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

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

REPLY BRIEF OF DEFENDANTS--APPELLANTS

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ORAL ARGUMENT REQUESTED

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INTRODUCTION AND SUMMARY

At its core, this case is not primarily about the representation of indigent criminal defendants. Stripped of the fanfaronade of "fair and efficient" representation, this case hinges first and foremost on a challenge to the authority of the Legislature to define the financial obligations of counties. Counties were created for one purpose: to serve as subdivisions and agencies of State government under the control of the Legislature. The Legislature has provided boards of supervisors with the ability to raise revenue and create a budget to meet the obligations of the county. Miss. Code Ann. § 19-3-41(1). The Legislature has defined the responsibilities of counties to include, among other items, the obligation to assist the State in the provision of public defenders for county residents – the State providing defenders in capital cases and counties providing such in non-capital cases. Miss. Code Ann. §§ 99-18-1, 99-39-101, 25-32-1; see also Miss. Const. Art. 14, Sect. 261. The Board's argument that any statutory requirement that counties assist in the provision of public defenders must be "unconstitutional" is legally unsupportable.

Simply stated, a county has no constitutional right to be free from "unfunded mandates." This Court has properly denied previous county requests for a judicial determination that the Legislature has misjudged county resources. Indeed, what is the standard by which Judge Smith would evaluate whether a statute requiring counties to fund non-capital public defenders is "unconstitutionally burdensome"? The arguments of the Quitman Board and briefs amicus curiae are unvarnished policy arguments misdirected to this forum, without constitutional

foundation, and previously rejected by this Court.[1] It is undisputed that the Legislature has "creator's power" to control counties and "[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." State v. Hinds County, 635 So.2d 839, 843 (Miss. 1994); Jackson County v. Neville, 95 So. 626, 628 (Miss. 1932). If a county fails to fulfill its statutory obligation to adequately fund a program vital to the judiciary, it is not entitled to a constitutional pardon from such statutes. Instead, "county boards of supervisors, which have imposed upon them the statutory duty [to fund judicial programs], are subject to appropriate court orders requiring them to do so when they adamantly fail or refuse to do so." Hosford v. State, 525 So.2d 789, 798 (Miss. 1988) (emphasis supplied).

Such clear and longstanding decisions of this Court foreclose the Quitman Board's assertion that it is "constitutionally" entitled to be relieved of its statutory duty to assist the State in the provision of public defenders. Such decisions also foreclose the ability of this specific plaintiff – the Board – to argue that the public defender system has caused "systemic ineffective assistance of counsel" because it has refused to fulfill its statutory obligation to adequately fund pubic defenders in non-capital cases.[2] Indeed, if a statewide funding crisis for public defenders

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[1]The very presence of amici in this matter, and the policy arguments they submit, implicitly recognize the lack of legal foundation for the Board's sweeping allegations of "unfunded mandates," "systemic ineffective assistance," and calls for a judicially created state-supported program.

[2]It is important to point out that note that the State and the Quitman County public defenders vigorously deny the Board's allegation of ineffective assistance. See State Br. at 28. No indigent defendant in Quitman County has been found by a court to have received ineffective

did exist, it would be irresponsible of the Board to argue that this Court should limit public defender resources to merely one source.

Importantly though, the State is not suggesting that individual defendants cannot argue that the system has denied them their specific right to counsel. Each indigent defendant is able to (before trial, at trial, or after trial) argue to the trial court or an appellate court that he is receiving or had received ineffective assistance of counsel. Each indigent defendant is able to argue that the "system" is so flawed that it has resulted in a specific error on the part of counsel which denied her of the right to counsel. The Quitman Board argues that "individual" challenges fail to address prospective remedies or large scale problems. But, from Wilson to this Court's decision in State v. Jackson, changes in the public defender system have always come from challenges by individual indigent defendants. Indeed, the Board has failed to point to a single "ineffective assistance" claim that has been brought by anyone other than an indigent defendant facing an alleged denial of the right to counsel. In this respect, the Board provides no justification for the departure from this Courts pronouncement in Wilson v. State that "ineffective assistance of counsel is a matter that is better decided on a case by case basis . . . . handled and determined individually by the appellate courts." 547 So.2d 1338, 1340 (Miss. 1990).

Moreover, this Court and the decisions of other courts cited by the Board have explicitly rejected arguments that "ineffective assistance of counsel" may be demonstrated by general allegations regarding compensation or workload of the type contained in the complaint. See

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assistance. Moreover, there is no dispute that the county public defenders are not overworked. In 1999, one defender was assigned to just fourteen (14) cases and the other merely nineteen (19) cases. See State Br. at 8.

Wilson, 547 So.2d at 1340, Cabello v. State, 524 So.2d 313, 316 (Miss. 1988) ("caseload and limited resources are, absent specific instances of error" insufficient to find ineffectiveness); State v. Peart, 621 So.2d 780, 792 (La. 1993). Even if the purpose of the argument is not to set aside a conviction, "ineffectiveness" by definition occurs only when a public defender's "acts or omissions were outside the wide range of professionally competent assistance." Carter v. State, 97-CA-01468, 1998 WL 906431, at * 3 (Miss. App. Dec. 30, 1998) (quoting Stickland v. Washington, 466 U.S. 668, 690 (1984)). Such analysis depends on the "facts of the particular case." Id. In this respect, the Board is seeking a retrial of 214 indigent defendants to argue that the public defenders the Board hired failed to adequately prepare for the examination of witnesses, failed to file motions to dismiss, or failed to call critical witnesses. See State Br. at 11. Indeed, no authority exists for such en mass retrials of hundreds of defendants. See Wilson, 547 So.2d at 1340. The Board could not point to a single court which has allowed such an en mass retrial -- especially when the Board professes that it is not seeking to overturn the convictions of any of the individual defendants. See Quitman Br. at 17.

Finally, if the Quitman Board is indeed successful and establishes that its failure to adequately fund public defenders resulted in one or more of the 214 indigent defendants receiving ineffective assistance of counsel, that is insufficient as a matter of law to establish that the statutes requiring counties to assist in public defender funding are unconstitutional. See Wilson, 574 So.2d at 1340; Peart, 621 So.2d at 787; see also Hosford, 525 So.2d at 798.

Therefore, the Quitman Board's challenge to the authority of the Legislature to determine the obligations of counties, as subdivisions and agencies of State government, should be dismissed and, if indeed statewide ineffective assistance of counsel were to exist, this Court has

the authority to review such as a challenge by a specific defendant and can address prospective remedies therefrom.

ARGUMENT

I. In 2000, the Legislature Created State-Supported Trial and Appellate Public Defender Offices for Capital Cases, Removing Such Requirements From Counties.

The Quitman Board's assertion that the Legislature is unresponsive to their financial and policy arguments is without relevance to the legal arguments raised herein. Importantly though, the statements are simply wrong. Within the past year, and since the filing of the complaint, legislation fundamentally altering the manner in which public defenders are funded has become effective. See State Br. at 5-7. At the time the complaint was filed, counties were required to provide public defenders for county residents in both capital and non-capital cases. In 2000, the Legislature removed from counties all financial responsibility for providing counsel for trial, direct appeal and post-conviction review proceedings in all capital cases by creating the Mississippi Office of Capital Defense Counsel and the Mississippi Office of Capital Post-Conviction Counsel. See generally, Miss. Code Ann. §§ 99-18-1 (Supp. 2000); 99-39-101 (Supp. 2000).

Legislature's actions were consistent with this Court's statements that the issue of county involvement in public defender funding is a "legislative matter rather than a judicial matter." See Wilson v. State, 574 So.2d 1338, 1341 (Miss. 1990); Board of Sup'rs of George County v. Bailey, 236 So.2d 420, 422 (1970). The creation of such offices was also consistent with this

Court's suggestion that the Legislature "review" funding of public defenders in capital cases. See Mease v. State, 583 So.2d 1283, 1285 (Miss. 1991); Quitman Br. at 1.[3]

In addition to the creation of state-supported offices for capital representation, the Legislature established the Public Defender Task Force to monitor the provision of representation to indigent defendants and submit annual reports to the Legislature. See Miss. Code Ann. § 99-18-1 (Supp. 2000); 2001 Miss. Laws Ch. 373 (HB 460). Contrary to the assertions of the Board and various amici, the Legislature has not "abandoned" public defender funding to the counties. Instead, the Board is properly heard to complain that the Legislature failed to adopt its suggested policies and now seeks judicial implementation of the same.

II. The Quitman Board Concedes That the Complaint Must Be Dismissed If the Legal and Factual Allegations Fail to Establish "Beyond All Reasonable Doubt" That the Challenged Constitutional and Statutory Provisions Are "Unconstitutional."

The Quitman Board recognizes through silence the heavy burden it faces in attempting to declare "unconstitutional" all constitutional or statutory provisions that require counties to assist in the provision of public defenders for their residents. See State Br. at 17-19. In reviewing motions to dismiss, "legal conclusions or allegations of the legal effect of events" are not taken as true and if such legal assertions are unsupported the complaint must be dismissed. See Tucker v. Hinds County, 558 So.2d 869, 872 (Miss. 1990). As statutes are "clothed with a heavy presumption of constitutional validity," challengers have the "very heavy burden" of

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[3]Although counsel for the Quitman Board now lambasts such reforms in capital cases as meaningless, this Court and the complaint note otherwise. The complaint alleged that the provision of defenders in capital cases had required the Board to raise taxes and secure a loan. See Complaint at ¶ 4. Indeed, in just the time since the complaint was filed, the Legislature has removed this allegedly "devastating" responsibility from counties.

"overcom[ing] the strong presumption" and establishing "beyond all reasonable doubt" that the statutes are constitutional. See James v. State, 731 So.2d 1135, 1136 (Miss. 1999); State v. Jones, 726 So.2d 572, 574 (Miss. 1998); State Br. at 17-19. The "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); Wilson, 574 So.2d at 1340 (applying same standard to challenge of public defender statutes).

III. Counties, as Mere Subdivisions and Agencies of the State, Have No Cause of Action Against "Unfunded Mandates" or "Overly Burdensome" Statutes.

Initially, the Quitman Board and amici argue that because decisions such as Gideon v. Wainwright, 372 U.S. 335 (1963), described the right to counsel for indigents as an obligation of the "States" and not counties, the Legislature is thereby constitutionally prohibited from requiring counties to assist in providing public defenders for its citizens. See Quitman Br. at 14; Sup'rs Assoc. at 6. This argument is specious to the point of being unbecoming of its advocates. The Quitman Board fails to respond to the numerous decisions of this Court firmly holding that counties exist only as administrative arms of the State and that all county financial responsibilities are in fact determined by the Legislature. See State Br. at 19-24; Miss. Code Ann. § 19-3-41 (defining responsibilities of counties).

A. The Constitution Provides Explicit Authority to Require Counties to Pay Any and All Expenses Associated With Criminal Prosecutions.

The Legislature has explicit authority to require counties to spend funds to assist with public defenders pursuant to the Constitution's pronouncement that "expenses of criminal

prosecution shall be borne by the county."[4] Miss. Const. Art. 14, Sect. 261. See State Br. at 19-21. In response, the Board argues that this provision has no application to the cost of "defense counsel" and, as a part of the 1890 constitution, it is trumped by the "State's responsibility" pronouncement of Gideon. See Quitman Br. at 15-16. However, in Board of Sup'rs of George County v. Bailey, this Court effectively rejected both such arguments. In Bailey, this Court stated that, pursuant to Art. 14, Sec. 261 the Legislature had the authority to determine whether "public defenders" are "an expense in criminal prosecutions." 236 So.2d 420, 422-23 (Miss. 1970).[5] Finally, the Bailey court's deferral to the Legislature to "implement" Section 261 with respect to counties and public defenders was decided years after Gideon and, in fact, refers to such decisions. See id. at 421.

The Board fails to cite to any provision of the Mississippi Constitution which prohibits the Legislature from requiring counties to assist in funding public defenders for its residents.

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[4] The Board does not argue, and rightfully so, that because the Legislature has decided to define expenses in such a manner as to remove the majority of such responsibility from counties that therefore, the Legislature is now constitutionally prohibited from requiring counties to assist with public defenders.

[5] The Board's assertion that in Bailey the court "expressly rejected" that Section 261 provides that counties may be required to assist with public defenders reads the case backwards. The Bailey court rejected the circuit court's specific decision that a public defender should be paid $150 per rape case and $50 per misdemeanor. 236 So.2d at 421. The Court, stating that the judiciary could not order such specific payments, stated that Section 261 "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. at 422.

B. The Legislature Has Implicit Authority to Require Counties, as State Subdivisions and Agencies, to Assist in Funding Public Defenders.

The Board and Supervisors Association's argument that public defenders are a "State" and not a "county" responsibility ignores the fundamental and unchallenged principle that counties are administrative arms of the State. See State Br. at 21-24. Counties were "created by the Legislature for political and civil purposes as agencies of the state government" and as a mere "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, emphasis supplied); see also Hinds County, 635 So.2d at 845 (rejecting argument that the responsibility of housing state inmates is an "obligation of the State as a whole" and not counties).

The Board next contends that requiring counties to fund public defenders in non-capital cases is an unfunded mandate which takes away from "other responsibilities" of counties. See Complaint at ¶ 22(a); Quitman Br. at 7; Sup'rs Assoc. at 5. However, it is the Legislature which decides what governmental functions counties must provide. See Miss. Code Ann. § 19-3-41 (defining responsibilities of counties); see also Miss. Code Ann. §§ 23-15-227 (counties pay election officials for state elections); 23-15-355 (counties provide ballots for elections); 25-3-9 (counties pay county prosecuting attorneys); 9-7-126 (counties compensate deputy circuit clerks).[6] As this Court has explained, "[t]he revenues of a county are subject to the control of

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[6]The Supervisors Association argues that this Court should create a new constitutional requirement that would prohibit the Legislature from passing "less important funding responsibilities to the counties" so that country treasuries will not be "depleted." Sup'rs Assoc.

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 v. Neville, 95 So. 626, 628 (Miss. 1932) (cited approvingly in Hinds County, 635 So.2d at 843).[7] The Board's and Supervisor Association's call to this Court to declare this and all other "of the Legislature's unfunded mandates" unconstitutional is clearly contrary to law and, indeed, bad policy itself. See Sup'rs Assoc.. at 6, 8.

The Board fails to cite to any provision of the Mississippi Constitution which prohibits the Legislature from determining the obligations of counties or imposing "unfunded mandates."

C. As Between the State and Its Political Subdivisions, Decisions as to Whether Counties Should Assist in Funding Public Defenders Is a Legislative Matter.

Cut to its core, the Board and amici seek a judicial determination that the Legislature has misjudged the resources of its "political subdivision" counties and that the Legislature has imposed a "too heavy" (and therefore, unconstitutional) financial burden on counties. Recognizing that a county may not sue the State to have its statutory responsibilities declared "too financial burdensome," the Board badly misframes its argument as a "constitutional" challenge. This Court has previously recognized that policy arguments mislabeled as

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at 5. Obviously, such an argument directly conflicts with the role of counties as administrative arms of the State "subject at all times to legislative control and change." Grenada County, 105 So. at 546.

[7] The Quitman Board and amici Chamber of Commerce argue that requiring counties to fund public defenders in non-capital cases results in "unequal tax burdens" and a system in which counties must pay to house "State" inmates awaiting "delayed" trials. See Quitman Br. at 7; Complaint at ¶¶ 22(b), 22(e); Chamber at 4. However, as set forth in the State's initial brief, both such arguments were rejected by this Court in State v. Hinds County Bd. of Sup'rs, 635 So.2d 839 (Miss. 1994) (affirming dismissal of complaint). See State Br. at 23-24.

"constitutional challenges" fail as a matter of law. As this Court has instructed:

> 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.

Pathfinder Coach Division v. Cottrell, 62 So.2d 383, 385 (Miss. 1953).

The Quitman Board, unable to met the argument squarely, misstates the State's position as one of advocating "complete immunity from judicial review" for arguments of ineffective assistance of counsel. See Quitman Br. at 11. To the contrary, the State's position is that this Court, and all other courts cited by the Board, have repeatedly held that -- as to the economic relationship between the State and its subdivision counties -- Legislative policy decisions are not subject to judicial policy review. This fundamental element of the separation of powers doctrine holds true even with respect to generalized claims of ineffective assistance of counsel. As this Court stated in the public defender constitutional challenge case of Wilson, "[a]lthough we recognize our inherent authority to provide counsel for indigents, we refused to interfere with the Legislature's right to expend public funds." 574 So.2d at 1340.

The Quitman Board cites this Court's Hosford decision as the guiding principle for the role of the judiciary in this State/county dispute; the State agrees. Hosford v. State, 525 So.2d 789 (Miss. 1988); Quitman Br. at 11. In Hosford, the county courthouse was in such a state of disrepair that it interfered with the administration of justice. Id. at 797. By statute, the Legislature requires counties to "erect and keep in good repair" courthouses. Id. The trial court set forth on the record that it had requested the board of supervisors to repair the courthouse but

the board responded that "they don't have the money." Id. at 796. The trial court further stated that it was "convinced of that due to the financial condition of the County[,] [i]t's impossible for them to spend the money that it would take to correct this situation." Id.

In a clear rejection of the Board's arguments, the Hosford court did not order a hearing on whether the burden placed on the county by the Legislature was "too financially burdensome" even though the trial court was "convinced" of the county's financial inability. Instead, this Court reiterated that the Mississippi Code "authorizes the boards of supervisors to levy taxes necessary to meet the demands of their counties" and the Code further creates "a clear statutory duty of a board of supervisors to provide adequate court facilities." Id. at 797. In explicit language which requires dismissal of the complaint, this Court held that "[i]t follows, of course, that county boards of supervisors, which have imposed upon them the statutory duty of furnishing adequate courtroom facilities, are subject to appropriate court orders requiring them to do so when they adamantly fail or refuse to do so." Id. at 798 (emphasis supplied); accord Sup'rs Assoc. at 9 (conceding that "if the county refused to provide any legal counsel to the indigent defendant, it would be sued and found liable").[8]

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[8] The Mississippi Bar, in this respect, correctly reads Hosford and Wilson to leave open the ability of Courts to ensure that they "do not atrophy." Miss. Bar at 1-2. However, the Bar misapplies the principle. Although such is not the case, if indeed a lack of public defender funding in non-capital cases by counties was threatening the existence of the judiciary, the action of this Court is properly an order to the Board that it must comply the Miss. Code Ann. §§ 25-32-1, 19-3-41 and properly fund non-capital public defenders. See Hosford, 525 So.2d at 798. Finally, the Bar's statement that this Court need not decide at this point what relief is appropriate is a tacit confession that the relief prayed for by the Board (to declare all county public defender funding statutes unconstitutional and order a state-supported program) has been previously rejected by this Court and by all other courts cited by the Board. See Wilson, 574 So.2d at 1340; State v. Peart, 621 So.2d 780 (La. 1993).

As more fully set forth in the State's initial brief, the pronouncements of this Court in Hosford are consistent with both prior and subsequent decisions which refuse to utilize the doctrine of ineffective assistance of counsel to strike down public defender statutes or order the judicial creation of new state-supported programs. See Young v. State, 255 So.2d 318, 321-322 (Miss. 1971); Wilson, 574 So.2d at 1340; State Br. at 25-27.[9] Indeed, 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. See State Br. at 26-27.

Undaunted by the holdings of this Court in Hosford, Wilson, and Young, the Quitman Board next draws this Court's attention to the Louisiana Supreme Court's decision in State v. Peart, 621 So.2d 780 (La. 1993) in support of its sweeping constitutional challenge to the public defender statutes. Quitman Br. at 20. Remarkably, the Peart court also explicitly rejected the arguments raised by the Board. The Louisiana Supreme Court (reversing the trial court's finding of an "unconstitutional" public defender system and order to the Legislature to fund all public defenders) stated:

"We find that [statutes directing county and city level funding of public

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[9] In this respect, amici have also argued that the creation of a statewide, state-supported office of public defender to handle all indigent representation would conserve State resources and "secure an economic future for Quitman County." See Fortenberry at 8; Chamber of Commerce at 1; Sheriffs at 3. These are indeed legitimate viewpoints in the Legislative policy debate over the most efficient manner in which to provide public defenders. However, as is evident to all involved, these arguments do not support a finding that the Legislature's requirement that counties assist with public defender funding is "unconstitutional."

> defenders] do not unconstitutionally burden the state's political subdivisions by requiring that they fund the indigent defender system. While the district court might question the wisdom of this means of funding, the statutes themselves are not unconstitutional."

621 So.2d at 782, 787; see also Jewell v. Maynard, 383 S.E.2d 536, 545, 547 (W.Va. 1989) (cited at Quitman Br. at 20) (rejecting request to "adopt statewide public defender system"); State v. Smith, 681 P.2d 1374, 1383 (Ariz. 1984) (cited at Quitman Br. at 20) (rejecting statewide "uniform system" given the State's "political subdivisions of widely varying population, geography, customs and problems"); Madden v. Township of Delran, 601 A.2d 211, 222 (N.J. 1992) (cited at Quitman Br. at 20) (holding that Court's balancing of burdens between counties and State with respect to public defenders would be an incursion into "an area ordinarily reserved to the Legislature and the Executive and presumptively better left there"). Indeed, each and every decision cited by the parties in which a court has considered the argument as to whether it is "unconstitutional" for a legislature to require counties to fund public defenders has concluded that the Board's arguments have no foundation in law.

D. As the Legislature Has the Unquestioned Authority to Require Counties to Expend Funds For Public Defenders, the Board's "Ineffectiveness" Argument Fails as a Matter of Law and the Case Should Be Dismissed.

As it is absolutely clear that "[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," the Board has no legal theory by which to challenge the public defender statutes as "too burdensome" or to argue that it "cannot afford" to abide thereby. See Jackson County, 95 So.2d at 628; Hinds County, 635 So.2d at 843.

In this respect, the Board is foreclosed from arguing that its failure to fulfill its statutory obligation has created an "ineffective assistance" crisis entitling it to seek to declare the public defender statutes unconstitutional. Indeed, even if the Board was correct that such a statewide ineffective assistance crisis exists, the proper resolution of the complaint would be, as this Court set forth in Hosford, an order requiring the Board to "levy such taxes as may be necessary to meet the demands" imposed on it as a political subdivision and agency of the State. See Miss. Code Ann. § 19-3-41. "It follows, of course, that county boards of supervisors, which have imposed upon them the statutory duty of furnishing adequate courtroom facilities, are subject to appropriate court orders requiring them to do so when they adamantly fail or refuse to do so." Hosford, 525 So.2d at 798 (emphasis supplied); see also Grant v. State, 686 So.2d 1078, 1090 (Miss. 1996) ("the constitutionality of state enactments are not to be reached if the case can be resolved upon other grounds").

IV. The Quitman Board Cannot Raise "Ineffective Assistance of Counsel" to Assail the Constitutionality of the Public Defender System.

Implicitly recognizing that the Legislature has the unquestionable authority to require a county to expend funds on programs for county residents, the Quitman Board is left to bastardize the doctrine of "ineffective assistance of counsel" to such an extent that it becomes almost unrecognizable. Indeed, neither the Quitman Board nor the amici have cited any authority for the proposition that ineffective assistance of counsel may be raised by anyone other than an indigent defendant or in the manner utilized by the Board.

First and foremost, Quitman concedes that it cannot and does not seek relief on behalf of, nor does it assert the constitutional rights of, any former or future individual indigent defendants.

See Quitman Br. at 17. Instead, it seeks to utilize the doctrine of ineffective assistance of counsel to relieve itself of "the intolerable burden" of funding public defenders. Quitman Br. at 17.

The Quitman Board's disfigured ineffective assistance arguments is as follows. First, the State must ensure that public defenders are provided. Second, the Legislature has required that counties assist in the provision of public defenders by funding such in non-capital cases. Next, the Board asserts that it has failed to fulfill its statutory obligation and has underfunded its public defenders. The Board now attempts to invoke the individual constitutional right to counsel and sue the State on behalf of taxpayers – not on behalf of the indigent defendants – seeking a judicial determination that the county's own failure to abide by statutes has created "systemic ineffective assistance of counsel" entitling the county, but not any indigent defendants, to relief. See Quitman Br. at 15. The doctrine of ineffective assistance of counsel does not support the unwieldy and disfigured arguments placed upon it by the Board and the complaint is properly subject to dismissal.

A. The Board Concedes That Its Actions in Implementing the Statues Have Created the Alleged "Systemic Ineffective Assistance."

The Quitman Board concedes that in 1990 the board passed by unanimous vote a resolution which: (1) determined that two part-time public defenders were sufficient to serve the needs of its citizens, (2) determined that the two part-time public defenders should be hired on a flat-fee contract basis, (3) hired Alan Shackelford and Thomas Pearson as the county public defenders, and (4) established the salaries of the public defenders. See August 6, 1990 Legal Representation for Indigent Defendants Resolution at ¶¶ 1,5,6 (R.E.7;R.1629-30); State Br. at 7-9, 28-30. The Quitman Board further concedes that the Legislature has provided the Board with

discretion as to the manner in which to provide public defenders, authorized the Board to perform any additional tasks "necessary" to provide "adequate legal defense for indigent persons," and empowered boards to "levy taxes necessary to meet the demands of their counties." See State Br. at 6-7; Miss. Code Ann. §§ 25-32-1, 19-3-41. 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 sue the State arguing that the actions of the Board have infringed on the constitutional rights of Quitman residents. See State Br. at 28-30.

In response, the Quitman Board cites Hosford for this Court's authority to order that funds be furnished and then argues that it is entitled to declare county funding "unconstitutional" because it "cannot afford to" abide by the statute and "if a county refused to provide and fund a system of indigent defense – either because of financial bankruptcy or other reasons – the duty would unquestionably fall to the State." Quitman Br. at 11, 15, 17. As discussed above, the Hosford Court quartered no such argument. Instead, this Court reiterated that counties must fulfill the statutory obligations imposed on them by the Legislature and the Board is subject to "appropriate court orders requiring them to do so when they adamantly fail or refuse to do so." 525 So.2d at 789 (emphasis supplied).[10]

B. The Quitman Board Lacks Standing to Assert the Individual Right to Counsel on Behalf of 214 Previously Tried Indigent Defendants or on Behalf of Unnamed Future Indigent Criminal Defendants.

[10] Moreover, if it is legally possible for a county to fail to fulfill its public defender obligation and then seek relief from the State under "ineffective assistance," such a doctrine would create an incentive for the county to completely "refuse to provide and fund" public defenders so that the Board could easily prove that indigent defendants were unquestionably denied the right to counsel.

The Quitman Board does not dispute that it does not have a "right to counsel" which is at stake in this litigation. Moreover, after the State argues that the Board lacks standing to assert the individual constitutional right to counsel of hundreds of former and future indigent defendants, the Board confesses such by stating that it is not seeking to assert such rights or seeking relief (in the form of retrials) for any individual defendants. See Quitman Br. at 17. Indeed, the Board is only seeking relief for itself. See id. The Board's wily dodge creates more problems for the Board than it solves. The Board admits that it does not have a right to counsel, and then it states that it is not asserting the rights of any individual defendants. The issue is: Who's individual constitutional right to counsel is at issue? The Board cannot argue that it has standing to assert the constitutional rights of indigent defendants for the benefit of the County while at the same time stating that will not seek relief for those defendants whose rights it asserts. The Board is indeed perplexed. It cannot rest on general allegations of "underfunding" to establish ineffective assistance. However, at the same time, it does not want to argue that specific individuals were denied their right to counsel because such would require a retrial for those individuals. The Board's attempted middle position is unsupportable.

The State does agree that counties have standing to initiate litigation over items such as the alteration of its boundaries through annexation and standing to initiate actions on behalf of taxpayers. See Harrison County v. City of Gulfport, 557 So.2d 780 (Miss. 1990). However, with respect to the individual constitutional right to counsel, "no court . . . has ever held that the Sixth Amendment protects anyone other than criminal defendants." Portman v.County of Santa

Clara, 995 F.2d 898 (9th Cir. 1993); accord Kinoy v. Mithcell, 851 F.2d 591 (2d Cir. 1988).[11]

C. The Quitman Board's Constitutional Challenge to the Public Defender Statutes By Means of a Generalized Assertion of Inadequate Funding Is Contrary to the Clear Precedent of This Court.

Citing the decisions of this Court, the State argued in its initial brief that the Board's generalized assertion of "underfunding" as an argument for declaring public defender funding statutes unconstitutional has been rejected by this Court. See State Br. at 34-36. In response, the Quitman Board again commits the error of exaggeration, mischaracterizing the State's position as an argument that no "prospective" relief is available with respect to the right to counsel. See Quitman Br. at 19; Van Slyke at 7. This is easily addressed: prospective relief is available. The Board misses the State's two crucial arguments. First, claims of "ineffective assistance" (upon which prospective relief may rest) must be evaluated on a case by case basis examining the facts of particular indigent criminal defendants. In this respect, the complaint's assertion that "poor funding" and "lack of oversight" means that "constitutional requirements for the effective assistance of counsel often are not met" is the type of generalized argument that is insufficient as a matter of law to state a claim of ineffective assistance of counsel as this Court, and every court cited by the Board, requires ineffectiveness claims to be reviewed on a case by case basis. Indeed, former public defender Van Slyke admits such when he states "[e]xcept for cases involving attorney ineffectiveness," courts allow generalized assertions regarding individual

[11] Moreover, the Board has failed to find a decision in this jurisdiction or elsewhere in which anyone other than criminal defendants or their attorneys have been found to have standing to assert the right to counsel. In contrast, the State has cited numerous authorities rejecting the ability of litigants to assert other individual's right to counsel. See State Br. at 32.

rights.[12] Van Slyke at 8.

Second, as this Court found in Wilson, (a capital case involving public defenders) a generalized claim of "systemic" ineffective assistance of counsel is insufficient, as a matter of law, to strike down public defender funding statutes as unconstitutional.

> 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.
>
> 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 even more appropriate regarding the Quitman Board's attempt to declare an entire type of public defender system -- any system in which counties assist in funding representation -- unconstitutional.

Further detached from constitutional support are the arguments of the various amici that a state-supported, statewide, full-time office of public defender is in fact mandated by the doctrine

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[12] The untested assertions of former public defender J.B. Van Slyke regarding his caseload are pending in separate suit filed against the Forrest County Board of Supervisors and the State asserting that his performance as a public defender was sufficiently poor as to deny his clients the right to counsel. See State Br. at 2. Although the Van Slyke case has not been litigated, such a case is marginally more appropriate than the challenge by the Quitman Board as the Van Slyke plaintiff is a public defender and the plaintiff has properly named the board of supervisors as a party. The Van Slyke case may present a better avenue in which to consider whether counties are abiding by the Mississippi Code.

of ineffective assistance because such an office would "increase the dependability of the criminal justice system." See e.g, Fortenberry at 1; Sheriffs at 1. However, neither the amici nor the Board have uncovered a court which has found such to be constitutionally mandated or a court which has ordered the creation of such. Indeed, in the decisions cited by the Board in footnote 6, courts have upheld the constitutionality of local appointment regimes in which the appointed defender is not compensated at all. See Madden v. Township of Delran, 601 A.2d 211, 215 (N.J. 1992) ("Even accepting that in general, a system of paid counsel . . . results in better representation than that provided by pro bono counsel, such a showing does not equate with a constitutional denial of counsel.").

Moreover, as to the cases cited by the Board for the proposition that generalized arguments about "funding" and "lack of state oversight" may serve as a basis for declaring the public defender statutes unconstitutional, none of the cases cited support such arguments and many such cited cases explicitly reject the same. See Quitman Br. at 20. Initially, the Board cites State v. Peart, 621 So.2d 780 (La. 1993). Unlike the case at bar, in Peart, an individual indigent defendant asserted that his right to counsel had been and continued to be compromised by the specific actions of a Louisiana public defender. Id. at 788. The Louisiana Supreme Court, reversed the trial court's finding of "systemic ineffective assistance" and its order that "the legislature allocate funds for additional staff." 621 So.2d at 784, 792. The court stated:

> We begin with the proposition that because there is no precise definition of reasonably effective assistance of counsel, any inquiry into the effectiveness of counsel must necessarily be individualized and fact-driven. See Strickland . . . .
>
> [T]he true inquiry is whether an individual defendant has been provided with reasonably effective assistance, and no general finding by the trial court regarding a given lawyer's handling of other cases, or workload generally, can answer that

> very specific question as to an individual defendant and the defense being furnished him.
>
> We find that a determination of effectiveness of counsel requires that the trial court examine each case individually.

621 So.2d at 788 (emphasis supplied). Indeed, Peart, far from supporting a "systemic" and generalized view of ineffective assistance of counsel, supports the dismissal of the Quitman Board's complaint. According to Louisiana courts, "Peart stands for the proposition that each claim of ineffectiveness must be evaluated on an individual basis." State v. Hughes, 653 So.2d 748, 751 (La.App. 1995); cf. Lucky v. Harris, 860 F.2d 1012, 1018 (11 Cir. 1988), rev'd on other grounds, Lucky v. Miller, 976 F.2d 673 (11th Cir. 1992) (specific indigent defendants may challenge public defender statutes as applied specifically to them); Gardner v. Luckey, 500 F.2d 712, 714-15 (5th Cir. 1974) (dismissing public defender challenge as arguments on behalf of past indigent defendants should be handled in the "appeals proceedings" and challenges as to future indigent defendants was too speculative given the fact specific nature of ineffective assistance of counsel).[13] The remaining cases cited on page 20 of the Quitman Brief are immaterial as they do not apply the doctrine of "ineffective assistance of counsel."

V. Each Alleged "Type" of Ineffectiveness Cited By The Board May Be Raised By Defendants Before, After, or During Trial and Has Been Subject To Extensive Review By This And Other State Courts.

[13] The Board also cites to State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987). See Quitman Br. at 20 n.6. However, the Kansas court, in language adopted by this Court in Wilson, rejected the "systemic" arguments. "Simply because the system could result in the appointment of ineffective counsel is not sufficient reason to declare the system unconstitutional; those rare cases where counsel has been ineffective may be handled and determined individually by the appellate courts." Id. at 831.

It is important to note that the State and the Quitman County public defenders vigorously deny the Board's allegation that every indigent defendant in the county received ineffective assistance. See State Br. at 28. Indeed, the Quitman County public defenders, the very persons the Board allegedly underfunded and denied resources to, have both testified that no indigent criminal defendants in Quitman County received ineffective assistance of counsel. See State Br. at 28. The Board cites to no case in which a Quitman County indigent defendant was found to have received ineffective assistance.

Moreover, there is no dispute that the Quitman County public defenders are not overworked. In 1999, one defender had been assigned to just fourteen (14) cases and the other merely nineteen (19) cases. See State Br. at 8. Neither are they denied appropriate compensation. Taking Quitman public defender Thomas Pearson as an example, Mr. Pearson was assigned to 156 cases over six years (1995-2000). See Quitman Br. at 28, n.12. This is an average of 26 cases per year. Mr. Pearson was paid $1,350 per month ($16,200 per year) by the Board. Id. Dividing his yearly compensation into the cases handled per year, Mr. Pearson was compensated $624 per case. Additionally, if you exclude the cases for which Mr. Pearson entered guilty pleas (63 cases over six year), Mr. Pearson was paid $1,045 per case. Mr. Pearson's compensation could not have resulted in systemic ineffective assistance of counsel.

However, if indeed the system in Quitman County was so flawed as to have denied the right to counsel of each indigent criminal defendant since 1995, such flaws could be challenged by individual defendants (before, during, or after trial) and this Court could, upon such a specific challenge, fashion prospective relief for all similarly situated defendants. See Wilson, 575 So.2d at 1340; Jackson v. State, 732 So.2d 187 (Miss. 1999). The Quitman Board asserts that the

"nature of the particular claims brought here do not lend themselves" to challenges by individual defendants. See Quitman Br. at 21; see also Van Slyke at 12. However, each of the allegations of ineffectiveness raised by the Board has been, and will continue to be, challenged by individual criminal defendants and presented to this Court. See Quitman Br. at 21.[14] Challenges by individuals are, in fact, the proper method by which to correct constitutional deficiencies and errors.

Finally, this Court's requirement that questions of ineffective assistance of counsel must be reviewed on a case by case review is rooted in the very doctrine of ineffective assistance of counsel. General allegations regarding workload or compensation do not establish claims if ineffectiveness. See Wilson, 547 So.2d at 1340, Cabello v. State, 524 So.2d 313, 316 (Miss. 1988) ("caseload and limited resources are, absent specific instances of error" insufficient to find ineffectiveness); State v. Peart, 621 So.2d 780, 792 (La. 1993). Even if the purpose of the argument is not to set aside a conviction, "ineffectiveness" by definition occurs only when a public defender's "acts or omissions were outside the wide range of professionally competent assistance." Carter v. State, 97-CA-01468, 1998 WL 906431, at * 3 (Miss. App. Dec. 30, 1998) (quoting Stickland v. Washington, 466 U.S. 668, 690 (1984)). Such analysis depends on the "facts of the particular case." Id. In this respect, the Board is seeking in effect a retrial of 214

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[14] Mississippi appellate courts have reviewed questions of ineffectiveness in the following challenges by individual defendants: fifth amendment rights (Austin v. State, 736 So.2d 390, 392 (Miss. App. 1999); ethical conflicts of counsel (Perry v. State, 682 So.2d 1027, 1031 (Miss. 1996); competent advice in pleas (Walker v. State, 703 So.2d 266, 268 (Miss. 1997); inadequate pre-trial investigation (Finely v. State, 739 So.2d 425, 428 (Miss. App. 1999); denial of expert assistance (Manning v. State, 726 So.2d 1152, 1191 (Miss. 1998); general competence (Cole v. State, 666 So.2d 767, 776 (Miss. 1995); and lack of pre-trial contact with counsel (Walker v. State, 703 So.2d 266, 269 (Miss. 1997)).

indigent defendants en mass to argue that the public defenders it hired failed to adequately prepare for examination of witnesses, failed to file motions to dismiss, or failed to call critical witnesses. See State Br. at 11. Pursuant to Wilson, such arguments regarding the 214 indigent defendants are properly reviewed on a case by case basis by appellate courts. 574 So.2d at 1340.

CONCLUSION

For the foregoing reasons, the Quitman Board's challenge to the authority of the Legislature to determine the obligations of counties, as subdivisions and agencies of State government, should be dismissed and, if indeed statewide ineffective assistance of counsel were to exist, this Court has the authority to review such as a challenge by a specific defendant and can address prospective remedies therefrom.

Respectfully submitted, this the 8th day of May, 2001.

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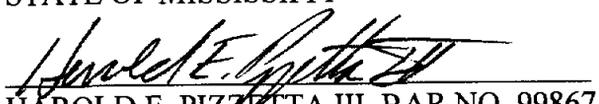

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