[4] In absence of a hearing transcript, counsel generally cites to testimony of particular witnesses by their first initial and last name. Defendant's Exhibits will be referred to as Ex. __, and Government's Exhibits will be referenced as G. __.

Between 5:30 and 6:00 p.m., there was a "lull in the activities." [B. Niewind] Government witnesses described the scene as "calm." Protesters were praying and chanting in the distance on the south side of the military-style and National Guard vehicles that officers were using to block Highway 1806. [D. Kensinger; G.14] There had been a report of rifle fire that caused officers to retreat behind their vehicles. After learning that the report was not substantiated, officers took advantage of their position to enjoy a break. [D. Kensinger]

During their break, officers reported hearing no commotion from the far side of the vehicles where the protesters were gathering. Officer Bueher recalled "a little shouting," but could not identify its source and conceded that the shouting was not unlawful. He concluded that he observed nothing to alert him to any problem. [J. Buehre]

By the end of the break, Officer Kensinger had moved to the area in front of the vehicles. He saw a woman who had arrived in a white car and observed that she was yelling. However, he didn't hear anyone tell her to stop and doesn't know if she was arrested[5]. Other protesters were chanting and singing, but not yelling. [D. Kensinger]

"For the most part", camp security officers were standing between law enforcement and the protesters. [D. Kensinger] One of the camp security officers on site was Dennis Martinez. Mr. Martinez, an Oglala Sioux, arrived at the treaty camp several months before and began acting as "camp security" following attacks on protesters by dogs from an unlicensed security company. He described his role as that of a "peacekeeper" and acted as a buffer between law enforcement and the protesters to ensure that there was no violence by either side. [D. Martinez] On October 27, Mr. Martinez was acting as a camp security officer and a buffer between officers and protesters on Highway 1806. He was wearing safety goggles, an air filter and a face mask to

[5] The woman in a blue shirt is depicted in G. 15 and Defense Exhibit A and there is no indication from either the videos or the testimony that she was arrested.

inhibit the effects of pepper spray if it was again used by police forces against protesters. [D. Martinez; Ex. F-10]

Ms. Fallis arrived at the site on Highway 1806 on a red ATV shortly before 6:00 o'clock p.m. Her arrival is depicted at time stamp 9:46 of G. 14 (video). She remained on her vehicle – located at a distance from the law enforcement line and vehicles – for approximately 15 seconds. She got off of the ATV at time stamp 10:03 of G. 14 (video). [Parties' Oral Stipulation #2]

After leaving her ATV, Ms. Fallis crossed on to the roadway and approached the line of vehicles from behind, and wound her way on the passenger's side to the front of Phyllis Young's white four-door sedan.[6] [Ex. A at 0:00 to 0:22; G. 14, at 10:03 to 10:12] She was wearing a heavy jacket, a lighter jacket, a backpack with an attached red fire extinguisher, and a gas mask. Video footage does not depict Ms. Fallis carrying the fire extinguisher, or anything else, in her hands. [Ex. A at 0:00 to 0:03, 0:17 to 0:24, 0:44-1:21, and 2:53-2:58] From the time she walked up to the front to when Mr. Martinez stood on the east side between the forming line of officers and the protesters, sixteen seconds elapsed. [Ex. A at 0:04 to 0:20] From both the drone video [G. 14] and Ex. A, it is clear that during that time Ms. Fallis did not physically touch or engage the lone sheriff in front of the MRAP. In fact, the sheriff's gaze is elsewhere and he is pointing over her shoulder. [Ex. A at 0:22 to 0:23].

Mr. Martinez was standing with his arms spread out. Although he saw Ms. Fallis, his attention was focused, not specifically on her but watching out for other people who might be "agitating."[7] He was not focused on keeping her back or away from the police line. He testified

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[6] No government witness reported having seen Ms. Fallis at this site or at any other protest location on any date, including October 27, 2017.

[7] Contrary to the government's suggestion that Mr. Martinez was required to concentrate his attention on Ms. Fallis due to her actions, his concentration was elsewhere much of the time

that Ms. Fallis never pushed into him, no officer ever pushed her with a baton, and she never got closer to the officers than he himself did before she was seized. At all times after he arrived on the east side of the road, Mr. Martinez stood between her and the officers. As she stood near him, Ms. Fallis had nothing in her hands. He observed that she at times seemed angry, as did other protesters, and was pointing her finger at the police line, but that there was nothing about her actions that were unusual, threatening, or violent. At one point, she moved to his side quickly and the next thing he heard was someone saying "hey, hey, hey." When he looked to his left, Ms. Fallis had been seized by law enforcement officers. [D. Martinez; Ex. A at 2:52 to 2:53]

The seizure of Ms. Fallis occurred almost exactly three minutes after she got off of her ATV. [G. 14 at 10:03 to 13:00; Ex. A at 0:00 to 2:54] During that time, she walked from the ATV to the area in front of Mr. Martinez where she remained for approximately 2 minutes and 45 seconds. [G. 14, 15, Ex. A] She was last in front of Mr. Martinez at approximately time stamp 12:55 and was seized by Officer Schmit at time stamp 13:00. [G. 14]

Prior to her seizure, the government's witnesses heard no commotion associated with Ms. Fallis [D. Kensinger, J. Buehre].

Government witnesses who were in a position close to the front line did not report hearing any orders or commands given to Ms. Fallis before she was seized. [D. Kensinger; J. Buehre] Although Officer Bitz testified that he heard a command to "move South," none of the videos of the scene depict movement on the part of the protesters and Officer Bitz conceded that, upon reviewing the bystander video [Ex. A], there were no audible or visible commands until the

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that Ms. Fallis was in close proximity to him. In Defendant's Exhibit A, Mr. Martinez and Ms. Fallis are seen together on the front line for a total of 39 seconds: 0:20-0:23 and 0:44-1:20. As Ms. Fallis stands in front of Mr. Martinez, he looks in directions away from her on at least 12 occasions including at video times: 0:22, 0:47, 0:48, 0:50, 0:51, 0:56, 0:59, 0:59, 1:00, 1:12, 1:15, and 1:19.

end of that video when officers were moving protesters out of the area following shots being fired. Indeed, Ms. Fallis was seized when she moved away from her position in front of the police line.

Officer Jones testified that he was in the skirmish line when he saw Ms. Fallis approach "from the road to the east ditch," noted that she had a gas mask, fire extinguisher,[8] and backpack and was shouting. However, he could not understand what she was saying as she had on a gas mask and he was wearing a visored helmet (as were many of the law enforcement officers on the scene). While he believed that Ms. Fallis was "aggressively coming at us," he never saw her push anyone, threaten anyone, or throw anything, which is corroborated by G. 14 and Ex. A. He reports hearing someone say "she needs to be arrested" but doesn't know who said it or why. [J. Jones]

The decision to arrest Ms. Fallis appears to have been made by Officer Schmit. He first saw Ms. Fallis sometime after he believed [erroneously] that the woman in the white car had been arrested. He claims that Ms. Fallis was screaming and pointing, although he concedes that he saw nothing in her hands and could not hear what she was saying. [T. Schmit] He claimed to have seen a uniformed officer push Ms. Fallis aside with a baton and further claims that "there was body contact" between the two. In the November 1, 2016 investigative statement that he authored regarding the incident, he did not assert that there was any contact between the unidentified officer and Ms. Fallis. [Docket No. 94-1, Exhibit L] Rather, in that post-arrest statement, Officer Schmit claimed that he asked the Mobile Field Force Officer if he [the MFF officer] wanted Ms. Fallis to be arrested and then made a decision to arrest her based on the MFF Officer's response and her "aggressive behavior" in the form of verbal expression and gesturing.

[8] The fire extinguisher was in Ms. Fallis backpack prior to and during the seizure. [Defendant's Ex's F-10 and F-3 as well as the drone video, G. 14]

The decision to arrest Ms. Fallis was based on her alleged expressive conduct only and was not preceded by any warnings or commands issued to her by Schmit. [T. Schmit] In fact, his claim as to Ms. Fallis' actions is not supported by the testimony of any other officer or by videos of the scene immediately predating the seizure [G. 14; Ex. A] and is directly contradicted by the testimony of Mr. Martinez who was on the scene and directly facing Ms. Fallis during the three-minute period between the time she left her ATV and her seizure.

B. The Argument.

A seizure occurs when a police officer, by physical force or show of authority, in some way restrains the liberty of a citizen. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

Law enforcement officers had no warrant for Ms. Fallis' arrest. Therefore, a legitimate seizure of her person depended entirely on the State's possession of "a particularized and objective basis for suspecting" legal wrongdoing. *United States v. Cortez*, 449 U.S. 411, 418 (1981). In other words, in order to justify their seizure of Ms. Fallis, officers had to have a reasonable basis for suspecting that she was committing or had committed a criminal offense.

"A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment [only] if the arrest is supported by probable case." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (citing *United States v. Watson*, 423 U.S. 411, 424 (1976)). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Pringle*, 540 U.S. at 371 (internal citations and quotations omitted); *United States v. Demilia*, 771 F.3d 1051, 1054 (8th Cir. 2014) (quoting *Devenpeck v.*

*Alford*, 543 U.S. 146, 152 (2004) ("[w]hether probable cause exists depends upon the reasonable conclusion to be *drawn from the facts known to the ... officer at the time*. . .") (emphasis added).

Ms. Fallis was targeted for arrest when she exercised her First Amendment right to free speech. She had no physical contact with officers and made no threat of violence toward them as she directed her speech at an arsenal of highly militarized law enforcement officers and their armored vehicles. Her interaction with officers lasted less than three minutes. No warnings were given to her, the officers did not identify themselves as "police" or "sheriff's deputies", nor was she commanded to stop prior to her arrest.

The allegations against Ms. Fallis boil down to Officer Schmit's claim that she was engaged in "aggressive" speech allegedly directed at an unidentified Mobile Field Force officer who authored no report and was not produced at the hearing on Ms. Fallis' Motion to Suppress Evidence. Most importantly, the videos introduced by both parties to the hearing do not depict the incident that Officer Schmit claims to have observed, despite the fact that they capture the majority of Ms. Fallis' actions during the brief interval between her arrival and her seizure.

Both the United States Supreme Court and the Eighth Circuit have held that the First Amendment protects, from the reach of criminal law, critical, zealous, and even aggressively rude speech directed at police.

In *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987), the Supreme Court held that a municipal ordinance making it unlawful to interrupt police officers in the performance of their duties was unconstitutionally overbroad, noting that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Id.* at 453, 461. The Court emphasized that the "freedom of individuals verbally to oppose or challenge police action

without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63. The Court went on to note:

> [This decision] reflects the constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint. . . . [T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.

Id. at 471-72. The Court also repeated Justice Powell's previous suggestion that even the "fighting words" exception to the First Amendment may "require a narrower application in cases involving words addressed to police because [officers] may reasonably be expected to exercise a higher degree of restraint than the average citizen." *Id*. at 462 (internal citation and quotations omitted).

The Eighth Circuit has similarly held that the First Amendment precludes arrest on the basis of rude or aggressive speech directed at law enforcement. In *Copeland v. Locke*, 613 F.3d 875 (8th Cir. 2010), the Eighth Circuit held that "[n]o reasonable police officer could believe that he had actual probable cause to arrest a citizen" for "the use of loud, profane language coupled with [ ] expressive gestures [pointing]" directed at a police chief while he was actively engaged in a traffic stop, even after the chief had rejected repeated requests that he move his police vehicle. *Id*. at 878, 880.[9] Notably, the Court found that an arrest under these circumstances would be unlawful even if the defendant's expressive conduct on its face constituted a violation of the relevant statute's prohibition on interference with a police officer. *Id.* at 880.

In *Buffkins v. City of Omaha*, 922 F.2d 465 (8th Cir. 1990), the Eighth Circuit found that "as a matter of law . . . officers could not have reasonably concluded that they had probable cause to arrest" a woman who had referred to one of the officers as an "asshole." *Id.* at 472. The

[9] The Eighth Circuit held in *Copeland* that the district court had erred in dismissing appellant's unlawful arrest claims on summary judgment. 613 F.3d at 881.

Eighth Circuit noted that "[n]either arresting officer contended that Buffkins" – who was arrested for disorderly conduct – "became violent or threatened violence." *Id.*; see also, *Copeland*, *supra*, 613 F.3d at 880 (testimony revealed that appellant "never once physically interfered with, threatened to physically interfere with, or threatened to use any violence against Chief Locke."). Similarly, although Ms. Fallis' speech was animated and expressive, she was neither violent nor did she threaten violence to the officers.

Moreover, the North Dakota statute prohibiting Disorderly Conduct, provides in pertinent part that " This section does not apply to constitutionally protected activity. If a person claims to have been engaged in a constitutionally protected activity, the court shall determine the validity of the claim as a matter of law and, if found valid, shall exclude evidence of the activity." 12.1-31-01(b). See, *City of Bismarck v. Schoppert*, 469 N.W.2d 808 (1991)( "In light of First Amendment considerations, defendant's reference to female police officer as "fucking, bitching cop," and defendant's reply of "fuck you" to officer's request for identification, could not support conviction for disorderly conduct under city ordinance, where officers and police chaplain who were present all testified that defendant's words would not incite them to violent reaction, even though they testified that defendant's statements angered them.)

The fact that Ms. Fallis may have engaged in what might otherwise be prohibited conduct[10] – such as making unreasonable noise or engaging in harassing conduct – does not subject her to criminal prosecution if her actions were constitutionally protected. Critical, zealous and even aggressively rude speech directed at police officers may be protected by the First Amendment if engaged in for political or social purposes.

[10] Ms. Fallis does not admit such activity, but provides these as examples.

Both Deputy Schmit and NDHP Captain Niewind testified that the officers received training in N.D. laws, including the N.D. Disorderly Conduct Statute 12.1-31-01. That Statute expressly states that otherwise disorderly conduct during the exercise of constitutional protected activity is not a violation of the criminal statute ("This section does not apply to constitutionally protected activity").

Ms. Fallis' conduct falls squarely within the umbrella of protected speech as prescribed by the *Houston, Copeland*, and *Buffkins* Courts.

Despite the officers' belief that they were entitled to arrest any of the protesters and despite their focus on "agitators" as potential targets, neither the North Dakota Century Code nor the United States Code criminalizes being an "agitator." Moreover, the United States Constitution does not tolerate prohibitions on aggressive speech, particularly when it is political in nature or when directed at law enforcement officers. Our government's constraint against arbitrary policing of expression is "one of the principal characteristics by which we distinguish a free nation from a police state." *Houston*, 482 U.S. at 463.

Based upon the holdings in *Houston, Copeland*, and *Buffkins*, an objectively reasonable police officer could not have found probable cause to believe that Ms. Fallis was committing or had committed any crime at the time she was seized by law enforcement. Therefore, her seizure and the resulting arrest were unreasonable and in violation of the Fourth Amendment to the U.S. Constitution.

## II. Ms. Fallis Did Not Resist Arrest and, to the Extent that She May Have Resisted Arrest, Her Resistance Does Not Excuse the Earlier Unconstitutional Seizure.

A. The Facts.

Ms. Fallis walked out in front of and parallel to the skirmish line, maintaining a distance between herself and the officers on the line. [G. 14, at 12:55 to 13:00] She directed her words to the officers on the line, although no one testified that they could understand what she was saying. She held nothing in her hands. She posed no threat to the officers. [J. Jones]

Seconds after she did so and within three minutes of arriving on the scene, she was "tackled" from behind by Officer Schmit and violently taken to the ground. [J. Jones, T. Schmit] Officer Schmit, who estimated his weight to be around 250 pounds with his gear on, hit Ms. Fallis[11] from behind and then fell on his knee on top of her body. [J. Jones, T. Schmit] Ms. Fallis appears to be unaware of the attack until she was knocked to the ground. [G. 14, at 12:55 to 13:00.]

As soon as Ms. Fallis hit the ground, other officers came to assist Officer Schmit. [J. Jones; J. Buehre; B. Niewind]

When Mr. Martinez heard a commotion and someone cry "hey, hey, hey," he looked to his left and saw Ms. Fallis on the ground, on her stomach, with three or four officers on her. [D. Martinez]

Ultimately at least five officers participated in "controlling" Ms. Fallis, who was pinned to the ground on her stomach with her hands and forearms beneath her. [B. Bitz] Officer Buehre describes "assisting" Officer Schmit by putting his knee on Ms. Fallis' upper back area near her neck while trying to pull her left arm out from underneath her. At the same time, he describes multiple other officers who were also applying pressure to her body, including an unnamed officer who was trying to pull her right arm out from underneath her, a third officer near her

[11] Described as a "small female" by Trooper Buehre.

torso and four to five other unnamed officers[12] holding her legs. [J. Buehre] Officer Jones testified that he and others had been responsible for "flipping" Ms. Fallis face down and that, while he didn't even know how many other officers were on top of her, he and at least one other officer had her legs pinned down. [J. Jones]

One of the unnamed North Dakota troopers had his knee pushed into Ms. Fallis' upper thigh with his weight on it. [Ex. G-2] Officer Schmit testified that putting pressure on this area is a known tactic to cause pain in order to gain compliance. Based on his own training and knowledge, he also testified that, when pressure is applied in this way, the initial act of the suspect is to move away from the pain and that one likely result of this type of control is a decreased ability on the part of the suspect to hear verbal commands. [T. Schmit]

The officers testified that Ms. Fallis was resisting them and their commands[13] by "squirming around" and by "not getting her hands out from under her." [J. Jones, J. Buehre]

With multiple law enforcement officers physically pushing down on her body, holding her legs down, and pinning her to the ground on her stomach, Ms. Fallis lacked the ability to comply with any commands – least of all to extricate her hands from beneath her body.

The gunshots were fired from an area beneath Ms. Fallis' body at a time when her hands were pinned beneath her and, according to Officer Niewind, she was "covered with cops." [T. Schmit, J. Jones, B. Niewind] At least five officers were "on her" at the time. [J. Buehre] Also, at the same time, Officer Jones, with the assistance of other unnamed officers, was trying to pull her right hand out from beneath her body and Officer Buehre was pulling on her left arm. [J.

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[12] Officer Buehre identified one of the officers as likely being Ryan Mugan.

[13] None of the officers testified that specific commands were given to Ms. Fallis, other than to produce her hands – which were trapped beneath her.

Jones, J. Buehre] The number of officers on her body following the shots were so substantial that Trooper Jones moved to her head area to make sure she was still breathing. [J. Jones]

No one testified that they saw her fire the shots. Rather, that the shots came from underneath her body during the struggle. Obviously, the person most in danger of injury from the shots was Ms. Fallis herself.

The government's evidence does not establish that Ms. Fallis resisted arrest. Rather, the evidence supports a conclusion that Ms. Fallis simply reacted to being aggressively tackled from behind, slammed to the ground, confined on her stomach and then subjected to the trauma and the pain necessarily caused by that violent confinement.

The government's evidence does not establish that Ms. Fallis fired the gun recovered by the police. Rather, the evidence could as easily support the conclusion that the gun was accidently discharged in the struggle to confine Ms. Fallis by one or more of the multiple hands trying to pull Ms. Fallis' hands out from underneath her as she lay pinned to the ground.

Further, while Ms. Fallis is alleged to have made certain statements following her arrest that the government suggests are indicative of guilt, these statements are unverified by the dozen or more law enforcement body, cell phone, handheld, and vehicle cameras present at the scene of her arrest. For instance, Trooper Bennett Bitz, testified that Ms. Fallis was screaming inculpatory statements subsequent to her arrest, yet he acknowledged on cross-examination that the only alleged verbal statement audible on a video Ex. A was immediately before Ms. Fallis was escorted from the scene. [B. Bitz; Ex. A at 6:33]. Mr. Martinez identified the speaker as Ms. Fallis, and the existence of only that statement on the video demonstrates that the video was capable of picking up screams or cries from Ms. Fallis and yet there is no evidence of any other purported screaming.

Moreover, to the extent that the Court concludes that Ms. Fallis did make those post-arrest statements suggested by the government, these statements do not indicate that Ms. Fallis intentionally discharged a firearm; rather they suggest that she was in a state of trauma and anger after being tackled, physically crushed by numerous men wearing heavy equipment, as well as having been endangered by an accidental discharge of a firearm in close proximity.

As to Officer Schmit's allegation that Ms. Fallis laughed in response to his question "Was it all worth it?", such a question was clearly intended to or was likely to elicit a response from Ms. Fallis, who was in custody and not yet Mirandized. Any alleged response flowing from such a query must be suppressed. Moreover, Schmit conceded that he had no prior knowledge of Ms. Fallis, that persons react differently to stressful situations, and that he lacked the ability to predict how Ms. Fallis would react during a traumatic encounter. [T. Schmit]

B. The Law.

The initial seizure of Ms. Fallis was unlawful and in violation of the Constitution of the United States for the reasons set forth in Section I (B), supra.

The North Dakota Century Code provides a defense to an act that would otherwise constitute resisting arrest if the arrest is a warrantless arrest and the officer effecting the arrest is acting unlawfully:

**Preventing arrest or discharge of other duties**.

1. A person is guilty of a Class A misdemeanor if, with intent to prevent a public servant from effecting an arrest of himself or another for a misdemeanor or infraction, or from discharging any other official duty, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of duty. …

* * *

2. **It is a defense to a prosecution under this section that the public servant was not acting lawfully**, but it is no defense that the defendant mistakenly believed that the public

servant was not acting lawfully. A public servant executing a warrant or other process in good faith and under color of law shall be deemed to be acting lawfully.

* * *

N. D. Century Code §12.1-08-02 (emphasis added).

In this case, Ms. Fallis' arrest – presumably for a misdemeanor or infraction – was without a warrant or other process and was unlawful and unconstitutional. Therefore, under North Dakota law, she had a legal right to resist the unlawful arrest.[14]

The government argues, in its Response to Ms. Fallis' Motion to Suppress Evidence [Document 120, p. 14], that even if the initial arrest was unlawful, Ms. Fallis' alleged resistance to that arrest constitutes an independent ground for a second, legitimate arrest. The government cites to three Eighth Circuit cases in support of its position, and the Court has asked the parties to address these particular cases. Each is inapposite to, and distinguishable from, Ms. Fallis' situation.

First, *United States v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995) is an easily distinguishable case that arose in Iowa. Iowa does not have a statute analogous to N.D. Century Code §12.1-08-02 that would have permitted Mr. Dawdy to raise a statutory defense to his resistance to an allegedly illegal misdemeanor/infraction traffic stop. 46 F.3d at 1429. In contrast, Iowa Code Ann. § 804.12 provides that "[a] person is not authorized to use force to resist an arrest . . . even if the person believes that the arrest is unlawful or the arrest is in fact unlawful" – a fact that the circuit court relied on in its Opinion. Iowa Code Ann. § 804.12; *id.* at 1431.

[14] Ms. Fallis does not concede that she resisted arrest. However, she asserts that she had a right to do so and that, if the Court finds that she resisted arrest, she was within her rights under the North Dakota Century Code.

The district court in *Dawdy* suppressed the methamphetamine found during the traffic stop on Fourth Amendment grounds. The circuit court disagreed, finding that the search was a valid *Terry* stop and, therefore, the arrest was itself not unlawful.

The court then went on to consider the government's argument that resistance to even an illegal arrest was a legitimate basis for a second, legitimate, arrest. *Dawdy*, 46 F.3d at 1431. The court then considered a series of attenuation cases that dealt with the passage of time between the commission of the first – presumably lawful – arrest and the second offense. Ms. Fallis' case is distinguishable from this line of cases by the complete absence of a temporal separation between the first, unlawful, arrest and the alleged resistance to that arrest.

Second, *United States v. Collins*, 200 F.3d 1196 (8th Cir. 2000), arises out of a drug interdiction stop in Missouri. Like Iowa, and unlike North Dakota, Missouri has no state statute permitting a citizen to resist an unlawful arrest.

Both parties to this dispute conceded, and the court agreed, that the arresting officer did not have a reasonable, articulable suspicion justifying the detention that led to Collins' arrest. *Collins*, 200 F.3d at 1197. The issue before the court was whether Collins' resistance to the admittedly unlawful arrest provided independent grounds for arrest. The circuit court's decision turned on the application of Missouri law and the court held that "Collins' resistance would have provided a reasonable officer with probable cause for arrest under Missouri law," citing back to *Dawdy*. *Id.* at 1198. Again, Ms. Fallis' case is distinguishable based on the fact that North Dakota law – unlike Missouri's law – provides for a citizen's right to resist an unlawful arrest.

Third, *United States v. Schmidt*, 403 F.3d 1009 (8th Cir. 2005) arises in South Dakota. South Dakota does not have a statute analogous to N. D. Century Code §12.1-08-02 that would have permitted Mr. Schmidt to raise a statutory defense to his alleged illegal misdemeanor arrest.

Moreover, Mr. Schmidt's case is different from Ms. Fallis' case in that the initial misdemeanor arrest effected in his home was deemed to be lawful under the "hot pursuit" doctrine and, thus, he would have had no legal right to resist even under North Dakota law.

The *Schmidt* Court cites *Dawdy* for the proposition that Schmidt's resistance to his allegedly unlawful arrest was an independent ground for the arrest. Schmidt had argued (successfully) at the district court level that the arrest was unlawful as law enforcement entered his home without a warrant to effect a misdemeanor arrest. His resistance was fleeing. Because the circuit court did not find the entry to be unlawful, they did not reach the issue of flagrancy.

None of these cases cited by the government arise in North Dakota which, alone among the states in the Eighth Circuit, has a statutory provision exempting citizens from arrest based on their resistance to an unlawful misdemeanor or infraction arrest. Other Eighth Circuit cases discussing attenuation and finding that suppression was not warranted are readily distinguishable from the circumstances underlying the seizure, and subsequent search, of Ms. Fallis' person and property. These cases generally do not implicate First Amendment protections and involve much less brutal[15] conduct on the part of law enforcement. Some cases discussing attenuation involve a finding that the police had probable cause for the initial search and/or arrest[16], rendering the question of intervening circumstances indecisive. Others find attenuation based on state resistance statutes that, unlike North Dakota's, do not justify resistance to unlawful arrest[17].

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[15] *See United States v. Drapeau*, 644 F.3d 646, 654 (8th Cir. 2011) (noting that "an individual may be justified in using force to resist excessive force used by a law enforcement officer").

[16] *See, e.g., United States v. Smith*, 789 F.3d 923, 926, 929 (8th Cir. 2015) (finding that smell of marijuana provided probable cause to search vehicle initially, and that a "high-speed chase that lasted several minutes" provided independent grounds for a search).

[17] *See United States v. Blackmon*, 662 F.3d 981, 985-86 (8th Cir. 2011) (finding reasonable suspicion to detain appellant, who matched the description of an individual reported to have

Ms. Fallis had a right to resist the unlawful arrest perpetrated by Officer Schmit and her alleged resistance did not create an independent basis for arrest under North Dakota law.

### III. The Remedy is Exclusion of Evidence Found and Derived as a Result of the Unlawful Seizure.

The exclusionary rule applies to "evidence obtained as a direct result of an illegal seizure" as well as "evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree." *United States v. Villa-Gonzalez*, 623 F.3d 526, 534 (8th Cir. 2010) (citing *Segura v. United States*, 468 U.S. 796, 804 (1984)). Evidence should be suppressed if "granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality." *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

"It is axiomatic that the exclusionary rule bars the admission of physical evidence and live witness testimony obtained through the exploitation of police illegality." *Hamilton v. Nix,* 809 F.2d 463, 475 (8th Cir. 1987); *Villa-Gonzalez*, 623 F.3d at 535 (upholding suppression of physical evidence discovered in search that was fruit of illegal seizure).

The Eighth Circuit has, on occasion, questioned whether "sufficient attenuation" may exist to "dissipate the taint" of an otherwise unlawful seizure. *United States v. Simpson*, 439 F.3d 490, 495 (8th Cir. 2006). In making this decision, the appellate courts focus on three factors: (1)

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violated a protective order and be under the influence of PCP, and probable cause to arrest him under Missouri's resisting arrest statute[17] after he displayed behavior consistent with PCP usage, ignored twenty police commands, and then "raised his fists as if he was ready to fight"); *United States v. Walker*, 276 Fed. Appx. 538, 539 (8th Cir. 2008) (finding probable cause for arrest when "during an investigative stop, [appellant] admitted that he had an outstanding warrant, pushed a police officer, fled, and resisted arrest" [in Missouri]); *United States v. Sledge*, 460 F.3d 963, 964-68 (8th Cir. 2006) (after police stopped car implicated in unlawful liquor transaction, officers detained the appellant, who attempted to run from law enforcement during a pat-down search; court found probable cause to arrest appellant for obstructing a peace officer and resisting arrest in Nebraska, where statutes did not justify obstruction or resistance to illegal arrest [*see* Neb. Rev. Stat § § 28-904, 28-906]).

the time elapsed between the illegality and acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the misconduct.

Here, no time elapsed between the unlawful seizure of Ms. Fallis and the alleged discovery of incriminating evidence.

The intervening circumstances, factually disputed by Ms. Fallis, are referenced in the preceding section and are distinguished from Eighth Circuit case law by the application of the unique North Dakota statute permitting resistance to an unlawful misdemeanor arrest.

The most important of the three factors is the "purpose and flagrancy of the official misconduct." 439 F.3d at 436. Where the unlawful conduct is purposeful and flagrant, the exclusionary rule is most needed. Purposeful and flagrant misconduct is evident where, as here, an officer effected an arrest without a warrant and without probable cause to believe a criminal violation had occurred.

Officers Niewind and Schmit both articulated a belief that all protesters were subject to arrest for illegal activity and that they were empowered to target "agitators" and "leaders" for arrest. Schmit acted on this erroneous belief when he decided to arrest Ms. Fallis for the constitutionally protected exercise of her right to speak out in opposition to the construction of the DAPL and to vocalize her opposition to the role of law enforcement in protecting that construction.

The exclusionary rule is most needed, and most effective, when it is used to deter the official abuse of power against vulnerable civilians in situations like the one at bar.

* * *

All of the property and physical evidence allegedly recovered from Ms. Fallis at or after her seizure was "obtained through the exploitation of police illegality" and is properly subject to suppression.

"[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. . . . Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence." *Wong Sun*, 371 U.S. at 485-86 (internal citation omitted); see also, *Villa-Gonzalez*, 623 F.3d at 534-35 (suppressing the fruits of defendant's statement when "the unwarned statements . . . were themselves fruits of an illegal seizure.").

As with the property allegedly recovered from Ms. Fallis, any statements that she allegedly made while in police custody are a direct result of her unlawful arrest and should be suppressed as the "fruit of the poisonous tree" and the products of her unlawful arrest.

## IV. Conclusion.

Because law enforcement officers violated Ms. Fallis' right to be free from unreasonable seizure under the Fourth Amendment when they seized her person without a warrant and without probable cause to believe she had committed or was committing a criminal offense, all evidence obtained following and as a result of the initial unlawful seizure should be suppressed.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned Counsel of Record for the defendant hereby certifies that a true and accurate copy of the above and foregoing document has been served on the Office of the United States Attorney this 20th day of December 2017. Parties may access this filing through the Court's system.

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