20160436
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 23, 2016
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA
IN THE SUPREME COURT

---

Supreme Court No. 20160436

**In the Matter of a Petition to Permit Temporary Provision of Legal Services by Qualified Attorneys From Outside North Dakota**

---

## RESPONSE TO NOTICE OF COMMENT

[¶1] On December 14, 2016, the Court entertained a Petition to Permit Temporary Provision of Legal Services by Qualified Attorneys from Outside North Dakota (the "Petition") and referenced the affidavit of William L. Tilton, along with Exhibits and a proposed order. In response to the Court's call for comments, I submit the following in support of the Petition.

[¶2] I am an attorney admitted in the State of New York and the State of New Jersey; I am also admitted in the Southern District of New York, the District of New Jersey, the Eastern District of Michigan, the U.S. Court of Federal Claims, the U.S. Courts of Appeal for the First, Second, Third, Sixth, Seventh and Ninth Circuits and the U.S. Supreme Court. I have either appeared and argued in all of these courts or, in the case of the U.S. Supreme Court, have submitted and responded to writs of certiorari. I also currently teach a seminar on Political and Corporate Corruption Law at Rutgers Law School where I have taught regularly in a variety of areas as an adjunct professor of law since 2001.

[¶3] Pursuant to the Court's order of December 15, 2016, I am filing this comment in support of the Petition.

[¶4] Pursuant to the Court's order this comment is being e-mailed to Penny Miller, Clerk of the Court.

[¶5] I am personally familiar with the facts concerning the Dakota Access Pipeline (the "Pipeline") and the associated protests and encampments and have consulted on multiple occasions with lawyers and others present at the protest sites that have arisen in connection with the Pipeline. I am aware that more than 500 people have been charged with protest-related offenses, largely in the nature of civil disobedience offenses and, often, more serious felony-level offenses that potentially carry significant punitive sanctions. All such individuals have a serious and significant need for legal representation.

[¶6] Without intending disrespect to the experienced practitioners of the Bar of the State of North Dakota, it would appear that the criminal and/or civil rights bar of the State is not large enough to expeditiously achieve representation of all of the hundreds of persons charged in connection with the Pipeline and the Water Protectors protests.

[¶7] It is my understanding that many individuals will have to be represented by the same counsel who may be overwhelmed both procedurally and factually, as well as financially. Without additional counsel being admitted to the State, the unusually large number of defendants will likely cause many to achieve less than optimum representation despite the best efforts of overstretched North Dakota counsel. In such case, significant due process concerns arise, particularly if cases are delayed due to the lack of practitioners available to handle the unusually large caseload.

[¶8] As a constitutional lawyer who also handles many habeas-type post-conviction proceedings, I am concerned that these individuals have access to counsel to avoid lengthy

delays that invoke due process concerns. Delay will undoubtedly cause pleas to be entered where individuals believe themselves to be innocent or will result in extended litigation contrary to the Fifth Amendment requirement of a speedy trial.

[¶9] In addition, protest-related criminal charges often are subject to difficult, if not confused, fact patterns with multiple witnesses seeing events from diametrically different and distinct perspectives. Counsel must have adequate time and scope to review such facts without the pressure of assuming representation for an unduly large number of clients.

[¶10] The constitutional authorities cited at ¶¶62 and 63 of the Petition demonstrate that the lack of adequate access to counsel endangers the defendant's interest in both 1) a speedy and fair trial and 2) effective assistance to counsel under both the North Dakota and Federal Constitutions. See e.g. *State v. Sahr*, 470 N.W.2d 185, 187 (1991) (recognizing right to speedy trial and describing analysis necessary to discerning violation of such right). In the present emergent circumstances, there are also not sufficient public defenders in the State to undertake the representation of the large number of indigent defendants who face legal proceedings or trial. Defendants not able to afford or locate North Dakota counsel or faced with a shortage of state-provided counsel would not have waived their rights to a speedy trial, cf. *Sahr*, *supra,* but would still be deprived of such right.

[¶11] Fundamental fairness will be impugned if sufficient lawyers cannot be found to represent these defendants. Convictions may arise improperly through pleas taken in the face of inadequate representation or through counsel who are not adequately able to prepare for multiple simultaneous proceedings. The State's interest is also threatened by these conditions since even convictions that may be supported by the record would be subject to almost immediate reversal if

a defendant was found to be without adequate access to counsel. As recognized by the U.S. Supreme Court in *United States v. Cronic*, 466 U.S. 648 (1984), a lawyer's retention without adequate opportunity to prepare and analyze the case renders the representation *per se* ineffective under the Sixth Amendment.

[¶12] While the present cases individually may seem limited in scope, the combination of multiple co-defendants spread among a small number of attorneys will compress and reduce counsel's opportunity to prepare for trial or pre and post-trial motions. The shortage of counsel is compounded by the complexity of the legal theories advanced by the prosecution, i.e., "conspiracy to endanger by fire" or "engaging in a riot". Petition at ¶22. Such charges will require extensive preparation that is necessarily fact-specific *for each individual defendant*. Such difficulties are exacerbated by the fact that virtually all of the charged defendants were engaged in arguably protected First Amendment activity, and trial counsel's preparation will require First Amendment analysis in each case: the charge of "riot", for example, arises from actual public protest. Many of the "endangerment" issues alleged by the State involve symbolic speech protected under the First Amendment such as the use of fire as a ceremonial image or the intentional crossing of the bridge to demonstrate the right of protestors to access the public highways or the right of Native Americans to travel across lands they still claim as sovereign.

[¶13] A limited number of counsel will not in each case be able to address the complex issues inherent in prosecutions that are imbued with First Amendment interests. For example, to decide whether conduct is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence v. Washington*, 418 *U.S.* 405, 409, 94 *S.Ct.* 2727, 2730, 41 *L.Ed.*2d 842, 846 (1974), courts must determine whether "[a]n intent to

convey a particularized message [i]s present" and whether those who view the message have a great likelihood of understanding it, *Id.* at 410-11, 94 *S.Ct.* at 2730, 41 *L.Ed.*2d at 847, issues that are fact-specific and present difficult constitutional questions. Multiple kinds and types of protest have been found to be sufficiently expressive to fall within the protections of the First Amendment. See, *e.g., Texas v. Johnson*, 491 *U.S.* 397, 109 *S.Ct.* 2533, 105 *L.Ed.*2d 342 (1989) (holding that burning of flag to protest government policies is protected speech); *Spence, supra*, 418 *U.S.* 405, 94 *S.Ct.* 2727, 41 *L.Ed.*2d 842 (placing of peace symbol on flag to protest invasion of Cambodia and killings at Kent State); *Tinker v. Des Moines School District*, 393 *U.S.* 503, 89 *S.Ct.* 733, 21 *L.Ed.*2d 731 (1969) (holding protected the wearing of black armbands to protest war in Vietnam); *R.A.V. v. St. Paul,* 505 *U.S.* 377, 112 *S.Ct.* 2538, 120 *L.Ed.*2d 305 (1992) (holding that racist speech that would be abhorrent or criminal to most Americans can still be deemed protected conduct). As these cases show, criminal charges that arise out of protected expressive interests require client-specific and fact-sensitive approaches that will likely be eluded, despite the best efforts of the courts to manage the docket, if counsel are forced to take on too many multiple representations at the same time.

[¶14] Such complexity is further shown by the U.S, Supreme Court's recognition that conduct that may appear to fall within the ambit of a criminal statute, such as an anti-trespassing law, may not be enforceable if it is used to bar or diminish First Amendment rights:

> "[R]ights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities. Accordingly, even if the accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case. See *Edwards* v. *South Carolina, supra*, at 235. The statute was deliberately

> and purposefully applied solely to t6erminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution."

*Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

[¶15] As this excerpt shows, what may, for example, seem like "riot" to officers standing watch on a bridge may well be symbolic speech by protestors whose act of entry onto the bridge is imbued with protected, expressive conduct, such as demonstrating the right to travel over roads that traverse lands that had belonged to indigenous peoples who still, today, claim sovereignty. See e.g. *Brown v. Louisiana*, supra (recognizing that African-American protesters who remained in lobby of segregated library after demand to leave could not deemed subject to criminal trespass charges because of the inherent speech expressed by their physical presence on the site).

[¶16] In the face of issues such as these that will inevitably arise as a result of the Pipeline protests, sufficient numbers of counsel are necessary to adequately address conduct that may seem criminal to some observers, i.e. law enforcement officials at the bridge, but from a constitutional perspective may well be deeply embedded with protected First Amendment interests. The First Amendment character of the acts of these hundreds of defendants may well result in acquittal of charges of "riot" or "endangerment" but would require sufficient numbers of counsel with the time to explore and fully brief such questions and not be burdened by an undue number of clients forced upon them by an emergency.

[¶17] For the above reasons and those expressed in the Petition, I endorse the proposed temporary rule change to permit qualified outside counsel to enter their appearance on behalf of the protest-related defendants.

[¶18] The remedy suggested at ¶57 of the Petition, i.e., following the admission process in the District of North Dakota, would seem to present an easy and efficient means of admitting additional counsel to practice on a temporary basis. While I am admittedly a stranger to the judicial system in North Dakota, I recently inquired into the process for admission into the District of North Dakota and it is among the most streamlined in the Nation allowing prompt and easy access to the federal district for attorneys who are in good standing in their home states. As set forth at ¶57 of the Petition, it appears that such process, or some similar means, could be adopted to the State court system for purposes of the present emergency in an expeditious and easily managed fashion.

Accordingly, it is respectfully requested that the Honorable Judges of the Supreme Court of North Dakota, accept and grant the proposed temporary rule change.

S/Bruce I. Afran
Attorney-at-Law
NJ Bar # 010751986
afran@andromeda.rutgers.edu
bruceafran@aol.com

Dated: December 22, 2016
10 Braeburn Dr.
Princeton, New Jersey 08540