IN THE CIRCUIT COURT
OF THE ELEVENTH CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

Criminal Division
Judge John W. Thornton
Division F15

THE STATE OF FLORIDA,
Plaintiff,

Case Number
F09-019364

vs.

ANTOINE BOWENS,

Defendant.
_____/

APPENDIX TO EXHIBITS TO ASSISTANT PUBLIC DEFENDER'S MOTION TO WITHDRAW AND TO DECLARE SECTION 27.5303(1)(d), FLORIDA STATUTES, UNCONSTITUTIONAL

Tab A	Affidavit of Jay Kolsky
Tab B	Affidavit of Carlos J. Martinez
Tab C	Affidavit of Norman Lefstein
Tab D	Affidavit of Robert C. Boruchowitz
Tab E	Affidavit of Frederick Freedman
Tab F	Affidavit of Jay Kolsky in Support of Motion to Withdraw from State v. Antoine Bowens, Case No. F09-19364

EXHIBIT D

DECLARATION

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

1. I am an attorney and a Professor from Practice at the Seattle University School of Law. I am the Director of The Defender Initiative at the School of Law, which is part of the Korematsu Center for Law and Equality. I have co-taught the Youth Advocacy Clinic, which includes classroom 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.

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. 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. As Director of The Defender Association, 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.

6. 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.

7. 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.

8. The City of Seattle has a law that limits public defender misdemeanor 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

9. 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, which now has evolved into the Council on Public Defense.

10. The first project of The Defender Initiative at Seattle University was 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 the report that was published in April 2009, entitled "Minor Crimes, Major Waste." For that project, I reviewed recent case law and ethical opinions relating to caseload. I conducted site visits in Pennsylvania, Arizona, and Washington State.

11. 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. See, 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

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

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.

13. 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, Idaho, and Washington, D.C.

14. 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.

15. The Miami-Dade Public Defender (PD-11) has asked me to review information concerning the caseloads of the Office's attorneys, and in particular the caseload of Jay Kolsky, in order to address whether the caseload is excessive and whether it requires that Mr. Kolsky obtain caseload relief in order to provide effective assistance of counsel to his clients.

I have been informed that Mr. Kolsky is an attorney of 37 years experience, that he is highly skilled and hard working, and has been in both public and private practice. He has handled major crimes, including homicides, and has done extensive training in the area of criminal trial practice.

In addition, I have received data concerning the composition of Mr. Kolsky's caseload and the work that Mr. Kolsky has done on his cases from General Counsel Rory Stein, and I have reviewed the following materials:

Affidavit of Jay Kolsky
Affidavit of Carlos Martinez

16. 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.

17. It is my understanding that Jay Kolsky was assigned 595 new cases[1] in the most recent fiscal year, July 1, 2008, to June 30, 2009.

18. 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, Mr. Kolsky's caseload is not controlled to permit the rendering of quality representation.

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[1] The new case total refers to cases assigned to Mr. Kolsky at arraignment going forward. The national standards reaffirmed in 2007 by the American Council of Chief Defenders set maximum standards of 150 felony cases annually per attorney. The Florida standard is 200 felonies per lawyer per year.

19. It is my understanding that Mr. Kolsky routinely represents clients at arraignment whom he has not met in advance of court, despite the fact that his office may have had the case for three weeks. Almost always, he has no information about the case other than the arrest affidavit that he receives in court. These circumstances preclude him from providing intelligent advice to his client about any plea offer made by the prosecution.

20. Mr. Kolsky's inability to provide effective advice about plea offers violates Florida's Rules of Professional Conduct:

> ***RULE 4-1.1 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.
>
> The commentary for the rule states: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."

21. The ABA Criminal Justice Standards, Defense Function, provide in part:

> **Standard 4-1.3 Delays; Punctuality; Workload**
>
> (a) Defense counsel should act with reasonable diligence and promptness in representing a client.
>
> ....
>
> (e) Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. ...

Mr. Kolsky's workload violates this standard.

22. Mr. Kolsky is not able to have confidential communications with his clients in an appropriate setting with enough time to assess their case and to advise them effectively. He says, "I do not have the opportunity for a private conversation with my clients to discuss a plea offer at arraignment. I usually speak to in-custody clients while they are handcuffed to other defendants in the jury box. I usually speak to out-of-custody clients in the hallway outside the courtroom. In either setting, confidential communication is impossible because of the presence of other persons nearby."

23. The ABA Criminal Justice Standards, Defense Function, provide, in part, as follows:

Standard 4-3.1 Establishment of Relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

(b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

Mr. Kolsky is unable to comply with this standard.

24. The ABA Criminal Justice Standards, Defense Function, provide, in part. as follows:

Standard 4-3.2 Interviewing the Client

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

Mr. Kolsky is unable to comply with this standard.

25. The ABA Criminal Justice Standards, Defense Function, provide, in part, as follows:

Standard 4-3.6 Prompt Action to Protect the Accused

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

Standard 4-3.8 Duty to Keep Client Informed

> (a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.
>
> (b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Mr. Kolsky is unable to comply with these standards.

26. Because of the distance to detention facilities, traffic, and his heavy workload, Mr. Kolsky does not visit his clients where they are held, but asks that they be brought to a "bridge" facility, which takes one to two weeks to arrange. As a result, his first interview usually occurs four to five weeks after arraignment, at least eight weeks after arrest.

As of July 21, 2009, Mr. Kolsky had 42 clients in custody. Twenty were located in Metro West, in western Miami-Dade County. I have been informed that any visit there requires at least half a day. Another 12 clients were located in two facilities that are located about a 16 mile round trip from Mr. Kolsky's office. I have been informed that it takes about 30-40 minutes to get to those jails.

I have been informed that approximately ten per cent of Mr. Kolsky's clients are non-English speakers, primarily Spanish and Creole-speaking clients. Mr. Kolsky does not speak Spanish or Creole and must rely on interpreters. In my experience, interviews and court hearings using interpreters take at least twice as long as those conducted in one language. In addition, many non-English speaking clients also have immigration issues which must be researched, requiring additional attorney time.

Given the challenges of representing non-English speaking clients and the geographical demands facing Mr. Kolsky, his caseload should be set below the national and state 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.
>
> .....[T]he NAC standards do not account for differences in urban and rural jurisdictions, and instances where attorneys must travel significant distances to and between courts, confinement facilities and clients. Such factors significantly affect the number of cases in which effective representation may be given.

27. In addition, Mr. Kolsky gives priority to his in-custody clients, resulting in

limited interviews of his out-of-custody clients, generally by telephone, or if a deposition is canceled. He says he "never" has time to work on his out of custody clients' cases. Mr. Kolsky reports that rarely is he able to spend more than one hour total meeting with a client, and many clients are only able to have one half hour to interview with him. Because he has so many pending cases, Mr. Kolsky has difficulty remembering his clients' names, and he does not have enough time to establish a rapport with them sufficient to earn their trust. Because he has so many cases, Mr. Kolsky is not able to provide to many of his clients enough information and advice for them to be able to make thoughtful and informed decisions about their cases.

28. I have been informed that due to his caseload, Mr. Kolsky sets depositions for every half hour that he is not in court. This results in between 30 and 54 depositions per month, but only for his in-custody clients.

29. Mr. Kolsky has so many cases that he does not have time to investigate adequately the factual basis of issues he spots or to research and draft appropriate motions. He relies on "shell motions from a form bank". He seldom is able to prepare jury instructions in advance or in writing.

30. I have been informed that this year, Mr. Kolsky has averaged approximately 20 cases set for trial in his trial weeks, which occur every third week. Based upon the conditions described above, it is my professional judgment that Mr. Kolsky has too many cases and inadequate time to properly prepare those cases for trial.

31. It is my understanding that Mr. Kolsky has approximately one hour per case for the 160 cases per year that he resolves at arraignment and approximately four hours per case to prepare the balance of his cases. This is simply not enough time to do the work required to represent a client effectively. In my experience, attorneys in felony cases need to do most or all of the following in every case:

> Interview client initially and maintain frequent and complete communication with the client.
> If the client needs an interpreter, coordinate interview times with the interpreter.
> Research client's criminal history, living situation, work experience.
> If client is in custody, seek release of client.
> For non-citizen clients, research immigration status and impact of any conviction on immigration status.
> Obtain and review discovery, conduct appropriate investigation, including visiting the scene of the incident.
> Research, prepare and file and argue pre-trial motions.
> Research law and facts relating to possible defenses.
> Meet with prosecutor to negotiate case.
> Advise client about any plea bargain offer from prosecutor.
> Talk with family and friends of client as appropriate.

Keep client advised of developments of case, and in the process develop rapport and trust with the client.
Travel to and wait at detention facilities and in court for meetings and hearings.
Consult with colleagues about the issues in the case.
Consider identifying and retaining expert witnesses, and prepare those witnesses.
In appropriate cases, engage social worker to assist with mental health or substance abuse evaluation and to assist in developing both pre-trial release alternatives and pre-sentence reports.
Prepare and conduct trial, including preparation of witnesses, preparation of exhibits, preparation of opening and closing statements, preparation of cross examination, preparation of trial memoranda and evidentiary motions and memoranda, preparation of jury instructions.
Prepare and conduct sentencing if a conviction.
Advise client about appeal options and prepare and file notice of appeal if there is a conviction.

In addition, a felony attorney should spend at least fifteen hours per year in continuing legal education related to his or her practice, and should stay current with case law developments in state and federal court that relate to the felony practice.

Mr. Kolsky is simply not able to meet all of these requirements on a consistent basis, given the caseload he is assigned.

32. Mr. Kolsky has so many cases that he does not have time to prepare for sentencing either by talking with his clients or by writing pre-sentence memoranda for the court.

33. The ABA Criminal Justice Standards, Defense Function, provide, in part, as follows:

Standard 4-8.1 Sentencing

(a) Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to defense counsel, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case, with the consent of the accused, be prepared to suggest a program of rehabilitation based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.

(c) Defense counsel should also insure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Where appropriate, defense counsel should attend the probation officer's interview with the accused.

(d) Defense counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a statement that might tend to prejudice an appeal.

Mr. Kolsky is unable to comply with this standard.

34. Based on the materials I have read, on my own experience, and on my research, in my professional judgment, Jay Kolsky has too many cases to provide effective assistance of counsel to his clients and to meet his ethical obligations under the Florida Rules of Professional Conduct, including the rule on competence cited above, **RULE 4-1.3 DILIGENCE:** "A lawyer shall act with reasonable diligence and promptness in representing a client", and **RULE 4-1.4 COMMUNICATION:**

(a) Informing Client of Status of Representation. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

35. ABA 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), provides:

> All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

36. In my opinion, Mr. Kolsky is acting according to his ethical responsibility by moving to limit his 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).

37. 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 site 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 25th day of July, 2009. Seattle