

**State of North Dakota**  
**In the Supreme Court**

**IN THE MATTER OF A PETITION TO PERMIT TEMPORARY  
PROVISION OF LEGAL SERVICES BY QUALIFIED ATTORNEYS  
FROM OUTSIDE NORTH DAKOTA**

**Supreme Court No. 20160436**

**COMMENTS IN SUPPORT OF PETITION**

**Submitted by**

**Itzhak E. Kornfeld, Esquire\***  
**Louisiana Bar No. 20905**  
**Pennsylvania Bar No. 68345**  
**16 East Roumfort Road**  
**Philadelphia, PA 19119-1618**  
**Tel.: 267.608.9330**  
**E-mail: itzhak.kornfeld@gmail.com**

\* These comments are being submitted in the writer's private capacity.

**To the Honorable Justices of the North Dakota Supreme Court:**

May it please the Court:

Kindly accept these comments in support of the Petition filed by Timothy Q. Purdon, Esquire, *et al.* on December 14, 2016, requesting this Honorable Court to permit temporary provision of legal services by qualified attorneys from outside of North Dakota.

Initially, I wish to incorporate each and every paragraph set forth in the afore-mentioned petition.

**I. The Petition Raises Critical Constitutional Matters**

**A. The Foundational Right to Counsel Guaranteed by *Gideon v. Wainwright***

The issue raised by the petition is one of the utmost Constitutional consequence: the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying the right to all states); Article I, § 12 of the North Dakota Constitution; *State v. Orr*, 375 N.W. 171, 178 (N.D. 1985). At this juncture, there are at least 575 Dakota Access Pipeline arrestees,<sup>1</sup> who have been at various times during the past few months, charged with criminal offenses which potentially carry imprisonment of up to one year and fines in excess of five thousand (\$5,000.00). N.D. Century Code t112.1c32, Penalties and Sentencing; 12.1-32-01.5-6 Classification of Offenses. These offenses arose from various protests over the Dakota Access Pipe Line (“DAPL”). The majority of these arrests occurred in Morton County.

Indeed, on one occasion, October 27, 2016, “there were at least 139 arrests, leading to 404 separate charges being brought. [Footnote omitted]. Virtually every arrestee was charged

---

<sup>1</sup> CBS News, [North Dakota Courts Strained by Pipeline Protest Arrests](http://www.cbsnews.com/news/dakota-access-pipeline-standing-rock-protest-arrests-north-dakota-courts), Nov. 30, 2016, <http://www.cbsnews.com/news/dakota-access-pipeline-standing-rock-protest-arrests-north-dakota-courts>. (“Police have made nearly 575 arrests since August during clashes at the protesters’ main camp along the pipeline route in southern North Dakota and at protests in and around the state capital, Bismarck . . .”)

with Endangering by Fire or Conspiracy to Endanger by Fire (a Class C Felony), Maintaining a Public Nuisance (a Class A Misdemeanor), and Engaging in a Riot (a Class B Misdemeanor).”

Petition at [¶ 22]. Conspiracy charges require two or more parties to agree to undertake a criminal act.<sup>2</sup> Thus, the interests of the individuals charged may diverge and/or conflict, which may necessitate different counsel for each person charged with the conspiracy.

**B. Too Few Lawyers: 575 Defendants and 50 Lawyers = Injustice**

The Petition clearly sets forth facts which illustrate the overwhelming shortage of criminal defense counsel in North Dakota that would be or are available to defend the DAPL defendants. See ¶¶ 22-43. Moreover, of those 575-plus arrestees less than a quarter have been able to retain counsel. Accordingly, were this Honorable Court to reject the Petition, these defendants would be left without qualified lawyers to represent their interests before the North Dakota courts. That would cause an abridgment of their Constitutional rights, pure and simple. Due process and fairness demanded by the United States Constitution and the Constitution of North Dakota and the case law interpreting the latter would be cast asunder like a used tissue, if these rights were not upheld or vindicated by this Honorable Court.

It is axiomatic that all defendants are guaranteed the right to effective assistance of counsel, by the Sixth Amendment of the United States Constitution. U.S. CONST. amend. VI

---

<sup>2</sup> To prevail on a charge of conspiracy, the Prosecution must prove that a person “agrees with one or more persons to engage in or cause conduct which, in fact, constitutes an offense or offenses, and any one or more of such persons does an overt act to effect an objective of the conspiracy . . .” N.D. Century Code t12.1-06-04.1. Criminal Conspiracy. See also, State v. Borner, 2013 ND 141, 836 N.W.2d 383 at ¶ 5, (Jury instruction: “A person is guilty of conspiracy . . . if the person agreed with another to knowingly engage in or cause conduct which, in fact, constitutes the offense . . . of murder of another under circumstances manifesting extreme indifference to the value of human life, and one party to that agreement did an overt act to effect an objective of the conspiracy. . .”)

(providing that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense”); Gideon v. Wainwright *supra*, 372 U.S. 335, 339 (1963). Indeed, in *Gideon* the Court acknowledged that the “guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 340.

Therefore, this Honorable Court may sua sponte raise the issue of a defendant’s constitutional rights. Silber v. United States, 370 U.S. 717, 717-18 (1962); DeRoo v. United States, 223 F.3d 919, 926 (8th Cir. 2000). No doubt, the State will argue that not all defendants will require the effective assistance of experienced criminal defense counsel. Nevertheless, such an argument must be rebuffed by this Court for the reasons set forth above; as well as the requirement that fairness and every constitutional touchstone, pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and Article One, Sections One and Twelve<sup>3</sup> of the North Dakota Constitution must be ensured by this Honorable Court.

---

<sup>3</sup> Section 1. All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed; and

Section 12. In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

(Emphasis added).

## **II. This Honorable Court Has the Means of Assuring that Out-of-State Counsel are Both Competent and Abide by North Dakota's Court Rules**

The law in North Dakota is crystal clear on the issue of the effectiveness of counsel. State v. Jensen, 333 N.W.2d 686, 697 (N.D. 1983). (Counsel must be “reasonably likely to render and rendering reasonably effective assistance.”). Attorneys are expected to know the North Dakota Rules of Criminal Procedure, and to be able to competently follow them. “The essence of . . . [] effective-assistance [by counsel] is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 384 (1986). This Court or a District Court can establish rules for out-of-state attorneys to demonstrate their competence, prior to any arraignment or trial. This would streamline the trial process, so that out-of-state counsel’s performance does not fall below the North Dakota professional norm, and that errors do not upset the adversarial balance in favor of the prosecution. E.g. A Defendant’s presentation of evidence, including exculpatory evidence.

Presently,

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.

Petition at [¶64].

Similarly, where issues of Publici Juris are extant, this Honorable Court can invoke its original jurisdiction. Indeed, the Petition establishes as much in its [¶74], which provides in pertinent part:

Original jurisdiction is a rarely-invoked use of court power, but it is appropriate in the present situation. Article IV, § 86 of the North Dakota Constitution (as amended, Art. 97, S.L. 1975, ch. 615, and approved September 7, 1976, S.L. 1977, ch. 599), gives this Court original jurisdiction over those cases in which the question presented is publici juris. A question is publici juris where it implicates the sovereignty of the State, the franchises or prerogatives of the State, or the liberties of its people. State ex rel. Vogel v. Garaas, 261 N.W. 2d 914 (N.D. 1978). To warrant the exercise of this Court's original jurisdiction, the interests of the State must be primary, not incidental, and the public, the community at large, must have an interest or right which may be affected. State ex rel. Jenkins, Inc. v. Omdahl, 138 N.W.2d 439 (N.D. 1965); State ex rel. Burgum v. North Dakota Hosp. Serv. Ass'n, 106 N.W.2d 545 (N.D. 1960).

Petition at [¶74]. Emphasis added.

In concluding the Court also has the competence to enforce its Rules of Professional Conduct as regards each and every out-of-state attorney that will appear before North Dakota's courts. See N.D.R., Lawyer Disciplinary, 1.2. Grounds for Discipline, which provides that "A lawyer may be disciplined . . ." Not a North Dakota lawyer but "a lawyer".

### **III. Conclusion**

The consequence from the DAPL demonstrations is unparalleled in North Dakota's history. The arrests and upcoming trials of over 575 defendants has and will present a crisis for the courts of the state and to the legal community. Court staff, including judges will strain under the weight of the sheer number of those requiring able, quality and efficient representation, so that North Dakota's court system protects the rights of the accused as it has done in the past. Accordingly, this Honorable Court should

persist in upholding individual rights and grant the relief requested here, i.e., grant the petition.

Respectfully submitted

/s Itzhak Kornfeld  
16 East Rounfort Road  
Philadelphia, PA 19119-1618  
LA Bar I.D. No. 209215  
PA Bar ID No. 68345  
(267) 608-9330  
itzchak.kornfeld@gmail.com