

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

Criminal Division  
Judge John W. Thornton  
Division F15

Case Number  
F09-019364

THE STATE OF FLORIDA,  
Plaintiff,

vs.

ANTOINE BOWENS,  
Defendant.

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

Jay Kolsky, the assistant public defender assigned to the above-styled case, respectfully moves this Honorable Court for an Order permitting him to withdraw from the above-styled case due to a conflict of interest caused by an excessive caseload and declaring section 27.5303(1)(d), Florida Statutes, unconstitutional.

I. Introduction

The undersigned is laboring under an excessive caseload that is preventing him from providing effective, competent, diligent, and conflict-free representation to his clients in all of the 164 pending cases he has been assigned. The undersigned's current 118 clients have a constitutional right to effective assistance of counsel and are being deprived of that right by counsel having such an excessive caseload that he cannot diligently or competently investigate his cases, communicate with his clients, counsel his clients to enable them to make informed

decisions regarding their cases, take depositions, or otherwise prepare for trial. That is what has happened in the above-styled case — no meaningful representation has been provided whatsoever. In fact, the undersigned seeks to withdraw only from cases where no meaningful attorney-client relationship has been established and no work has been done on the case.

Last year, the Public Defender for the Eleventh Judicial Circuit (“PD-11”) filed Motions to Appoint Other Counsel In Unappointed Noncapital Felony Cases Due to A Conflict of Interest in all twenty-one felony divisions in the Eleventh Judicial Circuit. The trial court granted the motions in part and denied the motions in part, permitting PD-11 to temporarily decline appointments in “C” felony cases. *See In re: Reassignment and Consolidation of Public Defender’s Motions*, 15 Fla. L. Weekly Supp. 1078, 1080 (Fla. 11th Cir. Ct. 2008). The Third District Court of Appeal (the “Third District”) reversed the trial court’s order and held that excessive caseload issues cannot be raised by the elected Public Defender on behalf of the entire office, but must be raised by individual assistant public defenders. *See State v. Office of the Public Defender*, 34 Fla. L. Weekly D963 (Fla. 3d DCA May 13, 2009). The Third District also held that section 27.5303(1)(d), Florida Statutes, prohibits this Court from providing any relief from excessive caseloads and that section 27.5303(1)(e), Florida Statutes, limits the spectrum of legally cognizable conflicts of interest for public defenders to those involving codefendants or certain witnesses, and excludes conflicts created by excessive workloads. *See id.*

PD-11 is seeking discretionary review of the appellate court’s decision in the Supreme Court of Florida. In the meantime, undersigned counsel and his clients require immediate relief from a crushing caseload.<sup>1</sup>

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<sup>1</sup> In accordance with Rule Regulating the Florida Bar 4-5.1(b), ABA Formal Opinion 06-441, and section 27.5303(1)(e)2, Florida Statutes, Public Defender Carlos J. Martinez has reviewed and approved the filing of this motion.

## II. Factual Background

In support of this motion, I have attached the affidavits of Jay Kolsky (Assistant Public Defender) (Ex. A), Carlos J. Martinez (Public Defender for the Eleventh Judicial Circuit) (Ex. B), Professor Norman Lefstein (a nationally recognized expert on public defender workload issues) (Ex. C), Professor Robert C. Boruchowitz (a lawyer and Director of The Defender Initiative at the Seattle University School of Law) (Ex. D), Frederick Freedman (a private lawyer and the immediate past President of the Miami Chapter of the Florida Association of Criminal Defense Lawyers, Inc.) (Ex. E), and the Affidavit of Jay Kolsky in Support of Motion to Withdraw from *State v. Bowens*, Case No. F09-019364 (Ex. F). PD-11 has also filed a Memorandum of Law in support of this Motion. In addition, the undersigned has filed a request that this Court take judicial notice of the record in the prior evidentiary hearing before Judge Blake on PD-11's motion to decline appointments.

Taken together, the foregoing documents demonstrate that my pending caseload is so high that despite my experience, skill and hard work, I cannot competently and diligently represent all of my clients and that there is a serious, substantial risk that my representation of one or more of my clients will materially limit my representation of other clients. Due to the high caseload, I must prioritize the 164 pending cases on which I work, which means I regularly spend time on some clients' cases to the exclusion of other clients' cases to the degree that many of my clients are not receiving the assistance of counsel required by the Sixth Amendment of the U.S. Constitution, the Florida Constitution, and the Rules of Professional Conduct. Pursuant to office policy, I am giving the cases of in-custody clients priority over out-of-custody clients.

As explained in more detail in my affidavit, I currently have *164* open and pending "C" felony cases. Kolsky Aff. ¶ 4 (Ex. A); Martinez Aff. ¶ 5. Forty-three of these cases are

probation violation cases, and 121 are cases where my clients have been charged with crimes, arraigned, and their cases are awaiting trial (“trial cases”). Martinez Aff. ¶ 5. These trial cases include 87 third-degree felonies, 26 second-degree felonies, and eight first-degree felonies. *Id.*

During FY08-09, I was assigned to handle 593 new “C” felony cases at arraignment. Martinez Aff. ¶ 6. Only 160 of those cases were resolved by plea at arraignment. *Id.* I also handled 185 violation of probation cases, which together with the new cases, made my caseload for FY 08-09 total 778 cases. *Id.* My current, pending caseload indicates that I am on track to have an enormous annual caseload in FY09-10, as well.

I am not aware of new clients until arraignment, which is 21 days after arrest. Kolsky Aff. ¶ 6. If a client calls before or shortly after arraignment, I will know nothing about the case (beyond the content of the arrest form). *Id.* If the state makes a plea offer at arraignment, I cannot intelligently advise the client to assist him/her in making an informed decision about the offer. *Id.* I will speak to most of my clients for the first time at arraignment, and those conversations are held either in the jury box next to other defendants or in the courthouse hallway. *Id.* ¶¶ 7-8. In neither setting can those conversations be private or confidential. *Id.*

In most cases to which I am assigned, very little to nothing has been done when I receive the case file at or after arraignment. *Id.* ¶ 9. The in-custody clients will have been interviewed, but the interview will have been conducted by a paralegal, not a lawyer. *Id.* ¶ 9; Martinez Aff. ¶ 9. Generally, 23% of out-of-custody clients will have been interviewed, sometimes by an attorney, other times by a paralegal. Martinez Aff. ¶ 9. Typically, no investigation will have begun on any of the cases I receive. Kolsky Aff. ¶¶ 9, 11 (Ex. A); Martinez Aff. ¶ 9 (factual investigations initiated in only about 5% of out-of-custody cases). Twenty-one days after arrest, many potential defense witnesses are difficult or impossible to locate. Kolsky Aff. ¶ 10 (Ex. A).

On average, I have less than three hours per year to work on each case I am assigned. Martinez Aff. ¶ 6. This is a wholly insufficient amount of time to adequately represent my clients. Freedman Aff. ¶ 14; Lefstein ¶ 13.

Due to my extremely high caseload, necessity requires that I prioritize some cases over others. Kolsky Aff. ¶¶ 12-13 (Ex. A). Even then, for a variety of factors outlined in my affidavit, I cannot interview most in-custody clients until four or five weeks after arraignment, which totals eight to ten weeks after arrest. *Id.* ¶ 11. Because of the priority given in-custody clients over out-of-custody clients, I frequently do not interview out-of-custody clients until right before trial, if the case goes to trial. *Id.* ¶ 24. I have only initiated three investigations of my current pending 164 cases. Martinez Aff. ¶ 5. I also never set depositions in out-of-custody client cases. Kolsky Aff. ¶ 17 (Ex. A). I have not taken depositions in about 62% of my trial cases. Martinez Aff. ¶ 5. I almost never visit a crime scene or inspect physical evidence prior to taking a deposition. Kolsky Aff. ¶ 18 (Ex. A). I have taken the depositions of only 114 witnesses of the 314 “A” witnesses listed by the state (meaning witnesses that can be deposed without leave of court) in 46 of my trial cases.

I am unable to adequately conduct motion practice. I have no time to research and draft appropriate motions and instead rely on form motions and hope they will be adequate to raise and preserve issues for trial and appellate purposes. *Id.* ¶ 19. In the past few trial weeks, I have had between 16 and 29 cases set for trial at one time. *Id.* ¶ 23. In preparation for trial, I do not always have time to outline voir dire or opening statements. I do not have time to prepare direct examinations for all defenses witnesses, and cross examination is often prepared while listening to direct. *Id.* ¶ 25. For out-of-custody cases, trial preparation may consist of reading the arrest affidavit, an incident report, and, at best, a brief conversation with the client in the courtroom

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hallway before the trial begins. *Id.* ¶ 24. Further, I do not have sufficient time to develop mitigation evidence needed for plea negotiations or at sentencing hearings. *Id.* ¶¶ 26-27.

In sum, the undersigned is providing little to no representation for clients who are out of custody and is struggling to provide representation to clients who are in custody. *See generally* Affidavit of Jay Kolsky in Support of Motion to Withdraw *State v. Bowens*, Case No. F09-019364 (Ex.. F).

**III. Undersigned Counsel Will Be Prevented From Meeting His Constitutional and Ethical Obligations To Existing In-Custody Clients If He Cannot Withdraw From Cases**

In 1963, the United States Supreme Court established the right to assistance of counsel, which arose out of Florida's failure to provide counsel to indigent persons accused of a crime. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). This constitutional right to counsel has been extended and elaborated in countless cases in the ensuing forty-five years, and *Gideon* has developed into a central pillar upon which our criminal justice system rests.

My representation of indigent defendants is controlled by: (i) the constitutional rights to counsel provided by the United States and Florida Constitutions, which require the same vigorous representation and advocacy as private, retained counsel;<sup>2</sup> (ii) the Rules Regulating The Florida Bar, which govern the quality and professionalism of all attorneys in Florida (including assistant public defenders), and other professional and ethical guidelines; and (iii) Section 27.5303, Florida Statutes, addressing certain conflict issues as to public defenders.

If any of the foregoing conflict, the constitutional obligations imposed on the Public Defender are the most fundamental and powerful. *Crist v. Florida Ass'n of Criminal Defense*

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<sup>2</sup> See U.S. Const. amend. VI & XIV; Art. I, §§ 2, 9 & 16, Fla. Const.

*Lawyers, Inc.* (“*FACDL*”), 978 So. 2d 134, 147 (Fla. 2008) (The public defender’s “principal responsibility is to serve the undivided interests of his client.” (citations omitted)).

**A. The U.S. and Florida Constitutions Prohibit PD-11 from Representing Clients If The Representation Creates A Conflict Of Interest**

The constitutional right to counsel is fundamental to our criminal-justice system. Only through the assistance of counsel are the other constitutional rights protected and enforced, including the right of access to courts. *See Penon v. Ohio*, 488 U.S. 75, 84 (1988). The counsel provided to indigent persons accused of a crime must be effective, which requires that counsel must be without any conflicts of interest. *See Wood v. Georgia*, 450 U.S. 261, 272 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”).

Conflicts of interest can arise from an excessive workload. As the Supreme Court of Florida stated: “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.” *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1135 (Fla. 1990). The Supreme Court of Florida recognized that an attorney working under an excessive workload is “little better than no attorney at all.” *In re Certification of Conflict*, 636 So. 2d 18, 19 (Fla. 1994). In situations involving inadequate state funding for appointed counsel, the court’s priority is to protect the constitutional rights of indigent criminal defendants, and courts may use their inherent powers to do so. *See Makemson v. Martin County*, 491 So. 2d 1109, 1113 (Fla. 1986).

**B. The Ethical Rules Prohibit Public Defenders from Representing Clients If The Representation Creates A Conflict Of Interest**

Public defenders have the same duties of effective and independent representation as lawyers in private practice. *See West v. Atkins*, 487 U.S. 42, 50 (1988); *FACDL*, 978 So. 2d at 147; R. Regulating Fla. Bar 4-1.7(b) & 4-1.8(f). In the criminal law context, compliance with the Rules of Professional Conduct ("Rules") is necessary to satisfy the state's obligations to criminal defendants under the Sixth Amendment and the Florida Constitution.

The Rules prohibit attorneys from representing clients if there is a conflict of interest, including where the attorney has other interests that impair loyalty to a client. *See* R. Regulating Fla. Bar 4-1.7(a)(2) & comment "Loyalty to Client." These rules also mandate diligence and promptness, competence, and expeditiousness in conducting the representation. *See* R. Regulating Fla. Bar 4-1.1, 4-1.3, 4-3.2. The comments to the rules note that excessive workloads impair competency, cause delay, and affect diligence. *See* R. Regulating Fla. Bar 4-1.3, comment ("A lawyer's workload must be controlled so that each matter can be handled competently."). Excessive caseload also undermines a client's confidence in the lawyer and the justice system. *See id.*; *see also* R. Regulating Fla. Bar 4-3.2, comment ("Dilatory practices bring the administration of justice into disrepute.").

The ABA's ethical guidelines require public defenders to decline additional cases when attorney workload exceeds national standards.<sup>3</sup>

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<sup>3</sup> *See* ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 with Commentary (Feb. 2002) (App. Tab 5). The ABA Ten Principles provide:

*Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event*

#### **IV. Section 27.5303(1)(d), Florida Statutes, Is Unconstitutional**

Section 27.5303(1)(d), Florida Statutes, provides that “[i]n no case shall the court approve a withdrawal by the public defender . . . based solely upon inadequacy of funding or excess workload of the public defender.”<sup>4</sup> Based on the language of section 27.5303(1)(d), which appears to prohibit a court from granting a motion to withdraw because of excessive caseloads, the undersigned is uncertain about his ability to withdraw from this case and seeks a declaration that section 27.5303(1)(d), Florida Statutes, is unconstitutional. The Third District Court of Appeal did not pass on the constitutionality of the statute as it interpreted it.

As demonstrated in more detail in the Memorandum of Law filed concurrently herewith, the Legislature’s prohibition on a court’s approval of a motion to withdraw when excessive caseload impairs the lawyer’s ability to provide reasonably competent, diligent, ethical, and conflict-free representation violates the indigent defendant’s right to effective assistance of counsel. *See* U.S. Const. amend VI & XIV; Art. I, § 16, Fla. Const. Additionally, the prohibition on withdrawals creates a situation where the undersigned is so overburdened that he cannot serve as an adequate conduit between his indigent clients and this Court, thereby significantly impairing his clients’ right of access to courts. *See* Art. I, § 21, Fla. Const. Further, prohibiting this Court from granting any relief from excessive caseloads restricts the judiciary’s

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be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.

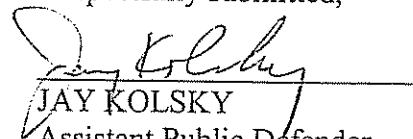
*Id.*

<sup>4</sup> Further, section 27.5303(1)(e) provides, in part: “In determining whether or not there is a conflict of interest, the public defender or regional counsel shall apply the standards contained in the Uniform Standards for Use in Conflict of Interest Cases found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004.” The section 27.5303(1)(e) standards are guidelines to assist attorneys in determining whether a conflict of interest exists and are not exhaustive.

authority to administer justice and protect the adversarial system in violation of the constitutional separation of powers. *See* Art. II, § 3, Fla. Const.

WHEREFORE, undersigned respectfully requests that this Court to grant this motion to withdraw from the cases listed in the style of this motion and to declare section 27.5303(1)(d), Florida Statutes, to be unconstitutional.

Respectfully submitted,



JAY KOLSKY  
Assistant Public Defender  
Fla. Bar No. 0163035  
Law Offices of Carlos J. Martinez  
Public Defender  
Eleventh Judicial Circuit of Florida  
1320 N.W. 14th Street  
Miami, Florida 33125  
305.545.1600

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Withdraw was served by this 3<sup>rd</sup> day of August 2009 on the following as specified:

**Chief Judge Joel H. Brown**

Dade County Courthouse  
73 West Flagler Street  
Miami, Florida 33130  
*Via Hand Delivery*

**Administrative Judge Stanford Blake**

Richard E. Gerstein Justice Building  
1351 NW 12<sup>th</sup> Street  
Miami, Florida 33125  
*Via Hand Delivery*

**Linda Kelly Kearson**

General Counsel  
Eleventh Judicial Circuit of Florida  
Lawson E. Thomas Courthouse Center

175 NW First Avenue, 30<sup>th</sup> Floor  
Miami, Florida 33128  
*Via Hand Delivery*

**Richard Polin**  
**Office of the Attorney General**  
444 Brickell Avenue  
Suite 650  
Miami, Florida, 33131  
*Via Hand Delivery*

**Bill McCollum**  
Attorney General of Florida  
Office of the Attorney General  
State of Florida  
The Capitol PL-01  
Tallahassee, Florida 32399-1050  
*Via U.S. Mail & Email*

**Scott D. Makar**  
**Louis F. Hubener**  
Office of the Attorney General  
The Capitol, PL-01  
Tallahassee, Florida 32399-1050  
*Via U.S. Mail & Email*

**Arthur J. Jacobs**  
**Jacobs & Associates, P.A.**  
961687 Gateway Blvd.  
Suite 201-I  
Fernandina Beach, Florida 32034  
*Via U.S. Mail*

**Penny Brill**  
**Don Horn**  
**Office of the State Attorney**  
E.R. Graham Building  
1350 N.W. 12<sup>th</sup> Avenue  
Miami, Florida 33136  
*Via Hand Delivery*

**Joseph P. George, Jr.**  
**Nancy C. Wear**  
Regional Civil and Criminal Conflict Counsel  
1501 N.W. N. River Drive  
Miami, FL 33125

*Via Hand Delivery*

**Stephen Presnell**

General Counsel

Justice Administrative Commission

P.O. Box 1654

Tallahassee, FL 32302

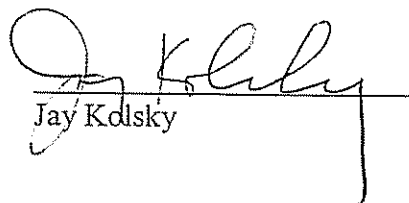
*Via U.S. Mail*

**Antoine Bowens**

2225 W. 5<sup>th</sup> Avenue

Hialeah, Florida 33010

*Via Hand Delivery & U.S. Mail*



Jay Kdlsky