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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

 Plaintiff,

 vs.

MICHAEL GIRON a/k/a/
MICHAEL GERON.

 Defendant.

NO. 1:17-cr-0031-DLH

DEFENDANT’S MEMORANDUM IN
SUPPORT OF DEFENDANT’S
MOTION FOR TRANSFER OF
VENUE.

Defendant Michael Giron, by his attorneys Timothy Lohraff and Peter Schoenburg, hereby submits this memorandum in support of his Motion For Transfer of Venue.

I. INTRODUCTION

Michael Giron is charged in a Superceding Indictment with one count of Civil Disorder in violation of 18 U.S.C. § 231(a)(3) and 2, and one count of Use of Fire to Commit a Federal Felony Offense in violation of 18 U.S.C. § 844(h) and 2. Count two carries a mandatory minimum sentence of 10 years in prison. Count 1 carries a maximum sentence of 5 years in prison. Whatever sentence is imposed on Count 1 must run consecutively to Count 2.

Mr. Giron (“Little Feather”) was part of an indigenous-led grass roots movement [“Water Protectors”] that sought to protect ancient and sacred sites and water resources of the Lakota People of the Standing Rock Reservation that were endangered by the

1 construction of the Dakota Access Pipeline. (DAPL).

2 Demonstrations started against the DAPL workers and construction work in August
3 of 2016. By October, 2016 hundreds, then thousands of people came from around the
4 United States and the world, to protest the construction of the pipeline. Hundreds of law
5 enforcement personnel and professional news media descended upon North Dakota. The
6 events of the mass protests were covered by news media and social media world-wide.
7 Hundreds of hours of video of the protests was recorded by both law enforcement
8 personnel, including Federal as well as state and local law enforcement officers and agents,
9 as well as private media and civilians.

10 **II. AN NJP RESEARCH PROJECT CONCLUDES THAT MASSIVE AND PREJUDICIAL PRETRIAL PUBLICITY MAKES OBTAINING A FAIR AND IMPARTIAL JURY IN BISMARCK IMPOSSIBLE.**
11

12 Mr. Giron cannot receive a fair trial in Bismark, North Dakota as a result of the
13 massive, pervasive and prejudicial pretrial publicity that has attended the pipeline protests.

14 The National Jury Project (NJP), a jury-consulting firm with four decades of
15 experience in jury research, initially conducted attitudinal surveys in Morton and Burleigh
16 counties in order to explore the impact of pre-trial publicity on community sentiment and
17 its impact on Water Protectors' ability to obtain a fair trial in Bismark.

18 A similar survey was aconducted in Cass County – the seat of the Fargo Division of
19 the District Court. The surveys, conducted by and under the supervision of Diane Wiley,
20 President of the NJP-Midwest and a long-time jury consultant, were “designed in
21 accordance with accepted survey research principles, and followed the same basic format
22 which has been accepted in numerous state and federal courts.” (Exhibit A, Wiley Affidavit
23 regarding surveys in Morton and Burleigh Counties, pp. 8-9).¹

24
25 ¹ Ms. Wiley's *curriculum vitae* is attached as Exhibit B, (Exhibit Appendix 1);
26 Exhibit C, (Appendix 2 - Questionnaires); Exhibit D, (Appendix 3 - Tabulated Response Rates); Exhibit E (Appendix 4 - Verbatim Answers to Morton County Survey);

1 **A. NJP Survey and Conclusions Concerning Morton and Burleigh Counties.**

2 The initial NJP survey of residents of Morton and Burleigh counties concluded that
3 it is “highly likely that the defendant protesters will not be able to receive fair trials from
4 petit jurors impaneled in Morton and Burleigh or surrounding counties” and the Bismark
5 Division generally in DAPL protest cases. (Exh. A, p. 2). As explained in an affidavit by
6 NLG by Diane Wiley, President of the National Jury Project, Midwest, the NLG project
7 conducted research using surveys and testimony about new coverage, venue evaluation, and
8 voir dire conditions in order to ascertain the likelihood of criminal defendants in Bismark
9 of obtaining a fair and impartial jury, as required by the Constitution.

10 Ms. Wiley, who has been conducting both quantitative and qualitative research into
11 jury attitudes and decision making since 1973, followed protocols previously accepted by
12 numerous courts as outlined in the NJP’s manual, JURYWORK: Systemic Techniques (2d
13 ed., Clark Boardman Callaghan). (Exh A, p.1).

14 **1. Massive and Pervasive Pre-Trial Publicity in North Dakota.**

15 The NJP reviewed and analyzed DAPL-related media coverage that was subjected
16 to the prospective venire between March and December 23, 2016 in the Bismark media
17 market and between August and January 11, 2017 in the Fargo media market. It found that
18 the Bismark Tribune, undisputedly the region’s leading newspaper with statewide
19 distribution, published 647 articles related to DAPL protests between August and December
20 23, 2017 alone – averaging more than four articles per day – that have, by and large, been
21 “extremely damaging to the defendant protestors, portraying them as violent and as ‘paid
22 professionals’ and ‘outside agitators.’” and otherwise reinforcing negative public perception

23 _____
24 Questions); Exhibit F (Appendix 5 - Verbatim Answers to Burleigh County Survey
25 Questions); Exhibit G, (Appendix 6 - Verbatim Answers to Cass County Survey
26 Questions); Exhibit H, (Appendix 7 - List of Newspaper Articles and Television
Broadcasts for Cass County); Exhibit I, (Appendix 8 - List of Newspaper Articles and
Television Broadcasts for Burleigh and Morton County).

1 of Water Protectors. (Exh. 1, p. 28, 30, 32-33).

2 The television coverage was “similarly intense,” and 99% of Morton County
3 respondents reported that they had seen media coverage of the protests. (Exh. A, pp. 28-29).
4 Fargo Forum, which is the second most distributed newspaper in the state, had a total of 579
5 articles between June 2016 and January 11, 2017 – an extraordinary amount of coverage in
6 seven months. The NJP review found that much of the coverage “included statements from
7 law enforcement, politicians and other opinion leaders talking about how many protesters
8 had been arrested, how most were from out-of-state, and that many were ‘violent’ and had
9 past criminal arrests. Protesters were characterized by these opinion leaders as violent and
10 a threat to eh community.” (Exh A, p. 34).

11 The NJP surveys found that residents in the potential venire areas had strong feelings
12 regarding the pipeline and its protesters: 74% of Morton County and 68% of Burleigh
13 County responders believe the Dakota Access pipeline should be built (Exh A, p. 26), and
14 “53% of Burleigh County responders indicated that they, or someone they knew, has some
15 kind of personal connection to the protests adn/or have been affected by the protests.” (Exh
16 A, p. 12).

17 A series of recently leaked and publicized Situation Reports generated by TigerSwan,
18 a private security firm employed by Energy Transfer Partners and apparently working in
19 close cooperation with law enforcement officials, acknowledges the hostile attitude toward
20 Water Protectors prevalent among residents of the Birmark/Mandan area. See Nov. 21
21 TigerSwan Situation Report, p. 1: “[l]ocal residents have started their own social media
22 pages to spread pro-DAPL & pro-LE sentiment.” (Attached as Exh J); Nov. 13 TigerSwan
23 Situation Report, p. 1: “...local residents are growing increasingly frustrated with the illegal
24

1 actions of the protesters as well as the actions taken by out of state agitators. Most locals are
2 now carrying weapons to protect themselves...” (attached as Exh K).

3 Moreover, released government email threads generated by local, state, and federal
4 officials, as well as Daily Intelligence Updates developed by TigerSwan and obtained from
5 the North Dakota Department of Emergency Services through Open Records requests,
6 suggest a coordinated law enforcement effort, at times involving members of the United
7 States Attorney’s Office, to propagate media narratives favorable to law enforcement and
8 prejudicial to Water Protectors.

9 The “Public Relations” slides contained with the October 19 and 20 Daily
10 Intelligence Updates, for example, proclaim: “Positive–Sheriff’s Association continues to
11 publish positive news stories. Local news media is highlighting the negative effects the
12 protesters are having on the area.” These slides contain ample screen shots of North Dakota
13 news articles including one entitled “Authorities highlight criminal histories of some
14 pipeline protesters” as well as articles suggesting that Water Protectors threaten children and
15 attack livestock.²

16 2. Findings Regarding Right to a Fair and Impartial Jury in 17 Bismark.

18 Ms. Wiley’s first affidavit, concerning Morton and Burleigh Counties, based upon
19 her analysis of the attitudinal surveys and pretrial media coverage, concluded that “it is
20 highly likely that the defendant protesters will not be able to receive fair trials from petit
21 jurors impaneled in Morton and Burleigh Counties.” (Exh A, p. 2). The surveys conducted

22
23 ² *Oct. 20 Daily Intelligence Update*, p. 4 (attached as Exh L); *Oct. 19 Daily
24 Intelligence Update*, p. 4 (attached as Exh M). See also *Nov. 5 Daily Intelligence Update*,
25 p. 4 (attached as Exh N) (“Sheriff’s Association continues to publish positive news stories
26 and show that the protest movement is no longer peaceful or prayer full.”)

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1 in Morton and Burleigh Counties revealed the existence of an “extremely high level of
2 knowledge of the protests” in the Bismark/Mandan area (Exh A, p. 9) and predicted that
3 panels of jurors can be expected to “have strong emotional feelings about the protesters, the
4 protests and their impact on the community.” (Exh A, p. 5).

5 In her expert opinion, Ms. Wiley found that due to: a) extensive exposure to news
6 coverage about the protests and the charges against the protesters; b) extensive exposure to
7 extra-ordinary material which may or may not be admissible in court, through the news
8 media, discussion with others in the community or both; c) having been (or continuing to
9 be) either personally affected by the protests or knowing others who have been personally
10 affected by the protests, and d) prejudice or the protesters based on information from the
11 news media, community discussion or both – having the opinion that the protesters are
12 guilty of the charges against them, make obtaining a Constitutionally fair and impartial jury
13 in Bismark impossible. (Exh A, p. 42).

14 **B. NJP Survey and Conclusions Concerning Cass County.**

15 The NJP, led again by Ms. Wiley, conducted a second research project to determine
16 whether criminal defendants charged in DAPL protests could receive a Constitutionally fair
17 and impartial jury in Fargo. (Exh O). The second project used the same research tools and
18 analysis to examine the potential venire members in Cass County and concluded that
19 “residents of Cass County do not have the personal involvement and connections to the
20 events that occurred as do residents of Morton and Burleigh counties. Cass County
21 respondents do not see the protests as threatening their families, friends or communities. As
22 a result, there has been much more extensive discussion in Morton and Burleigh county
23 communities than in Cass County, along with rumors and speculation. There is less hostility
24 towards the protesters than in Morton and Burleigh counties.” (Exh O, p. 2).

1 Ms. Wiley concluded, therefore, that cases should be moved to Cass County because
2 the defendant protesters are more likely to receive fair trials from jurors impaneled in Cass
3 County than in Morton, Burleigh or surrounding counties. (Exh O, p. 3).

4 Ms. Wiley cautioned, however, that given that the majority of Cass County
5 respondents who also expressed negative feelings towards the protesters, it will be
6 necessary to utilize the following procedures to ensure that bias is identified:

7 1) lawyers be allowed to conduct a probing voir dire;

8 2) administering a written Supplemental Case Specific Juror Questionnaire to
9 prospective jurors about their knowledge of and attitudes towards the protests and
10 protesters, and

11 3) sequestered voir dire of prospective jurors who have personal knowledge of the
12 protests or persons who have been affected by the protests or know someone who
13 has been affected in relation to their experiences. (Exh O, p. 3).

14 Mr. Giron requests that these three proposals be adopted by this Court in order to
15 guarantee Mr. Giron his Constitutional right to a fair and impartial jury.

16 **III. CASE LAW SUPPORTS MOVING THE TRIAL OF THIS CASE TO FARGO.**

17 The Sixth Amendment guarantees Mr. Giron a fair trial by an impartial jury. A
18 criminal defendant cannot be deprived of his life, liberty, or property “until there ha[s] been
19 a charge fairly made and fairly tried in a public tribunal free of prejudice, passion,
20 excitement and tyrannical power.” *Chambers v. State of Florida*, 309 U.S. 227, 236-237
21 (1940).

22 **A. Cases Analyzing the Right to Change the Venue of a Trial.**

23 This right is implicated in many aspects of the prosecution of a criminal case,
24 including the setting of proper venue. To effectuate proper venue as required by the U.S.

1 Constitution, Federal Rule of Criminal Procedure 18 requires that, “the government must
2 prosecute an offense in a district where the offense was committed.” Fed. R. Crim. P. 18;
3 *See United States v. Morales*, 445 F.3d 1081, 1084 (8th Cir. 2006) (noting that proper venue
4 is required by Art. II, § 2 of the U.S. Const. And Fed. R. Crim. P. 18).

5 The Rules also recognize, however, that there may be situations where a defendant’s
6 right to a fair and impartial trial is not adequately protected by Rule 18. Fed. R. Crim. P.
7 21(a) was adopted to follow Supreme Court case law to implement the Sixth Amendment’s
8 right to a fair and impartial jury, by allowing for change of venue to another federal district
9 if “the court is satisfied that so great a prejudice against the defendant exists in the
10 transferring district that the defendant cannot obtain a fair and impartial trial there.”³

11 A federal district court has broad discretion to grant a motion to change venue.
12 *Walker v. Bishop*, 408 F.2d 1378, 1389 (8th Cir. 1969). In exercising this discretion, the
13 Eight Circuit has developed a two-tiered analysis when pretrial publicity is at issue. *United*
14 *States v. Rodriguez*, 581 F.3d 775, 784 (8th Cir. 2009). The first tier examines whether
15 pretrial publicity was so “extensive and corrupting” that the court is required to presume
16 unfairness that impinges on the Sixth Amendment right to a fair and impartial jury. This
17 occurs when “pretrial publicity was so extensive that a reviewing court is required to
18 presume unfairness of constitutional magnitude.” *Id.*, at 785 (quoting *United States v. Blom*,
19 242 F.3d 799, 803).

20 The presence of pervasive prejudicial publicity can create a presumption that an
21 accused cannot receive a fair trial from an impartial jury in the state or district in which the
22 crime is alleged to have occurred. The right to be tried before an impartial jury is a

23
24 ³ Fed. R. Crim. P. 21(b) also allows for change of venue “in the interest of
justice” which is also applicable to Mr. Giron’s case.

1 “fundamental element of due process” and “pretrial publicity may have [] such an impact
2 upon the populace from which the jury is drawn as to create a probability...that this right of
3 impartiality has been violated.” *United States v. Crow Dog*, 532 F.2d 1182, 1187 (8th Cir.
4 1976).

5 If the district court does not believe that a sufficient showing has been made under
6 the first tier, ‘presumption of unfairness’ standard, the issue is determined by examining the
7 second tier, whether voir dire testimony of venire members, as prospective jurors,
8 demonstrates such actual prejudice that it is an abuse of discretion to deny a timely filed
9 change of venue motion. It is squarely within a court’s discretion to grant or deny a motion
10 to change venue. *United States v. Deggendorf*, 626 F.2d 47, 52 (8th Cir. 1980).

11 While Mr. Giron believes that there is a compelling case for finding that a change
12 of venue is mandated under either tier, there is certainly an extremely strong case for a
13 venue change under the analysis of second tier, as supported by the research conducted by
14 the NJP and the analysis and expert conclusions of Diane Wiley as contained in her two
15 affidavits.

16 **B. The NJP Studies and Conclusions of Diane Wiley Mandate a Change of
17 Venue in Mr. Giron’s Case Under Either Tier.**

18 **1. Uniqueness of Coverage of DAPL Protests.**

19 The federal prosecutions of DAPL criminal defendants are not ‘ordinary’ in any
20 sense of the word. The media coverage of the protesters was literally world-wide. The
21 protests, including the October 27, 2016 protest at the heart of this case, were covered by
22 not just the local press, but by national and international multi-media, such as The New
23 York Times, CNN and The Guardian, a major international newspaper. Coverage was not
24 just in the written format either. Coverage ranged from written articles and photographs in

1 newspapers to videos on national news like CBS, NBC, ABC and CNN, as well as, videos
2 and articles on social media like Facebook, Twitter, Instagram and other internet-based
3 platforms.

4 It is safe to say that appellate courts ruling on this issue prior to 2017 have never had
5 to determine the range and scope of today's internet-connected world, governed not by
6 traditional media sources such as newspapers, but commonly viewed media outlets as those
7 listed above. Moreover, coverage of the events in the DAPL protest were not limited to
8 North Dakota. The DAPL protests were reported by an extremely deep, wide ranging and
9 extensive network of professional and personal media.

10 **2. Impact of Media Coverage on Mr. Giron's Sixth Amendment**
11 **Right to Fair and Impartial Jury.**

12 Not only was the range and depth of the pretrial media coverage of DAPL protests
13 extraordinary, it had a huge impact on the local residents of Morton and Burleigh counties.
14 As residents of the area in which the protests were occurring, many people were personally
15 affected (or knew others personally effected, such as friends, family members or neighbors)
16 in their professional or personal lives by the demonstrations, as evidenced by the surveys
17 conducted by the NJP. For example, 58% of Morton County and 53% of Burleigh County
18 respondents indicated that they, or someone they knew, has some kind of personal
19 connection to the protests and/or been affected by the protests. (Exh A, p. 12).

20 The NJP surveys also found that as of mid-December 2016, approximately 75% of
21 the juror-eligible population of Morton County and 77% of the juror-eligile population of
22 Burleigh County stated that DAPL protesters who have been charged with crimes are
23 probably or definitely guilty. (Exh. A, pp. 16-17). Moreover, approximately 88% of Morton
24 and Burleigh Counties indicated strong signs of prejudice by declaraing one or more the

1 following: that they could not be fair and impartial jurors; that they had previously expresses
2 their opinion that the arrested protesters were guilty, and/or that they thought that most of
3 the protesters charged with crimes are probably or definitely guilty. (Exh. A, p. 18).

4 Based upon the research conducted, Diane Wiley concluded that it is “highly likely
5 that the defendant protesters will not be able to receive fair trials from petit jurors”
6 impaneled in Bismark. (Exh A, p. 2). Based upon the second research project conducted
7 in Cass County, Ms. Wiley concluded that “[b]ased upon the survey, my review of the news
8 coverage related to the protests against the Dakota Access Pipeline, the charges involving
9 the protesters, the characteristics of Morton and Burleigh counties and my extensive
10 experience in evaluating juror attitudes, I have concluded that it is highly likely that the
11 defendant protesters will be more likely to receive fair trials from petit jurors impaneled in
12 Cass County than in Morton, Burleigh or surrounding counties in the upcoming cases
13 involving the protests.” (Exh. O, p. 3).

14 Nonetheless, due to the impact of media coverage, Ms. Wiley also concluded that
15 transfer of venue to Cass County would not be enough to ensure a Constitutional right to
16 a fair and impartial jury short of enabling attorneys to conduct probing voir dire;
17 administering a written Supplemental Case Specific Juror Questionnaire to prospective
18 jurors about their knowledge of and attitudes towards the protests and protesters; and
19 sequestered voir dire of prospective jurors who have personal knowledge of the protests or
20 persons who have been affected by the protests or know someone who has been affected in
21 relation to their experiences. (Exh O, p. 3).

22 **3. Negative Attitudes of Prospective Jurors Regarding DAPL Water**
23 **Protesters and Negativity Towards an Entire Social Movement.**

24 As revealed by the NJP surveys, a great deal of animosity is demonstrated against the

1 DAPL protesters. Potential jurors, some of whom said they could be fair, focused much of
2 their animosity on their perception that protesters posed a violent threat to police officers,
3 stating for example: “[t]hey were doing wrong to law enforcement,” “I’ve heard of
4 aggression towards law enforcement,” “I...remember quite a few threats being thrown at law
5 enforcement people,” and “[t]hey have been...attacking law enforcement.” (Exh A, pp. 22,
6 44-46).

7 In *United States v. Blom*, 242 F.3d 799 (8th Cir. 2001), the Eighth Circuit found that
8 the trial court did not abuse its discretion in denying a pretrial motion for change of venue.
9 The defendant in that case was charged with a high profile kidnap and murder of a local
10 teenage girl, amidst significant pretrial publicity. In denying the defendant’s motion for a
11 change of venue, the federal district court noted that the defendant’s argument “rests
12 exclusively on the quantum of publicity that his State and Federal charges have received.
13 He has not directed us to any specific portions of the media reports, or to any other
14 evidence, which would require a finding of unconstitutional unfairness.” *Id.* at 803.

15 It should be noted, however, that the trial court in *Blom* did move the trial from
16 Duluth, Minnesota to Minneapolis, Minnesota and excluded all jurors from the Fifth
17 Division, where the victim had been abducted. Additionally, *Blom* involved local media
18 coverage of a single defendant. No national and international coverage of multiple
19 defendants was present.

20 In *Blom*’s case there was no research conducted by the nationally recognized
21 National Jury Project; no surveys performed and no extensive analysis of media coverage
22 unlike in this case. The scathing and denigrating rhetoric targeting the Water Protectors is
23 exactly the kind of “inflammatory [and] accusatory” pre-trial publicity that the *Blom* Court
24 said was absent in that case. (*Id.* at 804).

1 Moreover, unlike most cases involving challenges to venue based on pretrial
2 publicity which involve a single defendant and a single event, this case presents a far more
3 challenging situation, involving multiple defendants and events occurring over a number of
4 weeks captured in the national, international media and on internet based platforms like
5 Facebook, Instagram, Twitter etc. Instead of confronting prejudice and bias involving a
6 single defendant, Mr. Giron faces prejudice and bias against the entire Water Protector
7 movement. This makes for a far more compelling case for a change of venue than a single
8 defendant.

9 **IV. CONCLUSION**

10 Mr. Giron seeks to have a fair and impartial jury as guaranteed him by the Sixth
11 Amendment. To this end, for all of the reasons cited in this memorandum, he respectfully
12 requests that this Court grant his motion for a change of venue and order this case to be tried
13 in the Fargo, Eastern Division. He further requests that the Court order that defense
14 attorneys be granted probing voir dire to expose any bias and prejudice of potential jurors
15 regarding their feelings due to extensive pretrial media coverage and whether they or
16 someone they know was personally affected by the DAPL protests; that a written
17 supplemental Juror Questionnaire be sent to prospective jurors about their knowledge of and
18 attitudes towards the protesters be implemented; and that the Court perform sequestered
19 voir dire of any prospective jurors who have personal knowledge of the protests or persons
20 who have been affected by the protests or know someone affected by the protests.

21 DATED this 11th day of October, 2017.

22 Respectfully submitted,

23 *s/Timothy R. Lohraff*
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26 DEFENSE MOTION FOR TRANSFER OF VENUE - 13

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25 DEFENSE MOTION FOR TRANSFER OF VENUE - 14
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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties associated with this case.

s/Timothy R. Lohraff