

**AFFIDAVIT OF WILLIAM L. TILTON  
IN SUPPORT OF PETITION TO PERMIT TEMPORARY PROVISION OF  
LEGAL SERVICES  
BY QUALIFIED ATTORNEYS FROM OUTSIDE NORTH DAKOTA**

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3. I was contacted in mid September 2016 about representing an individual who was arrested on September 13, 2016 at an anti-pipeline protest. I was informed that this individual had not intended to get arrested, had intended to disburse, but was arrested anyway. I agreed to represent this person and have ended up representing other persons similarly situated in criminal cases brought in Morton County, North Dakota.
4. In anticipation of this representation, I applied for a license to practice law in North Dakota. I found the application process to be very time consuming, including the requirement that I provide extreme detail on matters that would seem to be irrelevant to my qualifications to practice law in North Dakota. Completing the full formal application process took at least two dozen hours over a few weeks period of time. The application form itself is 24 pages long. It requires the applicant to write every jurisdiction in which they have been admitted for letters summarizing any discipline history and getting certificates in good standing. It requires the applicant to provide arcane detail about events that happened decades ago. For example, I had a misdemeanor charge in Dinwiddie, Virginia 45 years ago, yet the application required that I obtain the contact information for the arresting authority and other details, requiring me to dig through decades-old files. After meeting all of these criteria for the application, it then cost \$400.00 to North Dakota for the application, \$450.00 to an independent agency to assess my qualifications, and then another \$100.00 for my temporary license.
5. My full application was 78 pages long and was submitted October 17, 2016.

6. On December 5, 2016 I received a letter from the NCBE (National Conference of Bar Examiners) telling me that my “application to the bar of North Dakota was incomplete” and I needed to provide information (a) verifying my own self-employment, going back 39 years; and (b) verifying my present position as a Conciliation Court Referee in Ramsey County, Minnesota. As to (a) my former landlord/ mentor /office-sharing attorney when I was a sole practitioner from 1977 to approximately 1985 is dead; and my former partner from my first partnership from about 1985 to 2001 is also dead; so I will have to search out remote references to verify what I’ve already sworn to as to my own private practice; as to (b) the information they request is either available from the information I already gave to the NCBE or it is no longer in existence; e.g. the Ramsey County Clerk’s office has told me it has no records of exactly when I started being a Referee in 1985; nor do I. Nevertheless, the absence of this data for the time being is preventing my ability to be admitted to the bar of North Dakota.
7. In the recent letter from the NCBI I am warned that if I do not provide this precise information within 10 days my “failure to provide a timely response could impact negatively on [my] application.”
8. In my opinion this quest for irrelevant detail by the NCBE is a classic example of form over substance, is a substantial impediment to my ability to represent a party in North Dakota courts, and illustrates how the typical application process for admission to the North Dakota bar is not a realistic way for solving the present crisis where hundreds of

defendants in North Dakota courts face immediate impending hearings for serious criminal charges without counsel.

9. The online website for the North Dakota licensing authorities warns that the NCBE investigation and final approval process could take six months.
10. In contrast, I applied for admission to the Bar of the United States District Court for the District of North Dakota. That application was one page long. It took less than half an hour to fill out. It took only a few days to get approved by the federal court.
11. Upon information and belief, this vetting process for the Bar of the United States District Court for the District of North Dakota is substantially similar in other U.S. District Courts around the country and has not resulted in notable numbers of dishonest applications nor in the admission of notable numbers of unqualified attorneys.
12. I have spoken to many attorneys from outside the state of North Dakota who would be interested in providing counsel to DAPL defendants arrested in North Dakota. However, the time-consuming and expensive nature of the application process serves as a substantial impediment for these out-of-state lawyers wishing to provide this representation. Therefore, the application process and expense is a substantial impediment to the ability of defendants to obtain competent counsel, including pro bono, low bono, and market rate counsel, in the state of North Dakota.
13. With my Temporary License I have associated with attorney Chad Nodland of Bismarck, North Dakota. Effectively, a Temporary License puts me in a position of practicing pro hac vice. This means that I cannot make an appearance on behalf of any client without

Mr. Nodland, my associated sponsoring attorney, also being there. In effect, for me to represent a single defendant in a single matter, it requires two licensed attorneys to be present at all times.

14. This Temporary License also may prevent Mr. Nodlund and I from representing co-defendants.
15. Other attorneys have also associated with Mr. Nodlund for purposes of their Temporary License, including Bruce Nestor, a very experienced criminal defense attorney from Minnesota who, like me, is awaiting word on his application for full licensure in North Dakota. Arguably our Temporary License associations with Mr. Nodlund could prevent Mr. Nestor and I from representing co-defendants in certain situations.
16. My Temporary License also forbids me from full access to North Dakota's electronic court filings. I cannot access charging documents and many other court records on my Temporary License. Specifically I have been forbidden access to North Dakota's Secure Records Inquiry and Document Access Account Registration, as I'm told it is not available to attorneys with *pro hac* vice or Temporary Licenses. This severely inhibits my ability to properly represent a person charged with a crime in North Dakota.
17. In short, it appears that a Temporary License or *pro hac* vice admission does little to advance the cause of getting competent representation to people accused of crimes.
18. I have personally observed and have heard of multiple indications that there are insufficient numbers of qualified and interested criminal defense attorneys currently

licensed in the state of North Dakota to represent the over 500 persons who have been arrested in civil disturbances related to the anti-Dakota Access Pipe Line matters.

19. In the last few months I have interviewed at least a dozen North Dakota attorneys about representation of DAPL protest defendants. From those conversations I have learned that many licensed North Dakota criminal defense attorneys feel conflicted in taking these cases, either because the attorneys have close relations with law enforcement folk who are undertaking the arrests, or because the attorneys have personal interests in the pipeline construction industry, some of them directly with the DAPL. Other licensed North Dakota criminal defense attorneys have been reticent to take anti-DAPL protesters as clients because they live far distant from the South Central District courts where the cases will be tried. Some criminal defense attorneys have already maxed out their public defender contract allotments. Others have undertaken representation of one or a few DAPL protestors and are not interested in taking on more. I have talked with several DAPL protesters who state they have made multiple calls to criminal defense attorneys licensed in North Dakota for representation on DAPL charges, all without success, for these several reasons.

20. I have also personally talked with multiple persons charged as defendants in these anti-pipeline protests who have expressed extreme dissatisfaction with assigned attorneys given to them through the Indigent Defense Commission. Multiple defendants have complained that some public defender-assigned attorneys have been unwilling to take

their phone calls, have not called them back, and have seemed uninterested in doing a thorough investigation of the factual circumstances of the arrests.

21. The factual circumstances faced by these defendants present situations much more complex than the average criminal charge. Many of the events happened where there were scores or even hundreds of witnesses. With a few exceptions, the North Dakota criminal defense bar, which has been assigned as public defenders for these cases, have been unable or reluctant to undertake the necessary fact gathering. Fact gathering would necessarily require defense counsel to spend hours if not days in the area of the arrests, including in particular at the Oceti Sakowan encampment, which exists north of the Cannonball River and east of Highway 1806 in Morton County, which is where many of the defendants live.

22. I have reviewed data provided by the South Central Judicial District Court Administrator's Office to attorney Chad Nodlund, who has in turn organized this data in three ways, by Next Hearing Date, by Offense Date, and by Defendant's Name. The most recent version of this data is the clerk's information as of 2 pm on December 2, 2016. A spreadsheet organizing this data by Offense Date is attached as part of the petition as Exhibit 1. On Ex. 1 I believe the first entry, for defendant Allan Miller, for an offense date of 6/21/16 is in error, as other records do not indicate any DAPL-related offense or arrest occurred that day.

23. As to the remaining DAPL-related defendants listed in Ex. 1, I count approximately 264 defendants as having no counsel of record.

24. Based on Ex. 1, I count 113 defendants as having requested an appointed attorney from the Indigent Defense office, but having been turned down. The column “App for counsel” records with an X persons who requested an appointed attorney from the Indigent Defense office; an X in the “Assignment” column indicates that a requested attorney has been appointed (also reflected in the “Attorney” column with the attorney’s name); and an X in the “Letter” column indicates that a letter has been sent to the defendant denying the request for appointed counsel. Some individuals had initially been denied appointed counsel, but then had their application reevaluated and were assigned a PD; those who received late assignments of a PD are not counted in the 113 defendants mentioned above as having been turned down for purposes of this paragraph.
25. Based on Ex. 1, I count 40 individuals who are listed in the column “Returned Mail,” meaning that letters to them have been returned to the clerk’s office for some reason. All but 9 of these defendants also have “None” entered in the “Attorney” column, meaning that some or all of the remaining 31 people will not be getting notices from the court or from counsel.
26. A spreadsheet organizing this data by Hearing Date is attached as part of the Petition as Exhibit 2.
27. A spreadsheet organizing this data by Defendant’s Name is attached as part of the Petition as Exhibit 3.
28. According to the South Central Judicial District Court Administrator’s Office’s data in Ex. 1, as of August 19, 2016, when Governor Dalrymple declared a state of emergency



existing in southwest and south central North Dakota, there had been just 28 persons arrested for alleged civil disobedience regarding the Dakota Access Pipe Line construction. Since then, well over another 500 additional arrests have occurred, for a total number of arrests to date from this civil disagreement totaling 550 or more people.

29. According to reports in the Bismarck Tribune dated November 23, 2016, law enforcement costs to that date had exceeded ten million dollars. This article is found at [http://bismarcktribune.com/news/state-and-regional/governor-calls-for-federal-help-in-eviction-of-camped-protesters/article\\_bf5513fb-0298-5654-a30b-29319e110100.html](http://bismarcktribune.com/news/state-and-regional/governor-calls-for-federal-help-in-eviction-of-camped-protesters/article_bf5513fb-0298-5654-a30b-29319e110100.html) and a true and correct copy is attached as Ex. 6.
30. On November 28, 2016 the governor announced he was seeking another \$7 million in spending authorization for law enforcement efforts due to DAPL protests, covered in the Bismarck Tribune at [http://bismarcktribune.com/news/local/govt-and-politics/million-more-approved-for-protest-law-enforcement-response/article\\_fa744ac2-2d5b-54e3-928a-9557a4f6f45c.html](http://bismarcktribune.com/news/local/govt-and-politics/million-more-approved-for-protest-law-enforcement-response/article_fa744ac2-2d5b-54e3-928a-9557a4f6f45c.html) and a true and correct copy is attached as Ex. 7.
31. I have been in several discussions about these issues with staff of the North Dakota Commission on Legal Counsel for Indigents (CLCI). In those discussions I have learned that none of the \$17 million in emergency funding sought by the governor has been attributed to the increased need for legal defense resources to guarantee the right to counsel for indigent defendants. Similarly, it appears none of the additional funds has been attributed to supplementing the already-stressed court personnel.

32. I personally attended the meeting of the Commission on Legal Counsel for Indigents (CLCI) on November 18, 2016, at which point I learned that the CLCI would be making a supplemental request for additional funding of some \$933,000. I understand that two-thirds of this need was based on the number of DAPL related arrests as of that time. Since then there have been approximately 50-100 additional DAPL related arrests, which will compound the already-insufficient resources of the CLCI office.
33. The extent of the civil arrests being faced by North Dakota citizens and authorities in South Central North Dakota is unprecedented. For purposes of this Petition, I have researched other incidents of civil disobedience in the United States. I have difficulty finding any situation in recent history, since the Gideon decision in 1963, comparable to that presently faced in North Dakota, given the modest size of its court system, the small numbers of admitted lawyers in the jurisdiction, the large numbers of defendants, the large number of days over which over numerous defendants have been arrested, the large number of co-defendants, and the seriousness of the charges.
34. As to the arrests that occurred October 27, 2016, public records indicate the following. The number of persons arrested that day has been stated as anywhere from 135 to 145 people. Recent data from Morton County lists some 139 defendants arrested that day. Virtually every one of those persons was charged with a Class C Felony, Endangering by Fire or Conspiracy to Endanger by Fire; a Class A Misdemeanor, Maintaining a Public Nuisance; and a Class B Misdemeanor, Engaging in a Riot. Recently these felony charges have been dismissed due to an inadequate Information. But these dismissals are

without prejudice and I learned from co-counsel Chad Nodlund that in court during an early November hearing on the October 27 charges the prosecution indicated that it may exercise its right of interlocutory appeal for the felony dismissals. It also is believed that in the alternative the prosecution may simply reindict these individuals.

35. I was personally involved in scores of bail hearings for persons arrested on October 27, 2016. On October 28, 2016, I appeared with attorney Chad Nodland during bail hearings that occurred in Burleigh County Courthouse. That same day additional bail hearings began to be heard in Morton County, at which point Mr. Nodland went to Morton County and I remained practicing per my Temporary License in Burleigh County, personally representing dozens of defendants. On Saturday, October 29, 2016, a session for bail hearings was held in Morton County by the Honorable James Hill. On information and belief, this was an unprecedented first-ever Saturday court session in Morton County. I started that day second-chairing Chad Nodland for bail hearings. We quickly learned that additional bail hearings were to begin in Burleigh County, at which point Mr. Nodland went to Burleigh County, and I finished the day appearing without North Dakota counsel for purposes of the remaining dozens of arraigned defendants. Most of these people arrested on October 27, 2016 were arraigned by ITV, interactive TV. They appeared from Cass County, Mercer County, and other places. As I understand the Morton and Burleigh County jails were simply unable to handle the surge of persons arrested.
36. During those bail hearings, the vast majority of individuals indicated that they intended to request appointed counsel.

37. According to data provided by the South Central Judicial District Court Administrator's office, of those approximately 139 persons arrested on October 27, 2016, as of November 14, 2016, 101 applications for assistance were filed; but 89 of them were initially denied that aid without a clear explanation for the denial. This would be 88% denials. Upon information and belief, 81 of the 89 denials were for "Incomplete Applications."
38. Mr. Nodland and I called attention to this large percentage of denials to the Commission on Legal Counsel for Indigents (CLCI). Due at least in part to that prompting, CLCI staff precipitated a re-evaluation of these applications. As I understand it, 47 (58%) of the initial "incomplete" denials (of the 81) were deemed to have sufficient information and were re-submitted for review; 24 of the re-submitted "incomplete" applications (29.6%) had been reviewed and approved by November 16, 2016. Unfortunately, as of November 16, 2016, 71.6% (58) of cases originally denied as "incomplete" were still incomplete and counsel had neither been assigned nor retained. Of those October 27 arrestees, it appears that 5 were denied appointed counsel for the October 27 charges, despite these same individuals having been approved for aid and assigned counsel for previous charges related to DAPL. By December 2, 2016 70 of the October 27 arrestees were still without counsel according to court records.
39. I have reviewed the spreadsheet data provided by South Central Judicial District Court Administrator's office as the DAPL related arrests as of December 2, 2016. From that data it appears that 264 defendants have the word "None" in the space where name of

counsel is recorded. I.e., as of December 2, 2016 264 defendants will be appearing pro se unless means are developed to provide them access to counsel.

40. Of the 139 persons with an arrest date of October 27, 2016, I count 69 who have a named attorney listed and 70 who have "none" listed at their attorney.

41. The strain on North Dakota's criminal defense resources caused by this situation seems clear. It is my understanding from conversations with CLIC staff that public defenders from many parts of North Dakota have been called upon to supplement the appointed counsel/Indigent Defense bar in the South Central district. As of December 4, 2016 the CLCI has had 265 cases assigned to 79 North Dakota attorneys, and despite weeks of searching the CLCI continues to look for available counsel willing and able to take these cases. It appears that local public defender panelists have been maxing out on their case allotments. It is my understanding attorneys from Dickinson, Minot, Devils Lake, Valley City and Fargo have been assigned cases through the Indigent Services Commission. CLIC staff have made robust efforts to seek out North Dakota criminal defense attorneys to represent the increased case load presented by the DAPL arrests. But the need still appears to remain beyond the reach of available criminal defense counsel currently licensed in North Dakota.

42. According to the website of the State Bar Association of North Dakota there are some 2800 plus members of the north Dakota bar, which I understand includes all attorneys licensed in the state. By my count approximately 1200 of these attorneys are listed as having offices outside the state of North Dakota.

43. I am personally aware that experienced criminal defense attorneys from many jurisdictions outside of North Dakota have volunteered to make themselves available to represent these defendants. Many of the attorneys have indicated their willingness to do such representation on a pro bono or low bono basis. This includes experienced criminal defense attorneys from South Dakota, Minnesota, Wisconsin, Colorado, Nebraska, Iowa, Illinois, and elsewhere.
44. Complicating the issue, I understand that county officials on several occasions have threatened to charge out-of-state licensed attorneys, who were trying to meet with defendants upon arrest in the county jails (since no public defenders were being appointed), with criminal trespass and/or impersonating an attorney.
45. During these months, attorneys from other jurisdictions have had significant difficulties in identifying local counsel who might be willing to associate pro hac vice. It is my understanding that requests for lawyers admitted in North Dakota were made by the South Dakota Indian Country Bar Association, the recently formed North Dakota Bar-Indian Law Section, and the Water Protector Legal Collective (formerly Red Owl Legal Collective), which was formed by legal workers to provide support to defendants, and outreach from former South Dakota Bar and criminal defense bar officials. Only limited interest has been indicated from the North Dakota bar.
46. Pro hac vice requests have received the same response from North Dakota licensed attorneys as has the request for market rate attorney availability, that there is a lack of

interest due to reasons including personal and professional conflicts, as well as time and financial burdens it places on local counsel.

47. I am familiar with the sentiments expressed in Affidavits by defendants Andrea Kilchrist, Richard Rowski and Daniel Nunamkin, and by attorneys Kyle Wiswall, Doug Parr and Andrea Carter and legal worker Emily Beck to the effect that defendants cannot find adequate representation by the North Dakota bar members and need to look to qualified counsel from out of state. Based on my experience, there are scores if not hundreds of other defendants who are similarly situated to defendants Kilchrist and others, *i.e.*, who need to be able to hire out-of-state lawyers in order to ensure their right to counsel.

48. The Exhibits attached hereto are all true and accurate copies of what they are purported to be and support the factual statements in the accompanying Petition to Permit Temporary Provision of Legal Services by Qualified Attorneys from Outside North Dakota. These Exhibits are as follows:

- A. Exhibit 1 – spreadsheet referencing DAPL-related defendants, arrests and charges information as of December 2, 2016, 2 pm, provided by the South Central Judicial District Court Administrator’s Office to attorney Chad Nodlund, who has organized the data based on the final column, “Next Hearing Datetime”;
- B. Exhibit 2 – spreadsheet referencing DAPL-related defendants, arrests and charges information as of December 2, 2016, 2 pm, provided by the South Central Judicial District Court Administrator’s Office, organized based on “Offense Date,”

- C. Ex. 3 – spreadsheet referencing DAPL-related defendants, arrests and charges information as of December 2, 2016, 2 pm, provided by the South Central Judicial District Court Administrator’s Office, organized by “Defendant’s Name;”
- D. Ex. 4 – North Dakota Court announcements page (<https://www.ndcourts.gov/>) citing 11/29/16 Washington Post article about the strain the pipeline protest arrests have placed on the court system [https://www.washingtonpost.com/national/pipeline-protest-arrests-strain-north-dakotas-court-system/2016/11/29/53bdf8aa-b65c-11e6-939c-91749443c5e5\\_story.html](https://www.washingtonpost.com/national/pipeline-protest-arrests-strain-north-dakotas-court-system/2016/11/29/53bdf8aa-b65c-11e6-939c-91749443c5e5_story.html) (stating nearly 575 arrests);
- E. Ex. 5 – August 19, 2016 North Dakota Governor Dalrymple declaration of a state of “emergency” existing in Southwest and South Central North Dakota due to civil unrest (“protesting activities”). <https://www.governor.nd.gov/media-center/executive-order/dalrymple-declares-emergency-exists-southwest-and-south-central-north-d>;
- F. Ex. 6 – Bismark Tribune 11/29/16 article entitled “Governor calls for help in eviction of camped protesters” discussing the accrued cost of law enforcement by the State exceeding \$10 million dollars [http://bismarcktribune.com/news/state-and-regional/governor-calls-for-federal-help-in-eviction-of-camped-protesters/article\\_bf5513fb-0298-5654-a30b-29319e110100.html](http://bismarcktribune.com/news/state-and-regional/governor-calls-for-federal-help-in-eviction-of-camped-protesters/article_bf5513fb-0298-5654-a30b-29319e110100.html);
- G. Ex. 7 – Bismark Tribune 11/30/16 article reporting the approval for requesting \$7 million additional dollars, [http://bismarcktribune.com/news/local/govt-and-politics/million-more-approved-for-protest-law-enforcement-response/article\\_fa744ac2-2d5b-54e3-928a-9557a4f6f45c.html](http://bismarcktribune.com/news/local/govt-and-politics/million-more-approved-for-protest-law-enforcement-response/article_fa744ac2-2d5b-54e3-928a-9557a4f6f45c.html);



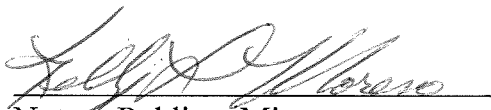
- H. Ex. 8 – 12/5/16 email of Jean Delaney to William Tilton stating that “79 attorneys have taken or agreed to take these [265] cases, and we are looking for more;”
- I. Ex. 9 – Bismark Tribune 7/23/16 article reporting on the high turnover in PD offices where lawyers are paid less than prosecuting attorneys despite similar work, [http://bismarcktribune.com/news/state-and-regional/despite-similar-work-north-dakota-s-public-defenders-paid-thousands/article\\_c271c94a-95db-515e-8](http://bismarcktribune.com/news/state-and-regional/despite-similar-work-north-dakota-s-public-defenders-paid-thousands/article_c271c94a-95db-515e-8)
- J. Ex 10 – 11/16/16 Jean Delaney, North Dakota Indigent Defense Commission, e-mail estimating that it will be facing a surge of new cases requiring a need for “a deficiency appropriation of \$937,000;”
- K. Ex. 11 – Affidavit of attorney Doug Parr;
- L. Ex. 12 – Declaration of attorney Andrea Carter;
- M. Ex. 13 – Declaration of attorney Kyle S. Wiswall dtd 12/1/16;
- N. Ex 14 – November 28, 2016 Governor Dalrymple “Emergency” Order “order[ing] a mandatory evacuation of all persons located in areas” where Oceti Sakowin and other water protector encampments exist north of the Cannonball River in Morton County. See <https://www.governor.nd.gov/media-center/executive-order/dalrymple-orders-emergency-evacuation-safeguard-against-harsh-winter-co>;
- O. Ex. 15 – Dakota Access LLC announces its intention to do whatever it can to continue construction, [http://bismarcktribune.com/news/state-and-regional/dakota-access-fully-committed-to-completing-pipeline-using-current-route/article\\_f406d5f3-d30d-5833-bd06-605b8a6894d8.html](http://bismarcktribune.com/news/state-and-regional/dakota-access-fully-committed-to-completing-pipeline-using-current-route/article_f406d5f3-d30d-5833-bd06-605b8a6894d8.html);
- P. Ex. 16 – Valley News story wherein Governor Dalrymple declares, “The decision today by the Obama Administration to further postpone any action on the easement for the Dakota Access Pipeline is a serious mistake.” <http://www.valleynewslive.com/content/misc/DALRYMPLE-OBAMA-ADMINISTRATION-IS-MAKING-A-SERIOUS-MISTAKE-404642866.html>;

- Q. Ex. 17 – Declaration of Emily Beck dtd 12/4/16;
- R. Ex. 18 – North Dakota (<http://www.nd.gov/>) Supreme Court  
(<http://www.ndcourts.gov/>) Electronic Document Access Agreement;
- S. Ex. 19 – Affidavit of Andrea Kilchrist;
- T. Ex. 20 – Affidavit of Daniel Nunamkin;
- U. Ex. 21 – Affidavit of Richard Rowski;
- V. Ex. 22 – Affidavit/Declaration of Steven S. Hoffmann;
- W. Ex. 23 – Affidavit of Amy Earlene Cirbo;
- X. Ex. 24 – Affidavit of Leah Ruth; and
- Y. Ex. 25 – Affidavit of Chad Nodlund.

I declare under penalty of perjury that the above is true and correct and that this Affidavit was signed this 7<sup>th</sup> day of December, 2016.

  
William L Tilton

Subscribed and sworn to before me  
this 7<sup>th</sup> day of December, 2016.

  
Notary Public – Minnesota  
My commission expires: 1/31/2020.

