

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

United States of America,	)	
	)	
Plaintiff,	)	<b>ORDER REGARDING MOTIONS</b>
vs.	)	<b>IN LIMINE</b>
	)	
Redfawn Fallis,	)	Case No. 1:17-cr-16
	)	
Defendant.	)	

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On December 29, 2017, the parties filed numerous motions in limine in this matter. See Docket Nos. 152, 156, 157, 158, 159, and 160. Responses have been filed to most, but not all, of the motions. See Docket Nos. 183, 184, and 185. Each motion will be discussed in turn.

**A. GOVERNMENT’S MOTION IN LIMINE**

On December 29, 2017, the Government filed a motion in limine seeking an order (1) restricting the Defendant from offering evidence or testimony relative to prior historic treaty agreements between the United States and the Lakota Sioux tribes and the 1877 Act during the trial; (2) requiring all witnesses to follow the normal decorum of the courtroom in taking the oath; and (3) precluding the submission of necessity as a defense. See Docket No. 152. On January 5, 2018, the Defendant, Redfawn Fallis, filed a response to the motion. See Docket No. 185. For the reasons outlined below, the motions are granted.

**1. TREATY RIGHTS**

The Defendant’s response states treaty rights “are relevant and admissible to the extent that they bear upon the twin elements of lawfulness—lawful engagement and lawful performance . . .” See Docket No. 185, p. 1. The Court will reserve ruling on this motion until trial. However, the Defendant will need to address the Government’s motion in more detail and specificity other than

to simply argue treaty rights are relevant. The relevance of historic treaty rights to the criminal charge of civil disorder is highly questionable.

## **2. OATH**

The Defendant's response notes that "[a]t present, the defense does not know whether any witness will seek to take an oath in a traditional Lakota manner." See Docket No. 185, p. 4. The Defendant notes that should a witness wish to take an oath in such a fashion, they would bring any necessary implements with them, and there would not be a delay. See Docket No. 185, p. 4. The Court will require all witnesses to take the oath typically administered or affirm in accordance with Rule 603 of the Federal Rules of Evidence.

## **3. NECESSITY DEFENSE**

The Defendant's response notes she does intend to present a necessity defense at trial. See Docket No. 185, p. 4. Thus, the Government's motion in limine regarding precluding the submission of necessity as a defense is granted.

## **B. DEFENDANT'S MOTION IN LIMINE REGARDING RULE 404(b)**

On December 29, 2017, the Defendant filed a motion in limine seeking to exclude any references to any prior crimes, wrongs or acts, charged or uncharged, allegedly committed by the Defendant. See Docket No. 156. To date, no response has been filed. Local Rule 47.1(E) provides that a failure on the part of an adverse party to file a response to a motion "may be deemed an admission that the motion is well taken." See D.N.D. Crim. L. R. 47.1(E). Further, the Government's failure to file a response within the prescribed time subjects the motion to summary ruling. Id. Accordingly, the Defendant's motion in limine regarding Rule 404(b) evidence (Docket No. 156) is granted.

**C. DEFENDANT’S MOTION IN LIMINE REGARDING RULE 609**

On December 29, 2017, the Defendant filed a motion in limine seeking to exclude any references to any prior convictions allegedly sustained by the Defendant if she chooses to testify in her own defense. See Docket No. 157. To date, no response has been filed. Local Rule 47.1(E) provides that a failure on the part of an adverse party to file a response to a motion “may be deemed an admission that the motion is well taken.” See D.N.D. Crim. L. R. 47.1(E). Further, the Government’s failure to file a response within the prescribed time subjects the motion to summary ruling. Id. Accordingly, the Defendant’s motion in limine regarding Rule 609 evidence (Docket No. 157) is granted.

**D. DEFENDANT’S MOTION IN LIMINE REGARDING RULE 402**

On December 29, 2017, the Defendant filed a motion in limine seeking to exclude any references to any demonstrations and/or protest activity, including the arrests of other individuals at sites other than the site of her arrest and/or that occurred at times distant from the time of her arrest. See Docket No. 158. On January 5, 2018, the Government filed a response in opposition to the motion. See Docket No. 183.

In its response, the Government states it must prove that law enforcement “lawfully engaged in the lawful performance of their official duties incident to and during the commission of such civil disorder” which is an element of the offense of civil disorder. The Government contends the events that started at approximately noon on October 27, 2016, and occurring in an ongoing manner throughout that afternoon, are relevant information as it establishes the lawful bases for which law enforcement was present on Highway 1806 and private property located

adjacent to Highway 1806. The Court agrees that some of the events of that day are relevant to establish context and an explanation for the presence of officers and protestors on Highway 1806.

The suppression hearing testimony of North Dakota Highway Patrol Captain Brian Niewind established that law enforcement was present on Highway 1806 on October 27, 2016 because protestors, as a whole, were causing a nuisance on Highway 1806 that required the State to shut down the highway due to safety concerns for both travelers on Highway 1806 and the protestors that were camping near the edge of the highway. In addition, Captain Niewind testified that law enforcement felt their actions on October 27, 2016, were necessary as all individuals present on Highway 1806 that day were violating North Dakota law, and as such were subject to lawful arrest.

It is clear that counsel for the Defendant intends to challenge the legality of law enforcement's presence on Highway 1806 on October 27, 2016. The Government argues that because it is an element of one of the offenses (civil disorder), the legality of the presence of law enforcement throughout the day, as well as at the time of Defendant's arrest, is at issue and is relevant. The Government further contends that criminal conduct occurring throughout the day will aid the jury in determining whether law enforcement's continued presence was necessary and lawful. The Government argues this evidence should include the obstacles protestors placed in the roadway, the fires set by protestors to prevent or obstruct law enforcement, the camps on private property or in the ditches of Highway 1806, and the conduct of protestors as they physically engaged with law enforcement officers and threw items at them throughout the day. The Government contends the jury must hear what transpired prior to and leading up to the time of the Defendant's conduct in order to fully understand the circumstances just prior to the Defendant's

contact with law enforcement– to help the jury determine if the law enforcement presence was lawful.

Counsel for the Government states that it anticipates testimony that the Defendant, while in the Bismarck/Mandan area earlier that day, witnessed the events of law enforcement removing people from the camps on private property and the ditches of Highway 1806 via live feeds from various social media websites. The Government states that based upon what the Defendant was viewing live online, she, according to a witness, requested or demanded to go to the protest sites. On the way, the Defendant allegedly stopped at the Red Warrior camp, located on the south side of the Cannonball River, in order to obtain some of her belongings and an ATV vehicle so she could join the protest on Highway 1806 as soon as possible. The Government argues that because the Defendant was directly responding to what appeared to be present and ongoing riotous protest conditions with the intent to join the protests, some of the earlier events of October 27<sup>th</sup> are highly relevant to allow the jury to make a determination as to her intent.

Finally, the Government argues it is necessary to present testimony of the day's events as they unfolded in order to prove the elements of the charged crimes. The Government does not intend to expand the scope beyond that which the Court heard during the presentation of the Government's position at the suppression hearing. Counsel states there will be additional witnesses testifying about the actions of protestors throughout the day, in addition to Captain Niewind, not only because they were either personally affected by protestor actions, but also because they can lay the proper foundation for a few additional videos and images the Government feels necessary to offer in the presentation of its case-in-chief. The Government further states it does not intend to present a minute-by-minute recitation of the entire six (6) hours leading up to the Defendant's

specific conduct, but only very limited portions relevant and necessary to proving the elements of the crimes.

As the Court noted in its Order of January 2, 2018 (Docket No. 170), it will allow some preliminary background evidence of the events that occurred on October 27, 2016, “for the purpose of providing some context and an explanation for why there were law enforcement officers and pipeline protestors on Highway 1806 . . .” See Docket No. 170, p. 4. Thus, the Government will be allowed to present some limited testimony/evidence of the day’s events as they unfolded in an effort to prove the elements of the charged crimes.

However, the Court will not allow this trial to become a series of “mini-trials” on the specific details of all the events that occurred on October 27, 2016—whether at the North Camp; in the ditches along Highway 1806; at the South Camp; or at other locations. Certainly some background evidence of what transpired the afternoon of October 27, 2016, beginning near or around the noon hour and leading up until the time the Defendant was arrested, is warranted to allow the Government to present its case-in-chief and address the elements of the crimes charged. However, specific and vivid details as to what items were thrown at officers earlier in the afternoon, or hours before the Defendant was arrested; or exhaustive details concerning the alleged criminal misconduct of other protestors; or specific details of other aggressive or violent interactions between protestors and law enforcement officers in the hours before the Defendant was arrested, lack relevance to the charges at issue in this case. The actions taken by the officers the afternoon of October 27<sup>th</sup>, the reasons they took steps to secure the peace and Highway 1806, and the reasons they were moving protestors to the South Camp, can be conveyed in general terms to the jury without the need to provide vivid, prejudicial details. In other words, the object of the

mission and the purpose for the presence of law enforcement officers on Highway 1806 during the afternoon hours of October 27, 2016, can be presented by the Government to prove up the elements without the need to get into the graphic, evocative details of what transpired. Even if such vivid details of what occurred (for example, what was specifically thrown at the officers earlier in the afternoon) would be considered relevant, the Court would likely exclude such evidence in accordance with Rule 403 of the Federal Rules of Evidence.

With respect to the Defendant's contention that any discussion of other arrests lacks relevance and would be prejudicial, the Court agrees in part. The Government will be allowed to show there were numerous other persons arrested on October 27, 2016, before the Defendant was arrested. However, neither the precise number of arrests made on October 27, 2016, nor the disposition of those cases in other courts (convictions, dismissals, acquittals, etc.) is relevant. Even if the precise number of arrests on October 27, 2016, or the disposition of those cases is somehow deemed relevant, the Court would, in its broad discretion, still exclude such evidence after giving careful consideration to the factors set forth in Rule 403 of the Federal Rules of Evidence.

**E. DEFENDANT'S MOTION IN LIMINE REGARDING RULES 402 AND 404**

On December 29, 2017, the Defendant filed a motion in limine seeking to exclude any reference to any prior convictions allegedly sustained by Fallis. See Docket No. 159. To date, no response has been filed. Local Rule 47.1(E) provides that a failure on the part of an adverse party to file a response to a motion "may be deemed an admission that the motion is well taken." See D.N.D. Crim. L. R. 47.1(E). Further, the Government's failure to file a response within the prescribed time subjects the motion to summary ruling. Id. Accordingly, the Defendant's motion in limine regarding Rules 402 and 404 (Docket No. 159) is granted.

**F. DEFENDANT’S MOTION IN LIMINE REGARDING RULES 701, 402, & 403**

On December 29, 2017, the Defendant filed a motion in limine seeking to exclude any references or assertions that a “civil disorder” or “riot” existed at any location or at any time on October 27, 2016, other than in closing argument. See Docket No. 160. On January 5, 2018, the Government filed a response in opposition, in part, to the motion. See Docket No. 184. For the reasons outlined below, the motion is granted in part and denied in part.

The Government agrees witnesses should not use the term “civil disorder” to describe the events of October 27, 2016, with the exception that the attorneys may use the term in their opening statements and closing arguments. See Docket No. 184, p. 1. The Government disagrees with limiting the word “riot” or any such derivations of the word by trained law enforcement officers during their testimony. See Docket No. 184, p. 1. The Government argues law enforcement officers have experience and knowledge in identifying prohibited criminal conduct, including inciting and engaging in riots. The Government also argues the officers’ training and experience give them the knowledge, experience, and perception to describe conduct they observe as riotous or riot-like conditions. Further, the Government asserts that officers’ testimony that they were present to enforce state criminal laws such as disobedience of public safety orders under riot conditions, and that the officers observed such conduct, is relevant to proving an element of one of the crimes Fallis is charged with, namely civil disorder. The Court finds the Government’s argument persuasive. Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** the Defendant’s motion in limine regarding Rules 701, 402, and 403 evidence (Docket No. 160). All witnesses shall be prohibited from using the term “civil disorder” to describe their observations of the events of October 27, 2016, with the exception that attorneys will be allowed to use the term

in opening and closing arguments. The Court, at this stage, will not extend that prohibition to the use of the word “riot” or derivatives of the word—but only when used by trained law enforcements—and only if the use of the term is necessary and relevant. The Court may revisit the matter, and reserves the right to modify this order, if circumstances warrant at trial and the terminology becomes a repetitive word of art for most witnesses.

The Court has reviewed the entire record and the relevant case law. In the broad exercise of its discretion, the Government’s motion in limine (Docket No. 152) is **GRANTED**, the Defendant’s motion in limine regarding Rule 404(b) evidence (Docket No. 156) is **GRANTED**, the Defendant’s motion in limine regarding Rule 609 impeachment evidence (Docket No. 157) is **GRANTED**, the Defendant’s motion in limine regarding Rule 402 evidence (Docket No. 158) is **GRANTED IN PART AND DENIED IN PART**, the Defendant’s motion in limine regarding Rule 402 and 404 evidence (Docket No. 159) is **GRANTED**, and the Defendant’s motion in limine regarding Rules 701, 402, and 403 evidence (Docket No. 160) is **GRANTED IN PART AND DENIED IN PART**.

**IT IS SO ORDERED.**

Dated this 10th day of January, 2018.

*/s/ Daniel L. Hovland*  
Daniel L. Hovland, Chief Judge  
United States District Court