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 A

STATE OF FLORIDA)
)SS
COUNTY OF MIAMI-DADE)

AFFIDAVIT OF JAY KOLSKY

BEFORE ME, the undersigned authority, personally appeared Jay Kolsky, who after being duly sworn, deposes and says:

1. My name is Jay Kolsky. I am of the age of majority, and the following information is true and correct. The following information is based either on my personal knowledge or on records of the Office of the Public Defender for the Eleventh Judicial Circuit of Florida ("PD-11") that were made by persons with personal knowledge, and made and kept in the regular course of PD-11's business.

2. I have been a licensed attorney in Florida since 1973. I served as an assistant state attorney in the State Attorney's Office for the Eleventh Judicial Circuit of Florida ("SAO-11") from 1973-79, prosecuting cases from DUI to 1st degree murder and serving as training director; served as an assistant public defender and training director in PD-11 from 1979-82; was in private practice focusing largely on criminal defense for the next 17 years, returned to SAO-11 in 2000, and then returned to PD-11 in 2002. I have been defense counsel or prosecutor in more than a hundred criminal jury trials over the course of my career.

3. I am an assistant public defender currently assigned to the entire "C" felony caseload in the Honorable John W. Thornton, Jr.'s division. "C" felony cases are largely third-degree felonies, although my caseload includes some first- and second-degree felonies. Although these cases appear to be the least serious felonies, the state has been filing increasing numbers of sentencing enhancements such that clients frequently are facing many years of jail time. "C" felony cases also take additional defense-attorney time to resolve because the state's

"C" level prosecutors have very limited authority to make plea offers and must clear everything through their supervisors. This requirement causes delays because their supervisors are not always present in court or readily available.

4. I currently am assigned to 164 "C" felony cases.[1] This number represents pending cases that did not result in a plea at arraignment, not annual totals.

As a concrete example of my caseload, I recently took five days of annual leave to attend my son's wedding. I returned to find that I had been assigned twenty-five new cases, consisting of both new criminal charges and probation violations. Because of the constant torrent of incoming cases, I must move cases quickly, so quickly that I often feel as though I am a case manager just processing clients and their paperwork, not an attorney[2].

5. If I am away from work for annual or sick leave, no attorney prepares my cases for trial. At best, another attorney will cover any court hearings or depositions. No matter how much information I attempt to impart, that other attorney does not have time to review the entire case, making a competent, thorough deposition almost impossible.

6. The first I am usually aware of a new client will be at or around the first arraignment setting, approximately 21 days after arrest. If the client calls either before or shortly after arraignment, I often have not seen or reviewed the file. As a result, I find myself attempting to have a conversation with the client knowing nothing about his or her case. I cannot intelligently answer almost any of their numerous questions other than those relating to the general process and procedure of a criminal case.

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[1] Public Defender Carlos J. Martinez has been reviewing my caseload based on the report dated July 15, 2009. As of today, my caseload is slightly lower (155) as a result of cases that were closed during my recent trial week, but it is still too high for me to provide adequate assistance to my clients.

[2] I am grateful for the assistance of a certified legal intern for the summer. That assistance comes with a price, however, as I must spend time supervising and training the intern.

7. If the state makes a plea offer at arraignment, I convey the plea offer as required by the ethical rules. I have no way to intelligently advise my client on whether to accept the offer or not because I do not know the facts of the case other than what is written in the arrest affidavit ("A-form") and provided by the state that day in open court. In my experience, more often than not police officers do not provide the factual basis for a defense in their A-forms. If the case involves a crucial laboratory report, the state never provides those reports at arraignment. For all practical purposes, my clients make that decision without any legal advice specific to their cases.

8. I do not have the opportunity for private conversations 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 with 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.

9. The 118 clients I have awaiting trial or facing a violation of probation are all cases in which the state did not make a plea offer, or the client did not accept it. When I receive the case file, very little if anything has been done. In cases where my client is in jail, the trial case file will contain notes of an interview done by a paralegal from PD-11's Early Representation Unit (ERU). The paralegal interviews rarely contain any exploration of possible defense theories and the evidence or witnesses necessary to support those theories. Instead, the paralegal interviews tend to elicit biographical information useful to ERU's attempts to secure pretrial release. In a few cases, PD-11's new Intake Unit will have interviewed out-of-custody clients and, even then, no factual investigation will have been started. In no case will I have interviewed any client prior to arraignment.

10. When I receive a case at arraignment, usually no one at PD-11 has begun an investigation into the case. By that time, three weeks after arrest, any transitory physical evidence is gone. Additionally, Miami witnesses are often very transient. After a three-week time lapse, potential defense witnesses are difficult to locate or to persuade to discuss what they know, and often they simply cannot be located.

11. In an effort to develop some attorney-client relationship with those clients, I give up my lunch hours to visit in-custody clients brought to the Courthouse "bridge" jail cells for attorney interviews. Because of traffic, the distance involved, and the press of other work, I do not have time to otherwise visit them in the detention centers where they are housed. Interviews on the bridge occur only three days a week (Tuesday-Thursday) and the clients must be interviewed in a three-hour window (noon to 3:00 p.m.). Because of demand and limited space on the "bridge," if I request a bridge interview the Department of Corrections will generally not bring the client over for 1-2 weeks. Additionally, because of the demands of interviewing other client, I often cannot conduct my first interview with a client until 4-5 weeks after arraignment, for a total of about 8-10 weeks after arrest. Because I prioritize my in-custody clients, I can interview out-of-custody clients only by telephone or when a deposition cancels.

12. I have filed notices of inadequate resources, together with letters to my out-of-custody clients, informing this Court and those clients of the situation and that those clients' cases have been given secondary priority. As a practical matter, with the constant influx of new in-custody clients, I never have time to work on out-of-custody clients' cases. Any work done on an out-of-custody client's case was probably done when that client was in custody.

13. My client interviews are necessary short, approximately 30 minutes each. With many clients, I will have only this one interview before their cases are closed, either by trial or

plea. Even if I get to speak with them a few times, rarely am I able to spend more than an hour total with any specific client.

14. I am unable to meet with clients often enough to create any rapport, which is crucial in a client trusting my legal advice. Additionally, they are not comfortable confiding what can be important (if sometimes embarrassing) details in a case. Without that information, in many cases I cannot effectively counsel them.

15. Additionally, a large percentage of my clients are not capable of quickly and accurately understanding their situation. As a result, many of my clients make hasty and uninformed decisions because I do not have the time to ensure that they actually understand their constitutional rights and are making a decision that is in their own best interest.

16. This lack of attorney-client relationship goes both ways. With 164 pending cases, I have difficulty knowing or remembering my current clients' names, let alone the facts of their cases. This lack of familiarity makes it difficult to provide intelligent advice to clients on plea offers even after arraignment.

17. I attempt to learn about my cases through pretrial discovery, primarily depositions. I set depositions every half-hour on the two or three weeks per month that I am not scheduled to be in court. Every possible time slot is filled more than a month in advance. Again, I prioritize my in-custody clients. The result is that I can never set a deposition in an out-of-custody client's case because to do so would mean delaying a deposition in an in-custody client's case. I took 35 depositions in July 2009, 54 in June 2009 (despite taking one week of annual vacation), 34 depositions in May 2009, and 31 depositions in April 2009.

18. In the past, I have found viewing a crime scene or physical evidence is very helpful in asking the right questions of witnesses both at deposition and at trial. Now in PD-11, I almost never have time to do so, especially not before depositions.

19. I can spot legal issues on behalf of my clients, but do not have time to adequately investigate the factual basis, research and draft appropriate motions. Instead, the press of cases requires that I file shell motions from a form bank and hope they will be adequate to raise and preserve issues for trial and appellate purposes. Similarly, requests for special jury instructions can seldom be presented to this Court in advance or even in writing; they must be done *ore tenus* at trial. This lack of an adequate motion practice is also a problem because well-researched motions can often lead to more favorable plea offers from the state.

20. Even keeping current on legal developments is challenging because there is no time to read the Florida Law Weekly during workweek. I must do so on my personal time, or rely on colleagues to inform me of new legal developments.

21. I have trial weeks scheduled every third week. On those weeks, I spend an average of 6-10 hours of my day in court, even if no cases actually go to trial. No depositions can be scheduled during those weeks. Of course, if a case does go to trial, that requires even more time and effort. I have tried four cases this year to date, and I have averaged more than 6 jury trials per year since my return to PD-11 in 2002.

22. Under the procedure established by this Court, trial cases sound on the Wednesday ten days before the trial week starts. Because of the number of cases for which I am responsible, I try to avoid taking any continuances, if at all possible. Taking continuances waives the client's right to speedy trial, but also would result in ever-increasing numbers of pending cases. Setting cases for trial is often the only way to resolve them.

23. The result is a very high number of cases set for trial at sounding. I had 19 cases set for my trial week beginning July 20, 2009. This is not unusual. In the last few trial weeks, I had 29, 16 and 24 cases set respectively. Even with my experience, I cannot professionally, competently and responsibly prepare 20 cases for trial the same week.

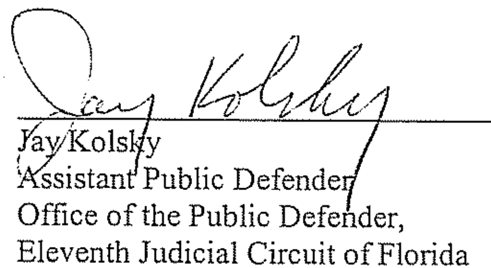
24. Because of the prioritization of in-custody clients' cases, if an out-of-custody client's case goes to trial, my trial preparation would consist of reading the A-form, perhaps an offense incident report, and, at best, a brief conversation with the client, often in the hallway outside the courtroom.

25. Even for in-custody clients, I do not have time to adequately prepare all of the cases. Instead, I rely on my legal experience in other cases. I do not have time to outline voir dire or opening statements in every case. I do not have time to outline direct examinations plans for all potential defense witnesses. My cross-examinations are prepared while listening to the witness's direct examination. Except in the cases involving the most serious punishments, I do not have time to prepare either my client or any other potential defense witness's testimony by going through mock questioning with them so they are comfortable when it comes time to testify in court. At best, I have time to generally discuss their testimony with them.

26. Past experience has shown that preparing a mitigation package is helpful in lowering the sentence if a jury verdict goes against my client. Otherwise, the only thing this Court will generally know about my client is the crime for which my client has just been convicted and what previous crimes the client has committed. Currently, I rarely have time to prepare a mitigation package to present to the court for sentencing or even to meet with clients before sentencing. Preparation for the client to personally address the court, if any, is done minutes prior to the sentencing hearing.

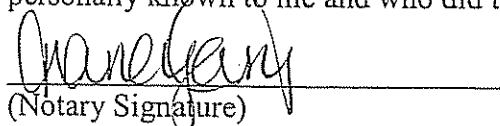
27. When I was in private practice, I had time to individually and thoroughly prepare cases for my clients. I met with clients extensively immediately after I was retained, usually right after arrest. I was able to establish the trust and rapport of a "real" attorney-client relationship with them. If appropriate, I immediately attempted to locate witnesses or physical evidence, or send investigators to do so. As a result, I had enough information to competently and professionally advise my clients on any plea offers at arraignment. I also made extensive efforts to contact the State Attorney's Office before charges were filed to either prevent charges from being filed, mitigate the charges that were filed, or negotiate favorable pleas. I took depositions in every case unless there was a very good, strategic reason no to do so. I filed detailed, researched, case-specific motions and requests for jury instructions. I would have only one or two cases set for trial at any given time and could spend the time to adequately prepare witnesses, my client, my voir dire, and my cross-examinations. And I could prepare mitigation packages if a client was found guilty. As noted above, I can no longer take these steps as an assistant public defender at PD-11.

Further affiant sayeth naught.



Jay Kolsky
Assistant Public Defender
Office of the Public Defender,
Eleventh Judicial Circuit of Florida

The foregoing instrument was acknowledged before me this 3rd day of August 2009, who is personally known to me and who did take an oath.



(Notary Signature)

Diane Yanez

(Print or name stamp notary)
NOTARY PUBLIC
State of Florida at Large

My Commission Expires:

NOTARY PUBLIC-STATE OF FLORIDA
Diane Yanez
Commission # DD536118
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