

In the Supreme Court

State of North Dakota

Supreme Court No. 20160436

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Response in Opposition to the Petition to Terminate the Special Provision of Legal Services by  
Qualified Attorneys From Outside North Dakota

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1. The Petition Submitted to Terminate the Special Provision of Legal Services by Qualified Attorneys from Outside North Dakota (Petition to Terminate) was submitted by Judges of the South Central District on September 11, 2017. This Comment seeks to inform the Supreme Court in its consideration of this Petition.
2. 831 cases were filed by Morton and Burleigh Counties against DAPL protest-related defendants. This sheer number of cases, in addition to the regular criminal docket, far exceeds the typical caseload handled by either of these counties.
3. On December 14, 2016, four North Dakota barred attorneys and two attorneys temporarily barred in North Dakota filed a petition (hereinafter Original Petition) with the Supreme Court requesting that North Dakota's process for admitting out-of-state lawyers be changed. The Original Petition cited concerns for defendants' rights to due process, fundamental fairness, equal protection, and right to adequate counsel. These concerns still are present for those still unrepresented who may want *pro hac vice* representation or who have *pro hac vice* representation but may have it terminated if this petition were granted as written and made effective as of the date of the petition. The Sixth Amendment rights of at least 100 criminal defendants could be compromised, creating grounds for many appeals on the basis of ineffective assistance of counsel, were this petition to be granted.
4. In an opinion (hereinafter Special Opinion) filed January 18, 2017, the Supreme Court of North Dakota granted the Original Petition. The Court noted that there were over 16, 000 comments received, of which a vast majority were in support of the Original Petition. Although the Court discounted many of the comments as misunderstanding the scope of the Original Petition's request, the Court also recognized the "the potential for delay or inconvenience for litigants due to the relatively large number of arrests and finite resources to handle the judicial proceedings related to those arrests." In light of these concerns, the Court granted Special Provisions by which *pro hac* lawyers could practice *pro hac vice* in North Dakota.

5. Attorneys practicing under these Special Provisions are still required to receive guidance and authorization in all filings and other legal business from a North Dakota associate counsel. The most notable modification to the standard rule governing such appearances is that the provision of Rule 3 requiring personal appearance at each and every court hearing by a local associate counsel was waived by the Supreme Court. Additionally, attorneys admitted *pro hac vice* are required to practice *pro bono* and may appear only on these charges related to the Water Protector camps expressing opposition to the Dakota Access Pipeline. The filing fee for *pro hac vice* admission was also waived.
6. As of September 11, 2017, attorneys practicing under the Special Provisions have represented or are currently representing DAPL protest-related clients on 127 separate matters. Experienced trial attorneys under the aegis of local associate counsel have provided superlative client representation, thanks to the Special Provisions. The representation of criminal defendants by *pro bono* lawyers acting under the Special Provision in this unusual mass arrest situation has saved the State of North Dakota enormous amounts of money that would otherwise have been spent on the administration and compensation of appointed counsel. Furthermore, these attorneys and their associated legal support networks have successfully accomplished procedural streamlining of the DAPL-related cases, while ensuring fundamental fairness and due process for Water Protector defendants.
7. Attorneys acting under the Special Provisions have often represented people who were listed as lacking representation after arraignment or after a trial date was set. These individuals did not, initially, qualify for appointed counsel. However, many were disqualified from appointed counsel eligibility because of an incomplete application – as opposed to not meeting the income requirements. Anecdotally, this denial of appointed counsel eligibility was confusing to many defendants, especially to those who lived out of state and were unfamiliar with North Dakota courts. Many of these defendants live on reservations or other remote areas and have limited access to information regarding the legal system. The absence of support served to discourage correction and resubmission of the application for court-appointed counsel. Moreover, those defendants who were denied on the basis of income eligibility may be in a significantly different financial position by the time of their trial, more than a year after their arrest.
8. Unrepresented individuals require counsel. It is the *sine qua non* of due process, and the State cannot ethically proceed with their prosecution in its absence. Unrepresented defendants can appear at their Final Disposition Conference three days before the trial and make an application to the judge to consider them for appointed counsel. The State may appoint counsel at its own expense. Appointment of counsel at the eleventh hour requires a continuance and is an inefficient use of State and judicial resources. Lawyers acting under the Special Provision serve these unrepresented persons, recognizing their need for counsel, while efficiently serving the needs of the courts.

9. In granting the original petition, the Supreme Court recognized, “the potential for delay or inconvenience to litigants due to the relatively large numbers of arrests and finite resources to handle the judicial proceedings related to those arrests.” Attorneys acting under the Special Provisions have significantly reduced delay and inconvenience to both parties in DAPL-related litigation. The potential for delay and inconvenience still exists. Attorneys acting under the Special Provision have and will significantly reduce this delay and inconvenience. To the degree that their vigorous defense of these cases, with depositions, motion practice, and trials, has created an administrative burden on the South Central Judicial district, this burden should not override the interests of justice and the mandates of the Sixth Amendment and Gideon. The States Attorney has dismissed over one hundred cases and could elect to dismiss additional cases as most are class A or B misdemeanor charges.
10. Law enforcement’s response to DAPL resistance, including mass arrests, generated enormous amounts of discovery (in some cases over 600 GBs of State’s discovery alone) and non-typical charges filed. These present unique challenges to attorneys on these cases. These are not the typical drug or assault cases and often require an immense amount of legal research and pre-trial motion drafting, as well as a massive logistical effort to coordinate defendants, perform fact-investigation, and review of documents and discovery. Due to the unusual nature of policing, paralegals and assistants face such novel problems as investigating arrests with no documented arresting officer or involvement of unidentified out-of-state officers; poring through terabytes of video to identify witnesses; tracking down information from jails and detention centers all over North and South Dakota to which arrestees were bussed; and locating and retrieving lost and destroyed personal property. The unusual charges involved, such as Engaging in a Riot and Maintaining a Public Nuisance, implicate First Amendment concerns, heightening all other constitutional concerns. Defending zealously against such charges requires and deserves considerable time and energy, as the fundamental civil rights of all North Dakotans, in addition to the liberty of individuals, is at stake. Attorneys acting under the Special Provision have approached this work with passion, expertise, and good faith, and have been willing to travel from afar without compensation precisely because they care about the unique issues and challenges these cases present.
11. A majority of criminal cases from two mass arrest dates (October 22 and October 27) have been dismissed by Morton County State’s Attorney’s Office by pretrial Rule 48 motions. However, a majority of these Rule 48 motions have been filed by the State merely days before the scheduled trial date. This has caused financial strain and inconvenience – that the Supreme Court meant to avoid in its Order – for defendants traveling to the Morton County Courthouse to have their day in court. Attorneys acting under the Special Provision have effectively represented these clients, communicated with them regarding these last minute dismissals, and avoided what would be a highly

inconvenient situation of numerous defendants traveling to Morton County only to see their cases dismissed for want of evidence.

12. Many of these cases from two mass arrest dates (October 22 and October 27) were charged twice, separately and successively for the same incident. We refer to these as recharges. The State's Attorney informed defense counsel they planned to issue new charges after they failed to obtain guilty pleas to the initial charges, which were lacking a factual and legal basis sufficient to sustain a conviction. The new charges were not only novel but carried greater penalties. Some defendants had their initial charges dismissed after which a new case was issued. Others had two cases pending which were later joined to include all five charges. This was confusing and burdensome for those defendants who had to "start over" with a new case. Even those that had been represented had an arrest warrant issued against them, rather than a summons and complaint. Those people who had been appointed counsel in their initial case were expected to reapply for counsel in the second case, which was burdensome and confusing for everyone involved. It created a very real danger that a previously represented defendant who failed to reapply for appointed counsel would suffer the cascading consequences of an unresolved arrest warrant. The extra set of tasks was not required for those people who had been represented by attorneys practicing *pro hac vice*, who were able to avoid seeking representation for a second time.
13. In DAPL-related cases, judges have been willing to grant the State's Attorney's Office wide discretion and treated these cases differently from others. This ranges from granting continuances for State's Attorneys because of failures to meet deadlines and produce discovery, to allowing the prosecution to recharge a defendant they know to be represented with the issuance of an arrest warrant. It ranges from passing new policies that would force defendants to resolve warrants *only* by turning themselves in at the jail rather than calendaring an appearance with the court, to permitting the prosecution to correct initial filing errors where charges were incorrect and affidavits were missing. We think it only appropriate and fair that the Supreme Court allow some latitude and accommodation for the defense given the novelty of these cases and the concomitant novelties in the way they are being handled.
14. Most appointed counsel have heavy caseloads and are under contract to take twenty-five cases per month on a full contract in addition to other work they may have. Despite diligent efforts by appointed counsel, pressure remains to give priority to their private practice. Attorneys appearing *pro hac vice*, by contrast, have expressly agreed to operate *pro bono*. As a result, they are more motivated to coordinate and share resources and devote more time, attention, and preparation to each case. They are assisted in reviewing all discovery and investigation and are equipped to submit pre-trial motions in these mass arrest cases. The presence of these attorneys relieves the caseloads of court-appointed counsel and functions to enable all attorneys for the defense to more effectively hold the State to its burden, ensuring the Sixth Amendment right to effective assistance of

counsel. The strategy of the prosecution has been to expedite the administration of justice by offering pleas and pretrial diversions. In some cases these are fair offers. The State, however, had no available witnesses for many of these cases. Without attorneys practicing under the Special Provisions to shoulder some of the load of the massive discovery review and taking the time to invest in misdemeanor cases, many more defendants are likely to have accepted unnecessary and unfair pleas.

15. Attorneys temporarily licensed under the Special Provisions have also substituted as counsel into cases when a local appointed counsel has been perceived as not communicating with or as being actively hostile to a DAPL defendant. As documented by jury surveys prepared for federal cases, a significant majority of the local population of Bismarck and Mandan have unfavorable views of individuals arrested during the DAPL protests.<sup>1</sup> These attitudes create enormous pressure on attorneys who practice in the local community to act in accordance with the views of prosecutors, law enforcement, and the general population. Even though most lawyers adhere to their professional duty to represent their clients without bias or prejudice, it is difficult to set aside the opinions of the community and to ignore the effect that vigorous representation of DAPL defendants could have on an attorney's private practice. Defendants in these cases have reported that their appointed counsel refused to take calls from or communicate with them about their case, said that they actively disagreed with their (alleged) actions that resulted in their arrest, and pressured them into pleading guilty. Attorneys practicing under the Special Provisions accept cases – often substituting in a short time before trial – in which the local appointed counsel is perceived as hostile to or evasive with the DAPL defendant. In doing this, these attorneys gain the confidence of the client and instill a sense of confidence in the justice system and the fairness of the ultimate outcome of the case.
16. In these mass arrest cases, attorneys acting under the Special Provisions work cooperatively with local appointed counsel. In numerous cases these attorneys have taken the lead in coordinating with co-defendants, drafting and circulating proposed joint motions, and sharing review of discovery. This collaboration ensures all defendants receive adequate representation. Adequate, informed representation alleviates the likelihood of DAPL defendants filing Ineffective Assistance of Counsel (IAC) claims, which have the potential of costing the State of North Dakota time and money. Since nearly half the cases remain open – the unique challenges that these cases present remain.
17. Data from the resolved cases speak to the excellent results for clients represented by specially admitted counsel. As of September 11, 2017, there have been two primary DAPL mass arrests that have had court dates scheduled: October 22, 2016 (124 arrests) and October 27, 2016 (140 arrests). All cases from these dates had identical facts and were virtually indistinguishable from each other. Attorneys practicing *pro hac vice*

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<sup>1</sup> The hostility of the local population to DAPL defendants is evidenced by Judge Hovland's recent granting of a Motion to Change Venue in Federal District Court, United States v. Red Fawn Fallis, 2017-CR-0016 (District of North Dakota).

represented 42 clients from October 22, 2016, and 46 from October 27, 2016. The State's Attorney voluntarily dismissed a vast majority of these cases. However, 12 people from the 10/22 mass arrest pled guilty, and seven from 10/27 pled guilty. These cases were indistinguishable from co-defendant cases that were dismissed. All the defendants who pled guilty were represented by local appointed counsel. Zero clients represented by attorneys acting under the Special Provisions pled guilty.

18. This disparity in outcome between clients represented by appointed counsel and clients represented by *pro hac vice* counsel speaks to the need for the continued existence of Special Provisions for *pro hac* attorneys regarding the DAPL cases. The defendants who entered into a plea of guilty have potential Ineffective Assistance of Counsel (IAC) claims if it is revealed their attorneys did not conduct adequate investigation, raise meritorious legal defenses, or fully review discovery. The outcomes discussed above suggest that *pro hac vice* lawyers are zealously advocating for their clients and improving the capacity of all attorneys and the State of North Dakota to ensure adequate representation to DAPL defendants — a primary concern of the Original petition.
19. The Petition to Terminate makes several incorrect and unsupported assertions. It attaches a list of attorneys acting under the Special Provisions (hereinafter referred to as Out of State Attorneys List). That list of attorneys and the number of clients they represented as of September 11, 2017, is inaccurate. The Out of State Attorneys List underreports the number of clients and cases handled by Attorneys acting under the Special Provision.
20. There are also many defendants who will neither qualify for indigent-appointed counsel nor can afford to pay to retain private counsel. Attorneys practicing under the Special Provisions fill an important need and gap which allows for many to be represented who would not otherwise be eligible for local appointed counsel or able to access private local counsel. Ensuring that all clients who want representation obtain counsel eases the burden on the courts, where otherwise swaths of involuntary *pro se* litigants would require counseling from the bench.
21. The Petition to Terminate alleges that “new cases are no longer being filed” as evidence that the Special Provisions are unnecessary. It is unclear that new cases are no longer being filed. On numerous occasions, the Morton County State's Attorney's Office has refiled cases from a mass arrest date. In April of 2017 the State's Attorney's Office refiled 15 cases from the October 10, 2016, mass arrest date. In May and June of 2017, the State's Attorney's Office refiled 30 cases from the October 22, 2016, mass arrest date. Assistant State's Attorneys have communicated to the media and to opposing counsel that they intend to refile charges “when we get a chance.”<sup>2</sup> New cases have been filed and the State's Attorney's Office has publicly stated it intends to continue this practice.

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<sup>2</sup> [http://bismarcktribune.com/news/state-and-regional/three-protesters-see-trespass-cases-dismissed/article\\_834f4435-c758-512f-bc11-23bb24d1c33b.html](http://bismarcktribune.com/news/state-and-regional/three-protesters-see-trespass-cases-dismissed/article_834f4435-c758-512f-bc11-23bb24d1c33b.html)

22. In addition to the possibility of more refiles, over 100 DAPL-related cases are in active warrant status. These defendants will need to be located and their cases will need to be scheduled.
23. The Petition to Terminate notes that many of the attorneys practicing under the Special Provision are associated with an attorney who maintains an office outside North Dakota thus “making it impractical for a judge to require the presence of the North Dakota attorney even when out-of-state attorneys are unfamiliar with local rules and procedures. The Petition to Terminate gives no evidence for this assertion. There is no supporting evidence of a lawyer who was unfamiliar with local rules or procedures to the detriment of either that attorney’s client or the Court. By following the guidance of over ten different local attorneys, we have found that local rules and procedures often vary widely in practice from the written code, and there is generally informality and discretion as judges allow untimely filings and deviations from procedure. Local attorneys have noted the distinct ways in which these DAPL cases have received differential treatment in relation to rules and procedure by the Court. As already mentioned, the attorneys acting under the Special Provisions are experienced trial attorneys. Local counsel supplements this trial experience with expert advice, guidance, and familiarity with local practice.
24. While some lawyers practicing under the Special Provision typically spend a week or so in North Dakota representing on a single case, others now live in Mandan and are actively involved in North Dakota legal organizations. They are an active part of the North Dakota community and are familiar with the prosecutors and local counsel. Further, many of these attorneys have formed strong ties to the Native American community, which has led to more confidence among all North Dakotans in the criminal justice system and the outcome of these cases.
25. The Petition to Terminate states there is no longer a need to waive the *pro hac vice* filing fees in the DAPL cases. The Petition to Terminate gives no reason for this assertion. The *pro hac* program has saved the State of North Dakota and Morton County time and money. The *pro hac* program avoids potential IAC claims from defendants. Most important, the *pro hac* program ensures the practices associated with the Constitutional demands for fundamental fairness are observed.
26. The Petition to Terminate requests that the Special Provisions relating to attorneys practicing *pro hac vice* be terminated retroactively to the date on which the Petition to Terminate was filed, September 11, 2017. Terminating the Special Provisions would interfere with attorney-client relationships established prior to September 11, 2017. From the date of the petition through today alone, there have been twenty-five (25) new notice of appearances or substitutions of counsel filed by *pro hac vice* counsel and eighteen (18) that are being prepared for filing. There are numerous examples of situations in which attorneys and clients form relationships prior to the formal entry of a Notice of

Appearance. Attorneys and clients often communicate in contemplation of representation prior to formalizing their relationship. Attorneys may also wish to consult their schedules after learning more from the client regarding the demands of the representation.

Retroactively terminating the *pro hac* Special Provisions would interfere with attorney-client relationships and jeopardize the right of the accused to choose their own counsel.

27. Petitioners are identified as a group. We respectfully ask that this Court require the petitioners to be individually identified and for the meeting minutes in which the decision to draft and file the petition was discussed to be made public. It is difficult to respond and address the arguments put forward when we are unsure which interactions, persons or cases are being referred to or by whom the arguments are being made. We believe we are entitled to know which judges support the ending of these temporary rules as it is pertinent to representation and identifying potential bias.

28. The Commission on Legal Counsel for Indigents was legislatively established in 2005 in large part “to separate the judiciary from the delivery of indigent services and thereby avoid an appearance of conflict for the Judiciary.”<sup>3</sup> Previously judges had assigned cases and monitored the contracts for indigent services for defendants, which, after extensive study, was determined to present a conflict of interest. This concern holds true for the present cases. There is a conflict of interest when the same judges who preside over cases are petitioning to determine who may or may not represent the same defendants in court. There is a conflict of interest when the Supreme Court of North Dakota is determining that defendants may no longer have representation by attorneys with whom they have built relationships.

For the aforementioned reasons, we respectfully ask your Honors to deny the Petition to Terminate the Special Provision of Legal Services by Qualified Attorneys From Outside North Dakota and request the continuation of Special Provisions for temporary licensure.

Dated October 2, 2017

By the following Petitioners:

/s/ William Tilton  
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<sup>3</sup> <https://www.nd.gov/indigents/commission/>



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