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Clerk of Court
 Penny Miller
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To the Honorable Justices of the Supreme Court of North Dakota,

I write today to share with you some of my experiences attempting to match local counsel to defendants facing charges stemming from the No DAPL protests, and eventually as an attorney practicing *pro hac vice* under the temporary special provisions, the termination of which is now under your consideration. It is my hope that my experience will persuade you to allow out-of-state attorneys to continue to practice under these special provisions until all the No DAPL cases have been disposed of completely.

As you can see from my letterhead, I practice law in the state of New York. My practice is almost exclusively devoted to the defense of people involved in mass arrests, where First Amendment concerns are heightened. This kind of criminal defense is often referred to as “mass defense.”

In October, 2016, while the DAPL protests were yet ongoing, I began to receive phone calls from people I had represented in New York, asking me to come out to North Dakota to provide legal support for the camps on the Standing Rock Sioux Reservation. At that time I explained to my former clients that I was not licensed to practice law in the state of North Dakota, and that there were lots of criminal defense attorneys who could surely be mobilized to take their cases, via court appointment, *pro bono* work, and legal defense fundraising for private counsel. At the urging of my former clients, I did agree to establish communication with legal support workers who were on the ground in North Dakota, to see how or whether I could help to connect those facing charges with local counsel.

Local ground organizers informed me that many people were having difficulty completing the application for counsel, or were not income-eligible, despite having insufficient assets to retain private counsel. I was also told that locating attorneys willing to take the No DAPL cases was proving exceedingly difficult. Attorneys either were or believed themselves to be unfamiliar with principles of first amendment defense. Many attorneys moonlighted as contractors for the oil and gas companies, which was perceived by defendants (though less often by the attorneys) as a conflict. Some attorneys practiced as prosecutors in one jurisdiction in which No DAPL arrestees were being prosecuted, but as court-appointed defense counsel for No DAPL clients in another jurisdiction. This, too was felt by many on all sides to be a non-waiveable conflict. In addition, many local attorneys were extremely discomfited by the prospect

of representing multiple codefendants. Given how many people were being arrested at once, almost 150 different attorneys would be required just to cover the cases arising from the events of October 27, 2016. Finally, I was told that attorneys expressed reluctance based on everything from fear of losing local clientele to outright personal hostility toward No DAPL arrestees.

It seemed almost inconceivable to me that criminal defense attorneys, champions of the Sixth Amendment, would be so resistant to defending these cases. I began brainstorming with the legal workers in North Dakota to develop strategies for effective outreach to local counsel, as the number of arrests skyrocketed. Our efforts included forthrightly offering competitive compensation and paralegal support, proposing CLEs on the history and practice of mass defense, and informally surveying local counsel for objections to and incentives for taking on these cases.

Our work was to little avail. Many arrestees neither qualified for court appointed counsel, nor could they afford private counsel. Local attorneys consistently refused to take so-called protester cases. The mandates of due process were under strain. In December, lawyers associated with the Water Protector Legal Collective (WPLC) petitioned you to temporarily relax the rules governing *pro hac vice* admission to practice in the state of North Dakota. In January, that petition was granted. Nevertheless, efforts to engage and mentor local counsel continued apace.

In February, I traveled to North Dakota to file motions in a federal case. While there, I met with WPLC to discuss ongoing efforts to find local counsel. I was given a list of 92 local criminal defense attorneys in private practice, many of whom had already been appointed to represent No DAPL arrestees. I called each of their law offices repeatedly. Of the 92, only a handful agreed to take cases. (None agreed to take cases *pro bono*, although mass arrest cases are frequently handled by *pro bono* counsel.)

My experience calling local counsel was upsetting, if illuminating of the painful wounds that were made salient by the pipeline project. In addition to being repeatedly advised that counsel was conflicted out by the kinds of ethical concerns mentioned above, I encountered all manner of evasion, including being outright hung up on. I was told “We won’t take any of *those* cases.” Many people informed me that “We don’t agree with those people.¹” I was told by some that that while they would love to pick up cases, they feared that their local clientele would boycott if anyone found out they were associated with “the protesters.”² Although work to recruit and involve local counsel has never ceased, at some point it became clear that there were simply not enough local defense attorneys willing to bind themselves to these cases to adequately cover the unmet need.

¹ The notion that a defense attorney must “agree with” the conduct of which their client is accused was deeply troubling to me. Surely counsel does not believe in the moral righteousness of narcotics conspiracies and drunk driving, although presumably they do accept cases in which the accused are being charged with such offenses.

² The characterization of a class according to their presumed association with constitutionally-protected activity was disappointing, but illuminating in a way that I hope is not lost on your honors.

Although I have been asked many times to travel to different states in order to provide specialized legal support, I have always declined the invitation. I would prefer to invest in the capacity of local attorneys rather than to supplant them. I value the legal expertise already in place in communities, and do not so lack humility as to believe myself to be necessary to mass defense, particularly outside my home jurisdiction.

Nevertheless, I did eventually agree to being admitted *pro hac vice* under the special provisions. Despite my conviction that local counsel is entirely qualified to take DAPL cases, I am now convinced that so many prefer not to, and even have vigorous objections to doing so, that outside help is necessary if the due process rights of all these defendants are to be honored. I have been active in taking No DAPL cases, and after much communication with the State's Attorneys, most of my cases have been dismissed. My understanding from that office is that they, and all local attorneys practicing in the criminal courts, are incredibly overwhelmed by these cases. This has been borne out in my observations of and interactions with the local attorneys with whom I have worked closely on these cases.

By no means do I think the concerns outlined in the petition to terminate the special provisions are entirely illegitimate. Unfortunately, the sheer number of No DAPL cases, the stringent income eligibility requirements for court appointed counsel, and the conflicts of many local attorneys, have made it incredibly difficult — I daresay impossible — to ensure that all the accused are adequately represented. In order for the remaining No DAPL cases to be adequately litigated, the special provisions must remain in place until the conclusion of all the cases.

I would enjoin you to read the influx of attorneys practicing *pro hac vice* not as an insult to the competence of local defense attorneys, but as a testament to the painful dynamics that emerged in the course of the construction of the DAPL pipeline, and the fact that the number of arrests outpaced the number of available attorneys. The special provisions have made it possible for the Criminal Courts of the State of North Dakota to fully comply with the Fifth and Sixth Amendments to the Constitution. The out-of-state attorneys have come, often at their own expense, in a spirit of humility and commitment to due process, and have shouldered some of this unexpected burden, relieving not only local counsel, but the taxpayers of North Dakota.

Finally, I would like to state for the record that the assistance of local counsel in navigating each unfamiliar jurisdiction has been invaluable. Those local attorneys interested in engaging in mass defense have worked tirelessly, and exemplify the commitment to criminal defense that animates the realization of fairness and justice in our legal system. It has been an honor and a pleasure to work with them, and I am personally and professionally humbled to have been admitted under the special provisions and given the opportunity to practice in these Courts.

I respectfully request this panel exercise your considerable discretion to maintain the special provisions until the conclusion of all DAPL litigation at the trial court level.



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