

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

|                                  |   |                               |
|----------------------------------|---|-------------------------------|
| <b>UNITED STATES OF AMERICA,</b> | ) |                               |
| <b>Plaintiff,</b>                | ) | <b>17 CR 16-DLH</b>           |
|                                  | ) |                               |
| <b>v.</b>                        | ) | <b>FOURTH</b>                 |
|                                  | ) | <b>MOTION FOR CONTINUANCE</b> |
| <b>RED FAWN FALLIS,</b>          | ) | <b>OF TRIAL AND RELATED</b>   |
| <b>Defendant.</b>                | ) | <b>FILING DEADLINES</b>       |

The Defendant, RED FAWN FALLIS, by and through her counsel, and pursuant to her rights under both the Fifth and Sixth Amendments to the United States Constitution, hereby moves this Court for an Order continuing her scheduled January 29, 2018 trial in this matter for a minimum of 90 days and resetting deadlines for the filing of related pre-trial motions and jury instructions. In support of her Motion, the following is stated:

1. Ms. Fallis is charged by Superseding Indictment (Dkt. 40) with serious offenses including Engaging In Civil Disorder (Count 1);<sup>1</sup> Discharging a Firearm in Relation to a Felony Crime of Violence (Count 2);<sup>2</sup> and Possession of a Firearm and Ammunition by a Convicted Felon (Count 3).<sup>3</sup> If convicted of all counts, she faces a mandatory minimum sentence of 10 years and the potential of life imprisonment.
2. Trial is currently scheduled for January 29, 2018 and is anticipated to last up to two weeks.
3. Previous motions for continuance were necessitated by the substitution of

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<sup>1</sup> 18 U.S.C. § 231(a)(3) and 18 U.S.C. § 2.

<sup>2</sup> 18 U.S.C. § 924(c)(A) and 18 U.S.C. § 2.

<sup>3</sup> 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2).  
<sup>2</sup> 18 U.S.C. § 924(c)(A) and 18 U.S.C. § 2.

<sup>4</sup> The recently disclosed reports pertain to government contact with the informant-witness this December 2017 in preparation for trial, but do not include additional

original appointed counsel, by medical issues experienced by one of Ms. Fallis' current counsel, by the need to complete the defense investigation and to obtain discovery not provided by the government, and by the complexity of the case itself. The government did not oppose such motions.

4. Since the scheduling of the January 29, 2018 trial date, Ms. Fallis' attorneys have litigated motions to suppress evidence and statements, conducted an extensive fact investigation, reviewed the physical evidence in the government's possession, researched numerous complex legal issues, and diligently pursued the discovery that is essential to Ms. Fallis' defense. Whenever possible, counsel has conferred with the government so as to expedite and resolve the remaining issues. Nevertheless, it is constitutionally untenable for Ms. Fallis' counsel to be prepared for trial with so many material issues—including the discovery of information essential to the defense—remaining to be resolved.

5. With just a couple days remaining within which to complete and file pretrial motions, including motions *in limine*, and to tender proposed jury instructions, the volume of work remaining on this case is staggering. As to substantive pretrial motions, Ms. Fallis anticipates filing a motion to dismiss arising under *United States v. Johnson*, 135 S. Ct. 2551 (2015) and its progeny, a jurisdictional challenge to her prosecution, a motion to dismiss based on selective prosecution (a task requiring a thorough review of prior civil disorder cases), and a motion to dismiss based on evidence spoliation. Ms. Fallis believes that a thorough review of these issues and an effective presentation of these issues is necessary in order for her to receive a fair trial.

6. In addition to the extraordinary volume of recordings and other discovery

already produced in this case and the volume of material information still sought, there are a host of potential factual issues that must be adequately explored pre-trial, including the role of a paid FBI informant who engaged in a romantic relationship with Ms. Fallis in the course of his employment by the government and the as-of-yet unclarified relationship between private security actors and the government, as well as the relationship of the former to the events at issue in this case.

7. The unique Civil Disorder Statute with which Ms. Fallis is charged creates complex legal issues for which the factual predicate has not yet been fully disclosed by the government. For example, the Eighth Circuit has sustained judgments of acquittal for persons charged under 18 U.S.C. § 231(a)(3) where the government failed to prove beyond a reasonable doubt that law enforcement officers were “lawfully engaged in the lawful performance” of their official duties. *See United States v. Jaramillo*, 510 F.2d 808, 809-810 (8th Cir. 1975) (sustaining trial court’s acquittal based on finding that government failed to prove beyond a reasonable doubt that law enforcement officers were “*lawfully engaged in the lawful performance*” of their official duties due to evidence of unlawful military involvement in Wounded Knee operation); and *United States v. Casper*, 541 F.2d 1275, 1276 (including as an element of § 231(a)(3) “[t]hat one or more officers were *lawfully engaged in the lawful performance* of their official duties...” ) (*emphasis added*).

In order to adequately explore the lawfulness of the government function on October 27, 2016, the defense requires disclosure of facts requested in discovery and not yet produced by the government. Without this information, defense counsel cannot effectively respond to the claimed lawfulness of the government action and, therefore,

cannot provide constitutionally effective representation to Ms. Fallis.

8. The Eighth Circuit has no pattern jury instructions for the rarely utilized Civil Disorder Statute. Counsel must therefore construct proposed instructions, the content of which may be dependent upon the as-of-yet undisclosed discovery material repeatedly requested of the government.

9. There is an enormous amount of discovery material that remains outstanding. As detailed in Ms. Fallis' Motion to Compel (Dkt. 135), counsel has diligently submitted good faith discovery requests to the government since the outset of this case. At this very late date, defense counsel continue to receive volumes of new discovery from the government. Discovery materials mailed to defense counsel on December 15, 2017 include more than 120 previously undisclosed video files, more than 1,250 previously undisclosed photographs and, albeit insufficient, written reports<sup>4</sup> pertaining to the government's witness who, while working as a paid FBI informant, initiated and maintained a duplicitous "romantic" relationship with Ms. Fallis.

Additional new discovery materials detail interactions between law enforcement and private security (although also limited in scope and largely unresponsive to Ms. Fallis' detailed requests). These materials, received less than two weeks prior to the motions' deadline and during the holiday season, were all requested by the defense months earlier and, in some cases, as early as January 2017. Consequently, additional time is necessary to enable counsel to adequately review and evaluate the evidentiary value of this material and to conduct relevant follow-up investigation, if needed.

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<sup>4</sup> The recently disclosed reports pertain to government contact with the informant-witness this December 2017 in preparation for trial, but do not include additional

10. The December 15, 2017 disclosure by the government, referenced above, contains two previously undisclosed PowerPoint presentations prepared prior to October 27, 2016, which outline law enforcement's command structure, objectives, and tactical action plan for October 27, 2016—the date of Ms. Fallis' arrest. These PowerPoints, along with additional undisclosed materials such as relevant OPORDs (operation orders),<sup>5</sup> fall squarely within the scope of Ms. Fallis' original January 31, 2017 discovery request for “[d]ocuments describing the ‘operational plan’” for law enforcement's actions on October 27, 2016. *See* Dkt. 135-33, p. 5.

As of December 27, 2017, Ms. Fallis has still not received the explicitly requested “Intel Threads” pertaining to the events of October 27<sup>6</sup>—information that is essential to her ability to contest the lawfulness of law enforcement activity on the date of her arrest. Given the Civil Disorder Statute's requirement that the government prove the lawfulness of law enforcement activity beyond a reasonable doubt, it is untenable for Ms. Fallis to be required to proceed to trial without receiving all relevant information regarding the nature of the October 27, 2016 operation. Notably, the government has not objected to

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reports requested from the time period in which this informant was employed by the FBI whilst in a romantic relationship with the Defendant.

<sup>5</sup> The OPORDs (including the OPORD for October 27) were disclosed via email this morning of Wednesday, December 27, 2017, despite falling within the scope of the Defendant's January discovery request as well as a follow-up request specifically requesting the OPORD for October 27, 2016 in a November 13, 2017 discovery letter. *See* Dkt. 135-2, p. 8.

<sup>6</sup> These threads, which contain real-time intelligence exchanges between local, state, and federal law enforcement, are known to include United States Attorney's Office Intelligence Specialist Terry Van Horn. In its response to Defendant's Motion to Compel (Dkt. 135, p. 4; Dkt. 143), the United States did not dispute that Van Horn at times requested that state and local officials on the Intel Thread perform intelligence research.

the disclosure of this information as undiscoverable.<sup>7</sup>

Once this essential information is disclosed, counsel must then be afforded a reasonable period of time within which to review it, to investigate leads arising from it, to incorporate it into pretrial motions, and to craft a trial strategy that is responsive to it.<sup>8</sup> Without this information and adequate time to review and incorporate it into the defense strategy, counsel cannot provide Ms. Fallis with constitutionally effective representation.

11. As is set forth more fully in Ms. Fallis' forthcoming Reply to the Government's Response to her Motion to Compel (Dkt. 135), essential disclosures made by the government regarding law enforcement informants and undercover officers and DAPL security personnel acting as informants and undercover agents are woefully deficient.

As referenced above, the Federal Bureau of Investigation (FBI) recruited, supervised, and paid a specific informant to infiltrate the camps of protesters near Standing Rock. During his employment by the FBI, this particular informant seduced Ms. Fallis and initiated an intimate, albeit duplicitous, relationship with her. He spent the majority of the 48-hour period prior to Ms. Fallis' arrest with her and had access to her and to her belongings. He was present and witnessed her seizure. The ammunition and the firearm she is accused of possessing and discharging following that seizure is the property of the same informant who, admittedly, made a series of false statements

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<sup>7</sup> The government has simply ignored, and not objected to, defense requests for relevant Intel Threads.

regarding his knowledge and involvement in the incident to various law enforcement agencies. The informant is a material, if not the key, witness in the government's case-in-chief and the defense is entitled to all available information regarding his employment and compensation by the government and/or by private security contractors as well as all available information regarding directives he was given by the government and/or by private security contractors and the role he played in the creation and support of the civil disorder alleged by the government, as well as his role in the events leading up to, and including, the arrest of Ms. Fallis<sup>9</sup>. Without this information, the defense is unconstitutionally compromised in its ability to investigate and cross-examine this key witness.

Moreover, at the Suppression Hearing, Deputy Thadius Schmit acknowledged that, on October 27, 2016, there was an unknown person who was embedded with the protestors and who gave briefings to law enforcement about what they witnessed. The identity of this person has not been disclosed, nor has the defense been advised if this person was an informant, an undercover law enforcement officer, or a DAPL security agent. The person's reports and debriefing materials have not been disclosed, nor has the government disclosed whether this informant witnessed or participated in the purported civil disorder, Ms. Fallis' arrest, or the alleged shooting.

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<sup>8</sup> Counsel also requires additional time to adequately review, investigate, incorporate, and craft trial strategy in response to the materials provided within the past two weeks and as recently as this morning.

<sup>9</sup> From August through October of 2016 this informant was engaged by the FBI and instructed to collect information on potential violence, weapons, and criminal activity on which he would regularly report to his FBI handlers. His work was considered so valuable that those handlers recommended additional compensation so that he would be "motivated for future taskings." The FBI documents disclosed by the government are

As is set forth in the Motion to Compel (Dkt. 135), DAPL security workers were present amongst protesters, dressed like protesters, participated in arrests, and were armed at the time of the demonstrations. The identity and reports of such undercover security operatives, possibly including the key informant here, have not been disclosed. Ms. Fallis has sought these materials from the outset of the case and will be materially prejudiced if required to go to trial without them and without sufficient time to review, investigate, and assess such material. Without timely access to the requested material, counsel cannot provide Ms. Fallis with constitutionally effective representation.

12. In its response to Ms. Fallis' Motion to Compel, the government acknowledged that it has yet to provide, and is currently seeking, additional information regarding law enforcement intelligence indicating that Ms. Fallis was identified and targeted as early as September 2016 - perhaps because she was perceived to be a "leader".

During the hearing on Ms. Fallis' Motion to Suppress, North Dakota Highway Patrol Captain Bryan Niewind acknowledged that "leaders" were targeted for arrest during the Standing Rock protests. Ms. Fallis has provided the government and this Court with copies of North Dakota state law enforcement documents, including a "link chart" purporting to identify leaders of the protest movement. See Dkt. 135, at p. 8; Dkt. 135-12, Dkt. 135-13. The government has yet to disclose the basis for Ms. Fallis' inclusion in this chart and multiple requests by the defense for disclosure of relevant law enforcement and/or corporate security documents underlying Ms. Fallis' inclusion on the "link chart" have been unsuccessful, necessitating the Court's intervention.

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sparse summaries of the telephonic or in-person debriefings of this informant, and not



This material is absolutely relevant to the lawfulness of government conduct as well as to law enforcement's motive to seize Ms. Fallis on October 27, 2016. Material from this, as well as from many other defense discovery requests, may inform or alter trial strategy and case theory, which is why discovery requests for specific items and information were provided early and often to the government. The late disclosure of any such material puts Ms. Fallis at a constitutionally indefensible disadvantage.

13. The government has neither objected to, nor complied with, the specific requests contained within Defendant's Discovery Letter 7 from November 13, 2017 (Dkt. 135-2), wherein Ms. Fallis sought materials establishing the symbiotic relationship between the government, the state, and private security contractors employed by DAPL. The defense has submitted uncontroverted evidence that DAPL security workers—some dressed as protesters—were present during the alleged civil disorder of October 27; that some private security officers directly assisted officers in making arrests; that DAPL security previously provided the government with real-time access to a live feed from its helicopter, as well as gathering and providing evidence to law enforcement officers for the purpose of assisting in prosecution. The well-demonstrated relationship of agency and cooperation between DAPL-contracted security and law enforcement renders the private security contractors members of the "prosecution team" for the purposes of discovery.

However, even if the Court were to conclude that private security entities are not subject to discovery requirements, Discovery Letter 7 also contains numerous requests for relevant information that is in the possession of law enforcement, including

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the detailed FBI 302 reports which would ordinarily be created.

memoranda of understanding regarding the joint involvement of law enforcement and private security contractors, communications between law enforcement and private security, “Intel Threads” (containing law enforcement only), state radio logs, and records of law enforcement meetings and operational plans for October 27. The government has made no attempt to distinguish between those materials requested in Discovery Letter 7 that are in the possession of prosecution team law enforcement agencies and those that may be solely in the possession of DAPL security entities, choosing instead to refuse to respond to any specific requests contained within this letter, thereby depriving Ms. Fallis of material information relevant to her defense and necessary to enable counsel to provide effective representation.

14. Significant and essential discovery related to audio and video material depicting the scene of the alleged civil disorder, Ms. Fallis’ arrest, and alleged shooting remains outstanding. The government only recently disclosed that the law-enforcement Forward Operating Base (FOB) collected all of the recording devices and their recordings after the events of October 27, 2016 and asserted, without documentation, that most devices for the requested recordings were not working, had run out of batteries, or otherwise were purportedly not recording during the events surrounding Ms. Fallis’ arrest. Furthermore, the only two as-of-yet provided GoPro recordings from the scene of the arrest do not begin until after Ms. Fallis is alleged to have discharged a firearm.<sup>10</sup>

Ms. Fallis is entitled to question the apparent mass mal- and mis-functioning of

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<sup>10</sup> One video begins within 60 seconds of the alleged discharged and the other within 90 seconds. No police reports provided in discovery indicate that any law enforcement

the numerous audio-visual recording devices present at the scene of her arrest, which would have been uniquely positioned to verify or contradict law enforcement testimony given that the police line largely shielded the seizure of Ms. Fallis from the view of civilian witnesses. The defense is entitled to obtain all documents requested regarding these recorders and recordings, as well as manuals or outlines of training received by these officers for their recording devices, including policies and procedures related to the operation of GoPro and other recording devices while deployed.

Particularly with respect to Cass County Officer Tonya Jahner and her camera, the government asserted that Officer Jahner was not filming the immediate aftermath of Ms. Fallis' arrest, despite screenshots that show Officer Jahner holding a camera and pointing it in the direction of Ms. Fallis at that very time. The relevance and materiality of such a recording is evident, as it could provide the best evidence depicting the statements, if any, and demeanor of the arrestee, as well as those of law enforcement, at the most critical time during which Ms. Fallis purportedly made numerous inculpatory statements.

Additional time is necessary to seek the assistance of this Court in ordering disclosure of documentation regarding the purported lack of relevant footage from Officer Jahner and others present at the scene with law enforcement-issued recording devices provided for the very purpose of documenting the events of October 27.

Importantly, unlike audio/video recordings of the scene created by protesters and bystanders, the defense does not have equal access to law enforcement created material. The government has the unique ability to access audio and video recordings, together

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officer turned on his or her GoPro in the time period immediately following the

with the relevant policies, procedures, and related communications governing the creation and maintenance of such recordings as are in the hands of cooperating law enforcement agencies. Despite investigative efforts undertaken by the defense, materials in the possession of law enforcement and/or private security cannot be obtained by the defense. As such, the government has a constitutional obligation to seek out and tender such material to the defense.

15. Ms. Fallis also requires additional time within which to obtain and prepare expert witnesses. The defense anticipates needing to utilize two expert witnesses. First, a law enforcement expert to address issues related to standard crime scene investigation and evidence preservation protocol. While the defense is in communication with such an expert, additional discovery materials, requested but not yet produced, are required in order to obtain a fully-informed opinion from such expert.

Second, a forensic video expert. A careful review of electronic discovery provided by the government raises questions regarding the condition of the recordings. Due diligence requires that counsel obtain a forensic video expert who can analyze the myriad audio-visual recordings and the accompanying metadata for any indicia of alterations to video footage provided in discovery.

16. “Strategic choices made *after thorough investigation of law and facts relevant to plausible options* are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable*

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Defendant’s arrest.

*decision that makes particular investigations unnecessary.” Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting Strickland v. Washington, 104 S Ct 2222, 2052 (1984) (emphasis added).* Counsel’s as-of-yet uncompleted consultation with both experts is not a result of reasonable professional judgment, but rather the inability of witnesses to complete these consultations prior to the deadline for motions and disclosure of witnesses.<sup>11</sup> Counsel has also been unable to complete the necessary factual investigation in advance of the pending motions deadline, and will be unable to adequately do so prior to January 29, 2018.

17. A continuance of the current trial date is necessitated by, inter alia, Ms. Fallis’ need to (a) present numerous complicated pretrial motions, (b) craft jury instructions; (c) prepare motions *in limine*; (d) complete discovery; (e) secure expert witnesses who have an opportunity to review the relevant discovery; and (f) complete the location, investigation and interviews of prospective defense witnesses.

18. Ms. Fallis has been consulted regarding this request for a continuance of the January 29, 2018 trial date and is in agreement with the continuance. A written consent to the continuance, signed by her, is forthcoming.

19. The requested continuance will allow Ms. Fallis the opportunity to adequately prepare the case for trial, comply with the Court’s pre-trial deadlines and receive the effective assistance of counsel at trial as contemplated by the Fifth and Sixth Amendments to the U. S. Constitution.

20. Any delay generated by this request for a continuance will be charged to

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<sup>11</sup> The ability of counsel to consult adequately with experts is also impaired by the lack of information provided in discovery relevant to audio-visual recording devices and practices, as well as law enforcement reports related to the crime scene.

Ms. Fallis pursuant to 18 U.S.C. § 3161 *et. seq.* for the reason that the ends of justice are served by the granting of this continuance and, therefore, the public's interest in a speedy trial is outweighed. 18 U.S.C. § 3161(b)(8)(A).

WHEREFORE, the Defendant Red Fawn Fallis respectfully requests that the Court continue the January 29, 2018 jury trial and reestablish reasonable pre-trial deadlines, granting her such further relief as may be just and proper in the premises.

Dated: December 27, 2017

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 December 27, 2017 on the Office of the United States Attorney by way of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Molly Armour  
Molly Armour