

Supreme Court Clerk's Office - Keller, Heather

From: Lana Brach <brach240@aol.com>
Sent: Thursday, December 22, 2016 3:56 PM
To: (SUP) Clerk of Court Office
Subject: Petition to Permit Temporary Provision of Legal Services by Qualified Attorneys From Outside North Dakota

To: Penny Miller, Clerk of the Supreme Court

Regarding the Issue Presented for Review, namely do the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as Article I, § 12 of the North Dakota Constitution, mandate that this state admit out-of-state attorneys in temporary practice to deal with the flood of criminal charges that is currently overwhelming the local bar's ability to adequately represent all defendants?

The fallout from the DAPL protests is unprecedented in North Dakota. The sheer scale presents a legal crisis in providing quality representation to all defendants. North Dakota has historically led the nation in its protection of the rights of the accused. It should continue to do so, by granting the relief requested here

Per the Commission on Legal Counsel for Indigents ("CLCI"), to date, 79 North Dakota attorneys have been assigned 265 cases; but the need is not yet met. As of December 2, 2016, court records list fully 264 defendants as being without counsel. Of these 264 defendants, at least 113 applied to be represented by public defenders but were denied, in which some of these denials likely to be reversed upon correction and/or completion of paperwork.

Pretrial hearings, dispositions conferences, and jury trials have been scheduled almost continuously throughout the winter, and have already begun to occur. Because of the enormous quantity of defendants, hearings are almost guaranteed to continue well into 2017. These events are of a historic scale. Petitioners know of no other time in which comparable strain has been placed on court system, relative to its size, by such a surge of arrests. While the total number of requests for indigent counsel cannot yet be determined, it is clear that there will be more requests for counsel than can be accommodated by present resources. Similarly, the demand for private counsel also exceeds the capacity of the local bar.

The need for attorneys to represent DAPL protestors is enormous and the number of charges is overwhelming the local defense bar. The strain on the state's criminal defense resources caused by this situation is clear. Public defenders from across the state have been called upon to supplement those in the South Central District. Local panelists have reached the limit of case allotments. Attorneys from Dickinson, Minot, Devils Lake, Valley City, Fargo, Crookston, MN and Mobridge, SD, have been assigned cases through the Indigent Services Commission. Scores if not hundreds of additional defendants have indicated they wanted to ask for appointed counsel. Despite the extraordinary pressure these arrests have put on the criminal justice system in Morton County, no emergency funds have been allocated to the court system. In particular, no emergency funding has been allocated to the already budget-constrained public defense system.

The counsel provided cannot be mere window dressing—to satisfy the obligations imposed under the North Dakota and United States Constitutions, counsel must be effective. Yet even if DAPL-related defendants are able to obtain indigent counsel currently, they risk having too little time and attention paid to their cases. When the indigent defense system is as overburdened as the system currently is in Morton County, excessive workloads lead almost inevitably to ineffective assistance of counsel. Thus, even those defendants who currently are able to obtain counsel still risk suffering constitutional indignity

Experienced criminal defense attorneys from nearby jurisdictions— including South Dakota, Minnesota, Wisconsin, Colorado, Nebraska, Iowa, Illinois, and others—have offered to assist.²⁸ Attorney Emily Beck, who has been coordinating volunteer offers since late September, has received commitments from over 50 attorneys. Over half of them have 20 or more years of experience in criminal law. Among those offering assistance, to date, only one is licensed to practice law in North Dakota.

Criminal defendants have long been recognized by this Court as a class in need of special protection, including effective assistance of counsel.. It follows that this Court possesses inherent authority to admit new attorneys for the purpose of ensuring adequate protection of the constitutional rights of criminal defendants in the present situation.

Should significant steps not be taken in the very near future to provide counsel for indigent persons who have been arrested for serious charges, the legal help may arrive too late to provide meaningful assistance. If that were to happen, representation would, by definition, be ineffective and inadequate, and would "equal a denial of due process."

Respectfully,
Lana Brach