UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

UNITED STATES OF AMERICA,	)	**No. 16 CR 17-DLH**
Plaintiff,	)	
- vs -	)	**DEFENDANT'S REPLY TO**
	)	**GOVERNMENT'S RESPONSE**
RED FAWN FALLIS,	)	**TO MOTION TO COMPEL**
Defendant.	)	**DISCOVERY**[1]

The Defendant, Red Fawn Fallis, by her counsel, hereby submits the following Reply to the government's Response [Dkt. 143] to Ms. Fallis' Motion to Compel Discovery [Dkt. 135]. As an initial matter, the Defendant notes that the government has failed to specifically respond to requests made in Discover Letter 7 [Dkt. 135-2] concerning material in the possession of cooperating law enforcement agencies, as well as to some requests within Discovery Letter 8[2] [Dkt. 135-3]. At a minimum, this Court should require the government to state specifically what they view as objectionable within these requests and respond to the remainder.

A. State and local law enforcement agencies who assisted in the investigation and prosecution of Ms. Fallis, and who assisted the United States Attorney's Office with intelligence gathering and coordination regarding law enforcement DAPL-related operations, are subject to discovery requirements of Rule 16 and *Brady*.

Prosecutors have a general duty to learn and disclose evidence known by investigating police officers. *United States v. Tyndall*, 521 F.3d 877, 882 (8th Cir. 2008). This duty applies to cooperating state officials. *See, e.g.*, *United States v. Risha*, 445 F.3d 298, 304-06 (3rd Cir. 2006). In *Risha*, the court noted that "most courts of appeals" look to the following factors in determining whether federal prosecutors have constructive knowledge of information known to state authorities: (1) whether the party with knowledge is acting on the government's behalf, (2) whether

[1] This oversized brief is brought purusant to the Court's order (Dkt. 150). The Defendant approximated that this motion would consist of 10 pages, but due to complexity, new discovery, and an onus to demonstrate materiality, this reply is 12 pages. The Defendant requests that these additional two pages be permitted.

[2] *See, e.g.*, request for relevant "DAPL Protest Incident Actions Plans" in Morton County Sheriff's Office's possession.

the state and federal governments are sharing resources or part of a "team" or "joint investigation," and (3) whether the prosecution has "ready access" to the evidence. *Id.* at 304.[3] The government's duty to discover information[4] under *Kyles v. Whitley*, 514 U.S. 419 (1995) extends to all agencies cooperating in the prosecution of Ms. Fallis, and plainly includes the North Dakota Highway Patrol (NDHP), Morton County Sheriff's Office, Cass County Sheriff's Office,[5] and North Dakota Bureau of Criminal Investigation (BCI).

Further, numerous local, state, and federal law enforcement agencies (*see* Dkt. 135, p. 4), engaged in DAPL-related communication and real-time intelligence exchanges via "Intel Threads"[6] to which U.S. Attorney's Office Intelligence Specialist Terry Van Horn was a party. These are cooperating agencies in the U.S. Attorney's Office DAPL-related criminal investigations.[7] The government cites *United States v. Pelullo*, 399 F.3d 197 (3rd Cir. 2005), where the court did not impute to prosecutors knowledge from Department of Labor (DOL) to civil investigation agents from Pension and Benefits Welfare Administration (PBWA) who compiled information in a civil case when DOL agents from a separate criminal department were members of the prosecution team. *Id.* at 216-18. Unlike the PBWA agents, Mr. Van Horn participated in criminal investigation of DAPL-related activity, spanning a timeframe including the Defendant's arrest as well as the filing of

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[3] *See also United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (imputing knowledge of state law enforcement to prosecution given cooperation between state and federal agencies); *United States v. Looking Elk*, 2011 U.S. Dist. LEXIS 22684, at *34 (D.S.D. Mar. 4, 2011) (invoking *Risha* in suggesting that "within the context of *Brady*, courts routinely consider prosecutors to be in constructive possession of information obtained by government agents involved in the investigations and acting on behalf of the prosecution.").

[4] The holding in *United States v. Whitehead*, 176 F.3d at 1030 (8th Cir. 1999), cited in government's Response, Dkt. 143, at 5 [hereinafter "R. _"], did not address the *Kyles* obligation upon the government's to discover information. Rather, the court held that because trial counsel become aware of the withheld material prior to trial and cross-examined about it no prejudice existed. *Id.* at 1036-37.

[5] Cass County officers have been interviewed in preparation for trial by federal officials, with members of the U.S. Attorney's Office present, as recently as November 21.

[6] These threads, undisclosed in discovery, were published by news source The Intercept.

[7] In its Response, the government did not dispute that Van Horn sometimes requested that officers on these threads perform intelligence research. *See* Dkt. 135, p. 4.

federal charges. While the PWBA was a "civil arm" of the DOL, *id.* at 209, Mr. Van Horn heads the Department of Justice's (DOJ) Law Enforcement Coordinating Committee (LECC), which is tasked with "creat[ing] an environment . . . where state, local, tribal, and federal agencies can work together to meet one another's needs." *See* Ex. A (LECC Page, N.D. U.S. Attorney's Office website). For DAPL criminal investigations, Mr. Van Horn is involved in precisely the type of "joint investigation" and "shar[ing] [of] labor and resources" lacking in *Pelullo*, 399 F.3d at 218.

Mr. Van Horn at times directed DAPL-related intelligence gathering by state officials; was a part of a sustained joint investigative effort involving numerous local, state, and federal law enforcement agencies; and had ready access to law enforcement-generated material as well as real-time evidence generated by private security entities. Dkt. 135-4, pp. 1, 5 (emails from Van Horn stating "[w]atching a live feed from DAPL helicopter" and "[d]eveloping pending intel from patrols in the field."). Van Horn's knowledge of any evidence relevant to the events of October 27 and the arrest of the Defendant is properly imputed to the prosecution, and local law enforcement agencies closely collaborating to investigate alleged DAPL-related criminal activity are properly considered prosecution team members. *See United States v. Barket*, 530 F.2d 189, 195 (8th Cir. 1976); *Cvijanovich v. United States*, No. 3:07-cr-55, 2011 U.S. Dist LEXIS 74000, at *11-12 (D.N.D. July 8, 2011); *Risha*, 445 F.3d 304 (citing state action on federal officials' behalf, whether there was a joint investigation, and whether federal officials have ready access to state-generated evidence, as crucial factors in determining constructive possession for discovery purposes).

Moreover, law enforcement agencies operating under the Unified Command structure should be deemed agents of Morton County Sheriff's Office for the purposes of DAPL-related criminal investigations. These agencies include but are not limited to the Mercer County Sheriff's Office, the Stutsman County Sheriff's Office, and the North Dakota Department of Emergency Services

(DES)[8]. *See* Ex. B (Unified Command Organization Chart for Dakota Access Pipeline Protest, excerpted from DAPL Incident Action Plan – 6).[9]

B. The requested and as-of-yet undisclosed discovery information and evidence is material under Rule 16 and *Brady*.

The Defendant requests that the government gives specific notice of which, if any, items requested in the Discovery Letters it deems immaterial, along with an opportunity to proffer additional evidence of their materiality in the form of exhibits as well as written and oral argument. To establish materiality under Rule 16, a defendant must make a colorable argument that evidence sought may be exculpatory. *United States v. Roach*, 28 F.3d 729, 734 (8th Cir. 1994). While the defense must demonstrate that requested evidence is related to issues in the case, the "materiality hurdle is not intended to be a high one." *United States v. Jean*, No. 5:15-CR-50087, 2016 U.S. Dist. LEXIS 163093, at *12-13 (W.D. Ark. Nov. 16, 2016). The Defendant offers the following initial showing of materiality of certain as-of-yet undisclosed discovery information and evidence. 1.

1. Undisclosed documents relating to DAPL-contracted security.

The government acknowledges communication between law enforcement and private security entitles [R. 4], but asserts that DAPL security contractors are not part of the prosecution team [R. 8-9], and that the prosecution does not possess records of any private security contractors. [R. 10]. Assuming DAPL security contractors are not members of the prosecution team, the governments ignores that many of the requests for DAPL security-related information are in the possession of cooperating law enforcement agents. *See* Dkt. 135-2 (November 13, 2017 Discovery Letter).[10] Rather than determining which records within this discovery letter are possessed by law

[8] The North Dakota State and Local Intelligence Center is a program of the DES.

[9] DAPL Incident Action Plans encompassing October 27 have been requested, but not disclosed.

[10] Examples include: including requests for memoranda of understanding between government agencies and security contractors [p. 3], payment records and agreements between law enforcement officers and private

enforcement, the government has generally declared these requests to be overbroad and irrelevant; it has failed to comply and respond without making specific objections.

The Defendant contends that **any** material in the possession of law enforcement regarding the relationship between law enforcement and DAPL-contracted security in general, and particularly regarding the events of October 27, 2016, is material to the preparation of her defense against the charge of Civil Disorder. *See United States v. Jaramillo*, 510 F.2d 808, 809-810 (8th Cir. 1975). In *Jaramillo*, the Eighth Circuit sustained a trial court's acquittal after the government failed to prove law enforcement officers were "lawfully engaged in the lawful performance" of their duties due to evidence of unlawful military involvement in the Wounded Knee operation. *Id*. Section 231(a)(3) requires that the government prove its lawfulness beyond a reasonable doubt. *See United States v. Jaramillo*, 380 F. Supp. 1375, 1381 (D. Neb. 1974) ("[T]his court is not finding that the actions of the [FBI] agents or the [U.S. marshals] were unlawful…. The prosecution's burden was to prove in court that the actions of those officers were lawful.").

The Defendant is entitled to argue to the jury that law enforcement's relationship to illegally-operating DAPL security entities rendered their October 27, 2016 operation unlawful—or at the very least, not lawful beyond a reasonable doubt. As early as September 7, 2016, Morton County Sheriff Kyle Kirchmeier and BCI officials received requests from the North Dakota Private Investigation and Security Board (PISB) to "investigat[e] possible criminal activity in the form of unlicensed individuals providing security services at the Dakota Access construction site." *See* Ex. C (Sept. 7, 2016 Letter From ND PISB to Kyle Kirchmeier and BCI). The PISB also requested that

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security companies [p. 3], radio transmission logs involving law enforcement and private security agencies [p. 4], records of joint law enforcement-private security meetings [p. 5], records of communication between law enforcement public information officers and private security [p. 5-6], records in possession of Terry Van Horn related to joint law enforcement/private security action [p. 7], relevant "Intel Thread" email chains (including the as-of-yet undisclosed October 27 thread) [p. 8].

Morton County "[c]onduct on-going, on-site compliance checks of private security personnel providing services to the Dakota Access Pipeline." *Id.*

Instead of policing the criminal operation[11] of TigerSwan and other unlicensed private security entities, Morton County Sheriff's Office, BCI, the U.S. Attorney's Office, and other law enforcement entities collaborated with TigerSwan and other contractors to: 1) access their surveillance live feeds [Dkt. 135-4, p. 1], 2) jointly arrest protesters on October 27 [Dkt. 135-16; 135-17]; 3) engage in mutual information-sharing;[12] 4) participate in meetings to gather "evidence collected for prosecution" and coordinate for "ongoing operations" [*United States v. Giron*, 17 CR 31-DLH, Dkt. 81-4, at 4],[13] and 5) apparently, obtain military-grade equipment for use in the October 27 operation.[14] Stutsman County Sheriff Chad Kaiser (DAPL Operations Local Deputy Unified Commander) was directly employed by TigerSwan. *See Giron*, Dkt. 81-3; Mar. 14 2017 Redmann Letter to PISB [Ex. I], p. 2.

Beyond those officers who were directly coordinating with, and even employed by, unlicensed private security companies such as TigerSwan, other officers clearly knew of these companies' role at the time of law enforcement operation resulting in Ms. Fallis' arrest. *See, e.g.*,

[11] *See, e.g.*, N.D. Cent. Code 43-30-10 ("any person who provides a private investigative service or private security service *without a current license* issued by the board … is guilty of a class B misdemeanor) (emphasis added); *United States v. Giron*, 1:17-cr-00031, Dkt. 81-2, p. 4 (PISB lawsuit alleging TigerSwan's unlicensed provision of investigative and security services related to DAPL protests over a time period encompassing Ms. Fallis' arrest).

[12] *See*, *e.g.*, "Sep. 12 DAPL Situation Report" (Ex. D), p. 2 ("Met with Sheriff Denzinger [sic]. Agreed to sharing of information"); "Dec. 27 2017 High Plains Reader Article" [Ex. E], (detailing coordination and information sharing between TigerSwan and law enforcement including Mercer County Sheriff Dean Danzeisen); *Giron*, Dkt. 81-1, p. 3 (indicating TigerSwan's advance knowledge of October 27 operation).

[13] *See also, e.g.,* "Oct. 20, 2016 FRAGO" (Ex. F), p. 2 (stating goal of "collect[ing] information of an evidentiary level" to "assist Law Enforcement" and "aid in prosecution"; instructing security officers to make video and photographic evidence available to law enforcement including "IMMEDIATE playback to further the LEO investigation."). Morton County Sheriff's Captain Lynn Woodall and Mercer Counties Sheriff Dean Danzeisen received were among the recipients of DAPL security FRAGOs. *See, e.g.*, "Oct. 19, 2016 FRAGO Email Thread" (Ex. G).

[14] *See* Oct. 18, 2016 TigerSwan Daily Intelligence Update [Ex. H], p. 5 (stating "2 Computers 1 for LE and 1 for OP have been shipped" "2 LRADS have arrived; "Body Armor ships tonight" and Still awaiting FLIR").

Ex. J, at 3 (Dec. 13, 2016 BCI Report containing Morton County Sheriff's Captain Jay Gruebele's report that as of October 18, 2016, there were several companies working security for DAPL with TigerSwan in charge). Morton County, BCI, and other law enforcement agencies ignored an explicit request made by the PISB to ensure private security operators were operating legally and instead initiated a sustained relationship of collaboration with these illegally-operating security companies. Under North Dakota law, officers (apparently including the top of the chain of command) who collaborated with TigerSwan and other unlicensed companies may be accomplices to the misdemeanor violation of unlicensed operation. *See* N.D. Cent. Code § 12.1-03-01(1). Defendant is entitled to evidence further elucidating the nature of the relationship between law enforcement and DAPL security, and **any** evidence of this relationship is material as to the lawful nature—or lack thereof—of law enforcement's October 27 operation resulting in her arrest.

Further, private security entities should be considered cooperating law enforcement agents for discovery purposes given the litany of undisputed facts establishing a relationship of agency and symbiosis between law enforcement, TigerSwan, and other security contractors. *See Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 291 (2001) (activity may be considered state action "when a private actor operates as a willful participant in joint activity with the State or its agents") (internal citations and quotations omitted); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (recognizing circumstances where the "State has so far insinuated itself into a position of interdependence with [a non-state actor] that it must be recognized as a joint participant in the challenged activity."). DAPL security's relationship to law enforcement embodies joint activity: DAPL security agents assisted with arrests, provided contemporaneous information in the form of live feeds and other intelligence gathered to "aid in prosecution," received information in return, procured military-grade equipment for October 27, and even employed a Sheriff prominent

in law enforcement's DAPL-related command structure, among other markers of joint activity and investigation. *Cf. United States v. Finnerty*, 411 F. Supp. 2d 428, 433-34 (S.D.N.Y. 2006) (finding Rule 16 did not apply to New York Stock Exchange when it undertook its own investigation and where there was "no suggestion that the Government participated" in the investigation).

2. Undisclosed documents relating to FBI informants.[15]

The FBI employed at least one paid informant, who enticed and seduced Ms. Fallis in order to infiltrate the camps without revealing his employment or purpose. He used their romantic relationship to rely upon her as an unwitting source of information for informant activities.[16] The relationship lasted up to and past the events of October 27. This informant owned the firearm and ammunition which Ms. Fallis is charged with possessing, was with Ms. Fallis for the majority of the 48-hour period prior to her arrest, and ultimately witnessed the arrest of Ms. Fallis. The informant is a material government witness who exculpates Ms. Fallis or otherwise mitigates her guilt, and the defense is entitled to all available information regarding his activities, any involvement of the FBI or other government agencies and/or private security contractors in communication with the informant, and his supervision, direction, and pay.

According to "unclassified" FBI documents disclosed by the government, the informant regularly reported to the FBI from August to October 2016. He was instructed to collect information on potential violence, weapons, and criminal activity.[17] This informant's work was considered so valuable that his FBI handlers recommended additional compensation for him to be

[15] Defendant hereby incorporates by reference paragraph 11 of her Motion to Continue (Dkt. 148, pp. 6-8) addressing undisclosed material regarding law enforcement and DAPL security informants and undercover officers. *See* Dkt. 135-32, p. 8-10 (requests #32-42).

[16] *See, e.g.,* Ex. K (Sep. 16 FBI FD-1023 CHS Reporting Document). Defendant seeks to seal Exhibits

[17] *See* Ex. L (Aug. 20 FBI FD-1023 CHS Reporting Document).

"motivated for future taskings."[18] The summaries show that the informant reported on specific people and activities in camp, and he consistently told the FBI that there were no plans for violence, "no firearms, explosives, or fireworks," and that the Lakota elders insisted on the protest being nonviolent.[19] Disclosed evidence indicates that people within the camps were focused on nonviolent resistance to the pipeline, and any documents further describing interactions and debriefings between the informant and the FBI are both mitigating and exculpatory.

Yet, the FBI documents disclosed are only sparse summaries of the informant debriefings, when it is clear detailed reports would likely be produced based on information provided. The last of reported the regular briefing summaries is from September 16, 2016. The remainder of such summaries and detailed reports remain undisclosed. *See* Dkt. 135-32, p. 9 (requests #34-35).

Additionally, on information and belief, this informant made numerous purchases using both cash and credit cards during his infiltration of the protest camps. The defense has not received any cash vouchers, credit card bills, or purchase receipts documenting the informant's or FBI's purchases made in furtherance of his infiltration activities while employed by the FBI. *See* Dkt. 135-32, p. 9 (requests #38-39). Finally, Ms. Fallis received a short summary report[20] but is otherwise missing any documents or information about the termination of the informant's FBI employment and the reported reason(s), including a possible transition to employment with a private security contractor.

The government has also failed to disclose any information, including witness and debriefing reports related to an unknown informant, undercover officer, or private security member embedded with protesters as testified to by Deputy Thadius Schmidt at the December 8, 2017 Suppression

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[18] *See* Ex. P (Aug. 30 FBI FD-794b Payment Request by SA Brian Hoff).

[19] *See, e.g.*, Ex. M (Aug. 22 FBI FD-1023 "UNCLASSIFIED" CHS Reporting Document); Ex. N (Aug. 23 FBI FD-1023 CHS Reporting Document); Ex. O (Aug. 25 FBI FD-1023 CHS Reporting Document).

[20] *See* Ex. Q [Oct. 4 FBI FD-1040a Source Closing Communication Form.

Hearing. As detailed in the Motion to Compel, DAPL security workers were present amongst protesters, participated in arrests, and, in at least one case, possessed liquid accelerant and a firearm while dressed as a protester [*see Giron*, Dkt. 81, pp. 9-11]. The identity and reports of other undercover security operatives, possibly including the informant boyfriend, have not been disclosed. Any such parties present during October 27 are material witnesses to the purported civil disorder, and their presence and activities that day are both mitigating and exculpatory.

3. Undisclosed documents relating to North Dakota law enforcement intelligence targeting Ms. Fallis starting in September or earlier.[21]

Ms. Fallis appears in a "link chart" prepared by the North Dakota State and Local Intelligence Center purportedly identifying leaders of the DAPL protests, including the Defendant. *See* Dkt. 135-12, 135-13. The Defendant maintains that information of this nature is material to the lawfulness of government conduct and law enforcement's motive to seize the Defendant on the date of her arrest. The government indicated it was attempting to gather information in respond to this inquiry and did not object [R. 3], but no additional materials have been provided.

4. Undisclosed audio-visual footage from October 27 and related metadata, policy, chain of custody, and technical information.[22]

The government's responses to both the Motion to Compel [Dkt. 143] and the Defendant's Discovery Group Exhibit [Dkt. 137] leave unanswered basic questions unanswered about the processes and practices surrounding the capturing, processing, distribution, and review of audio-visual evidence from October 27. The government has not disclosed complete information about who downloaded, processed, and eventually provided footage from October 27 to the Morton County State's Attorney and the United States.

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[21] Defendant hereby incorporates by reference paragraph 12 of her Motion to Continue (Dkt. 148, pp. 8-9).

[22] Defendant hereby incorporates by reference paragraph 14 of her Motion to Continue regarding missing audio-visual evidence (Dkt. 148, pp. 10-12).

Body camera footage supports the Defendant's concern that exculpatory footage may have been intentionally deleted and/or tampered with. *See* Ex. R at 0:56 (video of NDHP officer disabling a body camera after the officer wearing the camera states: "Before we start collecting people, I want to turn this off again"). While it is unclear if either of these unidentified officers were involved in the arrest of Ms. Fallis, the video in Exhibit R demonstrates that officers made conscious, premeditated decisions to avoid recording particular interactions with protesters on October 27. While acknowledging that the dash cam footage time stamps provided by NDHP may be inaccurate [R. 3], the government makes no attempt to explain why audio footage from a time period closely following the Defendant's arrest could be contemporaneous with video footage depicting it to be nighttime if such footage was not altered in a material way. [Dkt. 135, pp. 7-8]. The Defendant's requests for detailed information regarding metadata and chain of custody are crucial to her ability to independently analyze the integrity of audio-video footage.

On December 27, the United States disclosed a December 12 interview with Detective Jahner. *See* Ex. S (Dec. 12, 2017 ATF Interview with Detective Jahner). In this interview, Detective Jahner claimed—for the first time—that she thought she was recording at the time of the Defendant's arrest but had accidentally not turned the camera on. In contrast, when contacted by BCI Special Agent Joe Arenz regarding possible footage from Ms. Fallis' arrest, Detective Jahner made no indication that she had been intending to record the incident and instead stated generally that "there were times I was holding a recorder but it was not recording (the entire time) as I was trying to conserve battery/memory." *See* Ex. T (Dec. 11, 2017 Email From Detective Jahner to BCI). Neither of these explanations are noted in Agent Hill's record of a November 21 interview with Detective Jahner. *See* Ex. U [Nov. 21, 2017 ATF Interview with Detective Jahner].

Even if this Court is convinced that there was no bad-faith on the part of law enforcement

with regard to the staggering lack of camera footage from the scene of the Defendant's arrest, information regarding the policies and practices that resulted in this failure to appropriately document, gather, and preserve potentially exculpatory evidence is material insofar as such evidence of this systematic failure of documentation supports an argument for reasonable doubt. *See Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (Stevens, J., concurring) (citing appellant's ability to argue favorable inferences to the jury related the state's failure to preserve evidence as a critical factor in the Court's finding that the appellant was not constitutionally prejudiced by the State's failure to preserve evidence); *United States v. Boswell*, 270 F.3d 1200, 1207 (8th Cir. 2001) (noting the Defendant's opportunity to raise doubt among the jury as to unpreserved evidence before holding that he was not prejudiced by the lack of preservation). This Court should compel the government to respond in full to the Defendant's numerous, specific, and longstanding requests for information related to audio-visual footage. *See* Dkt. 135-32, pp. 10-13 (requests #48-52).

WHEREFORE, this Court should grant the Defendant's Motion to Compel Discovery, order the government to respond in writing to each of Ms. Fallis' discovery requests [*see* Dkt. 135, p. 11], order the government to make appropriate inquiring of all cooperating law enforcement agencies and DAPL-contracted security, and grant such further relief as may be just and proper.

Dated: December 29, 2017

Respectfully Submitted,

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