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

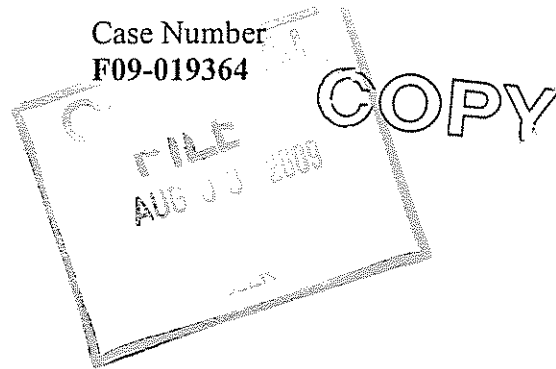
**Criminal Division**  
Judge John W. Thornton  
Division F15

**THE STATE OF FLORIDA,**  
Plaintiff,

vs.

**ANTOINE BOWENS,**  
Defendant.

Case Number  
F09-019364



**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO WITHDRAW AND TO  
DECLARE SECTION 27.5303(1)(d), FLORIDA STATUTES, UNCONSTITUTIONAL**

Carlos J. Martinez, the Public Defender for the Eleventh Judicial Circuit of Florida, respectfully submits this memorandum of law in support of Assistant Public Defender Jay Kolsky's motion to withdraw and to declare section 27.5303(1)(d), Florida Statutes, unconstitutional.

**FACTS**

The affidavits attached to Assistant Public Defender Jay Kolsky's motion establish the following facts:

1. Mr. Kolsky has a pending caseload of 164 "C" felony cases. In FY 08-09, Mr. Kolsky handled 593 new trial cases, only 160 of which closed by plea at arraignment. Affidavit

of Carlos Martinez ¶ 6 (Exhibit B to Motion to Withdraw).<sup>1</sup> He also handled 185 violation of probation cases, which would make his total annual FY08-09 caseload 778 cases. *Id.* ¶ 6. Mr. Kolsky is an experienced, talented, hardworking attorney, but no attorney can professionally and diligently represent his clients in the number of pending cases to which he has been assigned.

2. The result is that if Mr. Kolsky spends time working on any given client's case, the cases of other clients suffer from not being adequately prepared. In the end, every client's case suffers from a lack of time. Attorney-client communications are inadequate to create a real attorney-client relationship. Factual investigations, including visits to crime scenes, do not occur or are truncated. Motion practice is limited to form motions that are not researched and prepared to fit the individual client's case. Basic trial preparation, such as preparing witnesses or drafting voir dire and cross-examination questions, is omitted or abbreviated. Affidavit of Jay Kolsky ¶¶ 6-27 (Exhibit A to Motion to Withdraw).

3. Another result is that virtually nothing is done in a timely manner. Every aspect of the case is delayed, beginning with the initial interview. *Id.*

4. The case from which Mr. Kolsky seeks relief is a case in which the client is out-of-custody and in which Mr. Kolsky has had no time to establish a meaningful attorney-client relationship or take any steps to prepare for trial. Affidavit of Jay Kolsky in Support of Motion to Withdraw from *State v. Bowens*, Case No. F09-019364 (Exhibit F to Motion to Withdraw).

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<sup>1</sup> The following affidavits were filed with Jay Kolsky's Motion to Withdraw: Affidavits of Jay Kolsky (Assistant Public Defender), Affidavit of Carlos J. Martinez (Public Defender for the Eleventh Judicial Circuit), Affidavit of Professor Norman Lefstein (a nationally recognized expert on public defender workload issues), Affidavit of Professor Robert C. Boruchowitz (a lawyer and Director of The Defender Initiative at the Seattle University School of Law), and Affidavit of Frederick Freedman (a private lawyer and the immediate past President of the Miami Chapter of the Florida Association of Criminal Defense Lawyers, Inc.).

## ARGUMENT

### A.

#### **THIS COURT SHOULD PERMIT MR. KOLSKY TO WITHDRAW BECAUSE HIS EXCESSIVE CASELOADS ARE INFRINGING UPON HIS CLIENTS' SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL**

Since *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right to counsel has been central to our system of justice and many other constitutional rights. Commenting on this right, the United States Supreme Court wrote:

It bears emphasis that the right to be represented by counsel is among the most fundamental of rights. We have long recognized that “lawyers in criminal courts are necessities, not luxuries.” As a general matter, it is through counsel that all other rights of the accused are protected: “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is “best discovered by powerful statements on both sides of the question.”

*Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citations omitted).

Indigent defendants in criminal cases have a right to effective assistance of counsel. *See Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978) (“But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.”); *Luckey v. Harris*, 860 F.2d 1012, 1016-17 (11th Cir. 1988) (“The sixth amendment protects rights that do not affect the outcome of a trial”). The effective assistance of counsel anticipates and includes the right to the assistance of conflict-free counsel. *See Wood v. Georgia*, 450 U.S. 261, 271 (1981) (remanding case for hearing to determine if attorney representing convicted defendants and the operator of a criminal enterprise had conflict

at defendants' revocation of probation hearing).

The Supreme Court of Florida has addressed excessive public defender caseload for over thirty years. *Escambia County v. Behr*, 384 So. 2d 147, 150 (Fla. 1980) (holding that appointment of substitute counsel in place of the public defender due to excessive caseloads is at the discretion of the court); *In re Public Defender's Certification*, 709 So. 2d 101, 103 (Fla. 1998) (recognizing that excessive caseloads establish a significant problem of constitutional magnitude and permitting elected Public Defender to temporarily not accept further appeals and requiring monthly reporting of caseloads); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender ("In re Order 1990")*, 561 So. 2d 1130, 1131-33 (Fla. 1990) (ordering elected Public Defender to decline certain types of new cases until caseloads reduced); *In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit ("In re Certification 1994")*, 636 So. 2d 18, 19-21 (Fla. 1994) (approving order for elected Public Defender to withdraw from cases initiated during certain time periods).

The Supreme Court of Florida has held that excessive caseloads create conflicts in attorney loyalty:

When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created. As the court below stated, "The rights of defendants in criminal proceedings brought by the state cannot be subjected to the fate of choice no matter how rational that choice may be because of the circumstances of the situation."

*See In re Order 1990*, 561 So. 2d at 1135 (emphasis added; citations omitted). Four years later, the Supreme Court of Florida recognized that an attorney working under an excessive workload is little better than no attorney at all. *See In re Certification 1994*, 636 So. 2d at 19.

The United States Supreme Court has explained that the proper standard for attorney performance in representing an indigent defendant is reasonably effective assistance that does

not fall below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).<sup>2</sup> In other words, the Sixth Amendment relies on “the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.” *Id.* at 688. The U.S. Supreme Court explained:

Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel’s function as assistant to the defendant derive the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

*Id.* (citations omitted).

The Florida Rules of Professional Conduct set forth the duties an attorney owes his clients and are consistent with the duties the Sixth Amendment and the Florida Constitution require. Rule Regulating the Florida Bar 4-1.1 requires competence in representation, yet, despite Mr. Kolsky’s extensive criminal justice experience and expertise, Mr. Kolsky often cannot take basic steps necessary to prepare cases, such as going to the crime scene, researching or drafting legally appropriate motions or keeping current with Florida case law. Rule 4-1.3 requires diligence, but no attorney can diligently investigate and prepare 20 or more felony cases all set for trial the same day, while simultaneously representing clients in over a hundred other felony cases. Rule 4-1.4 requires communication with clients, but Mr. Kolsky has so little

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<sup>2</sup> *Strickland* involved an indigent defendant seeking post-conviction relief due to ineffective assistance of counsel. No post-conviction relief is being sought through Mr. Kolsky’s Motion to Withdraw. Therefore, the full standard for ineffective of assistance of counsel set forth in the *Strickland* case, requiring not only counsel’s deficient performance but also reasonable probability that the result of the trial would have been different, (*see id.* at 687, 694), is not applicable to Mr. Kolsky’s Motion to Withdraw.

communication with clients that he often does not know their names, let alone the facts and issues in their cases. He has so little communication with clients that they often feel uncomfortable confiding in him and distrust his legal advice. The commentary to the rule on diligence summarizes the problem:

A lawyer's workload must be controlled so that each matter can be handled competently.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer.

R. Regulating Fla. Bar 4-1.3 (comment); *see also State of Arizona v. Smith*, 681 P.2d 1374, 1381-82 (Ariz. 1984) (holding that a lowest bidder procedure for selecting counsel for indigent defendants, where attorneys can be assigned any number of cases, no matter what the attorney's experience level or how complicated the case, violates the right to counsel under the U.S. Constitution).

More importantly, Rule 4-1.7 requires that an attorney "shall not represent a client if . . . there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." R. Regulating Fla. Bar 4-1.7. Further, the comment to Rule 4-1.7 states:

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. . . . Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

R. Regulating Fla. Bar 4-1.7 (comment). Mr. Kolsky has that type of conflict because he does not have enough time during the workday to do everything that reasonably should be done on all

of his cases, and therefore must choose among clients in allocating his time. Specifically, he prioritizes the cases of his in-custody clients at the expense of his out-of-custody clients. Mr. Kolsky has 46 clients in custody and 72 out of custody. In the end, no client's case is adequately prepared because of the demands of all the other clients' cases.

In making inquiries into public defender conflicts of interest, Florida courts have been guided by the Florida Rules of Professional Conduct. *See Valle v. State*, 763 So. 2d 1175, 1177-78 (Fla. 4th DCA 2000) (relying on precedent that relied on Rule 4-1.7(a), governing conflicts of interest); *Ward v. State*, 753 So. 2d 705, 707-08 (Fla. 1st DCA 2000) (relying on Rule 4-1.7, governing conflict of interest, and Rule 4-1.10, governing imputed disqualification of all lawyers in the firm); *see also Turner v. State*, 340 So. 2d 132, 133 (Fla. 2d DCA 1976) (relying on Florida Code of Professional Responsibility provision governing conflicts of interest).

In the recent decision of *Scott v. State*, 991 So. 2d 971 (Fla. 1st DCA 2008), the court reviewed a denial of a public defender's motion to withdraw based on a conflict of interest. Because the issue was raised pretrial, the court applied the "substantial risk" standard of the Florida Rules of Professional Conduct.

Viewed prospectively, any substantial risk of harm is deemed prejudicial. Rule 4-1.7(a) of the Rules Regulating the Florida Bar provides that, unless certain conditions not present here are met, a lawyer shall not represent a client if . . . (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client and then goes on to quote and apply the rule.

*Id.* at 972-73 (emphasis added). The court specifically noted: "Conflicts of interest are best addressed before a lawyer laboring under such a conflict does any harm to his or her client(s)'s interests." *Id.* at 972.

Mr. Kolsky is not providing adequate representation by any reasonable standard. In FY08-09, Mr. Kolsky handled 593 cases at and after arraignment and 185 probation revocation

cases. His current pending caseload of 164 cases indicates he is on track to have a similarly excessive annual caseload this fiscal year. Mr. Kolsky's caseload in FY08-09 exceeded recognized maximum caseload standards by four to five times. The National Advisory Commission on Criminal Justice Standards and Goals ("NAC") recommended that full-time public defenders not accept for representation more than 150 felony cases during a year. The NAC caseload standards have been adopted by the National Legal Aid and Defender Association ("NLADA") and also by the American Council of Chief Defenders, which is a unit of NLADA comprised of heads of public defender offices. The Florida Governor's Commission established maximum caseload standards of 100 felony cases per year. *See* Governor's Commission on Criminal Justice Standards and Goals, Bureau of Criminal Justice Planning and Assistance, Final Report, Standards and Goals for Florida's Criminal Justice System, at 392-93 (1976) (Standard CT 10.12). Further, the Florida Public Defender Association ("FPDA") has established 200 felony cases as the maximum caseload for an attorney per year.

As established in the affidavits supporting the Motion to Withdraw, Mr. Kolsky's caseload is so high that he must choose between his clients in allocating his time, the result being that his out-of-custody client's cases are largely being ignored. Mr. Kolsky's only immediate solution is to withdraw from a significant portion of his assigned cases and request the appointment of other counsel. Although this Court may conduct a hearing into the adequacy of Mr. Kolsky's assertion of a conflict, (*see* section 27.5303(1)(a)), the U.S. Supreme Court has acknowledged that counsel's representations of a conflict are presumptively correct:

[M]ost courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. In so holding, the courts have acknowledged and given effect to several interrelated considerations. An "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the

course of a trial.” Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. Finally, attorneys are officers of the court, and ““when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.”” We find these considerations persuasive.

*Holloway v. Arkansas*, 435 U.S. at 485-86 (citations and footnotes omitted); *see also Cuyler v.*

*Sullivan*, 446 U.S. 335, 346 (1980); *see also* Comment to R. Regulating Fla. Bar 4-1.7

(“Resolving questions of conflict of interests is primarily the responsibility of the lawyer undertaking the representation.”).

On the basis of these standards, the granting of this motion would be automatic but for the language of section 27.5303(1)(d). Therefore, section 27.5303(d) must be addressed.

## B.

### **SECTION 27.5303(1)(d), FLORIDA STATUTES, VIOLATES THE CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS, THE RIGHT TO COUNSEL, AND ACCESS TO COURTS**

#### **1. Section 27.5303(1)(d) Violates Separation Of Powers By Interfering With The Inherent Authority Of Courts**

Section 27.5303(1)(d) is unconstitutional as applied to Mr. Kolsky’s Motion to Withdraw because it interferes with the inherent authority of courts to enter orders necessary to carry out their constitutional authority. The authority of Florida courts to provide redress for excessive workloads by appointed counsel derives from this inherent authority. *In re Order 1990*, 561 So. 2d at 1133 (“We agree with the court below that courts have the inherent authority to issue orders addressing problems such as this.”). As the Supreme Court of Florida wrote: “The cornerstone of American democracy known as separation of powers recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities.” *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). The Florida

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Constitution expressly prohibits the three co-equal branches of government from exercising powers over each other. Art. II, § 3, Fla. Const. (“The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”).

By enacting section 27.5303(1)(d), the Florida Legislature impermissibly intruded upon an inherent judicial function – the administration of justice, the protection of the adversarial system, and the protection of fundamental rights. *See generally Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978) (“Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions.”); *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986) (holding statutory fee cap for representation of indigent defendants to be unconstitutional as applied because it violates separation of powers and interferes with the Sixth Amendment right to counsel).

One question in *Makemson v. Martin County* was whether a statute setting attorneys’ fees caps for the representation of indigent defendants in criminal cases was unconstitutional. The Supreme Court of Florida answered in the affirmative and found “the statute unconstitutional when applied in such a manner to curtail the court’s inherent power to ensure adequate representation of the criminally accused.” *Id.* at 1112. The trial court had awarded an amount to the trial and appellate attorneys that exceeded the statutory cap. The Supreme Court found: “[T]he trial court has here met its burden of showing that its action in exceeding the statutory maximums was necessary in order to enable it to perform its essential judicial function of ensuring adequate representation by competent counsel.” *Id.* at 1113. This was because the facts

before the trial court were sufficiently extraordinary to warrant the award to ensure the appointment of competent counsel. *See id.*

The question in *Rose v. Palm Beach County* was whether trial courts have the inherent authority to order the prepayment of witnesses in a criminal trial that exceed the statutory maximum set forth in section 91.14, Florida Statutes, when the witnesses are indigent in a criminal trial. At the time, section 90.14, Florida Statutes provided that: “Witnesses in all cases, civil and criminal, in all courts, now or hereafter created, and witnesses summoned before any arbitrator or master in chancery *shall* receive for each day’s actual attendance five dollars and also six cents per mile for actual distance traveled to and from the courts.” *Rose*, 361 So. 2d at 136 n.1 (emphasis added). The Supreme Court of Florida answered in the affirmative, *id.* at 139, and wrote: “[W]here fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements. . . . The invocation of the doctrine [of inherent judicial power] is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.” *Id.* at 137.

The issue posed by Mr. Kolsky’s motion to withdraw is similar to the legislative intrusion at issue in *Makemson* and *Rose*. Section 27.5303(1)(d) appears to prohibit the court from approving the withdrawal from cases due to excessive workloads: “In no case shall the court approve a withdrawal by the public defender . . . *based solely upon* inadequacy of funding or *excessive workload* of the public defender . . . .” § 27.5303(1)(d), Fla. Stat. (emphasis added). However, the fundamental rights of Mr. Kolsky’s clients are at stake, namely the right to effective assistance of counsel under the Sixth Amendment of the U.S. Constitution and under the Florida Constitution. The Legislature’s prohibition on withdrawals, therefore, improperly

infringes upon the court's inherent authority to preserve the administration of justice and the fairness of trials and to protect the right of indigent defendants to effective assistance of counsel.

**2. Section 27.5303(d) Violates Separation Of Powers By Impermissibly Legislating Upon Matters of Practice And Procedure**

Section 27.5303(1)(d) also violates separation of powers by legislating upon matters of practice and procedure within the exclusive province of the Supreme Court of Florida. Article V, section 2(a) of the Florida Constitution provides: "The supreme court shall adopt rules for the *practice and procedure in all courts . . .*" (emphasis added). According to the Supreme Court:

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.

*Avila South Condo. Ass'n v. Kappa Corp.*, 347 So. 2d 599, 608 (Fla. 1977) (holding statute concerning class actions involving condominium associations violated separation of powers because it concerned court procedure and adopting the substance of the statute by amending Fla. R. Civ. P. 1.220).

Article V, section 15 of the Florida Constitution states: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted. The authority to discipline attorneys includes the exclusive province to proscribe rules of professional conduct the breaching of which renders an attorney amenable to such discipline." *Times Publishing Co. v. Williams*, 222 So. 2d 470, 475 (Fla. 1969) (holding that the Government in the Sunshine Law was not intended to interfere with attorneys' exercise of their ethical duties) (citations omitted). This means the Legislature "is without any authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court." *Id.* It also means the Legislature cannot interfere

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with a court's determination of a controversy dealing with the ethical rules promulgated by the Supreme Court of Florida and cannot amend those rules by statute.

3. **Section 27.5303(1)(d) Violates Mr. Kolsky's Clients' Sixth Amendment Right To Effective Assistance of Counsel**

For the reasons set forth above, if section 27.5303(1)(d) prohibits this Court from remedying the conflict of interest caused by Mr. Kolsky's excessive caseload, that statute also constitutes a violation of his clients' right to effective assistance of counsel. *See* U.S. Const. amend. VI; Art. I, § 16, Fla. Const.

4. **Preventing Any Judicial Remedy For Excessive Workload Violates Mr. Kolsky's Clients Right Of Access to Courts**

Indigent defendants must rely on their assistant public defenders to represent them in court. Courts will not consider *pro se* pleadings of a represented defendant. *See, e.g., Logan v. State*, 846 So. 2d 472, 475-76 (Fla. 2003). When an inundated attorney is too busy to file anything more than form motions, to know or remember basic facts of his clients' cases, and communicate with his clients, the clients suffer because they cannot effectively access this Court except through that attorney. In short, an attorney's representation is critical to the integrity of all other constitutional rights:

[A]n independent legal profession plays a critical role in maintaining our constitutional structure. It is the lawyers who bring cases before a court and advocate issues which assure the integrity of the Constitution and protect individual rights in our society. The availability of lawyers to challenge government conduct that interferes with constitutional rights is essential to assure that these rights are protected.

*In re Amendments to Rules Regulating the Florida Bar 1-3.1(a)*, 598 So. 2d 41, 43 (Fla. 1992).

A violation of the right of access to courts does not require complete loss of access. A violation occurs if there is "any significant degree" of obstruction or infringement. *Mitchell v. Moore*, 786 So. 2d 521, 525, 527 (Fla. 2001).

When Mr. Kolsky has such an excessive workload that he rarely can communicate with clients, cannot investigate his cases, cannot take all necessary depositions, cannot file legally appropriate motions on their behalf, and cannot otherwise prepare for trial, that client has lost the right of effective access to courts to a significant degree. The express language of section 27.5303(1)(d) as applied to Mr. Kolsky, prohibits this Court from remedying that excessive workload and therefore constitutes a violation of the constitutional right of access to courts.

### CONCLUSION

Two of the most basic judicial functions are to protect fundamental rights and to ensure the fair administration of justice. The Legislature cannot interfere with these core functions. Therefore, section 27.5303(1)(d) as applied to Mr. Kolsky, violates the constitutional separation of powers and creates situations where hard-working, diligent assistant public defenders like Mr. Kolsky are unable to provide effective assistance of counsel or provide their clients unimpaired access to the courts. This Court should grant Mr. Kolsky's Motion to Withdraw and hold that section 27.5303(1)(d) is unconstitutional.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 2<sup>d</sup> day of August 2009 on the following as specified:

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