ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2000-IA-01477

STATE OF MISSISSIPPI, RONNIE MUSGROVE, in his official capacity as GOVERNOR, and MIKE MOORE, in his official capacity as ATTORNEY GENERAL — DEFENDANTS--APPELLANTS

V.

QUITMAN COUNTY, MISSISSIPPI — PLAINTIFF--APPELLEE

On Appeal from the Circuit Court of the Eleventh Judicial District
In and For Quitman County, Mississippi

BRIEF OF DEFENDANTS--APPELLANTS

MIKE MOORE, ATTORNEY GENERAL
STATE OF MISSISSIPPI

HAROLD E. PIZZETTA, III, BAR NO. 99867
SPECIAL ASSISTANT ATTORNEY GENERAL
ROGER GOOGE, BAR NO. 4903
SPECIAL ASSISTANT ATTORNEY GENERAL

COUNSEL FOR DEFENDANTS--APPELLANTS

Civil Litigation Division
Office of Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2000-IA-01477

STATE OF MISSISSIPPI, RONNIE MUSGROVE, in his official capacity as GOVERNOR, and MIKE MOORE, in his official capacity as ATTORNEY GENERAL — DEFENDANTS--APPELLANTS

V.

QUITMAN COUNTY, MISSISSIPPI — PLAINTIFF--APPELLEE

On Appeal from the Circuit Court of the Eleventh Judicial District
In and For Quitman County, Mississippi

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

Plaintiff--Appellee
- Quitman County Chancery Clerk T.H. ("Butch") Scipper
- Quitman County Supervisor Sheridan Boyd
- Quitman County Supervisor Bobby E. Turner
- Quitman County Supervisor Brooks Earnest
- Quitman County Supervisor Manuel Killebrew
- Quitman County Supervisor Charles Bridges
- Former Quitman County Public Defender Thomas Pearson
- Quitman County Public Defender Allan Shackelford

Counsel for Plaintiff--Appellee

Robert McDuff, Esq.
Dennis C. Sweet, III, Esq.
William H. Voth, Esq.
Alexander H. Southwell, Esq.
Katheleen A. Behan, Esq.
Donna K. Norman, Esq.
John Freedman, Esq.
Beth Kallet, Esq.

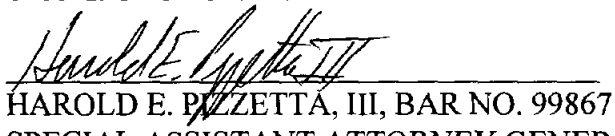
Defendants--Appellants

Governor Ronnie Musgrove
Attorney General Mike Moore

Counsel for Defendants--Appellants

Special Assistant Attorney General Harold E. Pizzetta, III
Special Assistant Attorney General Roger Googe

MIKE MOORE, ATTORNEY GENERAL
STATE OF MISSISSIPPI



HAROLD E. PIZZETTA, III, BAR NO. 99867
SPECIAL ASSISTANT ATTORNEY GENERAL
ROGER GOOGE, BAR NO. 4903
SPECIAL ASSISTANT ATTORNEY GENERAL

COUNSEL FOR DEFENDANTS--APPELLANTS

Civil Litigation Division
Office of Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

STATEMENT REGARDING ORAL ARGUMENT

In view of the language of the Mississippi Constitution and the clear precedent of this Court, the Attorney General respectfully submits that the lower court's judgment should be immediately reversed and the complaint dismissed based on the briefs without the need for oral argument. However, as the lower court's error relates to the authority of the State to direct counties, the political subdivisions of the State, to assist in providing representation for indigent criminal defendant and whether a board of supervisors is the proper party to raise issues of ineffective assistance of counsel to assail the constitutionality of a statute, these are the types of issues which would qualify for and benefit from oral argument. For the record, the Attorney General requests an oral argument in order to address any questions members of the Court might have.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF JURISDICTION

This is an interlocutory appeal from a Circuit Court's order denying the State Defendants' motion to dismiss this cause for failure to state a claim upon which relief can be granted. Appellate jurisdiction exists pursuant to a timely petition for interlocutory appeal pursuant to Mississippi Rule of Appellate Procedure 5 and this Court's October 10, 2000, Order granting such petition and staying the proceedings in the lower court.

STATEMENT OF RELATED CASES

Counsel for the Quitman County Board of Supervisors has filed three additional suits premised on the same material facts and asserting the same causes of actions. In Jefferson County v. State of Mississippi, Cause No. 99-0169, pending in the Circuit Court for Jefferson County, and Noxubee County v. State of Mississippi, Cause No. 99-0136, pending in the Circuit Court of Noxubee County, Plaintiff's counsel has asserted that approximately 400 indigent criminal defendants were provided ineffective assistance of counsel. The State Defendants filed similar motions to dismiss the Quitman County, Jefferson County, and Noxubee County matters. Neither the Jefferson or Noxubee County courts have ruled on the State Defendants' motion to dismiss.

Additionally, plaintiff's counsel has also filed suit on behalf of the Forrest County public defender against the State Defendants and the Forrest County Board of Supervisors. In J. B. Van Slyke v. State of Mississippi, Cause No. 00-0013-GN-D, pending in the Chancery Court for Forrest County, plaintiff's counsel has raised the similar issue of "systemic ineffective assistance of counsel."

The resolution of the contested legal issues in the case at bar will affect the resolution of the three additional related suits and the hundreds of instances of ineffective assistance of counsel raised therein.

STATEMENT OF ISSUES

I. Whether Article 14, Section 216 of the Mississippi Constitution and associated statutes directing counties, which are political subdivisions created for the convenience of the State, to assist the State in the provision of representation to indigent criminal defendants are "unconstitutional" unfunded mandates.

II. Whether a county board of supervisors may raise arguments regarding "systemic" ineffective assistance of counsel in a suit against the State in an effort to assail the constitutionality of all statutes which require counties to assist in the provision of representation to indigent criminal defendants when the complaint alleges that the actions of the board caused the alleged ineffective assistance of counsel.

STATEMENT OF THE CASE

Statement of Facts And Proceedings Below

This matter is an interlocutory appeal by the State of Mississippi, Governor Ronnie Musgrove, and Attorney General Mike Moore (collectively, the "State Defendants") from an order of the Honorable Elzy Smith denying the State Defendant's motion to dismiss the entirety of the Quitman County Board of Supervisors's (the "Quitman Board's") complaint.[1]

I. Mississippi Constitutional and Statutory Provisions Requiring Counties To Assist The State In Providing Representation For Indigent Criminal Defendants.

Article 14, Section 261 of the Mississippi Constitution directs that the "expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun." This Court, having previously reviewed the relationship between Section 261 and public defenders, has stated that Section 261 requires, and that the judiciary defers to, the "legislative implementation for the determination of what constitutes proper expenses, the amounts thereof or a method of making such determination, and to whom same should be paid." See Board of Sup'rs of George County v. Bailey, 236 So.2d 420, 422 (1970). Accordingly, the Legislature has

---

[1] The Circuit Court did grant the State Defendant's motion to dismiss as moot Count Two of the two count Quitman complaint. See August 30, 2000 Judgment on Motion to Dismiss (R.E. 5). Count One alleges that "[b]y imposing the obligation to fund indigent defense on counties, defendants have breached their duties under Article 3, Section 26 of the Mississippi Constitution to provide and fund adequate representation for indigent criminal defendants." See Complaint at ¶ 24 (R.E. 3). Count Two alleged that the State's failure to appropriate additional funds for the Mississippi Statewide Public Defender System Act of 1998 was a "breach of duty." See id. at ¶ 27. The State Defendants moved to dismiss Count Two as moot because the specific sections of the 1998 act relied on by the Quitman Board had never become effective and the entire 1998 act had been repealed.

implemented Section 261 by providing that the State and counties each bear certain costs related to prosecutors and public defenders.

Prior to the 2000 Legislative session, county boards of supervisors were required by statute to provide public defenders for indigent criminal defendants charged with capital and non-capital offenses. However, consistent with the explicit authority conferred by the Constitution[2], the Legislature has recently enacted several measures which fundamentally changed the manner in which public defenders are provided. Within the previous year the Legislature has passed and Governor Musgrove has signed into law legislation creating: (1) the Mississippi Office of Capital Defense Counsel; (2) the Mississippi Office of Capital Post-Conviction Counsel; and (3) the Mississippi Public Defender System Task Force. See generally, Miss. Code Ann. § 99-18-1, et seq. (Supp. 2000) (establishing Office of Capital Defense Counsel); § 99-39-101, et seq. (Supp. 2000) (establishing Office of Capital Post-Conviction Counsel); § 25-32-71, et seq. (Supp. 2000) (establishing Public Defender Task Force). The legislation, and the offices created thereby, were effective on July 1, 2000.

Mr. C. Jackson Williams was appointed effective September 2000 by the Mississippi Supreme Court as the director of Office of Capital Post-Conviction Counsel. The office is providing state-supported representation to indigent defendants under sentences of death in post-conviction proceedings. See Miss. Code Ann. § 99-39-105 (Supp. 2000). The Mississippi

---

[2] And the recommendation of this Court in Wilson v. State, 574 So.2d 1338, 134, encouraging the Legislature to review funding for public defenders in capital cases.

Office of Capital Defense Counsel will provide state-supported representation to indigent defendants under indictment for death penalty eligible offenses. See Miss. Code Ann. § 99-18-5 (Supp. 2000). For state fiscal year 2001, the Legislature appropriated approximately two million dollars for both offices. The Mississippi Public Defender Task Force, an eleven member committee formed by the Legislature to study the need for state-supported indigent defense counsel, has completed its statutory responsibilities and submitted a report to the Legislature. Proposals made by the task force and under consideration by the Legislature, includes the creation of a State office of indigent appeals.

As the Legislature has removed from counties the responsibility of providing public defenders in capital cases, counties now provide public defenders only for indigent defendants charged with non-capital offenses. See generally, Miss. Code Ann. § 25-32-1 (1999).[3] With respect to such non-capital offenses, county boards of supervisors have broad discretion to review the needs of their counties and fashion their public defender services in a manner that best addresses such needs. Supervisors may establish, on their own or with one or more other counties, an office of public defender. Miss. Code Ann. § 25-32-1 (1999). Supervisors have the discretion to employ any number of part-time or full-time public defenders and negotiate any type of service contract with such public defenders (such as "flat rate" or "per hour" contracts).

---

[3] The magnitude of this change is evidenced by the fact that Quitman complaint, filed before the creation of the State offices providing public defenders in capital cases, sited the financial burden on counties in capital cases as its primary example of the "unfair" financial burden placed on counties. See Quitman Complaint at ¶ 4.

Miss. Code Ann. § 25-32-5 (1999). However, supervisors are required by statute to compensate the county's public defenders at a rate at least equal to that which the supervisors compensate the county's prosecuting attorney. Miss. Code Ann. § 25-32-5 (1999). Supervisors must also provide the county's public defenders with resources at least equal to the resources of the county's prosecuting attorney. Miss. Code Ann. § 25-32-7 (1999).

Finally, supervisors are authorized to perform any additional tasks "necessary for the efficient operation of [their public defenders] to the end that adequate legal defense for indigent persons" is provided. See Miss. Code Ann. § 25-32-1 (1999).

II. Specific Actions Taken By The Quitman Board Regarding Public Defenders.

The Quitman Board has taken the following discretionary and official actions to provide public defenders for Quitman County's indigent criminal defendants.

A. Plaintiff Quitman Board Determined That Two Part-Time County Public Defenders Were Sufficient To Serve The Needs Of Quitman's Indigent Criminal Defendants.

In 1990, the Quitman Board passed a resolution by unanimous vote stating that the Board would nominate and compensate two part-time attorneys to serve as public defenders for all indigent defendants in Quitman County. See August 6, 1990 Legal Representation For Indigent Defendants Resolution (the "Public Defender Resolution") at ¶¶ 1, 5, 6 (R.E. 7; R. 1629-30). The resolution contains the proviso that the board would compensate additional public defenders if such defenders were named by Circuit Judge Elzy Smith. See id. at ¶ 7. Neither the Quitman

Board nor Judge Smith have named a third attorney to serve as a part-time or full-time public defender for Quitman County.

B. Plaintiff Quitman Board Determined The Type Of Contract And Amount Of Compensation To Be Provided The Quitman County Public Defenders.

The Quitman Board unanimously determined that the most appropriate method by which to compensate the two part-time Quitman County public defenders was, and continues to be, pursuant to a "flat-rate" contract providing a monthly salary to each defender regardless of the number or complexity of cases handled. See id. ¶ 6. Plaintiff Quitman Board has also decided that each of the two part-time public defenders should be paid approximately $1,350 per month. See Deposition of Allan Shackelford at 14 (R.E. 8l; R. 1551); Deposition of Thomas Pearson at 74 (R.E. 9; R. 1720). During 1999, Mr. Shackelford was the designated public defender in fourteen (14) cases in Quitman County. See Exhibit 3 to Shackelford Deposition (R.E. 8; R. 1634). During 1999, Mr. Pearson was the designated public defender for nineteen (19) cases in Quitman County. See Exhibit 3 to Pearson Deposition (R.E. 9; R. 1778).

C. Plaintiff Quitman Board Unanimously Selected Thomas Pearson and Allan Shackelford To Serve As Quitman County Public Defenders.

In the 1990 Public Defender Resolution, Plaintiff Quitman Board unanimously found that Thomas Pearson and Allan Shackelford were qualified to serve as the Quitman County public defenders and recommended their appointment to Circuit Judge Elzy Smith. See Public Defender Resolution at ¶ 6 (R.E. 7). Messrs. Shackelford and Pearson were so appointed by Judge Smith and Mr. Shackelford continued at all times relevant to this matter to serve at the will

and pleasure of the Quitman Board. Mr. Pearson was terminated as a Quitman County public defender during the Summer of 2000. See Pearson Deposition at 86-88 (R.E. 9; R. 1732-34). Mr. Pearson was not terminated by the Plaintiff Quitman Board. Instead, Mr. Pearson was terminated for undisclosed reasons by Circuit Judge Elzy Smith. Id.

D. Plaintiff Quitman Board's Allegations In The Case At Bar.

The Quitman Board has initiated this matter against the State Defendants on behalf of the Board and the county taxpayers.[4] See Complaint at ¶ 6 (R.E. 6). Importantly, the Quitman Board has not filed suit on behalf of indigent defendants. Id.

To further evidence the financial nature of the Quitman Board's action, the Board has not filed suit on behalf of the Quitman County public defenders. See id. Indeed, both Quitman Count public defenders have testified that they did not provide ineffective assistance of counsel or otherwise violate the constitutional rights of their indigent clients. See Shackelford Deposition at 81, 85-88 (R.E. 8; R. 1617, 1621-24); Pearson Deposition at 96-97 (R.E. 9; R. 1742-43). Upon learning of the Quitman Board's allegation that Mr. Shackelford provided ineffective assistance of counsel to every indigent criminal defendant he represented in the previous five years, Mr. Shackelford has threatened to sue the Quitman Board for defamation of character. See Shackelford Deposition at 85-88 (R.E. 8; R. 1621-24).

---

[4] As set forth in detail in the State Defendants' September 7, 2000 petition for interlocutory appeal, plaintiff's counsel has actually filed three identical suits in separate circuit courts containing the same legal and factual allegations and seeking the same state-wide relief. Plaintiff's counsel has resisted all efforts to coordinate either discovery or resolution of the redundant cases.

Couched in the general assertion that by virtue of directing counties to partially fund public defenders the State Defendants have breached their duties under "Article 3, Section 26 of the Mississippi Constitution to provide and fund adequate representation for indigent criminal defendants," the Quitman Board has made the following legal and factual allegations. See Complaint at ¶ 24 (R.E. 3).

First, the Quitman Board asserts that Article 14, Section 261 of the Constitution and related statutes that require counties to assist the State in providing public defenders in non-capital cases are "unconstitutional" because such directives are "arbitrary unfunded mandates" which impose "costs" and "tax burdens" on Quitman County. See Complaint at ¶¶ 4, 22(a), 22(b) (R.E. 3). Moreover, the Quitman Board contends that its unanimous decision to hire only two, part-time public defenders has resulted in "pretrial delays" which require "Quitman County to spend its own funds to hold defendants in county custody." See Complaint at ¶22(e) (asserting "lack of defense counsel" creates delays and custodial expenses) (R.E. 3); Public Defender Resolution at ¶ 6 (recommending only two, part-time public defenders) (R.E. 7).

Second, the Quitman Board asserts that the numerous appellate challenges to the adequacy of counsel and "subsequent retrials undermines confidence in the administration of justice and results in an unduly wasteful, inefficient and expensive justice system." See Complaint at ¶ 22(d) (R.E. 3). However, plaintiff's counsel has been unable to identify a single Quitman County indigent criminal defendant who has had their conviction overturned on the grounds of ineffective assistance of counsel.

Third, the Quitman Board contends that the present system of county public defenders is "unconstitutional" as it has resulted in each indigent criminal defendant in Quitman County in the previous five years receiving "ineffective assistance of counsel." See Complaint at ¶ 22(c) (R.E. 3); Plaintiff's Supplemental Response to Interrogatory No. 3 and exhibit thereto (identifying approximately 215 Quitman County indigent defendants alleged to have received ineffective assistance of counsel) (R.E. 10; R. 1198-99, 1202-12).

Specifically, the Quitman Board has alleged that the following actions undertaken by the Board have created such "systemic" ineffective assistance of counsel:

- The Quitman Board asserts that its own "underfunding" of its public defenders has resulted in "systemic ineffective assistance of counsel." See Complaint at ¶ 22(c) (stating "chronic underfunding" has created ineffective assistance) (R.E. 3); Public Defender Resolution at ¶ 6 (establishing compensation of public defenders) (R.E. 7).

- The Quitman Board asserts that its own decision to use "part-time contract public defenders who work for a flat fee constitutes presumptive ineffective assistance of counsel." See Plaintiff's Response to Interrogatory No. 13 at 13-14 (emphasis in original) (R.E. 11; R. 1792-93); Complaint at ¶ 22(c) (R.E. 3); Public Defender Resolution at ¶ 6 (unanimously hiring part-time contract public defenders on a "flat fee") (R.E. 7).

- The Quitman Board asserts that the public defenders it recommended (Messrs. Shackelford and Pearson) are incompetent and provided ineffective assistance of counsel to every indigent defendant in the previous five years in that the defenders failed to, among other actions, promptly consult with clients, keep clients reasonably informed, file motions to dismiss, file timely pre-trial motions, adequately prepare for examination of witnesses, call critical witnesses, suppress evidence, and file "meritorious" speedy trial motions. See Plaintiff's Response to Interrogatory No. 13 at 11-13 (R.E. 11; R. 1790-92); Public Defender

Resolution at ¶ 6 (unanimously recommending Messrs. Shackelford and Pearson as public defenders) (R.E. 7).

Thus, according to the legal and factual allegations maintained in this matter, the decisions of the Plaintiff Quitman Board has resulted in "systemic ineffective assistance of counsel" and, therefore, Article 14, Section 261 of the Constitution and related statutes that direct counties to assist the State in providing representation for indigent criminal defendants is "unconstitutional."

III. Relevant Proceedings Before Circuit Judge Elzy Smith.

In the proceedings before Circuit Court, the State Defendants filed motions seeking the recusal of Judge Smith and the dismissal of the complaint in its entirety. The State Defendants sought recusal on the basis of the "appearance of impropriety" created by Judge Smith's, a member of the Public Defender Commission, presiding as the finder of fact in this matter. The Quitman Board's allegations are squarely premised upon (and quote extensively from) the Implementation Report of the Public Defender Commission. The report was drafted in part by commissioners Judge Smith and Butch Scipper. Mr. Scipper, the Chancery Clerk for Quitman County, is the de facto plaintiff in this matter, as evidenced by Mr. Scipper's verification of plaintiff's interrogatory responses. In sum, the State Defendants sought the recusal of Judge Smith, for among other reasons, to avoid the appearance that the present litigation is a suit brought by a public defender commissioner, to be heard by a public defender commissioner, premised on the recommendations of the commission and seeking to accomplish through judicial

order that which the commission failed to successfully lobby the Legislature to undertake. Judge Smith denied the State Defendants' motions for recusal. This Court denied the State Defendants' petition for interlocutory appeal regarding the motions for recusal.

The State Defendants' sought dismissal of the complaint in its entirety (consisting of two counts) for failure to state a claim upon which relief can be granted. See State Defendants' Motion to Dismiss (R.E. 4). Judge Smith denied the State Defendants' motion with respect to Count One.[5] See Judgement on Motion to Dismiss (R.E. 5). The Circuit Court did grant the State Defendant's motion to dismiss as moot Count Two of the Quitman complaint. See id. Count Two alleged that the State's failure to appropriate additional funds for the Mississippi Statewide Public Defender System Act of 1998 was a "breach of duty." See Complaint at ¶ 27 (R.E. 3). The State Defendants moved to dismiss Count Two as moot because the specific sections of the 1998 act relied on by Quitman County had never become effective and the entire 1998 act had been repealed. See Motion to Dismiss (R.E. 4).

The State Defendants' petitioned, and this Court granted permission, for an interlocutory review of the lower court's denial of the motion to dismiss with respect to Count One. See Interlocutory Order (R.E. 6)

---

[5] Count I alleges that the State Defendants have "breached their duties under Article 3, Section 26 of the Mississippi Constitution to provide and fund adequate representation for indigent defendants." Complaint at ¶ 24 (R.E. 3).

SUMMARY OF ARGUMENT

The Quitman Board's sweeping constitutional challenge to any and all constitutional or statutory requirements that counties assist the State in the provision of representation for indigent defendants is properly subject to dismissal for failure to state a claim upon which relief can be granted. It is clear that even should the facts of the complaint be proven true, the Quitman Board's legal theories do not overcome the heavy presumption of constitutionality afforded statutes as the board's inventive theories are contrary to the language of the Mississippi Constitution and the precedents of this Court.

The Quitman Board's claim that "[b]y imposing the obligation to fund indigent defense [in non-capital cases] on counties, defendants have breached their duties under Article 3, Section 26 of the Mississippi Constitution" is factually and legally unsupportable. See Complaint at ¶ 24 (R.E. 3). Simply expressed, requiring counties to assist in the provision of representation for indigent defendants does not violate any constitutional right of the counties in Section 26 as Section 26 contains no rights for counties.[6] Moreover, the Quitman Board cannot attempt to assail the constitutionality of public defender statutes by arguing that the Board's own implementation of the statutes has caused widespread ineffective assistance of counsel. Certainly the Quitman Board cannot create an alleged constitutional crisis and then seek to declare the system unconstitutional in a suit against the State Defendants.

---

[6] Article 3, Section 26 provides in relevant part, "the accused shall have a right to be heard by himself or counsel, or both."

As set forth more fully below, the Quitman complaint is subject to dismissal as it fails to articulate facts or legal claims that would overcome the "very heavy burden" of rebutting the "strong presumption" of constitutionality afforded statutes. See State v. Jones, 726 So.2d 572, 574 (Miss. 1998); Cities of Oxford, Carthage, Starkville, and Tupelo v. Northeast Elec. Power Ass'n, 704 So.2d 59, 65 (Miss. 1997).

Specifically, the authority of the Legislature to divide the burden of indigent representation between itself and counties ("subdivisions" and "agencies" of the State) is consistent with the express and implied authority conveyed the Legislature pursuant to the Constitution. Article 14, Section 261 and the interpretative decisions of this Court clearly authorize the Legislature to determine which expenses associated with prosecution are to be "borne by the county." See Miss. Const. Article 14, Section 261; Board of Sup'rs of George County v. Bailey, 236 So.2d 420, 422 (Miss. 1970) (addressing Section 261 and public defenders). Moreover, the State has the implicit "creator's authority" to direct counties, which are political subdivisions created for the administrative convenience of the State, to expend funds for public services. See State v. Hinds County Bd. of Sup'rs, 635 So.2d 839, 843 (Miss. 1994) ("anything that belong[s] to a county also belong[s] to the state and . . . the state simply [has] creator's power to control the county"). Thus, counties have no cause of action against the State for "unfunded mandates" and the decision as to how to allocate the burden of public defender funding is with the sound discretion of the Legislature. Young v. State, 255 So.2d 318, 321-22 (Miss. 1971); See Complaint at ¶ 22(a), 22(b) (R.E. 3).

Additionally, it is clear that even if widespread ineffective assistance of counsel exists in Quitman County, the Quitman Board is not the proper party to raise the argument in an attempt to undermine the constitutionality of the public defender statutes. There is simply no cause of action between the Quitman Board and the State Defendants premised on ineffective assistance of counsel. Such is especially the case when the complaint evidences that it is the implementation of the challenged statutes by the Quitman Board which has caused the alleged constitutional violations. The Quitman Board is not at liberty to underfund, improperly contract with, and hire "incompetent" public defenders[7] and then sue the State Defendants to declare the public defender statutes unworkable and unconstitutional. Moreover, the Quitman Board, suing on behalf of Quitman taxpayers, does not have the standing to raise en masse arguments concerning ineffective assistance of counsel on behalf of hundreds of previously tried or unnamed future criminal defendants.

Finally, the Quitman Board's attempt to strike all public defender statutes relating to counties on the basis of a generalized assertion of ineffective assistance is contrary to the decisions of this Court in Wilson v. State, 574 So.2d 1338 (Miss. 1990) and Pruett v. State, 574 So.2d 1359 (Miss. 1990). "[I]neffective assistance of counsel is a matter that is better decided on a case by case basis. . . . and just because the [public defender statute] could have such a result is no reason to declare it unconstitutional." 574 So.2d at 1341.

---

[7] The State Defendants and the Quitman County public defenders both vigorously deny the Quitman Board's allegations in this respect.

ARGUMENT

I. The Complaint Is Properly Subject To Dismissal As The Quitman Board's Allegations Are Insufficient To Overcome The Applicable Presumption Of Constitutionality Or Otherwise Entitle The Quitman Board To Relief.

The Quitman Board's complaint is properly subject to dismissal for failure to state a claim upon which relief can be granted as the facts alleged in the complaint, even if proven true, would not overcome the presumption of constitutional validity afforded public defender statutes or in any other manner entitle plaintiff to the relief sought. See Robinson v. Stewart, 655 So.2d 866, 867 (Miss. 1995); see also Davidson v. State of Georgia, 622 F.2d 895, 896 (5th Cir. 1980) (cited in Tucker v. Hinds County, 558 So.2d 869, 872 (Miss. 1990)). While for present purposes plaintiff's factual allegations are taken as true, courts evaluating a motion to dismiss for failure to state a claim are not bound to accept the "legal conclusions or allegations of the legal effect of events" as asserted in the complaint. Tucker, 558 So.2d at 872. It is indeed the Quitman Board's sweeping legal conclusions which find no legal support in the language of the Constitution or the decisions of this Court.

It is well settled that a court may strike down an act of the Legislature "only where it appears beyond all reasonable doubt" that the statute violates the clear language of the constitution. See James v. State, 731 So.2d 1135, 1136 (Miss. 1999); Pathfinder Coach Division of Superior Coach Corp. v. Cottrell, 62 So.2d 383, 385 (Miss. 1953). A party challenging the statute must be able to "overcome the strong presumption" that the act is constitutional. Cities of Oxford, Carthage, Starkville and Tupelo v. Northeast Elec. Power Ass'n, 704 So.2d 59, 65

(Miss. 1997); see also James, 731 So.2d at 1136 (statutes are "clothed with a heavy presumption of constitutional validity"); State v. Jones, 726 So.2d 572, 574 (Miss. 1998) (plaintiffs have a "very heavy burden in contesting the constitutionality of a statute") (internal quotation omitted).

As "[a]ll doubts must be resolved in favor of the validity of a statute," a challenge will fail if the statute "does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity." Northeast Elec. Power Ass'n, 704 So.2d at 65. Pursuant to the pronouncements of this Court:

> In determining whether an act of the Legislature violates the Constitution, the courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution. Nor are the courts at liberty to declare an Act (of the Legislature) void, because in their opinion it is opposed to a spirit supposed to prevail the Constitution, but not the expressed words.

Cottrell, 62 So.2d at 385. "It is not this Court's duty to look for factual possibilities or scenarios that would create conflict with the statute, thereby rendering the statute unconstitutional. Rather, this Court's duty is to interpret the Act and envision facts and scenarios in which the statute could be held constitutional." Jones, 726 So.2d at 573 (internal citation omitted); see also Wilson v. State, 574 So.2d 1338, 1340 (Miss. 1990) (applying same rule of constitutional presumption to statutes regarding public defender compensation).

Thus, and as more fully set forth below, the Quitman Board's conclusory allegation that the State Defendants are constitutionally prohibited from requiring counties to assist in providing public defenders attempts to mask through vagueness the absence of factual support in the

complaint and the existence contrary legal authority which justifies dismissal of the complaint. Given the constitutional authority for the Legislature's directives to its political subdivision, the facts alleged in the complaint, even if proven true, would not overcome the presumption of constitutional validity afforded public defender statutes or in any other manner entitle plaintiff to the relief sought. See Robinson, 655 So.2d at 867; see also Davidson, 622 F.2d at 896 (cited in Tucker, 558 So.2d at 872).

II. Counties, As Mere Subdivisions And Agencies Of The State, Have No Cause Of Action Against The State For "Unfunded Mandates."

A. The Legislature Has The Explicit Constitutional Authority To Direct Counties To Fund Any "Expense Of Prosecution," Including Requiring Counties To Assist In Providing The Public Defenders Necessary For Such Prosecution.

Pursuant to the Mississippi Constitution, the State has the express authority to direct counties to expend funds to assist in the provision of representation for indigent criminal defendants. The Constitution's explicit pronouncement that "the expenses of criminal prosecution shall be borne by the county" provides clear constitutional authority for the Legislature to require counties to provide county public defenders in non-capital cases. See Miss. Const. Article 14, Section 261. This Court has previously reviewed whether public defenders are an "expense of prosecution" and has deferred to the Legislature's determination thereof. Board of Sup'rs of George County v. Bailey, 236 So.2d 420, 422 (Miss. 1970) (holding that the Legislature should determine whether public defenders would be paid by counties). "There is nothing in [Section 261] to indicate what shall constitute an expense in criminal

prosecutions. . . . . It requires legislative implementation for the determination of what constitutes proper expenses, the amounts thereof or a method of making such determination, and to whom same should be paid." Id. Pursuant to the discretion conveyed by Article 14, Section 261, the Legislature has in fact made a "determination" that the compensation of public defenders in non-capital cases is proper expense to be borne by the counties. See supra pps. 4-7. Importantly, the Legislature has also determined that public defenders in capital cases are to be provided by the State. See id.

Ignoring Article 14, Section 261, the Quitman complaint asserts that the language of Article 3, Section 26 mandates the State, and not the counties, to fund all public defenders. See Complaint at ¶ 24 (R.E. 3). As is evident from the plain language of Section 26, there is simply no such requirement. Even as Section 26 has been interpreted to include the personal guarantee of effective assistance of counsel, it has never been read to provide any rights to counties. Moreover, Section 26 has never been read to restrict the manner in which the State may compensate public defenders. As this Court stated in Wilson v. State, "the issue of compensation for an attorney appointed [pursuant to Section 26] is a legislative matter rather than a judicial matter." 574 So.2d 1338, 1340 (Miss. 1990); cf. Attorney General v. Interest of B.C.M., 744 So.2d 299, 303 (Miss. 1999) (holding that Constitution mandates that the State care for the insane, but "places no restrictions on how the Legislature may allot that duty of care").

The Quitman Board's attempt to engraft into Article 3, Section 26 an explicit constitutional directive prohibiting the State from requiring that its own political subdivisions

assist in providing representation for indigent criminal defendants is unsupported by a plain reading of Section 26 and in direct conflict with the explicit authority conveyed in Article 14, Section 261. As the Quitman complaint is unable to allege a "palpable conflict" between the actions of the Legislature and the Constitution, the Quitman Board's attempt to declare "unconstitutional" any constitutional or statutory requirement that counties assist in providing representation for indigent criminal defendants is properly subject to dismissal for failure to state a claim. See Interest of B.C.M., 744 So.2d at 303; Northeast Mississippi Elec. Power Ass'n, 704 So.2d at 65 (statute unconstitutional only if "clearly and apparently [in] conflict with organic law after first resolving all doubts in favor of validity"); Cottrell, 62 So.2d at 385 (statute not unconstitutional if "it is opposed to a spirit supposed to pervade the Constitution, but not the expressed words").

B. The Legislature Has The Implicit "Creator's Authority" To Direct Counties, Political Subdivisions Created For The Administrative Convenience Of The State, To Expend Funds On Services, Including County Public Defenders.

As "anything that belong[s] to the county also belong[s] to the State," the Quitman Board has no legal authority to support its assertion that the State is constitutionally prohibited from directing counties to assist in the provision of representation for indigent criminal defendants. See State v. Hinds County Bd. Of Sup'rs, 635 So.2d 839, 843 (Miss. 1994). Without such a legal basis, the complaint is rightfully subject to dismissal for failure to state a claim. See Davidson, 622 F.2d at 896 (dismissal appropriate when alleged facts fail to entitle plaintiff to relief).

It has long been established that "a county . . . is a subdivision of the state, created for administration and other public purposes, and owes its creation to the state, it is a rule that it is subject at all times to legislative control and change." State v. Board of Sup'rs of Grenada County, 105 So. 541, 546 (Miss. 1925) (citation omitted) (cited approvingly in Hinds County, 635 So.2d at 843 (1994)). Indeed, counties were in fact "created by the Legislature for political and civil purposes as agencies of the state government." Grenada County, 105 So. at 546 (emphasis supplied). As subdivisions and agencies of the State, "anything that belong[s] to a county also belong[s] to the state and . . . the state simply [has] creator's power to control the county." Hinds County, 635 So.2d at 843 (citing Leflore County v. Big Sand Drainage District, 383 So.2d 501 (Miss. 1980); Jackson County v. Neville, 95 So.2d. 626, 636 (Miss. 1932); Grenada County, 105 So. at 546).

Moreover, it is undisputed that the State's "creator's power" extends to the control of funds in the possession of its subdivisions and agencies. In reviewing constitutional challenges to the Legislature's financial directives to counties, this Court has repeatedly found the Legislature to have the authority to direct that a county expend funds in a certain manner or on a certain program. Simply expressed and fatal to the Quitman complaint, "[t]he revenues of a county are subject to the control of the Legislature, and when the Legislature directs their application to a particular purpose or to the payment of the claims of particular parties, the obligation to so pay is thereby imposed on the county." Jackson County, 95 So. at 628. In Jackson County, the board challenged a statute which provided that county records may be

audited by a state agency and that the audit would be paid for from county funds. 95 So. at 628 (cited approvingly in Hinds County, 635 So.2d at 843). The court, dismissing the county's challenge, held that:

> The revenues of a county are not the property of the county in the sense in which the revenue of a private person or corporation is regarded. The revenues of a county are subject to the control of the Legislature, and when the Legislature directs their application to a particular purpose or to the payment of the claims of particular parties, the obligation to so pay is thereby imposed on the county.

Id. at 629.

In 1994, the issue of the Legislature's authority to require counties to expend funds on specific services was revisited and reiterated. In Hinds County, supervisors asserted that the State should bear the cost of housing State prisoners in county facilities. 635 So.2d at 841 ("Hinds County argued that this inadequate [$10.00 per day] reimbursement resulted in the county being forced to pay for a majority of the costs of housing state inmates.") The claims of the Hinds County Supervisors are identical to those of the Quitman Supervisors. See Complaint at ¶ 22(e) ("pretrial delays have caused Quitman County to spend its own funds to hold defendants in county custody, even though those costs properly should be borne by the State") (R.E. 7). The Hinds County court, relying on the Jackson County and Grenada County decisions referenced above, restated that "the revenues of a county are subject to the control of the Legislature." 635 So.2d at 843 (quoting Jackson County, 95 So.2d at 629). The court found that the supervisors' complaint was properly subject to a motion to dismiss because statutes which

require counties to fund specific services violate "no constitutional right" of the counties.[8] See 635 So.2d at 843; cf. City of Jackson v. State, 676 So.2d 257, 259-260 (Miss. 1996) (affirming 12(b)(6) dismissal as city lacked standing to challenge State statute regarding State property).

As the Legislature has the implicit constitutional authority to direct counties, as subdivisions and agencies of the State, to assist in providing representation for indigent criminal defendants, the Quitman complaint is unable to allege a "palpable conflict" between the actions of the Legislature and the Constitution. The Quitman Board's attempt to declare "unconstitutional" any constitutional or statutory requirement that counties assist in providing representation for indigent criminal defendants is properly subject to dismissal for failure to state a claim. See Interest of B.C.M., 744 So.2d at 303; Northeast Mississippi Elec. Power Ass'n, 704 So.2d at 65; Cottrell, 62 So.2d at 385.

---

[8] The Quitman Board reargues a second legal claim rejected by the Hinds County Court. The Quitman complaint asserts that placing the cost of indigent defense on counties results in "unequal tax burdens" between counties. See Complaint at ¶ 22(b) (R.E. 3). Although the Quitman Board fails to declare which provision of the Constitution is violated by their allegation, the Hinds County decision found that "unequal" financial burdens between counties does not violate Section 112 of the Mississippi Constitution. See 635 So.2d at 845.

C. As Between The State And Its Subdivisions And Agencies, Decisions As To The Financing Of Public Defenders Is A Legislative Matter Which Counties Have No Authority To Challenge In Court.

Stripped of the fanfaranade of rhetoric regarding a "fair and efficient indigent defense system," the Quitman Board has initiated a challenge devoid of legal or factual support. As is evident from the complaint, the Board, suing only on behalf of its taxpayers and not on behalf of indigent defendants or public defenders, decries the "indigent defense costs" and "tax burdens" placed on Quitman County for public defenders. See Complaint at ¶¶ 22(a), 22(b) (R.E. 7). As the State provides public defenders in all capital cases, the Legislature has directed counties to assist in the provision of representation for indigent criminal defendants by providing public defenders only in non-capital cases.[9] There exists no constitutional restriction on the ability of the State to allocate the costs of indigent defense between the State and its subdivisions and agencies.

The decisions of this Court have consistently recognized that determinations regarding the best manner (or the "efficient" manner) to fund public defenders is a public policy decision within the purview of the Legislature.

> One of the fundamental constitutional principles is the division of governmental powers. The Mississippi Constitution specifically enjoins each department from exercising the powers vested in either of the others. The authority to empower payment of attorneys who are required by court order to defend indigents . . . is a legislative matter or a judicial matter; it cannot be both. . . . Sections 1 and 2 of our Constitution are clear on this point. The appropriation of public funds is

[9] To provide context for the Quitman Board's arguments, Quitman County spent $32,400 in state fiscal year 1999 on counsel expenses for public defenders.

> traditionally within the exclusive province of the legislature. While the judiciary possesses the inherent power to appoint counsel to defend indigents, it does not follow that courts can order the expenditure of public funds to pay their fees.
>
> The legislature is the appropriate branch of the government to deal with this matter because it can conduct hearings to determine the extent of the need, the amount of funds required, and the numerous related factors involved. While the legislature can view the full spectrum of the problem, the courts which do not have the means or facilities to adequately study the problem or provide the remedy, can only deal with the problem on a case by case basis.

Young v. State, 255 So.2d 318, 321-322 (Miss. 1971) (quoting Board of Sup'rs of George County v. Bailey, 236 So.2d 420, 423 (Miss. 1970)).

In a holding which reiterated the Legislative role discussed in Young, the Wilson decision further supports dismissal of the Quitman complaint. In contrast to the allegations of the Quitman Board, in Wilson an actual indigent criminal defendant alleged that the statutory maximum for public defender compensation was unconstitutional as it denied him and other defendants the "effective assistance of counsel." 574 So.2d 1338, 1339-40 (Miss. 1990). With respect to the Article 3, Section 26 "effective assistance of counsel" claims raised by both the Quitman Board and the Wilson indigent defendant, the challenge raised by the Wilson defendant was much more serious and yet this Court reiterated that the Legislature is the proper branch to determine the method for compensating public defenders. The Wilson defendant challenged the amount of compensation to be provided to his public defenders. 574 So.2d at 1340. In contrast, the Quitman Board's complaint is properly read to challenge the source of the compensation

(county or State) and not the amount thereof.[10] See Complaint at ¶ 2 (R.E. 3). In addressing the challenge to the amount of public defender compensation, the Wilson Court stated:

> While we do have the authority to override the Legislature in cases of absolute necessity, we have previously held that the issue of compensation for an attorney appointed to defend an accused in a criminal case is a legislative matter rather than a judicial matter.
>
> Although we recognize our inherent authority to provide counsel for indigents, we refused to interfere with the Legislature's right to expend public funds. The Legislature is better equipped to handle this matter. . . .

574 So.2d at 1340. It follows directly from this Court's discussion of the Legislature's "right to expend public funds" that if the Legislature has the right under Article 3, Section 26 to determine the amount of public defender compensation, then the Legislature also has the right to determine the source of such funding. As such the Quitman Board's allegation that Article 3, Section 26 explicitly prohibits the Legislature from requiring counties (subdivisions and agencies of the State) to assist in indigent criminal representation is legally unsupportable and properly subject to dismissal.

---

[10] In the alternative, a challenge by the Quitman Board to the amount of compensation provided public defenders fares no better. Even though such a challenge by the Board is improper given, among other items, the Board's role in setting such compensation, Section III of this brief, the Wilson decision clearly states that "we have previously held that the issue of compensation [for public defenders] is a legislative matter rather than a judicial matter." 574 So.2d at 1340.

III. The Quitman Board Is Not The Proper Party To Raise "Ineffective Assistance Of Counsel" To Assail The Constitutionality Of The Public Defender System.

For the purposes of a complete record, the State Defendants and the Quitman County public defenders vigorously deny that "systemic ineffective assistance of counsel" exists in Quitman County. See Shackelford Deposition at 81, 85-88 (R.E. 8; R. 1621-24); Pearson Deposition at 96-97 (R.E. 9; R. 1742-43). However, even if such ineffective assistance of counsel existed, the Quitman Board is procedurally and substantively prohibited from raising such an argument against the State Defendants in an effort to avoid its responsibility to assist in providing representation for indigent defendants. When the Quitman Board's factual and legal allegations are examined in detail, it is evident that there is no cause of action between the Quitman Board and State Defendants regarding ineffective assistance of counsel and that the Quitman Board is not the proper party to raise issues of Quitman County public defender funding or competence.

A. The Quitman Board Has No Cause Of Action Against The State For "Failure To Provide Adequate Representation" When The Complaint Alleges That The Actions Of The Board Caused The Ineffective Assistance Of Counsel.

Even the most inventive interpretations of an individual's right to counsel contained in Article 3, Section 26 of the Constitution will not support a suit by the Quitman Board against the State for an alleged failure to "provide adequate representation for indigent criminal defendants"

when the Quitman complaint acknowledges that it was the discretionary and unanimous the decisions of the Quitman Board which have caused the alleged constitutional violations.

First, the complaint asserts that "chronic underfunding of indigent defense" in Quitman County has resulted in wide-spread systemic ineffective assistance of counsel. See Complaint at ¶ 22(c) (R.E. 3). However, was is Plaintiff Quitman Board which, through a unanimous vote set the salary of the Quitman County public defenders and decided that no other resources need be provided to the defenders. See Public Defender Resolution at ¶ 6 (R.E. 7).

Second, the Quitman Board asserts that the use of "part-time contract public defenders who work for a flat fee constitutes presumptive ineffective assistance of counsel." See Plaintiff's Response to Interrogatory No. 13 at 13-14 (emphasis in original) (R.E. 11; R. 1792-93). However, it was Plaintiff Quitman Board that decided to hire only part-time public defenders. See Public Defender Resolution at ¶ 6 (R.E. 7). Moreover, it was by unanimous vote of the Quitman Board that such defenders were hired on a "flat fee" contract basis. See id. There is no statutory or other directive that required the Quitman Board utilize a "flat fee" contract or hire part-time defenders.

Finally, the Quitman Board argues that the Quitman County public defenders, Messrs. Shackelford and Pearson, were so incompetent as to render ineffective assistance of counsel to each criminal defendant they represented because the defenders failed to, among other actions, promptly consult with clients, keep clients reasonably informed, file motions to dismiss, file timely pre-trial motions, adequately prepare for examination of witnesses, call critical witnesses,

suppress evidence, and file "meritorious" speedy trial motions. See Plaintiff's Response to Interrogatory No. 13 at 11-13 (emphasis in original) (R.E. 11; R. 1790-92). However, it was the Quitman Board, and not the State Defendants, which unanimously recommended that Messrs. Shackelford and Pearson serve as the Quitman County public defenders. Public Defender Resolution at ¶ 6 (R.E. 7). Mr. Shackelford continues to serve as a Quitman county public defender at the will and pleasure of the Board. The State Defendants had no role in the Quitman Board's decision regarding which attorneys should be hired as public defenders.

Taking the Quitman Board's allegations as true for the purposes of this motion, there is simply no legal theory which supports the Board's ability to allegedly underfund, improperly contract for, and hire incompetent public defenders and then point to such alleged "systemic" deficiencies as evidence that the State Defendant's are denying the constitutional rights of Quitman County taxpayers.

Taking the allegations of the Quitman Board as true, it is not the statute itself which has caused ineffective assistance of counsel. Instead, it is the Quitman Board's unanimous actions in implementing the statute which has allegedly caused the constitutional violations at hand. Thus, the complaint is properly subject to dismissal as there exists no legal theory whereby the Quitman Board can underfund its public defenders and then sue the State Defendants to have the public defender statutes declared unconstitutional.

B. The Quitman Board Lacks Standing To Assert The Individual Right To Counsel On Behalf Of 215 Previously Tried Indigent Defendants Or On Behalf Of Unnamed Future Indigent Criminal Defendants.

Plaintiff Quitman Board has initiated this suit only on behalf of members of the board and the taxpayers of Quitman County. See Complaint at ¶ 6 (R.E. 3). The theme of the complaint in this respect is clear-- the board believes that the Quitman taxpayers should not have to bear any cost or burden whatsoever relating to the provision of public defenders. See Complaint at ¶ 2 (R.E. 3). However, in addition to the financial arguments discussed infra in Section II of this brief, the Quitman Board seeks redress from the State Defendants for violations of the individual constitutional right to counsel embodied in the Sixth Amendment to the United State Constitution and Article 3, Section 26 of the Mississippi Constitution. See Complaint at ¶ 24 (R.E. 3). Given the individual nature of the right to counsel, the frequency in which the right is reviewed in appellate criminal proceedings, and the Board's self-acknowledged role in the alleged violations, the Quitman Board does not have standing to raise the right to counsel in general, on behalf of 215 previously tried indigent criminal defendants, or on behalf of unnamed future indigent defendants.

It is undisputed that the Board is not claiming to assert its constitutional right to counsel or a general right to counsel on behalf of taxpayers. The right to counsel is an individual constitutional right available exclusively to criminal defendants. Neither the Quitman Board nor the Quitman taxpayers have such a right as "[n]o court . . . has ever held that the Sixth Amendment protects the rights of anyone other than criminal defendants." Portman v. County of

Sanata Clara, 995 F.2d 898, 902 (9th Cir. 1993); accord Kinoy v. Mitchell, 851 F.2d 591, 594 (2d Cir. 1988) (holding right to counsel creates no rights for the attorney or anyone other than defendant).

Without the ability to assert the individual right to counsel directly, and having brought the suit only in the name of the Board members and taxpayers, the complaint does not even contain the barest of explanation as to whose individual right to counsel is being indirectly asserted. Moreover, it is clear that the Quitman Board does not have standing to raise en masse the individual constitutional rights of 215 previously tried indigent defendants or unnamed future indigent criminal defendants.

As a general proposition, courts have recognized that individual constitutional rights for criminal defendants are different than ordinary claims with regard to standing. The difference is so stark that a criminal defendant lacks the ability to assert the constitutional rights of a co-defendant even in situations in which the right would be beneficial to the asserting defendant. See United States v. Sims, 845 F.2d 1564, 1568 (8th Cir. 1988) (holding individuals cannot assert co-defendant's right to counsel); Kennedy v. Fenton, Civ No. 89-0241, 1990 WL 118055, *1 (Aug. 13, 1990 E.D. Pa.) (holding individual cannot assert co-worker's right to counsel); Kansas v. American Oil Co., 446 P.2d 754, 757 (Kan. 1968) (holding employer cannot assert employee's right to counsel); cf. Alderman v. United States, 394 U.S. 165, 174, 89 S.Ct. 961, 966 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."); Ware v. State, 410 So.2d 1330, 1331 (Miss. 1982)

(holding defendant may not assert Fourth Amendment rights of co-defendant). The Quitman Board is subtly seeking a sea change in the context of criminal litigation -- the ability of a third party to vicariously assert personal constitutional rights of criminal defendants.[11] The Quitman Board simply does not have standing to assert en masse the individual constitutional rights of 215 previously tried indigent defendants or unnamed future indigent criminal defendants.

Moreover, even under the lenient standing requirements afforded rights which are, unlike the issues at bar, not individual constitutional guarantees of criminal defendants, the Quitman Board still lacks standing to raise such issues on behalf of its taxpayers. The standing requirements of Mississippi courts do not this type of systemic constitutional challenge unless there is "no probability" of the statute being challenged by a person protected by the statute. See Van Slyke v. Bd. Of Trustees of State Institutions of Higher Learning, 613 So.2d 872, 875 (Miss. 1993) (quoting Board of Trustees of State Institutions of Higher Learning v. Van Slyke, 510 So.2d 490, 497 (Prather, J., dissenting)). Indeed, the complaint admits that issues of "ineffective assistance of counsel" are frequently reviewed on appeal. Complaint at ¶ 22(d) (R.E. 3); see also Wilson, 574 So.2d at 1340.[12] As there is every probability that the adequacy of public defender funding has been, and will continue to be, challenged in proper criminal proceedings, the

---

[11] Moreover, the Quitman Board seeks to assert the individual constitutional rights of criminal defendants in a separate civil setting even though many of the previously tried indigent criminal defendants have already asserted and lost such arguments in their criminal appeals.

[12] The Quitman Complaint even alleges that "ineffective assistance" is reviewed so frequently as to "undermine confidence in the administration of justice." See Complaint at ¶ 22(d) (R.E. 3).

Quitman Board lacks the standing to raise en masse the individual constitutional rights of 215 previously tried indigent defendants or unnamed future indigent criminal defendants.

Finally, and demonstrative of plaintiff's flawed complaint, the Quitman Board fails to fulfill a crucial element of even the "colorable interest" standing analysis. "Standing to sue is conferred upon one who has a colorable interest in the subject matter or who is adversely affected beyond other members of the general public." Zimmerman v. Three Rivers Planning and Development Dist., 747 So.2d 853, 859 (Miss.App. 1999). As the Quitman Board has initiated this suit on behalf of the Quitman County general public (the Quitman County taxpayers), the Quitman Board lacks a suitable "colorable interest" in the individual constitutional rights of criminal defendants from which to launch its en masse review.

C. The Quitman Board's Constitutional Challenge To The Public Defender Statutes By Means Of A Generalized Assertion Of Ineffective Assistance On Behalf Of Hundreds Of Previous Indigent Defendants Or Unnamed Future Indigent Defendants Is Contrary To The Clear Precedent Of This Court.

A challenge almost identical in scope and substance to the allegations of the Quitman Board has been reviewed and rejected by this Court in Wilson v. State, 574 So.2d 1338 (Miss. 1990) and Pruett v. State, 574 So.2d 1359 (Miss. 1990). The indigent criminal defendant in Wilson asserted that the statutory limitation on public defender compensation systematically deprived "indigent defendants" of their Article 3, Section 26 right to effective counsel. 574 So.2d at 1340. Indeed, the Quitman Board has made the same allegation. The complaint alleges that Miss. Code Ann. § 99-15-17 (along with other statutes) systematically deprives indigent

defendants of their Article 3, Section 26 right to effective counsel. See Complaint at Prayer for Relief (a)(iii) and ¶ 24 (R.E. 3). Both the Wilson indigent defendant and the Quitman Board argued for the complete removal of the statute on constitutional grounds.

In reviewing the Wilson indigent defendant's constitutional claims, this Court rejected the defendant's systemic challenge for reasons which now have greater weight in light of the even more sweeping generalizations in the Quitman complaint.

> When a statute can be interpreted either as constitutional or unconstitutional, we have long held that we will adopt the constitutional construction. If possible, we will construe it so as to enable it to withstand the constitutional attach and to carry out the purpose embedded in the statute. . . .
>
> The argument concerning the ineffective assistance of counsel is a matter that is better decided on a case by case basis. As one court has held, those rare cases where counsel has been ineffective may be handled and determined individually by the appellate courts and just because the limitation could have such a result is no reason to declare it unconstitutional.

547 So.2d at 1341 (internal quotations and citations omitted). The Wilson court's skepticism for striking down a single statute as unconstitutional on a generalized ineffective assistance of counsel argument is appropriate for, and the concerns magnified by, the Quitman Board's attempt to declare an entire type of public defender system -- any system in which counties assist in funding representation -- unconstitutional on the generalized argument of ineffective assistance of counsel.

Additionally, it is important to note that the Wilson court rejected the indigent defendant's systemic challenge even though the defendant had been represented by a public

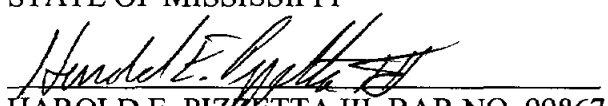
defender in a capital offense case. See 547 So.2d at 1339. As of July 1, 2000, all public defenders in capital cases are provided by the State and not the counties. Thus, there is exists no legal support for a departure from the requirements expressed in Wilson that ineffective assistance of counsel is resolved on a case by case basis and public defender statutes are not declared wholesale unconstitutional on the basis of over generalizations regarding Article 3, Section 26. See 547 So.2d at 1341.

CONCLUSION

In light the constitutional authority of the State to require its subdivisions to assist in providing public defenders, the precedents of this Court, the recent fundamental changes by the Legislature regarding public defenders in capital cases, the role of the Quitman Board in implementing the very statutes which it now challenges, and the Quitman Board's lack of standing to assail the entire public defender system, it is respectfully submitted that the judgment of the lower court should be reversed and the complaint of the Quitman County Board of Supervisors should be dismissed with all costs of appeal taxed to the Plaintiff-Appellee.

Respectfully submitted,

MIKE MOORE, ATTORNEY GENERAL
STATE OF MISSISSIPPI



HAROLD E. PIZZETTA III, BAR NO. 99867
SPECIAL ASSISTANT ATTORNEY GENERAL
ROGER GOOGE, BAR NO. 4903
SPECIAL ASSISTANT ATTORNEY GENERAL

COUNSEL FOR DEFENDANTS--APPELLANTS

Civil Litigation Division
Office of Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

This is to certify that I, Harold E. Pizzetta, III, a Special Assistant Attorney General for the State of Mississippi, have caused to be mailed this date, first-class postage prepaid, a true and correct copy of the foregoing brief of the Defendants--Appellants to the following:

Robert McDuff, Esq.
767 North Congress Street
Jackson, MS 39202

Dennis C. Sweet, III. Esq.
201 North President Street
P. O. Box 23307
Jackson, MS 39201

William H. Voth, Esq.
Alexander H. Southwell, Esq.
Arnold & Porter
399 Park Avenue
New York, NY 10022

Kathleen A. Behan, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004

Honorable Elzy J. Smith
Circuit Court of Quitman County
115 First Street
Clarksdale, MS 38614

This 7th day of February, 2001.