DECLARATION

I, Robert C. Boruchowitz, declare, based upon my good faith knowledge and belief, as follows:

1. I am an attorney and a Visiting Clinical Professor of Law at the Seattle University School of Law Ronald A. Peterson Law Clinic. I am the Director of The Defender Initiative at the School of Law. I co-teach the Clinic, which includes class room training on trial practice and ethical considerations, discussion of related criminal procedure issues, representation of in-custody juvenile offender clients at first appearances, and representation of juvenile offender and juvenile truancy clients in King County Superior Court. I also supervise students on independent study projects. I have taken one of our cases to the Washington Court of Appeals, winning a recent decision establishing the right to counsel for children at first hearings in truancy cases.

2. I graduated from Kenyon College in 1970 with a degree in Political Science, and from Northwestern University School of Law in 1973.

3. I have been admitted to the Washington State Bar Association since 1974 and I am an inactive member of the California Bar. I was admitted to the bars of the Western District of Washington in 1974, the United States Court of Appeals, Ninth Circuit, in 1983, and the United States Supreme Court in 1996. I am certified under Washington Special Proceedings Rules as qualified to be appointed as counsel in capital appeals and post-conviction proceedings.

4. Prior to joining the faculty of the Seattle University School of Law in January, 2007, I served as Director of The Defender Association in Seattle, a non-profit public defender program, for 28 years. In that role, I administered an office of approximately 125 staff, including 90 lawyers and a budget of approximately $10 million per year. During my tenure as Director, I tried six felony jury trials and consulted on several aggravated homicide cases. My office had attorney caseload limits set by contract with local government, by collective bargaining agreement, and by city ordinance. Those limits were guided by King County Bar Association Guidelines, by Washington Defender Association Standards, by Washington State Bar Association Standards, and by Washington law RCW 10.101.

5. During my tenure as Director, I co-counseled the first King County "sexual predator" commitment jury trial (1991), and the appeal in state supreme court (1991-1993), and the remand to superior court (1993-1994). I was co-counsel on an initially successful Federal Habeas Corpus challenge to the "predator" law. Young v. Weston, 898 F. Supp. 744 (W.D. Wash.) (1995.) I argued the state's

appeal of Young v. Weston in the Ninth Circuit (1996) and I argued the case on remand in Federal District Court (1998). I was lead counsel in Ninth Circuit review ordering remand for hearing on punitive conditions. Young v. Weston, 192 F.3d 870(9th Cir. 1999), reversed and remanded, Seling v. Young, 531 U.S. 250 (2001). I argued the case in the U.S. Supreme Court (2000).

6. As Director, I negotiated contracts with the City and County and State as well as with the union representing our staff. I hired staff and developed budgets for the office. I also established and for several years supervised the Racial Disparity Project at The Defender Association and I developed a successful proposal for a state capital defense assistance center funded by the Washington Office of Public Defense. I met frequently with the supervisors and periodically with the various divisions in the office. I met approximately once a month with the Board of Directors of the Association.

7. Before becoming Director, I worked for more than four and a half years as a staff attorney in misdemeanor, juvenile, felony, and appellate cases. I have handled cases at every level of state and federal court.

8. As Director, I worked to establish caseload limits for our attorneys and to monitor caseloads and to comply with caseload limits established by contract and by local ordinance.

9. The City of Seattle has a law that limits public defender caseloads in Seattle Municipal Court, providing in part:

> City agreements with indigent public defense service providers shall require caseloads no higher than 380 cases per-attorney per-year. The City also affirms the Washington State Bar- endorsed supervision standard of one full-time supervisor for every ten staff lawyers.

Ordinance Number: 121501 (2004), available at http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CBOR&s1=114900.cbn.&Sect6=HITOFF&l=20&p=1&u=/~public/cbor2.htm&r=1&f=G

10. I have participated in state and national efforts to develop public defender standards and a model defender services contract. For many years I have been a member of the American Bar Association Indigent Defense Advisory Group. I have served on other ABA committees and a working group and on a number of state and local committees relating to criminal justice and public defense. I was chairperson of the Washington State Bar Association, Criminal Law Section, 1981-1982, and 1984-1985, and Secretary, 1989-1993.

I worked on standards that have been published by the Washington State Bar Association, the American Bar Association, and the National Legal Aid and Defender Association. I helped to draft the Washington State law requiring local governments to develop standards for public defense (RCW 10.101). In 2007 I led an American Council of Chief Defenders committee that wrote a Statement on Caseloads and Workloads. For the last three years I have served on the Washington State Bar Committee on Public Defense.

11. In 2003, I was a Soros Senior Fellow working on issues relating to access to counsel in misdemeanor and juvenile cases. I worked to improve access to counsel in misdemeanor cases in several local jurisdictions in Washington State and I wrote articles and presented continuing legal education and judicial education seminars on the right to counsel.

12. I speak frequently at continuing legal education seminars on ethical issues relating to defender caseloads and other issues including the right to counsel, racial disparity, sex offender commitment, mental illness and criminal law, public defender management, and the death penalty. Among recent examples, I spoke at a Public Defense Management Seminar on "Lessons Learned: Achieving and Maintaining High Lawyer Performance and Satisfaction" for the Oregon Criminal Defense Lawyers Association in October, 2008.

I spoke at a Symposium on the 45th Anniversary of *Gideon v. Wainwright* at the Washington Supreme Court Temple of Justice on April 11, 2008. I spoke on "Ethical Practice With Limited Resources" at a Washington Defender Association Seminar December 17, 2004. I gave a presentation on Ethical Issues in Criminal Practice in Courts of Limited Jurisdiction for a Washington State Bar seminar in April, 2005. I have spoken at seminars for the Wisconsin Public Defender conference and the West Virginia Public Defender Conference. I spoke at American Bar Association "Hearings on the Right to Counsel 40 Years After Gideon v. Wainwright," February 7, 2003, Seattle, WA.

13. I have been a guest speaker at the law schools of The University of Washington, Cornell University, New York University, and Northwestern University.

14. I completed a three week intensive trial advocacy program of the National Institute of Trial Advocacy, Reno, Nevada, 1974. I have been a trainer for NITA at programs at the University of Washington and Northwestern University.

15. I was on the faculty for the National Defender Leadership Institute in Chicago in May, 2004, and in Santa Rosa, California, in May, 2002.

16. I attended a federally funded training called Operating a Defender Office, in Portland, Oregon, in 1979. I have attended numerous other local and national

seminars, including the Vera Institute National Defender Leadership Project seminars in Harriman, N. Y., in 1998 and 2000.

17. The first project of The Defender Initiative at Seattle University is a joint effort with the National Association of Criminal Defense Lawyers to conduct a comprehensive investigation of misdemeanor public defense in the United States. I organized a conference at the Open Society Institute in New York in May, 2008, and a second conference at Seattle University July 11, 2008. I was the primary researcher and drafter of a report that is scheduled to be published in 2009. For that project, I reviewed recent case law and ethical opinions relating to caseload. I conducted site visits in Pennsylvania, Arizona, and Washington State.

18. I was an expert witness in 2005 in a class action seeking injunctive relief from systemic ineffective assistance of counsel in Grant County, Washington. That litigation resulted in a settlement that established a per-attorney caseload limit of 150 felony case equivalents per year. In addition to one case equivalent for most felony cases, "extraordinary cases" result in one case equivalent for each 15 hours of attorney time. Such cases include persistent offender cases, aggravated murder cases with or without a death penalty notice, and certain fraud cases. Settlement agreement available at http://www.defender.org/files/archive/GrantCountyLitigationSettlementAgreement.pdf.

The judge in the Grant County case found:

> The systemic deficiencies of the pre-filing public defense system in Grant County certainly created an atmosphere in which the class plaintiffs developed a well-grounded fear of immediate invasion of their respective rights to effective assistance of counsel and is evidence of an ongoing concern.

The court noted that it was undisputed that prior to the litigation being filed, "the caseloads of the Grant County Public Defenders were excessively high and exceeded any advisory guideline for caseload limits." The Court found that "Evidence of past practices is certainly relevant and admissible where there exists a possibility that the practices will continue and/or occur again." [citation omitted]

Memorandum Opinion available at

http://www.defender.org/files/archive/grantcosummjud.pdf

19. In 2007, I was an expert witness in a King County Superior Court evidentiary hearing on effective assistance of counsel.

20. I have testified as an expert witness on effective assistance of counsel in death penalty cases and in a habeas corpus proceeding challenging a persistent offender conviction.

21. I was a consultant in a study by the Spangenberg Group of the public defense system for conflicts of interest cases in Los Angeles in 1986.

22. From 2002 to the present, I have participated in site visit evaluations of defender programs for the National Legal Aid and Defender Association. I have helped to evaluate programs in Idaho, Michigan, Louisiana, Nevada, and Washington, D.C.

23. I served for twenty years as President of the Washington Defender Association, which I helped to found in 1983. I oversaw this membership organization representing more than 800 lawyers and staff representing indigent accused, and I appeared as amicus curiae in trial and appellate courts on right to counsel issues. I was counsel for amicus curiae on behalf of the Washington Defender Association in Mount Vernon v. Weston, 68 Wn. App. 411 (1992), in which the court held that denial of a motion to withdraw by over-worked trial counsel was abuse of discretion and new counsel should be appointed on appeal.

24. I have written the following articles relating to public defense and caseloads:

"At 45, Gideon Right to Counsel Remains Elusive", King County Bar Bulletin, March, 2008.
"Right to Counsel Remains Threatened in Washington," Washington Bar News, February, 2007.
Op Ed, "Lawyers for juveniles not automatic", Seattle Post Intelligencer, January 2, 2008.
"Enough is Enough! Defenders Act on Excessive Caseloads", 29 NLADA Cornerstone, Jan-Apr 2008, at 12.
Op Ed, "State has chance to provide equal justice", January 25, 2006, with Anne Daly.
"How to Deal with the Denial of Counsel in Misdemeanor Cases Post-Shelton", The Advocate, January, 2004.
"The Right to Counsel: Every Accused Person's Right", Washington State Bar News, January, 2004.

25. In 2007-2008, I served as vice-chair of the Seattle Mayor's Police Accountability Review Panel.

26. The Department of Public Advocacy has asked me to review historical and other information concerning the caseloads of the Department's attorneys in order to address whether their caseloads violate relevant national standards and whether the service reduction plan developed by the DPA is consistent with

ethical obligations as established by the American Bar Association and the American Council of Chief Defenders.

I have reviewed the following materials submitted to me by the Kentucky Public Advocate or that I have obtained on the internet:

A Resolution recognizing the excessive caseloads being handled by Kentucky public defenders and requesting the general assembly to increase significantly funding in order to lower the caseloads of Kentucky's public defenders. Kentucky Bar Board of Governors, 2005.

Resolution Concerning Excessive Public Defender Caseloads in the Commonwealth of Kentucky, American Council of Chief Defenders, July 22, 2008.

Affidavit of Erwin W. Lewis, July 1, 2008
Affidavit of Damon L. Preston, July 1, 2008
Affidavit of B. Scott West
Affidavit of W. ANDREW BOWKER
Affidavit of James L. Cox
Affidavit of John Delaney
Affidavit of Rodney J. Uphoff
Affidavit of Shanda West
A memorandum on case-counting dated December 5, 2008
Affidavit of David Carroll
Affidavit of Rebecca Ballard DiLoreto

27. It is my understanding that the Kentucky defender attorneys are carrying caseloads of more than 436 new open cases per year. This is a mixed caseload, with a typical caseload being approximately 109 felonies, 61 juvenile cases, and 265 misdemeanors. The national standards reaffirmed in 2007 by the American Council of Chief Defenders set maximum standards of either 150 felony, 200 juvenile, or 400 misdemeanor cases per year per attorney. The Kentucky caseload is far above those standards.

Principle Five of the American Bar Association Ten Principles of a Public Defense Delivery System states: "Defense counsel's workload is controlled to permit the rendering of quality representation." Based on my review of the information provided to me, the Kentucky Department of Public Advocacy is not complying with this principle.

Given the geographical demands facing many of the Kentucky defenders, and the lack of adequate support staff and supervision in their offices, their caseloads

should be set below the national maximum standards. The ACCD Statement on Caseloads and Workloads points out:

These caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified.

28. I agree with Professor Uphoff that the ABA Standards for Criminal Justice Defense Functions (ABA Standards for Criminal Justice: Prosecution and Defense Function, 3rd ed., 1993) and the National Legal Aid and Defender Association (NLADA) *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995; 4th Printing, 2007) are relevant national standards for lawyers representing criminal defendants.

I also rely on the American Bar Association Ten Principles of a Public Defense Delivery System (available at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf), and on the American Bar Association Formal Opinion 06-441 Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation (May 13, 2006), available at http://www.abanet.org/cpr/06_441.pdf, and on the American Council of Chief Defenders Ethics Opinion 03-01 (2003). available at http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf.

29. Based on the materials I have read, on my own experience, and on my research, in my opinion the defenders in the Kentucky Public Advocate's office have too many cases and not enough resources to provide effective assistance of counsel to their clients and to meet their ethical obligations. Their caseloads exceed the national standards recommended by the ACCD and adversely affect their ability to meet their ethical obligations to provide constitutionally required effective assistance of counsel to their clients.

30. In my opinion, the service reduction plan developed by the Kentucky Public Advocate is consistent with the ethical requirements of the American Bar Association and the American Council of Chief Defenders.

31. The high caseloads in Kentucky are complicated by the necessity for many of the defenders to travel considerable distances to appear in court or to visit clients in jails far from their offices. One attorney mentioned in her affidavit that in her eight counties her office has to cover three judicial circuits in two time zones and to travel 100 miles between locations.

32. The defenders' resources do not match those of the prosecutors. As reported by John Delaney, his office does approximately 80% of criminal cases in the 16th and 17th Judicial Circuits. There are thirty two

prosecutors who regularly appear in court against the eleven attorneys in his office. This allocation of resources violates Principle 8 of the ABA Ten Principles of a Public Defense Delivery System: *"There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system."*

33. One supervisor, Mr. West, reports that several of his attorneys have told him that they do not have enough time to spend with their clients and are questioning their ability to provide competent representation. Because of his need to stop assigning cases to over-loaded attorneys and because of resignations, he does not have enough attorneys to cover his cases in a 20-county area for which he is responsible.

34. The supervision resources of the DPA are inadequate. John Delaney reports:

> A large part of my job is to train and closely supervise the less experienced attorneys. Due to the budget and shortage of staff I have been unable to appropriately execute this job duty. Inexperienced attorneys have had to represent clients in legal proceedings that they did not have enough experience to handle.

This violates both Principle 6 and Principle 10 of the ABA Ten Principles:

> Six: Defense counsel's ability, training, and experience match the complexity of the case.
>
> Ten: Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

35. The defenders do not have enough resources. For example, the Lexington office has 16 attorneys to handle almost 11,000 cases per year, and they have only one investigator available. The Somerset office has one investigator for seven attorneys. A more appropriate ratio is one investigator for four attorneys. See, Washington State Bar Association Standards for Indigent Defense Services, Standard Six, Investigators: "A minimum of one investigator should be employed for every four attorneys." Available at http://www.opd.wa.gov/Trial%20Defense/080721%20wsbastandards408.pdf.

36. Some Kentucky Public Advocate attorneys with full caseloads are assigned to work on capital cases as well. Attorneys on a capital case ideally would have no other cases assigned to them.

During FY 2007, the Louisville Metro Public Defender's office had 17 open capital cases, each with two of the five full-time capital trial division lawyers assigned (It is my understanding that the current number of cases is even higher). They have one full-time mitigation specialist assigned to the capital trial division, and a full-time investigator dedicated to the division, with five other investigators available for back-up. When I was Director of The Defender Association, we would assign two FTE lawyers to each capital case, and we moved quickly to re-assign other cases that the capital team might have. If we had had 17 open capital cases, we would have had 34 full-time equivalent attorneys and 17 full-time equivalent investigators assigned to those cases.

The American Council of Chief Defenders made the following recommendation in 2007:

> Each state that has the death penalty should develop caseload standards for capital cases. The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards. This should specifically include the ability of counsel to devote full time effort to the case as circumstances will require. Counsel must not be assigned new case assignments that will interfere with this ability after accepting a capital case. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised 2004), Guideline 6.1 and 10.3. Presumptively, there should be at least two counsel on the capital defense team.

American Council of Chief Defenders Statement on Caseloads and Workloads, available at http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf

37. It appears that all of the DPA attorneys have too many cases. The following example from one of the lawyers' affidavits demonstrates the complete lack of preparation that can occur when caseloads are too high:

> Our judge sets nine to ten cases for jury trial on any particular Friday, and usually intends to try at least two of those cases. With ten cases set for trial and no time to prepare for them due to being in court the whole rest of the week, Tera (Cozart) and I walk into court and seek out the prosecutor to find out which cases he would like to try that day, since the choice is almost exclusively his. Once the case to be tried is decided on, we then have to call the name of the defendant in question, since we haven't met with them to know their face. We inform the person they are having a jury trial, and then we take our seats and begin voir dire. When we retire to a small room to do our

> pre-emptive strikes, our client then tells us her story. Based on that story, we have perhaps five minutes to formulate a defense.

An attorney in that situation simply is not providing competent representation as required by Kentucky's Rules of Professional Conduct:

> **SCR 3.130(1.1) Competence**
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

38. Ms. Diloreto stated:

> In the juvenile and family court context, clients who may be completely innocent of the charged behavior end up having their attorneys admit to the offense and are placed under the jurisdiction of the juvenile or family court for years to come. Their parents may later be held in contempt for failure to follow a court order about which neither the child nor the parent understood the immediate or longer term ramifications.

This describes a situation in which the lawyers are not providing competent representation and are not meeting their ethical obligations to their client and are not providing effective assistance of counsel.

39. In my opinion, the Kentucky Defenders are acting according to their ethical responsibility by moving to limit their caseload. As outlined by a California appellate court:

> When a public defender reels under a staggering workload, he need not animate the competitive instinct of a trial judge by resistance to or defiance of his assignment orders to the public defender. ... The public defender should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel (Pen. Code, § 987a) at public expense. Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards of supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or of making provision of funds, facilities and personnel for a public defender's office adequate for the demands placed upon it.
>
> Ligda v. Superior Court, 5 Cal. App. 3d 811, 827-828 (Cal. App. 1st Dist. 1970).

40. In California, it is common for the Chief Defender to declare unavailability and thereby to limit the caseload for the attorneys in the office. The Los Angeles Alternate Public Defender says on the office web side that the mission of the office is

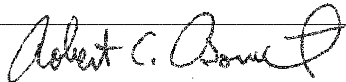
> To provide high quality and caring legal representation to indigent persons charged with a crime that the Public Defender is unable to represent (due to a conflict of interest or unavailability) in court proceedings in the Superior Courts and in appeals to higher courts.

http://apd.co.la.ca.us/

In a survey taken by the California Public Defenders Association in 2007 in which 19 defender offices responded, offices representing 81.9 per cent of the felony defendants stated that they refused to accept new cases "when a determination is made that the combination of the existing and incoming workload exceeds the capacity of the employees to provide necessary services in a competent fashion in a timely manner, and without unduly risking the health of the defender workforce." See letter at

http://www.ccfaj.org/documents/reports/incompentence/expert/CPDA%20Response.pdf

I CERTIFY UNDER PENALTY OF PERJURY UNDER OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.



Robert C. Boruchowitz

DATED AND SIGNED this 4th day of February, 2009.

Seattle