

**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 E

State of Florida)
) s.s.
County of Miami-Dade)

AFFIDAVIT OF FREDRICK FREEDMAN

Fredrick P. Freedman, personally appearing before the undersigned officer duly authorized by law to administer oaths in Florida and being duly sworn, states the following:

i) My name is Fredrick P. Freedman. I am over the age of 18 and competent to make this affidavit. I am a practicing attorney in the State of Florida. My business address is 1961 NW 150 Avenue, Suite 201, Pembroke Pines, FL 33028.

ii) After graduating from the University of Florida School of Law in 1983, I served as an Assistant Public Defender in Miami-Dade County until September 1987. During my tenure in the Public Defender’s Office, I handled traffic, misdemeanor and felony cases, including homicides. Since 1987, I have been in private practice, concentrating in the area of criminal defense. I have served on the board of directors of the Miami chapter of the Florida Association of Criminal Defense Lawyers for the past 9 years and was its immediate past President. I have also served on the Screening Committee for the Assigned Counsel Plan for the Eleventh Judicial Circuit for the past 17 years. The Screening Committee selects lawyers for participation in the court appointment system and adjudicates complaints regarding those lawyers.

iii) In July 2008, I testified at the hearing before Judge Stanford Blake regarding the workload of the Public Defender’s Office in Miami-Dade County. In connection with my testimony, I reviewed historical and other information related to the caseloads of the assistant public defenders employed in the Public Defender’s Office to evaluate whether they could continue to accept

appointments consistent with their duties pursuant to the constitution and professional responsibility rules and standards.

iv) Counsel for the Public Defender for the Eleventh Judicial Circuit of Florida (“PD-11”) has asked me to review data related to the caseload of assistant public defender Jay Kolsky, an attorney assigned to the Felony Division before the Honorable John W. Thornton, Jr., to evaluate whether his caseload is excessive and whether it requires that Mr. Kolsky obtain caseload relief, in order to provide effective assistance of counsel to his clients and to assure that Mr. Kolsky can perform his duties pursuant to professional responsibility rules and standards for public defense.

v) Among the documents or information furnished to me by counsel for PD-11 are the following: (1) an affidavit executed by Carlos J. Martinez, Public Defender for PD-11; (2) an affidavit executed by assistant public defender Jay Kolsky; (3) statistical information relating to Jay Kolsky’s caseload provided by Rory Stein, Executive Assistant/General Counsel for PD-11.

vi) I have been informed that Mr. Kolsky is an attorney of 37 years experience and that he has previously worked as a prosecutor and as a defense lawyer in private practice. I have been advised that Mr. Kolsky has handled a diverse range of criminal cases during his career, including homicides, and has been involved in the training of other lawyers. I have been informed that Mr. Kolsky is one of three attorneys assigned to Judge Thornton’s division and that Mr. Kolsky is assigned to handle the “C” caseload. “C” felony cases are generally cases that are less severe or complex in nature, although such cases often carry disproportionately high penalties because of Florida’s multitude of sentencing “enhancement” statutes.

vii) In my professional judgment, competent, diligent and thorough representation must begin immediately following the client's arrest. A thorough client interview prior to the first appearance hearing is critical. Background information concerning the client's family, job history, criminal history, psychological history and other information relating to the client's ties to the community must be ascertained. This information is essential to effective advocacy for pre-trial release at the first appearance hearing.

viii) After the first appearance hearing, a thorough investigation of the factual underpinnings of the State's case must be done. In conjunction with an investigator, I endeavor to develop a defense by interviewing State witnesses and potential defense witnesses. I visit the crime scene and photograph the area for possible later use in charging negotiations, plea negotiations and at trial. I consider the hiring of experts who might advance my client's defense or be useful in the development of mitigation evidence. Finally, I identify the need for pretrial motions, do legal research and prepare appropriate, case-specific motions that are designed to diminish the State's case or advance my defense.

ix) Timely performance of these professional functions early in the case is essential to making an effective presentation to the State's Attorney's Felony Screening Unit (FSU), a critical stage in the defense of a client. A persuasive, substantive presentation to FSU can frequently influence the State's charging decision and result in a reduction of charges or the announcement of a "no action." Such a presentation should include affidavits, photographs and other supporting materials that advance the defense or undercut the arresting officer's affidavit.

x) Should the State file an information, the thorough investigation done prior to arraignment enables me to properly advise my client during the arraignment proceeding. It is the

practice in this jurisdiction for the State to make a plea offer at arraignment. A thorough working knowledge of the facts gained prior to arraignment permits me to sufficiently counsel my client so that in the event my client elects to accept the State's plea offer, my client is in a position to make a knowing, intelligent and voluntary waiver of his constitutional rights. Without this preparation, this would not be so. Should my client reject the plea offer, my case preparation continues.

xi) In contrast, I am aware that PD-11 has a "horizontal" system of representation, in which multiple lawyers represent the client at different stages of a case. Any representation provided to clients prior to arraignment is handled by PD-11's Early Representation Unit (ERU) and Intake Unit. I have been informed that ERU has 7 full-time attorneys and a part-time contract attorney, who are responsible for 1177 felony cases currently pending arraignment; Felony Intake has two full-time attorneys and a part-time attorney responsible for 784 felony cases pending arraignment. ERU handles the cases of in-custody clients. I have been informed that due to underfunding and short staffing, ERU must rely upon a non-attorney interviewer to interview the client. These interviews are designed to provide general biographical information useful in seeking bond, custody release or bond reductions. The interviewers are not sufficiently versed in the law to ask the appropriate questions necessary to explore the merits of the individual case and possible defenses. Additionally, I have been informed that ERU rarely initiates an investigation. Finally, I have been advised that PD-11's Intake Unit interviews about 23% percent of out-of-custody clients prior to arraignment. Presently, the unit is able to initiate factual investigations in only 5% of its cases. As a consequence of PD-11's inability to conduct an effective and adequate investigation in most of its cases prior to arraignment, its felony trial attorneys are seldom able to negotiate with the State Attorney's Office

before the filing of an information. The felony trial attorneys are also unable to effectively counsel their clients about their cases prior to arraignment, or about plea offers at arraignment.

xii) I have been informed that during FY08-09, Mr. Kolsky was assigned to handle 595 new cases at arraignment. Of those cases, 160 were resolved by plea at arraignment. In my professional judgment, given the conditions described in the preceding paragraphs, Mr. Kolsky or any attorney, no matter how experienced, would be unable to provide competent representation to clients at arraignment, or comply with Rule 4-1.1 of the Rules Regulating the Florida Bar, because he lacked sufficient time, opportunity and knowledge to properly counsel his clients so as to permit his clients to make a knowing, intelligent and voluntary waiver of their rights.

xiii) In my professional judgment, post-arraignment trial preparation must include a thorough review of police reports, complete deposition practice, a thorough review of the State's physical evidence, follow-up interviews with the client to discuss discovered evidence, preparation of suppression or dismissal motions and the legal research attendant to those motions, preparation of voir dire, opening statements, direct and cross examinations, closing arguments, and jury instructions, research pertaining to anticipated legal issues at trial and the development of mitigation evidence for plea negotiations and sentencing. It has been my professional experience that the minimum time necessary to professionally and competently prepare a third degree felony case is twenty hours.

xiv) In contrast, I have been informed that during FY 08-09, for the clients remaining post-arraignment, Mr. Kolsky had no more than 4 hours per case available to prepare each case for trial, plea or other disposition. In my professional judgment, that amount of time is clearly insufficient to allow any attorney to perform the essential services that I outlined in the preceding paragraph. Under those circumstances, it is my professional judgment that Mr. Kolsky's clients could not have received the assistance of counsel guaranteed by the constitution and Mr. Kolsky or any attorney, no matter how experienced, could not comply with the standards of professional conduct mandated by Florida's rules.

xv) I have been informed that the conditions that existed during FY 08-09 persist today. I have been informed that as of July 15, 2009, Mr. Kolsky is responsible for 164 open, pending cases; 121 are substantive trial cases and 43 are probation violation cases. The trial cases are comprised of 87 third degree felonies, 26 second degree felonies, and 8 first degree felonies. Mr. Kolsky represents 118 clients; 46 of whom are in custody. I have been informed that because of his workload, Mr. Kolsky cannot depose witnesses in cases involving clients who are not in custody. As a consequence, Mr. Kolsky has not taken depositions in 62 % of his trial cases. I have been advised that in the cases where he is able to take depositions, Mr. Kolsky has only been able to take the depositions of 114 of the 314 listed "A" witnesses (witnesses that can be deposed without leave of court). I have been informed that Mr. Kolsky has only been able to conduct full interviews (in his office or in jail – excluding hallway or jury box conversations) with 15 of his clients. Finally, I have been informed that Mr. Kolsky has a trial week every third week and that he regularly has approximately 20 cases set for trial each week.

xvi) In my professional judgment, the sheer number of Mr. Kolsky's pending cases, 164 pending felony and probation violation cases,¹ make it impossible for him to do all of the things necessary to adequately and diligently provide representation to all of his clients. Due to time constraints and workload demands, Mr. Kolsky is unable to conduct thorough interviews with his clients. In fact, I have been informed that most of his interviews are done in public settings, where a lack of privacy does not allow for confidential attorney-client communications and is not conducive to full exploration of a client's knowledge and input. Mr. Kolsky is unable to depose all of the witnesses that he must speak to in order to have a thorough working knowledge of the State's case against his client. I have also been informed that Mr. Kolsky is unable to file detailed and substantive pretrial motions for his clients. Due to time constraints and his workload, Mr. Kolsky is frequently consigned to the use of form motions that are not useful in setting out the nuances of a particular defense theory. Mr. Kolsky is unable to visit the crime scene, which is an essential and critical predicate to understanding the State's case and to developing a successful defense. Finally, Mr. Kolsky does not have sufficient time to develop mitigating evidence that would be useful in plea negotiations or at sentencing hearings. Given these conditions, Mr. Kolsky's workload renders him unable to provide competent representation to his clients in preparation of their cases for trial or disposition short of trial.

xvii) Based upon my review of the aforementioned data and my experience as a criminal defense attorney in this jurisdiction for more than 25 years, Mr. Kolsky's workload is excessive and has created a conflict of interest as defined in the Rule of Professional Conduct 4-1.7. In my

¹ In contrast, given the time and work required to provide effective representation, I have found it necessary to limit my workload to between 50 and 100 cases per year. That number includes a mix of traffic, misdemeanor, DUI, personal injury cases and felonies. That range is the most that I can accept in order to provide diligent and effective representation to my clients.

professional judgment, any attorney with that caseload, even one as experienced, skilled, committed, and hardworking as Mr. Kolsky, would necessarily violate Rule of Professional Conduct 4-1.1, requiring competence, Rule 4-1.3, requiring diligence, and Rule 4-1.4, requiring communication.

xviii) In my professional judgment, no assistant public defender (or any attorney) can competently represent as many as 164 felony cases at one time or in excess of 500 during the course of a year. This judgment is based upon my personal experience as an assistant public defender and my years as a private practitioner in this jurisdiction. This judgment is supported by several circumstances peculiar to this jurisdiction which limit an attorney's ability to provide competent representation to a large number of clients. They include: 1) waiting in court while the judge handles cases represented by privately-retained counsel (a problem exacerbated by the increasingly large number of cases pending before each judge); 2) participation in required continuing legal education, training sessions and workshops; 3) traveling to outlying correctional facilities several miles from the Office where very congested roads make trips to visit clients extremely time consuming; 4) waiting to be allowed to see clients in the numerous correctional facilities where budget cuts and inadequate facilities make client visits time consuming; and 5) waiting for scarce interpreters (budget cuts and a shortage of qualified interpreters frequently cause interviews and depositions to be time consuming).

xix) In my professional opinion, pursuant to Formal Opinion 06-411, issued by the ABA Standing Committee on Ethics and Professional Responsibility, Mr. Kolsky is ethically obligated to withdraw from sufficient cases until his remaining caseload is sufficiently manageable so as to allow him to furnish competent representation to all of his clients.



FREDRICK P. FREEDMAN

SWORN TO AND SUBSCRIBED BEFORE ME THIS 27 DAY OF JULY, 2009

BY FREDRICK P. FREEDMAN WHO IS PERSONALLY KNOWN TO ME.



NOTARY PUBLIC, STATE OF FLORIDA

