

STATE OF NORTH DAKOTA  
COUNTY OF MORTON

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota,  
Plaintiff,

vs.

AFFIDAVIT OF  
DIANE WILEY

Kelli Maria Peterson,  
Joseph Haythorn,  
Valerie Dawn Wolfnecklace,  
Defendants

) 30-2016-CR-00937  
) 30-2016-CR-00938  
) 30-2016-CR-00941

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STATE OF MINNESOTA  
COUNTY OF HENNEPIN SS:

Diane Wiley, being first duly sworn, on oath, deposes and says:

**I. I am President of the National Jury Project, Midwest, located at 126 North Third Street, Suite 515, Minneapolis, Minnesota 55401.**

The National Jury Project Midwest is a subsidiary of the National Jury Project, Incorporated, a not-for-profit corporation specializing in the study of the American jury system and providing consultation to attorneys and courts. The National Jury Project, Inc. is incorporated in the State of Minnesota and has offices in New Orleans, Louisiana; Oakland, California and Minneapolis, Minnesota. Our primary areas of research include juror attitudes and decision-making, voir dire procedures, jury composition and venue evaluation, and other issues related to minimizing the effects of juror bias on the trial process. I have been conducting both quantitative and qualitative research into juror attitudes and decision making since 1973.

Our research, including surveys and testimony about news coverage, venue evaluation, and voir dire conditions, has been accepted by courts in numerous federal and state jurisdictions across the country. I have personally supervised the administration of venue surveys, content analysis of news coverage, consulted and/or given written or oral testimony in over 60 cases involving recommendations for change of venue, and have also recommended to attorneys that they not seek change of venue in various cases. [See *Appendix 1* for resume of Diane Wiley.]

Our manual, JURYWORK: Systematic Techniques, (2d ed., Clark Boardman Callaghan) is widely recognized as one of the most comprehensive and in depth works in the field of jury research. It is widely used by attorneys, court administrators and other jury researchers. I am a current editor and contributor.

In addition, I and other members of the National Jury Project have been invited speakers to a number of governmental bodies analyzing the jury trial process in various states, including both Minnesota Task Forces on Gender and Race in the Courts, and the Minnesota Sixth Judicial District Jury Management Task Force.

**II. I have been asked by attorneys Chad Nodland and Jessica Hibl, counsel for the listed defendant protesters and other Dakota Access Pipeline protesters to advise them and the court as to whether there is a need for a change of venue for the protesters' upcoming trials.**

To this end, I designed and implemented a survey to measure knowledge, attitudes and prejudgment in relation to a sample of juror-eligible persons in Morton and Burleigh Counties in relation to the cases involving the Dakota Access Pipeline protests.

**III. SUMMARY CONCLUSION AND RECOMMENDATION**

**This is an extraordinary situation due to the ongoing protests and sheer number of defendants. Based on the survey, my review of the news coverage related to the protests against the Dakota Access Pipeline, the charges involving the protesters, the characteristics of Morton and Burleigh Counties, and my extensive experience in evaluating juror attitudes, I have concluded that it is highly likely that the defendant protesters will not be able to receive fair trials from petit jurors impaneled in Morton and Burleigh Counties in the upcoming cases involving the protests.**

My recommendation is that the trials be moved to a different, non-contiguous county in a more metropolitan area outside the reach of the Bismarck media market. I base this recommendation on the fact that every defendant is entitled to a fair and impartial trial and the survey clearly demonstrates that petit juries convened in Morton or Burleigh Counties or surrounding counties at this time will consist of panels of jurors who we can expect to have characteristics from one or more of the following categories which will make it impossible for many of them to be fair and impartial and very difficult for others. We can expect Morton and Burleigh county jury panels (and surrounding counties served by the Bismarck media market) to consist of jurors who:

1. have had extensive exposure to news coverage about the protests and to discussion, rumors and speculation in the community;
2. have connections to law enforcement, the oil industry, landowners and others who have been affected by the protests and to a very small degree, protesters;
3. have strong emotional feelings about the protesters, the protests and their impact on the community;

4. are aware that others in the community think that the protesters are guilty;
5. have either prejudged the protesters as indeed guilty of the charges against them, or at best, are substantially predisposed to believe in their guilt.

The juror eligible population in Morton, Burleigh and surrounding counties has been exposed to a massive amount of news coverage, discussion, rumor and speculation as to the protests and the protesters. A significant percentage of people in both counties surveyed have been affected in some way or know others who have been affected by the protests. There were marches to show support for law enforcement, a GoFundMe page and collections of food, drinks and other supplies for law enforcement. There have been "reverse 911" calls to residents to warn them to avoid certain areas because of the protests. There has been a boycott of local businesses. People have had to drive miles out of their way to get to their homes, businesses and churches. Most of those surveyed and interviewed by the news media feel that the protests are having a negative impact on their community.

The survey also clearly demonstrates that the community atmosphere is one of hostility towards the protester defendants. Many respondents to the survey expressed hostility to the protesters and many said that they had expressed the opinion that the protesters were guilty and had heard others say that the protesters were guilty. They believe that others in the community think that the protesters are guilty. This type of atmosphere contributes to potential jurors' comfort level with their own prejudicial attitudes towards the defendants as it is normative.

In my professional opinion, it is next to impossible to expect that jurors holding these attitudes and predispositions, and living in such an atmosphere, can impartially weigh the evidence in the cases.

The Morton and Burleigh County communities are polarized, with a very small percentage of people who feel that the protesters are right and have been mistreated, but most feel that they are guilty and destructive. Emotions are running high in the community, as reflected by the survey and the news coverage.

The community has been inundated with news coverage about the protests; the sheriff and governor (who just left office) have weighed in with their own numerous negative and sometimes inflammatory statements about the protesters. Not surprisingly, the survey results show that most juror-eligible residents of Morton and Burleigh Counties have prejudged or at a minimum are negatively predisposed against the protester defendants.

This affidavit provides a summary of the survey results and analysis of the meaning of those results.

The attitudinal study shows that, as of mid-December 2016, approximately 82% of the juror eligible population of Morton County and 94% of the juror eligible population of

Burleigh County have prejudged the defendant protesters guilty or not guilty, with most believing they are guilty (77% in Morton and 85% in Burleigh think they are guilty).

In addition, 8% of the Morton County respondents and 2% of the Burleigh County respondents gave answers indicating they are predisposed to not be fair, relating to opinions they hold as to the protesters' guilt or innocence, having been affected by the protests or having connections to persons affected by the protests. When you combine the small percentage of residents who appear to not be biased with the tense and hostile atmosphere in the community, I conclude that the defendant protesters are facing prejudice and bias such that it is highly unlikely they could receive fair trials.

The survey interviews were completed before the first trial in Morton County where two protesters were found guilty of obstruction of a highway and disorderly conduct on December 20, 2016. This could easily affect potential jurors' opinions negatively as well for the next trials.

And as the protests are ongoing, there will continue to be news coverage and community discussion as the trials approach. The issues involved will remain very much alive for community residents and given the negative cast of most of the coverage towards the protesters, the situation is likely to get even worse as to potential jurors' attitudes towards the protesters. In my 43 years of being involved with venue evaluation surveys, this is the first time that I have seen 100% recognition of the issues involved in a court case or cases.

#### **IV. The Attitudinal Study**

The survey was designed to measure the sources, nature and extent of the knowledge and opinions held by potential jurors in Morton and Burleigh Counties in relation to the charges against the protesters. The study was designed in accordance with accepted survey research principles, and followed the same basic format which has been accepted in numerous state and federal courts.<sup>1</sup>

I designed a questionnaire which was administered over the telephone to a random sample of 129 juror-eligible residents of Morton County and 126 juror-eligible residents of Burleigh Counties. A random sample of phone numbers was purchased from Survey Sampling International<sup>2</sup>. Once the interviewer contacted a phone number, the respondent was then qualified as juror-eligible based on being a US resident of Morton or Burleigh Counties over the age of 18, either having a driver's license or state identification card or having voted in recent elections.

There were three primary purposes of the venue evaluation study:

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<sup>1</sup> Appendix 2 includes the screeners, survey questionnaires, response rates and margins of error.

<sup>2</sup> The samples included both landlines and cell phones.

1. to measure the extent, nature and sources of knowledge of the eligible juror population in relation to the Dakota Access Pipeline protests and protesters;
2. to measure the level of connection between the juror-eligible population and anything to do with the protests or with having been affected by the protests;
3. to measure the extent to which the juror-eligible population has prejudged or possesses predisposing opinions as to the protesters' guilt or innocence in relation to the charges against them.

The random sample of 129 Morton County and 126 Burleigh County residents was interviewed from December 2nd through December 14th, 2016. The questionnaires were then prepared for analysis by computer, and a computerized data analysis and content analysis were done.

The percentages of responses to each question are contained in *Appendix 3*. The questionnaire includes numerous open-ended questions which asked the respondents for comments. [See *Appendix 4* for all of the verbatim answers to Morton County and *Appendix 5* for all of the verbatim answers to Burleigh County.]

#### **A. Knowledge and Community Connections**

The survey results demonstrate an extremely high level of knowledge of the protests, and many connections of juror-eligible residents with the protests, with law enforcement who are involved with the protests, as well as other connections:

1. **There is a very high level of awareness of the protests.**

**Question 2: "For the last number of months, there have been people protesting against the Dakota Access Pipeline in Morton and Burleigh Counties. Have you read or heard about these protests?"**

**100% of those interviewed in both counties knew about the protests**

In forty-three years of conducting venue evaluation surveys, this is the first time I have ever had 100% of those interviewed know about the incident or events that the trial concerns.

2. **Question 6, "Have you read or heard or seen anything about the Dakota Access Pipeline protesters being arrested and charged with crimes in relation to these protests?"**

	<b>Morton County</b>	<b>Burleigh County</b>
Yes	93%	98%
No	6%	2%
Refused		
Don't know	1%	

3. **Most of the respondents indicated that they had multiple sources of information about the protests:**

	<b>Morton County</b>	<b>Burleigh County</b>
Newspaper	65%	74%
Television	88%	90%
Radio	53%	56%
Internet or Social Media	69%	60%

	<b>Morton County</b>	<b>Burleigh County</b>
All four categories of media	29%	28%
Three categories of media	32%	36%
Two categories of media	30%	20%
One category of media	9%	9%
No media about protests	1%	6%

There is clearly a high amount of interest in the news coverage of the protests.

4. **90% in Morton County and 94% in Burleigh County have talked to at least one person in the category of family, friends, co-workers or “other people” about the protests, and most of them talked to people in more than one of those categories:**

	<b>Morton County</b>	<b>Burleigh County</b>
Family	84%	88%
Friends	84%	85%
Co-workers	63%	49%
Other people	69%	60%

Only 10% in Morton County and 6% in Burleigh County say that they have talked to no one about the protests and most say that they have talked to people in more than one category:

	<b>Morton County</b>	<b>Burleigh County</b>
All four categories	55%	37%
Three categories	18%	29%
Two categories	9%	20%
One category	9%	9%
Talked to no one	10%	6%

Again, in my experience this is a larger number of respondents who say that they have talked to people outside of their families about the situation relating to an upcoming trial than we usually see in surveys.

5. **58% of Morton County respondents and 53% of Burleigh County respondents indicated that they, or someone they know, has some kind of personal connection to the protests and/or have been affected by the protests.**

	Morton County	Burleigh County
Know protester or family	19%	16%
Know someone who works for DAPL	10%	9%
Respondent or someone they know has been affected by the protests in some way	52%	48%

Respondents of both counties say that they or people they know have been affected by the protests because of traveling or living near where the protests have occurred.

Respondents either are or know people who have been affected such as:

- law enforcement
- first responders
- ham radio operators working with law enforcement
- construction workers
- DAPL and/or oil industry workers
- landowners
- casino or reservation connections
- protesters

By far, the biggest connections are law enforcement and local landowners.

Some respondents know both protesters and law enforcement, some know landowners who feel they've been harassed and other know Native Americans who feel they've been harassed or are scared by those who are against the protests.

Those who work at the Capital have been on lockdown a number of times because of protests. Others have had access to their homes and business restricted.

Many are or know landowners who have been affected – they maintain that property has been damaged, including livestock and physical property, including one respondent who said their dog had gone missing and attributed that to the protesters.

## **B. Prejudgment**

1. **82% of Morton County and 94% of Burleigh County respondents have prejudged the protesters as definitely or probably guilty or definitely or probably not guilty**



In addition, there are questions about the abilities of the remaining respondents to be able to be fair due to their attitudes or connections.

Comparing the answers to Question 20, (whether a respondent thought the protesters were guilty or not), Question 22, (whether the respondent thought he or she could be a fair and impartial juror), Question 14 (whether the respondent has ever expressed the opinion that the protesters were guilty) and their answers to the open-ended questions, it is clear that the vast majority of the juror-eligible population of Morton and Burleigh Counties has clearly prejudged the protesters or is predisposed to thinking they are guilty, such that they would not be able to presume they are innocent.

**2. 75% of Morton County respondents and 77% of Burleigh County respondents think that the protesters are either probably or definitely guilty**

5% of Morton County respondents think the protesters are probably not guilty and 9% of Burleigh County residents think the protesters are definitely or probably not guilty.

Question 20: "From what you have read and heard about these arrests, do you think that most of the protesters who have been charged with crimes are: definitely not guilty, probably not guilty, probably guilty or definitely guilty?"<sup>3</sup>

	<b>Morton County</b>	<b>Burleigh County</b>
Definitely guilty	35%	23%
Probably guilty	40%	54%
Probably not guilty	5%	7%
Definitely not guilty		2%
Don't know	19%	13%
Refused	1%	1%

In my experience, this is an extremely high number of survey respondents professing that they believe the defendant protesters are guilty or not guilty, particularly those stating that they are definitely guilty.

**3. 56% of Morton County respondents and 45% of Burleigh County residents said they had previously expressed the opinion to others that the protesters were guilty.**

Question 14: "Have you ever expressed the opinion to someone else that the

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<sup>3</sup> The order of the choices was read from definitely not guilty to definitely guilty on half of the surveys and from definitely guilty to definitely not guilty in order to reduce ordering bias.

protesters who were arrested are guilty or probably guilty?"

	Morton County	Burleigh County
Yes	56%	45%
No	33%	50%
Don't know	11%	5%
Refused	1%	

4. **33% of Morton County respondents and 39% of Burleigh County residents said they could not be fair jurors.**

Question 14: "Do you think you could be a fair and impartial juror in a case involving the Dakota Access Pipeline protesters?"

	Morton County	Burleigh County
Yes	49%	53%
No	39%	33%
Don't know	12%	13%
Refused		1%

5. **When the answers to the various questions are combined I find that 82% of Morton County and 94% of Burleigh County have prejudged the protesters as guilty or are so predisposed to believe that they are guilty that it would be very difficult for them to presume the protesters are innocent.**

	Morton County	Burleigh County
Respondents who said that they could not be fair jurors	33%	39%
Respondents who said they could be fair jurors <u>and</u> had expressed the opinion that the protesters were guilty <u>and</u> said the protesters were definitely or probably guilty	19%	22%
Respondents who said they could be fair jurors <u>and</u> who had expressed the opinion that the protesters were guilty <u>and</u> said the protesters were probably not guilty	1%	2%

Respondents who said they could be fair jurors <u>and</u> who had expressed the opinion that the protesters were guilty <u>and</u> said they didn't know if the protesters were guilty or not	2%	2%
Respondents who said they could be fair jurors <u>and</u> said protesters were definitely or probably guilty	9%	18%
Respondents who said they could be fair jurors <u>and</u> said the protesters were definitely or probably not guilty	3%	3%
Respondents who said they could be fair jurors <u>and</u> who didn't know if they had expressed the opinion that the protesters were guilty <u>and</u> said the protesters were probably guilty	3%	1%
Respondents who said they could be fair jurors <u>and</u> who didn't know if they had expressed the opinion that the protesters were guilty <u>and</u> said the protesters were probably not guilty	1%	
Respondents who said they didn't know if they could be fair jurors <u>and</u> said the protesters were definitely or probably guilty	11%	6%
Respondents who refused to say if they could be fair jurors <u>and</u> said the protesters were definitely guilty		1%
Total expressing an opinion on guilt and/or not being a fair juror:	82%	94%

There are also respondents who said that they didn't have an opinion about guilt and that they could be fair jurors who gave other answers which indicate that they would have problems with being fair. Research shows and the courts recognize that jurors do not always know what it means to be fair and can hold views that they don't see as causing problems with their ability to be fair and impartial, while professing that they can be "fair".

	<b>Morton County</b>	<b>Burleigh County</b>
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Respondents who said they could be fair jurors <u>and</u> did not know if the protesters were guilty <u>and</u> gave open-ended answers that indicated they are predisposed to not be fair	8%	2%
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The following are examples of a few of the respondents who say that they don't know if the protesters are guilty or not and think that they can be fair, but who hold opinions that would at best predispose them towards finding the protesters guilty before having heard any evidence in court.

M094<sup>4</sup> Can be a fair juror and hasn't expressed an opinion if the protesters are guilty or not and doesn't know if guilty or not:

[Q3] I live on Highway 1806 and I see it every day. This road leads right to the camp if the bridge was open but it is blocked. People are forced to go six miles west of here to Highway 6 that isn't blocked.

[Q6] That they were arrested for blocking streets and stuff. They've been getting away with a lot of stuff.

[Q12a.] We just want it to get over with. The out-of-staters need to go home.

[Q22] Can be a fair juror

[Q22a.] (Fair juror?) Why not? I would be open-minded and listen to evidence they have.

M113 Can be a fair juror and doesn't know if expressed an opinion if the protesters are guilty or not<sup>5</sup> and doesn't know if guilty or not:

[Q3] They are radical and not peaceful.

[Q6] They were doing wrong to law enforcement.

[Q22] Can be a fair juror

[Q22a.] (Fair juror?) I have nothing against anyone and will always be fair no matter what it is.

B019 Can be a fair juror and has not expressed an opinion whether the protesters are guilty or not and doesn't know if guilty or not:

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<sup>4</sup> The survey respondents are numbered to protect confidentiality. "B" in front of a number indicates that the respondent is from Burleigh County and "M" indicates Morton County. "Q" is the question number where the respondent's answer was given.

<sup>5</sup> When someone says they "don't know" if they've expressed an opinion that the protesters are guilty or not, it does not ring true that they have no opinions, particularly when they express negative attitudes towards the protesters.

- [Q17a.] I am active in the community and know many participants/actors.
- [Q19] (Can protesters get a fair trial?) No
- [Q21] I assume some are "guilty" and some were swept away. I dislike making such statements without more firsthand knowledge.
- [Q22] Can be a fair juror
- [Q22a] I hope so. I am less convinced of the rights and wrongs of it than most in the community.
- [Q23] It is sad and disruptive and has fed into old and new prejudices here. The effects will last a very long time.

B070 Can be a fair juror and has not expressed an opinion whether the protesters are guilty or not and doesn't know if guilty or not:

- [Q3] They were clogging up the streets of Bismarck before the snow came. Marched up the State Capitol.
- [Q6] I'd imagine that some belong in jail. Wherever they are they cause trouble and some are young and stupid. Some crimes are worse than others. Some are unclear.
- [12a.] That the upshot is harm to community and the State economy whatever the outcome. That's all.
- [17a.] (Know someone affected and how?) Yes, I'd rather not say.
- [Q21] I'm sure some are but the situation is very heated. Would prefer not to make a judgment based on diverse media reports.
- [Q22] Can be a fair juror
- [Q22a.] I am fair and believe the court system can sort it all out.

### C. The Community Atmosphere is Primarily Hostile to the Protesters

The atmosphere in both counties is primarily hostile to the protesters. Potential jurors in both Morton and Burleigh Counties perceive that their fellow citizens believe that the protesters are guilty and a large majority is in favor of building the pipeline.

1. **65% of Morton County and 75% of Burleigh County respondents believe that the majority of people in their county think that the protesters are guilty of something.**

Question 18: "Do you think that the majority of people in [Morton County or Burleigh County] think that the Dakota Access Pipeline protesters who were arrested are guilty of some crime?"

	<b>Morton County</b>	<b>Burleigh County</b>
Yes	69%	75%
No	3%	5%
Don't know	28%	19%
Refused	1%	1%

2. **48% of Morton County and 47% of Burleigh County respondents have heard someone else express the opinion that the protesters were guilty.**

Question 13: "Has anyone you know ever expressed the opinion to you that the protesters who were arrested are guilty or probably guilty?"

	<b>Morton County</b>	<b>Burleigh County</b>
Yes	48%	47%
No	39%	41%
Don't know	13%	11%
Refused		1%

3. **A vast majority of juror-eligible residents are in favor of the pipeline being constructed.**

Question 4: "What is your opinion about whether the Dakota Access Pipeline should be built or not?"

	<b>Morton County</b>	<b>Burleigh County</b>
I think it should be built	74%	68%
I think it should not be built	4%	6%
I have mixed feelings about whether it should be built	14%	23%
Refused	1%	2%
Don't know	9%	1%

#### **D. The Community Is Polarized**

The Community is polarized – while most respondents are hostile to the protesters, there are also a smaller number of respondents who made statements supporting the protests, although not always the protesters.

In Morton County, 5% said that the protesters were "probably not guilty".

In Burleigh County, 7% said the protesters were "probably not guilty" and 2% said they were "definitely not guilty".

These people also have strong feelings about the situation. Following are some examples of supportive statements and anti-pipeline statements made by respondents. Some of those who are for the protests are not supportive of all of the protesters.

- M112 [Q23] I think I'm pretty "partial" to everything right now. I think they should be transporting it all by railway and not a pipeline.
- M062 [Q3] Just that they're making it very rough for those who live here. If it were just the Indians that lived here it would be better, but all the people causing trouble are from out of state.  
 [Q6] That they were violent. And I think some was exaggerated.  
 [Q12a.] I just think it's all pretty sad. Too many people are involved now.  
 [Q20] Probably not guilty  
 [Q21] I don't know. They may have felt that what they were doing was OK.  
 [Q22] Can be a fair juror  
 [Q22a.] I feel that I would listen to both sides fairly and make the right decision based on the facts.
- M073 [Q3] I have to agree with protesters, not with what they've done. It's outsiders making all the trouble.  
 [Q6] What I remember hearing some minor things, poorly written, skewed reports against the police and for the protesters. Almost all the news have misrepresented the protesters and misrepresented our police force quite a bit. The state government and local media have done a terrible job standing up for our police officers.
- B003 [Q6] They did nothing wrong but the government says they broke the law.  
 [Q20] Probably not guilty  
 [Q21] First Amendment Rights  
 [Q22] Could be fair juror  
 [Q22a.] Someone given all the info should be able to give an unbiased opinion.
- B067 [Q6] So, here's what I think and I have said this for many years. The pipe should go over the river, not under it. As for arrests, most are dismissed and they are young followers who got carried away.  
 [Q12a.] Mainly that we wish it was over. I can see their point but technology goes on and we have to get used to changes and trust the technology.  
 [Q20] Probably not guilty  
 [Q21] Most are just followers. There are instigators and they came in or were brought in. Followers tend to be sincere and well meaning.  
 [Q22] Could be fair juror



- [Q22a.] Well, I think I have an open mind and would hear both sides and I wouldn't enter into it angry and sure of my facts.
- B118 [Q6] I think it's a bunch of BS. I believe it's all about greed. It's the tribe's land and if they don't want it built, they shouldn't have to put up with it.
- [Q12a.] The media is making it so one-sided and is reporting that it is so violent. And the townsfolk are ignorant about the facts here. It isn't violent. The protesters just feel strongly about this issue.
- [Q20] Definitely not guilty
- [Q21] The media is making it so one-sided and is reporting that it is so violent. And the townsfolk are ignorant about the facts here. It isn't violent. The protesters just feel strongly about this issue.
- [Q22] Cannot be fair juror
- [Q22a.] (Cannot be fair) Because I would fight for what is right

## **V. Examples of Survey Respondents' Attitudes towards the Protests and Protesters**

Survey respondents derogatorily characterize the protesters as “out-of state” and “paid” protesters. They describe the protesters as “violent”, “terrorists” and disrespectful of law enforcement. Some community residents are frightened. Others are disgusted and feel that their lives have been unfairly disrupted by the protests. Still others feel that the coverage of the protests has damaged the reputation of their community and North Dakota. The following are a sample of comments from the survey respondents which show their negative perceptions of the protesters and their fears and anger.<sup>6</sup>

- M002 [Q12a] Just about why it's happening and when it will stop. It's not the locals that are the problem; it's the others coming into town to cause problems. I don't think they even care about saving the water.
- M004 [Q12a] Scared to go to Bismarck. Today I was in Bismarck and we saw Homeland Security and that was frightening.
- M005 [Q23] All I know is that it has gone on long enough. Someone is going to get killed, so they need to stop it once and for all.
- M037 [Q3] I'm seeing very violent protesters. They're blocking the roads, they're driving 40-45 mile per hour and won't let anyone pass or enter the road - they're very vicious. We're tired of it. They're disrupting our lives. It's so much violence. They're saying the violence is all the police and it's them causing all the violence.

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<sup>6</sup> Full verbatim answers are provided in Appendices 4 and 5.

- M038 [Q3] How nasty they're protesting and totally disrespecting our law enforcement and making North Dakota look bad. They're trespassing and blocking traffic and roads.
- M046 [Q3] Demonstrators are not peaceful. Mean to the police officers.
- M096 [Q17a.] I do know some of the law enforcement who come into the convenience store where I work. We talk about things that are happening and I let them know how much we appreciate them.
- M116 [Q17a] (Connections to the protests) My nephew the policeman in Bismarck and some landowners. People are very frightened.
- B015 [Q6] If they get arrested, they've done something wrong. Going back to when it first started to get hairy, they were wearing masks. Why do that if it's peaceful? Then they damaged pipeline property. Cattle are missing and buffalo and horses are murdered. I don't know if it's Native Americans from here or outsiders but it's giving the Native Americans a bad name. So much media attention. Whoever is doing it should be held accountable. They shouldn't be damaging property if it's a peaceful protest.
- B024 [12a] Damage to property, anger and resentment on all sides. Most people believe the bad ones are paid agitators.
- B031 [Q3] They are protesting the water going under the river. That is all. We don't like professional protesters.
- [Q21] They are stirring up trouble and they'll stop at nothing to be "in the news".
- B041 [Q3] Both sides spin. People are shutting down roads. It's non-stop. What gets me the most is the spin. It's tiring to see someone take something that's happened as if it's the truth and getting it so wrong. People are coming in from out of state - Eco terrorists. People on the reservation are peaceful. We have good relations with people on the reservations. Those on the reservations are asking people to leave and they won't. People are going to be dead. Cops help them out and then they got to be told they're being arrested.
- B069 [Q21] They are paid \$1500 per week to cause trouble and now there are 500 Black Panthers coming in here. They are criminals and not Indians. And veterans with trauma will come and it only takes one person to raise a gun.

- B104 [Q3] More idiots are still down there. Hopefully, they all freeze to death.
- B114 [Q3] It's a lot. It's been going on since September. I've been told that they are protesting where the pipeline is going through. It's a sacred burial land but their artifacts were moved more than 40 years ago. Native Americans were asked to come to meetings before it happened but refused numerous times then everybody started protesting. It's the paid protesters causing an uproar, disruption of our community and trying to create havoc in businesses. They try to get others to initiate a confrontation and then videotape it to make it look like the businesses are refusing to serve them.
- B115 [Q6] I don't know exactly what they were charged with. They protested around the federal Building. They burned automobiles and a bridge and attempted murder.

**The survey results show that we can expect the vast majority of potential jurors in Morton and Burleigh Counties to have prejudged or have strong predispositions that the protesters are guilty.**

## **VI. News Coverage**

**There has been continuous widespread local and regional coverage relating to the protests, starting back on March 30, 2016. There has been considerable coverage of community responses to the protesters and law enforcement officials and the impact of the protests on residents of Morton and Burleigh Counties. The news coverage has been extremely damaging to the defendant protesters, portraying them as violent and as “paid professionals” and “outside agitators”. Sheriff Kirchmeier and then Governor Dalrymple have made numerous inflammatory statements about the protesters as being “outside agitators”, starting as early as August of 2016.**

The news coverage has been extensive, continuous and pervasive. The community has been saturated with information about the case, and the news coverage is only likely to continue with the continuing protests and court dates up until the time of trial.

There has been extensive and continuous coverage in the Bismarck Tribune<sup>7</sup>, on local television stations KFYZ, and to some extent on KXMB<sup>8</sup>. The television websites also have video with many of their stories.

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<sup>7</sup> The Bismarck Tribune is distributed throughout Morton and Burleigh Counties. As with all newspapers, households often have more than one reader. Local papers are also often circulated in café's, restaurants and other places of business, which increases the

The Bismarck Tribune coverage by month has included an extremely large number of stories, many with authority figures criticizing the activities of the protesters and characterizing them as illegal:

Month	Number of Newspaper Articles
March	1
April	5
May	0
June	2
July	3
August	75
September	142
October	179
November	146
Through December 23	105

The television coverage was similarly intense:

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readership. The Sunday Tribune has a circulation of 31,081 papers, with approximately 14,000 in Burleigh and 4,000 in Morton Counties. It has an average daily circulation of 27,620 papers, with approximately 10,000 in Burleigh and 3,000 in Morton. The Tribune has an online website and edition which are read by many residents who don't get a physical newspaper. It is reasonable to assume that a significant percentage of Morton and Burleigh Counties residents read this paper. These statistics are from [https://en.wikipedia.org/wiki/The\\_Bismarck\\_Tribune](https://en.wikipedia.org/wiki/The_Bismarck_Tribune) because the paper did not respond to my questions about their circulation. According to <http://www.mondotimes.com/1/world/us/34/1602/4735>, the paper's circulation is 25,584 copies, making *The Bismarck Tribune* the second largest newspaper by circulation in [North Dakota](#).

<sup>8</sup> Appendix 6 includes a list of the newspaper articles by date and headline; articles on television websites (some of which include video of the broadcast for that date) by date and headline; radio broadcasts and social media, which includes a statements and videos from the Morton County Sheriff, Kyle Kirchmeier which were found on the internet, relating to the protests. This does not include all of the coverage.

<b>Month</b>	<b>Broadcasts on KFYR</b>
March	1
April	2
May	3
June	0
July	1
August	42
September	70
October	75
November	93
Through December 23	35

In my experience, this is a tremendous amount of newspaper and television coverage relating to issues involved in a trial. It is one explanation for why there is 100% awareness of the protests and such a high level of prejudgment of the cases.

In addition, there were continuous local radio broadcasts and social media sites which dealt with the protests, in addition to statewide and national coverage, which would also be available to those with computers or smart phones.

Many of the newspaper articles were front page news. Television stories are often played more than once during the day and many of them are left up on the stations' websites to be viewed at viewers' convenience.

Survey respondents have seen coverage of the protests from a number of different types of media – 99% in Morton County and 94% in Burleigh County report that they have seen media coverage of the protests.

#### **A. Evolution of News Coverage from Factual To Negative and Inflammatory**

The first news coverage<sup>9</sup> found of the protests was on March 29, 2016, when there was an article in the Bismarck Tribune about a planned protest. On April 1, 2016, members of the Standing Rock Sioux and other tribes held a ceremonial ride across the reservation

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<sup>9</sup> Much of the news coverage was gathered by Mitchell Hamline law students under the direction of Professor Colette Routel.

ending at a spirit camp near the Cannonball River to protest the Dakota Access Pipeline (DAPL). The Bismarck Tribune reported on April 1 that the day was, “just right for horses still wearing fuzzy winter coats.” The article was mild and factual. Further coverage by the Tribune in April focused on prayer circles and the release of a wounded eagle from the encampment at Standing Rock; evolving issues regarding the environmental impact study; and the benefits of pipelines over other oil transportation methods.

Local media coverage of the DAPL Protests was slight in May, June and July. Local radio stations informed listeners that actor Leonard DiCaprio had joined the protest. A Tribune writer covered the economic benefits of pipeline construction in Emmons County. The paper reprinted an article from the Cedar Rapids Gazette reporting that the Bakken pipeline in northwestern Iowa would bore beneath tribal grounds rather than being entrenched and thus disturbing sacred land.

On July 26, the U.S. Army Corps of Engineers approved the final land easement and water crossing that would allow the pipeline to go forward. The next day, the Standing Rock Sioux Tribe sued the Corps seeking an emergency halt to construction. These actions are barely mentioned by local media. The protests are still seen as symbolic; with the pipeline as inevitable.

Articles in the Tribune increased from three in July to 75 in August, with corresponding increases among other local media. Mentions in early August remain calm and factual. As reported in the Bismarck Tribune on August 2, 2016, “campers” from the Standing Rock spirit camp remained on the Capitol grounds for three days during a special session of the legislature. Two days later the paper reported that multiple groups, including the Sierra Club, had joined the protesters and that the spirit camp would be, “occupied by protesters and supporters while the opposition continues.”

The intensity of the protests and characterizations of the protesters in local media began to change in a Tribune article, “Ten move beyond ‘legal’ protest boundaries,” on August 11 when ten people were arrested at the pipeline worksite. Morton County Sheriff Kyle Kirchmeier was quoted as saying the protesters were not staying within bounds set by law enforcement and getting in the way of surveyors. Local radio stations promoted videos of protesters, including the Standing Rock Chairman, being arrested on that and successive days.

Though an August 16 Tribune editorial (“Protests OK, calm needed by all parties”) characterized the ongoing debate as a “public relations battle, the Tribune posted a video the next day in which Sheriff Kirchmeier said the protesters were “compromising officers and property.” The same day on Prairie Public Radio, Sheriff Kirchmeier is reported as saying that the protests had turned unlawful and that some protestors had pipe bombs and fireworks.

At this point, public opinion takes a turn regarding the protests, their legality, and the Native American community in increasingly frequent radio call-in shows (at least 21 radio shows on this topic in August), and online commentaries. On radio call-in programs, from August 18 to 29, local residents called protestors “lawless thugs” ... “imported from all

over the place,” and “spoiling for a fight.” One caller said Native Americans were, “ravaging and decimating their tribes, their own reservations.” Another said that at the risk of “sounding racist, ‘I’ve lived on the reservation. ... There’s ones that don’t necessarily do anything for society.’”

At this time several themes common to the responses from survey respondents begin to emerge. A radio caller stated that the fact that people have been arrested makes the protests unlawful. A second common theme - the financial burden of the protests - emerges on August 22 when the Tribune reports that the Morton County sheriff estimated protest law enforcement costs at \$100,000 per week. On the same day, then Governor Dalrymple said that while many protesters were peaceful, there were “outside agitators” responsible for vandalism, trespassing and blocking the highway resulting in “hundreds of criminal acts.” In the same article, Sheriff Kirchmeier added that threats had been made against law enforcement on social media. Finally, there were numerous mentions among interviewees of the potential dangers to children. The Tribune reported on August 23 that Mandan student buses would receive a law enforcement escort for as long as necessary to ensure their safety.

In the same period, anger and anxiety about outside perceptions of North Dakota rises as the Tribune reports the expressed support for the protest of the American Civil Liberties Union, representatives of the United Nations, Amnesty International, and a growing list of celebrities and other groups. An August 19 letter to the Tribune editor asks, “Why aren’t people ... protesting actual ... threats: drug dealers in their communities, underage drinking, joblessness, single-parent families, sexual abuse, domestic abuse, and suicide of young people?”

Articles in the Tribune increased from August’s 75 to 142 in September, again with corresponding increases among other local media. Reporting and opinion on both sides of the controversy become darker and more angry after guard dogs attack and private security guards mace protesters on September 3<sup>rd</sup>. A Tribune reader writes, “‘Why isn’t the state protecting these workers from people throwing rocks, chasing them and wearing masks? If they’re not going to do anything and the company has to hire protective security and there are dogs out there, if they get bit, or whatever, hey, reality is reality.’”

Dueling videos and internet stories fuel both sides of the controversy on Facebook, YouTube and online forums. Arrests increase throughout September and the patience of local residents decreases while their anxiety and protest coverage become ubiquitous and unavoidable. Each story of a protester injury or incident is met with a corresponding justification for that injury/incident or denial that it occurred.

The Bismarck Tribune asks on September 4, “Anti-DAPL – Are you a traitor or a patriot?” On September 5, a much-quoted and copied Facebook post by a deputy court clerk in Minot stated, “Solution: let them keep their sacred land. Go around their water and burial grounds. It obviously means a lot to them and they should have it. ... Then, Stop the monthly checks and ALL the government payouts! Stop all the subsidies and hand outs. Done!”

Tribune articles on the protests peak in October, increasing from September's 142 to 179 that month. September and October television, radio and newspaper coverage reinforce the overarching themes; mostly promoted by credible sources in the community and all later reiterated by community members who were interviewed:

- Law enforcement and pipeline crew being harassed or mistreated;
- Financial, emotional, and long-term cost to society (e.g., Sheriff Kirchmeier's reports on law enforcement costs);
- Violence, vandalism, trespassing and other crimes ending in arrest (including stories of Molotov cocktails, tomahawks, pipe bombs
- The protesters are paid outside agitators with criminal histories (e.g. various rumors about website where one might arrange to be a protester and be paid up to \$1500 per week);
- Other destruction of public and private property (e.g., damage to the Capitol grounds, the frequently mentioned burning vehicle on the bridge)
- Missing and damaged livestock;
- Potential for harm to children (e.g., blockades and school buses);
- Landowner harassment and other resident inconvenience (e.g., most prominently, disruption at the mall on Black Friday);

There are more articles and forums devoted to the unfair perception of North Dakota and North Dakotans by people across the country and the world; an increasing desire to blame the Federal government, as well as local officials, for allowing this to happen. Residents express anger that outside reporting focuses on harm to protesters, for example when protesters are stripped, numbered and kept in cages, battered with rubber bullets, or hosed down in frigid weather. These are explained as people getting what they're asking for, or the normal consequences of criminal behavior.

The coverage indicates that the community is angry and exhausted. Media coverage declines (146 Tribune articles in November) and on November 18, then Governor Dalrymple calls on the Federal government for help, expressing his frustration and saying that "Delaying has no purpose. It does no good whatsoever."

There are inflammatory Facebook posts, such as this one on November 25: "Now, be continuing down the current path you all are headed ... If you don't get arrested by law enforcement some citizen might take things in their own hands ... You might think your cause is worth dying for, another person might feel it is equally important to help you with that.[sic]" There appear to be very few neutral parties to the conflict at this point.

In late November there is a boycott on certain businesses called for by the Standing Rock tribe and a rally by "hundreds" in support of law enforcement. There is news coverage of small business owners who are concerned about the effect of the boycott and protests on shoppers. On November 28, while the interviews were being conducted for this survey, the Morton County North Dakota Sheriff's Department kicked-off a, "Know the Truth Morton County" video series with the message that protesters are using social media to



get their “agitator message” to the public. The purpose of the video series is to “tell the real stories.” Series titles include: “Protesters harass female officers,” “Restoring the stars and stripes to its rightful position,” and “Protester arrested trying to locate law enforcement operations base.”

Throughout the protests there have been many YouTube postings and Facebook postings – both in support of the protesters and against them. A number of the postings have been extremely critical of the protests and quite vulgar. Two December Facebook posts show the level of nastiness that infects some of the debate:

“that two bit crook in charge of the s---hole known as standing rock wanted cash....but his half breed a-- chose to make a statement on water,” and

“get out of my state you f---ing asshole....we dont want or need your trash out here, [sic]” and “It’s a lack of education. It’s a lack of brain capacity. Simple problem solving skills all these monkies should have learned at some point in life....[sic]”

These comments are more vulgar yet no less intense or frustrated than comments made by a large number of respondents to this interview. The words of U.S. District Judge Daniel Hovland reflect the feelings of the majority of interviewees: “To suggest that all of the protest activities to date have been ‘peaceful’ and ‘lawful’ defies common sense and reality”, “Nearly everyday, the citizens of North Dakota are inundated with images of ‘peaceful’ protesters engaging in mindless and senseless criminal mayhem.”

## **B. Prejudicial Nature of the News Coverage Affects the Ability of the Defendants to Get a Fair Trial**

Every case which receives a lot of news coverage will result in some portion of the community forming a bias one way or the other. These particular cases are unique in that the events that the charges arise out of span a long period of time and are ongoing. The sheer number of arrests has ensured that most, if not all, community members are aware of the cases and that many community members will either be directly affected or will know someone who has been affected or involved in some way. This makes it highly likely that opinions, predispositions and prejudgments will be formed by potential jurors. And when there is extensive news coverage and impact on a community, it is more likely that more of the population will form stronger opinions, predispositions and prejudgments.

Media consumers tend to form stronger opinions when an incident affects their lives or their community in some significant way. If the trial of this case is held in a community with less emotional investment in the situation, this will still be a high publicity case, but there won’t be all of the emotional layers of the case that potential jurors in Morton and Burleigh Counties have experienced to interfere with jurors’ abilities to be fair and impartial. Many of the survey respondents used highly emotional language, calling the protesters “outside” or “paid” protesters, agitators, violent, setting fires, wearing masks, attacking law enforcement. There were many comments about residents’ lives being “disrupted”, people being fearful, property being destroyed, the huge cost to the counties and livestock being stolen or hurt. There are many comments about residents’ concerns

for their safety, including that of the children.

The Bismarck Tribune and the TV and radio stations have regional coverage throughout both Morton and Burleigh counties, as well as surrounding counties. However, in a different county with a larger population further away from Morton and Burleigh Counties, there would be a much higher percentage of jurors who really did not pay as close attention to the specific news coverage and/or don't have as strong feelings because it didn't happen in their community, and it didn't affect them directly.

The type of emotional, in-depth coverage provided by the news media would not likely be replicated in another area's local newspaper if the case were to be tried outside of the Bismarck media market. In addition, a higher percentage of jurors from another community would most likely not have the history of closely following the continuous coverage that has blanketed this community.

The news coverage since August has been very negative towards the protesters, and has received prominent placement in the newspapers and broadcasts. Authority figures, particularly the Sheriff, have made many many statements indicating that the protesters are guilty of various crimes. Jurors from another community outside of the Bismarck media market – particularly one with a larger population and less reliance on oil for their economic wellbeing -- are far less likely to have followed all of the details of the protests and the negative media coverage which have arisen, nor would they or their fellow community members be likely to be affected by the protests and have as strong feelings.

## **VII. Factors Affecting Venue**

Based on my experience, and the collective, shared experience of other National Jury Project and other jury researchers in evaluating jurors in cases of this type, it is my opinion that this case presents more difficulties in selecting jurors than the average case involving extensive pre-trial news coverage.

There are five factors which explain the high level of recognition of this case, and the extent of community discussion and speculation. These are:

1. The relatively homogenous character of Morton and Burleigh Counties.
2. The nature of the charges.
3. Being directly affected or knowing others who have been directly affected by the protests, such as law enforcement, landowners, oil industry employees, protesters or some other connection.
4. The scope, content and dissemination of the pretrial news coverage.
5. Community discussion about the protests and protesters, including highly inflammatory statements by local authorities.

#### **A. Morton and Burleigh Counties' Population**

The population of Morton County is 30,310 and Burleigh County is 92,991. Morton County has one city, Mandan, a number of small towns and rural areas. Burleigh County has the capital city of Bismarck, a number of small towns and rural communities.<sup>10</sup> Both areas are fairly homogenous and they are adjacent to each other.

#### **B. Direct Experience with the Protests**

There is a high level of emotion in both the Morton and Burleigh communities about the protests. They have been going on for nine months as of this writing and do not appear to be ending. They have affected many people directly or indirectly. There is concern in both counties about the impact of the protests on those communities. Emotions are running high.

The protests have raised community member's fears for their own personal safety and the safety of others as shown in both the survey and in the press coverage.

#### **C. The Impact of Community Discussion**

When a highly emotional case arises in a smaller city or rural area, there is a dissemination of information which takes place through discussion, rumor and speculation. This is clearly demonstrated in the Morton and Burleigh Counties' survey.

Discussion then results in potential jurors being exposed to extra-evidentiary material which, when brought into the jury room, seriously compromises the defendant's rights to a fair trial based only on the evidence presented in the courtroom.

In such circumstances, there is a concern as to the ability of the court to find jurors who could be fair and impartial, and the ability of a probing voir dire to identify and eliminate those who had been exposed to extra-evidentiary material due to discussion in the community.

The survey confirms these concerns. 90% of the survey respondents in Morton County and 94% of Burleigh County respondents reported having conversations about the

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<sup>10</sup> 2015 estimate from:

[http://www.northdakota-demographics.com/counties\\_by\\_population](http://www.northdakota-demographics.com/counties_by_population), statistics are taken from United States Census Bureau / American FactFinder. "Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015". 2015 Population Estimates Program. Web. March 2016. <http://factfinder2.census.gov> an internet publication of the US Census Bureau.

protests, most of those not just with family, but also with friends, co-workers and others. There has been ongoing discussion about many aspects of the case. Combined with the extensive news coverage, this type of ongoing, specific, emotional discussion throughout a community leads to rumors and speculation, and ultimately prejudgment.

Looking at the responses to the survey questions, most feel they “know” that the protesters are guilty of the charges against them. By the time of the upcoming trials, potential jurors will have held these types of opinions for many months and it is highly unlikely that they could set them aside, presume the protesters innocent and be impartial.

### **VIII. Voir Dire Is Not an Adequate Remedy**

The purpose of voir dire is to root out those jurors who have biases or prejudices. This becomes difficult, if not impossible when there is so much news coverage, discussion, anger and emotion in a community.

Given the tendency of some jurors to minimize their prejudices in court, the defendant protesters will have considerable trouble during voir dire in identifying those jurors who know about extra-evidentiary material and/or who have already prejudged the case. The defendant protesters are entitled to jurors who have not already formed an opinion and who do not know about extra-evidentiary material, and are also entitled to know what information the jurors have knowledge of, and what impact this will have on them.

The survey only gives a snapshot of what juror-eligible Morton and Burleigh Counties' residents know because the answers are relatively short. But there are enough troubling answers which reinforce my opinion that the case should be moved.

In cases such as this one, where emotions are high, some jurors will try to minimize what they have heard, since it is only “gossip” or “rumors” or “you can’t believe everything you read in the press”. At the same time, it is precisely this “gossip” and “rumors” which cause a person to form opinions and predispositions.

### **VIX. Jurors Have a Hard Time Assessing Their Own Biases**

Jurors' opinions of their own ability to be fair and impartial are often not reliable. It is not uncommon for jurors to think that they could be fair despite the fact that they already hold the opinion that a defendant is guilty.

It is unrealistic at best to think that someone who has already thought a defendant is guilty can just put those thoughts out of his or her mind and start with a clean slate. A defendant has the right to be presumed innocent. To think that a person who has been feeling that a defendant is guilty can just empty his or her mind and presume the defendant innocent is not realistic. None of us would want to be judged by jurors who have already prejudged us as guilty.

When a case has touched the life of a community, jurors are generally not able to accurately assess their own level of prejudice. Many want to believe that they could be fair, because that is what society expects of them, and they expect of themselves. However, as shown above, it is clear from looking at many of the respondents' answers that they would not be able to presume that the protesters are innocent.

While it's laudatory that these citizens want to serve and be fair, the issue is whether they will actually be able to be impartial under the circumstances. They don't necessarily know that they are responsible to presume that the defendant is innocent or what that means. They don't know that they are to decide any case based only on evidence that they hear in the courtroom. In any event, it is highly unlikely that most could put these opinions out of their minds and actually be fair and impartial.

**A. Many of the survey respondents said that they could be fair jurors.**

Question 22: "Do you think that you could be a fair and impartial juror in a case involving the Dakota Access Pipeline protesters?"

	Morton County	Burleigh County
Yes	49%	53%
No	39%	33%
Don't know	12%	13%
Refused		1%

**B. While an argument could be made that the approximately half of each county's respondents who said they could be fair jurors or didn't know if they could be fair jurors should be taken at face value, in looking at their answers to other questions, 77% of the respondents in Morton County and 90% of the respondents in Burleigh County who said they could be fair clearly could not:**

	Morton County	Burleigh County
Said they could be a fair juror <u>and</u> either had previously expressed an opinion that the protesters were guilty <u>and/or</u> said the protesters are definitely or probably guilty	33% <sup>11</sup>	43%
Said they could be a fair juror <u>and</u> Either had previously expressed an opinion that the protesters were guilty	5%	5%

<sup>11</sup> For ease of reference, percentages are given as to the percentage of the total Morton (129) and Burleigh (126) County respondents.

and/or said the protesters are definitely or probably not guilty		
Total:	38%	48%

The following are examples of answers from respondents who said they could be fair jurors.

- M076 [Q3] The way they cry abuse after they hurl rocks and stuff at the police and don't expect any repercussions.
- [Q6] I live just south of Mandan, North Dakota and I'm seeing it every day. They're doing things that we would be arrested for and I believe that the Federal Government should step in and take care of it and put a stop to it.
- [Q14] Has expressed to others that protesters are guilty
- [Q17a.] I know some of the police officers.
- [Q20] Definitely Guilty
- [Q21] Because I've seen them in action and seen the videos of protesters in the police officers' faces - they're very violent. This video is from someone who is not protesting.
- [Q22] Don't know if could be fair juror
- M111 [Q6] Right now this camp is on federal land, however they are protesting on private property. People are losing control of their land and losing fences and cattle. Cutting fences and trespassing is breaking the law.
- [Q12a] My daughter-in-law has bison that are being all stressed and this is affecting their ranch and land. These people are losing income of the bison.
- [Q14] Has expressed to others that protesters are guilty
- [Q17a.] (Know someone affected by protests?) Landowners, ranch owners, a resource officer and police department staff.
- [Q20] Probably Guilty
- [Q21] Because our law enforcement here is good. We have very good, honest officers working here.
- [Q22] Could be Fair Juror
- [Q22a.] I think I can be fair and reasonable. I would have to listen to all the hard evidence.
- [Q23] There is so much negativity towards North Dakota right now that it is just disheartening.
- M128 [Q3] They all need to go home. Because of the crap they are doing like terrorizing our police officers and residents. They are spreading lies and that the government is making it snow. It is not the government making it snow.

- [Q6] There has been over 500 arrests since they started. Over 80 percent of the protesters arrested are not from North or South Dakota.
- [Q12a.] How unlawful it is. How they say they are peaceful and they are not.
- [Q14] Has expressed to others that protesters are guilty
- [Q15a.] (Know protesters?) Some of them are people I grew up with that got involved with the tribe. I have Native friends that wish the protests would stop.
- [Q16a.] I have a family friend who works for the pipeline.
- [Q17a.] A family friend is a landowner and he seen a truck and the trailer pull into his cornfield. He went down there and there were two guys on horses wearing masks and swinging their lariats. My friend had a gun and pulled it out and told them to leave and they did.
- [Q20] Definitely Guilty
- [Q21] There is so many videos with proof of the police officers trying to control chaos. It is illegal what the protesters are doing and you can see it in the videos.
- [Q22] Could be Fair Juror
- [Q22a.] In order to be convicted there has to be evidence. That is how the court system works.
- B054 [Q3] I know that of the protesters, some are violent, some are peaceful. I've heard that there are 7000 there. If there are that many, then they're doing OK - no deaths. But they are targeting police just for doing their jobs. There was a post on Facebook about wanting to rape police officers' wives. That's swaying my mind. I heard protesters make \$1500 a day. I don't believe that. I heard about attacking farms and killing livestock for food. Also heard that tribes were not included in later meetings - only invited to one meeting, so couldn't have a say.
- [Q12a] I play bridge with a lady who has a ranch down there. She is even afraid to go to her ranch. We are afraid. Teachers who work in Fort Yates are scared.
- [Q14] Has expressed to others that protesters are guilty
- [Q20] Probably Guilty
- [Q21] From what I see on TV, see them doing the acts. 91 percent of protesters are from out-of-state.
- [Q22] Could be Fair Juror
- [Q22a.] Fair and honest. Very scary. Worry about being subject to being harassed.
- B068 [Q6] They have been trespassing, attacking law enforcement, killing animals and blocking streets and highways. I've seen it on TV.
- [Q20] Probably Guilty

- [Q21] Law enforcement has good reasons to arrest them. They are under scrutiny by the press, the media, do-gooders and the government so it would be hard to behave improperly.
- [Q22] Could be Fair Juror
- [Q22a.] Well, I think I could be a fair juror in any case regardless of the crime.
- B073 [Q6] Heard about protesters with warrants in other states for disobedience. Some have been arrested for minor infractions and held. Protesters have protested and then been released from jail. From disobedience to disrupting traffic. On Standing Rock, Molotov cocktails, burning logs thrown during the protest. There are bridges over there that they never give us access. The protesters have set fires on bridges, including vehicles. The DOT fears the bridges are damaged - they are damaging public property. Protesters are still trying to use the bridges and they have been arrested for that. Up to 500 arrests. The vast majority are nonviolent. A handful of concern for safety of the general public.
- [Q20] Probably Guilty
- [Q21] Ninety percent sick and tired of them. I trust the outside oversight. Every smart phone has a camera. It's hard to disguise the fact of what happened. TV is filming. It's hard to buy what they have done.
- [Q22] Could be Fair Juror
- [Q22a.] I have to believe that the outside attorneys who have been assisting could be wily. I believe in our system and that each has a right to a fair trial. I am intelligent enough to listen to all the facts to be fair.

The following are examples of open-ended answers from respondents who said they could be fair, that they had not previously expressed the opinion that the protesters were guilty and who said they didn't know if the protesters were guilty. Some of their answers indicate that they do in fact have a predisposition towards the protesters' guilt. This illustrates the problems jurors often have with evaluating their own abilities to be impartial.

- M046 [Q3] Demonstrators are not peaceful. Mean to the police officers.  
[Q22a.] I have years of experience in law enforcement and in the legal system.
- M052 [Q3] That they are not peaceful. Law enforcement has their personal info hacked. Animals are being killed. Vehicles are being burned.  
[Q6] At the Target there were arrests for being on private property. If they are on their own land, that would be different.  
[Q12a.] Mainly, people don't like the protests. It's causing a lot of



problems.

[Q17a.] I know people on the city side and hear it's affecting the economy. I've heard about the problems from the sheriff as well.

[Q22a.] I really don't have an opinion either way. I know people on both sides.

[Q23] I'm just here and want it all to go away.

M053 [Q6] I know they were arrested for doing unlawful acts. I think being on private land, setting fires on the bridge, harassing law enforcement just to name a few.

[Q12a.] I don't think it's necessary to say exactly what I talk about. I don't feel that people from out of state are here for any good reason. I think they are causing trouble. I don't think they are here to pray for a peaceful resolution.

[Q17a.] I know landowners down there who are affected and I also know some of the law enforcement.

[Q23] I think the out-of-state people and the agitators should go home. They're just hurting the people they're trying to help in the long run.

M113 [Q3] They are radical and not peaceful.

[Q6] They were doing wrong to law enforcement.

[Q14] Don't know if has ever expressed the opinion to others that the protesters are guilty

[Q22] I have nothing against anyone and will always be fair no matter what it is.

B100 [Q3] I am in the oil and gas business. I feel there is a misconception about the pipeline. It's out of hand.

[Q6] These are the protesters that came in and got arrested and they seem to be professionals.

[Q12a.] We talk about what has happened with the most recent confrontation.

[Q13] Refused to say whether anyone had expressed the opinion to him that the protesters were guilty.

[Q17a.] (Know someone affected?) Just friends with both first responders and landowner. I don't want to say any more about that.

[Q21] Wouldn't say more about his feelings that he doesn't know if the protesters are guilty or not.

[Q23] I do want it to be solved as fairly as possible. It is sad and it is hurting our community. We do need the oil at this point in our history so it is important to transport it as safely as possible.

- B102 [Q3] Basically, my thought - a few miles north of Bismarck - then they rerouted it to Fort Yates.
- [Q6] Most of them were from out-of-state. They set themselves up to be arrested. Therefore, the peaceful protest has been overshadowed and the tribal concerns have been minimized.
- [Q12a.] Most of them were from out-of-state. They set themselves up to be arrested. Therefore, the peaceful protest has been overshadowed and the tribal concerns have been minimized.
- [Q22a.] I feel I could be impartial and fair because I'm used to reporting the facts as a reporter.

**C. We see the inability to self-evaluate fairness and impartiality in the answers of the vast majority of respondents who said "don't know" when asked if they could be fair jurors, who had already given answers which clearly indicate that they thought the protesters were guilty.**

14 out of 16 respondents in Morton County who said they didn't know if they could be fair jurors also said that the protesters were definitely (8) or probably (6) guilty and 10 of them also said that they had previously expressed the opinion to others that the protesters were guilty.

14 out of 17 respondents in Burleigh County who said they didn't know if they could be fair jurors also said that the protesters were definitely (10) or probably (4) guilty and 6 of them also said that they had previously expressed the opinion to others that the protesters were guilty.

The following are examples of respondents who said that they didn't know if they could be fair, said they hadn't expressed that the protesters were guilty prior to the survey and didn't know if the protesters were guilty or not. They too have negative feelings about the protests:

- M015 [Q21] All people that protest are guilty.  
 [Q22a.] (Fair juror?) Depends on the circumstances, I might be.  
 [Q23] (Anything you want to add?) No I don't, so the protestors are all guilty.
- M059 [Q3] I don't believe in protesting.  
 [Q12a.] Just that roads are being blocked. Lots of police out and around  
 [Q22a.] I really don't know much about any of it.
- M092 [Q3] Probably everything. I think they should just go home. Obama vetoed putting the pipeline in so hopefully they're leaving.  
 [Q6] I've heard that more than 75 percent of these people don't even live in the area.

- [Q12a.] Well, people told me that they're bring them in and paying them \$16.00 a hour to protest but that is their business.
- B008 [Q3] I'm kinda neutral. Bad players on both sides.  
Q23 Everybody's definition of fair is different. Nah. No. Nope.
- B097 [Q3] It's on the news every day. Protestors were told to go home. Protestors are out of control. People are out of control. Not the local Natives but the protestors that were brought in.  
[Q6] Well, not too much but they're not saying too much. They arrest several hundred then suspend their sentence. Nothing is doing anything about it.  
[Q23] I'm just fed up with everything.

Many of the juror-eligible respondents said they could be fair because, even though they already believe the protesters are guilty, because they would "listen to the evidence". A number of the jurors evaluate themselves as being as fair as "anyone else in the community" and they think that the majority of other people in Morton and Burleigh Counties think that the protesters are guilty; therefore, they could be fair jurors too.

A good prosecutor could probably talk many of these people into saying that they could be fair, that they would follow the judge's instructions, that they would put what they already "knew" and thought out of their minds. But that would not make them fair or impartial.

### **VIII. Knowledge of the Case Comes From both the Media and Word Of Mouth**

Survey respondents reported receiving information about the case through a combination of media and word of mouth, over half reporting that they talked with other people about the case. At this point, the problem is not whether or not the news coverage is "inflammatory" or "factual", although a strong argument can be made that there was inflammatory coverage.

As the protesters's trial approaches, it is highly likely there will be additional news coverage and discussion which will only remind potential jurors of this tragic death, re-raise the community's sadness at the death of a highly respected and well liked police officer, frustration and fear that such an event has occurred in their county, and which will continue to stimulate discussion, rumor and speculation.

This will increase the number of people who have heard extra-evidentiary material and makes it impossible for jurors to decide the case only on the evidence they will hear in the courtroom.

The issues in this case will revolve around the protesters's credibility to a large extent. Unfortunately, a large majority of the community has already decided he is "guilty", and

not credible. When asked in Question 7 what they had heard about the protesters, many made comments such as, he's a pyscho, psychotic, schizophrenic, insane, a "career criminal", had prior convictions, loser, meth-head, on drugs, dirtbag scumbag, rabid dog, bad person, hates cops, said he was going to kill a cop, he killed "out of joy", he laughed about it.

In addition, the voir dire process itself unfortunately can contaminate that small percentage of the community which does not have much information before they come to the courthouse. The case of *Minnesota v. Lucille Tisland* provides a very concrete example of this phenomenon. Ms. Tisland was charged with protests for the shooting death of her husband in Bemidji in Beltrami County. Ms. Tisland's husband was a minister, and she had pled not guilty by reason of self-defense. A jury was selected during a weeklong, individual, sequestered voir dire. After the jury was seated, but before testimony began, it came to the attention of the court that a seated juror had not only been talking about the case while waiting during jury selection, but had been involved in a discussion where strong feelings were expressed. The other jurors were questioned, and it was found that they too had been exposed to a variety of discussion about the case during the week-long jury selection. The court granted a motion for change of venue and had to select a new jury in a different county.

In this case, there is a similar risk - particularly due to the number of jurors who could be expected to have been affected or know someone who has been affected by the protests and the strong feelings the case has generated.

**X. There are four categories of prejudice which are most likely to operate in Morton and Burleigh Counties and the surrounding area in relation to the protesters' trials.**

Our legal system recognizes four categories of prejudice which can operate in opposition to a defendant receiving a fair trial.<sup>12</sup> These categories are: interest prejudice, specific prejudice, generic prejudice and conformity prejudice. If the protesters are tried in Morton and Burleigh Counties, we are highly likely to see one or more of these prejudices affecting most of the jurors in ways that are unlikely to occur outside of Morton and Burleigh Counties.

**Interest prejudice** involves any prejudice which comes from the juror having a direct or indirect interest in the outcome of the trial. This interest may be reflected in familial, social, or economic relationships.

**Specific prejudice** occurs when a juror holds attitudes or beliefs about specific issues in the case at trial which prevent the juror from being impartial.

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<sup>12</sup> For further discussion of potential prejudices which operate within the trial setting, see Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation by Neil Vidmar in *Law and Human Behavior*, Vol. 26, No. 1, February 2002.

**Generic prejudice** occurs when jurors have pre-existing prejudicial attitudes, beliefs or stereotypes about categories of persons. If a juror sees that the defendant, victim or other witnesses fit into a category of persons about whom they already have positive or negative feelings or stereotypes, this can affect their ability to impartially analyze the credibility of the testimony. There has been news coverage and statements by the Sheriff and others that the protesters who were arrested were “paid” protesters and “violent”. Those beliefs can affect jurors’ willingness and ability to presume that the protesters are innocent.

**Conformity prejudice** exists when the juror perceives that there is a strong sentiment in the community that a trial should be resolved in a certain way, and the juror feels pressure to reach a verdict consistent with their perception of how other community members feel. 69% of respondents in Morton County and 75% of respondents in Burleigh County believe that the majority of people in their county think the protesters are guilty.

## **XI. The Atmosphere in the Community**

The media coverage and community discussion of a case of this type also prejudices the defendant’s right to a fair trial by creating an atmosphere in the county whereby there is pervasive hostility and anger towards a defendant which jurors could feel themselves, or would be aware of in others and which could cause them to feel justified in their own negative feelings towards the defendant. The survey demonstrates the intensity of feeling in the community and that most respondents had very strong feelings about the protesters and the protests.

### **A. These cases touch on issues involving the safety of the community as a whole.**

The answers to the survey demonstrate what a highly charged case this is. The defendant protestors are entitled to a fair trial, which necessitates that jurors objectively analyze the evidence. However, there is a combination of anger and fear in Morton and Burleigh Counties in relation to the protests. There is an underlying fear that these protests are jeopardizing the safety of the community as a whole – children, law enforcement officers, landowners and others, as well as property. A smaller number of respondents are concerned about the safety of the protesters as well.

- |            |  |
|------------|--|
| M016 [Q21] | Because of everything I have seen or heard. A protester hurt my neighbor with his truck.                     |
| M119 [Q23] | I work at a refinery so I'd be a little biased. I just don't want anyone to know I answered these questions. |
| M024 [Q6]  | That they are shooting at the police.  |

- M032 [Q6] There is a woman charged with murder. They've disrupted our whole lives. They've blocked streets, malls and stores.
- M034 [Q6] I remember a woman pulling a pistol from her purse and shooting at police. Stealing buffalo and stampeding toward police, then burning the National Guard truck on the bridge.
- M038 [Q3] How nasty they're protesting and totally disrespecting our law enforcement and making North Dakota look bad. They're trespassing and blocking traffic and roads
- M039 [Q6] Very few, but they get let go right away. Farmers had to move their families to town and people are fearful. I've also heard that they were slashing law enforcement's tires.
- M044 [Q23] I don't believe in it and they've caused too much damage and cost the stat \$10 million.
- M070 [Q3] Everything, the stupid crap the protesters are doing and no one's doing anything about it. At this point I don't think they're protesters, I think they're terrorists
- M075 [Q3] Blocking the roads, killing livestock, burning the equipment, this is not protesting or peaceful, it's terrorism.
- M108 [Q3] About the bombs/explosives and pulling gun out on the cops.
- M126 [Q3] I have read and seen things every day. If the Governor and Archambault would just have everyone leave right away. They are just disrupting everyone's lives. The President also should have done something about it. I'm just glad that no one has died yet. That's what scares me.
- B012 [Q17a.] People I work with, the wife and kids left their home from fear, they started blocking private roads and property.
- B017 [Q3] They threatened to burn down the homes of cops who arrested them. They spit at cops and blocked roads.
- B018 [Q3] Yeah, they can get the hell out of here. They are killing cattle, getting paid by someone \$1200 a week.
- B022 [Q3] A lot of things. People are being paid to protest. They are violent, abusive to children, blocking roads; keeping people from their destinations.

- B024 [Q3] Too much to say. #1 Rioting in the streets and malls. #2 Taunting of law enforcement #3 Most important, interfering with our lives in general.
- [Q23] Well, maybe no. I'd be worried about my friends and neighbors' opinions and reactions. In a small town everyone hears what happens in a jury even if they aren't supposed to talk about it. I consider this a small town because of our values.
- B025 [Q21] Because I have witnessed the anxiety they have caused for everyone. They are making people buy more guns. They put a severed pig's head on a stick and waved it around threatening the law. A man died because his ambulance couldn't get to the hospital. They are guilty of his death.
- B026 [Q6] That they have maliciously threatened police. A lot of press not reporting it as it is - blowing it all of proportion. They are tweaking police personally and their wives; that they'll get their bank accounts. Husband has a 'phone link' and heard protesters say, "let's go in to rape their wives while they're out."
- [Q21] Our governor has really been lenient. He didn't want to cause any commotion and didn't enforce some of the rules earlier. They have been spitting on police, yelling on TV. A girl injured her arm in the protest. They are throwing propane cylinders at police and slashing police vehicles. The state of North Dakota has incurred millions in expenses in trying to control them. Funds would be much better used for education, highways, safety. They are there to destroy, not rebuild. It's a very sad state of affairs.
- B048 [Q3] I've heard so much, I am definitely dead set against the protesters. Everything possible has been done to make the pipeline safe and we need it. It's time for the President to get on the ball and the Army Corps to get it done. It's costing the state and Indians a lot of money and causing a lot of hard feelings for years to come.
- B059 [Q6] Just very disruptive. My daughter was driving downtown and got held up and scared.
- B099 [Q6] There have been over 550-plus protesters arrested and my husband is a public defender and he says over 90 percent of them are from out of the area. We're afraid there will be bloodshed.
- B107 [Q6] Should have been a lot more arrested. They are shooting at ranchers, killing cattle and burning trucks.
- B115 [Q17a.] (Affected by protests?) For my work, I drive by there. I carried a firearm for my own safety on a highway that was blockaded. I was

told to by an armored express truck driver who said that more were considering carrying a firearm.

**B. A majority of respondents feel that they or people they know have been affected by or are connected to the protests in some way.**

When asked directly, 58% of Morton County respondents and 53% of Burleigh County respondents indicated that they, or someone they know, have some kind of personal connection to the protests and/or have been affected by the protests. But there were indications in other questions that they had other connections as well as feeling that they were affected by the cost of law enforcement and damage to property.

The following are a sample of answers showing perceived connections to people involved with the protests or people affected in the protests in some way.

- B009 [Q12a.] Actually, one of my family members lives less than a mile in St. Anthony ND. They were scared because of illegal protesters' activity. They couldn't leave their home.
- B021 [Q17a.] We have relatives who had stuff stolen from them and who have met roads blocks on the way home from town.
- B033 [Q17a.] I know some residents that had to commute around the area. They had to take detours because of the roadblocks.
- B037 [Q17a.] A law enforcer is my friend. He isn't sharing too much but they are exhausted. I also know a college student in the National Guard. He has had to drop out of school because he is called up all the time for this event.
- B048 [Q12a.] I work in a dental office. A patient came in and was very shook up. Protesters made her very uncomfortable. Law enforcement is the meat in the sandwich.
- B054 [Q17a.] Friends, community members, firemen, first responders, wives of law enforcement. Play bridge. Lots of worry.
- B098 [Q17a.] I know some of the police and ranchers. They've told me that some of their neighbors as well haven't been able to get out of their homes.
- [Q6] Well, I don't know any names. Locally, my friend has two large (stores) which have been targeted for protests. They've also been to his house.



- B105 [Q17a.] Ranchers I know have been losing cattle - a lot of cattle. Over \$100,000 worth.
- B107 [Q17a.] A former classmate was harassed on their property. They were in fear for their life.
- B111 [Q17a.] Brother-in-law is married to a woman with part-native kids. Nieces married to sheriffs in Burleigh and Morton. It's a strain on the family. We talk about that. We have conversations about who is really funding the protesters. We have a conspiracy theory that the railways are giving money to keep the pipeline from going through. They benefit from it being stopped.
- M004 [Q6] They attacked my uncle. They thought he worked for the pipeline, but he didn't.
- M042 [Q17a.] I know some of the law enforcement and first responders.
- M028 [Q17a.] Well, cousins are volunteer firefighters involved, friends who have children who are landowners.
- M064 [Q17a.] I know some people - landowners - by the camps and law enforcement has been on their land.
- M072 [Q17a.] I know some people who live in the area who have had to deal with them coming onto their property, climbing on their vehicles and things like that.
- M076 [Q17a.] I know some of the police officers.
- [Q6] I live just south of Mandan, North Dakota and I'm seeing it every day. They're doing things that we would be arrested for and I believe that the Federal Government should step in and take care of it and put a stop to it.
- M099 [Q6] Just about everything. We are friends with a Morton County sheriff and he's had to spend a lot of time down there. We've heard some from him. I also remember hearing about them protesting at and blocking different places.
- M100 [Q17a.] Landowners. They have animals that went missing.

**C. Community sentiment towards the protesters is hostile and there is fear of what else might happen.**

The fear of crime is, of course, not limited to smaller communities. But when a crime such as this takes place in a small community where such crimes are rare, community members often understandably feel that they have a personal stake in the outcome of the trial. The tendency towards prejudgment of whoever is charged is exacerbated by the extensive news coverage and the number of people in the community who have been affected, as well as the perception of the defendants as “violent”, “terrorists” and “paid protesters” or “outside agitators”. [See *Appendices 4* and *5* for the complete listing of open-ended answers.]

**XII. Conclusion**

In conclusion, a petit jury convened in Morton, Burleigh or surrounding counties which are in the same media market and which interact with Morton and Burleigh Counties will include a substantial majority of people who are affected by one or more of the following factors:

- a. extensive exposure to news coverage about the protests and the charges against the protesters;
- b. extensive exposure to extra-evidentiary material which may or may not be admissible in court, through either the news media, discussion with others in the community, or both,
- c. having been (or continuing to be) either personally affected by the protests or knowing others who have been personally affected by the protests, and
- d. prejudgment of the protesters based on information from the news media, community discussion or both - having the opinion that the protesters are guilty of the charges against them.

These factors make it impossible for jurors to presume the protesters are innocent and to impartially review the evidence as to the charges against them. The vast majority of jurors have either prejudged the defendant protesters or are highly predisposed to find them guilty. The small number of potential jurors who have not prejudged the defendants as guilty and do not have strong feelings at this time, are highly likely to be infected as the trials approach, or even in the course of a jury selection.

When a case involves an emotional issue that has touched the life of a community, jurors are generally not able to accurately assess their own level of prejudice. This is particularly true when people around them are of the same mind. Most jurors want to believe that they could be fair, because that is what society expects of them, and they

expect of themselves. Thus, many prospective jurors who have strong feelings about a case will also feel very strongly that they could be fair.

The small percentage of respondents who say they have not formed an opinion about the protesters' guilt and did not make comments indicating they do have prejudgments does not provide a large enough pool of non-prejudiced jurors to select from. In addition, the atmosphere in the community is highly charged negatively in relation to the protesters.

A significant number of the persons interviewed have specific information about the case and what they perceive to have happened or what the evidence is. It is clear that there have been many rumors and much discussion and speculation about the situation, and that the protests have negatively affected people's lives in both counties.

Unfortunately, the voir dire process itself can contaminate that very small percentage of the community which may not have prejudged the case before they come to the courthouse.

In my opinion, the direct experiences of community members in both Morton and Burleigh Counties, combined with the amount and content of the news coverage creates a real problem for jurors who want to be impartial. The extensive exposure of potential jurors from Morton and Burleigh Counties to extra-evidentiary material - in the form of news articles and television coverage, community discussion, speculation and rumor – and the resulting prejudice and predisposition that the protesters are guilty has created a situation under which there is more than a reasonable likelihood that the defendant protesters could not receive fair trials by petit juries convened in Morton and Burleigh Counties at this time, or in the foreseeable future.

**I would recommend that the protesters' trials be moved to a trial jurisdiction where prospective jurors are unlikely to have been personally affected by the protests and news coverage; who do not have an emotional stake in the outcome and where the overwhelming majority of county residents do not believe that the protesters are guilty.**

Further affiant saith not.

Diane Wiley  
Diane Wiley

Sworn to and subscribed before me this 28<sup>th</sup> day of December, 2016.

Jean M. Hoffman  
Notary Public

