

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

In the Matter of a Petition to Terminate the Special Provision of Legal Services by Qualified Attorneys From Outside North Dakota

Comments of
Chad C. Nodland
Bismarck, ND

No. 20160436

[1] I am an attorney licensed to practice law in the State of North Dakota, ND State Bar ID No. 05120.

[2] Peaceful demonstrators (i.e. people describing themselves as “water protectors”) in the northeastern corner of Sioux County started resisting what they felt was the illegal construction¹ of the Dakota Access Pipeline in approximately April of 2016. The resistance continued and expanded into much of Morton County and at times into parts of Burleigh County through the end of 2016 and into 2017.

¹ It eventually was determined they were correct that the construction permit(s) had been illegally issued. See Standing Rock Sioux Tribe, et al v. U.S. Army Corps of Engineers, et al (US Dist Court for D.C. Civil Action No. 16-01534, document 239, Memorandum Opinion dated June 14, 2017, at p.66.

[3] Early in August of 2016, law enforcement started arresting water protectors engaged in protest activities in Southern Morton County. The first arrestees were arrested on a public-highway right-of-way, while chanting environmental chants in support of Native American youth runners who had run from the East Coast back to North Dakota. They were charged with “disorderly conduct.” Some were ultimately convicted. Over the next month, the protest camp grew in size and more arrests took place. By early September, I had traveled to the camp twice and volunteered to help people who had been charged with crimes and were temporarily residing in the protest camps. Eventually people whose mailing addresses were outside of North Dakota and against whom there were criminal charges pending started asking many questions, such as: (a) When is my next court date?; (b) I applied for a court appointed lawyer and don't know if I've been approved; can you help me figure that out?; and (c) What is my lawyer's phone number? I tried accessing this information through my phone from within the camps, but cellular service was unreliable. I started seeking and periodically obtaining data/spreadsheets from the South Central Judicial District's Court Administrator's office and taking that data to the protest camps to try to help people answer these questions and other basic questions about their rights before they officially had their own attorneys. I felt an obligation to help both the water protectors and the court system, as I am an officer of the court.

[4] Over the next several months, North Dakota's public defense system was overwhelmed as hundreds of people were arrested for protesting the illegal pipeline construction. I tried to serve as a liason between public defenders, some of whom were having difficulty reaching their clients temporarily residing in the camps, and people residing in the camps. Because the state-

administered public defenders' office was overwhelmed, I watched as private attorneys residing from all parts of North Dakota and from as far away as Minnesota and South Dakota were brought in as contract public defenders. I was even asked if I would be willing to consider contracting with the Indigent Defense Office. Many defendants felt they were adequately represented by North Dakota licensed attorneys, but some ended up feeling pressured to plead guilty in cases where other defendants arrested at the same time in the same place eventually had their cases dismissed because the government literally had no evidence of any crime being committed by any of them.

[4] Because North Dakota's indigent defense system seemed to be overwhelmed, and because there were out-of-state attorneys willing to work pro bono to help water protectors but for whom North Dakota's *pro hac* rules were a hurdle, on December 14, 2017, I, along with seven other North Dakota lawyers and two *pro hac vice* attorneys, filed a petition with the North Dakota Supreme Court asking the Court to exercise its inherent authority to relax North Dakota's *pro hac* rules. The Court partially honored that request, issuing an order allowing qualified out-of-state attorneys to practice *pro hac vice* in North Dakota, so long as they did so for free (i.e. "*pro bono*") and with other conditions.

[5] Over the period of time since then, I continued to try to help water protectors on a macro level, helping them at their bond hearings and first appearances. Upon arrest, water protectors were having all of their personal belongings confiscated and were being transported to distant, remote jails across many parts of North Dakota. Some were being transported to Fargo while others were being sent to Devils Lake or Washburn or Valley City or Stanton. It was not uncommon that they would bond out and be released into the middle of the night in a

town hours away from anybody they knew, with no money, no phone and no idea how to get back to their tents, cars and belongings. I began asking friends in those remote communities if they would help. Many did.

[6] The information I had been obtaining and printing out from the South Central Judicial District Court Administrator was useful in helping me see patterns developing and problems arising. Around the early part of November, 2016, it became clear to me there were irregularities in the way water protectors were being treated. Cases were being combined for trial though the only thing they had in common was that people were charged with the same crime (e.g. Disorderly Conduct) in the same county on the same day. It is as if it is acceptable to try everybody in a county together if they are charged with DUI on the same day. Besides that irregularity, and besides the excessive show of militarized force in and around the courthouses, besides the unprecedented collaboration between public law enforcement and private security, besides the new rules and orders being implemented and issued only in DAPL cases, and besides many other troubling irregularities, the number of applications for indigent defense services that were being denied to water protectors began to skyrocket. With the assistance of law-trained people (i.e. lawyers and law students) from other states who were also tracking this data and hearing from denied applicants, we began – to the extent possible – to review the paperwork of applicants whose petitions were denied and discovered that dozens of applications for indigent defense services had been denied by the Court under inexplicable circumstances. Unemployed people with no assets were being denied counsel, and I could not understand why.

[7] On November 7, 2016, I reached out to the office of North Dakota Indigent Defense Services, by email, to ask if they might help me understand why the dozens of applicants were being denied services. I told them it appeared about one-hundred-eleven (111) applicants had been denied indigent defense services, and many appeared to have been denied counsel for reasons that made no sense. I gave the example of State v. Meagher, Morton County Case No. 30-2016-CR-01682, whose application had been denied. Another example I discussed with Indigent Defense Services was State v. Yenglin (30-2016-CR-01545). In these cases, and many others, we were able to avoid what might have been a constitutional crisis by getting dozens of applications reconsidered and many granted, as they had been improperly denied. Over the course of the next several weeks and months, I worked on fixing this problem (and others), tracked the problems and saw that many applicants' unfair – arguably unconstitutional -- denials were eventually reconsidered and granted. I also observed there were some significant delays in getting counsel appointed to some water protectors, and that – in some instances – large numbers of water protectors arrested at the same time in the same location were all being appointed the same lawyer. These all seemed problematic.

[8] Shortly after the present petition was submitted, I learned there were still over one hundred fifty water protectors who did not have counsel. I do not know how many are indigent, but that is not really the issue; the issue is whether they are able to retain qualified defense counsel whether they are indigent or not. During the course of the protests, I became aware there were criminal defense lawyers in Bismarck/Mandan – and certainly in other parts of the state – who were unwilling to represent water protectors. I also became aware of one local lawyer who was representing water protectors, but was also making negative, rumor-based

claims about water protectors on social media, creating an assortment of conflicts. I was also present at the courthouse when this same attorney did not show up at the time set for a DAPL defendant's preliminary hearing. I had to call the attorney's office to get the attorney to show up.

[9] During the process of trying to sort out the problem with indigent persons being unfairly denied applications for indigent defense services, I learned there had been at least one meeting of the judges in the South Central Judicial District at which information had been received by the judges from the office of Indigent Defense Services. I had previously been unaware that it was possible for information to be presented to judges in this manner and wondered about the appropriateness of such presentations.

[10] During argument made by counsel for Morton County during a hearing on a protective order sought by the State in one of the cases in which I was and am counsel (State v. Kelli Peterson, Case No. 30-2016-CR-00937, Doc ID# 52), the State's counsel made the argument that he was not merely asking the judges to simply issue a protective order in that one, individual case; he was hoping the judge would take the issue back to all the other judges and – at their next judges' meeting – come up with a blanket protective order in **all** DAPL-related cases to stop criminal defense attorneys from seeking material those attorneys felt was subject to Rule 16, NDRCrimP, and Brady v. Maryland. The idea that a motion might be made in a single case that would apply to hundreds of other cases where there had not been proper notice or an opportunity to be heard was jarring to me. The judge in that case rejected the request, but the fact that the State thought it to be normal and acceptable to make such a request was and is troubling.

[11] In the Peterson case, *infra*, a change of venue was sought because of all the jury pool poisoning engaged in by local and state government officials with the public relations and psy-ops specialists illegally working in North Dakota as "security officers" for Energy Transfer Partners. State v. Peterson, Morton County Case No. 30-2016-CR-00937, Doc ID## 78 – 88; and North Dakota Private Investigative and Security Board vs. TigerSwan, LLC, et al., Burleigh County Case No. 08-2017-CV-01873. I have never seen the kinds of public/mass misinformation engaged in by local law enforcement and other government officials. Yet the Bismarck-Mandan area press was publishing all of it and questioning none of it. Similar venue motions have been made in other DAPL-related cases, too. The motion was denied in the Peterson case, *supra*. at Doc ID# 95, and all other state cases where the motion was made.

[12] North Dakota Federal District Court Chief Judge Daniel Hovland has looked at the same data and determined that it is not possible to seat a fair and impartial jury in Western North Dakota.² It seems there should be a path for reversal on appeal or, if any guilty verdicts are attained by the State, when cases are eventually challenged in federal court. These water protectors need good counsel to keep making these and other motions.

[13] While North Dakota's public defender system continued to be overwhelmed, several dozen out-of-state attorneys volunteered their time to come to North Dakota and assist in defending water protectors. I have served as local associate counsel for several of them under the *pro hac* rules. To the best of my knowledge, these *pro hac* attorneys have represented their clients intelligently, honorably and aggressively, with a lot of success. They have assisted

² United States v. Fallis, US District Court for the State of North Dakota, Case No. 1:17-cr-00016, Doc ID## 60-65; and 86.

directly and indirectly in getting over one hundred frivolous charges in Morton County dismissed in cases where the government had no evidence a crime had been committed. They have successfully tried cases to “not guilty” verdicts. They have successfully negotiated reductions in charges and plea agreements.

[14] On September 11, 2017, a petition was filed by the judges of the South Central Judicial District, asking the Court to vacate its order allowing for the relaxation of the *pro hac vice* rules in DAPL-related cases. The petition was filed with the North Dakota Supreme Court but it was not served on any of the original petitioners or anybody else. No notice was given.

[15] When I eventually received a copy of the order through other channels, I immediately recognized two factual problems with assertions made in the Petition, as follows:

a] Because I have been working on monitoring these cases on a macro level, I could tell that the numbers presented in the grid attached to the Petition were inaccurate. This has since been confirmed to me both by the Court Administrators Office (see below), and by *pro hac* attorneys who have provided information to me about the number of cases they are working on; and

[b] The Judges made the factual assertion that “New cases are no longer being filed” relating to the DAPL protests. Petition at ¶13. This seemed (and still seems) like an inappropriate assertion for the Court as a fact when there appears to be no record to support it. In fact, there is record of the opposite being true. According to a story in the Bismarck Tribune (newspaper) in January of 2017, one of the Morton County Assistant States Attorneys was quoted as saying “We intend to refile these charges when we get a

chance.” Three protesters see trespass cases dismissed, Bismarck Tribune, January 13, 2017. http://bismarcktribune.com/news/state-and-regional/three-protesters-see-trespass-cases-dismissed/article_834f4435-c758-512f-bc11-23bb24d1c33b.html. I checked to see whether new charges had been refiled against the defendants referenced in the Bismarck Tribune story, and they had not, so it is reasonable to anticipate new charges will be filed at least in those cases, but possibly in others.

[16] Besides these two apparent factual inaccuracies, I wondered how the judges could have made these kinds of factually inaccurate representations in their Petition. I wondered what the process had been that led to the petition being drafted, signed and submitted. I wondered if there had been a meeting of the judges. I wondered if surrogate judges – the judges who are handling the vast majority of these cases – had been allowed to participate in the decision-making process. I wondered if there had been a vote and whether that vote had been unanimous. I wondered whether testimony was taken, and who presented the testimony. I wondered if there had been foundation for the exhibit attached to the petition. I had a lot of questions and so I reached out to the South Central Judicial District Court Administrator, let her know I had observed some inaccuracies in the information presented in the petition, and asked if I might get a copy of any record of the process followed by the Court. It seemed to me that – even though North Dakota’s open records laws do not apply to courts – a process that results in a petition apparently submitted on behalf of all the judges wherein facts are asserted and evidence appears to have been gathered, and facts "found," there ought to be some minimal level of transparency; but especially when the information submitted to the Supreme Court appeared to be inaccurate there should be a way to figure out how that happened.

[17] In the response from the Court Administrator, it was acknowledged that the information provided to the Supreme Court by the South Central Judicial District attached to its petition was, in fact, inaccurate. The Court administrator indicated that “From a quick review of the attorney names, it appears that the information provided by attorneys who had more than ten cases was inaccurate because of the way it appeared on the Odyssey screens.” Email exchange with Court Administrator Donna Wunderlich, September 12, 2017 including at 6:18pm, p. 1. (ATTACHMENT # A). It was indicated that the Court “certainly want[s] to correct any inaccuracies in the data that was provided to the Supreme Court” (Id.), but it does not appear those inaccuracies have been corrected.

[18] The Court Administrator ultimately indicated there is no public record of the judges’ meeting – such as minutes or a transcript. It appeared that whatever process there was that led to the petition being filed, it would remain a secret. Id. None of the questions I have and that the public should reasonably have about the process leading up to the presentation of factual assertions and a request from the court would be answered. While I understand the need for most internal court functions to remain confidential, it does not seem fair to the public to have this specific type of petition filed with the Supreme Court, and for the process leading to the petition to remain a court secret. I also understand that there might not be any problems with the processes followed by the District Court, but without any transparency, no member of the public will ever know.

[19] Regarding the question of whether “New cases are no longer being filed,” it appears that either (a) the judges are not aware of Morton County’s stated intention to refile new charges once they get time, or (b) the judges had received some other information – perhaps ex

parte from the Morton County States Attorney's office during one of their judges' meeting, or otherwise – that caused them to believe “New cases are no longer being filed.” Either way, it seems improper for a factual assertion like this to be made in a legal proceeding when the factual assertion is inconsistent with the facts or public record, and not in some record this court and the public can review. The public will not know how the District Court judges came to make the factual assertion that “new cases are no longer being filed.” That offends basic principles of the “justice” part of the justice system.

[20] Further, it is fundamentally unfair to the citizens of North Dakota, and to the defendants who are relying on *pro hac* attorneys in these cases, for the judges of the South Central Judicial District to submit a spreadsheet attachment with its petition, supporting its view that the relaxed *pro hac* rules should be terminated, especially when the judges have not offered any basic foundation for the document's numbers. This is especially true when the numbers are factually inaccurate, the Court has been made aware of the inaccuracies, and nothing has thus far been done to correct the record.

[21] It also seems important to note that when the original petition was submitted in December of 2016, seeking relaxation of the *pro hac* rules, there were many comments submitted in support of the petition and very few opposed. One of the very few comments in opposition came from the same judges of the South Central Judicial District. They apparently did not feel the relaxation was needed. It should not be a surprise to anybody, thus, that the same judges feel the relaxation of the *pro hac* rules is not needed now, as they did not feel the relaxation was ever needed.

[22] I have had the opportunity to work with many of the attorneys working *pro bono* and *pro hac vice* on DAPL-related cases in North Dakota. I have been able to do this as associate local counsel, but also as colleagues working under joint defense agreements on cases with similar legal issues and as counsel for co-defendants. The ones with whom I have had interactions are competent, experienced attorneys and have served their clients and the criminal justice system well. They have assisted – directly or indirectly – in getting over one hundred frivolous cases dismissed so far, and are working to get many more frivolous cases dismissed. They have saved the citizens of North Dakota massive amounts of money both in the expense of hiring public defenders, but also in helping the county avoid unnecessary trial costs in cases where there is no evidence.

[23] The information I have submitted, above, is being submitted so that the Court understands that I am not just another random commenter; I am someone who has been dealing with the DAPL protest cases both on a macro level, and on many micro levels. I have worked to try to make our criminal justice system fair to people who were unable to receive their mail from the court because they were temporarily residing in North Dakota, and did not have mailing addresses here. I have worked as defense counsel, co-counsel and associate counsel for individuals charged with DAPL-related crimes. I have been relied upon in many ways by the indigent defense system, by the court, by local attorneys, by *pro hac* attorneys, by non-profit organizations trying to help, and by individual water protectors. I am not saying I am somehow more important than any other commenter, but am trying to convey that my involvement in these cases over much of the past year with respect to understanding things on a macro level has quite possibly exceeded that of most other people.

[24] Because of attorney work product limitations, I am not able to discuss quite a few of the problems I have seen in the investigations and prosecutions of many of these DAPL-related cases. The irregularities I have vaguely described in this comment are "the tip of the iceberg." When this is all over, someone – possibly I – will write a book about the many injustices about which the public still is not aware. I believe my fellow North Dakotans will be quite troubled when they learn what has been done by law enforcement in the name of the people of North Dakota. Some of the government misconduct is shameful. To compound things, this past week we also learned that Energy Transfer Partners (ETP) has "donated" \$15 million to the State of North Dakota in "appreciation" for all the state and counties did to assist ETP in getting the unpermitted pipeline built. Because of this "donation," there is an appearance, now that North Dakota law enforcement were corporate mercenaries and the criminal justice system has been used as a tool by a multi-billion dollar private pipeline company. To many people outside of North Dakota, and some within, the appearance of impropriety is getting to be overwhelming. This Court and the lower courts in the state should be doing everything they can to not make things look worse than they already do. Granting the petition submitted by the South Central Judicial District would be another step in the wrong direction.

[24] I respectfully ask that this Court deny the petition submitted by the South Central Judicial District. I would further ask that this Court direct the District Court to disclose what its processes were in reaching the decision to submit its petition, what evidence was submitted, what foundation was offered for that evidence, whether it was sworn testimony, who participated, whether there was a vote, who participated in the vote, and the vote tally. This

would go a long way in rehabilitating the confidence some may have lost when learning of its petition and the secrecy behind it.

[25] I do not submit this petition on anybody else's behalf. Nobody is paying me to submit this petition. The opinions expressed herein are my own unless expressly indicated otherwise.

Dated this 2nd day of October, 2017.

Chad C. Nodland
418 E. Broadway Avenue, Suite 246
Bismarck, ND 58501
(701)222-4228
(701)222-4227 [fax]
ND Bar ID# 05120

 /s/ Chad C. Nodland
Chad C. Nodland
chad@nodlaw.com

ATTACHMENT A

Chad Nodland

From: Wunderlich, Donna [L.O.]
Sent: Wednesday, September 13, 2017 10:38 AM
To: Chad Nodland
Subject: RE: Supreme Court Petition

Yes, thanks.

From: Chad Nodland [mailto:L.O.]
Sent: Wednesday, September 13, 2017 8:35 AM
To: Wunderlich, Donna
Subject: RE: Supreme Court Petition

Hi Donna,

Is it safe for me to take away from your email that there is no public record of the judges' meeting -- such as minutes or a transcript -- that can be shared with me or any other member of the public?

Thank you again.

Chad

Chad C. Nodland
Chad C. Nodland, P.C.
Attorney at Law
418 E. Broadway Ave., Ste 246
Bismarck, ND 58501
(701)222-4228
(701)222-4227 [fax]
[L.O.]

From: Wunderlich, Donna [L.O.]
Sent: Tuesday, September 12, 2017 6:18 PM
To: Chad Nodland [L.O.]
Subject: RE: Supreme Court Petition

Hi Chad,

The judges decided to file the petition after discussion at a judges' meeting.

We certainly want to correct any inaccuracies in the data that was provided to the Supreme Court. From a quick review of the attorney names, it appears that the information provided on attorneys who had more than ten cases was inaccurate because of the way it appeared on the Odyssey screens.

We certainly understand that there may be responses and objections to the petition.

Thank you.

Donna

From: Chad Nodland [REDACTED]
Sent: Tuesday, September 12, 2017 12:01 PM
To: Wunderlich, Donna
Subject: Supreme Court Petition

Donna:

I don't know whether you are aware of this, but the judges in the South Central Judicial District have apparently filed a petition (see attached) asking the Supreme Court to end the DAPL pro hac attorney program/system. Since the petition is signed by Judge Haggerty on behalf of all the judges, I am trying to figure out how that petition came about. If there was a meeting, I'm wondering if I could get a transcript or the meeting minutes and any materials distributed during the meeting. If it was done by email, I'm wondering if I could get copies of the emails. If it was done some other way, I'm wondering if it might be possible to get any part of the record of that process, or an explanation of how it came to take place.

I ask for a number of reasons, but one of the reasons is that I am aware of some factual inaccuracies in the data provided to the Supreme Court in the petition from yesterday. Before submitting anything to the Supreme Court in response to the petition and/or those inaccuracies, I'm hoping to better understand how the information was presented to the judges and how the mistakes happened.

I apologize if this request seems disjointed. While I know that generally the courts are not subject to a lot of North Dakota's open records laws and I'm also fairly unfamiliar with the internal workings of the judges chambers, I have been told by a couple different people – including court staff -- a little bit about the meetings held by the judges specific to DAPL cases. I'm hoping to better understand, if possible, how the judges reached their decision to submit the petition with the information it presented, but do not necessarily know what I'm allowed to ask for.

If you're able to help or point me in the direction I need to look, I'd certainly appreciate it.

Thank you.

Chad

Chad C. Nodland
Chad C. Nodland, P.C.
Attorney at Law
418 E. Broadway Ave., Ste 246
Bismarck, ND 58501
(701)222-4228
(701)222-4227 [fax]

[REDACTED]